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# Pass in Review: Due Process and Judicial Scrutiny of Classification Decisions of the Selective Service System

By DONALD L. DOERNBERG\*

The United States is moving quietly but steadily towards reinstating the draft. Since the Selective Service System's induction authority expired in 1973,<sup>1</sup> various military and civilian leaders have declared the need to return to compulsory service.<sup>2</sup> Registration of eligible young men was resumed in July 1980,<sup>3</sup> and two bills are pending in Congress to restore the President's authority to order inductions.<sup>4</sup> Despite the fact that President Carter did not press for the immediate resumption of the draft<sup>5</sup> and President Reagan expressed disinclination to reinstitute it,<sup>6</sup> the nation is clearly moving towards its reinstatement.

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1. See 50 U.S.C. app. § 467(c) (1976).

2. See, e.g., *Bill Introduced in Senate to Reinstate the Draft*, N.Y. Times, Mar. 25, 1981, § 2, at 7, col. 2; Halloran, *Navy Chief, Reversing Stand, Supports Draft, Splitting with Carter*, N.Y. Times, June 20, 1980, at 15, col. 1; Stennis Says *It Is Time to Reimpose the Draft*, N.Y. Times, Feb. 11, 1979, at 56, col. 3; *Army Is Disturbed By Recruit Quality*, N.Y. Times, Jan. 11, 1977, at 9, col. 1; *No Rush to Fill the Ranks*, N.Y. Times, Sept. 23, 1973, § 4, at 4, col. 3.

3. Proclamation No. 4771, 45 Fed. Reg. 45,247 (1980). Registration had been suspended in 1975 by President Ford. Proclamation No. 4360, 40 Fed. Reg. 14,567 (1975).

Senator Hatfield refused to view the resumption as an empty gesture. "The mood of the country had to be tested. . . . The first critical step toward resurrection of the full draft is now complete." Hatfield, *Draft Registration: Simple Prudence or a Dangerous Sign of Desperation?*, 17 WILLAMETTE L.J. 1, 10 (1980).

4. S. 756, 97th Cong., 1st Sess., 127 CONG. REC. S2486 (daily ed. March 23, 1981); H.R. 1210, 97th Cong., 1st Sess., 127 CONG. REC. H175 (daily ed. Jan. 22, 1981).

5. See Committee on Federal Legislation of the Association of the Bar of the City of New York, *If the Draft Is Resumed: Issues for a New Selective Service Law*, 36 RECORD A.B. CITY N.Y. 98, 99 (1981).

6. Raines, *Reagan Vows U.S. Will Press Effort to Build Defenses*, N.Y. Times, May 28, 1981, at 1, col. 6; *Draft Officials Awaiting Decision From Reagan*, N.Y. Times, Nov. 9, 1980, at 28, col. 5; *Reagan, Anderson Disagree on Many Issues But Treat Carter Lightly*, N.Y. Times, Sept. 22, 1980, § 1, at 1, col. 5.

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Conscription has been a political and legal issue in the United States since the 1700's.<sup>7</sup> The constitutionality of conscription was settled by the Supreme Court during the First World War.<sup>8</sup> Since then, the courts have attempted to strike a balance between the government's interest in compelling military service and the citizen's interest in resisting it.

This Article traces the development of judicial review of administrative decisions in the conscription process. After briefly reviewing the history of conscription in the United States, the Article examines three periods in which standards of review were developed. During the first period, from the Civil War to the end of the Second World War, judicial inquiry was restricted primarily to the question whether the registrant's local board was acting in excess of its conferred jurisdiction. This restriction was formulated by the lower federal courts; throughout this period the Supreme Court did not address the issue of the scope of review. During the second period, from the end of the Second World War to the late 1960's, two new standards of review were promulgated: a local board was held to lack jurisdiction either if its classification action had "no basis in fact,"<sup>9</sup> or if it was grounded on multiple bases and at least one of these bases was legally insufficient.<sup>10</sup> During the third period, beginning in 1969, the courts began to require that the Selective Service System state reasons for its denial of a registrant's deferment request.<sup>11</sup> The result was a more searching examination of the decisions of local boards and, correspondingly, a lowering of the conviction rate of those charged with selective service offenses.<sup>12</sup> Although basis

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7. See notes 18-20 & accompanying text *infra*.

8. *Arver v. United States*, 245 U.S. 366 (1918).

9. *Estep v. United States*, 327 U.S. 114, 122 (1946). Technically, the courts reviewed the decisions of appeal boards, not of local boards. See *Gonzales v. United States*, 364 U.S. 59 (1960); *United States v. Crownfield*, 439 F.2d 839 (3d Cir. 1971); *United States v. Deere*, 428 F.2d 1119 (2d Cir. 1970). After 1971, appeals boards were required to give reasons for Selective Service classifications in some cases. See 50 U.S.C. app. § 471(b)(4) (1976). Before 1971, they did not express reasons for their decisions. A local board occasionally did express reasons, however, and the appeal board reviewed such a decision. See notes 78-112 & accompanying text *infra*. If the appeal board was silent, and it usually was, the courts consistently held that they would consider that the appeal board had adopted all of the reasons suggested by lower levels in the selective service process. See, e.g., *Clay v. United States*, 403 U.S. 698 (1971); *United States v. Atherton*, 430 F.2d 741 (9th Cir. 1970); *United States v. French*, 429 F.2d 391 (9th Cir. 1970); *Shepherd v. United States*, 217 F.2d 942 (9th Cir. 1954); *United States v. O'Rourke*, 341 F. Supp. 622 (S.D.N.Y. 1972). The cases, however, uniformly speak in terms of review of local board decisions.

10. See notes 78-125 & accompanying text *infra*.

11. See notes 126-72 & accompanying text *infra*.

12. For example, in fiscal 1966, there were 516 prosecutions. Of these, 371, or 72%, resulted in conviction. In fiscal 1968, of 1,192 prosecutions, 784, or 68%, resulted in conviction.

in fact remains the standard of review, it operates today differently from the manner contemplated when it was announced in 1946.

The Article suggests a better basis for retaining the requirement that the Selective Service System state reasons for its denial of a registrant's deferment request than the two reasons most often stated: facilitation of administrative decisions<sup>13</sup> and of judicial review.<sup>14</sup> The Selective Service System determines whether a person shall be required involuntarily to serve two years in the military, possibly at the risk of life and limb.<sup>15</sup> Certainly those deprivations are as real and as severe as any to which the due process clause is addressed.<sup>16</sup> The Article concludes that due process, not administrative or judicial convenience, should be held to require that the Selective Service System justify its decisions, which may affect registrants' lives and which do affect their liberty.

### The Development of Conscription in the United States

Federal conscription in the United States has had a brief history.<sup>17</sup> During the Revolution, there was no draft; moreover, there was widespread feeling before that war that a national standing army posed an unacceptable threat to liberty.<sup>18</sup> George Washington suggested a draft on at least three occasions during the Revolution,<sup>19</sup> but the Continental Congress never obliged him. Instead, the states were permitted to impose a draft if necessary to fill their militias, which were then requisitioned by the national government.<sup>20</sup>

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tion. By 1970, prosecutions had risen to 2,833, but only 1,027, or 36%, resulted in conviction, and in 1972, of 4,906 prosecutions, a mere 1,642, or 33%, resulted in conviction. [July-December 1972] SELECTIVE SERVICE SYSTEM, SEMI-ANNUAL REPORT OF THE DIRECTOR OF SELECTIVE SERVICE 46.

13. See, e.g., *United States ex rel. Bent v. Laird*, 453 F.2d 625, 634 (3d Cir. 1971).

14. See, e.g., *id.*; *United States v. Broyles*, 423 F.2d 1299, 1304 (4th Cir. 1970) (en banc).

15. Moreover, service in the armed forces inevitably connotes loss or curtailment of significant constitutional liberties. "While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community." *Parker v. Levy*, 417 U.S. 733, 751 (1974). Thus, the Court held that servicemen do not enjoy, for example, the same range of first amendment freedoms as do civilians. *Id.* at 758.

16. U.S. CONST. amend. V.

17. Before the ratification of the Constitution, conscription by the states was common. See *Arver v. United States*, 245 U.S. 366, 379-80 (1918).

18. Friedman, *Conscription and the Constitution*, 67 MICH. L. REV. 1493, 1507 (1969) [hereinafter cited as Friedman].

19. *Id.* at 1508.

20. *Id.*

The first federal attempt to institute conscription occurred during the War of 1812.<sup>21</sup> The bill was not well received by Congress,<sup>22</sup> and was never enacted.<sup>23</sup>

During the Civil War, a statute was enacted that permitted the national government to compel its citizens to render military service.<sup>24</sup> The public's reaction was unambiguous; riots protesting conscription occurred throughout the country.<sup>25</sup> Reaction to the draft was not limited to individuals or unorganized groups; some state and local governments also resisted the conscription act.<sup>26</sup> The Civil War draft, however, was a short-lived experiment; it did not continue even to the

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21. See *Arver v. United States*, 245 U.S. 366, 384-85 (1918).

22. The bill provoked sharp responses from members of Congress. For example, speaking in the House of Representatives on December 9, 1814, Daniel Webster attacked the notion of a compulsory draft: "The question is nothing less than whether the most essential rights of personal liberty shall be surrendered, and despotism embraced in the worst form. . . . The Constitution is libelled, foully libelled. The people of this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their own treasure and their own blood a Magna Charta to be slaves." 14 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 57 (1903).

23. Commentators have not agreed upon why the bill failed. Chief Justice White, writing for the Court in *Arver v. United States*, 245 U.S. 366 (1918), briefly reviewed the history of conscription in the United States and concluded that the Monroe Plan, named after then Secretary of War James Monroe, was never adopted because "[p]eace came before the bill was enacted." *Id.* at 385. Thus, the Chief Justice may have been implying that the bill otherwise would have passed. See also R. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 126 (1967). Professor Friedman disagrees with this interpretation. "[T]he Court blithely dismissed the most significant aspect of the Monroe Plan: not the fact that it was introduced, but the fact that Congress never passed the proposal because a substantial number of congressmen did not believe that the federal government had the power to conscript." Friedman, *supra* note 18, at 1541.

24. Civil War Enrollment Act, ch. 75, 12 Stat. 731 (1863); See R. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 208 (1967). Professor Friedman notes, however, that there is no agreement over whether the Act was a genuine conscription bill or merely a channeling device to encourage the rich to pay the poor to serve for them. Friedman, *supra* note 18, at 1544. One commentator suggests that only 6% of the Union Army was procured through conscription, rather than by commutation—payment of a sum of money in lieu of service—or substitution—securing another person to serve the draftee's term. R. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 210, 357 (1967).

25. Professor Friedman observed, "The largest disturbance, which took place in New York City, resulted in an estimated 1,200 deaths and millions of dollars in property damage. Fifteen regiments of regular troops were eventually required before the pillaging mobs could be subdued." Friedman, *supra* note 18, at 1545.

26. See *id.* Resistance by states or municipalities is not just a phenomenon of the distant past. During the United States' involvement in Viet Nam, the Massachusetts legislature enacted a bill requiring the state attorney general to challenge the constitutionality of the war by an original action in the United States Supreme Court if possible. The Court refused to accept the ensuing complaint, *Massachusetts v. Laird*, 400 U.S. 886 (1970), and Massachusetts thereupon commenced an action in the district court. The First Circuit affirmed the district court's dismissal of the action. *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971).

end of the war.<sup>27</sup>

After the end of the draft in April 1865, conscription was not again a serious issue until the First World War. Shortly before the United States declared war, a bill was introduced to establish the draft and, despite opposition,<sup>28</sup> was promptly enacted.<sup>29</sup> At this time, the Supreme Court undertook its only examination of the constitutionality of conscription in *Arver v. United States*.<sup>30</sup> Writing for a unanimous Court, Chief Justice White upheld the statute against a constitutional attack based both upon article I<sup>31</sup> and the thirteenth amendment.<sup>32</sup> The constitutional question has not again reached the Supreme Court,<sup>33</sup> although inferior federal courts occasionally have reviewed the draft and echoed *Arver*.<sup>34</sup>

The draft did not reappear until September 1940.<sup>35</sup> This draft was the first in United States history to be established during peacetime; although the war in Europe had begun, the United States was at peace.

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27. Friedman, *supra* note 18, at 1546.

28. *Id.* at 1550.

29. Selective Draft Act of 1917, ch. 15, 40 Stat. 76 (expired 1919).

30. 245 U.S. 366 (1918). Years earlier, the Pennsylvania Supreme Court had upheld the constitutionality of the Civil War draft. *Kneedler v. Lane*, 45 Pa. 238 (1863). For a discussion of the constitutionality of the draft, see Friedman, *supra* note 18. The only development in this area since 1969 has been the recent challenge to the all-male draft, which does not challenge the concept of conscription itself. *Rostker v. Goldberg*, 101 S. Ct. 2646 (1981).

31. The Court focused upon the war power, U.S. CONST. art. I, § 8, cl. 11, and the "power to raise and support armies," U.S. CONST. art. I, § 8, cl. 12, as the sources of authority which, together with the necessary and proper clause, U.S. CONST. art. I, § 8, cl. 18, implied the propriety of conscription. The Chief Justice replied to arguments that this analysis read too much into the Constitution: "[I]t is said, the right to provide is not denied by calling for volunteer enlistments, but it does not and cannot include the power to exact enforced military duty by the citizen. This however but challenges the existence of all power, for a governmental power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power." 245 U.S. at 377-78. Professor Friedman has attacked this technique of implying powers in the national government. Friedman, *supra* note 18, at 1498.

32. The thirteenth amendment argument was disposed of in a single paragraph. "Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation as the result of a war declared by the great representative body of the people can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement." 245 U.S. at 390.

33. It was, however, mentioned by the Court as a settled issue in *Billings v. Truesdell*, 321 U.S. 542, 556 (1944), and in *United States v. Nugent*, 346 U.S. 1, 9 (1953).

34. See, e.g., *United States v. Hobbs*, 450 F.2d 935 (10th Cir. 1971); *O'Connor v. United States*, 415 F.2d 1110 (9th Cir. 1969) (upholding constitutionality of provision requiring alternate civilian work), *cert. denied*, 397 U.S. 968 (1970).

35. Selective Training and Service Act of 1940, ch. 720, 54 Stat. 885 (expired 1945).

Introduction of the bill evoked serious debate in Congress;<sup>36</sup> the bill passed, however, and the Act continued to provide draftees until its expiration on May 15, 1945.<sup>37</sup>

Only three years later, Congress passed the Selective Service Act of 1948,<sup>38</sup> which provided for conscription of every able-bodied male sometime between his eighteenth and twenty-sixth birthdays.<sup>39</sup> Thus, after 172 years, the nation seemed to embrace a permanent commitment to a peacetime draft.<sup>40</sup> This commitment was continued with the passage of the Universal Military Training and Service Act<sup>41</sup> and the Military Selective Service Act of 1967,<sup>42</sup> which were major revisions of the 1948 Act.

Although by 1967 the nation was deeply involved in Viet Nam, technically it was still at peace. Opposition to the de facto war and the draft grew, however, as manifested by more frequent demonstrations and litigation.<sup>43</sup> Judicial recognition of the Selective Service System's faults also became more frequent.<sup>44</sup> In part because of the judiciary's increased sensitivity to problems created by the draft, Congress again revised the operation of the Selective Service System in 1971.<sup>45</sup> The draft continued, but with greatly improved protection for the registrant's rights<sup>46</sup> and concomitant restrictions on the Selective Service,

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36. See Friedman, *supra* note 18, at 1552.

37. Ch. 720, § 16(b), 54 Stat. 885, 897 (1940).

38. Ch. 625, 62 Stat. 604 (1948) (current version at 50 U.S.C. app. §§ 451-473 (1976)).

39. Ch. 625, § 4, 62 Stat. 604, 605-07 (1948) (current version at 50 U.S.C. app. § 454 (1976)).

40. The only internal limitation in the 1948 Act was the date of expiration of the authority for inductions. Ch. 625, § 17, 62 Stat. 604, 625 (1948). As that date approached, however, Congress extended it, and continued to do so successively into the 1960's. Ch. 445, § 1, 64 Stat. 318 (1950); ch. 144, tit. I, § 1(w), 65 Stat. 75, 87 (1951); ch. 250, tit. I, § 102, 69 Stat. 223, 224 (1955); Pub. L. No. 86-4, § 1, 73 Stat. 13 (1959); Pub. L. No. 88-2, § 1, 77 Stat. 4 (1963). At the same time, registration and classification continued for every male between the ages of 18 and 26.

41. Ch. 144, 65 Stat. 75 (1951) (current version at 50 U.S.C. app. §§ 451-473 (1976)).

42. Pub. L. No. 90-40, 81 Stat. 100 (1967) (current version at 50 U.S.C. app. §§ 451-473 (1976)).

43. See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968); *United States v. Berrigan*, 283 F. Supp. 336 (D. Md. 1968), *aff'd*, 417 F.2d 1009 (4th Cir.), *cert. denied*, 397 U.S. 909 (1969); [July-December 1972] SELECTIVE SERVICE SYSTEM, SEMI-ANNUAL REPORT OF THE DIRECTOR OF SELECTIVE SERVICE 46.

44. See, e.g., *Walsh v. Local Bd. No. 10*, 305 F. Supp. 1274, 1279 (S.D.N.Y. 1969) *quoted in* note 127 *infra*.

45. Act of Sept. 28, 1971, Pub. L. No. 92-129, tit. I, 85 Stat. 348 (codified at 50 U.S.C. app. §§ 451-473 (1976)).

46. See, e.g., 50 U.S.C. app. § 471a (1976). See notes 159-62 & accompanying text *infra*.

whose operations had been largely unregulated.<sup>47</sup>

The impending withdrawal of United States forces from Viet Nam led Congress to permit the draft to expire on June 30, 1973.<sup>48</sup> Despite occasional indications from the military that it wished to have inductions resumed,<sup>49</sup> not until 1980 was a serious effort begun to revive the Selective Service System by reinstituting registration.<sup>50</sup> Thus, the draft has existed for only thirty-three years, more than three-quarters of that period in peacetime.

## Judicial Review Before 1946

### Review Before the Second World War

Prior to the Second World War, judicial challenges to the draft were rare. Judicial review was available during the Civil War only by writ of habeas corpus, which was limited to cases in which the conscription authority had been illegally exercised.<sup>51</sup> Challenges focused on local board actions that were entirely without authority because they exceeded conferred jurisdiction.<sup>52</sup>

During the First World War, judicial review continued to be available only by writ of habeas corpus.<sup>53</sup> Although the procedural mechanism remained the same, the scope of review had been expanded. In *Angelus v. Sullivan*,<sup>54</sup> the court noted that draft board decisions could

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47. See notes 126-72 & accompanying text *infra*.

48. See 50 U.S.C. app. § 467(c) (1976).

49. See note 1 *supra*.

50. Proclamation No. 4771, 45 Fed. Reg. 45,247 (1980). The reinstitution of registration met some resistance. See, e.g., *Draft Foes Protest Registration*, N.Y. Times, July 29, 1980, § 11, at 7, col. 2; *Capital Protest is Planned Over Registration for Draft*, N.Y. Times, Feb. 15, 1980, at 16, col. 6; Kaiser, *Campus Rallies Across U.S. Protest Registration Plan*, N.Y. Times, Feb. 13, 1980, at 16, col. 3.

51. See, e.g., *Stingle's Case*, 23 F. Cas. 107 (E.D. Pa. 1863) (No. 13,458); *In re Irons*, 13 F. Cas. 98 (C.C.N.D.N.Y. 1863) (No. 7066).

52. See *In re Irons*, 13 F. Cas. 98, 99 (C.C.N.D.N.Y. 1863).

53. One of the reasons for this limited review involved the structure of the draft. Under the Selective Draft Act of 1917, ch. 15, § 2, 40 Stat. 76, 78 (expired 1919), issuance of the induction order immediately conferred jurisdiction over the registrant upon the military, subjecting the registrant to military law. See *Franke v. Murray*, 248 F. 865, 868 (8th Cir. 1918); *United States ex rel. Helmecke v. Rice*, 281 F. 326, 329 (S.D. Tex. 1922); see also *Estep v. United States*, 237 U.S. 114, 124 n.17 (1946); *Billings v. Truesdell*, 321 U.S. 542, 546 (1944). Violations of orders were then prosecuted by court-martial, not by criminal trial in the civilian courts. *Estep v. United States*, 327 U.S. 114, 132 n.1 (1946) (Murphy, J., concurring).

54. 246 F. 54 (2d Cir. 1917). In *Angelus*, a professed subject of Austro-Hungary, served with a conscription order, claimed that he was exempt because of his status as an alien. The local and appeal boards in New York City denied his application for exemption, whereupon he filed for injunctive relief in the district court. The district court dismissed his challenge



be reversed if "their proceedings have been without or in excess of their jurisdiction, or have been so manifestly unfair as to prevent a fair investigation, or . . . there has been a manifest abuse of the discretion with which they are invested under the act . . . ." <sup>55</sup> Thus, the writ was expanded to include matters, such as unfairness and abuse of discretion, which ordinarily might not enter into the question of jurisdiction. <sup>56</sup> *Angelus* thereby recognized three factors, any one of which could invalidate an induction order: absence of jurisdiction, unfairness of proceedings, and abuse of discretion.

Later courts more boldly reviewed substantive decisions of the draft boards. In *Arbitman v. Woodside*, <sup>57</sup> the court echoed the three-part inquiry of *Angelus* and elaborated the abuse of discretion standard: "[U]pon proof that the investigation has not been fair, or that the

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for lack of jurisdiction. The circuit court found that federal courts did have jurisdiction to review conscription orders that allegedly exceeded the Selective Service System's jurisdiction, *id.* at 63-64, but affirmed on other grounds.

55. *Id.* at 67.

56. See *Franke v. Murray*, 248 F. 865 (8th Cir. 1918); *Ex parte Cohen*, 254 F. 711 (E.D. Va. 1918); *United States ex rel. Pascher v. Kinkead*, 248 F. 141 (D.N.J. 1918); *Ex parte Beck*, 245 F. 967 (D. Mont. 1917); *United States ex rel. Troiani v. Heyburn*, 245 F. 360 (E.D. Pa. 1917).

This expansion of the reach of habeas corpus in the context of Selective Service cases parallels its expansion in federal review of state criminal convictions. Prior to 1915, habeas corpus was available only for a limited inquiry into the jurisdiction of the sentencing court. See *Andrews v. Swartz*, 156 U.S. 272 (1895); *Ex parte Parks*, 93 U.S. 18 (1876); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830). "The concept of jurisdiction, however, was subject to considerable strain during this period . . ." *Fay v. Noia*, 372 U.S. 391, 450 (1963) (Harlan, J., dissenting). The strain placed on the concept of jurisdiction during this period was made manifest by cases that stretched the ordinary concepts of jurisdiction to reach claims that otherwise might not have been cognizable. See, e.g., *Ex parte Siebold*, 100 U.S. 371 (1880) (writ held to lie to challenge conviction under unconstitutional statute).

In 1915, in *Frank v. Mangum*, 237 U.S. 309 (1915), the Court abandoned some of the rigidity of the concept of jurisdiction to consider the adequacy of the prisoner's opportunity to have constitutional claims heard in the state court system. The final expansion of federal habeas corpus review of state criminal convictions, *Brown v. Allen*, 344 U.S. 443 (1953), unambiguously expanded the writ to reach all errors of constitutional law made in trial or appellate proceedings. This change, too, is echoed in Selective Service cases that expanded judicial review to reach all errors of law made by the Selective Service System. See notes 113-22 & accompanying text *infra*.

For more extended discussion of the development of federal habeas corpus, see Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961); Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 101-25 (1959).

57. 258 F. 441 (4th Cir. 1919). The facts of *Arbitman* were similar to those of *Angelus*. *Arbitman* claimed an exemption from conscription because of his resident alien status. The district court dismissed his challenge for lack of jurisdiction, but the appellate court reversed, holding that the federal courts did have jurisdiction to grant relief.

board has abused its discretion by a finding contrary to all the substantial evidence, relief should be given by the courts . . . .”<sup>58</sup> The *Arbitman* court thus equated abuse of discretion with a board finding contrary to substantial evidence. *Angelus* and *Arbitman* in effect opened a debate concerning the extent to which the courts could review the substantive decisions of the Selective Service System.<sup>59</sup>

#### Review from 1940 to 1946

During the early 1940's, as in the pre-1919 period, the courts considered whether the local board had jurisdiction, whether it had afforded the registrant a fair investigation, and whether it had abused its discretion.<sup>60</sup> In 1943, however, the Fourth Circuit asserted in *Goff v. United States*<sup>61</sup> that an “action [of the board] is to be taken as final, notwithstanding errors of fact or law, so long as the board’s jurisdiction is not transcended and its action is not so arbitrary and unreasonable as to amount to a denial of a constitutional right.”<sup>62</sup> *Goff* appeared to retreat from the *Angelus* and *Arbitman* elements of review, because it implied that mere unfairness in the proceedings would not invalidate an induction order. The *Goff* court did not explain its pronouncement,

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58. *Id.* at 442.

59. *Arbitman* also foreshadowed another problem of judicial review that became acute four decades later. The petitioner had demanded classification as a resident alien who had not commenced the naturalization process. He submitted appropriate documentation to his local board. The board simply elected not to believe *Arbitman*’s evidence, although it had none of its own. This unsupported disbelief was found sufficiently egregious to justify judicial intervention on the petitioner’s behalf. 258 F. at 443.

As conscientious objector applications proliferated in the later years of the draft, the courts were faced with an increasing number denied by the Selective Service System solely on the basis of local boards’ unsupported disbelief of registrants’ submissions. Like the *Arbitman* court, later courts declined to endorse such decisions. *See, e.g.*, *Dickinson v. United States*, 346 U.S. 389 (1953); *United States ex rel. Checkman v. Laird*, 469 F.2d 773 (2d Cir. 1972); *United States v. Corliss*, 280 F.2d 808 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960); *cf. Helwick v. Laird*, 438 F.2d 959 (5th Cir. 1971) (judicial review of conscientious objector claims made by active-duty military personnel).

None of the draft acts prior to 1967 set forth the availability of judicial review, except for the repeated statement that the decisions of the local boards were final except for review in the selective service appellate process. *See* Selective Draft Law of 1917, ch. 15, § 4, 40 Stat. 76, 79-80; Selective Training and Service Act of 1940, ch. 720, § 10(a)(2), 54 Stat. 885, 893; Selective Service Act of 1948, ch. 625, § 10(b)(3), 62 Stat. 604, 620. It was left to the courts to determine what “final” meant. *Arbitman*, an early step in this determination, made it clear that finality would not preclude all substantive challenges to the Selective Service System’s actions.

60. *See, e.g.*, *Baxley v. United States*, 134 F.2d 998 (4th Cir. 1943) (dictum); *Rase v. United States*, 129 F.2d 204 (6th Cir. 1942); *United States ex rel. Ursitti v. Baird*, 39 F. Supp. 872 (E.D.N.Y. 1941).

61. 135 F.2d 610 (4th Cir. 1943).

62. *Id.* at 612.

however, and it was not followed by other courts. The proper scope of review thus was unclear, especially because the Supreme Court never ruled on the propriety and scope of judicial review of selective service decisions under the 1940 Act.<sup>63</sup>

While the courts considered the scope of review, they also wrestled with the procedural problem of when to review draft board decisions. During the early 1940's, the courts indicated their reluctance to interfere with the Selective Service System's operation. Although issuance of an induction order no longer automatically conferred jurisdiction over the registrant in the military courts,<sup>64</sup> thus allowing draft resisters to be prosecuted in the civilian courts, the courts continued to insist that a registrant could obtain review of a classification decision only by writ of habeas corpus after induction and not by refusing induction and being indicted.<sup>65</sup> Thus, if the defendant refused induction, the court would review only the board's jurisdiction, and not the broader question whether the local board's actions had been arbitrary or without substantial evidence.<sup>66</sup> In contrast, in habeas corpus cases the courts could and did reverse a board decision if it lacked substantial

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63. See *United States ex rel. Trainin v. Cain*, 144 F.2d 944, 948 (2d Cir. 1944), *cert. denied*, 323 U.S. 795 (1945).

64. See *Billings v. Truesdell*, 321 U.S. 542, 546-47 (1944).

65. See *Koch v. United States*, 150 F.2d 762 (4th Cir. 1945); *United States v. Rinko*, 147 F.2d 1 (7th Cir.), *cert. denied*, 325 U.S. 851 (1945); *United States v. Pitt*, 144 F.2d 169 (3d Cir. 1944). In part, this doctrine may have derived from a practice developed under the Selective Draft Act of 1917. Under that Act, there could be no criminal prosecutions in the civilian courts for refusal to accept induction, because as soon as an induction order was issued, the registrant was under military jurisdiction. See note 53 *supra*. In the 1940's, it may have been thought that the registrant challenging his induction should be subject to military jurisdiction while the challenge ran its course so that the military effort would not be compromised.

As a practical matter, the procedural differences between challenging an induction order by habeas corpus and by criminal defense are of enormous consequence to the registrant. If he refuses induction and is indicted, he remains a civilian, prosecuted in the civil courts. If he accepts induction and thereafter challenges the order that compelled it, he is within the jurisdiction of the military and subject to its orders. Thus, any inductee who subsequently challenges his induction order and fails to conform his conduct to military standards while his challenge is being adjudicated may be subject to court-martial. See *Estep v. United States*, 327 U.S. 114, 129-30 (1946) (Murphy, J., concurring); *Billings v. Truesdell*, 321 U.S. 542, 556 (1944); Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123, 2137 (1966).

66. For example, the court in *Fletcher v. United States*, 129 F.2d 262 (5th Cir. 1942), never considered the defendant's claim for exemption on the grounds that he was a Jehovah's Witness minister. He had pursued his claim through all available administrative channels and then had refused to submit to induction. At trial, the defendant offered to prove that he had not been given a fair hearing by his local board, but the evidence was ruled inadmissible. The Fifth Circuit affirmed the ensuing conviction. "The trial court was re-

evidence.<sup>67</sup>

The trend towards restricting judicial review in time as well as in scope reached its climax in *Falbo v. United States*.<sup>68</sup> In a prosecution for failure to report for alternative service,<sup>69</sup> the defendant argued that the local board's rejection of his claim for exemption as a minister was arbitrary, biased, and against the weight of the evidence. Although Falbo's claim would have been cognizable under the prevailing standards of review for habeas corpus applications,<sup>70</sup> the Court ruled, in effect, that the case was not ripe for judicial intervention. "The narrow question . . . presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process. We think it has not."<sup>71</sup> In further discussion, the Court made it clear that the defense was rejected because the defendant had not exhausted Selective Service System administrative steps remaining after issuance of the induction order.<sup>72</sup>

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quired to determine only whether the defendant, as a registrant, had been commanded by a lawful authority to report for induction, and had knowingly failed to do so." *Id.* at 263.

Two years later, the Fifth Circuit was even more emphatic about the unavailability of judicial review prior to actual induction. In *Biron v. Collins*, 145 F.2d 758 (5th Cir. 1944), the court explicitly ruled that the propriety of a registrant's classification could never be reviewed in the context of a defense to an indictment. *Id.* at 759.

67. See notes 54-60 & accompanying text *supra*.

68. 320 U.S. 549 (1944).

69. Registrants who claimed and were granted classification as conscientious objectors were required to perform two years of civilian service in lieu of induction. Selective Training and Service Act of 1940, ch. 720, § 5(g), 54 Stat. 885, 889 (expired 1945). Thus, for purposes of judicial review, an order to report for alternative civilian service was analogous to an order to report for induction. Falbo had filed as a conscientious objector and as a Jehovah's Witness minister. The former claim had been granted; the latter denied. 320 U.S. at 550-51.

70. See notes 54-60 & accompanying text *supra*.

71. 320 U.S. at 554.

72. These included a final physical examination or inspection by the military, which, if the registrant failed, rendered him unacceptable for military service and ineligible for induction, thus obviating the need for any judicial review of classification decisions. *Id.* at 553.

The Court also noted practical reasons for not interfering with the draft. The majority was concerned that excessive judicial intrusion might undercut the effort to obtain inductees, pointing out that, in Falbo's case, litigation had kept him in court until he had almost become ineligible because of his age. *Id.* at 555. The Court interpreted Congress' failure explicitly to authorize classification review in criminal proceedings as an expression of intent that there be none. *Id.* at 554-55.

Dissenting, Justice Murphy stated that the majority's opinion proved too much, precluding review by habeas corpus, which the Court's majority presumably intended to retain. *Id.* at 557. Justice Murphy also urged abandonment of the final order rule: "Criminal punishment for disobedience of an arbitrary and invalid order is objectionable regardless of whether the order be interlocutory or final." *Id.* at 558.

Thus, under *Falbo*, a registrant who sought to challenge his induction order by disobeying it, believing that in so doing he obtained judicial review of an unfavorable classification decision, merely ensured his conviction. A classification decision would not be reviewed unless the registrant reported for induction.

*Falbo* was the first Supreme Court decision directly addressing the availability of judicial review. The Court's disinclination to interfere with selective service processing<sup>73</sup> was immediately reflected in lower court refusals to allow prosecuted registrants to defend on the basis of improper classification.<sup>74</sup> At the end of the Second World War, therefore, registrants dissatisfied with their classifications faced a substantial obstacle to bringing their dissatisfaction to the courts' attention.<sup>75</sup> Judicial review could be obtained only through habeas corpus, not in defense to a criminal prosecution. A substantive hearing, once obtained, was narrowly limited in scope by decisions of the courts of appeals.<sup>76</sup> The result was a severe limitation on a registrant's ability to insist that the Selective Service System function in an impartial and reasonable

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73. *Id.* at 551-52, 554-55.

74. See, e.g., *Koch v. United States*, 150 F.2d 762 (4th Cir. 1945); *United States v. Rinko*, 147 F.2d 1 (7th Cir.), *cert. denied*, 325 U.S. 851 (1945); *United States v. Pitt*, 144 F.2d 169 (3d Cir. 1944). See generally *Sunal v. Large*, 332 U.S. 174 (1947); *Estep v. United States*, 327 U.S. 114, 138-39 (1946) (Murphy, J., concurring); *Fujii v. United States*, 148 F.2d 298 (10th Cir.), *cert. denied*, 325 U.S. 868 (1945); Connor & Clarke, *Judicial Investigation of Selective Service Action*, 19 TUL. L. REV. 344 (1945).

75. Since the beginning of the peacetime draft in 1948, both the deferment structure and the administrative procedural structure have remained essentially the same. Deferments have been made available to those whom the military considered mentally, physically, or morally unfit (1-Y and 4-F), students (1-S(C) and 2-S), those engaged in occupations essential to national welfare (2-A), those engaged in agriculture (2-C), and those whose induction would work an extreme hardship upon their dependents (3-A); exemptions or alternate forms of service were available to ministers (4-D) and conscientious objectors (1-A-O and 1-O). See 32 C.F.R. pt. 1622 (1970). Most of these classifications involved the draft board in discretionary determinations of the registrant's entitlement to the classification, such as whether the registrant had demonstrated extreme hardship (3-A), whether he was sincere in his professed beliefs (1-A-O and 1-O), or whether he was, in fact, engaged in an essential occupation (2-A). Regulations promulgated since the 1971 amendments have streamlined the classification structure to some extent by eliminating the 2-A, 2-C, and 1-S(C) deferments. See 32 C.F.R. pt. 1622 (1981). Granting or denying a deferment in part upon the draft board's subjective evaluation of the registrant's entitlement raised obvious possibilities of challenge, both in the administrative process and in the courts. For an excellent description of the Selective Service System administrative process, see Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123 (1966).

76. See, e.g., *Baxley v. United States*, 134 F.2d 998 (4th Cir. 1943) (dictum); *Rase v. United States*, 129 F.2d 204 (6th Cir. 1942); *Arbitman v. Woodside*, 258 F. 441 (4th Cir. 1919); *Angelus v. Sullivan*, 246 F. 54 (2d Cir. 1917); *United States ex rel. Ursitti v. Baird*, 39 F. Supp. 872 (E.D.N.Y. 1941).

manner.<sup>77</sup> Both this problem and the absence of a generally accepted standard of the scope of review were not addressed by the Supreme Court until after the draft ended.

## Post-War Review Under *Estep v. United States*

### The Basis-in-Fact Test

In 1946, the Court in *Estep v. United States*<sup>78</sup> first addressed the question of the scope of judicial review available to a Selective Service registrant challenging a classification action. The *Falbo* Court had clearly stated that the opportunity to challenge a local board decision would remain narrowly circumscribed, but had denied review on procedural grounds; thus, it did not address the permissible scope of judicial review of classifications.

In *Estep*, the Court explicitly attributed the result in *Falbo* to the defendant's failure to exhaust administrative remedies available to him with respect to his induction order.<sup>79</sup> Thus, by implication, the Court repudiated cases from the lower courts that had interpreted *Falbo* as precluding any judicial review in a criminal proceeding.<sup>80</sup> The *Estep* Court stated: "*Falbo* . . . does not preclude such a defense in the pres-

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77. *Falbo v. United States*, 320 U.S. 549, 560-61 (1944) (Murphy, J., dissenting).

78. 327 U.S. 114 (1946).

79. "In *Falbo v. United States* . . . [w]e found no provision for judicial review of a registrant's classification prior to the time when he had taken all the steps in the selective process and had been finally accepted by the armed services. The question in these cases is whether there may be judicial review of his classification in a prosecution under § 11 where he reported for induction, was finally accepted, but refused to submit to induction." *Id.* at 115-16 (1946). This statement of the issue should be contrasted with the statement in *Falbo*. See text accompanying note 71 *supra*. As the *Estep* Court portrayed *Falbo* as an exhaustion of administrative remedies case, its task in interpreting the finality language of § 10(a)(2) of the Selective Training and Service Act of 1940, ch. 720, § 10(a)(2), 54 Stat. 885, 893 (expired 1945), to permit review in some criminal proceedings was considerably easier. See note 53 *supra*.

Years later, the courts faced the question whether they could review Selective Service actions before issuance of an induction order. In general, they cannot. See *Clark v. Gabriel*, 393 U.S. 256 (1968). In a few unusual instances, however, pre-induction judicial review is permitted. See, e.g., *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233 (1968) (pre-induction judicial review allowed when entitlement to statutory deferment as a minister was plain, unequivocal, and uncontested, and registrant was punitively reclassified 1-A for reasons unrelated to his qualifications for deferment); *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817 (2d Cir. 1967) (pre-induction review allowed when students were reclassified as available for military service only because they participated in antiwar demonstrations). See generally *Fein v. Selective Serv. Sys. Local Bd. No. 7*, 405 U.S. 365 (1972); *Hunt v. Local Bd. No. 197*, 438 F.2d 1128 (3d Cir. 1971).

80. See, e.g., *Koch v. United States*, 150 F.2d 762 (4th Cir. 1945); *United States v. Rinko*, 147 F.2d 1 (7th Cir.), *cert. denied*, 325 U.S. 851 (1945); *United States v. Pitt*, 144 F.2d 169 (3d Cir. 1944).

ent cases. In the *Falbo* case the defendant challenged the order of his local board before he had exhausted his administrative remedies. Here these registrants had pursued their administrative remedies to the end. All had been done which could be done."<sup>81</sup> In *Falbo*, review was denied because the registrant failed to report for service and was not physically examined.<sup>82</sup> In *Estep*, the registrants had reported, had completed all steps of the administrative process, and had remaining only the symbolic step forward; the Court ruled that the administrative process had come to an end, and judicial review would be allowed.

Having decided that *Falbo* did not preclude review, the Court addressed section 10(a)(2) of the Selective Training and Service Act, which provided that in general "[t]he decisions of such local boards shall be final."<sup>83</sup> This section had been thought to preclude classification review by the courts in the criminal defense context,<sup>84</sup> but the Supreme Court, building on the theory of review from earlier, non-selective service habeas corpus cases,<sup>85</sup> seemed simultaneously to limit the statutory language and to allow an extensive classification review by the courts.

[A local board's] authority to hear and determine all questions of deferment or exemption is, as stated in § 10(a)(2), limited to action "within their respective jurisdictions." It is only orders "within their respective jurisdictions" that are made final. . . . By § 10(a)(2) the

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81. 327 U.S. at 123.

82. See note 72 & accompanying text *supra*.

83. Ch. 720, § 10(a)(2), 54 Stat. 885, 893 (expired 1945).

84. See, e.g., *Estep v. United States*, 327 U.S. 114, 138-41 (1946) (Frankfurter, J., concurring). Justice Frankfurter's argument may prove too much. It is difficult to interpret the language of § 10(a)(2) to exclude all judicial review in the criminal context and yet to permit it by way of habeas corpus. This is the problem Justice Murphy had pointed out in his dissent in *Falbo v. United States*, 320 U.S. 549 (1944). See note 72 *supra*. Yet to interpret the language so broadly would raise the specter of a conflict between § 10(a)(2) and the habeas corpus clause of the Constitution. U.S. CONST. art. 1, § 9, cl. 2. Apparently to avoid this conclusion, Justice Frankfurter cited a report of the House Committee on Military Affairs from January, 1945, that interpreted the Act to prohibit judicial review of classifications in the criminal forum while permitting it under habeas corpus. *Estep v. United States*, 327 U.S. 114, 140 (1946) (Frankfurter, J., concurring).

The *Estep* majority was aware of this possible problem as well, but declined to treat it as a constitutional conflict, implicitly construing the Act to permit habeas corpus review. The anomaly of refusing judicial review in the criminal proceeding struck the Court. "It has been assumed that habeas corpus is available only after a registrant has been inducted into the armed services. But if we now hold that a registrant could not defend at his trial on the ground that the local board had no jurisdiction in the premises, it would seem that the way would then be open to him to challenge the jurisdiction of the local board after conviction by *habeas corpus*. The court would then be sending men to jail today when it was apparent that they would have to be released tomorrow." *Id.* at 123-25 (footnotes omitted).

85. See note 56 & accompanying text *supra*.

local boards, in hearing and determining claims for deferment or exemption must act "under rules and regulations prescribed by the President." Those rules limit, as well as define, their jurisdiction. . . . [Action by a local board outside of those regulations] would be lawless and beyond its jurisdiction.<sup>86</sup>

The Court's analysis approved the limitation of review of selective service actions to questions of local board jurisdiction, apparently circumscribing the ambit of judicial review.<sup>87</sup> The Court defined the concept of jurisdiction broadly, however, giving courts the flexibility to review local draft board decisions. After *Estep*, any direct violation of selective service regulations would be subject to judicial review and, as *Estep* made clear, that review could be by habeas corpus after induction or by criminal defense after refusal of induction.

The Court next had to determine when, if ever, a discretionary decision was so unsupported that it warranted judicial intervention, and it held: "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."<sup>88</sup> By setting forth this standard, the Court underscored the narrowness of the intended review.<sup>89</sup> At the same time, it authorized a limited substantive review of classification decisions. Thus, a scope of review similar to that developed during the First World War in *Angelus v. Sullivan*<sup>90</sup> and *Arbitman v. Woodside*<sup>91</sup> was retained, although as a formal matter judicial inquiry was limited to the jurisdiction question.

Therefore, three drafts and eighty-three years after conscription first appeared in the United States, the Supreme Court finally decided the circumstances under which the courts would be permitted to adju-

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86. 327 U.S. at 120-21.

87. See notes 51-63 & accompanying text *supra*.

88. 327 U.S. at 122-23.

89. The Court noted that this standard of review is the same as that used in deportation cases. *Id.* at 123 n.14. The Court reviewed Congress' declaration that local board decisions were final. "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 made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous." *Id.* at 122.

The basis-in-fact issue is a question of law, not of fact. *United States v. Purvis*, 403 F.2d 555 (2d Cir. 1968); *Miller v. United States*, 169 F.2d 865 (6th Cir. 1948). The trial judge in a jury case, therefore, would charge the jury that a basis in fact exists or does not exist as a matter of law, leaving for the jury only the factual question whether the registrant failed to obey the order he was charged with violating. See, e.g., *United States v. Black*, 456 F.2d 1297 (9th Cir. 1972); *United States v. O'Bryan*, 450 F.2d 365 (6th Cir. 1971).

90. 246 F. 54 (2d Cir. 1917).

91. 258 F. 441 (4th Cir. 1919). See notes 54-60 & accompanying text *supra*.



dicating the government's claim upon an American's military service. The basis-in-fact test developed in *Estep* remains the standard applied in selective service cases<sup>92</sup> and in cases involving military refusals to grant a discharge.<sup>93</sup> The basis-in-fact test, however, has proved difficult to apply.<sup>94</sup> Basis in fact clearly was a limited standard of review;<sup>95</sup> it was criticized on the grounds that it would permit criminal convictions without substantial evidence to support them.<sup>96</sup> The basis-in-fact test's application in trials of selective service indictments however, remained unclear.

The Court reached this issue in *Dickinson v. United States*.<sup>97</sup> Dickinson had claimed exemption from service as a minister, but his claim was denied. He refused induction, and was convicted for his refusal. The Court declared that the reviewing court was required to search the registrant's record for some affirmative evidence to support the local board's denial of the exemption.<sup>98</sup> At the same time, the Court explicitly rejected any broader standard of review, such as a "substantial evidence" test.<sup>99</sup> In Dickinson's case, however, there was no evidence in the file countering his claim for deferment; apparently the local board simply had not believed him, and the lower courts had endorsed its decision. The Supreme Court overturned the conviction. "[W]hen the

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92. The *Estep* standard was incorporated into the selective service statute in 1967. Military Selective Service Act of 1967, Pub. L. No. 90-40, § 1(8), 81 Stat. 100, 104 (codified at 50 U.S.C. app. § 460(b)(3) (1976)).

93. The standard of judicial review of military decisions denying discharge of members of the armed forces has been taken from *Estep*. Cases arising under the selective service law and other military laws often are used interchangeably as precedents. See, e.g., *United States ex rel. Checkman v. Laird*, 469 F.2d 773 (2d Cir. 1972); *Helwick v. Laird*, 438 F.2d 959 (5th Cir. 1971); *United States ex rel. Donham v. Resor*, 436 F.2d 751 (2d Cir. 1971).

94. See, e.g., *Barker v. Laird*, No. 1276-70, slip op. at 12 (D.N.J. Jan. 8, 1971).

95. One court later characterized it as "the narrowest known to law." *Blalock v. United States*, 247 F.2d 615, 619 (4th Cir. 1957); accord *United States v. Stetter*, 445 F.2d 472, 483 (5th Cir. 1971); *Clay v. United States*, 397 F.2d 901, 915 (5th Cir. 1968), vacated on other grounds, 394 U.S. 310 (1969).

The Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-59, 701-06 (1976 & Supp. III 1979)), was adopted in the same year that *Estep* was decided. The Act provided numerous bases for review of administrative decisions, including the "substantial evidence" test, all of them broader than the *Estep* basis-in-fact standard. Selective service acts, however, have consistently exempted the Selective Service System from the Administrative Procedure Act. E.g., Selective Service Act of 1947, ch. 625, § 13(b), 62 Stat. 604, 623 (current version at 50 U.S.C. app. § 463(b) (1976)); see *United States v. Andrews*, 446 F.2d 1086 (10th Cir. 1971); *Paszal v. Laird*, 426 F.2d 1169 (2d Cir. 1970).

96. *Cox v. United States*, 332 U.S. 442, 458 (1947) (Murphy, J., dissenting).

97. 346 U.S. 389 (1953).

98. *Id.* at 396.

99. *Id.*

uncontroverted evidence supporting a registrant's claim places him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice."<sup>100</sup> Although the Court did not cite *Arbitman v. Woodside*,<sup>101</sup> its refusal to endorse the local board's decisions reflected the reasoning of *Arbitman* that such a classification action was an abuse of discretion.<sup>102</sup>

The *Dickinson* decision laid the foundation for a conflict that did not ripen for fifteen years: the obligation of the courts to limit their review of local board decisions versus the obligation of the local board to make clear the reasons for its decision. Justice Jackson dissented in *Dickinson*, stating that the practical effect of the Court's decision was to place upon the local boards a burden to build a record, contrary to *Estep* and the spirit of the Act.<sup>103</sup> Despite Justice Jackson's expressed concern, lower courts did not interpret *Dickinson* as imposing such a burden on the local boards.

*Dickinson* exemplified one of the difficulties of the basis-in-fact test enunciated in *Estep*: the problem of the silent record.<sup>104</sup> Two years after *Dickinson*, in *Witmer v. United States*,<sup>105</sup> the Court warned that "it is not for the courts to sit as super draft boards, substituting their

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100. *Id.* at 397. This language and the rationale underlying it are important in part because the Court made no effort to cast its decision in the familiar vocabulary of lack of jurisdiction of the local board. *Dickinson* was not always followed on this point by the lower courts. See *United States v. Washington*, 392 F.2d 37 (6th Cir. 1968) (suggesting local board's mere statement of disbelief of registrant's sincerity would suffice to satisfy the *Estep* basis-in-fact test). Other courts, however, have stated that "to sustain the denial of a claim on a mere *ipse dixit* of lack of sincerity . . . would create serious possibilities of abuse." *United States v. Corliss*, 280 F.2d 808, 814 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960); see also *Capobianco v. Laird*, 424 F.2d 1304 (2d Cir. 1970), *vacated*, 402 U.S. 969 (1971); *Kessler v. United States*, 406 F.2d 151 (5th Cir. 1969). Stated more affirmatively, "[i]t seems quite evident that mere disbelief is not enough, and that there must be some affirmative evidence to support the rejection of the claimed exemption, or something in the record which substantially blurs the picture painted by the registrant and casts doubt on his sincerity or the genuineness of his claim." *Batterton v. United States*, 260 F.2d 233, 237 (8th Cir. 1958).

101. 258 F. 441 (4th Cir. 1919).

102. See notes 57-59 & accompanying text *supra*.

103. *Dickinson v. United States*, 346 U.S. 389, 399-400 (1953) (Jackson, J., dissenting, joined by Burton, J. & Minton, J.). The dissent also recognized, but did not attempt to solve, the problem inherent in its approach. "The board, through silence, makes the registrant's task of proving lack of jurisdiction next to impossible." *Id.* at 400.

104. This aspect of the problem arose regularly in basis-in-fact cases, as the courts struggled with the burden of evaluating opaque local board decisions. See, e.g., *Rosengart v. Laird*, 449 F.2d 523 (2d Cir. 1971), *vacated*, 405 U.S. 908 (1972); *Keefer v. United States*, 313 F.2d 773 (9th Cir. 1963); *Batterton v. United States*, 260 F.2d 233 (8th Cir. 1958).

105. 348 U.S. 375 (1955).

judgments on the weight of the evidence for those of the designated agencies."<sup>106</sup> Furthermore, the Court reaffirmed its adherence to the *Estep* basis-in-fact standard, admonishing the lower courts to eschew any search for substantial evidence.<sup>107</sup>

The silent record problem arose because local selective service boards, as in *Dickinson* and *Witmer*, rarely stated reasons for their actions. In *Owens v. United States*,<sup>108</sup> the Tenth Circuit described the process used by the courts when faced with a silent record: "[W]here, as here, the Board discloses no reasons for the challenged classification . . . we will assume the Board relied upon whatever factual basis is reflected in the record, if any."<sup>109</sup> The *Owens* court thus suggested that courts would undertake a broad inquiry in attempting to locate any basis for upholding a selective service decision, and at the same time approved the narrow scope of review prescribed by *Dickinson*.

The technique of review described by the Tenth Circuit, however, did not resolve the problem, and invited the judiciary to endorse local board decisions blindly. For example, in *United States v. Stetter*,<sup>110</sup> the registrant had presented a prima facie claim for conscientious objector status, and his file contained no conflicting evidence. The local board stated no reasons for denying the claim. Reversing the district court's conviction, the Fifth Circuit rejected the government's suggestion that it search for any basis in fact to support the board's decision.

If the objective facts found in the record do not lead us to the factual basis, as they do not, the Government asserts that we may assume that intangible factors such a [sic] demeanor form such a basis. But how can we as a reviewing court know that the Board relied on such submicroscopic data if we are not so informed? We are not endowed with extrasensory perception. It is like playing the philosopher's game of looking into a dark room for a black cat that is not there. We refuse to play such a game.<sup>111</sup>

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106. *Id.* at 380-81. This theme would be repeated by lower courts. *See, e.g.*, *Kessler v. United States*, 406 F.2d 151, 156 (5th Cir. 1969); *Riles v. United States*, 223 F.2d 786, 788 (5th Cir. 1955); *United States v. Ruppell*, 278 F. Supp. 287, 289-90 (E.D.N.Y. 1968).

107. *Witmer v. United States*, 348 U.S. at 381 (citing *Dickinson v. United States*, 346 U.S. 389, 396 (1953)).

Although the local board had remained silent about its reasons for denying the claim, the *Witmer* Court found in the file enough conflicting evidence to conclude that the local board had had a basis in fact for doubting the registrant's sincerity. 348 U.S. at 382-83.

108. 396 F.2d 540 (10th Cir.), *cert. denied*, 393 U.S. 934 (1968).

109. *Id.* at 542-43.

110. 445 F.2d 472 (5th Cir. 1971).

111. *Id.* at 482. As a practical matter, the government's argument would require that all Selective Service defendants be convicted except when the local board failed to follow required procedures or affirmatively stated illegal reasons for its decisions. Silence would then become the best procedure for any local board, and judicial review would, as one court put

Thus, as in *Dickinson*, the *Stetter* court refused to assume an unstated basis for the board's decision and refused to permit a local board to reject a claim without evidence of its insufficiency.<sup>112</sup>

### The Problem of Erroneous Bases for Decisions

Local boards sometimes did state reasons for their decisions. Occasionally, reasons deficient in law or fact were commingled with valid reasons for the local board's decision. The first case of this type to reach the Supreme Court was *Sicurella v. United States*,<sup>113</sup> decided in 1955, in which Sicurella, a Jehovah's Witness, had been refused classification as a conscientious objector. In his application, he declared himself a soldier "in the Army of Christ."<sup>114</sup> The defendant's claim had been investigated by the Department of Justice,<sup>115</sup> which recommended denial of the deferment on the ground that Sicurella was not, as required by the statute, "opposed to participation in war in any form."<sup>116</sup> The appeal board denied the claim, and upon Sicurella's refusal to submit to induction, he was indicted and convicted.

The Supreme Court overturned the conviction, holding that the Department of Justice erred when it stated that Sicurella's willingness to participate in a theocratic war disqualified him under the statute.<sup>117</sup> The Court noted the possibility that the record contained some proper

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it, "be a meaningless exercise." *Barker v. Laird*, No. 1276-70, slip op. at 12 (D.N.J. Jan. 8, 1971).

112. The *Stetter* court ruled that local boards and appeal boards would be required to state reasons for rejecting prima facie claims for conscientious objector status. 445 F.2d at 483. See notes 126-72 & accompanying text *infra*.

113. 348 U.S. 385 (1955).

114. *Id.* at 386.

115. Under the Selective Service Act of 1948, ch. 625, § 6(j), 62 Stat. 604, 613 (current version at 50 U.S.C. app. § 456(j) (1976)), claims for conscientious objector status were, after decision by the local board, referred by the appeal board to the Department of Justice for investigation and hearing. The Department would then make a recommendation to the appeal board to assist that board's decision. This provision was deleted from § 6(j) in 1967. Military Selective Service Act of 1967, Pub. L. 90-40, § 1(7), 81 Stat. 100, 104.

116. 50 U.S.C. app. § 456(j) (1976). This statutory language consistently was interpreted by the courts to preclude selective conscientious objection, that is, opposition to particular wars but not to all. See, e.g., *Gillette v. United States*, 401 U.S. 437 (1971).

117. The Court found the error of law arising in the Selective Service System's misinterpretation of congressional intent in enacting the conscientious objector exemption. "[A]lthough the Jehovah's Witnesses may fight in the Armageddon, we are not able to stretch our imagination to the point of believing that the yardstick of the Congress includes within its measure such spiritual wars between the powers of good and evil where the Jehovah's Witnesses, if they participate, will do so without carnal weapons. We believe that Congress had in mind real shooting wars when it referred to participation in war in any form—actual military conflicts between nations of the earth in our time—wars with bombs and bullets, tanks, planes and rockets. We believe the reasoning of the Government in de-

basis in fact to support the decision, but held that "where it is impossible to determine on exactly which grounds the Appeal Board decided, the integrity of the Selective Service System demands, at least that the Government not recommend illegal grounds."<sup>118</sup> Thus, the Court incorporated into selective service law a principle long recognized in criminal law: a conviction based upon some valid and some invalid grounds cannot be allowed to stand.<sup>119</sup>

Many cases following *Sicurella* also espoused this principle,<sup>120</sup> with the result that the application of the basis-in-fact test changed. *Sicurella* restricted the court's role in reviewing classification actions. If reasons were stated by the board, the reviewing court could no longer search the record for a basis in fact, as in *Dickinson v. United States*,<sup>121</sup> but was instead limited to that part of the record relied upon by the board. The review was more critical of local board actions, however, because it was more difficult for local boards to state correct reasons than to remain silent and permit the court to find some supporting rationale.<sup>122</sup>

Thus, although basis in fact remained the test of validity of local board classification decisions, its significance changed after *Sicurella*.

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nying petitioner's claim is so far removed from any possible congressional intent that it is erroneous as a matter of law." 348 U.S. at 391.

118. *Id.* at 392.

119. See, e.g., *Stromberg v. California*, 283 U.S. 359 (1931), in which a general jury verdict of guilty followed instructions that there were three possible grounds to support conviction. One of the bases tendered by the trial court to the jury was unconstitutional. The Supreme Court overturned the conviction. "[I]f any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld." *Id.* at 368.

Deciding *Clay v. United States*, 403 U.S. 698 (1971), the Supreme Court traced application of the principle in selective service law to the decision in *United States ex rel. Levy v. Cain*, 149 F.2d 338 (2d Cir. 1945), and noted also its appearance in *Ypparila v. United States*, 219 F.2d 465 (10th Cir. 1954). See *Clay v. United States*, 403 U.S. at 705. *Sicurella*, however, marks the beginning of the principle's general acceptance in this area of law.

120. See, e.g., *United States v. Callison*, 433 F.2d 1024 (9th Cir.), *vacated*, 399 U.S. 526 (1970); *United States v. French*, 429 F.2d 391 (9th Cir. 1970); *United States v. Purvis*, 403 F.2d 555 (2d Cir. 1968); *Hammond v. Lenfest*, 398 F.2d 705 (2d Cir. 1968). The court in *Owens v. United States*, 396 F.2d 540 (10th Cir.), *cert. denied*, 393 U.S. 934 (1968), observed: "If the Board states reasons for its action . . . and these reasons are found to be legally insufficient to support the Board's classification, the classification should be found to be without a basis in fact. This is true even if an independent search of the record discloses an adequate basis in fact to support the action of the Board, for there would be the risk that the impropriety of the stated reasons tainted the Board's decision." *Id.* at 542-43.

121. 346 U.S. 389 (1953). See note 98 & accompanying text *supra*.

122. This anomaly was suggested by the court in *Hammond v. Lenfest*, 398 F.2d 705, 716 (2d Cir. 1968): "[The] decision was not grounded in considerations of military need and the question before us is the validity of the decision actually rendered, not of a decision that might have been on other facts."

The *Sicurella* rule compelled a finding of no basis in fact whenever the record included erroneous reasons for the board's decision, although other and proper bases might exist in the record. The basis-in-fact test had evolved to require that the record contain at least no improper bases.

Use of the *Sicurella* rule also suggested another problem with applying only the basis-in-fact test: application of the test could allow a court to affirm board decisions based on unstated illegal grounds. If due process was offended by the endorsement of selective service decisions based upon illegal grounds stated by the local board,<sup>123</sup> it would also be offended by the endorsement of decisions founded upon illegal grounds that remained unstated. Awareness of this anomaly caused the courts,<sup>124</sup> and then Congress,<sup>125</sup> to require the Selective Service System to give reasons for its classification actions.

### The Age of Reasons

As the war in Viet Nam escalated, with corresponding increases in draft calls,<sup>126</sup> dissatisfaction with the Selective Service System's operations grew.<sup>127</sup> In part, the rising tide of selective service prosecutions may have helped focus the courts' attention on the problems engendered by the basis-in-fact test.<sup>128</sup> Beginning in 1969, a series of cases was decided that substantially altered this test by requiring local boards to state reasons for their classification decisions.

The first of these, a Ninth Circuit decision, focused on the diffi-

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123. See *Clay v. United States*, 403 U.S. 698 (1971). See note 119 & accompanying text *supra*.

124. See notes 129-44 & accompanying text *infra*.

125. See notes 159-61 & accompanying text *infra*.

126. See, e.g., *302,000 Men Face Draft During 1968, a 72,000 Increase*, N.Y. Times, Jan. 20, 1968, at 3, col. 6.

127. One judge, concluding a case in which he found that the local board had acted arbitrarily, reflected the public's deteriorating confidence in the System. "The draft board's overzealous, highhanded and erroneous handling of this young man's plight hardly inspires confidence in the system. . . . At the very least, those entrusted with the awful power of conscripting the nation's young men into the armed forces in time of war or other military venture owe a duty of the most searching examination of the facts, scrupulous fairness, sensitive care, compassionate hearing, patient consideration, cautious action and deliberate and rational decision within the law. We afford no less to the worst criminal in our society." *Walsh v. Local Bd. No. 10*, 305 F. Supp. 1274, 1279 (S.D.N.Y. 1969).

128. In fiscal 1965, the year of the Tonkin Gulf Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964), repealed by Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055 (1971), there were 341 Selective Service prosecutions. By 1968, there were 1,192, followed in 1970 by 2,833 and in 1972 by 4,906. [July-December 1972] SELECTIVE SERVICE SYSTEM, SEMIANNUAL REPORT OF THE DIRECTOR OF SELECTIVE SERVICE 46.

culty presented by records without reasons. In *United States v. Haughton*,<sup>129</sup> the registrant's claim of conscientious objector status was denied. On appeal following his conviction for refusal to submit to induction, the court rejected Haughton's argument that *Dickinson v. United States*<sup>130</sup> required the local board to build a record supporting its denial.<sup>131</sup> Nevertheless, the court refused to endorse denial of a *prima facie* claim absent a statement of reasons. Without such reasons, "a court cannot determine whether a board's denial of a requested classification was based on a belief that the registrant's statements, even if true, did not entitle him to the classification, or on the reasonable disbelief of certain allegations necessary to the registrant's *prima facie* case."<sup>132</sup> The Ninth Circuit thus brought into focus the key area of conflict between the *Estep* basis-in-fact test and the *Sicurella* line of cases. Particularly in conscientious objector cases, in which the critical issue frequently was the registrant's sincerity in making the claim,<sup>133</sup> the courts were unwilling to infer from a silent record that the local board had properly evaluated an application and rejected it for legitimate reasons. Thus, the *Dickinson* approach of searching the record to locate a legitimate reason for the local board's decision, thereby satisfying the basis-in-fact test, was abandoned. The courts had become aware of the test's substantial problems.<sup>134</sup>

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129. 413 F.2d 736 (9th Cir. 1969).

130. 346 U.S. 389 (1953). See notes 97-103 & accompanying text *supra*.

131. 413 F.2d at 738.

132. *Id.* at 739 (citing *United States v. Jakobson*, 325 F.2d 409 (2d Cir. 1963), *aff'd sub nom.* *United States v. Seeger*, 380 U.S. 163 (1965)). The Ninth Circuit had rejected this rule in *Parrott v. United States*, 370 F.2d 388 (9th Cir. 1966), *cert. denied*, 387 U.S. 908 (1967). *Haughton* implicitly overruled *Parrott*.

133. See, e.g., *Witmer v. United States*, 348 U.S. 375, 381-82 (1955) (upholding denial of conscientious objector status based on examination of facts before the board).

134. In another sense, the *Dickinson* approach temporarily remained intact. If a registrant's *prima facie* claim for conscientious objector status was denied by a local board because it perceived the registrant as being insincere, a search of the record would reveal no basis in fact absent a statement from the local board. The Sixth Circuit had recognized this in *United States v. Washington*, 392 F.2d 37 (6th Cir. 1968). *Washington* recognized a distinction between *Dickinson* and the typical conscientious objector case in that *Dickinson*'s claim was for a ministerial exemption, "the validity of which depended on proof of certain objective facts with regard to the registrant's religious activities." *Id.* at 39. Conscientious objector cases, by contrast, involve an entirely subjective component: whether the local board believes the registrant is sincere. See *Witmer v. United States*, 348 U.S. 375, 381-82 (1955). The *Washington* court thus distinguished *Dickinson*: "Hence, in cases where the claimed classification depends on objective facts, mere disbelief by the selective service authorities will not provide a basis in fact for granting a different classification. Where, however, the veracity of the registrant is the principal issue, disbelief will suffice. But even in the latter situation, the record must contain some statement of this disbelief if the classification is to be upheld upon judicial review." *United States v. Washington*, 392 F.2d at 39. There-

Other circuits also confronted the problems raised by a denial of conscientious objector claims. In *United States v. James*,<sup>135</sup> the Fourth Circuit attempted both to remain faithful to *Estep*'s command that judicial review be narrowly circumscribed and, following *Sicurella*, to require that no unlawful reasons for the board's decision appear in the record. It held, therefore, that if a draft board rejected a conscientious objector claim because the board did not believe the registrant, that disbelief must be stated in the record.<sup>136</sup> The court explained its concern:

[W]e would be reluctant to sanction a decision of a local board when, from the record, we can only speculate that there *may* have been a basis in fact for the decision. . . . Where the local board's conclusion may be explainable upon alternate grounds, both legally acceptable and unacceptable, the risk is too great that we would place an imprimatur upon an insupportable basis of decision if we were to accept the government's contention.<sup>137</sup>

Thus, the *James* court implicitly established a requirement that the local board state reasons for its disbelief.<sup>138</sup>

The Fourth Circuit reconsidered the issues raised in *James* only a year later in *United States v. Broyles*,<sup>139</sup> which also concerned a prima facie conscientious objector claim denied without a statement of reasons.<sup>140</sup> Noting *James*'s requirement that the local board state its finding of insincerity,<sup>141</sup> the court expanded that principle to require a statement of reasons in all conscientious objector cases:

In any case where the board fails to disclose the basis for its decision, we risk blind endorsement of a mistake of law. Where it is clear that a *prima facie* case was established, we conclude that in conscientious objector cases, it is essential to the validity of an order to report [for induction] that the board state its basis of decision and the reasons therefor, i.e., whether it has found the registrant incredible, or insincere, or of bad faith, and why.<sup>142</sup>

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fore, *Dickinson*'s search-the-record approach would continue to be used, as long as the local board stated its disbelief.

135. 417 F.2d 826 (4th Cir. 1969). The facts of *James* are, in relevant part, identical to those in *Haughton*. The registrant's conscientious objector claim was denied by the Selective Service System. No reasons for the denial were stated at any level. *James* refused induction and was convicted.

136. *Id.* at 831; accord *United States v. Washington*, 392 F.2d 37 (6th Cir. 1968).

137. 417 F.2d at 831-32 (emphasis in original).

138. "[I]t is *not* sufficient that the board merely state its disbelief in a registrant's sincerity, . . . [T]here must be a 'rational basis' for the refusal of the Board to accept the validity of a registrant's religious claims." *Id.* at 832 (emphasis in original).

139. 423 F.2d 1299 (4th Cir. 1970) (en banc).

140. *Id.* at 1300-02.

141. *Id.* at 1303.

142. *Id.* at 1304. In reaching its decision, the court reviewed briefly an effort made dur-



After *Broyles*, therefore, the Fourth Circuit required the Selective Service System to state its reasons for denying any prima facie conscientious objector claim.<sup>143</sup>

The decisions in the Fourth and Ninth Circuits quickly found support in other circuits.<sup>144</sup> Recognizing that they could not properly review conscientious objector cases, in which there was a substantial subjective element,<sup>145</sup> without knowing why the local board had acted, the courts declined to undertake the search of the record commended to them in *Dickinson*. Their insistence that local boards present reasons broadened the originally narrow scope of judicial review articulated in *Estep*. By insisting that local boards explain their actions, however, the courts did attempt to follow *Witmer v. United States*,<sup>146</sup> in which the Supreme Court warned against reviewing courts acting as super draft boards.<sup>147</sup> Therefore, it is at least arguable that the evolution of the

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ing the 1967 revision of the selective service laws to require local boards to state reasons in conscientious objector cases. The court noted that the effort failed, but declined to find in Congress' refusal an intent that there be no reasons stated. The majority suggested that Congress might have presumed reasons to be necessary so that judicial review procedures were not "empty gestures." *Id.* at 1306. *Broyles* is, however, the only case to suggest this view of Congress' failure to act. Moreover, Congress' subsequent adoption of 50 U.S.C. app. § 471a(b)(4) (1976), see notes 159-61 & accompanying text *infra*, suggests that it made no such presumption.

143. Dissenting in *Broyles*, Judge Bryan argued that reasons should not be required and should not be considered in the court's review. Instead, he contended that *Witmer v. United States*, 348 U.S. 375 (1955), compelled the conclusion that a reviewing court was required to search the entire record for a basis in fact. *United States v. Broyles*, 423 F.2d at 1310 (Bryan, J., dissenting). The holding of the majority, he feared, would cast too great a burden upon local boards and would interfere with the efficient functioning of the Selective Service System. *Id.* at 1310-11. Judge Bryan failed to explain, however, how the reviewing court could both search the record and also remain faithful to *Sicurella v. United States*, 348 U.S. 385 (1955), in any case in which reasons were stated. See notes 113-22 & accompanying text *supra*. Judge Bryan had also dissented in *United States v. James*, 417 F.2d 826, 832 (4th Cir. 1969).

144. See, e.g., *McAliley v. Birdsong*, 451 F.2d 1244 (6th Cir. 1971); *United States v. O'Bryan*, 450 F.2d 365 (6th Cir. 1971); *United States v. Edwards*, 450 F.2d 49 (1st Cir. 1971); *United States v. Andrews*, 446 F.2d 1086 (10th Cir. 1971); *United States v. Stetter*, 445 F.2d 472 (5th Cir. 1971); *United States v. Speicher*, 439 F.2d 104 (3d Cir. 1971); *United States v. Lenhard*, 437 F.2d 936 (2d Cir. 1970); *Scott v. Commanding Officer*, 431 F.2d 1132 (3d Cir. 1970); *United States v. Lemmens*, 430 F.2d 619 (7th Cir. 1970); *Caverly v. United States*, 429 F.2d 92 (8th Cir. 1970); *Paszal v. Laird*, 426 F.2d 1169 (2d Cir. 1970); *United States v. Abbott*, 425 F.2d 910 (8th Cir. 1970); *Capobianco v. Laird*, 424 F.2d 1304 (2d Cir. 1970), *vacated*, 402 U.S. 969 (1971).

145. Compare *Witmer v. United States*, 348 U.S. 375 (1955) (upholding denial of conscientious objector status when record showed registrant's inconsistent statements) with *Dickinson v. United States*, 346 U.S. 389 (1953) (reversing denial of status when refusal of legitimately claimed exemption was based on mere suspicion and speculation).

146. 348 U.S. 375 (1955).

147. *Id.* at 380-81. See notes 105-06 & accompanying text *supra*.

statement-of-reasons rule in conscientious objector cases reflects continued adherence by the courts to their limited scope of review.<sup>148</sup> It is difficult to see how the *Sicurella* rule could be observed and applied by reviewing courts confronted by silent records.

The early cases concerning statements of reasons all addressed conscientious objector claims.<sup>149</sup> No logical reason, however, required the statement-of-reasons rule to be limited to this type of deferment. The statement of reasons that the courts required to facilitate judicial review<sup>150</sup> would assist evaluation of any challenged classification decision.

The first case to consider the possibility of expanding the rule was *United States ex rel. Bent v. Laird*,<sup>151</sup> in which the registrant had presented a compelling argument for a hardship deferment.<sup>152</sup> After the initial rejection of his classification, Bent wrote to the local board, requesting its reasons for rejecting his claim.<sup>153</sup> The board stated no reasons, but forwarded his file to the appeal board, which silently affirmed the denial of the claim. Bent subsequently was inducted and petitioned for a writ of habeas corpus.<sup>154</sup> The court, reflecting the earlier cases' difficulty in dealing with opaque records, recited some of the possible underpinnings of the local board's decision, which, had they been stated, would have invalidated the induction order.<sup>155</sup> The Third Circuit recognized that "[v]ery possibly the reasons for that decision were entirely proper and would be sustained if we knew them."<sup>156</sup> On

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148. See *United States v. Andrews*, 446 F.2d 1086, 1088 (10th Cir. 1971).

149. See cases cited in note 144 *supra*.

150. See, e.g., *Scott v. Commanding Officer*, 431 F.2d 1132, 1137 (3d Cir. 1970).

151. 453 F.2d 625 (3d Cir. 1971).

152. *Id.* at 632. Registrants who could demonstrate extreme hardship to dependents in the event of induction were entitled to be deferred in class 3-A. See 50 U.S.C. app. § 456(h) (1976); 32 C.F.R. § 1622.30 (1970).

153. 453 F.2d at 628-29.

154. *Id.* at 629-30. The case was more complicated procedurally. Bent was ordered for induction, but refused to submit. He was indicted, but thereafter agreed to submit to induction in exchange for the government's *nolle prosequi* of the indictment. Upon his induction, the indictment was withdrawn, and Bent challenged the local board's classification action by habeas corpus. *Id.* at 630.

In the district court, the government argued that Bent was estopped to bring the writ because of his agreement to submit to induction. Although the district court concurred, denying the petition, *id.* at 626-27, the court of appeals did not. "The only thing the United States Attorney asked in exchange for disposing of the criminal matter was that Bent now comply with the order to submit to induction. He was not asked and did not agree to give up the right to seek judicial review of his classification by post induction habeas corpus." *Id.* at 630. Thus, the court allowed consideration of Bent's claim on the merits.

155. *Id.* at 632.

156. *Id.*

the record presented on review, however, the court reversed the denial of the claim, extending the statement-of-reasons rule beyond conscientious objector cases.<sup>157</sup> Thus, the court explicitly extended the statement-of-reasons rule to cases in which the registrant was astute enough to request them<sup>158</sup> and implicitly extended the rule to all other deferment requests.

The *Bent* court based its decision in part upon Congress' 1971 amendments of the Military Selective Service Act.<sup>159</sup> After much debate, Congress added to the statute a section on procedural rights,<sup>160</sup> one of which was what Bent had requested of the court: "In the event of a decision adverse to the claims of the registrant, the local or appeal board making such decision shall, upon request, furnish to such registrant a brief written statement of the reasons for its decision."<sup>161</sup> Although the statute was enacted too late to control the decision in *Bent*, its passage assured the Third Circuit that expanding its rule requiring statements of reasons would not be seen as an undue burden on the Selective Service System.<sup>162</sup>

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157. "Because a statement of reasons is as essential for meaningful administrative and judicial review of the rejection of a hardship claim as for the rejection of a conscientious objector claim, because that requirement is no more onerous with respect to a hardship claim than with respect to a conscientious objector claim, and because Congress has concurred in the judgment of many courts that a statement of reasons is an appropriate procedural right, we hold that at least in cases where after a hardship claim is rejected the registrant has requested reasons, the failure to furnish some statement of reasons invalidates the order to report for induction." *Id.* at 634.

In *Scott v. Commanding Officer*, 431 F.2d 1132 (3d Cir. 1970), the Third Circuit had adopted the statement-of-reasons rule for conscientious objector cases.

158. 453 F.2d at 634.

159. Act of Sept. 28, 1971, Pub. L. No. 92-129, tit. I, 85 Stat. 348 (codified at 50 U.S.C. app. §§ 451-473 (1976)).

160. 50 U.S.C. app. § 471a (1976).

161. *Id.* § 471a(b)(4). This provision was the subject of considerable congressional debate. Those favoring the provision had originally proposed a version that would have required reasons to be furnished whether or not the registrant asked for them. Their arguments reflected an awareness of the courts' views, see notes 170-71 & accompanying text *infra*, that neither an effective administrative appeal nor significant judicial review could be had without a statement of reasons. See, e.g., 117 CONG. REC. 20,505 (1971) (remarks of Sen. Kennedy). This version failed to pass, however, and was replaced by § 471a(b)(4), requiring registrants to ask for a statement of reasons if they wanted one. Speaking in support of that section, Senator Kennedy remarked that "the Selective Service System as it exists today denies fundamental rights of due process, rights traditionally protected by both the fifth and fourteenth amendments of the Constitution." 117 CONG. REC. 21,954 (1971).

Those opposed to the provision argued that it would make the Selective Service process too adversarial and would impede the System's functioning. See, e.g., *id.* at 21,955 (remarks of Sen. Ervin). Whether either of these reasons should be regarded as sufficient is discussed at notes 195-96 & accompanying text *infra*.

162. See 453 F.2d at 633.

Thus, twenty-five years after *Estep*, the scope of judicial review of selective service classifications seemed to be defined. The principles of fairness underlying *Sicurella v. United States*,<sup>163</sup> *United States v. James*,<sup>164</sup> and *United States ex rel. Bent v. Laird*<sup>165</sup> appeared to have weighed more heavily than the more ephemeral considerations of non-interference with the Selective Service System and the military reflected in *Falbo v. United States*,<sup>166</sup> *Estep v. United States*,<sup>167</sup> and *Dickinson v. United States*.<sup>168</sup> The emergence of the statement-of-reasons rule was the necessary product of the synthesis of the *Estep* and *Sicurella* doctrines, because the courts could not know whether a local board had a proper basis in fact for its decision when the basis was not stated. Yet the resolution of the conflict begun in *Dickinson*<sup>169</sup> is based only upon practical considerations of facilitating administrative<sup>170</sup> and judicial review.<sup>171</sup> Moreover, because Congress enacted the statement-of-reasons rule,<sup>172</sup> the rule is subject to repeal by subsequent legislation. Finally, the benefit of the statute is limited to registrants sophisticated enough to invoke it by requesting a statement of reasons. A more enduring foundation for this rule thus is necessary.

### Due Process Review of Classification Decisions

The cases that created the statement-of-reasons rule as an adjunct to the basis-in-fact test did not clearly set forth the rule's justification. Some courts, such as the Ninth Circuit in *United States v. Haughton*,<sup>173</sup> noted that registrants claiming conscientious objector status articulated their claims in different ways and required statements of reasons to facilitate proper judicial review.<sup>174</sup> Other courts stated that the rule was

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163. 348 U.S. 385 (1955).

164. 417 F.2d 826 (4th Cir. 1969).

165. 453 F.2d 625 (3d Cir. 1971).

166. 320 U.S. 549 (1944).

167. 327 U.S. 114 (1946).

168. 346 U.S. 389 (1953).

169. See text accompanying notes 97-103 *supra*.

170. See, e.g., *Gonzales v. United States*, 348 U.S. 407, 415 (1955); *United States v. Edwards*, 450 F.2d 49 (1st Cir. 1971); *United States v. Speicher*, 439 F.2d 104 (3d Cir. 1971).

171. See *United States ex rel. Bent v. Laird*, 453 F.2d 625, 632 (3d Cir. 1971); *United States v. Deere*, 428 F.2d 1119 (2d Cir. 1970); *United States v. Haughton*, 413 F.2d 736 (9th Cir. 1969).

172. 50 U.S.C. app. § 471a(b)(4) (1976).

173. 413 F.2d 736 (9th Cir. 1969).

174. *Id.* at 742; accord *Joseph v. United States*, 405 U.S. 1006 (1972) (Douglas, J., dissenting); *United States v. O'Bryan*, 450 F.2d 365, 371 (6th Cir. 1971); *United States v. Andrews*, 446 F.2d 1086, 1088 (10th Cir. 1971); *United States v. Stetter*, 445 F.2d 472, 482-83 (5th Cir. 1971); *Scott v. Commanding Officer*, 431 F.2d 1132, 1137 (3d Cir. 1970).

necessary to ensure meaningful appellate review within the administrative process of the Selective Service System.<sup>175</sup> Other courts did not address the question.<sup>176</sup>

The court in *United States v. Abbott*<sup>177</sup> gave a different explanation: "Fundamental due process requires that the defendant be entitled to either know or be able to infer from the file itself the basis for the rejection of a conscientious objector claim."<sup>178</sup> *Abbott* is thus the only appellate decision to base the statement-of-reasons rule directly upon due process of law.<sup>179</sup> The only other appellate opinion directly to refer to the due process clause in the context of the statement-of-reasons rule is Justice Douglas's dissent from the denial of certiorari in *Windsor*

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175. *United States v. Edwards*, 450 F.2d 49, 52 (1st Cir. 1971); *United States v. Speicher*, 439 F.2d 104, 108 (3d Cir. 1971); *see also Joseph v. United States*, 405 U.S. 1006 (1972) (Douglas, J., dissenting); *Gonzales v. United States*, 348 U.S. 407, 415 (1955): "Just as the right to a hearing means the right to a meaningful hearing, . . . so the right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendations and arguments to be countered." In *United States v. Nugent*, 346 U.S. 1 (1953) and *Simmons v. United States*, 348 U.S. 397 (1955), the Supreme Court required that registrants be provided with a resume of the F.B.I. reports given by the Department of Justice to the selective service appeal boards after investigation of conscientious objector claims. Otherwise, the Court reasoned, registrants could not get fair appeals within the Selective Service System's administrative process. Although those cases are no longer directly applicable because the Military Selective Service Act of 1967 abolished Department of Justice investigations, *see note 115 supra*, the principle underlying the decisions, that knowledge of the basis of a local board's action is essential to fair appellate review, remains.

The court in *United States v. Speicher*, 439 F.2d 104 (3d Cir. 1971), explained how a statement of reasons might help the Selective Service System avoid error: "[S]ince the Appeal Boards are not restricted to the scope of review delineated in [*Estep*] but may reclassify, they might well reject a given basis for Local Board action which a reviewing court would feel constrained to accept. An Appeal Board might know, for example, that a given Local Board, when compared with other Local Boards under its jurisdiction, consistently finds conscientious objector claimants to be insincere on very little evidence. It might scrutinize the basis for decision from that Local Board more carefully than otherwise. It cannot do so when the basis for the Local Board action is unknown." *Id.* at 108.

176. *See, e.g., Caverly v. United States*, 429 F.2d 92 (8th Cir. 1970); *Capobianco v. Laird*, 424 F.2d 1304 (2d Cir. 1970), *vacated*, 402 U.S. 969 (1971).

177. 425 F.2d 910 (8th Cir. 1970).

178. *Id.* at 913 n.4; *see also United States ex rel. Morton v. McBee*, 310 F. Supp. 328 (N.D. Ill. 1970); *United States v. St. Clair*, 293 F. Supp. 337 (E.D.N.Y. 1968). The due process rationale of these cases, however, has not been explicitly followed, either at the appellate or trial levels.

179. In one of the leading statement-of-reasons cases, *Scott v. Commanding Officer*, 431 F.2d 1132 (3d Cir. 1970), Judge Aldisert explicitly stated that the rule was not constitutionally based. *Id.* at 1138 (Aldisert, J., concurring). The court in *United States v. Stetter*, 445 F.2d 472 (5th Cir. 1971), *discussed in notes 110-12 & accompanying text supra*, referred to fairness, but did not otherwise use the language of due process.

*v. United States*.<sup>180</sup> The Fifth Circuit had applied the statement-of-reasons rule, but found the reasons stated by the local board to be sufficient. Justice Douglas declared: "A statement of reasons accompanying a decision adverse to the applicant is no less a requirement of due process [than a hearing on a conscientious objector claim]."<sup>181</sup>

The Selective Service System should be required to state reasons for all classification decisions to ensure that no one is compelled to serve when denials of deferment requests have no lawful basis. As the courts recognized in developing the statement-of-reasons rule, without such a statement it is impossible for the courts to review properly the decisions of local draft boards.<sup>182</sup> The courts often found that a local board's stated reasons were erroneous as a matter of law, vitiating the induction order under the principle of *Sicurella v. United States*.<sup>183</sup> There also may have been cases in which the local board relied in part on erroneous reasons, but did not in fact state any reasons. If a statement-of-reasons rule is in effect, the illegal induction orders that are the product of such tainted reasoning can be identified, and the registrants reprocessed lawfully. Without the rule, and without such a statement, the courts reviewing such cases will search the record for evidence supporting the local board's decision, as commanded by *Estep* and *Dickinson*.<sup>184</sup> They will not search for possible erroneous bases for decision. In a case in which a silent local board has several reasons, some valid and some invalid, the decision will be affirmed. The only difference between this case and a case under the *Sicurella* principle, however, is the election of the local board to set forth its reasons; a registrant's liberty should not depend on a matter of so little substance.

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180. 419 U.S. 938 (1974) (Douglas, J., dissenting), *denying cert. to*, 488 F.2d 1364 (5th Cir. 1973).

181. *Id.* at 939. Justice Douglas went on to explain why he felt the statement of reasons rule was essential for the proper functioning of the basis-in-fact test. "It is a 'simple but fundamental rule of administrative law . . . [that if] the administrative action is to be tested by the basis on which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action.'" *Id.* at 940-41 (quoting *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947)). Thus, although the Selective Service System had been treated as a special case in the field of administrative law, see note 95 *supra*, Justice Douglas recognized the constitutional necessity of the rule.

182. For example, in *McAliley v. Birdsong*, 451 F.2d 1244 (6th Cir. 1971), the court explicitly observed that without a statement of reasons, the courts could not perform the review mandated by *Estep*. *Id.* at 1248. This observation raises the constitutional problem, recognized by Justice Murphy in *Estep v. United States*, 327 U.S. 114, 125-28 (1946) (Murphy, J., concurring), inherent in entering criminal convictions essentially without judicial supervision. See notes 78-125 & accompanying text *supra*.

183. 348 U.S. 385 (1955). See notes 113-25 & accompanying text *supra*.

184. See notes 88-103 & accompanying text *supra*.

The Military Selective Service Act requires decisionmakers in the Selective Service System to state reasons for decisions adverse to registrants only if requested to do so.<sup>185</sup> Two problems are raised by this limitation. First, as a policy matter, due process ought to be available as a matter of course, not limited to situations in which it is requested. Second, registrants should not be assumed to know that they must assert their rights.<sup>186</sup> The probable effect of providing reasons only upon request is to place a less sophisticated registrant at a disadvantage.<sup>187</sup> Vulnerability to induction or to criminal penalties for refusing to submit to induction should depend upon entitlement to deferment or exemption or the lack of such entitlement, and not upon an uncounseled registrant's legal sophistication.

Moreover, that due process may require decisionmakers to state reasons has been recognized explicitly in many other areas of law. For example, in *Kent v. United States*,<sup>188</sup> the defendant had been arrested in the District of Columbia and charged as a juvenile with housebreaking, robbery, and rape. The juvenile court waived its otherwise exclusive jurisdiction, permitting Kent to be tried and sentenced as an adult in a district court. The judge recited no reason for this waiver, but declared that it had been made after full investigation.<sup>189</sup> The Supreme Court reversed Kent's conviction and remanded the case for reconsideration of whether the juvenile court's waiver of jurisdiction had been proper. The Court denounced the absence of an explanation for the waiver,<sup>190</sup> leaving no doubt about why it regards a statement of reasons as essential:

Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not "assume" that there are adequate reasons, nor may it merely assume that "full investigation" has been made.<sup>191</sup>

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185. 50 U.S.C. § 471a(b)(4) (1976). See note 161 & accompanying text *supra*.

186. The courts have recognized registrants' limitations in this respect. *E.g.*, *United States v. Stephens*, 445 F.2d 192, 195 (3d Cir. 1971); *United States v. Stafford*, 389 F.2d 215, 218 (2d Cir. 1968); *United States ex rel. Berman v. Craig*, 207 F.2d 888, 891 (3d Cir. 1953); *United States v. Marshall*, 340 F. Supp. 117, 125 (E.D. Pa. 1972).

187. See 117 CONG. REC. 20,505 (1971) (remarks of Sen. Kennedy).

188. 383 U.S. 541 (1966).

189. *Id.* at 546.

190. "[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." *Id.* at 554.

191. *Id.* at 561. Similarly, the Court has required statements of reasons to support termination of welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970), revocations of

Another area in which the courts have recognized the dangers of unsubstantiated decisions is the setting of bail. In *United States ex rel. Keating v. Bensinger*,<sup>192</sup> the defendant used a writ of habeas corpus to challenge a state court's denial of bail while the appeal was pending. The court described the inadequacy of a record without a statement of reasons.

Absent any findings in support of the denial of bond, it is impossible to ascertain whether or not such denial was arbitrary or discriminatory. . . . [If reasons are not required,] the guaranty of the Eighth and Fourteenth Amendments against arbitrariness by a state court in the setting of bail authorized by the state legislature could be reduced to a nullity by the mere silence of the court denying bail. If a court may deny bail with no reason, hardly any set of circumstances can be imagined wherein it could be determined by a reviewing court that the denial was arbitrary or discriminatory.<sup>193</sup>

The logic of *Kent* and *Bensinger* has often been applied to require a statement of reasons in noncriminal contexts,<sup>194</sup> and such logic is difficult to refute in selective service cases. The basis-in-fact standard cannot avoid arbitrary or irrational classification decisions if the courts are not told what constitutes the basis in fact. Just as in *Bensinger*, the basis-in-fact standard is repealed de facto if draft board decisions can be upheld even when no basis is stated.

### Conclusion

Judicial review of draft board decisions has undergone substantial change since the First World War. At first, courts inquired only into the local board's jurisdiction; most recently, the courts asked whether the Selective Service System acted properly in ordering induction. The changes have been salutary. Judicial review must be sufficiently broad to ensure that due process is not a hollow concept. The records being reviewed must be sufficiently clear that the reviewing courts cannot be

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parole, *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972), and revocations of probation, *Gagnon v. Scarpelli*, 411 U.S. 778, 791 (1973). As in *Kent*, the underlying rationale for requiring a statement of reasons in these situations is that review is impossible when the reviewing body is not informed of the basis of the decision under review. See *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

192. 322 F. Supp. 784 (N.D. Ill. 1971).

193. *Id.* at 787; see also *Maldonado v. Delgado*, 345 F. Supp. 993, 995 (D.P.R. 1972).

194. See, e.g., *Escalera v. New York City Hous. Auth.*, 425 F.2d 853, 862 (2d Cir.), cert. denied, 400 U.S. 853 (1970) (denial of eligibility for public housing); *Aikens v. Lash*, 371 F. Supp. 482, 492 (N.D. Ind. 1974) (disciplinary prison transfer); *White v. Gillman*, 360 F. Supp. 64 (S.D. Iowa 1973) (same); *Jones v. Robinson*, 440 F.2d 249, 252 (D.C. Cir. 1971) (mental patient's transfer to ward for the criminally insane); *United States v. McNeil*, 434 F.2d 502 (D.C. Cir. 1970) (denial of release from hospital for mental patients).



accused of blindly endorsing decisions made on silent records. At least, due process should require that the Selective Service System supply reasons supported by evidence to justify any decision curtailing liberty. Inchoate fears that the process will become too adversarial and that the Selective Service System will be disrupted should not be used to excuse a denial of due process. A process that deprives an individual of liberty is inherently adversarial, and there is no evidence that the Selective Service System will be unable to perform its function if required to operate within the bounds of the Constitution. In this area, as in others, the appearance of fairness is as important as the fact. The appearance cannot be maintained or the fact ensured if the courts are forced by too narrow a scope of review to endorse decisions that may be based upon ignorance, misapprehension of the law, or bias. Only a process that allows judicial examination can avoid these traps.

Due process at least should entitle registrants who have unsuccessfully claimed deferment or exemption to know why their lives are being put at risk and their liberty circumscribed.<sup>195</sup>

The absence of reasons for governmental action has a long history of abuse. The King of England used to withhold from the courts the reasons for detaining prisoners who sought release by habeas corpus. In *Darnels Case*, decided in 1627, the absence of a reason for detention was held to justify the detention. "Mr. Attorney hath told you that the King hath done it, and we trust him in great matters, and he is bound by law, and he bids us proceed by law, as we are sworn to do, and so is the king; and we make no doubt but the king, if you seek to him, he knowing the cause why you are imprisoned, he will have mercy."<sup>196</sup>

The return of the draft will reopen the issue of whether the Selective Service System must justify its classification decisions. No individual should be compelled to serve in the military after rejection of a claim for exemption or deferment if the government cannot or does not explain the reason for the decision.

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195. As Senator Javits stated: "The draftee [should know] why he will have to accept the fate which is his." 117 CONG. REC. 21,956 (1971).

196. W. DOUGLAS, *THE COURT YEARS* 59 (1980) (quoting *Darnel's Case*, 3 St. Tr. 2 (K. B. 1627)).