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SELECTIVE SERVICE REGULATIONS AND THE MINISTRY

GERALD F. LAMBERTI, ESQUIRE

INTRODUCTION

On February 1, 1982, revisions of the Selective Service Regulations affecting deferments and exemptions from military service, including ministers and ministerial students, were published in final form.¹ Questions that, perhaps optimistically, were considered settled are once again on the horizon. Although no actual draft of individuals is in place, the regulations pose a potential for distress to certain of the Church's ministry. A dialogue with the management and staff of the Selective Service System (SSS) has been instituted for the purpose of resolving the difficulties raised by the regulations in a manner satisfactory to the Church's ministry. It is, therefore, appropriate to review at this time the content of the regulations as they affect ministers and divinity students and to reflect on the more perplexing problems, some of which have escaped resolution.

In discussing the regulatory framework for ministerial exemptions and deferments, there is a salient feature that, at the threshold, bears emphasizing. The regulations provide that ministerial exemptions and divinity student deferments are judgmental classifications, not administrative.² The import of this regulatory rubric is that ministerial student and minister classifications necessitate the exercise of judgment in the application of judicial and statutory standards in resolving issues that cannot be determined solely by documentation.³ The classification designation is 2-D⁴ for ministerial students and 4-D for ministers.⁵

¹ 47 Fed. Reg. 4,640 (1982) (to be codified at 32 C.F.R. §§ 1602, 1605, 1609, 1618, 1621, 1624, 1627, 1630, 1633, 1636, 1639, 1645, 1648, 1651, 1653).

² *Id.* at 4,644 (to be codified at 32 C.F.R. § 1602.13).

³ *Id.* at 4,640.

⁴ *Id.* at 4,652 (to be codified at 32 C.F.R. § 1630.26).

⁵ *Id.* at 4,653 (to be codified at 32 C.F.R. § 1630.43).

MINISTERIAL EXEMPTIONS

Rationale for the Exemption

The exemption of ministers from military training and service in the Armed Forces has origins dating back to the colonial period in United States history. The underlying rationale for such exemption is the "recognition not only of the religious beliefs of individuals devoted to the ministry, but also the necessity for maintaining the religious life of the Nation in war as in peace."⁶ Hence, "ministers of religion are relieved of the duty of service not so much for their personal religious training and beliefs, but for the disruption of public worship and religious solace to the people at large which would be caused by their induction."⁷

Requirements for Ministerial Exemptions

Under the Military Selective Service Act (the Act),⁸ persons satisfying the definitional predicates for "regular or duly ordained ministers of religion" contained in the Act are entitled to be exempt from training and service in the Armed Forces, but not from registration.⁹ The Act defines regular or duly ordained minister of religion in the following manner:

The term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization. The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister. The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a bona fide

⁶ 1 SELECTIVE SERVICE SYSTEM, PROBLEMS OF SELECTIVE SERVICE, SPECIAL MONOGRAPH NO. 16, at 169 (1952).

⁷ United States *ex rel.* Trainin v. Cain, 144 F.2d 944, 949 (2d Cir. 1944), *cert. denied*, 323 U.S. 795 (1945).

⁸ 50 U.S.C. §§ 451-473 (1976).

⁹ *Id.* § 456(g)(1).

vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect or organization.¹⁰

With the singular exception of the addition of the term "bona fide" to subdivision (g)(3) above, the definitions of regular and duly ordained minister are exactly the same as the definitions of those terms set forth in the Selective Service Act of 1948.¹¹ In addition, there is no substantive difference between the definitions set forth in subdivisions (g)(1) and (g)(2) above and the definitions of "regular minister of religion" and "duly ordained minister of religion" contained in the then operative regulations implementing the Selective Training and Service Act of 1940¹² or the regulations in effect during World War I.¹³ Indeed, the only difference in substance between the two classes of ministers is that the ordained minister must administer the rites and ceremonies of his religion while the regular minister need not do so.

Registrants seeking a class 4-D ministerial exemption from the Armed Forces must apply in writing to the local board and the burden of establishing entitlement to such classification rests with the registrant.¹⁴ Neither the training or abilities nor the motive or sincerity of the registrant in serving as a minister will be considered by the local board in evaluating a claim for a 4-D classification.¹⁵ The local board must exercise care "to ascertain the actual duties and functions of the registrant" largely because the 4-D classification is limited to "leaders of the various religious groups" and is not available to members of such groups generally.¹⁶ This latter requirement is apparently designed to defuse efforts by religious groups, such as Jehovah's Witnesses, which may urge that all its members are ministers and consequently entitled to the ministerial exemption.¹⁷ Preaching and teaching must be regularly performed and comprise the registrant's regular calling or full-time profession. Part-time,

¹⁰ *Id.* § 466(g)(1)-(3). The regulation implementing the definition, while different in format, precisely tracks the language of the Act. See 47 Fed. Reg. 4,640, 4,660 (1982) (to be codified at 32 C.F.R. § 1645.1(b)(1)).

¹¹ 50 U.S.C. app. § 451 (1976).

¹² 3 Selective Service Regulations § 24, ¶ 360 (rev. ed. Sept. 3, 1941).

¹³ Selective Service Regulations § 79, rule 12(b) (2d ed. 1918).

¹⁴ 47 Fed. Reg. 4,643, 4,660, 4,661-62 (1982) (to be codified at 32 C.F.R. §§ 1605.54, 1645.2, 1648); see *Dickinson v. United States*, 346 U.S. 389, 396-97 (1953).

¹⁵ 47 Fed. Reg. at 4,660 (to be codified at 32 C.F.R. § 1645.7(a)).

¹⁶ *Id.* at 4,660 (to be codified at 32 C.F.R. § 1645.7(b)).

¹⁷ 1 SELECTIVE SERVICE SYSTEM, *supra* note 6, at 174. For a discussion of the need to establish a leadership posture in order to qualify for the ministerial exemption and the special difficulties posed by members of Jehovah's Witnesses, see *Dickinson v. United States*, 346 U.S. 389, 394-97 (1953); *Cox v. United States*, 332 U.S. 442, 450-53 (1947). See also S. REP. NO. 1268, 80th Cong., 2d Sess. 13 (1948), reprinted in 1948 U.S. CODE CONG. & AD. NEWS 1989, 2001.

half-time, occasional or irregular performance of this activity will not suffice. Some secular employment on the part of the registrant, however, will not ipso facto deprive an otherwise qualified registrant of the ministerial exemption.¹⁸ These provisions effectively memorialize in regulatory form the teaching of the *Dickinson* case.¹⁹

Conceptually, the test of regular performance of ministerial activities on more than a part-time basis is well recognized. The application of the test to a particular set of circumstances has proven more elusive and, to some extent, enigmatic. There is little or no room for argument where the registrant is engaged in full-time ministerial activities. The penumbral situation arises where he is holding down a secular position for pay and also engaging in ministerial activities. In one case, for example, the court in denying the exemption, pronounced somewhat arbitrarily, "at least approximately 160 hours a month should be devoted to the ministry in order to qualify for exemption."²⁰ In another case, the court, weighing the fact that Jehovah's Witnesses do not have ministers in an orthodox sense, that their ministers are not paid salaries, and that they have no choice but to engage in secular employment to support their vocation as ministers, took a more expansive stance.²¹ That court held "that a crane operator working a forty-hour week may be a minister in Jehovah's Witnesses and entitled to the ministerial exemption under the Selective Service Act, although spending only forty hours a month on religious duties."²² In a later case in the same circuit, the court upheld the denial of the ministerial exemption to an alleged Jehovah's Witness minister on the ground that the facts evinced that his principal occupation was farming, not the ministry.²³ The court alluded to the fact that the ministerial activities were not regular or predictable, noting that he admitted "when the weather was good and there was farm work to be done, his farming took precedence over his ministerial affairs."²⁴ In sum, an objective assessment of the activities of the registrant is critical in assessing ministerial exemption claims: "[C]onscientious objection must be decided wholly on the subjective state of the registrant's mind. The problem is different in de-

¹⁸ 47 Fed. Reg. 4,640, 4,660 (1982) (to be codified at 32 C.F.R. § 1645.7(c)).

¹⁹ See *Dickinson v. United States*, 346 U.S. 389, 394-95 (1953). The Court stated that [p]reaching and teaching the principles of one's sect, if performed part-time or half-time, occasionally, or irregularly, are insufficient These activities must be regularly performed. They must, as the statute reads, comprise the registrant's 'vocation'.

Id. Current regulations define "vocation" to mean "one's regular calling or full-time profession." 47 Fed. Reg. 4,665 (1982) (to be codified at 32 C.F.R. § 1654.1(b)(4)).

²⁰ *United States v. Kenstler*, 250 F. Supp. 833, 836 (W.D. Pa. 1966) (footnote omitted).

²¹ *Wiggins v. United States*, 261 F.2d 113, 118 (5th Cir. 1958).

²² *Id.* at 119.

²³ *Fitts v. United States*, 334 F.2d 416, 421 (5th Cir. 1964).

²⁴ *Id.* at 421.

ciding the ministerial exemption, where 'the issue is the nature of his activities' and an objective determination can be made."²⁵

Comparable difficulty may be anticipated in applying the "preach and teach" test to a concrete set of facts. Research reveals no case directly construing the phrase "preach and teach." One court acknowledged its inability to distinguish between those who preach and teach in a conventional manner and those who adopt unorthodox methods, remarking:

We cannot validly distinguish for draft purposes between ministers of Jehovah's Witnesses who preach from door to door and on street corners as their vocations, and ministers of more conventional faiths who preach in pulpits, teach in church schools or carry on various other religious activities for their churches.²⁶

Discoverable case law lends support to the assertion that the phrase "preach and teach" should be interpreted broadly and accorded different and varied forms of performance or activity.²⁷

The Lay Brother Dilemma

In a letter dated November 26, 1940 from the Apostolic Delegate to the then General Secretary of the National Catholic Welfare Conference (NCWC), lay brothers were described under canon law as "real ministers of religion" and as such enjoy "the very same privileges as clerics." The Chief Legal Officer of the National Headquarters of the Selective Service issued an opinion in which he categorically concluded that "when the facts are established to the satisfaction of the local board that a registrant is a lay brother member of one of the duly established and recognized religious Congregations or Orders of the Holy Roman Catholic Church, we are of the opinion that the board should place such person in Class IV-D," as a regular minister of religion. A local board memorandum first issued on October 14, 1943, and amended February 21, 1947, as a primary instructional and guidance document for local boards in administering ministerial exemptions, unqualifiedly stated, *inter alia*, that "lay brothers of the Roman Catholic Church" were ministers of religion.²⁸ It went on to declare: "When otherwise qualified, a showing that [a lay brother of the Roman Catholic Church] is performing his religious and ministerial

²⁵ *Id.*

²⁶ *United States v. Ransom*, 223 F.2d 15, 18 (7th Cir. 1955). In another case, the court remarked in passing that entitlement to a ministerial exemption under the statute did not mandate "that he have a pulpit." *Pate v. United States*, 243 F.2d 99, 103 (5th Cir. 1957) (emphasis in original).

²⁷ See, e.g., *Pate*, 243 F.2d at 103-04.

²⁸ Local Board Memorandum No. 187, reprinted in *SELECTIVE SERVICE SYSTEM*, *supra* note 6, at 173-74.

duties to the substantial or complete exclusion of secular employment should be accepted as conclusive in determining the registrant's [ministerial exemption] classification."²⁹ Moreover, the regulatory definition of "regular minister of religion" in effect during World War II, which was interpreted as indicated above, was virtually identical to the currently effective statutory and regulatory definitions of that term.³⁰

Despite these facially conclusive interpretative precedents, the Selective Service now takes the position that the ministerial exemption for lay brothers as regular ministers of religion is an open question. While the staff of the Service insists it is not necessarily abandoning these and other similar, prior interpretive rulings, it has indicated an interest in reexamining and taking a "fresh look" at the status of lay brothers of the Catholic Church and other similarly situated religious of other religions and denominations.

DIVINITY STUDENTS

Deferment Not Exemption

Prior to 1971, qualified divinity students were afforded exempt status from service and training in the Armed Forces. In 1971, however, Congress amended the subsection dealing with divinity student exemptions to its present form.³¹ The thrust of the amendment is to change the classification of a divinity student from an exemption to a deferment and render

²⁹ *Id.*

³⁰ See 3 Selective Service Regulations § 24, ¶ 360(b) (rev. ed. Sept. 3, 1941), which provides as follows:

A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

Id.

³¹ Act of Sept. 28, 1971, Pub. L. No. 92-129, § 101(a) (16), 8 Stat. 348, 350 (current version at 50 U.S.C. § 456(g)(2) (1976)). The present version reads as follows:

Students 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, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been pre-enrolled, shall be deferred from training and service, but not from registration, under this title [sections 451 to 471a of this Appendix]. Persons who are or may be deferred under the provisions of this subsection shall remain liable for training and service in the Armed Forces under the provisions of section 4(a) of this Act [section 454(a) of this Appendix] until the thirty-fifth anniversary of their birth. The foregoing sentence shall not be construed to prevent the exemption or continued deferment of such persons if otherwise exempted or deferrable under any other provisions of this Act.

Id.

the divinity student liable for training and service in the Armed Forces until his 35th birthday. The rationale for the statutory change from exempt to deferred status was, as characterized by the Senate Committee on Armed Services, to close "a potential loophole."³²

Regulatory Factors

As in the case of a ministerial exemption, in order to obtain a ministerial student deferment classification, the student must first make a claim in writing to the local board.³³ To qualify, the student must be preparing for the ministry under the direction of a recognized church or religious organization, and one

- (1) Who is satisfactorily pursuing a full-time course of instruction required for entrance into a recognized theological or divinity school in which he has been pre-enrolled; or
- (2) Who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or
- (3) Who, having completed theological or divinity school, is a student in a full-time graduate program or is a full-time intern, and whose studies are related to and lead toward entry into service as a regular or duly ordained minister of religion.³⁴

This somewhat prolix delineation of the basic elements of 2-D qualification raises some interesting definitional questions. For instance, what is a recognized theological or divinity school? How does one establish that he is satisfactorily pursuing a course of instruction? What is a recognized church or religious organization? In anticipation of such questions, the SSS has attempted to provide solutions by defining several of these terms in the regulations. Thus, "a recognized church or religious organization"

³² S. REP. No. 129, 92d Cong., 1st Sess. 17, reprinted in 1971 U.S. CODE CONG. & AD. NEWS 1439, 1455. The Senate Report explained:

When a person has held an exemption, rather than a deferment, he is not liable to the draft after he reaches age 26. But if a person holds a deferment before he reaches age 26, he is liable to the draft until he is 35 years old. The Committee recognized that it might be possible for a divinity student, under current law, to remain in divinity school until his 26th birthday and at that point begin to pursue some career other than the ministry. A student who follows such a course would not be liable to the draft after his 26th birthday, whereas a student who held another sort of deferment would remain liable until he was 35. Under these circumstances, the Committee believed that the divinity student exemption should be changed to statutory deferment. Since deferment would be required by statute, the President would not have the authority to withdraw it. But under such a deferment a divinity student who did not follow a career in the ministry would remain liable to the draft for as long a period of time as another student.

Id.

³³ 47 Fed. Reg. 4,643, 4,660, 4,661-62 (1982) (to be codified at 32 C.F.R. §§ 1605.54, 1645.2, 1648).

³⁴ *Id.* at 4,658 (to be codified at 32 C.F.R. § 1639.3).

is defined as an "organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, and which engages primarily in religious activities."³⁶ A "recognized theological or divinity school" is one "whose graduates are acceptable for ministerial duties either as an ordained or regular minister by the church or religious organization sponsoring a registrant as a ministerial student."³⁶ And "satisfactorily pursuing a full-time course of instruction" means "maintaining a satisfactory academic record as determined by the institution while receiving full-time instruction in a structured learning situation," but does not include mail order programs.³⁷ While not models of precision and clarity, these definitional efforts should be of some help in understanding the divinity student regulatory framework.

The determination of a registrant's classification is based solely on written information contained in his file folder and any oral statements of the registrant and witnesses appearing on his behalf.³⁸ The registrant's claim for 2-D classification must, at a minimum, contain: "(1) A statement from a church or religious organization that the registrant is preparing for the ministry under its direction"; and, (2) a current certification that the registrant is either (i) "satisfactorily pursuing a full-time course of instruction for entrance into a recognized theological or divinity school in which he has been pre-enrolled"; or, (ii) satisfactorily pursuing a full-time course in a recognized theological or divinity school; or, (iii) having completed theological or divinity school, "is satisfactorily pursuing a full-time graduate program or is a full-time intern," relating and leading to becoming a "regular or duly ordained minister."³⁹

A 2-D classification extends to the end of the academic year and must be renewed each year to remain effective.⁴⁰ Currently, the renewal process calls for the same procedure and information as is employed in the initial request for 2-D status. SSS indicates they are in the process of devising a form that will facilitate the renewal of 2-D status by reducing the detail and paperwork.

Although the good faith of the divinity school registrant is not specifically required by the Act or the regulations, the Supreme Court has indicated it may be a factor if the school attended prepares students for temporal as well as spiritual vocations.⁴¹ In the *Eagles* case, the Supreme Court stated:

³⁶ *Id.* at 4,657-58 (to be codified at 32 C.F.R. § 1639.1(2)).

³⁶ *Id.* at 4,658 (to be codified at 32 C.F.R. § 1639.1(3)).

³⁷ *Id.* (to be codified at 32 C.F.R. § 1639.1(6)).

³⁸ *Id.* (to be codified at 32 C.F.R. § 1639.3(b)).

³⁹ *Id.* (to be codified at 32 C.F.R. § 1639.6(a)).

⁴⁰ *Id.* (to be codified at 32 C.F.R. § 1639.7).

⁴¹ *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 317 (1946).

The fact that the seminary in question was apparently not preparing men exclusively for the rabbinate make[s] questionable his claim that he was preparing in good faith for the rabbinate. A registrant might seek a theological school as refuge for the duration of the war. Congress did not create the exemption . . . for him.⁴²

Furthermore, interruption of instructional courses by normal recesses or vacation will not result in loss of deferred status to which a divinity student is otherwise entitled.⁴³

Past Experience

Certain of the troublesome areas in the past involving theological or divinity schools are useful from at least two perspectives. First, they provide valuable insight into anticipating troublesome areas that may surface under current regulations. Second, they provide guidance in fashioning satisfactory solutions to these troublesome problems.

During World War II, one source of controversy centered upon whether minor seminaries qualified under the then operative terms of the statute as "theological or divinity schools."⁴⁴ The eventual solution to this gnawing and apparently continuing controversy entailed the compilation of a list of recognized seminaries, both major and minor, in each archdiocese and diocese that was recognized by SSS "as an official and verified list of Catholic Seminaries."⁴⁵ An undesirable and perhaps unforeseen side effect of that solution was that many local boards refused to extend divinity student exemptions unless the seminary attended was on the officially predetermined list. Again, as a result of the efforts of the legal department, the SSS agreed to determine the status of a seminary upon the request of the NCWC, provided the necessary information was furnished over the signature of the rector of the seminary. A questionnaire designed, *inter alia*, to elicit the religious character of the school, was sent to the ordinaries, religious superiors, and rectors of major and minor seminaries. The completed questionnaires were submitted to the SSS and official recognition of the seminaries concerned was received.⁴⁶ In light of the previous discussion on the dilemma caused by the status of lay brothers, it is interesting to note that recognition as theological and divinity schools was also accorded by SSS to schools that prepared members of

⁴² *Id.*

⁴³ United States *ex rel.* Berman v. Craig, 207 F.2d 888, 890 (3d Cir. 1953).

⁴⁴ NATIONAL CATHOLIC WELFARE CONFERENCE, 1942 ANNUAL REPORT 20. For a discussion of many of the controversies surrounding divinity students, see SELECTIVE SERVICE SYSTEM, *supra* note 6, at 176-84.

⁴⁵ NATIONAL CATHOLIC WELFARE CONFERENCE, 1943 ANNUAL REPORT 132.

⁴⁶ NATIONAL CATHOLIC WELFARE CONFERENCE, 1944 ANNUAL REPORT 7-8.

the Church as lay brothers.⁴⁷

CONCLUSION

The new Selective Service Regulations on ministerial exemptions and divinity student deferments raise certain legitimate concerns for the Church and its ministry. A solid line of administrative precedent, however, apparently portends favorable resolution of these concerns.

⁴⁷ SELECTIVE SERVICE SYSTEM, *supra* note 6, at 184.