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EXECUTIVE ORDERS 10988 AND 11491, AND CRAFT RECOGNITION IN THE FEDERAL SERVICE*

By Captain John Clay Smith, Jr.**

In the dawn of President Nixon's new Executive Order 11491, Labor-Management Relations in the Federal Service, *the author reviews sample arbitration decisions under Executive Order 10988 before and after a major change in NLRB policy in the craft recognition area and concludes that the arbitrators were not responsible to Board rulings. He notes critically that even under Executive Order 11491, the ultimate decision-makers are not bound by NLRB rulings, or by their own. He offers suggestions for arguments and making a record in future hearings before the Assistant Secretary of Labor for Labor Management Relations and the Federal Labor Relations Council created by the new Order, and urges that these agencies should be responsive to NLRB decisions.*

I. INTRODUCTION

A. EXECUTIVE ORDERS 10988 AND 11491

Unionism in the federal service began in such government facilities as arsenals, naval yards and printing plants. Certain craftsmen (carpenters, mechanics and the like) joined the union movement around 1830. Initially, craft union enrollment flourished in government service but began to decline, reaching a low ebb of 250,000 by 1945.[1]

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*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.

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[1] Gimlin, *Organization of Public Employees*, 1967-2 EDITORIAL RESEARCH REPORTS 790. For a history of labor-management relations in the federal service, see W. R. HART, COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICE (1961).

In recent years, union membership in the federal service has grown impressively,[2] showing the renewed interest of federal workers in employee organization. In 1967 there were:

> —808 exclusive units throughout the federal establishment (plus 24,000 local post office units).
> —835,000 employees are covered by exclusive units (515,000 of these employees are in the Post Office Department).
> —429 agreements negotiated covering approximately 750,000 employees in over 20 federal departments and agencies.[3]

During 1966–1967 alone, exclusive recognition was afforded to 173 units, and 184 collective bargaining agreements were negotiated.[4] Recent statistics are even more impressive. The Office of Labor-Management Relations reports that as of November 1968 the number of units with exclusive recognition increased to 2,305. Approximately 1,416,073 federal employees are covered by these units, of 52 per cent of the total federal work force. Likewise, the number of negotiated agreements has increased to 1,181, and the total number of employees under those agreements equals 1,175,524, or 42 per cent of the total federal work force. Presently, over 30 federal departments and agencies have unit agreements.[5]

The increased interest in unions among members of the federal service can be traced directly to Executive Order 10988,[6] which was promulgated by President John F. Kennedy in 1962. That document established as federal policy the right of workers in the federal service to organize.[7]

This federal policy received a shot in the arm with the promulgation of Executive Order 11491[8] by President Richard M. Nixon in October 1969. Several progressive provisions were added to the new order.[9] However, no attempt is made in this

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[2] Wallerstein, *Labor Relations in Public Employment—The Federal Experience*, 19 PROCEEDINGS OF N. Y. U. ANNUAL CONFERENCE ON LABOR 205, 211 (1967).

[3] *Id. See generally* W. B. VOSLOO, COLLECTIVE BARGAINING IN THE UNITED STATES FEDERAL CIVIL SERVICE 112–25 (1966).

[4] Wallerstein, *supra* note 2, at 211. For an explanation of the differences between "exclusive," "formal," and "informal" recognition under the old and new executive orders, see note 73 *infra*.

[5] OFFICE OF LABOR-MANAGEMENT RELATIONS, U.S. CIVIL SERVICE COMM'N, UNION RECOGNITION IN THE FEDERAL GOVERNMENT—STATISTICAL REPORT 1–2, 7 (Nov. 1968).

[6] 3 C.F.R. 521 (1959–1963 Comp.) 5 U.S.C. § 631, at 866 (1964) [hereafter cited as Exec. Order 10988].

[7] Exec. Order, 10988, § 1. *See generally* President's Task Force on Employee-Management Relations in the Federal Service, A Policy for Employee-Management Cooperation in the Federal Service 11 (30 Nov. 1961).

[8] 34 Fed. Reg. 17605 (1969) [hereafter cited as Exec. Order 11491].

article to digest either Executive Order 11491 or 10988 beyond those provisions which influence craft recognition.

B. THE CRAFT UNIT SEPARATION PROBLEM

One of the most troublesome areas of Executive Order 10988, carried over into Executive Order 11491, was the provision requiring "appropriate units." [10] "This area alone . . . presented a number of difficult problems." [11]

When a unit petitioned an agency for exclusive recognition (including petitions for craft separation), a threshold question was "whether a unit was appropriate for purposes of exclusive recognition . . . ." [12] If the question of the appropriateness of the unit was not resolved internally by the agency, the Executive Order provided:

> Upon the request of any agency, or of any employee organization which is seeking exclusive recognition and qualified for or has been accorded formal recognition, the Secretary of Labor, subject to such necessary rules as he may prescribe, shall nominate from the National Panel of Arbitrators maintained by the Federal Mediation and Conciliation Service one or more qualified Arbitrators who will be available for employment by the agency concerned for . . . the following purposes . . . (1) to investigate the facts and issue an advisory decision as to the appropriateness of the unit for purposes of exclusive recognition and as to related issues submitted for consideration. . . ." [13]

There has been some discussion as to what effect, if any, the National Labor Relations Board's decisions had on arbitration decisions taken under section 11 of the Executive Order.[14] Under section 11, the arbitrator was not expressly required to rely on any published opinions, not even those promulgated under the Executive Order. But, it may well be asked, "Why allow the thirty

[10] Supervisors are prohibited from acting as union officers or representatives where such activity gives the appearance of conflict of interest. § 1(b). § 2 adds definitions of such terms as "agency," "employee," "supervisor," and "guard," and clarifies the definition of "labor organization." A Federal Labor Relations Council is established to administer the order, "decide major policy issues, prescribe regulations and . . . report and make recommendations to the President." § 4. A Federal Service Impasses Panel, appointed by the President, is created and authorized to take action necessary to settle impasses on substantive issues in negotiations. This panel, upon application of either party, is empowered to recommend procedure for binding arbitration, §§ 5, 17. The authority to decide representation disputes, supervise and certify elections, decide unfair labor practice complaints, and order violating parties to cease and desist from violating the Executive Order is transferred to the Assistant Secretary of Labor for Labor-Management Relations. § 6. The distinctions among exclusive formal, and informal recognition of employee

five years of NLRB experience go to waste?" [15] Since 1962 many labor organization representatives and government lawyers have argued NLRB policy to arbitrators. Likewise, many of the approximately 85 advisory arbitration decisions under Executive Order 10988 cited NLRB decisions as supporting their rationales.

Executive Order 11491, like its predecessor, does not require its administrators to rely on any published opinions—not even those to be published under the new order. Again, the question arises, "Why allow the thirty five years of NLRB experience go to waste?" [16]

One area of labor law in the private sector which has seen a drastic change is craft union separation cases. Starting with *American Potash & Chemical Corp.*,[17] the NLRB has decided a series of craft separation cases. However, in 1966 the *American Potash* parade came to an abrupt halt in *Mallinckrodt Chemical Works*.[18]

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bargaining units (see note 73 *infra*) are removed and the latter two categories eliminated for new units. §§ 7(f), 8(a), 24(b), (c). Also, exclusive recognition can no longer be granted to a proposed unit "solely on the basis of the extent to which employees in the proposed unit have organized. . . ." § 10(b). After a unit is accorded recognition, and a valid election is held to choose a labor organization as an exclusive representative, there is a twelve-month bar on new elections to determine whether the organization shall continue as the exclusive representative. § 7(c). Unions are now required to disclose information about their finances to the Assistant Secretary of Labor for Labor-Management Relations and must maintain internal democratic procedures and practices within the union. §§ 18(c), (d), (a)(1). § 19 clarifies what constitutes unfair labor practices on the part of both unions and agencies. (For the text of these provisions, see note 45 *infra*.) Procedures may be negotiated to provide for arbitration of employee grievances and disputes over the interpretation of agreements, but not to change agreements or agency policy. § 14. The Federal Mediation and Conciliation Service is directed to "provide services and assistance to Federal agencies and labor organizations in the resolution of negotiation disputes." § 16. Contract negotiations during working hours are prohibited, § 20, and a dues checkoff is authorized, § 21.

[10] Barr, *Executive Order 10988: An Experiment in Employee-Management Cooperation in the Federal Service*, 52 GEO. L. J. 420, 425, 430–36 (1964). The corresponding language in Exec. Order 11491 may be found in § 10(a).

[11] Wallerstein, *supra* note 2, at 212.

[12] Exec. Order. 10988, § 11.

[13] *Id.*

[14] Barr, *supra* note 10, at 428, 434; Vosloo, *supra* note 3, at 92.

[15] *See* U.S. DEP'T OF ARMY, CIVILIAN PERSONNEL PAMPHLET No. 71, THE BARGAINING UNIT 6–7 (1965); Barr, *supra* note 10, at 428–29. Barr reports that arbitrators are not all in agreement as to how much weight they should give to NLRB decisions.

[16] See materials cited in note 15 *supra*.

[17] 107 N.L.R.B. 1418 (1954).

[18] 162 N.L.R.B. 387 (1966).

Prior to *Mallinckrodt* many advisory arbitration decisions under Executive Order 10988 had either cited the *American Potash* case or applied the law of *American Potash* in arriving at craft unit separation decisions in the federal service. This article will address itself to a limited discussion of pre- and post-craft separation questions presented to advisory arbitrators during 1966–1968 in an effort to determine whether NLRB cases and policy were applied in advisory decisions rendered pursuant to section 11 of Executive Order 10988. It is hoped that the findings of this discussion will encourage arbitrators working under Executive Order 11491 to consider NLRB rulings and policies and to reach results consistent with them.

C. UNITS IN GENERAL

Before examining specific craft separation cases, a brief preliminary discussion of bargaining units in general is required.

A bargaining unit must consist of at least two essential elements. First, there must be a group of workers who choose an appropriate unit as their representative for the negotiation of better working conditions, hours and wages; secondly, there must be recognition by the agency which employs the members of the unit with negotiation on a group basis. A clear meaning of an "appropriate unit" is not easy to come by as many arbitrators, nominated to resolve unit questions under the Executive Order, discovered during the past half decade.

According to Executive Order 10988:

> Units may be established on any plant or installation, craft, functional or other basis which will ensure a *clear and identifiable community of interest among the employees concerned* . . . .[9]

As a later discussion of various section 11 arbitration opinions under Executive Order 10988 will reveal, many considerations must be pursued when attempting to establish "a clear and identifiable community of interest." A few of the myriad questions to be asked are: Should this unit be recognized on a plantwide or a departmental basis? Should the employees with X job description, Y responsibility, or Z expertise be included or excluded from the proposed unit. Does this union traditionally or historically represent these employees? When the gravamen of the unit petition is for craft separation, the appropriate unit question becomes even more murky.

[9] Exec. Order 10988, § 6 (emphasis added). This language is carried over into Exec. Order 11491, § 10(b).

What guidelines did section 11 arbitrators follow when nominated to rule on craft separation unit questions? What guidelines will the Assistant Secretary of Labor for Labor-Management Relations [20] or the Federal Labor Relations Council [21] follow under Executive Order 11491 when presented with craft severance issues? Some arbitration opinions reveal that both government and labor representatives sought to persuade arbitrators to adopt their theory of the cases by referring to NLRB rulings. Attorneys pointed out the similarities between the language of Executive Order 10988 and the National Labor Rela-

[20] [Hereafter referred to as the A.S.] Exec. Order 11491 sets out the responsibilities of the Assistant Secretary as follows:

Sec. 6. *Assistant Secretary of Labor for Labor-Management Relations.* (a) The Assistant Secretary *shall*—

(1) *decide questions as to the appropriate unit for the purpose of exclusive recognition* and related issues submitted for his considerations;

(2) supervise elections to determine whether a labor orgnization is the choice of a majority of the employees in an appropriate unit as their exclusive representative, and certify the results;

(3) decide questions as to the eligibility of labor organizations for national consultation rights under criteria prescribed by the Council; and

(4) except as provided in section 19(d) of this Order, *decide complaints of alleged unfair labor practices and alleged violations of the standards of conducts for labor organizations.*

(b) In any matters arising under paragraph (a) of this section, the Assistant Secretary *may require an agency or a labor organization to cease and desist from violations of this Order and require it to take such affirmative action as he considers appropriate to effectuate the policies of this Order.*

(c) In performing the duties imposed on him by this section, the Assistant Secretary may request and use the services and assistance of employees of other agencies in accordance with section 1 of the Act of March 4, 1915 (38 Stat. 1084, as amended; 31 U.S.C. § 686).

(d) The Assistant Secretary *shall prescribe regulations needed to administer his functions under this Order.*

(e) If any matters arising under paragraph (a) of this section involve the Department of Labor, the duties of the Assistant Secretary described in paragraphs (a) and (b) of this section shall be performed by a member of the Civil Service Commission designated by the Chairman of the Commission.

(Emphasis added.)

[21] The Federal Labor Relations Council [hereafter referred to as FLRC] is established under § 4 of Exec. Order 11491, which reads as follows:

Sec. 4. *Federal Labor Relations Council.* (a) There is hereby established the Federal Labor Relations Council, which consists of the Chairman of the Civil Service Commission, who shall be chairman of the Council, the Secretary of Labor, an official of the Executive Office of the President, and such other officials of the executive branch as the President may designate from time to time. The Civil Service Commission shall provide services and staff assistance to the Council to the extent authorized by law.

(b) The Council *shall administer and interpret this Order, decide major policy issues,* prescribe regulations, and from time to time, report and make recommendations to the President.

tions Act. From these similarities it can now be concluded with some certainty that the meanings with which they have become imbued should be incorporated into the law of labor relations in the federal service. Certainly, the thirty-odd years of NLRB analysis should be utilized as a relevant source in the interpretation of Executive Order 11491. However, "the history of the [old] order does not clearly suggest either reliance upon or rejection of NLRA as a helpful guide . . .;" [22] nor does the language of the new order.

Craft separation cases are a unique breed. Little or no guidance was available to section 11 arbitrators or practitioners charged with the responsibility of meeting an "adversary" in an "arbitral hearing." [23] Included among the traditional factors considered in unit determinations, however, are: (1) duties, training and qualifications; (2) employment conditions; (3) functions performed; (4) desires of employees; (5) compatibility of unit proposals with the organizational structure of the agency; and (6) history of prior labor-management relations.

In addition, an occupational bond of interest usually is one of the most influential of the forces which determine the pattern in which units form. The degree to which the occupational bond causes employees to group seems directly related to the degree to which entry into and practice of the occupation is made difficult because of the complexity of skills, knowledge requirements, and the exclusiveness of the occupational field.

(c) The council *may consider*, subject to its regulations—

(1) appeals from decisions of the Assistant Secretary issued pursuant to section 6 of this Order;

(2) appeals on negotiability issues as provided in section 11(c) of this Order;

(3) exceptions to arbitration awards; and

(4) *other matters it deems appropriate to assure the effectuation of the purposes of this Order.*

(Emphasis added.)

Since the word "consider" is used in § 4(c) and not the word "review," it seems apparent that the FLRC may hear a case *de novo*. The assertion of jurisdiction will obviously be on a case-by-case basis since the new order does not set out any mandatory subjects for appellate-type consideration from a decision by an A.S. But it is quite apparent from the plain language of §§ 4(b) and (c)(4) that the FLRC has virtually unlimited review power over any decision made under the new order. However, the new order is silent on the FLRC's power to enforce its own rulings. See discussion of this point in note 48 *infra*.

[22] Barr, *supra* note 10, at 426.

[23] Although the word "adversary" was used in Exec. Order 10988, theoretically "Section 11 hearings [were] non-adversary with the arbitrator's role being similar to that of the National Labor Relation Board's hearing officer." Wallerstein, *supra* note 2, at 212.

D. NLRB CASES

Four important NLRB decisions should be examined in any analysis of what constitutes an appropriate craft unit in government labor relations; namely, *American Can Co.*,[24] *American Potash*,[25] *National Tube Co.*,[26] and *NLRB* v. *Pittsburgh Plate Glass Co.*[27] These cases are significant for three reasons: they represent a sampling of the historical problems in craft separation cases; they point out valid criticisms of various craft separation decisions; finally, they must be read in order to compare the section 11 advisory opinions with NLRB rulings.

1. *American Can Co.*

Briefly stated, the *American Can*[28] case refused to permit craft units to be carved out from a broader unit already established, except under unusual circumstances. The decision was strongly criticized as unduly restricting the rights of craft employees to seek separate representation. It foreclosed the NLRB from exercising its discretion in granting severances once the craft was recognized. Under *American Can*, a "new" Board was bound by the order of an "old" Board.

With the inequities of *American Can* in mind,[29] Congress passed section 9(b)(2) of the National Labor Relations Act[30] which reads in pertinent part as follows:

> [T]he Board shall not . . . (2) decide that any craft unit is inappropriate . . . on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation . . . .[31]

2. *National Tube Co.*

Section 9(b)(2) was first considered by the Board in the *National Tube* case.[32] *National Tube* overruled *American Can* to the extent that no longer was the Board precluded from deciding that any craft unit was inappropriate upon the sole ground that

[24] 13 N.L.R.B. 1252 (1939).
[25] 107 N.L.R.B. 1418 (1954).
[26] 76 N.L.R.B. 1199 (1948).
[27] 270 F.2d 167 (4th Cir. 1959).
[28] 13 N.L.R.B. 1252 (1939).
[29] See NATIONAL LABOR RELATIONS BOARD, 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 417–18, 431; 2 *id.* at 1009; 93 CONG. REC. 3836 (1947).
[30] 29 U.S.C. §§ 151–66 (1964).
[31] 29 U.S.C. § 159(b) (1964).
[32] 76 N.L.R.B. 1199 (1948).

a different unit had been established by a prior Board determination. Other factors could now be considered.

3. *American Potash & Chemical Corp.*

It is helpful to examine the *American Potash* [33] case closely, not because it is good law today in regard to the indicia of appropriateness of craft units, but in order to appreciate the impact of the *Mallinckrodt* decision which is discussed below.

Since 1941 the United Mine Workers of America (Mine Workers) and the employers had bargained on a plant-wide basis. Petitions were filed with the NLRB pursuant to section 9(c)of the NLRA by the incumbent Mine Workers for a plant-wide bargaining unit; by the International Union of Operating Engineers (Operating Engineers) for a severance of the powerhouse employees from the plant-wide unit; by the International Brotherhood of Electrical Workers (IBEW) for a severance of the electricians in all departments except the powerhouse department from the plant-wide unit into a separate craft unit; and by the International Association of Machinists (IAM) to establish three separate craft units, consisting of pump packers and oilers, riggers, and tool room keepers.

The employer and the Mine Workers contended that severance should be denied because of the integrated operation of the industry. They attempted to persuade the Board to extend the *National Tube* case which, in considering the legal effect of section 9(b)(2), held that the Board was not precluded from finding that an insurgent craft unit was appropriate solely because a board had previously found another unit to be appropriate. The Board could consider other factors in deciding a craft severance question (unless a majority of voters in the proposed craft unit repudiated it).[34] In *National Tube* that "other factor" was that in the steel industry there was a "prevailing industry pattern and integration of operations in which craft units were inappropriate." [35] The Board, however, was unwilling to extend *National Tube* to other industries because such an extension would allegedly have resulted in the "emasculation of the principle of craft independence . . . ." [36]

Two criteria were set out in *American Potash* to determine a craft for severance purposes. The Board said, "[A] craft group will be appropriate for severance purposes in cases where a true

[33] 107 N.L.R.B. 1418 (1954).
[34] 76 N.L.R.B. 1199, 1206 (1948).
[35] 107 N.L.R.B. 1418, 1420 (1954).
[36] *Id.* at 1422.

craft group is sought and where . . . the union seeking to represent it is one which traditionally represents that craft."[37]

The heart of *American Potash* is its definition of a true craft and its application in industry.

> [A] true craft unit consists of a distinct and homogeneous group of skilled journeymen craftsmen, working as such, together with their apprentices and/or helpers . . . . An excellent rule-of-thumb test of a worker's journeyman standing is the number of years' apprenticeship he has served—the generally accepted standards of which vary from craft to craft. We will, however, recognize an experience equivalent where it is clearly demonstrated to exist. In addition, to meet the requirements for severance under the Board's new rule, we shall require that all craftsmen of the same type in any plant, except those in traditional units . . . be included in the unit . . . . All the craftsmen included in the unit must be practitioners of the same allied craft . . . . Furthermore, such craftsmen must be primarily engaged in the performance of tasks requiring the exercise of their craft skills.[38]

Although the Board said in *American Potash* that the new rule would be rigidly enforced, a special exception is carved out in the opinion itself for "minority groups . . . lacking the hallmark of craft skill." [39] Severance may be allowed to "unions which have devoted themselves to the special problems of . . . employees in functionally distinct departments, indicating that their interests are distinctive and traditionally recognized." [40] Strict proof was to be required on the latter point.

IBEW's petition for craft identity was granted because the workers involved met the criteria of a true craft unit and the union was a traditional representative of such workers. The reasons given were: (1) the employer maintained an apprenticeship program for electricians; (2) the electricians performed distinctive and typical craft tasks; and (3) the electricians were required by the state to obtain a license.

Unlike IBEW, the Operating Engineers sought to represent a group of employees who had no apprenticeship program, no special training, and no state requirements for license. Nevertheless, the Board concluded that they did constitute an appropriate unit. The Board found that they were not craftsmen, comprised a department unit (the powerhouse department) which was functionally distinct, and were requested by a union which historically and traditionally had represented this type of worker.

[37] *Id.*
[38] *Id.* at 1423–24.
[39] *Id.* at 1424.
[40] *Id.*

The group of employees sought to be represented by IAM, however, had no apprenticeship program and also consisted of unskilled workers who performed routine and repetitive work. The riggers did not do work for the entire plant, the toolroom workers were helped by others. The Board denied IAM's petition.

4. *Pittsburgh Plate Glass Co.*

In *NLRB* v. *Pittsburgh Plate Glass Co.*,[41] a determination was made by the NLRB that certain electricians in respondent's company constituted an appropriate bargaining unit. The company argued that a separate unit ought not to be created since the operations of the plant were highly integrated. When the Electrical Workers were certified by the Board, the company refused to bargain with that union and an order was issued requiring the company to negotiate pursuant to section 8(a)(5). On petition for enforcement, the Court of Appeals for the Fourth Circuit held that the order of the Board was arbitrary and the petition was denied. The court went on to say:

> The Board was right . . . [in the *National Tube* decision] in reaching the conclusion that the addition of subsection 2 of § 9(b) created no ambiguity. As amended, § 9(b) does not strip the Board of the original power and duty to decide in each case what bargaining unit is most appropriate . . . . In effect it frees the Board from the domination of its past decisions and directs it to *reexamine each case on its merits and leaves it free to select that unit which it deems best suited to accomplish the statutory purposes.* . . . Congress clearly did no command the Board, as it could have done, to establish a craft bargaining unit whenever requested by a qualified craft union, or relieve the Board of its duty to consider the interests of the plant unions and the wishes of the employees who desire to bargain on a plantwide basis. The amended section expressly requires the Board to decide *in each case* [original emphasis] what unit would be most appropriate to effectuate the overall purpose of the Act to preserve industrial peace.[42]

E. SUMMARY

In sum, the above group of cases, climaxing with *American Potash*, struggled with three problems: the destruction of the concept "once an appropriate unit, always an appropriate unit"; the criteria for making a determination of the appropriateness of carving a smaller craft unit out of a larger bargaining unit; and the definition of a "true craft." What influence, if any, did labor law in the private sector have upon section 11 arbitrators

[41] 270 F.2d 167 (4th Cir. 1959).
[42] *Id.* at 172–73 (emphasis added) (footnotes omitted).

when called upon to resolve the same questions of appropriateness and true craft in federal service? What guidelines will the A.S. or the FLRC use when presented with craft severance petitions in the federal service?

II. PRE-*MALLINCKRODT*—FEDERAL EMPLOYEE ARBITRATION DECISIONS DEALING WITH CRAFT SEVERANCE

A. *THE CRAFT SEVERANCE QUESTION*

The craft severance question in the federal service has a procedural as well as substantive aspect. The procedural aspect deals with the steps prior to the ultimate decision to request an arbitrator to resolve the craft separation question. Stated differently, the procedural aspect deals with the steps, events, and unresolved confrontations between an agency and union short of arbitration. The following case samples are illustrative of this procedural aspect under Executive Order 10988.

CASE I

Agency recognizes Union A on an agency-wide or plant-wide basis. Union B organizes a separate unit composed of alleged craftsmen. Union B petitions for recognition of the proposed unit. The Agency denies the petition. Union B appeals the decision, but it is subsequently denied. Union B petitions the Secretary of Labor for the nomination of a section 11 arbitrator on the substantive craft unit question. Union A, as an intervenor, submits briefs and may participate in the hearing at which the Agency and Union B will present their argument.

CASE II

Agency recognizes Union A on an agency-wide or plant-wide basis. Union B organizes a separate unit composed of alleged craftsmen whose jobs collectively serve functional roles in the plant or agency. The Agency denies the petition for severance of the proposed functional unit. Appeal denied. A section 11 arbitrator is requested to resolve the substantive unit question. Union A intervenes in the hearing involving Union B and the Agency.

CASE III

Agency recognizes Union A and Union B. Each represents crafts within the agency or plant. The agency establishes a new training program and unilaterally includes the new trainees in Union A. Union B objects. They allege that the new trainees are Union B craftsmen. The Agency denies Union B's petition for correction. Union B's appeal is denied by the Agency, whereafter they file for the nomination of a section 11 arbitrator. Union A may intervene in the hearing between Union B and the Agency.

CASE IV

The Agency recognizes Union A and Union B. Each represents a craft within the agency or plant. Union B petitions for recognition as exclusive representative of *certain workmen* in Union A. The agency denies the proposed unit. Union B appeals the decision. Denied. A section 11 arbitrator is selected. Union A may intervene in the hearing in which the agency and Union B will engage.

In these ways, the substantive issues in craft-unit separation cases were created for the arbitrator.

Under Executive Order 11491, the procedural aspects are entirely different.

CASE V

Agency recognizes Union A on an agency-wide, plant-wide or national level.[44] Union B petitions the agency or the Assistant Secretary of Labor for Labor Management Relations for exclusive recognition as the representative of part of the workers. The A.S. denies the petition and refuses to order an election. Union B may appeal this, or any other, order of the A.S. to the Federal Labor Relations Council.[44]

Under Executive Order 11491, the question of craft recognition could arise on an unfair labor charge filed by a union against an agency for refusing to bargain under sections 19(a)(1) and 19(a)(6).[45]

[44] Exec. Order 11491 provides for the granting of national consultation rights to a union, §§ 7(a), 9, under criteria to be established by the FLRC. A union accorded such rights may comment on proposed substantive changes in personnel policies, both in writing and in person. § 9. A denial of national consultation rights by the A.S. may be appealed to the FLRC. §§ 4(c)(1), 6(a)(3).

[44] Exec. Order 11491, §§ 4(c)(1), 6.

[45] Sec. 19. *Unfair labor practices.* (a) Agency management shall not—

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

(2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment;

(3) sponsor, control, or otherwise assist a labor organization, except that an agency may furnish customary and routine services and facilities under section 23 of this Order when consistent with the best interests of the agency, its employees, and the organization, and when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status;

(4) discipline or otherwise discriminate against an employee because he has filed a complaint or given testimony under this Order;

(5) refuse to accord appropriate recognition to a labor organization qualified for such recognition; or

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

(b) A labor organization shall not—

CASE VI

Agency recognizes Union A on an agency-wide, plant-wide or on a national level. Subsequently, Union B petitions for exclusive recognition, and the A.S. orders an election. Union B wins the election, but the Agency refuses to bargain. Union B may then file an unfair labor practice charge for violation of sections 19(a)(1) and 19(a)(6) with the A.S. Since the A.S. ordered an election, he will probably find an unfair labor violation and order the Agency to cease and desist [44] from its refusal to bargain. The Agency may then appeal the order of the A.S. to the FLRC.[45]

These cases illustrate the different postures in which the substantive questions of craft unit separation law may be presented under both Executive Orders. The unanswered question posed by both sets of cases is: From what source did the section 11 arbitrators, and will the A.S. and the FLRC, take the substantive law to reach sound resolutions of these problems? [46] An

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(1) interfere with, restrain, or coerce an employee in the exercise of his rights assured by this Order;

(2) attempt to induce agency management to coerce an employee in the exercise of his rights under this order;

(3) coerce, attempt to coerce, or discipline, fine, or take other economic sanction against a member of the organization as punishment or reprisal for, or for the purpose of hindering or impeding his work performance, his productivity, or the discharge of his duties owed as an officer or employee of the United States;

(4) call or engage in a strike, work stoppage, or slowdown; picket an agency in a labor-management dispute; or condone any such activity by failing to take affirmative action to prevent or stop it;

(5) discriminate against an employee with regard to the terms or conditions of membership because of race, color, creed, sex, age, or national origin; or

(6) refuse to consult, confer, or negotiate with an agency as required by this Order.

(c) A labor organization which is accorded exclusive recognition shall not deny membership to any employee in the appropriate unit except for failure to meet reasonable occupational standards uniformly required for admission, or for failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership. This paragraph does not preclude a labor organization from enforcing discipline in accordance with procedures under its constitution or by-laws which conform to the requirements of this Order.

(d) When the issue in a complaint of an alleged violation of paragraph (a)(1), (2), or (4) of this section is subject to an established grievance or appeals procedure, that procedure is the exclusive procedure for resolving the complaint. All other complaints of alleged violations of this section initiated by an employee, an agency, or a labor organization, that cannot be resolved by the parties, shall be filed with the Assistant Secretary.

[44] Exec. Order 11491, § 6(b).

[45] *Id.* at § 4(c)(1).

[46] The only provisions for enforcement in the new order are § 6, empowering the A.S. to issue cease and desist orders and make regulations, and § 4, which gives the FLRC authority to make regulations, consider appeals from

agency should be knowledgeable of the traditional standards and analysis that goes into the substantive decision making in craft separation cases. The following 1966 cases are useful in this respect.

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the A.S., "administer and interpret this order," and to "report and make recommendations to the President." It is arguable that the lack of a provision establishing specific penalties and granting specific enforcement powers to the FLRC may hamstring the new order and frustrate the federal policy favoring the right to organize. For example, what would happen if an agency refused to bargain with a union and defied an order from the A.S. to cease and desist from an unfair labor practice?

A series of cases have held that the federal courts have no jurisdiction to order an agency to hold an election, to process a grievance, or otherwise to enforce Exec. Order 10988. Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 978 (1966) ("[Exec. Order 10988] represents in essence a formulation of broad policy by the President for the guidance of federal employing agencies. . . . The President did not undertake to create any role for the judiciary in the implementation of this policy." 350 F.2d at 456); National Ass'n of Internal Revenue *Employees v. Dillon, 356 F.2d 811 (D.C. Cir. 1966) (the Secretary of the* Treasury excluded certain employees from participating in an election. Held, the suit for injunctive relief against the Secretary was properly dismissed for lack of subject matter jurisdiction); Lodges 1647 and 1904, AFGE v. McNamara, 291 F. Supp. 286 (M.D. Pa. 1968) (federal court is without jurisdiction to order the Secretary of Defense to process an employee grievance under Exec. Order 10988). *But cf.* Manhattan-Bronx Postal Union v. Gronouski, *supra* at 454-55, nn. 4, 5, and accompanying text.

If the federal courts are unavailable to police the execution of the new executive order, the FLRC and, ultimately, the President are left as enforcing agencies. The FLRC has powers to "administer" the order, to "prescribe regulations" and to "decide major policy issues." Arguably the FLRC could use these powers to establish penalties for violations, *e.g.*, fines and abolition of privileges for unions. In the case of an uncooperative agency, the FLRC could use its power to "report . . . to the President" and recommend that he reprimand or otherwise discipline the head of the agency, or order him to obey. In this regard, it is worth noting that the FLRC is appointed by the President and includes the Secretary of Labor and "an official of the Executive Office of the President," as well as the Chairman of the Civil *Service Commission and any others the President cares to appoint.* § 4(a). These officials should be in a position to know the President's mind, and to gain his sympathetic attention.

Several courts, in denying relief in disputes arising under Executive Order 10988, have suggested that the plaintiffs address their complaints to the head of the Executive Branch.

> If appellants disagreed with the Postmaster General's decision . . . and believed it to be contrary to the President's wishes, it is obvious to whom their complaint should have been directed. It was not to the judicial branch. Congress has given the District Court many important functions to perform, but they do not include policing the faithful execution of Presidential policies by Presidential appointees. Manhanttan-Bronx Postal Union v. Gronouski, 350 F.2d 451, 457 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 978 (1966) (emphasis added).

B. *SELECTED CASES*

1. *General Services Administration.*

In the *General Services Administration*[48] case, the International Association of Machinist and Aerospace Workers (AFL-CIO) and its Local Lodge 174 Machinists petitioned the General Service Administration (GSA), claiming the custodial equipment repair shop as an appropriate unit for exclusive craft recognition. At the time of the petition the repair shop employees were part of a broader unit represented by the American Federation of Government Employees (AFGE), the intervenor in the instant case. AFGE had only formal recognition.[50]

According to the Machinists, the facts established that the employees in this unit did work which was equal to or could be characterized as comparable to that of a craft known as Automotive Machinists. They pointed out that the latter was a skilled craft in that it required the use of certain sophisticated machinery and ability to read blueprint drawings and manufacturers' specifications. Further, they argued that the kind of work they did, the order of progression, the apprenticeship and the exclusion of any other crafts satisfied the criteria laid out by the NLRB and the *American Potash* decision, and asserted that a craft severance should be allowed.[51]

On the other hand, GSA took the position that the work done by the employees in the custodial equipment repair shop was not traditionally recognized as craft work. Further, it contended that

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[Executive Order 10988] is no more than a declaration of policy by the President for the internal management of the Executive Branch of the United States Government enforceable only by the President through administrative measures. Canal Zone Cent. Labor Union v. Fleming, 246 F Supp. 998 (D. Canal Zone 1965), *rev'd on other grounds sub nom.* Leber v. Canal Zone Cent. Labor Union, 383 F.2d 110 (5th Cir. 1967).

It would probably help to create harmonious labor relations and make the new executive order function smoothly, if rules are established as soon as possible dealing with penalties and a procedure for appealing from the FLRC to the President. These rules could be established as regulations laid down by the FLRC, or by amending the executive order. Such action would remove doubts and uncertainties, and help make each side aware of the position of the other. The penalties and appeal procedure would probably be used, if at all, only in an extreme or "test" case; perhaps a clear understanding that they were available would make it unnecessary to use them.

[48] General Services Administration, BNA GOV'T EMPLOYEE REL. REP. 1 (1966) (Schmertz, Arbitrator).

[50] *Id.* at 4. For an explanation of the differences between "exclusive," "formal," and "informal" recognition of a union under the old and new executive orders, see note 73 *infra*.

[51] *Id.* at 5.

the shop should not be considered an apprenticeable occupation.[52] It also argued that the proposed unit violated section 6(a) of Executive Order 10988 which discourages recognition of a unit based solely on the extent to which employees in the proposed unit have been organized.[53] It was GSA's position that the machinists had requested designation of this unit in which they had been able to gain a majority of members solely on the basis of numbers.[54] With regard to the issue of community of interest, GSA pointed out that none existed. GSA argued that to upset the incumbent union would not be an improvement and would do irreparable harm to existing patterns of bargaining.[55] Finally, it argued that the work of the custodial repair shop was merely one of many functions which constituted an integrated operation.[56]

AFGE took the position that the Machinists had failed to establish a clear and identifiable community of interest among the employees. Further, they argued that the degree of integration of work process with others outside the unit was such as to preclude an identifiable community of interest and that a dissimilarity of skills and wage levels existed among the repair shop employees. More particularly, they stressed a lack of distinctiveness of functions in that the custodial repair shop was only one of fourteen, all of which were directed toward accomplishing the mission of the central repair service section.[57] Moreover, they argued that the work force and work assignments were so integrated with the other shops that no identifiable community of interest existed; that the limited "qualifications needed between jobs within the shop together with the wide degree of interchange-ability of jobs and the broad area from which reductions in force and promotions could be carried out yielded the conclusion that the custodial equipment repairmen [were] not a true craft or an apprenticeable trade." [58]

Arbitrator Schmertz placed the burden of proof squarely on the Machinists in the following language:

> To sever this group from the larger unit it must be established

[52] *Id.* at 2.
[53] *Id.* This principle is carried over by the Exec. Order 11491, § 10(b), which states that "[A] unit shall not be established solely on the basis of the extent to which employees in the proposed unit have organized. . . ."
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* at 3.
[58] *Id.*

> that they have a "clear and identifiable community of interest." One way of showing this is to establish that the employees are a true craft group, *i.e.*, a separate group of employees, working together as a team with helpers and apprentices.[59]

The following tests were submitted as the yardstick for measuring appropriate units and to justify separate bargaining units:

1. The employees must have a separate and distinct skill which give rise to unique problems.
2. It is the skill not the agency goal which compels special recognition.
3. The integration of work with others must be *de minimis*.[60]

In his opinion, Arbitrator Schmertz held that the repair shop activity constituted an appropriate unit because the repair shop employees followed a single trade and were by the most part autonomous, the integration of their work with that of others was so *de minimis* as not to be a controlling factor, and, finally, the activity maintained an appropriate apprenticeship program.[61]

While tipping his hat to the notion that appropriate unit determination cases should be decided in accordance with criteria developed by the NLRB,[62] Arbitrator Schmertz concluded that these criteria ought not to be applied to the instant case because of the less than exclusive historical pattern of bargaining at GSA.[63] Arbitrator Schmertz said:

> The employees in the requested unit merely were represented through formal recognition. No true collective bargaining took place nor were any arguments covering these employees executed . . . the prior relationship was not of such duration or substantive content as to deny a true craft the opportunity to present its own special problems.[64]

The arbitrator further found that the Machinists' request was based on more than mere "extent of organization." He said:

> More specifically the fact that the machinists only have been able to organize this shop cannot be the basis alone for a finding that is an appropriate unit. However, their failure or inability to organize the other shops may not be determinative of the appropriateness of the unit. *Extent of organization cannot be held against the petitioner any more than it can work in his behalf.*[65]

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[59] *Id.* at 4.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* (emphasis added).

Finally, Arbitrator Schmertz found GSA's contention that an arbitrator should consider whether the petitioner's unit would yield results as good as other units to be "highly speculative" and abstained in ruling on that argument by saying that it "is really not for me to decide." [66]

2. *Charleston Naval Shipyard.*

In the *Charleston Naval Shipyard* [67] case, the National Association of Planners, Estimators and Progressmen (NAPEP), Local 8, requested that the Charleston Naval Shipyard grant to it exclusive recognition for a unit at the Shipyard of all employees holding the rating of Planner and Estimator, Scheduler, and Progressman, excluding supervisory and managerial personnel. The incumbent, the Charleston Metal Trade Council (MTC) objected. The objection was sustained by the commanding officer of the Naval Shipyard. The latter decision was appealed and reversed by the Secretary of the Navy, but that action was stayed pending a section 11 determination. NAPEP intervened.

The Navy's position was that under section 6(a) of Executive Order 10988, the proposed NAPEP unit was a functional and, hence, a proper unit. The Navy contended (1) that a uniqueness and community of interest existed among the intervenors and that the proposed unit operated separate and apart from the remainder of the employees of ungraded units; and (2) that the employees in the proposed unit had a similarity of skills and each of them was initially a highly skilled craftsman who obtained his position through a competitive examination and evaluation of qualifications, and then, in his position, continued to use his knowledge of other related crafts and trades.[68]

Petitioners, MTC, argued that the Secretary of the Navy was in error because in effect the recognition of NAPEP established an artificial organizational grouping of tradesmen filtered out of sundry crafts in the shop. They claimed that the proposed unit was not a craft nor a departmental unit known to labor relations.[69]

In sustaining the decision of the Secretary of the Navy, Arbitrator Ralph R. Williams found a community of interest, exclusive, separate and distinct from others which could be characterized as a functional unit. Although the Planners, Estimators and Progressmen brought a technical skill as journeymen to their

[66] *Id.*
[67] BNA GOV'T EMPLOYEE REL. REP. 7 (1966) (Williams, Arbitrator).
[68] *Id.* at 8.
[69] *Id.*

job and could individually be looked upon as craftsmen, collectively they served a unique functional role. They did in fact work with tools different than other employees in the department, *i.e.*, pencils, paper, books, work lists, plans and designs. The regular work of a Progressman involved many trades or crafts. They used their own discretion and were not closely supervised. An apprenticeship program on a competitive basis existed. Finally, they worked in offices rather than shops and did work foreign to craftsmen.[70]

3. *Bureau of Engraving and Printing.*

In *Bureau of Engraving and Printing*,[71] both the international Association of Machinists (Machinists) and the Washington Plate Printers Union (Printers) had exclusive craft recognition. However, a dispute arose when, upon the creation of a new trainee program, the Bureau unilaterally decided that the trainees should be included within the Printers' craft unit. The Machinists objected and petitioned for the nomination of a section 11 arbitrator; the Printers intervened. In making the award to the Printers, the arbitrator sustained the Bureau's action, resting his decision on the community of interest concept.

> The "community of interest" concept . . . is as controlling here as it manifestly is in the determination of the appropriateness of an 'original" unit. The interest and future welfare of the trainees dictate care in the selection of an appropriate unit in which they are to be placed. One of the basic considerations in making that decision has to be the degree of homogeneity of skills, techniques, knowledge, and interest existing among the employees in the unit and those to be included therein.[72]

C. *SUMMARY*

None of the above three pre-*Mallinckrodt* cases denied a craft separation merely because a broader unit already existed. To this extent, the theory of early craft separation cases were not followed. It does appear, however, that each arbitrator placed the burden of proof on each petitioner to show that a true craft existed. To that extent, *American Potash* was followed to the letter. In each of the above opinions a showing of a community of interest seemed to spring forth, once a showing of a true craft was made.

The arbitrators considered basically the same criteria for craft identity. In finding a community of interest sufficient enough to

[70] *Id.* at 10–11.
[71] BNA GOV'T EMPLOYEE REL. REP. 41 (1966) (Coburn, Arbitrator).
[72] *Id.* at 43.

warrant severance, each arbitrator considered that the proposed unit

—represented a single trade
—required a competitive examination or an apprenticeship program
—worked without close supervision
—had little or no work integration with other departments
—had similarity or identity of functions, skills, technique and knowledge.

Further, when a proposed unit consisted of craftsmen who served a special function outside of their craft unit, such function was sufficient to meet the community of interest criteria to qualify for a functional severance.

The *General Services Administration* case in particular reveals that an arbitrator is prone to view as critical the quality of recognition from which the proposed unit seeks to be severed. Recognition inferior to exclusive recognition apparently weighed in favor of the proposed unit,[13] especially where it could be shown that the incumbent unit had not done a good job of bargaining for the members of the proposed unit.

Another point of interest is that the extent of organization "defense" does not defeat a petition for a proposed unit merely because a union has organized a majority of the craftsmen in a

[13] *See* Exec. Order 10988 § 6(b). That section defined the scope of activities permitted to an employee organization which had been recognized as the *exclusive* bargaining representative. Included in such activities were the right to "*negotiate* agreements . . . [and] be represented at discussions between management and employees . . . concerning grivances, personnel policies and practices. . . ." (Emphasis added.) On the other hand, a *formally* recognized employee organization was entitled only to have the employing agency "*consult* with such organization from time to time in the formulation and implementation of personnel policies and practices, and matters affecting working conditions. . . ." § 5(b) (emphasis added). An agency could allow an *informally* recognized unit "to present . . . its views . . . on matters of concern to its members . . .," but it did not *have* to if such would not be "consistent with the efficient and orderly conduct of the public business. . . ." § 4(b) (emphasis added). Under Exec. Order 11491, a consideration based on the type of recognition is not possible because "[a]ll grants of informal recognition under Executive Order No. 10988 terminate on 1 July 1970." § 24(2)(b). Likewise, "[a]ll grants of formal recognition under Executive Order No. 10988 terminate under regulations which the Federal Labor Relations Council shall issue before 1 October 1970." § 24(2)(c).

"[A] labor organization . . . accorded exclusive recognition . . . is entitled to act for and to negotiate agreements covering all employees in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership. [It] shall be given the opportunity to be represented at formal discussions between management and employees . . . concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit." § 10(e). The bargaining between the parties must be "in good faith." § 11(a).

particular department or plant. Finally, whether a proposed unit would be as effective as another unit is not for an arbitrator to decide as that question may be beyond his jurisdiction.

III. THE *MALLINCKRODT* DECISION

On 30 December 1966, the NLRB in a series of three decisions [74] announced a major policy change in its consideration of requests for severance of craft employees from other plant workers for collective bargaining purposes. The effect of this trilogy was to make severance rules less automatic.

In the *Mallinckrodt Chemical Works* [75] case, the Board stated that its new policy would be to make a case-by-case decision on craft severance requests in the future, relying on a greater number of relevant factors or circumstances rather than on the almost mechanical rules of the past.

The new, relevant areas or inquiry include the following considerations:

1. Whether or not the proposed unit consists of a distinct and homogeneous group of skilled journeymen craftsmen performing the functions of their craft on a nonrepetitive basis, or of employees constituting a functionally distinct department, working in trades or occupations for which a tradition of separate representation exists.
2. The history of collective bargaining of the employees sought and at the plant involved, and at other plants of the employer, with emphasis on whether the existing patterns of bargaining are productive of stability in labor relations, and whether such stability will be unduly disrupted by the destruction of the existing patterns of representation.
3. The extent to which the employees in the proposed unit have established and maintained their separate identity during the period of inclusion in a broader unit, and the extent of their participation or lack of participation in the establishment and maintenance of the existing pattern of representation and the prior opportunities, if any, afforded them to obtain separate representation.
4. The history and pattern of collective bargaining in the industry involved.
5. The degree of integration of the employer's production processes, including the extent to which the continued normal operation of the production process is dependent upon the performance of the assigned functions of the employees in the proposed unit.

[74] Mallinckrodt Chemical Works, 162 N.L.R.B. 387 (1966); E. I. Dupont de Nemours & Co., 162 N.L.R.B. 49 (1966); Holmberg, Inc., 162 N.L.R.B. 53 (1966).

[75] 162 N.L.R.B. 387, 398 (1966).

> 6. The qualifications of the union seeking to "carve out" a separate unit, including that union's experience in representing employees like those involved in the severance action.[16]

The above list is not exclusive. The NLRB may take other factors into account on a case-by-case basis. In dismissing the severance petition, the Board explained that continued stable labor relations are vital.

The *American Potash* decision was thus overruled by *Mallinckrodt*.[17] The Board may now consider all relevant factors in making unit determinations—even those which weigh against separation. The *American Potash* approach allowed the Board to consider only whether the unit was a true craft and whether the union was one that traditionally represented and devoted itself to the special programs of the unit involved. This approach invariably lead to an automatic conclusion that the interest of the craft employees should always prevail.[18]

Mallinckrodt noted a period of technological change which influenced that decision:

> We are in a period of industrial progress and change which so profoundly affect the product, process, operational technology, and organization of industry that a concomitant upheaval is reflected in the type and standards of skills, the working arrangements, job requirements, and community of interests of employees.[19]

We may now well ask to what extent, if any, did *Mallinckrodt* affect unit determination cases involving craft severance under Executive Order 10988, section 11.

IV. POST-*MALLINCKRODT*—CRAFT SEPARATION AND RECOGNITION IN THE FEDERAL SERVICE

A. *ANALYSIS OF THE CASES*

Since the release of *Mallinckrodt* and its companion cases on 30 December 1966, only three section 11 arbitration decisions were found to have been rendered involving the subject of craft identity.

1. *Norfolk Naval Shipyard.*

In the *Norfolk Naval Shipyard* [20] case, the only craft separation decision found for 1967, the American Federation of Government

[16] *Id.* at 397 (footnotes omitted).
[17] *Id.* at 398, n. 17.
[18] *Id.* at 398, n. 16.
[19] *Id.* at 396.
[20] BNA GOV'T EMPLOYEE REL. REP. 19 (1967) (Stone, Arbitrator).

Employees (AFGE) was granted exclusive bargaining rights of a unit which included a group called Planners-Estimators and Ship-Schedulers. Another union, the Metal Trades Department (AFL-CIO) (MTD), had been accorded exclusive recognition of a unit which included the Progressmen. Subsequent to this recognition, the Planners-Estimators and Progressmen's Association (PEPA) petitioned the Department of the Navy for recognition as the exclusive bargaining unit for the Planners-Estimators, Ship-Schedulers and Ship Progressmen. The Navy Department granted and confirmed the request. Upon objection by AFGE and in accordance with section 11 of Executive Order 10988, an arbitrator was nominated to settle the unit determination dispute.

Since AFGE had represented a unit at the Norfolk Naval Shipyard which included, among others, Planners-Estimators and Ship-Schedulers, it contended that the issue was whether a unit composed of these employees could appropriately be severed [51] from the unit for which AFGE had exclusive recognition.[52]

The work of the proposed unit included such things as planning the work to be performed, estimating its cost (Planner-Estimator); deciding, on the basis of information available to them, when and where the work was to be performed (Scheduler); and expediting the work in accordance with the plan and schedule that has been previously determined (Progressman).[53]

The Navy and PEPA, the intervenor, argued that the appropriateness of the unit plainly demonstrated a similarity of skills, distinctiveness of function and an integrated work process of the jobs involved. Further, the Navy argued that "the ratings of the three crafts were closely allied allowing them to move laterally from one rating to another, and that the three ratings (Planners, Estimators and Progressmen) historically had their own union to represent them." [54] Moreover, the Navy argued that the backgrounds and skills of the three ratings were almost identical in that all started as journeymen, were required to take the same competitive examination to qualify for one of the positions, received the same rates of pay, performed work requiring the

[51] Whether this case may be characterized as one of severance is questionable since the proposed unit is composed not only of employees from the unit for which the AFGE has exclusive recognition, but also employees from a unit for which another organization has exclusive recognition, namely, the Metal Trades Department.

[52] BNA GOV'T EMPLOYEE REL. REP. 19, 20 (1967) (Stone, Arbitrator).

[53] *Id.*

[54] *Id.*

exercise of independent judgment, had a working knowledge of all the trades, and worked under substantially the same conditions and under limited supervision. The three rates dealt with each other personnel on a limited basis. Their primary contact was with each other because of the integrated work process and the constant replanning and rescheduling necessary in the course of the work.[84] More particularly, the Navy argued that the concerned employees had unique problems of their own. Their expertise created problems related to the functions of their own particular jobs, such as the amount of pay differential applicable to their ratings.

Petitioners (AFGE) argued that no severance should be allowed because the raters were engaged in a continuous interplay with the production shops and numerous other departments on a day-to-day basis; that the three rates were organizationally separate from each other; that disciplinary action could not be exercised across organizational lines; and that a community of interest existed with other employers in the unit. Further, AFGE contended that it had never refused to help solve any problems affecting any of the people in the proposed unit[86] and that evidence had failed to support the notion that another bargaining representative could do a better job.[87]

In holding for the proposed unit (PEPA), the arbitrator, Joseph M. Stone, said:

> Whether the issue is viewed as . . . one involving "severance" . . . is one of determining whether the proposed smaller unit is one with a clear and identifiable community of interest which is sufficiently distinct from that of other employees in the shipyard to justify its establishment as a separate and "appropriate" unit.[88]

Arbitrator Stone went on to state that what constitutes an "appropriate unit" must be determined on a case-by-case basis; "that a community of interest is an essential ingredient, and that such ingredient is to be found from an analysis of the skills, working conditions, supervision and location of the individuals from whom a unit is under consideration." [89]

Mr. Stone set out the relevant and less relevant factors for determining appropriateness as follows:

a. The "roots" of the employees recruited for jobs must be "deeply set in the trades." [90]

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[84] *Id.* at 21.
[86] *Id.* at 22.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.* at 23.

b. They must perform a unique function.
c. The unique function must include the exercise of judgment, and decision-making relative to what, when, where and how.

Other relevant factors are:

d. identity of rates of pay.
e. the ability to be readily transferred from one position to another within the proposed unit.
f. examination required of all members.
g. the performance of work under the same working conditions.

It should be particularly noted that in the instant case there were overlapping interests between the proposed unit and other departments, a circumstance which had heretofore operated as a bar to severance. However, Arbitrator Stone said:

> There may be an overlapping of interests on the part of all employees on the installation . . . . But, from my study of the Task Force reports, the Executive order and related literature, it seems clear that the unit should be one that will give the employees the best opportunity to participate in the formation of policies which will affect them, and accordingly the unit should include individuals whose skills, working conditions, location, function and supervision is such that it makes sense for them to deal collectively with management . . . "community of interest" . . . relates more to the relationship between supervision and those supervised and the special work problems, surroundings, and conditions surrounding the performance of a particular type of work.[91]

Finally, Arbitrator Stone indicated that the determination of appropriateness does not depend on whether representation received by employees has been adequate or responsive to their needs or whether another employee organization that may represent the employees in the proposed unit could or could not afford better representation.

2. *U.S. Naval Air Station Facility.*

In the *U.S. Naval Air Station Facility*[92] case, the International Association of Machinists was the exclusive bargaining representative on an installation-wide basis. Among other employees they represented all ungraded employees in the Public Works Department who were electrical craftsmen. It was these workers that the International Brotherhood of Electrical Workers (IBEW) sought exclusive recognition to represent. The only question was whether there existed an "identifiable community of interest among the employees concerned."[93]

[91] *Id.*
[92] BNA GOV'T EMPLOYEE REL. REP. 19 (1968) (Kagel, Arbitrator).
[93] *Id.* at 20.

The Navy argued that there was no community of interest since there was no common supervision or common physical location. The Navy, relying on the *Mallinckrodt* decision, contended that the existence of a true craft alone is insufficient for the establishment of a craft unit. They argued that the proposed unit lacked a functionally distinct department and stability.[84] The Navy supported the no community of interest argument by submitting that the electricians worked in different parts of the plant under different supervision and with other craftsmen. The final argument was that recognition would fragment the entire plant which would thwart the collective bargaining process.

On the other hand, the IBEW argued that the electrical craftsmen had a community of interest in that not only were they craftsmen, but they functioned homogeneously since their duties all involved the maintenance of electrical facilities for the base. Moreover, the electrical branch was the "parent shop" for all electrical work done on base as well as the advisor on technical electrical problems.

Holding that the proposed unit was appropriate, Arbitrator Samuel Kagel commented:

> The fact that the electricians may work in different parts of the plant under different supervision and with other craftsmen does not necessarily establish that they lack a community of interest . . . . *Even more important is the fact that the recognition of craft units is firmly established as part of federal labor law policy.*[85]

Kagel found a community of interest to exist out of the mutual interests in wages, hours and working conditions which he deemed applicable to all electrical craftsmen.

3. *U.S. Naval Oceanographic Office.*

In this case,[86] the International Brotherhood of Bookbinders (Bookbinders) petitioned the *Naval Oceanographic Office* (NOO) for severance and recognition of its union as the exclusive bargaining representative for 13 employees of the NOO's Finishing, Branching, & Lithographic Division. The employees were represented on a broader basis by the Lithographers and Photoengravers International Union (Lithographers), the intervenor in the instant case. In attempting to carry its burden of proof that the proposed unit had a clear and identifiable community of interest among the employees concerned, the Bookbinders as-

[84] *Id.*
[85] *Id.* at 21 (emphasis added).
[86] BNA GOV'T EMPLOYEE REL. REP. 27 (1968) (Holland, Arbitrator).

serted (1) that Bookbinders was a craft union;[97] (2) that the finishing section was separate from all other operations;[98] (3) that the finishing section had a physical separation, that is, was in a separate room or area, having no contract during working hours with other division employees and no interchange of employees with other departments;[99] that shop grievances were referred from the foreman to the Finishing Head and terminated at that point without the incumbent union's advice, consultation or intervention;[100] (5) that for the most part the people in the proposed unit had known each other for some years and that fifty per cent of the proposed unit ate together in the cafeteria [101] and most of the other fifty per cent brought their lunches;[102] (6) that each section of the Lithographic Division had a distinct supervisor responsible for his individual department, including the Finishing Department;[103] (7) that the chain of command at NOO was identical to that which existed at other government agencies in which Bookbinders was exclusively recognized as a craft;[104] (8) that although no apprenticeship was a condition precedent to obtain employment, the employees had an experience equivalent to satisfy craft status. Moreover, step increases were received on the basis of an employee's progress in his training; (9) that the decisions of the NLRB dealing with the problem of the appropriate unit in the private section had long recognized bindery employees as constituting a craft; and, finally (10) that the Finishing Department employees had little, if any, notification of the incumbent union meetings.[105]

On the other hand, the NOO asserted (1) that the proposed unit was presently represented on a division basis by Lithographers and had been so represented since 1963; (2) that the lithography practice at NOO fit within the terms of an integrated work process of which the Finishing Department was an integral part;[106] (3) that no community of interest existed in the unit in that (a) the finishing employees shared in a common division promotion plan, and discipline,[107] (b) a joint training

[97] Record at 20.
[98] *Id.* at 13.
[99] *Id.* at 18.
[100] *Id.* at 90–i.
[101] *Id.* at 90–h.
[102] *Id.* at 91.
[103] BNA GOV'T EMPLOYEE REL. REP. 27, 28 (1968) (Holland, Arbitrator).
[104] *Id.*
[105] Record at 90–b.
[106] *Id.* at 43.
[107] *Id.* at 44.

committee existed for all employees,[108] (c) the employees enjoyed the same work, and (d) leave and overtime were coordinated on a plant basis because of the integrated work process.

The arbitrator of this involved and complex case, Professor Thomas W. Holland, denied the craft separation. Professor Holland found the NOO to be highly integrated in plant processing. The proposed unit lacked an apprenticeship program. The men were trained on the job. This, Mr. Holland said, "is applicable to the employees in the other branches." [109] He found substantially the same working conditions as well as pivotal personnel administration policies. More important, he found that no craft skill existed at all, but rather, "an occupational group capable of performing skilled and semi-skilled work . . . ." [110]

B. *SUMMARY*

The above arbitration decisions were promulgated after the *Mallinckrodt* decision. Only Arbitrator Kagel, in *U.S. Naval Air Station Facility*,[111] cited *Mallinckrodt* specifically. The essential question is, however, to what extent, if any, did *Mallinckrodt* affect unit determination cases involving craft recognition in the federal service? To what extent will *Mallinckrodt* affect the future decisions of the Assistant Secretary of Labor for Labor-Management Relations and the Federal Labor Relations Council?

None of the above post-*Mallinckrodt* federal arbitration decisions explored *all* six "relevant" areas of inquiry specifically enumerated in *Mallinckrodt*. Each decision concentrated heavily on the community of interest question. This is understandable and quite acceptable since such a showing was prescribed by section 6(a) of Executive Order 10988.[112] To this extent the arbitration decisions satisfy the *Mallinckrodt* criterion which requires some degree of "separate identity during the period of inclusion in a broader unit . . . ." [113] Further, each arbitration decision sought to discover a homogeneity consisting of skilled workers performing jobs with roots in a craft.[114]

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[108] *Id.*

[109] *Id.* at 86.

[110] BNA GOV'T EMPLOYEE REL. REP. 27, 29 (1968) (Holland, Arbitrator).

[111] BNA GOV'T EMPLOYEE REL. REP. 19 (1968) (Kagel, Arbitrator).

[112] Exec. Order 11491, § 10(b), also requires "a clear and identifiable community of interest among the employees concerned."

[113] Mallinckrodt Chem. Works, 162 N.L.R.B. 387, 397 (1966), quoted in text at p. *supra*.

[114] *See* Norfolk Naval Shipyard, BNA GOV'T EMPLOYEE REL. REP. 19, 20 (1967) (Stone, Arbitrator).

On the other hand, there was very little discussion on the history of the incumbent unit achievements as a bargaining unit for the entire plant, naval yard, or department. No decision enumerated the achievements of the incumbent unit. Perhaps this was the fault of the incumbent union for not raising their achievements during the arbitral hearing.[117] But surely this was a vital inquiry for an arbitrator in weighing whether an incumbent unit had bargained for all of the various working groups that it represented. There were no comparisons made in the decisions between the agency, plant or department in issue and other agencies in other parts of the federal government on existing patterns of achievements in bargaining. Again, the incumbent union may have fallen short in defending itself during the arbitral hearing thereby leaving the arbitrators with a barren record to review. It must be noted, however, that the *General Service Administration*[118] decision did pivot to some extent on the fact that the proposed unit had been represented by a unit with less than exclusive recognition.[119] There is an implication that when a proposed unit sought a higher level of recognition than the incumbent unit, it asserted that it would be able to achieve more than the incumbent unit.[120]

In perhaps the most analytical of [illegible] decisions, Professor Holland dissected the integration process within NOO to combat Bookbinders' efforts to establish a community of interest. However, it should be remembered:

> Integration of a manufacturing process is a factor to be considered in unit determination. But it is not in and of itself sufficient to preclude the formation of a separate craft bargaining unit, unless it results in such a fusion of functions, skills and working conditions between those in the asserted craft group and others outside it as to obliviate any meaningful lines of separate craft identity.[121]

Professor Holland's decision in *U.S. Naval Oceanographic Office*[122] is an excellent example of the cited exception.

It is the opinion of this writer that arbitrators nominated under the Executive Order did not look very much to the criteria laid down by the NLRB in reaching their decisions. This

[117] Under Exec. Order 11491, the union and the agency should be prepared to argue bargaining history and patterns before the A.S.

[118] BNA GOV'T EMPLOYEE REL. REP. 1 (1968) (Schmertz, Arbitrator).

[119] For the differences between exclusive recognition and lesser forms of recognition under Exec. Order 10988, see note 73 *supra*.

[120] *But see* text at notes 46 and 55 *supra*.

[121] E. I. Dupont de Nemours & Co., 162 N.L.R.B. 49 (1966).

[122] BNA GOV'T EMPLOYEE REL. REP. 27 (1968) (Holland, Arbitrator).

is not to say that the decisions reached were unsound, but neither is this to say that they were industrially impeccable.

Not one of the post-*Mallinckrodt* arbitration decisions in the federal service considered the impact of the decision on other employees outside the craft but within the plant, yard or department. For example, in *U.S. Naval Air Station Facility*,[121] the Navy's primary argument was that the proposed unit of electricians worked in different parts of the plant with other craftsmen and that the recognition of the proposed unit would fragmentize the entire plant's collective bargaining process. Sam Kagel, the arbitrator, did not accept this argument but rather retreated to an *American Potash*-like position, stating that "the recognition of craft units is firmly established as part of federal labor law policy."[122] The statement is true as far as it goes. Beyond that, it leads us back to the mechanistic tests announced in *American Potash* as Kagel's decision depicts.

The same criticism may be voiced as to the *Norfolk Shipyard*[123] and *U.S. Naval Oceanographic Office*[124] cases. Neither of the arbitrators in these opinions considered the effect of their decisions on the unity and existing collective bargaining strength of other employees.

In all of the above arbitral decisions, the root problem is that of two competing interests, namely, the desire for industrial peace and stability in the federal service, which inextricably compels adherence to an established pattern of collective bargaining, against the peculiarly unique and special interest of skilled craftsmen. The desire to separate may result from many reasons. The craftsmen may believe that their agency, department, unit, production, or maintenance line is not adequately being represented or is being undermined by a majority of unskilled union members.

In the private sector, industrial peace and stability may be adversely affected if separate representation for craftsmen is allowed simply because the craftsmen are placed in a strategic strike position. But, since strikes in the federal service are illegal[125] and punishable by penal sanctions, it is apparently illogical to deny a craft severance out of fear of a work stoppage. Yet, a federal agency may still find it annoying to deal with

[121] BNA GOV'T EMPLOYEE REL. REP. 19, 20 (1968) (Kagel, Arbitrator).
[122] *Id.* at 21.
[123] BNA GOV'T EMPLOYEE REL. REP. 1 (1967) (Stone, Arbitrator).
[124] BNA GOV'T EMPLOYEE REL. REP. 27 (1968) (Holland, Arbitrator).
[125] 5 U.S.C. § 7311(3) (Supp. IV, 1969); Amell v. United States, 384 U.S. 158, 161 (1966).

separate units, which may have been the clandestine reason for administrative denials of craft severance under Executive Order 10988. Nevertheless, while annoyances or agency strife are undesirable, it must be admitted that a group of skilled federal servants should be deserving of special recognition.

To deny a craft severance merely because agency-wide bargaining exists is to deny federal workers the fullest freedom to bargain collectively through representation of their own choosing. Such a denial is contrary to the basic concept of industrial democracy which should exist in living reality in labor relations in the federal service. Under Executive Order 11491, the Assistant Secretary of Labor for Labor-Management Relations should tailor future craft recognition decisions so that they are consistent with this policy as reflected in the NLRB rulings.

SELECTIVE SERVICE LITIGATION AND THE 1967 STATUTE*

By Colonel William L. Shaw**

The major difficulties that have plagued the Selective Service System in the past three years, particularly conscientious objection, minister of religion, and draft card destruction, are discussed in this article. Legislation, significant cases, judicial review, appeals, administrative remedies, and right to counsel are covered herein. The author concludes that the present volume of litigation will enable the System to adjust now, in a period of limited offensive, so that in a general call-up, it will be prepared to handle an increased load of similar problems.

I. INTRODUCTION

On 30 June 1967, Congress extended the Universal Military Training and Service Act [1] for four years and renamed the basic statute the Military Selective Service Act of 1967 [2] (MSSA).

In 1966–1969, there has occurred a considerable volume of civil litigation centered about several features of the selective service program: the ministers of religion classification (IV–D); the conscientious objectors classification (I–O); the destruction of draft cards and notices of classification; and the extent of judicial review of selective service administrative determinations which result in orders to report for induction into the armed forces, or to report for assignment to civilian work in the national interest. This study will review briefly the vital amendments of the statute culminating in 1967 in the MSSA, court decisions since 1964, and certain proposed amendments of the

*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.

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[1] Act of 30 Jun. 1967, Pub. L. No. 90-40, § 1(1), 81 Stat. 100, *amending* 50 U.S.C. App. § 451(a) (1964) (codified at 50 U.S.C. App. § 451(a) (Supp. IV, 1969)). For the original text of the 1948 Act, see 62 Stat. 604 (1948).

[2] *Id.* at § 1(12), 81 Stat. 105, *amending* 50 U.S.C. App. § 467(c) (1964) (codified at 50 U.S.C. App. § 467(c) (Supp. IV, 1969)).

statute or the regulations to improve or refine procedures. In particular, it will be recommended that at the last stage of the administrative appellate process, the Presidential level, a registrant-appellant should be permitted to have legal counsel to advance his interests.

II. CLASSIFICATIONS AND NUMERICAL STRENGTH

The following table shows on a national basis the total number of registrants together with those shown in each Selective Service classification, and also develops the various individual manpower classifications within the Selective Service System as of 31 December 1968.[3]

Class	*Number*
Total	36,956,712
I-A and I-A-O	1,446,391
Single or married after 26 August 1965	
Examined and qualified	167,777
Not examined	353,044
Induction or examination postponed	11,586
Ordered for induction or examination	143,536
Pending reclassification	126,980
Personal appearance and appeals in process	59,736
Delinquents	23,422
Married on or before 26 August 1965	
Examined and qualified	13,126
Not examined	5,458
Induction or examination postponed	125
Ordered for induction or examination	561
Pending reclassification	1,104
Personal appearance and appeals in process	484
Delinquents	236
26 years and older with liability extended	120,396
Under 19 years of age	418,820
I-Y Qualified only in an emergency	2,849,939
I-C (Inducted)	486,531
I-C (Enlisted or commissioned)	2,445,060
I-O Not examined	7,032
I-O Examined and qualified	5,457
I-O Married, 19 to 26 years of age	852
I-W (At work)	6,402
I-W (Released)	9,262
I-D Members of a reserve component	949,185
I-S Statutory (College)	14,712
I-S Statutory (High School)	406,094

[3] SELECTIVE SERVICE, vol. 19, no. 2, Feb. 1969, at 4.

Class	Number
II-A Occupational deferment (except Agricultural)	399,296
II-A Apprentice	48,817
II-C Agricultural deferment	23,004
II-S Student deferment	1,779,630
III-A Dependency deferment	4,126,064
IV-A Completed service; Sole surviving son	2,936,299
IV-B Officials	81
IV-C Aliens	18,231
IV-D Ministers, divinity students	107,379
IV-F Not qualified	2,339,061
V-A Over age liability	16,551,933

The next table[4] reflects the manpower calls from the Department of Defense to the Selective Service System for the fiscal year 1968.

January	34,000
February	23,300
March	41,000
April	48,000
May	44,000
June	20,000
July	15,000
August	18,300
September	12,200
October	13,800
November	10,000
December	17,500
Total	299,100

The total 299,000 men called for the calendar year 1968 represents a slight increase over the 298,559 registrants called during the fiscal year 1967.[5]

The numerical strength of the armed forces on 31 October 1968, based upon a Department of Defense computation, was 3,454,160 men and women. The division among the services was as follows: Army, 1,496,011; Navy, 753,233; Marine Corps, 308,356; and Air Force, 896,560.[6] This was a decrease of 38,633

[4] Data extracted from SELECTIVE SERVICE, 1968, vol. 18. It should be understood that the men delivered to an Armed Forces Examination for Induction Station (AFES) in any month will exceed the number of men specified in the call for that month, as it is foreseen that a certain number of individuals will be rejected for physical and other reasons. For example, for the fiscal year 1967, the calls were for 288,900 men; 345,622 registrants were delivered to AFES for induction; 298,559 men were inducted. See 1967 DIR. OF SELECTIVE SECVICE ANN. REP. 30.

[5] 1967 DIR. OF SELECTIVE SERVICE ANN. REP. 30.

[6] Sacramento Union, 13 Dec. 1968, at 8.

individuals from the 30 April 1968 combined strength of 3,492,793.[7]

The following data[8] show total Selective Service calls, deliveries, and inductions for the fiscal years 1960–1967:

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
1967	288,900	345,622	298,559
Total			1,277,004

The very extent of the Selective Service operation suggests the probability of some delinquency in registration. The Department of Justice is responsible for bringing violators of the statute to trial in the federal courts. During fiscal year 1966, although the Department investigated 26,830 cases, it obtained only 353 convictions; for fiscal year 1967, there were 29,128 investigations leading to 763 convictions; during the period 1 July to 31 December 1967, 13,859 cases were investigated with a result of 324 convictions.[9] The low number of convictions results from the effort of the Department of Justice to induce delinquents to accept their obligations under the statute. Despite technical delinquencies, a registrant is encouraged to complete the Selective Service process and not to persist in his infraction.

III. SIGNIFICANT LEGISLATION AND LITIGATION OF PRIOR YEARS

A. *THE ACT OF 17 MAY 1917*

Congress enacted, on 17 May 1917, "An Act to Authorize the President to Increase Temporarily the Military Establishment of the United States," commonly known as the Selective Service Act of 1917.[10] There was recognized an obligation to perform military service from the time of the beginning of the war. The statute was conceived as a means of raising an army and, inci-

[7] SELECTIVE SERVICE, vol. 18, no. 7, Jul. 1968, at 4.

[8] 1967 DIR. OF SELECTIVE SERVICE ANN. REP. 30.

[9] FIRST SEMI-ANNUAL REPORT OF THE DIRECTOR, 1 Jul.-31 Dec. 1967, at 11. The failure of a registrant to report for induction must have been "willful," *i.e.*, with criminal intent, and not inadvertent in order to support a conviction. United States v. Rabb, 394 F. 2d 230 (3d Cir. 1968).

[10] Ch. 15, 40 Stat. 76 (1917).

dentally, a navy.[11] The operational details of the system were not set forth within the statute, but were to be promulgated as regulations by the President. There was to be one *local board of three civilians in each county. No board member was to be associated with the military.* The local boards were to register, classify, defer, cause to be physically examined, and transport the registrants. Claims for deferment because of *occupation* were made to a district board of five members chosen on the basis of their knowledge of occupational conditions. Males between the ages 21–30 were required to register. Exempted were certain legislative, executive and judicial officers of the federal and state governments; regular or duly ordained ministers of religion and divinity students in recognized schools; and members of any well-recognized sect whose principles forbade its members to participate in war in any form.[12]

B. *THE SELECTIVE DRAFT LAW CASES AND RELATED CASES*

In the *Selective Draft Law Cases,*[13] the 1917 Selective Service law was upheld as constitutional. The Court reasoned that Congress in the exercise of its power to declare war and to raise and support armies may exact military duty at home and abroad from citizens. The Court saw no illegal delegation of federal power to state officials nor an improper vesting of legislative or judicial authority in administrative officers. The first amendment restriction upon the establishment of a religion or an interference with free exercise of religion was not thwarted by allowing exemption to the members of certain religious sects.

[11] SELECTIVE SERVICE SYSTEM MONOGRAPH No. 16, PROBLEMS OF SELECTIVE SERVICE 46 (1952) [hereafter cited as SEL. SERV. PROBLEMS].

[12] Ch. 15, 40 Stat. 76–83 (1917). During the course of the war, nearly 24,000,000 men, aged 18–45 years, were registered in civilian boards located in 4,600 communities. 2,810,296 registrants were inducted into the military service (SEL. SERV. SYS. MONOGRAPH No. 1, BACKGROUND OF SELECTIVE SERVICE 81 (1947)), or 67 per cent of the total war strength (U.S. DEP'T OF ARMY ROTC MANUAL No. 145–20, AMERICAN MILITARY POLICY 1607–1953, at 339 (1956)).

[13] 245 U.S. 366 (1918). The Federal Enrollment Act of 3 Mar. 1863, ch. 75, 12 Stat. 731, was upheld in a state court in Kneedler v. Lane, 45 Pa. 238, 295 (1863), by a 3–2 decision. The Confederate Conscription Act of 16 Apr. 1862 (Const. & Stats. CSA, 1st Cong., 1st Sess., ch. 31 (1862)) was upheld in numerous decisions, including Barber v. Irwin, 34 Ga. 28 (1864) Jeffers v. Fair, 33 Ga. 347 (1862); Simmons v. Miller, 40 Miss. 19 (1864); Ex parte Coupland, 26 Tex. 387 (1862); Burroughs v. Peyton, 57 Va. (16 Gratt.) 470 (1864).

Military duty was not regarded as repugnant to the thirteenth amendment prohibition upon involuntary servitude.

The 1917 Act was held not to violate due process,[14] nor to constitute an unlawful delegation of legislative power to the Secretary of War,[15] nor to constitute class legislation or improper discrimination between classes of persons.[16] The federal courts were not deprived of a right to pass upon exemptions, as the local boards did not exercise judicial functions.[17] The local boards were not to be considered courts, although the boards possessed quasi-judicial powers.[18] Moreover, the law was not an infringement upon states' rights, as an invasion of the reserved powers of the states, nor was it an interference with the police power of the state.[19] A registrant was not compelled to be a witness against himself because he was required to exhibit a registration card,[20] and the Act was not *ex post facto* as to an alien who had not become a citizen, although he had taken out his first naturalization papers.[21]

A draftee could not utilize habeas corpus to test in advance whether or not he should be inducted into the Army.[22] Convictions were upheld for making false statements in connection with the statutory process,[23] for failure to register,[24] for conspiracy to induce men not to register,[25] for circulating pamphlets designed to interfere with the law application,[26] and for conspiring to obstruct enlistment and recruitment.[27]

C. *THE SELECTIVE TRAINING AND SERVICE ACT OF 1940*

The Selective Training and Service Act, commonly called the

[14] Angelus v. Sullivan, 246 F. 54 (2d Cir. 1917).
[15] United States v. Casey, 247 F. 362 (S.D. Ohio 1918).
[16] United States v. Sugar, 243 F. 423 (E.D. Mich. 1917).
[17] *Id.*
[18] United States v. Stephens, 245 F. 956 (D. Del. 1917) *aff'd*, 247 U.S. 504 (1918).
[19] United States v. Casey, 247 F. 362 (S.D. Ohio 1918).
[20] United States v. Olson, 253 F. 233 (D. Wash. 1917).
[21] United States *ex rel.* Pfefer v. Bell, 248 F. 992 (E.D. N.Y. 1918).
[22] *Cf.* Jones v. Perkins, 245 U.S. 390 (1918).
[23] O'Connell v. United States, 253 U.S. 142 (1920).
[24] Jones v. Perkins, 245 U.S. 390 (1918).
[25] Goldman v. United States, 245 U.S. 474 (1918).
[26] Pierce v. United States, 252 U.S. 239 (1920).
[27] Schenck v. United States, 249 U.S. 47 (1919) (Holmes, J.). *See also* Frohwerk v. United States, 249 U.S. 204 (1919) (Holmes, J.). Both cases are conspiracy prosecutions under the Espionage Act, 20 Stat. 217 (1917), and not the Selective Draft Act.

Burke-Wadsworth Act, became effective on 16 September 1940,[28] and was operative until 31 March 1947, approximately six and one-half years. Between these years, 50 million men were registered for military or civilian service, 36 million registrants were classified, and 10 million were inducted into the armed forces of the United States.[29]

A common misconception is that the statute functioned only to produce men for the armed forces. While this was a prominent feature of the Act, it was but one of four functions. These were: (1) selection of men for service with the armed forces; (2) selection of registrants for deferment, if actually engaged in an activity essential to the national health, safety and interest; (3) conduct of work of national importance under civilian direction for conscientious objectors to duty in the armed forces; and (4) assistance to veterans in getting back the jobs they held before entering the military, or in finding new employment.[30]

D. *THE FALBO DECISION*

In *Falbo* v. *United States*,[31] the operation of selective service under the 1940 statute was aptly described in its essentials. The Court affirmed the conviction of a conscientious objector who had willfully failed to comply with a local board order directing him to report for assignment to civilian work in the national interest. The Court stated:

> The selective service process begins with registration with a local board composed of local citizens. The registrant then supplies certain information on a questionnaire furnished by the board. On the basis of that information and, where appropriate, a physical examination, the board classifies him in accordance with standards contained in the Act and the Selective Service Regulations. It then notifies him of his classification. The registrant may contest his

[28] Ch. 720, § 17, 54 Stat. 897.

[29] SELECTIVE SERVICE SYSTEM MONOGRAPH NO. 17, THE OPERATION OF SELECTIVE SERVICE 4 (1955).

[30] *Id.* at 15. Writers about the operation of the 1940 statute, and particularly those whose articles appear in law periodicals, seem to overlook those phases of the Selective Service Law which are not concerned with the processing of men to the military. The second and fourth functions discussed above are usually disregarded, and the third function may be minimized. This observation also applies to the 1948 and 1967 statutes. The writer suggests that the induction of men into the military represents about a one-quarter of the activity of the present system. The greater fraction is concerned with the specific retention of registrants in industry, agriculture, government, the healing arts, schools, colleges, seminaries, and the ministry. A vast number of men are left undisturbed in civilian life because of the family hardships which would ensue if they were placed in the military.

[31] 320 U.S. 549 (1944).

classification by a personal appearance before the local board, and if that board refuses to alter the classification, by carrying his case to a board of appeal, and thence, in certain circumstances, to the President.

Only after he has exhausted this procedure is a protesting registrant ordered to report for service. If he has been classified for military service, his local board orders him to report for induction into the armed forces. If he has been classified a conscientious objector opposed to noncombatant military service, as was petitioner, he ultimately is ordered by the local board to report for work of national importance. In each case the registrant is under the same obligation to obey the order.[32]

IV. THE SELECTIVE SERVICE ACT OF 1948 AS AMENDED

A. *NECESSITY FOR THE STATUTE*

One reflection of the mounting tensions of the Cold War was the restoration of selective service in the form of the Selective Service Act of 1948,[33] which basically followed the framework of the 1940 statute. All male citizens and aliens between the ages 18 and 26 years [34] were registered, and the age of induction was 19 to 26 years.[35] The period of military service was 21 consecutive months unless sooner discharged.[36] A Selective Service System was established with a National Headquarters, a State Headquarters in each state, and a District Headquarters in the District of Columbia.[37]

In 1951, the statute was renamed the Universal Military Training and Service Act (UMT&SA).[38] The induction age was lowered to 18 years and six months while the period of service was 24 consecutive months or less.

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[32] *Id.* at 552–53 (footnotes omitted) (Black, J.). After the cessation of hostilities in 1945, the Act was extended to 15 May 1946 (Act of 9 May 1945, ch. 112, 59 Stat. 166), then to 1 Jul. 1946 (S. J. Res. of 14 May 1946, ch. 253, 60 Stat. 181), and finally to 31 Mar. 1947 (Act of 29 Jun. 1946, ch. 522, § 7, 60 Stat. 342) when the Act expired. The Office of Selective Service Records was created and functioned from 31 March 1947 to liquidate the Selective Service System and to service and preserve the records (Act of 31 Mar. 1947, ch. 26, 61 Stat. 31).

[33] Ch. 625, tit. I, 62 Stat. 604 (codified at 50 U.S.C. App. §§ 451–73, *as amended*, (Supp. IV, 1969)).

[34] 50 U.S.C. App. § 453 (1964).

[35] Ch. 625, tit. I, § 4(a), 62 Stat. 606, *as amended*, 50 U.S.C. App. § 454(a) (1964).

[36] *Id.* at § 4(b), 62 Stat. 606, *as amended*, 50 U.S.C. App. § 454(b) (1964).

[37] 50 U.S.C. App. § 460 (1964).

[38] Ch. 144, tit. I, § 1(a), 65 Stat. 75 (1951). There was comparatively minor opposition to the periodic extensions of the Act. For example, the 1959 extension for four additional years until 1963 (Act of 23 Mar. 1959, Pub. L. No.

B. *CONSTITUTIONALITY OF THE STATUTE*

The constitutionality of the successive selective service statutes from 1940 onward has been sustained without exception. In *Warren* v. *United States*,[39] which involved the conviction of one who knowingly advised another not to register, the 1948 Act was upheld. The court took judicial notice that in 1948, the balance between war and peace was so delicate that no one could forecast the future, and the national security of this country required the maintenance of adequate military, naval and air establishments.

In *United States* v. *Bethlehem Steel Corp.*, the Supreme Court upheld the power in Congress not only to draft men for battle service, but to "*draft business organizations* to support the fighting men . . . ." [40] Each separate but related authority was necessary to raise and support armies.

The hostilities in Korea caused a rapid utilization of the ready Selective Service System facilities. Although there were no calls for inductees during the first six months of 1950, from August through December 1950, 226,667 registrants were inducted.[41] A total of 1,895,431 registrants were received from August 1950 through June 1954.[42]

A so-called Doctors' Draft Law was enacted by Congress. The 1948 Act was amended to authorize the President to require the *special registration* of and *special calls* for males in needed medical, dental and allied special categories who had not passed the age of *50 years* at the time of the special registration.[43] By February 1951, there had been registered 90,832 physicians, 33,982 dentists, and 6,925 veterinarians or a total of 131,739 doctors.[44]

86–4, § 1, 73 Stat. 13) was adopted by a favorable vote of 34–1 in the House Armed Services Committee and a vote of 381–20 in the House of Representatives (*Hearings on H.R. 2260 Before the House Committee on Armed Services*, 86th Cong., 1st Sess. 176 (1959)). In 1963, the Act was extended through June 1967 (Act of 28 Mar. 1963, Pub. L. No. 88–2, § 1, 77 Stat. 4).

[39] 177 F. 2d 596 (10th Cir. 1949), *cert. denied*, 338 U.S. 947 (1950) (no lack of due process, no unlawful delegation of powers by Congress). For other opinions disposing of constitutional objections, see George v. United States, 196 F. 2d 445 (9th Cir.), *cert. denied*, 344 U.S. 843 (1952) (no establishment of religion); Richter v. United States, 181 F. 2d 591 (9th Cir.), *cert. denied*, 340 U.S. 892 (1950) (no violation of religious freedom); United States v. Henderson, 180 F. 2d 711 (7th Cir.), *cert. denied*, 339 U.S. 963 (1950) (in exercise of its war power, Congress can pass a draft law in peace time).

[40] 315 U.S. 289, 305 (1941) (emphasis added).

[41] *See* 1954 DIR. OF SELECTIVE SERVICE ANN. REP. 84.

[42] *Id.*

[43] 50 U.S.C. App. § 454(i) (1964).

[44] 1951 DIR. OF SEL. SERV. REP. 31 (1951).

The President was directed to establish a National Advisory Committee to counsel the Selective Service System with respect to medical personnel and like specialists.[45] The constitutionality of the Doctors' Draft was upheld.[46] Congress provided that a doctor who failed to seek and accept a commission could be used in an enlisted grade.[47]

V. THE PROBLEM OF CONSCIENTIOUS OBJECTORS AND MINISTERS OF RELIGION

A. *THE 1951 STATUTE APPLICATION*

The statutory exemption for concientious objectors (CO) and for ministers of religion has led to extensive litigation since 1940. More than in any other area of selective service law, the problem of the CO and of the alleged minister has proved to be a source of controversy at both the administrative level and in connection with judicial review.

The 1951 Universal Military Training and Service Act[48] in section 6(j) with reference to CO's provided in vital part:

> 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 participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.[49]

Section 6(j) then established that as an alternative to military service, the CO was subject to service in civilian work contributing to the maintenance of the national health, safety or interest. In an appeal from the local board to the appeal board in the instance of an alleged CO, the matter was referred to the Department of Justice which would conduct a hearing and return a recommendation to the board.[50]

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[45] 50 U.S.C. App. § 454(j) (1964).

[46] Bertelsen v. Cooney, 213 F. 2d 275 (5th Cir), *cert. denied*, 348 U.S. 856 (1954). *Cf.* Orloff v. Willoughby, 345 U.S. 83 (1953), denying habeas corpus to release an inducted doctor who had been refused a commission as a captain in the Medical Corps when he declined to state whether or not he had ever been a member of the Communist Party.

[47] 50 U.S.C. App. § 454a(a) (1964).

[48] Ch. 144, 65 Stat. 75 (1951) (*codified as amended*, at 50 U.S.C. App. §§ 451–73 (1964), *and* (Supp. IV, 1969)).

[49] Ch. 625, tit. I, § 6(j), 62 Stat. 612, *as amended*, 50 U.S.C. App. 456(j) (Supp. IV, 1969).

[50] See Sicurella v. United States, 348 U.S. 385 (1955), where a conviction

As to ministers of religion, the Universal Military Training and Service Act in section 6(g) [51] exempted regular or duly ordained ministers of religon, and also students preparing for the ministry under the direction of recognized churches or religious organizations who were satisfactorily pursuing a full-time course of instruction in recognized divinity schools.

Section 16(g)(2) [52] defined the term "regular minister of religion" as:

> one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect or organization as a regular minister.

Section 16(g)(3) of the Universal Military Training and Service Act provided that the exempt regular or duly ordained minister did not include "a person who *irregularly or incidentally* preaches and teaches . . . or [one who having] been duly ordained a minister . . . does not regularly, as a vocation, teach and preach the principles of religion . . . ." [53]

The term "minister of religion" must be interpreted in accordance with the intent of Congress.[54] The duty rests upon the local board to determine whether a registrant is in reality a minister of religion.[55] The registrant's status is adjudged as the facts are presented to the local board.[56] The exemption granted to a minister is a narrow one and the burden is upon the registrant to establish that he is entitled to the ministerial classification, IV–D.[57]

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of a registrant was set aside because of an error of law by Department of Justice. A registrant could not be denied exemption because he believed in a theocratic or religious war which was not contemplated within the statute. In Simmons v. United States, 348 U.S. 397 (1955), the omission of the Department to furnish to the registrant a fair resume of all adverse information in the FBI report was held to constitute reversible error since it deprived him of an opportunity to defend himself, and so also deprived him of a fair hearing.

[51] This exemption is retained by the present law. 50 U.S.C. App. § 456(g) (1964).

[52] This definition is retained by the present law. 50 U.S.C. App. § 466(g) (1964).

[53] This exclusion is retained by the present law. 50 U.S.C. App. 466(g)(3) (1951).

[54] Neal v. United States, 203 F. 2d 111, 117 (5th Cir.), *cert. denied*, 345 U.S. 996 (1953); Swaczyk v. United States, 156 F. 2d 17 (1st Cir.), *cert. denied*, 329 U.S. 726 (1946).

[55] Martin v. United States, 190 F. 2d 775, 777 (4th Cir.), *cert denied*, 342 U.S. 872 (1951).

[56] *See* Cox v. United States, 332 U.S. 442, 453–54 (1947).

[57] Dickinson v. United States, 346 U.S. 389, 395 (1953).

The minister-registrant may engage in some degree of secular employment.[58] The amount of such secular work will be scrutinized by the local board as part-time preaching may show that the ministry is a mere incidental avocation.[59]

A divinity student's status depends upon such factors as the character of the seminary and whether his studies are directed toward his becoming a recognized clergyman.[60] The student must be satisfactorily pursuing a full-time course in a recognized school.[61] The burden is upon the student-registrant and the board will consider and weigh the available facts.[62]

There is a certain amount of interrelationship between the ministerial exemption claimant (IV-D) and the CO (I-O). Although the registrant may fail to receive ministerial classification, he may have proved a conscientious objection to war. Congress has deemed it more essential to respect the religious beliefs of a bona fide CO than to compel him to serve in the armed forces.[63] However, unlike the minister who is accorded IV-D status, the *CO must perform directed civilian service* in work contributing to the national health, safety or interest.[64] "Religious training and belief" within the meaning of section 6(j) of the 1951 Act [65] has not been equated to political, sociological, or philosophical views or a personal moral code.[66]

As the subjective beliefs of an alleged CO may not be proved readily as a matter of evidence, the local board may consider his demeanor and his credibility in order to *appraise his sin-*

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[58] *Id.*

[59] *Id.*; *accord*, United States v. Hill, 221 F.2d 437 (7th Cir.), *cert. denied*, 349 U.S. 964 (1955).

[60] United States *ex rel.* Levy v. Cain, 149 F.2d 338, 341 (2d Cir. 1945).

[61] United States v. Bartelt, 200 F.2d 385, 388 (7th Cir. 1952).

[62] United States *ex rel.* Yaroslawitz v. Fales, 61 F. Supp. 960, 963 (S.D. Fla. 1945).

[63] Riles v. United States, 223 F.2d 786, 792 (5th Cir. 1955).

[64] Roodenko v. United States, 147 F.2d 752 (10th Cir. 1944), *cert. denied*, 324 U.S. 860 (1945).

[65] Ch. 625, tit. I, § 6(j), 62 Stat. 612 (1948). As will be discussed more fully, *infra*, the present wording of section 6(j) in the MSSA has been shortened to: "As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal code." 50 U.S.C. App. § 456(j) (Supp. IV, 1969).

[66] United States v. Kauten, 133 F.2d 703 (2d Cir. 1943) (Augustus Hand, J.). *But see* Welsh v. United States, 404 F.2d 1078 (9th Cir. 1968), *cert. granted*, 38 U.S.L.W. 3127 (U.S. 9 Oct. 1969) (Catholic convicted for refusing induction under 1951 statute, claims that the "religious training and belief" clause is an unconstitutional establishment of religion) and authorities cited at note 120, *infra*.

cerity.[67] The burden is upon the registrant to prove that he is a CO.[68] Facts which bear upon a registrant's sincerity as a CO may include such items as membership in military organizations,[69] derelictions as a youth,[70] willingness to hunt wild game,[71] family background,[72] and time spent in religious activities.[73] Employment for five years in a defense plant and a belief that this nation should use force to protect itself was a basis in fact to support denial of CO status.[74]

VI. THE MILITARY SELECTIVE SERVICE ACT OF 1967

A. *CONSCIENTIOUS OBJECTORS*

The 1967 statute,[75] the MSSA, has made certain vital changes in both form and substance in the matter of the processing of the claim of a CO to an ultimate classification. The general procedure continues to be that a registrant is required to inform his local board of his claim to be a CO. He completes a detailed questionnaire, Form No. 150(B),[76] which sets forth extensive personal information of a biographical nature and develops a statement of his religious practices and beliefs as bearing upon conscientious objection.

If the local board grants the CO claim and classifies the registrant I-O,[77] he need take no further action. If the board refuses to grant I-O status, the registrant has a right to a personal appearance before the local board in order to urge the merits of

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[67] *See* Witmer v. United States, 348 U.S. 375, 382 (1955); White v. United States, 215 F.2d 782, 785 (9th Cir. 1954), *cert. denied*, 348 U.S. 970 (1955).

[68] *See* 32 C.F.R. § 1622.1(c) (1969); Hunter v. United States, 393 F.2d 548 (9th Cir. 1968).

[69] United States v. Borisuk, 206 F.2d 338 (3d Cir. 1953); *accord*, United States v. Corliss, 280 F.2d 808, 816 (2d Cir. 1960), *cert. denied*, 364 U.S. 884 (1961), where the registrant previously had sought to enroll in a military college and later to join the Naval Reserve.

[70] *Cf.* Rempel v. United States, 220 F.2d 949 (10th Cir. 1955). The defendant, a Mennonite, showed derelictions as a youth including disturbing the peace, speeding, and vehicle warnings as to driving. The court characterized these as "minor incidents."

[71] *Id.*

[72] *Cf.* Annett v. United States, 205 F.2d 689 (10th Cir. 1953).

[73] Jeffries v. United States, 169 F.2d 86 (10th Cir. 1948).

[74] Hunter v. United States, 393 F.2d 548 (9th Cir. 1968).

[75] 50 U.S.C. App. §§ 451–73 (Supp. IV, 1969).

[76] 32 C.F.R. § 1621.11 (1969).

[77] 32 C.F.R. § 1622.14 (1969). This classification should be distinguished from I-A-O (eligible for noncombatant military duty) described in 32 C.F.R. § 1622.11 (1969).

his claim.[78] If, following the appearance, the board does not alter his classification, the registrant can appeal to the Appeal Board.[79] The time for appeal, initially ten days from the date the local board mailed to the registrant a Notice of Classification (SSS Form 110), was increased to thirty days.[80]

If there is a divided vote at the Appeal Board level, the registrant can take a further appeal to the Presidential Appeal Board.[81] However, the Director of Selective Service or any State Director could appeal to the President from any determination of an Appeal Board whether divided or unanimous.[82]

Before the MSSA, a registrant seeking a CO classification had a vital additional protection of the fairness of the determination of his claim. As a preliminary to the Appeal Board adjudication, the statute required that there be a hearing as to the "character and good faith" of the registrant which was achieved in a reported proceeding conducted by the Department of Justice. After the hearing, the Department made a written recommendation to the Appeal Board concerning the merits of the registrant's CO claim.[83] Generally, the Appeal Board followed this recommendation.

Since MSSA, the provision for a Department of Justice hearing has been eliminated from the statute.[84] Further, the scope

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[78] 32 C.F.R. § 1624 (1969). See Vaughan v. United States, 404 F.2d 586, 591 (8th Cir. 1968), which held that the Selective Service form need not be used by the registrant if he sets forth his claim in a letter.

[79] 50 U.S.C. App. § 460(b)(3) (Supp. IV, 1969); 32 C.F.R. § 1626.2 (1969).

[80] 32 C.F.R. § 1624.1(a) (1969), *amending* Exec. Order No. 9988, 13 Fed. Reg. 4874 (1948).

[81] 32 C.F.R. § 1627.3 (1969). The President's power to alter the results of the appeal boards is conferred by 50 U.S.C. App. § 460(b)(3) (Supp. IV, 1969).

[82] 32 C.F.R. § 1627.1–.2 (1969). Such appeals may be taken when either the state or national director ". . . deems it to be in the national interest or necessary to avoid an injustice. . . ." *Id.* at § 1627.1(a).

[83] Selective Service Act of 1948, ch. 625, tit. I, § 6(j), 62 Stat. 612–13. In United States v. Purvis, 403 F.2d 555 (2d Cir. 1968), a conviction was reversed where the defendant and other witnesses denied the statements attributed to them before the hearing officer; it was regarded as "unfair" for the Department of Justice to make recommendations before the registrant could respond to the hearing officer.

[84] 50 U.S.C. App. § 456(j) (Supp. IV, 1969). The abolition of the Department of Justice hearing is regarded as imposing a duty upon the reviewing court to scrutinize more carefully the record of the local board, United States v. St. Clair, 293 F. Supp. 337 (E.D. N.Y. 1968). In United States v. Haughton, 290 F. Supp. 422 (D. Wash. 1968), the defendant's appeal from denial of CO status was received on 29 May 1967. The MSSA amendments became effective on 30 June 1967. No Department of Justice hearing was held. The court ruled that the provisions of MSSA applied to the defendant, and that no hearing was required.

of judicial review has been regularized by statutory provision for a "basis in fact" test.[85]

In *Lingo* v. *United States*,[86] the defendant had been convicted in a district court of refusal to be inducted into the armed forces. The defendant registered in December 1959. In November 1962, he first filed a CO questionnaire claiming to be a student preparing for the ministry of Jehovah's Witnesses (JW). After a personal appearance in December 1962, he was classed I-A, and appealed. The Department of Justice hearing officer noted that the defendant was inactive in congregational work before being classed I-A, and concluded that the defendant lacked *sincerity*. The Appeal Board classed him I-A, and the Director of Selective Service appealed at the request of the defendant. The Presidential Appeal Board affirmed the I-A classification. Subsequently, when ordered to report, the defendant refused to accept induction. The court affirmed the conviction of the defendant. The circumstance that the defendant increased his church work *after* being classed I-A was a factor going to his sincerity. The scope of judicial review is limited to the question whether there is *any basis in fact* for the classification given to the registrant. The court noted:

> Inferences of insincerity in claiming conscientious objection to participation in war could properly be drawn from the frailty of his claim for ministerial student deferment, from his conflicting statements as to the time when his religious beliefs were formed, from his inconsistent statements regarding the extent of his involvement in church activities, and from the fact that he greatly accelerated his church activity following his I-A classification by the Local Board."[87]

A leading case is *Martinetto* v. *United States*.[88] The defendant JW was convicted of failure to obey an order to appear before his local board for instructions to report for civilian work.[89] The

[85] 50 U.S.C. App. § 460(b)(3) (Supp. IV, 1969). For a discussion of this provision, see text at note 155 *infra*.

[86] 384 F.2d 724 (9th Cir. 1967).

[87] *Id.* at 727.

[88] 391 F.2d 346 (9th Cir. 1968). A registrant does not have to obey an illegal order which is treated as if it were not an order at all. Brede v. United States, 396 F.2d 155 (9th Cir.), *rehearing denied*, 400 F.2d 599 (1968) (reversing a conviction for failure to report for civilian work when the order had been issued by an employee of the local board without a meeting or the approval of the board); *accord*, Cupit v. United States, 292 F. Supp. 146 (W.D. Wis. 1968).

[89] 32 C.F.R. § 1660.20 (1969) provides that when an I-O (CO) registrant is physically qualified, he shall discuss with his local board the type of civilian work acceptable to him and which contributes to the maintenance of the national health, safety or interest. If the board and the registrant are unable to agree as to a type of civilian work, the State Director or his representative

defendant, classed I-O by the local board, and denied IV-D classification as a minister, was ordered to report to the Los Angeles County Department of Charities. He failed to report and the prosecution followed. The trial court had instructed the jury that the issue involved was whether or not the defendant knowingly failed to report for civilian work. The jury could not review or determine the basis of the grant of I-O classification to the defendant. The court of appeals held that the lower court properly excluded any evidence bearing upon I-O classification and had correctly instructed the jury that proof went only to the sole issue of whether the defendant knowingly refused to report. It was a question for the trial judge, to be answered from the administrative record whether the I-O classification rested upon a basis in fact.

In *Loewing* v. *United States*,[90] the court affirmed the conviction of the defendant JW for failing to report for civilian work. The sincerity of the defendant was not questioned. He relied upon the first amendment and an alleged deprivation of his religious rights. The court saw no involvement of the first amendment, as the Constitution does not exempt a registrant from military service in the armed forces because of his religious beliefs. Although " . . . [a]n individual has the right to determine and hold his own religious beliefs . . ., when they collide with the power of Congress, the latter prevails." [91]

The sincerity of the defendant was challenged in *Salamy* v. *United States*.[92] The defendant JW was convicted of refusal to submit to induction. Ten days after he had been found physically

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shall meet with the local board and the registrant and endeavor to arrive at an agreement. If this proves unsuccessful, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for a chosen civilian work. See Brede v. United States, 396 F.2d 155, 157 (9th Cir. 1968), for a brief description of a meeting of the board members with the registrant to determine the type of civilian work. The registrant must complete required civilian work questionnaire forms, Elizarraraz v. United States, 400 F.2d 898 (5th Cir. 1968). In Burton v. United States, 402 F.2d 536 (9th Cir. 1968), the care of animals in a zoo, which was the regular occupation of the defendant, was not acceptable civilian work in the national interest.

[90] 392 F.2d 218 (10th Cir.), *cert. denied*, 393 U.S. 878 (1968). In point is the reasoning of the 9th Circuit in Richter v. United States, 181 F.2d 591, 593 (9th Cir. 1950), *cert. denied*, 340 U.S. 892 (1952): "Congress can call everyone to the colors, and no one is exempt except by the grace of Congress. . . . There is no constitutional right to exemption from military service because of conscientious objection or religious calling."

[91] 392 F.2d 218, 219 (1968).

[92] 379 F.2d 838 (10th Cir. 1967). On the issue of the sincerity of the registrant, see Olguin v. United States, 392 F.2d 329 (10th Cir. 1968).

acceptable, the defendant sought a hardship deferment (III-A), and completed a questionnaire in which no mention was made of religious scruples. He made a personal appearance and developed facts concerning his aged father who was claimed to be a dependent. One month later he submitted a CO form, but was denied CO status by his board. The appeal board, in response to a Department of Justice recommendation, denied the CO claim. The appellate court pointed out that in a selective service matter, the court does not weigh the evidence. An administrative classification will be overturned only if it had no basis in fact. In determining the sincerity and good faith of the defendant, the appeal board could consider the original disclaimer of CO status, the first request for hardship deferment, and the development of a CO claim when military service became imminent.

A novel argument was presented in *United States* v. *Spiro*.[93] The defendant asserted discrimination against him on the ground that he would fight only in a secularly "just war" and was liable to induction, whereas a JW would fight in a theocratic war (Armageddon) and might be allowed CO status. The court was impressed that the defendant did not establish his CO contention at the Department of Justice level. Further, the possible grant of CO status to JW's who would fight a theocratic type of war was not a denial of the same status to the defendant. Equal protection of the laws was not involved. Additionally, the court saw no prejudice to the defendant who claimed that he was not advised at the local board that a government appeal agent was appointed for that board and could advise the defendant as to his rights. The court held that the omission at the board level to discuss government appeal agents with the defendant did not establish prejudice as the defendant could observe on the board's bulletin board the names of the government appeal agent and the advisors to registrants.

In CO cases, any fact which casts doubt on the veracity of the registrant is relevant. In *United States* v. *Gearey*,[94] the local board could properly consider that the defendant made his CO claim *after he received an induction notice*. A claim to be a CO could

[93] 384 F.2d 159 (3d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968). The "just war" notion is discussed briefly in Sweeney, *Selective Conscientious Objection: The Practical Moral Alternative to Killing*, 1 LOYOLA U. L. A. L. REV. 113, 122 (1968). The concept is attributed to St. Augustine. The difficulty of course is to apply the distinction of "just" or "unjust" to twentieth century undeclared wars or national conflicts involving only a partial mobilization of men and materiel.

[94] 379 F.2d 915 (2d Cir.), *cert. denied*, 389 U.S. 995 (1967).

not be asserted for the first time while the matter was in the course of judicial review as this is obviously belated.[95]

The courts of appeal have arrived at contrary decisions when a registrant has sought to file a claim for CO status *after* he has been ordered to report for induction. The Fourth Circuit has seen no need for the local board to grant a hearing under such circumstances.[96] A Ninth Circuit decision arrived at the same result.[97] However, in another Ninth Circuit decision, the court concluded that the local board was required to reopen the case, if necessary, to consider such a CO claim made after order to report.[98] The Second Circuit has also so held, even where the CO claim was first urged at the induction center.[99] The Ninth Circuit has directed a remand to determine whether the personnel of the local board in fact refused to allow a claim to be made on the day before the registrant's scheduled induction.[100]

In a leading case,[101] *the defendant failed to report for induction* on 18 March, and on 21 March filed a CO form with his local board. Although he had not reported, the board considered the form, denied CO application, and mailed a I-A notice which was not appealed. In a pretrial motion to remand to the local board, the defendant asserted that as a Negro, he could not conscientiously serve in the armed forces of a nation whose laws and customs allegedly did not afford him the same opportunities allegedly extended to white citizens. The court denied the motion on the basis that the grounds asserted by the defendant were *frivolous. The case showed resort by the defendant to use of a*

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[95] Martinez v. United States, 384 F.2d 50 (10th Cir. 1967).

[96] United States v. Helm, 386 F.2d 434 (4th Cir. 1967), *cert. denied*, 390 U.S. 995 (1968). Mr. Justice Douglas would have granted certiorari. The 4th Circuit relied upon its similar ruling in United States v. Al-Majied Muhammad, 364 F.2d 223 (4th Cir. 1966). As to the use of Selective Service System Form No. 150, see 32 C.F.R. § 1622.11 (1969).

[97] United States v. Dugdale, 389 F.2d 483 (9th Cir. 1968); *accord*, Kroll v. United States, 400 F.2d 923 (3d Cir. 1968), *cert. denied*, 393 U.S. 1069 (1969); Nelloms v. United States, 399 F.2d 295 (5th Cir. 1968), *cert. denied*, 393 U.S. 1071 (1969).

[98] United States v. Miller, 388 F.2d 973 (9th Cir. 1967) (registrant told local board he was a CO and requested SSS Form 150 before he received the induction notice); *accord*, United States v. Hinch, *292 F. Supp. 696 (W.D.* Mo. 1968) (registrant requested SSS Form 150 *after* receiving induction notice). United States v. Sandbank, 403 F.2d 38 (2d Cir. 1968) held that a claim could be asserted after receipt of the order, but the defendant in the case then was unable to make out a prima facie case that he was entitled to be reclassified. *Accord*, Oshatz v. United States, 404 F.2d 9 (9th Cir. 1968).

[99] United States v. Stafford, 389 F.2d 215 (2d Cir. 1968).

[100] United States v. Boswell, 390 F.2d 181 (9th Cir. 1968).

[101] United States v. Lewis, 275 F. Supp. 1013 (E.D. Wis. 1967).

CO form as a means of apparently forestalling military service which had become in his words, "more pressing."

A Black Muslim was convicted of failing to submit to induction when his CO claim was made on the day after he refused induction.[102] The court stated that "belated development of conscientious objection is not a change of status beyond the control of the registrant." [103] Additionally, the court saw no error in the United States Attorney's exercise of peremptory challenges to exclude three Negro veniremen otherwise qualified to serve as jurors. Peremptory challenges may be exercised without reasons being stated, and the exclusion of veniremen in one trial is not an instance of a systematic use of the challenge to exclude Negroes in "case after case," which may become improper.[104]

A conviction of a CO was reversed where, in the absence of a personal appearance by the registrant, there could not have been an appraisal of attitude and sincerity by the local board members. The registrant did appear before the Department of Justice Hearing Officer, who made a recommendation of I-A and prepared a transcript and record. The court stated in an attitude of militant judicial independence of the Hearing Officer and in disregard of the administrative function: "It is plain that the author of the Department of Justice letter of advice to the appeal board based his conclusions solely upon what he found in the Selective Service record of the registrant. We are as able as he to examine and evaluate that record." [105]

A *cause celebre* of recent litigation is the case of Muhammad Ali, also known as Cassius Clay.[106] The defendant petitioned a district court in Texas for injunctive relief against the Governor and others. In response to motion of the respondents, the court dismissed the case, as prior litigation [107] of the issues was *res judicata* as to the petitioner. 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

[102] Davis v. United States, 374 F.2d 1 (5th Cir. 1967); *accord*, United States v. Griffin, 378 F.2d 899 (2d Cir. 1967).

[103] 374 F.2d at 4.

[104] *See* Swain v. Alabama, 380 U.S. 202 (1965). Systematic exclusion of Negroes from Selective Service Boards was alleged in DuVernay v. United States, 394 F.2d 979 (5th Cir. 1968), *aff'd by an equally divided court*, 394 U.S. 309 (1969), a prosecution for refusal to submit to induction. However, the case also involved an exhaustion of remedies question. The Supreme Court's opinionless affirmance provides no final guidance.

[105] Parr v. United States, 272 F.2d 416, 422 (9th Cir. 1959).

[106] Muhammad Ali v. Connally, 266 F. Supp. 345 (S.D. Tex.).

[107] *Id.* at 347.

> 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.[108]

The recent status of this recurrent litigation is that Clay has appealed from his conviction for refusing induction into the armed forces and a sentence of five years in jail and a $10,000 fine. Now free on $5,000 bond, Clay asks reversal of his conviction, and claims either a ministerial exemption or a status of CO based on his beliefs as a member of the Black Muslim faith. On appeal, he has alleged systematic exclusion of Negroes from both the local and the appeal boards which considered his case. The Justice Department filed a brief with the Supreme Court on 6 August 1968,[109] and resisted the IV-D and the I-O claims. It points out that Clay refers to himself on Selective Service System forms as a "Professional Boxer," "Heavyweight Champion of the World," and in other non-pacific terms. It explains that: "There is nothing in the record to indicate he is the leader of a congregation or a group of lesser members of his sect." Additionally the brief develops that Clay does "not have a conscientious scruple to participation in all wars, but only to certain wars." It is further stressed that any possible defect in Clay's classification by the local and appeal boards because of an absence of Negroes was cured by the action of the Presidential Appeal Board, one of whose three members was a Negro, and that Board upheld all prior lower administrative rulings.[110]

The MSSA of 1967[111] has altered the substance of section 6(j)[112] to exclude reference to a "Supreme Being."[113] As now worded, section 6(j) reads in vital part:

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[108] 266 F. Supp. at 346–47.

[109] Sacramento Union, 7 Aug. 1968, § B, at 2, col. 7–8.

[110] Clay v. United States, 397 F.2d 901 (5th Cir. 1968), *vacated and remanded*, 394 U.S. 310 (1969). The United States Supreme Court ordered a new lower court rehearing for Clay in order to determine if alleged government eavesdropping had led to Clay's conviction. *Id.* This was a package formula applying to 15 diverse defendants, and is not a retrial or rehearing on the merits, as such, of Clay's conviction. Clay in his appeal from conviction has not asserted illegal eavesdropping (Sacramento Union, 25 Mar. 1969, at 1). After the hearing, the district court found that there had been no unlawful surveillance and reimposed the original sentence. Clay's lawyers have appealed this ruling to the Fifth Circuit, and say they will again seek review by the Supreme Court if necessary. N.Y. Times, 30 Nov. 1969, § 6 (Magazine), at 33.

> Nothing contained in this title [Title 50 of U.S. Code] 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 beliefs, is conscientiously opposed to participation in war in any form . . . . [T]he term, "religious training and belief," does not include essentially political, sociological, or philosophical views, or a merely personal moral code.

The Supreme Being test of belief was weakened by the decision of the Supreme Court in *United States* v. *Seeger*,[114] where the registrant declared that he would not participate in a military conflict because of his belief in the "welfare of humanity and the preservation of democratic values," and because a state of war, he concluded, was "futile and self-defeating" and "unethical." The Court of Appeals for the Second Circuit had held that the statute in limiting the CO exemption to persons who believed in a Supreme Being violated the due process clause of the fifth amendment.[115] The Supreme Court noted that Buddhism, Taoism, Ethical Culture, and Secular Humanism do not teach a belief in the existence of a Supreme Being as such, but may stress a cult deity. Plato, Aristotle, and Spinoza, it was declared, evolved comprehensive ethical systems of moral integrity without a belief in God. The Court cited *Torcaso* v. *Watkins*,[116] and also placed reliance on *School Dist. of Abington Twp.* v. *Schempp*,[117] as well as *Engle* v. *Vitale*.[118] The end result in *Seeger* was that the Supreme Court upheld in result the Supreme Being test, but so weakened the concept of a Supreme Being that practically *any degree of religious belief would suffice* to qualify the registrant under section 6(j) of the Act.

The House Armed Services Committee which was concerned with overhauling of the Selective Service Law proposed that the reference to "Supreme Being" be deleted from the statute[119] be-

[114] 380 U.S. 163 (1965), *aff'g in part*, 326 F.2d 846 (2d Cir. 1964). Companion cases with *Seeger* were United States v. Jakobson, 325 F.2d 409 (2d Cir. 1963), and Peter v. United States, 324 F.2d 173 (9th Cir. 1963). The Supreme Court reversed *Peter*, affirmed *Jakobson*, and affirmed *Seeger* on other grounds.

[115] 326 F.2d 846 (2d Cir. 1964).

[116] 367 U.S. 488 (1961). The Court struck down a provision in the Maryland constitution which required a declaration of belief in the existence of God in order to qualify for the office of notary public.

[117] 374 U.S. 203 (1963). The Court held unconstitutional a Pennsylvania statute authorizing the reading of excerpts from the Bible and the recitation of the Lord's Prayer by the students at the opening of each school day.

[118] 370 U.S. 421 (1962). The State of New York could not permit a school district to attempt a program of daily classroom prayers in the public schools, although observance of the prayer interval was voluntary by the students, and the prayer recited was denominationally neutral.

[119] 113 CONG. REC. 14140 (1967).

cause "the Supreme Court decision [*Seeger*] established a 'conviction' test which permitted, in effect, a personal moral code to replace the test of religious training and belief." [120] The general expectation in Congress, if such a factor can be evaluated, was that the new language excluding reference to a "Supreme Being" would curb "draft dodging." [121]

It would seem that the legislative intent manifest in the present section 6(j) [122] is obscure and uncertain. Has the necessity for a belief in a Supreme Being been eliminated in the instance of a CO? Has the statutory section, 6(j), been tightened to require a firm belief in a personal God? Perhaps future litigation may clarify this question.[123]

RECOMMENDATION

The Department of Justice hearing going to the merits of a claimed conscientious objection should be restored. However, this would require a sufficiently increased appropriation to the department that would assure early completion of investigation and hearing. In any referral to the department, the report should

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[120] *Id.* Objection to war for moral and ethical reasons, without religious grounds, was held insufficient in Vaughan v. United States, 404 F.2d 586 (8th Cir. 1968); *accord*, Welsh v. United States, 404 F.2d 1078 (9th Cir. 1968), *cert. granted*, 38 U.S.L.W. 3127 (U.S. 9 Oct. 1969). In a district court decision, Judge Wyzanski in Massachusetts declared that the MSSA of 1967 "unconstitutionally discriminated" against registrants who claimed CO status on other than religious grounds. United States v. Sisson, 297 F. Supp. 902 (D. Mass.), *appeal filed*, 38 U.S.L.W. 3055 (U.S. 30 Jun. 1969), *jurisdiction postponed*, 38 U.S.L.W. 3127 (U.S. 9 Oct. 1969). The Supreme Court set the case for oral argument with the *Welsh* case, *supra*. A further development of this area involved a Roman Catholic who objected to the Vietnam War as "unjust" in terms of Catholic doctrine. A district court held that this "selective objector" was deprived the equal protection of the law by the statute's requirement that he object to war "in any form." United States v. McFadden, 38 U.S.L.W. 2485 (N.D. Cal. 20 Feb. 1970).

[121] *Cf.* 113 CONG. REC. 14120, 14140 (1967).

[122] In United States v. Shacter, 293 F. Supp. 1057 (D. Md. 1968), CO status was held to be in order for an atheist.

[123] An early decision by Judge Augustus Hand under the 1940 statute (Act of 16 Sep. 1940, ch. 720, 54 Stat. 885) sustained the requirement of religious belief in a CO as opposed to philosophical or political convictions. United States v. Kauten, 133 F.2d 703 (2d Cir. 1943). In Etcheverry v. United States, 320 F.2d 873 (9th Cir. 1963), *cert. denied*, 375 U.S. 930 (1963), the Supreme Being test was upheld as constitutional. The Supreme Court as late as March 1964 did not grant certiorari. However, in May 1964, the Supreme Court granted certiorari in *Seeger*, *Jakobson*, and *Peter* (see discussion in note 114 *supra* and accompanying text). Note that in *Peter*, the registrant expressed a belief in a "supreme expression" and this sufficed for the Supreme Court to show a sufficient, individual belief to qualify for exemption under section 6(j).

be completed within 90 days of the receipt of the request form from the appeal board.

B. *MINISTERS OF RELIGION*

1. *Survey of the Law.*

In Part V of this article, there has been some discussion of the classification of ministers of religion, IV-D. There has been *no amendment of the statute* affecting the category of ministers, nor have the regulations been altered. Section 6(g) of the statute[124] exempts "regular or duly ordained ministers of religion and students preparing for the ministry under the direction of recognized churches or religious organizations." Section 16(g)(2)[125] defines "regular ministers of religion." Section 16(g)(3)[126] specifies that an exempt "regular or duly ordained minister" does not include a person who irregularly or incidentally preaches and teaches.

In the administration of the 1940 statue,[127] it was resolved by the Supreme Court that the ministerial exemption did not extend of necessity to all members of a particular faith merely by virtue of membership in that church.[128]

In *Jones* v. *United States*,[129] the defendant was convicted for failing to report for civilian service and was sentenced to three years' imprisonment. At the time of registration, Jones informed his local board that he was both a CO and a minister of JW. He was classed I-A, had a personal appearance, appealed, and eventually was placed in Class I-A in accord with a Justice Department recommendation. The defendant claimed ordination at the age of 12 years, and had been intermittently a minister school "servant," book study conductor, Bible study servant, and assistant presiding minister. He had particpated in door-to-door evangelism, conducted classes in preaching techniques, and supervised

[124] 50 U.S.C. App. § 456(g) (1964).

[125] 50 U.S.C. App. § 466(g)(2) (1964).

[126] 50 U.S.C. App. § 466(g)(3) (1964).

[127] Act of 16 Sep. 1940, ch. 720, 54 Stat. 885.

[128] Cox v. United States, 332 U.S. 442 (1947). In a dissenting opinion, Justices Douglas and Black questioned whether the exemption applied only to ministers of more orthodox or conventional faiths and to the exclusion of JW ministers who practiced "door-to-door evangelism" on a part-time basis. The problem of secular activity by alleged ministers continues to be a major source of litigation and uncertainty. *Cf.* note 134 *infra*, and accompanying text.

[129] 386 F.2d 427 (4th Cir. 1967), *cert. denied*, 390 U.S. 1016 (1968). For other cases involving JW ministers, see Yeoman v. United States, 400 F.2d 793 (10th Cir. 1968); United States v. Tichenor, 403 F.2d 986 (6th Cir. 1968); McCoy v. United States, 403 F.2d 896 (5th Cir. 1968); Daniels v. United States, 404 F.2d 1049 (9th Cir. 1968).

12 "brothers." He devoted 50 hours monthly to ministerial tasks while working secularly 40 hours weekly. The court held that the local board's refusal of IV-D status was not without a basis in fact despite the variety of the defendant's tasks and the various offices he had held. He was not shown to be the religious leader of his congregation and had never been the "congregation servant" which corresponded to an ordained minister in other faiths. Congress "intended to provide the ministerial exemption for the leaders of the various religious faiths but not for the members generally," [130] whatever may be their titles within their sects.

In a recent case, the defendant was convicted for refusing to perform civilian work as ordered.[131] The local board was held to have a *basis in fact* for classifying the defendant I-O, and refusing IV-D, where he devoted 18 hours monthly to his ministry and was working full-time in a secular capacity.

Similarly, a full-time construction worker who performed some ministerial service as an avocation was properly denied IV-D classification.[132] The court stated succinctly:

> His ministry, part time and on an irregular basis, was not manifested by any formal education or ordination but seemed to arise by way of private compact between his deity and himself. We intend in no way to disparage this but we are constrained to observe that this is not the sort of minister contemplated by the law.[133]

The balancing of secular activity against time spent in ministerial service has been a recurrent feature in numerous cases. A ratio of 40 hours weekly secular work compared to 20–30 hours monthly in religious duties justified denial of IV-D status.[134]

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[129] United States v. Stewart, 322 F.2d 592, 594 (5th Cir. 1963). In United States v. Hull, 391 F.2d 257 (4th Cir.), *cert. denied*, 392 U.S. 914 (1968), a IV-D claimant who was in the "lower echelons of church officials" was regarded as not being a minister, but, rather a "devoted and active member of the congregation," and thus not qualified for the ministerial exemption.

[130] Gray v. United States, 391 F.2d 270 (9th Cir. 1968); similar cases are United States v. Gray, 405 F.2d 1204 (6th Cir. 1969) (registrant was a full-time welder who had never performed marriages or conducted funerals); Langhorne v. United States, 394 F.2d 129 (9th Cir. 1968) (registrant gave only 10 hours weekly to ministerial work); Greer v. United States, 378 F.2d 931 (5th Cir. 1967) (registrant was a JW who "performed sporadic work" in the ministerial field during vacation periods and was informed by his parent church that he did not meet required standards for a regular minister. The court held that IV-D status was properly denied).

[131] United States v. Magee, 392 F.2d 187 (1st Cir. 1968); a similar case is United States v. McNeil, 401 F.2d 527 (4th Cir. 1968) (part time, occasional, irregular preaching and teaching are insufficient).

[132] 392 F.2d at 189. The court concluded by citing Dickinson v. United States, 346 U.S. 389, 394 (1953): "Certainly all members of a religious organization or sect are not entitled to the exemption by reason of their membership, even though in their belief each is a minister."

[133] United States v. Jones, 382 F.2d 255 (4th Cir. 1967). In Matyastik v.

2. *The Kanas Case.*

An abuse of judicial authority would seem to be present in *Application of Kanas.*[135] The matter arose in a petition for writ of habeas corpus (denied in the lower court) on the ground that the petitioner was entitled to IV-D status rather than the I-A classification received from his local board. Under the facts, the petitioner was classed II-S while enrolled at the Hebrew Union College-Jewish Institute of Religion, School of Sacred Music, where he studied to be a cantor. Upon graduation, he received the degree of bachelor of sacred music and a diploma as cantor. The petitioner advised his local board that he had been "elected as a resident clergyman" by a congregation which in turn informed the board that the petitioner was employed as "cantor and musical director." The petitioner declined to appear before his local board, but provided completed questionnaires. The Governmental Appeal Agent,[136] in common with the petitioner, appealed on the basis that IV-D should have been granted. The appeal board by a vote 2–1 upheld the I-A on the ground that Kanas' regular vocation was that of "cantor and musical director" and that "by far the major portion of his time" was spent in the capacity of cantor. An appeal to the President was not availing, and the petitioner was inducted into the military.

United States, 392 F.2d 657 (5th Cir. 1968), a balance of 44 hours weekly in the business world compared with 75–80 hours monthly given to religious activity justified refusal of IV-D status. In Jones v. United States, 387 F.2d 909 (5th Cir. 1968), a finding that the defendant worked 40 hours weekly as an apprentice electrician afforded a *basis in fact* for denial of IV-D status. In Kuykendall v. United States, 387 F.2d 594 (10th Cir. 1968) there was a basis in fact for the local board to refuse IV-D classification but allow CO status where the defendant worked 200 hours monthly in secular employment, and performed 75 hours in religious work but held no titled position in the JW's. In United States v. Dillon, 294 F. Supp. 38 (D. Ore. 1968), a ratio of 25 hours monthly in secular work and with all other time being given to ministerial activity warranted IV-D status. In Fore v. United States, 395 F.2d 548 (10th Cir. 1968), 30 hours monthly in religious activity by a high school student who worked 28 hours weekly as a bus boy did not justify ministerial exemption. In United States v. Whitaker, 395 F.2d 664 (4th Cir. 1968), an increase in religious activity to 99 hours from 62 hours monthly by a CO claiming to be a minister did not warrant a reopening of his classification by the local board.

[135] 385 F.2d 506 (2d Cir. 1967).

[136] 32 C.F.R. § 1604.71 (1969) explains the duties of government appeal agents (GAA) who exist to protect both the interests of the government and of the registrant. This would seem to be a most difficult task to reconcile the conflicting interests of the registrant and the government which would process and induct him. Some boards have no GAA while in others the GAA is non-functioning. Selective Service has sought to make the GAA system workable and fair, but the task is tremendous. Local Board Memorandum No. 82 (*as amended*, 27 Jul. 1967, after the MSSA enactment) requires the local board to give to each registrant placed in Classes I-A, I-A-O, or I-O,

The Second Circuit reversed the trial court on the ground that the registrant made out a prima facie case for IV-D classification, and "there is no affirmative evidence to rebut his claim." The court went on that "in some instances cantors may qualify for IV-D. . . . There is a surprising paucity of cases on the point." [137]

The result in *Kanas* is subject to criticism. The court of appeals paid lip service to the notion that the local board classification is to be upheld if there is any basis in fact in the proof, but then proceeded as an appellate body to *weigh the evidence*, and give judgment to the registrant. The outcome in *Kanas* conflicts with the 1968 decision in *United States* v. *Jones*,[138] where the Fourth Circuit had upheld a denial of IV-D to a JW although he performed a variety of tasks for his congregation and held various offices. The court had noted that Jones had not held the top position in his church which corresponded to the ordained minister in other faiths.

The court in *Kanas* avoided any discussion of the duties of a *Rabbi*, and restricted comment to the tasks performed by a cantor. The result in *Kanas* contrasts with the decision in *United States* v. *Mohammed*,[139] which was a prosecution for failure to report for civilian work. The defendant was a Muslim *giving his services full time* in a restaurant operated in Chicago by his sect. This registrant claimed to be a student for the ministry at the University of Islam and an *assistant minister* in a temple existing for Negroes. The court in *Mohammed* held that the local board properly refused IV-D classification, and spoke of the "harsh reality of the age in which we live when military conscription is necessary to the national defense." [140] The *Kanas* decision shows an unfortunate judicial propensity to disregard the basis in fact test imposed under both the 1951 and the 1967 statutes, and, by the unwarranted device of weighing the evidence, arrive at a conclusion which the court views as desirable. If the result in *Kanas* should be carried to an ultimate extreme, ministerial exemption could be granted to choir masters, organ-

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information that a GAA is "available to advise him on matters relating to his legal rights including his right of appeal." The local board clerk, on request, will arrange a meeting of the registrant with the GAA. If the GAA is not available, the clerk will seek to obtain the assistance of an *advisor*. An LBM such as LBM No. 82 is distributed to every local board in the nation.

[137] 385 F.2d at 508–09.

[138] 386 F.2d 427 (4th Cir. 1967), discussed in text at note 129, *supra*.

[139] 288 F.2d 236 (7th Cir.), *cert. denied*, 368 U.S. 820 (1961).

[140] *Id.* at 244.

ists, vocalists, librarians, Sunday School directors, and others who may *work full time* in or about churches. Such a result is unreasonable, and would mark an evasion of the letter and the spirit of the law. Ministerial exemption should not be allowed under the statute to a registrant *merely because he is engaged exclusively in religious work*. The statute since 1951 has required something more from the registrant who must be a "duly ordained minister of religion," [141] or a regular minister of religion.[142] It specifically requires that the category of minister may not include a person who irregularly or *incidentally* preaches and teaches.[143]

RECOMMENDATION

In order to overcome what is regarded as an unsound result in *Kanas*, section 466(g)(2) of the statute should be amended to exclude from the scope of the term "regular minister of religion" one who is a cantor, choir director, vocalist, congregation librarian, cantor, or director of religious education or instruction.

C. *STUDENTS*

The 1967 statute[144] affects the status of both undergraduate and graduate students. Formerly, the local board was the final arbiter of the fate of a student and could extend or withhold a II-S deferment based upon whether or not the board viewed the classification to be in the national interest.[145] In order to assist the local board, the Director of Selective Service might promulgate

[141] 50 U.S.C. App. § 466(g)(1) (1964).

[142] 50 U.S.C. App. § 466(g)(2) (1964).

[143] 50 U.S.C. App. §466 (g)(3) (1964). The application of *Kanas* may be limited in two respects. (1) In *Kanas*, the local board made no finding concerning the allocation of the registrant's time between his ministerial duties and the music supervision. The court hinted that such a finding might show that a particular cantor's ministry was "merely 'irregular and incidental' to his other functions," assuming that the music supervision was non-ministerial in nature. 385 F.2d at 509. (2) The court referred (*id.*) to a statement from *Dickinson v. United States* as providing a test of a "regular minister": "In *Dickinson*, the Supreme Court identified 'regularly, as a vocation, teaching and preaching the principles of his sect and conducting public worship in the tradition of his religion' as the 'vital test' of a registrant's claim. 346 U.S. at 395. . . ." (Emphasis added.) The additional test of "conducting public worship" would eliminate many types of persons engaged in religious activity from the category of minister. (Supp. IV, 1969)).

[144] Pub. L. 90-40, 87 Stat. 100 (codified in 50 U.S.C. §§ 451-73 (Supp. IV, 1969)).

[145] 32 C.F.R. § 1622.25 (1969). Shaw, *Selective Service System in 1966*, 36 MIL. L. REV. 147, 166-67 (1967), sets forth the applicable percentages of rating for the undergraduate and graduate years. A major influence until 1967 was the Selective Service College Qualification Test.

criteria on an advisory basis concerning the placement of registrants in II-S. Certain standards of scholastic attainment were imposed upon the students as a whole.

The new law eliminates all of the prior percentage standards for students, and it is now sufficient if the registrant (1) requests a deferment, and (2) he is "satisfactorily pursing" a full-time course of instruction.[146]

The following table indicates the basic changes in the law affecting both undergraduate and graduate students.[147]

STUDENT

Formerly	As Changed
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 1 October 1967, only students pursuing medical studies or in other fields identified by the Director of Selective Service after receiving advice from 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.

Student deferment is now almost a matter of right and minimal standards are applied in order to gain and retain II-S status. However, graduate student deferment is considerably more difficult to obtain. Graduate students were eligible for deferment until the end of 1967–1968 academic year which was about mid-1968. A doctoral or professional school student who had previously devoted three years or more to his work is allowed one

[146] 32 C.F.R. § 1622.25 (1969) (codified at 50 U.S.C. App. § 456(h)(1) (Supp. IV, 1969)).

[147] SELECTIVE SERVICE, vol. 17, no. 7, Jul. 1967, at 3.

academic year only to complete his task.[145] As a matter of right, graduate deferments are granted to registrants pursuing subjects "necessary to the national health, safety or interest," such as medicine, dentistry, some categories of engineering. The National Security Council functions to advise the Director of Selective Service in this regard.[146]

Although graduate schools may experience some initial fall-off in enrollment from October 1968 onward, the effect of the retrograde movement from Vietnam should soon be felt, as veterans are discharged and become subject to educational benefits under the G. I. Bill of Rights.[150]

Litigation involving students has been relatively sparse. *United States* v. *Talmanson* [151] arose in a conviction for failing to submit to physical examination and to report for induction. The defendant, a high school graduate, assailed the Selective Service System regulation, which governed the deferment of college students,[152] as allegedly giving preference to the economically and socially-advantaged who can attend college. The court held that the defendant not enrolled in college lacked sufficient private interest to challenge the deferment of college students, simply because the pool of available manpower might be larger if college students were in the pool rather than in a deferred status. The court maintained that the "national interest" was not enhanced only by science students, but also by students in the social sciences and humanities. The circumstance that injustice might occur on the local level in the administration of the Selective Service regulations concerning college students is a matter for Congress and Selective Service and is not a basis for invalidating the regulations. Judicial relief must await a refusal to be inducted or habeas corpus after induction.[154] The court noted the absence of appeal

[145] 32 C.F.R. § 1622.26 (1969).

[146] Exec. Order No. 11415, 3 C.F.R. 122 (1968 Comp.) has reconstituted the National Advisory Committee on Selection of Physicians, Dentists and Allied Specialists and the Health Advisory Committee.

[150] Act of 22 Jun. 1944, 58 Stat. 284 (codified in scattered sections of 38 U.S.C. (1964)).

[151] 386 F.2d 811 (1st Cir. 1967), *cert. denied*, 391 U.S. 907 (1968). One may sympathize with this defendant, a non-student, who had been brought closer to induction because of what amounted to a group deferment of all those students who, for practical purposes, were removed from the pool of available I-A registrants. It is submitted by this writer that the group deferment of students who are free from any necessity to achieve high scholastic records is in fact discriminatory against all non-students.

[152] 32 C.F.R. § 1622.25(a) (1967) (codified at 50 U.S.C. App. § 456(h)(1) (Supp. IV, 1969)).

[154] Moskowitz v. Kindt, 394 F. 2d 648 (3d Cir. 1968), *aff'g* 273 F. Supp. 646 (E.D. Pa. 1967).

by this registrant from the local board classification. The court saw no analogy in the case to that of the Michigan students in *Wolff* v. *Selective Service Local Board*,[154] where the students as dissidents had demonstrated in the local board. This registrant had failed to exhaust administrative remedies.

RECOMMENDATION

Student deferment should be tightened and restored to the standard existing until mid-1967. Deferment should be conditional upon the attainment of high individual scholastic standing in the upper level of each college class and based upon the scores of full-time male students in that class. There should be discontinued the present group deferment of all male undergraduates who need only reach a minimal rating of "satisfactorily pursuing" a course of instruction.

D. *JUDICIAL REVIEW—BASIS IN FACT TEST*

The statute has been specifically amended to spell out the scope of judicial review. The MSSA of 1967 [155] now provides in section 10(b)(3):

> 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 registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such 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.[156]

The former statute was silent as to the mode of judicial review. With reference to the local board and the appeal board, section 10(b)(3) stated: "The decision of such local board shall be final,

[154] 372 F.2d 817 (2d Cir. 1967); see text accompanying note 178, *infra*.

[155] 50 U.S.C. App §§ 451–73 (1964), *as amended*, (Supp. IV, 1969).

[156] *Id.* at § 460(b)(3). In Faulkner v. Clifford, 289 F. Supp. 895 (E.D.N.Y. 1968), the court granted an injunction to stay induction into the armed forces, holding that the statute does not reflect a clear congressional intent to restrict judicial review and that there are limits upon the authority to adopt such a restrictive statute. See Hodges v. Clar, 291 F. Supp. 177 (D. Calif. 1968), upholding judicial review solely as a defense to a criminal prosecution; *accord*, Caulekas v. Clark, 291 F. Supp. 606 (D. Calif. 1968); Foran v. Weinhoff, 291; F. Supp. 498 (D. Wis. 1968) *appeal dismissed mem.*, 37 U.S.L.W. 3307 (U.S. 24 Feb. 1969); Hennessy v. Sel. Serv. Local Bd., 292 F. Supp. 465 (D. Mont. 1968).

except where an appeal is authorized and is taken. . . . The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President." [157]

Although the statute itself did not prescribe the method or extent of judicial review, the problem of civil and criminal litigation under the 1951 statute soon received attention as it had under the predecessor statutes of 1917 [158] and of 1940.[159]

The present statute, in common with the 1951 Act, contains an express provision that: "No person shall be tried by court martial in any case arising under this title [50 U.S.C.] unless such person has been actually inducted for the training and service. . . ." [160] There can be no involuntary induction.[161] There is a presumption, however, that all requisite legal steps have been taken at the induction center.[162]

In *Falbo* v. *United States*,[163] the Court recognized that under the 1940 Act, there was no provision for judicial review of a classification until the registrant was accepted by the armed forces. The defendant was a JW classed I-O and refused a ministerial classification IV-D. The defendant was convicted of failing to report for civilian work of national importance and sentenced to five years in jail. A majority of the Justices ruled that as the defendant had failed to exhaust administrative remedies, he could not later challenge his classification. Conceivably, the defendant might have been rejected for physical reasons if he had reported as ordered. Accordingly, any registrant must first exhaust all administrative stages before he could gain judicial review. In a concurring opinion, Mr. Justice Rutledge stated the term "final"

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[157] 50 U.S.C. App. § 460(b)(3) (1964).

[158] Act of 18 May 1917, ch. 15, 40 Stat. 80. Under the 1917 statute, induction was a unilateral act by the local board clerk, who merely issued a draft notice. Habeas corpus was the approved method to seek release. Arbitman v. Woodside, 258 F. 141 (4th Cir. 1919); Francks v. Murray, 248 F. 865 (8th Cir. 1918); *Ex parte* Cohen, 254 F. 711 (E.D. Va. 1918); *Ex parte* Beek, 245 F. 967 (D. Mont. 1917).

[159] Act of 16 Sep. 1940, ch. 720, § 10(a)(2), 54 Stat. 80.

[160] 50 U.S.C. App. § 462(a) (Supp. IV, 1969).

[161] United States v. Kiuwabara, 56 F. Supp. 716 (N.D. Calif. 1944).

[162] Kaline v. United States, 235 F.2d 54 (9th Cir. 1956). *See also In re* Grimley, 137 U.S. 147, 156–57 (1890) in which the court stated: "The taking of the oath of allegiance is the pivotal fact which changes the status from that of civilian to that of soldier." *Cf.* United States v. Rodriguez, 2 U.S.C.M.A. 101, 6 C.M.R. 101 (1952), where the accused-deserter omitted to take the oath of allegiance, but entered upon Army duty, signed forms, traveled to a military installation for basic training, donned a uniform, and observed a military status for 10 days. The Court of Military Appeals held that the conviction of desertion by general court-martial was lawful as induction in fact had been accomplished.

[163] 320 U.S. 549 (1944).

in the 1940 statute with reference to local board determinations precluded any judicial review.[184] Mr. Justice Murphy, dissenting, urged that a registrant could gain judicial assistance against any arbitrary administrative order.[185]

Exhaustion of administrative remedies as a requisite to court review may arise in several situations. Generally, this means that the registrant must have actually filed a claim for exemption and then taken timely appeal from the local board to the appeal board from the denial of the exemption.[186] Even after induction, before petition in habeas corpus may be filed, the registrant must make a written request, conform to appropriate Army regulations, and await the military determination as to his status.[187]

The next logical step in the evolution of the scope of judicial review in Selective Service matters, after *Falbo* [188] and *Estep*,[189]

[184] *Id.* at 535.

[185] *Id.* at 555–63. The issue of judicial review was at last faced in Estep v. United States, 327 U.S. 114 (1946). The defendant JW was denied a ministerial status, but unlike Falbo, he reported at the induction center, passed all requirements, and then refused to be inducted. The Supreme Court held that as a matter of statutory interpretation, judicial review could be obtained by the defendant. Congressional silence in the statute would not be construed to exclude authority in the federal courts to entertain judicial review. The court stated, by Mr. Justice Douglas: "We cannot readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local board 'final' as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency." 327 U.S. at 121.

Having concluded that judicial review was available, the court in *Estep* went on to set the standard to be applied in evaluating the evidence, reasoning: "The provisions making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." *Id.* at 122.

[186] Wyman v. La Rose, 223 F.2d 849 (9th Cir. 1955), *cert. denied*, 350 U.S. 884 (1955).

[187] United States *ex rel.* Coltman v. Bullock, 110 F. Supp. 126 (N.D. Ill. 1953). Of course, habeas corpus is available if there are other defects in the induction process besides classification. In Billings v. Truesdale, 321 U.S. 542 (1944), a university teacher, claiming to be a conscientious objector, was ordered by his local board to report for induction. He reported, was found physically and mentally qualified, but refused to take the oath of induction or submit to fingerprinting. Thereafter, he was tried and convicted by a *court-martial* for willful disobedience of a lawful order. Upon a petition for habeas corpus, the Supreme Court held that the court-martial was without jurisdiction as he had not been "actually inducted" into the Army.

[188] 320 U.S. 549 (1944).

[189] 327 U.S. 114 (1946).

was *Cox* v. *United States*.[170] This case held that whether there is a *basis in fact* for the local board's classification is a question for the trial judge and his review is limited to the evidence which is set forth within the registrant's file. It is not a trial *de novo* with plenary discretion in the trial judge to consider alleged new evidence.[171]

We may conclude that after induction, in response to a habeas corpus petition, a *limited judicial review* may be made as to a disputed classification. That judicial review is restricted to ascertaining whether the record from the local board contains any evidence to support the classification granted.[172] One criticism of this standard is that it compels a local board to *build a record* to meet possible subsequent litigation, and it is doubtful whether Congress intended a local board to be constrained to anticipate litigation. This point is discussed in a minority opinion in *Dickinson* v. *United States*.[173] It is to be recalled that in *Falbo*,[174] decided in 1944, the court would not "allow litigious interruption of the process of selection which Congress created." [175]

A difficulty in the basis in fact test is that a reviewing court may give lip service to the notion, but, in actuality, apply what amounts to a substantial evidence standard.[176] The amendment of section 10(b)(3)[177] seemed necessary to Congress in order to over-

[170] 332 U.S. 442 (1947).

[171] One exception suggests itself. If the registrant should contend that the file was tampered with or that documents within the file had been altered or destroyed, he should have the right to attempt to recreate any allegedly missing data.

[172] Wiggins v. United States, 261 F.2d 113 (5th Cir. 1958), *cert. denied*, 359 U.S. 942 (1959). In United States v. Carroll, 398 F.2d 651 (3d Cir. 1968), there was no basis in fact to support reclassification to I-A from I-O although the registrant expressed a willingness to use force to protect his family and friends. The Fourth Circuit, in two recent cases, has held that a draft board must make some finding of fact when it rejects a prima facie case for CO status, United States v. James, 417 F.2d 826 (1969), and must give a reason when it denies CO status on other grounds, United States v. Broyles, 7 *Crim. L. Rep.* 2068 (19 Mar. 1970) (en banc).

[173] 346 U.S. 389, 399 (1953).

[174] 320 U.S. 549 (1944).

[175] *Id.* at 554. In Lewis v. Secretary, 402 F.2d 813 (9th Cir. 1968), no basis in fact was seen to support reclassification to I-A from III-A when the same facts still prevailed as to the dependency of the registrant's mother.

[176] *E.g.*, Capehart v. United States, 237 F.2d 388 (4th Cir. 1956), *cert. denied*, 352 U.S. 971 (1956); Robertson v. United States, 404 F.2d 1141 (5th Cir. 1968); Application of Kanas, 385 F.2d 506 (2d Cir. 1967); Annett v. United States, 205 F.2d 689 (10th Cir. 1953). In Petersen v. Clark, 289 F. Supp. 949 (D. Calif. 1968), the court proceeded in an action for declaratory relief in advance of reporting for induction, received evidence outside of the Selective Service folder, and in effect reopened the classification of the registrant to permit him to seek CO status.

[177] 50 U.S.C. App. § 460(b)(3) (Supp. IV, 1969).

come the impact of the decision in *Wolff* v. *Sel. Serv. Local Bd No. 16*,[178] where several University of Michigan students were classified I-A and delinquent for demonstrating and disrupting a local board at Ann Arbor. The students petitioned to enjoin the local board from proceeding further in the classification process leading up to the issuance of induction orders. The registrants had not sought any administrative review within the Selective Service System before going into court, but proceeded in mandamus against the board personnel. The district court dismissed the proceeding, but the Second Circuit reversed and permitted the registrants to compel reclassification by the local board. In reaching this result, the Second Circuit seemed to disregard the Selective Service statute and applicable regulations. At the congressional hearings, General Lewis B. Hershey, Director of the Selective Service, testified that Wolff had been classed *I–A before the incident occurred at the local board* in Michigan. This factor conceivably would have been brought out at the administrative level if hearings allowed under the statute had in fact been held at the local board.

In *Oestereich* v. *Selective Serv. Local Bd. No. 11*,[179] the lower courts had held that the orderly *classification process of a registrant* to the time that he reports for induction *is not punitive in nature*. This was a proceeding against Selective Service System officials and seeking to challenge the plaintiff's status as a registrant who might be qualified for military service. The lower court dismissed the complaint; the Tenth Circuit affirmed, and also saw a lack of jurisdiction in the district court since the registrant had not yet responded affirmatively or negatively to an induction order. In reversing judgment, the Supreme Court held that preinduction judicial review was available to the petitioner, and that a statutory exemption (IV-D) as a ministry student could not be taken from a registrant because of his conduct which was not related to the exemption. Speaking through Mr. Justice Douglas, the Court said:

> There is no suggestion in the legislative history that, when Congress has granted an exemption and a registrant meets its terms and conditions, a [local] Board can nonetheless withhold it from him for activities or conduct not material to the grant or withdrawal of the

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[178] 372 F.2d 817 (2d Cir. 1967). *Hearing on Extension of the UMT & SA before the House Committee on Armed Services*, 90th Cong., 1st Sess. 30–31, 2525–27 (1967); S. REP. No. 2091, 90th Cong., 1st Sess. 10 (1967). For a discussion of the delinquency regulations, see note 243 *infra*.

[179] 390 F. 2d 100 (10th Cir. 1968), *rev'd*, 393 U.S. 233 (1968).

> exemption. So to hold would make the Boards free-wheeling agencies meeting out their brand of justice in a vindictive manner.[150]

A case close in time to *Oestereich* is *Gabriel* v. *Clark*.[151] The local board had refused CO classification to the registrant, who then petitioned the district court for an injunction against his induction until a final determination could be made as to his CO claim. The petition was filed in district court *before* the date of the scheduled induction. The district court declared that any judicial review restriction within the MSSA of 1967 was unconstitutional. The Solicitor General appealed directly to the Supreme Court from the district court under an Act of 1964.[152] The Supreme Court stated:

> Here the Board has exercised its statutory discretion to pass on a particular request for classification . . . . A Local Board must make such a decision in respect of each of the many classification claims presented to it. To allow pre-induction judicial review of such determinations would be to permit precisely the kind of "litigious interruptions of procedures to provide necessary military manpower" (113 Cong. Rec. 15426) which Congress sought to prevent when it enacted §10(b)(3).[153]

The Supreme Court decision in *Gabriel* upheld the judicial review restrictions in the MSSA of 1967 and refused to permit a district court to assume jurisdiction, under the facts, *before* the date of induction of the registrant. The court cited *Falbo* [154] and *Estep*.[155]

In a California case,[156] *habeas corpus was denied to a registrant* who had not yet actually been inducted, but awaited induction into the Armed Forces. The petitioner, a native of Indonesia, entered this country on a permanent resident visa in 1962. He sought a family deferment Class III-A because of a widowed mother aged 62 years, but was classed I-A by the board after a personal appearance. The mother received a monthly pension,

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[150] *393 U.S.* at *237*. Subsequent Supreme Court cases reversed convictions of students and other holders of *deferments* (as opposed to exemptions) who were reclassified for conduct unrelated to the deferment. See discussion in note 243, *infra*.

[151] 287 F. Supp. 369 (N.D. Calif. 1968), *rev'd*, 393 U.S. 256 (1968).

[152] 28 U.S.C. § 1252 (1964). The Supreme Court, in reversing the District Court, upheld the applicable provisions of section 10(b)(3). *See* text accompanying note 156, *supra*. For a critical review of the *Oestereich* and *Gabriel* cases and the constitutionality of § 10(b)(3), see Comment, *Pre-Induction Judicial Review Held Unavailable to Registrant Claiming Statutory Deferment*, 44 N.Y.U. L. REV. 804 (1969); Note, 83 HARV. L. REV. 261 (1969).

[153] 393 U.S. 256, 258–59.

[154] 320 U.S. 549 (1944).

[155] 327 U.S. 114 (1946).

[156] deRozario v. Commanding Officer, 390 F. 2d 532 (9th Cir. 1967).

$90.00, and there were two older brothers who contributed nothing to her support. On the same day that the petitioner was to report for induction, but in point of time before he completed the induction process, a stay order was served from the district court upon the induction center officials. After holding that habeas corpus was prematurely sought because induction had not in fact occurred, the Ninth Circuit noted that the *action of the local board was not without a basis in fact.* The pension of the mother would be augmented by the petitioner's financial allowance to be received from the government in return for military service. Additionally, older brothers could be expected to contribute to the mother's support.

An indication of the delays in induction that can be caused by a truculent registrant is *United States* v. *Moorman.*[187] The defendant was convicted on five counts of violating the statute by failing to report on as many occasions for either pre-induction physical examination or for induction, and was sentenced to five years on each count to run concurrently. On one occasion, the defendant asked that a special day be set aside for him at the induction center for the purpose of his physical examination. When told that a special day could not be set for any registrant alone, the defendant stated that he "was not in the army yet and could do what he pleased and that was just the way it was to be."

A defendant convicted of failing to register between the years 1956 and 1964 [188] had the obligation to present himself on his own volition for registration purposes and without a formal invitation from the Selective Service System to appear and register.

A failure to report for induction must be willful and not be attributable to mistake or inadvertence.[189] When a defendant is indicted for hindering and interfering with the administration of the Selective Service law, he is entitled to counsel at all stages, and under the doctrine of *Miranda* v. *Arizona*[190] must be cautioned before he makes incriminating statements which later the prosecution seeks to offer at trial. A conviction was reversed and remanded for new trial where the defendant had not been advised of his right to counsel and was permitted to incriminate himself by spoken admissions without prior warning of his rights.[191]

[187] 389 F. 2d 27 (5th Cir. 1968).
[188] United States v. Kaohelaulii, 389 F. 2d 495 (9th Cir. 1968).
[189] United States v. Rabb, 394 F. 2d 230 (3d Cir. 1968).
[190] 384 U.S. 436 (1966).
[191] United States v. Chambers, 391 F. 2d 455 (5th Cir. 1968). In United

In a leading decision,[192] it was held that there is no legal requirement in the Selective Service System that the selection of any administrative personnel in California be upon a *racially-oriented* pattern. The presence or absence of ethnic personalities within the system is immaterial. The classification action of a local board will stand if there is any evidence or basis in fact to support it.

The denial of IV-D ministerial status with regard to a *belated claim* made after a criminal complaint has been filed against the registrant rests upon the basis in fact test. The reviewing court can challenge the board's jurisdiction only if there is no basis in fact for the classification.[193]

A defendant prosecuted for knowing failure to report for induction cannot defend at trial by challenging the authority of Congress to rely upon the Selective Service System rather than upon a system of voluntary enlistments of men for the armed forces. Congress may choose a method to meet national defense manpower needs through the conscriptive process, and this is a valid exercise of congressional war powers. As the power in Congress to raise armies is plenary, the judiciary cannot review the determination by the legislative branch to rely upon the Selective Service System.[194]

At the time of trial, the Selective Service file is properly admissible in evidence when its custody and authenticity are established by an officer of the State Selective Service Headquarters.[195]

States v. Smith, 399 F. 2d 896 (6th Cir. 1968), the jury being deadlocked, the trial judge could not advise the jury that the defendant had been proved guilty.

[192] United States v. Richmond, 275 F. Supp. 43 (D.C. Cal. 1967). The absence of Negroes on the board did not affect the board's jurisdiction, Sumrall v. United States, 397 F. 2d 924 (5th Cir.), *cert. denied*, 393 U.S. 991 (1968). *Accord*, Nelloms v. United States, 399 F. 2d 295 (5th Cir. 1968), *cert. denied*, 393 U.S. 1071 (1969); United States v. Prince, 398 F. 2d 686 (2d Cir.), *cert. denied*, 393 U.S. 946 (1968). *But cf.* authorities cited in note 104 *supra*.

[193] Foster v. United States, 384 F. 2d 372 (5th Cir. 1967). *Accord*, United States v. Dougdale, 389 F. 2d 482 (9th Cir. 1968), where the registrant tendered the CO Form No. 150 to his board on 3 October, after receiving order to report on 18 October. At trial, the defendant stated that his views had been acquired through his home life and contacts with friends. The claim was still held belated, whether or not it rested upon alleged lifetime belief.

[194] United States v. Butler, 389 F. 2d 172 (6th Cir.), *cert. denied*, 390 U.S. 1039 (1968). *Accord*, United States v. St. Clair, 291 F. Supp. 122 (S.D. N.Y. 1968).

[195] United States v. Holmes, 387 F. 2d 781 (7th Cir. 1967), *cert. denied*, 391 U.S. 936 (1968). Mr. Justice Douglas, in a lengthy memorandum, indicates that he would have granted certiorari in order to determine if "conscription" may be enforced when there has been no declaration of war, re-

It is no defense to a charge of failure to report that there is pending against the registrant a criminal felony charge of child desertion and nonsupport.[196]

A conviction for refusal to submit to induction was reversed on the ground that there was no basis in fact to support a refusal of CO status to a defendant who had been given a I-A-O classification (eligibility for non-combatant duties with the armed forces).[197] The defendant member of the Church of Christ [198] was classed I-A-O in accord with the recommendation by the Department of Justice Hearing Officer, and the National (Presidential) Appeal Board affirmed. The hearing officer had noted that the defendant "was not strong or forceful in the statement of his belief." The appellate court in reversing regarded the evidence as establishing sincerity in the defendant, and the court used the description "gentleness of spirit" which it attributed to the defendant, and went on to conclude that a lack of force and strength would support, rather than defeat, a claim to CO status. No specific doctrinal support was required to entitle the defendant to CO classification if he was opposed in fact to war in any form. This is an instance of an appellate court substituting its judgment after *weighing the evidence*, and in disregard of the Justice Department recommendation and the basis in fact test.[199]

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lying on the *Hamilton* case, 293 U.S. 245, 265. Mr. Justice Stewart stated that this case, like Hart v. United States, 382 F. 2d 1020 (1967), *cert. denied*, 391 U.S. 956–60 (1968), involved the issue whether Congress, when no war has been declared, may enact a law providing for a limited period of compulsory civilian service. It does not involve the power, in absence of a declaration of war, to compel military service in "armed international conflict overseas." If the case did involve such a principle, then he would vote to grant certiorari. Brandon v. United States, 381 F. 2d 727 (10th Cir. 1967), is in accord with the Seventh Circuit's opinion that the Selective Service file is admissible in evidence to support a conviction.

[196] United States v. Nickerson, 391 F. 2d 760 (10th Cir.), *cert. denied*, 392 U.S. 907 (1968). The order to report was not invalidated although paragraph 3–9*c*(1) of Army Reg. No. 601–270, 18 Mar. 1969, provides that any person having a felony charge pending against him is not acceptable. The Army regulation does not apply until an inductee comes under the control of the armed forces. In Sumrall v. United States, 397 F. 2d 924 (5th Cir.), *cert. denied*, 393 U.S. 991 (1968), the court held that pending misdemeanor charges against a registrant would not justify his refusal to be inducted.

[197] United States v. Washington, 392 F. 2d 37 (6th Cir. 1968).

[198] The denomination of the defendant is small and was not identified with the larger denomination of the same name. The church opposes all military service and maintains itself in Tennessee, Arkansas, and Mississippi.

[199] In a recent comment entitled *Changes in the Draft: The Military Selective Service Act of 1967*, 4 COLUM. J. L. & SOC. PROB. 120 (1968), the anonymous author has stated: "Every commentator who has studied the [Selective Service] System has urged expansion of judicial review, at least in peacetime." *Id.* at 157. While the term "commentator" is not defined, the writer, who has written for some years on the subject of the Selective

VII. THE PRESIDENTIAL APPEAL BOARD

Provision was made for a summit-type Presidential Appeal Board (PAB) in the 1948 statute [200] and in the 1967 Act.[201] Within the statute as now constituted, section 10(b)(3) states:

> The decision of . . . appeal boards [not the PAB] shall be final in cases before them on appeal unless modified or changed by the President. The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title . . . and the determination of the President shall be final.[202]

The Selective Service regulations supplement section 10(b)(3). Appeal to the PAB may be taken by the Director of Selective Service or a State Director from any determination of an appeal board at any time. Appeal is taken by mailing to the local board through the State Director a written notice of appeal.[203] When a registrant's file has been reviewed by an appeal board of a state other than the state in which the registrant's local board is located, either state director may appeal.[204] When the appeal board vote is divided as to the classification granted, appeal may be taken by the registrant or his dependent, or certain others concerned with a current occupational deferment of the registrant.[205] When an appeal is taken, the state director checks the file to assure that all procedural requirements have been observed. He may return a file for correction. The file then goes forward to the Director of Selective Service.[206] An appeal to the President stays induction while the appeal is pending.[207] Section 1604.6 of the regulations sets forth, in some detail, the functions, compensation, housing and duties of the members of the National Selective Service Appeal Board, the popular name for the PAB.[208]

Service System, begs to be excepted from the application of this extravagant conclusion. It is submitted that the scope of judicial review in the area of Selective Service, in time of peace or war, should be limited and narrow, and the 1967 amendment of section 10(b)(3) is a sound legislative enactment.

[200] 62 Stat. 604 (1948).
[201] 50 U.S.C. App. § 460(b)(3) (Supp. IV, 1969).
[202] *Id.*
[203] 32 C.F.R. § 1627.1 (1969).
[204] 32 C.F.R. § 1627.2 (1969).
[205] 32 C.F.R. § 1627.3 (1969).
[206] 32 C.F.R. § 1627.5 (1969).
[207] 32 C.F.R. § 1627.8 (1969).
[208] 32 C.F.R. § 1604.6 (1969). The name "National Selective Service Appeal Board" was created within the Selective Service regulations, and lacked statutory origin. The term unfortunately suggests that the Board is a part of the Selective Service administrative system and is a unit of the National

The United States Supreme Court will take judicial notice of a decision by the Director of Selective Service on an appeal by a registrant from an appeal board which had affirmed in effect a local board's rejection of a CO claim.[209] Where a I-A classification is given to a registrant by the PAB and the classification has no basis in fact to support it, jurisdiction is lacking and the order of classification is a nullity.[210] The omission of a local board to advise a registrant of an appeal to PAB is an irregularity only and not a fatal procedural error.[211]

A state director must note his reason for taking an appeal to PAB.[212] One to whom the President delegates authority to determine appeals to the President can require members of his staff to make recommendations and consider them along with the entire file.[213] Decisions of PAB must have a proper basis under applicable law in order to prevail in court.[214]

In *Hagaman* v. *United States*,[215] a conviction for refusal to be inducted was reversed. A divided Third Circuit held that the PAB was not justified in reclassifying the defendant JW from I-O to I-A in the absence of a showing why this action was taken. The PAB should have indicated in a general and nontechnical way why it changed the classification, so that it could be ascertained whether the board had acted within its statutory powers. The court assumed that the PAB recorded any affirmative evidence coming to its attention, and held that it could not change the classification to I-A where the record showed no conflict with the evidence of the plaintiff.

The PAB consists of three civilian members appointed by the President and assisted by a small staff, a total of six indivi-

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Selective Service System Headquarters located at 1724 F Street, N. W., Washington, D.C. The writer suggests that the congressional intent was to create a summit-type appellate administrative agency independent in every sense, including location, of the Selective Service System.

[209] Bowles v. United States, 319 U.S. 33 (1943).

[210] United States v. Hartman, 209 F. 2d 366 (2d Cir. 1954).

[211] United States *ex rel.* Woodard v. Deahl, 151 F. 2d 413 (8th Cir. 1945).

[212] United States *ex rel.* Oper v. Ryan (N.J. 1954, unreported).

[213] United States *ex rel.* Brandon v. Dowder, 139 F. 2d 761 (2d Cir. 1944).

[214] United States v. Greene, 220 F. 2d 792 (7th Cir. 1955); Ypparila v. United States, 219 F. 2d 465 (10th Cir. 1954); United States v. Wilson, 215 F. 2d 443 (7th Cir. 1954); United States v. Hagaman, 213 F. 2d 86 (3d Cir. 1954); Jewell v. United States, 208 F. 2d 770 (6th Cir. 1953); Mintz v. Howlett, 207 F. 2d 758 (2d Cir. 1953).

[215] 213 F. 2d 86 (3d Cir. 1954); *accord*, Jewell v. United States, 208 F. 2d 770 (6th Cir. 1953).

viduals.[216] The following show the number of appeals to PAB in recent years:[217]

FY 1965	163 appeals
FY 1966	798
FY 1967	2,175
First half of FY 1968	1,067

A decision by the PAB is in memorandum form at the present time and does not disclose the reasons for the decision.

A great potential for assistance to registrants, the Selective Service System and the public resides in the PAB. This is because, unlike the appeal boards, the *PAB on its own motion may take over and determine cases*. The language of section 10(b)(3) of the statute[218] is: "The President, upon appeal or upon his own motion, shall have power to determine all claims . . . and the determination of the President shall be final."

A right to counsel before the *Presidential Appeal Board* (PAB) and a greater degree of accessibility by registrants to that highest board might overcome in part the doubts expressed in some quarters[219] as to the reality of the Selective Service appeals system. The general trend in penal litigation is to allow, if not require, counsel in punitive matters. It is conceded that a classification proceeding is not penal in nature, nor is it an adversary proceeding. There is no compelling reason, however, why a registrant should not have a right to counsel before the PAB. As recently as 1942, there was no absolute right to counsel in criminal prosecutions.[220] This concept has been radically changed by *Miranda* v. *Arizona*,[221] and *Escobedo* v. *Illinois*.[222]

Counsel should be permitted to tender written memoranda in support of the contentions of their registrant—clients before the PAB. Personal appearances before the PAB by the registrants and/or their attorneys should be allowed when requested by the PAB. In order to discharge the increased workload which would

[216] 1967 DIR. OF SELECTIVE SERVICE ANN. REP. 4–5.

[217] 1ST-SEMI 10.

[218] 50 U.S.C. App. § 460(b)(3) (Supp. IV, 1969).

[219] Robinson, *An Examination of Fairness in Selective Service Procedure*, 37 GEO. WASH. L. REV. 564 (1969); White, *Processing Conscientious Objector Claims: A Constitutional Inquiry*, 56 CALIF. L. REV. 652 (1968); Note, *Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2128 (1966); Note, *Changes in the Draft: The Military Selective Service Act of 1967*, 4 COLUM J. L. & SOC. PROB. 120 (1968); Note, *Fairness and Due Process Under the Selective Service System*, 114 U. PA. L. REV. 1014 (1966).

[220] Betts v. Brady, 316 U.S. 455 (1942).

[221] 384 U.S. 436 (1966).

[222] 378 U.S. 478 (1964).

result from these proposals, the appropriation for the PAB should be realistically enlarged. One or more panels of the PAB might be created on a regional basis, for example, in the eastern, central, and western United States. The PAB national headquarters might well be relocated, *e.g.*, to Chicago, Indianapolis, or Cincinnati.[223]

The PAB should utilize the authority granted in section 10(b)(3) of the statute, under which the Board on its own motion may "determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service. . . ." [224] Under the present practice,[225] a registrant or his dependent and certain others may appeal to the PAB only where the appeal board decision shows a divided vote. The basis of appeal to PAB might be broadened to permit a registrant, or other party in interest, to petition the PAB to take over his claim on its own motion, even though the vote at the appeal board is unanimous.[226] It is believed that if panels of the PAB are created on a regional basis, comprising at least three panels in the continental United States, the increased workload may be met.

RECOMMENDATIONS

1. A right to *counsel* before the PAB should be allowed.

2. *Additional panels* of PAB should be created to take care of an augmented workload.

3. The "Presidential Appeal Board," the popular name for this agency, should be its official title.

4. The PAB should exercise its authority under section 10(b)(3) to *take over on its own motion* claims or questions relating to training and service.

5. Personal appearance of a registrant or his counsel before the PAB should rest in the discretion of the PAB in any instance.

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[223] If a right to counsel should be permitted at PAB level, stress should be placed upon the early attainment of a final decision by PAB. All attorneys should be directly and emphatically informed that no continuances or extensions of time would be allowed in the submission of any memoranda in support of the positions of their clients. In short, no delay attributable to counsel should be tolerated.

[224] 50 U.S.C. App. § 460(b)(3) (Supp. IV, 1969).

[225] 32 C.F.R. § 1627.3 (1969).

[226] There might be adopted a procedure similar to that used by the California Supreme Court in selecting the cases it will consider. The party who loses in a district court of appeal petitions the Supreme Court for a hearing; if four of the seven Supreme Court Justices vote to grant the hearing, the lower appellate decision is deemed set aside, and the Supreme Court assumes jurisdiction: Rule 28(a), (b), and (e), CALIF. R. OF CT. (1968). If two of the three members of PAB would grant a hearing, the matter might be deemed transferred from the appeal board for all purposes.

VIII. DRAFT CARD DESTRUCTION

In 1965, Congress amended the Universal Military Training and Service Act to penalize one who "forges, alters, *knowingly destroys*, *knowingly mutilates*, or in any manner changes . . . any Selective Service certificate." [227]

In *United States* v. *O'Brien*,[228] the Supreme Court upheld the constitutionality of the amendment in a decision by Chief Justice Warren. The defendant had, in March 1966, publicly burned his Selective Service registration certificate on the steps of the South Boston Courthouse. After being advised of his right to counsel and to remain silent, the defendant informed FBI agents that he had burned his registration certificate because of his beliefs and knowing that he was violating federal law. The defendant was indicted, tried, convicted and sentenced. Under the Youth Correction Act,[229] he was turned over to the custody of the Attorney General for six years for supervision and treatment. On appeal, the First Circuit affirmed the judgment of conviction but remanded the case to the district court with instructions to resentence the defendant.[230] The First Circuit had viewed the 1965 amendment to be unconstitutional as abridging the freedom of speech of the defendant. However, the same court stated that the defendant had violated the Selective Service regulation requiring a registrant to keep his registration certificate in his possession at all times.[231] The Supreme Court vacated the judgment of First Circuit and reinstated the judgment and sentence of the district court. No involvement with the issue of freedom of speech was seen by the highest court, which stated:

> A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records.[232]

The court noted that the constitutional power of Congress is plenary to raise and support armies and to make all laws necessary and proper to that end. The court cited *Lichter* v. *United States* [233]

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[227] 50 U.S.C. App. § 462(b)(3) (Supp. IV, 1969), *amending* 50 U.S.C. App. § 462(b)(3) (1964) (emphasis added).

[228] 391 U.S. 367 (1968). Mr. Justice Harlan concurred. Mr. Justice Douglas dissented.

[229] 18 U.S.C. § 5010(b) (1964).

[230] 376 F. 2d 538 (1st Cir. 1967).

[231] 32 C.F.R. § 1617.1 (1969).

[232] 391 U.S. at 375.

[233] 334 U.S. 742, 756 (1948).

and the *Selective Draft Law Cases*[234] to establish the power of Congress to classify and conscript manpower. For practical purposes, the court drew no distinction between a Selective Service "registration certificate" and a Selective Service "notice of classification."

A requirement by the Selective Service that a registrant have in his possession his draft card at all times is valid and enforceable.[235] Conversely, it is criminal to have in one's possession any selective service certificate not duly issued to the holder.[236]

Several other courts of appeal have considered the same issue of draft card destruction. In *United States* v. *Edelman*,[237] the Second Circuit affirmed the conviction of three registrants who burned their registration cards at a publicized rally in New York City in November 1965 in order to demonstrate their opposition to the conflict in Vietnam. The court upheld the 1965 amendment prohibiting a draft card destruction.[238] The court cited its prior decision in *United States* v. *Miller*,[239] which had sustained the amendment. The court viewed as irrelevant defendant Edelman's reclassification to IV-F and defendant Cornell's classification of I-O.[240]

In *Cooper* v. *United States*,[241] the court in affirming a conviction for draft card destruction refused to consider the legality or the wisdom of the use of troops by the executive branch of the government and alleged violations of certain treaties to which the United States is a party.

In a recent decision, the defendant was convicted of refusal to submit to induction into the armed forces.[242] A full-time student

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[234] 245 U.S. 366 (1918). These were six cases consolidated at trial and on appeal, testing the Act of 1917, 40 Stat. 76. *See* note 13 *supra*.

[235] Zigmond v. United States, 396 F. 2d 290 (1st Cir.), *cert. denied*, 391 U.S. 930 (1968).

[236] Robinson v. United States, 401 F. 2d 523 (5th Cir. 1968).

[237] 384 F. 2d 115 (2d Cir. 1967).

[238] 50 U.S.C. App. § 462(b)(3) (Supp. IV, 1969), *amending* 50 U.S.C. App. § 462(b)(3) (1964).

[239] 367 F. 2d 538 (2d Cir. 1966), *cert. denied*, 386 U.S. 911 (1967).

[240] As to Cornell, the Supreme Court denied certiorari, United States v. Cornell, 392 U.S. 904 (1968). In United States v. Miller, 367 F. 2d 538 (2d Cir. 1966), *cert. denied*, 386 U.S. 911 (1967), the defendant was previously classified I-A before the time of the card destruction. It is anomalous that defendant Edelman, in Class IV-F and thus removed from the operation of the draft, chose to flaunt his opposition to the Vietnam conflict by burning his Selective Service card.

[241] 403 F. 2d 71 (10th Cir. 1968).

[242] Wills v. United States, 384 F. 2d 943 (9th Cir. 1967), *cert. denied*, 392 U.S. 908 (1968). Justices Douglas, Stewart and Brennan would have granted certiorari.

classed II-S, he wrote in October 1965 to his local board at Berkeley:

> This is to inform your office that (1) I have intentionally destroyed my draft card and will henceforth refuse to carry another . . . . (3) I will refuse to cooperate with your office . . . . History will judge both of us, and one will be declared an unintentional murderer. It will not be me.

On 23 October, the defendant was notified of reclassification to I-A, but did not appeal or request a personal appearance. In February, he refused induction.

It should be noted that within any applicable time limits, the board had not mailed a notice of delinquency to the defendant.[243] The Ninth Circuit affirmed the conviction, but held that the doctrine of failure to exhaust administrative remedies did not apply, as constitutional issues were involved, and the ultimate issue before the court was not administrative. As to the delinquency notice, the lower court found that the defendant knew full well why he was reclassified, and so was not prejudiced by the absence of the notice. About the destroyed draft card, the court commented: "Destruction is, in fact, no more than a willful and defiant refusal to possess. The card burners know this full well."[244]

A stay of induction was granted by the district court when a full-time divinity student (IV-D) was declared to be a delinquent by his local board and ordered to report for induction. This was done after he *turned in his notice of classification* as IV-D following a Vietnam war protest demonstration. The court concluded

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[243] 32 C.F.R. § 1642.4 (1969). At trial in *Wills*, the defendant urged noncompliance by Selective Service with the regulations, in the matter of the notice of delinquency. The prosecution stressed that the defendant did not appeal the local board classification of I-A and did not exhaust administrative remedies.

It should be noted that these defendants will now have to be prosecuted for failure to possess their draft cards instead of being reclassified and tried for refusing induction. The regulation under which this reclassification was done, 32 C.F.R. §1642 (1968), authorized local boards to declare any registrant, who "fail[s] to perform any duties . . . required of him under the selective service law," to be a "delinquent," reclassify him I-A, and move him to the head of the induction list. The *Oestereich* case, discussed in text accompanying note 179, *supra*, Breen v. Sel. Serv. Local Board No. 16, 38 U.S.L.W. 4122 (U.S. 26 Jan. 1970), and Gutknecht v. United States, 38 U.S.L.W. 4075 (U.S. 19 Jan. 1970), declared these delinquency regulations invalid as not authorized by Congress. See Note, 44 *N.Y.U.L. Rev.* 804 (1969); Note, 83 *Harv. L. Rev.* 261 (1969).

[244] 384 F. 2d at 947.

that a full-time divinity student exemption is mandatory and not permissive.[245]

IX. ADMINISTRATIVE REMEDIES [246]

A. *IN GENERAL*

Section 10(b)(3), as amended, provides:

> 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 . . ., *after the respondent has responded either affirmatively or negatively to an order to report* for induction, or for civilian work . . . . Such 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.[247]

Section 10(b)(3) was upheld in *Elena* v. *President of the United States*,[248] one of the first decisions arising after the 1967 statutory amendment. The district court declared that the provision was intended to codify a long line of cases which had held that Selective Service classifications and processing were reviewable only as a defense to a criminal prosecution or by habeas corpus after induction.

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[245] Kimball v. Sel. Serv. Local Bd., 293 F. Supp. 266 (S.D.N.Y. 1968); also 283 W. Supp. 606 (S.D. N.Y. 1968).

[246] In few areas of the law does the doctrine of exhaustion of administrative remedies receive such adherence as in Selective Service matters. Paradoxically, the local board and the appeal board work in an atmosphere of relative informality and simplicity. A reported transcript is not prepared, and counsel do not participate. Sworn statements are the exception and not the rule.

[247] 50 U.S.C. App. § 406(b)(3) (Supp. IV, 1969) (emphasis added). The language "responded either affirmatively or negatively" is believed to have been first used in Watkins v. Rupert, 224 F. 2d 47 (2d Cir. 1955), where the court affirmed the denial of an injunction that would have constituted an intervention by the court in the Selective Service System. The petitioner-registrant sought a permanent injunction against being placed in Class I-A. The court regarded the proceeding as premature in that it preceded exhaustion of administrative remedies and there could be no showing of irreparable harm. The language of the court was: "[N]o judicial review has ever been held appropriate before the registrant has responded, either affirmatively or negatively, to the order of induction. Falbo v. United States, 320 U.S. 549 (1944), Estep v. United States, 327 U.S. 114 (1946), Witmer v. United States, 348 U.S. 375 (1955) . . . . [I]f plaintiff Watkins is unwilling to run the gamut of criminal prosecution, he can test the legality of his induction after he has submitted to it by suing out a writ of habeas corpus." *Id.* at 48. *Accord*, McMahan v. Hunter, 179 F. 2d 66 (10th Cir.), *cert. denied*, 329 U.S. 968 (1950); Bagley v. United States, 144 F. 2d 788 (9th Cir. 1944).

[248] 288 F. Supp. 388 (D.P.R. 1968).

The exhaustion of administrative remedies must precede resort to habeas corpus, and this includes filing a claim for exemption with the local board,[249] and the taking of an appeal from any adverse ruling.[250] The order of the local board must be followed even where the board seems to be acting arbitrarily or in excess of authority.[251] But the exhaustion doctrine must be tailored to fit the facts in each Selective Service case, especially when an alleged error of law on the part of the local board is asserted as a defense to a subsequent criminal prosecution.[252]

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[249] Ashton v. United States, 404 F. 2d 95 (8th Cir. 1968); Du Vernay v. United States, 394 F. 2d 979 (5th Cir. 1968), *aff'd by an equally divided* court, 394 U.S. 309 (1969); Olinger v. Partridge, 196 F. 2d 986 (9th Cir. 1952); United States *ex rel.* Coltman v. Bullock, 110 F. Supp. 126 (N.D. Ill. 1953); *Ex parte* Blazekovic, 248 F. 327 (E.D. Mich. 1918).

[250] Yeater v. United States, 397 F. 2d 975 (9th Cir. 1968); Mahan v. United States, 396 F. 2d 316 (10th Cir. 1968); Edwards v. United States, 395 F. 2d 453 (9th Cir. 1968); Wyman v. LaRose, 223 F. 2d 849 (9th Cir. 1955), *cert. denied*, 350 U.S. 884 (1955); United States *ex rel.* Seldner v. Mellis, 59 F. Supp. 682 (M.D.N.C. 1945). *But see* McKart v. United States, 395 U.S. 185 (1969). It has been argued that a defendant's failure to appeal and thus to exhaust his administrative remedies should not be applied to bar a defense in a criminal trial, when the defendant received no warning that this would be a consequence of not appealing. Lockhart v. United States, 6 *Crim. L. Rep.* 2315 (9th Cir. 18 Dec. 1969) (dissenting opinion); United States v. Medina Orta, 305 F. Supp. 1073 (D.P.R. 1969).

[251] *Ex parte* Catanzaro, 138 F. 2d 100 (3d Cir. 1953), *cert. denied*, 321 U.S. 793 (1944); United States v. Grieme, 128 F. 2d 811 (3d Cir. 1942); Bullard v. Sel. Serv. Local Bd., 50 F. Supp. 192 (W.D. Okla. 1943).

[252] McKart v. United States, 395 U.S. 185 (1969). This case creates an exception to the *Falbo* rule. Falbo, classified a CO, claimed a ministerial exemption and was convicted of refusal to report for civilian work. He had failed to report for a preliminary physical, and this failure to exhaust his administrative remedies was held to preclude judicial review of his classification in his criminal trial. *See* discussion in text at notes 32, 163 *supra*.

McKart's draft board denied him the statutory exemption for a "sole surviving son," because it mistakenly read the statute to require that at least one parent be living. McKart neither appealed this denial nor took the preinduction physical exam, and was convicted of failing to report for induction. The Court excused the omission of both of these administrative steps, employing a balancing test which found that the harsh results of applying the exhaustion doctrine in this criminal case was not outweighed by considerations of judicial and administrative economy. It said that a court had no "overwhelming need," in construing a statute, for the opinions of the administrative appellate boards. Further, it doubted that many registrants would have appeals depending solely on issues of pure statutory construction, so that the administrative system of appeals would not be disrupted. As for McKart's refusal to take a physical exam, the Court felt again that very few registrants would fail to take advantage of this administrative opportunity to avoid induction. Furthermore, it pointed out that the Government now has criminal sanctions to enforce the duty to take a physical exam which it lacked at the time of the *Falbo* case. Consequently, it is not necessary to deny judicial review of the registrant's classification in order to persuade him to submit to the physical exam. *See* 83 HARV. L. REV. 262 n.6 (1969).

The classification duties of a local board cease with the induction of the registrant.[253] By the device of refusing induction, the registrant does not create for the board new duties of reopening and reclassifying his status.[254]

Laches in seeking habeas corpus will be considered by the court.[255] The closer the imminence of combat approaches the inductee, the less favorably will a court deem the alleged invalidity of induction.[256]

It should be borne in mind that the Selective Service System is not subject to the provisions of the Administrative Procedure Act,[257] except as it applies to the publication of regulations.

B. *FAILURE TO APPEAL*

An appeal by a registrant from a local board can only be taken to the appeal board,[258] but the right to such an appeal is absolute and unconditional.[259] The regulations specify the procedure to be followed in response to an appeal and what orders of a local board are appealable.[260] Not every local board order is appealable. The refusal of a local board to postpone an induction is not appealable.[261] A refusal to reopen a classification is not appealable.[262] Moreover, ignorance of the registrant regarding his right to appeal does not excuse his failure to appeal.[263] No particular form of wording is necessary to initiate an appeal.[264]

In *United States* v. *Kurki*,[265] the defendant was convicted for failure to report. Ordered to report for induction on 10 August,

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[253] Palmer v. United States, 401 F. 2d 226 (9th Cir. 1968).

[254] *Id.* at 227.

[255] United States *ex rel.* Seldner v. Mellis, 59 F. Supp. 682 (M.D.N.C. 1945).

[256] United States *ex rel.* Lawrence v. Commanding Officer, 58 F. Supp. 933 (D. Neb. 1945).

[257] 5 U.S.C. App. §§ 500–76 (1964), *as amended*, (Supp. IV, 1969).

[258] United States v. Grieme, 128 F. 2d 811 (3d Cir. 1942).

[259] Kaline v. United States, 235 F. 2d 54 (9th Cir. 1956); Chih Chung Tung v. United States, 142 F. 2d 919 (1st Cir. 1944).

[260] 32 C.F.R. § 1626.1–.61 (1969).

[261] Davidson v. United States, 225 F. 2d 836 (9th Cir. 1955), *cert. denied*, 350 U.S. 887 (1955).

[262] Klubnikin v. United States, 227 F. 2d 87 (9th Cir. 1955), *cert. denied*, 350 U.S. 975 (1956).

[263] United States *ex rel.* Tietz v. McClure (N.D. Cal. 1952) (unreported).

[264] *But see* Chih Chung Tung v. United States, 142 F. 2d 919 (1st Cir. 1944), where the defendant-alien wrote in a letter to the local board: "I appeal not to be drafted." This was held not to constitute an appeal, but rather a solicitation for favorable action.

[265] 384 F. 2d 905 (7th Cir. 1967), *aff'g* 255 F. Supp. 161 (D. Wis. 1966), *cert. denied*, 390 U.S. 926 (1968); *accord*, United States v. Prince, 398 F. 2d 686 (2d Cir.), *cert. denied*, 393 U.S. 946 (1968) (opposition to Vietnam duty not a legal defense).

the defendant, by a letter of 2 August to the local board and others, asserted that he was opposed as a matter of conscience to the conflict in Vietnam. The defendant had never appealed his I-A classification. On 10 August, at the local board, the defendant passed out a leaflet criticizing the Vietnam involvement and stating: "I am refusing to submit to induction." In the appellate court, for the first time, the defendant urged that he had not received any warnings at the induction center concerning likely criminal prosecution. The Seventh Circuit affirmed the conviction, holding that the defendant had not exhausted administrative remedies by taking an appeal from his local board and so could not complain of his I-A status in a subsequent criminal prosecution. The failure to appeal precluded the defendant from showing at trial that he had married subsequent to his I-A status and might have earned another classification.[266]

In *United States* v. *Dyer*,[267] the defendant was convicted of failing to report for civilian work. Classed I-A and ordered to report for physical examination, the defendant wrote to his local board: "I appeal I-A for the reason that I am one of the Jehovah's Witnesses. . . . " A full hearing followed before the local board, and the defendant was then classed I-O. He wrote to his local board: "You are under a gross misunderstanding . . . this is an appeal that you will sincerely consider my feelings regarding this." The court held that the statement in the letter was not an appeal. The letter was a request for IV-D classification, and led to a subsequent hearing. There was nothing to appeal from until after the outcome of the hearing which the defendant had requested. Additionally, a belated appeal, about 30 days late, showed a failure to exhaust administrative remedies where the local board did not accept the tardy appeal, and no exception or unusual circumstances were shown.[268]

Another court found that the *right to appeal had been denied* to a defendant[269] where, after being ordered to report for physical examination, the defendant filed a CO Form No. 150 with

[266] Similar cases are United States v. Barnes, 387 F. 2d 649 (5th Cir. 1967) (information of marriage given to board was not a request for appeal); Dunn v. United States, 383 F. 2d 357 (1st Cir. 1967) (registrant did nothing during 10-day appeal period following receipt of notice of classification).

[267] 390 F. 2d 611 (4th Cir. 1968), *aff'g* 272 F. Supp. 965 (D. W.Va. 1967).

[268] Thompson v. United States, 380 F. 2d 86 (10th Cir. 1967), *aff'g* 258 F. Supp. 535 (W.D. Okla. 1966).

[269] United States v. Freeman, 388 F. 2d 246 (7th Cir. 1967). *Accord*, Powers v. United States, 400 F. 2d 438 (5th Cir. 1968), where the local board's erroneous instructions to registrant concerning his right to appeal constituted a denial of the right to appeal.

his local board. The board refused to reopen his classification, and so informed the registrant by a letter which made no mention of a right to appeal. In the Form 150, the defendant had stated that he believed in a Supreme Being, was a member of Islam and opposed to war because of his religious beliefs. The court viewed the form to set forth sufficient new information that the *board should have reopened* the classification. As the defendant was not informed of his right to appeal, an irregularity occurred that could not be cured at trial by a de novo consideration of his religious status. The defendant had been prejudiced at the local board level by a denial in effect of his right to attempt an appeal from a refusal by the board to reopen his classification where reopening was proper.

C. *NO RIGHT TO COUNSEL*

Regulation § 1624.1(b)[270] states in vital part: "[N]o registrant may be represented before the local board by anyone acting as attorney or legal counsel."

A Selective Service registrant has no right to be assisted by counsel at any stage of the registration, classification or induction process.[271] However, a registrant is not to be treated in his appearance before his local board as though he is engaged in formal litigation and hence is assisted by counsel.[272] In such a case, a motion for acquittal was granted at the trial, in a prosecution for refusing to submit to induction, where the defendant had written a letter to his local board protesting a I-A classification and claiming in effect a CO status. The defendant had written: "I request either a hearing before the local board or appeal." It was held that the writing should have been construed by the board as a request for both a hearing and an appeal.

The trial court cited *United States* v. *Craig*[273] where habeas corpus was granted to release an Army inductee on the ground that he should have been classified IV-D as a theological student. The court held that the local board could not ignore a change in

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[270] 32 C.F.R. § 1624.1 (1969). However, this regulation has recently come under attack. It was declared invalid as not authorized by Congress in United States v. Weller, 309 F Supp. 50 (N.D. Cal. 1969), *cert. granted*, 38 U.S.L.W. 3366 (U.S. 1970).

[271] Fults v. United States, 395 F. 2d 852 (10th Cir. 1968); United States v. Sturgis, 342 F. 2d 328 (3d Cir. 1965), *cert. denied*, 382 U.S. 879 (1965); SELECTIVE SERVICE SYSTEM, LEGAL ASPECTS OF SELECTIVE SERVICE 24 (rev. ed. 1963).

[272] United States v. Derstine, 129 F. Supp. 117 (E.D. Pa. 1954).

[273] 207 F. 2d 888 (1953).

status by the registrant and treat the defendant as though he "were engaged in formal litigation assisted by counsel." [274]

In *Ex parte Fabiani*,[275] the rule against representation by counsel was relaxed in favor of a registrant who was a medical student in Italy and away from this country. The matter arose in a petition for habeas corpus which was granted to discharge the defendant from custody at a civilian detention point. As the registrant could not speak in his own behalf before his local board in the United States, he could engage an attorney to act for him. The local board was held to have acted capriciously in denying him student status in disregard of his proof that he was a medical student in a foreign university.

However, there was held to be no right to counsel at an induction center where the registrant was being processed for induction.[276] At the center, the defendant had voluntarily signed a statement for the induction military officers stating: "I refuse to be inducted into the United States Armed Forces." At trial the defendant asserted that he had not been informed at the induction center that he might remain silent or obtain counsel pursuant to *Miranda* v. *Arizona*.[277] When he was classed 1–A, the defendant did not appeal, and thereafter passed a physical examination. The court held that *Miranda* does not apply; the defendant was not in custody at the induction center when he signed the statement that he refused induction. The court stated: "A person is not entitled to counsel while he is committing a crime." [278] The defendant's statement "I refuse" was an incident of the commission of a crime rather than the confession of a crime previously committed. The same holding applies to article 31(b) of the Uniform Code of Military Justice.[279] The military restriction did not apply, as the defendant had refused induction into the armed forces and never entered the military service.

A CO convicted of willfully refusing to report to civilian work in lieu of military induction cannot complain that he had no counsel during administrative proceedings when he does not appeal, report for physical examination, or communicate with his local board which is striving to make contact with him.[280] A Selective Service classification proceeding is not a judical trial with a

[274] 207 F. 2d at 891.
[275] 105 F. Supp. 139, 148 (E.D. Pa. 1952).
[276] Noland v. United States, 380 F. 2d 1016 (10th Cir.), *cert. denied*, 389 U.S. 945 (1967).
[277] 384 U.S. 436 (1966).
[278] 380 F. 2d at 1017.
[279] 10 U.S.C. § 831(b) (1964), *as amended*, (Supp. IV, 1969).
[280] United States v. Dicks, 392 F. 2d 524 (4th Cir. 1968).

right to be represented by counsel and to call, examine, and cross-examine witnesses.[281]

D. *MISCELLANEOUS FEATURES*

1. *No Right in Registrant to Confront Witnesses.*

A registrant has no right to confront witnesses concerning the contents of memoranda which have become a part of his local board file.[282] The court held that the local board did not have to face the defendant with those persons whose statements were considered in the matter of the defendant's claim for ministerial classification IV-D. The court perceived that the registrant's own statements in writing in his file established that he did not qualify where he worked 50 hours weekly in secular employment contrasted with 20 hours weekly given to religious work. Proceedings before a local board are not converted from administrative to criminal merely because the defendant may be accused of a crime *after* he has failed to obey an order to report.

2. *Misstatements in Appeal Board Decision.*

A conviction was set aside and an indictment dismissed[283] where the appeal board prepared a memorandum of its decision which misstated the reasons for its denial of IV-D classification to the defendant. An appeal board is not required to make findings of fact or conclusions of law or indicate reasons for a decision.[284] However, when the appeal board states reasons for not granting

[281] Imboden v. United States, 194 F. 2d 508 (6th Cir. 1952); *accord*, Merrit v. United States, 401 F. 2d 768 (5th Cir. 1968) (a Selective Service administrative proceeding is not penal). Nor is the interview before the Department of Justice hearing officer penal in nature, United States v. Wagner, 292 F. Supp. 1 (D. Wash. 1967), *aff'd*, 403 F. 2d 1 (9th Cir. 1968).

[282] United States v. Mientke, 387 F. 2d 1009 (7th Cir. 1967), *cert. denied*, 390 U.S. 1011 (1968).

[283] Gatchell v. United States, 378 F. 2d 287 (9th Cir. 1967).

[284] *See* 32 C.F.R. § 1626.27(a) (1969). Under the facts, the defendant was denied IV-D as a JW minister by his local board and classed I-O (CO). He worked secularly 32 hours weekly and gave about 35 hours weekly to miscellaneous religious tasks, but lacked authority to perform marriages or baptisms. The appeal board in its memo stated that it refused IV-D because the "registrant is not pursuing a full-time course of study in a ministerial school." This was incorrect as the defendant claimed to be a minister and not a divinity student. Accordingly, the memo did not show a correct basis in fact. Further, the appeal board attributed to the defendant 50 hours monthly in religious work, but the defendant's time summary which was not contradicted showed over 100 hours monthly, and hence the appeal board was again in factual error. The appeal board could not disregard uncontroverted facts, and then misstate those facts. In view of the reasons given by the appeal board, the court held that the board's denial was without basis in fact. 378 F. 2d at 292. *See also* United States v. Stepler, 258 F. 2d 310, 317 (3d Cir. 1958).

a classification, the reviewing court will consider the reasons advanced by the appeal board. The basis in fact test will be applied in the light of the reasons set forth by the appeal board. The case illustrates the impropriety of local boards or appeal boards attempting to write out reasons to support their determinations. The chance is too likely for clerical or stenographic inadvertence to creep in and vitiate the action of the board. In fact, a local board is not required to make findings of fact or conclusions of law or indicate reasons for its decisions.[255]

3. *Error at Induction Center or at Local Board.*

Induction center personnel err prejudicially in not giving a physical examination to a registrant at the center even though he states that he will refuse induction.[256] When local board personnel inform a registrant that he will be advised by letter as to the outcome of a request by an employer in his behalf, and no letter is in fact mailed, this is an element going to whether the defendant "knowingly" failed to report for civilian work.[257]

While the circumstance of actual bias or prejudice in a particular case may lead to the disqualification of a board member, a charge of disqualification cannot be asserted for the first time as a defense to a criminal prosecution.[258] When a board clerk signs a document without authorization as prescribed by the regulations, but the registrant suffers no prejudice, there is no reversible error.[259]

A conviction was reversed where a letter by the registrant discussing his CO scruples was not within his file when considered by the state director. The letter contained substantial matter which should have reached the state director.[290]

A defendant cannot be convicted for failing to submit to induction when he is given only nine days' notice to report and not the ten days' notice specified in the regulations, section 1632.1.[291] And when a defendant is ordered on 12 February to report for induction, and on 13 February the defendant receives written notice that he has been accepted as a theological student (IV-D), the local board cannot disregard a possible change in status in the registrant.[292]

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[255] Owens v. United States, 396 F. 2d 540 (10th Cir.), *cert. denied*, 393 U.S. 934 (1968).
[256] Briggs v. United States, 397 F. 2d 370 (9th Cir. 1968).
[257] United States v. Kurilla, 401 F. 2d 448 (3d Cir. 1968).
[258] Haven v. United States, 403 F. 2d 384 (9th Cir. 1968).
[259] United States v. Crowley, 405 F. 2d 400 (4th Cir. 1968).
[290] United States v. Bellmer, 404 F. 2d 132 (3d Cir. 1968).
[291] United States v. Brown, 290 F. Supp. 542 (D. Del. 1968).
[292] United States v. Smith, 291 F. Supp. 63 (D. N.H. 1968).

In another case, failure of the local board to act upon proof of marriage and parenthood resulted in defendant's acquittal for refusing induction, as classification II-A should have been granted to him by the board.[293]

The effect of a lack of quorum in the local board is illustrated by *United States* v. *Shapiro*.[294] This was a proceeding in habeas corpus by a serviceman seeking release from the military on the ground that the local board which voted him 1–A was not properly constituted. Of six members of the board, four were present and the vote was 3–0 with one abstention. The fourth board member who was present had disqualified himself[295] because of his business affiliations with the petitioner's family. The court held that in the absence of a quorum, a valid record could not have gone forward to the appeal board, and the appeal board could not have made a de novo determination upon an incomplete record. The court held that the appeal board should have returned the file, as incomplete, to the local board.[296]

4. *Advisors to Registrants.*

A conviction for refusing to submit to induction was affirmed although the defendant urged that Wisconsin local boards did not have advisors to assist registrants.[297] A high school graduate, the defendant did not read a Selective Service form which discussed a right to appeal and a right to a personal appearance. The government conceded that advisors were not appointed in the Wisconsin Selective Service System. The court held that appointment of advisors was discretionary and no constitutional provision required the services of advisors for registrants.

Section 1604.41 of the regulations[298] states that (uncompensated) advisors "may be appointed by the Director of Selective Service upon the recommendation of the State Director to advise

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[293] United States v. Brunier, 293 F. Supp. 666 (D. Ore. 1968).

[294] 392 F. 2d 397 (3d Cir. 1968).

[295] 32 C.F.R. § 1604.55 (1969).

[296] 32 C.F.R. § 1626.28 (1969) provides that if any steps have been omitted by a local board, or the information within the file is incomplete, the appeal board is to return the file with a request for additional information or action. This authority in an appeal board to require complete information and correct action to be shown in those files which reach the appeal board is a *potential improvement of the entire local board structure* throughout the United States. It is believed that most appeal boards have at least one lawyer-member; if the lawyer-member would scrutinize the files coming before the appeal board, he probably would perceive glaring omissions in the files. Relatively few appeal boards act to correct files coming to the board on appeal.

[297] United States v. Jones, 384 F. 2d 781 (7th Cir. 1967).

[298] 32 C.F.R. § 1604.41 (1969).

and assist registrants . . ." on all matters relating to questionnaires and liabilities under the law. The names and addresses of advisors are to be posted conspicuously in local board offices. Before January 1955, the Selective Service regulations required the appointment of advisors. The failure to appoint advisors was a procedural defect,[299] but was not considered as a denial of due process unless the registrant was actually prejudiced.[300] Unquestionably, advisors who are attorneys could best function to advise registrants of their duties and rights under the Selective Service law. The alternative is that counseling falls upon local board personnel who often are overworked and who are scarcely disinterested in results of their advice. In particular, it is desirable that attorneys on an uncompensated basis should function to advise registrants as to changes in the statute law and the effect of decisions interpreting that law. Local bar associations might appoint special committees to provide advisors-attorneys to all local boards within the locality.

RECOMMENDATION

Advisors should be appointed for each local board. Because of the complexity of the laws and regulations involved, attorneys are recommended as advisors. Local bar associations through special committees might function to assure a rotation of capable, willing advisors for all local boards within the county or other locality.

X. PRECEDENCE FOR CASES AT TRIAL AND ON APPEAL

A 1967 amendment to section 12[301] added the following language:

> 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 from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

[299] Chernekoff v. United States, 219 F. 2d 721 (9th Cir. 1969).

[300] United States v. Mekolichick, 254 F. 2d 71 (3d Cir.), *cert. denied*, 352 U.S. 908 (1956); Uffelman v. United States, 230 F. 2d 297 (9th Cir. 1956); Rowton v. United States, 229 F. 2d 421 (6th Cir. 1956), *cert. denied*, 351 U.S. 930 (1956). *Compare* Steel v. United States, 240 F. 2d 142 (1st Cir. 1956), where an instance of prejudice was found by the appellate court.

[301] 50 U.S.C. App. § 462(a) (Supp. IV, 1969), *amending* MSSA § 12(a), 50 U.S.C. App. § 462(a) (1964).

In addition, a new subsection in section 12(c) [302] now requires that:

> 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 Selective Service System or shall advise the House of Representatives and the Senate in writing the reasons for its failure to do so.

At the time of the hearings in the House and Senate on the extension of the Selective Service law, there was a widespread feeling that the Department of Justice was taking excessive time in the handling of prosecutions under the law.[303] Additionally, it was thought that the department was being too cautious in its enforcement of the statute and was inclined to be unduly gentle towards offenders.[304] The amendment of the statute to its present form, to require a precedence both at trial and on appeal, should overcome this legislative uncertainty, and accelerate the disposition of Selective Service cases.

It is perhaps unwise to single out the Director of Selective Service as the arbiter to request prosecutions or the acceleration of appeals through the Department of Justice. The Civil War Federal Enrollment Act vested both the conduct of the draft and the disposition of prosecutions in one official, the Provost Marshal General of the United States.[305] Similarly, under the Selective Service Act of 1917,[306] the administrative head for the national draft was the Provost Marshal General who was also responsible for the apprehension and prosecution of deserters. It is suggested that the Director of Selective Service should not be officially involved with the conduct of prosecutions by the Department of Justice under this section.[307]

XI. CONCLUSION

Litigation under the Military Selective Service Act of 1967

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[302] 50 U.S.C. App. § 462(c) (Supp. IV, 1969). In Part II, *supra*, it is noted that in FY 1966, Department of Justice investigated 26,830 cases and it was necessary to obtain 353 convictions; in FY 1967, there were 29,128 investigations leading to 763 convictions; from 1 July through 31 December 1967, 13,859 cases were investigated and 324 convictions resulted. 1ST-SEMI 11.

[303] *Hearing on Extension of the UMT&SA before the House Committee on Armed Services*, 90th Cong., 1st. Sess. 2512 (1927).

[304] *Id.* at 2513–14.

[305] 12 Stat. 731 (1863). The Provost Marshal General controlled enrollment, draft and arrest, and headed the Bureau of the War Department which administered all features of the federal statute.

[306] 40 Stat. 76.

[307] 50 U.S.C. App. § 462(c) (Supp. IV, 1969).

and the prior Uniform Military Training and Service Act has been extensive and costly in recent years. The greater part of the court proceedings has involved CO's and alleged ministers of religion. At first glance one might conclude that the result has not been worth the effort and expense of resisting ill-founded claims to exemption under the statute. Nevertheless, for the very reason that we are now in a period of limited mobilization, as compared to a time of general call-up, it has become necessary to scan closely all claims for exemption from military service. Otherwise, in time of all-out war or great national emergency, the machinery of Selective Service might not adjust quickly to increased numbers of exemption claims, both spurious and *bona fide.*[*] It is submitted that Selective Service has succeeded in its primary function of screening and producing qualified registrants immediately available for training and service. Additionally, Selective Service is a *force majeure* to induce registrants to anticipate impending induction by enlistment with the armed forces.

In June 1967, the basic Selective Service statute was extended, relatively free from crippling amendments. The present section 6(j) [308] has eliminated the "Supreme Being" test and perhaps has overcome the uncertainty engendered in *United States* v. *Seeger.*[309] The "basis in fact" test, now set forth in section 10(b)(3) of the Act, [310] should regularize the standard to be followed by the courts in the course of judicial review. Finally, assuming that delinquency under the Act may be increasing, a precedence for Selective Service cases under section 12,[311] at trial and on appeal, should have a salutary effect.

[308] 50 U.S.C. App. § 456(j) (Supp. IV, 1969).
[309] 380 U.S. 163 (1965). *See* discussion at note 114 *supra.*
[310] 50 U.S.C. App. § 460(b)(3) (Supp. IV, 1969).
[311] 50 U.S.C. App. § 462(a), (c) (Supp. IV, 1969).

JUDICIAL REVIEW OF MILITARY DETERMINATIONS AND THE EXHAUSTION OF REMEDIES REQUIREMENT*

By Edward F. Sherman**

This article deals with administrative determinations in the armed services and their interrelationship with civilian and military courts. The author discusses the most recent Supreme Court cases affecting the exhaustion of remedies requirement. In conclusion, the increased scope of judicial review is noted with approval.

I. INTRODUCTION

Civilian courts have traditionally acknowledged that they lack jurisdiction to interfere with determinations by the military concerning its own personnel. It has been asserted that this doctrine is required by the Constitution's delegation of powers over the armed forces to the executive and legislative branches [1] and by the need for military autonomy in maintaining internal discipline and order.[2] Buttressed by a line of Supreme Court decisions spanning the last hundred years, the doctrine was reaffirmed in 1962 by Chief Justice Warren in an address devoted to examining the principles of military justice:

> [I]t is indisputable that the tradition of our country, from the time of the Revolution until now, has supported the miliary establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact

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[1] *See* W. WINTHROP, MILITARY LAW AND PRECEDENTS 49 (2d ed. 1920).

[2] *See* Barker, *Military Law—A Separate System of Jurisprudence*, 36 U. CIN. L. REV. 223 (1967); Fratcher, *Review by the Civil Courts of Judgments of Federal Military Tribunals*, 10 OHIO ST. L. J. 271 (1949); Comment, *God, The Army, and Judicial Review: The In-Service Conscientious Objector*, 56 CALIF. L. REV. 379 (1968).

> upon discipline that any particular instrusion upon military authority might have.[1]

Despite the fact that the military has continued to enjoy relative autonomy over determinations affecting its own personnel, several areas have been carved out in which federal court review is permitted, particularly involving claims of denial of constitutional rights during the course of courts-martial[4] and discharge proceedings.[5] The Vietnam War has resulted in a rash of new suits challenging the doctrine of nonreviewability by attempting to obtain federal court relief from a variety of military determinations. Suits have been filed in the last four years to require a discharge on the grounds that the military improperly determined conscientious objector status,[6] medical fitness,[7] and personal hardship,[8] to declare void the activation of reserve and national guard units[9] and individuals,[10] to prevent transfer of

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[1] Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. REV. 181, 187 (1962).

[4] *E.g.*, Burns v. Wilson, 346 U.S. 137 (1953).

[5] *E.g.*, Harmon v. Brucker, 355 U.S. 579 (1958) (per curiam).

[6] *E.g.*, Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); Brown v. McNamara, 387 F.2d 150 (3d Cir. 1967), *cert denied*, 390 U.S. 1005 (1968), *aff'g* 263 F. Supp. 686 (D. N.J. 1967); Noyd v. McNamara, 378 F. 2d 538 (10th Cir.), *cert. denied*, 389 U.S. 1022, *aff'g* 267 F. Supp. 701 (D. Colo. 1967); Cooper v. Barker, 291 F. Supp. 952 (D. Md. 1968); Gann v. Wilson, 289 F. Supp. 191 (N.D. Cal. 1968).

[7] *E.g.*, Petition of Bank, 290 F. Supp. 120 (N.D. Cal. 1968); Weber v. Clifford, 289 F. Supp. 960 (D. Md. 1968); Rank v. Gleszer, 288 F. Supp. 174 (D. Colo. 1968).

[8] *E.g.*, United States *ex rel.* Schonbrun v. Commanding Officer, 403 F.2d 371 (2d Cir. 1968), *reconsideration of denial of stay denied*, 394 U.S. 929 (1969) (Douglas, J., dissenting).

[9] *E.g.*, Felberbaum v. MacLaughlin, 402 F.2d 57 (4th Cir. 1968); McArthur v. Clifford, 402 F.2d 58 (8th Cir.), *stay denied*, 393 U.S. 810, *cert. denied*, 393 U.S. 1002 (1968) (Douglas, J., dissenting); Morse v. Boswell, 401 F.2d 544 (4th Cir.), *stay denied*, 393 U.S. 802 (1968) (Douglas, J., dissenting), *cert. denied*, 393 U.S. 1052 (1969) (Douglas, J., dissenting); McAbee v. Martinez, 291 F. Supp. 77 (D. Md.), *injunctive relief denied*, 393 U.S. 904 (1968); Sullivan v. Cushman, 290 F. Supp. 659 (D. Mass. 1968) (three-judge court) (unsuccessful action by Army reservists to prevent activation and orders to Vietnam on grounds of violation of reserve contract and denial of due process for failure to provide individual hardship hearings), *stay denied*, 393 U.S. 810 (1968) (Douglas, J., dissenting); Linsalata v. Clifford, 290 F. Supp. 338 (S.D. N.Y. 1968); Goldstein v. Clifford, 290 F. Supp. 275 (D. N.J. 1968).

[10] *E.g.*, Fox v. Brown, 402 F.2d 837 (2d Cir.), *aff'g* 286 F. Supp. 855 (S.D. N.Y. 1968); Weber v. United States, 288 F. Supp. 491 (E.D. Pa. 1968); Even v. Clifford, 287 F. Supp. 334 (S.D. Cal. 1968); Winters v. United States, 281 F. Supp. 289 (E.D. N.Y.), *aff'd per curiam*, 390 F.2d 879 (2d Cir.), *stay denied*, 390 U.S. 993, *reconsideration of denial of stay denied*, 391 U.S. 910, *cert. denied*, 393 U.S. 896 (1968) (unsuccessful action to prevent ordering to active duty for noncompliance with reserve obligations on

units [11] and individuals [12] overseas, to rescind orders concerning duty assignments,[13] and to prevent the court-martial of servicemen.[14] Most of these suits have foundered on the threshold question of jurisdiction, with federal courts denying jurisdiction in reliance on the traditional doctrine of nonreviewability or on a finding that the complainant failed to exhaust military remedies. However, in June 1968, a decision was handed down by the Second Circuit which appears to have made a significant breach in the old nonreviewability doctrine and to have liberalized the requirement of exhaustion of remedies. In *Hammond* v. *Lenfest*,[15] the Second Circuit reversed the district court's determination that it lacked jurisdiction to consider a reservist's application

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grounds contract obligations changed); Winters v. United States, 393 U.S. 896 (1968) (stay granted by Justice Douglas to prevent reactivation second time pending decision on merits by 9th Cir.); Ali v. United States, 289 F. Supp. 530 (C.D. Cal. 1968); Gion v. McNamara, Civil No. 76–1563–EC (C.D. Cal. 9 Jan. 1969) (order to active duty for more than 45 days because of unsatisfactory participation in reserves held in violation of contract and constitutional rights).

[11] *E.g.*, Morse v. Boswell, 401 F.2d 544 (4th Cir.), *stay denied*, 393 U.S. 802 (1968) (Douglas, J., dissenting), *cert. denied*, 393 U.S. 1502 (1969) (Douglas, J., dissenting); McAbee v. Martinez, 291 F. Supp. 77 (D. Md.), *injunctive relief denied*, 393 U.S. 904 (1968); Sullivan v. Cushman, 290 F. Supp. 659 (D. Mass. 1968); Johnson v. Powell, 393 U.S. 920 (1968) (application for stay denied) (Douglas, J., dissenting, objecting that National Guard petitioners were "spirited out of the country" to Vietnam by military and thereby deprived of hearing).

[12] Smith v. Ritchey, 89 S. Ct. 54 (1968) (stay granted) (stay issued by Douglas, J., to prevent transfer of serviceman to Formosa under orders issued after he organized peace march); Earl v. Cushman, Misc. Civil No. 68–1164–J (D. Mass. 18 Dec. 1968) (denied of temporary restraining order to prevent shipment of officer to Vietnam, such shipment allegedly in violation of Army regulation that he must be retained in unit upon filing application for conscientious objector discharge); Bates v. Commanding Officer, Misc. Civil No. 68–64–F (D. Mass. 29 Oct. 1968) (habeas corpus action to require discharge on grounds no basis in fact for denial of conscientious objector status resulting in voluntary return of petitioner by military to jurisdiction of district court pending court determination and appeal), *rev'd*, No. 7241 (1st Cir. 7 Jan. 1969), *writ denied on remand*, Misc. Civil No. 68–64–F (D. Mass. 14 Mar. 1969), *rev'd*, 413 F.2d 475 (1st Cir. 1969).

[13] *E.g.*, Noyd v. McNamara, 378 F.2d 538 (10th Cir.), *cert. denied*, 389 U.S. 1022, *aff'g* 267 F. Supp. 701 (D. Colo. 1967); Noyd v. Bond, 402 F.2d 441 (10th Cir.), *rev'g* 285 F. Supp. 785 (D. N.M.), *non-incarcerated status granted*, 393 U.S. 1048 (1968), *aff'd*, 395 U.S. 683 (1969).

[14] *E.g.*, *In re* Kelly, 401 F.2d 211 (5th Cir. 1968); Levy v. McNamara, Civil No. 953–67 (D. D.C. 9 May 1967), *aff'd sub nom.* Levy v. Corcoran, 389 F.2d 929 (D.C. Cir.) (Bazelon, J., dissenting) *stay denied*, 387 U.S. 915, *cert. denied*, 389 U.S. 960 (1967) (unsuccessful attempt to convene three-judge court and enjoin convening of court-martial on grounds of chilling effect on first amendment rights).

[15] 398 F.2d 705 (2d Cir. 1968).

for a writ of habeas corpus, and ordered him discharged from the Navy unless evidence was introduced at rehearing to provide a basis in fact for denial of his request for a conscientious objector discharge.[16] In holding that a serviceman is entitled to federal court review of a military administrative determination concerning a request for discharge, without requiring that he exhaust his military remedies through a court-martial proceeding, the Second Circuit rejected the stringent exhaustion rule which had been adopted in decisions by other circuits.[17] Other courts have now followed *Hammond* by accepting jurisdiction in both conscientious objector discharge[18] and non-discharge cases.[19] This article will re-examine the doctrine that federal courts lack jurisdiction to review military determinations concerning personnel in light of *Hammond* and its progeny, and will consider what standards are now required for reviewability.

II. HISTORICAL BASIS FOR DENIAL OF FEDERAL COURT JURISDICTION TO REVIEW MILITARY DETERMINATIONS

A military determination affecting personnel can be made either by a court-martial decision or a non-court administrative determination. The historical development of nonreviewability differs somewhat between the two categories.

A. *REVIEW OF COURT-MARTIAL DECISIONS*

With respect to review of court-martial decisions, American law has followed the English concept that military courts provide an autonomous system of jurisprudence which, due to the exi-

[16] Two and a half months after its decision in *Hammond*, the Second Circuit issued a new per curiam opinion on petiiton for rehearing. The court stated that because the armed services had adopted new regulations concerning discharge of conscientious objectors, the case should be sent back to the Department of the Navy to be processed in accordance with the new regulations. 398 F.2d 705, 718 (2d Cir. 1968). For discussion of the effect of this order upon the original opinion, see text at note 203 *infra*.

[17] *See* Brown v. McNamara, 387 F.2d 150 (3d Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968), *aff'g* 263 F. Supp. 686 (D. N.J. 1967); Noyd v. McNamara, 378 F.2d 538 (10th Cir.), *cert. denied*, 389 U.S. 1022, *aff'g* 267 F. Supp. 701 (D. Colo. 1967).

[18] Cooper v. Barker, 291 F. Supp. 952 (D. Md. 1968); Gann v. Wilson, 289 F. Supp. 191 (N.D. Cal. 1968); Mandel v. Dayton, Civil No. 68-2695 (S.D. N.Y. 3 Sep. 1968).

[19] Smith v. Resor, 406 F.2d 141 (2d Cir. 1969) (habeas corpus to prevent activation resulting from unsatisfactory attendance ratings on account of long hair despite regulations permitting it); *In re* Kelly, 401 F.2d 211 (5th Cir. 1968).

gencies of military life and the necessity for discipline, should not be interfered with by the civil authorities.[20] Article I, section 8, of the Constitution gives Congress the power to "make Rules for the Government and Regulation of the land and naval forces." It is this clause, together with the other legislative and executive powers over the armed forces,[21] that has served as a basis for the holding that the military courts are not Article III courts, but are agencies of the executive branch established pursuant to Articles I and II.[22] Furthermore, *Dynes* v. *Hoover* [23] established in the mid-nineteenth century that the civil courts have no power to interfere with courts-martial and that court-martial decisions are not subject to civil court review. The Supreme Court also eschewed jurisdiction to review by writ of certiorari the proceedings of a military commission.[24]

The unavailability of civil court review of court-martial decisions did not, however, extend to habeas corpus jurisdiction. Indeed, the policy reasons for preserving federal habeas corpus jurisdiction as a last remedy for a petitioner in unlawful custody [25] were as ancient and compelling as the policy of noninterference with the military, and when the two interests collided, habeas corpus was the victor.[26] By the latter part of the nineteenth

[20] *See* W. WINTHROP, MILITARY LAW AND PRECEDENTS 49 (2d ed. 1920). *See generally* Comment, *God, the Army, and Judicial Review: The In-Service Conscientious Objector*, *supra* note 2, which contains an excellent discussion of the nonreviewability doctrine.

[21] U.S. CONST. art. II, § 2, provides: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States. . . ." U.S. CONST. art. I, § 8, gives Congress the power: "To declare War . . . To raise and support Armies . . . To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces. . . ."

[22] Kurtz v. Moffitt, 115 U.S. 487 (1885); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858); *Ex parte* Dickey, 204 F. 322 (D. Me. 1913); United States v. Maney, 61 F. 140 (C.C.D. Minn. 1894).

[23] 61 U.S. (20 How.) 65 (1858).

[24] *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1864).

[25] Habeas corpus was termed the "great writ" in Justice Marshall's day, *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807), and has often been called "'the great writ of liberty,'" Burns v. Wilson, 346 U.S. 137, 148 (1953) (Frankfurter, J.); Fay v. Noia, 372 U.S. 391 (1963). *See* C. WRIGHT, FEDERAL COURTS 177–86 (1963).

[26] In *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866), the Supreme Court held that federal courts have habeas corpus jurisdiction to examine unlawful detention imposed by court-martial. After this decision, Congress passed the Act of 27 March 1868, ch. 34, 15 Stat. 44, removing appellate jurisdiction in habeas corpus cases from the Supreme Court, apparently in an attempt to remove the opportunity of the Court to invalidate the reconstruction military governments' provisions. *See* J. BURGESS, RECONSTRUCTION AND THE CONSTITUTION 197 (1902); 2 C. WARREN, THE SUPREME COURT IN UNITED STATES

century, it had been established that habeas corpus was the exclusive means of obtaining review of military determinations,[27] a doctrine which has only recently been modified to permit collateral review based on federal question jurisdiction, declaratory judgment, and mandamus.[28]

The scope of habeas corpus review of military determinations has always been severely restricted. It was originally limited to cases of actual confinement[29] and restricted to the issue of whether the court-martial had jurisdiction over the person tried and the offense charged.[30] However, since habeas corpus review could inquire into the lawfulness of military jurisdiction over the person, it was early held that the writ would lie to obtain

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HISTORY 455 (1937 ed.); Wooldridge, Book Review, 55 VA. L. REV. 569 (1969). The Act was upheld in *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869), but was later held to leave intact the power of the Supreme Court to review denial of a writ of habeas corpus on a petition for certiorari. *Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1869). *See* H. M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 290–94 (1953).

[27] *See Ex parte* Reed, 100 U.S. 13 (1879).

[28] "Federal question" jurisdiction, pursuant to 28 U.S.C. § 1331 (1964), would appear to provide the vehicle for federal court jurisdiction in most cases challenging a military determination, provided that the matter in controversy exceeds $10,000. Other bases for jurisdiction are mandamus pursuant to 28 U.S.C. § 1361 (1964), Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965); declaratory judgment pursuant to 28 U.S.C. § 2201 (1964), and FED. R. CIV. P. 57, Gallagher v. Quinn, 363 F.2d 301 (D.C. Cir.), *cert. denied*, 385 U.S. 881 (1966); suit for back pay in the Court of Claims, Augenblick v. United States, 377 F.2d 586 (Ct. Cl. 1967), *rev'd*, 393 U.S. 348 (1969) (leaves open question whether collateral attack on court-martial judgments may be made in the Court of Claims). Injunctive relief is sought under FED. R. CIV. P. 65 and the general equity jurisdiction of the federal courts. It is uncertain whether the Administrative Procedure Act, 5 U.S.C. §§ 701–06 (Supp. IV, 1969), *amending* 5 U.S.C. § 1009 (1964), applies to the military. *See* United States *ex rel.* Schonbrun v. Commanding Officer, 403 F.2d 371, 375 n.2 (2d Cir. 1968), *reconsideration of denial of stay denied*, 89 S. Ct. 609 (1969); Jaffe, *The Exhaustion of Administrative Remedies*, 12 BUFF. L. REV. 327, 327–34 (1963).

[29] Wales v. Whitney, 114 U.S. 564 (1885); United States *ex rel.* McKiever v. Jack, 351 F.2d 672 (2d Cir. 1965); Petition of Green, 156 F. Supp. 174 (S.D. Cal. 1957), *appeal dismissed as moot*, 264 F.2d 63 (9th Cir. 1959). *But see* United States *ex rel.* Schonbrun v. Commanding Officer, 403 F.2d 371, 373 (2d Cir. 1968), *reconsideration of denial of stay denied*, 393 U.S. 1009 (1969); Hammond v. Lenfest, 398 F.2d 705, 710–12 (2d Cir. 1968); *Ex parte* Fabiani, 105 F. Supp. 139 (E.D. Pa. 1952); United States *ex rel.* Steinberg v. Graham, 57 F. Supp. 938, 941–42 (E.D. Ark. 1944); *appeal dismissed per stipulation*, 149 F.2d 647 (8th Cir. 1945); United States *ex rel.* Altieri v. Flint, 54 F. Supp. 889 (D. Conn. 1943), *aff'd*, 142 F.2d 62 (2d Cir. 1944). *See also* Carafas v. LaVallee, 391 U.S. 234 (1968) (habeas corpus proceedings not mooted by discharge); Fiswick v. United States, 329 U.S. 211 (1946); Brown v. Resor, 407 F.2d 281 (5th Cir. 1969).

[30] *See generally* W. AYCOCK & S. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE 314–29 (1955).

the release or discharge of one unlawfully inducted.[31] Thus, habeas corpus actions have been used to obtain the release of a petitioner who refused to take the oath of induction on the grounds that he was never lawfully subject to military jurisdiction [32] and, in recent cases, to secure discharge where a draft board wrongfully denied an exempt classification,[33] failed to follow proper procedures,[34] or gave erroneous and misleading information concerning the right to appeal a classification.[35]

The limitation of military habeas corpus review to questions of jurisdiction was expanded only slightly at the turn of the nineteenth century to permit inquiry into whether the court-martial had exceeded its power in imposing sentence,[36] and whether the court-martial was legally constituted.[37] As late as 1950, the Supreme Court could still state in *Hiatt* v. *Brown* that "[i]t is well settled that 'by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial. . . . The single inquiry, the test, is jurisdiction.' " [38] However, *Hiatt* proved to be a last declaration of orthodoxy, for during the 1930's and 1940's there had been a steady expansion in the scope of federal habeas corpus review of state court decisions,[39] and by the early 1950's similar pressures were generated regarding military habeas corpus. In 1953, in *Burns* v. *Wilson*,[40] the Court accepted the contention that federal courts, on considering petitions for writs of habeas corpus, may review claims of denial of due process which the military had manifestly refused to consider in courts-martial. Since *Burns*

[31] *In re* Grimley, 137 U.S. 147 (1890); *In re* Morrissey, 137 U.S. 157 (1890); Stingle's Case, 23 F. Cas. 107 (No. 13,458) (E.D. Pa. 1863); United States *ex rel.* Turner v. Wright, 28 F. Cas. 798 (No. 16,778) (W.D. Pa. 1862).

[32] Billings v. Truesdell, 321 U.S. 542 (1944). *See* United States *ex rel.* Norris v. Norman, 296 F.2d 1270 (E.D. Ill. 1969); United States *ex rel.* Roberson v. Keating, 121 F. Supp. 477 (N.D. Ill. 1949).

[33] *E.g.*, Striker v. Resor, 283 F. Supp. 923 (D. N.J. 1968). *But see* Pickens v. Cox, 282 F.2d 784 (10th Cir. 1960).

[34] Application of Shapiro, 392 F.2d 397 (3d Cir. 1968); United States *ex rel.* Shiffman v. Commanding Officer, 68 Civ. 3176 (S.D. N.Y. 25 Jul. 1969); United States *ex rel.* Wilkerson v. Commanding Officer, 286 F. Supp. 290 (S.D.N.Y. 1968); United States *ex rel.* Caputo v. Sharp, 282 F. Supp. 362 (E.D. Pa. 1968).

[35] Powers v. Powers, 400 F.2d 438 (5th Cir. 1968).

[36] Carter v. McClaughry, 183 U.S. 365 (1902).

[37] McClaughry v. Deming, 186 U.S. 49 (1902).

[38] 339 U.S. 103, 111 (1950).

[39] *See* Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 660 (1948). *See generally* H. M. HART & H. WECHSLER, *supra* note 26, at 1238.

[40] 346 U.S. 137 (1953).

v. *Wilson*, the scope of military habeas corpus has included inquiry into whether the court-martial had proper jurisdiction of the person and the offense, whether the accused was accorded due process of law pursuant to the Uniform Code of Military Justice, and whether the military tribunal gave fair and full consideration to all procedural safeguards necessary to a fair trial under military law.[11] Federal habeas corpus has been invoked most frequently in recent years on the grounds of denial of constitutional rights, rather than on lack of jurisdiction of the military tribunal. However, the recent Supreme Court decision in *O'Callahan* v. *Parker*,[12] holding that courts-martial lack jurisdiction over a non-service connected crime of attempted rape committed by a soldier in peacetime while on a pass offpost, raises the likelihood that lack of jurisdiction will once again become a significant ground for invoking federal habeas corpus.

B. *REVIEW OF ADMINISTRATIVE DETERMINATIONS*

The second type of military determination affecting personnel—the nonjudicial administrative decision—has undergone a slightly different historical development with respect to the doctrine

[11] This interpretation of the scope of habeas corpus review after *Burns* was stated by the Tenth Circuit in Gorko v. Commanding Officer, 314 F.2d 858, 859 (10th Cir. 1963), and has been followed in a number of subsequent Tenth Circuit cases. *E.g.*, Kennedy v. Commandant, 377 F.2d 339 (10th Cir. 1967); Palomera v. Taylor, 344 F.2d 937 (10th Cir.), *cert. denied*, 382 U.S. 946 (1965). However, there have been a number of different interpretations of the scope of review after *Burns*. *See* Katz & Nelson, *The Need for Clarification in Military Habeas Corpus*, 27 OHIO ST. L. J. 193 (1966). The inquiry into whether the accused was accorded due process of law has generally been interpreted as including only those rights incident to military due process. United States v. Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951), viewed the term "military due process" as referring only to those rights, derived from Congress rather than the Bill of Rights, which are requisite to fundamental fairness in a court-martial, apparently as defined in the Uniform Code of Military Justice [hereinafter referred to as UCMJ] art. 64, 10 U.S.C. § 864 (1964). However, United States v. Jacoby, 11 U.S.C.M.A. 428, 430–31, 29 C.M.R. 244, 246–47 (1960), stated that "the protections of the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." *In re* Stapley, 246 F. Supp. 316 (D. Utah 1965), is an example of a liberal interpretation of *Burns*, and holds that the district court could determine on habeas corpus a claim of denial of the sixth amendment right to counsel in a special court-martial, although such right had not previously been held to be necessary for military due process, United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963). *See also* Kauffmann v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969). *But see* Kennedy v. Commandant, *supra*; LeBallister v. Warden, 247 F. Supp. 349 (D. Kan. 1965).

[12] 395 U.S. 258 (1969).

of nonreviewability. Throughout the nineteenth century, military administrative determinations were considered "executive" actions and hence immune from court review.[43] This rule, despite its questionable rationale,[44] prevailed until the development of modern concepts of administrative law in the twentieth century. In 1902 the Supreme Court in *American School of Magnetic Healing* v. *McAnnulty*[45] decided that courts have jurisdiction to review the acts of an administrative department (the Post Office) and thus abolished the "executive" immunity of military administrative determinations. Subsequently, the justification cited for nonreview of military administrative determinations was based upon the concept that because of the traditional and constitutional separation of military and civil authority, civilian courts have no power to interfere with the military sphere.[46]

The doctrine of nonreviewability of military administrative determinations was largely developed in suits seeking review of discharges. Discharge cases are a paradigm for the doctrine of nonreviewability[47] for they involve a particularly vital concern of the military—its ability to meet manpower requirements—which is frequently cited as a justification for giving the military a free hand over its personnel.[48] Since the military must rely on recruitment and the draft for its manpower, it is of some importance that it possess the power to require, grant, or withhold discharges and to condition them as honorable or less than honorable. The first discharge case to reach the Supreme Court after

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[43] *See* Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840), in which the Supreme Court held that it had no jurisdiction to review an administrative determination of the Secretary of the Navy as to the applicability of a federal pension statute to a member of the military, because the action of the Secretary, like any other executive department, was immune from review.

[44] The rule is criticized in 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23.11–.12 (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 181 (1965), and indeed is no longer followed. *See* Dismuke v. United States 297 U.S. 167 (1936) (granting review of administrative decision rejecting claims for annuity on question of law).

[45] 187 U.S. 94 (1902).

[46] This position was taken largely in reliance on the decision in Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858), see text at note 23 *supra* and subsequent court-martial cases.

[47] "It was almost exclusively against the background of these numerous disputes over the fact or type of discharge that the *Willoughby* rule developed during the first half of the twentieth century." Comment, *God, the Army, and Judicial Review: The In-Service Conscientious Objector*, *supra* note 2, at 419. See text at note 64 *infra*.

[48] *See, e.g.*, Winters v. United States, 391 U.S. 910 (application for stay denied mem.) (Harlan, J.), *cert. denied*, 393 U.S. 896 (1968); Brown v. McNamara, 263 F. Supp. 686 (D. N.J.), *aff'd*, 387 F.2d 150 (3d Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968).

McAnnulty was *Reaves* v. *Ainsworth* [48] in which an officer sought review of an examination board proceeding that had retired him involuntarily. The Court held that it lacked jurisdiction to review due process claims in discharge proceedings, emphasizing the military's autonomous nature rather than its executive immunity. Subsequent decisions [50] after World War I relied upon the *Dynes* [51] view of the military's historical immunity from civilian review in holding that discharge actions were not reviewable.

Although the nonreviewability of discharge determinations has often been stated in absolute terms,[52] significant modifications have been effected in this area. The first breaches in the nonreviewability doctrine occurred in cases seeking correction of a discharge after the fact, probably because such suits offer less threat of interference with military operations. In *Patterson* v. *Lamb*,[53] the petitioner brought suit twnety-nine years after receiving a World War I "discharge from the draft" (which disqualified him from veterans' benefits) to compel the Army to issue him a certificate of honorable discharge. The Supreme Court refused the relief, but only after accepting jurisdiction and reviewing the case on the merits. In *Harmon* v. *Brucker*,[54] decided in 1958, the Court made a more distinct break with the nonreviewability doctrine. Harmon had been given an undesirable discharge as a security risk because of his allegedly subversive advitities prior to induction, despite an excellent service record. He brought suit to require the Secretary of the Army to void the undesirable discharge and issue an honorable discharge. The Court relied upon *McAnnulty* and, by analogy, upon *Burns* v. *Wilson*,[55] in holding that federal courts have jurisdiction to consider claims that the Secretary has exceeded his statutory authority by basing the undesirable discharge on pre-induction conduct. A recent D. C. Circuit opinion, *Kennedy* v. *Secretary of the Navy*,[56] has further extended *Harmon* by permitting a suit to void a dishonorable discharge that was issued because the

[48] 219 U.S. 296 (1911).

[50] United States *ex rel.* French v. Weeks, 259 U.S. 326 (1922); United States *ex rel.* Greary v. Weeks, 259 U.S. 336 (1922).

[51] See text at note 23 *supra*.

[52] *See, e.g.*, Gentila v. Pace, 193 F.2d 924 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 948 (1952); Davis v. Woodring, 111 F.2d 523 (D.C. Cir. 1940); Marshall v. Wyman, 132 F. Supp. 169 (N.D. Cal. 1955); Nordmann v. Woodring, 28 F. Supp. 573 (W.D. Okla. 1939).

[53] 329 U.S. 539 (1947).

[54] 355 U.S. 579 (1958) (per curiam).

[55] See text at note 40 *supra*.

[56] 401 F.2d 990 (D.C. Cir. 1968). *See also* Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961); Davis v. Stahr, 293 F.2d 860 (D.C. Cir. 1961).

petitioner was a member of the Communist Party while he was in the service.

Further inroads on the nonreviewability doctrine have been made in remedial discharge cases involving claims that a discharge was based on a constitutionally defective court-martial. In *Ashe* v. *McNamara*,[57] the First Circuit ruled that the Secretary of Defense had a duty to change a seventeen-year-old dishonorable discharge to honorable because it was adjudged in a court-martial which violated petitioner's constitutional rights.[58] Two related Court of Claims decisions [59] voided the dismissals of two officers because the Secretary failed to provide regulation-required hearings after the officers' court-martial convictions (upon which the dismissals were based) were set aside. In a slightly different context, but also involving correction of military records after the fact, a federal district court in *Robson* v. *United States* [60] recently vacated a previously effected court-martial conviction because subsequent facts indicated that it had been obtained with illegally seized evidence.

Cases seeking court action affecting the discharge of one still in the military involve greater interference with day-to-day military operations, but here too there have been inroads on the nonreviewability doctrine. In *Reed* v. *Franke*,[61] a serviceman with 18 years of service sued to enjoin the Navy from administratively discharging him as an alcoholic because of two courts-martial concerning his driving while under the influence of intoxicants. (He had the misfortune of colliding with a Vice Admiral's automobile.) The court stated that while there can be no

[57] 355 F.2d 277 (1st Cir. 1965).

[58] In Davies v. Clifford, 393 F.2d 496 (1st Cir. 1968), *aff'g* 275 F. Supp. 278 (D. N.H. 1967), petitioner sued in federal court after an unsuccessful petition to the Court of Military Appeals to have a 16-year-old court-martial conviction vacated because of errors which, it was admitted, violated his constitutional rights. The First Circuit ruled that it had no jurisdiction to make a direct review of a court-martial conviction and distinguished its previous decision in *Ashe* as a case involving only "collateral administrative relief" in voiding a punitive discharge, while in *Davies* the petitioner sought direct review of a decision of the Court of Military Appeals. The court specifically rejected the language in Augenblick v. United States, 377 F.2d 586, 591–93 (Ct. Cl. 1967), *rev'd*, 393 U.S. 348 (1969), and Gallagher v. Quinn, 363 F.2d 301 (D.C. Cir.), *cert. denied*, 385 U.S. 881 (1966), which implied jurisdiction to review action of the Court of Military Appeals other than by writ of habeas corpus. *See also* United States v. Carney, 406 F.2d 1328 (2d Cir. 1969) (per curiam); Carter v. Seamens, No. 27359 (5th Cir. 8 May 1969).

[59] Hamlin v. United States, 391 F.2d 941 (Ct. Cl. 1968); Motto v. United States, 348 F.2d 523 (Ct. Cl. 1965).

[60] 279 F. Supp. 631 (D.C. Pa. 1968).

[61] 297 F.2d 17 (4th Cir. 1961).

direct judicial review of the administrative proceedings, the procedure involved will be subject to review where there is a substantial claim that prescribed military procedures violate constitutional rights.[62] Despite this statement, however, the court found that because the petitioner had not exhausted available military remedies, his claim could not be heard. Further extending the scope of available civilian relief, *Schwartz* v. *Covington*[63] held that a pending undesirable discharge based on alleged homosexual activities could be enjoined until the enlisted man involved sought relief from various review boards within the service.

Although genuine inroads have thus been made in the nonreviewability doctrine with respect to discharge cases, the doctrine is still closely followed with regard to military determinations concerning orders, duty assignments, personnel status, and other non-discharge administrative determinations. The principal authority for an absolute rule of nonreviewability in such cases is the Supreme Court's 1953 decision in *Orloff* v. *Willoughby*.[64] Orloff, a doctor who had been drafted, brought a habeas corpus suit to require the Army to assign him to medical duties and award him a commission which had been denied because of his refusal to answer certain questions concerning prior Communist Party affiliations. Despite a limited fact situation (the Army had voluntarily assigned him to medical duties before the case reached the Supreme Court, thus weakening his claim that the malassignment caused a substantial loss of rights), the Court expressed its decision in absolute terms. It found that although the Doctor's Draft Act entitled Orloff to a medical assignment, the Court had no power to review the Army determination preventing such an assignment.

> [I]t is not within the power of this Court by habeas corpus to determine whether specific assignments to duty fall within the basic classification of petitioner. . . . While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.[65]

The Court went on to express the policy behind the doctrine of nonreviewability in language which has been repeated in nearly every subsequent military review case:

[62] *Id.* at 19–21.
[63] 341 F.2d 537 (9th Cir. 1965).
[64] 345 U.S. 83 (1953).
[65] *Id.* at 93–94.

> [J]udges are not given the task of running the Army. . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.[66]

Although the broad proscription in *Orloff* has not been followed in the discharge cases discussed above, and although further doubt has now been raised as to the doctrine's applicability in attacking military personnel determinations on certain limited grounds,[67] the strict rule of nonreviewability has been applied in suits involving military orders for a particular assignment or a particular location (even if overseas),[68] discretionary administrative determinations such as whether an individual is physically fit for overseas duty[69] or whether a unit has received adequate training for assignment to a war zone,[70] and referral of charges to court-martial.[71] These decisions, generally involving the assignments and status of servicemen, are unlike the discharge cases in that they employ a mechanical application of the non-

[66] *Id.*

[67] *E.g.*, cases attacking determinations as exceeding the statutory authority of the military, Smith v. Resor, 406 F.2d 141 (2d Cir. 1969); Thompson v. Clifford, 408 F.2d 154 (D.C. Cir. 1968) (Secretary of Army lacked power to prevent burial of honorably discharged soldier in national cemetery); United States *ex rel.* Guagliardo v. McElroy, 259 F.2d 927, 929 (D.C. Cir. 1958), *aff'd*, 361 U.S. 281 (1960); Noyd v. Bond, 285 F. Supp. 785 (D. N.M.), *rev'd*, 402 F.2d 441 (10th Cir.), *non-incarcerated status granted*, 393 U.S. 1048 (1968), *aff'g* 395 U.S. 683 (1969); Winters v. United States, 281 F. Supp. 289 (E.D.N.Y.), *aff'd per curiam*, 390 F.2d 879 (2d Cir.), *stay denied*, 391 U.S. 910, *cert. denied*, 393 U.S. 896 (1968); Fox v. Brown, 402 F.2d 837 (2d Cir.), *aff'g* 286 F. Supp. 855 (S.D.N.Y. 1968) (dicta); Robson v. United States, 279 F. Supp. 631 (E.D. Pa. 1968) (dicta), or as violating first amendment rights, Smith v. Ritchey, 89 S. Ct. 54 (1968).

[68] Mora v. McNamara, 389 U.S. 934 (1967); Brown v. McNamara, 387 F.2d 150 (3d Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968), *aff'g* 263 F. Supp 686 (D. N.J. 1967); Noyd v. McNamara, 378 F.2d 538 (10th Cir.), *cert. denied*, 389 U.S. 1002, *aff'g* 267 F. Supp. 701 (D. Colo. 1967); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967); Cooper v. United States, 403 F.2d 71 (10th Cir. 1968) (dicta); United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967) (dicta).

[69] Weber v. Clifford, 289 F. Supp. 960 (D. Md. 1968).

[70] McAbee v. Martinez, 291 F. Supp. 77 (D. Md.), *injunctive relief denied*, 393 U.S. 904 (1968).

[71] *In re* Kelly, 401 F.2d 211 (5th Cir. 1968); Levy v. McNamara, Civil No. 953-67 (D. D.C.), *aff'd sub nom.* Levy v. Corcoran, 389 F.2d 929 (D.C. Cir.) (Bazelon, J., dissenting), *stay denied*, 387 U.S. 915, *cert. denied*, 389 U.S. 960 (1967); Gorko v. Commanding Officer, 314 F.2d 858 (10th Cir. 1963); *cf.* Stolte v. United States, Misc. No. 68-4 (U.S.C.M.A. 1968) (unsuccessful attempt to enjoin court-martial in Court of Military Appeals). *But see* Crane v. Hedrick, 284 F. Supp. 250 (N.D. Cal. 1968).

reviewability doctrine rather than a balancing of such relevant considerations as the nature of the petitioner's challenge to the military determination, the degree of anticipated interference with the military, the extent to which military expertise is actually involved, and the potential injury to the petitioner if review is refused.

The large number of suits during the Vietnam War period seeking relief from military determinations have put the federal courts in the difficult position of having to make decisions on highly sensitive political issues. The Supreme Court has rather consistently refused to grant certiorari in cases involving controversial questions relating to the conduct of the war and the operation of the military,[72] but the lower courts cannot avoid the issues as easily. Some courts have simply applied the strict doctrine of nonreviewability to military cases, summarily denying jurisdiction.[73] However, the erosion of the nonreviewability doctrine has made such absolute denials of jurisdiction difficult to justify in certain cases, particularly those claiming denials of constitutional rights in courts-martial, discharges, and other administrative decisions, or indicating clear abuses of statutory authority. Other courts have rejected the strict nonreviewability doctrine but, after reviewing a case on the merits and sometimes raising a number of considerations relating to the appropriateness of court interference, have refused the requested relief.[74] Still another approach has been to deny jurisdiction, not on the grounds of nonreviewability, but on the grounds that the petitioner had not exhausted available military remedies and there-

[72] *See, e.g.*, Brown v. McNamara, 390 U.S. 1005 (1968), and Noyd v. McNamara, 389 U.S. 1022 (1967) (attacks on denials of conscientious objector discharges and the statutory scheme); Mora v. McNamara, 389 U.S. 934 (1966), Luftig v. McNamara, 387 U.S. 945 (1967), and Mitchell v. United States, 386 U.S. 972 (1967) (attacking legality of the war in Vietnam); Morse v. Boswell, 393 U.S. 1052 (1969), McArthur v. Clifford, 393 U.S. 1002 (1968), and Winters v. United States, 393 U.S. 896 (1968) (attacking activation of reserve units and individual reservists).

[73] *See, e.g.*, Chavez v. Fergusson, 266 F. Supp. 879 (N.D. Cal. 1967), *appeal dismissed*, 395 F. 2d 215 (9th Cir. 1968) (appeal moot where petitioner had already served sentence and been discharged).

[74] Stanford v. United States, 399 F. 2d 693 (9th Cir. 1968) (denial of application to have record reflect disabilities suffered in military held not arbitrary or capricious or unsupported by substantial evidence); Schultz v. Clifford, No. 19,583 (8th Cir., 29 Oct. 1969) 2 SSLR 3361 (activation of individual held proper); *In re* Kanewske, 260 F. Supp. 521 (N.D. Cal. 1966) (adequate evidence in record to support denial of conscientious objector discharge), *appeal dismissed sub nom.* Kanewske v. Nitze, 383 F. 2d 388 (9th Cir. 1967) (habeas corpus not available after sentence served and petitioner discharged).

fore the case was not yet ripe for review by a federal court.[75] This use, or perhaps abuse, of the concept of exhaustion of remedies and its relationship to the nonreviewability doctrine will be examined in the following sections.

III. THE EXHAUSTION OF REMEDIES DOCTRINE JURISDICTION TO REVIEW MILITARY DETERMINATIONS

The rule that a party must exhaust the remedies available to him within the military before he can seek federal court review of a military determination has its roots both in common law and administrative law. The exhaustion concept developed as a practical requirement of finality to be met before an appellate court could review the determinations of a lower court.[76] The concept also played a role in the allocation of jurisdiction between law and equity by requiring the exhaustion of legal remedies before equity would take jurisdiction.[77] In administrative law the concept took on importance in relation to court review of administrative determinations; in refusing review of such determinations, courts have been especially concerned with preserving the autonomy of administrative agencies.[78] This concern is particularly relevant to the military which has a long tradition of independence as to its courts and administrative decisions.

The rationale behind the exhaustion of remedies doctrine includes both practical considerations of efficiency and orderly procedure, and a concern for retaining separation of powers between the judiciary and the other branches of the Government. In relation to court review of military determinations, the exhaustion doctrine embodies many of the same objectives as the

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[75] Brown v. McNamara, 387 F. 2d 150 (3d Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968), *aff'g* 263 F. Supp. 686 (D. N.J. 1967); Noyd v. McNamara, 378 F. 2d 538 (10th Cir.), *cert. denied*, 389 U.S. 1022, *aff'g* 267 F. Supp. 701 (D. Colo. 1967).

[76] *See* Jaffe, *supra* note 28, at 327–29.

[77] *See generally* 2 J. MOORE, FEDERAL PRACTICE ¶ 2.03 (2d ed. 1967).

[78] "Under the Anglo-American conception, administrative agencies are distinct entities; they are not a part of the judicial system. Judicial control comes in from the outside. The agency is either within the Executive or, under *Humphrey's Executor*, 'independent.' The Judiciary will not lightly interfere with a job given to the Executive until it is clear that the Executive has exceeded its mandate. The exhaustion doctrine is, therefore, an expression of executive and administrative autonomy. And it has peculiar pertinence when, as is so often the case, the agency has been given large discretionary powers and the potential exercise of these powers is relevant to the solution of the issues for which early review is sought." Jaffe, *supra* note 28, at 328.

precept of nonreviewability. By postponing civil court review of a military determination until the military has had an opportunity to apply its expertise, exhaustion, like nonreviewability, prevents unnecessary civilian interference in military matters and ensures military autonomy over its own business.

Although there are similar justifications for the use of nonreviewability and exhaustion of remedies, there is a distinct and important difference between the two concepts. The nonreviewability doctrine is a complete bar to a court's jurisdiction. If the principles of the concept apply to a given case, the court has no power to review the proceedings of a military tribunal, even in determining the scope of nonreviewability in the particular case.[79] Exhaustion of remedies, however, is a discretionary doctrine applied by courts to ensure that review is not permature. Although it also masks important interests in preserving separation of powers, this interest is served by the court's voluntarily abstention until an appropriate time, rather than by barring jurisdiction. Thus, to the extent that some recent cases intermingle the exhaustion doctrine with language from cases turning on nonreviewability,[80] they would appear to be misapplying the exhaustion rule.

The exhaustion of remedies doctrine, as it has develped in administrative law, has a number of limitations. First, one need only exhaust remedies which provide a genuine opportunity for relief.[81] Second, exhaustion is not required where the petitioner may suffer irreparable injury if compelled to pursue his administrative remedies.[82] Third, exhaustion is not required, under some precedents,[83] if the plaintiff has raised a substantial constitutional question.[84] This is especially true when the administrative tribunal lacks the expertise or authority to resolve adequately the

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[79] However, several recent decisions suggest that review may be necessary in order to make an adequate determination as to the question of reviewability. *See, e.g.*, United States *ex rel.* Schonbrun v. Commanding Officer, 403 F. 2d 371 (2d Cir. 1968), *reconsideration of denial of stay denied*, 393 U.S. 1009 (1969) (Douglas, J., dissenting); Fox v. Brown, 402 F. 2d 837 (2d Cir.), *aff'g* 286 F. Supp. 855 (S.D. N.Y. 1968); Robson v. United States, 279 F. Supp. 631 (E.D. Pa. 1968).

[80] For a discussion of this phenomenon, see text at notes 142–158 *infra*.

[81] *See* Jaffe, *supra* note 28, at 329.

[82] Eccles v. People's Bank, 333 U.S. 426, 434 (1948); Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290 (1923); Colonial House, Inc. v. Connecticut St. Bd. of Lab. Rel., 23 Conn. Supp. 30, 176 A. 2d 381 (Super. Ct. 1961).

[83] Utah Fuel Co. v. National Bituminous Coal Comm'n, 306 U.S. 56 (1939); Isbrandtsen v. United States, 211 F. 2d 51 (D.C. Cir. 1954); *see* Jaffe, *supra* note 28, at 331–34.

[84] *See* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.04 (1958).

constitutional question. Thus, in *Wills* v. *United States*,[85] *the* Ninth Circuit held that a plaintiff attacking his punitive reclassification as a violation of first amendment rights was not required to exhaust his selective service remedies:

> In the first place, appellant's objection to his classification was not addressed to the area of administrative judgment. It did not pose a question upon which courts, bowing to special expertise, would regard the administrative determination as final, save only where basis in fact is lacking. His objection, founded upon a claim of constitutional right, was one on which courts have little reason to defer to administrative determination. The exhaustion rule loses much of its force in this area.[86]

These limitations on the exhaustion doctrine are, of course, only working guides which courts have devised for dealing with administrative agencies. The degree to which the military can be analogized to an administrative agency or a state court system in its relation to the federal courts has been subjected to little judicial scrutiny. While certain historical and constitutional differences between the military and these other semi-autonomous systems indicate that wholesale application of administrative law exhaustion principles to the military may be inappropriate, there are distinct similiarites between the systems, and as the traditional concept of absolute military immunity from civil court interference continues to wane, the principles of exhaustion must have considerable weight in determining the timeliness of civilian court review of military determinations.

There is a basic similarity between state and military courts in their relationship to the federal courts: Untimely federal court interference is a threat to the autonomy of both. Exhaustion of remedies was introduced into state-federal relations when Congress extended habeas corpus jurisdiction over state prisoners to the federal courts in 1867,[87] and in *Ex parte Royall*[88] it was interpreted as an aspect of comity required to maintain the proper state-federal balance.[89] Since the scope of habeas corpus review of military determinations originally extended only to the question of whether the military tribunal had proper jurisdiction,[90] there was little need at that time for a rule of military exhaustion to

[85] 384 F. 2d 943 (9th Cir. 1967).
[86] *Id.* at 945.
[87] Act of 5 February 1867, ch. 28 § 1, 14 Stat. 385.
[88] 117 U.S. 241 (1886).
[89] Regarding the scope of habeas corpus review of state courts, *see generally* C. WRIGHT, FEDERAL COURTS 177–86 (1963). With respect to federal courts see W. AYCOCK & S. WURFEL, *supra* note 30, at 314–78.
[90] *See* text at note 30 *supra*.

deal with premature review. While a few early decisions seemed to rely upon considerations peculiar to the exhaustion doctrine,[91] explicit reliance upon the concept was not often utilized until after World War II when the expanded scope of habeas corpus review of military determinations raised the spectre of federal courts being inundated by the habeas corpus applications of military personnel.[92]

In 1949, Article of War 53[93] (now Article 73 of the Uniform Code of Military Justice [94]) was passed by Congress to permit, under certain conditions, a petition for new trial within one year after approval of a court-martial sentence by the convening authority. In 1951, a new *Manual for Courts-Martial* was published and included the following provision:

> Prior to the exhaustion of the remedies of appellate review and pe-

[91] *E.g.*, Wales v. Whitney, 114 U.S. 564 (1885), in which the Supreme Court held that it had no habeas corpus jurisdiction to determine the validity of military orders and that the petitioners could raise the question of their legality in the military courts.

[92] *See* W. AYCOCK & S. WURFEL, *supra* note 30, at 314, 350–54.

[93] Article 53 conferred discretionary authority upon The Judge Advocate General to grant a new trial, vacate a sentence, or modify a discharge if application for such relief was made within one year after final determination of the case upon initial military appellate review. The article ended with the following proviso: "Provided . . . That all action by the Judge Advocate General pursuant to this article . . . shall be final and conclusive . . . and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States." MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY 291 (1949), 13 Fed. Reg. 7519, 7550 (1949). Whelchel v. McDonald, 178 F. 2d 760 (5th Cir. 1949), *aff'd* 340 U.S. 122 (1950), stated that "the last words of the amended Article of War 53, seem to make the action of the Judge Advocate General refusing a new trial binding upon the courts of the United States." However, Schilder v. Gusik, 180 F. 2d 662 (6th Cir. 1950), *rev'd on other grounds*, 340 U.S. 128 (1950), read the same words (which are now part of art. 76, UCMJ) as giving The Judge Advocate General's determination, under art. 53, finality upon the merits only and not as precluding habeas corpus attack. United States v. Augenblick, 393 U.S. 348, 350 (1969) (dicta), states that habeas corpus relief is an "implied exception" to art. 76, UCMJ. The legislative history supports this view. See H. R. REP. No. 491, 81st Cong., 1st Sess. 35 (1949); S. REP. No. 486, 81st Cong., 1st Sess. 32 (1949).

[94] Article 73 reads: "Petition for a new trial. At any time within one year after approval by the convening authority of a court-martial sentence which extends to death, dismissal, dishonorable or bad conduct discharge, or confinement for one year or more, the accused may petition the Judge Advocate General for a new trial on the ground of newly discovered evidence or fraud on the court." Manual for Courts-Martial, United States, 1951. Article 73 was amended in 1968 to extend the time for appeal from one to two years and to permit the accused to petition for a new trial in all cases where there is newly discovered evidence or fraud on the court. The Military Justice Act of 1968, Pub. L. No. 90-632, § 873, art. 73 (24 Oct. 1968), 1 U.S. CODE CONG. & AD. NEWS 1570–71 (1968).

> tition for new trial which are available to an accused person, . . . a resort to habeas corpus to test the legality of restraint imposed pursuant to a sentence of a court-martial is inappropriate and premature.[95]

Commentators have observed that these changes were intended to establish adequate post-conviction procedures within the military which must be exhausted as a prerequisite to federal habeas corpus review.[96]

One year later, a case concerning the scope and application of Article 53 in relation to the exhaustion of remedies requirement reached the Supreme Court. In *Gusik* v. *Schilder*,[97] a petitioner convicted of murder by a court-martial petitioned for a writ of habeas corpus on the ground that the court-martial lacked jurisdiction due to denial of statutory and constitutional rights to a pretrial investigation and effective assistance of counsel. Analogizing the situation to state-federal habeas corpus practice, the Court stated that the reason for requiring exhaustion is that interference by the federal court may be a needless cause of friction if the military does offer a remedy,[98] and ruled that the district court should refuse to hear the case pending petitioner's exhaustion of his remedy under Article 53.

The exhaustion of remedies doctrine was codified at approximately the same time in the state-federal[99] and the military-federal contexts. Since that time, however, the exhaustion requirement as applied to federal court review of state decisions has been significantly liberalized. In *Fay* v. *Noia*,[100] the Supreme Court materially reduced the exhaustion requirement by holding that a state prisoner who failed to appeal his conviction in time can nevertheless obtain federal habeas corpus review because the

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[95] Manual for Courts-Martial, United States, 1951, ¶ 214*b*. The chapter concerning exhaustion and habeas corpus within the military has been deleted from the Manual FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION).

[96] "It is important to remember the extraordinary nature of habeas corpus, the basic doctrine of the necessity of full exhaustion of all other remedies first, the vast administrative burden that abusive resort to the write has cast upon the courts and the desire of both the courts and Congress to establish post-conviction hearing procedures which are both more adequate and more conclusive than the traditional writ of habeas corpus *ad subjiciendum* . . . . Article of War 53, and its Uniform Code successor, Article 73, constitute the congressional solution to the problem in military cases just as section 2255 is its solution to the problem in civil cases." W. AYCOCK & S. WURFEL, *supra* note 30, at 344.

[97] 340 U.S. 128 (1950).

[98] *Id.* at 132.

[99] 28 U.S.C. § 2254 (1964) (originally enacted as Act of 25 June 1948, ch. 646, 62 Stat. 967).

[100] 372 U.S. 391 (1963).

section 2254 exhaustion requirement[101] only applies to state remedies available at the time of application for habeas corpus.[102] No analogous development has taken place regarding federal habeas corpus jurisdiction over court-martial convictions. This can be explained in part, perhaps, by the fact that the Court of Military Appeals has taken an active role in upholding and extending due process rights in courts-martial,[103] thus lessening the need to liberalize the exhaustion rule. That liberalization of court review which has occurred has tended to concern the fact and scope of review, rather than the exhaustion element of timing.

The development of the exhaustion doctrine regarding court review of military administrative determinations has paralleled that concerning court-martial decisions. Where military regulations have made various channels of appeal or remedies available, courts have uniformly required that these channels be exhausted before seeking court review. The question often arises, however, as to whether a particular forum or channel is indeed necessary to achieve finality and whether it actually provides a genuine source of relief. For example, the discharge cases have created a dispute over whether one must exhaust all the military administrative boards created for post-discharge review before seeking court review.[104] Clearly, seeking court review before dis-

[101] See note 99 *supra*.

[102] *See also* Townsend v. Sain, 372 U.S. 293 (1963), providing guidelines as to when a hearing must be granted by federal courts on habeas corpus applications.

[103] The Court of Military Appeals has extended to servicemen such due process rights as the right to a speedy trial, United States v. Schlack, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964); right to confront witnesses, United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); right of protection against unreasonable searches and seizures, United States v. Vierra, 14 U.S.C.M.A. 48, 33 C.M.R. 260 (1963); United States v. Nowling, 9 U.S.C.M.A. 100, 25 C.M.R. 362 (1958); privilege against self-incrimination, United States v. Kemp, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1962); right to a public trial, United States v. Brown, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1956); right to compulsory process, United States v. Sweeney, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964); and the right to pre-interrogation warnings, United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). *See generally* Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225 (1961).

[104] *Discharge review boards are established by each service pursuant to* 10 U.S.C. § 1553 (1964). They are composed of military officers, follow a relatively informal procedure and will grant a hearing automatically upon request for review of any discharge or dismissal to determine whether an error or injustice has been made. Boards for the correction of records are established by each service under 10 U.S.C. § 1552 (1964). They are composed of civilians serving part time and do not grant hearings to an applicant as a matter of right. Subject to approval by the Secretary of the military department involved, they can grant change of type of discharge, elim-

charge is final would be a failure to exhaust administrative remedies. Thus, in *Bernstein* v. *Herren*,[105] two soldiers were refused declaratory judgment relief from a threatened administrative discharge because the discharge proceedings had not yet gone beyond a Field Board of Inquiry, and therefore the injury might never materialize.[106]

More difficult problems arise when an individual has already been discharged from the service, and there is a split among the circuit courts as to whether boards for correction of records and discharge review must always be petitioned unsuccessfully before resort can be made to the federal courts. The Fifth Circuit in *McCurdy* v. *Zuckert*[107] has held that the district courts lack jurisdiction in the absence of exhaustion of post-discharge review boards because such boards offer "complete retroactive restoration." However, the D. C. Circuit in *Ogden* v. *Zuckert* [108] permitted an Air Force officer to obtain court review of his medical disability discharge even though he had not petitioned the Air Force Board for Correction of Military Records. The court found that the statute which established the Board[109] was not intended to affect judicial jurisdiction, but to relieve Congress of having to pass private legislation aimed at remedying individual discharges. The extent of the court's actual reliance on this legislative intent is unclear, for the court went on to emphasize that a determination from the Board may take up to three years and that even if the Board finds in petitioner's favor, the power to correct the discharge is not in the Board but in the Secretary of the Air Force who is only bound to make corrections "when he considers it necessary." [110] These factors demonstrate the court's concern with the adequacy of the available relief rather than the legisla-

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ination of discharge and restoration to duty, restoration to rank, or elimination of derogatory information from applicant's military records. *See Joint Hearings on S. 745-62, S.2906-7, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., pt. 3, at 828-33 (1966); Everett, *Military Administrative Discharges—The Pendulum Swings*, 1966 DUKE L. J. 41; Meador, *Judicial Determination of Military Status*, 72 YALE L. J. 1293 (1963).

[105] 141 F. Supp. 78 (S.D.N.Y. 1956).

[106] Similarly, in Michaelson v. Herren, 242 F. 2d 693 (2d Cir. 1957), a sergeant was denied injunctive relief to prevent an administrative discharge because he had neither been discharged nor petitioned the discharge review boards.

[107] 359 F. 2d 491 (5th Cir. 1966), *cert. denied sub nom.* McCurdy v. Brown, 385 U.S. 903; *accord*, Tuggle v. Brown, 362 F. 2d 801 (5th Cir. 1966) (per curiam).

[108] 298 F. 2d 312 (D.C. Cir. 1961).

[109] 10 U.S.C. § 1552(a) (1964).

[110] 298 F. 2d at 316–17.

tive intent. Furthermore, the court stressed the fact that the principle of exhaustion is discretionary[111] and tempered its decision by stating that on remand the district court could, in its discretion, reject jurisdiction pending application for relief from the military board. Thus, although *Ogden* raised serious questions as to whether correction of records boards are intended as a step in the finality of a discharge determination and whether they provide an adequate remedy, it left the weighing of such considerations to the lower court's discretion. Subsequent circuit court opinions have followed this discretionary approach.[112]

The considerations to be weighed by the court in applying its discretion with regard to exhaustion include the adequacy of the military remedy, the threat of irreparable injury, and the existence of substantial constitutional questions. Indeed, it is the treatment of these considerations which distinguishes between a strict and a liberal application of the exhaustion doctrine. One of the few Supreme Court cases concerning the doctrine in military discharge cases provides a somewhat stringent application. In *Beard* v. *Stahr*,[113] an Army lieutenant colonel sought to enjoin the Secretary of the Army from giving him a general discharge for conduct unbecoming an officer. The suit was brought after the Army board of review recommended discharge but before the Secretary had made his decision, and alleged that the board's proceedings denied the officer due process of the law. The Supreme Court, in a per curiam opinion with five justices joining, directed that the suit be dismissed for prematurity since the Secretary had not yet exercised his discretionary authority and because the appellant had adequate procedures for seeking redress if he were removed from the active list.[114]

Justice Douglas, joined by Justice Black, dissented on the grounds that the hearing had denied petitioner due process by putting the burden of proving fitness on him and denying confrontation with his accuser. The dissent maintained that the suit was ripe for adjudication because even if the Secretary's decision were favorable, and even if petitioner could recover loss of salary and pension in a subsequent collateral action, the proceeding involved

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[111] *Id.* at 317.

[112] Nelson v. Miller, 373 F. 2d 474 (3d Cir.), *cert. denied*, 387 U.S. 924 (1967); Sohm v. Fowler, 365 F. 2d 915 (D.C. Cir. 1966). *Sohm* held that when post-discharge remedies have not been exhausted, the district court should retain jurisdiction but defer decision unless there are "special circumstances."

[113] 370 U.S. 41 (1962) (per curiam).

[114] *Id.* at 42.

the considerable issues of a man's professional standing, character, and claim to an honorable discharge.[115] Justice Douglas focused obliquely on the irreparable injury and constitutional question aspects of the exhaustion principle by arguing that a petitioner should not have to wait to attack an obviously unconstitutional administrative proceeding until the Secretary had determined to remove him from the active list. Such continued delay, the argument suggests, causes irreparable injury to reputation which cannot be repaired even by a final favorable determination. Thus *Beard*, unlike *Ogden* which concentrated on the adequacy of remedy, was primarily concerned with whether the exhaustion requirement should be waived in light of threatened irreparable injury. The fact that the majority supported exhaustion despite fairly persuasive evidence of at least intangible injury indicates a particular interest in requiring "finality" in military discharge determinations which may not easily be overridden by claims of irreparable injury.

Thus, prior to the Vietnam War period, the exhaustion of remedies doctrine applicable to military determinations had still not been thoroughly investigated and explained in the courts. The few relevant decisions were more expressions of judicial attitudes than clear, analytical statements of principles and guidelines to be employed in applying the doctrine. With the advent of the Vietnam War, however, the judiciary was given a greater opportunity to dissect the exhaustion principle, due largely to the magnification of problems attending the administration of conscientious objector discharges.

IV. APPLICATION OF THE EXHAUSTION DOCTRINE TO CONSCIENTIOUS OBJECTOR DISCHARGE CASES DURING THE VIETNAM WAR

Throughout the last fifty years, discharge cases have accounted for the majority of suits seeking court review of military determinations. The bases for such suits have often reflected problems and conflicts peculiar to the times in which they were brought. For example, discharge suits between the two world wars were largely brought by career officers seeking to prevent their separation under manpower reduction programs;[116] suits during World War II, the Korean War, the Vietnam War, and other periods of increased conscription predominantly sought to force the mili-

[115] *Id.* at 44.

[116] *See, e.g.*, United States *ex rel.* French v. Weeks, 259 U.S. 326 (1922); United States *ex rel.* Creary v. Weeks, 259 U.S. 336 (1922).

tary to grant a discharge;[117] and many of the suits brought between the Korean and Vietnam Wars sought to upgrade a less than honorable discharge awarded because of allegedly subversive, homosexual, or other unacceptable conduct.[118] A distinctive genus of suit during the Vietnam War has been that concerned with the conscientious objector discharge. The suit was only made possible by a 1962 change in military regulations which provided for discharge of conscientious objectors whose views developed or crystallized after induction.[119] While the United States had always provided for some form of exemption from the draft for conscientious objectors,[120] this was the first time that provision was made for discharge of in-service conscientious objectors. Since the new administrative scheme was established by a Department of Defense directive[121] and implementing service regulations,[122] it seems logical to expect that administrative law considerations would be important in determining the extent to which the courts should grant review of the military determinations.

The administrative scheme established in the service regulations provides that a serviceman seeking a conscientious objector discharge or noncombatant status must submit an application in writing to his immediate commanding officer, providing answers to detailed questions concerning his beliefs and attaching supporting documents and letters. The commanding officer is required to talk to the applicant personally, and to arrange for an interview with a chaplain and a military psychiatrist. Under a

[117] *See e.g.*, Nelson v. Peckham, 210 F. 2d 574 (4th Cir. 1954), and cases cited notes 6, 7, 8, 32 *supra*.

[118] *See, e.g.*, cases cited notes 54, 56, 61, 63 *supra*.

[119] Department of Defense (DOD) Directive No. 1200.6 (21 Aug. 1962) was issued by the Secretary of Defense pursuant to his power over the Department of Defense in 10 U.S.C. § 133 (1964). Its purpose was stated as providing "uniform procedures for the utilization of conscientious objectors in the Armed Forces and consideration of requests for discharge on the grounds of conscientious objection." It has been replaced by DOD Directive No. 1300.6 (10 May 1968) which made two changes: First, claims "based on conscientious objection growing out of experiences prior to entering military service, but which did not become fixed until entry into the service, will [now] be considered," *id.* at 3, while previously objection had to develop before entry; second, there is now an opportunity to appear "before an officer in the grade of 0-3 or higher, who is knowledgeable in policies and procedures relating to conscientious objector matters" who "will enter his recommendation and the reason therefor into the file." *Id.* at 7.

[120] *See* Mansfield, *Conscientious Objection—1964 Term*, in 3 RELIGION AND THE PUBLIC ORDER 1 (1965).

[121] See note 119 *supra*.

[122] *See* Army Reg. No. 635-20 (3 Dec. 1968); Air Force Reg. No. 35-14; Bureau of Naval Personnel Instruction No. 1616.6.

recently added provision in the Department of Defense directive [123] an applicant may request an opportunity to appear in person before an officer in the grade of O–3 (captain in the Army and Air Force, lieutenant in the Navy) or higher, and that the officer will record his recommendations and reasons therefor. The reports of these interviews, together with the recommendation of the commanding officer, are forwarded to the appropriate departmental headquarters official, the Army Adjutant General, the Chief of Naval Personnel or the Secretary of the Air Force. At this stage the file is referred to the National Director of Selective Service for an advisory opinion as to whether the individual would qualify for conscientious objector status under the Selective Service laws. Although this opinion is not binding, the departmental headquarters official frequently follows it.[124] Once the official makes his final decision, the applicant must receive written notice of the decision together with reasons for any denial of discharge.

While the directive declares that it does not create a vested right in an individual to be either processed or granted a discharge,[125] there is judicial support for the contention that there are certain constitutional rights (arising out of either the first amendment or the due process clause of the fifth amendment) upon which a valid claim for court review of a denial of discharge can be based.[126] The nature of such a claim and the grounds for attacking a denial of discharge have been previously suggested:

> Obviously, the serviceman whose request for discharge has been

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[123] See note 119 *supra*.

[124] "DOD [Directive] 1300.6 . . . provides that 'claims of conscientious objection by all persons, whether existing before or after entering military service should be judged by the same standards.' Accordingly, [the headquarters official referred the application for conscientious objector status] to the Director of the Selective Service System, General Hershey, for an 'advisory opinion' of its validity; the regulations contemplate that a negative decision by General Hershey will normally be decisive." Hammond v. Lenfest, 398 F. 2d 705 (2d Cir. 1968). The charge has been made that the Selective Service had been advising the armed services "to deny applications for discharge on the grounds of conscientious objection . . . for the purpose of discouraging such inservice applications." Petitioner's Brief for Habeas Corpus at 3, Mandel v. Dayton, Civil No. 68-2695 (S.D.N.Y. 3 Sep 1968) (judgment ordering Coast Guard to discharge petitioner as conscientious objector).

[125] DOD Directive No. 1300.6 at 2 (10 May 1968).

[126] *See* Comment, *God, The Army, and Judicial Review: The In-Service Conscientious Objector*, 56 CALIF. L. REV. 379, 397–404 (1968). *See also* Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 VA. L. REV. 1355 (1968).

> denied cannot petition the court for relief, alleging simply that the denial was unjust; he must also specify the manner in which it was unjust. From the practical standpoint, he can accomplish this only through the use of one or more of three basic approaches: 1) an attack on the final decision, as having been unreasonably, arbitrarily, or discriminatorily made; 2) an attack on the procedural scheme which the regulations establish, either as lacking the minimum essentials of constitutional due process or as fostering the denial of equal protection of the laws; 3) an attack on the procedure actually followed in the particular case, as involving an unlawful departure from the administrative scheme.[127]

Suits have been based on all three of these approaches. However, broad attacks upon the procedural scheme have not been successful,[128] and frequently there is no procedural flaw in the processing of an individual's claim. Thus, suits for review have increasingly been based on assertions that the denial was arbitrary because it had "no basis in fact." The "no basis in fact" test, developed in Selective Service determination review cases,[129] appears to have been accepted by the courts in determining whether substantive due process has been accorded by a military body which considers a petition for a conscientious objector discharge.[130]

With the first flood of conscientious objector cases prompted

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[127] *God, The Army, and Judicial Review*, *supra* note 126, at 404–05.

[128] *See, e.g.*, Brown v. McNamara, 387 F. 2d 150 (3d Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968), *aff'g* 263 F. Supp. 686 (D. N.J. 1967); Noyd v. McNamara, 378 F. 2d 538 (10th Cir.), *cert. denied*, 389 U.S. 1022, *aff'g* 267 F. Supp. 701 (D. Colo. 1967).

[129] *See* Dickinson v. United States, 346 U.S. 389 (1953); Estep v. United States, 327 U.S. 114 (1946). The test was codified in 50 U.S.C. app. § 460(b)(3) (1964), *as amended*, 50 U.S.C. app. § 460(b)(3) (Supp. IV, 1968).

[130] *See* Hammond v. Lenfest, 398 F. 2d 705, 716 (2d Cir. 1968); deRozario v. Commanding Officer, 390 F. 2d 532 (9th Cir. 1967); Crane v. Hedrick, 284 F. Supp. 250 (N.D. Cal. 1968). *But see* Brown v. McNamara, 387 F. 2d 150, 152–53 (3d Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968), *aff'g* 263 F. Supp. 686 (D. N.J. 1967), declining to pass on whether "no basis in fact" is the appropriate test for review. Although the "no basis in fact" test has been described as the "narrowest known to the law," Blalock v. United States, 247 F. 2d 615, 619 (4th Cir. 1957), it has been applied liberally in Selective Service cases. *See* Kessler v. United States, 406 F. 2d 151 (5th Cir. 1969); Lewis v. Secretary, 402 F. 2d 813 (9th Cir. 1968); Batterton v. United States, 260 F. 2d 233 (8th Cir. 1958); United States v. St. Clair, 293 F. Supp. 337 (E.D. N.Y. 1968). The test may be required for review of conscientious objector discharges in order to conform to the scope of review granted to Selective Service conscientious objector determinations. However, a broader test, such as "substantial evidence," may be appropriate for review of other military administrative determinations. *See e.g.*, Sanford v. United States, 399 F. 2d 693 (9th Cir. 1968) (finding determination of Army Board for Correction of Military Records not arbitrary, capricious, or unsupported by substantial evidence).

by the Vietnam War draft,[131] federal courts, having little experience in this area, tended to accept jurisdiction but then rule against the petitioner on the merits.[132] This pattern, however, was quickly arrested by two circuit court decisions. Both *Noyd* v. *McNamara*[133] and *Brown* v. *McNamara*[134] refused to grant review to servicemen seeking conscientious objector discharges, and *Noyd* established a strict rule of exhaustion to support its decision, apparently presaging the continued foreclosure of federal court review in conscientious objector cases and perhaps other military determinations.

In June 1968, the Second Circuit refused to follow the lead of *Noyd* and *Brown* and in *Hammond* v. *Lenfest*[135] allowed review of the claim of an in-service conscientious objector despite his failure to exhaust the available military remedies. With three other circuits subsequently reaching the same result as *Hammond*,[136] and the Supreme Court's denial of certiorari in both *Noyd*

[131] From late 1965 on, the services denied most conscientious objector discharge requests. The Central Committee for Conscientious Objectors advised in its 1968 handbook: "Although many men were discharged on grounds of conscience previous to the Spring of 1966, since that time almost all discharges have been denied regardless of merit." CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS, HANDBOOKS FOR CONSCIENTIOUS OBJECTORS 91 (10th ed. 1968). Statistics provided by the Department of Defense in November 1968 (unpublished) show for the Army:

Year	*C. O. Discharge Applications*	*Discharges Approved*
1961	8	1
1962	5	2
1963	69	29
1964	62	30
1965	101	26
1966	118	5
1967	185	9
1968 thru Oct	264	44

with slightly higher discharge rates for the Navy and considerably higher for the Air Force.

[132] *See e.g.*, *In re* Kanewske, 260 F. Supp. 521 (N.D. Cal. 1966), *appeal dismissed sub nom.* Kanewske v. Nitze, 383 F. 2d 388 (9th Cir. 1967); Gilliam v. Reaves, 263 F. Supp. 378 (W.D. La. 1966).

[133] 378 F. 2d 538 (10th Cir. 1967).

[134] 387 F. 2d 150 (3d Cir. 1967).

[135] 398 F. 2d 705 (2d Cir. 1968).

[136] The 4th and 5th Circuits have expressly endorsed the *Hammond* position, United States *ex rel.* Brooks v. Clifford, 409 F. 2d 700, *pet. for rehearing denied*, 412 F. 2d 1137 (4th Cir. 1969); *In re* Kelly, 401 F. 2d 211 (5th Cir. 1968). The 1st Circuit seems to have adopted the *Hammond* position in reversing a lower court's refusal of jurisdiction in a conscientious objector discharge case and, on remand, in reversing its denial of relief, although the exhaustion issue was not expressly raised. Bates v. Commanding Officer, Misc. Civil No. 68-64-F (D. Mass. 1968), *rev'd*, No. 7241 (1st Cir. 1969) *writ refused on remand*, Misc. Civil No. 68-64-F (D. Mass. 1969), *rev'd* 413 F. 2d 475 (1st Cir. 1969).

and *Brown*,[138] there is a temporarily irreconcilable split among the circuits. However, in October 1969, the Solicitor General filed a Memorandum in response to a petition for writ of certiorari to the Supremen Court in a Ninth Circuit conscientious objector case, stating: "The Department of Justice has, however determined to withdraw its support of the position previously urged in the Brief in opposition in *Noyd* v. *McNamara*, 378 F.2d 538 (C.A. 10), Certionari denied, 389 U. S. 1022, that military judicial remedies must be exhausted before resort by servicemen with conscientious objector claims to civilian courts." [139] The Memorandum added that the Department would, on remand of this case, "urge the court below to reach the merits of petitioner's conscientious objector claim" and would, in a case presently before the Tenth Circuit, "urge that court to abandon its Noyd holding." Thus it appears that the *Noyd* doctrine may eventually be uniformly rejected as an overly strict application of the exhaustion doctrine and that the *Hammond* rationale, permitting a more functional approach to review of military determinations, will be followed. However, questions as to the applicability of the exhaustion doctrine to other military administrative remedies, such as the Boards of Correction of Military Records,[140] and as the factors to be considered in determining the extent and scope of judicial review of a wide variety of military determinations are still very much undecided. An examination of the *Noyd*, *Brown*, and *Hammond* controversy may be useful in predicting where judicial review will go from here.

A. *NOYD* v. *McNAMARA*

Captain Dale Noyd became an Air Force officer in 1955, pursued graduate studies in psychology at the University of Michigan for three years from 1960 to 1963 under an Air Force education program, and was then assigned as an Assistant Professor of Psychology at the United States Air Force Academy. On 8 December 1966, he submitted a letter of resignation to the Secretary of the Air Force, stating that he was "opposed to the war that this country is waging in Vietnam" [141] and in subsequent letters requested that he be reassigned to duties providing min-

[137] 389 U.S. 1022 (1967).
[138] 390 U.S. 1005 (1968).
[139] Memorandum for the Respondents, Craycroft v. Ferral, No. 718 Misc. (S. Ct. Oct. Term 1969).
[140] *See* note 236 *infra*.
[141] Noyd v. McNamara, 267 F. Supp. 701, 703 (D. Colo.), *aff'd*, 378 F. 2d 538 (10th Cir.), *cert. denied*, 389 U.S. 1022 (1967).

imum conflict with his beliefs or, alternatively, that he be discharged as a conscientious objector. All his requests were denied and he eventually received orders assigning him to fighter pilot training, creating the probability that he would thereafter be sent to Vietnam. He thereupon filed a suit in federal court seeking declaratory relief, an injunction, and writs of habeas corpus and mandamus to require the Air Force either to assign him to duties consistent with his beliefs or to dismiss him. His alleged bases for relief were, first, that his application was improperly and discriminatorily denied in violation of his rights under the Constitution, statutes and regulations; second, that the pertinent Air Force regulation lacked minimum criteria of procedural due process; and, third, that the Air Force had failed to give reasons for disapproval of his application as required in its own regulation.

The district court [142] concluded that it had no jurisdiction to entertain the suit because Noyd had not yet been court-martialed for refusing to obey orders and appealed any conviction through all military appeal channels. The court mingled the policy reasons for the exhaustion rule freely with the reasons for a general policy of nonreviewability:

> There is good reason for the strict requirement of exhaustion as a prerequisite to jurisdiction. In part it is based on the separation of powers and particularly the desirability of allowing the military to govern its own affairs without interference from the courts. If courts were allowed to entertain these suits at any stage of the military proceedings, the delays incident to litigation could of themselves render military orders ineffectual.[143]

The court relied heavily upon the nonreviewability doctrine decisions,[144] and appears to have viewed the exhaustion doctrine as just another vehicle for preventing review of military determinations. Although Noyd argued that he was only obligated to pursue the remedies provided in the procedural regulation pertaining to conscientious objectors, the court rejected this contention with references to cases that had also confused exhaustion with nonreviewability.[145] Similarly, although Noyd argued

[142] *Id.* at 708.
[143] *Id.* at 707.
[144] *Id.* at 706.
[145] Eschewing substantive analysis, the court merely cited three district court decisions which had freely intermixed exhaustion and nonreviewability principles and had relied to a great extent on the concepts of *Orloff*, see text at note 64 *supra*. The three cases cited were: Brown v. McNamara, 263 F. Supp. 686 (D. N.J.), *aff'd*, 387 F. 2d 150 (3d Cir. 1967), *cert. denied*,

that requiring him to violate military law and risk court-martial in order to secure review would unreasonably place him in jeopardy, and indeed would be futile in view of the past rejections of his claim, the court dismissed these considerations by cursory references to cases not involving administrative remedies.[146] Aside from failing to delineate the policy considerations relevant in exhaustion situations, the court seemed unaware of the implications of requiring exhaustion of an entire set of military judicial remedies which had no connection with the administrative scheme governing conscientious objector discharges. In a per curiam decision, the Tenth Circuit adopted the lower court's opinion, merely adding a few words to endorse the district court's view of the exhaustion issue.[147]

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390 U.S. 1005 (1968); Chavez v. Fergusson, 266 F. Supp. 879 (N.D. Cal. 1967); Petition of Green, 156 F. Supp. 174 (S.D. Cal. 1957), *appeal dismissed as moot*, 264 F. 2d 63 (9th Cir. 1959).

[146] In answer to Noyd's contention that a refusal to grant him relief in court "would unreasonably force him to violate military law" and that this is contrary to the theory and purpose of declaratory proceedings, 267 F. Supp. at 706, the court stated that the cases did not support this argument and cited two cases involving the nonreviewability doctrines, Wales v. Whitney, 114 U.S. 564 (1885); Orloff v. Willoughby, 345 U.S. 83 (1953), and two decisions involving attempts to obtain court review of court-martial rather than administrative determinations, Gusik v. Schilder, 340 U.S. 128 (1950); Gorko v. Commanding Officer, 314 F. 2d 858 (10th Cir. 1963).

[147] "Although appellant has exhausted his administrative remedies as that term is concerned with Air Force regulations, he has not exhausted the military process and has not been denied, nor can we anticipate that he will be denied, a full consideration of his constitutional rights within the complete scope of that process." Noyd v. McNamara, 378 F. 2d 538, 539–40 (10th Cir. 1967).

Noyd also offered an argument based upon Dombrowski v. Pfister, 380 U.S. 479 (1965) (upholding federal court injunction of threatened state court prosecutions under vague state statutes to prevent "chilling effect" on first amendment rights). Noyd argued that the doctrine of *Dombrowski* should be expanded to afford injunctive relief to assure determination of his first amendment right to religious freedom without exposure to court-martial proceedings, on the theory that if such exposure were a prerequisite to judicial relief, other individuals with meritorious conscientious objection claims would be deterred from asserting their right to free exercise because of punishment and the absence of a ready means of redress. Petitioner's Brief for Certiorari at 23–25, Noyd v. McNamara, 389 U.S. 1022 (1967). The Second Circuit had recently found a "chilling effect" sufficient to justify federal court intervention in a Selective Service context. Wolff v. Selective Service Local Bd. No. 16, 372 F. 2d 817 (2d Cir. 1967). However, the Tenth Circuit rejected the *Dombrowski* argument as "contrary to established law," citing only pre-*Dombrowski* cases. 378 F. 2d at 540 n.2.

Noyd's argument was limited by the fact that no court has yet extended *Dombrowski* to a military context, that it is yet unclear whether the right to conscientious objection status is constitutionally protected under the first amendment, *see* MacGill, *Selective Conscientious Objection: Divine Will and*

B. BROWN V. McNAMARA

Private Brown, after enlisting in the United States Army and serving two weeks of basic training, applied for a conscientious objector discharge on the grounds that his beliefs had crystallized to the point that he was compelled to refuse to serve in the military. He complied with all the military procedures and submitted documentation of the sincerity of his claim, but the advisory opinion of the Director of Selective Service was that Brown could not be properly classified as a conscientious objector and thereafter the Adjutant General denied his application. Brown then refused to draw combat equipment and after being court-martialed, filed a petition for writ of habeas corpus, alleging: (1) that denial of his application was arbitrary and without basis in fact, thus violating the applicable statutes and regulations and the due process clause of the fifth amendment, and (2) that the procedures in the regulations denied him equal protection of the law because he was not given the hearing rights accorded those seeking conscientious objector status prior to entering the armed forces. The district court decision [148] first disposed of the attack on the statutory and regulatory provisions by finding that they did not result in a denial of equal protection, but then found that it had no jurisdiction to review the final determination of the Adjutant General. Relying on the nonreviewability language in *Orloff*,[149] the court refused to address even the limited question of whether the military determination had any basis in fact.[150]

While the court's decision was essentially based on the doctrine of nonreviewability and it never explicitly mentioned the exhaustion principle, it nevertheless emphasized the timing aspect

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Legislative Grace, 54 VA. L. REV. 1355, 1385-93 (1968); Mansfield, *Conscientious Objection—1964 Term*, in 1965 RELIGION AND THE PUBLIC ORDER 1, 59–67, and that both *Dombrowski* and *Wolff* concerned the exercise of free speech rather than the free exercise of religion. The question of *Dombrowski's* application to the military has been raised unsuccessfully in the free speech context in Levy v. Corcoran, 389 F. 2d 929 (D.C. Cir.), *cert. denied*, 389 U.S. 960 (1967), in an attempt to prevent the military from court-martialing an officer on charges arising out of activities he claimed were protected by the first amendment.

[148] 263 F. Supp. 686 (D. N.J. 1967), *aff'd*, 387 F. 2d 150 (3d Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968). This decision was rendered prior to the district court decision in *Noyd* and was cited in that decision, 267 F. Supp. at 708.

[149] See text at note 64 *supra*.

[150] 263 F. Supp. at 693.

of the attempt to obtain court review,[151] which is clearly related to the problem of exhaustion. Indeed, the district court opinion was subsequently cited by the district court in *Noyd* for the proposition that exhaustion of remedies is required in cases seeking review of conscientious objector determinations,[152] and the circuit court noted that Brown had not yet exhausted all his military remedies.[153]

By the time Brown's appeal had reached the Third Circuit, the Tenth Circuit's opinion in Noyd had already been decided. The Third Circuit, with separate opinions by the three judges, affirmed the district court's denial of the writ of habeas corpus, but not on the grounds suggested by the lower court. Judge Van Dusen's leading opinion began by affirming the lower court's conclusion "that the administrative scheme set up by the Department of Defense and the Army does not of itself result in any constitutional violation." [154] While making this determination, however, the opinion specifically stated, contrary to the district court's contention, that the federal courts have power to review questions involving procedural due process,[155] presumably including review of the procedure used at a specific trial. Judge Van Dusen then held that the bases for refusal in this case were neither arbitrary nor irrational.[156]

The decision thus appears to be explicable as a judgment that the court had jurisdiction to review at least some aspects of the

[151] The Court distinguished the precedents permitting federal court review of preinduction classification by a draft board, and of the form of discharge, on the basis of their timing: "Such litigation at the beginning and end of the military term of service is not nearly as disruptive to the function of the armed services as that which threatens the very utilization of the manpower which has been assembled for active service." *Id.* The court also expressed concern lest the military become "entangled in litigation" and face problems in the assignment of a conscientious objector claimant while the civilian courts were considering his case, and pointed to the superior efficiency of military tribunals in reaching a prompt and final decision. *Id.* The latter consideration is somewhat mitigated by the fact that federal courts are required to dispose of habeas corpus petitions without delay and that if petitioner were successful, injunctive relief might be granted immediately.

[152] 267 F. Supp. at 707–08.

[153] 387 F. 2d at 153 n.5. Unlike Captain Noyd, Brown had already been court-martialed, but all his reviews and appeals and a possible petition for new trial had not yet been exhausted.

[154] *Id.* at 152.

[155] *Id.*

[156] *Id.* at 153. In the court's view, factors such as that Brown made his claim only six weeks after enlisting and that his chaplain and commanding officer conditioned their opinions as to his sincerity indicated that "Private Brown's petition presents no claim sufficiently unique, nor does his position show such injustice, that we are compelled to interfere in whatever internal avenues of appeal are available to him within the Army." *Id.* at 154.

military determination but that there was in this case a basis in fact for the denial. Despite this seemingly liberal approach, Judge Van Dusen continued to flirt with the lower court's view of nonreviewability and the stringent use of exhaustion in *Noyd*. Although stating that the court need not decide whether complete exhaustion is always an indispensable prerequisite to the exercise of jurisdiction,[157] he added in a footnote:

> Claimed "conscientious objector" status can always be raised as a defense to prosecution for refusing to obey orders. From any judgment or sentence, comprehensive appeal is available. 10 U.S.C. §§ 817, 859–876. This includes resort to a board of review (10 U.S.C. § 866), to the Court of Military Appeals (10 U.S.C. § 867), to the Secretary of the Army (10 U.S.C. § 874), and petition for a new trial (10 U.S.C. § 873). Appellant has not pursued all these available remedies.[158]

Judge Van Dusen's colleagues were in fundamental disagreement with respect to the question of jurisdiction. Judge Maris felt that the court had jurisdiction to review and that Brown was entitled to reversal on the merits,[159] while Chief Judge Staley agreed with the lower court that the exercise of such jurisdiction was unduly disruptive of the operation of the armed forces and contrary to the doctrine of the separation of powers.[160] Thus, *Brown* stands as something of a watershed, with all three positions expressed—the old absolute rule of nonreviewability, acceptance of reviewability, and the *Noyd* interpretation of the exhaustion rule. However, Judge Van Dusen's willingness to consider the case on the merits, despite his hesitation to express a view on the applicability of the exhaustion doctrine, was a break from the stringency of opinions like *Noyd* and *Brown* in the district court. One can only conjecture whether, if Judge Van Dusen had found no basis in fact for the denial of Brown's application, he would have granted the relief requested without full exhaustion of the court-martial appeals.

C. *HAMMOND* V. *LENFEST*

Hammond, who had enlisted in the U.S. Naval Reserve in 1963 when he was seventeen years old, became attracted to the Society of Friends while in college and in 1966 he became a member of a local "Meeting." On 17 March 1967, he submitted a request to the commanding officer of his reserve unit for a conscientious

[157] *Id.* at 152.
[158] *Id.* at 153 n.5.
[159] *Id.* at 154.
[160] *Id.*

objector discharge. The request was denied by the Chief of Naval Personnel after the Director of the Selective Service System, General Hershey, rendered an adverse advisory opinion. Hammond refused to continue to attend reserve drills and was thereupon ordered to report for two years active duty. One week prior to the date on which he had been ordered to report, he filed a petition for writ of habeas corpus with the District Court for Connecticut, asserting that denial of his request for discharge was without basis in fact and violated the due process and equal protection clauses of the Constitution.

The district court, citing *Orloff*, *Noyd* and *Brown*, ruled that it had no jurisdiction over the case because Hammond had failed to exhaust the available administrative and military remedies.[161] The Second Circuit reversed and remanded.[162] After paying his respects to the nonreviewability doctrine at the outset of his opinion,[163] Judge Kaufman went on to cite *Burns* v. *Wilson* [164] as indicaitng "that in appropriate circumstances even a court martial proceeding—the ultimate method of enforcing discipline—could be reviewed in a civil court on an application for a writ of habeas corpus,"[165] and *Harmon* v. *Brucker*[166] as authority that federal courts possess jurisdiction to review military discharges.[167] Judge Kaufman's approach indicated that the old nonreviewability cases could no longer be relied upon to bar all review of military determinations, and thus a refusal to hear Hammond would have to be based on narrower grounds relating to the exhaustion of remedies.

After determining that Hammond, although not on active duty, was "in custody" so that habeas corpus would lie,[168] Judge Kaufman considered the exhaustion question. Distinguishing *Noyd* as susceptible of being read as a mere application of the settled doctrine that the federal courts will not interfere with duty

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[161] Opinion of Judge Zampano, D. Conn., has not been reported.

[162] Hammond v. Lenfest, 398 F. 2d 705 (2d Cir. 1968).

[163] *Id.* at 710, *quoting* Orloff v. Willoughby, 345 U.S. 83, 93–94 (1953).

[164] 346 U.S. 137 (1953).

[165] 398 F. 2d at 710.

[166] 355 U.S. 579 (1958) (per curiam).

[167] 398 F. 2d at 710. The court also cited an address by Chief Justice Warren as questioning the policy of treating the military as an enclave beyond the reach of civilian courts. See Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962).

[168] 398 F. 2d at 711–12. *But see* United States *ex rel.* O'Hare v. Eichstaedt, 285 F. Supp. 476 (N.D. Cal. 1967).

assignments of persons lawfully in the armed forces,[169] the opinion further rejected any implication in *Noyd* that a court-martial is a prerequisite for federal court review of the claim that the petitioner, at the time of bringing suit, is not lawfully in the armed forces. By analogy to the state prisoner's right to habeas corpus, the court then noted that exhaustion was not an absolute bar to jurisdictional power:

> [A]ssuming *arguendo* that Hammond's predictament can be analogized to that of a state prisoner petitioning for federal relief, it is settled that the doctrine requiring the exhaustion of available state remedies is not one defining power but one which governs the proper exercise of power, . . . and is rooted in considerations of comity rather than in the scope of federal habeas corpus jurisdiction. . . .[170]

Also recognizing the administrative law origins of the exhaustion doctrine, the court reasoned that if the court-martial is analogized to an administrative rather than a judicial remedy, "there is even less reason to require Hammond to be court martialled [sic] on the facts of this case."[171] The objectives of requiring exhaustion of administrative remedies, the court found, would not be met by requiring Hammond to subject himself to court-martial as a prerequisite to court review, for Hammond had already received the determination of General Hershey, the highest official in the administrative chain with the ultimate administrative expertise. Futhermore, resort to remedies in the court-martial area appeared to offer no real remedy for Hammond. He had no power to convene a court-martial, but even if one were convened, the court noted, there was no indication "that presenting a conscientious

[169] 398 F. 2d at 713. This same approach was taken in Crane v. Hedrick, 284 F. Supp. 250 (N.D. Cal. 1968), which was decided after the appeal in *Hammond* was argued but before a decision was rendered. Crane involved an apprentice seaman who had enlisted in the Navy and, after a month of active duty, had applied for a conscientious objector discharge which was denied. He went AWOL just prior to the scheduled departure of his ship for Vietnam, and petitioned for habeas corpus seeking an order that he be discharged. After distinguishing *Noyd*, the court rejected the view of the exhaustion doctrine as requiring submission to a court-martial: "If respondents' contentions were to prevail, the only way one in petitioner's position could raise his constitutional claims of wrongful detention would be by first committing a crime and facing the possibility of imprisonment. Neither Congress nor the majority of the federal courts has been willing to exact that price of persons seeking such relief." 284 F. Supp. at 253. The court made no further analysis of the policies which make the requirement of subjection to court-martial inappropriate, but the decision, coming at the moment that the Second Circuit was preparing its opinion in *Hammond*, no doubt lent support to a rejection of the *Noyd* rule.

[170] 398 F. 2d at 714.

[171] *Id.*

objector claim as a defense to a charge of violating military law by failing to obey orders would be anything more than a futile and ritualistic gesture." [172]

Judge Friendly's dissent relied heavily upon nonreviewability precedents, and argued further that since Hammond had voluntarily enlisted and enjoyed the privileges of reserve status for four and a half years, he should not now be relieved of the obligations.[173] By placing special emphasis upon the contractual nature of voluntary enlistment, Judge Friendly raised the possibility that court interference with miltary discharge policies might have an adverse effect on military recruitment. Concerning the exhaustion question, he argued that it is incorrect to assume that a court-martial might not be convened since "there is little doubt that the Navy is ready to set its disciplinary machinery in motion if Hammond persists in refusing to report for active duty, once the district court lifts its stay." [174] Furthermore, the court-martial would not be an exercise in futility since "[i]t would be well within the competence of a court martial to rule that, in the absence of evidence supporting General Hershey's 'advisory opinion,' it would follow the recommendation of Commanding Officer Lenfest. . . ." [175] These contentions, if proven, would undoubtedly weaken the majority's argument. If it were a certainty that Hammond would be court-martialed and that full consideration would be given his claims of unlawful and unconstitutional denial of discharge, then the court-martial might provide an adequate remedy and might properly be viewed as a genuine remedial step which should be exhausted. However, it would still be questionable whether the additional court-martial remedy should be grafted onto the administrative remedies, causing an almost endless chain of remedial hurdles.

Judge Friendly's arguments focus the debate essentially on the question of adequacy of remedy—whether the court-martial and its appeals would provide Hammond a full and fair review of the Secretary's administrative determination. Despite Judge Kaufman's suggestion that the Navy might not court-martial Hammond and thereby stall his appeal process,[176] the true concern of the court appeared to be the fact that a different kind of tribunal, criminal in nature, had been added to the administrative chain of remedies and that the petitioner would therefore be forced to

[172] *Id.* at 713.
[173] *Id.* at 717.
[174] *Id.*
[175] *Id.*
[176] *Id.* at 714.

take affirmative and unlawful action in order to obtain the ultimate remedy he sought. Indeed, even if the likelihood were strong that Hammond would be court-martialed, there was a question under military law whether he could raise the wrongful denial of his discharge at a court-martial.[177] In reviewing the court-martial conviction of Captain Noyd, the Air Force Board of Review found no error in the fact that at his court-martial for failure to accept a duty assignment, Noyd was not permitted to raise as a defense the alleged unconstitutionality of the denial of a conscientious objector discharge on the grounds that only the federal courts had jurisdiction to review such administrative determinations.[178] As Noyd himself expressed it:

> The Air Force Board of Review did not "uphold" the requirement of universal pacifism for conscientious objection: it merely approved the court-martial's exclusion of this issue and the legality of the denial of my C.O. applications.
>
> The distinction is not trivial. I have been before five courts and have yet to obtain a ruling on the merits. The Air Force successfully opposed my Federal court suit by arguing that the proper forum was the military judiciary; now, with consummate agility, they maintain the converse.[179]

The Court of Military Appeals finally settled the issue by holding that improper denial of a conscientious objector discharge is a valid defense in a court-martial, although finding that in fact this defense had been considered in Noyd's court-martial and affirming Noyd's conviction on the merits.[180]

Even though wrongful denial of discharge can now be raised as a defense in a court-martial for disobedience of orders, the *Noyd* doctrine that judicial review of the denial cannot be obtained before submitting to court-martial still seems to offend tradi-

[177] *See* United States v. Dunn, 38 C.M.R. 917 (1968); United States v. Taylor, 37 C.M.R. 547 (1966).

[178] United States v. Noyd, ACM 20,121 (3 Sep. 1968), *aff'd*, 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1969). The Air Force board decision cited with approval, United States v. Dunn, 38 C.M.R. 917 (1968), in which the defendant had attempted to obtain review of the denial of a conscientious objector discharge at his court-martial for disobeying a lawful order: "The obvious answer is that such judicial review was not within the jurisdiction of the court-martial which tried the accused. The jurisdiction of a court-martial is a very limited jurisdiction derived from the power of the Congress, in Article I, Section 8, Clause 14, of the Constitution . . . . In its exercise of this power, the Congress did not include in the Uniform Code of Military Justice a grant of jurisdiction to military tribunals to review such administrative determinations." *Id.* at 920. *But see* United States v. Sigmon, CM 416,356 (2 Jan. 1968); United States v. Quirk, CM 416,445 (31 May 1968).

[179] N.Y. Times, 28 Sep. 1968, Letters to the Editor, at 32, col. 8.

[180] United States v. Noyd, 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1969).

tional exhaustion principles concerning adequacy of the court-martial remedy. Presumably the evidence would only be admissible with respect to a defense of justification for the act which brought about the court-martial. Such a defense would not necessarily involve a full review of the administrative decision of the Secretary. Furthermore, the court-martial would have no particular expertise in determining the question of eligibility for a conscientious objector discharge, and indeed, reality suggests, as did petitioner Hammond, that there is a possibility that a court-martial panel composed largely of military officers not selected at random as is a civilian jury would be less than openminded.[181]

While these considerations are inherently subjective in nature and thus difficult to evaluate, federal courts have often inquired into difficult questions concerning the adequacy of state appellate procedures and the fairness of state practices.[182] A similar inquiry as to whether a court-martial provides the conscientious objector an adequate forum for review would almost certainly appear to raise serious doubts about the validity of the process supported by the dissenting opinion in *Hammond*[183] and the Tenth Circuit opinion in *Noyd*.[184]

D. *A CRITIQUE*

The foregoing decisions dealing with review of conscientious objector discharge denials have touched upon various aspects of the exhaustion of remedies doctrine without fully examining the policy considerations behind the doctrine. While the doctrine is clearly concerned with preserving the balance of authority between competing systems of decision-making, it does so by regulating the timeliness of court review rather than the ultimate

[181] Brief for Appellant at 9, Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968). The disciplinary philosophy is still present in the administration of courts-martial and, because of the compromise made in the Uniform Code of Military Justice, which left the administration of courts-martial under the control of commanders and failed to provide the serviceman with a jury of his peers, *see* Morgan, *The Background of the Uniform Code of Military Justice*, 28 MIL. L. REV. 17 (1965); Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3 (1970), there is some doubt as to whether servicemen can obtain adequate consideration of their conscientious objector beliefs from a court-martial. *But see*, Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225 (1961); Moyer, *Procedural Rights of the Military Accused: Advantages Over A Civilian Defendant*, 22 MAINE L. REV. 105 (1970).

[182] H. M. HART & H. WECHSLER, *supra* note 26, at 510–17, 527–45.

[183] 398 F.2d at 717.

[184] 387 F.2d 538 (10th Cir. 1967).

availability of review.[155] The objectives of exhaustion as applied to the military-federal court balance of authority seem to be threefold: first, to prevent premature court review which could upset the balance of power between the military (as a separate, functioning judicial and administrative system) and the civilian judiciary; second, to prevent interference with the efficient operation of the military judicial and administrative systems which could deny the military the opportunity to exercise its expertise before resort to the courts; and third, to prevent inefficient use of judicial resources by requiring "finality" within the military judicial and administrative systems so that needless review can be avoided.

The first consideration appears to be the principal concern of decisions such as *Brown, Noyd,* and Judge Friendly's dissent in *Hammond.* By mixing nonreviewability language with the exhaustion doctrine, these opinions have expressed the concern that court review will rob the military of its autonomy and interfere with its operations. It appears, however, that phrasing the exhaustion doctrine in terms of complete denial of review is a misapplication of the doctrine. The exhaustion doctrine, with its historical functions of requiring finality before appellate review, exhaustion of legal remedies before granting equitable jurisdiction, exhaustion of state remedies before granting federal habeas corpus, and exhaustion of administrative remedies before court review, does not bar jurisdiction but rather permits consideration of timing and comity by a court in deciding whether to exercise its proper jurisdiction and review a case at a particular time. A court applying the exhaustion doctrine has jurisdiction but chooses to withhold consideration of the issues until the completion of a foreign decision-making process.[156] To the extent that the courts have relied on the total nonreviewability of military determinations, a concept that has been eroded in recent years, they have ignored their crucial role of weighing relevant facts and policy considerations in determining whether to apply the exhaustion doctrine.

Whether court review at a particular time will, in fact, rob the military of its rightful autonomy and interfere with its operations must be determined on the basis of the circumstances

[155] *See* Fay v. Noia, 372 U.S. 391, 418 (1963); Jaffe, *supra* note 28, at 328. For statements indicating that the exhaustion rule is not an absolute in Selective Service cases, *see* McKart v. United States, 395 U.S. 185, 190–95 (1969); United States v. Davis, 413 F.2d 148 (4th Cir. 1969).

[156] *See* Gusik v. Schilder, 340 U.S. 128, 132 (1950); Ogden v. Zuckert, 298 F.2d 312, 317 (D.C. Cir. 1961).

of each case. Relevant considerations might include, for example, the status of the petitioner. Hammond argued in his brief that he was only a reservist, rather than on active duty, and that his discharge would thus have a less disruptive effect on military manpower stability.[187] Hammond also argued that because there was no indication that there are large numbers of in-service conscientious objectors, review would not substantially affect the military.[188] This argument, however, does not take into consideration the possibility that if courts were to grant review freely to in-service conscientious objectors, the number of such applications would increase, a factor that a court must weigh in making its determination.

The possibility of delay and consequent misuse of military manpower as a result of premature court review is another relevant consideration for the court. This factor was cited in *Brown* both in favor of and against review. The district court argued that part of the armed forces would be rendered "immobile and entangled in litigation" [189] if federal court review were permitted, while the appellant in *Hammond* maintained that because habeas corpus petitions must be heard and acted upon promptly, the effect on the military would be insignificant.[190]

A further consideration in applying exhaustion is whether court review would, in fact, have an adverse effect upon military discipline and the efficient operation of military personnel programs. Because the military has a tendency to reject any change in the status quo as a threat to good order and discipline,[191] courts must be wary of accepting arguments that military discipline will be destroyed if, for example, a conscientious objector can obtain court review and require the military to discharge him. Indeed, the argument has been made that conscientious objectors are rarely assimilated into the military and that disruption would in fact be reduced by a liberal discharge policy.[192]

A final relevant factor is the type of military determination which is being attacked. For example, cases seeking court review

[187] Brief for Appellant at 9, Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968).

[188] *Id.* at 18.

[189] 263 F. Supp. at 692.

[190] Brief for Appellant at 15, Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968).

[191] *See, e.g.*, the comments by Professor Morgan, Chief Drafter of the UCMJ, regarding military opposition to the reforms embodied in the UCMJ. Morgan, *supra* note 183.

[192] *See* Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, *supra* note 147, at 1385.

of a particular duty assignment or transfer overseas involve greater interference with the military than do cases seeking review of denial of a conscientious objector discharge, since duty assignments require more discretion by military authorities, and the potential for an avalanche of suits for review is greater.

It must be remembered that counterbalanced against the interest of the military in preserving its autonomy and effectiveness is the interest of the individual serviceman in having a prompt and effective means of protecting his rights. The balancing of the interests of the system against those of the individual is present in administrative law, and is expressed in certain principles already mentioned:[193] Exhaustion is not necessary where the available remedies are inadequate, where irreparable injury would occur, or where constitutional rights are involved. These principles must be considered thoroughly in the military context.

The adequacy of the court-martial remedy is certainly affected by the promptness of available review. In *Oestereich* v. *Selective Service System Local Board 11*,[194] Justice Harlan agreed with the majority that a ministerial student who had been denied an express exemption from the draft was entitled to federal court review of the draft board's determination despite the existence of a federal statute forbidding review of board determinations. In his opinion, however, Justice Harlan suggested that the constitutionality of a summary administrative deprivation of liberty may turn on the availability of a prompt, subsequent hearing.[195] Applying this to the *Oestereich* case, Harlan determined that such hearing was not meaningfully provided by the option of defending a criminal prosecution for refusing to report for induction or filing a petition for a writ of habeas corpus after induction into the armed forces.

If this reasoning is applied to the situation in *Hammond* or *Noyd*, it surely raises doubts about the adequacy of the court-martial remedy for the in-service conscientious objector who desires to appeal the allegedly unconstitutional rejection of his discharge. Indeed, Captain Noyd's case, in which a year and a half elapsed between the court-martial and the completion of military appeals remedies, attests to the fact that the court-martial and its attendant appeals is a painfully slow process. The lack of a prompt disposition of an alleged wrongful administrative determination clearly affects the adequacy of the court-martial remedy and

[193] *See* notes 81–86 *supra* and accompanying text.
[194] 393 U.S. 233, 239–44 (1968) (concurring opinion).
[195] *Id.* at 243 n.6.

weighs in favor of permitting court review of these claims.

The principle that exhaustion is not required when it would occasion irreparable injuries, or when constitutional rights are involved, should also be considered in balancing the serviceman's interests against those of the military. Quite apart from the possible chilling effect on the exercise of constitutional rights, an effect created by postponing a serviceman's ability to obtain review, the petitioner himself may suffer irreparable injuries in the interim. He is subjected to the anxiety, discomfort, and possible expense of defending against criminal charges, and of being in an uncertain position for the considerable time required to exhaust the court-martial process. Furthermore, since a convicted serviceman is usually required to begin serving his sentence before his appeals are made,[196] he may serve a substantial portion of his sentence before his remedies are finally exhausted and hence, before ever getting into a federal court. When constitutional issues are involved, one reason for waiving exhaustion is that administrative bodies often lack the expertise and authority to render a decision on constitutionality. For example, it has been suggested that both selective service boards [197] and boards for correction of records [198] are incompetent to determine questions concerning the constitutionality of an act of Congress. It would indeed be unreasonable to allow administrative tribunals and non-federal court systems to make determinations regarding the constitutional validity of federal statutes [199] if such determina-

[196] The Military Justice Act of 1968 permits release pending appeal in the discretion of the commander. 10 U.S.C. § 871 (Supp. IV, 1968), *amending* UCMJ art. 71, but has not thus far been widely used.

[197] Oestereich v. Selective Serv. Sys. Local Bd. 11, 393 U.S. 233, 242 (1968) (concurring opinion); Wills v. United States, 384 F.2d 943, 945 (9th Cir. 1967), *cert. denied*, 392 U.S. 908 (1968). In a recent case it was held *inter alia* that defendant, when prosecuted for refusal to submit to induction, could challenge the constitutionality of the draft laws although he had not raised this question before his draft board. "Whatever may be academic theory, no administrative agency, such as a draft board, believes it has the power or, practically, would exercise power, to declare unconstitutional the statute under which it operates." United States v. Sisson, 297 F. Supp. 902 (D. Mass. 1969). Several cases have followed *Sisson* in holding that the requirement that conscientious objection be based on "religious training and belief" in military discharge regulations is unconstitutional. Goguen v. Clifford, 304 F. Supp. 958 (D. N.J. 1969); Koster v. Sharp *et al.*, 303 F. Supp. 837 (E.D. Pa. 1968). *Contra*, Negre v. Larsen, No. 24,067 (9th Cir., 6 Nov. 1969), 2 SSLR 3360; Hildebrand v. Larsen, Civil No. 50, 464 (N.D. Cal., 17 Jun. 1969), 2 SSLR 3270.

[198] Nelson v. Miller, 373 F.2d 474, 480–81 (3d Cir. 1967), *cert. denied*, 387 U.S. 924 (1967).

[199] *See generally* H. M. HART & H. WECHLER, *supra* note 26, at 523–27, 539–45.

tions are to become effectively binding on litigants because of exhaustion requirements. Because the conscientious objector discharge suits have generally involved substantial attacks upon the constitutionality of both the federal statutory scheme and the regulations promulgated thereunder, a question is raised not only as to the competency of a court-martial to make such constitutional determinations, but as to whether the forced delay in obtaining a federal court determination is in keeping with the constitutional balance of powers and guarantee of individual rights.

As observed above, the basic function of the exhaustion doctrine in the military context is not only to balance military and civilian judicial power, but also to utilize fully administrative expertise and to insure finality. These latter objectives must also be considered in the light of the circumstances of each case. It would appear that whatever expertise the military has in processing conscientious objector discharges is exhausted in the determination made by the Adjutant General (after receiving the opinion of the Director of Selective Service), and that a court-martial convened to try a serviceman for refusing to obey orders has no special administrative expertise concerning the discharge issue. The argument that a court-martial itself offers additional expertise as it is composed of military men who are familiar with military problems overlooks the fact that a court-martial is basically a criminal court, and its function is distinct from that of the administrative scheme for processing discharge applications.

The objective of finality might be satisfied by judicial inquiry into whether the last administrative step which a petitioner has taken appears to be the logical end of available remedies from which he can obtain relief. Under this test, it might be argued that in *Hammond* the decision of the Adjutant General left no further step under the administrative scheme, while in *Brown* petitioner has been court-martialed and could have appealed the decision of that tribunal. In his opinion in *Hammond*, Judge Kaufman evidently believed this to be an important distinction since he distinguished *Gusik* v. *Schilder* [200] as a case in which the "petitioner had already been court martialed and the Court simply concluded that once that route had been traversed, it was incumbent upon him to exhaust his appeal to the Judge Advocate General." [201] Hammond, on the other hand, had no further step

[200] 340 U.S. 128 (1950).
[201] 398 F.2d at 713.

to take in the logical progression of his remedies. Unlike the strict approach to exhaustion in *Noyd*, which relies heavily upon principles of nonreviewability found in *Orloff*, this suggested approach would more easily permit consideration of both the appropriate principles of administrative law and the needs of the military in light of the unique circumstances of each case. *Hammond* v. *Lenfest* is a step in this direction because it offers, for the first time, an interest-balancing approach which is not preconditioned by the absolutes of nonreviewability.[202]

V. THE EFFECT OF *HAMMOND V. LENFEST* ON OTHER TYPES OF MILITARY DETERMINATIONS

Because *Hammond* appeared to reject the strict view of both the nonreviewability and exhaustion doctrines, it is viewed by many as evidence of a more liberal attitude by federal courts toward interference with the military, and will inevitably be cited as authority for permitting review of a wide variety of military determinations. The holding of the case, however, is restricted to its facts, and whether it will be applied by analogy to other areas is unclear.

The holding in *Hammond* has certain express limitations. First, in a per curiam opinion the decision was modified on a petition for rehearing and the case was sent back to the Department of the Navy to be processed in accordance with newly issued regulations[203] dealing with conscientious objector discharges.[204]

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[202] Subsequent decisions agreeing with *Hammond* have rejected the *Noyd* approach and tended to consider the competing interests in ruling on the requirement of exhaustion. In *In re* Kelly, 401 F.2d 211 (5th Cir. 1968), petitioner sought a writ of habeas corpus and stay of a court-martial for disobedience of orders, on the ground that the Army had frustrated and failed properly to process and grant his application for a conscientious objector discharge. The Fifth Circuit noted the split between the *Noyd* and *Hammond* circuits, and sided with *Hammond*: "But we view the requirement of exhaustion as did the majority in *Hammond*. We consider it to be based on principles of comity and not as an imperative limitation of the scope of federal habeas corpus power." 401 F.2d at 213. *Accord*, Crane v. Hedrick, 284 F. Supp 250 (N.D. Cal. 1968); Cooper v. Barker, 291 F. Supp. 952 (D. Md. 1968); Gann v. Wilson, 289 F. Supp. 191 (N.D. Cal. 1968); Mandel v. Dayton, Civil No. 68-2695 (S.D.N.Y. 3 Sep. 1968); Koster v. Sharp *et al.*, Civil No. 69-1242 (E.D. Pa. 29 Aug. 1969), 2 SSLR 3210; Packard v. Rollins, No. 2472 (W.D. Mo. 11 Apr. 1969); Benway v. Barnhill, No. 4093 (D. R.I. 20 Jun. 1969).

[203] DOD Directive 1300.6 (10 May 1968), see note 119 *supra*. It appears unlikely that the new right to appear before an officer of 0–3 or higher will make much difference in the processing of conscientious objector cases. It will simply add one more individual's recommendations to those of a chaplain,

While this decision prevented Hammond's discharge, it remained consistent with the original opinion, for it evidenced a willingness to accept jurisdiction over conscientious discharge cases pending exhaustion of all available *administrative* remedies within the military.

Second, *Hammond* indicated that it was not altering the traditional nonreviewability doctrine by distinguishing *Noyd* as a case attempting to interfere with "duty assignments of persons lawfully in the armed forces."[205] Although the distinction appears to be somewhat strained,[206] it permitted the court to avoid a holding directly contrary to *Noyd*, and more importantly, to distinguish *Orloff*. It is understandable that a circuit court would desire to avoid conflict with a decision as widely accepted as *Orloff*, and by distinguishing that case it was actually able to encroach upon *Orloff's* venerable doctrine.[207] Although *Orloff* used rather broad

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psychiatrist and commanding officer. It does permit the applicant to present information to the officer and to be represented by a civilian attorney, if desired, but it does not appear to be intended to provide a hearing aimed at making determinations of fact since the department official in the Pentagon still has full authority to make initial fact-findings and render conclusions of law. The provision for hearing before an officer appears to have been added to the regulations as a stop-gap measure to meet some of the objections being raised in federal suits against the insufficiency of conscientious objector review procedures and was not made with a view toward establishing an administrative system with opportunities for plenary hearings and relief.

[204] 398 F.2d at 718. One month after the original *Hammond* opinion was decided, a different Second Circuit panel in United States *ex rel.* Mankiewicz v. Ray, 399 F.2d 900 (2d Cir. 1968), ruled on another habeas corpus petition by a reservist seeking review of a denial of his conscientious objector application by the Navy. The court reversed the district court's denial of review, but remanded with instructions that Mankiewicz be reprocessed by the Navy under new DOD Directive procedures. This had the effect of deferring court-martial proceedings which were pending until determination was made under the new procedures. Judge Friendly concurred in the reversal but stated that he "would feel bound to object to an extension of Hammond . . . to a case where a court-martial had already been convened and there was no adequate showing that it would not consider Mankiewicz' defense." *Id.* at 902.

[205] 398 F.2d at 713.

[206] There appears to be no basis for treating Noyd's suit to require assignment to duties consistent with his beliefs as different from Hammond's suit to prevent activation which would result in assignment to duties inconsistent with his belief.

[207] The expansion of review in discharge cases in the 1950's and 1960's was also accomplished without actually admitting to incursions on the nonreviewability doctrine. However, unlike the *Harmon v. Brucker* type of discharge suit which sought alteration of records after discharge had been accomplished, or the court-martial review cases like *Burns v. Wilson* which reviewed courts-martial proceedings after the fact, *Hammond* directly affected the status of personnel presently in the military. *See also* Schwartz v. Covington, 341 F.2d 537 (9th Cir. 1965), enjoining issuance of undesirable dis-

language and has been cited for still broader notions of nonreviewability,[208] its holding was that "it is not within the power of this Court by habeas corpus to determine whether specific assignments to duty fall within the basic classification of petitioner." [209] Indeed, there are cogent reasons why the courts should not review duty assignments, which require considerable administrative discretion,[210] for if courts accepted such cases, every serviceman would be a potential litigant, and review could result in virtual day-to-day court control of the military. In contrast to this dilemma, however, court review of denial of a conscientious objector discharge requires consideration of only one basic factual determination which does not require substantial administrative discretion—whether the applicant's beliefs are sincere. Furthermore, there are a much smaller number of potential litigants, and court action, although it would interfere with military manpower,[211] would not interfere with day-to-day military operations. Thus, there are practical reasons why the *Orloff* doctrine should not apply to conscientious objector discharge determinations. Such practical considerations clearly prompted the *Hammond* court to limit its original holding:

> Specifically, we have not held that a decision based on military exigencies refusing to discharge a serviceman lawfully in the armed forces—the situation that would have been presented, for example, if a soldier on a battlefield during World War II had been refused a discharge because of the needs of the service—is subject to judicial review. The federal courts have neither appropriate judicial standards nor the capacity for dealing with such questions.[212]

It is difficult to ascertain precisely which elements mentioned by Judge Kaufman—lawful status in the armed forces, a battlefield situation, the existence of military exigencies—would make judical review inappropriate. Surely Hammond was "lawfully in the armed forces" so this consideration alone does not seem determinative. Apparently, the court meant that only extreme situations involving battlefield conditions or serious military exigencies

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charge and insuring present rank and status, pending petition to correction boards, on grounds that petitioner had shown likelihood he would ultimately prevail, would suffer irreparable injury if discharged (even if later reinstated) and there would be no irreparable injury to the government.

[208] *See, e.g.*, text at note 66 *supra*.

[209] 345 U.S. at 93.

[210] 345 U.S. at 94–95.

[211] See note 207 *supra*.

[212] 398 F.2d 705, 716 (2d Cir. 1968).

would prevent court review of a military denial of a conscientious objector discharge.

Most of the recent suits involving the concepts of exhaustion or nonreviewability have sought review of one of four types of military determinations: duty assignments, denial of discharge, activation orders, or convening of courts-martial. The implications of *Hammond* will be discussed with respect to each of these areas.

A. *DUTY ASSIGNMENT CASES*

Duty assignment cases prior to *Hammond* were generally dismissed on grounds of nonreviewability. In *Luftig* v. *McNamara*,[213] for example, an Army private sought delaratory and injunctive relief to prevent the Army from shipping him to Vietnam, asserting that American military action there was illegal and unconstitutional and that there was no lawful authority to assign him there. The district court dismissed on the ground that review of political questions was beyond its jurisdiction. On appeal the D.C. Circuit affirmed, stating:

> It is difficult to think of an area less suited for judicial action. . . . The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.[214]

While cases of this type[215] made it clear that direct attacks on the legality or constitutionality of the war would not be heard by the courts, plaintiffs have more recently relied, with limited success, on other grounds. Thus Justice Douglas has granted stays to prevent the sudden transfer to Formosa of a lieutenant who was active in organizing a peace march pending decision by the Court of Appeals on his suit raising first amendment and statutory issues[216] and to halt the deployment to Vietnam of three soldiers whose applications for conscientious objector discharges had been refused by the Army pending determination of their applications

[213] 373 F.2d 664 (D.C. Cir. 1967).

[214] *Id.* at 665–66.

[215] A similar suit was brought in Mora v. McNamara, 389 U.S. 934 (1967), by three soldiers ("The Fort Hood Three") just prior to their scheduled departure for Vietnam, seeking to enjoin the Secretary of Defense from carrying out their orders, and to obtain a declaratory judgment that the United States military activity in Vietnam is unlawful. After the circuit court dismissed for lack of jurisdiction, the Supreme Court denied certiorari, despite dissents by Justices Stewart and Douglas.

[216] Smith v. Ritchey, 89 S. Ct. 54 (1968).

for relief from the Army Board for Correction of Military Records.[217] In the latter case, Justice Douglas indicated that the only bar to federal court jurisdiction was lack of exhaustion of remedies [218] and that since the Board lacked the power to grant a stay [219] and it is undecided whether the Court of Military Appeals would provide relief in collateral actions involving refusal of a conscientious objector discharge,[220] the federal courts have the power to grant a stay to maintain the status quo "in aid of" its jurisdiction.[221] In other recent suits the *Orloff* doctrine preventing review of duty assignments has been held dispositive of the jurisdictional issue. In *Weber* v. *Clifford*,[222] a suit by a soldier with a history of rheumatic fever, seeking to set aside Army orders for Vietnam, was dismissed on the grounds that the district court had no jurisdiction to review a determination made by Army doctors. Similarly, in *McAbee* v. *Martinez*,[223] the district court

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[217] Quinn v. Laird, 89 S. Ct. 1491 (1969). *But see* Parisi v. Davidson, 90 S. Ct. 497 (1969). There has been little consistency as to granting of stay orders at the district court level. Thus, the same district court denied a temporary restraining order to prevent shipment to Vietnam of an officer whose suit claimed that under Army regulations he had to be retained in his unit until a determination was made with respect to his application for a conscientious objector discharge, Earl v. Cushman, Misc. Civil No. 68–1164–J, *temporary restraining order denied* (D. Mass. 18 Dec. 1968), *voluntary dismissal* (16 Jun. 1969), while it granted a temporary restraining order to prevent transfer of a marine pending determination of his habeas corpus suit seeking discharge after his request for a hardship discharge or humanitarian reassignment had been denied by the military, Jenkins v. Commandant, Civil No. 69–39–F (D. Mass. 23 Jun. 1969), 2 SSLR 3326.

[218] *See* note 198 *supra* for discussion of the exhaustion issue in relation to the Board for Correction of Military Records.

[219] 32 C.F.R. § 681.3(c)(4).

[220] 28 U.S.C. § 1651 (1969).

[221] *See* text accompanying notes 233–35 *supra*.

[222] 289 F. Supp. 960 (D. Md. 1968). *See also* Dalton v. Wells, No. 50446 (N.D. Cal. 17 Jun. 1969), 2 SSLR 3267.

[223] 291 F. Supp. 77 (D. Md.), *injunctive relief denied*, 393 U.S. 904 (1968). In *Martinez* the principal claim was that the overseas orders violated Army regulations (AR 612–35) requiring certain types of training before overseas deployment, and requiring removal of personnel "not qualified to perform duties" in their MOS (job category) from units being shipped overseas. The district court dismissed on the grounds that the Army rather than the courts should determine MOS qualifications since court review would require testimony of witnesses from widely divergent areas of the world, and that petitioners had not exhausted their administrative remedies through the Inspector General Complaints System (AR 20–1, ch. 3). This requirement that a serviceman seek relief through the Inspector General (an officer in each command who acts as a sort of ombudsman for hearing of grievances and complaints) seems particularly unsuitable to the exhaustion doctrine, since the Inspector General has no power to provide a remedy for an individual. He merely constitutes another time-consuming and probably inefficacious step before genuine remedies can be sought.

determined that it lacked jurisdiction in a suit brought by members of an activated Army reserve unit who claimed they had not received adequate training for overseas duty and sought to have orders for shipment to Vietnam enjoined on that ground.

One suit, *Noyd* v. *Bond*,[224] successfully obtained district court review of and relief from a duty assignment. After Captain Noyd was convicted by a court-martial and sentenced to dismissal, total forfeitures, and confinement at hard labor for one year, the convening authority, following customary procedures, directed that he be transferred to the disciplinary barracks at Fort Leavenworth. Noyd sought a writ of habeas corpus in the District Court for the District of New Mexico claiming that the order violated article 71(c), UCMJ,[225] which provides that no sentence of a punitive discharge or one year's confinement may be executed until affirmed by a board of review. The district court held that while it had no jurisdiction to determine the conditions of military confinement, under habeas corpus it could test the legality of a present order, including one involving a sentence to be served in the future. It also found that due to the Air Force's determination to execute the sentence, the military process was ineffective to protect petitioner's rights and so adequate grounds existed for not applying the exhaustion of remedies requirement.[226] The Tenth Circuit reversed,[227] holding that because the case was pending before a board of review, Noyd had not exhausted his military appellate remedies. The court stated that the Court of Military Appeals had power to grant habeas corpus relief under these circumstances, citing *Levy* v. *Resor*, another case seeking release on bail pending completion of appeals, in which the Court of Military

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[224] 285 F. Supp. 785 (D. N.M. 1968).

[225] The Government contended that since under UCMJ article 57*b* the period of confinement runs from the date of sentence, immediate confinement is authorized. The court, however, found that article 71*c* is an exception to article 57*b*. *Id.* at 787.

[226] *See* Smith v. Resor, 406 F.2d 141 (2d Cir. 1969), where review and relief were granted despite failure to utilize the right to make a complaint under article 138 and through the Inspector General because the commanding officer had indicated that there were no other remedies. *But see* Levy v. Dillon, 286 F. Supp. 593 (D. Kan. 1968), *aff'd*, No. 78–68 (10th Cir. 18 Sep. 1969), 2 SSLR 3325, which declined to follow *Noyd* and denied release, on habeas corpus, from disciplinary barracks and relief from allegedly improper treatment, despite the fact that appeal to a board of review was not completed, on grounds, *inter alia*, that petitioner had not exhausted his military remedies by making complaint to his commander under UCMJ article 138, and that article 71*c* was not applicable because, until affirmance by a board of review, sentence has not been "executed." *Accord*, United States *ex rel.* Berry v. Commanding Officer, 411 F.2d 822 (5th Cir. 1969).

[227] 402 F.2d 441 (10th Cir. 1968).

Appeals stated that it could grant extraordinary relief in appropriate cases but denied relief on the grounds that servicemen have no constitutional right to bail.[228] The Supreme Court affirmed in an opinion by Justice Harlan,[229] which based lack of jurisdiction solely on Noyd's failure to exhaust the remedy offered by the Court of Military Appeals' power to grant extraordinary relief. The Court invoked the rationale used in *Gusik* v. *Schilder*,[230] that courts should require exhaustion of military remedies before granting jurisdiction because its interference might prove needless and could result in undesirable friction between the two court systems. It particularly emphasized the role of the Court of Military Appeals, as established by Congress in the UCMJ, stating that Noyd "would have civilian courts intervene precipitously into military life without the guidance of the court to which Congress has confided primary responsibility for the supervision of military justice in this country and abroad." [231] It expressed the fear that it would be obligated to interpret technical provisions of the UCMJ which have no analogues in civilian jurisprudence and had not been fully explored by the Court of Military Appeals if jurisdiction could be taken prior to application to the Court of Military Appeals. However, the Court concluded that Noyd had not acted in bad faith in failing to exhaust his remedy to the Court of Military Appeals and therefore continued the order granting Noyd non-incarcerated status "in order to give petitioner the opportunity to present his arguments to the Court of Military Appeals." [232]

The doctrine that the Court of Military Appeals is a remedy which must be exhausted in cases such as *Noyd* v. *Bond*, which have at most ancillary relationship to court-martial proceedings, has certain disturbing aspects. The UCMJ vested the Court of Military Appeals only with power to review court-martial convictions,[233] and although the Court's recent claim to all writs powers [234]

[228] 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967). *See also* Levy v. Resor, 384 F.2d 689 (4th Cir. 1967) (per curiam), *cert. denied*, 389 U.S. 1049 (1968) (denial of subsequent application for habeas corpus to procure release on bail and grant of application by government to move petitioner to disciplinary barracks at Fort Leavenworth upheld on review).

[229] 395 U.S. 683 (1969).

[230] 340 U.S. 128 (1950), *supra* note 97.

[231] 395 U.S. at 695.

[232] *Id.* at 699. Noyd thereafter petitioned the Court of Military Appeals which ordered the Air Force not to impose confinement or restrictions on him pending completion of his military appeals. Noyd v. Bond, Misc. No. 69–25 (26 Jun. 1969).

[233] UCMJ art. 67.

[234] In Gale v. United States, 17 U.S.C.M.A. 40, 37 C.M.R. 304 (1967), the

appears to be a healthy development, still the authority for such expansion is questionable. Perhaps because of this questionable authority the Court has been particularly sparing in its granting of extraordinary relief. Since it first began accepting jurisdiction of cases involving other than direct review of court-martial convictions or seeking extraordinary relief in 1967, it has refused the relief sought in virtually every case.[235] The Court is not at present set up to provide prompt consideration and relief, if necessary, in a wide variety of cases not involving review of courts-martial. The Court sits only in Washington, D.C., which increases the problems of petitioners seeking an immediate order (for example, staying transfer of a serviceman) against some military determination. Even the recent claim to all writs powers by the Court is couched in terms of cases involving court-martial, and although *Noyd* v. *Bond* involves a duty assignment following court-martial, most administrative determinations concerning duty assignments are not ancillary to a court-martial. Therefore, at most *Noyd* v. *Bond* would seem to apply to administrative actions ancillary in

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Court of Military Appeals declared that it possesses "all writ" powers and could exercise, by means of extraordinary remedies, general supervisory control over military justice. *See also* United States v. Frischholz, 16 U.S. C.M.A. 150, 36 C.M.R. 306 (1966). In United States v. Bevilacqua, 18 U.S. C.M.A. 10, 39 C.M.R 10 (1968), involving a petition to the CMA for writ of error coram nobis by petitioners who had been convicted in a special court-martial which did not meet the requirements of UCMJ article 67 for court review, the Court stated that although its jurisdiction regarding direct appeals was conditioned by article 67, that article does not describe the full panoply of its powers and that Congress intended it to have power to grant relief on an extraordinary basis when an accused has been palpably deprived of his constitutional rights in a military trial. However, in United States v. Snyder, Misc. No. 69-22 (USCMA, 12 Aug 1969), the Court held it had no jurisdiction to review a special court martial conviction which did not involve a bad conduct discharge, stating "resort to extraordinary remedies such as those available under the All Writs Act, supra, cannot serve to enlarge our power to review cases but only to aid us in the exercise of the authority we already have." *See also* Mueller v. Brown, Misc. No. 69-39 (USCMA, 28 Aug 1969) (no jurisdiction over petition by serviceman seeking conscientious objector discharge since court martial not involved).

[235] The Court of Military Apppeals has frequently stated that it possesses the power to grant certain kinds of extraordinary relief, but has usually found such relief inappropriate in that case. *See* Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967). Extraordinary relief has been granted in United States v. Board of Review #2, #1, #4, 17 U.S.C.M.A. 150, 37 C.M.R. 414 (1967), returning the cases to the boards for disposition of command influence issues in accordance with its previously established policies, and in Jones v. Ignatius, 18 U.S.C.M.A. 7, 39 C.M.R. 7 (1968), ruling that commutation of special court martial sentence by convening authority to 11 months' confinement was beyond jurisdiction of special court martial (which cannot adjudge confinement in excess of 6 months).

some way to a court-martial, and, at least at present, there would seem to be no justification for requiring application to the Court of Military Appeals in the usual non-court-martial administrative determination case. Whether the Boards for Correction of Military Records, which have also recently undergone a judicial expansion of powers, should be considered a remedy which must be exhausted in a wide variety of non-court-martial administrative decision cases, is an open question which is now the subject of considerable debate and the cause of a split in the circuit courts not unlike the *Noyd-Hammond* controversy.[236]

Although *Noyd* v. *Bond* is not a typical assignment or order case because the order of Noyd into confinement was related to his court-martial, it shows the flexibility which is replacing the old nonreviewability doctrine in determining questions of judicial review of military determinations such as duty assignments.

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[236] *See* United States *ex rel.* Brooks v. Clifford, 409 F. 2d 700, *pet. for rehearing denied,* 412 F. 2d 1137 (4th Cir. 1969), holding that a serviceman who has been denied a conscientious objector discharge need not apply to the Board for Correction of Military Records before seeking federal court relief. *Accord*, Nason v. Secretary of the Army, Misc. Civil No. 69-32-C (D. Mass. 23 Sep. 1969); United States *ex rel.* Barr v. Resor, H. C. No. 107-69 (D.D.C. 23 Sep. 1969); 2 SSLR 3322; Healy v. Beatty, Civil Action No. 2469 (S.D.Ga. 18 June 1969), 2 SSLR 3141; Gann v. Wilson, 289 F. Supp. 191 (N.D. Cal. 1968). *Contra*, Craycroft v. Ferral, 408 F. 2d 587 (9th Cir. 1969); Bratcher v. McNamara, No. 22,865 (9th Cir. 12 Aug. 1969), 2 SSLR 3268; Yubetta v. Commander, Civil No. 51,432 (N.D. Cal. 18 Jun. 1969), 2 SSLR 3271; Laxer v. Cushman, Misc. Civil No. 62-28-5 (D Mass. 19 Jun 1969). *See also* McKenzie v. Schuppener, No. 28,172 (5th Cir. 18 Aug. 1969), 2 SSLR 3269. The 9th Circuit has modified its position by stating that if there were indications of "unreasonable delay" in petitioning a board, a district court might not be justified in withholding jurisdiction and that, in all events, the court should not dismiss but should retain jurisdiction pending petition to the board, Krieger v. Terry, No. 24,319 (9th Cir. 25 June 1969), 2 SSLR 3216. One district court under the 9th circuit has stated that it will hear the case if a petition has been pending before a board for more than 4 months, Allgood v. Kenan, No. 50,806 (N.D.Cal. 14 May 1969), 2 SSLR 3145.

There is dispute as to the availability and adequacy of the boards as a remedy in cases of servicemen seeking discharge. Although Air Force and Army boards will consider petitions claiming improper denial of conscientious objector discharge, *e.g.*, David T. Bezouski (A.F.Bd. for Correc. of Mil. Rec., 7 May 1968), there is uncertainty whether such boards will provide relief in a variety of cases prior to discharge, Nelson v. Miller, 373 F. 2d 474, 479 (3rd Cir. 1967), and whether they possess the expertise required for review of in-service determinations such as refusal to grant a conscientious objector discharge. The Naval board has declared it has no jurisdiction to review denials of conscientious objector discharges, and the Solicitor General's Memorandum to the Supreme Court in response to the petition for writ of certiorari in Craycroft v. Ferral has taken the position that application to the boards should not be required as a precondition to federal court review. Memorandum for the Respondents, supra note 139, at 4-6.

The Court relied upon *Gusik* v. *Schilder*,[237] a genuine exhaustion case, rather than upon the nonreviewability doctrine of *Orloff* v. *Willoughby*.[238] By maintaining the stay order until Noyd has had a chance to seek relief from the Court of Military Appeals, the Court has indicated that the bar to jurisdiction is exhaustion and not nonreviewability, and that if the Court of Military Appeals denies relief, there will be federal court jurisdiction to hear the suit. The decision is consistent with a Fourth Circuit decision handed down about a month before, *United States ex rel. Chaparro* v. *Resor*,[239] which reversed the lower court's dismissal for lack of jurisdiction of a suit by eight soldiers claiming that the Army had abused its authority in refusing pretrial release from confinement. The court ordered a full hearing as to whether the pretrial confinement had been "prohibited punishment" imposed due to the soldiers' antiwar sentiments. Thus it now appears that the nonreviewability doctrine no longer possesses the force it once held in cases seeking review of military orders and assignments and that if orders have been issued in an arbitrary or discriminatory manner, or to prevent exercise of first amendment rights, or in violation of military regulations or authority, there is recourse to federal courts once full exhaustion of available military remedies has been accomplished.

B. *CASES INVOLVING DENIAL OF DISCHARGE*

The few post-*Hammond* suits seeking review of a denial of discharge have similarly been dismissed on grounds of nonreviewability. In *Rank* v. *Gleszer*,[240] for example, a National Guard member was denied a writ of habeas corpus to require his discharge for physical unfitness on the grounds that the statutory provisions governing discharge gave the appropriate Secretary discretionary authority and, absent compelling considerations such as a first amendment claim or a claim that the military exceeded its authority, the courts will permit the military "to solve its own problems within its administrative system." [241]

The *Rank* court also noted that petitioner had not exhausted his administrative remedies within the military. The exhaustion doctrine is particularly confused in the area of administrative discharges because the administrative scheme is often not clearly

[237] 340 U.S. 128 (1950), *supra* note 97.
[238] 345 U.S. 83 (1953), *supra* note 64.
[239] No. 13494 (4th Cir. 19 May 1969), 2 SSLR 3157.
[240] 288 F. Supp. 174 (D. Colo. 1968).
[241] *Id.* at 175.

defined, and thus it is often uncertain what authority each of the relevant boards and individuals possess.[242] Furthermore, since an administrative discharge is considered a discretionary action in the best interests of the service,[243] courts have generally declined to review the military's refusal to discharge a serviceman who claims grounds for discharge, such as minority, dependency or hardship, physical or mental disability, or unsuitability or unfitness. However, recent district court decisions have ordered the military to discharge servicemen, on habeas corpus, where the court found that refusal to grant a hardship discharge was not supported by substantial evidence[244] and that the evidence established without contradiction that petitioner suffered from a character disorder entitling him to a medical discharge due to psychiatric unfitness.[245] When a refusal to take administrative discharge action or to grant a discharge involves arbitrariness or discrimination, a first amendment claim, or violation of military authority or regulations, there would seem to be reason for permitting court review once the serviceman has exhausted all hope of relief from the military authorities.[246]

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[242] *Id.* at 176 (expressing uncertainty concerning the significance of determinations by such administrative tribunals as Physical Evaluation Board, Physical Review Council, and Physical Disability Appeal Board).

[243] See DOD Directive 1332.14, pt. V, ¶ A; AR 635-212 (Personnel Separations: Discharge, Unfitness & Unsuitability), ¶ 10 (unit commander will recommend whether action for discharge, disposition through medical channels, or disciplinary action should be initiated); AR 635-40 (Physical Evaluation for Retention, Retirement or Separation); AR 635-200 (Personnel Separations: Enlisted Personnel). For congressional investigation into criticisms of the administrative discharge system, see *Joint Hearings, supra* note 104, at 769-836.

[244] Jenkins v. Commandant, Misc. Civil No. 69-39-F (D. Mass. 16 Sep. 1969), 2 SSLR 3326.

[245] Allgood v. Kenan, No. 50806 (N.D. Cal. 14 May 1969), 2 SSLR 3145.

[246] When a serviceman seeks release from the military by habeas corpus, not on the grounds that he is entitled to a discharge, but that he was unlawfully inducted, see text at notes 31-35 *supra*, there are different exhaustion considerations. The services have provided procedures for dealing with servicemen who claim wrongful induction. For example, AR 635-200, ch. 5, sec. III, ¶ 5-5, permits application for discharge through military channels for "an individual claiming erroneous induction because of denial of a procedural right." Cases have held that a serviceman must exhaust his in-service remedies, even if claiming unlawful induction, Pickens v. Cox, 282 F. 2d 784 (10th Cir. 1960); United States *ex rel.* Tomback v. Bullock, 110 F. Supp. 698 (N.D. Ill. 1953). On the other hand, there is authority that since the military lacks valid jurisdiction over one wrongfully inducted, he need not exhaust in-service remedies, United States *ex rel.* Ursitti v. Baird, 39 F. Supp. 872 (E.D.N.Y. 1941). A number of decisions have granted habeas corpus relief, despite failure to exhaust in-service remedies, without raising the exhaustion issue. *E.g.*, Powers v. Powers, 400 F. 2d 438 (5th Cir. 1968); United States *ex rel.* Wilkerson v. Commanding Officer,

C. *SUITS INVOLVING ACTIVATION ORDERS*

A number of suits seeking review of activation orders were filed by members of reserve and national guard units activated during the 1968 call-ups. Except for stay orders issued by Justice Douglas[247] and temporary restraining orders issued by some lower courts,[248] the activation orders were upheld. However, jurisdiction was generally accepted by the district courts and the determinations made on the merits. In *Morse* v. *Boswell*,[249] 113 members of an activated reserve unit sought to prevent assignment overseas and to cancel activation on the grounds that the statute under which they were activated,[250] passed after they had entered their enlistment contracts, violated those contracts and violated the equal protection clause of the Constitution and the doctrine of separation of powers. The Government did not contest jurisdiction and the claim was heard and rejected on the merits. Since these suits attacked the constitutionality of a federal statute, and there was no administrative scheme providing further remedies for appeal, the grant of jurisdiction would seem correct.

Another type of activation suit, challenging the activation of individual reservists, has experienced basic jurisdictional problems. Three recent Second Circuit decisions, each decided by a different panel, have dealt with these problems. *Fox* v. *Brown*[251] was an action by an Air National Guard reservist to annul an order directing him to report for active duty because of his un-

286 F. Supp. 290 (S.D.N.Y. 1968); United States *ex rel.* Caputo v. Sharp, 282 F. Supp. 362 (E.D. Pa. 1968). *See also* Scaggs v. Larsen, 90 S. Ct. 5, 7 n.2, 3 (1969). In Gross v. Commanding Officer, Misc. Civil No. 68-79-J (D. Mass. 30 Jul. 1969), involving an application for writ of habeas corpus on the ground that the Army violated its regulations in failing to give a proper medical examination at induction, the court granted jurisdiction despite government's contention that petitioner had failed to exhaust remedies under AR 635-200 and the Selective Service System, but refused relief on the merits.

[247] *See, e.g.*, Winters v. United States, 89 S. Ct. 57 (Douglas, Circuit Justice, 1968); Smith v. Ritchey, 89 S. Ct. 54 (Douglas, Circuit Justice, 1968).

[248] *E.g.*, temporary restraining orders were granted by the U.S. District Court for the Central District of California in Sofen v. McNamara, Civil No. 68-239-AAH (1968); Frohmuth v. United States, Civil No. 68-571-WPG (1968); Most v. United States, Civil No. 68-886-PH (1968); Ali v. United States, 289 F. Supp. 530 (C.D. Cal. 1968). Gion v. McNamara, Civil No. 68-986-S (C.D. Cal. 9 Jan. 1968), held that involuntary activation pursuant to 10 U.S.C.A. § 268 (Supp. 1969), violated the enlistment contract and the Constitution and ordered the activation rescinded.

[249] 289 F. Supp. 812 (D. Md.), *aff'd*, 401 F. 2d 544 (4th Cir.), *stay denied*, 393 U.S. 802 (1968), *cert. denied*, 393 U.S. 1052 (1969). *Cf.* Pfile v. Corcoran, 287 F. Supp. 554 (D. Colo. 1968).

[250] 10 U.S.C.A. § 268 (Supp. 1969).

[251] 402 F. 2d 837 (2d Cir), *aff'g* 286 F. Supp. 855 (S.D.N.Y. 1968).

satisfactory attendance at reserve meetings. Relying upon *Orloff* and distinguishing *Hammond*, the court held that there was no justiciable claim within its jurisdiction because the suit sought review of acts of military discretion which affected the status of persons in the armed forces. It indicated, however, that review is permissible to determine whether the military had acted within its jurisdiction under valid law,[252] and might be permissible in cases involving administrative decisions which had a chilling effect on first amendment rights.[253] A second decision, *United States ex rel. Schonbrun* v. *Commanding Officer*,[254] involved a reservist's petition for writ of habeas corpus to prevent his activation on the grounds of "extreme personal and community hardship." [255] While the court expressed uncertainty as to whether habeas corpus could be used to attack activation,[256] it ruled that mandamus pursuant to 28 U.S.C. § 1361 is available in such a situation if the military has not acted within its jurisdiction and the official conduct goes "far beyond any rational exercise of discretion." [257] The court found, however, that violation by the Army of its own regulations did not in this case prejudice the petitioner and denied review because of the need for expedition in the administration of military personnel and for avoidance of undue court interference. In a third decision, *Smith* v. *Resor*,[258] Judge Kaufman refused to review the "discretionary orders" activating an Army reservist who had been given unsatisfactory ratings for attendance at reserve meetings because he had long hair. However, he ruled that since Army regulations permit long hair if it contributes to one's civilian livelihood (petitioner played in a musical group), and since the record of the case clearly showed that at several crucial stages the Army failed to follow its own procedures and safeguards, the case should be

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[252] *Id.* at 840, *citing* Winters v. United States, 281 F. Supp. 289 (E.D. N.Y.), *aff'd per curiam*, 390 F. 2d 879 (2d Cir.), *stay denied*, 391 U.S. 910, *cert. denied*, 393 U.S. 896 (1968). *But see* Quaid v. United States, 386 F. 2d 25 (10th Cir. 1967) (delinquent reservist entitled to have local board investigate claim of conscientious objection before induction), *distinguished*, Even v. Clifford, 287 F. Supp. 334, 337-38 (1968).

[253] 402 F. 2d at 840.

[254] 403 F. 2d 371 (2d Cir. 1968), *reconsideration of denial of stay denied*, 393 U.S. 1009 (1969).

[255] *Id.* at 372.

[256] The court stated that habeas corpus cannot be used to test the conditions of lawful custody except where challenging the legality of a change from probation or parole to imprisonment. It expressed uncertainty as to whether activation falls within this exception. *Id.* at 374.

[257] *Id.*

[258] Smith v. Resor, 406 F. 2d 141 (2d Cir. 1969).

sent back to the Army with orders that the petitioner be permitted "fully to avail himself of the procedures the Army has established for review. . . ." [259] This view that the military is bound by the regulations which it promulgates and that the courts can grant relief when it fails to follow them is supported by substantial administrative law precedents dealing with the failure of other government departments to follow their regulations.[260] In a recent decision,[261] the United States District Court for the District of Columbia relied upon this precept in holding illegal the activation of Air National Guardsmen who claimed that they had been erroneously transferred from the Standby to the Ready Reserves.

These cases appear to present attempts by the Second Circuit to find a workable approach to the extension of *Hammond*. Since different panels have decided the cases there is less uniformity and continuity than there might be. Thus, despite the functional interest-balancing approach to reviewability and exhaustion which first appeared in *Hammond*, reliance on absolute statements of nonreviewability continue to crop up, such as the statement in *Fox* that the courts lack jurisdiction to review acts of military discretion or to affect the status of military personnel. Nevertheless, the cases indicate that where the administrative action exceeds legal authority [262] or is "beyond any rational exercise of discretion" [263] or has a chilling effect on first amendment rights,[264] review may be permissible. These factors must, of course, be weighed against the military's interest in accomplishing a rapid and efficient call-up of reserves or in maintaining an effective reserve program by use of punitive activation for delinquent reservists. The degree of interference with the military will necessarily differ according to variables such as the type of military action involved and the status of the reservist. For example, court review of the punitive activation of a reservist who claims that his orders violate military regulations

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[259] *Id.* at 145–46. *Compare* Raderman v. Kaine, 411 F. 2d 1102 (2d Cir. 1969), holding length of reservist's hair within exclusive jurisdiction of military.

[260] Yellin v. United States, 374 U.S. 109 (1963) (House Unamerican Activities Committee); Service v. Dulles, 354 U.S. 363 (1957) (State Department); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954) (Board of Immigration Appeals); Roberts v. Vance, 343 F. 2d 236 (D.C. Cir. 1964) (Secretary of Army).

[261] Clark v. Brown, 414 F. 2d 1159 (D.C. Cir. 1969).

[262] See text at note 251 *supra*.

[263] See text at note 256 *supra*.

[264] See text at note 252 *supra*.

would involve less interference with the military than the review of activation of an entire unit. Infringement on individual rights might also be of less consequence in the unit activation since such a wholesale activation is an accepted and omnipresent threat for a reservist. While the fear that the courts will be flooded with suits [265] continues to impede adoption of a more liberal review policy, it is clear that the *Orloff* doctrine of nonreviewability is no longer an absolute.

D. *SUITS TO ENJOIN COURTS-MARTIAL*

Suits to enjoin the military from holding a court-martial have been unsuccessful, primarily because of failure to exhaust military remedies. In *Gorko* v. *Commanding Officer*,[266] the Tenth Circuit refused a writ of habeas corpus to prevent the military from trying petitioner a second time following the reversal of his first conviction:

> Exhaustion of all available military remedies is required before reliance may be had on habeas corpus. The Uniform Code of Military Justice provides that no person, without his consent, may be tried a second time for the same offense. The adequacy and availability of the military remedy is not questioned. Consideration of the question by the courts is, accordingly, premature.[267]

Other attempts to enjoin a court-martial have relied for authority on *Dombrowski* v. *Pfister*.[268] In *Levy* v. *McNamara*,[269] for example, the plaintiff sought to prevent the military from bringing him to trial for activities allegedly protected by the first amendment. Although the suit was dismissed for lack of jurisdiction, it would appear that such a case involves many of the same considerations which led the Supreme Court in *Dombrowski* to interfere with the autonomy of the state courts by enjoining prosecutions which would have a chilling effect on the right of expression. Indeed, as the traditional view of the autonomy of the military continues to change, extension of *Dombrowski* to the military appears appropriate.

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[265] *See* United States *ex rel.* Schonbrun v. Commanding Officer, 403 F. 2d 371, 375 (2d Cir. 1968).

[266] 314 F. 2d 858 (10th Cir. 1963).

[267] *Id.* at 860.

[268] 380 U.S. 479 (1965). See note 147 *supra*.

[269] Civil No. 953–67 (D. D.C.), *aff'd sub nom.* Levy v. Corcoran, 389 F. 2d 929 (D.C. Cir.), *stay denied*, 387 U.S. 915, *cert. denied*, 389 U.S. 960 (1967). A similar suit to prevent the court-martial of 25 soldiers for mutiny who had staged a peaceful stockade sit-down strike was taken under advisement and the courts-martial permitted to be held. Hallinan v. Secretary, described in N.Y. Times, 27 Nov. 1968, at 23, col. 6; 25 Jan. 1969, at 56, col. 6.

Likewise, under a *Hammond* interest-balancing approach, there are compelling reasons for court review of the administrative decision to convene a court-martial when it is in clear violation of statutory authority, military regulations, or constitutional rights. Recent conscientious objector discharge suits have successfully prevented courts-martial by granting relief from prior administrative determinations denying conscientious objector discharges. Courts have ordered that pending court-martial proceedings be deferred until final administrative determination regarding discharge has been made,[270] and have ordered a petitioner discharged as a conscientious objector despite pending offenses [271] and court-martial proceedings.[272] Nevertheless, hesitancy to interfere with the military's judicial system remains a serious obstruction to court injunctions against the holding of courts-martial.

In summary, it is likely that the availability of federal court review of the above types of military determinations will continue to depend upon narrow exceptions to the nonreviewability rule. There are precedents for permitting review of and relief from certain military determinations when a challenge is made regarding the constitutionality of an act of Congress,[273] when the military is acting "far afield of its statutory powers," [274] far beyond any rational exercise of discretion [275] or in violation of its own regulations,[276] and when first amendment rights are in-

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[270] United States *ex rel.* Mankiewicz v. Ray, 399 F. 2d 900 (2d Cir. 1968).

[271] Crane v. Hedrick, 284 F. Supp. 250 (N.D. Cal. 1968).

[272] Cooper v. Barker, 291 F. Supp. 952 (D. Md. 1968). Although there had been no final administrative determination on petitioner's application for conscientious objector discharge and court-martial charges of AWOL and refusal of an order to put on a uniform were pending, the court found that "the Navy was refusing to complete processing and was insisting instead that court-martial proceedings of petitioner be completed first" and in view of these circumstances, the Court held that "there has been no failure by petitioner in this case to exhaust his available administrative remedies because the Navy has refused to permit him to do so." 291 F. Supp. at 959.

[273] Gallahger v. Quinn, 363 F. 2d 301 (D.C. Cir.), *cert. denied*, 385 U.S. 881 (1966).

[274] Robson v. United States, 279 F. Supp. 631, 633 (E.D. Pa. 1968), which states that military determinations may be upset "when the integrity of the fact-finding process has been destroyed by the gross lack of due process," *id., citing* Ashe v. McNamara, 355 F. 2d 277 (1st Cir. 1965).

[275] Schatten v. United States, 419 F. 2d 187 (6th Cir. 1969); United States *ex rel.* Schonbrun v. Commanding Officer, 403 F. 2d 371, 374 (2d Cir. 1968) (dicta), *reconsideration of denial of stay denied*, 393 U.S. 1009 (1969).

[276] Smith v. Resor, 406 F. 2d 141 (2d Cir. 1969); Clark v. Brown, 414 F. 2d 1159 (D.C. Cir. 1969). *See also* Reale v. United States, 413 F. 2d 556 (Ct. Cl. 1969); Stevens v. Smith, 294 F. Supp. 31 (E.D. Va. 1968).

volved.[277] These categories embody considerations of policy, and to the extent that they permit a functional analysis of the circumstances involved in an individual case, they should provide a salutary extension of court review of military determinations.

VI. CONCLUSION

During the Vietnam War, the exhaustion of remedies doctrine has undergone a tortured development in relation to court review of military determinations. The rejection of the strict rule of *Noyd* v. *McNamara* by the Second Circuit in *Hammond* v. *Lenfest* seems to have restored the doctrine's appropriate function in the legal process. As the absoluteness of the nonreviewability doctrine continues to wane, the exhaustion of remedies doctrine, applied as a discretionary measure to prevent premature review, should permit proper judicial consideration of the competing interests of the litigants. Because the profusion of military administrative channels continues to cause confusion in determining whether an alleged remedy is adequate, courts must examine such remedies carefully in making that determination. If the courts continue to show increased acceptance of functional standards for determining the applicability of both reviewability and exhaustion, the result should be less arbitrariness in military determinations and greater responsiveness of both military and civilian courts to protection of the rights of servicemen.

[277] Smith v. Ritchey, 89 S. Ct. 54 (1968); Fox v. Brown, 402 F. 2d 837 (2d Cir. 1968), *aff'g* 286 F. Supp. 855 (S.D.N.Y. 1968) (dicta). *But see* Saunders v. Westmoreland, CA 1368–69 (D. D.C. 26 May 1969), 22 SSLR 3157 (denial of relief to prevent transfer orders allegedly issued due to petitioner's statements to newspaper reporter). For suits seeking a declaration of soldier's rights to hold meetings for discussion of grievances and political subjects and enjoining the Commanding General from interfering with such rights by instituting court-martial or disciplinary proceedings, *see* Dash v. Commanding General (D. S.C. filed 1 Apr. 1969); Yahr v. Resor (E.D.N.C. filed 19 May 1969). *See also* N.Y. Times, 2 Apr. 1969, at 1, col. 6.

CONSULAR PROTECTION OF FOREIGN NATIONALS IN THE UNITED STATES ARMED FORCES*

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This article examines a recently enacted joint service regulation providing for notification of consular officers whenever a foreign national, serving in the United States Armed Forces, is apprehended, confined, or brought to trial under the Uniform Code of Military Justice. The authors discuss the legal basis for this consular protection and outline the procedures used to implement the regulation. The authors conclude that although initial interpretations of some policy questions will be difficult, the regulation will effectively fulfill the treaty obligations of the United States.

I. INTRODUCTION

The Departments of the Army, Navy, and Air Force recently adopted a joint service regulation[1] which provides that foreign consular officers shall be notified of the apprehension, confinement, or trial under the Uniform Code of Military Justice of their fellow nationals serving in the United States Armed Forces. The regulation also provides that the consular officer so notified may visit, communicate and correspond with the detained or accused serviceman on a confidential and privileged basis and

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

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[1] Army Reg. No. 27-52 (5 Nov. 1968); SECNAVINST No. 5820.6 (5 Nov. 1968); Air Force Reg. No. 110-13 (5 Nov. 1968), "Legal Services—Consular Protection of Foreign Nationals Subject to the Uniform Code of Military Justice" [hereafter referred to as "joint service regulation" or "the regulation"].

take whatever steps he deems appropriate to safeguard the interests of such person. The purpose of the regulation is to implement, within the military departments, provisions contained in a number of consular treaties between the United States and other countries[2] which entitle the consular representatives of the contracting parties to receive immediate notice whenever a national of the sending state is subjected to the criminal processes of the receiving state, and to advise, assist, and represent the foreign national concerned.[3]

This article reviews the treaty law upon which the foregoing regulation is based, discusses some of the legal and policy questions involved in applying the notification provisions of consular treaties to cases arising under the UCMJ, and describes the procedures set out in the regulations. The writers believe the regulation is noteworthy for several reasons. For one thing, it constitues a new and interesting development in the field of military justice. There does not appear to be any precedent in the military criminal law of the United States (or any other country, to the writers' knowledge) for consular notification under the circumstances specified in the regulation.[4]

The importance of the regulation in this respect lies not in the specific changes it has made in the administration of military justice, but in the potential that significant changes in international law and practice pertaining to consular protection of accused or detained alien servicemen will come about as a result of the regulation and the underlying determination of the Department of State that consular officers have a treaty right to receive notice of and inquire into the arrest, confinement, or trial of their fellow nationals under the military as well as civilian criminal law of the receiving state. Moreover, it represents one of the first and to date most comprehensive efforts to establish an administrative method for carrying out the notification provisions of such consular treaties. A parallel procedure

[2] *See infra* notes 11, 12, and 29.

[3] As used in this article, the term "sending state" refers to the country *that has appointed and is represented by the consul; "receiving state" refers* to the country to which the consul is assigned and accredited.

[4] Consular *Access* to detained alien servicemen has, in at least one instance, been the subject of a United States military directive. See Dep't of the Army Letter, AGAM-P(M) 250.4, 17 Mar. 1958, JAGW, subject: Privileges of Consular Officers of the United Kingdom When British Members of the United States Army are Confined, 2 Apr. 1958. This directive also provided that written notice be given to the nearest British consul or through *the United States Embassy in London whenever a British national was con*fined pursuant to military order in *overseas* areas. It does not now appear that the foregoing directive is in force.

was adopted by the Department of Justice on 23 January 1967, which is applicable to arrests of foreign nationals by officers of that department.[5] Similar procedures may be put into effect at the state and municipal levels in response to recent communications from the Secretary of State to the Governors of all states.[6] While the overall impact of these developments in the international practice of the United States upon arrests and criminal prosecutions of aliens, or upon the practice of other countries, is uncertain at this point, the potential for important changes in international practice in this area of consular law is plain.

II. LEGAL BASIS FOR CONSULAR PROTECTION OF ACCUSED AND DETAINED ALIENS

The right of a consular officer to protect and promote both the personal and business interests of his fellow nationals within the consular district, and to address authorities of the host country for such purpose, has long been recognized and expressed in consular treaties. The exercise of this right, in a manner consistent with his instructions and with applicable domestic law of the receiving state, is so essential to the office of a consular representative that its denial would be contrary to customary international law, even in the absence of a treaty provision conferring such right.[7]

[5] Published in 32 *Federal Register* 1040 (1967). The Department of Justice procedure is similar to the procedure adopted by the military departments, except: (1) consular notification is given only upon the arrest of a foreign national; (2) The Department of Justice procedure is applicable to United States territories and possessions; and (3) consular notification is required even where the foreign national arrested is also a United States national. In all cases, including those where the foreign national has stated to the arresting officer that he does not wish his consul to be notified, the local office of the United States Marshal, Federal Bureau of Investigation, or Immigration and Naturalization Service, whichever effected the arrest, will inform the nearest United States Attorney of the arrest and of the arrested person's wishes regarding consular notification. The United States Attorney provides notification to the appropriate consular officer where such notification has been requested or where it is required by treaty regardless of the wishes of the foreign national.

[6] The Department of State sent a letter to the Governors of all states on February 6, 1963, inclosing a compilation of treaty provisions then in force "relating to the duty of the United States to notify consuls of the arrest of their fellow nationals." 57 AM. J. INT'L L. 411 (1963). A similar letter and compilation were dispatched by the Department in 1966 to the Governors of all states, territories and possessions, and the Chairman of the Commissioners of the District of Columbia. 60 AM. J. INT'L L. 385 (1966). *See also* OFFICE OF SPECIAL CONSULAR SERVICES, DEPARTMENT OF STATE, POLICE NOTIFICATION OF FOREIGN CONSULS (1966).

[7] "The right of a consular officer officially to confer with a foreign magistrate concerning the case of one of his fellow countrymen, pending before

Traditionally, consular officers have been limited both by treaty law and the instructions of their home governments to the performance of "non-diplomatic" functions dealing with matters affecting the private rights and interests of sending state nationals residing, visiting, or doing business in the receiving state.[8] One of these traditional consular functions is that of receiving and acting upon grievances resulting from a failure of the host country to deal with the person or property of an alien in a manner consistent with rules of private international law and applicable treaties of navigation, commerce, or amity between the receiving and sending states.[9] Implicit in the exercise of this function is the right of a consul to visit, communicate with, and provide assistance to his fellow nationals who are accused of a crime in the receiving state.

The United States first agreed to give consular notification in cases where sending state nationals are accused or detained within the receiving state in 1948.[10] Prior to that time the right of a consul to protect and assist his nationals in such cases was meaningful only where the consul concerned received a request for assistance from the accused or detained national, or otherwise had the requisite information, interest, and initiative to provide it. With the addition of notification provisions to consular treaties, many of which give the detained or accused alien

such magistrate, is a right recognized by the law of nations, and uniformly admitted by governments in their intercourse. The right is clearly incident to the exercise of his rights as a natural protector of his countrymen." Letter from Director of the Consular Service (CARR) to the Consul General of Mexico, No. 191, 7 October 1910, cited in 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 286–87 (1942)) [hereafter cited as HACKWORTH].

[8] "A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes . . . . [H]e is not considered as a minister, or diplomatic agent of his sovereign . . . . There is no doubt, that his sovereign may specially entrust him with such authority . . . ." *The Anne*, 16 U.S. (3 Wheat.) 435, 445–46 (1818). *See also* J. BRIERLY, THE LAW OF NATIONS 264 (6th ed. 1963), and G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 79 (4th ed. 1960).

[9] For example, United States consular instructions provide: "Consuls . . . shall have the rights, in the ports or places to which they are severally appointed of receiving the protests or declarations which . . . citizens of the United States may . . . choose to make . . . ." 22 U.S.C. § 1173 (1964). The United Kingdom consular instructions refer to the duty of a consul to watch over and take all proper steps to safeguard the interests of British subjects. *See* L. LEE, CONSULAR LAW AND PRACTICE 121 (1961).

[10] Treaty with China for the Relinquishment of Extraterritorial Rights in China, and the Regulation of Related Matters, 11 Jan. 1943, art. VI, 57 Stat. 767 (1943), T.S. No. 984, which required that consular officers "be informed immediately whenever nationals of their country are under detention or arrest or in prison or awaiting trial in their consular districts . . . ."

the right to request or waive such notice, responsibility for taking affirmative action no longer rested solely with the consul, and the receiving state could no longer discharge its obligations simply by not interfering with the consul's right of "access," as was formerly the case. Along with this development arose the need for procedures within the receiving state for providing the required notice.

As previously indicated, pre-1943 consular treaties uniformly dealt with the question of consular protection of accused or detained aliens in fairly general language, if at all. United States consular treaties of this period typically provided that the consular officers of the contracting parties were entitled to protect and assist their fellow nationals in "the enjoyment of their rights accruing by treaty or otherwise," and nothing more.[11] Between 1943 and 1965, the United States entered into a total of thirty-seven consular and commercial treaties, containing specific provisions pertaining to consular protection of accused or detained sending state nationals as well as provisions requiring the receiving state to give immediate notice of the fact of such accusation or detention.[12] This change in the format of consular treaties, from rather broad and non-specific agreements which necessitated frequent recourse to rules of customary international law in their interpretation and application to more detailed and specific agreements, may be attributable to several factors, including:

(1) The diversity of national law and practices with respect to police interrogation of criminal suspects following arrest and pretrial confinement generally, and the difficulty (if not impossibility) of effectively protecting the rights of such suspects during pretrial confinement in countries that permitted *incommunicado* detention. As a result of this diversity, there did not

[11] For example, Article X of the Consular Convention with Cuba, 22 Apr. 1926, 44 Stat. 2471 (1926), T.S. No. 750, states: "Consular officers, nationals of the state by which they are appointed may, within their respective consular districts, address the authorities, national, state, provincial or municipal, for the purpose of protecting their countrymen in the enjoyment of their rights accruing by treaty or otherwise." Similar provisions are contained in Article XXI of the Treaty with Latvia on Friendship, Commerce, and Consular Rights, 45 Stat. 2641 (1928), T.S. No. 765; Article XVII of the Treaty with Austria on Friendship, Commerce, and Consular Rights, 19 Jun. 1928, and 20 Jan. 1931, 47 Stat. 1876 (1933), T.S. No. 830; and Article XXIII of the Treaty with Finland on Friendship, Commerce, and Consular Rights, 13 Feb. 1934, 49 Stat. 2659 (1934), T.S. No. 868.

[12] To this list may be added Article 12(2) of the Consular Convention with Russia, 1 Jun. 1964, T.I.A.S. No. 6503, which specifies that "[t]he appropriate authorities of the receiving state shall immediately inform a consular officer of the sending state about the arrest or detention in any form of a national of the sending state."

appear to be any clear rule of customary international law upon which a consul could assert a right to prompt and confidential visitation and communication with such person. Certainly, the very general provisions concerning consular right which were common to pre-World War II treaties were inadequate effectively to supersede national laws permitting *incommunicado* detention.[13]

(2) The publication of a number of "model" consular treaties and restatements of customary rules pertaining to the rights and duties of consular representatives, drafted by leading commentators in the fields of international law and multinational conferences, which incorporated specific provisions dealing with consular protection of accused or detained sending state nationals, including provisions requiring timely notification by the receiving state, and which suggested an emerging basis in international practice for such provisions.[14] Whereas the duty of the

[13] The right of a consular representative freely to visit and communicate with his fellow nationals who become subject to the criminal processes of the receiving state as a matter of customary international law was the subject of differing opinions in the late 19th and early 20th century, and the practice of states in this regard was by no means uniform. *See, e.g.*, the discussion of Swiss and German instructions on consular access to detained foreign nationals in 4 HACKWORTH, *supra* note 7, at 831. *See also* G. STUART, AMERICAN DIPLOMATIC AND CONSULAR PRACTICE 372 (2d ed. 1952). Express provisions concerning the right of a consular officer to visit or communicate with his fellow nationals in detention or confinement were incorporated in Article VI of the Treaty with Liberia on Friendship, Commerce, and Navigation, 8 Aug. 1938, 54 Stat. 1739 (1939), T.S. No. 956; Article VI of the Consular Convention with Mexico, 12 Aug. 1942, 57 Stat. 800 (1943), T.S. No. 985; and in an Exchange of Notes Between the United States and Canada on 19 Sep. 1935, *published in* 2 FOREIGN RELATIONS OF THE UNITED STATES 57 (1935). A collection of diplomatic correspondence in *incommunicado* detention cases is published in 5 J. MOORE, INTERNATIONAL LAW DIGEST 101–09 (1942), and 4 HACKWORTH, *supra* note 7, at 831–37. As recently as 1942, the Legal Adviser, Department of State, expressed the view that "[I] doubt whether we can say that, as a matter of international practice, a prisoner cannot be held incommunicado for a reasonable time after arrest until questioned by police or their other investigating authorities." 4 HACKWORTH, *supra* note 7, at 836.

[14] The Havana Convention on Consular Agents (Inter-American), 20 Feb. 1948, 47 Stat. 1976 (1933), T.S. No. 843; HARVARD RESEARCH IN INTERNATIONAL LAW, DRAFT CONVENTION ON THE LEGAL POSITION AND FUNCTIONS OF CONSULS, *published* (*with commentary*) in 26 AM. J. INT'L L. SUPP. 191 (1932); INTER-AMERICAN COMMISSION OF JURISTS, DRAFT CODE ON CONSULS (1927), *published in* 26 AM. J. INT'L L. SUPP. 389 (1932); and UN INTERNATIONAL LAW COMMISSION, DRAFT CONSULAR CONVENTION, 56 AM. J. INT'L L. 270–354 (1962). The traditional view of the United States that consular officers possessed no privileges and immunities, and only limited commercial functions, in absence of a treaty conferring them, is expressed in *The Anne*, 16 U.S. (3 Wheat.) 435 (1818). An early example of a United

receiving state to permit accredited consular officers to visit, communicate with, and otherwise assist their fellow nationals who are arrested, confined, or tried on criminal charges within the consular district was undoubtedly implicit in consular treaties prior to 1943 (particularly if requested by the consular officer), and whereas there was authority to support the proposition that such a duty existed independent of any treaty provision by force of customary international law,[15] the ability of the consul to provide any useful assistance to his fellow nationals under detention or charges in the receiving state was very often dependent upon how promptly he learned of such arrest, confinement, or trial. Even where the right of a consul to inquire into these matters as a treaty right was freely admitted, the right of the detained or accused alien to demand that the receiving state notify his consul upon his arrest remained in doubt.[16] In an effort to remove this doubt and permit an effective exercise of the right of consular protection of accused or detained aliens, all treaties which have been concluded by the United States on this subject since 1943 contain one of the following types of notification provisions:

States treaty provision which conferred non-commercial, "protective" authority upon consular representatives in Article IX of the Consular Convention with Rumania of 1881, *cited in* 4 HACKWORTH, *supra* note 7, at 829.

[15] It was held in the *Madame Julien Chevreau Case* (France v. Great Britain) (Perm. Ct. of Arb. 1931), that failure to permit consular access and consultation gave rise to an international claim by the sending state against the receiving state. 3 HACKWORTH, *supra* note 7, at 693 (1942). The right of consular access was codified in Article 12 of the *Draft Convention on Jurisdiction with Respect to Crime*, prepared by the HARVARD RESEARCH IN INTERNATIONAL LAW, as follows: "[No] state shall . . . prevent communication between an alien held for prosecution . . . [and] consular officers of the State of which he is a national. . . ." 5 HACKWORTH, *supra* note 7, at 606 (1943).

[16] In 1936, the Department of State summarized United States practice regarding consular notification, as follows: "[W]hile it is not the general practice [of the United States] to notify the consular representatives of a foreigner who is placed under arrest, such notification would be promptly made upon request therefor by the arrested person." Letter from the Secretary of State to the Italian Ambassador, 24 Oct. 1936, *cited in* 4 HACKWORTH, *supra* note 7, at 837. Article 14 of the *Draft Convention* prepared by the HARVARD RESEARCH IN INTERNATIONAL LAW does not require consular notification in the event a foreign national is arrested within the consular district. In the commentary to that Article it is noted that only one example of such a notification requirement, Article 11 of the German-Soviet Union Consular Convention of 1925, existed at that time. It is of historical interest that the 1933 Litvinoff Agreement gave United States nationals in the Soviet Union the same rights with respect to consular notification upon arrest as were enjoyed by German nationals under the 1925 treaty. The failure of the Soviet Union to comply with this undertaking is noted in Lay, *The United States-Soviet Consular Convention*, 59 AM. J. INT'L L. 876 (1965).

(*a*) Mandatory notification to consular officers of the arrest, confinement, or trial of his fellow nationals;[17]

(*b*) Mandatory notification to consular officers if the foreign national who was arrested, confined, or subjected to trial requests such notifications;[18] or

(*c*) Mandatory notification to consular officers unless the

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[17] Article 16 of the Consular Convention with the United Kingdom of Great Britain and Northern Ireland, 6 Jun. 1951, 3 U.S.T. 3426, T.I.A.S. No. 2494; Article VII of the Consular Convention with the Philippines, 14 Mar. 1947, 62(2) Stat. 1593 (1948), T.I.A.S. No. 1741; Article VII of the Consular Convention with Costa Rica, 12 Jan. 1948, 1 U.S.T. 247, T.I.A.S. No. 2045; and the provisions of the Chinese and Russian treaties cited above. The following countries have assumed the rights and duties arising under the United States-United Kingdom Convention: Cyprus, Ghana, Jamaica, Kenya, Kuwait, Malawi, Malaysia, Malta, Nigeria, Sierra Leone, Singapore, Trinidad and Tobago, and Zambia. Application of the Convention to Gambia, Tanzania, and Uganda, since their independence, has not been determined by the Department of State.

[18] Article 3 of the Treaty with Belgium on Friendship, Establishment and Navigation, 21 Feb. 1961, 14 U.S.T. 1284, T.I.A.S. No. 5432; Article III of the Treaty with Denmark on Friendship, Commerce, and Navigation, 1 Oct. 1961, 12 U.S.T. 908, T.I.A.S. No. 4797; Article VI of the Treaty with Ethiopia on Amity and Economic Relations, 7 Sep. 1951, 4 U.S.T. 2134, T.I.A.S. No. 2864; Section 1 of the Protocol to the United States-France Convention of Establishment, 25 Nov. 1959, 11 U.S.T. 2398, T.I.A.S. No. 4625; [Article 34 of the Consular Convention with France, 18 Jul. 1966, 18 U.S.T. 2839, T.I.A.S. No. 6389, contains a similar provision, as well as a provision requiring notification at the request of a consular officer, unless the nationals concerned do not desire such notification]; Article III of the Treaty with Germany on Friendship, Commerce, and Navigation, 29 Oct. 1954, 7 U.S.T. 1839, T.I.A.S. No. 3593; Article II of the Treaty with Iran on Amity, Economic Relations, and Consular Rights, 15 Aug. 1955, 8 U.S.T. 899, T.I.A.S. No. 3853; Article III of the Treaty with Israel on Friendship, Commerce, and Navigation, 23 Aug. 1953, 5 U.S.T. 550, T.I.A.S. No. 2948; Article II of the Treaty with Japan on Friendship, Commerce, and Navigation, 4 Nov. 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863; [a similar provision appears in Article 16 of the Consular Convention with Japan, 2 Mar. 1963, 15 U.S.T. 768, T.I.A.S. No. 5602]; Article III of the Treaty with Korea on Friendship, Commerce, and Navigation, 28 Nov. 1956, 8 U.S.T. 2217, T.I.A.S. No. 3947, and Article 5 of the Consular Convention with Korea, 8 Jan. 1963, 14 U.S.T. 1637, T.I.A.S. No. 5469; Article III of the Treaty with Luxembourg on Friendship, Establishment, and Navigation, 23 Feb. 1962, 14 U.S.T. 251, T.I.A.S. No. 5306; Article II of the Treaty with Muscat and Oman and Dependencies on Amity, Economic Relations, and Consular Rights, 20 Dec. 1958, 11 U.S.T. 1835, T.I.A.S. No. 4530; Article III of the Treaty with The Netherlands on Friendship, Commerce, and Navigation, 27 Mar. 1956, 8 U.S.T. 2043, T.I.A.S. No. 3942; Article III of the Treaty with Nicaragua on Friendship, Commerce, and Navigation, 21 Jan. 1956, 9 U.S.T. 449, T.I.A.S. No. 4024; Article III of the Treaty with Pakistan on Friendship, Commerce, and Navigation, 12 Nov. 1959, 12 U.S.T. 110, T.I.A.S. No. 4683; and Article 1 of the Treaty with Viet-Nam on Amity and Economic Relations, 3 Apr. 1961, 12 U.S.T. 1703, T.I.A.S. No. 4890. Application of the United States-France Convention of Establishment to Algeria, since its independence, has not been determined by the Department of State.

foreign national who is arrested, confined, or subjected to trial objects to such notification.[19]

III. PROTECTION OF ACCUSED OR DETAINED ALIENS IN THE UNITED STATES ARMED FORCES

None of the treaties discussed in the preceding section make specific reference to consular protection of aliens serving in the armed forces of the receiving state. They speak only in terms of the consul's right to be notified of the arrest, confinement or trial of "nationals" of the sending state, and to be given prompt access to such nationals. As a matter of interpretation, therefore, it could logically be assumed that no classes of sending state nationals are excluded under such treaties, even though the provisions dealing with consular protection are principally designed to safeguard rights of a visiting alien who finds himself in custody or on trial in a country where the language, laws, and customs are not familiar to him, and to prevent such abuses as *incommunicado* detention, involuntary confessions, unjust trials and punishments.

The provisions apply equally, however, to a resident alien who is completely conversant with the language, laws, and customs of the country where he resides and whose only tie with the country entitled to protect him is that of nationality. The application of the notification and access provisions of consular treaties to cases arising under the military criminal law of the receiving state demonstrates that no excepted categories of foreign "nationals" were intended, since voluntary enlistment in a nation's armed forces is a clear act of allegiance and affiliation with such nation.

The decision of the Department of State to seek a joint service regulation providing for consular protection of foreign nationals in the United States Armed Forces was prompted by a protest received from the British Embassy, based on the failure of the Departments of the Army and Air Force to notify an appropriate British consular officer of the court-martial of two British nationals.[20] Although some previous correspondence had

[19] Article 16 of the Consular Convention with Ireland, 1 May 1950, 5 U.S.T. 949, T.I.A.S. No. 2984. Article II of the Treaty with Ireland on Friendship, Commerce, and Navigation, 21 Jan. 1950, 1 U.S.T. 785, T.I.A.S. No. 2155, contains a notification provision similar to those treaties cited in note 18, *supra*.

[20] Letter from British Embassy to Department of State, 10 May 1966, which states, in part: "It is the view of the Foreign Office that Articles 15 and 16 of the Consular Convention apply in the case of a national whether or

passed between the Departments of State and Defense on this subject,[21] the Department of Defense maintained the view that such a consular notification provision did not apply to foreign nationals entering the military service of the receiving state.[22] The reasons for this view can be briefly stated as follows:

(1) Those foreign nationals who enter the armed forces voluntarily (as by enlistment or acceptance of a commission) and thereby give at least limited or temporary allegiance to the United States may not seek or receive consular protection from the country of their nationality as against the United States.[23]

(2) Those foreign nationals who are drafted into the armed forces should likewise be considered to have entered upon active duty voluntarily (thereby giving limited or temporary allegiance to the United States) by reason of the fact that they could have exempted themselves from service under the Universal Military Training and Service Act.[24]

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not he is serving in the Armed Forces of the receiving State and you will notice that the Consular Convention contains no exclusion in its provision for notifying consular officers when nationals of the sending State are confined in prison, awaiting trial or otherwise detained in custody within his district."

[21] Letter from the Secretary of State to the Secretary of Defense, 20 Nov. 1957, inclosing a protest from the British Ambassador concerning failure to give consular notification under Article 16 of the United States-United Kingdom Consular Convention in the court-martial of a British national serving in the U.S. Army.

[22] Letter from the Assistant General Counsel (International Affairs), Department of Defense, to the Deputy Legal Adviser for Administration, 9 Aug. 1966. The contention that foreign nationals serving in the United States armed forces were not entitled, under principles of international law, to consular protection and assistance was first made by the Department of Navy in 1948 in connection with the United States-Philippines Consular Convention. Letter from the Secretary of the Navy to the Secretary of State, 30 Dec. 1948.

[23] There are a number of State Department pronouncements regarding the effect of voluntary service of United States nationals in the military forces of foreign countries which lend support to this view. 3 HACKWORTH, *supra* note 7, at 509–10 and 601–02 (1942). For example, Assistant Secretary of State Messersmith, in a letter to Phil Bard, dated 28 Oct. 1937, stated: "It is a universally accepted rule of international law that a person voluntarily entering the military service of a foreign government owes that government temporary allegiance and must look to it for protection. In thus accepting service in the armed forces of a foreign state, he cannot look for protection to his own government against the legitimate consequences of his conduct." *Id.* at 601.

[24] Resident aliens, who are made subject to the draft under the Military Selective Service Act of 1967, 50 U.S.C. § 454 (Supp. IV, 1965–68), may request exemption from induction by claiming their alienage. If such exemption is requested, the alien is thereafter barred from becoming a citizen of the United States. If exemption is not claimed, the alien is accorded

Contrary to the view expressed by the Department of Defense, the British foreign office argued that while, under customary rules, a foreign national may not be entitled to look to the country of his nationality for consular protection, if he voluntarily enters the military service of another country, such customary rule can be and has been modified by treaty in the case of the United States-United Kingdom Consular Convention. The Department of State concurred in the position taken by the foreign office.[25]

Given the determination of the Department of State that the United States-United Kingdom Consular Treaty and similar treaties applied to cases involving alien servicemen, it became necessary to work out a notification procedure that would fit into the system of criminal procedure prescribed by the Uniform Code of Military Justice. One question that required resolution was whether the consular notification provisions apply to the arrest, confinement, or trial by court-martial of alien members of the United States Armed Forces serving in foreign countries. While the Department of State considered it desirable to apply consular notification provisions world-wide,[26] the military departments, in drafting the joint service regulation, considered it preferable from an administrative standpoint,[27] and permissible as a matter of treaty law, to limit the applicability of the regulation to the United States.[28]

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preferential naturalization rights under the Immigration and Naturalization Act of 1952 (8 U.S.C. § 1439 *et seq.*). Non-resident aliens are not subject to induction under the present legislation unless in the country more than one year.

[25] Letter from the Deputy Legal Adviser for Administration, Department of State, to the Assistant General Counsel (International Affairs), Department of Defense, 28 Sep. 1966. In addition to indicating the concurrence of the Department of State in the position taken by the Foreign Office, the letter further indicated that "Articles 15 and 16 of this Convention . . . give rights to the consular officer whose duties require him to inquire into cases concerning British nationals, and this is a right which the national cannot possibly waive even by voluntary enlistment."

[26] Letter from the Deputy Legal Adviser for Administration, Department of State, to the Acting General Counsel, Department of Defense, 2 Jun. 1966.

[27] Preliminary drafts of the joint service regulation provided for application of the regulation both within the United States and overseas. Among the administrative problems connected with providing consular notification in foreign countries are (1) identification of the appropriate consular officer within the foreign country (if any) or the nearest appropriate consular officer outside such country to whom notice is to be given, and (2) the expense and delay of submitting disputed or questionable cases to Washington for final determination.

[28] The treaties, by their own terms, apply to the territories of the contracting parties. The United States-United Kingdom Convention is made

Another issue was whether the consular notification provisions discussed above are applicable to cases involving nationals of countries with which the United States has no such treaty provision, by reason of the entitlement of consular officers of such other countries to "most-favored-nation" (MFN) treatment. The United States is a party to several consular and commercial treaties which contain a provision granting "most-favored-nation" treatment to consular officers of the contracting parties with respect to their "rights, privileges, exemptions, and immunities," but which do not contain a provision calling for consular notification in the event their countrymen are arrested, confined, or tried within the consular district.[29] In view of the possibility that a country could claim for its consular officers within the United States the right to receive prompt notification of the arrest, trial, or confinement of nationals within the consular district by virtue of their "most-favored-nation" entitlement, and for other reasons as well,[30] the military departments

applicable, by Article 1(1), on the part of the United States "to all territories subject to the sovereignty or authority of the United States of America, excepting the Panama Canal Zone. . . ." The joint service regulation does not, however, make the consular notification requirement applicable to United States territories and possessions.

[29] Consular officers from the following countries are entitled, by treaty, to unconditional most favored nation treatment within the United States: Bolivia, 12 Stat. 1003 (1863), T.S. No. 32; Colombia, 8 Stat. 306 (1853), T.S. No. 52; Cuba, 44 Stat. 2471 (1927), T.S. No. 750; Italy, 20 Stat. 725 (1879), T.S. No. 178; Morocco, 8 Stat. 100 (1853), T.S. No. 244-2; Paraguay, 12 Stat. 1091 (1863), T.S. No. 272; and Switzerland, 11 Stat. 587 (1859), T.S. No. 353. Consular officers from the following countries are entitled, by treaty, to conditional most favored nation treatment within the United States: Argentina, 10 Stat. 1005 (1855), T.S. No. 4; Austria, 47 Stat. 1876 (1933), T.S. No. 838; Greece, 33 Stat. 2122 (1905), T.S. No. 424; Honduras, 45 Stat. 2716 (1929), T.S. No. 764; Mexico, 57 Stat. 800 (1943), T.S. No. 985; Norway, 47 Stat. 2135 (1933), T.S. No. 852; Spain, 33 Stat. 2105 (1905), T.S. No. 422; Sweden, 37 Stat. 1479 (1913), T.S. No. 557; and Thailand, 53; Stat. 1371 (1939), T.S. No. 940. None of these treaties contain consular notification provisions.

[30] A memorandum from The Judge Advocate General of the Army to the Assistant General Counsel (International Affairs), Department of Defense, 2 Mar. 1967, recommended that the draft joint service regulation then under consideration be revised to require consular notification within the United States to all cases in which a foreign national is arrested, confined, or tried by court-martial, and suggested that such a revision would: (1) protect the services against a claim by a country (not having a consular notification provision in its Friendship, Commerce, Navigation or Consular Treaty) that it is entitled to notification as a most-favored-nation; (2) be consistent with principles of customary international law by providing an opportunity for consular assistance and protection in cases not covered by a treaty provision; and (3) establish a basis for reciprocal treatment (by such countries) when they assume criminal jurisdiction over United States service personnel. The foregoing recommendation was adopted by the Departments of the Navy and Air Force.

decided to make the regulation applicable to all cases involving foreign nationals.[31]

IV. CONSULAR NOTIFICATION AND ACCESS UNDER THE JOINT SERVICE REGULATION

The provisions of the joint service regulation may be summarized as follows:

(1) Whenever a foreign national[32] is apprehended[33] under circumstances likely to result in confinement or trial by court-martial and makes known the fact that he is a foreign national,[34] or is ordered into arrest or confinement, or is held for trial with or without any form of restraint, or when court-martial charges

[31] Para 4*a* of the joint service regulation.

[32] Para. 2*b* of the joint service regulation defines "foreign national" as "any member of the Armed Forces of the United States who is a national of a foreign country and who is not also a citizen or national of the United States." The legal basis for excluding members possessing United States citizenship or nationality in addition to one or more foreign nationalities in the above definition is the "general principle of international law" that a "State may not give diplomatic protection to one of its nationals against a State whose nationality he also possesses." Article 4 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, discussed in 1 H. LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 609 (7th ed. 1948). However, the treaties do not expressly exclude dual nationals from the category of nationals entitled to consular protection. For example, neither Article 2 of the United States-Japan Consular Convention, *supra* note 18, nor Article II(2) of the United States-Japan Friendship, Commerce, and Navigation Treaty, *supra* note 18, contain any provision which would exclude Japanese-American nationals from the class of Japanese nationals entitled to request consular notification upon their arrest, trial, or confinement. In this connection, it is noteworthy that the Department of Justice procedure appears to require consular notification even in the case of conflicting nationalities.

[33] The terms "apprehension" and "arrest" have distinct meanings in military usage. "Apprehension" refers to suitations where a member of the armed forces is arrested (ordinarily by a military policeman) upon probable cause that he has committed an offense. MANUAL FOR COURTS-MARTIAL UNITED STATES, 1969 (Revised ed.) ¶19.

[34] The restrictive phrases, "under circumstances likely to result in confinement or court-martial" and "makes known the fact that he is a foreign national," were included in the regulation to prevent the consular notification requirement from becoming operative in minor or routine apprehension cases (such as a case of drunk or disorderly conduct) and to avoid the imposition of a screening requirement to ascertain nationality in all apprehension cases. Under the UNIFORM CODE OF MILITARY JUSTICE, however, it is impossible accurately to forecast at the time of apprehension whether a relatively minor offense will be handled under the provisions of Article 15 (nonjudicial punishment), in which case consular notification is not required, disposed of under paragraph 4*c*(3) of the regulation, or tried by summary court-martial, in which case consular notification is required, in view of the fact that the offenses triable and punishments authorized by both procedures are essentially equivalent.

against him are referred for trial [35] within the United States,[36] he will be informed that his consul [37] will be notified thereof unless he objects to such notification.[38]

(2) If the foreign national does object to consular notification, it will not be given unless a treaty in force between the United States and his country requires notification regardless of his wishes.[39]

(3) In the event that the foreign national objects to consular notification, or there is a dispute as to his foreign nationality, a report is submitted by telegraphic means to The Judge Advocate General of the service concerned who will determine whether a treaty requires notification despite such objection or whether the subject is a foreign national within the meaning of the regulation. The Judge Advocate General of the service concerned has responsibility for notifying the appropriate con-

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[35] Reference of charges to trial by court-martial is a formal act by the convening authority of the court-martial, similar in effect to placing a case on the docket, and it occurs only after the convening authority has reviewed the charges, evidence, and personal information pertaining to the accused. Art. 34, UCMJ. It is at this point in the proceedings that paragraph 4*c*(5) of the regulation requires that the subject's military records be examined to ascertain his nationality even if he has not previously entered a claim of foreign nationality. Rarely will the requirement for notification arise for the first time when charges are referred to trial, since the subject will be "held for trial with or without restraint" at some point in time prior to such referral. Nonetheless, the provision serves as a "back-stop" against the possibility that the foreign nationality of the subject was not discovered earlier.

[36] Notification is required only if one of the circumstances listed above occurs in the 50 states, the District of Columbia, or in the territorial waters of the United States (except on a then outbound ship). Paras. 2*d* and 4*c*(1) of the regulation.

[37] The official representative of the foreign country of which the member is a national, who is charged with consular matters for the locale in which the circumstance requiring notification occurs. Honorary consuls are excluded. An appendix to the regulation lists the mailing addresses of all foreign consulates in the United States.

[38] The right to "object" to notification was incorporated in the regulation for two reasons: (1) to comport with the requirements of Article II of the U.S. Friendship, Commerce, and Navigation Treaty with Ireland, *supra* note 9, and (2) in view of the regulation's automatic notice provision, to allow the foreign national to choose whether he wishes notification to be given only in those cases where an applicable treaty provides that notice shall be given if requested.

[39] Under paragraph 4*b* of the regulation, consular notification is given by the officer exercising court-martial jurisdiction over the foreign national. For the Army and Navy (including the Marine Corps), the notifying officer is the officer exercising general court-martial jurisdiction. For the Air Force, the notifying officer is the officer exercising special court-martial jurisdiction.

sular officer directly in the latter two cases.[40]

(4) Whenever a circumstance requiring notification under the regulation arises, or whenever a foreign national is confined in a military confinement facility, the consul has a right to visit and communicate with the foreign national concerned on a privileged and confidential basis.[41]

V. CONCLUDING COMMENTS

The consular notification procedures discussed in this article represent a first effort to implement administratively difficult treaty obligations of the United States. It can be expected that changes and refinements will be made in the procedures as experience is gained in their administration, and the responses of various governments to the procedures are learned. In view of the procedure adopted by the Department of Justice in 1967, and the effort being made by the Department of State to secure compliance with consular notification provisions by state and municipal authorities, the United States has taken a clear position that such provisions are not only legally binding upon the parties to them, but that they require systematic and regular administration by all agencies of the government having responsibility for carrying out federal and state criminal laws.

Many judge advocates and others concerned with the administration of military justice may find the joint service regulation difficult in some respects to interpret and apply. Early experience under the regulation has indicated that there will be a degree of uncertainty on the part of convening authorities, provost marshals, and staff judge advocates alike as to how and when consular notification is to be given. While the regulation is designed to minimize the need for field commanders and their staffs to make an independent determination as to "foreign nationality" each time a member of the command is detained or charged under the Uniform Code of Militiary Justice, and to simplify the procedure for such determination when required, it nonetheless contemplates that responsibility for carrying out the necessary screening of cases and providing prompt and effective notification to the consular officer concerned will be at the general (or special) court-martial convening authority level. As previously noted, the regulation incorporates certain provisions which the military departments considered necessary from an administrative standpoint, but which may not be fully compatible with

[40] Para. 4*c*(5) and 4*d* of the regulation.
[41] Para. 5 of the regulation.

the underlying treaties. One such provision is that limiting the applicability of the regulation to the territory of the United States. The basis for making the regulation inapplicable to cases arising overseas, or on board ship, has already been discussed. There is little, if any, legal support either for or against such limited application. Most of the consular treaties in question do contain language restricting their own application to the "territories of the contracting parties." It is evident, therefore, that the treaties have no force outside the geographical boundaries of the contracting parties. In the case of the United States, and some other countries having sizeable numbers of armed forces deployed in overseas areas or on board ship outside their territorial waters which are subject to their criminal processes in such foreign areas, a restrictive interpretation of the term "territories" may serve to deny consular assistance and inquiry into those which are of greatest interest to the sending state. It is likely, in the opinion of the writers, that many foreign governments will express a desire to see the joint service regulation have world-wide applicability and that such expanded applicability will be favorably considered by the United States.

By Order of the Secretary of the Army:

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