

## AFFIRMATIVE EVIDENCE IN DRAFT CLASSIFICATION OF CONSCIENTIOUS OBJECTORS AND MINISTERS

An exemption from military service on the ground of conscientious objection, as supported by evidence of subjective convictions, is a privilege granted by Congress and not a right.<sup>1</sup> Since religious freedom includes the right to act or not depending upon religious convictions, so long as the national interest is not prejudiced, Congress has outlined service requirements for conscientious objectors.<sup>2</sup> Draft boards have recently experienced uncertainty as to their duty in formulating affirmative evidence in order to sustain their rejection of the draft registrant's claim to an exempt status in both minister and conscientious objector cases. Determination of draft classifications involves utilization of objective and subjective facts.<sup>3</sup> The former may result in concrete evidence for classification; the use of the latter to ascertain a subjective state of mind is more difficult.<sup>4</sup>

Responsibility for the selective service process rests with the local boards.<sup>5</sup> Each has the power to determine, subject to the right of appeal,

1. Draft Law Cases, 245 U.S. 366 (1918). Congress has the power to require performance of military service and may, if it wishes, disregard the views of draftees. In this draft process, the registrant is granted an exemption, not as a matter of right, but as a privilege. *United States v. Hein*, 112 F. Supp. 71 (D.C. Ill. 1953).

2. Selective Service is authorized under the Universal Military Training and Service Act. 65 STAT. 75 (1951), 50 U.S.C. App. § 451 (1952). Further reference to this Act shall be by reference to sections of the United States Code.

Section 456 (j) of the Act provides: "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code." This section outlines requirements for those who are only opposed to combatant training and also for those who are opposed to both combatant and non-combatant training.

3. For a discussion of objective and subjective facts in draft classification requests see *United States v. Witmer*, 348 U.S. 375 (1955).

4. *White v. United States*, 215 F.2d 782, 785 (9th Cir. 1954).

5. Each state has a director of selective service activities who is appointed by the Governor. The number of draft boards required for each county depends upon population. However, there must be one local draft board for at least every five counties. The members of the draft board are volunteers who serve without compensation. Upon volunteering, they are screened by selective service headquarters and are nominated by the Governor to the President. The local board consists of three or more members who are male citizens of the United States and who are residents of the area for which the board has jurisdiction. Each member must be at least thirty years of age and not a member of the armed forces or any reserve component. See 32 C.F.R. §§ 1604.11, 1604.12 (1951). See also 32 C.F.R. §§ 1604.51-1604.52a (1951).

all questions with respect to induction for, or exemption or deferment from, military training and service of all men registered in the board area. Since classification is the vital step in providing available man power, it becomes imperative that it be accomplished accurately and with fairness to each individual.<sup>6</sup>

Initially the registrant is classified on the basis of his questionnaire.<sup>7</sup> Subsequently, he is given ten days to request a personal hearing before the local board. The hearing is mandatory upon request, and the registrant is allowed to challenge the classification by presenting any new information, to bring to the board's attention evidence they may have neglected, and to rebut board conclusions. The board need not, however, give unlimited time to the registrant for this purpose.<sup>8</sup> As in any action where an individual is brought before an administrative agency which assumes a quasi-judicial function he must be advised of the charges and evidence from which a valid determination can be made.<sup>9</sup>

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A government appeal agent is provided for each local board. This agent is provided to examine records and determine whether in his opinion any local board decision should be appealed. Certainly this provision adds to safeguards afforded registrants. 32 C.F.R. § 1604.71 (1951). There is no error in procedure when the appeal agent assists in the questioning of the registrant, for by such conduct he is determining the necessity of appeal should the board decide against the registrant. *United States v. DeLime*, 121 F. Supp. 750 (D. New Jersey 1954).

6. In the classification process there will be no discrimination because of race, color or creed, or membership in any political or religious organizations. 32 C.F.R. § 1622.1(d) (1951). When a board bases a decision on these grounds its conduct becomes lawless and it is, therefore, acting beyond its jurisdiction. *Niznik v. United States*, 173 F.2d 328 (6th Cir. 1949), *cert. denied*, 337 U.S. 925 (1949). *United States v. Everngam*, 102 F. Supp. 128 (S.D. W. Va. 1951).

7. 32 C.F.R. § 1622.1 (1951). The questionnaire is sent each registrant after he has registered with his local board upon his eighteenth birthday.

8. The purpose of 32 C.F.R. § 1624.2(c) is to require the board to reclassify each registrant on the basis of the discussion of his classification with the board and whether or not he presents any new information. The section does not mean that the furnishing of new information is a condition precedent to reclassification. *United States v. Stiles*, 169 F.2d 455 (3d Cir. 1948). This should not be confused with the regulation allowing a registrant to report any new change of status which might require reclassification. If the registrant reports a change in status, within ten days of its happening, he is allowed a hearing before the board. 32 C.F.R. §§ 1625.1-1625.2 (1951). As interpreted by the court, the board has the duty to reopen this classification even though an order to report for induction has been sent, provided, of course, the registrant has not been inducted. *United States ex rel. Berman v. Craig*, 207 F.2d 888 (3d Cir. 1953).

The selectee must be allowed to present his views at the hearing. If the board fails to give the registrant this consideration his classification is void. *Davis v. United States*, 199 F.2d 689 (6th Cir. 1951). *Bejelis v. United States*, 206 F.2d 354 (6th Cir. 1953).

After each hearing the registrant is given another right to appeal the classification. *United States v. Vincelli*, 215 F.2d 210 (2d Cir. 1954).

9. "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1, 18 (1937).

Each registrant is allowed an appeal to the state appeal board.<sup>10</sup> At this time he is permitted to enclose within his personal file any statement in regard to local board classification.<sup>11</sup> This agency then considers his classification de novo. If his request is not sustained, the registrant may take an appeal to the President unless the rejection was by unanimous vote.<sup>12</sup> If it should be so rejected, he has exhausted his appeal remedies barring requests by the National or State Directors for appeal.<sup>13</sup> Ultimately, draft classification can be challenged by writ of habeas corpus<sup>14</sup> or in a criminal prosecution for failure to be inducted.<sup>15</sup> The language of the statute making administrative determination "final" has thus not been interpreted by the courts so as to give the Selective Service System the ultimate authority in classification. However, before the classification can be attacked in the courts, the registrant must have taken the final step of reporting for induction. Administrative remedies have not been exhausted until report for induction and submission to the physical examination since rejection could still result at this point in the selection procedure.<sup>16</sup>

The Supreme Court in *Estep v. United States*<sup>17</sup> held that there could

10. 32 C.F.R. § 1626 (1951). The state appeal board is an independent organization; it does not function under the State Director. The five members of the board are appointed by the President upon recommendation of the Governor. The appeal board strives to be a composite group and should include a businessman, lawyer, doctor, a member from labor, and if possible a representative of agriculture. This board is also uncompensated. *Id.* § 1604.22.

"The appeal boards are in no judicial sense appellate agencies. . . . A classification given by an appeal board is not . . . merely an affirmance of the action of an inferior agency, but is the independent act of such board." *United States v. Moore*, 217 F.2d 428, 431 (7th Cir. 1954). Such de novo hearings should eliminate any prejudices encountered by the registrant before the local board.

11. 32 C.F.R. § 1626.12 (1951). "The person appealing 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 the registrant's 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 the registrant's file." *Ibid.*

12. *Id.* § 1627.3.

13. *Id.* § 1627.1.

14. *Ex parte Fabiana*, 105 F. Supp. 139 (E.D. Pa. 1952). See also Note, 28 IND. L.J. 244 (1953).

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

16. Cases indicating that the registrant must exhaust his administrative remedies: *Rowland v. United States*, 207 F.2d 621 (9th Cir. 1953); *United States v. Dorn*, 121 F. Supp. 171 (E.D. Wis. 1954); *Westerbeke v. Local Draft Board No. 2, Islip, N.Y.*, 118 F. Supp. 441 (E.D. N.Y. 1954). This includes report for induction: *Billings v. Truesdell*, 321 U.S. 542 (1944). See also *Bradley v. United States*, 218 F.2d 657 (9th Cir. 1954).

17. 327 U.S. 114 (1946). "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification

be judicial review of a classification only if there was no "basis in fact" for the board's decision. Even though the classification appeared to the Court to be erroneous, if there were conflicting evidence, a court could not sit as a super draft board and substitute its opinion for that of the draft board. If there is an erroneous conclusion of law, however, the classification should not stand.<sup>18</sup> Any danger of unlimited administrative discretion resulting in a condition of administrative absolutism is remote.

During World War I conscientious objector exemption was extended only to members of well recognized religious sects whose creed forbade its members from participating in war and whose members' convictions were in accord with nonparticipation.<sup>19</sup> The duty required of draft boards in such classifications was simplified by the necessity of this condition precedent. The more liberal 1940 Act allowed an exemption to those who due to religious training and belief,<sup>20</sup> were conscientiously opposed to participation in war in any form. Later any objections based on philosophical, political, and sociological views, or on a personal moral code were specifically excluded, indicating the requisite of religious belief as grounds for conscientious objection.<sup>21</sup> Even a standard based on "religious belief" is elusive of definition. It is difficult to maintain that one must believe in a Supreme Being in order to be religious. The religious impulse may be the response of an individual to an inward admonition which might be called God or conscience.<sup>22</sup> At this time, a belief in a Supreme Being, requiring duties greater than those arising from any human relation, sets the limit on the standard.<sup>23</sup>

Draft boards are more readily inclined to understand opposition to war when expounded by members of one of the Historic Peace Churches

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made by the local boards was justified. The decision of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." *Id.* at 122, 123. See Note, 22 *Geo. Wash. L. Rev.* 604 (1954). Connor and Clarke, *Judicial Investigation of Selective Service Action*, 19 *Tul. L. Rev.* 344 (1945).

18. *Sicurella v. United States*, 348 U.S. 385 (1955). A classification based on an erroneous conclusion of law was invalidated.

19. 40 *Stat.* 78 (1917).

20. Selective Training and Service Act of 1940. 54 *Stat.* 885, 50 U.S.C. App. § 301 (1951).

21. See note 4 *supra*.

22. *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943). The court stated, "no matter how pure and admirable his standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of a deity cannot be said to be religion in the sense of that term as it is used in the statute." *Berman v. United States*, 156 F.2d 377, 381 (9th Cir. 1946).

23. See note 4 *supra*.

since their beliefs stem from a pacifist attitude.<sup>24</sup> Individuals have claimed pacifist belief and have not been excluded from such status even though belonging to a church which does not openly oppose war. However, this pacifist belief must stem from religious convictions.<sup>25</sup> Certainly, Jehovah's Witnesses have proved the most difficult to classify.<sup>26</sup> They are not pacifists for they believe in Theocratic wars, as opposed to wars between political units. The members of the sect indicate that they will fight in the final battle of Armageddon and openly profess belief in self defense, that is, protection of home, loved ones, and those associated with them in this religion. This naturally raised the question of whether or not their beliefs came within the statutory language requiring "opposition to war in any form." The Supreme Court recently held that it would be erroneous to conclude as a matter of law that such a belief was not within the

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24. The Mennonites believe that the burden of sin is on all mankind and that they alone have been lifted into the community of love. They refrain from participation in the administration of the laws. Generally, this group did not participate in combatant duty but did not object to alternative service. SIBLEY AND JACOB, CONSCRIPTION OF CONSCIENCE, 19-21 (1952). The Brethern believe that pressure of any kind violates the spirit of nonresistance; they maintain a traditional peace church attitude. *Id.* at 21-23. The Friends judge all matters by what they call the "Inner Light"; this is God working through the informed mind on its sensitive conscience. The participation by individual members of this sect is based primarily on the circumstances of each individual. *Id.* at 23-27. Such a position as this may not be far removed from the inner feeling by those who have attempted to base their objection on what has been termed political belief as distinguished from religious belief. "Mennonites, Brethern, and Friends come to be called the Historic Peace Churches because their corporate beliefs for so long a period had embraced the principle of conscientious objection to war, however different the interpretations of that principle might be." *Id.* at 27.

25. The Catholic Church does not have the principle of conscientious objection to war, yet many Catholics have been classified as objectors. This is an individual determination based on religious principles. *Id.* at 29.

In *United States v. Alvies*, 112 F. Supp. 618 (N.D. Cal. 1953), the registrant had declared his opposition to war but, as a matter of fact, he did not belong to any particular religious faith. The court concluded, "there is nothing in the statute or regulations which requires membership in a sect or organization in order to qualify as a conscientious objector." *Id.* at 623.

26. One writer has given an indication of objector group cooperation during World War II. "In terms of religious affiliation, the largest single group of c.o.'s who entered the Army and Navy as noncombatants were the Seventh-Day Adventists. Among those who rendered alternative civilian service . . . , members of the Historic Peace Churches constituted about 60 per cent of the total. As for the objectors who on various grounds were imprisoned, more than three-quarters were Jehovah's Witnesses." SIBLEY AND JACOB, CONSCRIPTION OF CONSCIENCE, 85 (1952).

Jehovah's Witnesses are difficult to classify since they claim exemption as ministers along with that of a conscientious objector. For a discussion of this position see pages 460-461 *infra*.

For a general discussion of this religious sect see McCown, *Conscience v. The State*, 32 CALIF. L. REV. 1 (1944).

statute.<sup>27</sup> The test was seen not as one of opposition to all wars but opposition on the basis of religious belief to "participation in war."<sup>28</sup> The wars in which these believers will participate are those of a spiritual nature between good and evil and without the use of carnal weapons. Congress must have intended participation in more mundane wars.<sup>29</sup> On the other hand, perhaps a nonpacifist attitude should be of significance. If the religion prohibits attack with carnal weapons but permits the use of such weapons in defense, it would seem that such a belief is no different from that of many who believe that killing is morally wrong but would resort to it in self defense.<sup>30</sup>

In accordance with the statutory exemption for conscientious objection, regulations have established classes of exemption commensurate with each registrant's degree of objection. Each individual who would have been acceptable for class 1-A if he were not conscientiously opposed to combatant training is placed in class 1-A-O.<sup>31</sup> These men will be inducted into the armed forces and serve in a noncombatant capacity. In class 1-O is placed every registrant who would have been acceptable for 1-A but who is conscientiously opposed to both combatant and non-combatant service.<sup>32</sup> Registrants in this latter class will be assigned to work of a national interest as determined by the local board.<sup>33</sup> Statutory exemption is also provided for ministers and those who are studying for the ministry under the direction of a recognized church or religious organi-

27. *Sicurella v. United States*, 348 U.S. 385 (1955). The Court indicated that the question presented in this case was one of law. The belief of Jehovah's Witnesses in Theocratic wars and the use of self defense did not as a matter of law preclude a classification of this sect as one opposed to war in any form. See *supra* note 18 and accompanying text.

The Supreme Court ruling gave affirmance to the decisions of circuit courts which had held that a registrant's belief in the use of force in self defense was not inconsistent with conscientious opposition to participation in war in any form. *Clark v. United States*, 217 F.2d 511 (9th Cir. 1954); *Jessen v. United States*, 212 F.2d 897 (10th Cir. 1954).

28. "As to theocratic war, petitioner's willingness to fight on orders of Jehovah is tempered by the fact that, so far as we know, their history records no such command since Biblical times and their theology does not appear to contemplate one in the future." *Sicurella v. United States*, *supra* note 27 at 390, 391.

29. *Id.* at 391.

30. See dissent by Mr. Justice Minton in *Sicurella v. United States*, *supra* note 27 at 395. "The petitioner is not opposed to 'participation in war in any form.' That is the congressional test. On the contrary, he reserves the right to choose the wars in which he will fight." He then continues in regard to use of carnal weapons by indicating, "they do not, they say, carry carnal weapons in anticipation of attack, but they will use them in case of attack." *Id.* at 396.

31. 32 C.F.R. § 1622.11 (1951).

32. 32 C.F.R. § 1622.14 (Supp. 1954).

33. They will be assigned to this work for the normal tour of duty given draftees but will be compensated in accordance with wages paid others performing work of a similar nature.

zation.<sup>34</sup> Provision is made not only for duly ordained ministers but also for regular ministers of religion. This latter classification includes those whose customary vocation is that of teaching and preaching the principles of the religious sect in which he is a member and whose members recognize him as a regular minister of religion. Neither class of ministers includes those persons who irregularly or incidentally preach and teach religious principles. The statute and regulations are silent, however, as to the applicable standard.

In *Dickinson v. United States*<sup>35</sup> the Court established a standard for ministerial classification which can be applied on an objective basis for the determination of an objective fact. The registrant, a member of Jehovah's Witnesses, was originally classified 1-A by his local board since he was devoting about 40 hours per week to secular work. He was continued in 1-A after denial of a request for reclassification as a minister pursuant to having left his secular employment to devote about one hundred fifty hours per month as a minister of Jehovah's Witnesses.<sup>36</sup> The Court indicated that if the board were to contradict the draft registrant's claim of exemption, it must look to evidence.<sup>37</sup> It indicated that no affirmative investigatory duty was placed on the local board, and that the boards need not abide by the customary rules of evidence.<sup>38</sup> Nor would the court interfere if the facts were disputed; each board should resolve the conflict.<sup>39</sup> Further, the board could, if it desired, adopt the role of investigator, that is, subpoena witnesses and documents, and obtain information from various agencies of the government or from the registrant's neighbors.<sup>40</sup> The Court stated, however, that, if the registrant placed himself *prima facie* within the exempt ministerial classification

34. Section 456 (g) of the United States Code provides for exemption of ministers and those who are studying for the ministry.

35. 346 U.S. 389 (1953).

36. This sect is unique in its doctrine in that each member is considered to be a minister of religion by the various sect followers. Therefore, the applicable standard for classification cannot be that of the particular religious sect. Quite often these individuals do not spend all their time as ministers but are also employed in secular activities, thus placing many of them in a category of irregular, preaching ministers.

37. "[T]he courts may properly insist that there be some proof that is incompatible with the registrant's proof of examination." *Dickinson v. United States*, 346 U.S. 389, 396 (1953).

38. "Local boards are not courts of law and are not bound by traditional rules of evidence; they are given great leeway in hearing and considering a variety of material as evidence." *Ibid.*

39. *Ibid.*

40. "The board is authorized to obtain information from local, state, and national welfare and governmental agencies. . . . The registrant's admissions, testimony of other witnesses, frequently unsolicited evidence from a registrant's neighbors, or information obtained from other agencies may produce dissidence which the boards are free to resolve." *Id.* at 396, 397.

and such evidence was uncontroverted, any "dismissal of the claim solely on the basis of suspicion and speculation [would be] foreign to our concepts of justice."<sup>41</sup> The duty required of the board in such cases is, then, to place in the record affirmative evidence that the registrant is not entitled to an exemption.<sup>42</sup>

It is obvious that the Court was not applying a test of substantial evidence for it was explicit on this phase of the requirement. Also expressly rejected was a classification based merely on suspicion and speculation. The draft board does not have a duty of determining that the registrant is not a minister after he has merely stated that he is a minister<sup>43</sup> or that he is a member of a sect recognizing all members as ministers.<sup>44</sup> Rather the claimant must first establish a prima facie case of ministerial exemption by means of objective facts showing his standing as a regular or duly ordained minister of religion. The board is under no duty to establish that the registrant is sincere or that he has such inward convictions as to establish his status as a minister since it does not deal with the subjective beliefs and convictions of the registrant.<sup>45</sup>

The standard in this type of registrant classification is clear. First, it must be established that he teaches and preaches the gospel of his religious sect.<sup>46</sup> Then, it must be determined whether or not he supplements this activity with secular employment. A showing that he does should not be conclusive of denial of exemption for certainly there are many ministers whose congregations are poor, thus necessitating secular work in order to maintain any standard of living.<sup>47</sup> However, the amount of time devoted to secular activities must be examined along with the amount of time given to ministerial activities. If a person is regularly

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41. *Id.* at 397.

42. Further, it was indicated, "the task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities." *Id.* at 396.

43. *United States v. Thomas*, 124 F. Supp. 411 (E.D. Ill. 1954). In this case the registrant had been classified as 1-0 but sought a ministerial classification even though he worked 40 hours per week as a brick mason. That the individual was not a minister was evident from the record and the board did not need to make special findings to support its refusal of the claim.

44. See note 36 *supra*. One court has indicated: "Whether he is a Jehovah's Witness, or a member of another sect or denomination, a registrant's status as a minister should be determined according to the facts of the individual case, and according to the realities of the situation,—not merely by what he professes." *Ncal v. United States*, 203 F.2d 111, 117 (5th Cir. 1953), *cert. denied*, 345 U.S. 996 (1953). *United States v. Pomorski*, 125 F. Supp. 68 (W.D. Mich. 1954).

45. See *Witmer v. United States*, 348 U.S. 375, 381 (1955).

46. See note 34 *supra*.

47. In *Dickinson v. United States*, 346 U.S. 389 (1953), the registrant found it necessary to work about 5 hours per week, outside of his ministerial duties, in order to earn a living, since he was not compensated for his ministerial activities.



employed in secular work and irregularly engaged as a minister, he would not come within the exempt classification. To be a regular minister the duties should be carried on continuously with full participation in religious activities.

The board need not go beyond the questionnaire to determine the status of the registrant if the facts as given do not indicate that he is a full time minister of religion.<sup>48</sup> If this can be inferred from the record, then there is a "basis in fact" for the determination with affirmative evidence in the record that the registrant did not fully augment his claim for exemption. Should the registrant show that he is a full time minister, devoting little or no time to secular work, and the draft board then disallows his claim without contradicting his showings, such action would be held arbitrary and without "basis in fact."<sup>49</sup> Under these circumstances the local board would be compelled to assume the role of investigator.

In the classification of conscientious objectors, on the other hand, the board is not involved in an objective determination of an objective fact, but, rather, in the determination of a subjective fact—inward religious convictions of opposition to war in any form—which necessarily places a greater duty and responsibility on the board. Such a classification also involves a need for evidence and a possible investigatory responsibility should the board believe the registrant is sincere but still contradict his claim for exemption.<sup>50</sup>

Since the *Dickinson* holding draft boards have assumed varying degrees of responsibility in objector cases. In a recent case, the Seventh Circuit declared, "a distinction must be drawn . . . between a claim of ministerial status and a claim of conscientious objector status as to

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48. In *United States v. Hoepker*, 126 F. Supp. 118 (E.D. Ill. 1954), the registrant claimed ministerial exemption even though he averaged only 65 hours per month in the ministry. Since he had failed to place himself prima facie within the exempt classification the board was justified in refusing his claim. See also *United States v. Thomas*, 124 F. Supp. 411 (E.D. Ill. 1954), where the board was justified in refusing a ministerial claim because the registrant had indicated he worked 40 hours per week in secular employment.

49. *Dickinson v. United States*, 346 U.S. 389 (1953).

50. *Ashauer v. United States*, 217 F.2d 788 (9th Cir. 1954). In this case the registrant had originally been classified 1-0. He was later reclassified 1-A; this reclassification was sustained on appeal. However, the court indicated that no conclusion could be reached, on the basis of the material furnished by the registrant, other than that he was conscientiously opposed to participation in war in any form. There was nothing to contradict the evidence furnished by the registrant or the sincerity of his beliefs. If the board were to find evidence to contradict the claim it would have to resort to some source other than the questionnaire or the personal appearance of the registrant in a hearing before the local board. *Accord*, *United States v. Benzing*, 117 F. Supp. 599 (W.D. N. Y. 1954); *United States v. Lowman*, 117 F. Supp. 595 (W.D. N. Y. 1954).

susceptibility of proof."<sup>51</sup> It was suggested that perhaps the best evidence to sustain a rejection of the claim of conscientious objection was not the statements of witnesses or the questionnaire of the registrant, "but his credibility and demeanor in a personal appearance before the fact finding agency. . . ."<sup>52</sup> The Court's requirement of affirmative evidence in the *Dickinson* case did not impose on local boards a burden of rebutting every claim made irrespective of the degree of proof presented.<sup>53</sup> Actually, such a reading would convert the privilege into an absolute right. The draft board is not limited by mere assertions of the registrant; if he has failed to support a claim by evidence of religious belief, the local boards are free to disbelieve him.<sup>54</sup> If this were not the case, the burden would fall on the Selective Service System to disprove the eligibility of all who claim exemption.<sup>55</sup> Proving a subjective state of mind by providing affirmative evidence as to the mental state of the conscientious objector would be an impossible task.<sup>56</sup>

The local board hearing becomes a searching process to determine registrant sincerity. Questions are aimed at the objector with the purpose of determining his credibility. The registrant is usually questioned concerning religion and beliefs of his church, how long he has been a member, his attendance at this church, the church's position on conscientious objection, and whether or not it has publicly taken a stand.<sup>57</sup> The

51. *United States v. Simmons*, 213 F.2d 901, 904 (7th Cir. 1954), *rev'd on other grounds*, 348 U.S. 397 (1955). *Simmons* was reversed on the procedural ground that the Department of Justice failed to furnish the registrant with a fair résumé of all adverse information in the FBI report and thus deprived him of the fair hearing provided by the Act.

52. *Ibid.* See *White v. United States*, 215 F.2d 782 (9th Cir. 1954) where the court distinguishes the case before it and *Dickinson* on the ground that one is a claim for ministerial exemption while the other is a conscientious objector case.

53. See *United States v. Simmons*, 213 F.2d 901, 905 (7th Cir. 1954).

54. *United States v. Wider*, 119 F. Supp. 676 (E.D. N.Y. 1954). The only evidence in the record consists of letters written by the registrant in which he explains his convictions and how they stem from his religious training as a Jew. There is no proof from others, and his file is silent as to any affirmative evidence obtained by the local board either in support of or contrary to the claim. The registrant failed to make out a prima facie case. "When the *Dickinson* case refers to the requirement of some affirmative evidence to support the board's finding . . . it seems that what the Court had in mind were cases wherein the registrant had submitted, in support of his claim, evidence which was more than statements of a subjective state of mind relative to his religious beliefs." *Id.* at 683. See *United States v. Adamowicz*, 119 F. Supp. 635 (N.D. Ill. 1954) where the registrant's claim was rejected because his belief was a political one and did not stem from religious convictions.

55. *United States v. Wider*, 119 F. Supp. 676, 683 (E.D. N. Y. 1954).

56. *White v. United States*, 215 F.2d 782, 785 (9th Cir. 1954).

57. For a discussion of the local board hearing see SIBLEY AND JACOB, *CONSCRIPTION OF CONSCIENCE*, 59-60 (1952). The board could conduct a more searching examination if the members were fully versed in the matters of conscientious objection. In this respect, this agency to which Congress has delegated the job of drafting of men is different from the ordinary governmental administrative body. The use of the ad-

registrant may be requested to explain his occupation, which might conflict with his attitude toward assisting in national defense. Often, on the basis of these answers, the board can determine that, even though the registrant appears sincere in his beliefs, he would qualify for noncombatant duty because of his civilian activities.<sup>58</sup> Above all the board is desirous of detecting those who have sought a church opposed to war in the manner that the draft has sought draftees. The procedure must not allow the faker to hide at the expense of the true objector. Certainly a very recent connection with a pacifist church should not be conclusive of an intent to evade the draft, but it is evidence to be considered.<sup>59</sup> Another fact which may be considered is whether or not the registrant has publicly expressed his beliefs.<sup>60</sup> These factors combined—the totality of the registrant's activities—can be examined to reach a decision.

Classification is based not only on information supplied by the registrant in his questionnaire and conscientious objector form; local board members are free to place information into the record to give standing to the classification.<sup>61</sup> They may certainly use knowledge of a par-

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ministrative agency is usually justified by the argument that the problem involved requires initial expert consideration. In the selective service system, however, the members of the local and appeal boards are not specialists; they have no special training or preparation for the job. Many draft boards consequently may be inexperienced in questioning draft registrants.

58. In *White v. United States*, 215 F.2d 782 (9th Cir. 1954), the registrant requested a 1-0 classification indicating that he was conscientiously opposed to both combatant and non-combatant service. The facts as related by the registrant indicated that he was employed in an aircraft plant. From these facts and the interview the board declared that the registrant was not so opposed to noncombatant service as he was to governmental service of any kind. The board then classified the registrant as a conscientious objector who is available for non-combatant military service only. See also *Roberson v. United States*, 208 F.2d 166, 169 (10th Cir. 1953).

59. See *Schuman v. United States*, 208 F.2d 801, 805 (9th Cir. 1953). "The length of time one has been connected with a faith has no bearing upon whether one is entitled to exemption as a conscientious objector. The only question to be considered is whether the registrant has a sincere (i.e., 'conscientious') religious opposition to participation in war in any form." *Ibid.*

See *Imboden v. United States*, 194 F.2d 508 (6th Cir. 1952). Failure to engage in activities of a religious organization is not conclusive but certainly a fact to be considered.

60. In *Witmer v. United States*, 348 U.S. 375 (1955), Mr. Justice Clark indicated that a registrant's failure to show evidence of prior expression of religious belief was a fact, though not controlling, to be considered in connection with the board's determination of the registrant's sincerity.

61. See *Lehr v. United States*, 139 F.2d 919, 922 (5th Cir. 1943). "The Local Board is not a court that must swear witnesses, allow representation by counsel, and act only on the evidence presented. It may act on matters within the knowledge of the Board whether in evidence or not." *Ibid.*

Also, boards are not restricted to what would be considered competent legal evidence in a judicial proceeding. See *Dickinson v. United States*, 346 U.S. 389 (1953); *Brown v. Spelman*, 254 F. 215 (1918).

Even though evidentiary requirements are relaxed, it is essential that a fair hearing be provided. The registrant should be made aware of the evidence considered by

ticular family background or religious history to classify a registrant. Conclusions formulated from evidence and used in the classification must be recorded in the registrant's file.<sup>62</sup> This gives the registrant an opportunity to examine evidence upon which his classification is based.

A standard of substantial evidence is not required to rebut the claimed exemption in conscientious objector cases.<sup>63</sup> Only a sufficient factual indication of evidence incompatible with the registrant's claim is necessitated.<sup>64</sup> Certainly, mere suspicion is not sufficient.<sup>65</sup> If the board believes that the registrant is sincere and there is no factual showing of contradiction, then denial of conscientious objector classification would be without "basis in fact."<sup>66</sup> However, the board is under no investigatory duty to construct an independent record in opposition to the registrant's statements and conduct if they alone constitute a "basis in fact."<sup>67</sup> The evidence requirement is met if the board finds inconsistency in the record. In *Witmer v. United States*<sup>68</sup> the registrant initially sought an agricultural

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the board. *United States v. Balogh*, 157 F.2d 939, 943 (2d Cir. 1946), *judgment vacated on other grounds*, 329 U. S. 692 (1947). See DAVIS, *ADMINISTRATIVE LAW* 497 (1951); Shipley, *Conscientious Objection—A Legal Right*, 13 *FED. B. J.* 282, 286 (1953); Connor and Clarke, *Judicial Investigation of Selective Service Action*, 19 *TUL. L. REV.* 344 (1944); Comment, 34 *B. U. L. REV.* 361, 364 (1954).

62. "Under no circumstances shall the local board rely upon information received by a member personally unless such information is reduced to writing and filed." 32 *C. F. R.* § 1623.1 (1951). In *United States v. Bender*, 206 F.2d 247 (3d Cir. 1953), the draft board clerk testified as follows: "Well, they considered the information on the Form 150, and I think the family is well known to all the Board members, and they felt the information did not justify a change in classification." *Id.* at 250. The classification appeared to have been based on information which was never placed in the file. The registrant was thus not informed of evidence upon which his classification depended. See also *United States ex rel. Remke v. Read*, 123 *F. Supp.* 272 (*W. D. Ky.* 1954).

63. *Witmer v. United States*, 348 U. S. 375, 381 (1955).

64. See *De Moss v. United States*, 218 F.2d 119 (8th Cir. 1954); *Bates v. United States*, 216 F.2d 130 (8th Cir. 1954); *Contra*, *Annett v. United States*, 205 F.2d 689 (10th Cir. 1953).

65. See *Witmer v. United States*, 348 U. S. 375 (1955); *Dickinson v. United States*, 346 U. S. 389 (1953); *United States v. Close*, 215 F.2d 439 (7th Cir., 1954).

66. In *Pitts v. United States*, 217 F.2d 590 (9th Cir. 1954) the board placed nothing in the record on which to base a decision or refute the registrant's sincerity. In fact, it indicated that no further evidence had been disclosed by a personal hearing and that it had not doubted the registrant's sincerity. See also *Williams v. United States*, 216 F.2d 350 (5th Cir. 1954); *Weaver v. United States*, 210 F.2d 815 (8th Cir. 1954). "To be sure, the Board may not accept the sincerity of the registrant's religious belief and at the same time deny him the classification which the law gives one conscientiously holding that religious belief. To do so would empower the Board to arbitrarily classify registrants regardless of religious beliefs or convictions." *Roberson v. United States*, 208 F.2d 166, 168 (10th Cir. 1953).

67. *De Moss v. United States*, 218 F.2d 119, 121 (8th Cir. 1954). The registrant's argument was that there were no facts to contradict the documentary proof submitted by him. The court stated, "the difficulty with that position lies in the fact that the documentary evidence . . . was contradictory and in some respects unconvincing and subject to being deemed incredible by the draft board." *Ibid.*

68. 348 U. S. 375 (1955).

exemption and indicated conscientious opposition to war. He specifically indicated lack of ministerial status, but, subsequent to the board's refusal of the agricultural deferment, he requested classification as a minister. He had originally indicated that he wanted to assist the war effort through work in agriculture and this was quite inconsistent with his later statements indicating opposition to war in any form. This inconsistency justified the board in doubting, on the record, his credibility and refusing his request.

In conscientious objector cases a registrant cannot make out a prima facie case solely from objective facts as in ministerial cases since the ultimate question to be determined is the sincerity of the registrant in his objection to war in any form.<sup>69</sup> Objective facts are used in objector cases only to determine the sincerity of the registrant.<sup>70</sup> The nature of the registrant's claim, either that of ministerial exemption or conscientious objection, thus determines the kind of evidence the board must find in order to contradict his claim for an exempt status. The court in *Witmer* said, "if . . . the issue is the registrant's sincerity and good faith, then there must be some inference of insincerity or bad faith."<sup>71</sup> For some inference of insincerity or bad faith other than that indicated through answers to the questionnaire the board can show in the record that the registrant's demeanor or character was unreliable or evasive in its meeting with him.<sup>72</sup> If there is no indication of this in the record, however,

69. *Id.* at 381.

70. "[A]ny fact which casts doubt on the veracity of the registrant is revelant." *Id.* at 381-82. This type of fact is affirmative evidence.

71. *Id.* at 382.

72. In the *Witmer* case, the registrant's sincerity, during his personal appearance before the local board, was not doubted. The Court indicated, however, that such a doubt could be of importance in the process of local board classification. "Since *Witmer* stated his beliefs with apparent sincerity, and since we find no indication anywhere in the record that his demeanor appeared shifty or evasive or that his appearance was one of unreliability, we must examine the objective facts before the Appeal Board to see whether they cast doubt on the sincerity of his claim." *Id.* at 382. From this it appears that the Court has left the door open for local board interpretation of registrant behavior during the personal interview as a basis for classification. However, the requisite of a record is vital. See also *Ashauer v. United States*, 217 F.2d 788, 791 (9th Cir. 1954), in which the court indicated that it would look to the personal hearing to find evidence of a contradictory nature. In *Tomlinson v. United States*, 216 F.2d 12 (9th Cir. 1954) a local board was again faced with the task of evaluating a mental attitude. "Attitudes and demeanors which develop at the time of such a person's personal appearance may well be the controlling factors." *Id.* at 17. See also *White v. United States*, 215 F.2d 782 (9th Cir. 1954); *United States v. Sinmons*, 213 F.2d 901 (7th Cir. 1954), *rev'd on other grounds*, 348 U. S. 397 (1955). Judge Learned Hand indicated that the registrant's appearance before the Board may be sufficient to justify distrust in his good faith. *United States ex rel. Levy v. Cain*, 149 F.2d 338, 341 (2d Cir. 1945).

Certainly, it is difficult to evaluate the demeanor or character of the individual, but the local board is in as good a position as anyone to attempt to determine a regis-

then an examination of the objective facts can determine the incredibility of independent statements which are seemingly credible.<sup>73</sup> All that is needed to support a classification is an inference from the registrant's conduct or testimony of the incredibility of his statements or the insincerity of his claim.

A special appeal process is outlined in the statute for all conscientious objectors.<sup>74</sup> This does not include ministerial claims which follow the regular appeal procedure.<sup>75</sup> If the local board, after its hearing, fails to sustain the conscientious objector claim the case is referred to the appeal board. Before this agency makes a final determination the file is forwarded to the Department of Justice for investigation by the Federal Bureau of Investigation. Subsequent to this investigation a hearing is held before a hearing officer, and the registrant is allowed to present his witnesses and rebut any information which was disclosed by the FBI report.<sup>76</sup> This is an investigatory proceeding, as contrasted with the local board procedure, since an affirmative duty is placed on the Department of Justice to investigate the registrant's claim through the FBI. Therefore, this hearing may include evidence of which the local board was unaware in its process of classification, and a "basis in fact" may thus be supplied.<sup>77</sup>

The statute makes no provision for examination of the FBI report by the registrant, but a recent case indicates that the registrant must be presented with a fair résumé of this report.<sup>78</sup> The entire FBI report need not be made available but may be kept secret if necessary to safeguard the procedure for getting such information. The Supreme Court recently held that, "a fair résumé is one which will permit the registrant to defend against adverse evidence—to explain it, rebut it, or otherwise detract

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trant's sincerity. If he does appear evasive, and this fact is placed in the record, then it would appear that the classification is determined on a "basis in fact."

73. *Witmer v. United States*, 348 U. S. 375 (1955).

74. See 50 U.S.C. APP. § 456 (j) (1952). 32 C.F.R. § 1626.25 (Supp. 1954) contains the special provisions that are applicable when the appeal involves a conscientious objector claim.

75. See note 10 *supra*.

76. "The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing." 50 U.S.C. APP. § 456 (j) (1952). See also *United States v. Borisuk*, 206 F.2d 338 (3d Cir. 1953). The Court there stated that, "upon request . . . the hearing officer will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat, the claim of the registrant, such request being granted to enable the registrant to more fully prepare to answer and refute at the hearing such unfavorable evidence." *Id.* at 341 n.3.

77. See *Shepherd v. United States*, 217 F.2d 942 (9th Cir. 1954); *Tomlinson v. United States*, 216 F.2d 12 (9th Cir. 1954); *United States v. Lynch*, 155 Supp. (S.D. Cal. 1953).

78. *United States v. Nugent*, 346 U. S. 1 (1953). The hearing officer prepares this résumé and informs the registrant of his right to receive it.

from its damaging force.”<sup>79</sup> Certainly, a decision of an administrative agency should not be reached without giving the affected party an opportunity to know and rebut evidence upon which the decision is based.

Subsequent to this hearing, the hearing officer, after examining the local board file and the FBI report and personally questioning the registrant so as to view his demeanor, sends his classification recommendation to the Department of Justice.<sup>80</sup> This agency then forwards a recommendation to the appeal board, which is only advisory. A recent decision indicates that the registrant is entitled to receive a copy of this report and to be given an opportunity to reply to it prior to final appeal board classification.<sup>81</sup> A regulation provides that the registrant has the right to enclose statements relevant to classification with his application of appeal.<sup>82</sup> This will have little significance unless he is afforded an opportunity to reply to the Justice Department's report. By giving the registrant this right, the appeal board will have a complete record on which to base its decision. It should be remembered that the registrant has had an opportunity to meet this evidence in a personal hearing before the hearing officer. The report is merely a summary of what transpired and gives a classification based on rebuttal testimony from the registrant. It would seem that this requirement now gives the registrant power to question the correctness of conclusions on which he has previously testified.

Presently the statute provides for an FBI investigation and hearing on conscientious objector status only if the local board has failed to sustain the claim.<sup>83</sup> If the registrant receives a conscientious objector classification, and also requests a ministerial status, and on appeal to

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79. *United States v. Simmons*, 348 U. S. 397, 405 (1955). There has been a difference of opinion as to whether an individual can properly rebut this FBI report if he is not given an opportunity to see it. A question also arises as to what test there is, if any, for determining whether the registrant has received a fair résumé. See *Sheats v. United States*, 215 F.2d 746 (10th Cir. 1954) and *Brewer v. United States*, 211 F.2d 864 (4th Cir. 1954) where a hearing officer's report and an FBI report were inadvertently placed in the registrant's file; he was allowed to see them since each had been instrumental in his classification. See *United States v. Edmiston*, 118 F. Supp. 238 (D. Nebraska 1954); *United States v. Stasevic*, 117 F. Supp. 371 (S.D. N. Y. 1953). See the following language in *United States v. Evans*, 115 F. Supp. 340 (D. Conn. 1953). "I cannot . . . determine that the résumé was fair without an opportunity to inspect the investigative report of which it is claimed to be a résumé. I think the Act should not be interpreted to mean that any communication by the hearing officer to the registrant with reference to the investigative report is conclusively presumed to be a fair résumé. Even if the résumé given be deemed presumptively fair, on trial the registrant must be allowed to combat the presumption by the only means possible,—comparison with the investigative report itself." *Id.* at 343. This problem remains unanswered.

80. See 32 C.F.R. § 1626.25 (1951).

81. *Gonzales v. United States*, 348 U. S. 407 (1955).

82. 32 C.F.R. § 1626.12 (1951). See note 11 *supra*.

83. 50 U.S.C. App. § 456 (j) (1952).

the state appeal board both requests are denied, he is not granted a hearing with the Department of Justice.<sup>84</sup> It would seem that the investigation and hearing as an aspect of fair play and substantial justice should be afforded any registrant who is denied conscientious objector status regardless of whether his claim was originally sustained by the local board.<sup>85</sup>

Ministerial classification should present little confusion among local boards since exemption is based on ascertainable objective facts. On the contrary claims of conscientious objection may still result in much litigation due to the impossibility of accurately ascertaining subjective religious convictions. In either case the board must at times assume an investigatory role in order to contradict the registrant's claim. Evidence needed to support a rejection of ministerial exemption may be based on facts presented by the registrant which indicate inadequate and irregular ministry. Here subjective probing is unnecessary, and the board assumes the role of investigator to find objective facts to rebut a registrant's prima facie case. In cases of conscientious objection, if the board believes the registrant is sincere, contradiction of the registrant's claim again requires assumption of an investigatory function. This is apart from obvious inconsistencies (objective facts) in the questionnaire and requires subjective probing; a draft board may reject the claim if the registrant's demeanor and character appear uncertain and evasive from the personal hearing. An inference of insincerity which casts doubt on the registrant's

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84. This situation will occur only under limited circumstances. Normally, if a registrant requests and receives a 1-0 exemption he will not appeal this classification. However, many who are members of Jehovah's Witnesses, after receiving a 1-0 designation, will also request classification as a minister. They do not forfeit the 1-0 classification by this request. See *De Moss v. United States*, 218 F.2d 119 (8th Cir. 1954). "The statute plainly says that when that claim is *denied* reference shall be made to the Department of Justice. The clear meaning of the amended regulation is that when that claim is granted, the appeal board may proceed with the classification without referral to the Department of Justice." *Id.* at 126, 127. See also the following cases which indicate that the registrant should be afforded a hearing if he is a conscientious objector. *Blevins v. United States*, 217 F.2d 506 (9th Cir. 1954); *Sterrett v. United States*, 216 F.2d 659 (9th Cir. 1954); *United States v. Crawford*, 119 F. Supp. 729 (N.D. Cal. 1954).

85. See 32 C.F.R. § 1626.25 (Supp. 1954). The Department of Justice hearing has become very important, since a copy of the report must now be sent to the registrant. It can now supply the "basis in fact" for classification. The Supreme Court has not been hesitant in affording procedural safeguards when the statute was silent. This is evident from the *Nugent* and *Gonzales* decisions. See note 78 and 81 *supra*. In the original 1940 Senate Bill, there was a provision for a register of all conscientious objectors, whose names were immediately referred to the Department of Justice for an investigation and hearing. 86 CONG. REC. 12038 (1940). This procedure was to antedate any local board classification. It may be surmised that Congress intended a hearing for all conscientious objectors prior to refusal of the claim. It might be argued that this report will uncover items not known to the local board and will be detrimental to the registrant. However, it would seem that this investigation may correct any erroneous information compiled by a local board.



veracity is all that is necessary. As a standard for review this seems not far removed from suspicion which is only authenticated by means of injecting such doubts into the record.

## CONSIDERATIONS IN DETERMINING THE LIMITATIONS ON STATE POWER TO REGULATE MOTION PICTURE CONTENT

The constitutional limitations on the power of state and local governments to protect the morals of their citizens through the regulation of the motion picture medium pose weighty problems. The Supreme Court recently placed movies within the category of matter protected by the First Amendment<sup>1</sup> but has not yet answered the critical question whether or not any regulation of movies prior to their exhibition can be squared with constitutional guarantees.<sup>2</sup> An attempt to determine the need, if any, for regulation of motion picture content and to appraise the validity of alternative measures of control in light of applicable Supreme Court decisions is in order. The right to disseminate ideas freely and the right of society to be free from moral degenerating forces can probably both be preserved.<sup>3</sup>

### *The Need for Regulation*

The need for governmental regulation and the form regulation must take are dependent upon conditions existing within the movie industry, the propensity of movies to influence human behavior, the effectiveness of unofficial pressures, and the adequacy of federal activity in the field. If the nature of the problem of film content can be understood, then perhaps the constitutional limitations on regulation can be viewed in proper perspective.

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1. *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495 (1952). The *Burstyn* decision has been followed per curiam in *Gelling v. Texas*, 343 U. S. 960 (1952) and *Superior Films, Inc. v. Dept. of Education*, 346 U. S. 587 (1954).

2. The question might have been decided this term had not the Court refused to review *A.C.L.U. v. City of Chicago*, 3 Ill.2d. 334, 121 N.E.2d. 585 (1954). See 23 U.S. L. WEEK 3242 (U.S. Apr. 5, 1955). The Illinois Supreme Court had upheld a Chicago ordinance authorizing the Police Commissioner to ban showing of any motion picture found to be "immoral or obscene." In an able opinion, Chief Justice Schaefer of the Illinois Court limited the discretion of the Commissioner and the scope of the standards of the ordinance, but held that censorship as such was not prohibited by the constitutional guarantees embodied in the First and Fourteenth Amendments. See also discussion in *Boxoffice*, February 19, 1955, p. 19.

3. Cf. 23 U. CIN. L. REV. 259, 263 (1954).