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Successful Evaluation of Sincerity After Welsh

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This comment will probe the difficulties in determining whether, and within what limits, a man's personal moral convictions shall be permitted to override his obligation to defend his country.

The author will initially examine how *Welsh v. United States*\(^1\) encompassed secular views within the "religious training and belief" clause of the statutory exemption.\(^2\) The Supreme Court reconciled the language Congress used in the Selective Service Act\(^3\) with the equal protection clause of the fourteenth amendment and the establishment clause of the first amendment. By "crowning conscience king," the Supreme Court has adopted a vague standard that could open a virtual Pandora's box requiring draft boards to make nearly impossible choices. In the vast majority of cases after *Welsh*, sincerity, rather than the requisite substantive belief, will become the ungovernable decisional touchstone.\(^4\)

Under the present administrative regulations, the means used to ascertain the sincerity of each claim is dangerously inadequate. Without a thorough inquiry by a competent and impartial examiner, unfairness to both the sincere conscientious objector and his country invariably result.

To best achieve the objective of assuring enlightened action which will afford proper safeguards to the affected interests of the registrant, the author advances a proposal that will require a thorough and reflective exploration of a conscientious objector's beliefs by an impartial civilian examiner.

**INTRODUCTORY CONSIDERATIONS**

Conscientious objectors feel compelled to object in various degrees to the state's requirements with respect to warmaking and military policy. There are really two groups of C.O.'s. The first, and overwhelmingly the largest, are members of the organized paci-

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4 "The primary test that must be used is the test of sincerity with which the belief is held. The board should be convinced by information presented to it that the registrant's personal history reveals views and actions strong enough to demonstrate that expediency is not the basis of his claim." *LOCAL BOARD MEMORANDUM No. 107, July 6, 1970.*
fist churches, namely Amish, Quakers, Jehovah Witnesses and Mennonites. A second and comparatively minute group consists of individuals whose objections are based on their own moral or ethical beliefs, rather than the tenets of a particular sect.5

A C.O.'s substantive belief reflects a continuum of considerations: religious, moral, ethical, philosophic, humanist, social and political. The differences within these beliefs are frequently so small that it is extremely difficult to tell where one ends and another begins. Historically, Congress has required "religious training and belief" to be the objector's prime motivation in conscientiously opposing war.6 Congress has traditionally felt that beliefs emanating from a religious source are held with a greater intensity. Ethics and morals, while the concern of secular philosophy, have been taught by organized religions and, for most individuals, spiritual and ethical nourishment came from that source.7 A long standing association of conscience with religious institutions has been a discreet way of avoiding having to take the individual at his word. When an objector is a member of a traditional religion, it is thought to be much easier to ascertain the strength of his belief by the relationship it bears to the theology as a whole.

A "nation under God" is willing to accept with tolerance the fact that some citizens will not, because of their religious beliefs, kill another human being even in time of war. But the broadening of the exemption to nonreligious objectors with its resultant increase in numbers is not as easily accepted. The nonreligious objector opposes war because he feels, based on his own reasoning and study, that armed conflicts are useless and wrong. The religious objector is motivated by teachings which he believes are inspired by God. He believes that if he violates the tenets of his faith by killing in war, he will be subjected to eternal punishment.8 Despite this critical difference in motivation, a gradual legislative and judicial attempt to

6 The Act of May 18, 1917, ch. 15, § 4, 40 Stat. 78, exempted only those found to be members of any well organized "religious sect or organization as presently organized and existing, whose principles forbid participation in war in any form and who actually subscribed to these principles of the sect or organization." Congress gradually has been forced to recognize that the belief rather than membership was more important. Mere formal affiliation is no true measure of intensity of beliefs since many nominal adherents do not share or pursue the ethics of their church. The 1940 Act provided that the exemption might be claimed by one "who by reason of religious training and belief, is conscientiously opposed to participation in war in any form."
8 Smith and Bell, The Conscientious Objector Program—A Search for Sincerity, 19 U. Pitt. L. Rev. 695, 711 (1958) [hereinafter cited as Smith and Bell].
enlarge the meaning of conscience beyond the traditional confines of religion has sought to protect the equally sincere objector.

**NONRELIGIOUS OBJECTION IS ENTITLED TO EQUAL STATUS**

Section 6(j) of the Military Selective Service Act of 1967 provides in pertinent part:

Nothing contained in the 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.⁹

It is difficult to define religion for the purposes of this single statute and distinguish it from social, philosophical or moral objections.¹⁰ In the absence of a universally acceptable touchstone which would enable a draft board to make this distinction, it is extremely difficult to administer a law which attempts to define true religion¹¹ without working hardship or discrimination against those who have the misfortune to dissent or believe otherwise. The radius of this exemption is the conscientiousness with which an individual opposes war in general. If section 6(j) only accords a preference to the religious, but disadvantages individuals motivated by teachings of non-theistic religions guided by an inner ethical voice, groups who legitimately fall within the natural perimeter of the latter class are unconstitutionally excluded.¹²

To avoid imputing to Congress an unconstitutional intent to classify different religious beliefs, exempting some and excluding others, the Supreme Court has come to recognize “all sincere beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."¹³ In *United States v. Seeger*, the Warren Court enunciated a test which included convictions which assumed the role of a traditional religion and functioned as such in the registrant's life:

. . . The test of belief in relation to a Supreme Being is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.¹⁴

Five years later, the Supreme Court made explicit its total elimination of the statutorily required religious element for the

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¹¹ *Id.* at 174.
¹⁴ *Id.* at 176.
exemption in *Welsh v. United States*. In reversing Welsh's conviction for refusing to submit to induction into the armed forces, the majority was obligated to reaffirm and expand *Seeger*. The Warren Court had considered Daniel Seeger's views as sufficiently religious to qualify for the exemption. However, Welsh's views were not even characterized as religious. The Court noted that “[n]o matter how pure and admirable Welsh's philosophy of life may be, and no matter how devotedly he adhered to it, his philosophy and morals and social policy cannot be said to be religious.”

The majority of the Court evidently felt that it was impractical to attack the religious preferment issue directly for fear of eliminating the C.O. category and removing all possibility of justifiable exemption. The Court probably would have felt obliged to declare the statute unconstitutional if it admitted that Congress has passed a law (as it undoubtedly intended to do) granting exemptions to young men who go to church while denying exemptions to those who do not. To avert this inevitable constitutional collision, the Court's only alternative was to fashion a meaning of the crucial phrase “religious training and belief” which would embrace the ever broadening understanding of the contemporary religious community.

In the very narrow context of one statute, “religion” has been denigrated to the point where it becomes equivalent to a “strongly held objection.” Virtually an indefinite number of value systems or beliefs, as varied as the individuals who hold them, theoretically could merit recognition as a “religion.” A broad construction of “religion” was necessary to avoid serious constitutional difficulties.

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15 398 U.S. 333 (1970). In his original application for conscientious objector status in April 1964, Welsh stated he did not believe in a Supreme Being but later advised his board he neither definitely affirmed or denied it. In a special conscientious objection form SSS 150, he struck out the words “religious training and” and stated he was opposed to participation in war by reason of his belief. He claimed he had deep conscientious scruples against taking part in wars where people were killed, being motivated by a voice so loud and insistent that he preferred to go to jail rather than serve in the armed forces. Welsh was sentenced to three years imprisonment for refusing to submit to induction into the armed forces in violation of 50 U.S.C.A. APP. § 462(a) (1965) after he had been denied C.O. status.


17 It does not really matter how the court decided to grant equal recognition to the nonreligious objector. When the Selective Service Act comes up for consideration this summer, Congress could respond to *Welsh* by a precise statement of the law for administrative purposes. The clause “religious training and belief” could be replaced with a guideline that on its face expressly encompasses the full range of sources from which men draw their beliefs on matters of ultimate concern. Such a guideline should require a *sincere and meaningful belief that is a product of profound human conscience*. Such a standard will withstand serious constitutional challenges never answered by the majority of the *Welsh* court. It makes little sense to include both religious and nonreligious views within language that states explicitly only “religious training and belief” would merit statutory protection. It is far easier to reckon with and incorporate nonreligious beliefs within the suggested guideline.
but *Welsh* can not be taken as a definitive statement as to what religion would mean for all persons and all purposes.

The common denominator for the exemption has become the intensity of moral conviction with which a belief is held. To determine the subjective sincerity of each claim will require a delicate and painstaking examination of the depths of the belief. Expertise is needed to improve the focus on this issue. Without it, such a nebulous standard could force local draft boards to make nearly impossible judgments.\(^1\)

**A HERCULEAN TASK**

There are few tasks more difficult than judging the sincerity of another man's belief. "Human experience has devised no precise gauge for appraising a subjective belief lodged in the mind and heart of the person..."\(^2\) Any external judgment about the most secret core and sanctuary of another man is a complex and delicate task. "That this judgment must be largely intuitive and therefore more or less arbitrary, aided only in part by the science of psychology, is regrettable but true."\(^3\) Law is therefore concerned with the acts and conduct of men and only rarely attempts to fathom the depths of man's conscience.\(^4\)

The subjective nature of the sincerity test militates against the application of any particular rules.\(^5\) Nonetheless, factual determination of the intrinsic sincerity of each claim is vital. The present test of sincerity lacks the essential specialized techniques demanded by the peculiar nature of the claim.

**Procedure in Obtaining Exemption**

The registrant has the burden of convincing his local board that he is entitled to the classification requested.\(^6\) Considering his youth, experience and lack of competent legal counsel,\(^7\) this burden

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\(^1\) See text accompanying notes 45-63 infra.

\(^2\) Blalock v. United States, 247 F.2d 615, 618 (4th Cir. 1957).


\(^5\) Smith and Bell, *supra*, note 8, at 716.


\(^7\) The Report of the National Advisory Comm'n on Selective Service, in Pursuit of Equity: Who Serves When Not All Serve? 29, [hereinafter cited as Marshall Report]. The Marshall Commission found that the appeal agents are almost totally inactive. Clerks freely admit that their appeal agents have checked no files and have seen no registrants. The advising that is done is by clerks who know only SSS regulations and very little about case law. The role of the government appeals agent requires him to have divided loyalty in that he is supposed to advise both the
is grossly unfair. Once a prima facie case has been made, the Selective Service has the burden of showing something in the record supporting a denial.

The initial classification form completed by a new registrant includes a brief statement to be signed by the registrant if he seeks C.O. classification. After signing this statement, the registrant receives a special Conscientious Objector Form from the local board. Otherwise, he will receive it only if he takes the initiative and brings his claim to the board's attention. In this form, the registrant describes the basis for his claim and the history of the development of his belief. He is advised to provide external evidence, if any, of his views, including the testimony of references. On receipt of this form, the draft board can decide what to do with the man on the basis of explicit knowledge of his position. Since very few board members know the registrant personally, the boards almost automatically refuse to grant the exemption. The registrant is entitled to a personal appearance before the board members to explain why he should not be available for military service. Lacking expertise and with only a minimal basis for judging sincerity, many conscientious but cautious boards are reluctant to take the initiative in deciding in favor of C.O.'s.
If a registrant is unsuccessful at this critical juncture, he is confronted with what some writers appropriately designate as a "legal obstacle course." The local board need not make a record of what is said at this personal appearance and the board is not required to give any explanation for the action it takes. The unsuccessful registrant can appeal to the state and national appeal boards. These administrative review boards make their decisions exclusively on the written record in the registrant's file. Neither the registrant nor any other person is permitted to appear. The only determinations are: whether the local board has given adequate consideration to all relevant facts and regulations; whether sufficient documentation is in the file to support the classification; whether the registrant has been granted all of his procedural rights; and finally, whether the classification appears to be in consonance with existing policy.

If no facts or inferences upon which the local board's conclusion is stated, effective rebuttal is impossible. If the decisions by appeal boards are made solely on the basis of material in the registrant's file, those registrants who are not skilled in the use of written English are at a great disadvantage. Where the sincerity of the claimant is wrongfully denied, review without rehearing is hardly meaningful. It is highly improbable that an appeal board with only a cold record before it could rationally reverse a local board determination without having an opportunity to observe the C.O.'s demeanor. Too many times the appeal process is only a "rubber stamp" of local board decisions. A noted author has described the situation well:

It would be an overstatement to assert that local board classificatory decisions are in fact conclusive as to registrants' claims for reclassification. However, it is no exaggeration to suggest that the processing of registrants—the gross allocation of manpower—is almost exclusively a product of local board administrative action, with the barest minimum of interference from above.

Consequently, within the Selective Service System adverse determination of sincerity is not subject to effective review.

decisions. See Rabin, Do You Believe in the Supreme Being? The Administration of the Conscientious Objector Exemption, 1967 Wis. L. Rev. 642 at 668, 673.
31 A registrant's own record is usually the only report of the hearing. The registrant is therefore required to concentrate on remembering what occurred as well as participate in the hearing. This places an unfair burden on him and could limit his responses to the board.
Judicial review is available to a registrant only if he is willing to risk raising the defective classification as a defense in a subsequent criminal proceeding. Before access to the courts is allowed, the unsuccessful claimant must refuse to step forward at the appropriate moment and demonstrate his refusal to be inducted into the armed forces. This act will usually result in prosecution for refusal of induction and will provide the registrant with a limited opportunity to challenge his classification.

But the registrant who takes the calculated risk of refusing to be inducted in order to obtain judicial review of his classification has no assurance that his allegation of unfairness will be fully examined by the courts. The scope of review is extremely narrow. The federal district courts have been hesitant to sit as "super draft boards." The classification is generally upheld if it is supported by any "basis in fact." If the registrant appeared before his local board, the classification can be upheld simply by a finding that his appearance was one of unreliability. Therefore, a court could uphold the local board's denial of a C.O.'s claim on the basis of insincerity even when there was no specific evidence inconsistent with the registrant's claim. If courts are not required to look to the whole record in these cases, they can scan the record for isolated facts which support a sometimes reluctant board decision.

The troublesome problem of review of the issue of sincerity was admitted in United States v. Simmons:

38 Prior to 1967 preinduction review was available only in limited circumstances. See Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956); Schwartz v. Strauss, 206 F.2d 767 (2d Cir. 1953); Warren v. Abernathy, 198 F.2d 622 (10th Cir. 1952). In Oesterich v. Selective Service Local Board No. 11, 393 U.S. 233 (1968), the Supreme Court held that a registrant who was entitled to a mandatory statutory exemption could obtain preinduction civil review of a local board order reclassifying him under the delinquency regulations. In cases where the Government will not concede the error in classification, such review is unlikely at the present time.


38 Congress has specifically excluded Selective Service proceedings from the provisions of the Administrative Procedure Act. 50 U.S.C.A. APP. § 463(b) (1968). Courts are not required to examine the entire record in reviewing the classification.


41 "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant. . . ." Estep v. United States, 327 U.S. 114, 122 (1946).

42 Rabin, Do You Believe in the Supreme Being? The Administration of the Conscientious Objector Exemption, 1967 Wis. L. Rev. 642, 668 [hereinafter cited as Rabin].

43 213 F.2d 901 (7th Cir. 1954), rev'd on other grounds, 348 U.S. 397 (1955).
The C.O.'s claim admits of no exact proof (as other classifications). Probing a man's conscience is at best, a speculative venture. No one, not even his closest friends and associates can testify to a certainty as to what he believes and feels. These, at most, can only express their opinion as to his sincerity.4

The court reluctantly acknowledged that the best evidence of this question may well be, not the man's written statement or those of other witnesses, but his credibility and demeanor in an impartial and fair hearing of his claim. Sincerity or good faith, at issue in every case, especially after *Welsh*, can only be judicially determined upon a new hearing. Such a hearing is beyond what Section 6(j) has promised or accomplished.

**The Local Board Decision**

If meaningful administrative and judicial review of sincerity is restricted, the classification process at the local board level is critical. The Selective Service System is premised on the theory that all citizens should bear proportionally the burden of personal risk and financial sacrifice which society must unwillingly parcel out to its constituents in time of war.45 Does the draft board that parcels out these burdens possess the impartiality necessary for fair and equitable treatment of conscientious objectors?

Equity and justice require a judge to disqualify himself from sitting in judgment on a case in which he has a personal interest. Fairness is more likely to result if an unbiased arbiter settles controversies.

The decisions of local boards are not made in a vacuum: they are influenced by the board members' attitudes toward the task they are to perform and their capacity for performance.46 By its role in the Selective Service System, the local board has or can have an alarming conflict of interest in determining exemptions from the armed forces since its main function is that of obtaining young men for our armed forces by meeting specific manpower quotas. The Southeast Asian conflict and its accompanying high quotas put pressure on local boards to make available as many young men as possible. Impartial administration of conscientious objector claims is somewhat inconsistent with this duty unless the available pool of young men is much larger than any expectable drain on it.47

44 Id. at 904.
46 Rabin, *supra* note 42, at 650.
The conscientious objector presents an exceptionally unique problem to his board. Unlike the college student, the C.O. will not later be available for military service. His alternate civilian service does not further the national interest as does the defense worker or scientist. Unlike any other registrant, his infrequent and complex request for distinctive treatment is uniquely based upon his contempt of the very system that the board member, through his service, seeks to make an effective enterprise.

When the boards were set up in the days prior to World War II, Congress decided that they should represent both political parties, and the board members should be veterans of our previous military campaigns. If a large majority of the board members had previously defended our country, they would have an understanding of service to the nation and a patriotic desire to do their best for their country.\textsuperscript{48} The military service—oriented brand of patriotism still permeates the decision making process. In data compiled by the Marshall Commission, 65 percent of local board members were shown to have served their country in the armed forces.\textsuperscript{49} A majority of those who decide the conscientious objector's fate are veterans of the same military system the C.O. scorns. There are naturally strong differences of opinion between the registrant and his "group of friends and neighbors in the community" who classify him. The Marshall Commission also reported that an alarming 55 percent of the local board members in one state believed C.O.'s should not be deferred at all.\textsuperscript{50} If claims are denied solely out of personal convictions, we do not have a rule of law but a rule of men who are intent on promoting a cause rather than objectively performing a job.

The seemingly unlimited administrative discretion given to local boards frequently permits this abuse of discretion. The local board autonomy in the present decentralized structure accentuates the lack of uniformity in policy and application, concealing the inconsistent and inequitable treatment of C.O.'s with similar beliefs. The informality that permeates the adjudication of conscience has bred a frustrating confusion which eliminates any elements of predictability. Since many provisions of the regulations are written in general language and are permissive rather than mandatory, they are easily misunderstood or misinterpreted. The lack of clarity in the regulations and the variations in amount and type of guidance provided are a reflection of the deficiencies of the entire process.\textsuperscript{51}

\textsuperscript{48} 1 Selective Service Systems: Organization and Administration of the System, 191 (1951).
\textsuperscript{49} Marshall Report, supra, note 24, Table 1.3 at 74.
\textsuperscript{50} Id. at 29.
\textsuperscript{51} See Task Force, supra, note 5, at IV-I.
DIFFICULTIES WITH THE TEST OF Sincerity

The overwhelming majority of local draft boards are manned by uncompensated individuals who are themselves highly conscien-
tious and can usually draw on what they have learned from years of experience to make most classifications. Yet the ability to peer into a man's conscience and unerringly read what is found there, is not something that can necessarily be acquired with the mere passage of time. Since man's conscience springs from some internal source of self-knowledge, it acknowledges no superior, bows to no authority and is governed by no law. No iron chain or outward force of any kind could ever compel the conscience of man to believe or disbelieve. The local boards are forced to look into a conscience, which by its definition, ignores reason, defies argument, and is unaccountable and unresponsive to any human test or standard.

The only significant determination of sincerity is at the personal appearance of the registrant. With no right to counsel or even to present evidence of his own, a nervous young man bears the burden of proving he is entitled to his classification. At this once in a lifetime moment, he will be compelled to answer antagonistic and confusing interrogatories. His answers can lead him into alternative civilian service, flight to foreign soil or even battle itself. Even

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52 See text accompanying notes 28-34, supra.
53 The Handbook for Conscientious Objectors, 10th ed., 46, suggests that sample questions asked by boards are:
1) What happens to people like you in Russia or China?
2) Do you object to killing or to being killed?
3) Aren't there a lot of Communists mixed up in so-called peace demonstrations?
4) Why accept the benefits of a country you won't protect?
5) If everyone held your view wouldn't Communists take over the country?
6) Why do most of the members of your church oppose the war?
7) Where in the Bible do you find anything that forbids you to help defend your country?
8) If God told you to defend your country, what would you do?

54 Registrants classified 1-O will be ordered to report for civilian work in the same call-up order as provided for 1-A and 1-A-O men. He can work for a government agency or a nonprofit organization, association or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare. It is unfortunately not always possible to find the type of work most suitable to the skills, experience, interest and vocational goals of all 1-O registrants.

55 Individuals conscientiously unable to serve in the armed forces but who find prison completely unacceptable are caught in a dilemma which almost 20,000 have resolved by leaving the country. Emigration does not relieve one from his liability under Selective Service and one may face the prospect of prosecution upon his return to the United States. See C.O. Handbook, supra, note 53, at 56. For an excellent discussion of the alternatives facing a registrant who must make this decision, See A. Giner, The New Draft Law 235:9 (1967).

56 Since only one out of six soldiers ever do actual front line fighting, this alternative is encountered infrequently. Occasionally, however, a non-combatant (1-A-O) who is serving his unit as a medical corpsman will face a life or death
though liberal parole into the military is available, many young men will accept prison rather than compromise their beliefs. In these "schools of crime," his antiwar ideas will not be "rehabilitated" but more likely will be shared with other "students" in a large graduate school of revolution. It is a sad spectacle if one determined to be insincere by his board must spend a substantial term in jail demonstrating his sincerity.

Studies have shown that appearances before a local draft board generally are no more than a mere ten minute harassment session. On occasions, registrants have been subjected to severe verbal abuse and have been denounced as being less than patriotic. One registrant was allegedly told he "never had done anything for his country and [was] now engaged in the greatest act of disloyalty to his country."

Other extensive studies concerning the superficial and tenuous nature of the judgment indicate that the factual issue is not one particularly suited for local board determination: "Many boards do not understand the problems involved, have not studied the law, are angry and intolerant or simply lack the necessary mental or moral equipment for such a delicate task." Local board members themselves have doubted their aptitude and proficiency to judge the sincerity of an individual in ten to fifteen minutes. In response to a questionnaire asking the boards to rank the difficulty of each classification, the conscientious objector proved the most troublesome.

The calls for rectification of this outrage upon fairness have been steady and persistent. But in the heat of war and its strife, far reaching changes are less apt to be made. A wide diversity of opinion exists in this sensitive area, limiting any legislation that must intimately touch the lives and deepest emotions of so many people.

situation. He is asked to kill or lose his own life. If he does kill, can he still be characterized as a conscientious objector? The draft board that puts him in this position has its decision quickly "reviewed."

The convicted registrant might be offered the option of being inducted into the armed forces rather than going to jail. See Comment, 114 U. Pa. L. Rev. 1014, 1018 (1966).

President Nixon has called U.S. prisons "universities of crime." U.S. Prisons, Schools For Crime, Time, Jan. 18, 1971 at 48. This author's experience with correctional facilities bear out this claim. Many an innocent offender would leave prison wiser in the ways of the recidivist.

Those who are not conscientiously opposed to killing in war can accept a parole into the military rather than be jailed. Only the sincere C.O. will spend time in jail refusing to compromise his beliefs.


Rabin, supra note 42, at 665.


Marshall Report, supra note 24, Table 7A, 182.
When the Selective Service Act of 1967 expires this summer, Congress should be urged to consider more effective means to evaluate the subjective sincerity of each claim. To afford proper safeguards to the affected interests of the registrant, the dangerously inadequate method of the present should be overhauled.

PROPOSAL

The difficulty of obtaining meaningful judicial review of sincerity makes it imperative that the administrative procedures of the local board be scrupulously fair to the conscientious objector. The sincere C.O., especially the nonreligious objector, is not afforded adequate protection under existing statutory law and procedure.

The experience of psychologists has shown that the most precise determination of veracity results from a deliberate inquiry by a competent and impartial examiner. Speed, not efficiency, characterizes present board operations. Assistance is urgently needed to assist those who lack the mental or moral equipment for such a delicate task.

To improve and hopefully alleviate the unfair and inconsistent application of the exemption, the Selective Service Act should be amended to require a thorough and reflective exploration of a conscientious objector's beliefs by an impartial civilian examiner.

Accompanied by an attorney or personal advisor, each appli-

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64 See Notes 36-42 and accompanying text.
65 Where an objector is a member of a traditional religion, it is much easier to ascertain the strength of his belief by the relationship it bears to the theology as a whole. But a nonreligious objection does not lend itself to such a fairly clear-cut determination and therefore is likely to end up in the courts with only a "basis in fact" required to sustain the classification. See TASK FORCE, supra, note 5, at VIII-3.
66 Conversation with Dr. Roland Lowe, Chairman of the Psychology Department, University of Santa Clara.
67 Former Selective Service Director General Hershey suggested that conscientious objectors "are handled best if no one hears from them." See MURRAY, CONSCIENCE AND THE JUST WAR (1970).
68 See Note 61, supra, and accompanying text.
69 Under present law, an applicant for C.O. status is not permitted the assistance of counsel in his personal appearance. Authorities feel that since this is not a criminal prosecution and is informal in nature, an articulate advocate might confuse and befog the layman on the board with legal "jargon." See generally MARSHALL REPORT 1-29. This denial of counsel was tolerated supposedly because of the non-adversary nature of the hearing. This danger would be non-existent if the attorney's representation was before a highly trained and specialized examiner (see Impartial Examiner, infra). If a lawyer could be used at this stage of the classification process, the unfairness to the inarticulate (usually poor and uneducated) registrant would be lessened. If a registrant's views could be expressed in a professional manner, they could be more accurately evaluated.
cant for C.O. status would be required to personally appear and explain his beliefs in an informal hearing before the detached examiners, who would then make a recommendation to the local board. The purpose of the hearing would not be to judge whether the applicant is correct in his personal assessment of the political, military or moral values of warfare, but merely whether his beliefs are unimpeachably authentic. The young man will be tested for the sincerity and clarity of his convictions within the reasonable limits set by the intellectual and spiritual maturity which may be properly expected of a young man his age. A more effective hearing should indicate less concern about the nature of the belief than its external manifestation.

Each examiner will be required to analyze the registrant's claim and provide a written recommendation to the local board. If the local board decided not to follow the recommendations, it would be required to provide a written explanation specifically enumerating why the local board thought it best to override the recommendation.

An Impartial Examiner

There are two attractive alternatives, either of which will insure that specialized assistance will be available to the local board. The civilian examiner could take the form of either a panel or a single hearing officer.

The first and most attractive alternative is a civilian panel. All members of this panel would be selected for good judgment and a sympathetic attitude toward the manifold problems of people as well as for their administrative ability. The membership of the panel might include an attorney, a psychologist and a high school teacher or counselor. These accomplished specialists are endowed with a

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70 It is rather extraordinary that a registrant can not have his beliefs rejected even if they are incomprehensible. No matter how queer, incomprehensible or illogical one man's beliefs might be, the establishment clause of the first amendment would not permit recognition of one without equal status for all others. See United States v. Ballard, 322 U.S. 78, 86 (1944).

71 Men may believe what they cannot prove. A registrant should not be put to the proof of his religion or beliefs. The hearing must decide whether the beliefs professed by the registrant are sincerely held and whether they govern his actions both in word and deed.

72 See text accompanying notes 81-82 infra.

73 The Selective Service Youth Advisory Committee recommended a similar panel above Local Board level to hear conscientious objector cases. See DIALOGUE . . . ACTION . . . CHANGE . . . REPORT OF THE NATIONAL CONFERENCE 9 (1970).

74 There are three issues generally demanding attention in a C.O. hearing: the sincerity of the claim, the legal implications of the claim, and finally, the capacity to "tune in" to these issues. Each member of the panel is a specialist in these areas.

The religious and nonreligious aspects of the claim suggest the inclusion of a theologian on this panel. Versed in the contemporary religious expressions of our time,
versatility to enable them to more accurately ascertain the sincerity of a conscientious objector.

The advantages of having an attorney sit on this panel are many. Most notably, he would bring a legal background to the difficult task of interpreting the legal implications of documents of the length and complexity of Form 150 applications.75 He is qualified to interpret and implement case law which will seem confusing to the ordinary layman. His presence will also deter a registrant's attorney from confusing the panel with legal terms and maneuvers.

Psychologists are best qualified to make the personal appraisal of the registrant's reactions, responses and demeanor on the critical sincerity issue. Even though a large number of people have a tremendous insight into the psychological intricacies of people with whom they live, a psychologist is specifically trained to make this analysis. His professional expertise on this one issue-narrowing inquiry will be an incredibly precious advancement over layman guesses.76

Accustomed to dealing with this particular age group in similar situations, experienced counselors and high school teachers have become sophisticated and skillful in discussing and analyzing their problems. Possibly the younger the age of this panel member the better equipped he would be to “tune in” to what the young man is saying.

The civilian examiner could take another form which also could effectively evaluate the merits of the conscientious objector's claim. A single examiner, preferably an attorney, could assist the board in the same manner as the panel. He could conduct a more personalized and informal de novo hearing in much the same manner as the old Department of Justice Hearing Officers.77 He would make his recommendation directly78 to the local board from the evidence he gathered in probing the depth and sincerity of a registrant's beliefs.

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76 Psychological testing could enable a more accurate understanding of the applicant.
78 The Hearing Officers interviewed the registrant and sent a report of the
An attorney’s experience in dealing with clients and witnesses has given him a “sixth sense” to determine when fabrication distorts an authentic version of the facts. A draft board lacking the mental or moral equipment to make an impartial decision urgently needs his assistance.

Although lacking the varied specialized professional experience, this second form of civilian examiner has advantages of immeasurable consequence. A more personalized appraisal of the registrant is available. It will contain all of the advantages gained prior to 1967 by the Department of Justice hearings while eliminating the structural deficiencies that doomed that earlier version.70

The number of panels or hearing officers would vary proportionally to the number of C.O. applications rather than the number of draft boards. It is of utmost importance to insure that there is a sufficient number of examiners to eliminate any possible procedural delay. By minimizing the uncertainty in waiting and discouraging strategic delays, a conscientious objector classification could be determined within the same time that is taken with other deferments.

The panel or hearing officer would be required to provide in writing an analysis of the validity of the registrant’s claim. This recommendation would be directed to the local draft board to assist them solely in the area of conscientious objection. The recommendation would not be binding, but if the board decided not to follow the opinions of qualified experts, the local board would then be required to provide a written explanation why it decided to override the recommendation. A written justification for a disputed classification could function as a precise legal reference point that would permit more meaningful administrative and judicial review.

Presently, local boards usually provide no reasons for denial of requested classifications. If reasons are given, they generally are terse one or two sentence conclusions. National Headquarters discourages a written opinion because of the considerable administrative difficulty it would entail. Furthermore, it was feared that local board members, not erudite and seldom lawyers, might give improper reasons for the classification which would result in reversal in the courts.

These well-grounded fears would not exist under the proposed hearing to the Department of Justice. His recommendations were not always followed and this referral process took a great deal of time. This proposal eliminates that problem by having the examiner assist the local board directly. See text accompanying notes 85-86, infra.

70 See text accompanying notes 83-85, infra.
improvements. Under either proposal, highly qualified specialists would draft the record to assist the board and courts. The basic procedural fairness of a writing would not burden the administration of the board unless they sought to override opinions made as a result of competent and deliberate inquiries.

Other Classifications Are Aided by Similar Guidance

Every structural level of the Selective Service System is constantly the recipient of information and advice to assist this agency in the classification of registrants. The Department of Labor and Commerce provide lists of critical occupations and essential activities that should be deferred. The Department of Health assists in the selection of doctors, dentists and other allied specialists. The Welfare Department furnishes data to enable consistent classification of hardship cases. The Education and Agriculture Departments establish criteria for student and agricultural deferments. Each board has at least one doctor who reviews and advises the board regarding the physical condition of the registrants. The best qualified segments of our national matrix enlighten and guide the boards in their respective areas.80 Similar guidance is long overdue in classifying conscientious objectors, a classification the draft boards themselves rank as their most difficult.81

Improvement Upon Department of Justice Hearings

The proposed “civilian examiner” structure stresses the equity and utility gained by the Department of Justice Hearings. Until the system was abandoned, a conscientious objector received a measure of protection from the requirement that the Department of Justice investigate and complete an impartial dossier on the registrant. Under this system, examination of the registrant’s sincerity by an impartial examiner not connected in any way with the local board provided a much deeper and more meaningful review than the local board.82

Prior to 1967, following almost automatic refusal of his claim on the basis of his Form 150, the registrant had a right to appear personally before the local board to convince the members of his sincerity. If the local board was not persuaded to grant him the classification, he had 30 days to appeal to the State Appeals Board.

At this point, his entire file was referred to the local United

80 See TASK FORCE, supra, note 5, at V-7.
81 See MARSHALL REPORT, supra, note 24 table 7.4, 182.
82 See SELECTIVE TRAINING AND SERVICE ACT OF 1940 ch. 720 § 10, 54 Stat. 885, and the UNIVERSAL MILITARY TRAINING AND SERVICE ACT OF 1948 ch. 62.62 Stat. 604,
States Attorney who, after checking it for procedural correctness, forwarded it to the local office of the F.B.I. for an investigation of the basis for, and sincerity of the registrant's beliefs. The local office of the F.B.I. conducted the investigation and rendered its report to both the United States Attorney and the Washington Headquarters of the F.B.I.

When a résumé of the file was completed in the Justice Department, it was forwarded to the United States Attorney. The résumé and the F.B.I. report was then referred to the local hearing officers. The hearing officer sent the registrant a notice of the time and place for a hearing along with a copy of the résumé and instructions regarding his rights.

At the appointed time, an informal nonadversary hearing was held in which the Hearing Officer probed the depths of a registrant's beliefs. A report of the evidence adduced and the hearing officers' recommendations were then submitted with the registrant's entire file to the Conscientious Objector Section in the Department of Justice. An attorney then drafted a recommendation that was transmitted to the appeal board. If the registrant did not respond to the classification within 30 days, the appeal board classified him.\(^3\)

The major benefit of this hearing was that it provided a de novo hearing of the claim before an impartial examiner not connected in any way with the local boards. A disappointed registrant was given an opportunity to appeal to a representative of the national government from a decision made by a local board which might be expected to be less than wholly sympathetic with or understanding of his claim.

The most unfortunate change in the Selective Service Act of 1967 was complete elimination of the Department of Justice Hearing Officers.\(^4\) The elimination of the vital protection for those claiming exemption from military service was very untimely.

A thorough investigation consumed an inordinate amount of time. Hearing officers displayed varying degrees of interest. Some handled their cases expeditiously while others were indifferent or simply too busy. The longest procedural drag occurred in the Justice Department where available personnel simply were not able to process the avalanche of résumés awaiting recommendations to local boards.\(^5\) It was very difficult to accurately draft numerous

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83 See TASK FORCE, supra, note 5, at VIII-2.
85 See TASK FORCE, supra, note 5, at VIII-2.
recommendations on a cold record. During congressional hearings on the subject, the Attorney General admitted that it had taken up to twenty-seven months to process some claims although the average time was only seven months.\footnote{90 CONG. REC. 14273 (1967) (remarks of Senator Rivers).}

Such a procedural drag offered a delaying tactic for registrants wishing to postpone induction as well as placing an undue hardship on the sincere C.O. The delays made it possible to forego a military obligation simply by filing a C.O. claim. The excessive and unwarranted delays at various stages in the process impaired the deterrent affect of the law for the insincere because he could delay the “moment of truth.”

Congress felt that the administration of the C.O. exemption was too cumbersome and complex. The courts were taking too much time to convict and sentence draft “criminals.” Congress also had a strong distrust for the Justice Department. Most of the hearing officers picked by the Attorney General were prosecutors rather than fact finders. The inconsistency in having the same agency investigate the registrant’s background, make recommendations to the local board and perhaps subsequently prosecute him was alarming.

Either alternative proposed in this comment would incorporate the commendable features of the old hearing officers scheme. If the civilian examiner will \textit{directly} assist the local board, the red tape and excessive and unwarranted delays that characterized the Justice Department Hearings would be minimized. The most precise test of sincerity possible under the circumstances will be made with specialized assistance. The civilian examiner will perform his valuable function unburdened by manpower quotas and the Department of Justice pressure. The recommendation received by the draft board will be written by the man who personally observed the claimant.

\textbf{Conclusion}

Surely the proposed civilian examiner will not be a cure-all because conscientious objection involves too many intrinsic peculiarities which can never be completely known. As a nation, we need the resolve to reach out for an imaginative and innovative solution to these difficulties that now seem beyond our capacity. We must have the foresight to consider the C.O. exemption in light of today’s realities rather than yesterday’s traditions. The civilian examiner could play a critical role in a politically sensitive area as an interme-
diary between the individual who makes a moral claim for the rightness of his conduct and the state; both to protect the individual and to satisfy society's concern that such matters be treated with all possible dignity and fairness.

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