

# Conscientious Objectors and Jehovah's Witnesses

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troversial. Under almost identical sets of facts *Bonwit Teller* and *Woolworth* were decided differently.

Where there is a limited rule, employees are accessible during nonworking hours on the company property. This accessibility is considered equal opportunity to hear both sides. Therefore, only a speech promising benefit or threatening reprisal will constitute an unfair labor practice.

Where there is a broad rule, the existence of the rule itself is an unfair labor practice unless the rule is privileged. When the privilege exists, then, on the basis of the *Woolworth* decision, it may be said that the employer is not required to grant the union equal time provided there are no exceptional circumstances which would interfere with the employee's right of self-organization, such as a company owned town or the like.

Both *Bonwit Teller* and *Woolworth* were department stores with broad, privileged rules and both made protected anti-union speeches to their employees on company time and property before refusing a union's request for equal opportunity to reply prior to a representation election. Both were located in vast metropolitan areas where a number of halls are available within easy reach of prospective union members. The court in the *Woolworth* case tried to distinguish the *Bonwit* case on the basis of the facts; that "promises of benefit had been made by the employer in the announcement of pending wage increases and threats of reprisal had been made by a supervisory employee to influence an election," while in *Woolworth* the one act was the refusal, after the manager's address, to permit the union to use the premises for its campaign. This distinction is contrary to the decision of the Court of Appeals for the Second Circuit in the *Bonwit* case which found the *Bonwit* speeches protected by the free speech provision of the Act.

The change in policy of the Board in *Woolworth*, with its approval by the Sixth Circuit, reduces the persuasive value of the Second Circuit *Bonwit* case considerably. Perhaps the Supreme Court will eventually put the matter to rest.

### CONSCIENTIOUS OBJECTORS AND JEHOVAH'S WITNESSES

The calling of young men to serve in the armed forces of the United States has been limited by Congress in that those who are conscientiously opposed to such service have been exempted. An entire body of law has arisen concerning members of Jehovah's Witnesses, a religious semi-pacifist sect, over the classification of that organization's members in regard to this exemption. In much the same manner as the Supreme Court had handed down on one day four decisions that reviewed the propriety of the "net worth" method of proving tax fraud,<sup>1</sup> so too, the Court on March 14, 1955 rendered four opinions that defined the rights of Jehovah's Witnesses for draft purposes.<sup>2</sup>

<sup>1</sup> See page 237 of this issue.

<sup>2</sup> *Gonzales v. U.S.*, 348 U.S. 407 (1955); *Simmons v. U.S.*, 348 U.S. 397 (1955); *Sicurella v. U.S.*, 348 U.S. 385 (1955); *Witmer v. U.S.*, 348 U.S. 375 (1955).

That Congress has the power to draft citizens into the army is hardly questionable. The Constitution of the United States has given Congress the authority to

... pay for the common defense ... declare war ... raise armies ... provide and maintain a Navy ... make rules for Government and Regulation of the land and naval forces ... provide for calling forth of the Militia ... provide for organizing, arming, and disciplining the Militia.<sup>3</sup>

Seven of the seventeen express powers concern the war authority that Congress possesses. When we couple these powers with the "necessary and proper" clause,<sup>4</sup> it takes very little effort to come to the conclusion that, in the light of the Constitution, Congress has universal authority to conscript all persons necessary to carry on a war or provide for the national defense.<sup>5</sup>

Despite the fact that this universal power exists, the legislature does not exercise it universally because it is not felt that such application is necessary or even desirable for the preservation of the armed forces. Thus, only able-bodied males between certain ages are eligible to be drafted.<sup>6</sup> To this group a host of exemptions apply for such men as public officials, certain veterans, students, ministers, and conscientious objectors. It is only by legislative grace that these men are relieved from military duty either completely or in a limited manner.

As a result of the provisions of the Selective Service Act and the Presidential regulations made pursuant thereto,<sup>7</sup> a system of local draft boards and state appeal boards has been established to process claimants of the privilege of exemption. Section 10(b) of the Act<sup>8</sup> provides that the decision of each local board is final until appealed; then the decision of the appeal board is final unless the President, either on his own motion, or on appeal, modifies any order. In either case the determination by the President shall be final. Congress apparently intended that the Selective Service System's orders should have the character of finality. Consequently, a refusal to submit to a final order of an appropriate board opens the door to criminal prosecution.<sup>9</sup>

A slightly different procedure was established for determination of conscientious objector cases.<sup>10</sup> Since there is extreme difficulty in deciding whether an applicant is sincere in his religious opposition to war, an added procedure was inserted in order to protect the Government from a flood of false claims. Whenever a registrant applies for a I-O classification (conscientious objector

<sup>3</sup> U.S. Const. Art. I, § 8.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Selective Draft Law Cases*, 245 U.S. 366 (1918).

<sup>6</sup> *Selective Service Act of 1948*, 62 Stat. 604 (1948), as amended, 50 U.S.C.A. App. §§ 451-473 (1951).

<sup>7</sup> 32 Code Fed. Regs. §§ 1602-1670 (1948) revised (1951).

<sup>8</sup> 62 Stat. 604 (1948), as amended, 50 U.S.C.A. App. § 460 (b) (1951).

<sup>9</sup> 62 Stat. 604 (1948), as amended, 50 U.S.C.A. App. § 462 (b) (1951).

<sup>10</sup> 65 Stat. 75 at 6 (j) (1951), as amended, 50 U.S.C.A. App. § 459 (j) (Supp., 1954).

to all service) or I-A-O (conscientious objector to bearing arms), and it is denied by the local board, on appeal the application is sent to the Department of Justice for a recommendation. The Department obtains an F.B.I. report and conducts a hearing with the registrant. A recommendation based on the F.B.I. report and the hearing is then made by the Department, and is forwarded to the appeal board. This recommendation is just that and no more. The appeal board uses it merely as an advisory opinion concerning the young man's eligibility for objector status. Again the decision of the board is final. This is a brief preliminary sketch of the Selective Service System as it applies to the granting of exemptions or the ordering to report for induction.

As was stated above, a refusal to submit to a final order of the System renders one liable to criminal penalties. Once a man who has been denied his claim is indicted for refusal to report, and placed on trial, how far may the court look into the defendant's qualifications for his claimed exemption which was denied by the Selective Service System? From the organization of the Act, it would seem that Congress has intended that the courts should not inquire into the merits of the claim because the decision of the appropriate board was made final by express provision. No mention was made of any court review of the decision. In the light of this particular arrangement the early view was that the courts had no jurisdiction to review. A lower court decision expressly adhered to this reasoning, stating that the court had no jurisdiction to upset a classification made according to the procedures provided by the Act and regulations.<sup>11</sup> Only upon the defendant's showing that the board acted arbitrarily or capriciously could the court go to the merits.

The case of *Falbo v. U.S.*<sup>12</sup> seemed to follow the same sort of policy although the Supreme Court relied on other grounds to uphold the conviction. There the defendant claimed an exemption as a minister, but it was denied. On his refusal to report for induction he was indicted for draft evasion. Falbo attempted to raise the validity of his exemption at the trial. The Supreme Court seemed to favor somewhat of a hands-off policy but ended up approving the conviction on the ground that in raising the merits of his claim on trial for failure to report for induction, the defendant had not exhausted his administrative remedies. If some authority to review was present, it would have to arise at a proceeding to contest the detention of the petitioner.<sup>13</sup>

The attitude of the Court did not remain the same. In 1946 the leading case of *Estep v. U.S.*<sup>14</sup> was decided. There defendants in criminal prosecutions for failure to report for induction into the armed service attempted to raise the

<sup>11</sup> *Goff v. U.S.*, 135 F. 2d 610 (C.A. 4th, 1943).

<sup>12</sup> 320 U.S. 549 (1944).

<sup>13</sup> Many lower court decisions expressly followed this case. E.g. *Koch v. U.S.*, 150 F. 2d 762 (C.A. 4th, 1945); *U.S. v. Flakowicz*, 146 F. 2d 874 (C.A. 2d, 1945); *Sirski v. U.S.*, 145 F. 2d 749 (C.A. 1st, 1944).

<sup>14</sup> 327 U.S. 114 (1946).

validity of their demands for minister classifications again. If *Falbo* were to be followed the defense would be invalid because it would be premature. The Court in effect modified *Falbo* by considering the entire question. Although the majority of the Court failed to distinguish clearly or overrule *Falbo*, a consideration of the concurring opinions and final result leads to the conclusion that the earlier case was then actually obsolete; a prosecution for failure to report for induction was held to be the proper proceeding to contest the merits of defendant's claim made before the boards.

The more important law of *Estep*, however, was the development of a foundation on which the courts may test the decisions of the boards.

The provisions making the decision of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be *erroneous*. The question of jurisdiction of the local board is reached only if there is *no basis in fact* for the classification which it gave the registrant.<sup>15</sup>

The result of this statement of law is that the courts will only look for some fact on which to base the board's decision. Once the court finds a mere "basis in fact" on which it can hang its hat, the order of the board is final. Thus, because the defendants were not allowed to enter evidence in court concerning the lack of a "basis in fact" for denial of their claim before the board, new trials were granted.

A study of the wording of the law of the *Estep* case shows how both the Government and defendants use the case for authority for their views. The Government cites the case as authority that the decisions of the appropriate board are final even though erroneous. Defendants use the case as requiring a "basis in fact" for the denial of their claims before the boards. This constant citing has led Courts of Appeals of various circuits to change the meaning of *Estep* from its establishment of a "basis in fact" test to "substantial evidence."<sup>16</sup> Gradually the courts have begun to adopt what is almost an administrative review when such was not contemplated by either Congress or the Supreme Court.

The next foundation case to arise in the Supreme Court was *Dickinson v. U.S.*<sup>17</sup> There too a registrant claimed a minister's exemption on uncontroverted facts. The local, state, and national (Presidential) boards denied that the registrant's duties qualified him as a minister. Appealing from a conviction for failure to report, Dickinson was found to be entitled to a minister's classification on consideration of all the facts of the case. These facts are not

<sup>15</sup> *Ibid.*, at 122. Emphasis added.

<sup>16</sup> *Jewell v. U.S.*, 208 F. 2d 770 (C.A. 6th, 1953); *U.S. v. Perkariski*, 207 F. 2d 930 (C.A. 2d, 1953); *Annet v. U.S.*, 205 F. 2d 689 (C.A. 10th, 1953).

<sup>17</sup> 346 U.S. 389 (1953).

important for our consideration here. What is important is that *Estep* was approved and applied. While denouncing the substantial evidence test, the Court did find that there was no "basis in fact" for denial of the claim.<sup>18</sup>

The law seems to be clear enough. First, the courts look to see if all procedures have been followed properly. Second, if the order of the board is in conformity with the procedural provisions, the courts will then seek some "basis in fact," not necessarily substantial evidence, that will uphold the board's decision. This sums up the law of *Estep* and *Dickinson*. These are the rules that Selective Service litigation will encompass when dealing with Jehovah's Witnesses.

It is to be noted that that these leading decisions arose in cases involving registrants applying for minister exemptions. All Jehovah's Witnesses call themselves ministers through mere membership in the sect. The courts, however, have had little difficulty in coming to the conclusion that membership alone will not entitle one to a minister's classification,<sup>19</sup> but neither does it preclude one who actually devotes a substantial amount of time to teaching and preaching, from claiming the privilege.<sup>20</sup> In other words, the courts will look to see if the man is actually a minister in the ordinary understanding of the word, no matter how he or his faith designates him.

The application of the law developed by the minister cases in situations involving conscientious objectors is an interesting one. A conscientious objector is defined as anyone

. . . who, by reason of religious training and belief, is conscientiously opposed to participation in *war in any form*. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or merely personal moral code.<sup>21</sup>

The tenets of the Jehovah's Witnesses faith set out a limited sort of pacifism. The members of that sect believe in self-defense, defense of brethren, and defense of Kingdom interests. In no case will they use weapons.<sup>22</sup> The difficult question is whether this belief in self-defense and Theocratic warfare disqualifies one from being conscientiously opposed to "war in any form." The

<sup>18</sup> The following are examples of cases where the facts formed no "basis in fact." *Schuman v. U.S.*, 208 F. 2d 801 (C.A. 9th, 1953) (mere suspicion of sincerity); *U.S. v. Graham*, 109 F. Supp. 377 (W.D.Ky., 1952) (change in claim from minister to conscientious objector); *U.S. v. Everngam*, 102 F. Supp. 128 (S.D.W.Va., 1951) (registrant was Catholic).

<sup>19</sup> *Cox v. U.S.*, 332 U.S. 442 (1947); *Neal v. U.S.*, 203 F. 2d 111 (C.A. 5th, 1953); *Martin v. U.S.*, 190 F. 2d 775 (C.A. 4th, 1951).

<sup>20</sup> *Dickinson v. U.S.*, 346 U.S. 389 (1953).

<sup>21</sup> 65 Stat. 75 at 6 (j) (1951), as amended, 50 U.S.C.A. App. § 456 (j) (Supp., 1954). Emphasis added.

<sup>22</sup> See answers that petitioner used on application for I-O classification. *Sicurella v. U.S.*, 348 U.S. 385, 387 (1955).

circuits were not unanimous in their answers. One of the leading cases denying the right of the boards to disqualify a registrant who was a Jehovah's Witness from objector status was the Tenth Circuit's case of *Annet v. U.S.*<sup>23</sup> Although that case cites *Estep*, which had established the "basis in fact" doctrine, it went on to state that a belief in self-defense was not incompatible with a disbelief in participation in "war in any form," and that there was a lack of *substantial evidence* to support the board's decision. *Taffs v. U.S.*<sup>24</sup> decided by the Eighth Circuit held that a belief in Theocratic warfare was not contemplated by Congress as a belief in war. This court took the position that "in any form" did not refer to "war" but to "participation." Thus it was felt that what the statute meant was "in any form of participation in war." "War" in this sense would mean any clash between nations. The court cited *Annet* and *U.S. v. Perkariski*,<sup>25</sup> both of which had used the substantial evidence tests.<sup>26</sup>

The Seventh Circuit was rather singular in its opposing view. The first time that it considered the issue was in *U.S. v. Dal Santo*.<sup>27</sup> It appeared that one of the reasons for the board's rejection of the registrant's claim was his belief in self-defense and defense of Kingdom interests. Because there was some evidence that the defendant was not sincere in his beliefs, the court did not discuss the issue at length and rested on the finality of the board's decision.

The next time the precise problem arose before that court was in *U.S. v. Sicurella*.<sup>28</sup> In that case there was no dispute as to the defendant's sincerity because his parents were Jehovah's Witnesses and the defendant was born and raised in the faith. On trial for refusing to respond to an order to report for induction after his request for a I-O classification had been denied, the defendant raised the fact that the only evidence in his draft board file upon which the board could have based its decision was the evidence of the defendant's belief in self-defense and Theocratic warfare. The court held that such beliefs were in effect merely rejection of governmental authority. The court cited the defendant's statements on his preliminary application for I-O that he was no part of this world governed by political systems, and that he could not desert the forces of Jehovah. At most, the board's decision was merely erroneous, and the presence of this religious conviction was at least a "basis in fact" sufficient to sustain a final order of the board relying on the express language of *Estep* with a criticism of those cases requiring substantial evidence.

The time then arose for the Supreme Court to settle the conflict among the

<sup>23</sup> 205 F. 2d 689 (C.A. 10th, 1953).

<sup>24</sup> 208 F. 2d 329 (C.A. 8th, 1953).

<sup>25</sup> 207 F. 2d 931 (C.A. 2d, 1953).

<sup>26</sup> *U.S. v. Izumihara*, 120 F. Supp. 36 (D.C.Hawaii, 1954), follows *U.S. v. Hartman*, 209 F. 2d 366 (C.A. 2d, 1954), to the same effect, but gives a good criticism of the law in general.

<sup>27</sup> 205 F. 2d 429 (C.A. 7th, 1953).

<sup>28</sup> 213 F. 2d 911 (C.A. 7th, 1954).

circuits. Certiorari was granted in the *Sicurella* case. This decision was the most newsworthy of the four handed down on March 14, 1955.<sup>29</sup> The Court, speaking through Mr. Justice Clark, held that Congress had contemplated real shooting wars with bombs, bullets, tanks, planes, and rockets when it had used the language "war in any form" in the statute. Although the Court used similar reasoning as those circuits which had reached this same result, it was careful not to cite them, probably due to the fact that those decisions had relied on substantial evidence tests. The effect of the decision was that a belief in self-defense and Theocratic warfare was held not to be a "basis in fact" for rejection of a claimant's request for I-O.

The Court was also careful to put some safety valve on conscientious objector classifications. One of the other cases decided was *Witmer v. U.S.*<sup>30</sup> In that case there was some evidence that the applicant was not sincere in his bid for objector status. He had asserted both farmer and minister claims before resorting to his conscientious objector request. In addition, the Court stated that there were other facts, which, while insignificant in themselves, when viewed as a whole raised the "basis in fact" which was sufficient.

It seems that the Court did legislate to a certain extent. As long as Congress had made the decisions of the boards final, and due to the fact that there was a reasonable theory on which at least a "basis in fact" could rest, it would appear that the rulings of the boards should have been approved. The exemption was legislative grace. In order to come under it, the applicant would have to satisfy the provisions of the Act. When the policy of the System became such that believers in Theocratic warfare were not to be exempt, there was no showing that the boards acted arbitrarily or capriciously. The Court has thus taken the attitude that this privilege is an absolute right and the Court shall define the scope of the right. The effect of *Sicurella* and *Witmer* is the rule that a sincere Jehovah's Witness following the teachings of his faith cannot be convicted for refusing to report.

The other two cases decided with *Witmer* and *Sicurella* involved procedural difficulties arising out of the processing of conscientious objector claims. Specifically, they were concerned with the requirement that the registrant be given notice of unfavorable evidence against him in his file.

The procedure for appealing a denial of a I-O classification involves a recommendation by the Department of Justice. To render this advice, the Department conducts an F.B.I. investigation in order to learn more about the applicant than appears in his file. When this investigation is completed, an officer of the Department conducts a hearing at which time the registrant may appear with witnesses in his behalf. His notice to appear includes the provision that he may obtain, on request, knowledge of the general nature and character of any adverse evidence that would tend to defeat the claim. The courts had difficulty

<sup>29</sup> *Sicurella v. U.S.*, 348 U.S. 385 (1955).

<sup>30</sup> 348 U.S. 407 (1955).

with this procedure, and the circuits were in conflict as to whether the F.B.I. report had to be shown to the registrant at the hearing.<sup>31</sup>

The conflict among the circuits was supposedly resolved in *U.S. v. Nugent*<sup>32</sup> where the Court stated:

We think that the statutory scheme for review, within the Selective Service System, of exemptions claimed by conscientious objectors entitles them to no greater guarantee than the F.B.I. reports must be produced for their inspection. We think the Department of Justice satisfies its duties . . . when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a *fair resumé* of any adverse evidence in the investigator's report.<sup>33</sup>

It is apparent that the *Nugent* case is very much like the *Estep* case in that it means all things to all people. The Government uses this case to deny the registrant access to F.B.I. files. Defendants use it as a requirement that a fair résumé be given. What constitutes a fair résumé is the natural stumbling block.

*Simmons v. U.S.*<sup>34</sup> presents an interesting picture of the Supreme Court reversing a lower court<sup>35</sup> with no great difference between the two tribunals as to the law involved. Apparently the two courts could have spent more time in analyzing facts. That was not done however. It seems that the F.B.I. report disclosed that the claimant was a gambler, drinker, and wife-beater. The final report of the Department used these facts to a great extent in recommending the rejection of the claim. The key issue naturally turns on whether, under the authority of *Nugent*, the registrant was given a fair résumé at the hearing. The lower court said that this was done, and the Supreme Court said that it was not. Each court used only a few facts that would bolster its ruling. The result of the *Simmons* case is that the law found in the *Nugent* case has been applied. It must be remembered that in so doing the Court did not go as far as some lower courts had done when they demanded that the hearing officer give a full summary.<sup>36</sup>

The last of the four cases decided on that day was *Gonzales v. U.S.*<sup>37</sup> That too concerned notice of adverse evidence. The defendant contended that he was denied due process before the appeal board when he was not informed of the nature of the Department of Justice recommendation. This contention was

<sup>31</sup> *Elder v. U.S.*, 202 F. 2d 465 (C.A. 9th, 1953) and *Imboden v. U.S.*, 194 F. 2d 507 (C.A. 6th, 1952) held that it did not have to be shown. *U.S. v. Packer*, 200 F. 2d 540 (C.A. 2d, 1952) and *U.S. v. Nugent*, 200 F. 2d 46 (C.A. 2d, 1952) held that it did.

<sup>32</sup> 346 U.S. 1 (1953).

<sup>33</sup> *Ibid.*, at 5. Emphasis added.

<sup>34</sup> 348 U.S. 397 (1955).

<sup>35</sup> *U.S. v. Simmons*, 213 F. 2d 901 (C.A. 7th, 1954).

<sup>36</sup> *U.S. v. Evans*, 115 F. Supp. 340 (D.Conn., 1953), is a foundation case on the trial court level. Somewhat in line with this decision are *U.S. v. Edmiston*, 118 F. Supp. 238 (D.Neb., 1954) and *U.S. v. Stasevic*, 117 F. Supp. 371 (S.D.N.Y., 1953).

<sup>37</sup> 348 U.S. 407 (1955).

made despite the fact that at all times the registrant's file is available for inspection by him under the regulations of the System.<sup>38</sup> The key issue decided by the Court was that the mere presence of this regulation will not satisfy due process if the registrant does not avail himself of it. The dissent presents a very concise argument that since the applicant has an opportunity to examine the file and also to re-open his classification on showing of error, the fair and just hearing contemplated by *Nugent* had been obtained.

Factually, the *Gonzales* case raises an interesting question of what constitutes sincerity. The Department of Justice recommendation stated that the hearing officer was satisfied as to the registrant's sincerity, but his affiliation with the sect was too closely related to his draft situation to warrant the acceptance of his conscientious objector position as genuine. The difficulty of ascertaining one's subjective motives never can be fully overcome. What then can be considered in questioning sincerity? Here the Department advisory opinion hinged on the fact that the claimant had been born and raised a Catholic. Although his wife had been a Jehovah's Witness since 1941, he did not become a member until 1950, the year of the Korean War. In the *Simmons* case the recommendation for denial was based on the facts that there was evidence that the registrant was a drinker, gambler, and wife-beater. It would have been enlightening had the Court been able to decide whether these facts were a "basis in fact" for denial of the claims.

At first glance, it may seem that these cases merely define a repealable statute that affects few people of our nation. Perhaps a second examination might indicate the tendency of the courts to legislate during different periods of time. For example, we see the strictness of *Falbo* in early 1944, the easing off of *Estep* in 1946, the firmness of *Nugent* in 1952, and now the softening of the statute in 1955 by *Sicurella*, *Simmons*, and *Gonzales*. It seems that these cases are related to the ebb and flow of current events. That criticism is not entirely justified however. Actually there is an underlying thread of thinking in the most recent decisions that goes beyond the merits of the particular cases. Apparently, Congress had set up a privilege that was merely legislative grace and provided for the final procedures for obtaining the benefits of that privilege. No judicial interference was contemplated. The Supreme Court has actually torn down this possibility. In effect the Court has said, "You did not have to create this privilege, Congress, but you did. Now that you have, we shall consider that privilege as a right, and, before that right shall be denied, we will see that the man shall have what we consider to be due process. This is especially true since you are attempting not only to deny the right but also to imprison him for disobeying you." Thus, in the narrow confines of this problem, the legislative and executive branches have been rebuked for their attempt to bypass the judiciary.

On the more practical sphere, we are faced with a situation where a poor

<sup>38</sup> 32 Code Fed. Regs. § 1606.32 (1948), amended (1951).

statute is on our books. There are many possibilities for revision. Perhaps the most consequential would be the elimination of the conscientious objector status altogether. Such is not likely to be done. One of the reasons is that there are too many ideological, social, military, and historic considerations which at the moment far outweigh the problems that are encountered. The more apparent reason why it is not likely that the exemption will be eliminated is that few Congressmen, who are elected officials, would care to be viewed as anti-religious or opposed to one particular sect. That type of stand would be political suicide.

The more sound approach is to adopt a new procedural system for processing of objector claims. The most important single innovation is to remove the Department of Justice from the process altogether. The inconsistency of having one agency to investigate, recommend, and later prosecute, should be eliminated. Aside from the possibilities of unfairness to the individual, there is also the danger that the courts will begin to require that the F.B.I. report be produced in evidence.<sup>39</sup> It is true that the *Nugent* case expressly stated that the report need not be produced, but logic is to the contrary. The Government's argument that the report is hearsay is without merit because the report would not be entered to show the truth of what it contains but merely to show what was reported, as compared to what was given to the applicant as a résumé. Rulings along this type of reasoning might be disastrous to the policy that F.B.I. reports should be kept extremely confidential so that only experts trained to evaluate such material have access to it. Once a crack is made in an area such as this where it could easily be avoided, the practice might extend to other areas, resulting in serious damage to investigative technique.

If the Department of Justice is removed from the picture someone must come in to fill the gap. It is recommended that a regular selective service staff be appointed to aid in proper disposition of claims. This staff would be in the hierarchy of the System traveling to boards where claims are filed. These experts, preferably legally trained, could sit in at the local board meeting interrogating the registrant and his witnesses. If this staff believes it to be necessary it may carry on some private investigation of its own. Some stress should be put on the registrant's recentness of conversion or poor moral habits, but certainly these factors standing alone should not be conclusive. Nobody can say absolutely that a man is not a sincere objector because he was converted just at draft age or even at the pre-induction center.<sup>40</sup> Also as to personal morals, all religions advocate certain moral restraints, and yet it is possible that even the leaders of each sect may not lead the most exemplary lives. Thus this staff would have to become

<sup>39</sup> *U.S. v. Stasevic*, 117 F. Supp. 371 (S.D.N.Y., 1953) (subpoenaed the report but allowed the names and addresses of informants to be withheld).

<sup>40</sup> See *Corrigan v. Sec. of Army*, 211 F. 2d 293 (C.A. 9th, 1954), where petitioner in habeas corpus proceeding contended that he was converted at the pre-induction center and never stepped forward to be sworn in.

expert in proper interrogation of claimants and witnesses and evaluation of testimony in the light of relevant external facts. This staff would sit in with local board members to guide them in rendering a decision. Then, appeal of these claims would be by ordinary appeal to the state appeal boards with continuing aid from the staff of experts. If necessary, a stenographic record might be made of the local board hearing with the claimant appealing on the basis of the record. All the ordinary procedures of processing other types of exemptions would remain.

Surely, these few ideas are not a cure-all, because this type of claim involves too many subjectives which can never be completely known. However, it would seem that the procedure would be very fair to the registrant for he would have the benefit of trained men assisting the local board directly. The presence of a stenographic record with pinpointed appeals, greatly facilitates a much more sound approach affording a fair and impartial hearing at all levels.

Perhaps it may appear that these ideas are too costly to be put into effect. Actually, they are far from it. Maintaining a staff certainly could be less expensive than having the local F.B.I. offices make an investigation. Also the comparative lack of conscientious objector claims in relation to the sum total of draft-eligible males would not make the expense of a stenographic record out of line with the justice derived, both from the registrant's and the Government's viewpoint. The courts will then be more at ease in finding a "basis in fact" for final orders of the boards.

Unless these or some other forms of revision are effected, the courts will continually chop away at the notions of legislative grace and insert their own rules of substantive rights and due process.<sup>41</sup> The result will be a broken, repaired, and patched up crazy-quilt of rules that will be burdensome for all concerned. It is better that Congress take the initiative so that a more streamlined and realistic law is effected.

<sup>41</sup> U.S. v. Greene, — F. 2d — (C.A. 7th, 1955). "At no time did Greene have a hearing. To affirm this particular judgment of conviction would leave the National Board an absolute cancelling power insulated against all challenges." Slip opinion No. 11133(1955).