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PREFACE

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VOIR DIRE—A NEGLECTED TOOL OF ADVOCACY*

By Major Ronald M. Holdaway**

The author analyzes and compares the use of voir dire examination in civilian courts against such examination in the military courts-martial. He discusses those areas of examination which tend to expose matters such as bias or interest, the extent to which voir dire may be used to develop a theory of defense on the case, and the degree of control which may be exercised over the voir dire by judges and law officers. He concludes by offering practical suggestions for conducting a successful voir dire examination.

I. INTRODUCTION

Voir dire examination of jurors is considered by many leading trial lawyers to be an extremely valuable tool of advocacy quite apart from its connection with the challenging process.[1] In civilian jurisdictions it is not uncommon for the examination of prospective jurors to take several hours or even several days as lawyers skillfully use it not only to develop possible challenges, but also as sounding boards for their theory of the case. On the other hand, use of voir dire in courts-martial is relatively neglected. This is not to say that voir dire is nonexistent in military courts; it probably is used and used effectively. Yet personal experience of the writer, his discussion with other military counsel and law officers, and a study of the relatively few cases reaching appellate level compel the conclusion that by and large, there is either no voir dire or, if an examination is conducted, it tends to be very perfunctory in nature. Therefore, the goal of

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[1] *See, e.g.*, I. M. BELLI, MODERN TRIALS 796 (1954).

this article is to develop the law of voir dire, its purposes and limitations, and the thesis that examination of prospective court members can and should be an effective tool of military advocacy provided it is carefully prepared and executed. Finally, an attempt will be made to state some practical and useful suggestions as to how to prepare and conduct voir dire examination.

II. PURPOSES OF VOIR DIRE EXAMINATION

The origin of voir dire examination of prospective jurors is rather obscure. No doubt it developed as a natural concomitant of the right to an impartial jury.[2] The major purpose of examining the jury was then and remains now, at least ostensibly, to discover possible challenges against prospective jurors. Discussed below, however, are three purposes for conducting voir dire examination.

A. *DISCLOSING DISQUALIFICATION OR ACTUAL BIAS*

All jurisdictions in the United States allow inquiry to disclose disqualification or actual bias.[3]

B. *AID IN EXERCISING PEREMPTORY CHALLENGES*

Voir dire was considerably expanded by the inclusion of peremptory challenges. Most jurisdictions, though not all,[4] will allow examination which will reasonably aid in a more intelligent exercise of peremptory challenges. Since such a challenge is often exercised on the basis of a juror's personal background and beliefs, the scope of inquiry is naturally rather broad.[5]

C. *A TACTICAL DEVICE TO INDOCTRINATE THE JURY*

This use of voir dire will be the main focus of this article. By indoctrination is meant that the question itself is designed to have an influence on the juror and his answer thereto is only incidental or of little significance. Such a question may be little more than an attempt to create rapport with the juror (or in

[2] *See* 4 W. BLACKSTONE COMMENTARIES 352-55 (13th ed. 1800).

[3] *See, e.g.*, State v. Higgs, 143 Conn. 138, 120 A.2d 152 (1956); People v. Car Soy, 57 Cal. 102 (1880). *See also*, Morford v. United States, 339 U.S. 258 (1949), wherein the Supreme Court held that the constitutional right to a jury trial was infringed when defense counsel was precluded from interrogation as to actual bias.

[4] *See, e.g.*, People v. Raney, 55 Cal.2d 236, 359 P.2d 23 (1961); McGee v. State, 219 Md. 53, 146 A.2d 194 (1959).

[5] *See, e.g.*, Lightfeet v. Commonwealth, 310 Ky. 151, 219 S.W.2d 984 (1949); Sorrentino v. State, 214 Ark. 115, 214 S.W.2d 517 (1948).

courts-martial, the court member—the terms are interchangeable for purposes of this article). However, more often the purpose of the question will be to advise, in an interrogatory form, the juror of certain rules of law, defenses, or facts expected to arise in the case in such a way as to ally the juror with the counsel's side or theory of the case. For example, the following question does not really anticipate a negative response: "Do you agree with the rule of law that requires acquittal in the event there is reasonable doubt?" The rule of reasonable doubt is one of the fundamental principles of our criminal law and is known as such by most of our citizens; therefore, even in the instance where a court member did not particularly agree with the rule, he would hardly acknowledge so in open court. The real reason for such a question is, in a sense, to put the member on notice right from the start that there might be reasonable doubt in the case and to get him mentally familiar with the rule in the hope that he will look for reasonable doubt in the case and vote to acquit. It makes it more likely, furthermore, that in the decision-making process the member will be more aware than he otherwise would have been of the principle of reasonable doubt; he will have committed himself to believing it, and perhaps by emphasizing it at the voir dire and, of course, during summation, the rule will be enlarged in his mind. Therefore, particularly in cases where the facts are close or the defense technical, skillful examination of the jurors or court members may well prove important in the eventual outcome of the case.

Having pointed out this third use of voir dire and having noted that the focus of this article is its use as a means of advocacy, a note of caution is appropriate. Voir dire is part of the challenging procedure; therefore, its only *legitimate* use is as part of that challenging procedure.[6] That it may be useful for indoctrination purposes does not change the requirement that it ostensibly relate to possible challenges—either peremptory or for cause. Thus while the farthest thing from counsel's mind might be a potential challenge, he is still obliged to frame the question so that it appears relevant to a possible challenge. This must be understood as it colors the whole spectrum of the law of voir dire. Many of the problems concerning permissible scope of examination, as will be seen, arise from a failure of counsel properly to phrase their questions so that the responses thereto

[6] *See, e.g.*, Kephart v. State, 93 Okla. Crim. 451, 229 P.2d 224 (1951); State v. Bauer, 189 Minn. 280, 249 N.W. 40 (1933); State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924).

appear to relate to a challenge. For example, it is fairly common to preface a question concerning a rule of law as to whether the juror understands the rule. Such a question will generally be held improper.[7] Whether the juror *understands* the law does not go to his qualifications or existence of prejudice (absent a response indicating a mental incompetency).[8] On the other hand, what a juror's attitude is toward the law might well go to his ability to be impartial and hence his qualification to hear the case.[9] Therefore, a slight change in phrasing, showing an understanding of the form voir dire examination must take, may be the difference between a proper and an improper examination.

III. THE LAW OF VOIR DIRE IN CIVILIAN JURISDICTIONS

The emphasis of this article is the use of voir dire in military courts-martial. Yet, as in many other phases of courts-martial procedure and practice, the civilian law forms the basis for the military law. An understanding of the general principles applicable in federal and state jurisdictions will not only enable the military counsel better to understand the law of voir dire, but will be very instructive in formulating more effective ways of conducting voir dire examination in military courts.

There are two main problems that arise in civilian practice. The first problem pertains to who should properly conduct the examination; the second and most vexatious pertains to the proper scope of the examination.

A. *WHO CONDUCTS VOIR DIRE EXAMINATION?*

There is no unanimity as to whether the trial judge or counsel should conduct the voir dire examination. Some states have held that counsel has no absolute right to ask questions of the jurors;[10] while others, conceding the judge to be chiefly responsible for examinations, have found error in completely pre-empting counsel from supplementary examination.[11] Most jurisdictions, however, contemplate an examination participated in by both

[7] *See, e.g.*, People v. Harrington, 138 Cal. App.2d 902, 291 P.2d 584 (1955).
[8] *Id.*
[9] *See* People v. Wein, 50 Cal.2d 383, 326 P.2d 457 (1958); State v. Plumlee, 177 La. 687, 149 So. 425 (1933).
[10] *See, e.g.*, Bryant v. State, 207 Md. 565, 115 A.2d 502 (1955); Commonwealth v. Taylor, 327 Mass. 641, 100 N.E.2d 22 (1951).
[11] *See, e.g.*, Blount v. State, 214 Ga. 433, 105 So.2d 304 (1958); State v. Guidry, 160 La. 655, 107 So. 479 (1926).

court and counsel. Even where the judge has chief responsibility, he is often under some obligation to allow supplementary examination by counsel.[12] The litigation has arisen as to how far the judge could go in cutting off inquiry and whether the actions of the judge were prejudicial under the circumstances.[13] If there is such a thing in this area as a modern trend, it is the practice of taking voir dire from counsel and giving the trial judge the main responsibility for examination of the jurors. This practice no doubt has arisen because of real or imagined abuses of counsel in using the examination as a springboard to indoctrinate the court, a subject to be covered later on. The federal courts greatly restricted counsel by rule 24, Federal Rules of Criminal Procedure,[14] which, in effect, gives the trial judge the authority to conduct the voir dire and permits the judge, should he so desire, to compel counsel to submit questions to him in writing. The Supreme Court of Illinois by rule forbids any questions concerning the law or instructions;[15] and, as will be seen, the wide discretion given to the judge in regulating the scope of voir dire examination in all jurisdictions has greatly curtailed counsel, even in those states where counsel has chief responsibility for examination.[16]

B. *PERMISSIBLE SCOPE OF EXAMINATION*

There are two general rules which are cited in almost every case that considers the permissible scope of voir dire examination. The first, and one already alluded to, is that examination of the jury is limited to questions which relate to a possible challenge.[17] The second rule is that the judge is vested with wide discretion in determining whether the inquiry is relevant and proper.[18] As to the first rule—the necessity of relating inquiry

[12] CAL. PENAL CODE, § 1078 (West 1956). *See generally* Hamer v. United States, 259 F.2d 274 (9th Cir. 1958), wherein the court held that precluding counsel from personally asking questions pursuant to rule 24, Federal Rules of Criminal Procedure, was not violative of the defendant's constitutional rights. However, the court did look to the voir dire posed by the judge to ensure that it was adequate and fair.

[13] *Compare* People v. Boorman, 142 Cal. App.2d 85, 297 P.2d 741 (1956), *with* People v. Coen, 205 Cal. 596, 271 P. 1074 (1928).

[14] FED. R. CRIM. P. 24.

[15] *See* Christian v. New York Cent. R.R., 28 Ill. App.2d 57, 170 N.E.2d 183 (1960).

[16] *See, e.g.*, Roby v. State, 215 Ind. 55, 17 N.E.2d 800 (1938); State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924); State v. Douthitt, 26 N.M. 532, 194 P. 879 (1921).

[17] *See* cases cited note 6 *supra*.

[18] *See, e.g.*, State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924).

to possible challenges—there are few problems raised when counsel is truly seeking possible disqualification or subjective bias on the part of the juror. The statutes that set forth juror qualifications vary greatly. Suffice it to say that examination concerning statutory eligibility is not only permissible but in at least one state mandatory.[19] Also, where counsel is seeking facts showing subjective bias on the part of the juror such as prior knowledge of the case, relationship with one of the parties, or actual prejudice, there will be little question but that the inquiry is within proper limits.[20] The other broad area of challenges is, of course, peremptories. In connection with this type of challenge, it is generally held that counsel may interrogate the juror as to that part of his personal, social, and economic background that would reasonably aid counsel in exercising his peremptory challenges.[21]

Therefore, so long as the question clearly relates to a juror's subjective fairness, ability to be fair in a general sense, or his background there will be little problem as to scope of examination. The problems have developed when counsel has sought to influence or indoctrinate the jury by means of voir dire examination concerning the facts or law of the case. This might be termed inquiry, not to determine an ability to be fair in general, but an inquiry concerning an ability to be fair in general, given specific facts, defenses, or rules of law that will be part of the case. Judges, no doubt discerning the true intent of such examination, have resisted such questions and a fairly considerable body of case law has developed testing the judge's discretion in regulating the scope of examination. The question usually takes the form of a hypothetical one that attempts to obtain a commitment from a juror as to how he would react to certain issues which may be developed at the trial. Appellate courts go in every possible direction in these situations. The questions that can be asked and the way in which they can be are infinite in their variety. Accordingly, it is impossible to categorize with any accuracy those questions which are permissible and those which are not. There are some general guidelines which might be helpful so long as the reader recognizes that the application of these principles is by no means universal and that they are sometimes inconsistently applied even within a single appellate jurisdiction.

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[19] *See* Commonwealth v. Taylor, 100 N.E.2d 22, 327 Mass. 641 (1951).

[20] *See, e.g.*, Morford v. United States, 339 U.S. 258 (1949); State v. Higgs, 143 Conn. 138, 120 A.2d 152 (1956).

[21] *See* I. F. BUSCH, LAW AND TACTICS IN JURY TRIALS § 84 (1959).

It has been said that hypothetical questions and questions concerning the law of the case are improper.[22] This is much too broad a statement. If such questions are held improper (or properly excluded) it generally will not be because of the hypothetical nature of the question or because it touches on the law of the case, but rather because there is a defect in the form of the question or because the purpose of the question shows no clear relationship to a possible challenge. Thus, questions which seek a commitment from a juror as to how he will decide the case,[23] or what impact certain facts or law will have on him,[24] or what his understanding of the law is[25] will generally be excluded because the purpose of the question does not relate to anything which could form the basis of either a challenge fo. cause or a peremptory challenge; the purpose is to gain a commitment from the juror prior to the time he has heard any evidence. Illustration of questions defective as to form, as distinguished from content, would be those that are repetitious,[26] ambiguous, confusing, or awkwardly worded. Also, those which incorrectly state the law or inaccurately or incompletely state the facts[27] would fall in this category.

It would seem to follow then that if a question is carefully framed to show a clear relation to a possible challenge and avoids defects as to form, the problems just referred to could be avoided. However, it is not that simple. The rule that vests wide discretion in the trial judge makes it by no means certain that an ostensibly proper question will be allowed or conversely that a seemingly improper question will be excluded. For example, in *State* v. *Douthitt*,[28] a case decided by the Supreme Court of New Mexico, the following question was disallowed by the trial judge: "[C]ould [you] give the defendants the benefit of reasonable doubt if such doubt should exist?"[29] Relying on the discretion of the trial judge, the court, while finding nothing particularly wrong with the question itself, said that there was no clear abuse of the judge's discretion in denying the question.

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[22] *Id.*

[23] Kephart v. State, 93 Okla. Crim. 451, 229 P.2d 224 (1951); State v. Bauer, 189 Minn. 280, 249 N.W. 40 (1933); Christianson v. United States, 290 F. 962 (6th Cir. 1923).

[24] State v. Smith, 234 La. 19, 99 So.2d 8 (1958); State v. Dillman, 188 Iowa 1147, 168 N.W. 204 (1918).

[25] People v. Harrington, 138 Cal. App.2d Supp. 902, 291 P.2d 584 (1955).

[26] People v. Modell, 143 Cal. App.2d 724, 300 P.2d 204 (1956).

[27] State v. Zeigler, 184 La. 829, 167 So. 456 (1936).

[28] 26 N.M. 532, 194 P. 879 (1921).

[29] *Id.*

Certainly a persuasive argument could be made that the question was proper. A negative response would clearly be a cause for a challenge.

On the other hand, there are several cases in which either the prosecutor or the trial judge was allowed to ask a question which seems improper according to the general guidelines set forth above, yet has been held properly allowed.[30] There are, as a result, seemingly contradictory rules within a single appellate jurisdiction.[31] However, a rule that truly does vest wide discretion in the trial judge presupposes that results need not be uniform. Trial judges within the same appellate jurisdiction can and will have differing attitudes as to what the proper scope of voir dire should be. Therefore, the appellate courts have consistently refused to impose a uniformity on them except within very broad limits.

At this point it would be traditional to attempt to analyze and summarize the law as to the proper scope of voir dire examination in civilian jurisdictions. It should be evident, however, that this would be virtually impossible aside from the basic rule that examination must relate to challenges and whether it does is within the discretion of the trial judge. The cases in this area are decided very much on an ad hoc basis and whether the judge is found to have abused his discretion, a very rare thing,[32] probably depends on whether the appellate court thinks it important enough to base a reversal on. Subsequent portions of this article will attempt to make a more detailed breakdown as to the questions commonly asked, and an effort will be made to show how the courts have approached the problem of the proper scope of an examination on specific questions. The best that can be said in a general way concerning counsel's dilemma in determining whether a question is going to be held proper or improper is that if he wishes to have the best possible chance of having the question allowed he must be certain that the inquiry is related to a possible challenge, accurately states the law and/or facts, and is correct as to form.

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[30] *See, e.g.*, Stovall v. State, 233 Ark. 597, 346 S.W.2d 212 (1961).

[31] *Compare* People v. Guasti, 110 Cal. App.2d 456, 243 P.2d 59 (1952), *with* People v. Wein, 50 Cal.2d 383, 326 P.2d 457 (1958); State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924), *with* State v. Pettit, 33 Idaho 319, 193 P. 1015 (1920); State v. Peltier, 229 La. 745, 86 So.2d 693 (1956), *with* State v. Normandale, 154 La. 523, 97 So. 798 (1923).

[32] In relation to the number of cases that have tested the discretion of the court, those finding an abuse of discretion are extremely small. Those resulting in reversal show no common rationale but merely point up the ad hoc approach that is taken in this area. *See, e.g.*, People v. Raney, 213 Cal. 70, 1 P.2d 423 (1931); Territory v. Lynch, 18 N.M. 15, 133 P. 405 (1913); People v. Car Soy, 57 Cal. 102 (1880).

IV. VOIR DIRE EXAMINATION IN MILITARY PRACTICE

In the introduction it was pointed out that examination of the court members is probably not nearly as extensive in courts-martial as it is in most civilian jurisdictions. This is an empirical observation of the writer gained from both personal experience and discussion with other military counsel and law officers. As the military system actively promotes appeals as to any possible defect that might have occurred at the trial,[33] it is surprising that there are relatively few appellate cases. Of course there are differences between courts-martial and civilian trials that partly account for this. For example, the composition of the court is known in advance. Therefore, counsel will have an opportunity to make inquiries concerning court members in advance of trial, although it should be noted parenthetically that this advantage is probably not exploited as much as it could be. Quite often too, a military counsel will know many of the members of the court at least casually. Also, a court sits for more than one case; this will afford an opportunity to observe the members, and, of course, if voir dire is conducted in the first case or two, it will make it less necessary in subsequent cases. Then too it should be considered that the ordinary military court is a relatively homogeneous body, at least compared to the average civilian jury; there is a rough similarity of background, interests, and economic and social status. In short, the military court is much more of a known quantity and very many of the questions asked of a jury in a civilian trial, which seek basic information concerning the personality and background of the juror, are simply not necessary in a court-martial. Another factor leading to a less extensive examination is that an accused is only entitled to one peremptory challenge and unless the challenge reduces the membership below five members no one is appointed to replace the challenged member. Therefore, the somewhat exhausting and exhaustive process of repeating questions to a prospective juror who is called to replace one challenged is avoided.

Perhaps another reason which would explain in part the less extensive examination of the court, if the reader will accept the assumption that it is less extensive, is inherent in the military structure of the court. There is a tradition, very real to some,

[33] Review is automatic for all general courts-martial and most of them include a free transcript of the court-martial record as well as furnishing of appellate defense counsel. The raison d'etre of appellate defense is to carefully "fly-speck" a record for any and all errors at the trial level.

that says that an officer will do his duty and is not to be questioned or put on oath about his ability to do so, particularly by one junior in rank. This attitude as it applies to examination of the court is exemplified in a comment made by The Judge Advocate General of the Army during World War II in an indorsement to a general court-martial that had been submitted to him for review and transmittal to the Secretary of War. There had been a voir dire conducted during the trial, the nature and extent of which are not contained in the opinion, but it apparently was an inquiry pertaining to the law of the case. In discussing the propriety of such an examination of the court, The Judge Advocate General said: "[Voir dire] assumes that there may be members of the court who are unwilling to follow the mandates of the law and is a gratuitous assumption carrying aspersions which are unfair and unauthorized."[34] That there has been a change in the official line goes without saying; examination is specifically allowed by the *Manual for Courts-Martial*,[35] and certainly has the blessing of the Court of Military Appeals. In fact, one case found that failure to voir dire the court was an error in tactics that indicated, along with other deficiencies, inadequate representation.[36] Yet the old attitude hangs on and from time to time there is a case where attempted examination of the court provokes an outburst from a "traditionalist" that he resents his word being questioned.[37] Undoubtedly some counsel, particularly those junior in rank, are deterred from at least some exmination because of this.

Yet aside from the fact that the membership of the court is known in advance, the reasons for voir dire would appear to be just as persuasive as in civilian trials; perhaps more in some instances. Certainly anytime there is even the hint of improper command influence, a factor unknown in civilian criminal law, voir dire becomes a necessity. Also, the fact that the court-martial is the sentencing agency would seem to call for more and broader examination of the court's attitude towards crime and punishment.[38] Consider also that in many instances the military community is relatively small and perhaps parochial in its outlook; this would seem to call for inquiry concerning

[34] B.R. (E.T.O.) 2203, Bolds (1944).

[35] MANUAL FOR COURTS-MARTIAL, UNITED STATES, *1951*, para. 62*b*.

[36] *See* United States v. McMahan, 6 U.S.C.M.A. 709, 21 C.M.R. 31 (1956).

[37] *See* United States v. Lynch, 9 U.S.C.M.A. 523, 26 C.M.R. 303 (1958).

[38] The Court of Military Appeals has recognized that the court-martial sentencing powers make relevant the attitudes and beliefs of court members. *See, e.g.*, United States v. Fort, 16 U.S.C.M.A. 86, 36 C.M.R. 242 (1966); United States v. Cleveland, 15 U.S.C.M.A. 213, 35 C.M.R. 185 (1965).

knowledge of the case and relationship of the court members with the parties, witnesses, or convening authority, and attitudes towards courts-martial in general. The military procedure then, although perhaps calling for a less extensive examination of the "jurors," should not discourage the necessity for examination and, in fact, might indeed demand a more incisive examination than would be true in civilian trials.

The United States Court of Military Appeals (hereinafter referred to as the court) has developed a rule, discussed hereinafter, not too different in form to that discussed above as to civilian jurisdictions. Yet the substance of the rule has a subtle difference as to emphasis which implies a much broader examination.

In the military there is no problem as to who is to conduct voir dire examination. The *Manual for Courts-Martial* states in paragraph 62*b* that counsel "may question the court," and although formerly Judge Latimer expressed a preference for the federal rule which gives the trial judge chief responsibility,[39] this view was disputed in the same case by Judge Quinn and has not been brought up again in any reported case. However, there is no doubt that the law officer has the right to supplement counsel's examination should he so desire.[40] The troublesome question that the court has been called on to decide is, as is true in civilian jurisdictions, the proper limits of voir dire examination. The use or attempted use of the examination to indoctrinate the members of the court-martial has been the chief cause of most of the litigation. The landmark case, the one which definitively stated the rule and the one which is cited in every case since is *United States* v. *Parker*,[41] decided in 1955. There were several questions asked on voir dire, all of which were obviously designed to indoctrinate rather than obtain an answer. The following colloquy took place:

> DEFENSE COUNSEL: Is there any member of the court who would, though finding any reasonable doubt in his mind as to the guilt of the accused, nevertheless find the accused guilty?
>
> LAW OFFICER: That question is improper because the court will be instructed on reasonable doubt at the time the law officer gives his instructions. That question will not be answered.

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[39] *See* United States v. Parker, 6 U.S.C.M.A. 274, 19 C.M.R. 400 (1955).

[40] *Id.* at 282, 19 C.M.R. at 408.

[41] 6 U.S.C.M.A. 274, 19 C.M.R. 400 (1955).

> DEFENSE COUNSEL: Very well, is there any member of the court who, while being instructed on matters given by the law officer, would feel he personally is privileged to go ahead and arrive at conclusions disregarding the instructions given by the law officer?[42]

The latter question was also disallowed. The court stated that generally as to scope of voir dire:

> [The members of the court-martial] may be asked any pertinent question tending to establish a disqualification for duty on the court. Statutory disqualifications, implied bias, actual bias, or other matters which have some substantial and direct bearing on an accused's right to an impartial court. . . .[43]

In applying this general principle to the case, while upholding the rulings of the law officer, the court said:

> [W]e do not seek to encourage law officers to be miserly with counsel on the preliminary examination. Within the military system, if any reason is advanced therefor, we think the law officer who either inquires himself or permits inquiry to determine with certainty that court-martial members will accept their law from the law officer, follows a desirable course.[44]

Concerning the questions in this particular case, Judge Latimer stated:

> Perhaps as to these particular questions, the law officer would have been wiser had he permitted them to be answered, although negative responses were inevitable. But one of the well-recognized rules of criminal jurisdiction is that wide discretion is vested in trial judges as to the questions which must be answered by jurors on voir dire. Appellate courts should reverse only when a clear abuse of discretion, prejudicial to the defendant, is shown. Conceding that the purposes of voir dire are to determine whether individual jurors can fairly and impartially try the issues, and to lay a foundation so that peremptory challenges can be widely exercised, those purposes do not permit the examination to range through fields as wide as the imagination of counsel. Because bias and prejudice can be conjured up from many imaginary sources and because peremptory challenges are uncontrolled except as to number, the areas in which counsel seeks to question must be subject to close supervision by the law officer.[45]

The rule as thus stated and the rationale to support it are not different in any substantial respects from the rules earlier discussed that apply in most civilian courts; examination is limited

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[42] *Id.* at 279–80, 19 C.M.R. at 405–06.

[43] *Id.* at 279, 19 C.M.R. at 405.

[44] *Id.* at 282, 19 C.M.R. at 408.

[45] *Id.* at 280, 19 C.M.R. at 406.

to inquiry touching upon challenges for cause or that which will aid in the exercise of peremptory challenges. While some latitude should be given counsel, the law officer has broad discretion and only clear abuse on his part will be considered error. Yet it is apparent that the court is troubled to some extent by the law officer's ruling. In the part of the opinion just quoted, the court concedes that it "would have been wiser" to allow the question and that law officers should not be "miserly with counsel" in limiting the scope of examination. In another part of the opinion, wherein Judge Latimer prefaces the discussion on voir dire with some general considerations, he states that "when there is a fair doubt as to the propriety of any question, it is better to allow it to be answered. While materiality and relevancy must always be considered to keep the examination within bounds, they should be interpreted in a light favorable to the accused."[46] There is then, as contrasted with civilian jurisdictions, much more emphasis on the accused's rights to impartial triers of fact. Perhaps there is even a hint that the court has reservations about a military court's ability to be impartial. Anyone who read this opinion in 1955 could not have been too surprised, considering the language in it, to see the emphasis shift in later cases from the wide discretion of the law officer to the wide latitude to be allowed counsel. This has happened.

Consider the following colloquy from *United States* v. *Sutton*,[47] decided in 1965:

> DC: . . . .
>
> Major, if a reasonable doubt were raised in your mind, would you vote for a finding of guilty—
>
> LO: Well, I'll interrupt that question.
>
> On voir dire examination preliminary to challenges, the members of the court-martial may be asked any pertinent question tending to establish a disqualification for duty on the court. Statutory disqualification, implied or actual bias, or any other matter which would have some substantial doubt—I correct myself—which would have some substantial and direct bearing on the accused's right to an impartial court as exercised through his challenges for cause, are proper subjects for inquiry. While counsel will be allowed considerable latitude, each will be expected to stay within the bounds which I have just indicated in asking any questions.
>
> Now, the question that you just put [Captain] undertakes to go into the matter of what the law of the case will be. When this court gets ready to make its decision they must take the law from

[46] *Id.* at 279, 19 C.M.R. at 405.
[47] 15 U.S.C.M.A. 531, 36 C.M.R. 29 (1965).

> me. You do not know what the law is going to be as it applies to this case at this time, and consequently, I think that I will hold that this is not a proper question on voir dire.
>
> You may proceed within the limitations that I have indicated, but before you do so I turn to each member of the court and say that each of you should listen carefully to any question asked. If you do not understand the question you should say so. If you wish to enlarge any answer to a question calling for a "yes" or "no" to express yourself clearly, you should say so.
>
> . . . .
>
> DC: In view of the ruling by the law officer, the defense has no further questions of the court.[48]

Pause briefly and consider the importance this exchange must have had in the minds of the participants. Had counsel been fully conversant with the case law, and particularly *Parker,* he would not have been surprised by the law officer's ruling; no doubt the law officer felt confident of the correctness of his ruling. The question asked was almost identical to the first question asked in *Parker.* The law officer quoted almost verbatim from the general rule cited in *Parker* as to the permissible scope of voir dire in making this ruling. It is true that he placed the emphasis on his discretion and paid lip service to that portion of *Parker* enjoining him to be liberal in his rulings, yet such a rule presupposes, implicitly anyway, that lip service will have to be paid to one facet or another of the rule. You cannot give the law officer wide discretion and at the same time give wide latitude to counsel; one or the other has to be dominant. The law officer in *Sutton* must have been certain that he properly exercised his discretion and would be upheld on review of the case. There is nothing certain in the law; the court found error in the law officer's ruling and somehow managed to quote *Parker* as precedent.

> While an accused is not entitled to favorable court members or any particular kind of juror, he is guaranteed the right to a fair-minded and impartial arbiter of the evidence. . . . When one is found to be willing to convict, though he entertains a reasonable doubt of guilt, he fails to accord the proper scope to the presumption of innocence and may be imbued with the concept that the accused may be blameworthy, else he would not stand arraigned at the bar of justice. And to those who doubt the existence of such beliefs on the part of some court members, we point to our decisions in United States v. Carver and United States v. Deain. . . . Thus, it seems entirely proper for counsel to interrogate a member, as in this case, as to whether he entertains such beliefs and would convict despite a reasonable doubt of the accused's guilt.[49]

[48] *Id.* at 534-35, 36 C.M.R. at 32-33.
[49] *Id.* at 536, 36 C.M.R. at 34.

This quote from *Sutton* could have been equally applicable to *Parker*. In *Sutton*, both sides on appeal cited *Parker*, the government relying on the "wide discretion" of the law officer and the defense relying on the "wide latitude" to be allowed counsel. It would be oversimplifying to say that the court was successful in distinguishing the facts. They were not that different. Yet instead of overruling *Parker* directly, the court did attempt to reconcile it. Four general distinguishing facts were pointed to: (1) The inquiry was not general, but was directed to one member; (2) the law officer misunderstood the purpose of the question; the question did not go into the law of the case, but rather was an inquiry into the member's belief in the law; (3) the guidelines of the law officer excluded voir dire as an aid in peremptory challenges; and (4) this cautionary instruction to the court indicated that counsel was trying to trap them. There was also some indication that the court felt *Parker* was partly based on a suspicion that counsel did not ask the question in good faith.[50] In any event *Sutton*, while ostensibly relying on the *Parker* case, emphasizes the point that had been merely referred to in *Parker*, that is that counsel *should* be allowed a wide latitude and slid over the crux of *Parker*, which was the wide discretion to be accorded to the law officer.

Other cases, one quite recent, might indicate that the court has not wholly abandoned the law officer. In *United States* v. *Freeman*[51] *and United States* v. *Fort*,[52] the rulings of the law officers, excluding questions, were upheld. In *Freeman*, the following question was excluded by the law officer:

> IC: . . . Now gentlemen, is there anybody on this court who does not think, in-his own opinion, that a person can be so drunk that they cannot entertain a specific intent and a prescribed offense, such as, say, the intent to wilfully disobey an order, or say, the intent to deprive somebody, permanently of their property?[53]

Appellate defense counsel construed this as asking whether anyone had a prejudice against intoxication as a defense; thus they tried to fit it into the rationale of *Sutton*. The law officer apparently construed it as asking how the court would decide the case and based his ruling on that. The court felt it could be construed either way. In their holding they pointed out that all the law officer did was point out the infirmities in the question and

[50] *Id.* at 535, 36 C.M.R. at 33.

[51] 15 U.S.C.M.A. 126, 35 C.M.R. 98 (1964).

[52] 16 U.S.C.M.A. 86, 36 C.M.R. 242 (1966).

[53] United States v. Freeman, 15 U.S.C.M.A. 126, 128, 35 C.M.R. 98, 100 (1964).

emphasized that the ruling of the law officer did not prohibit further questioning.[54] There is then an implication that the general line of inquiry was proper.

Similarly in *Fort*, wherein the charge was indecent assault on a 68-year-old woman, the following colloquy took place:

> DC: In spite of any mitigation, or extenuating circumstances. Just the sole fact of conviction on this charge. Regardless of what may be presented in the case. Regardless of what may be presented in extenuation. Do you think this would require a punitive discharge?
>
> PRES: I think it might. I don't know that it would require it absolutely, but you made an assumption that he is guilty. This is an assumption that we don't know yet.
>
> LO: I don't think we ought to carry this—I think the question is improper because of the way it is worded.
>
> DC: Sir, can I rephrase the question?
>
> LO: All right, rephrase the question. You make it a very difficult question to answer because the nature of the offense in itself calls for a punitive discharge. The nature of the offense itself, if one is found guilty, calls for a punitive discharge and other accessories. The way you have the question worded makes it difficult for anyone to answer it.
>
> DC: Well, my question is this, sir, I'll rephrase it, that regardless of what it presented in mitigation or extenuation, regardless of what comes in at this point, that you would require—that you would find that this would require a punitive discharge, regardless of what might be brought in later as to the circumstances surrounding the—or any extenuation or mitigation.
>
> PRES: Well, I think it might.
>
> LO: Does any member of the court wish to comment?
>
> MEMBER: I think it might.
>
> LO: I think the question is highly improper and I don't think we'll go into this discussion. If you wish to question the members individually, you may do so. I think that collectively it is difficult to answer this question anyway.[55]

On appeal when the rulings of the law officer were attacked, *inter alia*, for improperly curtailing voir dire examination, the court, citing *Parker*, found that the law officer did not abuse his discretion. Had they left it at that then perhaps there would have been an indication that the pendulum was swinging back to the discretion of the law officer. However, the court stressed

[54] *Id.* at 129, 35 C.M.R. at 101.

[55] United States v. Fort, 16 U.S.C.M.A. 86, 87–88, 36 C.M.R. 242, 243–44 (1966).

the fact that the law officer did not foreclose further inquiry but merely directed that under the circumstances the inquiry would have to be on an individual basis; this ruling was proper they said in view of the fact that individual members had indicated a possible ground of disqualification. The clear implication again is that the content of the inquiry was proper and that a ruling of the law officer which shut it off entirely would have been error.[56]

In summarizing the military rule, it would be safe to state that while the Court of Military Appeals purports to apply the same general rule cited in *Parker* as to permissible scope of juror examination, in reality the rule has evolved to a point that the wide discretion vested in the law officer has largely been dissipated by emphasizing the accused's right to an impartial court and the concomitant of that, a right to a searching examination of the attitudes and beliefs of the court members. To this extent the military practice and procedure is significantly different than its civilian counterpart. A study of the civilian cases compels the conclusion that, if anything, there is a trend towards removing voir dire examination from counsel and making it a function of the judge, and of course as has been seen, even where counsel conducts the inquiry, most civilian appellate jurisdictions repose a truly wide discretion in the trial judge in regulating the scope of examination. On the other hand, the Court of Military Appeals has rejected any attempt to remove the examination from counsel and has very distinctly moved from a position of restrictive examination under the strict supervision and discretion of the law officer to one of a wide examination covering almost every relevant belief and attitude a court member might have. While ritual homage is paid to the law officer's power in regulating the scope of the examination, it really appears to be little more than power to guide the inquiry so that it is in an understandable and appropriate form.

Whether the court consciously moved to a rule different from that of the civilian courts is a matter of pure speculation. As has been intimated before, the cases from civilian jurisdictions are not that clear, and they too have reached different results while purporting to apply the same rule.[57] But it could be theorized that the court did consciously reach the result they did in *Sutton* because of the peculiar nature of the military court-martial as distinguished from the civilian jury. A military court is a crea-

[56] *Id.* at 89, 36 C.M.R. at 245.

[57] *See* note 31 *supra* and accompanying text.

ture of orders created for the express purpose of deciding cases referred to it by the convening authority, who is in most cases also the commanding officer of the court members. Moreover, by the nature of rank and position of the members, most of whom are either subordinate commanders or members of the convening authority's staff, they have a personal and direct stake in the maintenance of discipline. No fair minded person will deny that the *potential* for abuse exists in such situations. Because of this the court has been quick to strike at even the hint of illegal command influence or the existence of predispositions or prejudices on the part of the court members.[58]

While the court has not explicitly stated a different rule as to voir dire examination, their opinions do show a great sensitivity to the attitudes and beliefs a court member carriers into court with him. Such a concern is nonexistent in civilian trials, except perhaps in those few cases that have engendered a great deal of newspaper publicity.[59] It could be said that a civilian court will presume a juror can be fair as to the general issues of a case, whereas, perhaps, at least insofar as the court is concerned, no such presumption exists in courts-martial because of the more personal involvement of the member in the system. This makes possible an extensive examination, subject only to the limitations that it be relevant in a very broad sense and that it be phrased in an understandable and proper form. A persuasive argument could therefore be made that the military situation does call for a different approach to examination of the court.

V. VOIR DIRE AS AN INDOCTRINATION DEVICE

As indicated heretofore the main burden of this article is to focus on voir dire examination as a tool of advocacy in influencing or indoctrinating the court-martial members. We have seen in discussing the scope of examination that its use for this purpose along is not proper. It must be made relevant to a possible challenge. Yet it is apparent from the cases so far cited and discussed that much of the litigation as to scope of inquiry has arisen from attempts to bring up legal and factual issues that will arise during the trial, not for the purpose of challenging prospective jurors but for the purpose of gaining a commitment in one form or another that the juror will apply the defense (or

[58] *See* United States v. Fort, 16 U.S.C.M.A. 86, 36 C.M.R. 242 (1966); United States v. Sutton, 15 U.S.C.M.A. 531, 36 C.M.R. 29 (1965); United States v. Cleveland, 15 U.S.C.M.A. 213, 35 C.M.R. 185 (1965).

[59] *See* Sheppard v. Maxwell, 384 U.S. 333 (1966).

prosecution) oriented law to the case or will not be unduly influenced by adverse facts expected to develop at the trial. In this section, then, will be discussed the arguments for and against voir dire examination as an indoctrination device, circumstances where it can be so utilized, and analysis of questions commonly asked.

A. *THE CASE AGAINST INDOCTRINATION BY VOIR DIRE*

Basically, the argument against voir dire examination of this type is that its use in such a manner is a subversion of the legal purpose of examining the jury. A corollary of this argument is that unrestricted voir dire can result in such a serious abuse as to impede the administration of justice. As Judge Latimer pointed out in *Parker*, the variety of questions that can be asked are only limited by the "imagination of counsel." [60] Similarly, consider this language from the New Mexico Supreme Court: "The examination of jurors would be interminable if parties were allowed to take up the whole law of the case item by item, and inquire as to the belief of the jurors and their willingness to apply it." [61] This is somewhat overdrawn. Good sense of counsel, not to mention the trial judge, will ordinarily impose some reasonable limitation far short of this; yet it is apparent that there is potential for abuse. In turn, this has led to curtailing examination by counsel and reposing chief responsibility on the judge. The federal courts by rule 24 of the Federal Rules of Criminal Procedure gave the trial judge almost plenary authority over voir dire examination.[62] California, as a result of real or imagined abuses on the part of counsel, did the same thing by statute.[63] Illinois moved directly against indoctrination by voir dire with a 1958 rule of their Supreme Court which states that counsel "shall not directly and indirectly examine the jurors concerning matters of law or instructions." [64] The reports of the Committees which recommended the adoption of this rule succinctly summarized the arguments against this type of examination:

> The examination of jurors concerning questions of law supposed to be encountered in the case is without question one of the most pernicious practices indulged in by many attorneys. The usual procedure is to inquire as to whether or not jurors will fol-

[60] United States v. Parker, 6 U.S.C.M.A. 274, 19 C.M.R. 400 (1955).
[61] State v. Douthitt, 26 N.M. 532, 534, 194 P. 879, 880 (1921).
[62] FED. R. CRIM. P. 24.
[63] CAL. PENAL CODE, § 1078 (West 1956).
[64] People v. Lexow, 23 Ill.2d 541, 542, 179 N.2d 683, 684 (1962).

> low certain instructions if given. . . . [The] supposed instructions as orally expounded by the advocate are slanted, argumentative and often . . . clearly erroneous. . . .
>
> . . . [P]ropounding questions of law to the jury is of no aid in arriving at the legitimate purpose of the voir dire, namely, an intelligent exercise of the right of challenge. Such questions are improper and should not be allowed.
>
> . . . .
>
> . . . [M]any lawyers infringe upon the prerogatives of the court and under the guise of eliciting information attempt to impart to the jurors a conception of the law highly favorable to their side of the cause. Such tactics, unfortunately almost universally followed in today's Illinois jury trials, invade the province of the court, are time consuming, tend to confuse the jurors and do nothing to further the purpose of the voir dire procedure. . . .[55]

B. *THE CASE FOR INDOCTRINATION BY VOIR DIRE*

The arguments for allowing counsel to indoctrinate by means of voir dire cannot be found articulated anywhere other than in texts on trial practice. The reason is obvious. If counsel admitted or even inferred this was his reason for conducting an examination, he would lose all legal standing to conduct it. Nevertheless, a case can be made that counsel should, within limits, be allowed to inquire into the juror's attitudes concerning the law or facts of a case. It is generally acknowledged, or at least is part of our legal folklore, that many of the rules of law, particularly those designed to protect seemingly guilty people, are probably pretty much ignored in deliberations as to guilt or innocence. The judge or law officer intones these high sounding rules in a not always interesting or understandable fashion and likely they are promptly forgotten by most of the jurors. For example, instructions to acquit because of insanity, instructions on intoxication as a defense, or instructions to ignore a confession if there is duress or the warning found improper may largely be ignored if the juror thinks the accused probably did the act alleged. The author feels there is nothing wrong with a system that admits such attitudes might exist and allows inquiry concerning them. It is disingenuous to argue that a person prejudiced as to the facts or biased against the particular accused is disqualified from sitting, but a person prejudiced as to the law of the case is not. If it be admitted that few people will acknowledge such a prejudice, at least counsel should be able

[55] Christian v. New York Cent. R.R., 28 Ill. App.2d 57, 59–60, 170 N.E.2d 183, 185–86 (1960).

to force potential jurors to deny such bias. The result would be less of a chance that mere lip service would be paid to some of these so-called "unpopular" but nevertheless important rules of law. There is certainly adequate machinery available in the guise of the trial judge to curb any blatantly improper examination.

C. *THE ACTUAL USE OF VOIR DIRE TO INDOCTRINATE IN CURRENT PRACTICE*

Arguments pro and con aside, there is no doubt but that voir dire examination is extensively used in an attempt to indoctrinate the jury. One recent study,[66] admittedly of a limited scope, concluded that of examinations conducted in one jurisdiction during one session of the court, 80 per cent were designed to indoctrinate the jury and only 20 per cent were legitimately concerned with challenges. Moreover, the inquiries designed to indoctrinate were far more effective. Therefore, the task of this section will be to discuss some of the more common lines of inquiry for a voir dire examination, the main goal of which is to influence or indoctrinate potential jurors. There are perhaps four broad areas of inquiry which lend themselves to possible indoctrination. The first, and most common, are questions which touch upon the law of the case; second, are questions concerning evidence which might be introduced during the trial. This type of question usually takes the form of inquiry as to the impact certain evidence would have on a juror or the effect conflicting evidence would have. The third broad type of question concerns the influence a juror would feel from the other jurors; and finally, there are questions which seek to determine the effect the testimony a certain witness or type of witness would have on the juror.

1. *Examination Concerning the Law of the Case.*

Questions about the law of the case may take the form of inquiry as to whether the jury would follow the instructions of the judge[67] or about specific rules of law or legal defenses that will be relevant to the case. Also, it is common to ask a juror about his reaction to or belief in reasonable doubt,[68] burden of proof,[69] self-defense,[70] or insanity.[71] Such questions are proper provided

[66] Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503 (1965).
[67] State v. Dean, 65 S.D. 433, 274 N.W. 817 (1937).
[68] State v. Douthitt, 26 N.M. 532, 194 P. 879 (1921).
[69] State v. Bauer, 189 Minn. 280, 249 N.W. 40 (1933).
[70] State v. Zeigler, 184 La. 829, 167 So. 456 (1936).
[71] State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924).

they are in such a form as to clearly relate to a challenge, although in most civilian jurisdictions it is not an abuse of discretion on the part of the trial judge to disallow them.[72] Certainly in the military the rationale of the *Sutton* case would make such questions proper. When this type of question is disallowed it is often because of some reason aside from the fact that it pertains to the law of the case. For example, such questions are disallowed because the form is seeking a commitment from a juror as to how he will vote,[73] is repetitious,[74] or is worded in such a manner as to render it ambiguous, unclear, or an incorrect statement of the law.[75]

2. *Examination Concerning Evidence.*

Inquiry concerning the effect of certain evidence commonly occurs when one side expects adverse testimony to be introduced and it is desirable to bring the matter up at voir dire. The purpose of the inquiry on voir dire is to steal the thunder from the other side and also to gain a commitment from the jury that they will disregard the adverse evidence to the extent legally permissible. For example, a record of previous convictions or aggravating circumstances surrounding the alleged offense are often the subject of examination.[76] The tenor of the question is usually directed to whether a juror can disregard such evidence or whether he can and will follow an instruction which requires him to disregard it.[77] Such questions have been held to be proper,[78] although to allow them is not ordinarily considered an abuse of discretion in most civilian jurisdictions.[79] Generally, when such questions are disallowed it is because they are defective in form or purpose rather than because the ultimate line of inquiry is inappropriate.[80] Exclusion would also be proper if the question asked for a commitment from the juror or the phrasing

[72] *See* State v. Douthitt, 26 N.M. 532, 194 P. 879 (1921); Commonwealth v. Barner, 199 Pa. 335, 49 A. 60 (1901).

[73] State v. Bauer, 189 Minn. 280, 249 N.W. 40 (1933).

[74] McKinney v. State, 80 Tex. Crim. 31, 187 S.W. 960 (1916).

[75] State v. Williams, 230 La. 1059, 89 So.2d 899 (1956); State v. Peltier, 229 La. 745, 86 So.2d 693 (1956).

[76] *See, e.g.*, People v. Louzen, 338 Mich. 146, 61 N.W.2d 52 (1953); State v. Dillman, 183 Iowa 1147, 168 N.W.2d 204 (1918).

[77] *See* People v. Louzen, 338 Mich. 146, 61 N.W.2d 52 (1953).

[78] *See, e.g.*, People v. Hosier, 116 N.Y.S. 911 (1909) (prejudicial error not to allow a question as to impact prior convictions of the defendant would have on the jury).

[79] *See, e.g.*, Manning v. State, 7 Okla. Crim. 367, 123 P. 1029 (1912).

[80] *See* People v. Louzen, 338 Mich. 146, 61 N.W.2d 52 (1953).

was ambiguous. The most serious defect of questions as to evidence, however, is a failure to properly qualify the question. It may be perfectly proper for such evidence to be considered and weighed by the jury; therefore, to the extent the question infers that the evidence is to be disregarded in its entirety it may be disallowed as an inaccurate statement of the law.[81]

3. *Inquiry on Conflicting or Evenly Balanced Evidence.*

This type of question is normally phrased this way: If at the end of the trial you determined that the evidence was evenly balanced, that if there was as much reason to believe one side as the other, would you feel compelled to vote for the prosecution? [82] There are decisions,[83] notably from Michigan, that would allow this question, but such a question seems to be clearly improper as to form and purpose. The defects are obvious; not only does the question seek a commitment from the juror as to how he would decide the case, but more importantly, it fails to sufficiently define what is meant by "evenly balanced." The judge can dispense with such a question by stating that he will properly instruct the jury as to the weight to be given evidence and the quantum of proof required, leaving open only the general question as to whether the jury will follow the judge's instructions.[84]

4. *Examination on the Weight to be Given the Testimony of Specific Witnesses.*

This line of inquiry concerns the weight the jury will give to the testimony of certain people or classes of people. Many older cases asked about the ability or willingness of the jury to give as much weight to the testimony of non-whites as that accorded to the testimony of whites.[85] Other questions asked along the same lines concern the effect a juror is willing to give the testimony of a convict, an accomplice, or the accused himself.[86] There are also questions where the inquiry was directed to the weight the jury would give to the testimony of an expert or a police

[81] *See* Manning v. State, 7 Okla. Crim. 367, 123 P. 1029 (1912); State v. Dillman, 183 Iowa 1147, 168 N.W.2d 204 (1918).

[82] *See* People v. Peck, 139 Mich. 680, 103 N.W. 178 (1905).

[83] *E.g., id.*; Towl v. Bradley, 108 Mich. 409, 66 N.W. 347 (1896).

[84] *See* People v. Lockhart, 342 Mich. 595, 70 N.W.2d 802 (1955).

[85] *See* Lee v. State, 164 Md. 550, 165 A. 614 (1933); People v. Car Soy, 57 Cal. 102 (1880).

[86] *See* Frederick v. United States, 163 F.2d 536 (9th Cir. 1947); State v. Smith, 234 La. 19, 99 So.2d (1958); Lesnick v. State, 48 Ohio App. 517, 194 N.E. 443 (1934).

officer.[87] Here again, questions of this sort have been held proper, but the disallowance of them has not been normally considered an abuse of discretion.[88] In addition to upholding the discretion of the trial judge, exclusion of such questions has often been based on the usual defects discussed previously, that is, improperly seeking a commitment, defective phrasing, or repetition. However, the most serious error found in this line of questioning is failure to properly qualify it. For example, as the testimony of a convict, accomplice, or accused ordinarily is not entitled to as much weight as that of another witness, a question implying that such testimony has absolute equality with other testimony should be disallowed as erroneous.[89] Also, a question may be defective in that it attempts to get the juror to commit himself as to the weight he would give one witness singly or as compared to another witness. This inquiry is unrelated to challenges and is nothing more than an attempt to get a juror to commit himself as to the testimony of a witness before he has even heard the witness testify.[90] An illustration of this defect, together with the appellate court's solution as to how to properly ask the question, occurred in *Chavez* v. *United States*.[91] Defense counsel requested the judge to ask the prospective jury this question: "Would any of you place a greater amount of weight upon the testimony of law enforcement officers over that of the defendants?" [92] The court of appeals stated that the exclusion of the question was proper, but went on to state that had the question been properly qualified by asking "whether the prospective juror would give greater or less weight to the testimony of a law enforcement officer than to that of another witness *simply because of his official character*," [93] then it would have been allowable. A subsequent case,[94] citing *Chavez*, found error when the trial judge disallowed the question that the court in *Chavez* had suggested would have been proper. Some lawyer had been doing his homework.

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[87] *See* Sellers v. United States, 271 F.2d 475 (D.C. Cir. 1959); Matney v. State, 26 Ala. App. 527, 163 So. 656 (1935).

[88] *See, e.g.*, Lesnick v. State, 48 Ohio App. 517, 194 N.E. 443 (1934); *cf.* Sellers v. United States, 271 F.2d 475 (D.C. Cir. 1959).

[89] *See* People v. Louzen, 338 Mich. 146, 61 N.W.2d 52 (1953); Manning v. State, 7 Okla. Crim. 367, 123 P. 1029 (1912).

[90] *See* Chavez v. United States, 258 F.2d 816 (10th Cir. 1958); Matney v. State, 26 Ala. App. 527, 163 So. 656 (1935).

[91] 258 F.2d 816 (10th Cir. 1958).

[92] *Id.* at 819.

[93] *Id.*

[94] Sellers v. United States, 271 F.2d 475 (D.C. Cir. 1959).

5. *Examination on the Influence of Fellow Jurors.*

A question commonly asked in civilian courts and normally held properly excluded pertains to whether or not a juror will allow his decision to be influenced by his fellow jurors.[95] The defect in such a question is that it tends to create division among or between jurors when jurors should listen to the opinions of one another. However, such a question, if properly qualified, does seem appropriate to a court-martial because of the rank structure of the court. Thus the question, "Would you allow yourself to be influenced by the other members of the court?", is objectionable for the reasons cited above. On the other hand, it would seemingly become allowable in a court-martial by adding the phrase, "solely because of the superior rank of the other members."

6. *Examination Concerning Predisposition Towards Sentence.*

Questions peculiar to military cases are those pertaining to the attitudes and beliefs of court members towards sentencing. The only civilian parallel are those cases upholding the right to ask about a juror's feelings concerning the death penalty.[96] In a court-martial the question is generally directed towards possible bias in favor of a discharge as part of the sentence. Those most familiar with the military system will concede that the very fact that a case is before a general court-martial has a tendency to predispose the court members to adjudge discharge in the event of conviction. Recognizing this, the court has laid down a very broad rule as to inquiry in this area. "Inflexible attitudes" and predispositions concerning sentence can be inquired into very extensively provided counsel clearly frames the question properly as to purpose and form.[97]

VII. VOIR DIRE BY THE PROSECUTION

The implicit orientation of this article has been the use of voir

[95] *See, e.g.*, State v. Wolfe, 343 S.W.2d 10 (Mo. 1961); Caesar v. State, 135 Tex. Crim. 5, 117 S.W.2d 66 (1938); Walks v. State, 123 Fla. 700, 167 So. 523 (1936).

[96] *See, e.g.*, United States v. Puff, 211 F.2d 171 (2d Cir. 1954). Para. 62*b*, MANUAL FOR COURTS-MARTIAL, UNITED STATES, *1951*, sets forth an example of a proper question whether or not the member has any scruples against the death penalty in a capital case.

[97] The language in Cleveland v. United States, 15 U.S.C.M.A. 213, 35 C.M.R. 185 (1965), and United States v. Fort, 16 U.S.C.M.A. 86, 36 C.M.R. 242 (1966), certainly expresses sensitivity as to the attitudes and beliefs court members carry into court with them. This would imply, as mentioned previously, a very broad and far reaching voir dire into the very mental processes of the members.

dire examination by the defense. This is not due to any particular defense bias on the part of the writer but rather to the fact that the case law has largely developed around denial of voir dire to the defense. Denial of voir dire to the trial counsel or prosecution is not an appealable error in the vast majority of American jurisdictions. However, some cases have reached the appellate level on the theory that examination allowed to the prosecution was prejudicial to the accused. These cases do warrant a brief treatment of voir dire by the prosecution.

Ostensibly, the same general rules apply to both sides of the case. The prosecution may ask any question relevant to the exercise of his challenge, be they for cause or peremptory. Likewise, he may, to the extent that he is successful in relating them to challenges, ask questions designed to indoctrinate the jury. However, common sense suggests that greater restrictions are placed upon the prosecutor. He must be careful not to use voir dire as a guise for the introduction of inflammatory or otherwise inadmissible evidence. There have been a few cases finding error when this was done.[98]

There are no military cases where examination by the trial counsel resulted in reversible error. In *United States* v. *Carver*,[99] the Court of Military Appeals found the error nonprejudicial as it was not directed to the subject matter of the inquiry (*i.e.*, weight a member would give the opinion of an expert), but rather the fact that the trial counsel was seeking to get a member to commit himself to his attitude toward a witness who had already testified.

It could be assumed that the court would apply the same rules on voir dire to trial counsel examination as it would for defense counsel examination, absent an attempt to improperly influence the court.[100]

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[98] *See, e.g.*, People v. James, 140 Cal. App.2d 392, 295 P.2d 510 (1956); State v. Hoffman, 344 Mo. 94, 125 S.W.2d 55 (1939); Nelson v. State, 129 Miss. 288, 92 So. 66 (1922).

[99] 6 U.S.C.M.A. 258, 19 C.M.R. 384 (1955).

[100] Beyond the purview of this article, which is concerned with the scope of examination, are those problems raised when voir dire results in disclosure of information which is prejudicial to the accused, such as a member's knowledge of a previous act of misconduct on the part of the accused. Counsel who is aware of such potential problems should take care that the member is excused prior to trial or is questioned and challenged outside the presence of the other members.

VIII. SOME PRACTICAL RULES FOR PREPARING VOIR DIRE

That voir dire examination can be and should be better utilized is the theme of this article. From the antecedent discussion it is apparent that much of the litigation has arisen because of defects in the form of the inquiry rather than its substance. Since the vast majority of the cases, at least from civilian courts, are finding exclusion of questions proper, it is fairly obvious that poorly executed voir dire often results in exclusion of questions which if properly planned and executed would have been allowed. There are some rules which if applied should at least greatly enhance the chances of having the question accepted. These suggestions are largely limited to examination designed chiefly to indoctrinate the court. While many of them apply equally to an examination seeking possible challenges, by and large such an examination will cause little difficulty. If there is a suspected or known disqualification, or a known or suspected bias on the part of a court member, there will be little problem in either the phrasing or the form of the question. The problem arises, as has been stated throughout this article, when counsel's purpose is to influence the court members by his questions.

1. *Examination Must Only Touch on Important Issues.*

While the argument has been made here, persuasively it is hoped, that there should be more voir dire in courts-martial, this is not to say that there should always be extensive examination or even examination at all. It should be saved for the important issues if it is to have the intended effect. It must be remembered that a military court might hear several cases presented by the same counsel. While each case is separate, it would not do to ignore the fact that the court might have been examined on the same point before in a previous case. Also, there will be routine guilty pleas before a court that has not been immoderate in sentencing. In such a case, examination would not be particularly appropriate by the defense and could be dangerous if conducted by the prosecution.

2. *Examination Should Have a Clear Purpose.*

This ties in somewhat to the first rule. Before asking any question, counsel should first decide what the purpose of the question is and whether the question is framed to aid this purpose. He will then have to relate his examination to what his general analysis of the case has revealed are the crucial issues of

law and fact that the court will be called on to decide. The examples are obvious. If reasonable doubt and burden of proof appear to be the chief hope for the defense, then the purpose of examination will be to emphasize these rules in the minds of the court members. Likewise if insanity, self-defense, or intoxication are to be the defenses, the purpose of voir dire will be to negate, insofar as is possible, the unpopularity that such defenses often have in the minds of laymen. The point is that the truly important issues of the case must be isolated and pinpointed, and the inquiry planned to revolve around only those issues (unless of course there is an apparent reason to examine for a possible challenge).

3. *Voir Dire Must Be Thoroughly Prepared.*

Every phrase of a properly tried case demands this; nevertheless, how many times does counsel carefully prepare his case yet stand up to examine the court with little or no preparation and only a vague idea of what he would like to accomplish by voir dire? It is apparent from reading the cases that this often happens. Consider the following question asked in a case arising in Illinois prior to the adoption of their rule forbidding such an inquiry:

> The prosecuting witness may appear to be an elderly white lady who may have parted with various sums of money, and it may develop that this defendant received this money and that she had not received any part of the money back, and she entered into an obligation with this defendant by which she expected to receive large returns for the money that she advanced, and if you are satisfied that this defendant did receive this money, but the criminal intent to defraud her by making representations that are false, and he had knowledge of the falsity, if the state fails to show that this is the truth, would you by your verdict find this defendant not guilty? [10]

Perhaps this is the case that prompted the Illinois Supreme Court to greatly curtail examination as to the law. It is clear that such a question, aimless and with no apparent purpose other than to state the facts of the case in advance of the trial, was not planned or well thought out. This is admittedly an extreme case, yet it can be used to illustrate what proper analysis would have done. The key to the defense was reasonable doubt and burden of proof concerning the intent to defraud; therefore, a simple question to the juror as to his attitude towards these rules would have stood at least some chance of acceptance. Even if a long, rambling

[10] People v. Robinson, 299 Ill. 617, 618, 132 N.W. 803, 804 (1921).

question is allowed it will largely lose its effectiveness. The question needs to be incisively drawn, highlighting the issue considered important, else the wheat will get lost in the chaff.

4. *Examination Should Be Directed To An Individual.*

Collective questions which allow an individual court member to answer more or less anonymously normally do not accomplish the intended result. The very purpose of this type of examination is to force a commitment of sorts from an individual.[102] Only in this way will it have a lasting effect. A court member does not come into court expecting to be placed on the spot. While he may resent it, nevertheless, the fact that all eyes are on him while he is answering the question is likely to make the question and his answers loom large in his mind. Moreover, if a senior member of the court commits himself to belief in or sympathy with a certain rule of law, or commits himself to disregarding certain adverse facts, then this is likely to have at least some effect on the junior members.

5. The Court Should Be Advised of the Purpose of Voir Dire.

The preceding paragraph noted that examination of the court will catch most of the members by surprise; also, particularly in the case of quite senior members, the experience of having their attitudes and beliefs questioned will be relatively novel. The following response to a question posed on voir dire by the court president in *United States* v. *Lynch*[103] will no doubt stir memories of similar instances in the minds of those who have practiced extensively in courts-martial:

> You, as a civilian lawyer, may not be aware that an officer of the United States Army is bound to tell the truth.
>
> . . . .
>
> Possibly, in civilian courts, you do not trust the witnesses or the members of the jury. This is not a jury. This is a court—it's a military court. It is a custom of the service—from all usage of military courts—that those members of the court are officers and—I'm running out of words. I think you know what I mean. There is a difference between civilian trials and military trials.[104]

Defense counsel unsuccessfully challenged the president of the court for cause. The case was naturally reversed, not so much

[102] Commitment not in the sense of how the member would vote, but rather a commitment as to the willingness to apply a certain rule or ignore a certain fact.

[103] 9 U.S.C.M.A. 523, 26 C.M.R. 303 (1958).

[104] *Id.* at 525–26, 26 C.M.R. at 305–06.

because voir dire was curtailed, but because of the outburst of the president. While the case makes for light reading, the situation at the trial was no doubt rather tense. No matter how well planned and executed, voir dire in such a situation will not accomplish much. The goal is, remember, to ally the court with the questioner's theory of the case. If it is done in such a way as to antagonize the court then it will not accomplish its purpose. This is so whether or not the court should have reasonably been antagonized. Furthermore, there is no sure way of avoiding this type of problem. There will always be a few irreconcilables who simply do not care for the present court-martial system. But there is a way to minimize the possibility of this happening and that is a low-key, simple explanation to the court of the nature of voir dire examination with emphasis on the fact that it is a perfectly legitimate part of the trial process and has express approval of the *Manual for Courts-Martial*. While the law officer might cut off a lengthy discussion, he no less than counsel should wish to avoid the type of situation exemplified by *Lynch*. It might be well to informally advise the law officer prior to the trial that voir dire is planned and invite him to explain to the court its nature and purpose. This would illustrate to the court members his approval of voir dire and remove some of their suspicion.

6. *Examination Should Be Phrased to Show a Purpose Consistent with Possible Challenges.*

This point has been made throughout, yet it is clearly the chief defect in questions held improper by appellate courts. In addition to relating to a possible challenge, that is in such a form that a response thereto would be grounds for challenge or an aid in exercising a peremptory challenge, the question should be simple, concise, accurate as to law and facts, and insofar as possible stripped of legalisms not understood by most laymen.

IX. SUGGESTED QUESTIONS FOR VOIR DIRE EXAMINATION

Some suggested questions in areas of inquiry commonly encountered which meet the requirements of most jurisdictions are suggested in this section. The author does not contend that the questions must be allowed, only that there is a reasonable possibility that they will be.

A. *QUESTIONS AS TO LAW*

Are you in sympathy with (or do you agree with) the rule of law that (herein state rule)?

Are you willing to follow the instructions of the law officer without qualifications?

Does the fact that charges have been referred predispose you to a belief that the accused is guilty?

Do you have any bias against a defense based on insanity (or intoxication or any other relevant defense)?

If you determine that there is a reasonable doubt as to the accused's sanity, will you acquit, even though you might feel he committed the act alleged?

B. *QUESTIONS CONCERNING EXPECTED TESTIMONY*

1. *Police.*

Would you give more weight to (or would you believe) the testimony of a policeman simply because he is a policeman?

2. *Officer.*

Would you give more weight to (or would you believe) the testimony of an army officer, solely because of his rank?

3. *Accused.*

Would you tend to disbelieve (or give less weight to) the testimony of the accused, bearing in mind his interest in the case, solely because he is the accused?

4. *Accomplice or Convict.*

If a witness testifies who is a/an (convict) (accomplice) will you give such weight to his testimony as allowed by law regardless of the conviction (complicity)?

C. *SENTENCE*

Would you feel obligated, regardless of extenuation and mitigation, to adjudge a discharge because of the nature of the offense alleged?

Are you predisposed to adjudge a discharge because the case has been referred to a general court-martial?

D. *DELIBERATIONS OF THE COURT— DIRECTED TO JUNIOR MEMBERS*

Lt. _____, there are several officers of higher rank on the court than yourself. During the deliberations of the court will you allow yourself to be influenced by the opinions of the senior members based solely on their superior rank?

X. CONCLUSION

We have seen that voir dire examination may have a usefulness quite apart from its ostensible purpose of aiding in the process of challenges. This use is as a trial tactic for indoctrinating or influencing prospective court members. However, the rules which set forth the guidelines as to what extent such examination may properly go still require that if counsel is to use it as an indoctrinating device he must be careful to plan his questions so as to satisfy the requirement that they relate to possible challenges. If this is done, and it is hoped that this article has suggested ways of doing it, then voir dire can be a positive aid in gaining a more sympathetic court.

A proper balance between the right to inquire into a prospective court member's attitudes and beliefs and the need for an orderly trial can be struck. A rule which emphasizes one to the detriment of the other, however, can result in the inclusion of court members unqualified to sit because of fixed or inelastic attitudes. The ideal rule, which is perhaps pretty close to present military practice, recognizes that such attitudes might exist and will allow inquiry concerning them. On the other hand, the rule must be flexible enough to prevent such limitless and extensive examination that would impede the orderly processes of the court. The discretion accorded to the law officer together with proper preparation by counsel can result in an effective voir dire which can insure to the maximum extent possible a fair and impartial court.

COMMENTS

SELECTIVE SERVICE AND THE 1967 STATUTE*

Climaxing months of discussion and debate, on June 30, 1967, the Universal Military Training and Service Act [1] was extended for four years and renamed the Military Selective Service Act of 1967.[2] In 1967 the Selective Service System has witnessed a considerable volume of litigation centered around conscientious objectors (Classification I–O), ministers of religion (IV–D), the reemployment rights of veteran-registrants, and destruction of draft card notices of classification (Selective Service System Form # 110).

This study will seek to update several prior articles and comments in this publication by this writer dealing with the general subject of Selective Service.[3]

I. CLASSIFICATIONS AND NUMERICAL STRENGTH

The following classification picture shows the total number of all registrants and those in each Selective Service classification on a nation-wide basis and also discloses the various manpower classifications within the Selective Service System as of June 30, 1967.[4]

Classification Picture June 30, 1967

Class	*Number*
Total	34,235,023
I–A and I–A–O	1,417,629
Single or married after August 26, 1965	
Examined and qualified	155,571
Not examined	270,426

*The opinions and conclusions presented are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

[1] 62 Stat. 604 (1948), *as amended*, 50 U.S.C App. § 451 (1964) [hereafter cited as the Act].

[2] 81 Stat. 100, Pub. L. No. 90–40 (30 Jun. 1967).

[3] See Shaw, *Selective Service: A Source of Military Manpower*, 13 MIL. L. REV. 35 (1961); *Selective Service Litigation Since 1960*, 23 MIL. L. REV. 101 (1964); *Selective Service Ramifications in 1964*, 29 MIL. L. REV. 123 (1965); *Selective Service in 1965*, 33 MIL. L. REV. 115 (1966); *Selective Service System in 1966*, 36 MIL. L. REV. 147 (1967).

[4] *Selective Service*, vol. 17, No. 8, Aug. 1967. p. 2.

Class	*Number*
Induction or examination postponed	7,743
Ordered for induction or examination	189,865
Pending reclassification	104,749
Personal appearance and appeals in process	27,042
Delinquents	13,084
Married on or before August 26, 1965	
Examined and qualified	40,336
Not examined	13,370
Induction or examination postponed	409
Ordered for induction or examination	1,803
Pending reclassification	3,773
Personal appearance and appeals in process	1,159
Delinquents	543
26 years and older with liability extended	72,050
Under 19 years of age	515,706
I-Y Qualified only in an emergency	2,417,165
I-C (Inducted)	589,155
I-C (Enlisted or commissioned)	2,128,404
I-O Not examined	5,875
I-O Examined and qualified	3,351
I-O Married, 19 to 26 years of age	1,138
I-W (At work)	6,415
I-W (Released)	5,954
I-D Members of a reserve component	1,018,148
I-S Statutory (College)	48,504
I-S Statutory (High School)	526,278
II-A Occupational deferment (except agricultural)	234,246
II-A Apprentice	29,879
II-C Agricultural deferment	22,437
II-S Student deferment	1,654,507
III-A Dependency deferment	3,860,155
IV-A Completed service; sole surviving son	2,552,108
IV-B Officials	71
IV-C Aliens	14,770
IV-D Ministers, divinity students	101,474
IV-F Not qualified	2,449,425
V-A Overage liability	15,147,935

The following table [5] shows the manpower calls from the Department of Defense to the Selective Service System for the year 1967.

[5] Data extracted from volume 17 of *Selective Service* covering each month. It should be understood that the men *delivered* to AFES in any month will exceed the number of men specified in the call, as it is expected that rejections will result at AFES. For example, for the fiscal year 1966, the calls were for 336,530 men; 399,419 registrants were delivered for induction; 343,481 were inducted. See 1966 DIR. OF SEL. SERV. ANN. REP. 25 [hereafter cited as 1966 Report].

January	15,600
February	10,900
March	11,900
April	11,400
May	18,000
June	19,800
July	19,900
August	29,000
September	25,000
October	17,000
November	22,000
December	18,000
Total	218,500

It is significant that former I–Y registrants (qualified for military service only in time of war or national emergency) are being absorbed into the military. For three months—March, April, and May—approximately one-fourth of the accepted registrants were formerly classified I–Y.[6]

In contrast to 1967, the following data[7] show Selective Service calls, deliveries, and inductions for *fiscal years* since 1960:

Fiscal Year	*Calls*	*Deliveries*	*Inductions*
1960	89,500	130,119	90,549
1961	58,000	85,274	61,070
1962	147,500	194,937	157,465
1963	70,000	98,971	71,744
1964	145,000	190,496	150,808
1965	101,300	137,590	103,328
1966	336,530	399,419	343,481
Total			978,445

The totality of eighteen years of inductions since Congress restored Selective Service after World War II is reflected in the following:[8]

Armed Forces Inductions
November 1948—July 31, 1966

Army	3,469,754	96.3%
Navy	30,041	.8
Marine Corps	103,343	2.9
Air Force	--------	-----
Coast Guard	--------	-----
	3,603,669 registrants	100%

The age level of registrants inducted has gradually lowered. In October 1963 (before the impact of Vietnam) the average

[6] *Id.*
[7] 1966 REPORT 25.
[8] *Selective Service*, vol. 16, No. 10, Oct. 1966, p. 3.

inductee's age was 22 years and eight months.[9] By the end of June 1966, the average age had dropped to 20.4 years.[10] On the other hand, in May 1955 (after Korea) the average age of involuntary induction was 23 years and 7 months.[11] Note that present policy, as a result of Presidential Executive Order No. 11,360, is to place the "[p]rimary liability for military training and service . . . on those persons . . . between the ages of 18 years and 6 months and 26 years." [12]

During fiscal year 1966 the Defense Department placed special requisitions for 3,242 physicians, 350 dentists, 100 veterinarians, 100 *optometrists*, and 900 *male nurses*.[13] However, only 40% of the male nurses could be obtained due to a serious shortage in this manpower item.

For volunteers, the physical standards were lowered by the Department of Defense as of February 1, 1967.[14] Men were accepted who could not previously meet weight requirements—either over or under—or who had other minor defects which could be corrected in six weeks. It was anticipated that this program would procure in one year a minimum of 15,000 men or the equivalent of a combat division.[15]

Also, mental standards for induction were lowered after December 1, 1966.[16] As a result, 40,000 registrants in Class I–Y were expected to be gained. This group includes high school graduates or nongraduates who scored 90 on any one area of the Army Qualification Battery.

In March 1967, the Army Surgeon-General's Report [17] showed the significance of the efforts to reach the vast number of registrants in Class IV–F (not qualified mentally or morally or physically) and I–Y. In 1965, 1.23 million men were examined; in 1966, 1.61 million were examined. In the later year, 605,199 were rejected on mental, medical, or administrative grounds. Of these examinees, 176,027 failed to meet mental requirements, a drop of 51,782 from the 1965 total. Also, in 1966 only 12% of the registrants failed to meet mental requirements, whereas in 1965 21% failed.

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[9] *Selective Service*, vol. 16, No. 5, May 1966, p. 4.
[10] 1966 REPORT 26.
[11] *Selective Service*, vol. 16, No. 5, May 1966, p. 4.
[12] 32 Fed. Reg. 9787, 9789 (1967).
[13] 1966 REPORT 27.
[14] *Selective Service*, vol. 17, No. 1, Jan. 1967, p. 3.
[15] *Id.*
[16] *Id.* at 4.
[17] OFFICE OF THE ARMY SURGEON-GENERAL'S REPORT (1967).

II. THE MILITARY SELECTIVE SERVICE ACT OF 1967

Effective June 30, 1967, the President signed into law the Military Selective Service Act of 1967.[18] The title change is an amendment of Section 1(a) [19] of the statute which had been designated previously as the Universal Military Training and Service Act.[20] The basic statute was last extended for four years beginning July 1, 1963.[21]

General Lewis B. Hershey, the Director of Selective Service, has characterized the 1967 statutory extension and revision in these words:

> The law which has emerged has been changed in some particulars from the former Act. It can be said that the changes are far from revolutionary. . . . The procurement of men for the Armed Forces has been left ultimately in the hands of the Selective Service System without any additional confidence being placed in the providing of a completely volunteer system. The faith of the Congress in the present organizational pattern of the Selective Service System, including the local boards as now constituted, has been reiterated in a positive manner.[22]

A. *STUDENTS*

Section 6(h) [23] was amended to assure deferment of "persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning." [24] The deferment continues until one of the following happens—the person completes the requirements for the baccalaureate degree, attains the age of 24 years, or fails to pursue satisfactorily a course. "Satisfactorily pursuing" formerly depended upon a registrant being in the upper ⅔, ¾, or ½ percentage of his class. Now, an undergraduate is judged simply on the percentage of his units completed toward a degree.

As to graduate students, the amendment tightens the deferments that will be granted. Now, only in certain specialized fields such as medicine, dentistry, veterinary medicine, osteopathy, or subjects necessary to the maintenance of the national health, safety, or interest will a deferment be granted. However, all new graduate students accepted by October 1967 will be automatically deferred for one year.

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[18] 81 Stat. 100, Pub. L. No. 90–40 (30 Jun. 1967).
[19] 62 Stat. 604 (1948), *as amended*, 50 U.S.C. App. § 451(a) (1964).
[20] 62 Stat. 604 (1948), *as amended*, 50 U.S.C. App. § 451 (1964).
[21] *See* 77 Stat. 4 (1963), 50 U.S.C. App. § 467(c) (1964).
[22] *Selective Service*, vol. 17, No. 7, Jul. 1967, p. 1.
[23] 62 Stat. 611 (1948), *as amended*, 50 U.S.C. App. § 456(h) (1964).
[24] 81 Stat. 102, Pub. L. No. 90–40 (30 Jun. 1967).

Once a registrant has been deferred as a college student, he will not be eligible for any other deferments except for extreme hardship to dependents, graduate study, or an occupation necessary to the national health, safety, or interest.

Section 5(a) [25] has been amended by adding a provision that the President shall not effect any change in the method of determining the relative order of induction for registrants within age groups.[26] The amendment permits the President to order 19-year-olds to be first called. By a recent Executive order,[27] the President has implemented the new statute by ordering that younger registrants as an age group may be called ahead of older men. The minimum age when a registrant may be called continues to be 18½ years. All registrants born within a calendar year constitute an age group. This Executive order alters the policy of at least fifteen years of calling from ages 26 years downwards. Now, the emphasis will be on obtaining age 18 years upwards.

B. *CONSCIENTIOUS OBJECTORS*

Section 6(j) of the Act [28] has been tightened in its application of exemption to conscientious objectors. The amendment has stricken the former reference to "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." *United States v. Seeger* [29] had shown the difficulty inherent in applying any personal test involving belief in a Supreme Being.

The amendment [30] to Section 6(j) discards the language referring to a Supreme Being and may tend to restrict conscientious objector status to members of established religious groups. Also, it eliminates any requirement for Department of Justice involvement by way of inquiry or hearing. No change was made in the language of Section 6(j) that "the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code." [31]

C. *LOCAL BOARDS*

The present system of approximately 4,000 local boards exer-

[25] *62 Stat. 608 (1948), as amended, 50 U.S.C. App. § 455(a) (1957).*
[26] 81 Stat. 100, Pub. L. No. 90-40 (30 Jun. 1967).
[27] Exec. Order No. 11360, 32 Fed. Reg. 9787 (1967).
[28] 62 Stat. 612 (1948), *as amended*, 50 U.S.C. App. § 456(j) (1964).
[29] 380 U.S. 163 (1965).
[30] 81 Stat. 104, Pub. L. No. 90-40 (30 Jun. 1967).
[31] *Id.*

cising local autonomy will continue. Section 6(h) [32] was amended to permit the President to "recommend criteria for the classification of persons subject to induction . . . [and] recommend that such criteria be administerd uniformly throughout the United States whenever practicable." [33] Undoubtedly, presidential criteria stressing a recommendation to local boards will influence many boards. However, the presidential authority falls short of tendering mandatory criteria to the boards.

Section 10(b)(3) of the Act [34] was amended [35] by an addition providing that no member could serve on a local board or an appeal board for more than 25 years or after he reached the age of 75 years. Also, sex will not disqualify anyone for membership on any board. The amendment goes on to provide that the age, length of service, and sex requirements "shall be fully implemented and effective not later than January 1, 1968."

An amendment to Section 10(b)(4) [36] designates an "executive secretary" "an employee of a local board having supervisory duties with respect to other employees of one or more local boards." The term of employment of an "executive secretary" shall not exceed ten years "except when reappointed."

D. *JUDICIAL REVIEW*

Section 10(b)(3) [37] was further amended by the following addition:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the respondent has responded either affirmatively or negatively to an order to report for induction, or for civilian work. . . . [S]uch review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.[38]

This amendment affirmatively places within the statute the legal principle which has governed judicial review under the Act. For example, in *United States* v. *Blalock*,[39] the Fourth Circuit declared that "the scope of judicial inquiry into the [Selective

[32] 62 Stat. 611 (1948), *as amended*, 50 U.S.C. App. § 456(h) (1964).
[33] 81 Stat. 103, Pub. L. No. 90-40 (30 Jun. 1967).
[34] 62 Stat. 619 (1948), *as amended*, 50 U.S.C. App. § 460(b)(3) (1951).
[35] 81 Stat. 104, Pub. L. No. 90-40 (30 Jun. 1967).
[36] 62 Stat. 619 (1948), *as amended*, 50 U.S.C. App. § 460(b)(4) (1951).
[37] 62 Stat. 611 (1948), *as amended*, 50 U.S.C. App. § 460(b)(3) 1951).
[38] 81 Stat. 104, Pub. L. No. 90-40 (30 Jun. 1967).
[39] 247 F.2d 615 (4th Cir. 1957).

Service] administrative proceedings is very limited. The range of review is the narrowest known to the law." [40] Likewise, the Supreme Court in *Witmer* v. *United States* [41] expressed its opinion that "it is not for the courts to sit as super draft boards, substituting their judgment on the *weight of the evidence* for those of the designated agencies. Nor should they look for *substantial evidence* to support such determinations. . . . The classification can be overturned only if it has no basis in fact. *Estep* v. *United States*. . . ." [42]

Therefore, the 1967 amendment adopts the view of the Supreme Court and should be beneficial to lower federal courts which have at times in the past followed a substantial evidence test,[43] although avoiding the use of such terminology.

E. *UNSATISFACTORY READY RESERVE PARTICIPATION*

Title 10 of the United States Code was amended [44] to provide that the President may order to active duty any member of the Ready Reserve who "(1) is not assigned to, or participating satisfactorily in a unit of the Ready Reserve; (2) has not fulfilled his statutory reserve obligation; and (3) has not served on active duty for a total of 24 months." [45]

Therefore, a reservist ordered to active duty may be required to serve until his total active duty equals 24 months. If his enlistment would expire, it may be extended until he has served the required 24 months of active duty. The amendment further states that to "achieve fair treatment," appropriate consideration shall be given to family responsibilities and employment necessary for the national interest.

In February 1967, the Secretary of Defense announced that an estimated 25,000 to 30,000 reservists from all the armed services would be inducted from those "unable or unwilling" to meet their reserve obligation. An example cited by the Secretary was that of a reservist who moves to another community and does not affiliate in his new home area. Such a registrant may expect to be inducted.[46]

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[40] *Id.* at 619.

[41] 348 U.S. 375 (1955).

[42] *Id.* at 380-81 (emphasis added).

[43] *See, e.g.*, Wiggins v. United States, 261 F.2d 113 (5th Cir. 1958), *cert. denied*, 359 U.S. 942 (1959).

[44] 10 U.S.C. § 673a (1967).

[45] 81 Stat. 105, Pub. L. No. 90-40 (30 Jun. 1967).

[46] Sacramento Union, Feb. 17, 1967, p. 6.

F. *PROSECUTION OF DELINQUENTS*

The amendment to section 12[47] provides that: "Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing, and an appeal . . . shall take precedence over all other cases pending. . . ." [48]

Furthermore, a new subsection states: "The Department of Justice shall proceed as expeditiously as possible with a prosecution under this section, or with an appeal, upon the request of the Director of the Selective Service System or shall advise the [Congress] in writing the reasons for its failure to do so." [49]

For the year 1966, the FBI reported that 450 persons were convicted of violating Selective Service laws. This was double the number for 1965.[50] Assuming that the delinquency rate will continue to run high, promptness of prosecution and priority on the trial docket should tend to mitigate violations of the Act.

G. *MISCELLANEOUS*

The Director of Selective Service is now required to submit to Congress *semiannually* a written report covering the operation of the Selective Service System.[51] Heretofore, the Director's Report has been annual under Section 10(g) of the Act. The Annual Report for fiscal year 1966 was released January 3, 1967.

The following table[52] shows the basic changes affecting students, dependency, occupations, and registrants in Class V–A:

STUDENT

Formerly	Changes
II–S College student whose activity in study is necessary in the national interest, with much depending on test score or class standing	Any college student satisfactorily pursuing a full-time course of instruction, and making proportionate progress each academic year, until he receives baccalaureate degree, ceases to perform satisfactorily, or attains age of 24.
Graduate student who scored 80 or more on test or was in upper one-quarter of senior undergraduate class	*After October 1, 1967,* only students pursuing medical studies or in other fields identified by the Director of Selective Service after receiving advice from

[47] 62 Stat. 610 (1948), *as amended,* 50 U.S.C. App. § 456(c)(2)(A) (1964).
[48] 81 Stat. 105, Pub. L. No. 90-40 (30 Jun. 1967).
[49] *Id.*
[50] Sacramento Union, Jan. 14, 1967, § C, at 2.
[51] 81 Stat. 105, Pub. L. No. 90-40, § 10(g) (30 Jun. 1967).
[52] *Selective Service,* vol. 17, No. 7, Jul. 1967, p. 3.

	National Security Council. Students entering graduate school for first time in October 1967 may be deferred for 1 year. Students entering their second or subsequent year of graduate school in October 1967 may be deferred for 1 year to earn a master's degree or not to exceed a total of 5 years to earn a doctorate.

DEPENDENCY

Formerly	Changes
III-A Hardship to dependents	No change.
Father maintaining bona fide family relationship with his children	No change, except men who have been deferred as students may not subsequently be deferred as fathers.

OCCUPATIONAL

II-A Irreplaceable man whose employment is necessary to maintenance of national health, safety, or interest	No change, except Director of Selective Service may identify needed critical skills and essential occupations after advice from National Security Council.
Persons in training for critical skills, as identified by the Director of Selective Service after consultation with the Secretary of Labor	No change, except persons preparing for critical skills and other essential occupations as identified by the Director of Selective Service after receiving advice from the National Security Council.
II-C Essential and irreplaceable agricultural worker	No change, except shortage or surplus of agricultural commodity may be considered in determining deferment.
V-A Men over age of liability	No change, except there is now liability for service to age 35 for all physicians, dentists, and allied medical specialists (under present law no liability after age 26 unless previously deferred).

The Selective Service System has promptly acted to implement the statutory changes by the promulgation of regulations to carry out and interpret the amendments. The first issue appeared in Executive Order No. 11360 by President Lyndon B. Johnson, entitled "Amending the Selective Service Regulations." [53] To conform to the Military Service Act of 1967,[54] approximately sixty extensive changes are necessary.

[53] 32 Fed. Reg. 9787 (1967).
[54] 81 Stat. 100, Pub. L. No. 90-40 (30 Jun. 1967).

III. LITIGATION IN 1966–1967

Considerable litigation has arisen during the calendar year and mainly involves the following areas—ministers of religion (IV–D), conscientious objectors (I–O), and the reemployment rights of veteran-registrants.

A. *WHO IS A MINISTER?*

United States v. *Jackson* [55] involved a conviction for failure to report to perform civilian work at Memorial Hospital, Charleston, West Virginia. The defendant, a Jehovah's Witness (JW), claimed before his local board that he was both a conscientious objector and a minister. However, the board classified him I–O, conscientious objector, and he did not appeal. The facts showed that defendant was employed as a bread salesman, working 40–45 hours weekly for $55–$60 per week. His duties as a "minister" were to give sermons, sell magazines, and provide transportation for congregation members.

The Fourth Circuit held that the defendant, although a "minister" in his sect, was not regularly and customarily engaged in the pursuit of this office. His full-time employment was that of a bread salesman. Therefore, the court said:

> While the mere fact that secular labor is performed by the defendant is insufficient to serve as the basis for a denial of the exemption, there is a point at which the relative amount and type of secular activity may permit such a decision.[56]

Here, the court concluded, the evidence supported the trial court's conclusion that the defendant's classification (I–O rather than IV–D) was *not* without any "basis in fact [and therefore] the sole issue for the jury was whether or not defendant was ordered to report and if so, did he fail to obey the order." [57]

In *United States* v. *Wood*,[58] the defendant, a Jehovah's Witness, registered with his local board in August 1958, and on his classification questionnaire claimed the status of a minister of religion. The defendant alleged that his ministry began when he was ordained in 1955 at the age of fifteen years. He made no claim to be a conscientious objector and was classified I–A. Four years later, he was ordered to report for induction on September 25, 1963. On September 16th, Wood inquired at his local board con-

[55] 369 F.2d 936 (4th Cir. 1966).
[56] *Id.* at 938-39.
[57] *Id.* at 939. *Accord*, United States v. Hogans, 369 F.2d 359 (2d Cir. 1966); United States v. Kovalchick, 255 F. Supp. 826 (E.D. Pa. 1966).
[58] 373 F.2d 894 (5th Cir. 1967).

cerning his classification, and was given a conscientious objector form which he completed and to which he attached a statement that he was a "minister of Jehovah's Witnesses." Subsequently, the local board rejected the defendant's claim for a ministerial classification and forwarded his file to the state headquarters of the Selective Service in Georgia. The state headquarters recommended that the defendant's classification be reopened, and he was reclassified by the local board as a conscientious objector (I–O). The Appeal Board approved the classification. Subsequently, however, the defendant failed to report for civilian employment assigned to him.

In affirming a sentence of eighteen months' imprisonment, the Fifth Circuit held that the registrant had the burden of proving his right to an exemption.

> [T]he registrant bears the burden of clearly establishing a right to the exemption. . . . The Board has no affimative duty to ascertain whether or not the registrant qualifies for the exemption.[59]

As Wood had failed to take any action on his I–A classification until he was ordered to report for induction, and then at a hearing merely reiterated his claim to a ministerial exemption, the board reclassified him as a conscientious objector. As the conscientious objector classification was the most favorable one possible and was supported by the record, the court could not reverse the classification.

> Once the Board has classified the registrant, review by the Courts is ordinarily limited to determining whether there is any basis in fact for the classification given.[60]

B. *WHO IS A CONSCIENTIOUS OBJECTOR?*

United States v. *Kurki*[61] arose on a motion to dismiss an indictment for knowingly failing to report for induction into the armed forces. On June 18, 1964, the defendant filed a classification questionnaire form with his local board and left blank the section inviting a claim of conscientious objection status. On August 11, 1964, he was classified I–A. In further questionnaires filed on November 13, 1964, and on April 1, 1965, no claim was made concerning conscientious objection status. Sub-

[59] *Id.* at 897. *Accord*, United States v. Kushmer, 365 F.2d 153 (7th Cir. 1966), *cert. denied*, 388 U.S. 911 (1967). United States v. Carlson, 364 F.2d 914 (10th Cir. 1966).

[60] 373 F.2d at 897.

[61] 255 F. Supp. 161 (E.D. Wis. 1966).

sequently, the defendant was ordered to report for induction on August 10, 1965. Meanwhile, in a letter dated August 2, 1965, directed to the local board and others, the defendant claimed that he was in effect opposed as a matter of conscience to the conflict in Vietnam. On August 10th, when he reported to the local board, the defendant passed out a leaflet criticizing the Vietnam involvement which stated: "I am refusing to submit to induction. I ask you to do the same." [62] Due to the defendant's refusal to be inducted, the local board informed higher authorities and he was indicted by a grand jury. This in turn led to the motion to dismiss upon which the case was decided.

In denying dismissal of the indictment, the district court rejected the defendant's contention that his case came within the test set down by the Supreme Court in *United States* v. *Seeger*.[63] Judge Reynolds stated that what the defendant was contending, in fact, was a new *"particular war"* test for conscientious objectors to military service, whereas, the statute allows only exemption for conscientious opposition to *"war in any form."*

> In effect, [the defendant] urges this court to adopt a new test, a "particular war" test, and in so doing he asks this court to alter the provisions of § 456(j) to read:
>
> > "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to *any particular war.*"

The court has carefully scrutinized the *Seeger* case and finds absolutely no authority for such a test.

> This court cannot adopt such a test which flies in the face of the language of 50 U.S.C.A. App. § 456(j) and defies the intent of Congress when it set up the conditions for the conscientious objector exemption.[64]

The court also stressed the fact that the defendant had not exhausted the administrative remedies available, as he had failed to take an appeal from his I–A classification. However, the defendant contended that *Glover* v. *United States*,[65] which held that in extremely exceptional and unusual circumstances the rule requiring exhaustion of administrative remedies might be relaxed, was applicable to his case. The court, nevertheless, found

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[62] *Id.* at 163*.
[63] 380 U.S. 163, 176 (1965).
[64] 255 F. Supp. at 165.
[65] 286 F.2d 84 (8th Cir. 1961).

no exceptional circumstances in the present case which would require application of the *Glover* rationale.

Consolidated appeals of four defendants for violations of the Act were affirmed in *United States* v. *Parrott*.[66] Three of the appellants requested the Ninth Circuit to "ignore the doctrine of *Witmer* v. *United States* . . ., wherein the yardstick of sincerity is made decisive." [67] In rejecting the request and upholding the classifications by the local boards, Judge Barnes stated:

> *Witmer v. United States* . . . points out that while the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form . . ., inconsistent statements of the registrant are sufficient to cast doubt on his claim. . . . We assume that inconsistent actions, as well as statements, are valid proof of a "basis in fact" for the denial of the requested exemption.[68]

The court also took the opportunity to disagree with the Second Circuit's rationale in *United States* v. *Geary*.[69] There, the Second Circuit set out the "crystalizing" theory, namely, that the principle of conscientious objection does not set any time limit when objections must fully crystalize in the mind of a registrant, and genuine objection may ripen after he receives an order to report for induction. In rejecting this theory, the Ninth Circuit stated:

> An average man of average intelligence, who can read, must daily realize that he may, once he is subject to a draft call from his board due to his designated classification, be "soon" called upon to kill.[70]

In the *Geary* [71] case, the defendant appealed his conviction for failing to submit to induction into the armed forces. In October 1960, the defendant registered with his local draft board. At that time he did not claim to be a conscientious objector. Subsequently, he was granted a student deferment (II–S) until November 1964, when he was classified I–A due to the fact that he was no longer enrolled in college. After preinduction physical examinations, on January 4, 1965, the defendant was notified by his local board that he was deemed acceptable for military service. However, due to subsequent developments he was again classified II–S for a short time, before finally being reclassified

[66] 370 F.2d 388 (9th Cir. 1966).
[67] *Id.* at 391.
[68] *Id.* at 392.
[69] 368 F.2d 144 (2d Cir. 1966).
[70] 370 F.2d 388, 396 (9th Cir. 1966).
[71] 368 F.2d 144 (2d Cir. 1966).

I–A on April 6, 1965. After further correspondence between the defendant and his local board, on May 24, 1965, the defendant requested a conscientious objector questionnaire. After filing the questionnaire with the board, the defendant was granted an interview on July 6th, but at the same time was ordered to report for induction on July 8th. At the conclusion of the July 6th hearing, the defendant was informed that the board did not regard him as a "genuine c.o." He reported for induction on July 8th, but refused to take the symbolic step forward and was arrested.

In remanding the cause for further proceedings, the Second Circuit outlined its "crystalizing" theory for the lower court to follow.

> Section 6(j) does not set any time limit by which an applicant's conscientious objections must fully crystalize in his mind. It would be improper to conclude that an individual is not a genuine conscientious objector merely because his beliefs did not ripen until after he received his notice, although the belatedness of a claim may be a factor in assessing its genuineness . . . . The realization that induction is pending, and that he may soon be asked to take another's life, may cause a young man finally to crystalize and articulate his once vague sentiments. . . . [A]ny individual who raises his conscientious objector claim promptly after it matures—even if this occurs after an induction notice is sent but before actual induction—be entitled to have his application considered by the Local Board.[77]

As the Second Circuit was unable to determine what the board meant when it found that the defendant was not a "genuine c.o.," the cause was remanded to the trial judge to determine exactly what the board meant and to decide the cause according to the test outlined in the appellant court's opinion.

In a dictum statement, the court indicated that the mere mailing of a conscientious objector questionnaire to a registrant was not, *ipso facto*, a reopening of the registrant's classification.

On the remand of *Geary*,[78] the district judge held that the local board, in determining that the defendant was not a "genuine c.o.," meant that he had never been and was not now a conscientious objector. After concluding that there was a "rational basis" for the board's determination, Judge Young stated:

> The members of the Local Board are ordinary citizens doing volunteer work for their country. . . . Because they do not speak or write with pristine clarity is no reason to fault them. I found

[77] *Id.* at 149-50 (footnotes omitted).
[78] 266 F. Supp. 161 (S.D. N.Y. 1967).

> these board members to be honest, sincere, open-minded and without a trace of prejudice. . . .[74]

In *United States* v. *Storey*,[75] which involved a conviction for failure to report for induction, the defendant had written a letter to his local board inquiring whether his "defense" work for Boeing Airplane Company would impair his ultimate classification as a conscientious objector. The local board did not answer the inquiry. His case was transmitted to the appeal board, which classified the defendant as I–A–O (conscientious objector available for non-combatant military service only). Thereafter, the defendant refused induction and was prosecuted.

The Ninth Circuit held that the defendant had full knowledge of the nature of his work at Boeing, and could not expect advice from his board in matters that involved an exercise of his own conscience.

In closing, the court stressed that the grant of exemption to conscientious objectors is a matter of legislative grace, and that a hearing dealing with a claim to conscientious objection status is *not criminal* in character. Therefore, it is unnecessary that a registrant be given the warnings and precautions identified in *Miranda* [76] and *Escobedo*.[77]

When filling out the Selective Service questionnaire form, the defendant in *United States* v. *Sobeyak*[78] left blank the questions relating to conscientious objector status. However, elsewhere on the questionnaire the defendant wrote: "Have been raised in the faith of Jehovah's Witnesses but am not an active preacher." [79] He also told the clerk of his local board that "he did not believe in fighting." [80] In spite of this information, the defendant was never advised by the board that he might file an SSS Form 105 and claim exemption as a conscientious objector.

The district court, in vacating the judgment of guilty and entering a judgment of acquittal, found that the defendant had not been advised of his rights or furnished an opportunity to formalize his claim as a conscientious objector even though the local board had on several occasions gained some degree of knowledge of his beliefs. The defendant should have been af-

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[74] *Id.* at 162.
[75] 370 F.2d 255 (9th Cir. 1967).
[76] 384 U.S. 436 (1966).
[77] 378 U.S. 478 (1964).
[78] 264 F. Supp. 752 (N.D. Ga. 1966).
[79] *Id.* at 754.
[80] *Id.*

forded a hearing to develop proof, if he could, as to his conscientious objector status.

The Second Circuit, in *United States* v. *Garland*,[81] affirmed a conviction for defendant's twice refusing to submit to physical examinations to determine his fitness for induction. In upholding the defendant's conviction, the court held that evidence of defendant's good moral character could only be considered in evaluating his credibility as a witness. This evidence was not relevant as to whether he willfully and knowingly violated the orders to report for physical examination, as he fully admitted that he had knowledge of the orders.

In a per curiam decision,[82] the Fifth Circuit upheld a conviction for defendant's failure to perform nonmilitary duties assigned him by his local board after classifying him as a conscientious objector. Defendant contended on appeal that he was denied the right to offer testimony that "under no circumstances should a member of the Jehovah Witness Religion be compelled to submit to any law which would draft him for work or service to any government." [83] The court, in rejecting this contention, stated:

> But where the status and the good faith thereof is conceded, it was not error to exclude the proffered testimony. Regardless of the religious tenets of [the defendant's] faith, it is his duty—and the law may attach sanctions to compel obedience—to obey valid laws. His religious beliefs cannot excuse a knowing and willful refusal.[84]

C. *SELECTIVE SERVICE PROCEDURES*

1. *Failure to Grant a Hearing.*

United States v. *Tucker* [85] involved a conviction for failing to comply with a local board's order to report for instructions to proceed to a place of civilian employment. The local board of the defendant, a Jehovah's Witness, had on four separate occasions refused to reopen and reconsider his I–O classification. In one instance, the board refused to reopen his classification after receiving a letter from the defendant stating that his family was purchasing a farm and he wished an agricultural deferment (II–C). On the other occasions the defendant based his plea on his religious activities.

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[81] 364 F.2d 487 (2d Cir. 1966).
[82] O'Moore v. United States, 370 F.2d 916 (5th Cir. 1967).
[83] *Id.*
[84] *Id.* at 917.
[85] 374 F.2d 731 (7th Cir. 1967).

The appellate court held the defendant was not denied due process of law when the board refused to reopen his classification. As to the first letter, the court stated that "[w]e do not view the . . . letter as a request for reopening and reconsideration . . . ." [86] Of the second letter seeking an agricultural deferment, the court found that defendant "did not present to the board any evidence which would have supported an agricultural deferment . . . ." [87] The last two letters were sent after the board had ordered the defendant to report for civilian work, and therefore were not considered as the board did not have "the power to reopen and reconsider a registrant's classification after an order to report for civilian work has been mailed, unless the change in status results from circumstances beyond registrant's control, which defendant does not assert." [88]

In a prosecution for refusal to submit to induction, a district court in *United States* v. *Burlich* [89] acquitted the defendant on the ground that he was denied due process when his local board refused to reopen his classification, although he had made out a prima facie case for a dependency deferment (III–A). As the defendant had presented new facts (he had become the sole supporter of his ill mother and younger brother), the local board could not act arbitrarily or capricious or refuse a fair consideration of the request.

The district court stressed that despite the broad discretion in a local draft board, there are circumstances, such as the present case, which require a reopening of a classification. Therefore, in response to a proper showing of facts, a failure by the board to reopen a classification is a deprivation of due process. The district court cited and relied upon the following statement in *United States* v. *Ramson*: [90] "The local board should not be able to escape the requirement of a basis in fact by simply refusing to reopen a registrant's file and consider it further."

2. *Exhaustion of Administrative Remedies.*

The defendant in *United States* v. *Daniels*,[91] after receiving orders, did not report to his local board for instructions to proceed to a place of civilian employment. At his trial, the defendant contended that his conscientious objector classification was improper and that he should have been classed as a minister

[86] *Id.* at 733.
[87] *Id.*
[88] *Id.* at 734.
[89] 257 F. Supp. 906 (S.D. N.Y. 1966).
[90] 223 F.2d 15, 17 (7th Cir. 1955).
[91] 372 F.2d 407 (9th Cir. 1967).

of religion (IV–D). The Government argued that he could not raise this defense as he had not exhausted administrative remedies by reporting to the board or the employer, and thus the Selective Service process or route was not at an end.

The Ninth Circuit reversed and remanded for a new trial. Today, a conscientious objector (I–O), unlike an individual classified I–A or I–A–O, is not subject to rejection at an induction center. The defendant was to report directly to a civilian agency, and, if need be, could be readily reassigned to another civilian employer. Therefore, the administrative remedies had been exhausted by the defendant and the trial court should have considered the merit of the classification granted to the defendant. In reaching its decision, the court declined to follow an analogous case, *United States* v. *Bjorson*,[92] where failure to report to the board for final instructions as to civil employment had precluded the registrant from challenging his board classification at the time of prosecution. Instead, the court relied upon *Dodez* v. *United States, sub. nom., Gibson* v. *United States*,[93] where the registrant failed to report for civilian employment, but a change in Selective Service regulations had relieved him of the necessity of reporting in order to exhaust his administrative remedies. In the court's words:

> [W]e disapprove our contrary holding in Bjorson v. United States. . . . We now hold that a class I-O conscientious objector, who has passed his physical examination, exhausted his board appeal remedies, and been ordered to report to the board for assignment to a civilian employer, may defend a criminal action for failure to so report on the ground that his classification is invalid. Such a person has reached the "brink" in the selective process without going through the formality of reporting to the board or the civilian employer.[94]

3. *Failure of Registrant to Appeal Classification.*

In *United States* v. *Irons*,[95] the defendant was convicted of a failure to report for physical examination and a failure to report for induction. Although he had not taken an administrative appeal from his I–A classification, the defendant contended "there was no basis in fact" for his I–A classification by his board, and that he should have been classed I–O (conscientious objector). He had never claimed conscientious objection status before his board and raised the issue initially on judicial appeal.

[92] 272 F.2d 244 (9th Cir. 1959).
[93] 329 U.S. 338 (1946).
[94] 372 F.2d at 414 (footnote omitted).
[95] 369 F.2d 557 (6th Cir. 1966).

The conviction was affirmed by a majority of the appellate court on the ground that a registrant who refused to claim conscientious objector classification before his local board waived such classification. Furthermore, by failing to appeal administratively from the local board's classification, he was precluded from subsequently attacking it.

In a similar case, *Capson* v. *United States*,[96] the defendant failed to exercise his rights under the administrative processes provided within the Act. At his trial, the defendant was not permitted to raise the defense of improper classification by the local board and the court refused to submit the issue to the jury on the ground that because the defendant "failed to exercise the rights available to him under the administrative processes provided for by Congress he had waived his right to question the validity of his classification in any subsequent proceeding." [97]

4. *Request for Reclassification After Order to Report.*

On May 31, 1966, the defendant in *United States* v. *Fargas* [98] was mailed a notice to report for induction on June 13, 1966. On June 1st he requested and obtained a special form for conscientious objectors (SS Form ≒ 150) which he filed with the board on June 9th. He was interviewed by the board on the latter date. On June 10th, however, the board mailed a letter informing the defendant that the evidence did not warrant reopening his case. Subsequently, the defendant refused induction. Charges were filed and the defendant made a motion to dismiss in the district court.

One of the defendant's contentions before the district court was that "the local board should have determined whether or not his beliefs as a conscientious objector matured after he knew of the order to report, and if so whether he was a bona fide conscientious objector." [99] In response to this contention, the court stated that the validity of the defendant's I–A classification was a matter of *defense to be raised at the trial* and not in connection with a motion to dismiss. Whether or not the defendant's belief as a conscientious objector matured after he received an order to report for induction would require consideration of factual questions which could not be determined from only legal papers before a court on a motion to dismiss an indictment.

[96] 376 F.2d 814 (10th Cir. 1967).
[97] *Id.* (footnote omitted).
[98] 267 F. Supp. 452 (S.D. N.Y. 1967).
[99] *Id.* at 455 (footnote omitted).

In *United States* v. *Al-Majied Muhammad*,[100] the defendant was prosecuted for refusal to submit to induction into the armed forces. In October 1960, the defendant registered with his local board. He expressed no objection to military service and was classified I–A. In October 1964, the defendant was ordered to report for induction on November 23, 1964. On November 10, 1964, however, the defendant verbally claimed that he was a conscientious objector to a clerk in the office of the draft board. He was asked to set forth his objection in writing which he did on the same date. As a result, the local board postponed his induction in order to consider the information. Nevertheless, on November 27th the board ordered the defendant to report on December 2d for induction. The defendant appeared on December 2d but refused to be inducted.

In his first letter to the board, the defendant stated that he was a Muslim and that he would not take part in wars of the United States, unless the United States would give the Muslims their own territory. Then they would have something for which to fight.

The Fourth Circuit held that the board would not have been warranted in concluding that the defendant was a conscientious objector based upon his statements which were *political* rather than religious. Furthermore, contrary to *United States* v. *Geary*,[101] the court held that:

> [A] classification of a registrant is not to be reopened after an order to report for induction has been mailed, unless there is a specific finding by a local board of a change in the registrant's status resulting from circumstances beyond his control. The validity of this regulation has been upheld by the courts. Belated development of conscientious objection is not such a change in status beyond the control of a registrant.[102]

Also, the court stated that the postponement of induction for about ten days did not obligate the board to conduct a "full evidentiary hearing," and the withholding of such a hearing was not a denial of procedural due process.

In the famed case of *Muhammad Ali* v. *Connally*,[103] the defendant petitioned a district court in Texas for injunctive relief. On respondent's motion, the court dismissed the case as the

[100] 364 F.2d 223 (4th Cir. 1966).
[101] 368 F.2d 144 (2d Cir. 1966).
[102] 364 F.2d at 224 (footnotes omitted). *Accord*, *Davis* v. *United States*, 374 F.2d 1 (5th Cir. 1967).
[103] 266 F. Supp. 345 (S.D. Texas 1967), *motion for leave to file writ of prohibition denied*, 18 L. Ed. 2d 1376 (1967).

prior litigation [104] of the issues was res judicata to the petitioner. Also, in denying the injunction the court reasoned:

> [T]he scope of the Act does not provide for judicial review in the ordinary sense. The Orders of the Selective Service Board, after having run the gamut of statutorily authorized examination and re-examination, must be deemed final although they may be erroneous. The Act does not provide for or authorize injunctive relief against the final order of the authorized and duly constituted Selective Service Board.[105]

5. *Destruction of Draft Card.*

The defendants in three similar cases—*United States* v. *Miller*,[106] *United States* v. *Smith*,[107] and *United States v. O'Brien* [108]—were convicted for knowingly destroying their draft cards in violation of a 1965 amendment to the Act.[109] The defendant in *Miller* urged that the 1965 amendment was unconstitutional. The Second Circuit upheld the 1965 amendment as being within the Congressional power to raise and support armies. Furthermore, "[o]n its face, the amended statute here attacked concerns administration of the draft, not regulation of ideas or the means of communicating them." [110] The duty to possess a draft card has clearly been held constitutional.[111] Therefore, "what Congress did in 1965 only strengthened what was already a valid obligation of existing law; *i.e.*, prohibiting destruction of a certificate implements the duty to possessing it at all times." [112]

In the *Smith* case, the defendant also attacked the constitutionality of the 1965 amendment. In a per curiam opinion the Eighth Circuit affirmed the defendant's conviction. The court cited and relied upon *Miller*, viewing the constitutional issues to be identical in the two cases. In particular, the court stressed that the "cruel and unusual punishment" restriction of the Eighth Amendment was not violated. "[A] sentence falling within

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[104] Ali, aka Clay v. Gordon, *petition for rehearing denied*, 386 U.S. 1027 (1967); Ali, aka Clay v. Gordon, *certiorari denied*, 386 U.S. 1018 (1967); Ali, aka Clay v. Gordon, *motion for leave to file a petition for writ of mandamus denied*, 386 U.S. 1002 (1967).

[105] 266 F. Supp. at 346-47.

[106] 367 F.2d 72 (2d Cir. 1966), *cert. denied*, 386 U.S. 911 (1967).

[107] 368 F.2d 529 (8th Cir. 1966).

[108] 376 F.2d 538 (1st Cir. 1967).

[109] 79 Stat. 586 (1965), 50 U.S.C. App. § 462(b)(3) (1965).

[110] 367 F.2d at 77.

[111] United States v. Kime, 188 F.2d 677 (7th Cir.), *cert. denied*, 342 U.S. 823 (1951).

[112] 367 F.2d at 77.

the terms of a valid statute cannot amount to cruel and unusual punishment." [113]

Finally, in *O'Brien* the defendant urged that his public act was an expression of free speech. The First Circuit questioned the wisdom of the 1965 amendment and criticized the Second Circuit's rationale in *Miller*. This court felt that the 1965 amendment did violate the defendant's right to free speech.

> In singling out persons engaging in protest for special treatment the amendment strikes at the very core of what the First Amendment protects. It has long been beyond doubt that symbolic action may be protected speech. Speech is, of course, subject to necessary regulation in the legitimate interests of the community, . . . but statutes that go beyond the protection of those interests to suppress expressions of dissent are insupportable. . . . We so find this one.[114]

Nevertheless, the court found that in burning his draft card, the defendant parted with the possession of his card which contravened the provision of the Act making mandatory the possession of a draft card.[115] As free speech was not involved with this issue, the court found no constitutional objection to his conviction for *non-possession of his certificate*. The court recognized that the lower court in imposing the sentence may have viewed the non-possession of a draft card to be aggravated by the act of burning. Accordingly, while the conviction was affirmed, the cause was remanded for resentencing.

E. *MISCELLANEOUS CASES*

1. *Who Is A Reservist?*

In *United States ex rel Sanders* v. *Yancey*,[116] the petitioner Sanders was inducted into the Army on May 11, 1966, and on the next day petitioned for a writ of habeas corpus directed to the Commanding General, Fort Hamilton. The lower court denied the writ.[117] The facts show that petitioner was classified I–A by his local board in June 1965. In September 1965, he enlisted in the National Guard, but did not inform his local draft board. Unaware of the reserve affiliation, on October 20th the board ordered the petitioner to report for induction on November 17th. The Notice to Report for Induction stated that "if you . . . are

[113] 368 F.2d at 531.
[114] 376 F.2d at 541 (footnote omitted).
[115] 50 U.S.C. App. § 462(b)(6) (1951).
[116] 368 F.2d 816 (2d Cir. 1966).
[117] 260 F. Supp. 855 (E.D. N.Y. 1966).

now a member of the National Guard . . . bring evidence with you . . . ." However, the petitioner made no attempt to notify his board that he had joined the National Guard. On November 8th, petitioner was discharged from the National Guard after he failed to attend drills due to illness. Finally, in January 1966, the board learned that petitioner had been a member of the National Guard. On March 7, 1966, he requested the board to reopen his I–A classification, claiming that he was still a member of the Guard as his discharge was allegedly improper.

In affirming the lower court, the appellate court pointed out that before a local board could grant a deferment to a reservist it must be apprised of the facts which may give rise to deferred status. In this case, the petitioner disregarded the notice printed on his draft card (SSS Form 110) that he was required to report in writing within ten days any fact that might change his classification. Furthermore, he neglected to follow the instruction set forth on the Notice to Report for Induction (SSS Form 252) that he present evidence of membership in the National Guard. As a result, the petitioner was not denied any procedural rights to which he was entitled, and his induction was lawful.

United States v. *Lonstein* [118] involves a defendant who failed to report for induction after unsatisfactory participation in the Army Reserves. The sequence of events was as follows:

1962—classified I–D after enlistment in the Army Reserve at Monticello.

1962—served six months ACDUTRA.

January 1963—May 1964—absent for 24 drills without leave.

June—July 1964—performed 45 days' active duty as corrective training ending July 29.

August 1964—missed next drill.

August 11th—defendant warned by certified mail that absence for five drills would subject him to induction for unsatisfactory participation.

August—September—missed five drills.

February 1965—Army notified defendant and local board that he was certified for induction. State Selective Service System Headquarters recommended induction and noted that no change of classification was necessary.

[118] 370 F.2d 318 (2d Cir. 1966).

July 1967—board ordered defendant to report for induction on July 21st; failed to report.

In affirming the conviction, the Second Circuit stated:

> If anyone who has read up to this point wonders why this appeal was taken, so do we. Determination whether [the defendant] has satisfactorily performed his duties was for the Army; if he seriously believed he had been relieved of the duty to attend drills, his remedy was to seek to have the Army's certification [for induction] withdrawn. So long as that remained effective, the Local Board's responsiblity was solely *ministerial* . . .; the Regulations as to the right to a hearing with respect to a classification or refusal to reopen one were thus inapplicable.[119]

In so holding, the court upheld the 1961 statutory amendment to the Act[120] empowering the President to provide by regulation that any person enlisted after October 4, 1961, in the Ready Reserve who failed to serve satisfactorily could be selected and inducted into the armed forces of his reserve component prior to the induction of other registrants. The amendment had been effectuated in Selective Service Regulations, 32 C.F.R. § 1631.8.

2. *Discharge From The Army.*

An inductee in the Army brought a habeas corpus proceeding against the commanding general of his station. In rejecting the petitioner's contention that he was illegally ordered for induction by his local board, the district court denied the writ.[121] On his appeal, *United States* v. *Perez*,[122] the petitioner relied upon Selective Service Regulations 1627.5 and 1627.8,[123] "which provide . . . that when an appeal is taken to the President the local board shall notify the registrant . . . and any order to report for induction . . . shall be cancelled." [124] Here, although the Director of Selective Service appealed on behalf of the petitioner, no formal notice was given to the petitioner by his board. Eventually, the petitioner was classed I–A by the Presidential Appeal Board. The petitioner's contention that the lack of formal notice from his board prejudiced him, as he lost the opportunity to enlist in the Army Reserve, was again rejected as the appellate court found that the petitioner had *actual knowledge* of the presidential appeal and had an intimate knowledge of the

[119] *Id.* at 320 (emphasis added). *Accord, United States v. Smith,* 266 F. Supp. 309 (D. Mont. 1967).
[120] 75 Stat. 807 (1961), 50 U.S.C. App. § 456(c)(2)(D) (1961).
[121] United States v. Perez, 260 F. Supp. 435 (D. S.C. 1966).
[122] 372 F.2d 468 (4th Cir. 1967).
[123] 32 C.F.R. 1627.5, 1627.8 (1967).
[124] 272 F.2d at 469.

regulations. He knew that he could have enlisted in the reserves but he "lacked a real desire to join a reserve component." [125] As the defendant was not prejudiced by the procedural irregularity involved, he was not entitled to the relief claimed.

Brown v. *McNamara* [126] involved a habeas corpus petition by an individual who had enlisted in the Army for three years. He was assigned to Fort Dix for an eight-week basic combat training course. After completing two weeks of the course, the petitioner informed his superior officers that he was unable to continue in the Army by reason of his religious training and belief. Pursuant to Army Regulation No. 635–20, he submitted a request for discharge. The request was forwarded by the Adjutant General to the Director of Selective Service. The Director's advisory opinion stated that Brown would not be classed in I–O or I–A–O classification if he were being considered for induction. Therefore, the Adjutant General denied the application for discharge. Subsequently, the petitioner refused to draw combat equipment, was convicted by special court-martial, and ordered into confinement. The federal court proceeding followed.

The district court denied the writ. It found that the provisions of classification for those who had not yet been inducted did not apply to one who had voluntarily enlisted in the Army. In upholding the post-induction procedure which denied the petitioner a hearing, the court held that "the necessity of the armed services to order and control those already within its operation is a sufficiently rational basis for such a distinction." [127] The court also declined to accept jurisdiction to review the factual basis of the administrative determination of the Adjutant General.

> We do not wish to foster a situation which results in having part of what is supposed to be our active force immobile and entangled in litigation. . . .
>
> . . . It is our feeling that the benefits to be derived from the added safeguard of having us review the administrative determination are outweighed by the burdens on the military which would result. Consequently, we refuse to accept jurisdiction to pass on the factual adequacy of administrative decision.[128]

Gilliam v. Reaves [129] was a habeas corpus proceeding seeking release from the Army. The petitioner was classed I-A by his local board in June 1964 and made no claim for exemption. He

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[125] *Id.*

[126] 263 F. Supp. 686 (D. N.J. 1967).

[127] *Id.* at 691. *Accord*, Chavez v. Fergusson, 266 F. Supp. 879 (N.D. Cal. 1967).

[128] *Id.* at 692-93.

[129] 263 F. Supp. 378 (W.D. La. 1966).

was physically examined in February 1965 and inducted on October 12, 1965. On October 19, 1965, he arrived at Fort Polk and was assigned to a unit for Base Combat Training. During initial training, the petitioner acted in the same manner as any other trainee. On October 29, 1965, however, the petitioner refused weapons training on the ground that he was a conscientious objector. His application for separation from the service was considered and denied through Army channels on January 11, 1966. In the habeas corpus petition filed on September 6, 1966, the petitioner alleged that he did not take a "step forward" when his name was called at the induction center although he had signed a service obligation. (The Government refused to admit the veracity of the contention that he had not taken a step forward.) The petitioner also asserted that the Army refused to discharge him as a conscientious objector because he did not belong to a church or sect.

As to the defendant's contention that he was not in the Army, the court concluded that whether or not he took the "step forward" was immaterial, as his subsequent conduct cured any irregularities. Furthermore, "[t]he idea that a soldier's tenure in the service may be terminated at a later date by his simply stating, without any substantiating proof, that he did not take a physical step forward would sadly effect the war effort. . . ." [130] Turning to the conscientious objection issue, the trial court would not substitute its judgment for that of the Army on the weight of the evidence. "The totality of the evidence convinces us that the Army rejected the request for discharge because it concluded that [the defendant's] professed 'religious belief' was not truly held." [131]

3. *Dissident Registrants.*

A young dissenter in *United States v. Mitchell* [132] was convicted of willful failure to report for induction. After registering with his local board, the defendant "disaffiliated" himself from the Selective Service and refused to cooperate with his board. He did not appeal a I-A classification. A first conviction in the district court was reversed because the trial judge had failed to allow sufficient time for the defendant to obtain new counsel after he discharged his attorney on the day of trial.[133] He was retried,

[130] *Id.* at 381.

[131] *Id.* at 385. *See* Noyd v. McNamara *et al,* 267 F. Supp. 701 (D. Colo. 1967), where an Air Force officer was denied release from active service because of alleged conscientious objector scruples.

[132] 369 F.2d 323 (2d Cir. 1966), *cert. denied,* 386 U.S. 972 (1967), *petition for rehearing denied,* 386 U.S. 1042 (1967).

[133] United States v. Mitchell, 354 F.2d 767 (2d Cir. 1966).

convicted before a jury, and sentenced to five years' imprisonment. At the second trial, the defendant sought to offer evidence to the effect that the conflict in Vietnam was being conducted in alleged violation of certain treaties to which this nation was a signatory and that the Selective Service System was an adjunct of the military effort. The evidence was excluded by the trial court. On this appeal, the Second Circuit upheld the trial court's exclusion of the disputed evidence and affirmed the conviction. An alleged treaty violation was found to be no defense to a prosecution for failing to report for induction. The court reasoned that:

> as a matter of law the congressional power "to raise and support armies" and "to provide and maintain a navy" is a matter quite distinct from the use which the Executive makes of those who have been found qualified and who have been inducted into the Armed Forces. Whatever action the President may order, or the Congress sanction, cannot impair this constitutional power of the Congress.[134]

Due to their participation in demonstrations protesting United States involvement in Vietnam, the petitioners in *Wolff v. Selective Service Local Board No. 16* [135] were reclassified from II-S (student deferment) to I-A. They brought this action to facilitate their reclassification as students (II-S). The local boards had originally reclassified the petitioners on the theory that they had "become delinquents by reason of their alleged violation of Section 12(a) of the [Act]." [136]

In reversing the trial court, the Second Circuit held that the *local boards lacked authority to reclassify the petitioners* as delinquents because of their participation in a demonstration against the Vietnam conflict. "[I]t is not the function of local boards in the Selective Service System to punish these registrants by reclassifying them I-A because they protested as they did over the Government's involvement in Vietnam." [137] The court reasoned that the freedoms of speech and of assembly were vital to the preservation of democracy, therefore, to allow the petitioners to be reclassified because they were exercising these rights would result in irreputable injury not only to the petitioners, but democracy, and the trial court should not have dismissed the action for lack of "a justiciable controversy."

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[134] 369 F.2d at 324.
[135] 372 F.2d 817 (2d Cir. 1967).
[136] *Id.* at 820.
[137] *Id.* at 822.

4. *Past Failures to Comply by the Defendant.*

United States v. Pardo [138] involved a conviction for failure to report for induction. At trial, the district judge allowed evidence of past failures of the defendant to comply with local board orders directed to him, and admitted in evidence the Selective Service file of the defendant. The appellate court saw no error as the evidence of the defendant's past failures to comply bore upon the intent of the defendant who alleged that he was ill on the occasion when he was charged with failing to report. As the defendant was the only person truly aware of his state of mind when he failed to report, the government's evidence by necessity was indirect and circumstantial.

F. *REEMPLOYMENT RIGHTS UNDER THE SELECTIVE SERVICE STATUTE*

A separated serviceman sought to enforce his right to reemployment by the defendant in *Paredey* v. *Pillsbury Co.*[139] The plaintiff had been employed by Pillsbury until October 1961, when he departed to report for induction into the armed forces. Upon being separated, plaintiff applied to be reinstated to his former job. He was reemployed in November 1963. However, on April 24, 1964, the plaintiff was demoted and his pay reduced from $2.86 to $2.61 per hour because he could not function as efficiently as the workman who had taken his place during his military absence. The plaintiff contended that he could not be discharged from his former position without cause within one year after reemployment. In agreeing with the plaintiff, the court found that "[t]he demotion of the plaintiff was tantamount to discharge." [140] Congress did not intend under the Act [141] "that the availability of a man with greater skills who could turn out work more rapidly would justify discharging the separated serviceman within one year [of his restoration to employment]." [142] The plaintiff was allowed to recover for the difference between the wages he actually received during the year and what he would have received if he had not been demoted.

Hatton v. Tabard Press Corporation [143] was an action to recover a wage increase which the plaintiff might have received

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[138] 369 F.2d 922 (5th Cir. 1966).
[139] 259 F. Supp. 493 (C.D. Calif. 1966).
[140] *Id.* at 495.
[141] 50 U.S.C. App. § 459(c)(1) (1951).
[142] 259 F. Supp. at 495.
[143] 267 F. Supp. 447 (S.D. N.Y. 1967).

from his former employer had he not been performing military service. After receiving an honorable discharge, the plaintiff was restored to employment with his former employer on February 2, 1964, but was laid off for lack of work on May 29, 1964. Before his military service the plaintiff had not been a member of a labor union. During his military service, the plaintiff's employer entered into a collective bargaining agreement leading to wage increases for some employees based on their job performance. Upon his reemployment, the plaintiff joined the labor union.

Evidence at the trial showed that an employee in the plaintiff's status was entitled to a wage increase only if his on-the-job performance merited one and this factor was determined solely by the employer. There was no automatic pay increase or promotion. Therefore, the district court held that the Act,[144] which guaranteed reemployment and participation in benefits arising during the veteran's absence on military duty, did not apply in the present case. The wage increase did not accrue automatically, but to the contrary, it was the product of an *exercise of management discretion* based on evaluation of job efficiency. The Act did not contemplate that a returning veteran would be treated as if he had worked continuously for his former employer and thereby become the recipient of pay increases which were based solely on job performance.

The plaintiff in *Fortenberry* v. *Owen Brothers Packing Company* [145] sought to recover damages from an employer who refused to reemploy the plaintiff after his rejection for military service. The plaintiff was ordered by his local draft board to report for induction on July 8, 1963. On July 3, 1963, the plaintiff left his employment, exclusive of unemployment compensation.
though plaintiff claimed he notified his employer of his induction, two supervisory employees denied that they were personally notified by the plaintiff. On July 8th, the plaintiff reported for induction and was rejected on the 9th. The plaintiff reported at the defendant's plant on July 10th, but was told that he was off the payroll. He then made contact with the Regional Director of the Bureau of Veterans' Reemployment Rights. The parties agreed that had the plaintiff continued in the defendant's employ, he would have received $1,713.58 more than he gained in other employment, exclusive of unemployment, compensation.

The court allowed recovery of pay from July 10th to September 26th, 1963, the latter date being when the plaintiff secured other

[144] 50 U.S.C. App. § 459 (1951).
[145] 267 F. Supp. 605 (S.D. Miss. 1966).

employment, less total unemployment compensation received by the plaintiff. Reemployment rights under the Act [146] extended to a registrant who left his employment to report for induction, although subsequently he was rejected by the military. Furthermore, the plaintiff was not required to give notice of his anticipated induction in order to qualify for reemployment benefits.

IV. USE OF EXECUTIVE ORDERS

An increasing use is being made of Executive orders signed by the President as a means to achieve changes in various phases of Selective Service procedures. The following are significant examples:

Executive Order No. 11350 [147] extended from 10 to 30 days the time during which a registrant may appeal his classification to the Appeal Board. The order was announced by the President to a convocation of all State Selective Service Directors. Also, the time was extended to 30 days in which a registrant may request a personal appearance before his local board. Likewise, the 30-day rule applies to an appeal to the National Selective Service Appeal Board (commonly called the Presidential appeal). These changes should eliminate close time situations in which a postal miscarriage or like inadvertence prevents a registrant from perfecting a timely appeal.

Executive Order No. 11325 [148] authorized the parole of Selective Service violators in order that they may perform their military service obligation or civilian work in the national interest. The Director of Selective Service may recommend parole of a convicted person to the Attorney General.

Executive Order No. 11289 [149] set forth the appointment of a National Advisory Commission on Selective Service empowered to review and report upon the policies and trends of the Selective Service System and to make recommendations.

In Executive Order No. 11327,[150] the President authorized a procedure for inefficient reservists to be called to 24 months of active duty. The call may result if the reservist is not assigned to or participating satisfactorily in a unit in the Ready Reserve. However, "appropriate consideration" shall be given to family responsibilities and employment in the national interest.

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[146] 50 U.S.C. App. § 459(g) (1951).
[147] 32 Fed. Reg. 6961 (1967).
[148] 32 Fed. Reg. 1119 (1967).
[149] 31 Fed. Reg. 9265 (1966).
[150] 32 Fed. Reg. 2995 (1967).

V. CONCLUSION

In 1967 the basic Selective Service statute has been extended relatively free from crippling amendments. The changes that were made should tend to reduce the increasing volume of litigation under the Act since 1965. In particular, Section 6(j), as amended,[151] has eliminated the "belief in relation to a Supreme Being" test and the uncertainty resulting from *United States* v. *Seeger*.[152] The amendment [153] of Section 10(b)(3) of the Act provides that only if there is "no basis in fact" may a board classification of a registrant be overturned in judicial review. It also provides that there will be no judicial review of Selective Service action, except in a criminal prosecution after the defendant has responded to an order to report for induction or civilian work. This would preclude such cases as *Kurki*,[154] *Fargas*,[155] *Muhammad Ali*,[156] and *Wolff*.[157] Finally, assuming that delinquency under the Act is increasing, the precedence at trial and on appeal for Selective Service cases, provided for under amended Section 12,[158] should result in a salutary effect.

Since 1964 the probability of Congress extending the Act in 1967 has brought forth considered public comment and debate. At times, the discussion was virulent and dissident registrants demonstrated against the enforcement of the statute. However, the end result would seem to show the acceptability of Selective Service, which has been a part of the American way of life since 1940 and is a vital feature of our military manpower procurement.

WILLIAM LAWRENCE SHAW**

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[151] 81 Stat. 104, Pub. L. No. 90-40 (30 Jun. 1967).

[152] 380 U.S. 163 (1965); see Shaw, *Selective Service Ramifications in 1964*, 29 MIL. L. REV. 123, 127-31 (1965).

[153] 81 Stat. 104, Pub. L. No. 90-40 (30 Jun. 1967).

[154] 255 F. Supp. 161 (E.D. Wis. 1966), see note 61 *supra*.

[155] 267 F. Supp. 452 (S.D. N.Y. 1967), see note 98 *supra*.

[156] 266 F. Supp. 345 (S.D. Texas 1967), see note 103 *supra*.

[157] 372 F.2d 817 (2d Cir. 1967), see note 135 *supra*.

[158] 81 Stat. 105, Pub. L. No. 90-40 (30 Jun. 1967).

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