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Judicial Development of the Law of Selective Service Reopening

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COMMENTS

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I. INTRODUCTION

The Military Selective Service Act of 1967[1] (Act) and the regulations[2] issued by the President pursuant to the authority granted him by the Act[3] comprise the basic statutory and administrative guidelines for registrants, local boards, and the courts to follow in dealing with matters concerning the draft. However, this statutory scheme is so nondescript that it has allowed local boards to engage in abusive procedures that have raised serious constitutional issues, especially those of procedural and substantive due process. As a result of these legislative shortcomings and administrative abuses, the courts have been called upon to play an important role in the Selective Service System. This role has encompassed more than merely ensuring that the substantive and procedural provisions in the regulations and the Act are followed. The courts have also served a type of legislative function by modifying and adding to the regulations to ensure that these regulations, as well as local board activities conducted pursuant to them, remain consistent with the policies underlying the Act and with the basic notions of fairness inherent in the concept of due process.

The role that the courts have played recently in Selective Service matters is effectively illustrated by cases involving the problem of reopening a Selective Service classification for consideration of a change in a registrant's status that might put him into a new classification.[4] Typically, although not always, this problem arises in cases in which reclassification will be favorable to the registrant since the local boards do not seem to have any qualms about reopening to classify a registrant I-A (available for military service).[5]

The Supreme Court recently considered one aspect of the reopening problem in *Mulloy v. United States*[6] and it has dealt with another aspect of that problem this term in *Ehlert v. United States*.[7]

1. 50 U.S.C. App. §§ 451-67 (Supp. IV, 1965-1968).

2. Selective Serv. Sys., 32 C.F.R. §§ 1600-90 (1971).

3. Military Selective Service Act of 1967, 50 U.S.C. App. § 460(b)(1) (Supp. IV, 1965-1968) [hereinafter Act], authorizes the President "to prescribe the necessary rules and regulations to carry out the provisions of this title."

4. The regulations governing the reopening of a registrant's classification are found in 32 C.F.R. § 1625 (1971).

5. 32 C.F.R. § 1622.10. *See* notes 177-97 *infra* and accompanying text.

6. 398 U.S. 410 (1970). *See* notes 137-61 *infra* and accompanying text.

7. 39 U.S.L.W. 4453 (U.S. April 21, 1971). *See* notes 286-314 *infra* and accompanying text.

While the particular issues involved in *Mulloy, Ehlert,* and other reopening cases may seem rather technical, they are of considerable interest to Selective Service practitioners and, of course, to registrants themselves. There are two major reasons for this interest. First, reopening problems usually arise in the context of discretionary deferments and exemptions such as hardship and conscientious objection.[8] These classifications have become increasingly significant to those seeking exemption from military service since most nondiscretionary classifications, such as the deferments for fathers[9] and for graduate students,[10] have either effectively been terminated or are likely to be similarly dealt with in the near future—particularly the II-S deferment.[11] Second, reopening often presents the only avenue a registrant has for raising a claim for a classification other than I-A. When the registrant registers at age eighteen his beliefs as a conscientious objector may not yet have crystallized, or the facts and circumstances constituting a hardship claim may not yet have arisen. Once the period allotted to a registrant to appeal his initial classification has expired,[12] reopening is the only procedure by which he can receive a new classification.

Therefore, in the light of the context in which reopening occurs today, it is an important area of the draft law, and, barring abolition of the entire draft system, there is likely to be considerable continuing controversy over it. Moreover, aside from the importance of this particular aspect of the draft law, a study of the problems of reopening is especially relevant to a discussion of the role of the courts in the Selective Service System since abuses in this area have been among the most scandalous examples of administrative arbitrariness. The purpose of this Comment is to restate the law of reopening as developed by the Act, the regulations, and the courts. The discussion will necessarily include a look at the abuses committed

8. A brief look at the cases in the Selective Service Law Reporter that deal with reopening will show this to be the case. The Selective Service Law Reporter began publication in April 1968 and includes all subsequently reported draft cases, as well as a number of otherwise unreported draft cases.

9. 32 C.F.R. § 1622.30(c) (1971) eliminates fatherhood deferments as of April 23, 1970. However, those registrants previously deferred because of fatherhood will continue to be deferred so long as they "continue to maintain a bona fide family relationship in their home."

10. 32 C.F.R. § 1622.26(a) (1971) provides that graduate deferments are restricted to "any registrant who is satisfactorily pursuing a course of graduate study in medicine, dentistry, veterinary medicine, osteopathy, optometry or podiatry, or in such other subjects necessary to the maintenance of the national health, safety, or interest."

11. *See* note 37 *infra.* President Nixon has indicated his intention to eliminate undergraduate student deferments if Congress empowers him to do so. *See* 2 SEL. SERV. L. REP. NEWSLETTER 59 (1970). The Act currently requires the President to provide for undergraduate student deferments. 50 U.S.C. § 456(h)(1) (Supp. IV, 1965-1968). The student deferment is found at 32 C.F.R. § 1622.25 (1971).

12. A registrant has the right to appeal within thirty days any classification given him by his local board. 32 C.F.R. § 1626.2(c) (1971).

by local boards, the judicial reaction to these improprieties, and the availability of judicial review in various reopening situations, as well as comments on the various aspects of the substantive law of reopening.

II. Basics of Reopening

A. *Reopening Defined and Introduced*

Selective Service regulations state explicitly, "No classification is permanent."[13] When new facts or conditions arise that affect a registrant's status and thus justify a change in his classification, reopening is the only vehicle available for the realization of that change.[14] The reopening process consists of two separate steps that local boards, registrants, and courts often fail to distinguish.[15] Because of the varying procedural consequences that flow from each of these two steps, it is important that each remains clearly denoted. The first, the decision whether to reopen, involves a determination by the local board members, or, in appropriate situations, by the state or local director,[16] whether the new facts submitted to them or those reasonably to be implied from the information submitted justify taking the second step, the actual reclassification decision.[17] It is quite possible that in some situations the facts communicated to the local board could not, under any reasonable circumstances, be sufficient to warrant reclassification of the registrant, even if they subsequently were proved true. For example, a registrant classified I-A may write his board, inform it that he is enrolled in law school, and ask that his classification be reopened for consideration of a student deferment. Since student deferments are no longer granted to most graduate students under current regulations,[18] the board would properly refuse to reopen. In such a situation there is no need or purpose in proceeding any further, and, after proper notice from the local board informing the registrant of its action,[19] the reopening process is termi-

13. 32 C.F.R. § 1625.1(a) (1971).

14. *See* text accompanying note 12 *supra*.

15. *See, e.g.*, United States v. Norman, 412 F.2d 629 (9th Cir. 1969). In *Norman* the local board failed to consider whether reopening could be had on the basis of new facts submitted by a registrant. The board was apparently unaware that consideration of whether reopening is proper constitutes a mandatory step under 32 C.F.R. § 1625.4 (1971), as interpreted by the courts, while the act of reopening itself usually constitutes a discretionary step under 32 C.F.R. § 1625.2 (1971). *See* notes 73-83 *infra* and accompanying text. This mistake may have been attributable to the board's failure to realize that reopening consists of two separate steps. The differences between these steps are spelled out more fully at notes 17-27 *infra* and accompanying text.

16. *See* notes 34-36 *infra* and accompanying text.

17. 32 C.F.R. § 1625.4 (1971).

18. *See* note 10 *supra*.

19. 32 C.F.R. § 1625.4 (1971) provides in part: "In such a case [refusal to reopen], the local board, by letter, shall advise the person filing the request that the informa-

nated.[20] Thus, while this first step in the reopening process is a preliminary one, it nevertheless plays an important screening role by weeding out patently invalid claims.

However, if the facts and circumstances brought to the attention of the board or the State or National Director would qualify the registrant for a new classification if subsequently found to be true, the registrant is said to have presented a prima facie case.[21] Once presented with a prima facie case, the local board, either on its own motion or at the direction of the State or National Director, will normally proceed to the second step of the reopening process—the actual reclassification decision.[22] In making this decision the board undertakes determination of the truth of the facts and evaluates the over-all merits of the claim.[23] This inquiry may involve, among other things, attempts to verify information, or merely a weighing of the sincerity of the registrant's feelings and beliefs if he is seeking a conscientious objector classification.[24] Should the board find the registrant's claim meritorious, it will grant him a new classification. But should the claim fail to meet the board's approval, the new classification will be denied and the registrant will keep his initial classification.

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tion submitted does not warrant the reopening of the registrant's classification . . . ." Generally, the failure to give notice will not provide a registrant with a defense in a criminal prosecution or a basis for a writ of habeas corpus unless he has been prejudiced in some way by the failure to receive proper notice. *See* Battiste v. United States, 409 F.2d 910 (5th Cir. 1969); Chaney v. United States, 406 F.2d 809 (5th Cir. 1969); United States v. Smogor, 411 F.2d 501 (7th Cir. 1969); Yeoman v. United States, 400 F.2d 793 (10th Cir. 1968); United States v. Gearey, 368 F.2d 144 (2d Cir. 1966), *aff'd. on remand*, 266 F. Supp. 161 (S.D.N.Y.), *aff'd.*, 379 F.2d 915 (2d Cir.), *cert. denied*, 389 U.S. 959 (1967); United States v. Beaver, 309 F.2d 273 (4th Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); Smith v. United States, 238 F.2d 79 (5th Cir. 1956); United States v. Jones, 263 F. Supp. 943 (M.D. Ga. 1967), *aff'd.*, 387 F.2d 909 (5th Cir. 1968). *But see* Stain v. United States, 235 F.2d 339 (9th Cir. 1956). However, the failure to send notice of a denial of reopening may be a defense to an indictment charging that a registrant knowingly and wilfully failed to report for induction, when it is shown that the registrant was awaiting an answer to his request for reopening. United States v. Rabb, 394 F.2d 230 (3d Cir. 1968).

20. The regulations afford the right of appeal from a refusal to reclassify a registrant after reopening has occurred, but they afford no right of appeal from a decision denying reopening. *See* 32 C.F.R. § 1625.13 (1971).

21. *See, e.g.*, Mulloy v. United States, 398 U.S. 410, 415 (1970); Miller v. United States, 388 F.2d 973, 975-76 (9th Cir. 1967). The prima facie case is considered in more detail at notes 137-76 *infra* and accompanying text.

22. Failure to reopen upon presentation of a prima facie case is deemed an abuse of discretion and a denial of due process. Mulloy v. United Staes, 398 U.S. 410, 415-16 (1970). *See* notes 137-61 *infra* and accompanying text.

23. 32 C.F.R. § 1625.11 (1971) provides: "When the local board reopens the registrant's classification, it shall consider the new information which it has received . . . ."

24. Previously, in cases in which a claim of conscientious objection was raised, boards were also authorized to grant the registrant a pre-classification interview. Selective Serv. Local Bd. Memorandum No. 41, paras. 2, 3(a), and 3(b), Nov. 30, 1951 (rescinded Aug. 27, 1970). *See also* B. Silard, *Some Comments on the Local Board Memorandum No. 41 Pre-Classification Interview*, 2 SEL. SERV. L. REP. 4001 (1969).

The procedural consequences resulting from each step in the reopening process are significant.[25] On the one hand, if the board refuses to reopen—that is, declines to engage in an evaluative determination of the merits of the claim—because it feels that the registrant has failed to present a prima facie case, no administrative recourse is available to the registrant since neither the Act nor the regulations afford a right of appeal within the Selective Service System from the refusal to reopen.[26] If the registrant still feels that his claim is meritorious, he must look to the courts for further review.[27] On the other hand, once the board determines that reopening is proper and actually reopens the registrant's classification and engages in reclassification, the resulting procedural consequences are much more significant than when reopening is refused. Reopening cancels any work or induction order that previously has been issued.[28] Moreover, "[c]rucial to the concept of 'reopening' is 'classification anew.' "[29] Thus, when the board reopens and either retains the registrant in the same classification or awards him a new one, the classification retained or awarded is considered, in effect, a new and initial classification.[30] As a result, the registrant acquires the right to a personal appearance before the local board and also the right to a subsequent appeal before an appellate board if he should still object to his classification.[31] The regulations also charge the local boards with the duty of informing the registrant of the procedural avenues thus made available to him.[32] Therefore the decision

25. 32 C.F.R. § 1625.11 (1971) provides that once the board decides to reopen, the registrant is classified as if he had never before been classified. Thus, the normal classification procedure provided for in 32 C.F.R. § 1623 (1971) is followed in classifying the registrant anew.

26. *See* note 20 *supra.*

27. For a discussion of the availability of judicial review of local board actions, see notes 47-72 *infra* and accompanying text.

28. 32 C.F.R. § 1625.14 (1971). However, this section further provides that "if the registrant has failed to comply with either of those orders, the reopening of his classification thereafter by the local board for the purpose of placing him in Class IV-C or Class V-A shall not cancel the order with which he has failed to comply." Class IV-C is reserved for aliens not admitted to the United States for permanent residence and who have not resided in the United States for one year. 32 C.F.R. § 1622.42 (1971). Class V-A is reserved for registrants who have reached their twenty-sixth birthdays. 32 C.F.R. § 1622.50 (1971). Furthermore, there appears to be a split among the courts on the issue whether reopening by the local board after the registrant has refused induction and has been indicted will have the effect of cancelling the outstanding induction order and thus the indictment. *See, e.g.*, United States v. Noonan, 3 SEL. SERV. L. REP. 3519 (3d Cir. 1970) (a reopening or a procedural error after the registrant has refused induction will not be a proper defense in an ensuing prosecution). *Contra*, United States v. Nordlof, 3 SEL. SERV. L. REP. 3546 (7th Cir. 1971); United States v. Lloyd, 3 SEL. SERV. L. REP. 3171 (9th Cir. 1970).

29. SEL. SERV. L. REP. PRACTICE MANUAL ¶ 1095, at 1071 (1968).

30. 32 C.F.R. § 1625.11 (1971).

31. 32 C.F.R. § 1625.13 (1971).

32. 32 C.F.R. § 1625.12 (1971). This section refers to the notice provisions of 32

of the local board in the first step of the process–whether or not to reopen–is a matter of great procedural significance to the registrant since a decision to reopen, whether or not a new classification is awarded, has the result of cancelling any existing work or induction orders as well as vesting the registrant with the right to a personal appearance and appeal.

B. *Methods of Obtaining Reopening*

The regulations authorize reopening by the local board in three basic situations.[33] In two of these situations, the board has no discretion and must reopen; in the third situation, the board has discretion and reopening is nonmandatory. As discussed below, it has been this nonmandatory, or discretionary, situation that has generated the greatest body of litigation and from which the major judicial developments in the law of reopening have evolved.

The first nondiscretionary reopening situation arises when either the State Director or the National Director of Selective Service, acting upon a request made directly to him by the registrant, submits a written request to the local board to reopen the registrant's classification.[34] When such a request is made, the local board must reopen. Viewing reopening as a two-step procedure, deciding first whether to reopen and then whether to reclassify, the State Director or National Director in effect is substituted for the local board by taking the first step, that is, by deciding to reopen the registrant's classification. This decision then is binding upon the local board. However, the evaluation of the over-all merits of the claim, the actual reclassification decision, still falls into the hands of the local board.[35] Furthermore, a director's request for reopening automatically cancels any outstanding induction or work order.[36]

C.F.R. § 1623.4 (1971), which specify the notice requirements after a registrant has been classified.

33. Prior to the Supreme Court's decision in Gutknecht v. United States, 396 U.S. 295 (1970), there were four situations in which reopening was available. Under 32 C.F.R. § 1642 (1970) a registrant declared delinquent for failing to perform any duty required under the Selective Service law was to be reclassified I-A, I-A-O, or I-O and then called for induction before any other registrants. Reclassifying the registrant from one classification to I-A, I-A-O, or I-O was considered a reopening which required that a personal appearance and appeal be allowed. 32 C.F.R. § 1642.14 (1970). However, a registrant already classified I-A, I-A-O, or I-O before being declared a delinquent was allowed no appeal because he had not been reclassified but merely put at the top of the order of call. *See* J. GRIFFITHS, THE DRAFT LAW, *A "College Outline" for the Selective Service Act & Regulations* 61 (2d ed. 1968). In *Gutknecht* the Court struck down § 1642 as unauthorized by and in conflict with the Act, and thus ended reopening by this method.

34. 32 C.F.R. § 1625.3(a) (1971).

35. The availability of reopening through a request by the State or National Director can be of considerable significance to a registrant confronted with a hostile local board. If the board refuses to reopen, the registrant can turn to the State or National Director and attempt to obtain reopening through him. *See, e.g.*, Miller v.

The second nondiscretionary reopening situation occurs when the local board receives facts establishing that a registrant who has previously been ordered to report for induction should be granted the limited student deferment conferred by classification I-S(C).[37] The board must reopen the classification and consider anew the registrant's classification, thereby cancelling the outstanding order to report for induction.[38] In this situation, then, the regulations clearly state that the board must make the decision to reopen.

The final reopening situation authorized by the regulations is characterized by the discretion vested in the local board to decide whether to reopen. Two methods are provided to authorize reopening.[39] First, the local board may reopen a registrant's classification

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United States, 388 F.2d 973 (9th Cir. 1967). While it will be the same hostile board that will pass on the validity of the claim, the right of appeal following reopening will ensure that some body, in addition to the local board, has the opportunity to review the facts and circumstances presented in favor of a new classification. Furthermore, 32 C.F.R. § 1625.2 (1971) renders a board powerless to reopen, absent an involuntary change in circumstances, once an induction order has been mailed to the registrant. However, in *Miller*, the court held that the State or National Director may empower the board to reopen in a post-induction order situation, notwithstanding 32 C.F.R. § 1625.2 (1971). 388 F.2d at 976. Thus, a registrant who seeks a new classification after he has received an induction order will have to proceed through the State or National Director unless he has undergone an involuntary change in status or is seeking the I-S(C) classification, which is discussed at notes 37-38 *infra* and accompanying text.

36. 32 C.F.R. § 1625.3(a) (1971).

37. 32 C.F.R. § 1625.3(b) (1971). Classification I-S(C) is reserved for college students not qualified for classification in Class II-S (undergraduate deferment—32 C.F.R. § 1622.26(b) (1971)) and provides those students with a deferment until the end of the academic year. 32 C.F.R. § 1622.15(b) (1971).

38. 32 C.F.R. § 1625.14 (1971). Normally the local board lacks the power to reopen once it has mailed an order to report for induction or civilian work unless it first finds an involuntary change in the registrant's status that has occurred since the mailing of that order. 32 C.F.R. § 1625.2 (1971). Thus, the mandatory cancellation of the order to report for induction upon a showing by the registrant that he is qualified for Class I-S(C) can be of considerable significance to a registrant approaching age twenty-six. If the board grants the registrant a I-S(C) classification upon verifying his claim, and if the registrant reaches age twenty-six between the time his first induction order is sent to him and the time the I-S(C) terminates, his susceptibility to the draft will be reduced. This is so because 32 C.F.R. § 1631.7(d)(7) (1971) provides that registrants who have not received an induction order *before* reaching age twenty-six will be placed in a lower priority. Thus, a registrant who reaches age twenty-six without being ordered to report for induction will have his vulnerability to the draft reduced.

39. 32 C.F.R. § 1625.2 (1971) provides:

> The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written requeset for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induc-

upon written request.[40] This request does not necessarily have to emanate from the registrant. The registrant, the government appeal agent, any person claiming to be a dependent of the registrant, or any person who seeks an occupational deferment on behalf of the registrant may request reopening if he presents new facts and circumstances that would justify a new classification if proved true.[41] Second, the board may reopen upon its own motion when it becomes aware of facts not previously considered when the registrant was classified initially.[42] Thus, if new facts and circumstances reach the board unaccompanied by a written request, the board may itself take the initiative and reopen.[43]

In the two discretionary situations outlined above, it should be noted that the regulations state that the board *may* reopen. Neither the Act nor the regulations compel the board to reopen, and ostensibly the board is left in command of the situation with vast discretion vested in it. There is only one nonjudicial limit on the board's use of that discretion—the board may not reopen, either upon request or upon its own initiative, after an induction or work order has been mailed unless there is a finding that "there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."[44] It should be emphasized, however, that this restriction merely prevents the board from reopening when a work or induction order has been mailed; it does not force reopening.

In summary, the regulations allow the local boards to wield nearly complete control over the reopening process except when the State or National Director requests reopening or when the board is faced with a I-S(C) situation. Entrusting this discretion to the boards has resulted in widespread abuses of reopening by the boards.[45] For

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tion . . . or an Order to Report for Civilian Work and Statement of Employer . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

40. 32 C.F.R. § 1625.2 (1971).

41. 32 C.F.R. § 1625.2 (1971).

42. 32 C.F.R. § 1625.2 (1971). It should be noted that these "facts not considered" previously do not necessarily have to be new facts. A board may reopen upon its own motion "whenever it appears that it erred in failing to consider all material facts available" when it originally classified the registrant. Bradshaw v. United States, 242 F.2d 180, 186 (10th Cir. 1957).

43. Although a registrant has no obligation to request reopening, 32 C.F.R. § 1625.1(b) (1971) provides that the registrant has an affirmative duty to report "within 10 days after it occurs . . . any fact that might result in the registrant being placed in a different classification." For a discussion of whether the failure to report any changes in status within the specified ten-day limit will result in a waiver of the right to obtain reopening, see note 262 *infra*.

44. 32 C.F.R. § 1625.2 (1971).

45. *See* the discussion beginning at note 73 *infra* and accompanying text. These abuses have had at least the tacit support of the ex-National Director. General Hershey's application of the delinquency regulations (*see* note 33 *supra*) illustrates his role in

example, boards often fail to consider new facts submitted by registrants, evaluate claims without reopening first—thereby denying a registrant the right to appeal—and occasionally reopen classifications to the detriment of a registrant without a prior finding of new facts.[46] In response to challenges to these abuses, many courts have developed a number of rules and doctrines that substantially modify the regulations and also curb the exercise of discretion by the local boards. After a brief consideration of the availability of judicial review of local board activities and procedures, the discussion will focus on these rules and doctrines, as well as on other developments in the law of reopening.

C. *Judicial Review of Reopening*

A registrant who believes that the Selective Service System has treated him unfairly is entitled to judicial review of the propriety of the procedures employed and the classification awarded him by his board.[47] Several different methods of obtaining judicial review are available to the registrant. First, if the registrant decides to refuse induction, he may raise his claim as a defense to a criminal prosecution for draft evasion.[48] The basis of such a defense would be that the error committed by the local board invalidates his induction order. Second, the registrant has the option of submitting

promoting local board excesses. His Local Board Memorandum 85 (April 19, 1968) and the cover letter that accompanied it suggested that local boards reclassify students who took part in demonstrations against draft boards or in other anti-war protests that the local board believed to be illegal. *See* National Student Assn. v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969). However, after the Court of Appeals for the District of Columbia invalidated a portion of the memorandum, General Hershey persistently refused to notify local boards, although he did notify boards of the favorable part of the district court decision in the same case. *See* Hershey Directive Declared Invalid in Part, 2 SEL. SERV. L. REP. NEWSLETTER 5 (1969); Congressman Notified State Directors of N.S.A. v. Hershey, 2 SEL. SERV. L. REP. NEWSLETTER 13, 16 (1969); California Local Boards Not Aware of N.S.A. v. Hershey, 2 SEL. SERV. L. REP. NEWSLETTER 25, 28 (1969). Subsequent to these events the Supreme Court invalidated the delinquency regulations in Gutknecht v. United States, 396 U.S. 295 (1970). *See* note 33 *supra*.

46. *See* discussion beginning at note 177 *infra* and accompanying text.

47. *See generally* Tigar, *Judicial Review of Selective Service Decisions*, in SELECTIVE SERVICE: THE ATTORNEY'S VIEW 81 (B. Poindexter ed. 1969); Donahue, *The Supreme Court vs. Section 10(b)(3) of the Selective Service Act: A Study in Ducking Constitutional Issues*, 17 UCLA L. REV. 908 (1970); Leonard & Frantz, *Judicial Review of Selective Service Orders*, 26 THE GUILD PRACTITIONER 85 (1967); O'Neil, *Review of Selective Service Reclassifications*, 37 GEO. WASH. L. REV. 536 (1969); Winick, *Direct Judicial Review of the Actions of the Selective Service System*, 69 MICH. L. REV. 55 (1970).

48. *E.g.*, Estep v. United States, 327 U.S. 114 (1946). However, *Estep* and Falbo v. United States, 320 U.S. 549 (1944), held that *no* method of judicial review of local board action was available to registrants who had failed to exhaust their administrative remedies. The exhaustion requirement was recently relaxed somewhat in McKart v. United States, 395 U.S. 185 (1969).

to induction and then petitioning for habeas corpus, again claiming that his induction order is invalid.[49]

While habeas corpus and defense to a criminal prosecution are nearly always available as avenues for judicial review, they are seldom desirable. If the registrant petitions for habeas corpus after submitting to induction, he may, for some period of time, needlessly be faced with serving the military obligation he is seeking to avoid, as well as the possible hostility of his superiors.[50] The registrant may compromise his religious, ethical, and moral convictions merely by submitting to induction. On the other hand, if the registrant decides to refuse induction, the "cost" of raising his claim will be the exposure to criminal prosecution and accompanying sanctions,[51] as well as the social stigma attaching to such a refusal.[52] Thus, it is apparent that neither habeas corpus nor defending against a criminal prosecution are satisfactory methods of raising a claim in the courts.

A third method, preinduction judicial review, is often available to the registrant. When such review is available, the registrant may sue in a federal district court, prior to his induction, to challenge the legality of the induction.[53] From the registrant's standpoint, preinduction review clearly is the preferable procedure for raising a claim since the registrant is able to avoid the hardships and difficulties of habeas corpus or a defense to criminal prosecution. However, preinduction judicial review is often unavailable. Indeed, in enacting section 460(b)(3) (commonly referred to as section 10(b)(3)) of the Military Selective Service Act of 1967,[54] Congress clearly expressed its intent that preinduction judicial review "of the classification or processing of any registrant" be made unavailable.[55]

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49. *E.g.*, Mulloy v. United States, 398 U.S. 410 (1970); Billings v. Truesdell, 321 U.S. 542 (1944).

50. In Estep v. United States, 327 U.S. 114, 129 (1946), Justice Murphy noted that the habeas corpus approach to judicial review

> requires one first to enter the armed forces and drop every vestige of civil rights. Military orders become the law of life and violations are met with summary court-martial procedure. No more drastic condition precedent to judicial review has ever been framed. Many persons with religious or conscientious scruples are unable to meet such a condition.

51. The maximum penalty for a conviction of refusal to submit to induction may be five years imprisonment, a fine of $10,000, or both. Military Selective Service Act of 1967, 50 U.S.C. App. § 462(a) (Supp. IV, 1965-1968).

52. *See, e.g.*, Donahue, *supra* note 47, at 956; Note, *Admission to the Bar Following Conviction for Refusal of Induction*, 78 YALE L.J. 1352 (1969).

53. *E.g.*, Nestor v. Hershey, 425 F.2d 504 (D.C. Cir. 1969); Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956); Tomlinson v. Hershey, 95 F. Supp. 72 (E.D. Pa. 1949).

54. 50 U.S.C. App. §§ 541-67 (Supp. IV, 1965-1968), *amending* 50 U.S.C. App. §§ 451-73 (1964).

55. Section 10(b)(3) provides:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title . . . after the regis-

The Supreme Court, however, in *Oestereich v. Selective Service Local Board Number 11*[56] and *Clark v. Gabriel*[57] construed section 10(b) (3) as not precluding all preinduction judicial review and in effect carved out a narrow exception that permits a limited sphere of preinduction review. In *Oestereich,* a divinity student was reclassified from IV-D[58] to I-A and was ordered to report for induction after he refused to carry a draft card. He was subsequently declared a delinquent. The Court held that the local board's reclassification of Oestereich was "basically lawless" because the Act gives divinity students a "plain and unequivocal" right to the IV-D exemption and because that right cannot be lost by "activities unrelated to the merits of granting or continuing that exemption."[59] Thus, notwithstanding section 10(b)(3), the Court held that preinduction judicial review was available to a registrant when there is "a clear departure by the Board from its statutory mandate"[60] and when this departure involves "no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved."[61]

In *Gabriel,* the Court held that section 10(b)(3) precluded preinduction judicial review of a local board's refusal to grant a registrant an exemption as a conscientious objector.[62] The Act conditions the right to the conscientious objector exemption upon the local board's determination that the claim is meritorious.[63] Accordingly, the Court held that this determination "inescapably involves a determination of fact and an exercise of judgment."[64] Thus, the Court viewed the board's refusal to grant the exemption as merely an exercise of the discretion granted to the board by the Act and that refusal could not properly be termed as being "basically lawless." In effect, then, in *Oestereich* the board acted "without statutory basis"[65]

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trant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in the war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

Military Selective Service Act of 1967 § 1(8)(c) [amending Universal Military Training and Service Act § 10(b)(3)], codified in 50 U.S.C. App. § 460(b)(3) (Supp. IV, 1965-1968).

56. 393 U.S. 233 (1968).

57. 393 U.S. 256 (1968) (per curiam).

58. *See* 50 U.S.C. App. § 456(g) (Supp. IV, 1965-1968); 32 C.F.R. § 1622.43 (1971).

59. 393 U.S. at 237.

60. 393 U.S. at 238.

61. 393 U.S. at 238.

62. *See* text accompanying note 256 *infra.*

63. 50 U.S.C. App. § 456(j) (Supp. IV, 1965-1968).

64. 393 U.S. at 258.

65. 393 U.S. at 258.

while in *Gabriel* the activity depended "upon an act of judgment by the board."[66]

One commentator, in attempting to define the *Oestereich-Gabriel* exception, has concluded that

> Read together, *Oestereich* and *Gabriel* establish a construction of section 10(b)(3) that allows preinduction judicial review in cases in which the local board's action violates the statute, but prohibits such review in cases in which the board acts within its statutory authority with respect to a discretionary classification, when such classification involves the exercise of board judgment in determining facts and evaluating evidence.[67]

The reason advanced by the Court for the preclusion of preinduction judicial review of the local board's fact-finding functions and its use of discretion is that such review inevitably will result in the very "litigious interruption" that Congress clearly has intended to avoid.[68] On the other hand, the Court felt that preinduction judicial review of "basically lawless" activity has the tendency to yield significantly less disruption.[69]

The holdings in *Oestereich* and *Gabriel* deal only with the narrow issue of preinduction judicial review of local board classification decisions.[70] However, several lower courts have extended the reasoning of these cases to preinduction suits by registrants claiming violations of board procedures spelled out in the Act and regulations.[71] Thus, when a local board omits or incorrectly employs a mandatory procedure involving no exercise of discretion or finding

66. 393 U.S. at 258.

67. Winick, *supra* note 47, at 71. For another interpretation of the *Oestereich* line of cases, see Donahue, *supra* note 47.

68. 393 U.S. at 258-59. The legislative history seems to indicate that Congress intended to preclude all judicial review, even of basically lawless activity. The Senate Report notes that it "attaches much importance to the finality provision and reemphasizes the original intent that judicial review of classifications should not occur until after the registrant's administrative remedies have been exhausted and the registrant presents himself for induction." S. REP. No. 209, 90th Cong., 1st Sess. 10 (1967). However, in *Oestereich* the Court noted that it is doubtful "that § 10(b)(3) can sustain a literal reading." 393 U.S. at 238.

69. 393 U.S. at 258-59. The concern of the courts for the efficient processing of registrants has its roots deep in history. *See, e.g.*, Falbo v. United States, 320 U.S. 549 (1944); Selective Service Draft Law Cases, 245 U.S. 366 (1918).

70. The courts have consistently held that they will not review the correctness of Selective Service classification decisions if they are supported by a "basis in fact." Estep v. United States, 327 U.S. 114, 122 (1946). The "basis in fact" rule was written into the Selective Service law in 1967. *See* note 55 *supra*.

71. *E.g.*, Keibler v. Selective Serv. Local Bd. No. 170, 3 SEL. SERV. L. REP. 3294 (N.D.N.Y. 1970); Rich v. Hershey, 303 F. Supp. 177 (D. Colo.), *aff'd.*, 408 F.2d 944 (10th Cir. 1969); Murray v. Blatchford, 307 F. Supp. 1038, *motion to dismiss denied sub nom.* Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969); Wiener v. Local Bd. No. 4, 302 F. Supp. 266 (D. Del. 1969). *See also* notes 162-66 *infra* and accompanying text.

of facts, that action again becomes "basically lawless" and susceptible to preinduction judicial review.[72] It is the availability of preinduction judicial review to registrants asserting various procedural errors by their local boards in the administration of the reopening process—as well as the implications of such review—that necessitates a consideration in this Comment of the problems of preinduction judicial review. As each reopening abuse is considered, an attempt will be made to determine whether or not that particular error in applying the regulations, as they have been interpreted by the courts, should entitle a registrant to judicial review prior to his induction.

III. Judicial Development of a Law of Reopening

A. *Checks on Local Board Discretion and Abuses*

1. *Failure To Consider a Request*

As noted above,[73] the first step in the reopening process consists of determining whether the facts and circumstances under consideration justify actual reopening of the registrant's classification for the purpose of making an evaluative determination of the merits of his claim. However, some local boards often omit this first step; that is, they completely fail to consider whether reopening is proper by ignoring the information contained in express requests for reopening that registrants have sent to them. For example, in *United States v. Norman*,[74] the registrant, classified as a conscientious objector, submitted information to his board in a request for reopening that indicated his eligibility for a ministerial exemption. The local board, however, failed to act upon his request for reclassification or to make a determination whether or not reopening was available. In reversing the registrant's conviction for refusal to obey a work order, the Court of Appeals for the Ninth Circuit stated that the board's failure to act was ". . . contrary to the language and spirit of the . . . regulations. A duty rests upon the Board, when it receives any written request to reopen a registrant's classification, to either reopen or refuse to do so."[75]

It should be noted that although the Ninth Circuit held that the "language" of the regulation compels a consideration of new facts submitted, in fact, the regulations remain silent on the matter, and

72. *See, e.g.*, Murray v. Blatchford, 307 F. Supp. 1038, *motion to dismiss denied sub nom.* Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969). In *Murray*, the court held, *inter alia*, that it had jurisdiction to hear a preinduction suit because of the local board's failure to vote on the registrant's request for reopening as required by 32 C.F.R. § 1604.52a(d) (1971). This failure, the court noted, amounted to "regulatory lawlessness." 307 F. Supp. at 1058.

73. *See* notes 15-20 *supra* and accompanying text.

74. 412 F.2d 629 (9th Cir. 1969).

75. 412 F.2d at 631.

merely state that the board "may" reopen upon a request that contains new information.[76] While section 1625.4 spells out a procedure the board should follow if it does consider the request, that regulation is also silent on the question whether the board must consider the new information. Thus, the Ninth Circuit's decision seems to rest on the "spirit" of the regulations rather than on a literal interpretation of their language.

Whatever the reasoning behind decisions such as *Norman*, courts have held unanimously that a local board must at least take the first step in the reopening process by considering new facts and circumstances submitted to it to determine whether they support a decision to reopen.[77] Of course, before this duty arises, the registrant must submit a valid request for reopening.[78] Once faced with a proper request, however, the board must take the initial step in the reopening process, and the courts have consistently labelled its failure to do so as a denial of due process.[79] Indeed, several courts have even held that a registrant is denied due process when a local board forwards new facts to an appeal board—which is already hearing an appeal on other grounds—without first considering whether reopening is proper.[80] The decisions in these cases are premised on the

76. 32 C.F.R. § 1625.2 (1971) provides: "The local board may reopen and consider anew the classification of a registrant . . . ."

77. *See, e.g.*, Battiste v. United States, 409 F.2d 910 (5th Cir. 1969); United States v. Smogor, 411 F.2d 501 (7th Cir. 1969); Mizrahi v. United States, 409 F.2d 1219 (9th Cir. 1969); United States v. Norman, 412 F.2d 629 (9th Cir. 1969); United States v. Gearey, 368 F.2d 144 (2d Cir. 1966), *affd. on remand*, 266 F. Supp. 161 (S.D.N.Y.), *affd.*, 379 F.2d 915 (2d Cir.), *cert. denied*, 389 U.S. 959 (1967); United States v. Ransom, 223 F.2d 15 (7th Cir. 1955); United States *ex rel.* Berman v. Craig, 207 F.2d 888 (3d Cir. 1953); Davis v. United States, 199 F.2d 689 (6th Cir. 1952); United States v. Zieber, 161 F.2d 90 (3d Cir. 1947), *cert. denied*, 333 U.S. 827 (1948); United States *ex rel.* La Charity v. Commanding Officer, 142 F.2d 381 (2d Cir. 1944); Helden v. Laird, 306 F. Supp. 1351 (S.D.N.Y. 1969); United States v. Seeley, 301 F. Supp. 811 (D.R.I. 1969); United States v. Shaifer, 311 F. Supp. 366 (N.D. Ill. 1969); United States v. McNeal, 1 SEL. SERV. L. REP. 3227 (N.D. Cal. 1968); United States v. Smith, 291 F. Supp. 63 (D.N.H. 1968); United States v. Simms, 285 F. Supp. 981 (D. Del. 1968); United States v. Blaisdell, 294 F. Supp. 1303 (D. Me. 1968); United States v. Singleton, 282 F. Supp. 762 (S.D.N.Y. 1968); United States v. Walsh, 279 F. Supp. 115 (D. Mass. 1968); United States v. Longworth, 269 F. Supp. 971 (S.D. Ohio 1967); United States v. Burlich, 257 F. Supp. 906 (S.D.N.Y. 1966); United States v. Brown, 129 F. Supp. 237 (D.N.J. 1955); United States v. Sage, 118 F. Supp. 33 (D. Neb. 1954).

78. *See* notes 85-115 *infra* and accompanying text.

79. *See* cases cited in note 77 *supra*. In Davis v. United States, 199 F.2d 689, 691 (6th Cir. 1952), the court stated in dictum: "If a local board refuses to consider new information offered by the registrant at the time of his personal appearance or refuses to receive new information which the registrant endeavors to offer, he is thereby denied due process of law." The *Davis* court cited United States v. Zieber, 161 F.2d 90 (3d Cir. 1947), *cert. denied*, 333 U.S. 827 (1948), for this proposition.

80. United States *ex rel.* Berman v. Craig, 207 F.2d 888 (3d Cir. 1953); United States v. Zieber, 161 F.2d 90 (3d Cir. 1947), *cert. denied*, 333 U.S. 827 (1948); United States v. Sage, 118 F. Supp. 33 (D. Neb. 1954). In *Berman*, the registrant, classified I-S(C), was reclassified I-A and ordered to report immediately for induction. Within ten days he submitted evidence showing that he was a theology student. The local board did not

rationale that the error cannot be cured by appellate board consideration of facts submitted independently of the whole file since these boards lack the power to "receive or consider any information other" than information found in the record.[81]

A local board that fails to consider facts submitted with a valid request for reopening thereby fails to follow an express provision of the regulations as it has been interpreted by the courts. Since the initial reopening decision is a mandatory procedure that involves no fact-finding or exercise of discretion, it seems clear that a failure to make that decision constitutes "basically lawless" activity, which can be challenged by a registrant in a suit seeking preinduction judicial review of his claim.[82] For example, in *Murray v. Blatchford*,[83] the court held that a local board's failure to consider the facts contained in a request for reopening was one of several lawless activities engaged in by the board that justified the decision to grant the registrant preinduction judicial review of his case.

It is submitted that the courts' position in requiring local boards at least to consider whether reopening is proper is entirely reasonable. By placing a considerable limitation on the exercise of local board discretion and thereby curbing one aspect of arbitrary local board behavior, the courts have helped ensure that each registrant may have some minimal review of his claim. However, this limitation deals only with one of several reopening abuses committed by the boards, and by itself it is insufficient to ensure complete fairness in the reopening process. The courts have been called upon to formulate other limitations as well, and the discussion now turns to a consideration of these judicial developments.

2. *The Implicit Request*

As has just been noted,[84] the courts have unanimously interpreted the regulations to require local boards to take the first step in the reopening process—that is, to decide whether newly submit-

consider the evidence but forwarded it to the appeal board, which retained Berman in class I-A. The Federal District Court for the District of New Jersey granted habeas corpus, 107 F. Supp. 529 (D.N.J. 1952), and the Third Circuit affirmed on the ground that 32 C.F.R. §§ 1625.(1) and (2) require the local board to consider a request for reopening if the facts supporting the classification are reported within ten days after they occur. 207 F.2d 888 (3d Cir. 1953).

81. 32 C.F.R. § 1626.24(b) (1970) provides: "In reviewing the appeal and classifying the registrant, the appeal board shall not receive or consider any information other than the following:

(1) Information contained in the record received from the local board.

(2) General information concerning economic, industrial, and social conditions."

82. *See* Edwards v. Local Bd. No. 58, 313 F. Supp. 650 (E.D. Pa. 1970), discussed in note 114 *infra*.

83. 307 F. Supp. 1038 (D.R.I.), *motion to dismiss denied sub nom.* Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969).

84. *See* note 77 *supra* and accompanying text.

ted facts justify reopening—when they are faced with a valid request for reopening. However, the question of precisely what constitutes a "valid" request has generated considerable disagreement among the courts that have considered the problem. The regulations specify that a registrant who seeks reopening through his local board must initiate the reopening process by submitting a written request accompanied by new facts.[85] Many boards interpret this regulation literally and require that the person seeking reopening submit a written request specifically asking for a reopening. Thus, local boards have refused to reopen when the request is made orally[86] or when new facts included in a letter are unaccompanied by words specifically asking that the registrant's classification be reopened.[87]

The weight of authority in the courts, especially in the circuit courts of appeal, has supported a literal reading of the regulation.[88] The effect of these decisions has been to establish the written request as a condition precedent to the existence of any duty on the part of the board to take the first step in the reopening process by considering new facts it has received. The courts give various reasons in support of a policy requiring a written request. In *Hoapili v. United States*,[89] the court expressed concern that less than a literal interpretation of the regulations "could effectively obstruct economical and expeditious military organization."[90] Other courts have merely accepted the regulation at face value and have required a written request without presenting any underlying reasons such as efficiency and orderliness.[91]

85. 32 C.F.R. § 1625.2 (1971).

86. Hoapili v. United States, 395 F.2d 656 (9th Cir. 1968) (upholding local board's refusal to reopen upon an oral request made to a clerk); Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956) (refusal to reopen upon an oral request made to local board chairman was improper since the chairman had a duty to reduce information to writing or direct the registrant to do so).

87. *E.g.*, United States v. Hasmuk, 419 F.2d 929 (7th Cir. 1970) (a letter communicating new facts is not a specific request for reopening); United States v. Whitaker, 395 F.2d 664 (4th Cir. 1968) (local board and court denied reopening on the ground that facts regarding ministerial exemption were not accompanied by a written request); Shaw v. United States, 264 F.2d 118 (9th Cir. 1959) (local board's failure to consider statement that registrant was a minister upheld because not accompanied by a written request for reopening).

88. United States v. Hasmuk, 419 F.2d 929 (7th Cir. 1970); United States v. Whitaker, 395 F.2d 664 (4th Cir. 1968); Hoapili v. United States, 395 F.2d 656 (9th Cir. 1968); United States v. Tucker, 374 F.2d 731 (7th Cir. 1967); Storey v. United States, 370 F.2d 255 (9th Cir. 1966); Shaw v. United States, 264 F.2d 118 (9th Cir. 1959); United States v. Pyrtle, 299 F. Supp. 1103 (E.D. Mo. 1969); United States v. Jones, 263 F. Supp. 943 (M.D. Ga. 1967), *aff'd.*, 387 F.2d 909 (5th Cir. 1968); United States v. Thompson, 253 F. Supp. 535 (W.D. Okla. 1966), *aff'd.*, 380 F.2d 86 (10th Cir. 1967).

89. 395 F.2d 656 (9th Cir. 1968).

90. 395 F.2d at 658.

91. In United States v. Whitaker, 395 F.2d 664, 666 (4th Cir. 1968), the court stated: "However, the letter written by Whitaker to the board did not request a reopening of his classification. There being no express request to reopen, the local board was not

However, it seems clear that requiring registrants to submit a written request must, of necessity, lead to arbitrary administration of the reopening process. On the one hand, the registrant who fails to submit a written request can be denied any consideration at all, even if he presents a claim that entitles him to a new classification. On the other hand, when the registrant fails to satisfy the written request requirement, the regulations *allow*, but do not require, his local board, unrestrained by a request or notice requirement, to reopen upon its own motion when presented with new facts and circumstances.[92] Yet, in numerous instances, local boards have refused to exercise that discretion when such an exercise would result in a classification favorable to the registrant. For example, in *Shaw v. United States*,[93] the registrant submitted facts to show he was a minister, but the board failed to reopen or even consider reopening upon its own motion. Similarly, in *Townsend v. Zimmerman*,[94] the registrant left his wife and child and, as a result, lost his III-A classification. He later returned to his family and informed the chairman of his local board of his changed status, but the board failed to reopen his classification.

In contrast, when the exercise of discretion will yield a I-A classification, local boards are much more disposed to use their "discretion" to reopen. For example, in *Townsend*, the board had received no request to reopen and classify the registrant I-A after he left his family. Nevertheless, it reopened on its own motion.

As noted above, the requirement that the request be in writing and that it be accompanied by words specifically requesting reopening can have the effect of denying a registrant any review or determination of the merits of his claim if his board chooses not to reopen on its own motion. This literal interpretation of section 1625.2 places an enormous burden upon registrants since few registrants have access to, or any knowledge of, the regulations. Furthermore, it may be questioned whether denying review to a registrant who fails to satisfy this literal interpretation furthers any significant policies. Delay is one factor to consider, but it seems that a brief review by the board of whether reopening is appropriate would cause little delay. Moreover, the notions of fairness and of maintaining regis-

required to advise Whitaker that it would not reopen his classification." *See also* Shaw v. United States, 264 F.2d 118 (9th Cir. 1959). *Shaw* and Hoapili v. United States, 395 F.2d 656 (9th Cir. 1968), were both decided by the Ninth Circuit. In *Shaw* the court presented no underlying reasons for requiring an express request but preferred to rely on the regulation itself. However, in the face of other decisions that have adopted the implicit request approach (discussed at notes 100-15 *infra* and accompanying text), the Ninth Circuit in *Hoapili* seems to have considered it necessary to defend its position and the regulation by presenting the underlying reasons of efficiency and orderliness. 395 F.2d at 658.

92. 32 C.F.R. § 1625.2 (1971).

93. 264 F.2d 118 (9th Cir. 1959).

94. 237 F.2d 376 (6th Cir. 1956).

trants in proper classifications emerge as major policies of the Act.[95] Therefore, what little delay might result would be outweighed by these statutory policies. Indeed, proper classification of registrants could have the effect of keeping numerous cases out of the courts, thereby benefiting both the Selective Service and the judicial system.

Another possible reason for favoring a literal interpretation of section 1625.2 is to prevent perjury by registrants who falsely claim they have submitted oral requests for reopening. While this position may have merit, the problem of a lack of fundamental fairness still remains. Requiring the board or its employees to write down oral requests or to direct registrants to do so would seem to be a more suitable approach to the perjury problem than would denying the registrant any consideration of his claim.[96] Thus, when local boards become aware of new facts, sound policy dictates that they should not be free to refuse reopening on the basis of a mere technicality, which at best serves a limited purpose.

Furthermore, the fact that many courts favor a literal interpretation of the written request requirement leads to the conclusion that these courts are somewhat inconsistent in their approach to construing and interpreting the regulations. For example, in *United States v. Norman*,[97] when faced with the ultimate issue whether a board must consider facts submitted to it with a proper written request, the Ninth Circuit, as have all courts, interpreted the word "may" to mean "must." Although the court held that the "language and spirit" of the regulations compelled this interpretation, as noted above,[98] the language of the regulations is permissive and thus the decision appears to rest solely upon the "spirit" of the regulations. Yet, in *Storey v. United States*,[99] when the court considered the implicit re-

95. Military Selective Service Act of 1967, 59 U.S.C. App. § 451(c) (Supp. IV, 1965-1968), provides:

> The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy.

96. *See* Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956). In that case, the court held that 32 C.F.R. 1623.1 (1971), which provides that "[u]nder no circumstances shall the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file," placed a "duty" upon a local board chairman "to make a written summary" of oral information submitted to him. 237 F.2d at 378. *But see* United States v. McKinney, 427 F.2d 449 (6th Cir. 1970), in which the court held that an oral claim of conscientious objection raised during a security clearance interview need not be communicated to the board or considered by the board.

97. 412 F.2d 629 (9th Cir. 1969).

98. *See* text following note 76 *supra*.

99. 370 F.2d 255 (9th Cir. 1966). In *Storey*, the registrant sought an exemption as a conscientious objector. While the claim was on appeal, he sent his local board a letter indicating that he had become a member of the Radio Church of God. The board failed to determine if reopening was proper but forwarded the letter to the appeal board. The court held that the failure to consider the newly submitted facts

quest issue—whether the "written request" requirement of the regulation should be read literally—the Ninth Circuit appeared to ignore the "spirit" of the regulations and considerations of substantial justice by adopting a literal interpretation of this part of the regulation.

In *Storey*, as in *Norman*, substantial justice to the registrant and the "spirit" of the regulations would seem to have called for a less than literal interpretation of the regulation. Yet, the court employed such an equitable interpretation only in *Norman*. However, the Ninth Circuit's varying approach in interpreting the regulations, as exemplified by the conflict between *Storey* and *Norman*, does illustrate that the role of the courts in eliminating arbitrariness in the Selective Service System has not been consistent. While the reasons for a vacillating position in construing the regulations remain uncertain, such inconsistency can only foster arbitrariness and capricious behavior and procedures, or, at the very least, retard their elimination. It is submitted that in construing the written request requirement, as in construing the board's duty to reopen, an unwavering policy of interpreting the regulations so as to afford a registrant at least some consideration of his claim would certainly be more in accord with the basic notion of fairness and with minimal standards of due process.

A minority of courts have recognized the inherent unfairness in the majority's literal interpretation of the written request requirement[100] and have allowed oral requests or the submission of facts unaccompanied by any request to operate as the "written" request called for in the regulations.[101] The rationale usually given in support of

was not a denial of due process because the letter concerning the registrant's church membership did not expressly request reopening. It should be noted that the Ninth Circuit has also held that a writing asking for a personal appearance cannot be considered a request for reopening when new facts are not submitted. Frank v. United States, 236 F.2d 39 (9th Cir. 1956).

100. 32 C.F.R. § 1626.11(a) (1971) (emphasis added), which describes the procedure for taking an appeal, provides in part: "Any person entitled to do so may appeal to the appeal board by filing with the local board a written notice of appeal . . . [and] the language of any such notice shall be *liberally construed* in favor of the person filing the notice so as to permit the appeal." In contrast, the regulations governing reopening, 32 C.F.R. § 1625 (1971), have no such provision. There seems to be no rational basis, however, why a request for reopening should have to meet the technical requirements of § 1625.2 while an appeal under § 1625 does not. It seems obvious that the purpose of both the right of appeal and reopening is to ensure that registrants are properly classified. *See* note 108 *infra*. Thus, the distinction that some courts have in effect created between a request for an appeal and a request for reopening rests on questionable grounds.

101. United States v. Holmes, 426 F.2d 915 (2d Cir. 1970) (oral claim of conscientious objection made at induction station held to satisfy requirements of the regulations); United States v. Turner, 421 F.2d 1251 (3d Cir. 1970) (letter explaining beliefs of conscientious objection contained "implied" request); Vaughn v. United States, 404 F.2d 586 (8th Cir. 1968) (letter informing board of beliefs as conscientious objector held a sufficient request for reopening even though registrant failed to use special form in making his request); Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956) (oral

this position is that the submission of new facts constitutes an implicit request to reopen.[102] Accordingly, the submission of new facts accompanied by the words "appeal"[103] or "postponement"[104] have been held to be sufficient to satisfy the regulations.[105]

In *Vaughn v. United States*,[106] the Eighth Circuit, seemingly more concerned with notions of fairness than with over-technical construction of the regulations, held that "compliance with § 1621.11 is conducive to efficient processing of a claim for exemption. . . . [but] classification in accordance with the law should not rest upon technical considerations. Substance, not form, is the controlling factor."[107]

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request made to local board chairman held a sufficient request for reopening); United States *ex rel.* Berman v. Craig, 207 F.2d 888 (3d Cir. 1953) (request for an "appeal" held to be a request for reopening); United States *ex rel.* Vaccarino v. Officer of the Day, 305 F. Supp. 732 (S.D.N.Y. 1969) (request for "postponement" of induction accompanied by submission of new facts should be treated as a request for reopening); United States v. Pollero, 300 F. Supp. 808 (S.D.N.Y. 1969) (submission of facts which would support a ministerial exemption ruled a proper request for reopening); United States v. Seeley, 301 F. Supp. 811 (D.R.I. 1969), United States v. Simms, 285 F. Supp. 981 (D. Del. 1968) (submission of new facts deemed a request for reopening); United States v. Longworth, 269 F. Supp. 971 (S.D. Ohio 1967) (letter requesting an "appeal" may be treated as a request for reopening if accompanied by new facts); United States v. Howe, 144 F. Supp. 342 (D. Mass. 1956) (oral request for reopening held to satisfy requirement of a written request when board secretary mistakenly advised registrant that it was too late for reopening); *Ex parte* Fabiani, 105 F. Supp. 139 (E.D. Pa. 1952) (submission of new facts constitutes an implicit request for reopening).

102. *See* cases cited in note 101 *supra*.

103. United States v. Thompson, 431 F.2d 1265 (3d Cir. 1970); United States *ex rel.* Berman v. Craig, 207 F.2d 888 (3d Cir. 1953); United States v. Longworth, 269 F. Supp. 971 (S.D. Ohio 1967).

104. United States *ex rel.* Vaccarino v. Officer of the Day, 305 F. Supp. 372 (S.D.N.Y. 1969).

105. It should be noted at this point that neither an express request nor an implied request made after the mailing of an induction order will entitle a registrant to consideration of whether reopening is justified unless the "board . . . finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." 32 C.F.R. § 1625.2 (1971). In United States v. Holmes, 426 F.2d 915 (2d Cir. 1970), and United States *ex rel.* Vaccarino v. Officer of the Day, 305 F. Supp. 732 (S.D.N.Y. 1969), there was a finding that the respective claims of hardship and conscientious objection arose through no control of the registrant and thus post-induction order requests for reopening were allowed. However, *Holmes* would be decided differently today in light of Ehlert v. United States, 39 U.S.L.W. 4453 (U.S. April 21, 1971), in which the Court held that the crystallization of a person's beliefs is not a circumstance within the meaning of § 1625.2. Thus, the board would be powerless to reopen. These matters are discussed further at notes 286-314 *infra* and accompanying text.

106. 404 F.2d 586 (8th Cir. 1968).

107. 404 F.2d at 591. In United States *ex rel.* Bergdall v. Drum, 107 F.2d 897, 900 (2d Cir. 1939), Judge Clarke noted that the protection of individual rights "do[es] not call for an over-technical construction of the regulations not necessary for such protection and merely hampering to the Government in its tremendous task of mobilizing its manpower into an effective fighting organization." In *Vaughn*, it appears that the Eighth Circuit has applied Judge Clarke's reasoning to the Government by holding that an over-technical construction of the regulations is not necessary to protect the Government's interests.

This attitude seems more in accord with the over-all purpose of reopening, which is to ensure that all registrants are in the proper classification as specified in other regulations.[108] In *United States v. Simms*,[109] this purpose was clearly recognized when the court stated that the "discretion to reclassify does not operate solely to remove exemptions or deferments but to keep all registrants properly classified."[110]

In summary, the state of the law with regard to the requirement of a written request is divided, with the majority of the federal circuits interpreting the regulation literally.[111] However, a persuasive minority has dispensed with the absolute necessity for a written request when new facts are submitted to the local board in oral or in written form unaccompanied by an express request to reopen.[112] The minority approach views the requirements of the regulation as being met by the implicit request inherent in the submission of new facts. In the minority view, a board must determine whether reopening is proper when the registrant submits information that might possibly support a new classification, even if he fails specifically to request reopening or makes an oral claim.[113]

Furthermore, under the minority view, it seems that preinduction judicial review would be available in cases in which a local board fails to consider whether reopening is proper when the registrant submits either an oral request or new facts in writing but unaccompanied by a literal request for reopening.[114] As interpreted by these courts, section 1625.2 requires the board in all cases in which a "request" is made to consider whether new facts justify reopening.

108. Although the regulations do not expressly state that the over-all purpose of reopening is to maintain registrants in proper classifications, this may be fairly implied from 32 C.F.R. § 1625.1(c) (1971), which requires local boards "to keep informed of the status of classified registrants," and also from 32 C.F.R. § 1625.2 (1971), which authorizes the board to reopen upon its own motion when it becomes aware of "facts not considered when the registrant was classified."

109. 285 F. Supp. 981 (D. Del. 1968).

110. 285 F. Supp. at 988 n.6.

111. *See* cases cited at note 88 *supra*.

112. *See* cases cited at note 101 *supra*.

113. It should be emphasized that the board does not actually have to reopen when an express or implied request is submitted; it merely has to consider if the facts submitted justify reopening. However, the board is required to reopen if the registrant presents a prima facie case. *See* notes 137-76 *infra* and accompanying text.

114. *See* Edwards v. Local Bd. No. 58, 313 F. Supp. 650 (E.D. Pa. 1970), in which the court held that it had jurisdiction to enjoin the induction of a registrant whose local board had failed to meet and consider his claim for a I-S(C) deferment. The court reasoned that the duty at least to meet and consider the claim was "implicit in 32 C.F.R. § 1625.3(b) and 32 C.F.R. § 1604.52a(d)" and in failing to do so, the board "did not comply with the clear mandate of its own regulations." 313 F. Supp. at 652. In this case, the registrant had delivered a letter to his board specifically requesting a reopening. However, it seems that if a letter conveying new facts but not requesting a reopening is held to be an implicit request, the failure to consider these facts would be equally as lawless and subject to the *Oestereich* exception to § 10(b)(3).

Thus, the decision whether the newly submitted facts should be considered is mandatory and involves no fact-finding function or discretion. Therefore, a failure to consider these facts should be considered basically lawless activity, *i.e.*, contrary to the regulations, which should support preinduction judicial review if the logic of *Oestereich* and *Gabriel* is interpreted to apply to procedural violations of the regulations.[115]

However, under the majority approach—in which the courts have adopted a literal interpretation of the written request requirement of section 1625.2—the failure to consider newly submitted facts when section 1625.2 is not literally satisfied cannot be termed basically lawless because the board has followed the regulation. Following *Oestereich* and *Gabriel*, then, preinduction judicial review of that failure should be unavailable. And since a board's failure to consider the request because the literal requirements of section 1625.2 are not fulfilled does not invalidate an induction order, the registrant will lack a valid defense to a criminal prosecution or a basis for habeas corpus when he finally does obtain judicial review.

3. *De Facto Reopening*

Abuses of local board discretion have not been limited to the omission of any consideration of new facts offered by the registrant. While some boards fail to consider requests for reopening, others go to a different extreme. These latter boards actually receive a request for reopening, thoroughly examine the information included in the request and evaluate the merits of the claim, and then notify the registrant that reopening is denied. In effect, the board bypasses the first step—determining whether reopening is justified on the facts submitted—and actually considers whether reclassification is proper. However, after determining the claim adversely to the registrant, the board only tells the registrant that it has failed to reopen.[116] In effect, then, the board is trespassing over the boundary between the reopening decision and reclassification, and by doing so it is effectively denying the registrant the procedural rights of personal appearance and appeal to which he is entitled once an evaluation of the merits and truth of his claim begins.[117]

This procedure contradicts the express language of the regula-

115. *See* notes 70-72 *supra* and accompanying text.

116. *See* note 87 *supra*.

117. United States v. Grier, 415 F.2d 1098 (4th Cir. 1969), provides an excellent illustration of this abusive procedure. The registrant sought a hardship deferment and submitted a request for reopening. The local board investigated the claim by procuring a report from a county welfare department and holding an interview with the registrant's brother. After determining that the claim was invalid, the board notified the registrant that it had decided not to reopen. The effect of this procedure was to deny Grier the right of appeal that normally accompanies reopening.

tions. If the board feels that it is not justified in reopening on the facts submitted and declines to consider the truth or merits of the facts, it may then refuse reopening and leave the registrant without the right of further review.[118] But, if the board does believe that the facts, if true, would entitle the registrant to a new classification and then engages in the reclassification process by inquiring into the truth and merits of the claim, it has reopened and must first notify the person requesting reopening that it has either granted or denied the request, and, second, it must notify the requester of the procedural rights available.[119]

The courts have reacted to this abuse by formulating the rule or doctrine of de facto reopening.[120] Under this rule, a board that inquires into the merits of a claim is deemed to have reopened and must cancel any outstanding induction order and notify the registrant of his procedural rights of personal appearance and appeal. Failure to notify the registrant of these rights invalidates any subsequently issued induction or work order, or cancels any outstanding order. In effect, the courts give formal recognition to the fact that the board has reopened, although the board may not denote its actions as such.

The leading case in the area of de facto reopening is *Miller v. United States*,[121] in which the court clearly defined the rule and the rationale behind it. In that case, the registrant, Miller, sent his local board a completed form requesting a conscientious objector exemption. Although the local board evaluated the claim and subsequently rejected it, it told Miller that it had decided not to reopen his classification. Miller refused induction and was convicted for violation of the Selective Service laws.[122] In reversing Miller's conviction, the Ninth Circuit stated:

> The local board did not deal with the alleged facts or evidence of appellant's conscientious objector form as a question of whether this legally could provide basis for a reopening to be made, so as to entitle consideration and evaluation to be engaged in thereafter under

118. 32 C.F.R. § 1625.4 (1971) provides in part that

> [when] the local board is of the opinion that the information . . . fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification . . . .

119. 32 C.F.R. §§ 1625.11-13 (1971).

120. *See, e.g.*, Mulloy v. United States, 398 U.S. 410 (1970); Witmer v. United States, 348 U.S. 375 (1955); United States v. Bowen, 421 F.2d 193 (4th Cir. 1970); United States *ex rel.* Luster v. McBee, 422 F.2d 562 (7th Cir. 1970); United States v. Grier, 415 F.2d 1098 (4th Cir. 1969); Davis v. United States, 410 F.2d 89 (8th Cir. 1969); United States v. Freeman, 388 F.2d 246 (7th Cir. 1967); United States v. Vincelli, 216 F.2d 681 (2d Cir. 1954).

121. 388 F.2d 973 (9th Cir. 1967).

122. 388 F.2d at 976.

> the general classification procedure of the regulations. It shortcut the situation by directly proceeding, without purporting to reopen, to a consideration of whether appellant was entitled to a conscientious objector classification on the merits of the probative elements of its file.[123]

Thus, the court clearly recognized that "[t]his was action amounting to a determination of the question of classification" and then accurately concluded that ". . . the local board [had] engaged in the processes which were open to it under § 1625.11, but with an ignoring of the procedural prescription of § 1625.11 for a reopening as a basis therefor."[124]

Accordingly, the court held that Miller's board denied him due process of law by denying him the procedural right to a fair hearing of his claim as specified in sections 1625.2 and 1625.11. Furthermore, the court held that due process problems would still be present even if the regulations could possibly be construed to grant an implied power to the board to "engage in a general consideration and evaluation and then to accord the result a summary status only."[125] This is true, the court noted, because the regulations, in violation of the due process clause of the fifth amendment, would allow the local board to discriminate between the claims of two registrants. For example, a board could conceivably discriminate between two identical claims by reopening one and, at the same time, evaluating the second without reopening—the registrant making the latter claim being denied the right of appeal.[126]

The de facto reopening rule has become established in the circuit courts of appeal[127] and recently has been approved by the Supreme Court in *Mulloy v. United States*.[128] Furthermore, since de facto re-

123. 388 F.2d at 976.

124. 388 F.2d at 976.

125. 388 F.2d at 976-77.

126. 388 F.2d at 976-77.

127. *See* note 120 *supra*.

128. 398 U.S. 410 (1970). *See also* United States *ex rel.* Rasmussen v. Commanding Officer, 430 F.2d 832 (8th Cir. 1970), in which the court concluded "that under Mulloy the procedural rights to a personal appearance and an appeal do not flow from a de facto reopening unless the registrant has first established a prima facie case for the requested classification." 430 F.2d at 838-39. However, neither *Mulloy* nor the cases cited at note 120 *supra* appear to have established that the registrant must present a prima facie case (discussed at notes 137-76 *infra*) as a condition precedent to the application of de facto reopening principles. Such a requirement would render the de facto reopening rule superfluous since the registrant is generally entitled to reopening and its attendant rights of personal appearance and appeal upon presentation of the prima facie case (*see* notes 21-32 *supra* and accompanying text), except when an induction order has been issued. *See* notes 198-254 *infra* and accompanying text. Therefore, if the de facto reopening rule is to add anything to the registrant's rights and to the development of the law of reopening, it would necessarily have to apply to situations in which the registrant fails to present a prima facie case but his board nevertheless ignores the procedural prescription of the regulations by engaging in the reclassifi-

opening can be classified as basically lawless activity that calls for no finding of fact or use of discretion, it would seem that preinduction judicial review of this abuse should be available.[129] Once de facto reopening has been accepted as a general rule, however, there still exists the problem of defining what actions by the local board satisfy the rule so as to be deemed reopening. *United States v. Grier*[130] illustrates one side of the spectrum where no doubt lingers whether the board reopened in fact. Grier sought a hardship deferment, III-A, which his board denied. In reversing the registrant's conviction for refusing induction, the Fourth Circuit ruled that an "extensive investigation" of the merits of the claim—which included "procurement of a report from the county welfare department" and "the holding of a personal interview with Grier's brother"—constituted de facto reopening.[131] At the other end of the spectrum, the mere sending of a form to a conscientious objector[132] certainly falls short of de facto reopening.[133] Between these two extremes, *Mulloy*, as well as other decisions,[134] indicate that a personal appearance before the board is sufficient to constitute de facto reopening. While there are some cases to the contrary, they can be distinguished on other grounds.[135] In light of *Mulloy*, therefore, a personal appearance should be sufficient to establish de facto reopening.

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cation decision without first reopening. Indeed, when the board undertakes to make the reclassification decision, a process that normally follows only after the presentation of a prima facie case, it should be estopped from claiming that the registrant failed to present a prima facie case.

129. Rhem v. Local Bd. No. 104, 3 SEL. SERV. L. REP. 3437 (W.D. Wis. 1970).

130. 415 F.2d 1098 (4th Cir. 1969).

131. 415 F.2d at 1101.

132. Selective Serv. Sys. Form 150 is normally sent to registrants who request reopening on the ground of conscientious objection. The elements comprising the claim are supposed to be put on the form by the registrant and then returned to the board. *See* note 141 *infra*.

133. United States v. Baker, 1 SEL. SERV. L. REP. 3017 (E.D.N.Y. 1968); United States v. Gearey, 368 F.2d 144 (2d Cir. 1966), *affd. on remand*, 266 F. Supp. 161 (S.D.N.Y.), *affd.*, 379 F.2d 915 (2d Cir.), *cert. denied*, 389 U.S. 959 (1967). In addition, none of the courts that have found that de facto reopening has occurred have mentioned that sending Selective Serv. Sys. Form 150 constitutes an element of de facto reopening. *See, e.g.*, Mulloy v. United States, 398 U.S. 410 (1970); Miller v. United States, 388 F.2d 973 (9th Cir. 1967). However, it has been recognized that sending out other forms to obtain information to aid in evaluating the claim may constitute de facto reopening. Kurjan v. Commanding Officer, 314 F. Supp. 213 (E.D. Pa. 1970).

134. United States v. Westphal, 304 F. Supp. 951 (D.S.D. 1969); United States v. Baker, 1 SEL. SERV. L. REP. 3017 (E.D.N.Y. 1968); United States v. Clark, 105 F. Supp. 613 (W.D. Pa. 1952).

135. *See, e.g.*, United States *ex rel.* Luster v. McBee, 422 F.2d 562 (7th Cir. 1970); Scott v. Commanding Officer, 431 F.2d 1132 (3d Cir. 1970). The *Luster* decision, which relied heavily on United States v. Mulloy, 412 F.2d 421 (6th Cir. 1967), held that a personal appearance cannot be equated with de facto reopening. Since Mulloy v. United States, 398 U.S. 410 (1970), reversed the Sixth Circuit opinion, the Seventh Circuit might re-evaluate its position. The *Scott* decision held that once an induction order is mailed to a registrant who later raises a claim for a new classification, a personal appearance

Any further judicial development of the scope of de facto reopening will probably occur on a case-by-case basis.[136] Nevertheless, the doctrine has already been well established and represents another important restraint that the courts have found necessary to impose on local board discretion in order to afford some measure of fairness to the registrant.

4. *The Prima Facie Case*

a. *The Basic Rule and Its Rationale.* Several judicial restraints on the exercise of local board discretion in reopening cases have been discussed thus far. In some instances the courts find a request implicit in the submission of new facts when no request is expressly made.[137] In other situations, assuming a request has been made for reopening, the courts require the local board to take the preliminary step in the reopening process by compelling it to receive information and consider and review that information to determine whether the facts, if true, would justify actual reopening and the evaluative analysis of the claim that flows from reopening.[138] Both of these judicial developments are designed to ensure that the registrant has at least minimal board review and consideration of the facts comprising his claim. Under the de facto reopening rule,[139] the courts merely give formal recognition to the fact that the board—although it has not denoted its action as such—has indeed reopened. It should be noted, however, that none of these developments forces the local board actually to reopen and evaluate the merits of the registrant's claim.

The prime facie case rule, recently approved by the Supreme Court in *Mulloy v. United States*,[140] requires the local board to re-

will not constitute de facto reopening. Since 32 C.F.R. § 1625.2 (1971) specifically authorizes the board to find an involuntary change in status before reopening after it has issued an induction order, the court reasoned that de facto reopening cannot occur. *See* notes 206-31 *infra* and accompanying text.

136. Other cases that have added to the definition of de facto reopening include United States v. Price, 427 F.2d 162 (9th Cir. 1970) (appointment of an appeal agent does not constitute reopening); United States v. Vincelli, 216 F.2d 681 (2d Cir. 1954) (de facto reopening waives any argument that registrant has not notified board of change in status within ten days); United States *ex rel.* Tomback v. Bullock, 110 F. Supp. 698 (N.D. Ill. 1953) (local board's request of advice from State Director as to whether reopening is proper held not to be de facto reopening).

137. *See* notes 85-115 *supra* and accompanying text.

138. *See* notes 73-83 *supra* and accompanying text.

139. *See* notes 116-36 *supra* and accompanying text.

140. 398 U.S. 410 (1970). "[T]he courts of appeals in virtually all Federal Circuits, have held that where the registrant has set out new facts that establish a prima facie case for a new classification, a board must reopen to determine whether he is entitled to that classification." 398 U.S. at 415. Among these cases are United States v. Grier, 415 F.2d 1098 (4th Cir. 1969); Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1969); United States v. Freeman, 388 F.2d 246 (7th Cir. 1967); Miller v. United States, 388 F.2d 973 (9th Cir. 1967); United States v. Gearey, 379 F.2d 915 n.11 (2d Cir.), *cert. denied*, 389 U.S. 959 (1967);United States v. Burlich, 257 F. Supp. 906 (S.D.N.Y. 1966).

open and engage in an evaluative determination of the merits of a registrant's claim. In *Mulloy,* the petitioner, classified I-A, wrote his local board on October 17, 1967, and informed it that he had "concluded" that he was a conscientious objector. The clerk of his board sent him a Selective Service System Form 150,[141] for use by conscientious objectors, which Mulloy completed in detail stating the reasons for and sources of his objection. Among the reasons and sources he noted were his religious training as a youth, his thoughts early in life that he might someday become a Catholic priest, his experience with antipoverty work in Appalachia, and the influence on him of Thomas Merton, a teacher of nonviolence. The sincerity of Mulloy's beliefs was supported in five letters written to the local board. The petitioner's brother noted that he disagreed with his brother's beliefs but that he never doubted his sincerity. A Catholic priest "wrote of the petitioner's honesty and integrity and said that he felt military service would do violence to the petitioner's conscience."[142] After a personal appearance on November 9, 1967, the board voted on January 11, 1968, to deny reopening despite Mulloy's strong showing of conscientious objection. On January 21, 1968, Mulloy sought to appeal the board's decision because he considered the November interview a reopening of his case. The board denied that it had reopened and ordered Mulloy to report for induction in February. Mulloy refused to report in violation of the Military Selective Service Act of 1967 and was sentenced to five years imprisonment and fined 10,000 dollars.

The Supreme Court, in an eight-zero decision,[143] reversed Mulloy's conviction. After noting the procedural consequences associated with reopening, the Court declared, "Though the language of 32 CFR § 1625.2 is permissive, it does not follow that a board may arbitrarily refuse to reopen a registrant's classification."[144] The Court then reiterated and affirmed the prima facie case rule previously adopted by numerous lower courts that had dealt with reopening cases.[145] Under the prima facie case rule, a local board "must" reopen a registrant's classification "where the registrant has set out new facts that establish a prima facie case for a new classification."[146] Any failure to reopen under these circumstances is deemed an abuse of board discretion.

141. 32 C.F.R. § 1621.11 (1971) imposes a mandatory duty on the board to supply a registrant a Special Form for Conscientious Objectors (Form 150) upon request. Failure to do so will invalidate a conviction for refusal of induction. United States v. Bowen, 414 F.2d 1268 (3d Cir. 1969).

142. 398 U.S. at 413.

143. Justice Blackmun took no part in the decision of the case.

144. 398 U.S. at 415.

145. *See* note 140 *supra.*

146. 398 U.S. at 415.

Having recognized the rule and thereby modified the express language of the regulations, the Court set out to define the rule and its elements somewhat more precisely:

> Where a registrant makes nonfrivolous allegations of facts that have not been previously considered by his board, and that, if true, would be sufficient under regulation or statute to warrant granting the requested reclassification, the board must reopen the registrant's classification unless the truth of these new allegations is conclusively refuted by other reliable information in the registrant's file.[147]

In analyzing this statement, the two basic elements comprising the prima facie case must be considered separately. First, the registrant must submit nonfrivolous allegations of fact that are not conclusively refuted by other information in the registrant's file. Thus, "plainly incredible" claims need not compel reopening since they are frivolous;[148] the same is true of claims based on facts already considered by the local board. However, a claim is not frivolous merely because it is based on facts that are not new. A registrant who points out facts already in his file but not previously considered by the local board can also be considered to have submitted nonfrivolous allegations of facts.[149] In addition, the facts presented by the registrant must not be refuted by other reliable information in the registrant's file. This limitation on the rule represents a modification of the view expressed by the Ninth Circuit in *Miller v. United States*[150] in which the court held that the local board must accept the new facts as true and that the other facts in the registrant's file cannot be used to impeach the new facts. *Miller* seemed to equate a probative weighing of old facts in the file against new facts just submitted with de facto reopening. *Mulloy* refuted this analysis, however, and added further definition to the de facto reopening concept by allowing the local board to use the registrant's file to impeach new facts without actually reopening. The Court did acknowledge, though, that any further investigation of the claim, such as the personal appearance, would constitute de facto reopening.[151]

Second, if the facts *are* nonfrivolous and uncontradicted by the record, then, accepting them as true, they must be sufficient under current regulations or statute "to warrant granting the requested classification."[152] This requirement, a determination whether the

147. 398 U.S. at 416. The Court relied heavily on United States v. Burlich, 257 F. Supp. 906 (S.D.N.Y. 1966).

148. 398 U.S. at 416 n.6.

149. *See* Bradshaw v. United States, 242 F.2d 180 (10th Cir. 1957) ("facts not considered previously" are not necessarily synonymous with new facts).

150. 388 F.2d 973 (9th Cir. 1967).

151. 398 U.S. at 417.

152. 398 U.S. at 416.

facts, if accepted as true, justify reclassification can by itself require the use of a substantial amount of discretion. In cases involving certain deferments or exemptions—such as the student deferment—the determination of the adequacy of the facts needed to entitle the registrant to a new classification is relatively easy because the local board merely decides whether the registrant is currently enrolled as a full-time undergraduate student. However, the process of determining what showing of facts constitutes a prima facie case for a hardship deferment or for conscientious objection is far more complicated. Subjective evaluations of hardship and the sincerity of an individual's beliefs are involved in such cases, and the formulation of precise standards of a prima facie showing poses great difficulties for a local board. Furthermore, a uniform standard is quite illusory since subjective evaluations and opinions will likely differ from board to board. In *Mulloy*, the Court did not treat the question of how a particular registrant must proceed in making a prima facie case. In *United States v. Seeger*[153] and other cases,[154] the Supreme Court attempted to define more precisely the elements of the prima facie case for conscientious objection cases, but considerable room still remains for the local boards to exercise and abuse their discretion in deciding a registrant's fate. Thus it seems probable that future litigation will be necessary to define more clearly the elements of the prima facie case for hardship, conscientious objection, and other discretionary deferments.

In *Mulloy*, the Court found that the petitioner had presented a prima facie case and that his local board had thus improperly refused to reopen. In reversing Mulloy's conviction, the Court noted that the "statutory standard for a classification as a conscientious objector"[155] had been met, and it then proceeded to present the rationale for its acceptance of the prima facie rule. In the Court's opinion, two major considerations seemed to weigh heavily in support of the rule. First, the Court noted that once a prima facie case, unrefuted by information in the registrant's file, has been presented, ". . . there can be no basis for the board's refusal to reopen except an evaluative determination adverse to the registrant's claim on the merits. And, it is just this sort of determination that cannot be made without affording the registrant a chance to be heard and an opportunity for an administrative appeal."[156] Thus, the Court acknowledged—albeit not expressly—the relationship of the de facto reopening rule to the

153. 380 U.S. 163 (1965).

154. *See, e.g.*, Welsh v. United States, 396 U.S. 816 (1970) (holding that one need not necessarily believe in a Supreme Being to qualify as a conscientious objector). *See also* United States v. Burlich, 257 F. Supp. 906 (S.D.N.Y. 1966) (defining the prima facie case for the III-A hardship deferment).

155. 398 U.S. at 417.

156. 398 U.S. at 416.

prima facie case rule—that is, when a prima facie case has been submitted to the board, it has no basis on which to reject the claim except by an evaluation of the claim itself. And since, by its evaluation of the claim, the board has in fact reopened, it cannot deny the registrant his right to appeal by labelling its action a refusal to reopen.

As a second consideration in support of the prima facie rule, the Court recognized "the narrowly limited scope of judicial review available to a registrant" and concluded that "the opportunity for full administrative review is indispensable to the fair operation of the Selective Service System."[157] Thus, a board should not be allowed to deprive the registrant of any right of appeal and review available to him, by reopening in fact but not characterizing this action as a reopening. In effect, the Court merely expressed the rationale behind the de facto reopening rule rather than a separate rationale for the prima facie case rule. The de facto reopening rule ensures that a registrant is afforded a full measure of review. Yet, as noted above, the prima facie case rule has a close relationship to de facto reopening in that once a prima facie case is established, reopening in fact provides the only basis for rejection of the claim.

After presenting the rationale for the prima facie case rule, the Court fielded the Government's argument "that if a local board must reopen whenever a prima facie case for reclassification is stated by the registrant, he will be able to postpone his induction indefinitely and the administration of the Selective Service System will be undermined."[158] After noting that the prima facie case rule as formulated will screen out most unmeritorious claims, the Court responded to this argument by pointing out that "a registrant who makes false statements to his draft board is subject to severe criminal penalties."[159] While criminal penalties no doubt do deter many registrants from making false statements, it must be conceded that the prima facie case rule will cause some delay in the administration of the Selective Service System—*i.e.*, in those cases in which registrants have told the truth and are willing to refuse induction because they believe their claims to be genuine and nonfrivolous. This delay will probably occur when the board is called upon to make subjective determinations of hardship and conscientious objection. Nevertheless, not all registrants are willing to incur the consequences associated with prosecution for refusal to submit to induction, especially when they have presented a borderline case. Furthermore, in light of the vast manpower pools available for induction and the relatively small current and projected needs of the armed services,[160] some delay can be justi-

157. 398 U.S. at 416.

158. 398 U.S. at 418 n.7.

159. 398 U.S. at 418 n.7.

160. *See* J. DAVIS & K. DOLBEARE, LITTLE GROUPS OF NEIGHBORS: THE SELECTIVE SERVICE SYSTEM 130-31 (1968).

fied when a registrant's rights under the Act and regulations are at stake. Efficiency and expediency are questionable bases for deprivation of an individual's right of due process of law.[161] In formulating the prima facie case rule, it seems that the Supreme Court and the various circuit courts of appeal have begun to recognize this principle and accordingly have refused to follow a hands-off attitude toward selective service matters.

b. *Preinduction Judicial Review of Local Board Application of the Prima Facie Standard.* As previously suggested, if the courts continue to interpret the principles of *Oestereich* and *Gabriel* as applying to "regulatory lawlessness," preinduction judicial review of a local board's failure to comply with the mandatory procedures provided for in the regulations should be generally available to registrants.[162] However, extension of the logic of *Oestereich* and *Gabriel* to suits in which the registrant claims that the local board erred in the application of the prima facie standard may preclude preinduction review in many cases. When a registrant seeks certain exemptions and deferments such as conscientious objection and hardship, his local board is called upon to evaluate the facts presented and exercise its discretion in determining whether a prima facie claim has been presented. In these situations, the board's refusal to reopen after its analysis of the data cannot be fitted into the *Oestereich* exception of basically lawless activity. Thus, most courts have construed section 10(b)(3) and *Gabriel* to bar preinduction judicial review of local board application of the prima facie standard in cases in which claims of hardship[163] and conscientious objection[164] have been raised.

However, preinduction judicial review should be available when the classification sought is mandatory and not dependent upon the discretion and analysis of the local board. Thus, the registrant seeking a mandatory deferment or exemption, such as the student deferment, which entails virtually no discretion or fact finding, could obtain preinduction judicial review of his board's refusal to reopen, despite the prohibitions of section 10(b)(3).[165] In this type of situa-

161. *See* Ohio Bell Tel. Co. v. Public Util. Commn. of Ohio, 301 U.S. 292, 305 (1937); Cella v. United States, 208 F.2d 783 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954).

162. *See* notes 71-72 *supra* and accompanying text.

163. Steiner v. Commander, 3 SEL. SERV. L. REP. 3588 (5th Cir. 1970); Pasquier v. Tarr, 318 F. Supp. 1350 (E.D. La. 1970); Grossfeld v. Morris, 303 F. Supp. 227 (D. Md. 1969); Ryan v. Hershey, 308 F. Supp. 285 (E.D. Mo. 1969); Gee v. Smith, 306 F. Supp. 891 (N.D. Ga. 1969).

164. Ferrell v. Local Bd. No. 38, 3 SEL. SERV. L. REP. 3395 (2d Cir. 1970); Boyk v. Mitchell, 425 F.2d 263 (6th Cir. 1970); Czepil v. Hershey, 425 F.2d 251 (7th Cir. 1969); Sloan v. Local Bd. No. 1, 414 F.2d 125 (10th Cir. 1969); Gabel v. Hershey, 308 F. Supp. 524 (E.D. Va. 1970); Ryan v. Hershey, 308 F. Supp. 285 (E.D. Mo. 1969). *Contra*, Murray v. Blatchford, 307 F. Supp. 1038, *motion to dismiss denied sub nom.* Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969); Barker v. Hershey, 309 F. Supp. 277 (W.D. Wis. 1969).

165. *See* Keibler v. Selective Serv. Local Bd. No. 170, 3 SEL. SERV. L. REP. 3294

tion, a failure by the board to reopen when presented with a valid request for the mandatory deferment or exemption would be considered basically lawless activity, and therefore subject to preinduction review under the *Oestereich* exception to section 10(b)(3).[166]

c. *Problems with the Present Rule.* It may be premature to presume that the prima facie case rule by itself can curb local board excesses and thereby facilitate the reopening process. Neither the courts [167] nor Congress[168] have formulated standards defining pre-

(N.D.N.Y. 1970) (in which the court held that it had preinduction jurisdiction to order the board to reclassify a registrant who asserted the nondiscretionary right to a student deferment); Lang v. Mitchell, 3 SEL. SERV. L. REP. 3484 (N.D. Cal. 1970) (in which the court held that the registrant was statutorily entitled to a IV-A deferment as a sole surviving son and that his board's denial of that classification supports preinduction judicial review).

166. On the face of the Act and regulations, mandatory nondiscretionary deferments and exemptions would appear to be the exemption for veterans of military service (class IV-A), 50 U.S.C. App. § 456(b) (1964) and 32 C.F.R. §§ 1622.40(a)(1)-(9) (1971); the exemption for ministerial students and ministers (class IV-D), 50 U.S.C. App. § 456(g) (1964) and 32 C.F.R. § 1622.43 (1971); the undergraduate student deferment (class II-S), 50 U.S.C. App. § 456(h)(1) (Supp. IV, 1965-1968) and 32 C.F.R. § 1622.25 (1971); the student deferment for completion of the academic year (class I-S), 50 U.S.C. App. § 456(i) (1964) and 32 C.F.R. § 1622.15 (1971); the deferment for elected officials (class IV-B), 50 U.S.C. App. § 456(f) (1964) and 32 C.F.R. § 1622.41 (1971); and the aviation cadet deferment (class I-D), 50 U.S.C. App. § 456(e) (1964) and 32 C.F.R. § 1622.13(c) (1971). Discretionary nonmandatory exemptions and deferments would appear to include the conscientious objector exemptions (class I-A-O and I-O), 50 U.S.C. App. § 456(j) (Supp. IV, 1965-1968), *amending* 50 U.S.C. App. § 456(j) (1964), and 32 C.F.R. §§ 1622.11, 14 (1971); the dependency deferment (class III-A) 50 U.S.C. App. § 456(h) (1964), *as amended*, 50 U.S.C. App. § 456(h)(2) (Supp. IV, 1965-1968), and 32 C.F.R. § 1622.30 (1971); and the occupational deferment (class II-A), 50 U.S.C. App. § 456(h) (1964), *as amended*, 50 U.S.C. App. § 456(h)(2) (Supp. IV, 1965-1968), and 32 C.F.R. § 1622.22 (1971). However, not all courts have viewed the various classifications in this manner. *See, e.g.*, Bookout v. Thomas, 3 SEL. SERV. L. REP. 3230 (9th Cir. 1970) (holding that the refusal to reopen the classification of a registrant who alleges that he is a full-time minister is not subject to preinduction judicial review); Evans v. Local Bd. No. 73, 425 F.2d 323 (10th Cir. 1970) (denying preinduction review of a board's failure to grant a II-S deferment to a registrant enrolled in a vocational school because the board was required to use discretion to determine whether the school is a proper institution of learning); Coleman v. Local Bd. No. 61, 432 F.2d 225 (10th Cir. 1970) (denying preinduction judicial review of a local board's refusal to grant a I-S(C) deferment).

167. While the courts have attempted to formulate some standards (*see* cases cited at note 154 *supra*), prior cases have served inadequately as meaningful guides to registrants. *See, e.g.*, United States *ex rel.* Rasmussen v. Commanding Officer, 430 F.2d 832 (8th Cir. 1970), in which the court denied habeas corpus to a registrant who alleged that his local board had failed to reopen upon his application for a III-A hardship claim because the registrant failed to make a prima facie showing by alleging financial contribution and extreme hardship. These standards were clearly established in United States v. Burlich, 257 F. Supp. 906 (S.D.N.Y. 1966). However, most registrants do not have access to or the ability to locate prior judicial opinions, and thus these opinions have limited value to uncounseled registrants. The regulations, 32 C.F.R. § 1622 (1971), would also appear to provide some guidance for the registrant. However, Local Board Memorandums issued by the Director of Selective Service result in substantial "dilution, amplification, and (sometimes) alteration of those standards" because ". . . boards are technically free to disregard the LBM's and many of them do so, although to an unpredictable and varying extent . . . ." H. Shattuck, III, *Record Keeping Obligations*

cisely what constitutes a prima facie case, and thus not only are registrants left to guess at what showing is required of them, but they are also subjected to varying and inconsistent local board interpretations. The dual-element definition of the prima facie case—nonfrivolous facts must be presented that would support a new classification if later proved true[169]—merely begs the basic question of what standards should be employed because it is not clear what precise facts are necessary to support a hardship claim or a claim for conscientious objection. At best the standards remain vague and subject to inconsistent applications by local boards.

The absence of adequate standards for establishing a prima facie case becomes especially troublesome when a registrant has to submit all the facts necessary to support a new classification or lose his opportunity for reopening and reclassification. The registrant who has a valid claim but fails to include all the essential facts probably will be denied any review of the merits of his claim or even an opportunity to submit the remainder of his claim at a later hearing.[170] The problems with this procedure, which allows the ultimate determination of a claim to rest upon the registrant's precise and complete submission of facts, are obvious. Given the lack of classification standards, the registrant is often unable to determine what facts are crucial to the reopening of his classification. It also should be remembered that even if such standards were available, most registrants lack the skills of an attorney. Indeed, most registrants have probably never heard of the prima facie rule, much less know what it involves. Furthermore, the Selective Service System discourages the use of attorneys in Selective Service matters.[171] In this light, then, the current formulation of the prima facie case rule, which cuts off claims without the opportunity for a fair hearing, can fairly be described as an arbitrary mechanism that is little better than no rule at all.

As long as reopening standards remain vague, fairness to the

of Local Boards, 1 SEL. SERV. L. REP. 4015, 4017 (1968). The inability of the registrant to ascertain classification standards from prior court cases and the regulations has been further complicated by decisions holding that the local board has no affirmative duty to inform him of these standards. *See, e.g.*, United States v. Wood, 373 F.2d 894 (5th Cir. 1967); Rase v. United States, 129 F.2d 204 (6th Cir. 1942). However, the boards are not free to misinform the registrant, Keene v. United States, 266 F.2d 278 (10th Cir. 1959), or to ignore a registrant's written request for information about the regulations, United States v. Liberato, 109 F. Supp. 588 (W.D. Pa. 1953).

168. The autonomy given local boards seems to be intentional. In 1967, the Senate rejected an amendment to the Act that would have imposed binding uniform national standards for classification. 113 CONG. REC. 12,499 (1967).

169. *See* note 147 *supra* and accompanying text.

170. This was the situation in United States *ex rel.* Rasmussen v. Commanding Officer, 430 F.2d 832 (8th Cir. 1970). *See* note 167 *supra*.

171. 32 C.F.R. § 1624.1(b) (1971), which deals with the personal appearance, provides in part: "No registrant may be represented before the local board by anyone acting as attorney or legal counsel."

registrant demands more than what the prima facie case rule, as presently interpreted, and the present regulations provide. The registrant should at least have the opportunity for a hearing or an interview to explain his claim and its elements more fully. Changes in the regulatory guidelines could be effected so as to allow the registrant a personal appearance before his board on the issue of reopening. These changes could be drafted in a manner to avoid the problems of de facto reopening occurring merely on the basis of the interview[172] and to preclude any further appeal from a denial of reopening. If reopening were refused, no further administrative avenues would exist. If the board reopened, the usual procedures would apply. This framework would help ensure that the elements of the claim become fully known to the board before it votes on reopening and at the same time would involve only a minimal amount of additional delay.

The inherent difficulties in formulating a prima facie case for classifications such as hardship or conscientious objection are further intensified by the current state of the law in the area of preinduction judicial review. As suggested above,[173] when the classification desired involves the exercise of board discretion and an evaluation of evidence, preinduction judicial review of the decision not to reopen will probably be denied. Thus, registrants claiming hardship or conscientious objector classifications will be unable to obtain preinduction review as a decision to award these classifications involves a considerable amount of board discretion.[174] The registrant's only available remedies will be to refuse induction and present his claim as a defense to a criminal prosecution or to accept induction and sue for a writ of habeas corpus. Neither of these alternatives is particularly attractive to a registrant who has a borderline claim. Yet, it is submitted that the registrant who does have a borderline claim or who claims a discretionary deferment such as conscientious objection or hardship is the very person to whom the availability of preinduction review is most important. Because such vague standards—or no standards at all—exist in cases involving these discretionary classifications, the registrant cannot be certain whether he has presented a prima facie claim, and a decision to refuse induction or seek habeas corpus and risk the attendant consequences may be quite traumatic. In order to raise his claim the registrant is forced to subject himself to substantial risks. On the other hand, preinduction judicial review will probably be available to the registrant who is seeking a mandatory deferment—such as a student deferment—which entails virtually

172. *See* notes 134-35 *supra* and accompanying text.

173. *See* notes 47-72 *supra* and accompanying text.

174. *See* notes 162-66 *supra* and accompanying text.

no discretion or fact-finding.[175] Preinduction review is not nearly so crucial to this registrant, and a refusal to accept induction involves less uncertainty because the deferment or exemption he seeks is mandatory. If his local board fails to reopen, he can refuse induction and be relatively sure that he has a good defense (his board's failure to reopen upon presentation of a prima facie case) to any ensuing prosecution. The registrant has no such assurances, however, when a discretionary claim is involved.

Thus, under the current state of the law, preinduction judicial review is not available to the registrant who, because of the uncertain nature of his claimed deferment or exemption and the risks he faces, most needs such review, while the individual to whom preinduction review is less crucial does have access to such review. Given this status of preinduction review, the lack of standards for reopening becomes even more crucial to those registrants with borderline or discretionary claims. If more precise standards for reopening existed, the registrant and his attorney would be able to determine what comprises a prima facie case; without such standards any decision must be made with uncertainty and considerable risk. The net effect of a lack of standards for determining what constitutes a prima facie case may very well be that registrants with borderline claims may be unwilling to raise them in court because of a fear of prosecution or reprisal from military authorities if a writ of habeas corpus is sought.

Thus, a strong case can be made for uniform classification standards to aid in the implementation of the prima facie case rule.[176] While uniform standards would lack the flexibility of the present system, it is this very flexibility that has been employed by local boards to deny registrants procedural due process rather than to accommodate extenuating cases. Perhaps a more rigid set of classification guidelines, restricting the discretion vested in the local boards, would avoid many of the problems inherent in the present formulation of the prima facie case rule.

5. *Arbitrary Reopening*

The majority of reopening problems arise when the registrant seeks to have his classification reopened for consideration of new facts

175. *See* notes 165-66 *supra* and accompanying text.

176. *See* SUBCOMM. ON ADMIN. PRACTICE & PROC., SENATE COMM. ON THE JUDICIARY, A STUDY OF THE SELECTIVE SERVICE SYSTEM: ITS OPERATION, PRACTICES & PROCEDURES (1970), which advocates classification standards. *See also* Donahue, *The Supreme Court vs. Section 10(b)(3) of the Selective Service Act: A Study in Ducking Constitutional Issues*, 17 UCLA L. REV. 908, 967 (1970), in which the author suggests that a specialized Selective Service court, which would be the sole court for judicial review of the Selective Service, would by its decisions "provide standards for the local boards on such questions as the quantum of evidence the registrant must present to make a prima facie case for reopening of a classification."

and circumstances.[177] Typically, he is unhappy with this classification and is attempting to secure a classification that will reduce his vulnerability to the draft or coincide more closely with his religious beliefs. However, in some situations a registrant who is satisfied with his draft status finds that his local board has reopened and reclassified him—usually to a I-A classification. The important issue then is to determine whether the board was justified in reopening.

Regulation 1625.2 provides in part that the local board may reopen a registrant's classification "upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification."[178] A board acts without the authority of the Act or the regulations if it reopens without a prior finding of new or previously unconsidered facts. Accordingly, the courts have been unanimous in their condemnation of this kind of reopening, often termed arbitrary reopening.[179] For example, in *United States v. Pence*,[180] the registrant was classified I-O as a conscientious objector until he refused to report for a physical examination prior to assignment for noncombatant service, wrote his board stating his objections to the Vietnam war, and refused to volunteer for civilian work by not completing a conscientious objector form.[181] Pence was subsequently reclassified I-A by his local board, and he refused induction and was prosecuted for draft evasion. In reversing the conviction the Eighth Circuit stated, "It is well settled that reclassification of a registrant must be based upon some fact not considered in granting the original classification which would justify a change in classification."[182] In reference to Pence's antiwar activities the court noted that "[n]one of these incidents are in any way related to a factual change justifying a reclassification,"[183] and declared that violations of "Selective Service laws cannot serve as a basis for a board's retaliation by depriving a selectee of a statutory exemption."[184]

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177. All the cases involving de facto reopening, an implicit request, the prima facie case rule, or instances in which the board failed to consider new facts offered to it arise in situations in which the registrant actively seeks reopening rather than when he tries to avoid it. *See* notes 84-176 *supra* and accompanying text.

178. 32 C.F.R. § 1625.2 (1971).

179. *See* United States v. Pence, 410 F.2d 557 (8th Cir. 1969); United States v. Carrol, 398 F.2d 651 (3d Cir. 1968); Lewis v. Secretary, Dept. of the Army, 402 F.2d 813 (9th Cir. 1968); United States v. Brown, 290 F. Supp. 542 (D. Del. 1968); United States v. Wymer, 284 F. Supp. 100 (S.D. Iowa 1968); United States v. Thomas, Crim. No. 229-54 (D.N.J. 1954); United States v. Owens, Crim. No. 10,528 (M.D. Ala. 1953); United States v. Ryals, 56 F. Supp. 773 (N.D. Ga. 1944).

180. 410 F.2d 657 (8th Cir. 1969).

181. *See* note 132 *supra*.

182. 410 F.2d at 562.

183. 410 F.2d at 562.

184. 410 F.2d at 562. *Cf.* Gutknecht v. United States, 396 U.S. 295 (1970); Oestereich

Thus, without a finding of new or previously unconsidered facts, the board lacks the power to reopen upon its own motion. If the board does reopen and acts to reclassify the registrant, it does so arbitrarily and any subsequently issued induction or work order will be declared void by the courts.[185] Furthermore, it would seem that a board that reopens without first finding new or previously unconsidered facts has engaged in basically lawless activity that involves no examination of facts or exercise of discretion. This regulatory lawlessness would appear to fall within the *Oestereich* exception and thus be susceptible to preinduction judicial review.[186] However, section 1625.2 does authorize the board to reopen on its own motion "if such action is based upon facts not considered when the registrant was classified."[187] These facts do not necessarily need to be new facts or newly submitted facts; the regulation requires merely that they be previously unconsidered. In *Bradshaw v. United States*,[188] the Court of Appeals for the Tenth Circuit held that a "board may reopen and reconsider its former determination whenever it appears that it erred in failing to consider all available material facts."[189] Under this approach it is conceivable that a board could reopen at any time it discovered facts in a registrant's file that it had not considered initially. Thus, a registrant's classification could, in effect, be changed without any actual change in his physical, spiritual, or occupational status because after his initial classification his board "finds" facts that it failed to consider when it classified him originally.

The arbitrary reopening rule has been applied in situations where the board has no punitive purpose in mind but merely reconsiders its position.[190] And, as illustrated by *Pence*, the rule has been used to strike down punitive reclassifications that result from a registrant's violation of the Selective Service laws. The recent case of *Gutknecht v. United States*[191] bears a close relationship to cases in-

v. Selective Serv. Local Bd. No. 11, 393 U.S. 233 (1968); Dickenson v. United States, 346 U.S. 389 (1953).

185. *See* cases cited at note 179 *supra*.

186. It should be noted that this proposition is tentative, at best, since the issue has not yet been considered by any court.

187. 32 C.F.R. § 1625.2 (1971).

188. 242 F.2d 180 (10th Cir. 1957). For the possible impact of this case on the prima facie case rule, see notes 148-49 *supra* and accompanying text.

189. 242 F.2d at 186.

190. *See, e.g.*, Lewis v. Secretary, Dept. of the Army, 402 F.2d 813 (9th Cir. 1968). In *Lewis* the registrant was classified III-A (hardship) in 1964 because he had a dependent mother. In 1966 his local board reclassified him I-A (available for military service) without a prior finding of changed circumstances. The court granted Lewis a writ of habeas corpus, thereby releasing him from the service. The court noted that the facts relating to the dependency of Lewis' mother were substantially the same in 1966 as they were in 1964. Thus, the board was powerless to reopen and reclassify the registrant.

191. 396 U.S. 295 (1970).

volving arbitrary reopening in which the local board's purposes are punitive. In *Gutknecht*, the registrant, classified I-A, turned in his draft card to his local board and was soon classified as a delinquent under the delinquency regulations.[192] Since the regulation provided that delinquents were to be given priority induction, Gutknecht soon received his induction order; he refused induction and was convicted of violating the Selective Service laws. Because Gutknecht was only twenty years old he probably would not have been inducted as soon as he was if he had not been declared delinquent.[193] In reversing his conviction the Supreme Court invalidated the delinquency regulation as unauthorized by the Act after a vain search "for any clues that Congress desired the Act to have punitive sanction apart from the criminal prosecutions specifically authorized."[194]

The Court's holding in *Gutknecht* then would seem to reinforce the approach in the arbitrary reopening cases that the regulations cannot be employed punitively to deny a registrant his lawful exemption or deferment.[195] Yet, Gutknecht's induction pursuant to the delinquency regulations can be distinguished from arbitrary reopening on two grounds. First, Gutknecht was classified I-A prior to the activities leading up to his induction and no reopening or reclassification did occur—his induction was merely moved up.[196] Second, assuming Gutknecht had been reclassified I-A from another classification, there still could not have been a finding of arbitrary reopening even though his physical, spiritual, or occupational status had not

192. 32 C.F.R. §§ 1642.1-46 (1971). Section 1642.4(a) provides:
Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction . . . or the duty to comply with an Order to Report for Civilian Work . . . , the board may declare him to be a delinquent.

193. The Court noted:
By virtue of the declaration of delinquency he [Gutknecht] was moved to the first of the categories which meant, according to the brief of the Department of Justice, that "it is unlikely that petitioner, who was 20 years of age when ordered to report for induction, would have been called at such an early date had he not been declared a delinquent."
396 U.S. at 299.

194. 396 U.S. at 307. After *Gutknecht* was decided, local boards were ordered to terminate the delinquency reclassification process. Selective Serv. Local Bd. Memorandum No. 101 (Jan. 21, 1970).

195. *See* notes 182-84 *supra* and accompanying text.

196. 32 C.F.R. § 1642.12 (1970) provided that a delinquent registrant could be reclassified I-A, I-A-O, or I-O by his local board. However, a registrant already classified in one of these classifications was not reclassified but was declared delinquent and ordered to report for induction before all other nondelinquents pursuant to 32 C.F.R. §§ 1631.7, .13 (1970). Furthermore, 32 C.F.R. § 1642.14 (1970) only granted the right of personal appearance to registrants who had been reclassified pursuant to the delinquency regulations, but not to those who only had their inductions moved up. The apparent rationale for this latter distinction seemed to be that these rights attached only to classification determinations and that "delinquency" was not a classification. *See* J. GRIFFITHS, THE DRAFT LAW, *A "College Outline" for the Selective Service Act & Regulations* 62 (2d ed. 1968).

changed. Since the delinquency regulations specifically authorized reopening for violations of selective service procedures, they had, in effect, carved out an express exception to the requirement of section 1625.2 that reopening by the board be preceded by "facts not considered when the registrant was classified."[197] However, the delinquency regulations appear to have been rendered inoperative and no longer constitute a valid basis for reopening or reclassification. As a result of this development, then, any reopening today by a local board without a prior finding of new facts can properly be termed arbitrary reopening.

In light of *Gutknecht* and *Pence*, it seems unlikely that local boards will legally be able to resort to further punitive reclassifications under *any* of the regulations. The delinquency regulations have been declared void while the reopening regulations themselves prohibit arbitrary and punitive reopening through the requirement of a finding of new facts. Furthermore, in nonpunitive situations in which the local board reconsiders a registrant's classification upon further reflection but without a prior finding of new facts, the arbitrary reopening rule should continue to afford him a measure of protection.

B. *Regulation 1625.2 and Claims Raised or Maturing After Issuance of a Work or Induction Order*

Once a work or induction order is mailed to a registrant, section 1625.2 of the regulations prohibits reopening "unless the board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."[198] Thus, in attempting to ensure the efficient and orderly operation of the selective service process,[199] this regulation renders the local board powerless to reopen after issuance of an order when the change in status after the induction order change has been mailed

197. 32 C.F.R. § 1625.2 (1971).

198. 32 C.F.R. § 1625.2 (1971) provides in pertinent part that

> the classification of a registrant shall not be reopened after the local board has mailed to . . . registrant an Order to Report for Induction . . . or an Order to Report for Civilian Work and Statement of Employer . . . unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

One court has held that once the time for induction has passed, however, 32 C.F.R. § 1642.41(a) (1971) rather than 32 C.F.R. § 1625.2 (1971) governs the local board's actions and that the former section does not empower a board to reopen under any circumstances. United States v. Hart, 3 SEL. SERV. L. REP. 3379 (9th Cir. 1970). *Contra*, United States v. Stoppelman, 406 F.2d 127 (1st Cir. 1969), in which the court held that a board may consider a post-induction request for reopening although it does not have to do so.

199. The regulations do not specifically state that the rationale for denying reopening after an induction order is mailed rests on efficiency and orderliness of administration but the courts have concluded that this is the case. *See* Ehlert v. United States, 422 F.2d 332, 334 (9th Cir. 1970) (en banc), *aff'd.*, 39 U.S.L.W. 4453 (U.S. April 21, 1971).

is voluntary, or when the registrant has failed to raise a claim—which in fact existed before he received that order—until after receiving his work or induction order.[200] In this latter situation, the courts have held that the registrant waives his right to a deferment or exemption if he does not raise the question before issuance of the order.[201]

The regulations do not ignore the fact that a change in a registrant's status may occur after the board mails an order. Thus, they allow a post-induction order claim to be raised if the change that occurs is beyond the registrant's control.[202] For example, a registrant whose father dies after an induction order has been issued would undergo a change in status beyond his control, and, accordingly, the board could properly reopen to consider a hardship claim.[203]

1. *Impact on the De Facto Reopening and Prima Facie Case Rules*

Section 1625.2 directly influences the application of the de facto reopening and prima facie case rules in post-induction order settings. Two basic issues arise. First, can there be reopening in fact once an

200. This interpretation of the regulation has been generally adopted by the courts. *See, e.g.*, Porter v. United States, 334 F.2d 792 (7th Cir. 1964); United States v. Beaver, 309 F.2d 273 (4th Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); Williams v. United States, 203 F.2d 85 (9th Cir.), *cert. denied*, 345 U.S. 1003 (1953); United States v. Lemmon, 313 F. Supp. 737 (D. Md. 1970). However, at least two courts have interpreted the regulation differently. In United States *ex rel.* Vaccarino v. Officer of the Day, 305 F. Supp. 732, 736 (S.D.N.Y. 1969), the court held that the regulations only require a change in circumstances beyond the registrant's control in order for the board to reopen and that they "do not, however, strictly state that the change in status must occur after the issuance of the order." This court thus raised the issue whether the change in status required for a board to reopen after an order to report for induction has been issued means a change that occurs only after a mailing of the order or whether it also includes any change that occurred since the last classification. The *Vaccarino* distinction was rejected in United States v. Lemmon, 313 F. Supp. 737 (D. Md. 1970) (registrant waived his right to a fatherhood claim by failing to notify his local board of the birth of a child prior to his order to report for induction) but was accepted in Lidster v. Sutherland, 3 SEL. SERV. L. REP. 3509 (W.D. Ky. 1970) (dictum).

201. *See* notes 255-85 *infra* and accompanying text.

202. 32 C.F.R. § 1625.2 (1971).

203. For cases defining what constitutes a change in status beyond the registrant's control, see Clark v. Commanding Officer, 427 F.2d 7 (3d Cir. 1970) (acceptance of a contract is not a change in status beyond the registrant's control); United States v. Sampson, 3 SEL. SERV. L. REP. 3056 (4th Cir. 1970), United States v. Bittinger, 422 F.2d 1032 (4th Cir. 1969) (a change from a conscientious objector to a full-time minister *may* result from circumstances beyond the registrant's control); United States v. Wroblewski, 432 F.2d 422 (9th Cir. 1970) (marriage or a wife's pregnancy is not a change in status beyond a registrant's control); Wright v. Local Bd. No. 105, 3 SEL. SERV. L. REP. 3407 (D. Minn. 1970) (reopening required upon notice of pregnancy when diagnosis prior to induction order was impossible). Whether the crystallization of a person's beliefs as a conscientious objector after he has received his induction order will satisfy § 1625.2 and thus permit reopening by the local board is considered at notes 286-303 *infra* and accompanying text.

induction order has been mailed? And second, what showing must a registrant make to establish a prima facie claim once his board has ordered him to report for induction? The courts have been called upon to answer these questions, and their responses, while not unanimous, have effected several significant changes—at least in the post-induction order setting—in the de facto reopening and prima facie case rules.

Before proceeding to any analysis of these changes, it should be noted that the particular problems that have arisen with respect to conscientious objection and section 1625.2 have been rendered moot by the Supreme Court's holding in *Ehlert v. United States*[204] that the late crystallization of a person's beliefs as a conscientious objector, even if an involuntary process, does not constitute the "objectively identifiable" change in status envisioned by section 1625.2.[205] The effect of this holding is to preclude any further reopening and reclassifying of registrants claiming to be conscientious objectors subsequent to the issuance of an induction order in those jurisdictions that have previously held crystallization to be an involuntary process which satisfies the regulation. If the registrant claims that his beliefs crystallized after issuance of the order, his change in status, as interpreted by the Court and the Selective Service System, would fail to satisfy the "objectively identifiable" involuntary change in status that section 1625.2 establishes as a condition precedent to post-induction order reopening. And, if the registrant claims that his conscientious objection arose before he was mailed an induction order, there would be no post-induction order change in status to satisfy the regulations and any claim would thus be deemed to have been waived.

Nevertheless, while the practical problems of conscientious objection can no longer arise in the post-induction order setting, it appears that they may have influenced, at least implicitly, the decisions of those courts that have rejected the prima facie case rule and the concept of de facto reopening in this setting, especially since such a large number of these claims were raised before the Court's decision in *Ehlert*. Thus, even though these issues are now moot with respect to conscientious objection, a better understanding of the various decisions and, *a fortiori*, the general subject of post-induction order reopening apart from conscientious objection may be facilitated by examining at appropriate points in the discussion the problems of conscientious objection. This examination may aid in ascertaining, first, whether problems of conscientious objection have been the unarticulated, and perhaps dominant, reasons for rejection of post-induction order application of the prima facie case rule and de facto

204. 39 U.S.L.W. 4453 (U.S. April 21, 1971).

205. 39 U.S.L.W. at 4455. *See* notes 294-303 *infra* and accompanying text.

reopening, and, second, whether the courts that have rejected these doctrines might be willing to reassess their positions in light of the fact that the problems generated by post-induction order conscientious objector claims can no longer occur.

a. *Effect on De Facto Reopening.* Under the de facto reopening rule formulated in *Miller* and *Mulloy*, a local board that crosses the boundary between the reopening decision and the reclassification decision, and thus inquires into the merits of a registrant's claim without first reopening, is deemed to have reopened in fact.[206] However, in the post-induction order setting, section 1625.2 complicates the application of this rule. Under that regulation, a board that reopens after it has sent the registrant an induction order must first find that the registrant has undergone an involuntary change in status since the mailing of that order.[207] This inquiry into when and how the change in status arose often involves an investigation of the merits of the claim because the time a claim arises and its origins may be indicative of the merits, especially in cases of conscientious objection.[208] Thus, the courts have necessarily had to face the task of accommodating the de facto reopening rule, which forbids an inquiry into the merits of a claim without first reopening, and section 1625.2, which forbids post-induction order reopening without a prior investigation of one aspect of the merits of the claim, *i.e.*, the time and source of its origin.

The courts that have been presented with this problem have approached it in two different ways. On the one hand, the Second and Third Circuits have completely rejected the possibility of post-induction order de facto reopening.[209] These courts have reasoned that, because section 1625.2 specifically authorizes the local board to find that the change in status has arisen after the induction order due to circumstances beyond the registrant's control, the board may delve into the merits of the claim without committing the de facto reopening abuse. For example, in *Scott v. Volatile*,[210] the registrant's local board mailed him a conscientious objector form and also granted him a courtesy interview after he had raised a claim of conscientious objection subsequent to receiving his induction order. The Third Circuit held that the de facto reopening rule of *Mulloy*

206. *See* notes 116-36 *supra* and accompanying text.

207. 32 C.F.R. § 1625.2 (1971).

208. *See, e.g.*, Kurjan v. Commanding Officer, 314 F. Supp. 213, 221 (E.D. Pa. 1970), in which the court noted that "to determine if there has been a change in status necessarily requires an inquiry into the merits of the claim."

209. Ferrell v. Local Bd. No. 38, 3 SEL. SERV. L. REP. 3395 (2d Cir. 1970); Paszel v. Laird, 426 F.2d 1169 (2d Cir. 1970); Scott v. Volatile, 313 F. Supp. 193 (E.D. Pa.), *revd. on other grounds sub nom.* Scott v. Commanding Officer, 431 F.2d 1132 (3d Cir. 1970); Lane v. Local Bd. No. 17, 315 F. Supp. 1355 (D. Mass. 1970).

210. 313 F. Supp. 193 (E.D. Pa.), *revd. on other grounds sub nom.* Scott v. Commanding Officer, 431 F.2d 1132 (3d Cir. 1970).

was totally inapplicable in post-induction order situations and thus upheld the district court's ruling that characterized the courtesy hearing and investigation into the merits of the claim as "a perfectly proper method of fulfilling the obligation imposed by the regulation."[211] In other words, the court ruled that the board's duty to find an involuntary change in status before it reopened authorized an investigation of the merits of the claim, notwithstanding the de facto reopening rule.[212] Thus, the court strictly confined the de facto reopening rule to the preinduction order setting.

On the other hand, the Seventh Circuit[213] and several federal district courts[214] have adopted a different position in their attempts to accommodate the de facto reopening rule and section 1625.2. They reject the notion that de facto reopening applies only to the investigation of claims raised prior to the mailing of an induction order and recognize that de facto reopening can have a limited, but nevertheless important, application in post-induction order situations. These courts hold that the threshold question whether there has been an involuntary change in status occurring after the mailing of the induction order can be separated from a determination of the over-all merits of the claim.[215] Under this approach, while activities related to answering the threshold question do not constitute de facto reopening, activities that proceed beyond determining the answer to this question, and thereby constitute an evaluation of the merits, run afoul of *Mulloy's* prohibition of de facto reopening.[216]

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211. 313 F. Supp. at 195.

212. However, when the State Director orders reopening of a registrant's classification after the registrant has been ordered to report for induction, the local board does not have to find an involuntary change in the registrant's status to reopen. *See* note 255 *infra*. Thus, the Third Circuit has held that investigation of the merits of a registrant's claim, when such investigation is not necessary to satisfy 32 C.F.R. § 1625.2 (1971), will constitute de facto reopening. United States v. Noonan, 3 SEL. SERV. L. REP. 3519 (3d Cir. 1970).

213. United States v. Nordlof, 3 SEL. SERV. L. REP. 3546 (7th Cir. 1971); United States v. Garvin, 3 SEL. SERV. L. REP. 3699 (7th Cir. 1971).

214. Lubben v. Local Bd. No. 27, 316 F. Supp. 230 (D. Mass. 1970); Kurjan v. Commanding Officer, 314 F. Supp. 213 (E.D. Pa. 1970); United States v. Young, 3 SEL. SERV. L. REP. 3381 (D. Minn. 1970); Murray v. Blatchford, 207 F. Supp. 1038, *motion to dismiss denied sub nom.* Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969).

215. One court has even held that a mere courtesy interview granted after an order to report for induction has been mailed constitutes de facto reopening, notwithstanding the requirement of 32 C.F.R. § 1625.2 (1971) that the board must specifically find an involuntary change in status. United States v. Westphal, 304 F. Supp. 951 (D.S.D. 1969).

216. Furthermore, it appears that if a board makes an evaluative determination of the merits of the registrant's claim after it has issued an induction order but refuses to reopen, the de facto reopening will fall within the *Oestereich* exception and thus be subject to preinduction judicial review. Rhem v. Local Bd. No. 104, 3 SEL. SERV. L. REP. 3437 (W.D. Wis. 1970).

In *Kurjan v. Commanding Officer*,[217] the registrant sought reopening and a II-A occupational deferment after he had received an induction order. His board granted him a personal appearance at which he indicated that his status had changed from that of a graduate trainee to a full-time salaried research assistant working on a project for the Electronics Command of the United States Army. After the personal appearance, the board directed its activities to determining whether Kurjan's endeavors were "essential."[218] These activities included a request to the State Board for a "decision or ruling," two requests for opinions of the registrant's work from the State Scientific Advisory Committee, two separate mailings of Occupational Inquiry Forms to the University of Pennsylvania, and a final board evaluation of the claim at which the II-A classification was denied. None of the activities were directed at finding whether the change in the registrant's status occurred after the induction order was mailed or whether the change was beyond the registrant's control. Instead, they were clearly designed to aid the board in determining the merits of the claim—that is, whether the new occupation was essential. The District Court for the Eastern District of Pennsylvania noted that "to determine if there has been a change in status necessarily requires an inquiry into the merits of the claim,"[219] but the court nevertheless held that the board in fact reopened, first, when it continued its investigation after it had become aware of the fact that the change in status had occurred subsequent to the mailing of the induction order and, second, when it failed to direct its investigation toward a determination of the voluntariness of the change.[220]

In *Lubben v. Local Board Number 27*,[221] a registrant sought re-

217. 314 F. Supp. 213 (E.D. Pa. 1970).

218. 32 C.F.R. § 1622.22(a) (1970), *as amended*, Exec. Order No. 11527, 32 C.F.R. § 1622.22(a) (1971), provided: "In Class II-A shall be placed any registrant whose occupation . . . or . . . employment . . . or whose activity in research, or medical, scientific, or others deavors [sic] is found to be necessary to the maintenance of the national health, safety, or interest." 32 C.F.R. § 1622.22(b) (1970), *as amended*, Exec. Order No. 11527, 32 C.F.R. § 1622.22(b) (1971), provided: "In Class II-A shall be placed any registrant who is preparing for critical skills and other essential occupations as identified by the Director of Selective Service upon the advice of the National Security Council."

219. 314 F. Supp. at 221.

220. The court held:

> Where, as here, the Local Board is found to have exceeded its duties and, on its own motion, to have extensively investigated the petitioner's claim, we do not think that the Board's ultimate decision on the merits of the claim should be insulated from administrative review by merely calling it a "refusal to reopen." Cutting through form, the substance of the Board's actions qualifies as *de facto* reopening of the classification . . . from which the registrant was entitled to an appeal (as well as a personal appearance) under 32 C.F.R. § 1625.13.

314 F. Supp. at 222.

221. 316 F. Supp. 230 (D. Mass. 1970).

opening and a change of classification from I-A to I-0 (conscientious objector) after he received his induction order. His local board mailed him a form for conscientious objectors, postponed his induction, and granted him a courtesy interview, but subsequently refused to reopen. The District Court for the District of Massachusetts, while recognizing that section 1625.2 authorizes an inquiry into when and how the claim arose, interpreted the board's statement that the registrant "recently became aware of his possible conscientious objector classification after receipt of his induction order" as "an inept statement by the board" that the change was beyond the registrant's control and that section 1625.2 had been satisfied.[222] However, the court also noted that the board had proceeded beyond the threshold question when it made "an evaluative determination" of the conscientious objection claim after it had expressly found that the change in status arose involuntarily and subsequent to the issuance of the induction order. According to the court in *Lubben,* this "evaluative determination" after the finding of an involuntary change in the registrant's status constituted de facto reopening.[223]

Similarly, in *United States v. Young,*[224] the District Court for the District of Minnesota distinguished a "consideration" of the merits, which is inherent in the threshold question, from "deciding" the merits without reopening.[225] The court then ruled that *Mulloy* prohibits only the latter.

Thus, while the courts that take this second approach allow the local board to evaluate the threshold question and engage in activities aimed at answering it,[226] they recognize that there exists a point at which the investigation may become so extensive that the de facto reopening rule should apply. However, because these courts have also recognized that the threshold question necessarily involves a degree of consideration of the merits of the claim, problems inevi-

222. 316 F. Supp. at 232.

223. The court recognized that Lane v. Local Bd. No. 17, 315 F. Supp. 1355 (D. Mass. 1970), in which another judge of the same district had rejected the registrant's contention of de facto reopening, was "factually on all fours" with the present case. However, the court felt that "the response of the board in the instant case more clearly establishes . . . an 'evaluative determination' of the registrant's claim . . . was made by the board *subsequent* to the personal appearance of the petitioner." 316 F. Supp. at 231 (emphasis added).

224. 3 SEL. SERV. L. REP. 3381 (D. Minn. 1970).

225. The court noted that

> a distinction must be drawn between the Board having before it and possibly *considering* the merits of the claim on the one hand, and the Board actually *deciding* the merits on the other. The former need not result in prejudice to the registrant while the latter may well have such a result.

3 SEL. SERV. L. REP. at 3383. The court failed to explain precisely, however, the difference between considering the merits and deciding them.

226. *See, e.g.,* Garrell v. Volatile, 3 SEL. SERV. L. REP. 3606 (E.D. Pa. 1970), in which the board's investigation of a post-induction order hardship claim was held not a de facto reopening since its activities were directed toward the threshold question.

tably arise in defining and drawing the line between permissible activities directed toward answering the threshold question and those directed toward an evaluation of the over-all merits. In *Kurjan*, it was possible for the board to answer the threshold question—whether there had been an involuntary change in status—without having to proceed to the merits—that is, whether the new position was essential to the security of the country. Therefore, the board's extensive investigation of the merits of the II-A claim after it had found that the registrant's status had changed from a graduate trainee to a salaried employee, clearly constituted de facto reopening. In this situation, application of the conceptual difference between permissible and impermissible activities presented only minor problems because the threshold activities were, for the most part, mutually exclusive of those directed toward the merits.

However, when claims of conscientious objection are in issue (and as a result of *Ehlert*, such claims can no longer arise after an induction order has been mailed), the better rule would appear to be that section 1625.2 precludes the application of the de facto reopening rule after an induction order has been mailed. When claims of conscientious objection are involved, investigation of the threshold question is necessarily tied to the merits because the time of origin of the claim and its voluntariness often relate closely to whether the registrant is truly a conscientious objector. When a post-induction order claim of conscientious objection arises, the board is charged with the duty of ascertaining whether and when the registrant has undergone an involuntary change in status that will support a reopening. Yet, in determining whether or not there has been an involuntary change in status, the board must find that the registrant has become a conscientious objector. If he has not become a conscientious objector—that is, if his mental state has not changed—there will not have been a change in status that will satisfy section 1625.2. In other words, if he has not become a conscientious objector, there has been no change. Certainly the unsupported statements of the registrant cannot be the involuntary change envisioned by the regulations. Thus, in answering the threshold question, it is clear that the board must also delve into the merits and ascertain whether a valid claim exists. Moreover, if the board, in answering the threshold question, finds that there has been a change in status, it has also and necessarily determined the merits of the claim.

The essential differences between conscientious objection reopening requests and others, such as hardship or occupational reopening requests, are obvious. In cases involving the latter there is some objective manifestation of the change in status that remains separate from the merits. For example, a person's job may change due to circumstances beyond his control or his father may die after he receives his induction order. These involuntary changes, upon being sub-

stantiated by the board, would satisfy the requirements of section 1625.2 and justify a decision by the board to reopen. However, in a case in which the registrant's job has changed, the question whether the new job can be termed essential or necessary to the nation's well-being and thus supportive of the II-A occupational deferment would remain unanswered.[227] In the case of the registrant whose father dies, the question whether the death has caused a hardship within the meaning of the III-A hardship deferment would still require an answer.[228] In these situations, then, room exists for the application of the de facto reopening rule, and, if after investigating the threshold question and finding an involuntary change in status, the board considers the merits (*e.g.*, whether the job is essential or whether there is a hardship), it can properly be said to have reopened in fact.

On the other hand, there is no outward, objective manifestation of a change in status in cases in which a claim of conscientious objection is raised.[229] The changes that occur, if they do occur, are mental and not independently ascertainable. The threshold question thus becomes merged into the merits because the registrant cannot be said to have undergone any change whatsoever without first having become a true conscientious objector. Few courts seem to have recognized this problem,[230] and as a result some courts have held that even in cases involving a claim of conscientious objection a separable threshold question exists.[231] Yet, these latter courts have failed to explain how the board may find a change in status without first finding that a valid claim exists. Thus, until *Ehlert* eliminated the possibility of post-induction order reopening when conscientious

227. *See* note 218 *supra* and accompanying text.

228. *See* note 167 *supra*.

229. The Supreme Court has acknowledged this in Ehlert v. United States, 39 U.S. L.W. 4453 (U.S. April 21, 1971).

230. The Second Circuit in Paszel v. Laird, 426 F.2d 1169 (2d Cir. 1970), and the Third Circuit in Scott v. Commanding Officer, 431 F.2d 1132 (3d Cir. 1970), seem to have recognized the merger of the threshold question and the merits of the claim when conscientious objection is involved. In *Scott*, the court "concluded that the regulations required the local board to decide the merits of petitioner's conscientious objector claim as a part of its decision whether to reopen." 431 F.2d at 1134.

231. *See, e.g.*, United States v. Young, 3 SEL. SERV. L. REP. 3381 (D. Minn. 1970); Lubben v. Local Bd. No. 27, 316 F. Supp. 230 (D. Mass. 1970). In *Young*, the court found that de facto reopening had not occurred. The fact that the board granted the registrant a personal appearance was not construed by the court as de facto reopening since the appearance was directed to answering the threshold question. The court also held that the registrant's allegations failed to show that his beliefs matured after he received his induction order and thus the denial of reopening was proper. 3 SEL. SERV. L. REP. at 3384. In *Lubben*, the board was ordered to reopen and ascertain the merits of the claim. Of course since the board's de facto reopening had already resulted in a judgment of the claim, the court-ordered reopening would merely be a reaffirmation of the prior decision. However, the registrant would have the right of appeal after this reopening.

objection claims are raised, this area remained in a somewhat unsettled state.

The Second and Third Circuits, while expressly relying on a strict interpretation of the regulation, may have at least implicitly rejected post-induction order de facto reopening with the practical consideration of conscientious objection cases in mind, especially since such a large number of these claims have been raised in the past. However, since post-induction order claims of conscientious objection are now precluded, the de facto reopening concept can be applied practically since the threshold question and permissible activities directed toward that question generally can be separated from activities directed toward the merits in those cases in which a claim of conscientious objection is not involved.[232] In light of *Ehlert* and the implications of that decision, it would thus appear that the approach of the Seventh Circuit and several district courts—one which accommodates de facto reopening principles with the mandate of regulation 1625.2, rather than rejecting post-induction order de facto reopening altogether—represents the conceptually sounder and therefore better rule. Since the conceptual problems that necessarily arise in attempting to accommodate conscientious objection, de facto reopening, and section 1625.2 are now precluded from arising, the major justification for not applying de facto reopening principles once the registrant has received an induction order has been eliminated. Therefore, it is entirely possible that the Second and Third Circuits, after reflecting upon the *Ehlert* decision and its removal of conscientious objection from the post-induction order setting, may re-examine their positions and thus apply *Mulloy* and its prohibitions against de facto reopening to local-board evaluation of the merits of a registrant's claim, even if the local board has already issued an induction order to the registrant.

b. *Effect on the Prima Facie Case Rule.* In *Mulloy v. United States*,[233] the Supreme Court recognized the prima facie case rule and held that a local board must reopen a registrant's classification when he submits facts that would support a decision to reclassify him if later proved true. However, *Mulloy* was rendered in the context of a preinduction order claim for a new classification. Thus, when post-induction order claims for reopening and new classifications arise, the impact of section 1625.2 and its requirement that post-induction order reopening be preceded by an involuntary change in status must be accommodated in applying the prima facie case rule. As in the case of post-induction order de facto reopening, the question of how this accommodation should be made has com-

232. *See* text following note 225 *supra*.

233. 398 U.S. 410 (1970). *See* notes 137-61 *supra* and accompanying text.

plicated the application of the general rule and has caused the courts to separate into two distinct and conflicting positions.

The Seventh and Tenth Circuits and several district courts apply the prima facie case rule after an induction order has been issued, although the elements of the rule are somewhat altered in this setting.[234] According to these courts a post-induction order prima facie showing includes: (1) the usual submission of facts that would justify a new classification if subsequently proved true and (2) additional allegations that an involuntary change in status occurred after issuance of the registrant's induction order.[235] When the registrant makes this dual showing, the board has the affirmative duty to ascertain when the change in status arose and whether or not it was voluntary.[236] If, after investigation of this threshold question, the board finds an involuntary change in status that satisfies section 1625.2, it *must* then reopen and make the actual reclassification decision.[237] If the board purports to make a further evaluation without expressly reopening, it will be deemed to have reopened in fact.[238] However, should the board deny a post-induction order claim when the registrant has submitted facts that would normally support a new classification if proved true, it must make a specific finding that there has been no change beyond the registrant's control that might satisfy the requirements of section 1625.2.[239] A failure to make this

234. United States v. Nordlof, 3 SEL. SERV. L. REP. 3546 (7th Cir. 1971); United States v. Garvin, 3 SEL SERV. L. REP. 3698 (7th Cir. 1971); United States *ex rel.* Brown v. Resor, 3 SEL. SERV. L. REP. 3188 (10th Cir. 1970); Lane v. Local Bd. No. 17, 315 F. Supp. 1355 (D. Mass 1970); Lubben v. Local Bd. No. 27, 316 F. Supp. 230 (D. Mass. 1970); United States v. Young, 3 SEL. SERV. L. REP. 3381 (D. Minn. 1970); Rhem v. Local Bd. No. 104, 3 SEL. SERV. L. REP. 3437 (W.D. Wis. 1970).

235. In United States *ex rel.* Brown v. Resor, 3 SEL. SERV. L. REP. 3188 (10th Cir. 1970), the court held that

> to be granted a reopening under the regulation the registrant must not only present facts which, if true, would justify his classification as a conscientious objector but must also make prima facie allegations establishing the post-induction order crystallization of those beliefs. As mandated by the exacting language of the regulation, the board must "specifically find" that the newly sought classification is founded in these two elements; only then does the regulation contemplate a reopening of the classification.

3 SEL. SERV. L. REP. at 3188.

236. *See* note 235 *supra.*

237. *See, e.g.,* Lubben v. Local Bd. No. 27, 316 F. Supp. 230 (D. Mass. 1970) and cases cited in note 234 *supra.* In Lane v. Local Bd. No. 17, 315 F. Supp. 1355, 1359 (D. Mass. 1970), the court held: "Once the reopening is justified then there is nothing to distinguish a request for reopening made prior to the notice of induction and one made after the notice. There is therefore no reason for failing to apply the rationale of . . . [the prima facie case] to both situations."

238. *See* notes 213-14 *supra.*

239. United States *ex rel.* Brown v. Resor, 3 SEL. SERV. L. REP. 3188 (10th Cir. 1970); United States v. Pacheco, 3 SEL. SERV. L. REP. 3384 (10th Cir. 1970); Spencer v. Bradley, 3 SEL. SERV. L. REP. 3444 (W.D. Mo. 1970); Warwich v. Volatile, 3 SEL. SERV. L. REP. 3597 (E.D. Pa. 1970). In *Brown,* the court noted:

> A reopening of a classification after issuance of an induction order absent specific

finding will—at least in the Seventh and Tenth Circuits—invalidate a previously issued induction order.[240] In summary, it appears that this first group of courts has established a finding of an involuntary change in status as a condition precedent to application of the prima facie case rule in the post-induction order setting. Without this essential finding by the board, these courts will not apply the prima facie case rule. With the addition of the required finding, the rule is applied in exactly the same manner as it is applied in the pre-induction order setting. And, in any case, regardless of whether the board reopens, it appears that it *must* always ascertain whether or not an involuntary change in status has arisen after the issuance of the induction order.

The Second and Third Circuits have taken a different approach than the Seventh and Tenth Circuits and have held that post-induction order application of the prima facie case rule is inappropriate, at least when claims of conscientious objection are at issue and possibly when any claim has been raised.[241] In *Paszel v. Laird*,[242] the Second Circuit stated that "[s]ection 1625.2 cannot be read as mandating reopening when there has been only a prima facie showing in the case of requests made after notice of induction . . ."[243] and then held that reopening in post-induction order situations can only be had after the registrant's claim is evaluated by the board and is found to justify a new classification. Under this approach, the board remains legally free to evaluate the claim to find whether there has been an involuntary change in status and also to ascertain the merits. The board may reopen and reclassify the registrant if the claim for a new classification proves to be worthy. But, if the claim fails to stand up under the board's investigation or if this investigation shows that the claim arose prior to induction, the board may properly refuse to reopen. Moreover, since these same courts generally refuse to apply the de facto reopening rule in the post-induction or-

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affirmative findings satisfying . . . [the involuntary change in status requirement] would not be in accord with the regulations. A refusal to reopen absent findings which negative these prerequisites necessarily shares the same defect.

3 SEL. SERV. L. REP. at 3188. Furthermore, it appears that if the board fails to ascertain when the change in status arose or whether the registrant has presented a prima facie case, preinduction review will be available, even in cases of conscientious objection. Lane v. Local Bd. No. 17, 315 F. Supp. 1355 (D. Mass. 1970).

240. *See* note 239 *supra*.

241. Paszel v. Laird, 426 F.2d 1169 (2d Cir. 1970); Ferrell v. Local Bd. No. 38, 3 SEL. SERV. L. REP. 3395 (2d Cir. 1970); Scott v. Commanding Officer, 431 F.2d 1132 (3d Cir. 1970). These courts have not faced the issue of whether the prima facie rule would be applied to claims other than conscientious objection in the post-induction order setting.

242. 426 F.2d 1169 (2d Cir. 1970).

243. 426 F.2d at 1173-74.

der setting, investigation of the merits will not be deemed to be reopening in fact.[244]

Under this second approach, then, the board must reopen only when reclassification is justified; hence, reclassification will inevitably follow reopening.[245] Furthermore, a board's refusal to reopen in these circumstances is treated like any other refusal to reopen and thus " a registrant will not have the right to a personal appearance or appeal and will be left only with judicial review of the refusal to reopen, in accordance with the narrow scope generally prevailing in selective service cases."[246] Moreover, in *Ferrell v. Local Board Number 38*,[247] the Second Circuit held that this "narrow scope" of judicial review does not include preinduction review since the board's evaluation of the facts comprising the claim of conscientious objection and its exercise of discretion cannot come within the *Oestereich* exception to section 10(b)(3).

Unlike the Seventh and Tenth Circuits, the Second and Third Circuits have not expressed a view on the issue whether the board has an affirmative duty to take any action on a post-induction order claim. However, this duty may fairly be implied from a plain reading of the provisions of section 1625.2, which require the board specifically to find an involuntary change in the registrant's status before reopening, and from the preinduction order cases which hold that a board must consider new facts submitted to it. Thus, it is unlikely that either the Second or Third Circuit would hold that the board has no duty to reopen and reclassify a registrant with a valid claim merely because the claim arose and the registrant presented it after he received his induction order. Rather, it would appear that these courts would hold that whereas there is an absolute duty to *evaluate* the claim, there is no duty to reopen unless it is valid. The Third Circuit has ruled, however, that before such a duty arises the registrant must first present a "prima facie case showing of entitlement to a new classification."[248] While this prima facie showing may

244. *See* notes 209-12 *supra* and accompanying text.

245. In Paszel v. Laird, 426 F.2d 1169, 1174 (2d Cir. 1970), Judge Friendly noted that "where the alleged change in status is a newly crystallized conscientious objection, a decision to reopen will necessarily lead to a decision to reclassify in the absence of new evidence reflecting adversely on the claim . . . ."

246. 426 F.2d at 1174.

247. 3 SEL. SERV. L. REP. 3395 (2d Cir. 1970).

248. Scott v. Commanding Officer, 431 F.2d 1132 (3d Cir. 1970). The court established the following requirements for a post-induction order prima facie case:

> Before the local board may reopen after an induction order has been issued there must be (1) a prima facie showing of entitlement to a new classification; (2) a specific finding of a "change in the registrant's status" since the induction order; and (3) a specific finding that this change resulted from circumstances over which the registrant had no control. Thus, a local board's denial of a post-induction-order reopening claim cannot generally be upset on judicial review if the court

be a condition precedent to the board's duty to take action on the claim, it will clearly not entitle the registrant to reopening and the procedural consequences of personal appearance and appeal that are associated with the preinduction order prima facie showing.[249]

Since the great majority of post-induction order reopening cases prior to *Ehlert* involved claims of conscientious objection, it appears the Second and Third Circuits fashioned the better rule—that both the prima facie case rule and the de facto reopening rule do not apply once the board issues an induction order. As noted earlier, when claims of conscientious objection are raised after the mailing of an induction order, the local boards subject to the jurisdiction of the Seventh and Tenth Circuits face the impossible task of separating the threshold question from the merits of the claim and then directing their activities accordingly. It was concluded that post-induction order de facto reopening is inappropriate when conscientious objection claims are at issue since the separation of the merits from the threshold question is conceptually impossible.[250] Moreover, application of these same considerations leads to the conclusion that the prima facie case rule, even as modified by the Seventh and Tenth Circuits, also can have no meaningful or practical application when post-induction order conscientious objection claims are at issue.

Following the approach of the Seventh and Tenth Circuits, it appears that when the registrant presents new facts that would justify a conscientious objector classification the board has an affirmative duty to determine whether there has been an involuntary change in status that occurred after the registrant received his induction order.[251] If the board finds the required change, it must reopen.[252] However, as noted above,[253] in ascertaining whether there has been a change in status that will empower it to reopen, the board must necessarily decide the merits—that is, whether the registrant has become a conscientious objector. Once the board finds the requisite involuntary change in status that will support a reopening, it has necessarily determined the merits favorably toward registrant, and reclassification should inevitably ensue. Thus, it is logically difficult, if not impossible, to conclude that there can be a prima facie case of conscientious objection after a prior finding of a change in status.

determines that no prima facie case for a new classification was made out, or that a negative board finding on (2) and/or (3) above had a basis in fact.
431 F.2d at 1135.

249. *See* notes 25-32 *supra* and accompanying text.

250. *See* text following note 225 *supra*.

251. *See* notes 239-40 *supra* and accompanying text.

252. *See* notes 234-40 *supra* and accompanying text.

253. *See* text accompanying note 250 *supra*.

The Second Circuit seems to have recognized the existence of the merger between the threshold question and the merits of the conscientious objector claim and thus has allowed reopening only when the claim is valid.[254] If the claim is found to be invalid, the court would acknowledge that no change in status ever occurred and thus would allow the board to refuse reopening, unencumbered and unrestrained by doctrines that make little sense in light of the nature of conscientious objection and the requirements of section 1625.2.

However, as in the case of de facto reopening, *Ehlert* has eliminated the problem of accommodating conscientious objection, the prima facie rule, and section 1625.2. Thus, the modified prima facie rule of the Seventh and Tenth Circuits—holding that allegations that an involuntary change in status has occurred must accompany the usual prima facie case allegations—becomes workable. If the board finds that an involuntary change in status has occurred subsequent to the issuance of an induction order in a nonconscientious objection case, the merits of the claim will still remain. And if a prima facie claim has been presented, the rationale and reasoning of *Miller* and *Mulloy* would appear to be fully applicable despite the fact that the board has issued an induction order. Thus, it is submitted that the board should have the affirmative duty to reopen and evaluate the claim on its merits, thereby affording the registrant the procedural consequences associated with reopening. Since this is the approach followed by the Seventh and Tenth Circuits, these courts appear to have fashioned the better rule. Hopefully, the Second and Third Circuits, whose rejection of the prima facie case in the post-induction setting was logical when the problems encountered in cases of conscientious objection were factors to consider, will reconsider their positions in light of *Ehlert*.

2. *Conscientious Objection and Regulation 1625.2*

One of the most heavily litigated areas of Selective Service law today is that involving the right to the conscientious objector exemption and the relationship of that right to section 1625.2 of the regulations. This litigation appears to be fostered by the inherent difficulty encountered by a board in gauging the crystallization of an individual's beliefs as a conscientious objector and also by the preferred status Congress has apparently given conscientious objectors. The problems with respect to conscientious objection and section 1625.2 frequently arise in one of two distinct situations:

(1) When the claim of conscientious objection is made after

254. *See* note 230 *supra*.

issuance of an induction order but when it appears that the registrant's beliefs arose before that issuance.

(2) When the claim of conscientious objection is made after issuance of an induction order and the registrant claims that his beliefs crystallized after he received that order.

Each of these two situations, in turn, generates a separate legal issue. The first issue concerns the question whether the regulations can take away a congressionally authorized exemption. In other words, can the regulations require the registrant either to raise his claim of conscientious objection at a particular time or lose the right to raise it, especially when Congress has expressly authorized that particular military status? At stake in the determination of this issue is the validity and legality of section 1625.2.

The second issue involves a determination whether the crystallization of a person's beliefs as a conscientious objector is a circumstance beyond his control which will empower a local board to reopen after mailing an induction order. This issue can be broken down into two subissues. First, whether crystallization is beyond a person's control, and, second, even if it is beyond his control, can it be deemed a "circumstance" within the meaning of the regulations?

a. *Is Regulation 1625.2 Valid and Lawful?* In the situation in which a registrant's beliefs as a conscientious objector arise long before his local board orders him to report for induction but he nevertheless waits until after receiving that order to submit a request for reopening, section 1625.2 clearly cuts off the right to raise any claim of conscientious objection that crystallized before the induction order was mailed. Unless the board finds that "there has been a change in the registrant's status resulting from circumstances over which the registrant had no control," section 1625.2 renders it powerless to reopen.[255]

While section 1625.2 purports to cut off any rights a conscien-

255. 32 C.F.R. § 1625.2 (1971). However, at least one court has recognized that, notwithstanding § 1625.2, the State Director or the National Director of Selective Service can authorize reopening of a claim that arose before the induction order was mailed but not raised until after the mailing. Miller v. United States, 388 F.2d 973 (9th Cir. 1967). In *Miller* the registrant obtained Selective Serv. Sys. Form 150 before he was ordered to report for induction but returned it two days after the order was mailed. His board refused to consider his request but was ordered to do so by the State Director. The local board again refused to reopen and subsequently Miller refused induction and was convicted for that refusal. In reversing the conviction the court noted that there was no problem of late reopening because the exercise by the State Director of his power under § 1625.3(a) made § 1625.2 inapplicable. 32 C.F.R. § 1625.3(a) (1971) requires the board to reopen upon a request from either the State or National Director and also requires that outstanding work or induction orders be cancelled. However, if a local board reopens and grants a III-A hardship deferment after it has issued an induction order, a subsequent induction based on the advice of state headquarters that reopening is not warranted is invalid. Rochford v. Volatile, 3 SEL. SERV. L. REP. 3478 (E.D. Pa. 1970).

tious objector may have to present his claim, section 456(j) (frequently referred to as section 6(j)) of the Act clearly states:

> Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.[256]

Although the Act expressly provides that nothing in the Act shall be construed to require combatant training and military service for conscientious objectors, nearly all courts, including the Supreme Court in *Ehlert*,[257] have upheld the validity of section 1625.2 despite its seeming conflict with the statute.[258] Even those courts that have expressed some disfavor with section 1625.2 have tried to deal with it by passing on the crystallization-of-beliefs issue[259] rather than by questioning the validity of the regulation as applied to conscientious objectors.[260] The major justification for upholding the regulation is found in section 460(b)(1) (commonly referred to as 10(b)(1)) of the Act, which authorizes the President "to prescribe the necessary rules and regulations to carry out the provisions of this title."[261] Thus, the courts have held that the right to claim the conscientious objector exemption will be deemed to be waived if not raised within the time limit specified in the regulations.[262] The waiver theory seems to have

256. Military Selective Service Act of 1967, 50 U.S.C. App. § 456(j) (Supp. IV, 1965-1968).

257. 39 U.S.L.W. at 4456.

258. *See* cases cited in note 286 *infra*.

259. *See* notes 286-303 *infra* and accompanying text.

260. *See, e.g.*, United States v. Gearey, 368 F.2d 144, 149 (2d Cir. 1966), *aff'd. on remand*, 266 F. Supp. 161 (S.D.N.Y.), *aff'd.*, 379 F.2d 915 (2d Cir.), *cert. denied*, 389 U.S. 959 (1967).

261. Military Selective Service Act of 1967, 50 U.S.C. App. § 460(b)(1) (Supp. IV, 1965-1968).

262. Waiver can result in either of two ways. First, if a registrant fails to raise a claim that exists prior to the mailing of his induction order until after that mailing, his claim is deemed to be waived. (*See* cases cited in note 286 *infra*). In addition, waiver may occur if the registrant does not raise a claim within ten days after the time it arises. 32 C.F.R. § 1625.1(b) (1971). *See* Porter v. United States, 334 F.2d 792 (7th Cir. 1964); United States v. Beaver, 309 F.2d 273 (4th Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); Williams v. United States, 203 F.2d 85 (9th Cir.), *cert. denied*, 345 U.S. 1003 (1953); United States v. Lemmon, 313 F. Supp. 737 (D. Md. 1970) (waiver of right to raise fatherhood claim because of failure to notify local board of birth of child prior to induction order and within ten days from the time the facts arose). *Contra*, Vaccarino v. Officer of the Day, 305 F. Supp. 732 (S.D.N.Y. 1969). In *Vaccarino*, the registrant was permitted to raise a hardship claim after the order to report for induction and after ten days from the time the hardship arose. After noting the confused state of the registrant's plight, which involved a heart condition of the registrant's father, the court stated: "It would be unthinkable, and patently unjust, to hold that a registrant waived so important a right by failing to comply with a procedural requirement of which he was unaware. The forfeiture of so important a right cannot rest on so trivial a ground." 305 F. Supp. at 737.

originated in *United States v. Schoebel.*[263] In *Schoebel,* the registrant sought to raise a post-induction order claim of conscientious objection, but his local board refused to reopen. In upholding the registrant's conviction for refusing induction, the court held that Schoebel had waived or abandoned the right to claim an exemption. While *Schoebel* itself did not consider the conflict between the Act and section 1625.2 of the regulations, nearly all courts that have accepted the waiver theory have sought to justify that theory by reference to the statutory delegation of power to the President to prescribe necessary rules and regulations. Furthermore, these courts have agreed not only "that the regulation is within the perimeter of the grant of power,"[264] but also that without section 1625.2 "the manpower quotas of Selective Service could not be met with any degree of certainty."[265] The Supreme Court recently summarized the position of nearly all courts when it held that "[t]he System needs and has the power to make reasonable timeliness rules for the presentation of claims to exemption from service."[266]

The Supreme Court's decision in *Ehlert,* accepting (although in dictum on this particular issue)[267] the view that a claim that arises before the issuance of an induction order but that is not asserted until after receipt of that order is deemed waived, represents a marked departure from several of its most recent decisions. Until *Ehlert* it appeared that the validity of the waiver theory had been put in doubt in several recent Supreme Court cases, including *Gutknecht*[268] and *Oestereich*[269] and in a federal district court case, *United States v. Eisdorfer,*[270] cited by the Supreme Court in *Gutknecht.* As noted earlier in this discussion,[271] *Gutknecht* invalidated the delinquency regulations on the ground that they were unauthorized by, and in conflict with, the Act. In considering the status of the delinquency regulations, the Court, quoting the *Eisdorfer* opinion, noted that "The delinquency regulations, more-

263. 201 F.2d 31 (7th Cir. 1953). The court held: "Deferment being a privilege, it may be abandoned like any other personal privilege." 201 F.2d at 32. *But see* the language of the Supreme Court in *Gutknecht* at text accompanying note 272 *infra.*

264. Ehlert v. United States, 422 F.2d 332, 334 (9th Cir. 1970) (en banc), *affd.,* 39 U.S.L.W. 4453 (U.S. April 21, 1971).

265. 422 F.2d at 334.

266. Ehlert v. United States, 39 U.S.L.W. 4453, 4454 (U.S. April 21, 1971).

267. The Court faced the issue whether crystallization of a person's beliefs as a conscientious objector is a circumstance beyond the registrant's control. However, before passing on this issue, the Court noted that "the penalty of forfeiture" would be appropriate if a registrant with a claim existing before he received his induction order did not assert it until after receipt. 39 U.S.L.W. at 4454 n.4.

268. 396 U.S. 295 (1970).

269. 393 U.S. 223 (1968).

270. 299 F. Supp. 975 (E.D.N.Y. 1968).

271. *See* notes 191-94 *supra* and accompanying text.

over, disregard the structure of the Act; deferments and priorities-of-induction, adopted in the public interest, are treated as if they were forfeitable personal privileges."[272] The Court in *Gutknecht* also cited *Oestereich*:

> "There is no suggestion in the legislative history that, when Congress has granted an exemption and a registrant meets its terms and conditions, a Board can nonetheless withhold it from him for activities or conduct not material to the grant or withdrawal of the exemption. So to hold would make the Boards free-wheeling agencies meting out their brand of justice in a vindictive manner.
>
> "Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption."[273]

Thus, several propositions appeared to have been established in *Gutknecht, Oestereich,* and *Eisdorfer*. First, regulations that are unauthorized by and in conflict with the Act clearly are invalid. Second, deferments and exemptions are not forfeitable personal privileges. Third, one cannot be deprived of a deferment or exemption because of conduct or matters that do not go to the merits of granting or continuing that deferment or exemption.

Application of these propositions to section 1625.2 builds a strong case for holding that section of the regulations invalid as applied to conscientious objectors. The regulation patently conflicts with the Act, which provides that "nothing" shall deny a conscientious objector his exemption. Also, it seems somewhat fallacious to argue that the regulation is authorized by section 10(b)(1) and can thus contradict other provisions of the Act. The delinquency regulations were promulgated under the same statutory grant, but the Court nevertheless struck them down as unauthorized by, and in conflict with, the Act. The real conclusion gained from *Gutknecht* would seem to be that a regulation which conflicts with the Act falls outside the authority of the President, notwithstanding section 10(b)(1). However, in *Ehlert* the Court ignored this conclusion when it upheld the waiver theory despite the congressional mandate that no conscientious objector be subjected to combatant training. Furthermore, it should be noted that the grant of authority found in section 10(b)(1) authorizes the President to prescribe rules "to carry out the provisions of this title."[274] It is clear from section 6(j) that

272. 396 U.S. at 303.

273. 396 U.S. at 303-04, quoting Oestereich v. Selective Serv. Local Bd. No. 11, 393 U.S. 233, 237 (1968).

274. Military Selective Service Act of 1967, 50 U.S.C. App. § 460(b)(1) (Supp. IV, 1965-1968).

Congress intended to exempt conscientious objectors from military service.[275] Therefore, any regulation that destroys the right to the conscientious objector exemption cannot be said to carry out the provisions of the Act and in effect represents only the unauthorized assertion of power. Finally, it is submitted that in situations in which a registrant with a valid claim may be denied his liberty on grounds of a mere technicality, the view expressed in *Gutknecht*—that delegated powers will be construed narrowly when the civil liberties of citizens are concerned—should be adopted to ensure a fair hearing of all claims.[276]

Section 1625.2 not only represents the unauthorized assertion of power, but it also treats exemptions and deferments as waivable and forfeitable. Yet *Gutknecht, Eisdorfer,* and *Oestereich* expressly rejected such treatment as invalid in establishing the proposition that deferments and exemptions cannot be waived or otherwise denied by conduct unrelated to the merits of the particular exemption or exemptions. Thus, a reasonable application of the principles espoused in these recent decisions clearly leads to the conclusion that section 1625.2 is invalid as applied to conscientious objectors.[277] The registrant, therefore, should have the right to raise his claim at any time before or after his induction order is mailed regardless of when his beliefs crystallized. However, in emphasizing the System's need for efficient administration and timeliness, the Court appears to have dismissed lightly the powerful reasoning found in *Oestereich, Gutknecht,* and *Eisdorfer,* as well as the apparent congressional preference given to conscientious objectors.

In addition to departing from precedent, the Supreme Court's position in sustaining section 1625.2 violates certain considerations of fairness. Section 451(c) of the Act provides that ". . . the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just . . . ."[278] It is difficult to find any justification in terms of fairness in a regulation that denies a registrant the right to have his claim decided on the merits. The Selective Service regulations are technical, confusing, and often beyond the comprehension of many registrants, many of whom may

275. *See* text accompanying note 256 *supra.*

276. "Where the liberties of the citizen are involved, we said that 'we will construe narrowly all delegated powers that curtail or dilute them.'" 396 U.S. at 306-07, citing Kent v. Dulles, 357 U.S. 116, 129 (1958).

277. As far back as the 1950's, several courts seemed to feel that this conclusion was warranted. United States v. Underwood, 151 F. Supp. 874 (E.D. Pa. 1955); United States v. Crawford, 119 F. Supp. 729 (N.D. Cal. 1954); United States v. Clark, 105 F. Supp. 613 (W.D. Pa. 1952).

278. Military Selective Service Act of 1967, 50 U.S.C. App. § 451(c) (Supp. IV, 1965-1968).

be financially unable to hire necessary legal assistance.[279] The technicality of the regulations is further compounded by the totally inadequate ability or willingness of the Selective Service System to provide more than minimal help in explaining to a registrant exactly what his rights are under the Act and regulations.[280]

As mentioned earlier,[281] the justification usually given by courts for section 1625.2 is that considerations of efficiency and orderly administration of the Selective Service System dictate a point beyond which claims cannot be raised.[282] Thus, only those claims arising out of circumstances beyond the registrant's control are presently allowed once an induction order is mailed. However, it may be questioned whether section 1625.2 is a necessary prerequisite to the efficient and orderly administration of the System. Even assuming that an increased number of last-minute claims would result if section 1625.2 were invalidated, the System has been geared to handle last-minute delays and problems. To ensure fulfillment of manpower quotas, the local boards consistently order substantially more men to report for induction than they actually need.[283] The monthly calls could be adjusted for an additional number of last-minute claims. This is especially true at the present time when the manpower pool consists of far more men than the System can possibly need for induction.[284] In addition, not every registrant will wait until the last possible point in time to raise his claim. Unless the registrant is approaching age twenty-six, the only thing he might gain by frivolous

279. *See, e.g.*, Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123 (1966); Wright, *Book Review*, 78 YALE L.J. 338 (1969).

280. During a registrant's continuing association with the System, he will find this failure to apprise him of his rights and duties continually repeated. The regulations impose a presumption that registrants have notice of the requirements of the law and the regulations. 32 C.F.R. § 1641.1 (1971). This notice requirement actually extends further than the common-law rule that a person is presumed to have knowledge of the criminal law since it imposes on a registrant notice of his affirmative duties as well. *See* R. PERKINS, CRIMINAL LAW 799-809 (1957). Until very recently, the Selective Service System made little effort systematically to inform registrants what these affirmative duties are. Moreover, the System never made a concerted effort systematically to inform registrants of their rights under the Act and the regulations. Editorial Note, *An Examination of Fairness in Selective Service Procedure*, 37 GEO. WASH. L. REV. 564, 571-74 (1969).

281. *See* note 199 *supra* and accompanying text.

282. *See, e.g.*, United States v. Gearey, 368 F.2d 144, 149 (2d Cir. 1966), *aff'd. on remand*, 266 F. Supp. 161 (S.D.N.Y.), *aff'd.*, 379 F.2d 915 (2d Cir.), *cert. denied*, 389 U.S. 959 (1967).

283. *See* "Supplement to Health of the Army: Results of the Examination of Youth for Military Service, 1968," Medical Statistics Agency, Department of the Army (1969); Committee for Legal Research on the Draft, Model Brief: *Invalidity of Regulation 1625.2*, at 18 n.24 (1970).

284. *See* J. DAVIS & K. DOLBEARE, LITTLE GROUPS OF NEIGHBORS: THE SELECTIVE SERVICE SYSTEM 130-31 (1968).

delay will be an additional period of uncertainty and further delay in beginning his civilian career.[285]

In summary, sound analysis, both in terms of precedent and policy, weigh against upholding section 1625.2 in its application to conscientious objectors. It is unfair to registrants with valid claims who are unable to discover their rights and duties in the maze of Selective Service technicalities and regulations. In addition, section 1625.2 itself, without the guise of authority, conflicts with the very law it should further by treating the right to claim a conscientious objector status as waivable and forfeitable. In *Gutknecht* and *Oestereich*, the Supreme Court clearly rejected a waiver theory as applied to *all* deferments and exemptions. The coverage of protection extended to deferments and exemptions by these cases extends to *all* deferments and exemptions whether they originate within the Act itself or are merely authorized by the Act and granted by the regulations. Moreover, even if a waiver theory were appropriate for deferments and exemptions granted by the regulations, it is clearly inappropriate as applied to an exemption—*e.g.*, the conscientious objector exemption—to which Congress and the courts have given a preferred status. In this light, then, it may fairly be said that the Court's opinion in *Ehlert*, which completely ignores these considerations without attempting to reconcile or distinguish them, and instead rests on timeliness and efficiency, is somewhat less than satisfactory.

b. *Is Crystallization of a Person's Beliefs as a Conscientious Objector a "Circumstance" Beyond His Control?* Prior to *Ehlert* the courts took two different positions on the issue whether an individual can control his beliefs as a conscientious objector.[286] The two

285. Exec. Order No. 11563, 35 Fed. Reg. 15435 (1970), modified 32 C.F.R. § 1631.7 to provide, *inter alia*, that registrants who have reached age twenty-six without receiving an induction order will be inducted only after all available registrants (except those between ages eighteen years-six months and nineteen years) have been inducted. Thus, regardless of whether the registrant has used delaying tactics, reaching age twenty-six without receiving an induction order will reduce his draft vulnerability significantly. A registrant who is subject to the lottery in any year but who reaches age twenty-six before the year expires and before he has been issued an induction order will be placed in a low-priority group. *See* 3 SEL. SERV. L. REP. NEWSLETTER 29 (1970).

286. Among those cases holding that crystallization is beyond a registrant's control are United States v. Nordlof, 3 SEL. SERV. L. REP. 3546 (7th Cir. 1971); Scott v. Commanding Officer, 431 F.2d 1132 (3d Cir. 1970); United States v. Sandbank, 403 F.2d 38 (2d Cir. 1968), *cert. denied*, 394 U.S. 961 (1969); United States v. Gearey, 368 F.2d 144 (2d Cir. 1966), *affd. on remand*, 266 F. Supp. 161 (S.D.N.Y.), *affd.*, 379 F.2d 915 (2d Cir.), *cert. denied*, 389 U.S. 959 (1967); Keene v. United States, 266 F.2d 378 (10th Cir. 1959); Peterson v. Clarke, 289 F. Supp. 949 (N.D. Cal. 1968). *Contra*, Ehlert v. United States, 422 F.2d 332 (9th Cir. 1970) (en banc), *affd. on other grounds*, 39 U.S.L.W. 4453 (U.S. April 21, 1971); United States v. Jennison, 402 F.2d 51 (6th Cir. 1968), *cert. denied*, 394 U.S. 912 (1969); United States v. Helm, 386 F.2d 434 (4th Cir. 1967), *cert. denied*, 390 U.S. 958 (1968); David v. United

leading circuit court cases dealing with this issue were the Ninth Circuit's opinion in *Ehlert v. United States*[287] and the Second Circuit's opinion in *United States v. Gearey*.[288] In *Gearey* the Second Circuit took the view that a registrant's beliefs may be crystallized after he receives his induction order and that this crystallization is not within the registrant's control. The court stated, "The realization that induction is pending, and that he may soon be asked to take another's life, may cause a young man finally to crystallize and articulate his once vague sentiments."[289] Similarly, the dissenting opinion in the Ninth Circuit's decision in *Ehlert* accepted the view that it is not within an individual's control to become a conscientious objector and noted that the opposite view is ". . . a disparagement of the concept of conscience most out of tune with the prevailing mores of the day. One simply cannot order his conscience to be still or make himself believe what he does not believe."[290]

A majority of the Ninth Circuit, rejecting the *Gearey* position, concluded that "[p]resumptively, every human is a rational being, having a free will and in complete charge of his thinking,"[291] and omitted any further consideration of whether a person can control his conscience and beliefs. However, in a concurring opinion Judge Duniway carried the analysis somewhat further and stated that, regardless of the volitional element, crystallization of conscientious objection is not a "circumstance" within the meaning of the regulations. Thus, even if crystallization is beyond the registrant's control, it is not a circumstance because "circumstance indicates . . . some fact, act or event external to the mind or consciousness of the registrant, rather than the mysterious and unfathomable internal mental and spiritual processes of the registrant himself."[292] Judge Merrill in his dissenting opinion responded to Judge Duniway's position quite persuasively:

> A "change in the registrant's status" under the regulation can

States, 374 F.2d 1 (5th Cir. 1967) (dictum); United States v. Al-Majied Muhammad, 364 F.2d 223 (4th Cir. 1966). *See also* Kulas v. Laird, 315 F. Supp. 345 (E.D.N.Y. 1970), in which the court held that the late crystallization of a registrant's claim of conscientious objection required reopening even though this involved a late crystallization, not of substantive beliefs, but of knowledge of the law. The basis for this decision was the fact that the registrant's local board had mistakenly informed him that Roman Catholics could not qualify as conscientious objectors and that he had not discovered this error until after an induction order had been issued.

287. 422 F.2d 332 (9th Cir. 1970) (en banc), *affd.*, 39 U.S.L.W. 4453 (U.S. April 21, 1971).

288. 368 F.2d 144 (2d Cir. 1966), *affd. on remand*, 266 F. Supp. 161 (S.D.N.Y.), *affd.*, 379 F.2d 915 (2d Cir.), *cert. denied*, 389 U.S. 959 (1967).

289. 368 F.2d at 150.

290. 422 F.2d at 339.

291. 422 F.2d at 334.

292. 422 F.2d at 335.

> have reference only to a change in the registrant's right to a particular classification. "Circumstances" in this context can have reference only to the conditions relevant to such a change of status. In the case of the conscientious objector status the only relevant condition or circumstance is the registrant's state of mind. The effect of the majority's construction is to single out conscientious objector as one status entitled to no consideration at this stage of the proceedings.[293]

Thus, when Ehlert appealed his conviction to the Supreme Court, two issues were presented: (1) Does the crystallization of a person's beliefs as a conscientious objector constitute an involuntary change in status which section 1625.2 establishes as a post-induction order condition precedent to reopening and (2) Even if crystallization can properly be said to represent an involuntary process, is it a circumstance within the meaning of the regulations? Only if the Court answered both of these questions affirmatively would post-induction order reopening of claims maturing after issuance of the order have been permissible. For if crystallization were voluntary, section 1625.2 would specifically withhold from the local board the authorization to reopen. Moreover, even if the ripening of a claim of conscientious objection were deemed uncontrollable, the availability of reopening would depend on a finding that it is the type of circumstance envisioned by the regulations.

The Supreme Court, speaking through Justice Stewart, noted that it was unnecessary to "take sides in the somewhat theological debates about the nature of 'control' over one's own conscience which the phrasing of this regulation has forced upon so many federal courts,"[294] and thus refused to answer the first issue. Instead, the Court agreed with Judge Duniway[295] and disposed of the appeal by holding that mental changes in status, such as those that occur when conscientious objection crystallizes, do not represent the circumstances contemplated by section 1625.2. Claiming that the regulation is ambiguous, Justice Stewart held that in the face of such ambiguity, the court was obligated to defer to a "reasonable, consistently applied administrative interpretation"[296] of the regulation. Therefore, since the Government had "consistently urged . . . in litigation" that circumstances are limited "to those 'objectively identifiable' and 'extraneous' circumstances that are most likely to prove manageable without putting undue burdens on the adminis-

293. 422 F.2d at 338.

294. 39 U.S.L.W. at 4455.

295. *See* text accompanying note 292 *supra*.

296. 39 U.S.L.W. at 4455. In support of this proposition, the Court cited Thorpe v. Housing Authority, 393 U.S. 268, 276 (1969); Immigration & Naturalization Serv. v. Stanisic, 395 U.S. 62, 72 (1969); Udall v. Tallman, 380 U.S. 1, 16-17 (1965); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945).

tration of the Selective Service System,"[297] and since this position was "wholly rational,"[298] the Court accepted the Government's position. This acceptance thus excluded mental events, such as the conversion to conscientious objector status, from the definition of circumstances.

However, Justice Stewart did note that "[i]t would be wholly arbitrary to deny the late crystallizer a full opportunity to obtain a determination on the merits of his claim to exemption from combatant training and service just because his conscientious scruples took shape during a brief period in legal limbo."[299] But since the Court was "assured . . . by a letter included in the briefs in this case from the General Counsel of the Army to the Department of Justice, that present practice allows presentation of such claims, and that there thus exists no possibility that late crystallizers will find themselves without a forum in which to press their claims,"[300] it dismissed these fears as groundless and decided to allow the military, rather than the Selective Service System, to evaluate claims that mature subsequent to the issuance of an induction order. Justice Stewart thus characterized the decision as merely effecting an "allocation of the burden of handling claims."[301]

Finally, in response to the argument that section 6(j) precludes the induction of conscientious objectors, Justice Stewart concluded that "[t]he only unconditional right conferred by statute upon conscientious objectors is exemption from *combatant* training and service."[302] And, since the court was assured that those claiming conscientious objection who are inducted do not receive "combatant training or service until their claims [have] been acted upon,"[303] induction itself does not present a conflict with the Act.

The impact of the decision, then, is not to cut off the late crystallizer's claim on the merits, but to change the forum that will conduct the evaluation. Furthermore, since the opinion fails to distinguish between voluntary and involuntary maturation of late-rising beliefs of conscientious objection, presumably even the registrant who controls his beliefs can qualify for a hearing on the merits.

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297. 39 U.S.L.W. at 4455.

298. 39 U.S.L.W. at 4455.

299. 39 U.S.L.W. at 4455.

300. 39 U.S.L.W. at 4456. The Court noted that Army Regulations "are somewhat inconsistent in their phrasing" as to whether a claim which matured before induction will be heard by the military. 39 U.S.L.W. at 4455-56. *See* Army Regulation No. 635-20, ¶ 3; Department of Defense Directive No. 1300.6, § IV(B)(2). However, the Court accepted the General Counsel's letter as sufficient indication that the claim will be evaluated on the merits.

301. 39 U.S.L.W. at 4454.

302. 39 U.S.L.W. at 4454.

303. 39 U.S.L.W. at 4455.

The dissenting opinion of Justice Brennan,[304] joined by Justice Marshall, and the dissenting opinion of Justice Douglas[305] clearly illustrate the problems in the majority's reasoning as well as the potential impact of the decision on those individuals whose beliefs mature after their boards issue induction orders to them. First, Justice Brennan argued that the cases cited by the Court in support of its deference to an administrative agency when there is "a reasonable, consistently applied administrative interpretation"[306] stand for the proposition "that judicial interpretation of an ambiguous regulation is to be informed by reference to *administrative practice* in interpreting and applying a regulation, not by reference to positions taken for purpose of litigation."[307] After noting that North Carolina and California local boards, upon direction from state headquarters, have in fact interpreted and actually treated crystallization as a proper circumstance within the meaning of section 1625.2, he concluded that administrative practice cannot "properly form the basis of decision."[308]

As a further argument, Justice Brennan, objecting to the majority's characterization of the regulation as ambiguous, noted:

> In the context of a blanket Selective Service regulation applicable to all claims for deferment and exemption, the reference to "circumstances" must be taken to refer to any conditions relevant to eligibility for a deferment or exemption. Since conscientious objection to war is the basis for a deferment, it must constitute a "circumstance" within the plain meaning of the regulation.[309]

Thus, as Brennan recognized, the conclusion flowing from *Ehlert*, that crystallization of conscientious objector status is not a circumstance within the meaning of the regulations, seems to be a somewhat strained interpretation of "circumstance." It is difficult to understand why the President—by way of the regulations—would attempt to discriminate against conscientious objectors by "singl-[ing] out conscientious objector status as one status entitled to no consideration"[310] after the induction order has been issued. According to the Court's view, a reopening to consider a hardship claim could be allowed after an induction order had been issued because the change in status would be a proper circumstance, whereas a similar claim for conscientious objection will not be allowed because a

304. 39 U.S.L.W. at 4459.

305. 39 U.S.L.W. at 4456.

306. 39 U.S.L.W. at 4460.

307. 39 U.S.L.W. at 4460.

308. 39 U.S.L.W. at 4460.

309. 39 U.S.L.W. at 4460.

310. Ehlert v. United States, 422 F.2d 332, 338 (9th Cir. 1970) (en banc) (Judge Merrill, dissenting).

change in a mental state can not constitute a proper circumstance. The result of such an approach, of course, would be gross discrimination against the conscientious objector that Congress certainly has not authorized. On the contrary, by embodying the conscientious objector exemption in the Act, Congress has evinced an intent that they have a preferred status.[311] Thus, it appears highly unlikely that either Congress or the President has ever contemplated that the rights or privileges afforded to other classifications be denied to conscientious objectors. Yet, this is precisely the impact of *Ehlert*. Only the registrant whose post-induction order involuntary change in status is the crystallization of his beliefs as a conscientious objector will have to undergo induction and have his claim reviewed by military, not civilian, tribunals.

Justice Douglas, in his dissent, appeared less concerned with technical questions of regulatory construction and emphasized the problems facing the individual who raises a claim of conscientious objection after induction. First, he noted and documented the abusive treatment often meted out by the military to those claiming to be conscientious objectors. Then he emphasized the practical problems faced in raising an in-service claim of conscientious objection:

> [P]roof of a conscientious objector's claim will usually be much more difficult after induction than before. Military exigencies may take him far from his neighborhood, the only place where he can find the friends and associates who know him. His chance of having a fair hearing are therefore lessened when the hearing on his claim is relegated to in-service procedures.[312]

Thus, Justice Douglas reasoned that any ambiguity in the regulation be resolved "in favor of the procedure most protective of the rights of conscience"[313] and that the registrant should not be relegated "to the regime where military philosophy, rather than the First Amendment, is supreme."[314]

In summary, the *Ehlert* decision effects a discrimination against conscientious objectors whose claims arise after classification and thrusts them and their claims into an environment that is often hostile to them. The result is somewhat ironic. Of all the registrants entitled to exemption and deferment on the basis of a last-minute change in status, the only one posed with the dilemma of becoming a part of the military establishment and having his claim evaluated by the organization is the conscientious objector. Yet, the military represents the precise source and heart of his objection. In this regard, the *Ehlert* decision is less than satisfying.

311. *See* text accompanying note 256 *supra*.

312. 39 U.S.L.W. at 4458.

313. 39 U.S.L.W. at 4458.

314. 39 U.S.L.W. at 4458.

IV. Conclusion

Judicial refinements of the regulatory guidelines for reopening have played a significant role in ensuring that each registrant receives a modicum of procedural due process when he raises a claim for a new draft classification. However, by themselves, these modifications may be insufficient to guarantee substantially equal treatment among registrants. Because the classification standards by which classification decisions are made appear to be vague at best,[315] it can be expected that similarly situated registrants will continue to be evaluated by varying criteria,[316] notwithstanding the presence of procedural restrictions on the absolute discretion of local boards. While it may also be possible for the courts to develop substantive classification criteria, as they have indeed done in several cases,[317] it appears that this would merely be an ad hoc approach leading to splits among the courts, which would perpetuate and further compound the present problems of inequality. Furthermore, it is doubtful that judicial standards would be readily discoverable and ascertainable by the average registrant and therefore they would fail to serve as meaningful guides in the presentation of a claim to the local board.[318] Thus, the task of formulating substantive, as opposed to procedural, guidelines for the Selective Service System classification decisions would appear to be most appropriately carried out by congressional action.

315. *See* notes 167-72 *supra* and accompanying text.

316. For an informative discussion of the discrimination among registrants found both within and among local boards, see J. Davis & K. Dolbeare, Little Groups of Neighbors: The Selective Service System 17 (1968).

317. *See* note 154 *supra* and accompanying text.

318. *See* note 167 *supra*.