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The recent verdict of a federal jury in Colorado[1] finding a member of Jehovah's Witnesses guilty of violation of the Selective Service Act[2] makes timely a brief review of some of the principles applicable to judicial appeal from a decision of a draft board.

Boeff registered and returned his questionnaire. In his questionnaire he stated, "I am a minister of religion * * *. I have been formally ordained." He also stated that he was a "conscientious objector" and filed a regular supporting affidavit in connection with this section of his questionnaire. The local board found Boeff to be a conscientious objector and put him in class IV-E. Boeff appealed, claiming that he should have been put in class IV-D. The regulations provide that "regular or duly ordained ministers of religion" shall be placed in class IV-D and that they are "exempt from training and service." The appeal board affirmed the decision of the local board, and the local board thereafter served notice upon Boeff to report at the federal camp at Colorado Springs under Amendment No. 72 to the regulations of the Selective Service Act. This amendment provides that conscientious objectors shall be placed in class IV-E and shall be "assigned to work of national importance under civilian direction." Boeff ignored the notice, was arrested, indicted, and tried. The trial judge permitted defendant to introduce evidence supporting his claim that he was a "regular and ordained minister," and instructed the jury that if they found from the evidence that defendant was a regular and ordained minister that he should be acquitted. The jury returned a verdict of guilty.

It will be noticed that in effect defendant was permitted to take a judicial appeal from the decision of the local board by his plea of not guilty.

In a recent article upon this question[3] it was suggested that "on

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[1]United States v. Irwin Paul Boeff, U. S. Dist. Ct. for the Dist. of Colo., No. 9487.

[2]50 U. S. C. §§301-318.

[3]Bell, *Selective Service and the Courts* (1942) 28 A. B. A. J. 164.

principle, it would seem that the defendant should be permitted to offer as a defense the same questions that he could present in a *habeas corpus* proceeding, that is, * * * whether there was a fair hearing or whether the action of the board was arbitrary or unlawful."

Boeff made claim that his board had acted arbitrarily but the oral instruction of the court (if reported accurately to the writer) went farther and permitted the jury to review upon its merits the finding of fact made by the board.

Neither the Selective Service Act of 1940 nor the regulations issued thereunder expressly provide for judicial review of the acts and decisions of local boards.[4] In addition, the act provides that decisions of local boards "with respect to inclusion, or exemption or deferment from, training and service" shall be final except where the regulations issued by the President authorize an appeal.[5] The Selective Service Act of 1917 likewise made the decision of the appeal board final. Under both laws, however, registrants have been permitted relief in the courts under certain circumstances.[6] Of course, the registrant must first exhaust his administrative remedies.[7]

In the *Boeff* case there could be no appeal to the President from the decision of the appeal board since such appeal may be made on grounds of dependency only.[8]

It has been suggested that *habeas corpus* after induction is the only appropriate court remedy.[9]

In a recent review of the decisions[10] it is said:

> "The courts state that they will restrict any officer presuming to act under a statute to the authority given him by that statute,

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[4]Petition of Soberman, 37 F. Supp. 522 (E. D. N. Y. 1941); *Ex parte* Platt, 253 Fed. 413 (E. D. N. Y. 1918).

[5]50 F. C. A. Appendix 5, §10 (a) (2) (Supp. 1941).

[6]Application of Greenberg, 39 F. Supp. 13 (D. N. J. 1941); Arbitman v. Woodside, 258 Fed. 441 (C. C. A. 4th, 1919); *Ex parte* Beck, 245 Fed. 967 (D. Mont. 1917).

[7]United States *ex rel.* Cubyluck v. Bell, 248 Fed. 995 (E. D. N. Y. 1917); United States *ex rel.* Ursitti v. Baird, 39 F. Supp. 872 (E. D. N. Y. 1941).

[8]3 Selective Serv. Reg. §28, Par. 379 (1940).

[9]Dick v. Tevlin, 37 Fed. Supp. 836 (S. D. N. Y. 1941); Petition of Soberman, *supra* note 4; United States *ex rel.* Filomio v. Powell, 38 Fed. Supp. 183 (D. N. J. 1941).

[10]*Judicial Review of Classification under the Selective Service Act* (1942) 20 TEX. L. REV. 371, summarized in 8 CURRENT LEGAL THOUGHT 295.

and will issue a writ of *habeas corpus* to prevent wrongful detention by him when he has exceeded his authority. Under this general rule, the courts in the conscription cases have limited their decisions to a determination whether there has been a full and fair hearing accorded the registrant and whether there is evidence to support the board's decision."[11]

In the *Boeff* case the defendant employed a writ of *habeas corpus* to challenge the manner in which the local board handled his classification. The court dismissed the writ but permitted the jury to pass upon the chief points raised thereby, as has been stated.

The *Greenberg* case[12] held that where the evidence showed that where defendant's wife had no independent income and that defendant's induction would force her to leave their rented house and return to her parents that the local board and the board of appeals acted arbitrarily in putting defendant in class I-A. It is submitted that this decision, too, amounted virtually to a judicial review of a finding of fact made by the administrative board. The district court for the eastern district of New York held that such findings were final and that the courts must accept the decision of the local board where any evidence to support its finding was presented to it.[13] Unless defendant has not been afforded a full and fair hearing or discretion has been abused, courts will not disturb the board's decision.[14]

Certiorari has been held to be an inappropriate remedy to review the action of draft boards.[15]

The remedy of injunction has also been refused in cases of this sort.[16]

In Oregon a registrant sought a declaratory judgment freeing him from duty to register. An injunction restraining prosecution for failure to register was prayed. The injunction was denied.[17]

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[11]Shimola v. Local Board, 40 F. Supp. 808 (N. D. Ohio 1941); United States *ex rel.* Errichetti v. Baird, 39 F. Supp. 388 (E. D. N. Y. 1941).

[12]*Supra* note 6.

[13]United States *ex rel.* Errichetti v. Baird, *supra* note 11.

[14]United States *ex rel.* Broker v. Baird, 39 F. Supp. 392 (E. D. N. Y. 1941).

[15]*In re* Kitzerow, 252 Fed. 865 (E. D. Wis. 1918); United States *ex rel.* Roman v. Rauch, 253 Fed. 814 (S. D. N. Y. 1918); Shimola v. Local Board, *supra* note 11.

[16]Angelus v. Sullivan, 246 Fed. 54 (C. C. A. 2d, 1917); Bonifaci v. Thompson, 252 F. 878 (W. D. Wash. 1917).

[17]Stone v. Christensen, 36 F. Supp. 739 (D. Ore. 1940).

It is believed that in the ordinary case courts will always permit registrants to show that local boards were biased, prejudiced, acted arbitrarily, or that their findings were supported by no competent evidence. These questions may be presented by a writ of *habeas corpus* or upon a plea of not guilty. The registrant should not be allowed to have court review of a finding of fact made by the local board upon conflicting evidence, however.

The *Boeff* case, and the numerous cases that will soon be before the courts involving Jehovah's Witnesses, present complications not present in the ordinary case. The selective service regulations[18] define a "regular minister of religion" as "a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member without having been formally ordained as a minister of religion; and who is recognized by such church, sect or organization as a minister." The regulations define a "duly ordained minister" as "a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church * * * to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties."

In the *Boeff* case defendant claimed that he was "ordained by God" and that he was a "regular minister" who preached from house to house and person to person.

On June 12, 1941, General Hershey classified certain groups of "ministers" among Jehovah's Witnesses as "regular" practitioners and vested local boards with wide discretion in individual cases. This will unquestionably result in diverse rulings on somewhat similar fact situations by different boards, and will result in a number of court cases. Depending upon a question of definition, courts may well be somewhat liberal, as was the court in the *Boeff* case, in permitting evidence to go before the jury relative to the nature of the activities of a given defendant in cases of this sort.

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[18] 10-622.44.