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INTRODUCTION

ONE of the most vital problems confronting every male youth in this country who attains his eighteenth birthday is the obligation imposed by the Universal Military Training Service Act of 1951,[1] popularly referred to as the Selective Service Law or "Draft" law. Despite the far-reaching effects of this law upon such a large mass of the American populace, there is a surprising lack of knowledge as to the meaning, intentions and ramifications of the Selective Service Law and of the system which implements that law. Even the nation's press—the newspapers and magazines—which so often competently educate the public as to the meaning and effects of Federal, state and local laws, find themselves occasionally unable to cope with the complexities of the Selective Service Law and as a result avoid giving more than an occasional comment which, when published, sometimes contains an inadvertent error or misinterpretation which is then passed on to the public.

A common misconception—even among lawyers—relates to the jurisdiction of the courts in matters pertaining to Selective Service. For example, many an attorney has gone into Federal Court to obtain an injunction in order to prevent his client from being inducted into Armed Forces only to find that a court will refuse to grant injunctive[2] relief. Such a suit is deemed to be premature since the registrant has not yet passed completely through the administrative processes leading to induction.[3]

In other instances the courts have similarly refused to entertain

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1 62 STAT. 604 (1948); 65 STAT. 75 (1951), 50 U. S. C. A. App., Par. 451-473.

2 Westerbeke v. Local Draft Board, No. 2, 118 F. Supp. 441 (E. D. N. Y. 1954); Local Board No. 1 v. Connors, 124 F. 2d 388 (9th Cir. 1941).

3 Watkins et al. v. Rupert, 224 F. 2d 47 (2d Cir. 1955); Reap v. James, 232 F. 2d 507 (4th Cir. 1956); Permutt v. Armstrong, 112 F. Supp. 247 (N. D. Ill. 1943); Schwartz v. Strauss, 114 F. Supp. 438 (S. D. N. Y. 1953).

proceedings pertaining to Selective Service for want of jurisdiction, especially in cases where a registrant seeks a mandamus order directing the local board to give the registrant a particular classification,[4] or a petition to grant a declaratory judgment exempting the registrant from military services.[5]

The reluctance of the courts to intervene in Selective Service determinations is based upon the Act itself which states that the decision of Selective Service authorities in connection with the classification of registrants "shall be final".[6] Congress in enacting the law withheld from the courts the customary power of review of administrative action.[7] Even if the local boards patently had made an erroneous classification, that erroneous classification, in and of itself, is final and not reviewable by the courts, provided that the board had some "basis in fact" for making the classification.[8]

How Final Is "Final"?

The "finality" doctrine has been contained in the various Draft Acts of 1917,[9] 1940[10] and 1948.[11] Apparently the real purpose of Congress in providing this administrative finality was to prevent the catastrophe which would undoubtedly develop if the courts were permitted to sit as super draft boards and dispense slow justice in times of war or grave national emergency where the element of time would be a vital factor in the conscription of young men into the nation's Armed Forces. Such Congressional purpose is legitimate not only under the war powers provided for in the Constitution of the United States but also in the peacetime concern for meeting any future emergency which might arise.[12]

4 United States v. Mancuso, 139 F. 2d 90 (3rd Cir. 1943); Bullard v. Selective Service Local Board, 50 F. Supp. 192 (W. D. Okl. 1943).

5 United States v. Rumsa, 212 F. 2d 927, *cert. denied,* 348 U. S. 838, 75 S. Ct. 36, 99 L. Ed. 661 (1954); Hirsh v. Adair, 113 F. Supp. 116 (E. D. Pa. 1953).

6 50 U. S. C. A. App. Par. 460 (b) (3) 1951. "The decisions of such local board shall be final except where an appeal is authorized and is taken. . . . The decision of such appeal boards shall be final . . . . unless modified or changed by the President . . . . and the determination of the President shall be final."

7 Eagles v. United States ex rel. Samuels, 329 U. S. 304, 67 S. Ct. 313, 91 L. Ed. 308 (1946).

8 Estep v. United States, 327 U. S. 114, 66 S. Ct. 423, 90 L. Ed. 567 (1946).

9 Selective Draft Act of 1917, 40 STAT. 76.

10 Selective Service Act of 1940, 54 STAT. 894.

11 Selective Service Act of 1948, 62 STAT. 604, as amended, 50 U. S. C. A. App. (Par. 450).

12 United States v. Henderson, 180 F. 2d 711, *cert. denied,* 339 U. S. 963, *rehearing denied,* 340 U. S. 846, 71 S. Ct. 13, 95 L. Ed. 620 (1950).

Prior to the Act of 1940,[13] the "finality" clause was construed by the courts in such a way as to permit a registrant, who claimed to have been illegally inducted, the remedy of court review through a writ of habeas corpus. It must be borne in mind that, prior to the 1940 Act,[14] a registrant was considered to be in the service under the jurisdiction of military law immediately upon receiving his notice of induction, although his actual induction was to take place at a later date.

The Acts of 1940[15] and 1948,[16] however, continued a registrant in his civilian status until the very moment of actual induction and, only at that time, would the Armed Services take over, and thereupon subject the registrant to military jurisdiction.

The "finality" doctrine was never more clearly enunciated than in the oft-cited 1944 case of *Falbo* v. *United States*.[17] For the first time in a criminal prosecution based upon a registrant's refusal to submit to induction (Falbo contended that he was a minister of religion and refused to report to the civilian public service camp to do work of national importance). The United States Supreme Court considered the invalidity of a classification and its resultant induction order. In affirming Falbo's conviction in the lower court, the Supreme Court refused to grant judicial review of Falbo's classification on the grounds that the registrant had not completed the draft process and therefore had failed to exhaust all of his administrative remedies. The *Falbo* decision not only failed to aid registrants who were seeking judicial review of their draft classifications, but left completely vague and open the answer to the question—"What constitutes the exhaustion of all administrative remedies?"

In view of the Supreme Court's refusal to grant judicial review, the lower Federal courts interpeted the *Falbo* decision as meaning that no review of a selective service order would be available to a registrant. His only recourse was to submit to induction and then seek a judicial review of his classification by instituting a habeas corpus proceeding.[18]

[13] See note 10, *supra*.
[14] See note 10, *supra*.
[15] See note 10, *supra*.
[16] See note 11, *supra*.
[17] 320 U. S. 549, 88 L. Ed. 305 (1944).
[18] United States v. Flakowicz, 146 F. 2d 874, *cert. denied*, 325 U. S. 851, 65 S. Ct. 1086, 89 L. Ed. 1971 (1945); Rinko v. United States, 147 F. 2d 1, *cert. denied*, 325 U. S. 851, 65 S. Ct. 1086, 89 L. Ed. 1971 (1945); Sunal v. Large, 332 U. S. 174, 67 S. Ct. 620, 91 L. Ed. 619 (1947); Gibson v. United States, 329 U. S. 338, 67 S. Ct. 301, 91 L. Ed. 331 (1946).

Since *Falbo,* the courts have, piecemeal, attempted to consider various points which relate to the exhaustion of one's administrative remedies. By virtue of its decisions in *Billings* v. *Truesdell,*[19] *Estep* v. *United States,*[20] *Gibson* v. *United States,*[21] and certain regulation changes,[22] the Supreme Court came around to hold that the administrative process is complete when administrative appeals are exhausted, a final order of induction has been received from the draft board, and the registrant has been asked to undergo whatever ceremony or requirements of admission the Department of Defense has prescribed for induction. If the registrant reached that point of exhausting his administrative remedies, then, in such instance, the courts could consider a review of the Selective Service classification order where it is shown that there was no "basis in fact" for the classification issued by the board to the registrant.[23]

It was becoming increasingly apparent that the "finality" provisions of the various draft acts[24] were not quite as final as originally appeared and that the door to judicial review, which had been slammed shut by the *Falbo* case, had now been definitely pried open—if only so little—by a series of cases highlighted by the *Estep* decision.

Until *Estep,* a registrant could only obtain judicial review by waiting to be inducted—then petitioning the court for a writ of habeas corpus. Since *Estep,* a registrant, *provided he has exhausted his administrative remedies,* may refuse to submit to induction, and, in the criminal prosecution for violation of the Act[25] which thereafter follows, he may set up as grounds for a defense the fact that the board's action was without "basis in fact" or was contrary to law.[26]

EXHAUSTION OF ADMINISTRATIVE REMEDIES

IT IS well established then that a Federal court will not hear the claim of a registrant who contends that he has been improperly classified or that his local board has acted in an arbitrary or capricious

19 321 U. S. 542, 64 S. Ct. 737, 88 L. Ed. 917 (1944).
20 327 U. S. 114, 66 S. Ct. 423, 90 L. Ed. 567 (1946).
21 329 U. S. 338, 67 S. Ct. 301, 91 L. Ed. 331 (1946).
22 See Sec. 653.11 et seq. of the Selective Service Regulations.
23 Estep v. United States, note 8, *supra.*
24 See notes 9, 10, 11, *supra.*
25 50 U. S. C. A. App. Par. 462 provides for punishment of up to five years imprisonment and/or a fine of not more than $10,000.00 for violation of the provisions of the Act.
26 Since Estep v. United States, note 8 *supra,* the remedy of seeking a writ of habeas corpus has been little used,—see Tietz, Jehovah's Witnesses: Conscientious Objection, 28 So. CAL. L. REV. 123, 134 (1955).

fashion *until and unless* the registrant has exhausted all of his administrative remedies.[27] In such instance the registrant may raise the invalidity of the induction order as a defense to the criminal action instituted against him by the Government.[28]

The question arises—What constitutes exhaustion of administrative remedies?

A registrant, for example, has failed to exhaust his administrative remedies if he neglects to appeal from the last classification given him by his local board.[29] A common situation of this type involves the registrant who seeks a classification either as a conscientious objector or as a minister of religion and who fails to appeal from the decision of the local board which has denied him that classification.[30] The right of appeal is a vital and integral part of the Selective Service System. Every registrant is made aware of this right of appeal to correct errors of the local board. In fact, each notice of classification advises the registrant of his right to appeal to the appeal board.[31] Congress never intended that a registrant could ignore the Selective Service provisions designed for his protection and, instead

[27] United States v. Kauten, 133 F. 2d 703 (2d Cir. 1943); Seele v. United States, 133 F. 2d 1015 (8th Cir. 1943); United States v. Dorn, 121 F. Supp. 171 (W. D. Wisc. 1954).

[28] Swaczyk v. United States, 156 F. 2d 17, *cert. denied,* 329 U.S. 726, 67 S. Ct. 77, 91 L. Ed. 629 (1946); United States v. Stiles, 169 F. 2d 455 (3rd Cir. 1948); Imboden v. United States, 194 F. 2d 508, *cert. denied,* 343 U. S. 957, 72 S. Ct. 1052, 96 L. Ed. 1357 (1952). A registrant may not take a short cut to the courts by ignoring the administrative procedures, United States v. Nichols, 241 F. 2d 1 (7th Cir. 1957).

[29] Skinner v. United States, 215 F. 2d 767, *cert. denied,* 348 U. S. 981, 75 S. Ct. 572, 99 L. Ed. 763 (1955); United States v. Dorn, 121 F. Supp. 171 (E. D. Wisc. 1954); United States v. Sutter, 127 F. Supp. 109 (Cal. 1954).

[30] Johnson v. United States, 126 F. 2d 242 (8th Cir. 1942); Penor v. United States, 167 F. 2d 553 (9th Cir. 1948); United States v. Dorn, 121 F. Supp. 171 (E. D. Wisc. 1954).

[31] Selective Service, Form No. 110, has the following legend inscribed thereon:

"If this classification is by a local board you may, within ten days after the mailing of this notice, file a written request for a personal appearance before the local board. . . . Following such personal appearance you may file a written notice of appeal from the local board's classification. . . .

"The appeal from classification by local board in any class other than Class I-C, Class I-W, Class IV-F and Class V-A may be taken by filing written notice of appeal with local board within one of the following periods after the date of the mailing of this notice. . . . Ten days if both you and local board are located in the continental United States or in the same territory or possession of the United States. . . . Upon your written request filed with the local board the appeal may be submitted to the appeal board having jurisdiction over the area in which you are currently residing, or if you are claiming occupational deferment, to the appeal board having jurisdiction over the area in which is located your principal place of employment.

"If an appeal has been taken and you are classified by the appeal board in either Class I-A, Class I-A-O or Class I-O and one or more members of the appeal board dissented from such classification, you may file a written notice of appeal to the President with your local board within ten days after the mailing of this notice."

of following the established procedures, take a short cut to the courts.[32]

Other examples of a registrant's failure to exhaust administrative remedies include a registrant who neglected to present to the appeal board his claim that the local board was guilty of misconduct and prejudice in connection with its determination of registrant's classification;[33] or where a registrant had failed to appeal from a new 1-A classification given by the local board after the board had been ordered by the Director of Selective Service to reopen the previous 1-A classification because of certain irregularities;[34] or where a registrant overlooked notifying his local board of his wife's pregnancy and of his eligibility for a dependency classification, and otherwise failed to avail himself of the administrative steps necessary in order to obtain a dependency classification.[35]

Although it is not necessary for a registrant, in order to exhaust his administrative remedies, to actually submit to induction,[36] he must bring himself to the brink of induction, since it is only when a registrant is found acceptable at the time fixed for induction that any injury or violation of his rights can be said to have resulted from the action of the Selective Service board.[37] A registrant is deemed to have exhausted his administrative remedies when he has done everything required of him by Selective Service officials *except the actual taking of the oath by induction*[38] (sometimes referred to as "taking the one step forward").

It is obvious, therefore, that a registrant must obey an order from his board to report for induction.[39] Where a registrant has not responded, either affirmatively or negatively, to such an order of induction, a court will not entertain any jurisdiction of the matter.[40]

The point at which a registrant who is a conscientious objector

32 United States v. Nichols, 241 F. 2d 1, 3 (7th Cir. 1957).

33 Davis v. United States, 203 F. 2d 853 (8th Cir. 1953).

34 Evans v. United States, 252 F. 2d 509 (9th Cir. 1958).

35 Hirsh v. Adair, 113 F. Supp. 116 (E. D. Pa. 1953).

36 Berman v. United States, 156 F. 2d 377, *cert. denied,* 329 U. S. 795, 67 S. Ct. 480, 91 L. Ed. 680 (1946); United States v. Alvies, 112 F. Supp. 618 (N. D. Cal. 1953).

37 Falbo v. United States, 320 U. S. 549, 64 S. Ct. 346, 88 L. Ed. 305 (1944); Thomson v. United States, 161 F. 2d 761, *cert. denied,* 332 U. S. 768, 68 S. Ct. 78, 92 L. Ed. 353 (1947); McGahee v. United States, 163 F. 2d 875 (5th Cir. 1947); Williams v. United States, 203 F. 2d 85, *cert. denied,* 345 U. S. 1003, 73 S. Ct. 1149, 97 L. Ed. 1408 (1953). See Legal Aspects of Selective Service (1957), Sec. 61.

38 United States v. Alvies, 112 F. Supp. 618 (N. D. Cal. 1953).

39 Fujii v. United States, 148 F. 2d 298, *cert. denied,* 325 U. S. 868, 65 S. Ct. 1406, 89 L. Ed. 1987 (1945); United States v. Wider, 119 F. Supp. 676 (E. D. N. Y. 1954); United States v. Rumsa, 212 F. 2d 927 (7th Cir. 1954).

40 Watkins v. Rupert, 224 F. 2d 47 (2d Cir. 1955).

and who has been ordered to report for civilian work in lieu of induction, exhausts his administrative remedies, has not been clearly determined under the current law. One case has held that the point is reached when the registrant reports to his local board pursuant to such order.[41] Under the 1940 Act, after the Selective Service Regulations were amended to provide for a pre-induction physical examination substantially similar to the procedures now followed, the Supreme Court held that it was not necessary for the registrant to report to the work camp in order to exhaust his administrative remedies since all the significant administrative steps had already been accomplished and the procedures to be accomplished after reporting were only formalities.[42] However, it would seem that this decision does not apply to present procedures under which a conscientious objector may be rejected at the assigned place of work and must so report there in order to exhaust his administrative remedies just as other registrants must report to the induction station.

In determining whether or not a registrant has exhausted his administrative remedies, a court would be bound by an entry in the local board minutes made by the clerk and initialed by the board members which showed that the registrant had appealed his classification.[43] It has been held that a registrant exhausted his administrative remedies where, upon applying for the reopening of his classification, the board refused to reopen, thereby leaving registrant without any remedy of appeal from the board's refusal to reopen.[44] A registrant may even exhaust his administrative remedies without the necessity of carrying himself to the brink of induction. One who is forcibly detained from reporting as directed in an induction order—without any negligence on his own part—would not be barred from seeking relief of the courts.[45]

The Limited Extent of Judicial Review

Assuming that a registrant has properly exhausted his adminis-

41 United States v. Sutter, 127 F. Supp. 109 (N. D. Cal. 1955).

42 Gibson v. United States, 329 U. S. 338, 67 S. Ct. 301, 91 L. Ed. 331 (1946); see also Falbo v. United States, 320 U. S. 549, 64 S. Ct. 346, 88 L. Ed. 305 (1944), holding that reporting to a public service camp was an important part of the administrative process. This decision was made at a time when there was no preinduction physical examination and such examination was given for the first time after a registrant reported to the camp.

43 United States v. Hufford, 103 F. Supp. 859 N. D. Pa. 1952).

44 United States v. Scott, 137 F. Supp. 449 (E. D. Wisc. 1956).

45 United States v. Kuwabara, 56 F. Supp. 716 (N. D. Cal. 1944).

trative remedies, to what extent would a court then be willing to review the decisions of a local board?[46]

The courts may judicially review the ruling of administrative agencies where there is a constitutional question raised;[47] or where Congress specifically by the parent statute grants them the right of review.[48] The normal scope of review applied by the courts is known as the "test of substantial evidence."[49] This has been defined by the courts as meaning that an agency's rulings are proper if supported by " . . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[50]

However, the courts have acted differently in instances where the parent statute has made the findings of the administrative body "final" such as is provided in the Draft Acts.[51]

In 1946 the Supreme Court of the United States hammered out its basic formula for judicial review of Selective Service rulings with its landmark decision of *Estep* v. *United States*.[52] In the *Estep* case the Court accomplished two important matters, i.e., it interpreted the word "final" in the statute, and it declared the "substantial evidence" test to be inapplicable.

"The provisions 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 board was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The ques-

[46] See Shipley, Selective Service: "Finality of Draft Board Decisions," 41 American Bar Association Journal 709, 711—"Apparently the only methods by which—(one) . . . . can obtain judicial review are: (1) to wait until he has been inducted and then petition for a writ of habeas corpus, or (2) refuse to submit to induction and in the criminal prosecution for violation of the Act which follows, defend on the ground that the board's action was without basis in fact or contrary to law."

[47] Ng Fung Ho v. White, 259 U. S. 276, 42 S. Ct. 492, 66 L. Ed. 938 (1922).

[48] 34 BOST. U. L. REV. 362 (1954).

[49] For example, findings of the Federal Trade Commission are final if supported by evidence, F. T. C. v. Army and Navy Trading Co., 88 F. 2d 776 (D. C. C. 1937); Labor Board findings of fact are conclusive if supported by evidence, N. L. R. B. v. Arcade Sunshine Co., 118 F. 2d 49 (D. C. C. 1940); for Public Utilities Commission see Washington Gaslight Co. v. Byrnes, 137 F. 2d 547 (D. C. C. 1943); for Federal Communications Commission, see Mansfield Journal v. F. C. C., 180 F. 2d 28 (D. C. C. 1950); for Federal Power Commission, see Montana Power Co. v. F. P. C., 185 F. 2d 491 (7th Cir. 1950).

[50] Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 229, 59 S. Ct. 206, 217, 83 L. Ed. 126 (1938).

[51] See note 6, *supra*.

[52] See note 8, *supra*.

tion of jurisdiction of the local boards is reached only if there is *no basis in fact* for the classification which it gave the registrant."[53] (Italics supplied.)

The Court soon held that whether or not the local board had any "basis in fact" for making the classification, was a matter of law for a judge rather than a jury to determine.[54] In reviewing the classification, the Court is not permitted to consider additional evidence which was not made a part of the registrant's file, nor considered by the local board, nor on appeal may the evidence be reweighed once the judge determines that the evidence in the Selective Service file supports the decision which the board has reached.[55] But where all of the evidence in the file supports the registrant's claim, the board may not deny the classification "solely on the basis of suspicion and speculation."[56] There must be some reason shown, based upon affirmative evidence in the file, why the board chooses to disbelieve the registrant's claim.[57]

Some of the more recent cases[58] have concerned themselves with procedural rights and denials of due process rather than the question of the degree of evidence which is necessary to satisfy the "basis in fact" doctrine. Even this doctrine, however, has been somewhat liberalized so that convictions for violation of the Act have been reversed where, although the board may have had some factual basis for denying the claim, the Selective Service authorities had acted upon mistaken assumptions of law.[59]

The rash of Selective Service cases decided by the Supreme Court

[53] 327 U. S. at page 122, 66 S. Ct. at page 427, 90 L. Ed. at page 573.

[54] Cox v. United States, 332 U. S. 442, 68 S. Ct. 115, 92 L. Ed. 59 (1947); but even where the Court finds some basis in fact for the conclusion, the jury may determine whether the board had acted arbitrarily or capriciously. Imboden v. United States, 194 F. 2d 508, *cert. denied,* 343 U. S. 957, 72 S. Ct. 1052, 96 L. Ed. 1357 (1952); see 34 No. CAR. L. REV. 381 (1956).

[55] Cox v. United States, *supra,* note 54; see also 10 WYO. L. JOURNAL 211 (1956).

[56] Dickinson v. United States, 346 U. S. 389, 74 S. Ct. 152, 98 L. Ed. 132 (1953). But here the Court also affirmed the *Estep* pronouncement that the courts will not apply a test of substantial evidence in reviewing the Selective Service determinations.

[57] Dickinson v. United States, *supra,* note 56.

[58] Gonzales v. United States, 348 U. S. 407, 75 S. Ct. 409, 99 L. Ed. 407 (1955); Simmons v. United States, 348 U. S. 397, 75 S. Ct. 397, 99 L. Ed. 453 (1955); United States v. Nugent, 346 U. S. 1, 73 S. Ct. 991, 97 L. Ed. 1417 (1953).

[59] Annett v. United States, 205 F. 2d 689 (10th Cir. 1953); Sicurella v. United States, 348 U. S. 385; (Selective Service authorities thought as a matter of law that a member of the Jehovah's Witnesses could not be a conscientious objector because of their belief in self-defense and "theocratic wars". The Court held that Congress had meant "present-day wars fought with real bullets"). See 34 No. CAR. L. REV. 382 (1956).

since 1953[60] has caused considerable uncertainty but general approbation on the part of some observers,[61] since it appeared that the Supreme Court was moving further and further away from the holdings in the *Estep* case[62] and was, in fact, flexing its judicial muscles so as to permit considerably greater leeway in granting judicial review. It was even thought that the Court had sidetracked the "basis in fact" doctrine of the *Estep* case and was approaching a position more akin to the "substantial evidence" ruling applied to the review of other administrative agencies.[63] Perhaps, it was contended, greater interference on the part of the courts would exert pressure upon the local boards not only to make decisions in conformity with the regulations of the Act, but also to weigh the evidence carefully in order to make certain that their orders were supported by substantial evidence.[64]

However, the Supreme Court has halted the retreat away from *Estep*. In 1955 the Court in *United States* v. *Witmer*[65] reechoed the "basis in fact" doctrine of *Estep* by stating,

"It is not for courts to sit as super draft boards substituting their judgment on the weight of evidence for those of designated agencies, nor to look for substantial evidence to support such terminations, and a classification can be overturned only if it has no basis in fact."[66]

Since *Witmer*, the courts have spoken in terms of "basis in fact" and not of "substantial evidence". In *United States* v. *Cheeks*[67] it was held that the courts are not to weigh evidence in order to determine whether a classification made by a local board was justified regardless of whether erroneous, provided the local board decisions were made in conformity with regulations. Review may be had, however, only if the local board or appeal board errors are so arbitrary,

60 Annett v. United States, note 59 *supra;* Sicurella v. United States, note 59 *supra;* Dickinson v. United States, note 56 *supra;* United States v. Nugent, note 58 *supra;* Gonzales v. United States, note 58 *supra;* Simmons v. United States, note 58 *supra;* Niznik v. United States, 184 F. 2d 972 (6th Cir. 1950), where the Court reversed a conviction on the ground that the local board's order was not based on sufficient evidence and thus was contrary to the regulations.

61 See Shipley, Selective Service "Finality of Draft Board Decisions," 41 Amer. Bar Association Journal 709 (1955); Watts, "Military Service—Judicial Review of Draft Classification," 34 No. CAR. L. REV. 375 (1956).

62 See note 8, *supra.*

63 See note 49, *supra.*

64 See note 61, *supra;* also see Jefferson, "Judicial Review of Draft Board Orders," 10 WYO. L. JOURNAL 208 (1956).

65 348 U. S. 375, 75 S. Ct. 392, 99 L. Ed. 428 (1955).

66 Note 65, *supra* at 380-381, 75 S. Ct. at 395, 99 L. Ed. at 433.

67 159 F. Supp. 328 (D. C. Md. 1958).

capricious or biased as to destroy the jurisdiction of the board;[68] or if there is a denial of basic procedural fairness;[69] or if the board is without basis in fact for rendering its decision.[70] The decision of the board is final even though a court or jury might have decided differently on the facts.[71]

CONCLUSION

INHERENT to any right of possible review by the courts of the determination of Selective Service boards (however limited that may be), it must always be borne in mind that a registrant's condition precedent to even obtaining court consideration is the necessity that the registrant completely exhaust his administrative remedies. Once having done that, then—and only then—may the registrant possibly seek limited court review of his classification based upon a claim that the board,

(a) was arbitrary, capricious, or bias,
(b) had no basis in fact for issuing its order, or
(c) denied registrant the procedural right to which he was entitled.

Selective Service is not just an ordinary administrative agency. Its very existence is necessitated by the tensions and fears of a "cold-war" world. The permanency of its existence has now been accepted; the importance of its operation has long been recognized. Its very presence has admittedly served to provide the most important impetus for voluntary enlistments by American youths into all of the Armed Forces; its continuance is easily justified by the realization that constant preparedness is probably the best deterrent to a future holocaust. In the event of any emergency which might arise, there is neither time nor place for the courts to sit as "super draft boards".

As the late Chief Justice Vinson stated in *United States* v. *Nugent*,

"The Selective Service Act is a comprehensive statute designed to pro-

[68] United States v. Diercks, 223 F. 2d 12, *cert. denied*, 350 U. S. 841, 76 S. Ct. 81, 100 L. Ed. 750 (1955); Swaczyk v. United States, 156 F. 2d 17, *cert. denied*, 329 U. S. 726, 67 S. Ct. 77, 91 L. Ed. 629 (1946).

[69] Blalock v. United States, 247 F. 2d 615 (4th Cir. 1957); but there need be no judicial review of procedural defects which are inconsequential and do not result in prejudice or unfairness to registrant—United States v. Schultz, 150 F. Supp. 303, *aff'd*, 243 F. 2d 349, *cert. denied*, 354 U. S. 921, 77 S. Ct. 1379, 1 L. Ed. 2d 1436 (1957).

[70] Blalock v. United States, note 69, *supra;* United States v. Miller, 143 F. Supp. 712, *aff'd*, 239 F. 2d 148 (4th Cir. 1956); Bouziden v. United States, 251 F. 2d 728 (10th Cir. 1958).

[71] United States v. Miller, note 70, *supra.*

vide orderly, efficient and fair procedure to marshall available manpower of the country and to impose a common obligation of military service on all physically fit young men. . . . It is calculated to function . . . in times of peril . . . . Its procedures (must be free from) litigious interruption."[72]

[72] 346 U. S. at 9, 10, 73 S. Ct. at 996, 97 L. Ed. at 1424, 1425.