ARMED SERVICES

By DONALD N. ZILLMAN*

In a year marked by the My Lai trials and massive anti-war demonstrations in the Nation's Capitol it was not surprising that most armed services cases in the United States Court of Appeals for the Fifth Circuit involved persons seeking exemption or discharge from military service. A great majority of cases came to the court either as federal prosecutions under 50 U.S.C. App. § 462a for refusal to submit to induction or as habeas corpus actions seeking release from the military. Two distinct kinds of habeas action were present. The first, typically involving the recently inducted Selective Service registrant, challenged his local board's classification or induction order. The second challenged the validity of *military* administrative decisions denying a serviceman discharge from the military.

The single most important issue raised in the cases decided by the Fifth Circuit was conscientious objection. These cases involving both Selective Service Act violaters and military habeas corpus applicants will be considered first. Then a variety of other draft law prosecutions will be examined. A concluding section will examine other armed services' cases including a significant decision concerning the retroactivity of the 1969 Supreme Court case, *O'Callahan v. Parker*.[1]

CONSCIENTIOUS OBJECTION

Several United States Supreme Court cases decided in 1970 and 1971 controlled or influenced the attitude of the Court towards conscientious objection. Four decisions helped both to define the substantive qualifications of a conscientious objector and the procedural requirements for granting CO status. Probably of greatest import was the 1970 decision in *Welsh v. United States*.[2] The *Welsh* decision, interpreting the statutory grounds of "religious training and belief," allowed conscientious objector deferment for "those whose consciences [are] spurred by deeply held moral, ethical, or religious beliefs [which] would give them no rest

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1. 395 U.S. 258 (1969).
2. 398 U.S. 333 (1970).

or peace if they allowed themselves to become a part of an instrument of war."[3] The *Welsh* decision and the earlier decision in *United States v. Seeger*[4] in essence opened the conscientious objector classification to a far broader field than those members of the traditionally pacifist religious sects.

A measure of the *Welsh*-created uncertainty was removed by the 1971 Supreme Court decision in *Gillette v. United States*.[5] *Gillette* and its companion case[6] specifically rejected a "single war" or "selective" conscientious objector. In a more straightforward reading of the statutory language than was found in *Welsh*, the Court held that conscientious opposition "to war in any form" could not include opposition solely to the Vietnam War.

The High Court's procedural decisions were no less significant. The 1970 case of *Mulloy v. United States*[7] struck out at arbitrary and capricious draft board action. Mulloy, having previously received several Selective Service deferments, had been classified I-A by his local board. He then filed an application for conscientious objector [I-O] classification. The local board granted Mulloy a personal appearance but felt that the information he presented did not warrant reopening his I-A classification. The Supreme Court rejected the board's action holding that where "new facts which establish a prima facie case for a new classification" are set out the "board must reopen to determine whether [the registrant] is entitled to that classification."[8] In passing, the Court noted that a board need not reopen where the registrant's claim was plainly incredible, previously passed on or conclusively rebutted by other information in the file. Mulloy's claim clearly fell outside of these categories and stated a prima facie case for conscientious objector classification. Accordingly, the board had wrongly refused to reopen his classification.[9]

One limitation on the *Mulloy* holding was made clear in *Ehlert v.*

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3. *Id.* at 344.
4. 380 U.S. 163 (1965).
5. 401 U.S. 437 (1971).
6. Negre v. Larsen, 401 U.S. 437 (1971).
7. 398 U.S. 410 (1970).
8. *Id.* at 415.
9. A board's reopening of a I-A classification would not, of course, guarantee that the registrant would be placed in a different class. However, even if the local board retains the registrant in class I-A, he is entitled to a personal appearance before his board and an appeal to the state Selective Service headquarters. *See* 32 C.F.R. §§ 1624.1, 1626.2 (1971). In practice this may result in a significant delay in the registrant's induction. The board's refusal to reopen a classification would not entitle the registrant to these further rights.

United States.[10] Unlike Mulloy, draft registrant Ehlert waited until *after* receiving an order to report for induction to request conscientious objector classification from his local board. Ehlert contended that his CO beliefs had not crystallized until receipt of the induction notice, *i.e.*, approximately one month before he was to be inducted into the Army. Ehlert's draft board refused to reopen his classification contending that reopening after notice of induction was only permissible in cases involving "a change in circumstances beyond the control of the registrant."[11] Without deciding whether crystallization was a circumstance beyond the control of the registrant the Court affirmed the local board's action. They held that the Selective Service System had the power to make reasonable timeliness rules and that this was such a rule. Seemingly crucial to their decision was the fact that Ehlert would have been able to submit his claim for conscientious objector classification to the military after induction.[12] The Court found that the military procedures offered a "full and fair opportunity to present" Ehlert's CO claim.

One of the Fifth Circuit's significant cases in the conscientious objector area was *United States v. Stetter*,[13] a prosecution for failure to submit to induction. Stetter defended on the ground that the Selective Service System wrongfully denied him classification as a CO. Shortly after being classified I-A, Stetter had told the board of his conscientious objector beliefs and submitted the appropriate Selective Service Form 150. His application provided a detailed statement of his total opposition to war based on his recent Bible study. After a second hearing with his local board Stetter's requested I-O classification was denied. He was never notified of the reason for denial nor did the board specify any reason in its minutes. A month later the state appeal board affirmed Stetter's I-A classification without stating its reason. Stetter subsequently refused induction and was convicted of a violation of 50 U.S.C. App. § 462a.

Reviewing Stetter's Form 150 the Fifth Circuit found it "apparent that he established a prima facie case"[14] for conscientious objection even under pre-*Welsh* standards. The court next considered whether the record revealed a "basis in fact"[15] which would authorize board denial of

10. 402 U.S. 99 (1971).

11. 32 C.F.R. § 1625.2 (1971).

12. The discharge of military personnel on grounds of conscientious objection is governed by Department of Defense Directive 1300.6 (2d August 1971).

13. 445 F.2d 472 (5th Cir. 1971).

14. *Id.* at 477.

15. Federal court review of Selective Service decisions is limited to determining whether the decision rests on any basis in fact. 50 U.S.C. App. § 460(b)(3) (1971). *See also* Estep v. United

I-O status. Government counsel on appeal attempted to provide a basis fact for the court. They noted that Stetter's application showed insufficient religious training in molding his beliefs, that there was no showing as to the impact the beliefs had on Stetter's life and that Stetter's claim had not been filed until he had lost his student deferment. The Fifth Circuit had little difficulty rejecting all contentions. First, they noted that sincerity of belief rather than the amount or extent of religious training is determinative. Next, "[t]he very fact that defendant requested a conscientious objector exemption and stated enough to come prima facie within *Seeger* demonstrates that his beliefs, assuming they are sincere, have significantly affected his life in the only manner relevant under the statute."[16] Similarly, the court rejected the Government's tardiness claim. The Fifth Circuit noted that Stetter had withdrawn in good standing from school and notified his local board that he was no longer eligible for that deferment. Further, by Selective Service regulations, Stetter's CO claim would not have been considered until after the deferment for his student status was terminated.[17] Under these circumstances no basis in fact was presented.

The final conceivable basis in fact was that "the Local Board simply did not believe [Stetter's] protestations of conscience."[18] On the record, this basis could not be sustained. Noting previous cases,[19] the Fifth Circuit observed that

> there is no evidence that the Local Board did find defendant insincere by virtue of his appearance before it. Much less is there any indication of any basis for such disbelief. Rather, the record is silent, for the Local Board assigned no reasons for its action. The Government's argument, then, is based on sheer guessmanship. But that will not do.[20]

Likening the review of Stetter's case to "playing the philosopher's game of looking into a dark room for a black cat that is not there,"[21] the court refused to accept mere assertions of the registrant's insincerity. Reversing the conviction, the board adopted the prophylactic rule of the Fourth Circuit:[22]

States, 327 U.S. 114, 122-23 (1946). The same standard has been used by federal courts reviewing military conscientious objector determinations. Pitcher v. Laird, 421 F.2d 1272, 1278-79 (5th Cir. 1970).

16. 445 F.2d at 479.

17. *See* 32 C.F.R. § 1623.2 (1971).

18. 445 F.2d at 481.

19. Helwick v. Laird, 438 F.2d 959 (5th Cir. 1971), discussed *infra*; Kessler v. United States, 406 F.2d 151 (5th Cir. 1969).

20. 445 F.2d at 481.

21. *Id.* at 482.

22. *Id.*

> Where it is clear that a *prima facie* case was established, we conclude that in conscientious objector cases, it is essential to the validity of an order to report that the board state its basis of decision and the reasons therefor, *i.e.*, whether it has found the registrant incredible, or insincere, or of bad faith, and why.[23]

Without such a rule the court found that meaningful administrative and judicial review would be impossible. Neither the legally untutored registrant nor the sophisticated jurist can rebut or review a blank record. While denying an intent to burden the Selective Service System "with all the habilimants or impedimenta of an adversary trial" the court felt that the benefits of the Fourth Circuit review standards "amply justify an imposition [they] might entail."[24]

The other criminal prosecutions involved procedural aspects of the conscientious objector application. Defendants in *United States v. Kilby*[25] and *United States v. Adams*[26] both ran afoul of the *Ehlert* decision which rebutted their contention that their local boards should have considered their CO applications filed after notices to report for induction had arrived. Defendant Adams also contested a previous failure to send him SSS Form 150, the pertinent CO application. Counterbalancing this possible delict on the board's part was Adams' failure to again request the form, his failure to request a personal appearance or to appeal his subsequent I-A classification, and the fact that at the time of the original request the board would not have considered the CO contention unless Adams had given up his present II-S deferment. Adams' conviction was affirmed.

A similar disregard of procedural requirements was fatal to the registrant in *United States v. McDuffie*.[27] McDuffie's classification questionnaire indicated that he wished conscientious objector status. The board sent him an SSS Form 150 and subsequently requested that he return it. When no SSS Form 150 was received, McDuffie was classified I-A. McDuffie did not appeal his classification or request a personal appearance before his local board. After he refused induction he contended that the Selective Service System wrongfully refused to classify him as a conscientious objector. The court found McDuffie's failure to exhaust necessary administrative remedies foreclosed his challenge to the I-A classification. The court specifically distinguished McDuffie's situation

23. United States v. Broyles, 423 F.2d 1299, 1304 (4th Cir. 1970).
24. 445 F.2d at 485.
25. 446 F.2d 1002 (5th Cir. 1971).
26. 449 F.2d 122 (5th Cir. 1971).
27. 443 F.2d 1163 (5th Cir. 1971).

from that of the registrant in *United States v. Davila.*[28] In Davila's case, a Form 150 had been filed and the board file contained no facts to rebut Davila's prima facie case. Since no further facts could have been developed through administrative appeal exhaustion was not required as a condition to judicial review. McDuffie's situation was opposite. There administrative appeal "might [have] put some flesh on his barebones claim and present[ed] the type of CO issue as to which the board's expertise is useful."[29] Even aside from the exhaustion question, however, McDuffie failed to make a prima facie case for conscientious objection. The court noted that the classification form did no more than state that McDuffie believed himself a conscientious objector. SSS Form 150 was "the instrument by which a claim of conscientious objection made in the Form 100 is further developed or perfected."[30] In short, Form 100 by itself could not make a prima facie case of sincerity.

A sharply divided court in *United States v. Taylor*[31] rejected another registrant's excuse for failure to file an SSS Form 150. It was undisputed that Taylor had requested and received the form. The form, quoting statutory language, noted that the CO request must be grounded in a "religious belief." Taylor asked the board's secretary about the meaning of the phrase and she informed him that such a question must be answered by his board members. Taylor kept the Form 150 but failed to return it. At trial he alleged that he could not in good conscience claim religious beliefs because he belonged to no conventional religion. Subsequently informed of the expanded definition of religious beliefs. Taylor contended he was misled by the language of Form 150 and as a reslt was deprived of due process of law by being denied the opportunity to pursue an available classification.

All members of the court were agreed that SSS Form 150 did not suggest the broad meaning given by Supreme Court decisions to religious belief.[32] However, the majority saw the evidence as "undisputed that appellant acting unilaterally decided on uncounselled, subjective information that he could not qualify [for the exemption]."[33] The majority noted that Taylor had not sought information and advise at his local board despite its "ready availability," and had not responded to a local board letter informing him that he should return his SSS Form 150. In conclusion,

28. 429 F.2d 481 (5th Cir. 1970).
29. 443 F.2d at 1165.
30. *Id.* at 1166.
31. 448 F.2d 349 (5th Cir. 1971).
32. *See generally* discussion at nn. 2-4, *supra.*
33. 448 F.2d at 351.

> [h]aving failed to ask for a reclassification or to press in any way before induction that he should be reclassified, or to provide the local board with any information which could warrant reconsideration of his classification, Taylor [could not] now charge the board with unconscionable dereliction in violation of due process of the law.[34]

Dissenting from the denial of a petition for rehearing en banc, Judges Goldberg and Simpson criticized the Selective Service's reliance on SSS Form 150, calling it at best a "half truth" and at worst "clearly wrong."[35] Disagreeing with the majority's conclusion the dissenting judges found Taylor's interpretation and his resulting actions were reasonable. Aside from the common sense understanding of "religious belief," the nature of the non-adversary Selective Service System encouraged Taylor to rely on its pronouncements and placed on the System "a strong affirmative obligation of frankness and candor regarding the state of applicable law in its dealings with registrants."[36] Placing the blame "squarely on officials of the Selective Service System,"[37] the dissenters would have reversed the conviction.

Reviews of habeas corpus petitions from in-service conscientious objector claimants typically turned on substantive matters. As in the *Stetter* case, the Fifth Circuit wrestled with the issue of what constitutes a sufficient basis in fact to deny CO discharge. Petitioner in *Helwick v. Laird*[38] was classified as a I-A-O (opposed to combatant training rather than any military service) conscientious objector by his Selective Service board. At the time, he stated that service in the Army medical branch would be acceptable because of its concern for healing the victims of war. After exposure to the Army and disillusionment with the Medical Corps' attitude of "patch them up to kill again," Helwick filed an administrative request[39] for I-O classification and discharge from the service. Helwick's petition was denied by the Army Conscientious Objector Review Board on the grounds of insincerity and the failure to show that his views had changed subsequent to his I-A-O classification. Noting again the requirement for "hard, provable, reliable facts"[40] to defeat Helwick's prima facie case, the court found no basis in fact supporting the CORB's action. Among matters cited by the Govern-

34. *Id.* at 352.
35. *Id.* at 354.
36. *Id.* at 356.
37. *Id.*
38. 438 F.2d 959 (5th Cir. 1971).
39. In-service conscientious objectors in the Army are processed under Army Regulations 635-20.
40. 438 F.2d at 963.

ment in defense of its action were Helwick's "temporary rejection of the institutionalized church" in earlier years, a lack of "depth and maturity" of views and a statement by Helwick that his one goal was to "get out of the military no matter what the consequence."[41] Taken singly or collectively the court found no basis in fact. The first matters were essentially extraneous. The third remark was most appropriately interpreted as meaning that Helwick's beliefs were so strong as to force him to jail rather than to continue to serve in the Army.

The contention that Helwick's views had not changed since his entry into the Army was rejected on two grounds. Initially, it was found that the district court had relied heavily on a letter which was not part of the file before the Army's CORB. The court reiterated its position in *Application of Tavlos*[42] that the basis in fact for denial "must be determined by considering only the evidence before the deciding agency."[43] Additionally, the court found no basis in fact from the evidence considered by the CORB that Helwick's objection had not changed since his entry into the service. His application amply showed a change in views sufficient to entitle him to discharge as a I-O conscientious objector. Rejecting the district court and the CORB opinion that it was unlikely that Helwick's views would change after only a short time on active duty, the Fifth Circuit noted that the very purpose of Army basic training was to "break down the recruit's civilian orientation and orient him in the ways of military life."[44] The district court judgment was reversed and the case remanded with instructions to grant habeas corpus relief.

The Army was only a little more successful in denying conscientious objector status to two Fort Bliss enlisted men in *Rothfuss v. Resor* and *O'Brien v. Resor*.[45] In essence, both claims were rejected on sincerity grounds because the military reviewing officers found the applications triggered by impending Vietnam reassignments. Treading delicately, the Fifth Circuit held that the Army "can legitimately consider the fact that the application comes on the eve of deployment of the claimant to a combat zone."[46] Nevertheless, it found that timing "as a solitary fact without other support in the record" was insufficient to provide a basis in fact for rejecting a prima facie CO claim.[47] The court was convinced that the late filing of a CO claim was a "two-edged blade." Under

41. *Id.* at 965.
42. 429 F.2d 859 (5th Cir. 1970).
43. *Id.* at 863.
44. 438 F.2d at 967.
45. 443 F.2d 554 (5th Cir. 1971).
46. *Id.* at 558.
47. *Id.*

certain circumstances, applications immediately prior to shipment to a combat zone might indicate nothing more than a dishonorable attempt to avoid personal danger. In other cases, however, the immediacy of armed combat "may be the added ingredient which crystallizes beliefs in opposition to war."[48] In short, further facts were required. In both cases the record before the court failed adequately to reveal whether additional grounds for denial were present. In each case there were statements by Army reviewing officers that indicated the existence of non-religious grounds for filing the applications. The court, however, refused to rely on these "naked conclusionary statements" and remanded the case to the district court for evidentiary hearings "to determine what transpired at the interviews of the applicants which might have created additional doubt as to their sincerity."[49] The court indicated it would be acceptable if the district court allowed the Army to hold the fact finding hearing to determine the basis in fact and urged the Army to subsequently "in each case . . . transcribe the interview with the applicant" to allow intelligent judicial review.[50]

The Air Force came in for its share of criticism in handling conscientious objector applications.[51] Airmen Lawson and Palmer had submitted applications under the appropriate Air Force regulation. The final Air Force reviewing authority had "not favorably considered" the applications for lack of sufficient documentation. Shortly thereafter, both airmen submitted a second application and sought habeas corpus relief in the federal district court. The district court summarily denied both petitions. The Fifth Circuit enjoined the Air Force from transferring the two airmen while their case was pending appeal.

The Government initially contended that Lawson and Palmer had not exhausted their administrative remedies since no decision had been reached on their second CO application. The Fifth Circuit rejected this contention. It held that the earlier decision that the applications were "not favorably considered" constituted final denials of the application and cleared the way for federal habeas corpus review.[52] Under these circumstances the district court was clearly in error in summarily denying the habeas corpus petitions without even examining the merits of the CO claim. The cases were remanded for a determination of whether a basis in fact existed for the denials. Pending such determination the injunction against reassignment was to remain in effect.

48. *Id.* at 559.
49. *Id.* at 560.
50. *Id.*
51. Lawson v. Laird, 443 F.2d 617 (5th Cir. 1971).
52. *Id.* at 620.

The Army was able to show a basis in fact for denying CO status to the doctor petitioner in *Kurtz v. Laird*.[53] Kurtz's application was denied by the Army CORB on the sole ground that he was not opposed to participation in all war. Most of the "hard, provable, reliable facts"[54] supporting the government position were found in Kurtz's application. In essence, Kurtz argued that the Vietnam War was the prototype of all present and future wars and by conscientiously being opposed to the Vietnam War he was in fact opposing all wars. The court, however, read the application as the assertion of selective objection. It reasonably inferred from Dr. Kurtz's application "that he would not object to participation in a war waged with less sophisticated weapons, a war that did not result in a large-scale killing of innocent civilians or a war waged as a matter of national survival rather than as an 'instrument of policy'."[55] Accordingly, there was a basis in fact for the Army's action. Judge O'Sullivan specially concurring also questioned the sincerity of Kurtz's application. He read his record as a continuing effort to avoid military service.[56]

OTHER DEFERMENTS

A number of cases allowed the court to examine Selective Service registrants' eligibility for other deferments. In most cases the parties seeking relief were unsuccessful.

The same Selective Service regulation considered in the *Ehlert* case denied relief to petitioner in *United States ex rel. Johnson v. Irby*.[57] Johnson had received an order to report for induction. Several days later a request for an occupational deferment as a teacher was filed on Johnson's behalf. The local board declined to reopen Johnson's classification, failing to find a change in circumstances "over which the registrant had no control." On appeal, the Fifth Circuit endorsed the board's action. In particular, it noted that the evidence suggested Johnson had applied for the teaching position only after he had received his order to report for induction. Since "he could well determine the moment at which he applied for the teaching position" a reopening was clearly not a matter of right.[58]

53. 449 F.2d 210 (5th Cir. 1971).
54. *See* text accompanying n. 40, *supra*.
55. 449 F.2d at 210.
56. *Id.*
57. 438 F.2d 114 (5th Cir. 1971).
58. *Id.* at 115.

The in-service equivalent of a Selective Service occupational deferment was at issue in *United States ex rel. Hutcheson v. Hoffman*.[59] Prior to his entry on active duty as an ROTC commissioned officer, Lieutenant Hutcheson had been employed full time with the Center for Research and Social Change at Emory University. At the Center he "played an important role in various research projects designed to empirically develop knowledge of urban social and political problems."[60] Based on this work Hutcheson sought an exemption from active duty and discharge from the Army based on "extreme community hardship" under appropriate Army regulations.[61] When his request was denied by the Army he sought habeas corpus review in federal court.

Despite conceding the importance of Lieutenant Hutcheson's work at the Center, the court found no evidence that his services were "essential to the health, safety or welfare of his community in the sense that his absence will have an immediate, detrimental impact on the community, or will leave it exposed to dangers which may not otherwise be controlled."[62] The court suggested that the regulation was meant to exempt such persons as a community's only physician. The court seemed further disturbed that Hutcheson had obligated himself to an ROTC commission before he began work at the Center. Accordingly, the Army's action had a basis in fact and the petition for writ was denied. Judge Tuttle, specially concurring, turned his decision on the absence of a showing of detriment to "the safety or welfare of *his community*" as required by the Army regulations.[63]

The hardship-claiming defendant in *United States v. Lee*[64] joined other defendants who discovered to their detriment that deferment claims should be raised before receipt of a notice to report for induction. Lee had lost a III-A (fatherhood) deferment when his board discovered that he was divorced from his wife. His appeal of his I-A classification was denied and shortly thereafter he received an order to report for induction. Four days before the induction date he requested that his classification be reopened in order that he might perfect a III-A (hardship) deferment. The board found no showing of a change in circumstances beyond Lee's control and denied the request. The court concurred with the board's ruling in affirming Lee's conviction for refusal to report for induction.

59. 439 F.2d 821 (5th Cir. 1971).
60. *Id.* at 823.
61. Army Regulations 601-25.
62. 439 F.2d at 823.
63. *Id.* at 824 (Emphasis added).
64. 443 F.2d 897 (5th Cir. 1971).

One of the Fifth Circuit's hardest decisions involved the claimed fatherhood deferment in *Plotner v. Resor*.[65] Plotner had received a II-S deferment under the 1967 Selective Service Act while completing graduate school. Shortly thereafter, he discovered his wife was pregnant. Plotner claimed that he informed his local board of this fact and was told by the clerk that he was ineligible for a fatherhood deferment. The clerk denied any conversation with Plotner. In any event no formal deferment request was filed and Plotner was subsequently inducted into the Army. While in service Plotner brought a successful habeas corpus action and was ordered released from the Army after 20 months' service.

On review, the court remanded for a factual determination of whether Plotner had discussed his impending fatherhood with his board. The court held that if Plotner's story were true, he was not required to file a formal deferment request and then exhaust subsequent administrative review. The court again discussed the non-adversary nature of the Selective Service System and a registrant's entitlement to rely on the representations of fact of its clerks.[66] The court found this a far stronger case than that presented earlier in *Taylor*. In *Taylor*, the clerk had merely informed the registrant that his question would have to be answered by the board and advised Taylor to prepare the necessary deferment papers. By contrast, Plotner was explicitly told that he was not eligible for a fatherhood deferment.

The *Plotner* court next considered whether there was statutory authority in the 1967 Draft Act for the Selective Service regulation denying a fatherhood deferment to a registrant who had previously had a graduate student deferment.[67] Examining the appropriate regulations and the statute, the court was convinced that "Congress did not intend to authorize any such blanket prohibition against fatherhood deferments by regulations to implement the law authorizing the President to provide for graduate deferments."[68] While the fatherhood deferment need not be granted, the board was at least under an obligation to consider it. Judge Wisdom dissented. He observed that both graduate deferments and fatherhood deferments were statutorily discretionary deferments under the 1967 Selective Service Act.[69] Accordingly, Selective Service regulations could properly withhold fatherhood deferments

65. 446 F.2d 1066 (5th Cir. 1971).

66. *Id.* at 1067.

67. The appropriate regulation was 32 C.F.R. § 1622.30 (1957). Plotner's graduate deferment was granted under 50 U.S.C. App. § 456(h)(2) (1948).

68. 446 F.2d at 1069.

69. *Id.* at 1069-71.

from all who had previously received graduate deferments. Judge Wisdom found such action clearly consonant with the congressional goal of eliminating the "pyramiding" of deferments which enabled some registrants to avoid any liability for military service.

Several cases considered a Jehovah's Witness eligibility for a ministerial deferment.[70] In *United States v. Solomon*,[71] defendant had been classified as a conscientious objector in order to perform civilian work. Shortly after receiving a local board order to report for such work, Solomon informed his board that he had recently been appointed a Congregation Book Study Servant in his faith. He accordingly asked for a ministerial exemption which would have removed any liability for alternate service. The Fifth Circuit upheld the board's action in refusing to grant Solomon the requested deferment. The court first cited prior decisions[72] holding that the office of Book Study Servant by itself did not establish a prima facie case for a ministerial exemption. The Fifth Circuit also observed that no circumstances beyond Solomon's control was shown to authorize a post reporting order change of classification. Solomon admitted that he could have refused the Book Study Servant appointment. Solomon's final argument was that his board was required to specify reasons for refusing to reopen his classification. The court distinguished Solomon's situation from that of registrants who had made prima facie cases for reclassification. While a statement of reasons in Solomon's situation "might be desirable," it was not required.[73]

Failure to Communicate with Local Board

While 50 U.S.C. App. § 462a is typically used to prosecute persons refusing to submit to induction, it in fact makes criminal the knowing failure to perform any duty required under the act. At issue in *United States v. Read*[74] was a prosecution for registrant's failure to keep his draft board informed of his loacal address. The only challenge on appeal was to the sufficiency of the evidence to support a conviction. The Fifth Circuit observed a history of draft board letters returned with "moved, left no address" or "address unknown." Further, appellant testified that he had lived in Mexico, Canada, and the United States during the period

70. United States v. Walker, 451 F.2d 1325 (5th Cir. 1971); United States v. Hall, 449 F.2d 1206 (5th Cir. 1971); United States v. Solomon, 450 F.2d 456 (5th Cir. 1971).

71. 450 F.2d 456 (5th Cir. 1971).

72. Camp v. United States, 413 F.2d 419 (5th Cir. 1969), *cert. denied*, 396 U.S. 968 (1970); McCoy v. United States, 403 F.2d 896 (5th Cir. 1968).

73. 450 F.2d at 459.

74. 443 F.2d 842 (5th Cir. 1971).

he was out of contact with his local board. The court found this ample evidence to indicate lack of good faith effort on Read's part to keep his local board informed of his current mailing address.

COURT-MARTIAL JURISDICTION

In 1969, the United States Supreme Court in the landmark case of *O'Callahan v. Parker*[75] held that court-martial jurisdiction over military personnel could be sustained only upon showing that the offense charged was "service connected." In its first significant decision since *O'Callahan*, the Supreme Court held that any offense committed by a serviceman within the confines of a military reservation would meet the "service connection" requirement and confer court-martial jurisdiction.[76] In the same opinion, however, the Court refused to decide the retroactivity of the *O'Callahan* decision. This set the stage for the Fifth Circuit's extensive discussion of retroactivity in *Gosa v. Mayden*.[77]

The issue was quickly defined. Gosa's court-martial conviction became final approximately two years before the *O'Callahan* decision. His offense, rape of a civilian off-post, was clearly not "service connected." A lengthy majority opinion examined the grounds of the *O'Callahan* decision. In essence, it found that the decision held that "a member of the Armed Forces has an area of off-duty life wherein his general serviceman's status is an insufficient nexus to bring his actions under the constitutional range of military 'Government and Regulation.'"[78] Differing from the majority of courts facing the issue, the court held the decision rested on a lack of adjudicatory power over the subject matter and person of soldiers such as O'Callahan and Gosa. The court determined, however, that such a characterization by itself could not be determinative of the retroactivity issue. The court next examined the history of Supreme Court retroactivity decisions und essentially adopted the *Stovall v. Denno*[79] trilogy of decisional factors: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[80] The court had little difficulty finding that factors (b) and (c)

75. 395 U.S. 258 (1969).
76. Relford v. Commandant, 401 U.S. 355 (1971).
77. 450 F.2d 753 (5th Cir. 1971).
78. *Id.*
79. 388 U.S. 293, 297 (1967).
80. 450 F.2d at 757.

strongly argued against retraoctivity. The difficult question involved factor (a). Viewed one way the purpose of the *O'Callahan* decision was to secure constitutional rights of grand jury presentment and petit jury trial. The court noted that *DeStefano v. Woods*,[81] the most closely analogous case, had not required retroactivity. An alternate view of the *O'Callahan* standard, however, was that the decision was intended "to avoid numerous incidents and functions of military justice considered less satisfactory to the determination of guilt than procedures available in civilian courts that would occupy the jurisdictional vacuum."[82] This interpretation went much more to the integrity of the fact finding process and more strongly argued for retroactivity. Despite language in the *O'Callahan* opinion critical of the entire military justice system, the Fifth Circuit found that the former was a more accurate interpretation of the Supreme Court's holding. On balance, therefore, the majority held that *O'Callahan* should not be given retroactive effect. Judge Godbold agreed with the majority's conclusion that *O'Callahan* was grounded on a lack of adjudicatory power. Because of this fact he found the current state of constitutional law to clearly require full retroactive effect for *O'Callahan*.[83] Until the Supreme Court ruled to the contrary, Judge Godbold felt bound to grant Gosa's petition for the writ.

MISCELLANEOUS

A minority of litigants sought to assert, rather than reject, their ties with the military. Petitioner in *Davis v. Secretary of the Army*[84] sought to convene a three-judge federal court to determine the validity of an Army regulation under which he was undesirably discharged in 1953. While a service member, Davis had been convicted in federal court of the interstate transportation of a stolen motor vehicle. Appropriate Army regulations mandated an automatic discharge upon proof of the federal conviction. Petitioner now contended that he was entitled to a hearing, confrontation of witnesses and presentation of mitigating factors before the Army separated him under less-than-honorable conditions. The court, adopting the opinion of the district judge, found no impropriety in the Army's action. It was further noted that Davis had never sought review of his discharge through appropriate statutory boards. This failure to exhaust available administrative remedies also

81. 392 U.S. 631 (1968).
82. 450 F.2d at 765.
83. *Id.*
84. 440 F.2d 817 (5th Cir. 1971).

barred him from equitable relief before the court.

A second undesirably-discharged-Davis[85] had no better luck in seeking benefits from the Veterans Administration. He sought mandamus to require the Administration to grant him disability compensation for an arthritic condition allegedly incurred on active service. The court found that 38 U.S.C. § 211(a) provided that the Administrator's decision was final and not subject to judicial review. The court gratuitously added that Davis was disqualified from receiving VA benefits because of his undesirable discharge after conviction of car theft in Texas.

Plaintiff in *Lowe v. United States*[86] brought action under the Federal Tort Claims Act for damages arising from the alleged malpractice of Army physicians. The Army asserted that Lowe's claim was barred as one involving an injury occurring incident to military service. The court found no significance in the fact that "elective" medical treatment was involved and dismissed Lowe's claim under the authority of *Feres v. United States*.[87]

EPILOGUE AND CONCLUSION

Just nine days before the end of this survey period, the circuit court authored *Mindes v. Seaman*,[88] a potentially significant re-evaluation of the law of federal court review of military decisions. While the decisions of the 1972 term of court will determine the true significance of *Mindes*, its facts and holding are of immediate interest.

Air Force officer Mindes alleged a denial of due process in his separation from the Air Force. He cited a factually erroneous Officer Efficiency Report,[89] Air Force regulations violating due process, and an Air Force Board for Correction of Military Records' failure to conduct a full, fair and impartial hearing, and to file findings of fact and conclusions of law. The District Court for the Middle District of Florida denied a temporary restraining order and dismissed the case with prejudice for want of jurisdiction.

On review, the Fifth Circuit observed that the procedure of rendering a final dismissal for want of jurisdiction should be sparingly used and was not appropriate here. The court cited Professor Charles Wright for

85. Davis v. United States, 447 F.2d 959 (5th Cir. 1971).

86. 440 F.2d 452 (5th Cir. 1971).

87. 340 U.S. 135 (1950).

88. 453 F.2d 197 (5th Cir. 1971).

89. The officer efficiency report, prepared by an officer's superiors, is typically the most important if not the only factor in determining promotion for career military officers.

the proposition that "federal jurisdiction exists if the complaint states a case arising under federal law, even though on the merits the party may have no federal right."[90] The court noted that the district court should have considered whether the case failed to state a claim on which relief may have been granted.

To assist the district court in considering the case on remand, the Fifth Circuit offered an analysis of when military decisions should be subject to court review. The Fifth Circuit noted that it was really determining a "judicial policy akin to comity."[91] Unwillingness to second guess military expertise, a fear of inundating the courts with servicemen's complaints and an impairment of the military mission traditionally have made courts hesitant to review internal military affairs. "On the other hand, the courts have not entirely refrained from granting review and sometimes subsequent relief. However, no collection or collation of these cases has yet been attempted by this circuit. This is the task we undertake now."[92] The Fifth Circuit then held that a review of internal military affairs should not take place in the absence of

> (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures. The second conclusion, and the more difficult to articulate, is that not all such allegations are reviewable.[93]

Faced with a sufficient allegation the court must examine the substance of the allegation in light of the policy matters behind nonreview of military decisions including the potential injury to the plaintiff, the nature and strength of the plaintiff's challenge to the military determination, the degree of interference with military functions, and the extent to which military expertise or discretion is involved. Having articulated a standard of review, the Fifth Circuit quickly expressed no opinion as its application in Mindes' situation.

The Fifth Circuit's armed services decisions in 1971 were a mixed bag of the significant and the trivial. The *Gosa* rejection of *O'Callahan* retroactivty and the *Mindes* discussion of standards of review for military decisions have probably the widest application. A healthy, continuing trend is the insistence on valid bases for decision by Selective Service and military administrative boards. Cases like *Stetter* and *Helwick*

90. 453 F.2d at 198.
91. *Id.* at 199.
92. *Id.*
93. 453 F.2d at 201.

emphasize that an earlier era of virtually unfettered board discretion is ended. Yet, other cases make clear that the Fifth Circuit is largely out of sympathy with the registrant or serviceman trying to manipulate the law to his advantage. Volunteer Army or no, there remains an unspoken judicial attitude that "every man shall do his duty."

Most of 1971's major questions remain open. What are the permissible bases in fact for denying a conscientious objector claim? How are the *Mindes* standards of review of military decisions to be applied in practice? What further expansion or contraction of *O'Callahan* "service connection" can be expected? Possibly 1972 will provide answers or at least clearer guidelines.