Right to Counsel and the Selective Service System

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INTRODUCTION

The Selective Service System has come under increasing criticism by both anti-war demonstrators outside the Government and legislators within it. Anticipation of a revision of the system arose within Congress in the spring of 1967 when the law’s four-year provision was due to expire. In preparation for that event, proposals were forwarded which called for a “volunteer army,” a “lottery system,” or for drastic revisions within the law’s basic framework. The expectations for a sweeping change came to an end when Congress re-enacted the basic system for another four years.

During the congressional considerations of the Military Selective Service Act of 1967, Senator Morse proposed an amendment that would have provided the right to counsel for registrants appearing before local draft boards when appealing their classifications. The Selective Service Regulations at that time specifically prohibited an attorney’s presence. In spite of the proposed amendment and a similar one advanced by Senator Long of Missouri to the Omnibus Crime Control Bill of 1968, an attorney’s presence remains prohibited.

The purpose of this discussion is to explore further the issue presented by the above-mentioned amendments. Although the present Selective Service System will be enforced until July, 1971, it is subject to procedural changes through amendment of the Selective Service Regulations. Further, although the circuit courts of appeal have failed to recognize this extension of the right to counsel, the Supreme Court has yet to decide the issue.

The registrant’s right to the presence of counsel in his personal appearance before the local draft board will be viewed from two standpoints. First, the Supreme Court increasingly has broadened the sixth...
amendment right to counsel in criminal cases. That this right should be extended to the Selective Service System follows from a recognition of the view that a registrant's appearance before his local board may be a critical stage in a later criminal proceeding. Secondly, the registrant's right and need for an attorney must contend with the fear that an attorney's presence may greatly inhibit the board's ability to function in a time of national emergency. By utilizing these two approaches it will become evident that a need does exist for an attorney to represent the registrant. The denial of that need is unfounded in fact and its fulfillment lies in an extension of the right to counsel doctrine.7

BACKGROUND

The Selective Training and Service Act of 19408 was the precursor of today's draft system. It expired in 1947 but, due to the increasing pressures of the Cold War, President Truman called for the first long-range peace-time draft in the nation's history. The Selective Service Act of 19489 resulted.10 In 1967, the name of the Act was changed to the Military Selective Service Act of 1967. The import of this Act was to continue the present system until July, 1971.11

Under the present Selective Service procedure, after a local board has classified a registrant, he is allowed to appeal to his local board if he is dissatisfied with his classification. The registrant must give written notice of his desire to appeal within thirty days after receiving his classification.12 At this appearance:

7. The right to counsel in an administrative agency will not be discussed except to note that the Selective Service Agency has been taken completely out of the reach of the Administrative Procedure Act of 1946. That Act provided:
   Any person compelled to appear in person before any agency or representa-
   tive thereof shall be accorded the right to be accompanied, represented and
   advised by counsel, or if permitted by the agency, by other qualified repre-
   sentative. Every party shall be accorded the right to appear in person or by
   or with counsel or other duly qualified representative in any agency pro-
   ceeding. ch. 324, § 6, 60 Stat. 240.
   The Selective Service Agency was removed from the operation of the Act except as to
   section 3 of such Act in 50 U.S.C.A. § 463(b) (App. 1968).
11. Some changes were enacted; however, none of them are of concern to the present discussion.
12. 32 C.F.R. § 1624.1(a)(b) (1968 rev.). This information also is presented on the back of every Notice of Classification, SSS Form No. 110, revised May 25, 1967.
... [t]he registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing by the registrant and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.  

At his personal appearance the registrant, in the discretion of the local board, may have any other person appear with him or on his behalf; however, "no registrant may be represented before the local board by anyone acting as attorney or legal counsel."  

After the personal appearance, the local board is required to reconsider the registrant's classification and may either reclassify him or determine not to reopen his classification. The registrant is then notified of the board's decision by the mailing of a Notice of Classification to him.

After receiving his Notice of Classification following his personal appearance, the unsatisfied registrant has thirty days to appeal a second time to the State Appeal Board for his district. There is no provision in the regulations allowing a registrant a personal appearance before the appeal board; however, he may attach to [his] appeal a statement specifying the matters in which he believes the local board erred, may direct attention to any information in his file which he believes the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in [his] file.  

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13. Id. at § 1624.2(b).
14. Id. at § 1624.1(b).
15. Id. at § 1624.2(c)(d).
16. Id. (Selective Service Form No. 110, revised May 25, 1967).
17. It should be noted that many other persons also have this right of appeal, including the National and State Director of the Selective Service, the government appeal agent and any person claiming to be a dependent of the registrant. Id. at §§ 1626.1-2(a) (b) (c).
18. Id. at § 1626.12.
In this second appeal, the board is not allowed to receive or consider any information other than what is contained in the record received from the local board and general information concerning economic, industrial, and social conditions. 19

Under two circumstances a further appeal from the state board may be taken to the President's Appeal Board. Such an appeal is granted if there was a dissenting vote when the State Appeal Board considered the registrant's case, or if the State Director or the National Director takes an appeal for him. 20 As in the appeal to the State Appeal Board, there is no provision for a personal appearance by the registrant or anyone representing him.

Since a personal appearance is allowed the registrant only during his first appeal to his local board, it is only at this point that the right to counsel becomes necessary. Therefore, a brief overview of the local boards will be helpful. The philosophy of their composition and function has been termed that of a "friends and neighbors" concept. They are founded upon the grassroots principle by which boards made up of citizens in each community determine when registrants should be made available for military service. 21 "Such a philosophy . . . rejects a firm, nationally directed system of rules and procedures, and . . . places great faith in local discretion and informality." 22 The persons exercising this discretion are volunteer civilians 23 who perform this function mainly out of a sense of civic duty. 24

Assigned to each local board is a government appeal agent who is to be available to advise the registrant regarding his rights and liabilities under the Selective Service Regulations. 25 He also is uncompensated for his services and whenever possible should be a person with legal training and experience. 26 His advisory duties flow to both the registrant and to the local board. Specifically, his duties are to appeal from any classification of the local board brought to his attention which

19. Id. at § 1626.24(b). It is presumed that this economic, industrial, and social information is what section 1626.12 is referring to when it allows additional information to be attached to the registrant's appeal statement. Otherwise, any other information contained in the appeal statement would not be considered under this regulation.
20. Id. at §§ 1627.1-3 (1968 rev.).
22. Id. at 165.
23. 32 C.R.F. § 1603.3 (1968 rev.)
24. The criteria for the standard of conduct by officers and employees of the Selective Service System can be found in 32 C.R.F. at §§ 1600.735-1 to 735-71.
25. Id. at § 1604.71.
26. Id. at § 1604.71(c).
he feels should be reviewed; to suggest to the local board that it re-
open a classification if deemed necessary by him; to attend meetings 
with the local board when the board so requires; to render such as-
sistance to the local board as it may request by advising the members 
and interpreting for them laws, regulations, and other directives; and 
to be equally diligent in protecting the interests of the Government and 
the rights of the registrant in all matters.27

The very existence of the government appeal agent and his avail-
ability to counsel registrants has been thought to mitigate the need for 
the registrant to be aided by counsel.28 However, the function of the 
appeal agent has come under increasing criticism due to the inherent 
conflict of interest of his work and the extent to which he actually 
advises the registrants. As Senator Edward Kennedy has pointed out:

These contrary—if not totally incompatible—regulations require 
a government appeal agent to protect both the interests of the 
Government and the rights of an individual—a de facto case of 
conflict of interests.29

Senator Kennedy further pointed out that as a result of a directive 
dated October 26, 1967, from General Lewis B. Hershey, National 
Director of the Selective Service System, appeal agents are required 
to report to the local board any information which might lead to a 
prosecution of any registrant under the Selective Service law.30 The 
Senator commented on this directive:

Clearly, no more blatant hypocrisy and conflict of interests can 
be found anywhere in our legal system. On the one hand, a 
registrant is informed on his draft registration certificate that the 
Government appeal agent is available at each board “who is ready 
and willing to offer any legal counsel on selective service matters.” 

Yet, on the other hand, this same appeal agent, who is “legally 
trained” wherever possible, is required to divulge information 
given to him in confidence by the registrant.31

The few existing empirical studies have suggested that the appeal 
agent may not be playing an important part in the system. One study

27. Id. at § 1604.71(d).
30. Id.
31. Id.
pointed out that very few draft boards bother to appoint advisors to registrants, while another found that from January to March, 1966, eleven agents helped a total of sixteen registrants and ten of them were helped by a single agent. Only two of the agents spent more than one hour a month on draft work, and the most time spent in any one month was four hours.

In addition to the opinion that the government appeal agent meets the registrant's need for an attorney is the legal argument that opposes the attorney's presence because the proceedings are non-judicial and non-criminal in nature and because recognition of the right to counsel would be an unwarranted extension of an individual's right to counsel. In *United States v. Pitt* this argument was fully expressed. The court stated that the proceedings before the local boards are informal, stripped of the panoply of formal judicial tribunals. The local boards are composed of persons who are or should be familiar with conditions in the county in which they serve. Frequently they know the registrant and certainly may not be deemed to be unaware of the problems which confront him. The registrant has the opportunity, if he seeks it, to discuss fully with the local board his status or his claim for exemption. The court doubted if a better or fairer method could be devised to meet the requirement of raising armed forces in an emergency, and was of the opinion that the provisions of the Selective Service Act afforded adequate protection for the individual registrant and was not a violation of due process. The court further stated that while a denial of the right to counsel in a judicial proceeding would constitute a denial of due process, the proceedings before the Selective Service agencies were not within that category.

35. 144 F.2d 169 (3d Cir. 1944).

The utmost devotion to one's profession and the fullest recognition of the great role of lawyers in the evolution of a free society cannot lead one to erect as a constitutional principle that no administrative inquiry can be had in camera unless a lawyer be allowed to attend.

The right to representation by counsel is not an essential ingredient to a
A second rationale opposed to the presence of an attorney at the registrant's personal appearance is based on the emergency character of the Selective Service function and the conviction that the nation's welfare can neither await the customary and leisurely litigation of issues nor tolerate the law's delay. This fear of a long delay in the induction process due to the attorney's use of dilatory tactics was expressed by Senator Russell in debate on the floor of the Senate:

Under this amendment [to allow an attorney's presence at the local board's meeting with the registrant] the registrant would be entitled to have a lawyer at any proceeding. He would be entitled to unlimited hearings on his classification. He would say, "I am a conscientious objector." If that were overruled, he could say, "I am studying medicine." If that were overruled, he could say, "I am studying for the ministry," which would exempt him. There is hardly a limit to what a resourceful lawyer . . . could urge as a means of avoiding or delaying induction of his client.

Not only that, but when the registrant is ordered to report for a physical examination he would be entitled . . . to take his lawyer along with him when he is physically examined, to see if any issue could be raised and to enable him to appeal to the State board and on up to the national board. The same thing would happen over and over again. When he finally got his order to report for induction he could start all over . . . The lawyer would go down to see if he were properly inducted.

Referring to the same amendment, General Hershey expressed his fear as to the total effect upon the armed forces:

The enactment of this amendment would seriously jeopardize the ability of the Nation to maintain adequate armed forces in my judgment.

The nature of the function of any compulsory system to mobilize the manpower of the Nation in time of crisis is such that a prompt and unhesitating obedience to orders issued in that process is indispensable to the attainment of national defense.

fair hearing in all types of proceedings. Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967).


37. Note, supra note 36, at 436.


39. Id. at 6077.
Even though the courts have yet to accept such an extension of the right to counsel and strong fears of it have been expressed by influential persons in the upper levels of our Government, the problem is still a real one which has yet to be resolved by a decision of the Supreme Court or by a favorable legislative enactment. The inherent intricacy and importance of the problem was aptly stated by one jurist:

The awesome responsibility carried by Local Boards in "balancing between the demands of an effective system of mobilizing the nation's manpower in times of crisis and the demands of fairness toward the individual registrant," cannot justify denial of basic fairness.  

We have, therefore, a vital function being performed by an administrative agency that has been mandated to exercise authority in which the very life of the citizen is in the balance. Because it is an emergency organization with emergency objectives, time is of the essence in its operations. Since it is an organization which passes the most vital judgments on vast numbers of citizens, one would think that it would have incorporated within its procedural framework every possible element and condition necessary for the protection of the individual's rights. Yet the Selective Service System remains a loose-knit, though powerful, governmental agency that continues to place the rights of the individual citizen in an inferior position. This stems from the very structure of the agency itself and a fear that the exercise of individual rights will cause it to lose its ability to function.

The Right to Counsel and the Supreme Court

Within the past decade the Supreme Court has extended the right to counsel beyond all past constitutional standards. The extension of this sixth amendment right began with the Court's decision in Gideon v. Wainwright, which overruled the previous constitutional standard enunciated in Betts v. Brady. In Betts, the Court held that the "...
appointment of counsel is not a fundamental right, essential to a fair trial." In overruling Betts, Gideon held that the right to counsel is one of the fundamental rights made obligatory upon the states by the fourteenth amendment. Following Gideon was Douglas v. California, which held that an indigent has an absolute right to appointed counsel on appeal of a state criminal conviction. In re Gault further held that in a juvenile court adjudication of delinquency, the child and his parents must be advised of their right to be represented by counsel and, if they were unable to afford counsel, one would be appointed. In its most recent decision on the issue, the Court broadened the concept further in Mempa v. Rhay. In this opinion the right to counsel received its broadest application, as the Court ruled that counsel must be afforded "... at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." The Court said:

There was no occasion in Gideon to enumerate the various stages in a criminal proceeding at which counsel was required, but Townsend, Moore, and Hamilton, when the Betts requirement of special circumstances is stripped away by Gideon, clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.

a denial of fundamental fairness, ... may, ... in the light of other considerations, fall short of such denial.

45. Id. at 471.
47. 387 U.S. 1 (1967).
49. Id. at 257. Another area of the extension of the right to counsel yet to be decided by the Supreme Court is that of misdemeanor cases. For views which would deny that right, see Winters v. Beck, 239 Ark. 1093, 397 S.W.2d 364 (1965), cert. denied, 385 U.S. 907 (1966); DeJoseph v. Connecticut, 3 Conn. Cir. 624, 222 A.2d 752, cert. denied, 385 U.S. 982 (1966); for decisions favoring such an extension, see Minnesota v. Borst, 154 N.W.2d 888 (Minn. 1967); Arbo v. Hegstrom, 261 F. Supp. 397 (D.Conn. 1966).
50. 389 U.S. 128, 130 (1967); Townsend v. Burke, 334 U.S. 736 (1948) held that the absence of counsel during sentencing after a plea of guilty coupled with "assumptions concerning his criminal record which were materially untrue" deprived the defendant of due process. Mr. Justice Jackson stated in conclusion:

In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner. Id. at 741.

In Moore v. Michigan, 335 U.S. 155 (1957), a denial of due process was found when
Although this trend of decisions has had a striking effect upon our criminal law, proceedings before the local boards always have been considered non-criminal in nature. It also has been felt that the validity of one's classification could be raised in a criminal prosecution for a violation of the Selective Service Act and that any injustice which existed could be remedied.\textsuperscript{51} This judicial remedy, however, is greatly limited in application due to the very narrow scope of judicial review available to one dissatisfied with his board's classification. The draft classification process must be exhausted before judicial power can be interposed. The exhaustion of the process ends with a registrant submitting, or refusing to submit, to induction.\textsuperscript{52} By submitting, he may, after induction, proceed to challenge the legality of his classification by habeas corpus.\textsuperscript{53} By refusing, he may challenge the legality of his classification as a defense to a criminal prosecution.\textsuperscript{54} In either case, the judicial function in reviewing the classification is closely circumscribed to the narrow questions of whether the registrant has been denied due process, or whether the board's classification is without basis in fact.

the defendant did not waive counsel intelligently and understandingly before entering a plea of guilty. The Court emphasized the prejudice stemming from the absence of counsel at the hearing on the degree of the crime following entry of the guilty plea and stated that "the right to counsel is not a right confined to representation during the trial on the merits." \textit{Id.} at 160.

In \textit{Hamilton v. Alabama}, 368 U.S. 52 (1961), it was held that failure to appoint counsel at arraignment deprived the petitioner of due process, notwithstanding the fact that he simply pleaded not guilty at that time, because under Alabama law, certain defenses had to be raised then or be abandoned.


\textsuperscript{52} Falbo v. United States, 320 U.S. 549 (1944).

\textsuperscript{53} Estep v. United States, 327 U.S. 114 (1946).

\textsuperscript{54} United States v. Freeman, 388 F.2d 246 (7th Cir. 1967). For a conscientious objector, the scope of judicial review is even more limited since he cannot turn to the habeas corpus remedy because his religious belief prevents him from accepting induction under any circumstances. Hence he must seek review in a criminal trial for refusal to submit to induction. In \textit{Freeman} the court stated:

In this criminal proceeding, as in any proceeding reviewing a draft classification, his defense of invalid classification is tested by the "basis in fact" formula. Under these circumstances conviction is almost inevitable, since the Board's refusal to grant the conscientious objector classification is based on an inference as to the sincerity of the registrant's belief and there will almost always be something in the record to support an inference of lack of sincerity. \textit{Id.} at 249.
In Blalock v. United States, the court referred to the scope of review as the "narrowest known to the law." The court further observed:

The "clearly erroneous" rule . . . has no place here, nor even the "substantial evidence" rule. . . . Congress gave the courts no general authority of revision over draft board proceedings, and we have authority to reverse only if there is a denial of basic procedural fairness or if the conclusion of the board is without any basis in fact.66

Due to this narrow scope of judicial review, when a registrant appears for the first time before his draft board to appeal his classification, he may very properly be considered to be at a critical stage in a criminal proceeding against him, for at that time a decision may be made which will be determinative in a criminal prosecution for violation of the Selective Service Act. A criminal proceeding in the usual sense will not be commenced until a later date when the registrant refuses to submit to induction, or submitting to induction, chooses to sue on a writ of habeas corpus, but the outcome of that criminal prosecution will be a predetermined reality. As Senator Morse has pointed out:

We lawyers know that particularly in the administrative law process, once you get an administrative ruling against you, the presumption is going to follow that ruling on up the ladder. You should guarantee or give the assurance to the individual citizen involved that he has the right of counsel at the very beginning of the process. I believe that is basic to guaranteeing a fair administration of justice in this country.67

And in United States v. Wierzchucki, where the defendant was being tried for the failure to submit to induction, the court observed:

When criminal conviction is virtually inevitable because the die has been cast irrevocably in the administrative proceedings, . . . the right to counsel in the criminal proceeding may be a hollow thing.68

55. 247 F.2d 615 (4th Cir. 1957).
56. Id. at 619.
59. Id. at 789.
The court proceeded to state:

It appears that the time may have come for re-evaluation of the constitutional implication of the closed circuit outlined above. If it is not to be re-evaluated, then at a minimum, candor and forthrightness should accompany a basic and deliberate decision that the expanding concept of the right to counsel in criminal cases is not to reach prosecutions under the Selective Service Act, and that the reason for this restraint is that military manpower requirements prevent the full sweep of individual constitutional liberties.60

If a registrant is to have the effective assistance of counsel in a criminal prosecution, that assistance must come when he first appears before his local board. Although such assistance is not denied when he is charged criminally, it is at his first appearance that the determination of those criminal charges will be made. The registrant's appearance before the board is, therefore, of critical importance to him. Unless he is allowed the right to counsel at that point, the results of any later criminal prosecution will have been pre-determined at a time when the balance of justice was greatly in his disfavor. Unless the local board's determination was so erroneous as to have no "basis in fact," the beginning and end of a criminal prosecution will have been decided in what has been termed a "non-judicial" and "non-criminal" proceeding.

The Fear v. The Need

It would be unwarranted to grant the right of an attorney's service to a registrant appearing before his local board without a showing that his presence is needed. The vital importance of the personal appearance to the registrant, the complexities of the Selective Service System's regulations and the deprivations of due process found in the local boards' actions establish this need. Yet the contention that an attorney's presence may severely inhibit the boards' ability to function must still be met. Such a fear may not be as viable as anticipated and it is suggested that this fear can be assuaged by defining the scope of the attorney's activity in the presence of the local board.

60. Id. at 790. The court refused to grant the motion in defendant's favor in this instance because it felt that there was "meager basis for decision presently provided" to require that an Act of Congress and Presidential action pursuant to Congressional authority be deemed in violation of the sixth amendment.
Of primary importance to the registrant is the opportunity to have his case presented effectively before the local board. Because the registrant must rely on his own abilities in presenting his case, many are put at a distinct disadvantage. This is more forcefully realized when one considers that it is the young man between the ages of eighteen and twenty-six who must appear before the board. The presence of an attorney can aid in remediing this inherent inequity. As Senator Morse has pointed out:

It is this place [the appearance before the local board] where he should have the right of the oral representation of his counsel. The local draft boards have lawyers on them. . . . [The presence of an attorney] would give an equal opportunity for justice to the registrant, to see that all his rights are presented by a lawyer competent to present his view. Keep in mind who some of these registrants are. Many of them do not possess much ability and are not capable of adequately representing themselves. . . .

Further, these very inequities may well play a decisive role in the board's decision due to the basis upon which that decision is reached. Although objective evidence is controlling, the board is constantly attempting to weigh the credibility of the person sitting before it.

In searching the registrant's conscience and motives, the board may attach a great deal of significance to his demeanor and this factor may be decisive in a given case. Therefore, an attorney's presence in aiding the registrant will enhance the chances that the board's decision will be based on the merits of the particular situation and not on the registrant's personal ability to sway the board.

Due to the complexities of the Selective Service Agency's Regulations, a need arises for the attorney to safeguard effectively the rights and privileges of the individual registrant. The statutes and amendments of the Act relate back to 1948, while the applicable regulations are found in approximately one hundred pages of Title 32 of the Code of Federal Regulations. Yet a great deal of pertinent information vital to the registrant is unknown to him. This information is contained in the multitude of Local Board Memos sent by General Hershey or in many of his confidential letters to the local boards. Being basically

ignorant of the law, many registrants are not aware of procedural and substantive errors which occur in their presence. But a person trained in the law would be able to realize when basic violations of fairness occur. If a fair hearing is to be had, it is mandatory that each participant be knowledgeable in the context of law within which they are operating. It is ventured that many registrants leave the proceeding wondering as to what exactly did transpire.

The only available sources of evidence of injustices stemming from local boards' decisions are from reported personal incidents and criminal cases where either the registrant is being tried for failure to submit to induction or, being inducted, he is proceeding on a writ of habeas corpus. While such evidence is not overly abundant, it does indicate that an attorney's presence would have aided in assuring the registrant fair treatment and that an "induction rate" slow-down due to the attorney's presence is not inevitable.

Senator Hart received a letter from an attorney who had attempted to accompany a client before the local board in his personal appearance. He was refused admittance before the board and reported that:

At this point, my client re-appeared, his interview with the Board was over. I estimate that the total elapsed time was four minutes or less. . . .

My client advised me that he had a short conversation with the Board; that the Board refused to accept all of his documentary material (e.g., The registrant had certain letters stating facts, and requesting his deferment. The Board counted the number of letters, but refused to read or receive them.) He was advised by the Board that if he disagreed with their forthcoming decision, he could appeal to the Appeal Board within 30 days.

Senator Long of Missouri reported another incident made known to him by an attorney who wanted to represent his eighteen year old son before the local board. But, because the father happened to be an attorney, he was denied the right to accompany his son. Senator Long felt this to be an affront to the legal profession, for while any other father could accompany his son in the personal appearance, fathers who were also lawyers were disallowed.

63. Note, supra note 10 at 178-79.
65. Id. at 6074. Senator Long quoted from the attorney's letter:

Clearly a part of the lawless attitude, which is developing among our young
In *Davis v. United States* a registrant was refused a hearing before his local board when he was reclassified 1-A. The court held that the refusal by the local board to consider new information offered at the time of the registrant's appearance or its refusal to receive new information offered by the registrant was a denial of due process. The registrant had the right to have the board consider his arguments fairly. The failure to allow such discussion was a violation of the regulations and, because of denial of due process, the action of the board in classifying the registrant was void.

The local board's procedural oversight in the process of reclassifying a registrant also resulted in a void classification in *Smith v. United States*. There, the local board failed to add to the registrant's file a written summary of all facts considered by it in making its classification. Upon appeal, the incomplete record was forwarded to the appeal board. The court held that an omission of material facts from the appeal record deprived the registrant of his right to an adequate consideration of his case on appeal and amounted to a denial of due process by the local board, invalidating the classification and the order for induction. In another instance, a registrant had sent a letter to the local board after his reclassification which expressed his desire to appeal. No appeal was taken and he was ordered to be inducted. The induction order was held void by the regulations which require that induction should not be ordered while an appeal is pending. And in *Simmons v. United States*, it was held that the failure of the Department of Justice to furnish the registrant with a fair resume of all adverse information in the F.B.I. report regarding his status for a conscience.

... people, stems from their justifiable belief that they are being dealt with unfairly by the Selective Service System. When a young man is being torn from his home against his will for whatever reason, it is supremely important that he be given every opportunity to feel that he has been dealt with fairly and that he has been permitted to take advantage of his legal rights. . . . If we do seek a rule of law in this country, then we must permit our citizens effectively to exercise their legal rights.

66. 199 F.2d 689 (6th Cir. 1952).
67. *See* United States v. Zieber, 161 F.2d 90 (3d Cir. 1947). This right to have an opportunity to talk over and explain one's case to the members of the local board has been termed the "greatest value" for the registrant, "even though he has no new information to present." United States v. Stiles, 169 F.2d 455 at 458 (3d Cir. 1948).
68. 157 F.2d 176 (4th Cir. 1946).
69. Chih Chung Tung v. United States, 142 F.2d 919 (1st Cir. 1944); *see* 32 C.F.R. 1626.41 (1968 rev.).
70. 348 U.S. 397 (1955).
entious objector exemption deprived him of the hearing provided for in the Selective Service Act.

The preceding survey indicates that local boards have not been invariably correct in their decisions to induct registrants. When one considers that only a small percentage of the persons involved fully litigated their cases before a judicial body, the number of illegal inductions becomes proportionately larger. In each of the above situations, had an attorney been present, he would have known the rights and privileges of the registrant and would have guarded against their violation. However, to propose that an attorney be present to guard against future injustices, one is still met with the contention that an attorney’s presence before the board would severely cripple its ability to function rapidly in the time of national crisis. Just how realistic is this fear? It is very probable that such a fear is largely unfounded and that an attorney’s presence may actually streamline the board’s function. In United States v. Peterson, it was held that the failure of the board to allow a registrant a personal appearance was a violation of due process and hence the board’s classification of the registrant was void. If an attorney had been present, he would have known of his client’s right to an appearance. All indications are that such an appearance would have produced a legally proper 1-A classification. With no “basis in fact” for an appeal to the courts, the attorney would not have had a case to present. As it happened, the court ordered the board to grant Petersen a personal appearance. By replacing the court’s order to the local board with the attorney’s knowledge of the law and his consequent guarding of the registrant’s rights, a streamlining and hastening of the induction process would have been accomplished.

It is suggested, therefore, that the local boards also can be the recipients of the benefits of an attorney. By seeing that the registrant’s rights are not being violated an attorney can aid the local board in not

71. It has been suggested that a clear presentation of all relevant facts before the local board might result in even fewer appeals, thus relieving part of the burden of the time-consuming appeal procedure. Note, Fairness and Due Process Under the Selective Service System, 14 U. Pa. L. Rev. 1014, 1033 (1966).

72. 53 F. Supp. 760 (N.D. Cal. 1944). For other instances where a local board’s decision has been declared void by the courts, see United States ex. rel. Berman v. Craig, 207 F.2d 888 (3d Cir. 1953); United States v. Fry, 203 F.2d 638 (2d Cir. 1953); Knox v. United States, 200 F.2d 398 (2d Cir. 1952); Davis v. United States, 199 F.2d 689 (6th Cir. 1952); In re Abramson, 196 F.2d 261 (3d Cir. 1952); United States v. Stiles, 169 F.2d 455 (3d Cir. 1948); United States v. Zieber, 161 F.2d 90 (3d Cir. 1947); United States ex. rel. Remke v. Read, 123 F. Supp. 272 (W.D. Ky. 1954).
committing obvious breaches of due process. The attorney's knowledge of the present law can enhance the board's ability to deal fairly with the registrant. By guarding his client's rights, the attorney will be of service to both his client and the local board.78

Although the registrant is in need of the assistance of counsel, no one could argue rationally that an attorney should be able to halt the boards' vital function. But are the registrant's need and the local board's function mutually exclusive alternatives? Cannot individual rights be protected within an administrative agency without that agency's complete breakdown? Could not the agency establish guidelines for the attorney whereby he would be allowed a "limited presence" to advise, consult and, if need be, represent his client and not be allowed the chance to slow drastically the local board's function? Could not an attorney's presence be allowed for the purpose of an expert's first-hand surveillance of the board's procedure and activity so that he may be fully able to represent and protect his client's rights should he later find himself in a court of law defending in a criminal prosecution?74 Since the local boards keep no record of their proceedings, when a registrant finds himself defending in a court of law, his attorney must rely on second-hand information and evidence related to him by his client.75 Should an attorney's presence be allowed the registrant can be assured that something other than his own memory will be

73. The majority of local boards may very well need such assistance. As one writer suggests:

Since [the local board members] are unpaid volunteers with other full-time employment, and are not offered brush-up courses on the law, they may not have studied the new statutes passed July 1, 1967, or the regulations issued under it. They may not have studied the over 100 Local Board Memos issued by General Hershey or his confidential letters to the local boards. It is extremely doubtful that they have all read the recent United States Supreme Court or courts of appeals decisions on draft cases. There are no standards for competence and no education or experience qualifications for draft board members.


74. As one observer noted:

There is no procedure by which citizens can observe or scrutinize the decision making process of local boards and there is no annual evaluation of the procedures followed or the correctness of local boards' decisions by the State Director, Gen. Hershey or an independent agency. Id. at 1324.

75. A board is entitled to survey its registrants in light of world conditions and in so doing it need not keep elaborate records of matters discussed or its considerations in making or changing a classification, nor record its thoughts and motives. Benson & Schesser, supra note 62 at 151.
able to capture all pertinent information which may be vital to him in the future. As one observer stated:

If an attorney were permitted to attend the personal appearance, he could be expected to familiarize himself with the statutes or regulations in advance and then observe whether the board’s actions conformed with legal requirements. It is no solution to say that the registrant can report his experiences to his attorney. The registrant may not appreciate the legal significance of certain board actions, and his account of the personal appearance may omit crucial details. . . . Further, the presence of someone other than the registrant and board members at the personal appearance could serve as a check on abusive behavior by board members.

CONCLUSION

The Selective Service System plays an extremely important role in the lives of millions of young men. No other federal agency holds such powerful sway over the destiny of so many. Yet with such extensive governmental power it has failed to allow young men who must confront it the basic safeguard of having their rights protected by someone knowledgeable in the law. Instead of having his fate decided in a proceeding which allows the registrant to be on equal terms with those who will make the decision, the Selective Service System places him behind closed doors to fend for himself in a contest that matches his knowledge of the law with those who sit to decide what that law will be. A mismatch of intelligence, knowledge, and competence is the obvious result. If the System is to retain public approval and if the rule of law is to prevail in our society, a fairer system must be devised to perform the System’s vital function. If it is the structure of the System itself which is the cause for a denial of individual rights, then the answer plainly must lie in its reformation and not in the continued deprivation of those individual rights. No matter what the necessity of an institution’s function, if it is not able to operate within the laws, its operation cannot be justified. And if that function is vital to a free society, then a system should be devised which is worthy of operation in such a society.

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76. Although the local board’s hearing is not criminal, it is here that the administrative record is made, and, should the registrant later wish to contest his classification in court, he will be doing so in a criminal proceeding. Note, supra note 71 at 1032.

77. Comment, supra note 32 at 2150-1.