THE RIGHT TO COUNSEL AT SELECTIVE SERVICE HEARINGS

I. INTRODUCTION

The Selective Service System has been in continuous operation since 1948. Only in the last four years, however, have major changes been made in the System. In 1967, deferments for graduate students and certain occupational specialties were phased out.[1] In 1969, after a long debate, the method of determining induction order was changed to a lottery system based upon dates of birth and a registrant's prime vulnerability to the draft was cut from seven years to one year.[2] In 1971, the Draft Extension Act,[3] authorized the establishment of a national draft call, rather than one based on local board quotas,[4] and the prospective abolition of undergraduate deferments,[5] In addition, the Act required all regulations to be published thirty days in advance of their effective dates to enable the public to comment on the proposals,[6] and gave statutory recognition to certain procedural rights which registrants may not be denied.[7] These statutory rights included the right to a personal appearance before any local or appeal board,[8] the right to present witnesses before the local board,[9] the right to the presence of a quorum of any board during the registrant's personal

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[1] Exec. Order No. 11,360, 32 Fed. Reg. 9787 (1967). In 1970, the future issuance of occupational and agricultural deferments was terminated except to those registrants who already held them. Exec. Order No. 11,527, 35 Fed. Reg. 6571 (1970). See Local Board Memorandum Nos. 95, Sel. Serv. L. Rep. 2200:3-5 (Apr. 19, 1968, as amended, Apr. 23, 1970, rescinded, Nov. 10, 1971), and 105, Sel. Serv. L. Rep. 2200:13 (Apr. 23, 1970, as amended, May 24, 1971).

[2] After some discussion in favor of a lottery system, Congress acted in 1967 to amend the draft law to specifically prohibit the President from establishing such a lottery. Military Selective Service Act of 1967, Pub. L. No. 90-40, § 1(3), 81 Stat. 100. In 1969, at the urging of the President, Congress repealed this provision. Selective Service Amendment Act of 1969, Pub. L. No. 91-124, § 2, 83 Stat. 220, formerly 50 U.S.C. App. § 455(a)(2) (1968). The President then established the lottery by Proclamation and Executive Order. Proclamation No. 3945, 34 Fed. Reg. 19017 (1969); Exec. Order No. 11,497, 34 Fed. Reg. 19019-20 (1969), as amended, Exec. Order No. 11,537, 3 C.F.R. 138 (1970), as amended, Exec. Order No. 11,563, 3 C.F.R. 174 (1970). See Local Board Memorandum No. 99, Sel. Serv. L. Rep. 220:8-8.1 (Nov. 29, 1969, as amended, Nov. 3, 1971), for the specific operation of the lottery system.

[3] Pub. L. No. 92-129, 85 Stat. 348 (Sept. 28, 1971).

[4] Id. § 101(a)(9), authorizing waiver of 50 U.S.C. App. § 455(b) (1970), which required the assignment of state and local quotas based on the number of eligible registrants in each. The regulations were then revised to authorize such a national call. 36 Fed. Reg. 23381-83, amending 32 C.F.R. pt. 1631 (1971).

[5] Pub. L. No. 92-129, § 101(a)(17), 85 Stat. 348 (Sept. 28, 1971), repealing 50 U.S.C. App. § 456(h)(1) (1970), which mandated undergraduate student deferments. These deferments were eliminated, except for those students who held such deferments during the 1970-71 academic year, by the new regulations. 36 Fed. Reg. 23377, amending 32 C.F.R. § 1622.25 (1971).

[6] Pub. L. No. 92-129, § 101(a)(32), 85 Stat. 348 (Sept. 28, 1971), amending 50 U.S.C. App. § 463(b) (1970).

[7] Id. § 101(a)(36).

[8] Id.

[9] Id.

appearance,[10] and the right to have, on request, a written explanation of any board action contrary to the request of the registrant.[11]

These provisions represent the first time Congress has specified minimum procedural rights to which the registrants are entitled, and are aimed primarily at extending the existing personal appearance at the local level throughout the system and assuring that a majority of the board members actually attend the personal appearance.[12] These new statutory provisions underscore congressional recognition of the importance of the personal appearance, the only official personal confrontation between registrant and board members. At this appearance, the registrant can answer questions from the board members concerning his application for deferred or exempt status, and can seek to impress the board with his sincerity.[13] Many of these deferred classifications are within the discretion of the board[14] and, therefore, the ability of the registrant to persuasively communicate his claim can be decisive.

However important these new protections are, conspicuous by its absence is another fundamental guarantee: the right to the presence of counsel at the personal appearance. The right to have counsel present at the personal appearance was included in the Senate version of the draft bill, but was deleted by the Senate-House Conference Committee before the bill was enacted in its final form.[15]

The absence of a provision authorizing the presence of counsel in the final version of the law passed by Congress does not forbid counsel's presence. Rather, it leaves the issue to the determination of the President, under his general authority to prescribe the necessary rules and regulations to carry out the provisions of the Selective Service Act.[16] Through the use of this authority, President Nixon has authorized a regulation declaring: "No registrant may be represented before the local board [or Appeal or National Board] by anyone acting as attorney or legal counsel."[17]

This Note will consider whether a registrant may constitutionally be denied representation of counsel before the Selective Service. Such a denial may be challenged on three grounds.[18] First, it is arguable that the regulation is invalid under *Greene v.*

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[10] Id.

[11] Id. Many courts had previously ruled that as a matter of due process boards must give reasons for denying conscientious objector claims. United States v. Stetter, 445 F.2d 472,483 (5th Cir. 1971); United States v. Lemmens, 430 F.2d 619 (7th Cir. 1970); United States ex rel. Brown v. Resor, 429 F.2d 1340 (10th Cir. 1970); Caverly v. United States, 429 F.2d 92 (8th Cir. 1970); United States v. Deere, 428 F.2d 1119 (2d Cir. 1970); United States v. Broyles, 423 F.2d 1299 (4th Cir. 1970); United States v. Haughton, 413 F.2d 736 (9th Cir. 1969); United States v. Washington, 392 F.2d 37 (6th Cir. 1968).

[12] The regulations issued to effectuate this new requirement go even further than the statute, at least in respect to appearances before the Appeal and National Appeal Board, stating that only those board members before whom the registrant actually appears shall classify him. 37 Fed. Reg. 5124 (1972), amending 32 C.F.R. § 1626.4(f) (1971) (Appeal Board); 36 Fed. Reg. 23380, amending 32 C.F.R. § 1627.f(f) (1971) (National Appeal Board).

[13] 37 Fed. Reg. 5122 (1972), amending 32 C.F.R. § 1624.4 (1971); 37 Fed. Reg. 5124 (1972), amending 32 C.F.R. § 1626.4(f) (1971); 36 Fed. Reg. 23379, amending 32 C.F.R. § 1627.4(e) (1971).

[14] E.g., Class 1-A-0: Conscientious objector available for noncombatant military service only; Class 1-0: Conscientious Objector available for alternate Service; Class 3-A: Registrant with a child or children; and registrant deferred by reason of extreme hardship to dependents.

[15] Conference Report to accompany H.R. 6531, Extension and Revision of the Draft Act and Related Laws, H.R. Rep. No. 433, 92d Cong., 1st Sess. 29-30 (1971).

[16] 50 U.S.C. App. § 460(b)(1) (1970). The President has delegated to the Director of Selective Service his authority to prescribe regulations under the draft law. Exec. Order No. 11,623, 36 Fed. Reg. 19963 (1971).

[17] 37 Fed. Reg. 5122 (1972), amending 32 C.F.R. § 1624.4(e) (1971); 37 Fed. Reg. 5124 (1972), amending 32 C.F.R. § 1626.4(d) (1971); 36 Fed. Reg. 23379, amending 32 C.F.R. § 1627.4(d) (1971).

[18] All of these grounds have been advanced without success, with one exception. See, e.g., United States v. Goodman, 435 F.2d 306 (7th Cir. 1970); Cassidy v. United States, 428 F.2d 585

McElroy[19] because it is not specifically authorized by Congress. Secondly, since the personal appearance may be considered a "critical stage" in any prosecution for refusing induction, it is possible that denial of counsel violates the sixth amendment.[20] Third, the denial of due process may violate the fifth amendment guarantee of due process. This Note will evaluate the assertion that due process, applied to Selective Service hearings, requires that the registrant by represented by counsel.[21]

II. THE RIGHT TO COUNSEL IN ADMINISTRATIVE HEARINGS

The extent to which the due process clause mandates certain procedures and practices in administrative hearings depends, in the first instance, on the nature of the hearing involved. If the personal appearance is an adjudicative hearing, then the due process clause requires that the hearing agency "use the procedures which have

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(8th Cir. 1970); United States v. Baird, 427 F.2d 521 (6th Cir.), cert, denied, 400 U.S. 826 (1970); United States v. Evans, 425 F.2d 302 (9th Cir. 1970); Robertson v. United States, 417 F.2d 440 (5th Cir. 1969); United States v. Tantash, 409 F.2d 227 (9th Cir. 1969), cert. denied, 395 U.S. 968 (1969); Haven v. United States, 403 F.2d 384 (9th Cir. 1968); Merritt v. United States, 401 F.2d 768 (5th Cir. 1968); Fults v. United States, 395 F.2d 852 (10th Cir. 1968); United States v. Dicks, 392 F.2d 524 (4th Cir. 1968); Nickerson v. United States, 391 F.2d 760 (10th Cir.), cert. denied, 392 U.S. 907 (1968); United States v. Mientke, 387 F.2d 1009 (7th Cir. 1967), cert. denied, 390 U.S. 1011 (1968); United States v. Capson, 347 F.2d 959 (10th Cir.), cert. denied, 382 U.S. 911 (1965); United States v. Sturgis, 342 F.2d 328 (3rd Cir.), cert. denied, 382 U.S. 879 (1965); Imboden v. United States, 194 F.2d 508 (6th Cir.), cert. denied, 343 U.S. 957 (1952); Niznik v. United States, 173 F.2d 328 (6th Cir.), cert. denied, 337 U.S. 925 (1949); Peterson v. United States, 173 F.2d 111 (6th Cir.), cert. denied, 337 U.S. 925 (1949); United States v. Pitt, 144 F.2d 169 (3rd Cir. 1944). The one exception is United States v. Weller, 309 F. Supp. 50 (N.D.Cal. 1969), appeal dismissed and remanded, 401 U.S. 254 (1971), where the District Court applied the rationale of Greene v. McElroy, 360 U.S. 474 (1959), finding that only Congress had the authority to deny the right to counsel and it had not done so. See note 19 infra. The court also indicated that, in light of recent developments in the concepts of due process, the exclusion of counsel may be violative of the due process clause of the fifth amendment. 309 F. Supp. at 54.

[19] 360 U.S. 474 (1959). In *Greene*, the Supreme Court held that regulations which are restrictive of rights which are generally considered to be fundamental (even though not constitutionally required under the particular circumstances in question) must be specifically authorized by either the President or Congress, depending upon where the original authority derives, and that the Court will not consider mere acquiescence a sufficient manifestation of authorization. Applying this rationale to the issue under consideration, it has been argued that since only Congress has the power to raise armies, U.S. Const. art. I, § 8, the President cannot limit the traditional procedural safeguard of the right to counsel at a hearing without an explicit authorization from Congress, which has never been given. This argument was accepted by the District Court in United States v. Weller, 309 F. Supp. 50 (N.D.Cal. 1969), appeal dismissed and remanded, 401 U.S. 254 (1971). While this case was decided prior to the enactment of the 1971 Act, and thus discusses congressional action prior to that date, it is still arguable that Congress has taken no action since that date to authorize such a limitation on counsel. See text accompanying notes 142-156 infra.

[20] See United States v. Wade, 388 U.S. 218 (1967), where the Supreme Court held that a lineup at a police station prior to trial was a "critical stage" of a criminal prosecution, requiring that the accused be afforded his sixth amendment right to counsel at that lineup. Applying this rationale to the issue under consideration, it has been argued that since the courts must approve any classification by a Selective Service board which has any basis in fact, Estep v. United States 327 U.S. 114 (1946), the personal appearance is a "critical stage" of any subsequent prosecution for refusing induction, and the right to counsel must be afforded at that appearance.

[21] This Notes makes no distinction between having counsel present at the personal appearance without the right to participate, and permitting such participation, assuming that the right to counsel encompasses the right to have counsel fully participate in the proceeding. Cf. FCC v. Schreiber, 329 F.2d 517, 526 (9th Cir. 1964), modified, 381 U.S. 279 (1965). Nor ford yhid Note consider whether counsel must be provided for those registrants who cannot afford one. Cf. Goldbert v. Kelly, 297 U.S. 254, 270 (1970).

traditionally been associated with judicial process."[22] If, on the other hand, the appearance is an investigative hearing, the government agency is not required to afford the registrant such protection. Hence, the first determination that must be made is whether the personal appearance is an adjudicative hearing in which the right to counsel may not be denied.

Investigative and adjudicative hearings have been distinguished on several grounds. Investigative or general fact-finding hearings, held to obtain information to govern future action, are not proceedings which result in actions that will directly and immediately affect personal rights. In an adjudicative hearing, there is at least one party around whose actions issues of law and fact arise;[23] the administrative tribunal must "consider the evidence and apply the law to the facts as found, thereby exercising a discretion in judgement judicial in nature on evidentiary facts;"[24] and "the nature of the final act [of the administrative board] determines the nature of the previous inquiry."[25] If, at the conclusion of the administrative process, binding determinations are made that will materially affect the rights of the individual(s) involved, the hearing held as part of the decision-making process is adjudicative.

Professor Kenneth Davis has suggested that the types of hearings may also be distinguished on the basis of the type of facts each seeks to elicit:[26]

> Adjudicative facts are the facts about parties and their activities, businesses, and properties. Adjudicative facts usually answer the questions of who did what, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.

Many lower courts in recent times have analyzed the problem in terms of the type of facts which the agency has been employing to reach its decision.[27] Though the Supreme Court has never explicitly endorsed this type of inquiry, it did distinguish some cases "because they do not involve individualized fact-finding and classification, but legislative determinations, political judgments, and the exercise of judicial discretion,"[28] seemingly indicating a recognition of the types of factual evidence involved in judicial and legislative decisions.[29]

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22 Hannah v. Larche, 363 U.S. 420, 442 (1960).

> When governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used.

23 Bowles v. Baer, 142 F.2d 787, 788-89 (7th Cir. 1944).

24 Handlon v. Town of Belleville, 4 N.J. 99, 105, 71 A.2d 624, 627 (1950). Accord, Morgan v. United States, 298 U.S. 468, 480 (1936), which held that

> [A] proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding.

25 Prentis v. Atlantic Coast Line Co. 211 U.S. 210, 227 (1908). Accord, Southeastern Greyhound Lines v. Georgia Pub. Service Comm'n, 181 Ga. 75, 81, 181 S.E. 834, 838 (1935); In Re Opinion of the Justices, 87 N.H. 492, 179 A. 344 (1935); Handlon v. Town of Belleville, 4 N.J. 99, 104, 71 A.2d 624, 626 (1950).

26 Administrative Law Treatise § 7.02 (1958).

27 See, e.g., NLRB v. Smith Industries, 403 F.2d 889, 892 (5th Cir. 1968); Hyson v. Montgomery County Council, 242 Md. 55, 64, 217 A.2d 578, 584 (1966); State v. Weinstein, 322 S.W. 2d 778, 783-84 (Mo. 1959); and cases cited in K. Davis, Administrative Law Treatise § 7.04 (Supp. 1970).

28 Gonzales v. United States, 348 U.S. 407, 412 n.4 (1955).

29 Prof. Davis takes this an an endorsement of his theory. 1 K. Davis, Administrative Law Treatise § 7.02 (1958).

III. THE PERSONAL APPEARANCE BEFORE THE SELECTIVE SERVICE BOARD

A. THE ADJUDICATIVE NATURE OF THE HEARING

When confronted with the claim of a right to counsel, the courts have almost uniformly held that the personal appearance before the local Selective Service board is non-adjudicative.[30] In a different context, however, the Eighth Circuit declared: "the character of their [board members] duties as defined by Congress placed them in a category of quasi-judicial officers rather than in a purely ministerial or executive position."[31] Similarly, the District Court for Puerto Rico found the local board hearing to be adjudicative, citing the Eighth Circuit, when it sought to expand a registrant's rights.[32] In addition, the Supreme Court favorably cited a passage from an earlier decision concerning the rights which accompany a quasi-judicial hearing,[33] in expanding the registrant's due process protections.[34]

An examination of the Selective Service board's procedures for determining the classification of registrants demonstrates the adjudicative nature of the personal appearance. Both the immediacy of the consequences which may result from and the type of facts elicited by the personal appearance are characteristic of an adjudicative hearing.

First, the classification process directly determines, in a judicial fashion, the individual's legal obligation to perform military service. Pusuant to the draft board's responsibility for the "selection, assignment, [and] delivery for induction" of recruits,[35] the local boards have been authorized to issue induction orders to registrants who have been certified as available for military service.[36] The registrant has a legal obligation to respond to the induction order.[37] If he fails to do so he is subject to a fine of $10,000 and/or a five year prison sentence.[38]

The local board proceeding begins with the presumption that every registrant is to be classified available for induction into military service unless his eligibility for a deferment or exemption is established.[39] The local board must "receive and consider all information, pertinent to the classification of a registrant, timely presented to it."[40] It must classify the registrant on the basis of all written information available to

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30 See note 18 supra.

31 Gibson v. Reynolds, 172 F.2d 95 (8th Cir. 1949). Accord, Dodez v. Weygandt, 173 F.2d 965 (6th Cir. 1949). These cases involved suits against local board members for monetary damages based on claims of wrongful classification.

32 Nevarez Bengorchea v. Micheli, 295 F. Supp. 257, 258 (D. P.R. 1969). Accord, Benitez-Manique v. Micheli, 305 F. Supp. 334, 338 (D. P.R. 1969), rev'd on other grounds, 439 F.2d 1173 (1st Cir. 1971). See also United States v. Bouziden, 108 F. Supp. 395, 399 n.13 (W.D. Okla. 1952).

33 Morgan v. United States, 304 U.S. 1, 18-19 (1938).

34 Gonzales v. United States, 348 U.S. 407, 413-14 n.5 (1955).

35 50 U.S.C. App. § 460(b)(3) (1970).

36 32 C.F.R. § 1622.10 (1971).

37 36 Fed. Reg. 23383, amending 32 C.F.R. § 1632.14 (1971).

38 50 U.S.C. App. § 462(a) (1970).

39 36 Fed. Reg. 23376, amending 32 C.F.R. § 1622.1 (1971).

40 The statute states that the local board shall have the power to "hear and determine" all claims for exemptions or deferments. 50 U.S.C. App. § 460(b)(3) (1970). However, the power to "hear and determine" is not necessarily distinctive of a judicial act. "Whether the power to hear and determine is judicial depends upon the nature of the subject of the inquiry, the parties to be affected and the effect of the determination." State v. Guilbert, 56 Ohio St. 575, 627, 47 N.E. 551, 559 (1897). Accord, Handlon v. Town of Belleville, 4 N.J. 99, 105, 71 A.2d 624, 626 (1950). Thus the use of this terminology in the statute does not assist in the inquiry. An analysis of the process by which the board acts and the effect of that action is still necessary.

the board. Any oral information must be reduced to writing.[41] It must keep abreast of the registrant's status and may reopen a registrant's classification if it is warranted by a change in the registrant's status.[42] On appeal, the Appeal Board and the National Appeal Board must consider the information in the registrant's file, general information concerning economic, industrial, and social conditions and oral statements made by the registrant before the respective appeal board, in determining the registrant's classification.[43]

The registrant myst affirmatively request a personal appearance before any of these boards.[44] If he does not request such an appearance, the registrant may point out any class or classes in which he believes he should be placed and may direct attention to any information in his file which he believes the board overlooked or failed to give adequate weight.[45]

The boards must examine the facts presented and "when grounds are established to place a registrant in one or more of the classes," he must be placed "in the lowest class for which he is determined to be eligible," based on an order of precedence.[46] This process involves "consider[ing] the evidence and applying the law to the facts as found,"[47] resulting in a classification that will materially affect the rights of the registrant; namely, whether or not he will have to face induction into the armed forces. Hence, the liability that may result from the board's decision directly affects the obligations and rights of the individual.

This immediate liability can be readily contrasted with the fact situation in *In Re Groban*,[48] which led the Supreme Court to hold that the hearing at issue was not adjudicatory. In *Groban*, the Court ruled that witnesses at a hearing conducted by a fire marshal to determine the cause of a fire could be denied counsel.[49] The Court reasoned that the hearing was merely investigative since it only elicited facts relating to the cause and circumstances of the fire, and did not adjudicate responsibility for the fire. The fire marshal could bring criminal charges against anyone if the evidence warranted such charges, but the actual adjudication of responsibility for the fire would take place only after a full trial, in which the accused was afforded full due process protections.[50] The draft registrant has no trial between the Selective Service's determination of his draft classification and an order to report for induction. If he is classified as eligible for induction, he is immediately subject to receipt of an induction order.[51]

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[41] 36 Fed. Reg. 23378, amending 32 C.F.R. § 1623.1(b) (1971).

[42] 37 Fed. Reg. 5123 (1972), amending 32 C.F.R. § 1625.1(c) (1971); 37 Fed. Reg. 5123 (1972), amending 32 C.F.R. § 1625.2 (1971).

[43] 37 Fed. Reg. 5124 (1972), amending 32 C.F.R. § 1626.4(g) (1971); 36 Fed. Reg. 23379, amending 32 C.F.R. § 1627.4(g) (1971).

[44] 37 Fed. Reg. 5122 (1972), amending 32 C.F.R. § 1624.2 (1971); 37 Fed. Reg. 5123 (1972), amending 32 C.F.R. 1626.2 (1971); 36 Fed. Reg. 23379, 32 C.F.R. § 1627.2(e) (1971).

[45] 37 Fed. Reg. 5122 (1972), amending 32 C.F.R. § 1624.4(b) (1971); 37 Fed. Reg. 5124 (1972), amending 32 C.F.R. § 1626.4(e) (1971); 36 Fed. Reg. 23379, amending 32 C.F.R. § 1627.4(e) (1971).

[46] 36 Fed. Reg. 23378, amending 32 C.F.R. § 1623.2 (1971).

[47] Handlon v. Town of Belleville, 4 N.J. 99, 105, 71 A.2d 624, 627 (1950).

[48] 352 U.S. 330 (1957) (5-4 decision). See also Anonymous Nos. 6 & 7 v. Baker, 360 U.S. 287 (1959).

[49] 352 U.S. 330, 335 (1957).

[50] Id. Until charges were filed, the only protection available to a witness was the privilege against self-incrimination. Id. at 333. In this sense the investigation is similar to a grand jury proceeding, in which the witness cannot bring counsel into the jury room but can invoke the privilege against self-incrimination. Jones v. United States, 342 F.2d 863, 882 (D.C. Cir. 1964); In Re Black, 47 F.2d 542 (2d Cir. 1932); United States ex rel. Bironoraba v. Comm'r of Correction, 316 F. Supp. 556, 562 (S.D. N.Y. 1970). See also Meshbeshers, Right to Counsel Before a Grand Jury, 41 F.R.D. 189 (1967).

[51] The Selective Service classification process is comparable to the expulsion of a student from a state-supported school, which has been held to be an adjudication, requiring that the expelled student be given a hearing with minimum due process requirements. Wasson v. Trowbridge,

Secondly, the facts elicited during the Selective Service hearing are, in Professor Davis' terms, adjudicative facts. This characterization is particularly valid with respect to the two major types of deferments sought, conscientious objector status and hardship claims.

In determining whether a registrant qualifies for conscientious objector status the board must find that he is "conscientiously opposed to participation in war in any form" and conscientiously opposed to both combatant and noncombatant training.[52] If he is opposed only to combatant training, he must be classified as available for some form of noncombatant service.[53] Such a determination requires an extensive inquiry by the board into the extent of the registrant's beliefs to insure that he is opposed to war in any form, and not to a particular war,[54] and a judgment on the registrant's sincerity. Sincerity must be determined in each case[55] and is probably the single most important criteria for determining conscientious objector status.[56]

In determining hardship claims, the board must find whether the hardship that would be imposed is extreme; whether the allegedly dependent person(s) is within the included class, including whether he or she is under eighteen years of age and physically or mentally retarded if that is the claim; whether support was assumed in good faith; to what extent allowances should be taken into consideration in determining the claim; and other, more complex determinations when the hardship "is based upon other than financial considerations."[57]

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382 F.2d 807, 812 (2d Cir. 1967); Dixon v. Alabama, 294 F.2d 150 (5th Cir.) cert. denied, 368 U.S. 930 (1961). In both situation, the possible result of the administrative process would be immediate, either induction into the armed forces or expulsion from school. Cf. Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970), which held that due process required a hearing with the right to notice of charges, and to confront all evidence, when the city sought to evict a tenant from a public housing project; Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969), which held that a teacher charged with violating a school board policy against the wearing of beards was entitled to a hearing before being discharged for allegedly violating that rule; Baker v. Hardway, 283 F. Supp. 228, 238 (S.D.W.Va.), aff'd, 399 F.2d 639 (4th Cir. 1968), cert. denied, 395 U.S. 905 (1969), which distinguished between an investigative and adjudicative college disciplinary hearing. Compare *Wasson*, supra, and *Dixon*, supra, with Madera v. Board of Education of the City of New York, 386 F.2d 778, 784 (2d Cir. 1967), cert. denied, 390 U.S. 1028 (1968), which was distinguished from the first two cases on the ground that it involved a preliminary conference which resulted in no direct action being taken against the student. See also criticism of *Madera* in 1 K. Davis, Administrative Law Treatise § 8.10 (Supp. 1970).

The draft board's classification process is also similar to a licensing board examinging the applications of potential licensees to determine if they have met the established requirements, which has been held to be an adjudication. Hornsby v. Allen, 326 F.2d 605, 608 (5th Cir. 1964). See also Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926). In both instances, the respective board examines the applicant's credentials in light of preestablished standards, resulting in direct action concerning the applicant. Compare *Hornsby*, supra, with Albert v. Public Service Comm'n, 209 Md. 27, 35-38, 120 A.2d 346, 350-51 (1946), in which the Maryland Court of Appeals held that the commission could decide there was no present need to issue any more taxi permits without giving all potential taxi permittees a hearing since this was quasi-legislative (and not adjudicative) in nature.

The Selective Service boards' actions are distinguishable from the activities of the Civil Rights Commission, which the Supreme Court found were not adjudicatory in describing them as follows:

> It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions . . . In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights.

Hannah v. Larche, 363 U.S. 420, 441 (1960). This description is easily comparable to the workings of Selective Service Boards which do issue orders which if not followed could result in criminal liability.

52 37 Fed. Reg. 5121 (1972), amending 32 C.F.R. § 1622.14 (1971).

53 37 Fed. Reg. 5121 (1972), amending 32 C.F.R. § 1622.11 (1972).

54 See Gillette v. United States, 401 U.S. 437, 443 (1971).

55 See, e.g., Welsh v. United States, 398 U.S. 333, 339 (1970); United States v. Seeger, 380 U.S. 163, 185 (1965); Witmer v. United States, 348 U.S. 375, 381-82 (1955).

56 See note 55 supra.

57 32 C.F.R. § 1622.30(d) (1971).

These are difficult considerations that require a careful examination of the facts about specific individuals and their activities. These facts would be presented for evaluation to a jury in a jury trial. In addition, as the Ninth Circuit Court of Appeals observed, the board performs a function similar to that of a trial court in evaluating the testimony of witnesses on the issues of fact.[58] Therefore, it is reasonable to conclude that the personal appearance is concerned with adjudicative facts.[59] Moreover, Selective Service registrants are being "brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities."[60] Because the decision of the board directly affects the rights of the registrant, the personal appearance must be considered an adjudicative hearing, to which due process protections should be applied.

B. THE RIGHT TO COUNSEL AT THE PERSONAL APPEARANCE

Having concluded that the classification of registrants is an adjudicative process, and that the personal appearance is an adjudicatory hearing, the question remains whether the right to the presence of counsel is required by due process. As a basic principle, due process requires only adequate notice and a fair hearing.[61] However, other protections, including the type of hearing,[62] the right to confront and cross-examine witnesses, and the right to counsel, depend upon a balancing of the governmental and individual interests in the subject-matter of the hearing.[63]

Among the factors to be considered in weighing opposing interests, the Supreme Court has included "[t]he nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding [of providing the desired protections]."[64] In addition to discussing the governmental and individual interests the Court has also considered the congressional attitude toward the right sought and the availability of judicial review in determining the extent of due process rights required in a particular hearing.[65]

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[58] Dickinson v. United States, 203 F.2d 336, 345 (9th Cir.), rev'd on other grounds, 346 U.S. 389 (1953).

[59] See 1 K. Davis, Administrative Law Treatise § 7.02 (1958), which states that:

> Even though a selective service registrant is vitally affected by the question whether or not he is drafted, he is entitled to a hearing only on issues of adjudicative facts, not on issues of legislative facts.

An example of an adjudicative fact would be the determination of whether the registrant's past conduct qualified or disqualified him for a deferment, while setting the minimum vision requirements would be an example of finding legislative facts. Davis goes on to declare that conscientious objector determinations "involve the clearest kind of disputed adjudicative facts." Id. § 7.14.

[60] Morgan v. United States, 304 U.S. 1, 18 (1938).

[61] 1 K. Davis, Administrative Law Treatise § 7.02 (1958).

[62] E.g., trial type or argumentative.

[63] See Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961), which held

> [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

See also Goldberg v. Kelly, 397 U.S. 254, 263 (1970), which held

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.

[64] Hannah v. Larche, 363 U.S. 420, 442 (1960).

[65] FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265, 275 (1949).

1. The Governmental Interest

The governmental interest in denying the registrant the right to counsel can be divided into four major concerns: (a) the need to expedite the classification process; (b) the broader need to be able to respond quickly to a threat to the national security during a national emergency; (c) the desire to maintain the nonadversary hearing; and (d) the claim that counsel is unnecessary because the registrant has adequate access to information.

a. The Need to Expedite the Classification Process

The foundation of the argument against affording the right to counsel to registrants in the contention that, since the Selective Service System is the means by which the nation provides adequate manpower to meet its national security needs, due process rights must be limited to expeditiously accomplish these needs.[66] The courts have often expressed concern about anything that would cause "litigious interruption"[67] of the selection process. A former Director of the Selective Service System has warned that the right to counsel at the personal appearance would decrease the efficiency of the manpower system and its ability to deliver its quotas.[68]

However, the fears of undue interruption of the Selective Service process are unjustifiable. There is presently no limitation on seeking the advice and assistance of counsel in preparing Selective Service forms, in the preparation of a case to be presented before either the local or appeal boards or in seeking the intervention of the State and National Director to halt induction or reopen a classification. Since lawyers are already intervening on behalf of aggrieved registrants, the presence of counsel at the personal appearance would have little additional effect on these activities.[69]

As to the claim that the lawyer's presence at the personal appearance will disrupt that hearing, it should be remembered that the board need only give the registrant such time as is necessary for the fair presentation of his claim.[70] Specifically, the new regulations recommend fifteen minutes for the appearance before the local board, including the time for the testimony of as many as three witnesses.[71] No specific time recommendation is made for the appearance before the Appeal Board,[72] but fifteen minutes is permitted for the registrant's presentation before the National Board.[73] Considering the limited judicial review of board decisions to be discussed later, attorneys would allocate this limited time allowance productively.

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66 Cf. United States v. Nugent, 346 U.S. 1 (1953); Falbo v. United States, 320 U.S. 549 (1944); United States v. Pitt, 144 F.2d 169 (3rd Cir. 1944).

67 Falbo v. United States, 320 U.S. 549, 554 (1944). See also Clay v. United States, 397 F.2d 901, 923 (5th Cir. 1968), vacated, 394 U.S. 310 (1969).

68 Hearings on S. 3303 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 90th Cong., 2d Sess. 4 (1968) (Testimony of General Louis B. Hershey).

> The bill before the committee [providing for the right to counsel at the personal appearance] would offer literally millions of occasions annually on which a local board, through adequate and timely notice, would be required to afford an opportunity for counsel to appear. It would offer literally millions of opportunities for delays in processing which could well defeat the vital necessity that the function of raising Armed Forces be accomplished swiftly and simply, for the threats to our survival come swiftly and often without warning even to our most knowledgeable leaders.

69 This fact has been recognized by the former Chairman of the National Appeal Board in testimony before a Senate subcommittee. Hearings on S. 3303, supra note 68, at 59 (Testimony of Judge Henry J. Gwiazda).

70 37 Fed. Reg. 5122 (1972), amending 32 C.F.R. § 1624.4(c) (1971).

71 Id.

72 37 Fed. Reg. 5124 (1972), amending 32 C.F.R. § 1626.4(d) (1971).

73 37 Fed. Reg. 5124 (1972), amending 32 C.F.R. § 1627.4(d) (1971).

Notably, the Court of Appeals for the District of Columbia was faced with a similar claim of disruption and delay when asked to declare that a parole violator had a right to counsel when appearing before the Parole Board. That court's very strong rejection of the claim is equally applicable to appearances before Selective Service boards.

> The presence of counsel does not mean that he may take over control of the proceeding.... [T]he presence of counsel and the receipt of testimony offered by the prisoner need not prolong the hearing beyond the time necessary in any event for the Board to ascertain the facts upon which it is about to act.... The participation by counsel in a proceeding such as this need be no greater than is necessary to insure, to the Board as well as to the parolee, that the Board is accurately informed from the parolee's standpoint before it acts, and the permitted presentation of testimony by the parolee need be no greater than is necessary for the same purpose.[74]

Similarly, the presence of counsel at the personal appearance need not prolong the hearing any longer than necessary to insure a fair presentation of the registrant's evidence.

b. National Security and National Emergency Rationale

On a broader level, it can be claimed that, where the national security is at stake, the courts have traditionally permitted the streamlining of procedural requirements in order to expedite action.[75] Without denying the concern for national security, the courts have conditioned relaxed due process requirements on the proof of an imminent national emergency. For example, in *United States v. Pitt*,[76] the federal appellate court took note of the compelling emergency caused by World War II, holding that due process did not require the presence of counsel at the local board personal appearance. This result is reasonable, since the governmental interest, reflected in the need for speed in raising the necessary manpower, is directly related to the degree of

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[74] Fleming v. Tate, 156 F.2d 848, 849 (D.C. Cir. 1946). See also People ex rel. Menechino v. Warden, 27 N.Y.2d 376, 383, 267 N.E.2d 238, 242, 318 N.Y.S.2d 449, 454 (1971):

> It is desirable, however, to indicate that the hearings we are directing must not be permitted to unreasonably delay the proceedings ... In other words, participation by counsel need be no greater than is required to assure, to the board as well as to the parolee, that the board is accurately informed of the facts before it acts, and the permitted presentation of testimony by the parolee need be no greater than is necessary for that same purpose.

[75] "[I]n particularly vital and sensitive areas of government concern such as national security and military affairs, the private interest must yield to a greater degree to the government." Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967). Accord, Dixon v. Alabama State Bd. of Education, 294 F.2d 150, 157 (5th Cir.), cert. denied, 368 U.S. 930 (1961). The following statement from 1 K. Davis, Administrative Law Treatise § 7.02 (1958), is illustrative of the judicial recognition of an exception in national security matters:

> The true principle is that a party who has a sufficient interest or right at stake in a determination of governmental action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts, except in the rare circumstance when some other interest, such as national security, justifies an overriding of the interest in a fair hearing.

For examples of the limitation of individual rights due to national security considerations see, e.g., Silesian-American Corp. v. Clark, 332 U.S. 469 (1947); Korematsu v. United States, 323 U.S. 214 (1944); Yakus v. United States, 320 U.S. 81 (1943).

[76] 144 F.2d 169, 171 (3rd Cir. 1944).

> The means embodied in the [Selective Service] Act for the raising of armed forces for the national defense bear a real and substantial relationship to the danger which has materialized with great rapidity on the horizon of our national life.

emergency. However, with the Vietnam War widing downward, and the number of persons expected to be inducted each year declining, such an emergency does not exist today.[77]

The Supreme Court has ruled that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit."[78] The courts may determine when an emergency exists sufficient to justify the suspension of normal constitutional protections.[79] For instance, the Supreme Court has confined the power of the government to enforce martial law to the actual theater of military operations when the civilian courts are closed.[80] The Court implied that the judiciary would be the ultimate arbiter of the duration of the emergency, declaring:

> [A]s necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power.[81]

Hence, it would be entirely consistent with precedent for the courts to determine that due process requires the presence of counsel, reserving the authority to permit limitations of the right should an emergency arise.

c. The Nonadversary Hearing

In further support of the argument against permitting counsel, it has been contended that since the proceedings before the Selective Service boards are "stripped of the panoply of formal judicial tribunals,"[82] counsel is unnecessary. This argument is supported by the claim that the personal appearance was not established as an adversary proceeding, that the boards do not employ counsel, and the decision-making power has been entrusted to people who are the registrant's neighbors and are given broad discretion to classify the registrant in the best interests of both the registrant and the country.[83] Therefore, the presence of counsel would be unnecessary.[84]

Whatever its validity years ago, the concept of a draft board as a "friendly group of neighbors" has no such validity today, especially in urban areas.[85] The Selective Service System itself has implicitly recognized this fact by rescinding the regulation requiring that all members of local boards "if at all practicable" be residents of the area in which the board has jurisdiction[86] after many courts had found that the

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[77] N.Y. Times, Jan. 31, 1972, at 1, col. 4; N.Y. Times, Jan. 16, 1972, § 4 at 1, col. 1.

[78] United States v. Robel, 389 U.S. 258, 263 (1967).

[79] See Home Bldg. & Loan Ass'n. v. Blaisdell, 290 U.S. 398, 426 (1934), in which the Supreme Court enunciated the principle that an emergency may give rise to a different interpretation of the "general clauses" of the Constitution, such as the due process clause.

[80] Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866).

[81] Id. at 127. See also Woods v. Miller, 333 U.S. 138, 144 (1948) ("And the question whether the war power has been properly employed in cases such as this is open to judicial inquiry."); Falbo v. United States, 320 U.S. 549, 556 (1944) (Murphy, J., dissenting); Chastletown Corp. v. Sinclair, 264 U.S. 543, 547-48 (1924).

[82] United States v. Pitt, 144 F.2d 169, 172 (3rd Cir. 1944).

[83] Hearings on the Review of the Administration and Operation of the Selective Service System Before the House Committee on Armed Services, 89th Cong., 2d Sess. 1986 (1966) (Testimony of General Louis B. Hershey).

[84] Cf. Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967).

[85] The findings of the National Advisory Commission on Selective Service, In Pursuit of Equality: Who Serves When Not All Serve 20 (1967), support this conclusion.

> However universally valid this personalized concept might have been in the past, only in rural areas does it appear to be true today. Urban board members usually work in anonymity – and indeed seem to look upon that anonymity as an advantage. Rarely it would seem do those on such a board actually know the men whom they are classifying on the basis of their records – and vice versa.

[86] 32 C.F.R. § 1604.52(c) (1970), as amended, Exec. Order No. 11,555, 35 Fed. Reg. 14191 (1970).

regulation had been violated.[87] Of course, it is unlikely that any of the registrant's neighbors would be members of the various appeal boards, before whom registrants have an opportunity to appear under the new Act.[88]

The claim that the board hearing is informal and nonadversary has no basis in fact. Numerous instances of unfairness by local boards towards registrants appear in the court reporters. In *United States ex rel. Berman v. Craig*,[89] the court admonished a local board that "registrants are not thus to be treated as though they were engaged in formal litigation assisted by counsel."[90] Similarly, in *Walsh v. Local Board No. 10*,[91] the court rebuked "the draft board's overzealous, high-handed and erroneous handling of this young man's plight."[92] In *United States v. DeLime*,[93] the registrant was subject to "extensive" and "incisive" questioning by the government appeals agent, a lawyer, about his conscientious objector beliefs.[94] Usually, the reality of the encounter between the registrant and the local board is reflected by the following passage from *United States v. Turner*:[95]

> The testimony of the clerk reveals the existence of an adversary policy toward the defendant, as if he were an antagonist against whom the board was on guard rather than a young man dealing with his own government without the aid of counsel in a rather technical area in which he evidently showed himself, if not incoherent, at least lacking in the ability to advance his claim and maintain his rights.[96]

Thus, the personal appearance has the characteristics of an adversary hearing. The boards have been interested solely in meeting draft quotas, suspicious of any registrant who seeks to avoid induction, regardless of the legitimacy of his reasons.[97]

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87 See, e.g., United States v. Lemke, 439 F.2d 762 (9th Cir. 1971); United States v. Reeb, 433 F.2d 381 (9th Cir. 1970), cert. denied, 402 U.S. 912 (1971); Czepil v. Hershey, 425 F.2d 251 (7th Cir. 1969), cert. denied, 400 U.S. 849 (1970); Jessen v. United States, 242 F.2d 213 (10 Cir. 1957). These courts, however, refused to read the regulation's order as mandatory, holding that the residency violations did not create a defense for the registrant. Contra, United States v. Cabbage, 430 F.2d 1037 (6th Cir. 1970).

88 Pub. L. No. 92-129, § 101(a)(36), 85 Stat. 348 (Sept. 28, 1971).

89 207 F.2d 888 (3rd Cir. 1953).

90 Id. at 891.

91 305 F. Supp. 1274 (S.D.N.Y. 1969).

92 Id. at 1279.

93 121 F. Supp. 750 (D. N.J. 1954), aff'd, 223 F.2d 96 (3rd Cir. 1955).

94 Id. at 754. Nevertheless, the court held this questioning not to be prejudicial.

95 431 F.2d 1251 (3rd Cir. 1970).

96 Id. at 1254.

97 Another example of adversary action by local boards was the recent use of the delinquency regulations, 32 C.F.R. pt 1642 (1971), to reclassify any registrant who participated in anti-war and anti-draft activities. Boards were authorized by General Hershey to determine the legality of anti-war activities and to punish registrants who participated through immediate reclassification.

> The military obligation for liable age groups is universal and ... deferments are given only when they serve the national interest.... It follows that ... illegal activity which interferes with recruiting or causes refusal of duty in military or naval forces could not by any stretch of the imagination be construed as being in support of the national interst.... A local board, upon receipt of [such evidence] ... may reopen the classification of the registrant and reclassify him anew....

Quoted in National Student Ass'n. v. Hershey, 412 F.2d 1103, 1117 (D.C. Cir. 1969). This directive was subsequently declared an unconstitutional abridgement of first amendment rights, Id., as was the use of the delinquency regulations to accelerate induction. Gutknecht v. United States, 396 U.S. 295 (1970). The delinquency provisions have since been revoked by the new regulations. 36 Fed. Reg. 23383 (1971). Nonetheless, the use of these regulations in such a manner belies the claim that boards do not act in an adversary manner towards registrants.

d. The Registrant's Access to Information

An additional argument that may be advanced to show that counsel is unnecessary is that the system presently provides the registrant with ample opportunity to obtain any information he needs. The back of the two forms which eligible registrants must have in their possession at all times, the Registration Certificate and the Notice of Classification,[98] suggest: "For Information and Advice: Go To Any Local Board." Unfortunately, while this statement may reflect the goal of the Selective Service System to assure fairness toward all registrants, it has not been verified in practice. The contentious attitude of many board members towards individuals who seek information on deferments has already been noted. Additionally, there are numerous cases where clerks have been equally unhelpful.[99] Though the local board may have an advisor to registrants,[100] more often than not no such advisor exists.[101]

For many years the System claimed that the government appeal agent, which each local board was required to have, and who was preferably a member of the legal profession, would provide adequate information to any registrant who sought his advice.[102] However, the requirement that the government appeal agent was to be "equally diligent in protecting the interests of the Government and the rights of the registrant in all matters,"[103] raised the possibility of a conflict of interest.[104] Additionally, it was recognized that the agent was almost totally inactive.[105] The result of this conflict was, despite the claim that the appeal agent was protecting the rights of the registrants, the abolition of the position by the new regulations.[106]

2. The Individual's Interest

From the registrant's point of view, it appears self-evident that conscription will have a drastic impact on his life.[107] In addition to the physicial dangers that a draftee

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98 36 Fed. Reg. 23375, amending 32 C.F.R. § 1617.1 (1971). 36 Fed. Reg. 23378, amending 32 C.F.R. § 1623.5 (1971).

99 See, e.g., Platnor v. Resor, 446 F.2d 1066 (5th Cir. 1971); United States v. Bagley, 436 F.2d 55 (5th Cir. 1970); United States v. Burns, 431 F.2d 1070 (10 Cir. 1970); United States v. Lansing, 424 F.2d 225 (9th Cir. 1970); Battiste v. United States, 409 F.2d 910 (5th Cir. 1969); United States v. Goodman, 000 F. Supp. 000, 1 Sel. Serv. L. Rep. 3239 (N.D. Ill. Sept. 20, 1968).

100 37 Fed. Reg. 5120 (1972), amending 32 C.F.R. § 1604.41 (1971).

101 See, e.g., United States v. Jones, 384 F.2d 781 (7th Cir. 1967); United States v. Spiro, 384 F.2d 159 (3rd Cir. 1967); Steele v. United States, 240 F.2d 142 (1st Cir. 1956); Rowton v. United States, 229 F.2d 421 (6th Cir.), cert. denied, 351 U.S. 930 (1956); United States v. Howe, 144 F. Supp. 342 (D. Mass. 1956); United States v. Schwartz, 143 F. Supp. 639 (E.D. N.Y. 1956).

102 32 C.F.R. § 1604.71, repealed by 36 Fed. Reg. 23375 (1971).

103 32 C.F.R. § 1604.71(d)(5) (1971). In addition, each agent was directed to make known to the local board any knowledge of any violation of Selective Service regulations by registrants. The directive stated in part:

> Violations of the Military Selective Service Regulations by registrants and non-registrants are of utmost concern to all members of the Selective Service System. . . . I [Director Hershey], therefore, request each Government Appeal Agent to make known to the Local Board any knowledge of such violations by a registrant.

Quoted in Hearings on S. 3303 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 90th Cong., 2d Sess. 255-56 (1968).

104 The appeal agent's dual responsibility to the registrant and the government raised the possibility that he would be in violation of the Canon of Ethics. See New York State Bar Association's Committee on Professional Ethics, Opinion No. 185, 4 Sel. Serv. L. Rep. 32 (1971); Letter from Jack B. Hayes, Secretary of the State Bar of California to John T. McTernan, June 28, 1968, in Hearings on S. 3303 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 90th Cong., 2d Sess. 257-58 (1968).

105 See National Advisory Commission on Selective Service, In Pursuit of Equality: Who Serves When Not All Serve 28 (1967).

106 36 Fed. Reg. 23375 (1971).

107 See Local Bd. No. 4 v. Weiner, 302 F. Supp. 266 (D. Del. 1969): "The life or death of a registrant may well turn on the classification he receives." Cf. Clay v. United States, 397 F.2d

may be forced to face, his constitutional rights are severely limited within the Armed Forces. With the exception of crimes not related to the military, and committed off base,[108] the soldier is subject to military jurisdiction, which severely curtails certain basic procedural rights, including trial by jury, an independent judiciary, and the grand jury indictment or presentment.[109] As a member of the Armed Forces he is subject to criminal liability for actions which are nonculpable in civilian life and is subject to rules and regulations which severely limit his freedom.[110]

In the case of a conscientious objector these considerations are heightened because the sanctity of an individual's beliefs are at stake. An individual who is denied a requested conscientious objector classification is forced to choose between refusing induction, thus incurring criminal sanctions, or submitting to induction contrary to his personal beliefs, possibly in hope of eventually obtaining his release on a habeas corpus petition.[111] A person claiming conscientious objector status who submits to induction and fails to win a discharge would be subject to military court-martial if he fails to obey future military orders.

In response to this it has been argued that since Congress has the authority to involuntarily induct anyone,[112] deferments and exemptions are privileges, which can be granted or denied without affording the claimant full due process protections. Following this approach, the classification procedure does not directly infringe upon any individual's right to liberty[113] the distinction between "right" and "privilege," when considering the extent of procedural due process protections, has significantly eroded in recent times.[114] As the Court of Appeals for the District of Columbia, quoted by the Supreme Court, has quaintly explained it,

> One may not have a constitutional right to go to Baghdad, but the government may not prohibit one from going there unless by means consonant with due process of law.[115]

901, 911 (5th Cir. 1968), vacated, 394 U.S. 310 (1969): "It is undeniable, as appellant contends, that conscription deprives an individual of his liberty and may even take his life;" Arndt v. United States, 222 F.2d 484, 486 (5th Cir. 1955): "These boards have been invested with great authority over the lives and actions of the people, and that authority must be exercised only after scrupulous observance of the protective safeguards provided by the Constitution and statutes"; United States v. Beltran, 306 F. Supp. 385, 388 (N.D. Cal. 1969): "[t]he consequences of the classification decision are severe . . ."

108 See O'Callahan v. Parker, Warden, 395 U.S. 258 (1969).

109 Uniform Code of Military Justice [hereinafter U.C.M.J.] § 2(1) (1951).

110 Exemplary of such regulations is the General Article, which provides

> Though not specifically mentioned in this code, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces and crimes and offenses not capital . . . shall be taken cognizance of by a general or special or summary court-martial.

U.C.M.J. art. 134. See, e.g., Absent Without Leave, U.C.M.J. art. 86; Missing Troop Movement, U.S.M.J. art. 87; Disrespect Towards Superior Officer, U.C.M.J. art. 89; Willful Disobeyance Of A Lawful Order, U.C.M.J. art. 90; Failure To Obey Order Or Regulation, U.C.M.J. art. 92; Misbehavior Before The Enemy, U.C.M.J. art. 99.

111 See United States v. Freeman, 388 F.2d 246 (7th Cir. 1967), which recognized that the conscientious objector's options may even be more limited.

112 See Selective Draft Law Cases, 245 U.S. 366 (1918); United States v. Macintosh, 283 U.S. 605, 623 (1931); Fleming v. United States, 344 F.2d 912, 915 (10th Cir. 1965); Clark v. United States, 236 F.2d 13, 23 (9th Cir.), cert. denied, 352 U.S. 882 (1956); Uffleman v. United States, 230 F.2d 297, 298 (9th Cir. 1956); Brown v. McNamara, 263 F. Supp. 686, 690 (D.N.J. 1967); United States v. Kenstler, 250 F. Supp. 833, 834 (W.D.Pa. 1966).

113 U.S. Const. amend. V.

114 See, e.g., Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Cafeteria Workers v. McElroy, 367 U.S. 886 (1961). See also Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1451-54 (1968).

115 Homer v. Richmond, 292 F.2d 719, 722 (D.C. Cir. 1960), cited in Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Cafeteria Workers v. McElroy, 367 U.S. 886, 894 (1961).

Secondly, rather than employing the right-privilege dichotomy to determine due process rights, the courts have looked to the respective interests involved. Any person who has a sufficient interest in the outcome of governmental action should be entitled to due process protections.[116] As already seen, it is hardly debatable that the individual seeking to establish a claim for a deferment has a vital interest at stake. The difference between being in or out of the service cannot be minimized. A person classified 1-A may be "condemned to suffer a grievous loss,"[117] his life may be sacrificed, his beliefs may be compromised and his personal liberties will certainly be restricted upon induction.[118] In view of this, his interest in his draft classification is equal to the governmental interest in the procurement of manpower, absent the existence of a genuine emergency. His interest in obtaining the full protection of the due process clause is equal to others who, when in conflict with the government, have the right to be accompanied by counsel.[119] Moreover, a review of the rights provided the registrant by statute demonstrates that assistance of counsel is indispensible to a cogent presentation of the registrant's claim.

Under the new regulations, the registrant is entitled to a personal appearance before his local board on the denial of any claim, unless he appeared in advance of this classification, in which case he is entitled to no further appearances before the board.[120] He is entitled to such time as is necessary to adequately present his case, though the regulations state that fifteen minutes is the time normally needed. During this period he is allowed to present three witnesses on his behalf and make a statement of his own.[121] If the local board determines that the information presented does not justify any change in the registrant's status, the board so notifies him, enclosing a statement of reasons.[122]

The registrant may appeal an unfavorable classification to the Appeal Board, and request a personal appearance before that board.[123] The registrant is entitled to such time for his Appeal Board appearance as the board determines is necesssary for the fair presentation of his claim. The regulations establish no recommended time limit for the personal appearance nor do they permit the presentation of witnesses, as they do for the local board appearance.[124] Following the personal appearance, the Appeal Board classifies the registrant.[125] If the Appeal Board makes a decision adverse to the registrant by a split vote, the registrant may appeal to the National Appeal Board, requesting a personal appearance before that board if he so desires.[126] At the National Appeal Board appearance the registrant has fifteen minutes to present his testimony,

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Support for the contention that the Selective Service personal appearance is of constitutional significance can be found in Davis v. United States, 410 F.2d 89, 96 (8th Cir. 1969), and United States v. Greene, 220 F.2d 792 (7th Cir. 1955).

116 1 K. Davis, Administrative Law Treatise § 7.02 (1958); See also Cafeteria Workers v. McElroy, 367 U.S. 886 (1961), which, though mentioning the right-privilege dichotomy, talks primarily in terms of the interests at stake. See, generally, the authorities cited in note 114 supra.

117 Cf. Goldberg v. Kelly, 397 U.S. 254, 165 (1969).

118 See text accompanying notes 108-10 supra.

119 The right to be represented by counsel is guaranteed by statute in proceedings before, e.g., Civil Rights Commission, 42 U.S.C. § 1975a(c) (1971); Indian Claims Commission, 42 U.S.C. § 70n (1971); Interstate Commerce Commission, 49 U.S.C. § 17(12) (1971); Veterans Administration, 38 U.S.C. § 3404 (1971); and by regulations in proceedings before, e.g., Civil Service Commission, 5 C.F.R. § 771.208 (1971); Federal Communications Commission, 47 C.F.R. § 1.221(c) (1971); Federal Power Commission, 18 C.F.R. § 1.4(c) (1971); National Labor Relations Board, 29 C.F.R. § 102.38 (1971); Subversive Activities Control Board, 28 C.F.R. § 201.5 (1971).

120 37 Fed. Reg. 5122 (1972), amending 32 C.F.R. § 1624.1(a) (1971).

121 37 Fed. Reg. 5122 (1972), amending 32 C.F.R. § 1624.2 (1971).

122 37 Fed. Reg. 5122 (1972), amending 32 C.F.R. § 1624.3 (1971).

123 37 Fed. Reg. 5122 (1972), amending 32 C.F.R. § 1624.4 (1971).

124 37 Fed. Reg. 5122 (1972), amending 32 C.F.R. § 1624.6 (1971).

125 37 Fed. Reg. 5123 (1972), amending 32 C.F.R. § 1626.2 (1971).

126 37 Fed. Reg. 5124 (1972), amending 32 C.F.R. § 1626.4 (1971).

although the board may extend that time if it so desires. The registrant may not present any witnesses.[127] Again, the board will classify the registrant.[128]

Within this administrative framework, the role of counsel can be crucial. Because of his knowledge of the law, and present interpretations given sections of the statute by the courts, counsel can delineate the important issues which the board must decide. He can also organize the facts in such a manner as to apply the facts to the specific requirements of the statute, assisting the board in its own independent analysis of the registrant's claim. Likewise, he can assure that the important facts which come to the attention of the board are given the proper emphasis in the oral presentation, giving consideration to their respective importance in determining the registrant's classification. This would be especially beneficial to the registrant since he is unlikely, because of nervousness, to be as persuasive and succinct as he is capable.[129] Counsel could supply moral support and help cue the registrant on his presentation before the board. Finally, the mere presence of counsel can act as a deterrent to the summary, hostile, and biased treatment which has been known to have been accorded some registrants in the past.[130]

Specifically, at the local board personal appearance counsel could help the registrant divide the time of his presentation between his witnesses and himself. If the fifteen minute guideline is strictly enforced, it is probable, given the additional probability that the board members will ask questions, that the registrant will not be able to complete his presentation. In such a case, the lawyer could assist the registrant in budgeting his remaining time to assure that the important aspects of his claim are orally presented, resting the other parts of his claim on the strength of the written presentation.

At the personal appearances before the various appeal boards, the absence of provisions for witnesses means that the registrant will have to face a board without the benefit of friendly observers. The possibility of a disregard for the registrant's rights in such a closed situation cannot be ignored, particularly in light of the experience with closed-door local board appearances.[131] This is especially true when considering the appearance before the Appeal Board, for which no specified time limits are enumerated in the regulations.[132] Since there is no objective criteria to determine if the personal appearance is at all adequate, the only evidence in court for evaluation of the adequacy of the hearing will be the registrant's word against that of the board.

The personal appearance before the National Appeal Board poses additional problems for the registrant. The panels of the National Appeal Board are to meet in Washington, D.C. except, when specifically requested by the National Director, or as determined by the Chairman of the Board, to meet at another place.[133] However, the wording of the regulation implies that most meetings will be held in Washington, D.C. If this is so, then to those registrants who live at a great distance from Washington and cannot afford the expense of coming to the Capitol, the right to a personal appearance before the National Board will be illusory, since the registrants will be unable to take advantage of it. In these cases, the ability to be represented by a Washington counsel may be the only way that the registrant can record any appearance before the board. While the board will be unable to personally speak to and judge the registrant on the

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127 37 Fed. Reg. 5124 (1972), amending 32 C.F.R. § 1626.4 (1971). The National Board returns the registrant's file, along with its reclassification decision and reasons, if required, to the local board, which mails the registrant a new Notice of Classification and, if required, the reasons for the National Board's classification decision. Id.

128 37 Fed. Reg. 5125 (1972), amending 32 C.F.R. § 1627.1 (1971). The 15 day period starts with the date of the local board's mailing of the Notice of Classification notifying the registrant of the Appeal Board's action.

129 Cf. Menechino v. Oswald, 430 F.2d 403 n.2 (2d Cir. 1970).

130 See text accompanying notes 89-97 supra.

131 Id.

132 37 Fed. Reg. 5124 (1972), amending 32 C.F.R. § 1626.4 (1971).

133 37 Fed. Reg. 5120 (1972), amending 32 C.F.R. § 1604.6(a) (1971).

basis of personal contact, having a lawyer present to carefully explain the issues and answer any questions of the board concerning the registrant's application is preferable to the total inability to present any oral argument. Any oral argument can certainly supplement the written materials the registrant has submitted.

Additionally, now that boards must, on request, give a statement of reasons for denying a registrant's request for a classification,[134] counsel would be able to compare that statement with the evidence presented at the personal appearance to assure that the registrant has been given a fair and complete evaluation of his claims. He can point out any discrepancies between the personal appearance and the statement of reasons to either the appeal board(s) or the courts. His first-hand knowledge of what transpired at the personal appearance is likely to be more accurate than that of the registrant since the lawyer is specially trained to keep aware of such proceedings and also because he will be more emotionally detached than the registrant.

Finally, the Supreme Court has held that the "opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."[135] Therefore, note should be taken of the average age and education of the registrants that must appear before the Selective Service boards. The Selective Service lottery is held in the year of the registrant's nineteenth birthday[136] and he will most likely appear before the boards in that or the following year. With the abolition of college deferments,[137] the registrant's educational background will often be no more than that of a high school diploma. Despite the youth and possible immaturity of the registrants, the Selective Service classification process begins with a rebuttal presumption that all registrants are to be classified as available for induction.

In another context, the Supreme Court has held that one requirement of a hearing involving youthful participants is the right to counsel:

> The juvenile needs the assistance of counsel to cope with the problems of the law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.[139]

Since the Selective Service System is "a labyrinth of statutes and regulations, which are inscrutable not only to laymen but also to most lawyers"[140] the need of the juvenile to have counsel at his draft board hearing is equally necessary to assure the meaningfulness of that hearing.[141]

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134 See note 11 infra.

135 Goldberg v. Kelly, 397 U.S. 254, 267 (1969).

136 36 Fed. Reg. 23381, amending 32 C.F.R. § 1631.1 (1971).

137 36 Fed. Reg. 23377, amending 32 C.F.R. § 1622.25 (1971).

138 36 Fed. Reg. 23376, amending 32 C.F.R. § 1622.1(a) (1971).

139 In Re Gault, 387 U.S. 1, 36 (1967) (Right to counsel at juvenile delinquency hearing). See also Kent v. United States, 383 U.S. 541, 561 (1966).

140 United States ex rel. Vaccariano v. Officer of the Day, 305 F. Supp. 732, 736 (S.D. N.Y. 1962).

141 Though speaking in terms of the old Department of Justice hearing for conscientious objectors, see Uniform Military Training and Service Act of 1951, ch. 144, § 6(j), 65 Stat. 75 (codified at 50 U.S.C. App. § 456(j) (1951)), repealed, Military Selective Service Act of 1967, Pub. L. No. 90-40, § 1(7), 81 Stat. 100, the courts have stated that a hearing denotes a meaningful hearing. See, e.g., Gonzales v. United States, 348 U.S. 407, 415 (1955), which states that "the right to a hearing means the right to a meaningful hearing" and Arndt v. United States, 222 F.2d 484, 487 (5th Cir. 1955), which states that the conscientious objector hearing "provided in the Act carries the connotation that it is such a hearing as conforms to the concepts of such a proceeding under the American system." There doesn't appear to be anything in the nature and objective of the Justice Department hearing to differentiate it from the personal appearance before the draft board.

3. Attitude of Congress

The congressional position on the issue is difficult to discern. Congress has recognized, as a general principle, the importance of counsel in administrative proceedings. The Administrative Procedure Act,[142] which establishes general rules of procedure for most federal agencies, guarantees the right to counsel at hearings of the tribunal.[143]

The Selective Service System is exempt from the hearing provisions of the Administrative Procedure Act.[144] This exemption was originally afforded the Selective Training and Service Act of 1940[145] by the Administrative Procedure Act itself.[146] That exemption was not based on a desire to deny Selective Service registrants the rights given to others by the APA. Rather, the committee reports on the bill emphasized the fact that Selective Service, like the other wartime agencies that were exempted from the Act, was rarely required to have hearings of the type had by those agencies covered by the Act, and was also being rapidly liquidated as the war effort came to a close.[147] It does not appear that the legislators considered granting or denying rights to draft registrants. When the Selective Service was reinstituted in 1948, that Act included similar provisions exempting the System from the hearing provisions of the APA.[148] The legislative history of that Act indicates that this provision was included since it merely restated the law as it applied to the prior act, and not as an attempt to specifically deny certain rights to registrants.[149]

This legislative record is particularly important in considering the congressional declaration of policy regarding the Selective Service System.

> The Congress further declares that in a free society the obligations and privileges of serving in the Armed Forces should be shared generally, in accordance with a system which is fair and just.[150]

This declaration shows a grave congressional concern, and thus a strong societal interest, in providing for a "fair and just" system of conscription. Permitting the right to counsel at the personal appearance would better reflect that congressional purpose,[151] by insuring that the means by which registrants are classified met the "minimum requirements of fair administrative procedure."[152]

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142 5 U.S.C. § 551 et seq. (1970). Hereinafter APA.

143 5 U.S.C. § 555(b) (1970). In reporting the Act to Congress, the Senate Judiciary Committee stated:

> By enacting this bill, the Congress – expressing the will of the people – will be laying down for the guidance of all branches of the Government and all private interests in the country a policy respecting the *minimum requirements of fair administrative procedure.*

S. Rep. No. 752, 79th Cong., 1st Sess. 31 (1945) (emphasis added). The House Judiciary Committee seconded this sentiment in its report of the bill: "The bill is an outline of *minimum essential rights* and procedures." H.R. Rep. No. 1980, 79th Cong., 2d Sess. 16 (1946) (emphasis added).

144 50 U.S.C. App. § 463(b) (1971).

145 Act of Sept. 16, 1940, ch. 720, 54 Stat. 885.

146 Act of June 11, 1946, ch. 324 § 2(a), 60 Stat. 237.

147 Administrative Procedure Act, Legislative History, Doc. No. 248, 79th Cong., 196, 253 (1944-1946). See also the remarks of Sen. McCarran on the floor of the Senate, Id. at 313, and Rep. Walter on the floor of the House, Id. at 355.

148 Selective Service Act of 1948, ch. 625, § 13(b), 62 Stat. 604.

149 1948 U.S. Code Congressional Service 1989, 2009.

150 50 U.S.C. App. § 451(c) (1971).

151 Id.

152 S. Rep. No. 752, 79th Cong. 1st Sess. 31 (1945).

Recent Congressional action aimed at specifically authorizing the presence of counsel at Selective Service hearings is enlightening. The Senate defeated a procedural rights amendment which included the right to be accompanied and advised by private counsel before any board.[153] However, it passed a procedural rights amendment that gave the President the right to set limitations on all procedural rights, but which also included a specific provision authorizing the presence of counsel to advise the registrant, although not permitting counsel to participate in the proceeding in any other way.[154] This provision was deleted in the House-Senate Conference Committee,[155] so that the House never had a chance to vote on the proposal.

Viewing this overall record of Congress on this issue, a clear mandate one way or the other cannot be ascertained. Certainly, even if the right to counsel could be limited by congressional action, such a fundamental right should not be denied by administrative fiat without a clear congressional mandate to do so. Otherwise, "decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them."[156]

4. Judicial Review

If a registrant fails to convince the administrative system he is qualified for a deferment or exemption, judicial review of the decision is limited. He must either refuse induction and test his claim as a defense against a criminal prosecution or he must accept induction and test his claim in a petition for a writ of *habeas corpus*.[157] The statute prohibits pre-induction review of a draft classification,[158] and the Supreme Court has upheld this except in cases where the conduct of the board is "basically lawless." obviously in violation of the statute.[159]

Despite the fact that judicial review is limited to when the registrant has responded "either affirmatively or negatively to an order to report for induction,"[160] the courts have applied the narrowest standard for review of administrative action;[161] the "basis in fact" test.[162] This test is substantially narrower than the standard of "substantial evidence" prescribed in the Administrative Procedure Act,[163] and means that even though clearly contrary to what the court would have found, a draft board decision will be sustained if there is any evidence in the record which supports the draft board's finding. Under the new statute and regulations, all draft boards must state reasons for any decision adverse to the claim of the registrant.[164] Exactly what effect this will have on the basis in fact is yet to be determined.[165]

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153 117 Cong. Rec. 9386 (daily ed. June 17, 1971).

154 117 Cong. Rec. 9833 (daily ed. June 24, 1971).

155 Conference Report to accompany H.R. 6531, Extension and Revision of the Draft Act and Related Laws, H.R. Rep. No. 433, 92 Cong., 1st Sess. 29-30 (1971).

156 Greene v. McElroy, 360 U.S. 474, 507 (1959).

157 50 U.S.C. App. § 460(b)(3) (1970).

158 Id.

159 See Breen v. Selective Serv. Local Bd. No. 16, 396 U.S. 460 (1969); Clark v. Gabriel, 393 U.S. 256 (1968); Oestereich v. Selective Serv. Local Bd. No. 11, 393 U.S. 233 (1968).

160 50 U.S.C. App. § 460(b)(3) (1971).

161 Blalock v. United States, 247 F.2d 615, 619 (4th Cir. 1957).

162 Estep v. United States, 327 U.S. 114 (1946).

163 5 U.S.C. § 706(2)(e) (1970).

164 Pub. L. No. 92-129, § 101(a)(36), 85 Stat. 348 (Sept. 28, 1971).

165 United States v. French, 429 F.2d 391, 392 (9th Cir. 1970); Caverly v. United States, 429 F.2d 92, 95 (8th Cir. 1970); United States v. James, 417 F.2d 826, 832 (4th Cir. 1969); United States v. Haughton, 413 F.2d 736 (9th Cir. 1969); Gatchell v. United States, 378 F.2d 287, 292-93 (9th Cir. 1967); United States v. Jakobson, 325 F.2d 409 (2d Cir. 1963), aff'd *sub. nom.* United States v. Seeger, 380 U.S. 163 (1965); United States v. Stepler, 258 F.2d 310, 317 (3rd Cir. 1958); United States v. St. Clair, 293 F. Supp. 337, 344 (E.D. N.Y. 1968). Cf. Sicurella v. United States, 348 U.S. 385 (1965).

Additionally, this right to a statement of reasons may be of limited worth once boards find out what kind of reasons are acceptable to the courts and which ones do not pass muster. It can be expected that unofficial "form" reasons for the rejection of different claims will soon be employed as the pat response included in the denial of the claim. Since no transcript of the personal appearance is permitted,[166] it will be impossible to determine what evidence was presented to or considered by the board. In addition, if the board has established a basis in fact for its decision by utilizing the "form" reasons derived from court decisions, the inquiry will be at an end, to the detriment of the registrant. Counsel's presence at the trial will be of little help on the basis of these facts. "When the criminal conviction is virtually inevitable because the die has been cast irrevocably in the administrative proceedings . . . the right to counsel [at trial] may be a hollow thing."[167]

In view of these judicial shortcomings, the individual's personal appearance can be of great importance, and the registrant's interest in having counsel present at the appearance cannot be overestimated.

IV. CONCLUSION

While no one can deny the nation's right to rapidly mobilize its manpower to defend itself, neither can it be denied that "implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart."[168] A long line of judicial precedents supports the notion that due process rights can be limited in order to meet a national emergency,[169] and this contention is not disputed by this Noted. However, the possibility that an emergency will arise in the future should not be an excuse to permit the continued denial of a fundamental due process right, regardless of the present state of world affairs. This is especially true when the due process right being denied is the right to counsel, a right that is one of the "basic characteristics of our whole system of administration of justice."[170]

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166 32 C.F.R. § 1604.58 (1971) provides for minutes of local board proceedings to be taken by the board secretary but makes no mention of a transcript. The regulations make no mention of any right to a transcript of the personal appearance and this has been held to mean that there is no such right. Cf. United States v. Tittlerud, 000 F. Supp. 000, 2 Sel. Serv. L. Rep. 3283 (D. Minn. Sept. 12, 1969).

167 United States v. Wierzchucki, 248 F. Supp. 788, 789 (W.D. Wis. 1965).

168 United States v. Robel, 389 U.S. 258, 264 (1967).

169 See note 75 supra.

170 Fleming v. Tate, 156 F.2d 848, 859 (D.C. Cir. 1946). See also Kent v. United States, 383 U.S. 541, 561 (1965), which stated that the right to counsel is "not a formality. It is not a grudging gesture to a ritualistic requirement. It is the essence of justice." See also Powell v. United States, 287 U.S. 45, 68-69 (1932), which stated:

> What, then, does a hearing include? Historically and in our practice, in our country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. 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.

While this case involved litigation in a court of law, this principle has been cited in extending rights to administrative proceedings. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 270 (1970); People ex rel. Menechino v. Warden, 27 N.Y.2d 376, 382, 267 N.E.2d 238, 241, 318 N.Y.S.2d 449, 454 (1971).

The right to counsel was recognized by Congress with the passage of the Administrative Procedure Act. 5 U.S.C. § 555(b) (1971). Even the military permits participation of counsel in hearings considering servicemen's applications for discharge on the basis of conscientious objection. D.O.D. Directive 1300.6, ¶ VIBA (May 10, 1968): Army Regulation 635-20 ¶ 4BC3 (July 31, 1970). Until 1967, when the Selective Service Act was amended to delete the provision for the Department of Justice hearing, counsel was permitted to participate in that part of the determination of a registrant's claim for conscientious objector status. Uniform Military Training and Service Act of 1951, ch. 144, § 6(j), 65 Stat. 75 (codified at 50 U.S.C. App. § 456(j) (1951)), repealed, Military Selective Service Act of 1967, Pub. L. No. 90-40 § 1(7), 81 Stat. 100.

The courts have a duty to examine this administrative proscription on the right to counsel in light of the importance of that right in our modern concepts of fundamental fairness and not rest their decisions, for the most part, on a stale 1944 precedent;[171] a decision reached in the middle of a world war in which this nation found itself fighting for its survival. In so examining this prohibition the courts will have to weigh the interests of the draft registrant against those of the government. Such a balancing of interests will find, under present circumstances, that the need for counsel to assist the registrant at the personal appearance far overrides any governmental interest in denying such assistance.

A decision in favor of affording the registrant the right to counsel at his personal appearance will, in addition to satisfying the demands of due process, have the salutary effect of giving the draft registrant more assurance that his claim will be adequately heard. Only when the registrant can be so assured will he express any confidence not only in the Selective Service System, but in his government as well. For, as the courts have reminded us, when a governmental program affects as many people as the Selective Service System does, at stake is not only a citizen's belief in the justness and fairness of that one aspect of government, but the fairness of the government itself.[172] The presence of counsel at the personal appearance, to help assure the fairness of that proceeding, would represent a giant step toward assuring this nation's young citizens of the fairness of their government.

PAUL M. PETIGROW

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171 United States v. Pitt, 144 F.2d 169 (3rd Cir. 1944).

172 See Gillette v. United States, 401 U.S. 437, 455, 460 (1971); Gonzales v. United States, 346 U.S. 59, 74 (1959) (Warren, C.J. dissenting); Walsh v. Local Board No. 10 (305 F. Supp. 274, 279 (S.D N.Y. 1969).