SELECTIVE SERVICE: RIGHT TO COUNSEL, DUE PROCESS AND THE FIRST AMENDMENT

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I. INTRODUCTION

This article will concern itself with a discussion of the implications of the Fifth and Sixth Amendments to the United States Constitution as they relate to the right to counsel in Selective Service Proceedings, and the important question of whether conscientious objection is a constitutional right protected by the freedom of religion clauses of the First Amendment. Subsidiary consideration will also be given to other aspects of due process.

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In form, the article will first consider the historical aspects of the problem, discussing and analyzing the cases and regulations which have, for some time, supported the position that there is no right to counsel in Selective Service Proceedings, and will then conclude with suggestions about how the Fifth and Sixth Amendments can be brought to bear on the question.

The major portion of the article will be concerned with some assumptions that are generally believed to adequately resolve the First Amendment implications of conscientious objection. Discussion and analysis of these assumptions will, perhaps, lead to the conclusion that they are inadequate, and it is to be hoped that the author's final suggestions will resolve this difficult question in a manner commensurate with our country's constitutional traditions.

II. Selective Service—Right to Counsel

A. Reasons for Denial

Traditionally, no registrant appearing before his local board has been permitted representation by counsel. In addition to regulations which specifically prohibit legal counsel at proceedings before selective service boards, a number of cases apparently stand for the proposition that registrants' rights do not include the right to counsel. For purposes of analysis the decisions can be divided into three categories. In the first, the courts deny a registrant's right to counsel by terming proceedings before draft boards "nonjudicial." In the second, they use what might be termed as the "expediency argument." The third is limited to the United States Supreme Court's position. For purposes of clarity and coherence, this article will first list the cases in each category and briefly describe the holding of the court. Analysis, discussion and criticism will be reserved for a later section of the article.

1. Nonjudicial Proceedings

The case of United States v. Pitt\(^2\) is particularly important regarding the right-to-counsel question because later court decisions generally refer to it. The Court of Appeals in Pitt held that denial of the right to counsel did not deny the defendant due process because the proceedings were not judicial in nature. Although the case will be fully discussed later, it should be noted at this point that the defendant did not raise the issue that denial of counsel violated his constitutional rights, and therefore, at least in this respect, the holding is dictum.

United States v. Niznik\(^3\) held that selective service hearings were not judicial trials, and therefore the Constitution did not require that registrants be represented by counsel. Similarly in United States v. Sturgis\(^4\) the court noted that in proceedings before the Board the

\(^1\) 32 C.F.R. § 1624-1(b) (1968).
\(^2\) 100 F.2d 328 (3d Cir. 1944).
\(^3\) 173 F.2d 328 (6th Cir. 1949).
\(^4\) 342 F.2d 328 (3d Cir. 1965).
registrant was neither a suspect nor an accused, and that the proceedings themselves were nonjudicial and noncriminal. The court decided that extending the right to counsel to include administrative proceedings would be "an unwarranted extension of an individual's right to counsel." Both cases cite only United States v. Pitt as authority for that position.

United States v. Capson, held that classification for military service is not penal in character and a registrant has no Sixth Amendment right to counsel. However, the court relied heavily on the fact that the registrant had been referred by his board to an appeal agent who was charged with a statutory responsibility to advise registrants. In addition, the court considered the question only under the Sixth Amendment and did not discuss the applicability of the due process clause of the Fifth Amendment.

2. Inexpediency

In Harris v. Roth, the court held that representation by counsel would impede the functioning of the selective service boards and inhibit the rapid supply of manpower necessary for national defense. The court noted that local boards are not courts where witnesses are heard and lawyers represent defendants.

Lehr v. United States held it would be impossible for local boards to suspend activity and have a normal trial under established rules of evidence for every registrant who objected to performance of his duty under selective service laws.

3. Position of the United States Supreme Court

On a number of occasions, federal courts have cited the decision of the United States Supreme Court in Cox v. United States to bolster their position that the constitutional right to counsel does not extend to selective service proceedings. But Cox merely affirmed the defendant's conviction without majority concurrence in the grounds for the opinion. The decision was based only on the extent of judicial review and was concurred in by Justices Reed, Vincent, Jackson and Burton with Justices Black, Douglas, Murphy and Rutledge dissenting. The pivotal vote was cast by Justice Frankfurter who concurred in the result but did not join in any opinion. At best the case is dubious authority for the proposition that a registrant is not entitled to counsel.

B. Analysis of Decisions

1. Inadequate Consideration

Decisions as significant as those denying a registrant's right to counsel should be made only after a complete analysis of the issues.

5 Id. at 332.
6 347 F.2d 959 (10th Cir. 1969).
7 Id. at 963.
8 146 F.2d 355 (5th Cir. 1944).
9 139 F.2d 919 (5th Cir. 1943).
Examination of the cases commencing with *United States v. Pitt*, upon which most of the other cases are based, fails to reveal such careful analysis. The holding in *Pitt* is mere dictum, for the court admitted that the registrant did not raise the question of lack of counsel, implying therefore the absence of adequate briefs and argument.

The question of constitutional guarantee of full legal representation in selective service proceedings has never been squarely considered by the United States Supreme Court, although, despite the above comments, *Cox* is sometimes cited in support of the *status quo*.

*United States v. Niznik* relied on *Pitt* and *Cox* and concludes that selective service board hearings are nonjudicial, while *United States v. Capson* ignores the due process requirements of the Fifth Amendment, considering only Sixth Amendment provisions, feeling that the presence of an appeal agent with a statutory responsibility to advise registrants eliminates any prejudice resulting from lack of counsel.

### 2. Labeling of Proceedings

Cases reasoning that selective service proceedings are neither judicial nor criminal and, therefore, that legal representation is not necessary, hold to an artificial distinction that makes the rights of registrants depend on the terminology used to describe the proceedings. The court said in *Ex Parte Chin Lay You*:

> “To make the defendant's substantial rights in a matter involving personal liberty depend upon whether the proceeding be called ‘criminal’ or ‘civil’ seems to me unsound.”

In light of recent pronouncements of the United States Supreme Court and its expansive interpretation of the right to counsel in such cases as *Escobedo v. Illinois*[^18] and *Miranda v. Arizona*[^14] it is unlikely that the present Court would uphold this distinction.

The right to counsel in proceedings of great seriousness was also considered by the Supreme Court in *In re Gault*[^15] and *Mempa v. Ray*.[^16] In the former, the Court said the availability of constitutional rights is not dependent upon the type of proceedings[^17] and pointed out that they may be claimed in civil or administrative proceedings. Scorning as artificial a distinction based on the fact that juvenile proceedings do not lead to “criminal involvement,” the Court pointed out that: “To hold otherwise would be to disregard substance because of the feeble enticement of the ‘civil’ label-of-convenience which has been attached to juvenile proceedings.”[^18] *Mempa* may be even more pertinent because the Court specified that the stage at which the right to

[^12]: Id. at 838.
[^17]: 387 U.S. 1, 47-50 (1967).
[^18]: Id. at 49-50.
counsel commences is that where legal rights may be lost if not exercised. This statement bears on the Selective Service System because of the waiver of defenses which results from failure to exhaust administrative remedies. The Court held that whether a proceeding is labeled revocation of probation or deferred sentencing, it is a stage of criminal proceeding where counsel is required.

3. Expediency Argument

The argument that representation by counsel will impede the functioning of the Selective Service System and prevent its effective use for national defense is based on expediency. It would seem to carry little weight, at least since Escobedo v. Illinois where Mr. Justice Goldberg, writing for the majority, stated:

We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

The belief that allowing registrants to be represented by counsel will cause intolerable delay is based on the assumption that those registrants will seek administrative review more regularly, thereby disrupting the process of selecting manpower for the Armed Forces. Even aside from its basic flaw in assuming that potential difficulties in implementation can frustrate recognition of constitutional rights, this argument is not persuasive, for as long as appeal within the Selective Service System is a matter of right, any registrant can press a nonmeritorious appeal to delay his induction. It should be recognized that any system which chooses some and not others will undoubtedly be attacked by those who feel their selection was unfair. More formal procedures and representation by counsel may be only a neutral factor. The affluent and intelligent can generally protect their rights under the present system. Change would bring us closer to the ideal of equal justice for all.

There is some evidence indicating that a few local boards allow the presence of counsel during hearings without any noticeable burden on the system.

22 Id. at 490.
We should also recognize that nothing breeds greater disrespect for legal procedures than lack of an ascertainable standard by which a person is judged. After a series of interviews, Charles W. Wilson in *The Selective Service System: An Administrative Obstacle Course,* concluded that the number of student-deferment appeals would be appreciably reduced after the adoption of clear regulations restricting discretion of local boards. Representation by counsel would have the same effect, since the rule of law is generally more satisfactory than the rule of men, and presence of counsel at the selective service board proceedings will ensure adherence to the rules established by the United States Congress.

4. Accountability

Attorney Ben Margolis recounts experiences leading to at least some suspicion of the fairness with which boards operate in the absence of legal representation for registrants. He writes that at a trial he subpoenaed the minutes of the defendant's local board with the result that:

We found a very interesting thing: the draft board had sat six and a half hours, and in that period had considered more than 645 cases. We also established that two cases had involved conscientious objector hearings, each of which had taken about an hour. So that in four and a half hours, they had considered 643 cases, one of which was our client's.

Perhaps even more surprising is the result of his actions pertaining to defendant's appeal board.

We subpoenaed the minutes of the appeal board and learned that the appeal board sat for two hours, in which time it decided 867 cases, one every ten or eleven seconds. They didn't take a deep breath. They didn't leave the room—they all had good kidneys. *One every ten or eleven seconds.*

The results of Attorney Margolis' actions contrast sharply with regulations which require a de novo consideration of a registrant's file by the appeal board.

An invitation has been extended by the Honorable James Doyle, when, agreeing with the defendant's motion that the "constitutional implications of the closed circuit" should be re-evaluated, he suggested the proper procedure was not a motion, but a full trial. He proposed three alternatives: first, no change in the system; second, right to counsel during selective service proceedings; third, relaxing the degree of

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26 *Id.* at 103.
27 *Id.* at 104.
28 32 C.F.R. § 1626.26(a) (1968).
30 *Id.* at 790.
"finality" of Selective Service Boards' decisions. The "closed circuit" Doyle refers to is the virtual certainty of criminal conviction on a record made during administrative proceedings where counsel was not present, followed by judicial review so narrow that it becomes a mere hollow right. For an appellate decision acknowledging the certainty of conviction, see *United States v. Freeman.*

Allowing, and, if necessary, providing legal representation would give some credence to the assumption that registrants know their rights and insure that the encounter between the registrant and his local board is a confrontation of equals. Under the present system, the registrant is in no position to demand procedural fairness or the classification to which he is entitled. He must depend on the good will of his board for equitable treatment and proper classification.

The persuasiveness of any contention that registrants do not need counsel is diminished by the practice of the local board, for the boards themselves have counsel available and consult with their attorneys before taking action.

The assertion that innocent persons do not need lawyers is far from the truth. In reality, the so-called plain, unvarnished truth is nothing but an abstraction which, until after the fact, exists only in man's imagination and even then must, in the mind of any honest person, always be accompanied by at least a suspicion that things may not have been as they seemed. A case containing judicial acknowledgement that important facts bearing on the ultimate outcome were not presented due to absence of counsel is *United States v. Zimmerman.*

5. Conclusion

If constitutional guarantees require that registrants be represented by counsel, a decision is required as to the stage of the proceedings at which this right will be implemented.

Several possibilities exist:
1. At all times.
2. When a registrant is dissatisfied with his classification.
3. At his personal appearance.
4. When advised of his appeal rights.
5. When his freedom is in jeopardy.

The difficulties thus presented and the relative appropriateness of the various alternatives are beyond the scope of this article. It is enough to say that the obstacles do not seem insurmountable, especially when compared with the difficulties that ensued from such decisions as *Gideon v. Wainwright,* *Miranda v. Arizona,* and *In re Gault.*

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31 388 F.2d 246 (7th Cir. 1967).
35 387 U.S. 1 (1967).
C. APPLICABLE REGULATIONS PROHIBITING COUNSEL

Although some of the preceding discussion applies to the validity of administrative regulations prohibiting representation by counsel in selective service proceedings, some separate consideration of a regulation is necessary.

Regulations forbidding legal representation before an agency must be measured by the same constitutional standard as would a similar enactment prohibiting counsel during trial. It is a function of the courts, not the legislative or executive branches, to determine finally what is and what is not required by the Constitution. The legislative process must be implemented in accord with judicially determined constitutional principles. If the Bill of Rights requires counsel, no regulation or statute can change it. Neither regulation nor statute could have changed the result of Gideon, Escobedo, or Miranda. This rule was clearly expounded in the concurring opinion of Justice Murphy in Estep v. United States.

A court having jurisdiction to try such a case has a clear, inherent duty to inquire into these matters so that constitutional rights are not impaired or destroyed. Congress lacks any authority to negative this duty or to command the court to exercise criminal jurisdiction without regard to the due process of law or other individual rights. To hold otherwise is to substitute illegal administrative discretion for constitutional safeguards. As this Court has previously said, 'Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority.' St. Joseph's Stock Yards v. United States, 298 U.S. 38, 52.

This reasoning was confirmed in Miranda, when the Court pointed out: "[T]he issues presented are of constitutional dimensions and must be determined by the courts. . . . Where rights secured by the Constitution are involved, there can be no rule-making or legislation which would abrogate them."

Denial of counsel at administrative proceedings is not standard procedure. Section 6(a) of the Administrative Procedure Act provides that any person compelled to appear before any agency shall be accorded the right to be accompanied, represented and advised by counsel. This establishes a standard which should be departed from only for sound reasons.

D. SIXTH AMENDMENT

The Sixth Amendment guarantees must be carefully considered

36 32 C.F.R. § 1624.1(b) (1968).
37 327 U.S. 114 (1946).
38 Id. at 127.
because judicial review is limited, and it is clear that at least since, if not prior to, *Powell v. Alabama* the constitutionally guaranteed right to counsel requires effective representation:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. He is incapable of determining whether the indictment is good or bad. He is unfamiliar with the rules of evidence. He lacks both the skill and knowledge to adequately prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true it is of the ignorant and illiterate, or those of feeble intellect.41 (emphasis added)

Provision for counsel at trial alone does not adequately discharge Sixth Amendment protections, particularly in selective service cases where the issue is whether defendant submitted to induction, and judicial review is limited to the board's failure to afford due process. The contrary assertion is further weakened by the realization that the latter defense can be unwittingly waived if the defendant fails to exhaust his administrative remedies.

Various constitutional guarantees must be available at pretrial stages to insure effective protection of the defendant's rights at trial. A registrant's rights should be assured unless knowingly and intelligently waived following advice of counsel. Judicial review does not obviate the necessity of representation by counsel before the board any more than the right of appeal eliminates the need for counsel during trial.

The blunt words quoted in *Escobedo* strongly express the importance of counsel during pretrial proceedings. "One can imagine a cynical prosecutor saying: 'Let him have the most illustrious counsel now. They can't escape the noose. There is nothing that counsel can do for them at the trial.'"42

Discussion of the extent to which the right to effective representation at trial requires the presence of counsel at administrative proceedings is inevitably flavored by the dissent in *In re Groban,*43 a case involving a state fire marshall. The dissenting opinion, authored by Justice Black, and concurred in by Justices Warren, Douglas, and Brennan, gives an indication of the position the Court might take if it were confronted with this question again. While the dissenting opinion acknowledges that no one would suggest that a defendant does not need

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40 287 U.S. 45 (1932).
41 Id. at 68-69.
counsel at trial, it went further, inserting that: "The right to use counsel at a formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by a pretrial examination."\textsuperscript{44}

The majority opinion based its position that there is no right to counsel in an administrative investigation on three lower Federal Court decisions. The dissent criticized this singular lack of authority, stating: "Heretofore this Court has never held and I would never agree that an administrative agency conducting an investigation could validly compel a witness to appear before it and testify in secret without the assistance of his counsel."\textsuperscript{45}

The effect of the majority position is weakened because only three of the five Justices who agreed with the result concurred in the opinion. The dissent has more weight because it has been approved in subsequent majority opinions, with specific reference to the quoted language.\textsuperscript{46}

In a lengthy analysis, the dissent discusses the majority argument that administrative agencies may exclude counsel and such other persons as they choose, so their investigatory proceedings will not be unduly encumbered, dismissing it with the statement: "It is undeniable that law enforcement officers could rack up more convictions if they were not 'hampered' by the defendant's counsel or the presence of others who might report to the public the manner in which people were being convicted."\textsuperscript{47}

The importance of counsel at pretrial stages is stressed in \textit{Ex parte Sullivan},\textsuperscript{48} quoted with approval by the Supreme Court in \textit{Miranda}:

In view of the United States Supreme Court decision in \textit{Powell v. Alabama} . . . , to mention but one of the many cases, unquestionably Petitioners were entitled to have effective counsel \textit{at the trial}. The question here is how they ever could have had effective counsel at the trial, no matter how skilled, in view of what went on before the trial. They were denied effective counsel at the trial itself because of what went on before the trial while the defendants were without counsel, and absolutely under the control of the prosecution.\textsuperscript{49}

The reasoning can be related to selective service cases by the reasoning of Justice Murphy, dissenting in \textit{Cox v. United States}\textsuperscript{50}:

This differs from an ordinary civil proceeding to review a non-punitive order of an administrative agency, an order which is unrelated to freedom of conscience or religion. This is a criminal trial. It involves administrative action denying that the defendant has conscientious or religious scruples against war, or that he is a minister. His liberty and reputation depend upon the validity

\textsuperscript{44} Id. at 344.
\textsuperscript{45} Id. at 348.
\textsuperscript{47} 352 U.S. 330, 349.
\textsuperscript{49} Id. at 517.
\textsuperscript{50} 332 U.S. 442 (1947).
of the action. If the draft board classification is held valid, he will be imprisoned or fined and will be branded as a violator of the nation’s law; if the classification is unlawful, he is a free man. Moreover, he has had no previous opportunity to secure a judicial test of this administrative action, no chance to prove that he was denied his statutory rights.\footnote{Id. at 458.}

Weaknesses of cases generally cited to sustain convictions of registrants despite absence of counsel have already been pointed out. There is always the danger that courts might become merely administrators of an ossified “stare decisis,” lending contemporary validity to the comments Jonathan Swift had Lemuel Gulliver give his Master Houyhnhnm about the English courts of his times, in his satire, \textit{Gulliver’s Travels}:

It is a Maxim among these Lawyers, that whatever hath been done before, may legally be done again: And therefore they take special Care to record all the Decisions formerly made against common Justice and the general Reason of Mankind. These, under the name of \textit{Precedents}, they produce as Authorities to justify the most iniquitous Opinions; and the Judges never fail to direct accordingly.\footnote{The Fourth Voyage, Ch. V, 275 (Heritage Press, N.Y. 1940) (It might be pointed out that other parts of this chapter are anything but funny. Swift, apparently, considered all lawyers and judges to be liars and thieves.)}

In language less colorful, but perhaps more persuasive, the United States Supreme Court in \textit{Escobedo} quoted the \textit{Report of Attorney General’s Committee on Poverty and the Administration of Federal Criminal Justice}, 10—11 (1963):

The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. . . . Persons [denied access to counsel] are incapable of providing the challenges that are indispensable to satisfactory operation of the system. The loss to the interests of accused individuals, occasioned by these failures, are great and apparent. It is also clear that a situation in which persons are required to contest a serious accusation but are denied access to the tools of the contest is offensive to fairness and equity. Beyond these considerations, however, is the fact that [this situation is] detrimental to the proper functioning of justice and that the loss of vitality of the adversary system, thereby occasioned, significantly endangers the basic interests of a free community.\footnote{Escobedo v. Illinois, 378 U.S. 478, 490 n.13 (1964).}

\section{Due Process}

\subsection{Fifth Amendment—Counsel}

Perhaps the most serious omission in judicial consideration of the question of legal representation before selective service boards is a full exploration of the implications of the Fifth Amendment.
As early as 1932, the Supreme Court, in an opinion by Justice Sutherland, specifically acknowledged that the Sixth Amendment right to counsel is also within "the intendment of the due process clause of the Fifth Amendment."\(^{54}\) Similarly, Gideon, which overruled Betts v. Brady\(^ {55}\) held that the due process clause of the Fourteenth Amendment made the right to counsel provision of the Sixth Amendment applicable to the States. Although the Court accepted Betts' assumption "that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment,"\(^ {56}\) it added: "We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of the fundamental rights."\(^ {57}\) The Court specifically noted that Powell\(^ {58}\) had made "conclusions about the fundamental nature of the right to counsel"\(^ {59}\) ten years previously. The Court referred to its 1936 decision in Grossjean v. American Press Co.\(^ {60}\) that "certain fundamental rights, also safeguarded by the first eight amendments against federal action, were safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to aid of counsel in a criminal prosecution."\(^ {61}\)

Escobedo reiterated that the right to counsel was implicit in constitutional guarantees of due process, approving Crooker v. California,\(^ {62}\) which held its denial a violation of due process:

"... not only if the accused is deprived of counsel at trial on the merits, but also if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of that fundamental fairness extended to the very concept of justice."\(^ {63}\) (emphasis added)

If the due process clause of the Fourteenth Amendment imposes upon the states all the obligations of the guarantee of counsel and the multiplicity of circumstances in which it is applicable, it would seem that the due process clause of the Fifth Amendment is no less restrictive in the circumstances in which the presence of counsel is required.

Specht v. Patterson\(^ {64}\) is also pertinent. The Court said that commitment proceedings "whether denominated civil or criminal are subject to both the Equal Protection Clause of the Fourteenth Amendment ..."

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\(^{55}\) 316 U.S. 455 (1942).


\(^{57}\) Ibid.

\(^{58}\) Powell v. Alabama, 287 U.S. 45 (1932).


\(^{60}\) 297 U.S. 233 (1936).

\(^{61}\) Id. at 243-4.


\(^{63}\) Id. at 439.

\(^{64}\) 386 U.S. 605 (1967).
and to the Due Process Clause."65 A standard applicable to selective service proceedings was outlined: "Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own."66

2. Findings of Fact

Assuming the defendant has exhausted available administrative remedies, he is entitled to judicial review of his board's decision to determine whether it had any basis in fact.67 In analyzing the record to determine the validity of the actions of the board "the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption."68 The board, according to Mr. Justice Jackson in a dissenting opinion, may not merely disbelieve the registrant, but must build a record containing affirmative evidence to rebut his claim for exemption.69 Board actions are conclusive, however, if they have some basis in fact.70

Generally, orders of administrative agencies are final and free from court alteration only if they are within the scope of the agency's authority and based upon adequate findings which are supported by substantial evidence.71

The Court in Dickinson v. United States72 held that the court's duty is to look for affirmative evidence supporting the board's finding that a registrant has not told his whole story. As to the local boards the Court said:

[W]hen the uncontroverted evidence supporting the registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concept of justice.73

In light of this unusually narrow judicial review, selective service decisions become unassailable unless the reasons for them are clearly stated. At present, however, there is no indication of facts found or conclusions drawn. If, for example, a registrant's request for a student deferrment is denied, the board merely sends a card (Selective Service

65 Id. at 608.
66 Id. at 610.
69 Id. at 399.
72 346 U.S. 389 (1953).
73 Id. at 397.
System Form 110) stating that he has been classified 1-A and has a right to appeal. The registrant is not told which of various possible deficiencies in his request prompted its denial. As a result he is unable to address himself with any degree of specificity to the problems with which he must be concerned on appeal. The appeal board’s decisions are equally unquestionable. If a registrant refuses induction and is indicted, the judge must examine his entire cover sheet to determine whether any factual basis existed for the board’s classification. The court is faced with the onerous task of attempting to justify the actions of the agency rather than examining the record to see if its stated position is legally valid. Thus the provisions for appeal and judicial review, even limited as they are, are largely illusory. Serious problems of due process of law result whenever practices “saddle the reviewing process with the burden of attempting to reconstruct a record.”

Applicable requirements of due process are outlined in Specht where in addition to the rights above referred to the Court held that:

Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed.

It is argued that a formal fact-finding would unduly burden the selective service system; however, requiring the members and clerks of local boards to testify in Federal Court would be a much greater inconvenience and has been steadfastly opposed.

The importance of findings of fact is implied in United States v. Jakobson where the defendant was convicted of refusing to submit to induction. In reversing that conviction, the Court of Appeals said it was unable to determine from the record whether the legal basis for the defendant’s classification was correct or erroneous. The record revealed two possible grounds upon which the decision of the board could have rested. Relying on a number of cases the court held that “when a case is submitted to fact finders on two legal theories, one right and the other wrong, their determination cannot stand.” In the absence of evidence that the board’s decision was based on the valid rather than the invalid ground, the conviction had to be reversed. If selective service boards were required to make findings of fact, there

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74 In Re Gault, 387 U.S. 1, 58 (1967).
75 Specht v. Patterson, 386 U.S. 605 (1967).
76 Id. at 610.
77 325 F.2d 409 (2d Cir. 1963).
could be no doubt about the reasons for the decisions and courts would not be burdened with the task of justifying them or acquitting the defendant because unable to determine their basis.

II. CONSCIENTIOUS OBJECTION: CONGRESSIONAL GRANT OR CONSTITUTIONAL RIGHT

The final question to be considered in this article is whether that section of the Military Selective Service Act of 1967 pertaining to conscientious objection is congressional recognition of a First Amendment right or a gracious provision of the legislative arm of the Federal Government.

Section 6(j) of the Act provides as follows:

Nothing contained in this title shall be construed to require any person to be subjected 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 the participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological or philosophical views or a merely personal moral code.80

A. TRADITIONAL INTERPRETATION AND ITS PROBLEMS

Despite occasional implications to the contrary,81 most cases state: "There is no constitutional right to exemption from military service because of conscientious objection or religious calling."82 No recent case discusses in any detail the reasoning which leads to this conclusion. Certainly none contains anything even approaching a full and fair discussion of this obviously difficult issue. The majority position which stands for negative resolution of the proposition is based on the Selective Draft Law Cases83 with which the following language resolved the issue:

And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the Act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more.84

It is submitted that the consideration hardly qualifies as the kind of analysis which generally precedes decision of serious questions of constitutional law. Hopefully it can be demonstrated in this article that the First Amendment does require recognition of the right to refuse service in the armed forces and that the contrary is not as apparent as the courts seem to believe.

In the final analysis the proposition that conscientious objection is

80 Section 6(j) of Military Selective Service Act of 1967.
81 United States v. Freeman, 388 F.2d 246 (7th Cir. 1967).
82 See Richter v. United States, 181 F.2d 591, 593 (9th Cir. 1950).
84 Id. at 389-390.
a matter of legislative grace rather than a First Amendment right depends solely on the Selective Draft Law Cases. The cases which stand for the majority position have been overruled, a factor which clearly requires the re-evaluation of the soundness of their reasoning. They discussed the issue in the context of an alien's willingness to bear arms in defense of this country, and concluded that the willingness is a prerequisite for citizenship:

The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. The alien, when he becomes a naturalized citizen, acquires, with one exception, every right possessed under the Constitution by those citizens who are native born (Luria v. United States, 231 U.S. 9, 22); but he acquires no more. The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution, but from the Acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert the privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers as above illustrated, which include, by necessary implication, the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or war in general.

That argument evidences a belief that there is a constitutional duty to bear arms which derives from the war power of the federal government. The courts at that time felt that that conclusion was self-evident and any contention that conscientious objection was a First Amendment right must fail or introduce a conflict into the Constitution itself.

Reliance today on these cases runs afoul of Girouard v. United States, which expressly overruled Schwimmer, MacIntosh and Bland, destroying the basis of the above argument and undercutting the Selective Draft Law Cases at least insofar as they hold there is no constitutional right to be a conscientious objector. In disposing of the argument that there was a constitutional duty to bear arms, Girouard suggested that such a holding would make "an abrupt and radical

85 Arver v. United States, 245 U.S. 366 (1917).
91 Arver v. United States, 245 U.S. 366 (1917).
departure from our traditions," and concluded there were many ways for a person to support his country, and that: "The fact that his particular role may be limited by religious convictions has no necessary bearing on the attachment to his country or on his willingness to support and defend it to his utmost."

The Girouard case uses language unmistakably relevant to the dilemma in which the MacIntosh Court found itself. Whereas MacIntosh and Schwimmer held that citizens had a constitutional duty to bear arms which precluded any recognition of a right to be a conscientious objector, Girouard decided that no such constitutional requirement exists, and referred to the beliefs of conscientious objectors in terms that bring the question within the confines of the First Amendment. The decision seems inconsistent with the contention that Congress has established a privilege when it refers to "Respect over the years for the conscience of those having religious scruples against bearing arms" and "recognition by Congress that even in time of war one may truly support and defend our institutions though he stops short of using weapons of war." The Court recalled the traditions of this country which recognize conscientious objection, couching its position in First Amendment terms:

The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

The decisions of the United States Courts of Appeal are based on the above cases and either use the language of the Supreme Court as justification or cite no authority whatever. If the decisions of the Supreme Court have fallen, so must those of the Courts of Appeal. It seems, then, that although the courts appear to believe that conscientious objection is a matter of legislative grace, the decisions do not adequately deal with the issue. The question still remains open, and the decisions may stand for the proposition that conscientious objection is a constitutional right.

To thus preclude consideration of the question, however, is to leave the matter in an apparent dilemma. On the one hand, if Congress decrees that the citizen must bear arms or participate in war regardless

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92 Girouard v. United States, 328 U.S. 61, 64 (1946).
93 Id. at 65.
94 Id. at 66-7.
95 Id. at 67.
96 Id. at 68.
of his religious beliefs, clearly it prevents him from practicing his
religion as he believes he must, and at least on the surface conflicts
with the free-exercise clause of the First Amendment. On the other
hand, if the Congress attempts to provide for free-exercise of religion
and permits those who "by reason of religious training and belief"97
are opposed to war to claim exemption from military service on that
ground, it assumes to the Government the right to define which re-
ligious beliefs are sufficiently orthodox to come within the exemption,
thus violating the establishment clause of the First Amendment.

B. PROPOSED SOLUTION

Perhaps the exit from this dilemma can be found in a careful
reading of United States v. Seeger98 where the Court points out that
at the present time the statute requires, and draft boards must deter-
mine, the existence of two criteria. They being "whether the beliefs
professed by a registrant are sincerely held and whether they are, in
his own scheme of things, religious."99 The question of sincerity is, of
course, a question of fact to be determined by local boards subject to
judicial review. It is the other question which raises the constitutional
dilemma. The best resolution may be adoption of a definition of religion
which gives full meaning to the recognition of man's basic dignity
found in the First Amendment to the Constitution. In Seeger the
Court arrived at this result by straining the language of the Military
Training Act to avoid "a serious constitutional doubt."100

As used in the Seeger case: "This construction would avoid imput-
ing to Congress an intent to classify different religious beliefs, exempting
some and excluding others . . ."101 The Court held that religious train-
ing and belief within the context of the Act include:

[A]ll sincere religious beliefs which are based upon a power or
being, or upon a faith, to which all else is subordinate or upon
which all else is ultimately dependent. The test might be stated
in these words: A sincere and meaningful belief which occupies
in the life of its possessor a place parallel to that filled by the
God of those admittedly qualifying for the exemption.102

The Court asks the rhetorical question: "Does the term 'Supreme
Being' . . . mean orthodox God or the broader concept of a power or
being, or a faith, 'to which all else is subordinate or upon which all else
is subordinate or upon which all else is ultimately dependent'?"103 This
allows, in the words of the Court, use of a test which is "essentially
an objective one, namely, does the claimed belief occupy the same place

97 Section 6(j) of Military Service Act of 1967.
99 Id. at 185.
100 United States v. Rumely, 345 U.S. 41, 47 (1953).
102 Id. at 176.
103 Id. at 174.
in the life of the objector as an orthodox belief in one God holds in
the life of one clearly qualified for exemption?"\textsuperscript{104}

The term religion, as used in the First Amendment, it need hardly
be said, is a broader term than theism. The latter concept is much too
narrow to satisfy the diverse demands made on it by the sincere beliefs
of the citizens of the United States. To limit religion to those who be-
lieve in a personal God or in the Judeo-Christian sense is hardly more
valid constitutionally than would be a test limiting the definition to
Roman Catholicism. The test is simply stated by Mr. Justice Douglas,
concurring in the result: "In sum, I agree with the Court that any
person opposed to war on the basis of a sincere belief, which fills in
his life the same place as a belief in God fills in the life of an orthodox
religionist, is entitled to exemption under the statute."\textsuperscript{105} To do other-
wise would be to invite the religious prosecution that Mr. Justice
Jackson refers to in his dissent in \textit{United States v. Ballard}\textsuperscript{106} where he
points out that toleration of unorthodox or even ridiculous beliefs is
necessary, and their prosecution "is precisely the thing the Constitution
put beyond the reach of the prosecutor, for the price of freedom of
religion or of speech or of the press is that we must put up with, and
even pay for, a good deal of rubbish."\textsuperscript{107}

Persecution may reach "into wholly dangerous ground,"\textsuperscript{108} and
"discomfort orthodox as well as unconventional religious teachers, for
even the most regular of them are sometimes accused of taking their
orthodoxy with a grain of salt."\textsuperscript{109} Finally, Justice Jackson reminds us
that if we are to honor our Constitution, we must "have done this
business of judicially examining other people's faiths."\textsuperscript{110}

Mr. Justice Jackson's dissent has added weight because the only
point of disagreement between him and the majority was his conclusion
that the defendant's conviction should be reversed, which was con-
trasted with the majority's decision that a remand for further pro-
cedings in conformity with the opinion was more appropriate.

Certainly he is in agreement with the most important expression of
Mr. Justice Douglas in the majority opinion:

\begin{quote}
Heresy trials are foreign to our Constitution. Men may believe
what they cannot prove. They may not be put to the proof of
religious doctrines or beliefs. Religious experiences which are as
real as life to some may be incomprehensible to others. Yet the
fact that they may be beyond the ken of mortals does not mean
that they can be made suspect before the law.\textsuperscript{111}
\end{quote}

\textsuperscript{104} Id. at 184.
\textsuperscript{105} Id. at 192-3.
\textsuperscript{106} 322 U.S. 78, 92-5 (1943).
\textsuperscript{107} Id. at 95.
\textsuperscript{108} Ibid.
\textsuperscript{109} Ibid.
\textsuperscript{110} Ibid.
\textsuperscript{111} Id. at 86-7.