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Prohibition of Counsel at Selective Service Proceedings: The Impact of the Weller Case

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Recent Developments

Prohibition of Counsel at Selective Service Proceedings:
The Impact of the Weller Case

Selective Service Regulation 1624.1(b)\(^1\) states that “no registrant may be represented before the local board by anyone acting as attorney or legal counsel.”\(^2\) In *United States v. Weller*\(^3\) a federal district court in California rejected 25 years of precedent\(^4\) and held this longstanding regulation invalid.\(^5\) The court suggested a two-fold basis for the regulation’s invalidity:

1. 32 C.F.R. § 1624.1(b) (1970).
2. This ban applies to the registrant’s personal appearance before his local board when requesting reconsideration of his classification. *See id.* § 1624.1(a) (1970).
3. 309 F. Supp. 50 (N.D. Cal. 1969). The decision is an order granting the defendant’s motion to dismiss an indictment for failure to submit to induction. The district court distinguished its parent court of appeals’ decision in *United States v. Tantash*, 409 F.2d 227 (9th Cir. 1969) noting that the apparent approval of the prohibition of counsel in that case was dictum and that the defendant there had not requested counsel before his local board. However, since the *Weller* case, the Ninth Circuit has confirmed its *Tantash* dictum in *United States v. Evans*, 425 F.2d 302 (9th Cir. 1970).

The government appealed *Weller* directly to the Supreme Court under color of the Criminal Appeals Act, 18 U.S.C. § 3731 (Supp. V, 1970). After filing the appeal, the government reconsidered and concluded that direct appeal was not authorized and moved that the case be remanded to the Ninth Circuit. This motion was denied and further consideration of the question of jurisdiction was postponed until the hearing on the merits. 397 U.S. 985 (1970) (No. 1082, 1969 Term; renumbered No. 77, 1970 Term). The Court handed down its decision denying jurisdiction and remanding to the Ninth Circuit. 39 U.S.L.W. 4261 (Feb. 24, 1971).


5. The first regulation, which was promulgated pursuant to the Selective Service
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(1) as unauthorized by the Military Selective Service Act of 1967, and (2) as a violation of due process. However, since the court's holding was predicated on the non-constitutional grounds, it avoided the full development of the due process question. This article analyzes the regulation's validity at both levels and concludes that the Weller court was correct in voiding the regulation but erred in deciding on non-constitutional grounds.

and Training Act of 1940, 54 Stat. 885, provided that "no registrant may be represented before the local board by an attorney." 32 C.F.R. § 603.369(a) (1940 Supp.). The designation was changed to 32 C.F.R. § 625.2(a) in 1941. 6 Fed. Reg. 6843. It was re-promulgated in its present form as 32 C.F.R. § 624.1(b) under the Selective Service Act of 1948, 62 Stat. 604; the designation was changed to 32 C.F.R. § 1624.1(b) in 1949, 14 Fed. Reg. 5021. The phrase "anyone acting as attorney or legal counsel" was apparently added to ensure the prohibition of lay draft counselors as well as lawyers.

6. 50 U.S.C. App. 451 et seq. (1964). Weller was the first case in which the statutory authorization question was discussed; all previous decisions dealt only with the constitutional issue.

7. Due process was the only constitutional issue raised in the district court opinion, and that question is discussed fully in this article. Sixth amendment right to counsel was not treated by the district court. However, it is relevant and merits some discussion.

The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." In several recent cases registrants, who have been denied classification as conscientious objectors, have argued that this guarantee is applicable to the personal appearance. See, e.g., United States v. Sturgis, 342 F.2d 328 (3d Cir.), cert. denied, 382 U.S. 879 (1965). They argue that in the case of a CO the classification procedure is a "critical stage" in the criminal process. Cf. Escobedo v. Illinois, 378 U.S. 478, 487-88 (1964); Hamilton v. Alabama, 368 U.S. 52, 53 (1961). This argument was outlined in United States v. Freeman, 388 F.2d 246 (7th Cir. 1967).

A sincere claimant for conscientious objector status cannot turn to the habeas corpus remedy because his religious belief prevents him from accepting induction under any circumstances. As a result he is limited to seeking review in a criminal trial for refusing to submit. In this criminal proceeding, as in any proceeding reviewing a draft classification, his defense of invalid classification is tested by the "basis in fact" formula. Under these circumstances conviction is almost inevitable, since the Board's refusal to grant the conscientious objector classification is based on an inference as to the sincerity of the registrant's belief and there will almost always be something in the record to support an inference of lack of sincerity.

Id. at 248-49.

In applying the sixth amendment's protection, courts must analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." United States v. Wade, 388 U.S. 218, 227 (1967). Such analysis has resulted in determinations that the right to counsel is applicable to pretrial police interrogations, Massiah v. United States, 377 U.S. 201 (1964) and criminal tax investigations where the suspect is in custody, Mathis v. United States, 391 U.S. 1 (1968). At least one court has suggested that local board proceedings might be included in this line of development of the sixth amendment. In United States v. Wierzchucki, 248 F. Supp. 788, 790 (W.D. Wis. 1965) the court called for a re-evaluation of "the constitutional implications of the closed circuit" procedures involved in prosecutions of Selective Service violations in light of the "expanding concept of the right to counsel in criminal cases."

But can a right to counsel at the personal appearance be logically extrapolated from the sixth amendment's guarantee of "Assistance of Counsel" for "defence" of the ac-
Statutory Authorization

The Weller court's resolution of the statutory authorization issue was incorrect because it improperly applied the "explicit action" doctrine of Greene v. McElroy. In Greene the Supreme Court held that congressional authorization for administrative rules that deny traditional procedural safeguards is not to be presumed "by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." In holding certain procedures of the Industrial Security Program invalid, the Court stated:

[I]t must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. . . . Such decisions cannot be assumed by acquiescence or non-action . . . . They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized . . . but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws.

In Weller, the district court reasoned that this language required invalidation of the regulation since "nowhere in the [Selective Service] Act has Congress expressly denied the right to counsel or expressly delegated the power to do so to the President." Rather, the President is merely empowered "to prescribe the necessary rules and regulations to carry out the provisions of" the Act. The court concluded that this is not the "'explicit action by the Nation's lawmakers' . . . taking the constitutionally-suspect action of removing the right to be represented by counsel" required by Greene.

The court's interpretation of the "explicit action" doctrine proves simplistic,
since it fails to consider the Supreme Court's modification of Greene in Hannah v. Larche.\textsuperscript{14} In Hannah the Court applied the "explicit action" doctrine to certain procedural rules\textsuperscript{16} used by the Civil Rights Commission in conducting investigations under the Civil Rights Act of 1957.\textsuperscript{16} The three-judge district court which first considered the question in Hannah made the same error as the district court in Weller. It based its decision solely on the words of the statute. Relying on Greene, the statutory court stated:

[W]e find nothing in the Act which expressly authorizes or permits the Commission's refusal to inform persons . . . of the nature, cause and source of the accusations against them, and there is nothing in the Act authorizing the Commission to deprive these persons of the right of confrontation and cross-examination.\textsuperscript{17}

The Supreme Court reversed, explaining that Greene should not be applied to all cases concerning questionable administrative procedures. In Greene the Court was aware that Congress knew of the questioned procedures but did not consider corrective legislation. Moreover, the Government relied solely on this congressional acquiescence as evidence of authorization. By contrast, in Hannah the Court found considerable legislative deliberation on the questioned procedures. The legislative history of the Civil Rights Act of 1957 reveals that Congress considered two bills—one providing the procedural safeguards insisted on by the witnesses in Hannah while the second did not.\textsuperscript{18} Congress enacted the second bill, from which the Supreme Court concluded:

The legislative background of the Civil Rights Act not only provides evidence of congressional authorization, but it also distinguishes [this case] from Greene v. McElroy . . . upon which the court below relied so heavily. . . . The facts of this case present a sharp contrast to those before the Court in Greene. Here, we have substantially more than the mere acquiescence upon which the Government relied in Greene. There was a conscious, intentional selection by Congress of one bill, providing for none of the procedures demanded by respondents, over another bill, which provided for all those procedures.\textsuperscript{19}

Thus to determine whether Congress has authorized certain administrative procedures, a court should review the legislative history as well as the statute itself. The Weller court failed to do this.

\textsuperscript{14} 363 U.S. 420 (1960). Hannah is cited in Weller but not in connection with the statutory authorization issue.
\textsuperscript{15} Witnesses before the commission objected to the denial of rights of appraisal, confrontation, and cross-examination.
\textsuperscript{18} 363 U.S. at 434-37.
\textsuperscript{19} Id. at 438-39.
The legislative history of the Military Selective Service Act reveals evidence of congressional authorization similar to that found by the Court in *Hannah*. During hearings before the House Armed Services Committee, Representative Melvin R. Laird asked the Committee to consider deleting the prohibition of counsel.\(^{20}\) In his statement before the same committee, Representative William F. Ryan noted a similar prohibition of counsel in Selective Service appeals procedures and requested that the ban be removed.\(^{21}\) In responding to these suggestions, the Director of Selective Service told the Committee that the prohibition of counsel was necessary to the efficient operation of the System.\(^{22}\) The Director also referred the Committee to the House Judiciary Committee's report on the bill which became Public Law 89-332 entitled "An Act to provide for the right of persons to be represented in matters before Federal agencies."\(^{23}\) This report stated:

In this connection the committee wishes to make clear that the bill would not affect the operations of the boards of the Selective Service System. The functions performed under the Universal Military Training and Service Act [now the Military Selective Service Act] are expressly excluded from the operation of the Administrative Procedure Act, except those relating to public information. Under regulations prescribed by the President a registrant may not be represented before a local board by an attorney. This is because of the large number of registrants involved, the informality of the procedures, and the need for a capacity to provide large numbers of men quickly for service. [The present bill] does not extend a right of representation to the Selective Service System, where the right does not now exist.\(^{24}\)

The Committee must have agreed with the Director, since it failed to recommend deletion of the ban on counsel in its report on the bill\(^ {25}\) which became the Selective Service Act.

The reformers received a similar response during the floor debates. In the House, Robert K. Kastenmeier criticized the bill for its failure to provide a right of counsel to registrants at appeal hearings.\(^ {26}\) His plea apparently raised little support. In the Senate, Wayne Morse introduced an amend-


\(^{21}\) *Id.* at 9921. Rep. Ryan addressed his remarks mainly to the procedures before the appeal boards; however, he also alluded to the general lack of counsel at all steps in the System.

\(^{22}\) *Id.* at 9984-88.


\(^{24}\) *Id.* at 5.


\(^{26}\) 113 *Cong. Rec.* 14119 (1967).
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The amendment which provided "Each individual shall be afforded the opportunity to appear in person and be represented by counsel before the local board . . . ." The amendment failed to draw support and was defeated.

The Selective Service System was again the subject of legislative action in 1969. In the House, Frank Thompson introduced a bill which provided "each registrant the right to appear in person before . . . local boards, and to be represented by counsel, irrespective of his ability to pay for counsel . . . ." An identical bill was introduced in the Senate by Edward M. Kennedy. Neither bill was reported out of committee.

Thus, in both 1967 and 1969, there was "a conscious, intentional selection by Congress of one bill, providing for none of the procedures demanded . . . over another bill, which provided for all those procedures." There can be "no doubt that Congress' consideration and rejection of [the right to counsel at the personal appearance] constituted an authorization to the [Selective Service System] to conduct its hearings according to the [rules of procedure it has adopted]."

Had the Weller court followed the Hannah rule and reviewed the legislative history of the Selective Service Act, it could not invalidate the regulation on statutory authority grounds. The result necessitates a full exposition of the due process issue.

Due Process

The Weller court suggested that the regulation prohibiting counsel violates due process; but due to its unwarranted reliance on the statutory authorization issue, the court's reasoning on the due process question suffers from a lack of depth. The Weller court's analysis will provide a basis for an in-depth study of the regulation as it relates to due process.

There is no universally accepted methodology for resolving problems involving due process. It is an "elusive concept." However, it is generally agreed that any analysis must investigate the following issues: (1) applicability of due process; (2) requirements of due process; and (3) balance

27. Id. at 12502. The amendment also extended the right "to present testimony or other evidence to the local board . . . ."
28. Id. at 12502-04. The vote was 55-17 (28 not voting).
33. Id.
34. Id. at 442.
of governmental interest and private rights. This section will apply the three-fold test to the challenged regulation to show that the Weller court’s suggestion that the regulation violates due process is correct.

Applicability of due process

The Weller court resolved this issue as follows. First, it reviewed recent due process developments and noted that the concept had been applied in cases involving: liquor license applications, termination of welfare payments, admission to the bar, and juvenile proceedings. Second, the court noted that the interests involved in those cases were often less important than the interests involved in a registrant’s personal appearance. From this the court concluded that due process must be applied to the personal appearance.

This analysis is misdirected. The touchstone for applicability of due process is not the relative importance of the interests involved in the proceeding. Rather, it is the character of the decisions rendered which must be examined. Due process applies only when a government proceeding results in a deprivation of life, liberty, or property. But the rights included in this protected triumvirate are not limited to the common meaning of the words. The protection of due process has been extended whenever “governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals.” Thus, the requirements of due process are not imposed on administrative agencies which issue only advisory opinions or otherwise make non-determinative decisions.

In Weller the district court concluded that “a registrant’s personal appearance before his local board is in every sense an adjudication at which the registrant should be awarded traditional judicial safeguards.” However the majority of courts have taken a contrary view. Most courts have taken the common description of personal appearances as “nonjudicial hearings.”

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36. 309 F. Supp. at 54-56.
41. 309 F. Supp. at 55.
as conclusive proof of the nature of the board's determinations. The error of such reasoning is made readily apparent by Professor Davis:

The crucial question is not characterization of the whole proceedings as judicial or nonjudicial but the presence or absence of adjudicative facts. Adjudicative facts are the facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, and with what motive or intent.

The Selective Service System itself has consistently characterized its proceedings as non-adjudicatory. A persual of the System's regulations and literature reveals a conscious effort to refrain from using such terminology as "hearing" or "adjudication." Local and appeal boards are constantly referred to as "administrative bodies" whose decisions are "administrative decisions rather than judicial or quasi-judicial decisions." However, the substance of the System's regulations belies this assessment. For example, the regulations require the board to place in class 1-A any "registrant who has failed to establish to the satisfaction of the local board...that he is eligible for classification in another class." Thus, every registrant is presumed available for immediate induction. If he wishes to prove otherwise, he must come forward with satisfactory evidence. Each classification "is based on matters to be decided in a particular case and each case is decided upon its own individual facts without reference to the facts in any other case."

Proponents of the regulation argue that since there is no constitutional right to deferments or exemptions, due process does not apply to the proceed-

42. See cases cited note 4 supra.
43. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.03, at 418 (1958).
44. Id. § 7.02, at 413. In Air Line Pilots Ass'n v. Quesada, 276 F.2d 892 (2d Cir. 1960), cert. denied, 366 U.S. 962 (1961) "adjudication" was defined as "the application of a statute or other legal standard to a given fact situation involving particular individuals." Id. at 896.

In the Administrative Procedure Act "adjudication" means the formulation of an agency order which finally disposes of any matter other than by rule-making. Rule-making is the formulation of an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency . . . ." 5 U.S.C. §§ 1001(c)-(d) (1964).
47. SURVEY, supra note 45, at 1978. Compare this description of the classification process, with the classic definition of adjudication found in 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 413 (1958). See notes 43-44 and accompanying text, supra.
ings in which they are granted or denied.\textsuperscript{48} Such reasoning has been recently discredited.\textsuperscript{49} The argument fails to consider that the very fact that Congress has stipulated terms and conditions for granting a privilege is one reason that due process is required. At the personal appearance, the local board must explore the situation of the individual registrant to determine which set of terms and conditions he fits. It must answer questions about the registrant and his activities; who did what, where, when, how, why, and with what motive or intent. That is adjudication\textsuperscript{50} and due process must be afforded.

Moreover, in \textit{Goldberg v. Kelly},\textsuperscript{51} the Supreme Court indicated that due process is applicable to any proceeding where the government seeks to terminate “benefits [which] are a matter of statutory entitlement for persons qualified to receive them.”\textsuperscript{52} When \textit{Goldberg} is viewed in light of the Court’s recent decisions in \textit{Oestereich v. Selective Service Board}\textsuperscript{53} and \textit{Breen v. Selective Service Board},\textsuperscript{54} which indicate that assignment to a particular classification is a matter of statutory right, the apparent conclusion is that due process applies to the personal appearance.

\textbf{Right to counsel as a requirement of due process}

As the \textit{Weller} court recognized, a procedural element is required by due process only if classified as a fundamental safeguard.\textsuperscript{55} The basic method for determining whether an element can be so classified consists of examining

\begin{itemize}
\item \textsuperscript{48} Cf. \textit{DiMarco v. Greene}, 385 F.2d 556, 563 (6th Cir. 1967) which held that since release on parole was considered a privilege, the state may prohibit counsel at a pre-release hearing.
\item \textsuperscript{50} See notes 43-44 and accompanying text, \textit{supra}. The French have not been so reluctant to recognize that such classification decisions amount to adjudication. They have a system of compulsory military service similar to ours. Deferments are granted to qualified men. The decisions concerning assignment of these deferments are considered adjudicatory decisions in French law. \textit{INT’L COMM’N OF JURISTS, EXECUTIVE ACTION AND THE RULE OF LAW} 75-76 (1962) (Statement by Prof. Jean Paul Gilli).
\item \textsuperscript{51} 397 U.S. 254 (1970).
\item \textsuperscript{52} \textit{Id.} at 262.
\item \textsuperscript{53} 393 U.S. 233 (1968).
\item \textsuperscript{54} 396 U.S. 460 (1970).
\item \textsuperscript{55} 309 F. Supp. at 53.
\end{itemize}
"moral judgments already made on the point at issue, sought for in the ex-
press or implicit views of important segments of our society, past or pres-
ent." There is no scarcity of such judgments on the question of represen-
tation by counsel. Only a few need be presented here.

The Supreme Court has recognized that the right to be represented by
retained counsel in court is an element of due process. As Justice Suther-
land stated in Powell v. Alabama:57

If in any case, civil or criminal, a state or federal court were
arbitrarily to refuse to hear a party by counsel, employed by
and appearing for him, it reasonably may not be doubted that such
a refusal would be a denial of a hearing, and, therefore, of due pro-
cess in the constitutional sense.58

The unanimity of opinion on this point is evidenced by the lack of any re-
ported cases challenging it. Thus when a person is subjected to a deprivation
of life, liberty, or property in court, he may be represented by his attorney.
But when the adjudicating forum is an administrative agency such as the
Selective Service System, the government feels free to prohibit counsel. This
dichotomy cannot be justified. "Although [court] and administrative pro-
cedures may vary in detail, the ultimate goal of [each] is the rectitude of deci-
sion as between opposing interests and the just dealing of government with its
citizens.”59 If counsel is required by due process in court adjudication, it is
also required in adjudicative administrative proceedings.

The most revealing evidence that legal representation is an essential ele-
ment of due process is that of all federal administrative agencies only the
Selective Service System prohibit counsel at its hearings.60 In 1955, the
Hoover Commission’s task force on legal services and procedures noted that:

   Every individual has the right under our constitutional system to
appear in person before an agency to answer charges or to re-
quest appropriate action. The right to be accompanied by an attor-
ney-at-law in good standing or other duly qualified representative in
appearances before agencies, however, has not always been re-
spected.61

56. Kadish, Methodology and Criteria in Due Process Adjudication—A Survey and
57. 287 U.S. 45 (1932).
58. Id. at 69.
59. COMM’N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT,
TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 138 (1955) [hereinafter cited
as TASK FORCE REPORT].
60. SURVEY, supra note 45 at 1978. A questionnaire circulated to all administrative
agencies asked: “Does the agency give recognition to the right of persons to be repre-
sented by an attorney?” Id. at 1855. The Selective Service System was the only agency
to reply in the negative.
61. TASK FORCE REPORT at 287.
In support of this observation, the task force cited: the denial of counsel by the Internal Revenue Service in non-public investigatory proceedings; restriction of legal representation for Indians under the Code of Tribal Offenses; and the Selective Service System's ban on attorneys. As a corrective measure the task force recommended that:

Every person, party, or organization should have a statutory right to appear by or with an attorney-at-law or other qualified representative in any formal or informal proceeding before an administrative agency.

Following the task force report the prohibition of counsel has been removed in all administrative agencies except the Selective Service.

The recognition of representation by counsel as an element of due process is not limited to current American legal thought. In 1962, the International Commission of Jurists at its Congress on Executive Action and the Rule of Law concluded:

In nearly every country one type of action of administrative agencies and executive officials is in the nature of adjudication, and the decisions made are similar to judicial decisions. Whatever variations in procedure may be appropriate to this kind of Executive action, there are certain fundamental principles that must be followed if the Rule of Law is to be preserved. These are:

* * *

(4) [the] right to be represented by counsel or other qualified person.

Representation by counsel has been a commonplace in American jurisprudence since the early colonial period. For example, under both the First and Second Charters of the Massachusetts Bay Colony, parties were represented by attorneys in all cases, including administrative matters such as licensing ordinances and meeting houses.

Today as throughout our history, the right to appear with counsel at adju-
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Deducative hearings ranks as a fundamental procedural safeguard required by due process.

Governmental interest versus private rights

The previous two sections have shown: (1) that due process is applicable to the personal appearance because it is an adjudicative hearing, and (2) that the right to appear with counsel is a requirement of due process. Ordinarily, these conclusions would suffice to demonstrate that the Selective Service System's prohibition of counsel violates due process. However, in due process cases courts have held that an individual's right to a particular procedural safeguard may be counter-balanced by the government's right to protect a substantial interest. That is, if allowing the demanded procedure would sufficiently endanger a governmental interest, courts hold that the procedure is not required by due process. 67

There is some question as to just how endangered a governmental interest must be before a court will endorse the withholding of a fundamental safeguard. 68 This question can be resolved by analogy to fourth amendment procedures. The constitutional guarantee of freedom from unreasonable searches and seizures can be viewed as a specialized due process clause. Both provisions set forth procedures to be followed in governmental deprivations of liberty and property. The basic protection against an unreasonable search or seizure is the warrant based on probable cause, while the fifth amendment's basic protection against unlawful deprivations is the fundamental safeguards of due process.

To exercise his fourth amendment right, one need only show that a search or seizure has occurred. The government must then show that it complied with the amendment's procedures. There is a rebuttable presum-

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67. See e.g., Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961): "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Id. at 895. "Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account." Hannah v. Larche, 363 U.S. at 442.

68. Compare the cases cited note 67 supra, with Parker v. Lester, 227 F.2d 708 (9th Cir. 1955) in which the court stated that the government must use a system which affords the "maximum procedural safeguards . . . without jeopardizing" the objective of the process involved. Id. at 718.

69. U.S. Const. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
tion of invalidity if the search or seizure was not authorized by a valid warrant. This presumption can be rebutted only by showing that deviation from the basic warrant procedure was necessary to protect a substantial governmental interest. Thus by analogy it appears that in due process cases the government is justified in withholding fundamental procedural safeguards only when that course is essential to the protection of a substantial interest. This section will show that the prohibition of counsel at the personal appearance is not essential to the operation of the Selective Service System.

The System's Director has stated that the Weller decision would "place an intolerable burden upon the administration of the Selective Service System . . . and . . . would result in constructive paralysis of the . . . System in the performance of its mission of procurement of manpower for the Department of Defense." As an "illustration of the administrative havoc that would be wrought . . . if . . . attorneys [were] allowed to be present for each personal appearance" the Director noted that in the year ending September 30, 1969, local boards conducted between 190,000 and 210,000 personal appearances. The implication is that the mere presence of a lawyer would so confuse these proceedings as to destroy the ability of the System to function effectively. This confusion could arise from two sources: (1) the dilatory tactics of the lawyer, or (2) the inability of the board members to cope with the legal arguments of counsel.

Although there are imperfections in the Selective Service regulations, which may be used for delaying the classification and induction process, the admittance of counsel to the personal appearance would not enhance his ability to take advantage of these loopholes. Such delays are a product of

70. See the dissent by Justice Frankfurter in United States v. Rabinowitz, 339 U.S. 56, 68 (1950) which is basically the prevailing view today. See also Chimel v. California, 395 U.S. 752 (1969); Stoner v. California, 376 U.S. 483 (1964). There are several generally accepted exceptions to the warrant requirement. However, these exceptions are justified in terms of necessity and the burden is on the government to show that exigent circumstances preclude use of a warrant. United States v. Rabinowitz, 339 U.S. at 68, 70.


73. A common delaying technique consists of requesting a re-opening of the registrant's file just as the appeal process on a previous classification is being completed. This second request for re-opening must be granted unless it is clearly frivolous even though the reason for the request was known to the registrant at the time of the previous classification. See Mulloy v. United States, 398 U.S. 410 (1970); 32 C.F.R. § 1625.2 (1970).
loose regulations. Any registrant or his lawyer can take advantage of them by correspondence. The solution to this problem is tighter regulations, not a ban on counsel. Keeping the lawyer out of the personal appearance does not significantly decrease his ability to use these unproductive tactics; it only serves to diminish his effectiveness in the more beneficial aspects of the profession.

If the expected confusion at the personal appearance is caused by the inability of the board members to cope with the legal knowledge of counsel, it will only serve to emphasize that the presence of a lawyer is desirable. The statutes, rules, and court decisions concerning the prerequisites for the various classifications are indeed complicated. But is it asking too much to require that the people who are responsible for classifying the registrants to be thoroughly familiar with these prerequisites? Certainly any confusion can be remedied by requiring all board members to be educated on the laws and regulations which they purport to administer. The familiar description of local boards as "little groups of neighbors" who deal in a friendly, informal manner with friends and acquaintances has proven a mirage. Regardless of the validity of this concept, when an administrative body makes final determinations affecting the rights of individuals, familiarity with the individual is no substitute for familiarity with the statutes, regulations and other legal standards involved in the administrative process.

The Director has further suggested that Selective Service procedures are so simple that legal advice at the personal appearance is unnecessary. The initial response is that the Director has a strange definition of "simple." How-

74. For example the technique mentioned in note 73, supra, could be eliminated by issuing a regulation providing for waiver of all objections to a classification which were known but not made at a previous personal appearance. See Fed. R. Civ. P. 12(h)(1).

75. For a review of the issues involved in a conscientious objector case, see United States v. Haughton, 413 F.2d 736 (9th Cir. 1969).


77. Hearings on Review of the Administration and Operation of the Selective Service System Before the House Comm. on Armed Services, 89 Cong., 2d Sess. 9987 (1966). In the same sentence, the director made the somewhat contradictory observation that allowing counsel would give an unfair advantage to those who could afford a lawyer's services. If the procedures are so simple that anyone can understand, why would advice of counsel be an advantage? If the process is pellucid to start with, it is hard to see how any amount of elucidation could give an advantage. The Director could have been alluding to a tactical advantage, but, as explained in the text, the lawyer's presence at the personal appearance is not necessary for the formulation of tactics. Once this point is realized, the Director's statement must be recognized as an acknowledgment that the presence of counsel at the personal appearance would be helpful to the registrant. The registrant with counsel would have an advantage over the
ever, even if the procedures were simple, the ban on counsel would not be justified. The test is not "Is the presence of an attorney necessary?" but rather, "Is the prohibition of attorneys necessary?"

An attorney can serve many purposes other than explaining complex legal issues. As the court in Weller suggests, he can "act as a deterrent to possible abrupt or summary treatment." This effect of the lawyers presence is well documented. One study of the System observed that local boards took greater pains to substantiate information given to registrants when an attorney was present than when the registrant was alone. As the district court also noted, counsel can also serve to "bridge potential hostilities . . . between the board members . . . and the registrant." Regardless of the neutrality of the board members, the registrant will see them as adversaries. After all, if he agrees with the board, he has no need for a personal appearance.

Probably the most important function of counsel at the personal appearance is simply to recognize mistakes on issues of law so they may be pre-

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registrar without counsel. The System's remedy for this is to ban counsel altogether and thus give all registrants an equal disadvantage. This approach is unique but not very satisfactory. The opposite course—equal advantage to all registrants by universal availability of counsel—would seem more readily attainable. All registrants who desire counsel and can afford a lawyer should be allowed to retain counsel. Registrants who desire counsel but cannot afford one could be handled in two ways. The local board could furnish the registrant with a list of legal aid and public defender services (both public and private) which are available for free legal counselling. See A. Tatum & J. Tuchinsky, Guide to the Draft 272-81 (1969) for a list of 123 organizations offering free draft counselling. Registrants who are unable to acquire representation through these channels could be accommodated by a reconstructed government appeal agent program. To accomplish this, the regulations would be amended to give these advisors the freedom and independence required for adequate representation. See notes 88-96 and accompanying text, infra.


80. 309 F. Supp. at 55.

81. Comment, The Selective Service System: An Administrative Obstacle Course, 54 Cal. L. Rev. 2123, 2148 (1966). The absence of anyone who shares the registrant's point of view puts him at a disadvantage psychologically. Since he sees the board members as adversaries, his relations with them are fraught with anxiety. This anxiety leads to a restriction of communication which serves to amplify the feelings of hostility on both sides. The presence of a lawyer or other counselor would serve to decrease the anxiety and thus increase meaningful communications between the registrant and the board. See generally H. Lindgren, Effective Leadership in Human Relations (1954); White & Lippett, Leader Behavior and Member Reaction in Three "Social Climates," in Group Dynamics: Research and Theory 40 (D. Cartwright & A. Zander eds. 1953); Newcomb, Autistic Hostility and Social Reality, 1 Human Relations 68 (1947).
served for appeal. Due to the complexity of the issues, the registrant may not even recognize a mistake in the proceedings. The proceedings are not usually recorded so there is little chance for post-hearing discovery of the error. The detection of such mistakes of law is especially important in draft cases due to restricted judicial review. Review of the facts is precluded if the court finds a "basis in fact" for the board's decision. However, the court's review of the law is not so circumscribed. The court has broad power to correct mistakes of law, but that power cannot be invoked if the mistake is never discovered.

It has been suggested that the admittance of counsel to the personal appearance would rigidify the proceedings and convert the present informal procedure into a conventional trial-type hearing with strict legal rules. The Supreme Court found this argument unpersuasive in Goldberg v. Kelly where it ruled out the prohibition of counsel at informal pre-termination hearings for welfare recipients. The contention was dismissed by the Court stating that it did "not anticipate that [the assistance of counsel would] unduly prolong or otherwise encumber the hearing."

The System's figure of 210,000 personal appearances per year is not as heavy a burden as it initially appears. There are over 4,000 local boards with a total of over 17,000 members. The regulations call for the presence of a "member or members" at a personal appearance. If there is an average of two members at each personal appearance, each member need participate in an average of less than two hearings per month. Thus, even a significant increase in the time required for a personal appearance should not overburden the System.

Proponents of the prohibition argue that the availability of "advisors to..."
registrants” and “appeal agents” makes the advice of outside counsel unnecessary. The argument implies that these counselors provided by the System can do as much for the registrant as an outside attorney. If this is true why has the System insisted on maintaining its ban on outside counsel? The answer is, as the Weller court discussed, appeal agents are not as effective as retained counsel. They serve as advisors to the board as well as to the registrant, and are expected “[t]o be equally diligent in protecting the interests of [both].” In addition, the appeal agents are asked to report any information which could be used for designating a registrant as a delinquent.

The tenuous contention that these government counselors are effective is further weaken by evidence gathered in various studies made of the Selective Service System. These studies have revealed that since the regulation authorizing local boards to appoint advisors to registrants is wholly permissive, most boards fail to appoint them. Although appointment of appeal agents is mandatory, they are seldom used. The National Advisory Commission on Selective Service concluded that the appeal agents “appear to have a negligible effect within the System.” Another study reported that since the appeal agents work directly with and for the local board, they tend to identify with that body and thus lose the independence necessary for objective counselling of registrants. In light of these observations, the contention that registrants are adequately represented by government advisors and appeal agents appears spurious.

Conclusion

In defending its prohibition of counsel at the personal appearance, the Selective Service System contends that the presence of counsel is unnecessary for the registrant and inconvenient for the System. This article has not tried to disprove those allegations. Rather, it has attempted to demonstrate their ir-

88. Id. § 1604.41 (1970).
89. Id. § 1604.71 (1970).
90. Again, notice that this argument tries to place the burden on the registrant to show that counsel is necessary.
91. 309 F. Supp. at 56.
relevance in considering the prohibition's validity. The registrant should not have the burden of showing his need for counsel. On the contrary, the System has the burden to show its need for the prohibition and this cannot be met with arguments based on mere inconvenience.

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