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## APPEAL PROCEDURE UNDER THE SELECTIVE SERVICE LAW

ANDREW JACKSON LEWIS\*

The Selective Training and Service Act of 1940 made ample provision for appeals within the Selective Service System. Section 10 (a) (2) of the Act authorized the President of the United States to “. . . establish within the Selective Service System civilian local boards and such other civilian agencies, *including appeal boards and agencies of appeal*, as may be necessary to carry out the provisions of this Act. . . . Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final *except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe.*” (Italics added).

Simultaneously with the creation of the Selective Service System, the President prescribed regulations by which the right of appeal was guaranteed to every selective service registrant; and in cases of dependency, to the claimed dependent of the registrant; and in cases of claims for deferment by reason of being a necessary man in a necessary occupation or industry, to any person who has filed written evidence of the occupational necessity of the registrant.

The policy of the Selective Service System has always been to keep the appeal procedure as simple as possible, consistent with an effective administration of the law. But the appeal must necessarily be taken within the time and in the manner required by the regulations; but even after the required time has elapsed, where a person failed to appeal through a lack of understanding of his rights or for some

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cause beyond his control, the local boards have wide discretionary power to allow belated appeals.

### Boards of Appeal

The appeal machinery within the Selective Service System is likewise very simple. Each State is divided into one or more board of appeal areas. The area of each board of appeal varies greatly because of geographical conditions and density of population. Each board of appeal area always includes whole local board areas and generally embraces several local board areas. Unless otherwise authorized by the Director of Selective Service, the board of appeal areas do not extend beyond an area wherein more than 70,000 registrants registered in the first registration on October 16, 1940.<sup>1</sup>

The board of appeal normally consists of five members appointed by the President of the United States, upon recommendation of the Governor of the particular State in which the board functions. The members are required to be male citizens of the United States who are not members of the land or naval forces; they shall be residents of the area in which their board has jurisdiction; and they should be at least 36 years of age. The membership should be representative of all the major activities of the usual board of appeal area, and as such should include one member from labor, one member from industry, one physician, one lawyer, and, where applicable, one member from agriculture.

If the work of the board of appeal becomes too burdensome for the board to handle without undue delay, the regulations provide for the appointment of an additional group or groups of five members similarly appointed and constituted. Each group acts separately and with full authority for the board of appeals on all cases assigned to it. Where groups are appointed, an additional member, whose duty it is to supervise and coordinate the work of the groups of a board of appeals, may also be recommended and appointed in the same manner.<sup>2</sup>

Each board of appeal has jurisdiction to review the decisions of the local boards within its area, and to affirm or change such decisions, when appealed to it. It also has

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<sup>1</sup> Sel. Ser. Reg. 603.21 (1942).

<sup>2</sup> Sel. Ser. Reg. 603.22 (1942).

the same appellate jurisdiction to review any decision transferred to it by another board of appeal for review. No member of any board of appeal may act on the case of a registrant who is his first cousin or closer relation, either by blood or marriage, or who is an employer or employee, or stands in the relationship of superior or subordinate in connection with any employment, or is a partner or close business associate of the member.<sup>3</sup> If a board of appeal cannot act on the case of a registrant because of disqualification of its members, it is required to transfer such case to another board of appeal in accordance with section 627.22 of the Selective Service Regulations.

Each board of appeal has a chairman and a secretary; keeps a record of each meeting in the Minute Book (Form 101) provided for such purpose; and may transact its business whenever a quorum consisting of a majority of its members is present at any meeting. Every member present, unless disqualified, shall vote on every classification. In case of a tie vote on a classification, the board postpones action until it can be decided by the majority vote. If a member is absent so long as to hamper the work of the board, he is subject to removal and a new member is thereupon appointed in his place.<sup>4</sup>

### Government Appeal Agents

The Selective Service Regulations provide that a government appeal agent for each local board shall be appointed by the President upon recommendation of the Governor. Provision is also made for a similar appointment of an associate government appeal agent for a local board when the government appeal agent requests such assistance and, in the opinion of the Governor, the circumstances require it. The associate government appeal agent performs such duties and has such powers and rights as are delegated to him by the government appeal agent. In the absence or inability of the government appeal agent to act, he performs the duties and has the powers and rights of the government appeal agent.<sup>5</sup>

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<sup>3</sup> Sel. Ser. Reg. 603.25 (1942).

<sup>4</sup> Sel. Ser. Reg. 603.26 (1942).

<sup>5</sup> Sel. Ser. Reg. 603.71 (1942).

The duties of the government appeal agent are set forth in section 603.71 (a) of the Regulations as follows:

“To appeal from any classification by a local board which, in his opinion, should be reviewed by the board of appeal; to care for the interests of ignorant registrants and their dependents with respect to appeals and, where the decision of the local board is against the interests of such persons and where it appears that such persons may not take appeals, due to their own nonculpable ignorance, to inform them of their rights and assist them to enter appeals to the board of appeal; and, after classification, to investigate and report upon matters which are submitted for his investigation by the local board. It shall also be the duty of such government appeal agent, where the interests of justice may require, to suggest to the local board a reopening of any case and to impart to the local board any information which in his opinion ought to be investigated. The government appeal agent should expedite the examination of the records of registrants as soon as they have been classified by the local board in order that appeals to the board of appeal, where found necessary, may be filed within the time limit specified in the regulations.”

The duties of a government appeal agent arise only when and after the decision of classification has been rendered. It is not a function of the government appeal agent to advise or assist registrants in any matter prior to the classification decision; that should be done by the advisory board for registrants.

The duties of a government appeal agent are onerous because, in order to determine for himself or advise the registrant or others concerned whether an appeal should be taken, he must read and clearly understand each record. But the appeal agent should not concern himself with the record or seek to influence or aid the local board prior to the classification decision. He should not participate in the deliberations of the local board or even be present when the local board is in session or voting.

Once the classification has been made, however, the government appeal agent must carefully review the record to determine whether the classification given the registrant is fair and just, considering the interests of the registrant and his dependents and the interest of the government. It is his duty to take an appeal when in his judgment a classification is not fair and just. When a registrant or his dependents, or any person who has filed written evidence of the occupational necessity of the registrant, wishes to appeal, even though the appeal agent believes that an appeal

is not justified, it is his duty to assist such person to properly perfect such appeal. When, at any time after a registrant is classified and before an Order to Report for Induction (Form 150) is mailed to such registrant, facts come to the attention of the government appeal agent which were not considered at the time such registrant was classified and which, if true, would justify a reopening of such registrant's classification, it is the appeal agent's duty to assist the registrant or his dependents, or any interested party in a case involving occupational deferment, in preparing and presenting such facts to the local board, or, if he prefers, he may present them himself.

The government appeal agent should appeal every classification where the facts in his judgment warrant further consideration. In determining whether or not an appeal should be taken, he should be equally as diligent in seeking a deferred classification where warranted as in seeking a Class I-A classification where in his opinion a deferred classification is not justified.

The government appeal agent should examine each appeal record before it is forwarded to the board of appeal to be certain that all procedural steps required by the regulations have been compiled with and that the record contains all of the information which was before the local board. In those cases which he has appealed, the government appeal agent may attach a statement specifying the respects in which he believes the local board has erred. He may also direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight, and he may set out in detail any evidence which was offered to the local board and which it failed or refused to include in the registrant's file. In those cases which have been appealed by the registrant or his dependents or any person who has filed written evidence of the occupational necessity of a registrant, the agent may, if requested to do so, assist in the preparation of a similar statement to be signed by the person appealing. In either event, he should carefully refrain from arguing the merits of his views or of attempting to place any interpretation on the facts. His function ends when he has made certain that all the facts are in the record. He should not advocate either the merits of the local board's classification or the appealing parties' exceptions thereto.

Since no classification is permanent, the government appeal agent should bring to the attention of the local board any facts which may have a bearing on a change in the registrant's classification. He should request the reopening of any case when he has knowledge of facts which were not considered by the local board when the registrant was classified which, if true, would, in his opinion, justify a change. While the government appeal agent cannot appeal from a determination of the local board not to reopen a classification, he may, nevertheless, feel free to communicate to the State Director of Selective Service his opinion that the local board has erred in not reopening a classification. If the facts warrant such action the State Director may appeal from such determination or he may direct the local board to reopen the registrant's classification and classify the registrant anew.

### Persons Who May Appeal

Appeals may be taken by the Director of Selective Service or any State Director of Selective Service *at anytime from* any local board determination including *decisions of classifications*.<sup>6</sup> Local boards are called upon to make "determinations" from time to time, aside from decisions of classification, such as, for example, granting or refusing permission to a registrant to leave the United States, or refusing to reopen a classification not directly involved in a decision of classification.

Appeals from decisions of *classification* to the board of appeal, may be taken by the registrant, or by any person who claims to be a dependent of the registrant, or by any person who has filed written evidence of the occupational necessity of the registrant, or by the government appeal agent, except that no such person may appeal from the determination of the registrant's physical or mental condition by the examining physician, the examining station of the armed forces, or the local board. The appeal by such persons, except the government appeal agent, must be taken within 10 days after the date when the local board mailed the registrant Notice of Classification (Form 57). After the 10 days have elapsed, the local board is authorized to permit such persons to appeal if it is satisfied that the failure to appeal within

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<sup>6</sup> Sel. Ser. Reg. 627.1 (1942).

the 10-day period was due to a lack of understanding of the right to appeal or by some cause beyond the control of such persons. The 10-day rule does not apply to an appeal by the government appeal agent. Appeals from a *decision of classification* may be taken by the government appeal agent *at any time* prior to the date when the local board mails to the registrant an Order to Report for Induction (Form 150), except that even he may not appeal from the determination of the registrant's physical or mental condition by the examining physician, the examining station of the armed forces, or the local board.

### Method of Appeal to Board of Appeal

Any person entitled to do so may appeal in either of the following ways:

(1) By filing with the local board a written notice of appeal, which need not be in a particular form but must state the name of the registrant and identity of the person appealing so as to show the right of appeal.

(2) By signing the "Appeal to Board of Appeal" on the Selective Service Questionnaire (Form 40).

The person appealing may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board has erred; and he may direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight; and he may set out in full any information which was offered to the local board and which the board failed or refused to include in the registrant's file.<sup>7</sup>

### Appeal Stays Induction

The local board must not issue an Order to Report for Induction (Form 150) either during the period allowed to take an appeal to the board of appeal or during the time such an appeal is pending. Any order to report for induction which may have been issued becomes ineffective and must be cancelled by the local board.<sup>8</sup>

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<sup>7</sup> Sel. Ser. Reg. part 627 (1942).

<sup>8</sup> Sel. Ser. Reg. 627.41 (1942).



### Appeal to the President

When either the State Director of Selective Service or the Director of Selective Service deems it to be in the national interest, or necessary to avoid an injustice, he may appeal to the President from *any determination* of a board of appeal *at any time*.<sup>9</sup>

The registrant, or any person who claims to be a dependent of the registrant, or the government appeal agent, at anytime within 10 days after the mailing by the local board of the Notice of Classification (Form 57) or the Notice of Continuation of Classification (Form 58), may appeal, *on the grounds of dependency only*, to the President from the board of appeal classification of a registrant in either Class I-A, Class I-A-O, Class I-B, Class I-B-O, Class IV-E, Class IV-E-LS, provided either (1) one or more of the members of the board of appeal dissented from the determination of that board, or (2) the government appeal agent executes the following required certificate:

"Great and unusual hardship will follow the induction of  
 ..... I therefore recommend that he be  
 (Name of registrant)  
 placed in Class III-A."

The government appeal agent should not make any other statement or attach any other information to such certificate.

The local board may permit any person who is entitled to appeal to the President additional time even though the 10-days period has elapsed, if it is satisfied that the failure to appeal was due to a lack of understanding of the right to appeal or to some cause beyond the control of such person.<sup>10</sup>

### Method of Appeal to the President

The appeal to the President is taken (1) by mailing or delivering to the local board written notice of an appeal, or (2) by going to the local board and signing the "Appeal to President" on the Selective Service Questionnaire (Form 40) and, in either event, when necessary, by attaching the required certificate of the government appeal agent. Written notice of appeal need not be in any particular form but should

<sup>9</sup> Sel. Ser. Reg. 628.1 (1942).

<sup>10</sup> Sel. Ser. Reg. 628.2 (1952).

include the name of the registrant, his serial and order numbers, the identity of the person appealing so as to show his right of appeal, and the fact that such person wishes the President to review the determination of the board of appeal.<sup>11</sup>

When such an appeal is taken, the local board notifies the registrant of the fact, unless he is the person who took the appeal, and the entire file is forwarded to the State Director of Selective Service for transmission through the proper channels. When the appeal has been decided the file is returned to the local board through the State Director and notices consistent with the action of the President are mailed by the local board.<sup>12</sup>

### **Appeal to the President Stays Induction**

The local board must not issue an Order to Report for Induction (Form 150) either during the period allowed to take an appeal to the President or during the time such an appeal is pending. Any order to report for induction which may have been issued shall be ineffective and cancelled by the local board.<sup>13</sup>

### **Appeals Involving Conscientious Objection**

One of the unusual phases of the appeal procedure appears in connection with an appeal involving the issue of conscientious objection of a registrant to participation in war. Section 5 (g) of the Selective Training and Service Act of 1940 gives a conscientious objector the right of appeal, in the event his claim of conscientious objection is not sustained by the local board, and, in such event, the appeal board, if it is necessary to decide such issue, must refer the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof.

If an appeal involves the question of whether or not the registrant is entitled to be sustained in his claim that he is a conscientious objector, the board of appeal must first determine whether he should be classified in Class I-C, Class IV-F, Class IV-D, Class IV-C, Class IV-B, Class IV-A (not considered in time of war), Class III-A, Class II-B, Class

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<sup>11</sup> Sel. Ser. Reg. 628.3 (1942).

<sup>12</sup> Sel. Ser. Reg. 628.4 and 628.5 (1942).

<sup>13</sup> Sel. Ser. Reg. 628.7 and 629.3(b) (1942)

II-A, or Class I-H, in the order listed, and if it so determines, it shall place such registrant in such class. If the board of appeal does not determine that such registrant belongs in one of such classes, it shall transmit the entire file to the United States district attorney for the judicial district in which the local board of the registrant is located, for the purpose of securing an advisory recommendation of the Department of Justice.<sup>14</sup>

After appropriate inquiry by such agency, a hearing is held by the Department with respect to the character and good faith of the objections of the person concerned, and such person is entitled to notice of the time and place of such hearing. He has an opportunity to be heard, but he is not entitled to be represented by counsel at such hearing. Under the Selective Service Regulations, if the objections of the registrant are found to be sustained, the Department of Justice recommends to the board of appeal (1) that if the registrant is inducted into the land or naval forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be assigned to work of national importance under civilian direction. If the Department of Justice finds that the objections of the registrant are not sustained, it recommends to the board of appeal that they be not sustained. The board of appeal gives consideration to, but is not bound to follow, the recommendation of the Department of Justice.<sup>15</sup>

#### **Special Appeal Direct to the Director of Selective Service on Issue of Nondeclarant's Residence in the United States**

The Selective Training and Service Act of 1940, as amended, imposes liability for registration and for training and service on every male citizen of the United States and "every other person residing in the United States" within the ages affected thereby. While section 611.11 of the Regulations unconditionally declares that every declarant alien "is a male person residing in the United States", within the meaning of the Act, and sections 611.12 and 611.13 specify as far as possible when a nondeclarant alien is or is not re-

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<sup>14</sup> Sel. Ser. Reg. 627.25 (1942).

<sup>15</sup> *Ibid.*

siding in the United States; nevertheless, the circumstances under which an alien has heretofore or may hereafter enter the United States sometimes make it difficult to determine the question of residence. For such cases a special procedure, including a right to appeal, has been prescribed within the Selective Service System (secs. 611.21—611.36).

Under this procedure a nondeclarant alien may (within the time prescribed) file with his local board (if he is registered) or with the local board where he is at the time located (if he is not registered) an Alien's Application for Determination of Residence (Form 302), requesting that the local board determine if he is "a male person residing in the United States" within the meaning of section 2 and section 3 of the amended act. An Alien's Personal History and Statement (Form 304) must also be filed with such application.

If, after such alien has filed an Alien's Application for Determination of Residence (Form 302) and his Alien's Personal History and Statement (Form 304), the local board determines that he is not "a male person residing in the United States," it must then determine the period of time such alien may continue to remain in the United States without becoming "a male person residing in the United States," and the last day of any period thus determined shall be known as the expiration date. When such determination has been known as the expiration date.

If the local board determines that such alien is "a male person residing in the United States," it mails to him a Notice of Determination of Alien's Residence (Form 305).

At anytime within 10 days after the mailing of such notice (Form 305), the alien may appeal to the Director of Selective Service from such residential determination of the local board, either by signing and filing a written statement that he appeals therefrom or by signing and filing the statement of appeal on the Notice of Determination of Alien's Residence (Form 305). The appealing alien at that time may also file such additional information as he wishes to call to the attention of the Director of Selective Service. The State Director of Selective Service is also authorized to appeal from any residential determination of the local board, and the Director of Selective Service may review any residential determination of a local board upon his own initiative.

If the appeal is not taken within the required time, the alien must register, if he has not already done so, and be classified in the usual way.

In the event the appeal is taken, however, the entire file of such alien is thereupon forwarded, through the State Director of Selective Service, to the Director of Selective Service for final determination of the residential issues.

If upon appeal the Director of Selective Service determines that the alien is "a male person residing in the United States," the file is returned through the State Director of Selective Service to the local board, whereupon a Notice of Determination of Alien's Residence (Form 305) is prepared and mailed by the local board to such alien.

If, however, the Director of Selective Service determines that the alien is not "a male person residing in the United States", the Director of Selective Service must then determine the period of time the alien may continue to remain in the United States without becoming such "a male person residing in the United States," and the last day of any period thus determined shall be known as the expiration date. Thereupon the record is returned, through the State Director of Selective Service, to the local board, at which time the local board (1) prepares an Alien's Certificate of Nonresidence (Form 303), recording thereon the expiration date; and (2) notifies the alien to report to the office of the local board; and (3) requires the alien, when he reports, to sign such Alien's Certificate of Nonresidence (Form 303) in the presence of a member or the clerk of the local board.

An alien who has received an Alien's Certificate of Nonresidence (Form 303) may again file with the local board issuing such certificate, at any time before the expiration date of such certificate, a new Alien's Application for Determination of Residence (Form 302), together with any information not previously presented to such local board which he believes will assist the local board to determine his status. The determination of the local board upon such second or subsequent application is subject to the same rights of appeal to the Director of Selective Service as upon the original application.