Systematic Exclusion of Negroes from Selective Service Boards: Some Proposals for Reform

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Civil Rights and Discrimination Commons, Law and Race Commons, and the Military, War, and Peace Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol67/iss4/5

This Response or Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
COMMENTS

Systematic Exclusion of Negroes from Selective Service Boards: Some Proposals for Reform

I. INTRODUCTION

A. Operation of the Selective Service System

The concept of the local draft board is based on the theory that selection of persons for compulsory military service can be accomplished most fairly by small groups of neighbors of those who are to serve. As the National Office of the Selective Service recently stated: “Because of its comparatively long association with a registrant and knowledge of what he has done, the local board is relatively well qualified to evaluate his ability to perform.” A corollary to this basic theory is that a more flexible selection process evincing greater sensitivity to the problems of individual registrants can be achieved by granting local boards some discretion in determining whether particular registrants are entitled to permanent exemptions or temporary deferments instead of being inducted immediately.

Although the premises which must support this model of the ideal system of military selection may have been valid years ago, their contemporary validity is dubious. Today, the idea of a personalized local draft board is generally an anachronism, except in a diminishing number of very small rural communities. The contemporary local board typically functions in a large, impersonal urban or suburban environment, and this all but precludes any personal contact between the registrant and those who are empowered to select him for service. Moreover, the National Advisory Commission on Selective Service (the Marshall Commission) has severely criticized the role which discretion plays in the administration of the system:

The present Selective Service System is based on a rule of discre-

2. MARSHALL COMMISSION REPORT 20.
3. MARSHALL COMMISSION REPORT 20.
4. The first statute establishing a system of civilian boards was passed in 1917. Act of May 18, 1917, ch. 15, 40 Stat. 76.
5. MARSHALL COMMISSION REPORT 20.
tion, applied locally by more than 4,000 different groups following
guidelines that are general in nature. Its lack of uniformity is a
consequence of a deliberate policy of decentralization, which is con­sidered one of its strengths.

The Commission sees the overriding need to be precisely the
opposite: To achieve the greatest possible degree of equity demands
. . . a system based on impartial standards uniformly applied
throughout the nation. The Commission proposes, in short, to
introduce a new controlling concept into the Selective Service Sys­
tem: the rule of law, to replace the rule of discretion.9

Yet, despite its impracticality and theoretical imperfections, the
local board remains the central fixture in the immense bureaucracy
responsible for conscripting young Americans. As a result, the oper­
ation of the Selective Service System (SSS) is plagued by inequities.7
In particular, the Negro American has been required to shoulder a
greater share of the burden of our national defense than his Cauca­
sian counterpart.8 Such a result is not surprising; any system which
gives small groups of local citizens a relatively free rein in determin­ing which of their “neighbors” are eligible to be inducted into the
armed forces runs the risk of institutionalizing community prejudices along with community understanding. When certain minority
groups are excluded from such a “personalized” selection process,
the exercise of discretion can easily degenerate into the practice of
discrimination.

B. Clay v. United States

The problem of racial discrimination in the operation of the
Selective Service System confronted the Court of Appeals for the
Fifth Circuit recently in Clay v. United States.8 Cassius Marcellus

---

6. Id. at 31.
7. The Marshall Commission found that the exercise of discretion by local boards
across the country has led to unjustifiable variability in the granting of deferments
and exemptions to registrants. MARSHALL COMMISSION REPORT 26-28. See generally
1 Layton & Fine, The Draft and Exhaustion of Administrative Remedies, 56 Geo.
L.J. 315 (1987); Comment, Judicial Review of Selective Service Action: A Need
for Reform, 56 CALIF. L. REV. 448 (1968); Comment, Fairness and Due Process Under
the Selective Service System, 114 U. Pa. L. Rev. 1014 (1966); Note, The Selective Service,
76 YALE L.J. 160 (1966). See also notes 69, 70 infra.
8. MARSHALL COMMISSION REPORT 22-26; see notes 85-90 infra and accompanying text.
9. 397 F.2d 901 (5th Cir. 1968), a petition for cert. filed, 97 U.S.L.W. 5036. (U.S.
July 18, 1968). As this Comment was in the final stages of preparation, the Supreme
Court granted certiorari and remanded Clay to the district court for determination
of whether the Government employed illegal electronic eavesdropping in securing the
conviction and of whether Clay has standing under the fourth amendment to object
to the use of the information so obtained. N.Y. Times, March 25, 1969, § 1, at 26,
col. 2. Although Clay is no longer “before the Court” (as indicated elsewhere in this
Comment), it could reach the court again for consideration of the systematic exclusion
issue; moreover, a number of other cases in the Court of Appeals present the issue.
See note 12 infra.
Clay, the Negro defendant in a criminal prosecution for refusal to submit to induction into the Armed Forces of the United States in violation of the Selective Service Act, claimed that his fifth amendment right to due process of law had been violated by the effect of "systematic exclusion" of Negroes from membership on his local and state draft boards. Clay was reclassified 1-A by his Louisville,

10. Clay's name is now Muhammed Ali, but he has been prosecuted under the name he bore when he first registered with the SSS.


12. Similar contentions have been made in other cases recently decided. See, e.g., Haven v. United States, 37 U.S.L.W. 2285 (9th Cir. Nov. 26, 1968) (relief denied for reasons similar to those enunciated in the Clay case); Sellers v. United States, No. 25,108 (5th Cir. 1968) (pending) (followed Clay case); cf. Du Vernay v. United States, 394 F.2d 979 (6th Cir. 1968), cert. granted, 37 U.S.L.W. 3209 (Dec. 10, 1968) (question of systematic exclusion of Negroes from draft boards raised but case resolved on grounds of nonexhaustion of administrative remedies).

There are numerous other cases based on the systematic exclusion argument pending or recently decided. In the Court of Appeals for the Fifth Circuit, see, e.g., McNamara, 398 F.2d 893 (1968); Battiste v. United States, No. 25,075; Kemp v. United States, No. 25,704; Simmons v. United States, No. 25,571; Nelloms v. United States, 399 F.2d 295 (1968). In the Court of Appeals for the Sixth Circuit, see, e.g., United States v. Brooks, No. 18,679. There are also cases pending in the Second and Ninth Circuits involving the systematic exclusion argument. See Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit at 8 n.4, Clay v. United States, 397 F.2d 901 (1968).

Prior to any decision in Sellers v. United States, supra, appellant Sellers filed an application for bail pending the disposition of his appeal. Justice Black concluded that Sellers was entitled to bail. One of the criteria for determining whether a defendant is entitled to bail pending appeal is whether his appeal is frivolous or taken for delay. On this point, Justice Black stated:

Applicant contends that members of his race have been systematically ... excluded from Selective Service boards in his State. I am unable to say that a challenge to draft boards of this kind would be dismissed by this Court as frivolous, and ... I must assume that the appeal to the court below is not a frivolous one.

Sellers v. United States, 21 L. Ed. 2d 64, 67 (1968).

13. Selective Service Regulations provide for classification of registrants into eighteen classes. 32 C.F.R. § 1622.2 (1968). The classifications in order of priority are 1-A, registrant is available for military service; 1-A-O, registrant is conscientious objector available for noncombatant military service only; 1-O, registrant is conscientious objector available for civilian work; 1-S, registrant is high school or college student who has received notice to report for induction but is deferred until the end of the academic year; 1-Y, registrant is available for military service, but qualified for service only in event of war or national emergency; 2-A, registrant is deferred because of civilian occupation; 2-C, registrant is deferred because of agricultural occupation; 2-S, registrant is deferred as active student; 1-D, registrant is exempt as member of reserve component or student taking military training; 3-A, registrant is deferred as father or by reason of extreme hardship for dependents; 4-B, registrant is a public official deferred by law; 4-C, registrant is an alien; 4-D, registrant is exempt as a minister of religion or a divinity student; 4-F, registrant is not qualified for military service on physical, mental, or moral grounds; 4-A, registrant is exempt as one who has completed service or as sole surviving son of person killed in military service; 5-A, registrant is over the age of liability for military service; 1-W, registrant is conscientious objector performing civilian work; 1-C, registrant is exempt as member of the armed forces of the United States, the Coast and Geodetic Survey, or the Public Health Service. Persons deferred in the national interest in categories 2-A, 2-C, and 2-S are liable for service until age thirty-five. Other persons are liable for service only until age twenty. All deferments are made on an individual basis [50 U.S.C. App. § 456(h) (Supp. III, 1965-1967)].
Kentucky, draft board in February 1966. His appeals to the Texas and Kentucky state appeal boards, based on his alleged "conscientious-objector" and "ministerial" status, were unsuccessful. None of these boards had a Negro member despite the substantial number of Negroes residing in both states. In February 1967, Clay's classification was appealed to the National Selective Service Appeal Board (presidential board) by the National Director of Selective Service, who is empowered to institute such an appeal on behalf of a registrant when he deems it in the national interest or necessary to prevent injustice. The presidential board voted unanimously to classify Clay 1-A. On April 28, 1967, Clay reported to the induction center but refused to submit to induction. He was indicted, tried, and convicted by the Federal District Court for the Southern District of Texas for refusing to submit to induction. On appeal, the

14. Local Board No. 47.
15. 397 F.2d at 905. For a lengthy chronological account of the events in Clay's case, see 397 F.2d at 905-08.
16. On March 28, 1966, Clay appealed his 1-A classification to the Kentucky Appeal Board. On January 10, 1967, the Kentucky Appeal Board denied the requested 1-O conscientious objector classification. On January 12, Local Board No. 47, Louisville, Kentucky, reviewed Clay's complete Selective Service file and unanimously agreed that he was not entitled to a 4-D ministerial exemption. On January 19, 1967, Local Board No. 47 again classified Clay 1-A.
17. The appeal board for the southern district of Texas classified Clay 1-A and returned his file to Kentucky on February 20, 1967, after rejecting both his conscientious objector claim and his claim for ministerial exemption.
18. See notes 47-51 infra and accompanying text.
19. This board is authorized by 50 U.S.C. App. § 460(b)(3) (Supp. III, 1965-1967) which reads: "The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title ... and the determination of the President shall be final."
20. 32 C.F.R. § 1627.1 (1968). Clay could not file such an appeal himself because the regulations [32 C.F.R. § 1627.3 (1968)] require the dissent of at least one member of the state appeal board from the classification as a prerequisite to a registrant's right to appeal to the Presidential Appeal Board.
21. 397 F.2d at 906.
22. Clay refused to submit to induction on the grounds of his religious beliefs respecting the Nation of Islam religion.
23. United States v. Clay, No. Cr. 67-H-94 (June 21, 1967). Clay was sentenced to the maximum penalty of five years imprisonment and a fine of $10,000 for knowingly and willfully refusing to submit to induction into the armed forces of the United States in violation of 50 U.S.C. § 462(a) (Supp. III, 1965-1967): Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, ... who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, ... shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000 or by both such fine and imprisonment ....
Fifth Circuit held that the I-A status assigned to Clay was a valid classification by the Selective Service System, and that his refusal to submit to induction had therefore been a criminal violation of the Selective Service Act.\textsuperscript{24}

The Fifth Circuit's decision on Clay's systematic exclusion contention was based essentially on three grounds. While the court did "not justify the failure to include substantial numbers of Negroes on such boards,"\textsuperscript{25} it concluded that such failure did not violate any rights secured to Negro registrants and thus that it did not invalidate their induction orders.\textsuperscript{26} The court further stated that, even assuming a right to classification by a draft board from which Negroes had not been systematically excluded, Clay's classification and induction was de facto valid and binding.\textsuperscript{27} It analogized the action of his Selective Service boards to the acts of malapportioned legislatures: such acts are valid despite their origin.\textsuperscript{28} Finally, the court noted that "the Appeal Board considers matters of classification de novo and its classification is one of the first instance, not a mere affirmation or reversal of the Local Board," and concluded that "any . . . prejudice on the local level is cured by a fair consideration on appeal."\textsuperscript{29} Thus, the fact that there was one Negro on the three-man

\textsuperscript{24} 397 F.2d at 905. The Court stated:
There has been no administrative process which Clay (Ali) has not sought within the Selective Service System, its local and appeal boards, the Presidential Appeal Board, and finally the federal courts, in an unsuccessful attempt to evade and escape from military service of his country. Being entirely satisfied that he has been fairly accorded due process of law, and without discrimination, we affirm his conviction.

\textsuperscript{25} 397 F.2d at 911.

\textsuperscript{26} 397 F.2d at 911. It is noteworthy that the Fifth Circuit held that a registrant has no right to a \textit{racially proportioned} draft board. 397 F.2d at 911. Clay, however, did not claim the right to \textit{proportional} racial representation on his draft board. He did claim the right to a draft board from which members of his race had not been \textit{systematically excluded}. Petitioners Brief for Certiorari at 8 n.4, Clay v. United States, \textit{petition for cert. filed}, 37 U.S.L.W. 3036 (U.S. July 5, 1968). In cases dealing with systematic exclusion of racial minorities from juries, the Supreme Court has drawn the distinction between systematic exclusion and proportional representation. In \textit{Hernandez v. Texas}, 347 U.S. 475, 482 (1954) the Supreme Court stated:

to say that [finding systematic exclusion unconstitutional] revives the rejected contention that the Fourteenth Amendment requires proportional representation of all the component ethnic groups of the community on every jury ignores the facts. The petitioner did not seek proportional representation. . . . His only claim is the right to be indicted and tried by juries from which members of his class are not systematically excluded—juries selected from among all qualified persons regardless of national origin or descent. To this much he is entitled by the Constitution. \textit{See also Atkins v. Texas}, 325 U.S. 398, 403 (1945); \textit{United States ex. rel. Seals v. Wiman}, 304 F.2d 53, 66-67 (5th Cir. 1962). Thus the Fifth Circuit seems to have misconstrued Clay's argument by failing to distinguish between an objection to systematic exclusion and a demand for proportionate racial representation.

\textsuperscript{27} 397 F.2d at 911, 923-24.

\textsuperscript{28} \textit{See Mann v. Davis}, 238 F. Supp. 458 (E.D. Va. 1964); \textit{aff'd}, 379 U.S. 694 (1965) (Virginia General Assembly directed to reapportion itself by 1966 but permitted to continue to enact statutes after passage of reapportionment act but before actual reapportionment).

\textsuperscript{29} 397 F.2d at 912-13, quoting \textit{DeRamer v. United States}, 340 F.2d 712, 719 (8th Cir. 1965).
presidential appeal board which heard Clay's case was deemed to
cure any possible illegality arising from systematic exclusion of Ne­
groes from the lower boards.30

If Clay had shown that there was actual bias31 against him in
the proceedings to determine his Selective Service status, he could
have invoked the rule that arbitrary or capricious treatment of a
registrant violates due process and renders any classification or order
concerning that registrant invalid. The draft cases expressing this
rule require the registrant to prove actual bias and resulting in­
jury.32 But Clay did not allege that any of his local or state appeal
boards had acted in an arbitrary, capricious, or prejudicial manner
by exhibiting actual bias during the classification and induction pro­
cess,33 rather, he asserted that bias could be implied because there
was systematic exclusion of Negroes from the draft boards which
considered his case.34 To evaluate such a contention by a reclassified
'Negro registrant requires a preliminary inquiry to determine whether
Negroes have in fact been systematically excluded from those boards
which considered his classification.

II. THE FACTUAL BASIS FOR A CLAIM OF SYSTEMATIC EXCLU­
SION OF NEGROES FROM SELECTIVE SERVICE BOARDS

The concept of "systematic exclusion" has evolved primarily in
cases involving alleged racial discrimination in the selection of grand
and petit juries. Basically, the concept involves a presumption that
a great disparity between the percentages of Negroes in the general
population and on the jury venire furnishes sufficient evidence of
the systematic exclusion of Negroes from jury service.35 The exclu­

30. 397 F.2d at 913.
32. See, e.g., Swazyk v. United States, 156 F.2d 17 (1st Cir.), cert. denied, 329 U.S
726 (1946).
33. 397 F.2d at 913. If Clay had shown that there was actual bias against him in
the proceedings to determine his Selective Service status, he could
have invoked the rule that arbitrary or capricious treatment of a
registrant violates due process and renders any classification or order
concerning that registrant invalid. The draft cases expressing this
rule require the registrant to prove actual bias and resulting in­
jury. But Clay did not allege that any of his local or state appeal
boards had acted in an arbitrary, capricious, or prejudicial manner
by exhibiting actual bias during the classification and induction pro­
cess, rather, he asserted that bias could be implied because there
was systematic exclusion of Negroes from the draft boards which
considered his case. To evaluate such a contention by a reclassified
Negro registrant requires a preliminary inquiry to determine whether
Negroes have in fact been systematically excluded from those boards
which considered his classification.

II. THE FACTUAL BASIS FOR A CLAIM OF SYSTEMATIC EXCLU­
SION OF NEGROES FROM SELECTIVE SERVICE BOARDS

The concept of "systematic exclusion" has evolved primarily in
cases involving alleged racial discrimination in the selection of grand
and petit juries. Basically, the concept involves a presumption that
a great disparity between the percentages of Negroes in the general
population and on the jury venire furnishes sufficient evidence of
the systematic exclusion of Negroes from jury service. The exclu­

30. 397 F.2d at 913.
32. See, e.g., Swazyk v. United States, 156 F.2d 17 (1st Cir.), cert. denied, 329 U.S
726 (1946).
33. 397 F.2d at 913. If Clay had shown that there was actual bias against him in
the proceedings to determine his Selective Service status, he could
have invoked the rule that arbitrary or capricious treatment of a
registrant violates due process and renders any classification or order
concerning that registrant invalid. The draft cases expressing this
rule require the registrant to prove actual bias and resulting in­
jury. But Clay did not allege that any of his local or state appeal
boards had acted in an arbitrary, capricious, or prejudicial manner
by exhibiting actual bias during the classification and induction pro­
cess, rather, he asserted that bias could be implied because there
was systematic exclusion of Negroes from the draft boards which
considered his case. To evaluate such a contention by a reclassified
Negro registrant requires a preliminary inquiry to determine whether
Negroes have in fact been systematically excluded from those boards
which considered his classification.

II. THE FACTUAL BASIS FOR A CLAIM OF SYSTEMATIC EXCLU­
SION OF NEGROES FROM SELECTIVE SERVICE BOARDS

The concept of "systematic exclusion" has evolved primarily in
cases involving alleged racial discrimination in the selection of grand
and petit juries. Basically, the concept involves a presumption that
a great disparity between the percentages of Negroes in the general
population and on the jury venire furnishes sufficient evidence of
the systematic exclusion of Negroes from jury service. The exclu­

30. 397 F.2d at 913.
32. See, e.g., Swazyk v. United States, 156 F.2d 17 (1st Cir.), cert. denied, 329 U.S
726 (1946).
33. 397 F.2d at 913. If Clay had shown that there was actual bias against him in
the proceedings to determine his Selective Service status, he could
have invoked the rule that arbitrary or capricious treatment of a
registrant violates due process and renders any classification or order
concerning that registrant invalid. The draft cases expressing this
rule require the registrant to prove actual bias and resulting in­
jury. But Clay did not allege that any of his local or state appeal
boards had acted in an arbitrary, capricious, or prejudicial manner
by exhibiting actual bias during the classification and induction pro­
cess, rather, he asserted that bias could be implied because there
was systematic exclusion of Negroes from the draft boards which
considered his case. To evaluate such a contention by a reclassified
Negro registrant requires a preliminary inquiry to determine whether
Negroes have in fact been systematically excluded from those boards
which considered his classification.

II. THE FACTUAL BASIS FOR A CLAIM OF SYSTEMATIC EXCLU­
SION OF NEGROES FROM SELECTIVE SERVICE BOARDS

The concept of "systematic exclusion" has evolved primarily in
cases involving alleged racial discrimination in the selection of grand
and petit juries. Basically, the concept involves a presumption that
a great disparity between the percentages of Negroes in the general
population and on the jury venire furnishes sufficient evidence of
the systematic exclusion of Negroes from jury service. The exclu­

30. 397 F.2d at 913.
32. See, e.g., Swazyk v. United States, 156 F.2d 17 (1st Cir.), cert. denied, 329 U.S
726 (1946).
33. 397 F.2d at 913. If Clay had shown that there was actual bias against him in
the proceedings to determine his Selective Service status, he could
have invoked the rule that arbitrary or capricious treatment of a
registrant violates due process and renders any classification or order
concerning that registrant invalid. The draft cases expressing this
rule require the registrant to prove actual bias and resulting in­
jury. But Clay did not allege that any of his local or state appeal
boards had acted in an arbitrary, capricious, or prejudicial manner
by exhibiting actual bias during the classification and induction pro­
cess, rather, he asserted that bias could be implied because there
was systematic exclusion of Negroes from the draft boards which
considered his case. To evaluate such a contention by a reclassified
Negro registrant requires a preliminary inquiry to determine whether
Negroes have in fact been systematically excluded from those boards
which considered his classification.

II. THE FACTUAL BASIS FOR A CLAIM OF SYSTEMATIC EXCLU­
SION OF NEGROES FROM SELECTIVE SERVICE BOARDS

The concept of "systematic exclusion" has evolved primarily in
cases involving alleged racial discrimination in the selection of grand
and petit juries. Basically, the concept involves a presumption that
a great disparity between the percentages of Negroes in the general
population and on the jury venire furnishes sufficient evidence of
the systematic exclusion of Negroes from jury service. The exclu­

30. 397 F.2d at 913.
32. See, e.g., Swazyk v. United States, 156 F.2d 17 (1st Cir.), cert. denied, 329 U.S
726 (1946).
33. 397 F.2d at 913. If Clay had shown that there was actual bias against him in
the proceedings to determine his Selective Service status, he could
have invoked the rule that arbitrary or capricious treatment of a
registrant violates due process and renders any classification or order
concerning that registrant invalid. The draft cases expressing this
rule require the registrant to prove actual bias and resulting in­
jury. But Clay did not allege that any of his local or state appeal
boards had acted in an arbitrary, capricious, or prejudicial manner
by exhibiting actual bias during the classification and induction pro­
cess, rather, he asserted that bias could be implied because there
was systematic exclusion of Negroes from the draft boards which
considered his case. To evaluate such a contention by a reclassified
Negro registrant requires a preliminary inquiry to determine whether
Negroes have in fact been systematically excluded from those boards
which considered his classification.

II. THE FACTUAL BASIS FOR A CLAIM OF SYSTEMATIC EXCLU­
SION OF NEGROES FROM SELECTIVE SERVICE BOARDS

The concept of "systematic exclusion" has evolved primarily in
cases involving alleged racial discrimination in the selection of grand
and petit juries. Basically, the concept involves a presumption that
a great disparity between the percentages of Negroes in the general
population and on the jury venire furnishes sufficient evidence of
the systematic exclusion of Negroes from jury service. The exclu­

30. 397 F.2d at 913.
32. See, e.g., Swazyk v. United States, 156 F.2d 17 (1st Cir.), cert. denied, 329 U.S
726 (1946).
33. 397 F.2d at 913. If Clay had shown that there was actual bias against him in
the proceedings to determine his Selective Service status, he could
have invoked the rule that arbitrary or capricious treatment of a
registrant violates due process and renders any classification or order
concerning that registrant invalid. The draft cases expressing this
rule require the registrant to prove actual bias and resulting in­
jury. But Clay did not allege that any of his local or state appeal
boards had acted in an arbitrary, capricious, or prejudicial manner
by exhibiting actual bias during the classification and induction pro­
cess, rather, he asserted that bias could be implied because there
was systematic exclusion of Negroes from the draft boards which
considered his case. To evaluate such a contention by a reclassified
Negro registrant requires a preliminary inquiry to determine whether
Negroes have in fact been systematically excluded from those boards
which considered his classification.

II. THE FACTUAL BASIS FOR A CLAIM OF SYSTEMATIC EXCLU­
SION OF NEGROES FROM SELECTIVE SERVICE BOARDS

The concept of "systematic exclusion" has evolved primarily in
cases involving alleged racial discrimination in the selection of grand
and petit juries. Basically, the concept involves a presumption that
a great disparity between the percentages of Negroes in the general
population and on the jury venire furnishes sufficient evidence of
the systematic exclusion of Negroes from jury service. The exclu­
sion need not be deliberate or motivated by malice in order to be deemed "systematic."

There is no reason why a similar disparity in the context of the Selective Service System should not give rise to the same conclusion of systematic exclusion. Draft board members, like jurors, need satisfy only minimal standards in order to qualify for service; thus, no requirements of greater than minimum competence can justify racial disproportion on draft boards. As in the jury cases, when there are variations in Labat v. Bennett, 365 F.2d 698, 712 (5th Cir. 1966), cert. denied, 386 U.S. 991 (1967) in describing the degree of racial disproportion necessary for a finding of systematic exclusion. See also Brown v. Allen, 344 U.S. 443, 471 (1953); Scott v. Walker, 358 F.2d 561, 571 (6th Cir. 1966); United States ex rel. Seals v. Wiman, 304 F.2d 55 (5th Cir. 1965) (31.7% of population non-Caucasian, less than 2% Negroes on jury rolls); Mitchell v. Johnson, 250 F. Supp. 117 (M.D. Ala. 1966) (population of county was 82% Negro and the jury list was 35.7% Negro). But see Swain v. Alabama, 380 U.S. 202, 206 (1965), in which 26% of those eligible for jury service were Negroes and panels averaged 10% to 15% Negro over the previous years. The Court held: "[w]e do not consider the evidence in this case to make out a prima facie case of invidious discrimination under the Fourteenth Amendment."

36. See United States ex rel. Seals v. Wiman, 304 F.2d 55, 65:
Many of the cases speak in terms of "purpose to discriminate" . . . "intentional exclusion" and "purposeful systematic non-inclusion because of color" . . . . Those same cases, however, and others . . . . show that it is not necessary to go so far as to establish ill-will, evil-motive, or absence of good faith, but that objective results are largely to be relied upon in the . . . test (for systematic exclusion).
38. As in the case of jury selection, an application of the rule would not require that racial exclusion in the composition of draft boards be the product of deliberate prejudice on the part of the governor of the state when he recommends individuals to the President for appointment. See note 36 supra and accompanying text. Choice of jurors and, draft board members, entails discretion in the process of choosing from among available citizens. Discussing the jury problem, Professor Kuhn states that "many legitimate non-racial factors can produce racial disproportion [on juries]. The 'prima facie rule' simply requires the state to demonstrate that non-racial factors did in fact produce the disproportion, once chance has been eliminated as the source of disparity." Kuhn, Jury Discrimination: The Next Phase, 41 S. CAL. L. Rev. 235, 256 (1968). (For a comprehensive account of cases in which statistical disparity was held to make out a prima facie case of systematic exclusion which was not rebutted by the state, see id. at 254, n.6.) Of course, the qualifications for jury service then become significant. And, as the Supreme Court stated in Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946):
Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.
Likewise, it would be difficult for governors to rebut the presumption of systematic exclusion from draft boards if eligibility to serve on a board turned on the satisfaction of relatively insignificant criteria. Competency is a criterion that is equally important in the recommendation of persons for appointment to draft boards as it is in the selection of jurors. However, standards of competency must be viewed in light of the statutory provisions establishing the qualifications for draft board membership; these are set forth in 50 U.S.C. App. § 460(b)(5) (Supp. III, 1965-1967). This statute provides
many Negroes in the community and relatively few, if any, serving on the decision-making panel, the laws of chance preclude, for practical purposes, the possibility that the disparity is merely fortuitous.\footnote{Cf. Hernandez v. Texas, 347 U.S. 475, 482 (1954), in which the Court stated: Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury . . . . But it taxes our credulity to say that mere chance resulted in there being no members of this class among the over six thousand jurors called in the past 25 years. The result bespeaks discrimination, whether or not it was a conscious design on the part of any individual jury commissioner.\textit{See also} Smith v. Texas, 311 U.S. 128, 131 (1940): where 20% of the population of the County was Negro, but very few served on juries, the Court commented that "[c]hance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands who undoubtedly possessed the legal qualifications for jury service." Of course, the fact that juries exist only for the duration of a single trial may make the statistical analysis of systematic exclusion more certain in jury cases than in the case of draft boards: statistical "aberrations" on a draft board tend to last much longer.}

In determining whether or not systematic exclusion of jurors is prevalent in a particular area, the courts have perforce referred to statistical data.\footnote{The courts have not yet adopted a purely mathematical approach to the determination of whether or not there has been systematic exclusion in the selection of jurors. Rather, they have preferred to use statistics to augment their "intuitive . . . understanding of the laws of chance." Kuhn, \textit{Jury Discrimination: The Next Phase}, 41 S. Cal. L. Rev. 235, 255 (1968). However, statistical theory does supply a mathematical means for determining the likelihood of chance being responsible for the absence of Negroes on jury rolls. See Finkelstein, \textit{The Application of Statistical Decision Theory to the Jury Discrimination Cases}, 80 Harv. L. Rev. 338 (1966). In Whitus v. Georgia, 385 U.S. 545, 552 n.2 (1967), the Supreme Court stated that while statistical theory was unnecessary to the disposition of the case, it was "interesting to note the 'probability' involved" with respect to the disproportionate ratio of Negroes in the population to Negroes on the jury venire. Either method—an intuitive approach augmented by statistical data, or a purely statistical approach—would be as useful in determining whether a lack of Negroes on draft boards is the result of chance or exclusion as it is in jury discrimination cases. The Fifth Circuit, which decided Clay, \textit{``has frequently relied on percentages in}}

that the President shall appoint three or more members to each local board upon recommendation of the governors of the states. Local board members may serve for a maximum tenure of twenty-five years, but not after attaining the age of seventy-five. Also, no citizen is to be denied membership on any board on account of sex.\footnote{32 C.F.R. § 1604.52(c) (1968) requires that: \textit{The members of local boards shall be citizens of the United States who shall be residents of a county in which their local board has jurisdiction and who shall also, if at all practicable, be residents of the area in which their local board has jurisdiction. No member of a local board shall be a member of the armed forces or any reserve component thereof. Members of local boards shall be at least 30 years of age.} \textit{32 C.F.R. § 1604.22 (1968) requires that: For each appeal board area an appeal board, normally of five members, shall be appointed by the President upon recommendation of the Governor. The members shall be citizens of the United States . . . . they shall be residents of the area in which their board is appointed; and they shall be at least 30 years of age. . . . The appeal board should be a composite board, representative of the activities of its 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. When recommending potential draft board members, governors must exercise sound judgment in assessing their competence. Nevertheless, in view of the minimal eligibility standards established by the federal statute and regulations, it cannot reasonably be advanced that no members of a substantial minority group are eligible or competent to serve.}}
that underrepresentation of Negroes pervades the SSS. The Fifth Circuit acknowledged this inequity in citing the 1967 Marshall Commission Report, which assimilated data from draft boards in every section of the United States.\(^{41}\) The Marshall Commission concluded that, nationwide, "members of the local boards are . . . almost exclusively white: a 96.3 per cent response to a Commission questionnaire in October 1966 indicates that only 1.3 per cent of the 16,632 local members are Negro . . . ."\(^{42}\) According to the Marshall Commission, only in the District of Columbia\(^ {43}\) and Delaware\(^ {44}\) were substantial numbers of Negroes appointed to local boards; in twenty-three states there were no Negroes on any draft boards.\(^ {45}\)

\(^{41}\) 397 F.2d at 909. The Marshall Commission undertook extensive studies of all aspects of the SSS. Included in the studies were inquiries submitted to each of the more than 4,000 local boards in the country, and to each of the ninety-seven state appeal boards existing at the time. MARSHALL COMMISSION REPORT 69.

\(^{42}\) MARSHALL COMMISSION REPORT 19. See also id. at 19, n.7: "Responses to a December 1965 telegraphic inquiry by the Selective Service System show 261 Negro members out of 17,123 local board members, or 1.5%." There has been some recent progress in bringing Negroes into greater participation in the Selective Service System. See Recent Decision, Challenge to the Selective Service System—The Right to Minority Representation on Draft Boards, 57 GEO. L.J. 189, 190, n.10 (1968): "As of Aug. 1968, there were 791 minority members out of 17,000. This represents an increase of over 280% in a two year period." See notes 42 and 52 infra and accompanying text.

The racially disproportionate character of board membership was evidenced in both metropolitan and nonmetropolitan areas. MARSHALL COMMISSION REPORT 75, table 1.6, "Ethnic status or race of local board members in metropolitan areas and nonmetropolitan areas":

<table>
<thead>
<tr>
<th>Ethnicity or race</th>
<th>Metropolitan</th>
<th>Non metropolitan</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>%</td>
</tr>
<tr>
<td>Negro</td>
<td>178</td>
<td>2.8</td>
</tr>
<tr>
<td>White or other</td>
<td>6,083</td>
<td>96.0</td>
</tr>
</tbody>
</table>

\(^{43}\) The District of Columbia had 80 Negro draft board members or 36.2% of the total board members. 53.8% of the population of the District of Columbia is Negro. MARSHALL COMMISSION REPORT 80, table 1.8.

\(^{44}\) Delaware had 26 Negro draft board members or 19.2% of the total. 18.6% of the population of Delaware is Negro. Id.

\(^{45}\) MARSHALL COMMISSION REPORT table 1.8, at 80-81. (By January 1969, the number of states without Negro local board members was eleven. Unpublished table provided by the SSS, on file with the Michigan Law Review.) Many states were characterized as having gross discrepancies between the percentage of Negroes on draft boards and in the general population: in Illinois 2.6% of board members were Negro; 10.3% of the population was Negro. In Kentucky 2% of board members were Negro; 7.1% of the population was Negro. In Maryland, 2.7% of board members were Negro; 16.7% of the population was Negro. In Michigan 2.0% of board members were Negro; 9.2% of
A compilation of more recent figures indicates that, although the national situation had improved somewhat by January 1, 1969, the percentage of Negro members on Selective Service boards is still low. Moreover, there are still many states where Negroes are seriously underrepresented on these boards. The figures, presented state-by-state, are on pages 766-67.

In Kentucky, one state in which Clay appealed his reclassification through the SSS, only 0.2 per cent of 641 local board members were Negro, although 7.1 per cent of the state's total population was Negro. In Texas, the other state in which he appealed, only 1.1 per cent of local board members were Negro, although 12.4 per cent of the total population was Negro. More specifically, while there were no Negroes on either of the local boards which considered Clay's classification, Negroes account for 12.8 per cent of the population of Jefferson County, site of Clay's local board in Kentucky, and for 19.3 per cent of the population of Harris County, site of his local Texas board. Similarly, there were no Negroes on either of the state appeal boards which considered his case, although Negroes comprise 7.1 per cent of the population of Kentucky and 12.4 per cent of the population of Texas.

Taken as a whole, these statistics would certainly support a conclusion that Negroes have been systematically excluded from serving in the SSS. On the facts of the Clay case itself, the statistical base for a finding of systematic exclusion is very strong.

46. As of January 1, 1969, there were 972 Negro board members out of a total of over 17,000, or approximately 5.7%. Telephone interview with Col. Dee Ingold, Asst. Director of the Natl. Selective Serv. Sys., Feb. 14, 1969.

47. 397 F.2d at 909. Of course, the figures cited in the Fifth Circuit's opinion are those of the Marshall Commission. Comparable figures supplied by the SSS, as of January 1, 1969, are presented in the table accompanying note 52 supra.

48. 397 F.2d at 909.

49. 397 F.2d at 909.

50. 397 F.2d at 909.

51. See note 45 supra.
TABLE²²

<table>
<thead>
<tr>
<th>State</th>
<th>No. of Local Board Members</th>
<th>Percentage of Negro Members</th>
<th>Negro Percentage of State Population</th>
<th>Difference Between Population and Board Percentages</th>
<th>Deviation from Neutrality As a Percentage of Possible Deviationb</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>344</td>
<td>1.2</td>
<td>59.0</td>
<td>28.8</td>
<td>95</td>
</tr>
<tr>
<td>Alaska</td>
<td>20</td>
<td>0</td>
<td>3.0</td>
<td>3.0</td>
<td>3</td>
</tr>
<tr>
<td>Arizona</td>
<td>100</td>
<td>2.0</td>
<td>3.3</td>
<td>1.3</td>
<td></td>
</tr>
<tr>
<td>Arkansas</td>
<td>312</td>
<td>18.1</td>
<td>21.8</td>
<td>8.7</td>
<td>40</td>
</tr>
<tr>
<td>California</td>
<td>576</td>
<td>11.6</td>
<td>5.6</td>
<td>-6.0</td>
<td>-108</td>
</tr>
<tr>
<td>Colorado</td>
<td>268</td>
<td>0.7</td>
<td>2.3</td>
<td>1.6</td>
<td></td>
</tr>
<tr>
<td>Connecticut</td>
<td>104</td>
<td>4.8</td>
<td>4.2</td>
<td>-0.6</td>
<td></td>
</tr>
<tr>
<td>Delaware</td>
<td>20</td>
<td>25.0</td>
<td>13.6</td>
<td>-11.4</td>
<td></td>
</tr>
<tr>
<td>Dist. of Columbia</td>
<td>64</td>
<td>57.8</td>
<td>53.9</td>
<td>-3.9</td>
<td></td>
</tr>
<tr>
<td>Florida</td>
<td>336</td>
<td>10.7</td>
<td>17.8</td>
<td>7.1</td>
<td>40</td>
</tr>
<tr>
<td>Georgia</td>
<td>656</td>
<td>3.2</td>
<td>28.5</td>
<td>25.3</td>
<td>89</td>
</tr>
<tr>
<td>Hawaii</td>
<td>52</td>
<td>0</td>
<td>0.8</td>
<td>0.8</td>
<td></td>
</tr>
<tr>
<td>Idaho</td>
<td>160</td>
<td>0</td>
<td>0.2</td>
<td>0.2</td>
<td></td>
</tr>
<tr>
<td>Illinois</td>
<td>668</td>
<td>7.3</td>
<td>10.5</td>
<td>3.0</td>
<td></td>
</tr>
<tr>
<td>Indiana</td>
<td>620</td>
<td>3.4</td>
<td>5.8</td>
<td>2.4</td>
<td>41</td>
</tr>
<tr>
<td>Iowa</td>
<td>416</td>
<td>1.4</td>
<td>0.9</td>
<td>-0.5</td>
<td></td>
</tr>
<tr>
<td>Kansas</td>
<td>336</td>
<td>2.7</td>
<td>4.2</td>
<td>1.5</td>
<td></td>
</tr>
<tr>
<td>Kentucky</td>
<td>544</td>
<td>2.4</td>
<td>7.1</td>
<td>4.7</td>
<td>66</td>
</tr>
<tr>
<td>Louisiana</td>
<td>356</td>
<td>12.9</td>
<td>51.9</td>
<td>39.0</td>
<td>60</td>
</tr>
<tr>
<td>Maine</td>
<td>68</td>
<td>0</td>
<td>0.3</td>
<td>0.3</td>
<td></td>
</tr>
<tr>
<td>Maryland</td>
<td>264</td>
<td>12.5</td>
<td>16.7</td>
<td>4.2</td>
<td>25</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>512</td>
<td>2.3</td>
<td>2.2</td>
<td>-0.1</td>
<td></td>
</tr>
<tr>
<td>Michigan</td>
<td>528</td>
<td>11.9</td>
<td>9.2</td>
<td>-2.7</td>
<td>-14</td>
</tr>
<tr>
<td>Minnesota</td>
<td>524</td>
<td>1.3</td>
<td>0.7</td>
<td>-0.6</td>
<td></td>
</tr>
<tr>
<td>Mississippi</td>
<td>360</td>
<td>0</td>
<td>42.0</td>
<td>42.0</td>
<td>100</td>
</tr>
<tr>
<td>Missouri</td>
<td>560</td>
<td>5.0</td>
<td>5.0</td>
<td>0.0</td>
<td></td>
</tr>
<tr>
<td>Montana</td>
<td>224</td>
<td>0</td>
<td>0.2</td>
<td>0.2</td>
<td></td>
</tr>
</tbody>
</table>

²² A complete explanation of the statistics used in this table appears in note 52.

b Figures are included in this column only when the difference between the percentage of Negroes in the general population and the percentage of Negroes on the state's local draft boards (fourth column) exceeds 2% and the change in the number of Negro board members for the given state would have to exceed four in order to appear racially neutral. For a more complete discussion of this column, see note 52.

52. This table was prepared from sources which are not completely contemporaneous. The resulting errors, where they exist, are errors which tend to understate evidence of systematic exclusion by overstating the percentages of Negroes on the various draft boards.

The number of local board members in each of the states ("state" as used in this footnote will refer to any of the political subdivisions at the left side of the table), presented in the first column, is based upon (1) the number of local draft boards in each state as of January 1969 (unpublished table supplied by the SSS, on file with the Michigan Law Review) and (2) the assumption that local boards have four members when averaged by state. Unfortunately, the SSS does not supply figures on the number of local board members per state, but two facts make the number four a reasonable average: (1) the statute requires at least three members [50 U.S.C. App. § 460(b)(3) (Supp. III, 1965-1967)]; and (2) the nationwide average, based on 1966 figures for the total number of local board members (MARRILL COMMISSION REPORT 19 n.7) and 1969 figures for the total number of local boards (unpublished table, supra), is approximately 4-1/5. Even though the number of local board members may have increased somewhat since 1966 (which would make 4-1/5 too small a figure) the number four was chosen to avoid possible overstatement of racial exclusion.
TABLE (continued)

<table>
<thead>
<tr>
<th>State</th>
<th>No. of Local Board Members</th>
<th>Percentage of Negro Members</th>
<th>Negro Percentage of State Population</th>
<th>Difference Between Population and Board Percentages</th>
<th>Deviation from Neutrality As a Percentage of Possible Deviation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nebraska</td>
<td>384</td>
<td>0</td>
<td>2.1</td>
<td>2.1</td>
<td>100</td>
</tr>
<tr>
<td>Nevada</td>
<td>68</td>
<td>2.9</td>
<td>4.7</td>
<td>1.8</td>
<td></td>
</tr>
<tr>
<td>New Hampshire</td>
<td>92</td>
<td>1.9</td>
<td>0.3</td>
<td>-1.6</td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>184</td>
<td>14.7</td>
<td>8.5</td>
<td>-6.2</td>
<td>-73</td>
</tr>
<tr>
<td>New Mexico</td>
<td>124</td>
<td>0.8</td>
<td>1.8</td>
<td>1.0</td>
<td></td>
</tr>
<tr>
<td>New York</td>
<td>460</td>
<td>14.2</td>
<td>8.4</td>
<td>-5.8</td>
<td>-144</td>
</tr>
<tr>
<td>North Carolina</td>
<td>404</td>
<td>6.7</td>
<td>24.5</td>
<td>17.8</td>
<td>75</td>
</tr>
<tr>
<td>North Dakota</td>
<td>212</td>
<td>0</td>
<td>0.1</td>
<td>0.1</td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>536</td>
<td>8.9</td>
<td>8.1</td>
<td>0.8</td>
<td></td>
</tr>
<tr>
<td>Oklahoma</td>
<td>332</td>
<td>8.6</td>
<td>6.6</td>
<td>-1.8</td>
<td></td>
</tr>
<tr>
<td>Oregon</td>
<td>128</td>
<td>0.8</td>
<td>1.0</td>
<td>0.2</td>
<td></td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>704</td>
<td>8.7</td>
<td>7.5</td>
<td>-1.2</td>
<td></td>
</tr>
<tr>
<td>Puerto Rico</td>
<td>524</td>
<td>7.1</td>
<td>e</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rhode Island</td>
<td>44</td>
<td>4.5</td>
<td>2.1</td>
<td>-2.4</td>
<td></td>
</tr>
<tr>
<td>South Carolina</td>
<td>184</td>
<td>12.0</td>
<td>34.8</td>
<td>22.8</td>
<td>66</td>
</tr>
<tr>
<td>South Dakota</td>
<td>264</td>
<td>0</td>
<td>0.2</td>
<td>0.2</td>
<td></td>
</tr>
<tr>
<td>Tennessee</td>
<td>420</td>
<td>5.0</td>
<td>16.5</td>
<td>11.5</td>
<td>70</td>
</tr>
<tr>
<td>Texas</td>
<td>630</td>
<td>7.7</td>
<td>12.4</td>
<td>4.7</td>
<td>58</td>
</tr>
<tr>
<td>Utah</td>
<td>156</td>
<td>0.6</td>
<td>0.5</td>
<td>-0.1</td>
<td></td>
</tr>
<tr>
<td>Vermont</td>
<td>56</td>
<td>0</td>
<td>0.1</td>
<td>0.1</td>
<td></td>
</tr>
<tr>
<td>Virginia</td>
<td>516</td>
<td>6.4</td>
<td>20.6</td>
<td>14.2</td>
<td>69</td>
</tr>
<tr>
<td>Virgin Islands</td>
<td>8</td>
<td>75.0</td>
<td>e</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Washington</td>
<td>120</td>
<td>5.0</td>
<td>1.7</td>
<td>-3.3</td>
<td></td>
</tr>
<tr>
<td>West Virginia</td>
<td>224</td>
<td>4.5</td>
<td>4.8</td>
<td>0.3</td>
<td></td>
</tr>
<tr>
<td>Wisconsin</td>
<td>320</td>
<td>1.6</td>
<td>1.9</td>
<td>0.3</td>
<td></td>
</tr>
<tr>
<td>Wyoming</td>
<td>92</td>
<td>1.1</td>
<td>0.7</td>
<td>-0.4</td>
<td></td>
</tr>
<tr>
<td>Canal Zone</td>
<td>4</td>
<td>0</td>
<td>e</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Guam</td>
<td>4</td>
<td>0</td>
<td>e</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* e Census data unavailable.

The percentage of Negro board members for each of the states, set out in the second column, is based on the figures in the first column and statistics on the number of Negro board members per state (unpublished table, supra).

Negro populations for each of the states, set out in the third column, are based on the 1960 census. UNITED STATES BUREAU OF THE CENSUS, UNITED STATES CENSUS OF POPULATION: 1960, vol. 1, CHARACTERISTICS OF THE POPULATION, pt. 1, United States Summary, page 1-161 (1964). Changes in racial percentages since 1960 are assumed not to be statistically significant.

The fourth column sets out the difference by state between present local board composition and racially neutral composition. It is assumed that racial neutrality—the goal referred to in this Comment as impartial nomination of board members—will, on the average, equalize the percentage of Negroes in state population and the percentage of Negroes on the same state's local boards; thus, the figures in the fourth column are calculated by taking the differences between corresponding figures in the second and third columns.

The fifth column must be interpreted with care. It may be said to represent for each state the degree of deviation from racial neutrality measured as a percentage of the greatest deviation possible in that state. For example, Mississippi, which has no Negro
III. The Legal Arguments

The argument before the Fifth Circuit in Clay was based on the well-recognized right to classification by an impartial Selective Service board.\textsuperscript{53} Critical to any such argument is the conclusion that the right to an "impartial" board is equivalent to the right to a board untainted by the systematic exclusion of members of the registrant's race.\textsuperscript{54}

Local board members but approximately a 40% Negro population, can be said to be practicing "100% exclusion" in the sense that it could go no further than it does in excluding Negroes from its local boards. If instead Mississippi's local boards were 30% Negro (still assuming a 40% statewide Negro population), Mississippi could be said to have achieved 75% of the ideal of racial neutrality, and its deviation from that neutrality—25%—would be its figure in the fifth column. Mathematically, the figures (x) in the final column represent the quotient of the figures (y) in the fourth column and the corresponding figures (z) in the third column expressed as a percentage. The formula expressing this relationship is 

\[ x = \frac{100\% \times y}{z} \]

Not all states were assigned a percentage figure in the final column because the ratios expressed in that column become less relevant as the numbers being compared become smaller. Somewhat arbitrarily, it was decided to calculate a ratio for the fifth column only when the difference between the percentage of Negroes in the state and the percentage of Negroes serving on local boards exceeded 2%, and when the number of changes that would have to be made to achieve racial neutrality would exceed 4 board members. In states not meeting both of these criteria, deviations can reasonably be attributed to chance. In Alaska, for example, the fifth column figure would have been 100%, yet "6/10 of a Negro" would have taken it to 0%. Generally speaking, the numbers in the fifth column are more relevant as the total number of local board members in the state and the statewide percentage of Negroes in the population both increase.

Figures on the racial composition of each local board are not made available by the SSS. In terms of systematic exclusion, however, statewide figures may be more significant than local figures. If nominations were made locally for each local board, one might argue that a significant statewide deviation from neutrality was merely the result of an accumulation of insignificant local deviations; the same "accumulation" argument cannot be made when there is no accumulation of nominations, but only one source for them—the governor.

\textsuperscript{53} See, e.g., Swaczyk v. United States, 156 F.2d 17 (1st Cir.), cert. denied, 329 U.S. 726 (1946).

\textsuperscript{54} Another issue raised by the existence of systematic exclusion is whether Negroes in general have the right to be equally considered with Caucasians for appointment to positions on local boards and state appeal boards. For discussion of the statutory provisions relevant to this question, see notes 93-102 infra and accompanying text.

It seems clear that if governors were to exclude Negroes from their recommendations on the basis of racial or other arbitrary criteria, there would be a denial of equal protection. (Note, however, that parties challenging this discriminatory treatment might have to rely on the general concept of equal protection outside of the fourteenth amendment. See note 95 infra.) Such discriminatory selection would be directed at Negroes as a class, and would emphasize racial distinctions in opposition to the accepted policy that government should be officially indifferent to race. See Pollak, \textit{Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1} (1959); Tussman & tenBroek, \textit{The Equal Protection of the Laws, 37 Calif. L. Rev. 341}, 353 (1949): "The assertion of human equality is closely associated with the denial that differences in color or creed, birth or status, are significant or relevant to the way men should be treated."

The current attitude of the Supreme Court is reflected in \textit{Anderson v. Martin, 375 U.S. 899} (1964), which involved the practice of designating the race of candidates on voting ballots. It was asserted that the essence of the constitutional infirmity is the racial classification per se, regardless of any showing of injury or prejudice. It is this concept of presumptive unconstitutionality that would bring any exclusion of Negroes
A. The Constitutional Right to Classification by a Selective Service Board Free of Systematic Exclusion

It is well established that if a civil or criminal case is tried before from consideration as potential draft board members within the sphere of prohibited governmental activity. Of course, there are difficult standing problems which would attend any attempt to assert the right to be considered equally for an appointive position on a Selective Service board. See note 135 infra.

55. Clay contended that statistics compiled by the Marshall Commission (see note 45 supra) evidenced racial exclusion in the composition of draft boards, in violation of the fifth amendment. He invoked the fifth amendment due process clause (rather than the fourteenth amendment due process and equal protection clauses) because the SSS is a creature of the federal government. Cf. Totus v. United States, 39 F. Supp. 7, 10 (E.D. Wash. 1941) (local board members are officers of the United States appointed by the President). Hence, the acts of local and state appeal boards which he challenged as being invalid involved federal rather than state action.

There is, however, an element of state action in the process of appointing persons to serve on draft boards, since the President is authorized to appoint members only upon recommendation of the governors of the respective states. 50 U.S.C. App. § 460(b)(3) (Supp. III, 1965-1967). Because the crux of the problem of systematic exclusion in the SSS is the unwillingness of state governors to recommend Negroes for appointment to these positions, Clay arguably could have invoked the fourteenth amendment to challenge the composition of his various draft boards. It is not clear whether a governor is acting in the capacity of a state official, or whether he assumes the role of a federal functionary administering the Universal Military Training and Service Act when he makes recommendations to the President. The cases have universally held, however, that since the appointments are made by the President, they are technically federal. In United States v. Bordonaro, 253 F. 477 (V.D.N.Y. 1918) the court held that "[i]f the members of local boards appointed for carrying out the provisions of the Selective Service Draft Act are appointed by the President, and it is entirely immaterial that the appointments are made upon recommendation of the Governors of the various states . . . ." While Clay rested his systematic exclusion contentions on the due process clause, the jury selection cases in which the concept of systematic exclusion has been developed are most often based on the equal protection doctrine. But some mention due process as well. See note 61 infra. Of course, if systematic exclusion can properly be said to constitute a denial of due process in jury selection cases, there is no conceptual difficulty in arguing that it should also amount to a denial of due process in draft board cases. But even if systematic exclusion relates only to the equal protection clause (a proposition which is doubtful in light of the recent cases and commentary; see, e.g., note 61 infra) there is very little difficulty in applying that concept to the challenged "federal selection" practices. Although the fifth amendment contains no express equal protection clause, the Supreme Court has recognized that the concept of equal protection is part of the larger, all-embracing concept of due process. See, e.g., Bolling v. Sharpe, 347 U.S. 497 (1954) [applying Brown v. Board of Educ., 347 U.S. 483 (1954) to public schools in the District of Columbia]; Hurd v. Hodge, 334 U.S. 24, 35 (1945) ("[e]qual protection] is a part of the public policy of the United States.") Similarly, the Ninth Circuit announced recently that "the arbitrariness of a classification, if it is bad enough, may be a violation of the due process clause of the Fifth Amendment even though that contains no equal protection clause." Pacific Natural Gas Co. v. FPC, 276 F.2d 350, 353 (9th Cir. 1960).

Hence, it seems clear that a registrant may rely on the fundamental guarantees of equal protection and may invoke the systematic exclusion rule even if state action is not present in the factual circumstances surrounding his case. See generally Antieau, Equal Protection Outside the Clause, 40 CALIF. L. REV. 362, 363 (1952); Miller, An Affirmative Thrust to Due Process of Law?, 30 GEO. WASH. L. REV. 399, 413 (1962); Miller & Scheflin, The Power of the Supreme Court in the Age of the Positive State: A Preliminary Excursus (pt. 1), 1967 DUKE L.J. 273 (1967); Wilson, The Merging Concepts of Liberty and Equality, 12 WASH. & LEE L. REV. 182 (1955).
a jury, due process requires that the jury be impartial.\textsuperscript{56} It is also settled that, with respect to juries, the term “impartial” means more than “without actual bias.”\textsuperscript{57} When a defendant in a criminal prosecution demonstrates that members of his race have been systematically excluded from the jury venire, the court is often confronted with a situation in which there is no proof that the exclusion actually

\begin{footnotesize}
\textsuperscript{56} Smith v. Texas, 311 U.S. 128, 130 (1940). There are numerous cases in which criminal convictions have been reversed on the ground that the defendant did not have a trial by a panel of impartial jurors. See, e.g., Irvin v. Dowd, 366 U.S. 717 (1961) (where a majority of jurors believed, on the basis of newspaper stories, that defendant was guilty before the trial); Rideau v. Louisiana, 373 U.S. 723 (1963) (motion picture showing defendant confessing to the sheriff had been televised and viewed by thousands of persons including the jurors). It is clear that the right to an impartial jury is guaranteed by due process as well as the express language of the sixth amendment, which states: “In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .” (There is, of course, no comparable language respecting the right to impartial Selective Service boards). It was not until 1968 that the Supreme Court incorporated the sixth amendment into the due process clause of the fourteenth amendment. In Duncan v. Louisiana, 391 U.S. 145 (1968), the Court stated: Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.

391 U.S. at 149. Prior to the decision in \textit{Duncan}, the jury trial provisions of the sixth amendment were not deemed applicable to the states through the fourteenth amendment. Hence, it was not necessary for states to provide for jury trials in all criminal cases. See, e.g., Fay v. New York, 332 U.S. 251, 256-63 (1947) (federal “cross-section rule” does not apply to states); Palko v. Connecticut, 302 U.S. 519, 525 (1937) (the right to trial by jury is not of the “very essence of a scheme of ordered liberty”); Hallinger v. Davis, 146 U.S. 311, 319 (1893) (state may allow waiver of a jury trial); cf. Snyder v. Massachusetts, 261 U.S. 97 (1923); Maxwell v. Dow, 176 U.S. 581 (1900). But it was nonetheless required that if a jury was used, due process required that it be fairly and impartially constituted. See, e.g., Fay v. New York, 332 U.S. 261 (1947); \textit{cf. In re Murchison}, 349 U.S. 133 (1955); Tumey v. Ohio, 273 U.S. 510 (1927); Moore v. Dempsey, 261 U.S. 86 (1923); Frank v. Mangum, 257 U.S. 309 (1919). See also Kadish, \textit{Methodology and Criteria in Due Process Adjudication—A Survey and Criticism}, 66 \textit{Yale L.J.} 319, 346 (1957); Scott, \textit{The Supreme Court's Control over State and Federal Criminal Juries}, 34 \textit{Iowa L. Rev.} 577, 581 (1949); Note, \textit{Constitutional Law: State Jury Selection Procedure Held a Violation of the Fourteenth Amendment}, 1967 \textit{Duke L.J.} 346 (1967).

\textsuperscript{57} In \textit{Estes} v. \textit{Texas}, 381 U.S. 532 (1965), the Supreme Court answered the question whether the defendant was deprived of his right to due process by the televising and broadcasting of his trial in the affirmative. Alluding to the possible effects television might have had on the performance of the jurors, the Court stated: It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process . . . .

“A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the \textit{probability} of unfairness . . . . [(T)o perform its high function in the best way] justice must satisfy the appearance of justice. . . . . “(The requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a \textit{possible} temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law.”

381 U.S. at 542-43 (emphasis in original).
\end{footnotesize}
prejudiced the defendant's position.60 Nevertheless, if the defendant is a member of the race or class excluded,60 the court will presume bias and condemn the verdict without requiring a showing of actual prejudice.60 Underlying any application of this rule are two lines of reasoning which converge to require the reversal on equal protection and due process grounds.61 First, it is axiomatic that a man's decisions

58. See notes 65-66 infra and accompanying text.
59. The broader question is whether any defendant has a right to a jury free from systematic exclusion whether or not he is of the same race or class as the excluded jurors. The comparable question in the case of a draft board would be whether any registrant, Caucasian, Negro, or other, has a right to a draft board from which Negroes have not been systematically excluded.

In jury selection cases, the courts have usually applied the so-called “same-class rule,” and held that if the defendant is not a member of the excluded race or class, the danger of prejudice is not great and the verdict will not be condemned unless there is proof of actual prejudice. See Scott, The Supreme Court's Control over State and Federal Criminal Juries, 34 IOWA L. REV. 577, 584 (1949). [But in Thiel v. Southern Pac., 328 U.S. 217, 225 (1946), the Court, speaking of exclusion of daily-wage earners, indicated that it was “unnecessary to determine . . . whether [petitioner] was one of the excluded class.”]

Presumably, the same rationale would apply to systematic exclusion of Negroes from Selective Service boards. Of course, the same-class rule presents no obstacle to Clay's argument, since Clay is of the same minority racial group as the excluded board members.

For an argument that the same-class rule is unduly restrictive and that Caucasian defendants should have an equal opportunity to challenge convictions on the ground of systematic exclusion of Negroes from the jury venire, see Comment, The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection, 74 YALE L.J. 919, 920-22 (1965).

60. See, e.g., Avery v. Georgia, 345 U.S. 559 (1953); Pierre v. Louisiana, 306 U.S. 354 (1949); Strauder v. West Virginia, 100 U.S. 303 (1879); Labat v. Bennett, 355 F.2d 698 (5th Cir. 1966), cert. denied, 386 U.S. 991 (1967); Note, Constitutional Law: State Jury Selection Procedures Held a Violation of the Fourteenth Amendment, 1967 DUKE L.J. 346, 351-52; Comment, supra note 55, at 920-22. This discussion raises some points that are also relevant in the context of the SSS.

61. Traditionally, the cases have held that systematic exclusion violates the equal protection clause on the ground that Negro defendants were not treated as favorably as Caucasians. It was thus unnecessary to decide whether the exclusion also violated the due process clause by denying the defendant a fair trial. See, e.g., Fay v. New York, 332 U.S. 261, 284 n.27 (1946). See generally Scott, supra note 59, at 585.

One of the reasons why the courts have generally not discussed the due process aspects of systematic exclusion is that the jury selection cases have almost invariably involved state selection practices. And, the few cases involving discrimination in the selection of federal jurors have not been decided on constitutional grounds; the Supreme Court has preferred to rely on its supervisory power over the federal courts as a basis for condemning such exclusion, or, in recent years, on the federal jury selection statute. Kuhn, supra note 40, at 237-38. See, e.g., Rabinowitz v. United States, 306 F.2d 54 (5th Cir. 1962); Dow v. Carnegie-Illinois Steel Corp., 224 F.2d 414, 423 (3d Cir. 1955); United States v. Dennis, 183 F.2d 201, 222 (2d Cir. 1950), aff'd on other grounds, 341 U.S. 494 (1951); International Longshoremen & Warehousemen's Union v. Ackerman, 82 F. Supp. 65, 121-22 (D. Hawaii 1949). Nevertheless, some commentators and courts have cited the due process clause in this context; see, e.g., Kuhn, supra note 40, at 242 & n.32. As was noted in Comment, supra note 59, at 999:

with respect to jury selection, it seems clear that equal protection and due process point to the same fundamental values and that it is particularly appropriate to include equal protection among the limitations of the due process clause upon the kinds of criminal procedures that will support a conviction.

The Fifth Circuit applied a clear due process rationale in Labat v. Bennett, 355 F.2d 638, 723 (5th Cir. 1966): [Systematic exclusion] goes to the fairness of the trial. The "very integrity of the
reflect his own personal realm of experience. Therefore, he may be less sympathetic toward those persons with whom he cannot easily identify.62 Indeed, particular individuals may manifest affirmative biases against persons who differ from them in some notable respect. Accordingly, as the Court of Appeals for the Fifth Circuit recognized in Labat v. Bennett,63 prejudice against a defendant is likely to occur whenever members of his race or class are systematically excluded from the jury considering his case.64 Second, because of the difficulty of discovering and proving the existence of actual bias,65 the Supreme Court has concluded that the “degree of prejudice can never be known” in any particular case.66 Thus, it is because of the likelihood that undetectable bias against Negro defendants will result from the systematic exclusion of Negroes from jury panels that the same-class rule is invoked to vindicate the rights of these defendants to equal treatment before impartial tribunals.67

...
A draft board shares with the jury the power to impose upon individuals an involuntary deprivation of personal liberty, but it


68. It has been asserted that "[t]he Selective Service is the only government institution outside the criminal courts with the power to condemn a man to possible death." Note, The Selective Service, 76 YALE L.J. 160 (1966). While this language may be too strong, as the Court of Appeals for the Fifth Circuit stated in Clay, "It is undeniable . . . that conscription deprives an individual of his liberty, and may even take his life." 397 F.2d at 911. Judge Wright of the Court of Appeals for the District of Columbia Circuit has described the draft as "one of [the nation's] gravest powers over an individual . . ." Wright, Book Review, 78 YALE L.J. 358, 342 (1968). Conscription may also deprive individuals of substantial property rights in the form of lost income. Clay, with his earning potential in professional boxing, is a case in point.

The important question, of course, is whether the draft board itself has the power to affect a registrant's liberty, rather than merely the power to administer clearcut rules and regulations which affect a registrant's liberty. If the draft board is a purely ministerial functionary, allegations that it has not acted impartially are meaningless since there would be no discretionary functions which could be influenced by board members' prejudice or partiality.

It is clear, however, that draft boards do exercise a good deal of independent discretionary power in regard to matters of classification. See, e.g., Talmanson v. United States, 386 F.2d 811 (1st Cir. 1967) (delegation of discretionary power to local boards held proper). In fact, the present structure of the SSS has as one of its principal attributes a great deal of local board discretion. See notes 1 & 2 supra and accompanying text. The local board is charged with the duty of determining, subject to appeal, whether a registrant is entitled to deferment or exemption in lieu of immediate induction. 50 U.S.C. App. § 460(b)(3) (Supp. III, 1965-1967). See also 32 C.F.R. § 1622.1(c) (1966); Tyrrell v. United States, 200 F.2d 8 (9th Cir. 1952) (in determining what classification a registrant should receive, the board must consider each registrant available for induction until his eligibility for deferment is clearly established to the satisfaction of the board); Pritto v. United States, 289 F.2d 12 (5th Cir. 1961); Pickens v. Cox, 282 F.2d 784 (10th Cir. 1960); Swaczek v. United States, 156 F.2d 17 (1st Cir.), cert. denied, 329 U.S. 726 (1946). The Marshall Commission recognized the "wide latitude for critical judgment" accorded to local boards and characterized the SSS generally as being governed by the "rule of discretion" rather than by the rule of law. MARSHALL COMMISSION REPORT, 27, 31; text accompanying note 6 supra.

For examples of the ways in which local boards may exercise discretion, see Bradshaw v. United States, 242 F.2d 180 (10th Cir. 1957) (Congress has given the power to make decisions concerning facts of a particular case to the SSS); Brown v. United States, 216 F.2d 528 (9th Cir. 1954) (when evidence of a change of status is presented, the local board must weigh the evidence and classify the registrant in light thereof); Dickinson v. United States, 305 F.2d 336 (9th Cir.), rev'd on other grounds, 346 U.S. 389 (1953) (a local board engaged in classification of registrants has the same right to evaluate testimony as a trial court); Witmer v. United States, 348 U.S. 375 (1954) (the local board has the authority to evaluate the credibility of the registrant). See also notes 81, 118-19 infra.


For a discussion of the possible curative aspects of appellate procedure within the SSS, see pt. IV.A. infra.
denies many of the procedural safeguards present in a trial at law, and its actual operations enjoy a de facto administrative anonymity.

69. See, e.g., United States v. Mientke, 387 F.2d 1009 (7th Cir. 1967) (registrant was not entitled to safeguards appropriate to a criminal proceeding at a classification proceeding). In United States v. Freeman, 388 F.2d 248 (7th Cir. 1967), the court warned: "The procedural framework of the draft classification process and the narrowly limited judicial review available to draft registrants make adherence to procedural safeguards crucial to the maintenance of basic fairness." Although the requirement of fairness is reiterated throughout the selective service laws and regulations, [see, e.g., 50 U.S.C. App. §§ 451(c) (1964), 455(c) (Supp. III, 1965-1967); 32 C.F.R. § 1622.1(b) (1968)], the SSS is excluded from the more pervasive procedural safeguards of the Administrative Procedure Act (APA), 5 U.S.C. §§ 552-59 (Supp. III, 1965-1967), by 50 U.S.C. App. § 465(b) (1964), excepting the sole provision in section 552 of the APA.


The following are some examples of weaknesses which may be present in SSS procedures. Local boards meet in private. There is no procedure by which the public can scrutinize the decisions or work of board members, and there is no annual evaluation of the performance of local boards by officials at higher levels of government. Ginger, supra, at 1324. Local boards handle between 28 and 55,000 registrants, depending upon time and location. Marshall Commission Report at 17. It has been disclosed, for example, that San Francisco draft boards averaged less than one minute of consideration per case in 1967. Ginger, supra, at 1324 n.69.

The registrant is not informed of the reasons why a claim for deferment was rejected. See, e.g., Ayers v. United States, 240 F.2d 802 (9th Cir. 1956), cert. denied, 352 U.S. 1016 (1957). The notice of the right to appeal does not include instructions concerning the manner in which the appeal may be taken, nor, in many cases, does it offer the services of the legal advisor, although some boards have adopted this policy since 1967. Ginger, supra, at 1325. There is no procedure for challenging board members for ignorance of the law or of religious philosophy, although such ignorance may lead to an erroneous classification. Id. at 1325. Nor can the board members be challenged for prejudice against the registrant because of race, religion, or general appearance, or for a general predisposition against granting conscientious objector status or other deferments. Id. at 1325. The registrant is specifically denied the right to counsel at the personal appearance, 32 C.F.R. § 1624.1(b) (1968), although he may bring an advisor. But he is not informed of this right. Id. at 1325. See also Nickerson v. United States, 391 F.2d 760 (10th Cir. 1968). The registrant has no right to present witnesses in his own behalf; this privilege is granted or denied at the discretion of the local board. 32 C.F.R. § 1624.1(b) (1968); Ginger, supra, at 1325. See also United States v. Capson, 347 F.2d 295 (10th Cir.), cert. denied, 302 U.S. 911 (1965); United States v. Sturgis, 342 F.2d 328 (8d Cir.), cert. denied, 382 U.S. 879 (1965). The registrant cannot cross-examine any witness or official who has spoken against him. Ginger, supra, at 1326. He must rely upon his right to inspect his file to discover any evidence used against him. Shattuck, Record Kepping Obligations of Local Boards, 1 S.S.L.R. 4015, 4016 (1968). The local board is required to place all tangible evidence that it used to determine the registrant's proper classification in his file. Niznik v. United States, 173 F.2d 528 (6th Cir.), cert. denied, 337 U.S. 925 (1949); 32 C.F.R. § 1626.13 (1968); Shattuck, supra, at 4024. On occasion, local boards have failed to hold a formal meeting to consider
for its members in which bias, if present at all, may flourish.\textsuperscript{70} Moreover, because the scope of judicial review of draft board proceedings is the "narrowest known to law," board action is often effectively insulated from judicial scrutiny.\textsuperscript{71} Given these unfavorable factors, requested classifications and have not allowed all members to participate in the decision. \textit{See}, e.g., \textit{United States v. Walsh}, 279 F. Supp. 115 (D. Mass. 1968). The discussion at the personal appearance is not recorded; no stenographer is provided, and the registrant is not entitled to bring his own. The only transcript of the proceedings must be made by the registrant himself, based on recall. Such a record may be placed in his file, but the registrant is not told to submit such a report. \textit{Id.} at 1327. The registrant's personal appearance is not open to the public. Even the request that family and friends be allowed to attend has been rejected. The registrant is never advised of his rights prior to the proceeding, and he is not told that any information given may be used against him. \textit{Id.} at 1326. The personal appearance has no form or structure. Since the registrant is not told why his requested classification was rejected, he cannot know what he needs to prove in order to change the decision on appeal. The decision of the local board may be based on matters outside of the record. \textit{Id.} at 1327; \textit{see}, e.g., \textit{Lehr v. United States}, 139 F.2d 919 (6th Cir. 1945); \textit{Harris v. Ross}, 146 F.2d 355 (6th Cir. 1944); \textit{cf. United States ex rel. Lawrence v. Commanding Officer}, 58 F. Supp. 933 (D. Neb. 1945). There are no standards of proof to be met. \textit{Ginger, supra}, at 1327. There is no requirement, such as APA, 5 U.S.C. § 556(d) (Supp. II, 1965-1966), that reliable, probative, and substantial evidence support the agency's (local board's) opinion. \textit{Id.} at 1327.

\textsuperscript{70} Local board members are insulated from public (\textit{see note 69 supra}) and judicial (\textit{see note 71 infra}) scrutiny. Moreover, no records are kept of the board's proceedings which could later be evaluated. (\textit{See note 69 supra}). Young people complain of the anonymous character of local boards. \textit{See MARSHALL COMMISSION REPORT} 20. Of course, the anonymity problem can be overstated, particularly since local boards have recently been required to disclose the names of their members. \textit{See Martin v. Neuschel}, No. 69-301 (E.D. Pa. Feb. 13, 1968), vacated and remanded for procedural reasons, 376 F.2d 759 (3d Cir. 1968); 32 C.F.R. §§ 1606.62-63 (1968). Yet it seems clear that local board members are neither fully accountable for their actions, nor sufficiently exposed to the public eye.

\textsuperscript{71} United States v. Blalock, 347 F.2d 615 (4th Cir. 1957). The basic rule is that judicial review of a selective service classification or order is available only after the aggrieved registrant has exhausted his administrative remedies and has either taken or refused the final step toward military induction. \textit{See}, e.g., \textit{Falbo v. United States}, 300 U.S. 549 (1939); \textit{Estep v. United States}, 327 U.S. 114 (1946); \textit{Muhammad Ali v. Connally}, 266 F. Supp. 345 (S.D. Tex. 1967). The registrant may then seek judicial review in one of two ways. If he refuses to submit to induction he may assert any claim as a defense to his criminal prosecution. \textit{Estep v. United States, supra.} If he submits, he may thereafter petition for a writ of habeas corpus and challenge any selective service action in the resultant proceedings; e.g., \textit{United States ex rel. Levy v. Carn}, 149 F.2d 336 (2d Cir. 1945); \textit{Note, Habeas Corpus and Judicial Review of Draft Classifications}, 28 Ind. L.J. 244, 252-53 (1953). A court will not reverse a board's action unless there is "no basis in fact" to support its decision. \textit{See}, e.g., \textit{Witmer v. United States}, 318 U.S. 375 (1956); \textit{Dickinson v. United States}, 346 U.S. 389 (1953); \textit{Cox v. United States}, 332 U.S. 442 (1947); \textit{Estep v. United States}, 327 U.S. 114 (1946).

Traditionally, there has been no pre-induction judicial review permitted. \textit{See}, e.g., \textit{Witmer v. United States}, 348 U.S. 375 (1955). \textit{Walkins v. Rupert}, 224 F.2d 47 (2d Cir. 1955) (per curiam). However, in one case, \textit{Wolf v. Local Bd. No. 16}, 327 F.2d 617 (2d Cir. 1963), a reclassification was held to present a justiciable controversy prior to induction when the local board's action had a chilling effect on registrants' first amendment rights. Thereafter, Congress, in response to the \textit{Wolf} case, included a new provision in the Selective Service Act of 1967, \textit{50 U.S.C. App. § 460(b)(3) (Supp. III, 1965-1967)}, which restricts judicial review of classifications "except as a defense
the impartiality which due process requires of a draft board must mean more than simple lack of actual bias. Draft registrants, like defendants challenging jury convictions on the basis of systematic exclusion, will find it extremely difficult to unearth evidence of actual bias resulting from the discriminatory selection of board members. More important, the decisions of draft board members, like 

to a criminal prosecution ... after the registrant has responded either affirmatively or negatively to an order to report for induction . . . ."

Although the 1967 Act appears to limit judicial review solely to criminal defenses, the legislative history of the Act indicates that Congress did not intend to preclude the possibility of habeas corpus proceedings. Moreover, it is not clear that Congress could constitutionally provide for such a preclusion. See Comment, Judicial Review of Selective Service Action: A Need for Reform, 56 CALIF. L. REV. 448, 459 & n.81 (1968). In any case, this remedy is often more illusory than practicable; thus, it is not often used by registrants seeking to contest classifications. Comment, supra, at 461 n.91.

As Justice Murphy said in his concurring opinion in Estep v. United States, 327 U.S. at 130: "No more drastic condition precedent to judicial review has ever been framed." As of 1966, there were only three cases where the court actually ordered the inductee released from the Army as a result of a habeas corpus proceeding. Arbitman v. Woodside, 258 F. 441 (4th Cir. 1919); Ex parte Cohen, 254 F. 711 (E.D. Va. 1918); Ex parte Beck, 245 F. 907 (D. Mont. 1917). In most of the other cases, the courts concluded that Selective Service findings were neither arbitrary nor capricious. Comment, Fairness and Due Process Under the Selective Service System, 114 U. PA. L. REV. 1914, 1015 n.10 (1966). See also Tietz, Jehovah's Witnesses: Conscientious Objectors, 28 S. CAL. L. REV. 125, 134 (1955); Comment, The Selective Service System: An Administrative Obstacle Course, 54 CALIF. L. REV. 2123 (1966); Note, Judicial Review of Selective Service Board Classifications by Habeas Corpus, 10 GEO. WASH. L. REV. 827, 829 n.7.

The traditional restrictive policy toward judicial review has recently come under heavy attack by commentators. Moreover, at least one federal district court has held that § 460(b)(3) of the 1967 Selective Service Act is an unconstitutional violation of the fifth amendment's due process clause because it places unreasonable conditions upon the registrant's right to obtain judicial review of his classification. Petersen v. Clark, 283 F. Supp. 700 (N.D. Cal. 1968). See, e.g., Case Comment, Selective Service Act of 1967—Civil Judicial Review of Local Board Decisions—Section 460(b)(3) Violates Fifth Amendment Due Process Rights and Is Unconstitutional, 44 NOTRE DAME L. REV. 469 (1969). This may be the wave of the future. As yet, however, it remains the minority view. After Petersen v. Clark, supra, was decided by the district court, the Supreme Court held in two cases that, except in limited situations, the statutory restraints on judicial review of Selective Service Act are constitutional. In Oestereich v. Selective Serv. Local Bd. No. 11, 37 U.S.L.W. 4053 (U.S. Dec. 16, 1968), the Court interpreted section 460(b)(3) to deny pre-induction judicial review in cases in which a local board has made classification decisions from its discretionary evaluation of evidence pertaining to the registrant's status. But the Court held that the statutory restraint on judicial review would be unnecessarily harsh in cases in which the registrant clearly qualifies for an exemption and the only question is whether or not the local board's action is clearly forbidden by statute or regulation. See also Clark v. Gabriel, 28 U.S.L.W. 3217 (U.S. Dec. 16, 1968).


73. Cf. note 31 supra.

74. Cf. notes 65, 66 supra. This is especially true since there is no way for a registrant to challenge board members for bias or prejudice, nor are board members required to justify their actions. See note 68 supra. Indeed, bias might not even be a
those of jurors, are necessarily influenced by their sociological and psychological predispositions; thus, when Negroes are systematically excluded from draft boards, draft board decisions are almost certain to be weighted against Negro registrants.

The bias affecting the deliberations of draft boards which are not impartially constituted may be undetectable in the individual case, but there is compelling evidence of its general existence. The fact that no Negroes have been appointed to most draft boards suggests that members of the Negro race have been implicitly or explicitly relegated to a position of inferiority; whether this is the product of conscious or subconscious prejudice, it is not conducive to fair and equal treatment of the races. Ultimately, any classification decision—including whether or not a registrant is granted conscientious-objector status or a ministerial exemption—may turn

conscious phenomenon. In many cases, subconscious partiality could be more damaging since fair-minded board members would not have the opportunity to compensate rationally for their own recognized prejudices. Of course in some cases outright racial bias would be a manifest personality characteristic; for example, the chairman of a three-man Atlanta local board expressed his disappointment that Selective Service files contain no mention of a registrant's civil rights activities. He stated: "This nigger Julian Bond [now a Georgia state legislator], we missed him. I've always regretted that." NEWSWEEK, July 10, 1967, at 42, 43; cf. Du Vernay v. United States, 394 F.2d 979 (5th Cir. 1968) cert. granted, 37 U.S.L.W. 3209 (Dec. 10, 1968) (appellant alleges that local board chairman has organizational ties with the Ku Klux Klan.)

75. See notes 62, 64 supra. These predispositions may be allowed a freer rein on the draft board than on the jury. See note 70 supra. A draft board determination is often not even circumscribed by ascertainable standards (see note 68 supra) while the jury at least gets relatively precise instructions from the trial judge.

76. The very fact of systematic exclusion reflects a degree of racial prejudice existing in a particular area. The rationale of the same-class rule should apply to draft boards as well as to jury exclusion cases. See text accompanying notes 59-67 supra, text accompanying notes 77-82 infra, note 59 supra.

77. The Marshall Commission stressed in its summary of conclusions that "(The Negro's) position in the military manpower situation is in many ways disproportionate." MARSHALL COMMISSION REPORT 9.

Former President Johnston stated in a press conference on March 9, 1967, when asked about the Marshall Commission report: "Unquestionably, in the field of Selective Service boards, and the draft machinery . . . there has been discrimination against minority groups." Brief for Appellee at 10, Clay v. United States, 397 F.2d 901 (5th Cir. 1968).

78. See notes 42-53 supra and accompanying text.


80. See note 13 supra.

81. In reclassifying a registrant, the local board is simply directed to "consider the new information which it receives and, if [it] determines that such new information justifies a change in the . . . classification, the local board shall reopen and classify the registrant anew." 32 C.F.R. § 1624.2(c) (1968). It may base its decision on evidence or considerations outside the record and all other information "pertinent to the classification." 32 C.F.R. § 1622.1 (1968). See note 69 supra. Where actual proof is possible, of course, objective evidence is controlling, but in searching a registrant's conscience and motives a local board may evaluate a registrant's credibility and even his demeanor; these factors could easily be decisive. See, e.g., Witmer v. United States, 348 U.S. 375, 381-82 (1955); White v. United States, 215 F.2d 782 (9th Cir. 1954), cert. denied, 348
on intangibles such as the sympathy which the registrant evokes from the board. For example, many local boards might find difficulty in considering Negro laymen capable of developing intense philosophical and religious commitments to nonviolence.

The Marshall Commission came to the general conclusion that "the Negro's position in the total military manpower picture . . . is in several ways inequitable." Nevertheless, the Fifth Circuit cited the portion of the Commission's Report which says that "there is no evidence that the variability of the Selective Service System leads to any systematic biases against poor people, or Negroes, insofar as the final proportion of men serving in the Armed Forces is a measure of this." It should be clear, however, that the final proportion of men in the armed services is neither an accurate nor an appropriate measure of discrimination—or the lack of it—in the SSS. A more important and revealing statistic is that a far greater number of Negro than Caucasian registrants are rejected for mental, moral, or physical

U.S. 970. The board may properly indicate in the written record that the registrant's veracity is subject to question. See, e.g., United States v. Alvies, 112 F. Supp. 618 (N.D. Calif. 1953). Other subjective factors may be weighed by the local board, such as the idea that claims for successive deferments on varying grounds may call the registrant's sincerity into question. See, e.g., Witmer v. United States, supra; United States v. Peebles, 220 F.2d 114 (7th Cir. 1955); Taffs v. United States, 208 F.2d 329 (8th Cir. 1953), cert. denied, 347 U.S. 928. Evaluating the registrant's claim for a conscientious-objector exemption is of necessity a subjective endeavor involving philosophical and theological inquiry. In Clay, for example, the board evaluated his claims for a conscientious-objector exemption in light of his past pugilistic efforts, and the Justice Department in its recommendations characterized his Nation of Islam religion as "primarily political and racial." 397 F.2d at 919.

82. See, e.g., 50 U.S.C. § 460(g) (1964), which provides that registrants "preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools . . . shall be exempt from training and service . . . ." Local Bd. Mem. No. 56 (S.S.L.R. Practice Manual at 2179) stipulates that

[i]t is the responsibility of the local board to determine whether or not a theological or divinity school is recognized as such within the provisions of section [460(g)] of the Act and also whether or not the church or religious organization under the direction of which the registrant is preparing for the ministry is similarly recognized.

83. MARSHALL COMMISSION REPORT 22.
84. 397 F.2d at 910 (emphasis added). The Fifth Circuit appears to have taken this quotation out of context. The complete statement of the Commission follows:

While none of the evidence . . . is conclusive in itself, taken together it indicates that there is a substantial amount of variability in the way the System operates. There is both variation among states, and variation among boards within a single state. . . . There is no evidence that the variability of the Selective Service System leads to any systematic biases against poor people, or Negroes insofar as the final proportion of men serving in the Armed Forces is a measure of this.

Qualified Negroes do serve . . . in higher proportion on active duty than do qualified whites, at least in part because they have much lower rates of direct enlistment in the Reserves and National Guard.

MARSHALL COMMISSION REPORT 71.

85. The Marshall Commission itself recognized that the final-proportion test was misleading insofar as it indicates that Negroes and Caucasians are treated equitably in the Selective Service System. Throughout its Report, the Commission cited instances in which inequality is notable. See notes 77, 83, 84 supra.
reasons. As a result, the ratio of Negroes to Caucasians in the armed forces, other factors being equal, should not be the same as that in the general population; but it should, simply on a statistical basis, be smaller. Of course, “other factors” may not be equal; for example, re-enlistment rates are higher for Negroes than for Caucasians. One thing, however, is clear: the Fifth Circuit’s reliance on “the final proportion of men serving in the Armed Forces” as an indication of fairness in the Selective Service System is unrealistic.

There is further reason why systematic exclusion should be prohibited in the context of draft boards. The federal government must exemplify fairness and equality to those who are called upon to act in its defense. There can be no respect for the SSS, or for the dignity of military duty, if the burdens of national service are inequitably distributed on the basis of race. As the Fifth Circuit noted, “[t]he Selective Service System must not only be fair, it must likewise have the appearance of fairness. Negro draftees should be selected for military service by a system which gives Negro citizens a full participation in the selection process.”

As the Marshall Commission pointed out:

Department of Defense estimates showed that of all those examined, almost 50 percent of nonwhite men ... in 1964 had been found unfit for service as opposed to almost 25 percent of the white male population of the same age group. ... The percentage of Negroes considered qualified for service was thus considerably smaller than the similar percentage of whites.

MARSHALL COMMISSION REPORT 22.

Thus, while the final proportion of Negroes to Caucasians in the Armed Forces is the same as that in the general population, 30.2% of the qualified Negroes were drafted, whereas only 18.8% of the qualified Caucasians were. MARSHALL COMMISSION REPORT 22.

It would, of course, be presumptuous to ascribe the inequities of the Selective Service System solely to the bias or discrimination of draft boards. While enlistment rates are about equal for qualified Caucasians and Negroes, the Marshall Commission cited two factors as possible explanations for the disproportionate conscription of qualified Negroes as opposed to qualified Caucasians: First, fewer Negroes get into reserve programs or National Guard units; second, fewer Negroes get into officer programs.

Of course, any suggestion that Negroes should contribute a fixed percentage of all those inducted, or that Caucasians should not contribute more than a fixed percentage, is an affront to the fundamental proposition that in the eyes of the law people are individuals, not members of races.

In Clay, the Court of Appeals for the Fifth Circuit stated, 397 F.2d at 911:

There is no stigma attached to wearing the military uniform of the United States, to the contrary, it is a badge of the highest honor. ... It is the same willingness of Americans to sacrifice their lives in the military service of the country which has made it possible to establish the United States as a free nation.

The Selective Service regulations provide that an employee “shall avoid any action ... which might result in, or create the appearance of” giving favored treatment to any person, or which might undermine public confidence in the integrity of the Government. 32 C.F.R. § 1600.735-20 (1968). Judge Wright of the D.C. Circuit has commented: “When a nation exercises one of its gravest powers over an
B. The Statutory Basis of the Right to Classification by a Selective Service Board Free of Systematic Exclusion

The Universal Military Training and Service Act contains a declaration of congressional policy stating that "in a free society, the obligations and privileges of serving in the armed forces . . . should be shared generally in accordance with a system of selection which is fair and just . . . ." Any selection process that manifests inequality by systematically excluding Negroes from participation in its selective processes can hardly be called "fair and just." Fairness and justice require government to be "officially indifferent to race." "Distinctions between people solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality . . . ."

The Universal Military Training and Service Act also provides that "in the interpretation and execution of the provisions of this title [sections 451-471], there shall be no discrimination against any person on account of race or color." This language is, by its own terms, applicable to section 460(b)(3), which provides for the creation of local and appellate draft boards and authorizes the appointment of board members. There is no indication in the statute that the words forbidding discrimination apply only to registrants; to the contrary, only a strained construction could avoid the conclusion that discrimination in the selection of board members is forbidden. Thus, proof of systematic exclusion amounts to a prima facie violation of this clause of the conscription statute.

...
Finally, the Universal Military Training and Service Act stipulates that "[t]he selection of persons . . . shall be made in an impartial manner, under such rules and regulations as the President may prescribe . . . ." 101 It has already been suggested that a system which incorporates systematic exclusion and thus involves the likelihood of undetectable bias cannot, as a matter of law, act in an "impartial manner." 102 The same prejudices which motivate the systematic exclusion of Negroes from draft boards are inevitably reflected in the actions of the boards ultimately created. Consequently, in Selective Service board jurisdictions where systematic exclusion is demonstrable, the selection of persons for training and service is not accomplished in an "impartial manner" as required by the statute.

Read in their entirety, the statutory provisions reflect significant emphasis on the need for impartiality throughout the conscription system. Impartiality was a goal of Congress, but achievement of that objective is severely jeopardized by a selection process that includes many operating units which have been staffed in a discriminatory manner.

IV. THE INDIVIDUAL REGISTRANT'S STANDING TO CHALLENGE THE COMPOSITION OF HIS SELECTIVE SERVICE BOARDS

The existence of a right does not necessarily mean that it may be asserted by every person; the concept of standing comes into play to limit an individual's opportunity to assert a particular right. 103 The limitations which the standing requirement imposes are neither clearly defined nor inflexible; 104 as generally stated, the doctrine requires that a person be "aggrieved" in some sense by the denial of a right before he may assert that right on his own behalf or on behalf of others. 105

In the cases involving systematic exclusion from jury venires, it is not necessary for a defendant to show that he has actually been aggrieved in order for him to have standing to object to the composition of the jury which heard his case. A defendant is presumed to be an aggrieved party whenever there is proof that members of his race have been systematically excluded from the venire. 106 Similarly,

102. See pt. III.A. supra.
104. See discussion in text accompanying notes 159-62 infra.
106. See text accompanying notes 59-67 supra.
assuming the existence of a right to classification by a Selective Service board from which members of one's race have not been systematically excluded, proof by a Negro registrant of systematic exclusion should, without more, entitle him to personal standing—that is, standing to challenge the legality of his own classification. As has been suggested, a presumption that prejudice results from systematic exclusion is as appropriate in the context of Selective Service boards as it is in the context of juries. 107

Two questions about standing remain: (1) Does an appeal by a registrant to a biracial SSS appeal board deprive him of standing to challenge his own classification? (2) Does an individual registrant have "third-party standing" to assert the rights of other registrants?

A. The Effect of Consideration by a Biracial Appeal Board 108 on Personal Standing

In very general terms, a party becomes an "aggrieved party" when some action is taken which significantly affects him. 109 If such action is the denial of a right, the standing doctrine generally precludes a claim for relief if the denial is subsequently "cured." 110 The Fifth Circuit applied this aspect of the standing doctrine in Clay: it held that since Negroes were not systematically excluded from the presidential board which ultimately gave de novo consideration to Clay's classification, any illegality that could have resulted from the systematic exclusion of Negroes from other units of the SSS was cured by that board's decision. 111 It is submitted, however,

107. See text accompanying notes 68-82 supra.
108. The term "appeal board" as used in this Comment will include both the state and the presidential appeal boards.
110. If a party's aggrievement is cured, he is no longer "adversely affected in fact." See K. Davis, supra note 109, at 398-99.
111. 397 F.2d at 913. The court did not identify the standing problem by name. Along with other reasons for denying Clay relief, however, the court stated that "[a]ny error or invalidity in the selective service procedures up to and including the Presidential Appeal Board was cured by de novo consideration by that board which acted in the place and stead of the President himself." 397 F.2d at 913 (emphasis added). With all deference, it is submitted that the presidential board can hardly be deemed to cure errors in its own proceedings, unless, of course, there is a subsequent hearing for the purpose of doing so.

In the Clay case, there were no Negroes on any of the local boards or state appeal boards which considered Clay's classification. Hence, systematic exclusion extended through the state appeal board level and was absent only at the presidential board level. In other cases, however, it is entirely possible that systematic exclusion might exist at the local board level but not at the state appeal board level. Because the state appeal board proceeding, like that of the presidential board, is characterized as de novo, the question whether classification by an impartially constituted state appeal board should operate to deny a registrant standing to challenge systematic exclusion present at the local level would be likely to arise. The cases generally agree that state appeal board action also supersedes that of the local board and cures any prejudice
that there is a particular kind of prejudice resulting from improperly constituted local boards which cannot be cured by the proceedings of impartially constituted appeal boards. Under present conditions, not all men eligible for service are needed in the armed forces; some are deferred or exempted. Deferments and exemptions are not matters of right; rather, they are matters of legislative grace. But the fact that no registrant has a right to be deferred or exempted does not justify arbitrary or discriminatory allocation of deferred or exempt status. Due process demands that privileges be granted as equitably as rights. With the wide discretion accorded draft boards and the broad guidelines used to determine classifications, it is quite possible for boards to discriminate against Negroes which occurred at the local level. See, e.g., De Remer v. United States, 340 F.2d 712, 719 (8th Cir. 1965); United States v. Van Hook, 284 F.2d 499, 491 (7th Cir. 1960); United States v. Chadorski, 240 F.2d 590, 599 (7th Cir. 1956).

112. All qualified individuals are obligated to serve when called, of course, but under present circumstances, all are not required to serve. As the Marshall Commission stated:
The facts are these: some 2 million men will be reaching draft age each year . . . . Nearly three-fourths of them will be qualified for service under current Department of Defense standards. Of that 1 1/2 million, only 600,000 to 1 million—varying with the circumstances—will be required to serve. And of these, between 100,000 and 200,000 may have to be inducted.


114. See K. Davis, Administrative Law Text 127-28 (1959). It may be proper to attach some conditions on the grant of “privileges” that could not be similarly used to limit “rights,” since privileges may be removed at the discretion of the authority that extends them. But the right-privilege dichotomy is diminishing in importance. See French, Comment: Unconstitutional Conditions: An Analysis, 50 Geo. L.J. 234, 236-39 (1961); Linde, Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector, 39 Wash. L. Rev. 4, 31-32 (1964); O’Niel, Symposium: Law of the Poor: Unconstitutional Conditions: Welfare Benefits with Strings Attached, 54 Calif. L. Rev. 443, 445 (1966). In no circumstances may privileges be conditioned for some racial groups while being distributed unrestricted to others. Distinctions between people based on race are per se unconstitutional. Differences in color or birth are in no way relevant to the way men should be treated. See Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 353 (1949).

115. See notes 68, 81 supra. This includes the state appeal boards. J. Davis & K. Dolbear, Little Groups of Neighbors: The Selective Service System 106.

116. There has not been an attempt to establish uniform rules defining explicitly the criteria for classification of registrants by local and appeal boards. See, e.g., 32 C.F.R. §§ 1622.1-50 (1968). The Marshall Commission Report stated that a great deal of the variability in the system may be due to the “lack of standardization in the guidance the local boards receive . . . . Because the System offers wide latitude for critical judgment by the boards themselves, [the guidance] does not always articulate a clearly defined policy to the board.”

In resisting efforts to impose uniform standards for classification on local boards, SSS representatives have stated:
We do not believe that more detailed mandatory criteria for local board classification guidance is desirable or would be beneficial to the registrant or to the country. At the present time local boards, subject to appeal, determine the classification of
and other minority groups within the confines of various Selective Service classifications.\textsuperscript{117} For example, student, occupational, and hardship deferments,\textsuperscript{118} and ministerial and conscientious-objector exemptions,\textsuperscript{119} may be granted as liberally as the law allows to

the registrant based on all the facts in the case and then knowledge of the general economic, employment and defense situation in the country. There can be no uniformity, nor is it desirable since there are no two cases that are exactly the same, whether they be students, employees, or family providers.\textit{Hearings on the Review of the Administration and Operation of the Selective Service System Before the House Comm. on Armed Services, 89th Cong., 2d Sess. at 9986 (1966). See notes 68, 81 supra; notes 118, 119 infra.}

In effect, the local boards are supposed to engage in a balancing process. They determine whether registrants should be inducted—at any given time, this determination turns on the number of men needed and the relative merits of individual claims for deferments and exemptions.

117. This is not to suggest that local boards could not discriminate in a manner which would be patently illegal but nevertheless uncorrected by de novo appeal. The most obvious possibility would be for local boards to act in a neutral way toward Negro registrants while extending illegal deferments and exemptions to Caucasians. Since Caucasians would not be expected to challenge their fortune, and since the local boards are not required to write opinions which would expose this lack of evenhandedness, such illegality would probably not be exposed in appeals by Negro registrants. But even if Negroes were overtly discriminated against, many of them would never appeal. Indigent Negroes, for example, are unlikely to retain counsel and be aware of their rights vis-à-vis the SSS. Hence many Negro registrants, even those who were discriminated against, would merely resign themselves to their fate and submit to induction without recourse to appeal. See Ginger, supra note 69, at 1335-37.

There are, of course, limitless possibilities for outright dishonesty and malfeasance by board members or clerks in terms of altering files or failing to submit complete information to the appeal boards. Most board members are undoubtedly honest. But the occasional dangerous bigot would be less capable of prejudicing innocent registrants if local boards were constituted in a less exclusive manner than is presently the case. See note 74.

118. Occupational (2-A, 2-C) and hardship (3-A) deferments are perhaps most susceptible to abuse since there are no clear standards which establish criteria for determining whether a registrant is entitled to either. As a result, board members tend to base their decisions regarding these deferments on general newspaper reading, personal assumptions or prejudices, or such factors as the physical appearance of the registrant or his choice of wording in the letter of written request. See J. Davis & K. Dolbeare, supra note 115, at 81.

In the case of hardship deferments, local boards are charged with the responsibility of determining when induction would operate as an “extreme hardship” on dependents—at best a subjective task. See, e.g., 32 C.F.R. § 1622.30(b) (1968).

In the case of occupational deferments, local boards were formerly guided by a list of essential activities distributed by the National Security Council. The list, however, was not always followed, and many boards paid little attention to it. J. Davis & K. Dolbeare, supra, at 8. The Marshall Commission found that “[a]bout half reclassified into [occupational deferments] were in neither a critical occupation nor an essential industry as defined by the Department of Labor.” MARSHALL COMMISSION REPORT 27. In February of 1968, partly as a result of the above problems, the National Security Council repealed the list of essential activities. Local boards are now authorized to grant occupational deferments on the basis of a showing of an “essential community need.” This highly subjective standard emphasizes “community need” as opposed to the prior standard of “national interest.” J. Davis & K. Dolbeare, supra, at 8. See 32 C.F.R. §§ 1622.20-24 (1968). Thus, local attitudes and prejudices may enter directly into these deliberations.

119. By their nature, conscientious-objector exemptions involve subjective determinations by board members concerning the philosophical and religious beliefs of the
Caucasian registrants, while Negro registrants may be confronted with stricter application of the regulations, receiving an exemption only when the law explicitly requires it. Since both the liberal standards applied to Caucasians and the strict standards applied to Negroes could be valid if considered individually rather than in the context of all the other cases decided by the same board, review by an appeal board of a single case could not be sufficient. The fact that a local board’s discrimination falls within its range of discretion does not make the discrimination any more acceptable. It does make it harder to detect, and therefore harder to correct even in a “de novo” hearing.

The curative effect of review by an appeal board is open to serious question on another ground: the characterization of the registrant. See 50 U.S.C. App. §§ 456(g), 466(g)(2) (Supp. III, 1965-1967); 32 C.F.R. §§ 1622.11, 1622.14 (1968). The present standard exempts any person “who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.” 50 U.S.C. App. § 456(f)(2) (Supp. III, 1965-1967); cf. United States v. Seeger, 380 U.S. 163 (1965) (the requirement that conscientious objection to war be based on belief in a Supreme Being whose power is superior to the acts of men struck down); Dodge, The Free Exercise of Religion: A Sociological Approach, 67 Mich. L. Rev. 679, 713 (1969). The criteria for granting conscientious-objector exemptions are qualified by the provision that “the term ‘religious training and belief’ does not include essentially political, sociological, or philosophical views, or a merely personal moral code.” 50 U.S.C. App. § 456(f) (Supp. III, 1965-1967). This qualification raises significant conceptual problems of comparative theology in light of the spread of new religions and creeds throughout the contemporary Negro community. See Dodge, supra, at 712-15. In the principal case, for example, the Department of Justice concluded that Clay’s objections to war, “insofar as they are based on the teachings of the Nation of Islam ‘rest on grounds which are primarily political and racial.’” 397 F.2d at 919. Ministerial exemptions may be more capable of objective determination. But even in this area, subjectivity may play an important role: cf. 50 U.S.C. App. §§ 456(g), 466(g)(2) (Supp. III, 1965-1967); 32 C.F.R. § 1622.43 (1968); Matyastik v. United States, 392 F.2d 657 (6th Cir. 1968) (there must be a regularity of religious activities, a ministerial vocation rather than an avocation); Jones v. United States, 387 F.2d 909 (5th Cir. 1968); Wood v. United States, 373 F.2d 894 (5th Cir.), rev’d on other grounds, 399 U.S. 20 (1970) (registrant must bear the burden of establishing the claim).

120. Of course, where uncontroverted evidence places the registrant clearly within the confines of a claimed exemption or deferment, the board is not free to deny the claim on the basis of speculation or conjecture. See, e.g., Dickenson v. United States, 346 U.S. 389 (1953); United States v. Wilson, 215 F.2d 443 (7th Cir. 1954).

121. It might be argued that appeal boards themselves engage in a balancing process, free from rigid or uniform criteria, which would tend to negate any discriminatory action by local boards and substitute the judgment of an impartial tribunal on appeal. Appeal boards do apparently function in relatively autonomous fashion, and they are vested with a great deal of discretion. J. Davis & K. Dolman, supra note 118, at 106. But there is some doubt whether appeal board proceedings are in fact de novo. See notes 123-24 infra. Moreover, appeal boards have a different frame of reference than the local board; they review cases only of registrants who challenge local board classifications. Hence the appeal board could not be apprised of the extent to which certain local boards might be unusually liberal in their treatment of registrants of favored races or groups. Impartially constituted appeal boards can be expected to adopt reasonably fair policies with respect to matters of classification. But this does not assure that they will apply the same standards as the local boards apply to the most favored registrants in the community.
review as “de novo.” 122 The appeal board at either the state or national level can spend only a limited amount of time on each case, 123 and it bases its decision about classification on the registrant’s SSS file as submitted by the local board (the presidential board uses the file submitted by both the local and state appeal boards). 124 As a practical matter, therefore, a registrant appealing classification within valid guidelines to an appeal board would in all probability be faced with a decision unresponsive to the important distinction between evenhanded treatment and technical compliance. In reality, such a decision would amount to nothing more than a formal reissuance of the local board’s initial classification.

Thus, the essential question is not whether the registrant’s classification is justifiable in light of the often imprecise SSS regulations; rather, it is whether the regulations have been applied in an evenhanded manner by the local boards. As suggested above, there is no evidence that the appeal boards give extensive attention to such considerations. 125 If the regulations are not applied equally regardless of race, the disfavored registrant has been denied due process and should have standing to challenge the inequity regardless of de novo consideration by the appeal board. Therefore, the registrant in Clay’s position should be granted standing to challenge his draft board’s prejudice.

Yet, even assuming that any prejudice affecting the registrant’s Selective Service status is cured by an appeal, he might justifiably

122. See Comment, The Selective Service System: An Administrative Obstacle Course, 54 CALIF. L. REV. 2123, 2159 (1966), which concludes that review by a state appeal board is not, in practical effect, de novo. Information concerning the action of the presidential board is sparse. Presumably, however, many of the difficulties inherent in the state appeal board procedures are also present at the level of the presidential board; the authorizing regulations are similar for each body: Compare 32 C.F.R. § 1626.1-.6 (1968) with 32 C.F.R. § 1627.1-.8 (1968). See also J. DAVIS & K. DOLBEARE, supra note 118, at 106-07.

123. There is one state appeal board for each federal judicial district [32 C.F.R. § 1604.21 (1968)] and one presidential board which is composed of a single panel of three members (J. DAVIS & K. DOLBEARE, supra note 118, at 106-07). Both the state appeal boards and the presidential board meet only once or twice a month. Therefore, individual cases can receive only a brief analysis. J. DAVIS & K. DOLBEARE, supra, at 100-07.

124. The registrant is not entitled to appear before either the state appeal board or the presidential board. The state appeal board has only the registrant’s file, as submitted by the local board, upon which to make its decision. The state appeal board is directed to consider only the information received in the record from the local board, and “general information concerning economic, industrial, and social conditions.” 32 C.F.R. § 1626.24 (1968). Standards for review by the presidential board are not specified in the SSS regulations, but the presidential board also bases its decision primarily on the registrant’s file. J. DAVIS & K. DOLBEARE, supra note 118, at 107.

The registrant, of course, can build his own record by adding information to his file at any time, but the file will also contain the findings of all other boards.

125. Even if the appeal boards wished to undertake such an analysis, it is doubtful that useful comparative data would be available to provide them with information necessary effectively to evaluate a registrant’s status in light of the relative treatment accorded other registrants by the local or state appeal board.
be permitted to challenge bias occurring at the lower levels. The end result of the draft process need not be sustained because curative processes have operated. A fair appeal cannot erase the prejudice which preceded it. Due process assures more than freedom from harmful prejudice; it also protects values which are unrelated to the elimination of outcome-affecting injury in a single case—values such as the integrity of governmental processes and the dignity of individuals affected by those processes. The importance of these values in the context of judicial proceedings may explain the willingness of appellate courts to overturn criminal convictions of Negro defendants who receive a fair trial by an impartial jury if the defendants were indicted by grand juries from which members of their race were intentionally, or "systematically," excluded. 126 This has been the universal result in these cases, despite the obvious objection that such a defendant could not claim that he was prejudiced by the composition of the grand jury since any prejudice occurring at that stage of the proceeding was presumably cured by his subsequent fair trial. 127 Although the courts have not articulated a clear rationale for applying the systematic exclusion doctrine to grand jury cases, 128 it is apparent that they have not allowed the absence of outcome-affecting injury to deter them from attacking the constitutional infirmity.

Two lines of criminal procedure cases also lend general support to the principle of granting relief despite lack of prejudice. In Mapp v. Ohio 129 and subsequent cases the Supreme Court has required that illegally seized evidence be excluded from state trials even though the evidence itself was reliable. Among the reasons for imposing the exclusionary rule on state courts, the Mapp Court included "the imperative of judicial integrity." 130 Quoting Justice Brandeis, it stated:

"Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. If the Government becomes a lawbreaker, it breeds contempt for the law; it in-

127. See Cassell v. Texas, 339 U.S. 282, 302, 304 (1950) (Justice Jackson, dissenting): This Court has never explained how discrimination in the selection of a grand jury, illegal though it be, has prejudiced a defendant whom a jury trial, chosen with no discrimination, has convicted. The reason ... perhaps, is that, in the earlier cases ... the discrimination condemned was present in selecting both grand and trial jury and ... the opinions made no differentiation. ... Only within the last few years have convictions been set aside for discrimination in composition of grand juries alone, and in these the question now under discussion was not discussed.
130. 367 U.S. at 660.
vites every man to become a law unto himself; it invites anarchy.\textsuperscript{131}

In several confession cases the Court has guaranteed to every defendant the right not to be convicted by the use of a coerced confession, regardless of its relevance to the case or its veracity.\textsuperscript{132}

The standing doctrine, useful though it may be to prevent wholesale constitutional litigation, should not operate to deny a registrant his right to evenhanded treatment by the Selective Service System, nor should it operate to allow continued undermining of the integrity of the System.

**B. The Individual Registrant's Standing To Assert the Rights of Others**

If a court is reluctant to grant personal standing to a Negro registrant to challenge his classification on grounds of systematic exclusion, the registrant could argue that he is also representing other registrants. Such a claim would require a demonstration that systematic exclusion of Negroes from Selective Service boards also violates the constitutional rights of other Negro registrants.\textsuperscript{133}

\textsuperscript{131} 367 U.S. at 659.

\textsuperscript{132} See, e.g., Blackburn v. Alabama, 361 U.S. 199, 206-07 (1959) in which Chief Justice Warren stated:

It is ... established that the Fourteenth Amendment forbids “fundamental unfairness in the use of evidence whether true or false.” ... Consequently, we have rejected the argument that introduction of an involuntary confession is immaterial where other evidence establishes guilt or corroborates the confession. ... As important as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence. Thus, in cases involving involuntary confessions this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government ... wrings a confession out of an accused against his will. ... “The abhorrence of society to the use of involuntary confessions ... also turns on the deep rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.”

\textsuperscript{133} It may be that a Negro registrant could assert the rights of Negroes in general to be considered equally with Caucasians for positions on local and appeal draft boards. The Selective Service Act, 50 U.S.C. App. § 455(a)(1) (Supp. III, 1965-1967), prohibits discrimination in the recommendation and appointment of persons to serve on local boards. See notes 98-99 supra and accompanying text. There has been some discussion of the standing of criminal defendants to assert the rights of unknown jurors who were systematically excluded from the venire. See, e.g., Sedler, Standing To Assert Constitutional Jus Tertii in the Supreme Court, 71 YALE L.J. 599, 638 (1962); Comment, The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection, 74 YALE L.J. 919, 931-36 (1965). While the courts have not dealt with this question, they have long recognized that Negroes have a valid interest in being included on juries (see, e.g., Strauder v. West Virginia, 100 U.S. 303, 305 (1879)), and it is clear that jury discrimination “denies equal protection to Negro citizens who are otherwise qualified for jury duty, because it denies them equal opportunity to serve as jurors.” Kuhn, Jury Discrimination: The Next Phase, 41 S. CAL. L. REV. 225, 247 (1965).

By the same token, discrimination against available Negroes in the recommendation and appointment of persons to serve on local or appeal draft boards denies them equal opportunity to serve as draft board members. But the argument for allowing a Negro
On occasion, the Supreme Court has granted third-party, or *jus tertii*, standing to a litigant seeking to assert the rights of other parties who would have been adversely affected by the outcome of the case. It is difficult to predict in a given case whether a court will entertain a constitutional challenge in behalf of third parties. This is true in part because of the Supreme Court's failure to articulate clear guidelines with regard to *jus tertii* standing. But perhaps more important, the propriety of granting third-party standing turns upon the particular circumstances of each case.

Despite this uncertainty, in many cases it is clear that the presence of important third-party rights has been crucial to the Supreme Court's ultimate decision to allow an individual litigant to assert broad constitutional claims. It has been suggested that there are four factors which the Supreme Court weighs when determining whether granting *jus tertii* standing is appropriate in a given case.

The first of these factors is a consideration of whether the litigant would be a vigorous enough representative of the third-party interests he seeks to assert. It is apparent that the criminal defendant who has
draft registrant to advance the equal protection rights of excluded board members may be even more tenuous than the hitherto unrecognized argument which favors a grant of standing to criminal defendants to vindicate the equal protection rights of excluded jurors. Since the draft board positions are filled by discretionary appointment, no individual has a "right" to board membership.

Despite the technical difficulties inherent in any attempt to frame a "right" to draft board membership or a registrant's standing to assert that right, it seems clear that important interests, which go to the essence of the doctrine of equality, are infringed by the discriminatory exclusion of Negroes from draft boards. Moreover, there may be no realistic way in which these interests can be protected except in a registrant's criminal appeal. Cf. Sedler, supra, at 638; Comment, supra, at 932-33 (suggesting that existing remedies by which excluded jurors could vindicate their rights to serve on juries are insufficient). The fact that a reversal of a registrant's conviction for refusal to submit to induction on systematic exclusion grounds would deter the continuation of exclusionary policies in the Selective Service System may not be sufficient grounds to permit an express grant of third-party standing to the registrant, but it should not be ignored in a compilation of the advantages that would flow from a judicial vindication of a registrant's right to draft boards free from systematic exclusion.

134. Griswold v. Connecticut, 381 U.S. 479 (1965) (doctors challenging state anti-contraceptive statute had standing to raise constitutional rights of married people with whom they had professional relationship); NAACP v. Alabama, 357 U.S. 449 (1958) (NAACP had standing to assert members' right to freedom of association in refusing to produce membership lists); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (owners of private school permitted to assert rights of potential pupils and their parents); Barrows v. Jackson, 346 U.S. 249 (1953) (Caucasian land vendor had standing to assert the rights of unknown non-Caucasian vendees to equal protection in resisting enforcement of a restrictive covenant). But cf. Tileston v. Ullman, 318 U.S. 44 (1942) (doctor denied standing to challenge a state statute outlawing contraceptive devices on the ground that it imperiled the lives of his patients). See generally Sedler, supra note 133.

135. Sedler, supra note 133, at 600.

136. Id.

137. Id. at 641-45.

138. Id. at 626-28. None of these factors should be considered conclusive, but all are relevant and likely to be balanced by the Supreme Court when it decides whether or not to permit *jus tertii* standing.
refused to submit to induction is vitally interested in the outcome of his case. To him, failure means imprisonment. Thus, it is probable that he would be a vigorous advocate of his own rights and the rights of others who are similarly situated.

The second factor is the nature of the constitutional right being asserted. "It takes no great imagination to realize that certain constitutional guarantees inspire a greater sensitivity on the part of the Court than do others." The elimination of racial discrimination from all areas of government activity has been a constant theme of Supreme Court decisions, particularly since Brown v. Board of Education. Moreover, the need for equitably constituted draft boards and the right of Negro draft registrants to be classified by a system that is free from bias is of special urgency in light of contemporary social problems.

The third factor is the relationship between the litigant and the third parties whose rights he is asserting. Where both are of the same class, there is a greater likelihood that third-party standing will be granted. In a case based on claims of systematic exclusion of members of a particular race, the members of that race form a meaningful class for purposes of asserting third-party rights.

The fourth and perhaps crucial factor centers on the question of whether the third party can effectively assert the claimed rights in a single, independent action. This is usually a pragmatic question: if assertion by one of the third parties is unlikely, the Court will be more willing to grant just tertii standing to the litigant. Under present circumstances, it is unlikely that Negro registrants would seek to vindicate their right to be classified by racially balanced draft boards until they have been classified I-A, since any such challenge might elicit reprisal from the racially exclusive boards being attacked. The Selective Service Act of 1967 makes explicit provision

---

139. Violations of 50 U.S.C. App. § 462(a) (1964) for failure to submit to induction are punishable by a maximum sentence of $10,000 fine and five years imprisonment.
140. Sedler, supra note 133, at 627.
142. The problems generated by systematic exclusion of Negroes from draft boards are neither abstract nor neutral in character. The existence of racial discrimination in the SSS impugns the integrity of the entire executive branch. Such discrimination can only aggravate existing racial tensions in America. Moreover, for various social reasons Negroes are more vulnerable to discriminatory treatment than more advantaged groups: they are less likely to be apprised of their procedural rights, less likely to obtain deferments or exemptions, and, for economic reasons, often less able to secure legal advice. See Ginger, Minimum Due Process Standards in Selective Service Cases, 19 Hastings L. Rev. 1335-37 (1968).
143. It is doubtful that such a challenge could be undertaken in any case. Courts have generally rejected attempts to enjoin the operation of selective service boards. See note 149 infra.
144. A few cases involving punitive reclassification of registrants by local boards have reached the courts. A prime example is Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967), in which two University of Michigan students were reclassified for sitting in at a local draft board and allegedly obstructing its activities. The court held that the local board exceeded its jurisdiction by reclassifying the
for judicial review only in the form of defenses raised to a criminal prosecution for violation of the Act, and it is understandable that many registrants would be unwilling to assert their rights in such a manner. Although it is unlikely that the absence of authorizing language in the 1967 Act is intended to eliminate the traditional alternative avenue of review—seeking a post-induction writ of habeas corpus—this approach is seldom used because of numerous pragmatic difficulties. As a practical matter, Congress has made it very risky for registrants to attempt to challenge the constitutionality of their draft boards; even if a Negro were to undertake a challenge on the grounds of systematic exclusion, he would be likely to encounter the same problems that have faced recent defendants like Cassius Clay. The practical difficulties imposed on all potential challengers of systematic exclusion argue strongly in favor of allowing the main issues to be settled in one case, rather than in many.

---

students 1-A, but limited the scope of its grant of pre-induction judicial review to cases in which first amendment rights are impaired.

Lt. General Hershey did not follow the Wolff mandate after the decision was rendered; he wrote a letter to all local boards in which he told the boards that any registrant who had violated the draft laws should be reclassified. N.Y. Times, Nov. 9, 1967, at 2, col. 4. Although he later tempered this statement, it was never completely withdrawn. N.Y. Times, Dec. 10, 1967, at 3, col. 1. See Comment, Judicial Review of Selective Service Action: A Need for Reform, 56 CALIF. L. REV. 448, 457 n.64 (1968). See also United States v. Eisdorfer, 1 S.E.L. SERV. L. REP. 3115 (E.D.N.Y. 1968); Griffiths, Punitive Reclassifications of Registrants Who Turn in Their Draft Cards, 1 S.S.L.R. 4001 (1968); cf. United States ex rel. Goldsby v. Harpole, 253 F.2d 71, 82 (6th Cir. 1959), in which the court stated:

As Judges of the Circuit comprising six states of the deep South, we think that it is our duty to take judicial notice that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries. . . . [T]he very prejudice which causes the dominant race to exclude members of what it may assume to be members of an inferior race from jury service operates with multiplied intensity against one who resists such exclusion. Conscientious southern lawyers often reason that the prejudicial effects on their client of raising the issue far outweigh any practical protection in the particular case. . . . Such courageous and unselfish lawyers as find it essential for their clients' protection to fight against the systematic exclusion of Negroes from juries sometimes do so at the risk of personal sacrifice which may extend to loss of practice and social ostracism.

145. But see the possible exception discussed in note 144 supra.
146. See note 71 supra.
147. Id. See Comment, supra note 144, at 460-61.
149. For example, Clay was rebuffed several times by various courts in his attempts to seek injunctive relief against the action of his draft boards on the ground of systematic exclusion. In each case, the ruling court decided that judicial review was unavailable until a registrant either submitted or refused to submit to induction. The courts also held that except in rare or unusual circumstances, it was not a proper function of the judiciary to enjoin the operation of Selective Service boards. See, e.g., Muhammed Ali v. Breathitt, 268 F. Supp. 63 (W.D. Ky.), aff'd, No. 17,787 (6th Cir. March 28), cert. denied, 386 U.S. 1018 (1967); Muhammed Ali v. Connally, 266 F. Supp. 345 (S.D. Texas 1967).
150. Taking a criminal appeal through several appellate proceedings and ultimately to the Supreme Court is a very costly endeavor. Few registrants of any race would have sufficient financial resources.
The inability of injured third parties to assert their rights effectively is compounded in the case of the Selective Service System by a peculiar device which permits the SSS Director to “appeal” a decision unfavorable to the registrant.151 In most instances, the opportunity to have de novo consideration at the presidential board level would be clearly advantageous. Yet, in some cases the effect may be quite the opposite. If the “de novo” hearing is deemed to cure the particular defendant’s right to complain about the effects of systematic exclusion in the staffing of state and local boards,152 the courts will simply have to wait to consider that issue until a registrant appears who has been denied presidential review, either because of the limited work capacity of the presidential board,153 or because of that body’s limited jurisdiction (a registrant must have at least one favorable vote at the state appeal board level to obtain presidential board review on his own initiative).154 Thus, the SSS Director has the chance to seek presidential board review of those cases which he thinks offer the greatest threat of litigation.155 Those who seek to assert their rights get “curative” review, while the majority without the resources or information necessary to pursue their rights never receive any review. Such a tactic on the part of the Director could not work in every case,156 but it seems undesirable to let it work at all—the rights involved are too important.

Besides the four factors postulated above as criteria relevant to the grant or denial of jus tertii standing, it is important whether the reversal of a refusal-to-submit conviction would effectively cure the practice which the defendant is attacking on behalf of third par-

---

151. 32 C.F.R. § 1627.1 (1968). The Director may initiate such appeal when he deems it in the national interest or necessary to prevent injustice. Id.

152. It is the prevailing view in the courts that presidential board review cures any prejudice which preceded it at lower levels in the SSS. See, e.g., Clay v. United States, 397 F.2d 901, 912-13 (5th Cir. 1968).

153. The presidential appeal board is comprised of three members selected by the President. Most of its work is done through the mail from briefs of facts and suggested classifications submitted by the national headquarters. The board meets about once a month to discuss particular problems. See J. DAVIS & K. DOLBEARE, LITTLE GROUPS OF NEIGHBORS: THE SELECTIVE SERVICE SYSTEM 106-07 (1968).

154. 32 C.F.R. § 1627.3 (1968).

155. In the Clay case, for example, the Director appealed Clay’s classification to the presidential board at a time (February 24, 1967) when Clay was instituting suits for injunctive relief against his draft boards on the ground of systematic exclusion [Muhammad Ali v. Breathitt, 268 F. Supp. 63 (W.D. Ky. 1967)]. Since the purpose of the SSS is to make men available quickly and efficiently for military service, any potential disruptions or interruptions, such as a court decision divesting racially exclusive boards of jurisdiction over Negroes, would probably be viewed as a distinct threat to the system by those responsible for its smooth operation. They might well be interested in avoiding such interruption, and the tactic of presidential appeal might afford them the opportunity to do so.

156. If a registrant remains silent about systematic exclusion until after refusing to submit to induction, there would be no opportunity for the Director to invoke curative presidential review in his behalf, at least not for the purpose of avoiding possible judicial intervention.
ties. If reversal of his conviction would have no deterrent effect on continuing systematic exclusion, a grant of third-party standing would clearly be inappropriate. In such a case, however, military manpower demands and the resulting pressure from the community to maintain orderly induction of registrants should ensure that a reversal would have a rapid, positive effect in eliminating the evils of systematic exclusion.

C. The Registrant's Case for Standing: A Summary

Neither the individual registrant's personal standing to challenge the composition of his Selective Service boards, nor his jus tertii standing to assert the rights of other persons adversely affected by systematic exclusion, is clearly dictated by traditional standing principles. Although the standing doctrine has been used by courts as a means of implementing general policies of judicial restraint, some recent Supreme Court decisions advance the theory that standing is in reality an "amorphous concept," without clearly defined limits. Courts may now be more willing to grant standing, especially where arguments for granting both personal and third-party standing are joined in the same action. Moreover, policy considerations often enter into deliberations about the propriety of granting or denying standing, and cases involving racial discrimination have recently received particularly attentive consideration by the courts. In general, recent decisions suggest that rigid standing requirements are being relaxed to permit challenges to the constitutionality of governmental action and consideration of pressing civil rights issues.

V. The Appropriate Relief: A Challenge to the Supreme Court

The conclusion that systematic exclusion of Negroes from Selective Service boards is wrong by legal standards, and that a criminal defendant in a prosecution for refusal to submit to induction should have standing to "assert" that wrong as a constitutional defense, is not enough. There remain difficult problems of judicial technique.

157. See Comment, supra note 126, at 934-35.
159. See, e.g., Flast v. Cohen, 392 U.S. 83, 98-99 (1968); "Standing is an aspect of justiciability and, as such, the problem of standing is surrounded by the same complexities and vagaries that inher in justiciability. Standing has been called 'one of the most amorphous concepts in the entire domain of public law.' " See also Poe v. Ullman, 367 U.S. 497, 508 (1961); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (1966).
in handling delicate issues. The following discussion is devoted to exploring techniques that might be brought to bear on a representative case—Clay v. United States—presently before the Supreme Court.

As a preliminary matter, it is necessary to determine the scope of the relief sought and the type of corrective action that would be required. Some random racial imbalance is unavoidable whenever groups comprised of limited numbers of persons are impartially appointed from a racially heterogeneous community. Any such imbalances are the product of chance, not systematic exclusion; these random imbalances can be eliminated only by replacing genuinely impartial appointment procedures with an appointive system which would operate according to some predetermined plan of racial apportionment. But actual racial apportionment is neither feasible nor desirable as an alternative to impartiality in this situation. It should not be required that draft boards be racially proportioned or representative of every minority group within their respective jurisdictions. Given the racial and ethnic heterogeneity of American society, satisfaction of such a requirement would be a practical impossibility. Moreover, “weighting” the composition of a local draft board in accordance with community racial population percentages is contradictory to the policy of official indifference to race implicit in the constitutional equality principle. Once again, the goal is impartial appointment. If, after achieving this objective, random imbalances occur—and they probably will—they must be tolerated.

At the other extreme, however, are the gross imbalances created by systematic exclusion of certain racial groups from appointive positions in the SSS. To the extent that such imbalances exceed the level of imbalance attributable to chance they are neither random nor incurable; therefore, they cannot be tolerated. If racial imbalance

---

163. This, of course, assumes that all members of the community are equally qualified for the positions to be filled. Imbalances caused by the unavailability of eligible persons from certain segments of the community are a different matter. However, it should be noted that the “qualifications” for draft board membership are not rigorous. See note 38 supra.

164. The only way that racial balancing could be accomplished would be for each draft board to have a sufficient number of members so that one member from the area’s smallest minority group would bear the same ratio to the total number of board members as the total number of persons of that minority group in the area bears to the total population of the area. This would be permissible (the statute provides for local boards of three or more members, 50 U.S.C. App. § 460(b)(3) (Supp. III, 1965-1967)) but it would generally require immense boards.

165. See notes 96, 97 supra.

166. Indeed, it may be impossible to cure such imbalances. See note 164 supra.

167. Of course, in cases in which the minority group is very small, there may be no way short of proving actual discrimination to distinguish random imbalances from those produced by systematic exclusion. But if the imbalances are infrequent or insignificant enough to be attributable to factors other than discrimination, there can be no real basis for presuming improper conduct. In such situations, proof of actual bias should be required.
in the composition of Selective Service boards is the product of
demonstrable systematic exclusion, corrective action must be taken
to eliminate that measure of the imbalance attributable solely to the
discriminatory appointment process.

Because the President and the governors of the states are re­
spnsible under the Universal Military Training and Service Act for
appointing and maintaining Selective Service boards (the President
makes SSS appointments from the persons recommended to him
by the governors),\textsuperscript{168} they must be charged with the task of eradicat­
ing systematic exclusion.\textsuperscript{169}

\textbf{A. Alternatives to Judicial Relief}

The Supreme Court might choose to ignore the systematic ex­
clusion issue in \textit{Clay v. United States}, even if it does find merit in
the contention that systematic exclusion offends both the constitu­
tional and statutory rights of SSS registrants. The Court could achieve
this result by holding that SSS rulings cannot be overturned without
proof of actual prejudice to the registrant,\textsuperscript{170} and that Clay did not
prove such injury. One of the primary motivations for this type of
response would undoubtedly be a belief that systematic exclusion
could be eliminated from the SSS by Congress or the executive
branch soon enough to obviate the need for judicial intervention.
Deference to Congress or the President to formulate a solution to
the problem of systematic exclusion, however, might result in no
solution at all. Congress recently ignored the problem in passing
the Selective Service Act of 1967,\textsuperscript{171} even after the Marshall Com­
mission reported on the racial inequities in the SSS.\textsuperscript{172} The Executive
has demonstrated somewhat more concern: President Johnson was
apparently dedicated to the solution of the problem\textsuperscript{173} and there
is no reason to doubt that President Nixon is similarly inclined.\textsuperscript{174}

\textsuperscript{169} As will be discussed hereinafter, however, it may require some judicial urging
to generate remedial action.
\textsuperscript{170} See note 32 supra and accompanying text.
\textsuperscript{172} The report was released in February of 1967. \textit{MARSHALL COMMISSION REPORT},
at III.
\textsuperscript{173} In a message to Congress on the SSS, President Johnson stated that he had
ordered the National Director to work with the governors of the respective states “to
assure that all local boards are truly representative of the communities they serve
and to submit periodic reports on the progress in this area.” \textit{President’s Message to
Congress, March 6, 1967, 3 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 385,
895 (1967).}
\textsuperscript{174} President Nixon’s general disaffection for the draft is evidenced by his recent
order to the Defense Department to prepare a “detailed plan” to replace the present
draft scheme with an all-volunteer military after the conflict in Vietnam has
substantially subsided. \textit{N.Y. Times}, Jan. 31, 1969, at 1, col. 8. If such a plan is
But, because the President can appoint new draft board members only from those persons recommended by the governors of the states,\textsuperscript{175} he must rely completely on his powers of persuasion with the governors to eliminate systematic exclusion of Negroes from Selective Service boards. Unless he can convince the governors to include Negro appointees in their personnel recommendations, he cannot appoint Negroes to draft boards.\textsuperscript{176} Yet the President’s persuasive powers are not always effective in the field of civil rights, particularly in states where significant racial hostility still exists.\textsuperscript{177} Even if the governors of such states were willing to recommend Negroes for appointment, however, the fundamental objections engendered by systematic exclusion might not be eradicated. For obvious political reasons,\textsuperscript{178} these governors might want to recommend Negroes for some local board positions; for example, it would be to their advantage to do so in counties with a Negro majority or a substantial Negro minority, or in counties that demonstrate the least racial bias and are thus more willing to accept Negro appointees.\textsuperscript{179} While this would be desirable in itself, it would not cut to the core of the evils engendered by systematic exclusion since counties with the least likely to achieve racial balance in the short run. The governors would be hesitant to antagonize the majority of their Caucasian constituents in such counties by recommending Negroes for board positions. Furthermore, racially biased incumbent board members might be less likely to relinquish their seats before the law required them to do so if they realized that they might be re-implemented, the problems relating to systematic exclusion in the SSS would, of course, be eradicated.


\textsuperscript{176} The Assistant Director of the National Selective Service System, commenting on the problems encountered by the National Office in attempting to include more Negroes on local boards, stressed that the powers of the National Office were limited to “exhorting” governors to recommend more Negroes. This may explain the disparity between the number of Negroes employed by the National Office and the number sitting on local and state appeal boards across the country. According to the Assistant Director, the personnel employed by the National Office are approximately 35% Negro; the percentages are significantly smaller on local and state appeal boards. Telephone interview with Col. Dee Ingold, Assistant Director of the Natl. Selective Serv. Sys., Feb. 14, 1969.

\textsuperscript{177} An obvious example is that of President Eisenhower’s difficulties with Governor Faubus and the integration of Little Rock schools.

\textsuperscript{178} Governors are of course affected by political considerations and can be expected to respond to pressures from constituents, regardless of their personal attitudes. Whether or not they bend to local pressures is dependent upon many variables. But since local board members come in direct contact with young men in the community and directly influence their lives, community prejudices are likely to generate vigorous opposition to the inclusion of Negroes on some local boards.

\textsuperscript{179} In many instances, of course, the same counties that would be amenable to the inclusion of Negroes on local boards would also have a plurality, or at least a substantial number, of Negro inhabitants.
placed by Negroes. Since a local board member has a twenty-five-year maximum tenure of office,\textsuperscript{180} natural turnover might be totally ineffective in creating vacancies. Thus, one likely prospect is that in many states there would be increased integration on draft boards in counties where racial discrimination is relatively less serious, while those counties harboring some of the strongest racial prejudice would see little or no change in local board composition.

There are two possible executive solutions to this dilemma. Neither, however, appears to be totally satisfactory. First, the Universal Military Training and Service Act provides that local boards are to be comprised of three or more members.\textsuperscript{181} Thus, if governors were to recommend some Negro appointees to the President, he could enlarge the membership of local boards in areas of significant Negro population by selecting Negro board members. Of course, this tactic would operate in spite of adverse community sentiment or the unwillingness of present members to give up their posts. However, it is not logically consistent with the long-term goal, postulated above, of impartial appointment. And, the major practical flaw in this approach is that it is still the governors who control the appointment of extra Negro board members; they merely have to limit their Negro recommendations to certain relatively "safe" counties.\textsuperscript{182}

The second possible solution entails working toward some semblance of racial balance at the state appeal board level. State appeal boards can be reconstituted more quickly than local boards because of their limited number.\textsuperscript{183} Moreover, the inclusion of Negro members on state appeal boards would not entail the same political "risk" to governors as the inclusion of Negroes on local boards, since it would not intrude as directly on local prejudices. Since every registrant is entitled to one appeal to a state appeal board for every reclassification by a local board,\textsuperscript{184} reconstituted state appeal boards could arguably offer an adequate means of relief to Negro registrants aggrieved by systematic exclusion at the local board level. Yet, the effectiveness of state appeal boards in curing the effects of local board prejudice depends on their ability to give fair consideration to each registrant's appeal. The fact that state appeal boards are

\begin{footnotes}
\footnote{182. Recommendations do not go into a general statewide pool from which the President fills vacancies by appointment. Separate recommendations must be made for each draft board jurisdiction because the Selective Service Act, \textsection 50 U.S.C. App. \textsection 460(b)(3) (Supp. III, 1965-1967), requires that members of a local board reside in the geographical area over which their board has jurisdiction.}
\footnote{183. There is one appeal board for each judicial district. 32 C.F.R. \textsection 1604.52(a). Correcting a few appeal boards in each state can be more easily accomplished, as a practical matter, than correcting several hundred local boards in various communities throughout each state.}
\footnote{184. 50 U.S.C. App. \textsection 460(b)(3) (Supp. III, 1965-1967); 32 C.F.R. \textsection 1626.2 (1968).}
\end{footnotes}
available to all registrants is insufficient in and of itself. The de novo review which state appeal boards are supposed to provide has recently been criticized as not being de novo at all.\textsuperscript{185} The main complaints seem to be that the state appeal boards have excessive workloads and that they do not have sufficient information to give adequate consideration to each case. In many cases they rely almost entirely on the prior judgment of the local board.\textsuperscript{186} Thus, state appeal board review may be even less "curative" than presidential board review.\textsuperscript{187} Impartially constituted state appeal boards, in short, are probably not a satisfactory substitute for impartially constituted local boards.

Although there are signs that gross racial imbalance on Selective Service boards throughout the country is beginning to wane,\textsuperscript{188} the infirmity is still far from being adequately cured.\textsuperscript{189} Unfortunately, composition statistics for individual local boards, which might reveal the degree of racial exclusion prevalent in particular areas,\textsuperscript{190} are not available.\textsuperscript{191} Even without such statistics, however, it is safe to say, for the reasons suggested above, that the states and counties most in need of corrective action to provide Negro representation on draft boards will be the least likely to obtain it under present circumstances. Therefore, at least in those states historically hostile to full recognition of civil rights, the President's appointive power alone may prove ineffective as a means of ridding the SSS of systematic exclusion.

It is generally recognized that the Supreme Court has been the moving force behind many of the advances made in governmental recognition of civil rights.\textsuperscript{192} In many instances, it appears that a


\textsuperscript{187} See the discussion of curative appeal in pt. IVA. supra.

\textsuperscript{188} See notes 42-46 supra and accompanying text.

\textsuperscript{189} See table accompanying note 52 supra.

\textsuperscript{190} Locating such areas, of course, involves a difficult and not completely objective evaluation. But it seems fair to say that certain areas in particular states, for a variety of historical and cultural reasons, tend to manifest greater overt prejudice and discrimination than do others.

\textsuperscript{191} According to the Assistant Director of the National Selective Service System, monthly statistics are compiled which show the number of Negro local draft board members in each state. But there are no publicly available statistics that show the number of Negro members on each separate board within the states. Telephone Interview with Col. Dee Ingold, Assistant Director of the Natl. Selective Serv. Sys., at Washington, D.C., Feb. 14, 1968.

\textsuperscript{192} Over the past decade and a half the Supreme Court has done a great deal to promote the doctrine of equality which lies at the heart of our constitutional scheme. See Carter, \textit{The Warren Court and Desegregation}, 67 Minn. L. Rev. 237, 237-39, 246-47 (1968); Pye, \textit{The Warren Court and Criminal Procedure}, id. at 249. It attacked racial discrimination in \textit{Brown v. Board of Educ.}, 347 U.S. 483 (1954), and its progeny;
judicial decision has been necessary to stimulate action by Congress and the executive branch and to provide them with the legal mandate to achieve social reform. In the present case, a Supreme Court decision condemning systematic exclusion in the SSS would provide the President with significant legal leverage to complement his persuasive techniques; thus, presidential appeals to the governors to recommend more Negroes for appointment in all appropriate local board jurisdictions might be much more effective. Conversely, by completely ignoring the issue of systematic exclusion the Court could be taken as condoning its continued existence in the Selective Service System.

Since the latter alternative is obviously undesirable, some form of judicial relief is appropriate in the Clay case. But how should that relief be framed in order to secure maximum protection of individual rights while imposing the least possible disruption upon the operations of the Selective Service System?

B. Three Avenues of Judicial Relief

Assuming that the Supreme Court explicitly recognizes the right of Negro registrants to be classified by draft boards form which members of their race have not been systematically excluded, there are at least three remedial approaches which the Court might adopt in framing its response to Clay's contentions of systematic exclusion.

---

193. See Cox, The Supreme Court 1965 Term, 80 HARV. L. REV. 91 (1966). Professor Cox concludes:

If one arm of government cannot or will not solve an insistent problem, the pressure falls upon another. It would have been best, no doubt, for the Congress to have taken the initiative in compelling school desegregation, but legislative action was blocked by the power of the southern congressmen and the filibuster. The Executive theoretically could have provided more leadership. As a practical matter, however, the task of initiating steps to realize a national ideal fell to the Court; either it had to act or nothing would have been done. Similarly, the state legislatures initially and, when they failed, the Congress should have dealt with the spreading cancer of malapportionment, but . . . it was plain that the evil would continue to grow unless the Court excised it. The same is true of judicial activism in criminal procedure. In the long run the actual response of Congress to the Court's invitation is likely to have more influence upon the course of decisions than the bare clarification of its authority, because the need for judicial action is strongest in the areas of the law where political processes prove inadequate, not from lack of legislative power but because the problem is neglected by politicians.

194. It would not be necessary to make such recommendations for all boards "deficient" in Negroes, of course. The determination of "appropriate" boards depends on many factors, not just race, and simple racial proportion is not the answer to systematic exclusion.

195. Of course, such a decision would also provide another rallying point for the vocal critics of an "activist" Supreme Court. See Beane, The Warren Court and the Political Process, 67 MICH. L. REV. 243, 348-52 (1968).
I. Denial of Standing Coupled with a Warning

By applying the standing doctrine strictly, the Supreme Court could focus on the curative aspects of Clay's presidential appeal. The Court could deny relief on the ground that ultimately Clay had not been prejudiced as a result of systematic exclusion of Negroes from his local and state draft boards. This approach would eliminate the necessity for adjudicating the merits of Clay's contention of systematic exclusion, and would avoid the attendant disruption of the SSS that such direct judicial action might cause. But such an opinion could nonetheless provide a vehicle to transmit a warning to the SSS to rid itself of systematic exclusion. The warning might be nothing more than a suggestion that the Court would be receptive to the systematic exclusion argument at a later date. A bare recognition, in dictum, of the unconstitutionality and statutory invalidity of systematic exclusion in the Selective Service System would carry such an implication. A more direct warning might also be included; it could take the form of an express or implied invitation to other Negro registrants whose aggrievement was not "cured" by presidential board review to challenge the composition of their Selective Service boards.

The primary reason for the Court to adopt this approach is that it would provide Congress and the executive branch with sufficient time to implement appropriate measures to eliminate systematic

196. See pt. IVSA.
197. See text accompanying notes 217-19 infra.
198. On at least one occasion, the Supreme Court has issued such an invitation. In Poe v. Ullman, 367 U.S. 497 (1961), the Court dismissed the appeals of the complainants who asserted that Connecticut statutes prohibiting the use of contraceptive devices deprived them of life, liberty, and property without due process of law, in violation of the fourteenth amendment. The grounds for dismissal were based on the reasoning that the case presented no justiciable controversy, since the statutes had seldom been enforced against doctors or patients. Writing for the Court, Justice Frankfurter stated:

Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought. Both these factors justify withholding adjudication of the constitutional issue raised under the circumstances and in the manner in which they are now before the Court. 367 U.S. at 508-09 (emphasis added). In his concurring opinion, Justice Brennan stated:

It will be time enough to decide the constitutional questions urged upon us when, if ever, that real controversy flares up again. Until it does, or until the state makes a definite and concrete threat to enforce these laws ... this Court may not be compelled to exercise its most delicate power of constitutional adjudication 367 U.S. at 509 (emphasis added). Following this decision, physicians openly challenged the statutes, invited prosecution, and were convicted. They appealed their convictions on the fourteenth amendment grounds asserted in Poe v. Ullman and the Supreme Court permitted standing and granted the requested relief in Griswold v. Connecticut, 381 U.S. 479 (1965).

199. An express or implied invitation might be more likely to appear in a concurring opinion, since this would not require the majority of the Court to oblige itself to hearing the next case raising the systematic exclusion argument.
exclusion from the SSS without sacrificing the Court's option to take affirmative action if the other branches remained inactive. It is also possible that the mere threat of further judicial action would add impetus to any attempted reforms from within or without the SSS.

Although this approach appears to mesh with traditional canons of judicial restraint and would probably avoid any immediate disruption of the SSS, it has three significant shortcomings. First, as discussed previously, denial of standing might be improper in this case because of the uncertainty about the actual curative effect of presidential board review. Second, postponing a formal decision on the issue of systematic exclusion would, in all probability, postpone any substantive reform as well. A mere judicial warning, even if expressly stated, would not motivate all of the recalcitrant governors to alter their positions. Progressive governors would implement programs designed to increase Negro representation on draft boards in areas of Negro population, but those opposed to change would certainly await a formal judicial condemnation of systematic exclusion before taking steps to eliminate it. Any delay on the part of the Supreme Court might result in a flurry of local board resignations in anticipation of a Supreme Court decision adverse to systematic exclusion but with only prospective effect. In effect, the way would be cleared for the submission of an equal number of "midnight recommendations" to the President for the purpose of seating Caucasian replacements for board members who were nearing the end of their terms.

Perhaps the most serious difficulty is that an implied warning would leave the Court's actual intentions with regard to systematic exclusion clouded in ambiguity. Such a warning would be an unfair inducement to other Negro registrants to risk criminal prosecution in order to challenge the composition of their draft boards, unless the Court was willing to vindicate the rights of such registrants by reversing their convictions. Of course, an express invitation to Negro registrants would avoid this problem, since it would obligate the Court to accept the first available systematic exclusion case. But this would postpone the necessity of adjudicating the issue of systematic exclusion at most until the succeeding Supreme Court term, since there are many systematic exclusion cases either pending or

201. See text accompanying notes 121-25 supra.
202. Seating new members who would be entitled to remain at their posts for twenty-five years or until reaching the age of seventy-five [50 U.S.C. App. § 460(b)(3) (Supp. III, 1965-1967)] could fix the composition of the boards for a lengthy period and reduce the prospect of vacancies which might be filled by Negro appointees. Such a scheme could be easily thwarted by a variety of techniques involving actual reconstitution of the boards pursuant to a constitutional mandate—such as adding additional members to boards or completely rebuilding them. See text accompanying notes 233-39.
recently decided by various circuits of the Court of Appeals. Because of the questionable willingness of Congress and the uncertain ability of the President effectively to eliminate systematic exclusion in such a short time absent a judicial mandate, such an express "invitation" would require the Court to confront the issue a second time before opportunity for a nonjudicial solution—the reason for the delay—had arisen. A satisfactory solution to systematic exclusion in the SSS will not be one which counts delay or indirection among its strengths. A more straightforward, resolute approach is needed.

2. Extending De Facto Authority to the Selective Service System

A second course of action would be for the Supreme Court to recognize formally the unconstitutionality and statutory invalidity of systematic exclusion in the SSS—thereby establishing a judicial mandate for its elimination—while extending de facto authority to Selective Service boards so that they might continue to function in the interim before their reconstitution in accordance with the law. Conceptually, this approach embodies two phases: (1) a general decision that the constitutional and statutory rights of Negro registrants are infringed by systematic exclusion, and (2) a qualification to the effect that those rights cannot be vindicated immediately because of countervailing policy considerations. Thus, Clay's individual rights would be outweighed in the balancing of interests, but the Court would remove all doubts about the illegality of systematic exclusion in the Selective Service System.

---

203. See note 11 supra.

204. The doctrine of de facto authority was originally developed to protect public interests when those interests were in the hands of persons acting in official capacities, but not lawfully in office. See, e.g., State v. Carroll, 38 Conn. 449, 9 AM. REP. 409 (1871). See generally A. CONSTANTINEAU, PUBLIC OFFICERS AND THE DE FACTO DOCTRINE (1910); 3 E. McQUILLIN, MUNICIPAL CORPORATIONS § 12.106 (5th ed. 1963); Recent Decision, Challenge to the Selective Service System—The Right to Minority Representation on Draft Boards, 57 GEO. L.J. 189, 196 (1968). The doctrine has been extended to other areas as well. Notably, it has been held that laws will not be invalidated as being unconstitutional on the ground that they were enacted by malapportioned legislatures. See, e.g., Dawson v. Bomar, 322 F.2d 445 (6th Cir. 1963), cert. denied, 376 U.S. 933 (1964). Moreover, authority has been extended to malapportioned legislatures to continue to enact statutes until reapportioned in accordance with the standards set down in Baker v. Carr, 369 U.S. 186 (1962). See, e.g., Mann v. Davis, 238 F. Supp. 458 (E.D. Va. 1964), aff'd, 379 U.S. 694 (1965).

205. In the Clay case, however, the Fifth Circuit applied the de facto doctrine as an alternative ground for denying Clay relief, but failed to specify whether or not systematic exclusion in the Selective Service System rises to the level of a constitutional infirmity. Presumably the court was anticipating a possible Supreme Court decision to that effect, while refusing to accept the systematic exclusion argument itself. See 397 F.2d at 911. Whatever its purpose, the analogy drawn between the acts of malapportioned legislatures or county commissions and Selective Services boards, which supported the Court's willingness to apply the de facto doctrine to racially imbalanced draft boards, is subject to attack. There are striking dissimilarities between draft boards and malapportioned legislatures. It is difficult to term draft boards "political authorities" as did the Fifth Circuit. 397 F.2d at 911. Most important, a state legislature
By applying the doctrine of de facto authority to avoid reversal, the Court would recognize the fact that a reversal of Clay's conviction might impose a considerable strain on the SSS and the current war effort;\(^{206}\) for in substance, such action would mean that draft boards from which Negroes have been systematically excluded could not, after that reversal, validly classify Negro registrants. Although the de facto authority approach is appealing in that it would avoid a potentially dangerous interruption of the orderly process of military induction,\(^{207}\) its application would raise several difficult questions.

The de facto doctrine is by definition a stop-gap measure. De facto authority is granted to vital governmental institutions so that they may continue to function pending the elimination of recognized constitutional or statutory infirmities.\(^{208}\) The doctrine is designed only to avoid chaos and confusion, and to prevent debilitating judicial interruptions.\(^{209}\) Since the extension of de facto authority to a legally defective institution is justified only by its temporary nature, the Court, in invoking the doctrine, must determine that it has the power to assure that the defects in question will in fact be only temporary. Ultimately, that power will have to rest on the threat of reversing convictions; the problem is to avoid the disruption that generally acts with respect to the public at large, whereas a draft board always acts on individual cases. Thus, while the adverse effects of a "discriminatory" legislature are spread over large numbers of people and affect them only in a general sense, the product of a discriminatory draft board is of direct consequence to the individuals negatively affected. Hence, in terms of individual rights, it is more compelling that the discrimination of draft boards be eliminated. If a state legislature acts in a discriminatory manner, the group adversely affected is likely to be large, and there is a greater probability that the illegal action will be challenged in the courts than in the case of the youthful draft registrant, who may or may not be aware that he has been treated unfairly by his draft board. Malapportioned legislatures, even with de facto authority, are subject to a good deal of public scrutiny; the same is not true of draft boards.

\(^{206}\) Aside from the argument that the de facto authority doctrine should not apply in cases where important individual rights are at stake (see note 205 supra), such a balancing process might conceivably involve the Supreme Court in an assessment of the Vietnam conflict as a "war," and, eventually, of its legality. At least to date, the Court has demonstrated that it is uninterested in such a determination. See, e.g., Hawthorne v. Hardaway, 393 U.S. 802 (1968), in which the Court denied without opinion a petition for stay which attacked the legality of the war. Justice Douglas dissented in an eight page opinion.

\(^{207}\) Cf. Mann v. Davis, 288 F. Supp. 458 (E.D. Va. 1964), aff'd sub nom. Hughes v. WMCA, Inc., 379 U.S. 694 (1965). In Mann, the district court directed itself to the problems which would attend any decision declaring malapportioned legislatures unable to act until effectively reapportioned. "If the present legislature could not act in this interim, a potentially dangerous interregnum could result, for there would be no legislature available in an emergency." 238 F. Supp. at 459.

\(^{208}\) See generally Pannam, Unconstitutional Statutes and De Facto Officers, 2 Fed. L. Rev. 37 (1960).

\(^{209}\) Cf. Griffin's Case, 11 F. Cas. 7, 18 (No. 5,815) (C.C.D. Va. 1869): "Without the rights of de facto governments, who would recognize the Norman titles against the Saxon barons?"
tion that premature reversals would cause while maintaining the believability—and thus the effectiveness—of the threat. In the context of the Clay case, there are at least two responses which the Supreme Court might make. First, it could merely apply the de facto doctrine without mention of any limit on the duration for which de facto authority is to remain in effect. Such an indefinite holding, however, would offer no guidelines to the President or Congress for an appropriate rate of progress in eliminating systematic exclusion. Indeed, it could even have the effect of delaying progress; recalcitrant governors might look upon the blanket grant of de facto authority as an indication of the Court's unwillingness to challenge the structure or composition of the SSS in any direct way. Thus, governors might feel that they could continue their discriminatory appointment policies without fear of a direct confrontation with the federal judiciary. This approach would also tend to bind the Court to a hands-off policy with regard to the SSS before it could be ascertained whether Congress or the Executive is able to eliminate systematic exclusion without more active judicial support.

A more direct approach to the problem would be to set a time limit within which Selective Service boards would have de facto authority, but beyond which convictions for refusal to submit to induction would be subject to attack on the ground of systematic exclusion. The time limit could be for the duration of the Vietnam war or for a time reasonably calculated to allow the boards to be impartially reconstituted, if necessary by adding extra Negro members to existing boards. A slightly different technique would be to "require" governors to include Negroes in their recommendations made subsequent to the date of the Court's decision in the Clay case by refusing de facto recognition to those boards with members nominated in defiance of this requirement. Although this approach would allow racially exclusive boards to continue to function for a time, it would avoid any interruption of the operations of the Selective Service System and would ultimately lead to the total elimination of systematic exclusion.

3. Reversal

The problem common to denying standing to Clay and extending de facto authority to Selective Service boards is that in either event the Court merely lends its moral support to the task of eliminating systematic exclusion from local and state draft boards. In substance, the Court would be deferring to Congress and the President to

210. In malapportionment cases, state legislatures have been directed to reapportion themselves before a specified date. In Mann v. Davis, 238 F. Supp. 458 (E.D. Va. 1964), aff'd sub nom. Hughes v. WMCA, Inc., 379 U.S. 694 (1965), for example, the Virginia Assembly was ordered in 1964 to reapportion itself by 1966.

211. There are other possibilities as well. See text accompanying notes 181-95 supra.
formulate a workable solution to the problem. And for reasons discussed previously, neither Congress nor the President may be willing or able to provide an effective solution without the strongest kind of judicial intervention. Therefore, a more forthright approach by the Supreme Court is needed.

The most direct method of eliminating systematic exclusion would be for the Court to order local and state Selective Service boards to be reconstituted to include Negro members. But the Court would not have equity jurisdiction to issue such a mandate in the review of a criminal conviction, and a separate mandamus action is impractical for two reasons: the registrant not classified I-A has little inclination (and perhaps no standing) to bring such a suit, while the person already classified I-A will not be aided by a subsequent reform in the system.

The alternative, therefore, is for the Court to employ a tactic similar to the one it used in Miranda v. Arizona. Clay's criminal conviction for refusal to submit to induction would be reversed, and the opinion would contain language to the effect that the Court would not uphold similar convictions of registrants classified by draft boards from which members of their respective races had been systematically excluded. The Court might also include an invitation to Congress or the executive branch to establish appropriate standards to insure that draft boards would be staffed in a manner that does not involve exclusion of Negroes. Such a decision would in-

212. See text accompanying notes 171-95 supra.
213. Cf. Brown v. Board of Educ., 349 U.S. 294, 301 (1955), in which the Court ordered public schools to integrate "with all deliberate speed."
214. It is possible that the President would have the requisite standing to bring a mandamus action, but for many obvious reasons he might be unwilling to do so. Civil rights organizations such as CORE or the NAACP might have the requisite standing [see Sedler, Standing To Assert Jus Tertii in the Supreme Court, 71 YALE L.J. 599, 653 (1962)], but this result is by no means certain.
215. 384 U.S. 436 (1966). There the Court held that a state in a criminal prosecution may not use statements stemming from questioning initiated by law enforcement officers after the defendant has been taken into custody, unless procedural safeguards were invoked in behalf of the defendant to protect his fifth and sixth amendment rights. The Court set forth a list of procedures to be followed by police in order to safeguard the individual defendant's rights; it also indicated that in the absence of other effective measures established by Congress or the states, the courts would enforce these procedures by reversing convictions. By employing the threat of reversal in this manner, the Court presented Congress and state legislatures with the option of accepting by inaction the rigid standards promulgated in Miranda, or undertaking through legislation to provide other effective procedural safeguards.
216. This would be comparable to the Miranda invitation to Congress and state legislatures to formulate procedures that would effectively protect the fifth and sixth amendment rights of defendants during interrogation. The Court stated:

It is impossible for us to foresee the potential alternatives for protecting the privileges which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straightjacket which will handicap sound efforts
directly compel a reconstitution of local and state draft boards which is indifferent to race; draft boards from which Negroes had been systematically excluded could not thereafter validly classify Negro registrants. It is unlikely that governors would refuse to recommend Negroes for appointment after such a decision. To the contrary, governors subject to the greatest discriminatory pressures from their constituents would probably be the first to make such recommendations. Otherwise, to fill draft quotas, more Caucasian registrants would have to be inducted to compensate for the temporary loss of Negro inductees. On the other hand, the inability to reclassify (and thus to induct) Negroes might prevent the reclassification and induction of all registrants within the given board’s jurisdiction. To exempt Negroes from induction, no matter what the reason, while continuing to induct members of other races, might well violate the right of the latter groups to equal protection under the law.

Although reversal initially seems to be a drastic remedy in terms of its immediate impact on the Selective Service System, the impact would be great in only a few states outside the South and therefore would not place an unbearable strain on the nationwide functioning of the SSS. Moreover, reversal may be the only way to protect the rights of Negro registrants adequately while avoiding the delays which would invariably attend the other remedies discussed above. Of course, reversal of an individual registrant’s conviction would not necessarily mean that he would escape induction. The

---

217. The Miranda approach and that suggested here for cases involving systematic exclusion in the SSS may not be entirely apposite. Governors may not have the same incentive to avoid reversal of convictions of Negro registrants for refusing to submit to induction as police would have to avoid reversal of criminal convictions. The threat of reversal, therefore, might not have as great an impact on a governor’s conduct as it should have on the conduct of police. [Recent evidence indicates that reversal may not be an effective deterrent to some police activity. See Medalle, Zeltz, & Alexander, Custodial Police Interrogation in Our Nation’s Capital: The Attempt To Implement Miranda, 60 MICH. L. REV. 1347, 1394 (1968).] But public and political pressure would be brought to bear on any governor who refused to recommend Negroes, since refusal would interrupt the supply of manpower for the Armed Forces and would be viewed as contrary to the national interest. Moreover, if governors refused to make Negro recommendations following a Supreme Court reversal, the President, who is ultimately responsible for providing adequate manpower to the Armed Forces through the SSS, could arguably circumvent the governors and make his draft board appointments directly. See notes 203, 204 infra.

218. This violation would have to be based on the general concept of equal protection outside of the fourteenth amendment, since the action of SSS is federal. See note 55 supra.

219. See Table accompanying note 52 supra.

---
individual Selective Service files could be returned to the appropriate local board for reconsideration after the boards in that jurisdiction had been impartially reconstructed. Such reconsideration assures that the registrant will be classified by Selective Service boards which at least offer the opportunity for fair representation of all the important segments in the population of the community.  

VI. CHANGE WITHIN THE EXISTING STRUCTURE: SECURING THE REQUIRED REFORM

Any form of judicial condemnation of systematic exclusion of Negroes from Selective Service boards will require significant changes in the SSS. As suggested above, achieving changes may be difficult in this context. Moreover, if change is mandated, it must be accomplished swiftly. Therefore, it seems appropriate to consider briefly the practical opportunities for reform which do exist.

Most recent draft reform proposals advocate complete restructuring of the SSS. But aside from the fact that the present statutory and administrative structure has existed for over two decades, our current military commitments in Vietnam seem certain to preclude any such sweeping changes. These considerations must also bear upon judicial consideration of a case such as Clay; for example, reversal of the conviction might be viewed as intolerable unless there are feasible means to bring Negroes into the Selective Service boards within a relatively short period of time. But since statutory reform by Congress is unlikely until the Vietnam conflict ends, systematic exclusion will be eliminated only if the courts can initiate prompt action within the existing structure.

As a first step, it is submitted that the governors should impartially select a pool of nominees for each local and state appeal

---

220. Clay's draft boards already may have been reconstituted so that they are no longer characterized by systematic exclusion. See Table accompanying note 52 supra. In that case, Clay could be reclassified immediately by his local board.


222. The present structure was created in 1948, and has continued virtually unchanged up until the present time.

223. President Nixon's proposal for eliminating the draft calls for a plan to replace it with an all-volunteer military after the current war effort has substantially subsided. N.Y. Times, Jan. 31, 1969, at I, col. 8. When wartime manpower demands diminish, however, conscription affects fewer people, and unfortunately, public pressure to reform draft processes and find alternatives to compulsory military service invariably decreases.

224. Up to now, the primary impediment to racial integration on Selective Service boards in certain states has been the unwillingness of governors to recommend Negroes to the President for appointment. See pt. V.A. infra. Thus, any plan to eliminate systematic exclusion from the SSS must focus on the gubernatorial role in the appointive process.
board. It should be re-emphasized that the goal here is impartiality; Negroes do not have to be deliberately included in the pool in proportion to their representation in a particular community. Rather, the governors should make an essentially random selection from a qualified base that includes all the diverse segments in the community.

It might be argued that creation of such nominee pools would undermine the congressional purpose in requiring gubernatorial nomination of all Selective Service board personnel. The governors are part of the process presumably because they have a greater awareness of local conditions and closer contacts with local officials and civic leaders who can suggest nominees than would federal officials at national headquarters. But given this intention, there is no statutory requirement that the governors' screening of potential appointees be limited to the exact number of vacancies available at any one time. Instead, it seems that the governors are supposed to engage in a qualitative screening process in which there are few disqualifying criteria for nominees, but, as suggested in this Comment, one important constitutional constraint on the governors. Thus, requiring governors to select pools of nominees rather than to submit recommendations only to fill existing vacancies is proper in terms of the congressional concept of the governors' role in the SSS. Moreover, such a requirement does not conflict with the specific statutory provisions dealing with gubernatorial appointment procedures.

Creation of these impartially chosen pools would provide a

---

226. The pools would not have to be very large. Five or ten persons for each Selective Service board would be sufficient.


228. Another possible explanation for the provision requiring gubernatorial nominations is that it avoids the cost of hiring administrative personnel to perform the function. On the extreme cost consciousness of the SSS, see J. Davis & K. Doleare, Little Groups of Neighbors: The Selective Service System 38-39 (1968).

229. See the discussion of standards for local board membership in note 38 supra.


The creation of these pools should pose no serious administrative problems either. Civic or other community groups could be requested to submit names for consideration.
reasonably representative cross section of the various communities. The President could then make his appointments consonant with the theoretical philosophy underlying the SSS—that local draft boards should be composed of neighbors of the registrants and thus, implicitly, that the boards should be as representative as possible of the communities they serve.

Although appointments made after the creation of these pools would be impartial, existing imbalances resulting from systematic exclusion should also be eliminated. The appointment of new draft board members only as vacancies occur would allow many improperly constituted boards to continue in operation for a significant period of time. The President could deal with such boards in two ways. First, he could appoint additional members to sit on local and state appeal boards in jurisdictions in which there is racial imbalance that is the product of systematic exclusion. This technique would be particularly appropriate where a majority or substantial minority of the population is Negro but no Negroes serve on the Selective Service boards. The second, and more direct approach, would be for the President to disband all imbalanced draft boards in jurisdictions in which there is systematic exclusion and then to appoint new boards from the impartially chosen pools. This is not prohibited by the Selective Service Act, which grants the President broad powers to create and maintain draft boards. Furthermore, this approach would not violate any rights of present board members.

231. Although the statute does not require it, it would seem reasonable to require the pools to reflect a cross section of the community. This would not mean that every draft board would have to be constituted to represent a cross section of the community, but it would at least ensure that all segments of the local population have the opportunity to be appointed. The federal rule pertaining to juries, which is not applicable to the states, is that panels must reflect a cross section of the community. Cf. Fay v. New York, 332 U.S. 261 (1947).

232. See pt. I supra. There is every indication that the executive branch is desirous of bringing Negroes into full participation in the SSS. This is indicated by the nationwide increase in Negro representation on draft boards since 1966. Only in several Southern states has there been little or no progress. Compare note 45 with note 52 supra. As a practical matter, therefore, it is apparent that the President has already adopted a policy of fair and impartial appointment.

233. Because draft board members are granted twenty-five year maximum tenures of office, systematic exclusion might have a protracted existence.

234. The statute provides for the appointment of three or more members by the President, 50 U.S.C. App. § 460(b)(3) (Supp. III, 1965-1967). There is no maximum number prescribed.

235. This would also be useful to cure racially exclusive appeal boards. Negro members could be added with very little difficulty. In either instance, of course, such action is not strictly "impartial." However, since the newly appointed pools would be the principal element of change, the impartiality is perhaps justifiable as a one-shot remedy applicable to only the most discriminatory areas.

236. Of course, it would be necessary to disband existing boards only in states which did not already have impartially constituted boards.

since they serve at the grace of the President\textsuperscript{238} and do not receive remuneration for their services.\textsuperscript{239} Moreover, governors could place the incumbent board members in the newly created pools along with additional nominees, and many incumbents undoubtedly would be returned to their positions. This second approach has the advantage of providing an immediate solution to the problem of systematic exclusion without increasing the size of local and state appeal boards.

The plan suggested in this discussion is subject to one fundamental weakness: it presupposes a willingness to work for reform on the part of all participants in the appointive process. The most important ingredient in the proposed plan is that governors, particularly from the states in which systematic exclusion is most evident, must agree to establish impartially chosen pools of nominees so that the President's appointments can be made in a manner which exemplifies equal treatment of all persons regardless of race. Yet it is this ingredient of gubernatorial cooperation that is all too likely to be missing. Although the executive branch has demonstrated its willingness to appoint Negroes to draft boards whenever it has been enabled to do so by impartial gubernatorial recommendations,\textsuperscript{240} statistics indicate that the governors of some states have neglected to include Negroes in their recommendations.\textsuperscript{241} As pointed out above, this could be a serious barrier to the President if he had to rely exclusively on his persuasive powers. However, condemnation of systematic exclusion in the SSS by the Supreme Court might strengthen his position considerably. If some governors still prove recalcitrant, their cooperation should be found unnecessary. Apart from arguments based upon the proposition that governors who refuse to nominate Negroes deny Negro registrants their fifth amendment rights,\textsuperscript{242} a strong argument for bypassing such governors can be made from the prohibition of discrimination contained in the Universal Military Training and Service Act.\textsuperscript{243} Because the right of the governors to participate in the selection of board members arises from the Act, it is the intent of Congress, which passed the Act, that controls in the determination of what effect is to be given to the governors' nominations if those nominations constitute violations of the Constitution or the Act. While this problem does not appear to have received specific congressional attention, the need to induct registrants and

\begin{itemize}
  \item \textsuperscript{238} See Parsons v. United States, 167 U.S. 324 (1897), in which it was held that the President has power to remove an inferior officer prior to the expiration of that officer's statutory term of office. It is important to note that the officer in Parsons—a United States district attorney—was salaried.
  \item \textsuperscript{239} 32 C.F.R. § 1603.3 (1968).
  \item \textsuperscript{240} See table accompanying note 52 supra.
  \item \textsuperscript{241} See id.
  \item \textsuperscript{242} See pt. III supra.
  \item \textsuperscript{243} See text accompanying notes 98-100 supra.
\end{itemize}
the constitutional barriers to doing so in states where systematic exclusion is practiced lead to the conclusion that Congress "intended" to allow presidential appointments without a governor's recommendation where necessary.\textsuperscript{244} Such a conclusion is reasonable, since it merely recognizes that when the only recommendations actually available to the President have been made in violation of the law, he cannot be forced to violate the law himself by choosing appointees from among them.

\section*{VII. CONCLUSION}

Whether or not the issue of systematic exclusion in the SSS is decided by the Supreme Court will depend upon how the Court views the balance between individual rights and military necessity. In general, this case is also one in which the Court must assess the wisdom of either judicial activism or judicial passivism. This Comment has attempted to present the arguments on these questions, and to suggest several possible courses of action. Ultimately, the fact that the nation is engaged in armed conflict in Vietnam and that the Selective Service System is a vital link in the chain which ensures the nation's preparedness to meet its military commitments may encourage the Court to exercise judicial restraint and avoid adjudication of the specific constitutional issues. Yet, the Court has an obligation to the Constitution. As long as means may be found both to meet the nation's military needs and to assure those individual rights which the nation is committed to defend, the Supreme Court must search out those means.

\textsuperscript{244} If, in a hypothetical case, a governor refused to recommend any persons to serve on draft boards, and the number of members on a draft board in the state fell below the minimum required by statute (three), it seems obvious that the President would have the power to make the necessary appointment to fill the vacancy without gubernatorial nomination.