EVIDENCE—PRODUCTION OF PRIVILEGED SELECTIVE SERVICE FILES—RIGHTS IN CONFLICT—*United States v. Baker*, 416 F.2d 202 (9th Cir. 1969).

Considerable controversy and dissatisfaction with the Selective Service System, stimulated in part by the conflict in Southeast Asia, has caused many young men to resist induction in the federal courts. An example of such resistance, *United States v. Baker*,[1] may prove to be a springboard for protracted litigation of orders of induction. Having been previously classified I-A by his local draft board, Baker was ordered to report for induction in November, 1967. He refused to comply with the order and was thereafter tried and convicted.[2] Baker's defense was based on the alleged invalidity of the order of call, proper order being set forth in 32 C.F.R. § 1631.7.[3]

At an *in camera* hearing before the trial judge, Baker obtained the names of six I-A registrants in his local board who were older than he but not called. Since Baker was the youngest registrant called for induction during that month, he would not have been called if any of these six registrants had been ordered to report. Manifestly, if the order of call were improper, the notice of induction would have been invalid.[4]

On defendant's direct examination, Colonel Neilson, a field attorney for Selective Service, testified to the fact that there were six registrants *apparently* eligible for induction before defendant. Upon cross-examination, Neilson stated that he had personally determined that the reasons for by-passing these registrants were valid but that he could not divulge any information contained in their files because it was confidential and privileged by law.[5] Neilson was then asked to state these reasons generally, without identifying the registrant. Baker objected, contending that Neilson's oral testimony was not the "best evidence" for establishing regularity of call and that only the written

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[1] 416 F.2d 202 (9th Cir. 1969).

[2] An unreported decision of the United States District Court for the Northern District of California.

[3] 32 C.F.R. § 1631.7 (1969):

> (a) . . . . [R]egistrants . . . shall be selected and ordered to report for induction in the following order: . . . (3) Nonvolunteers who have attained the age of 19 years and have no [*sic*] attained the age of 26 years . . . in the order of their dates of birth with the oldest being selected first.

The new lottery system, which became effective on January 1, 1970, has revised the above section whereby relative age is no longer a factor.

[4] *Baker* expressly affirms the need for strict compliance with the prescribed order of call. 416 F.2d at 205.

[5] *See* 32 C.F.R. § 1606.31 (1969), as to confidential nature of Selective Service files. *See also* 32 C.F.R. § 1606.35(b) (1969) as to restriction of testimony.

records were competent for that purpose. The trial court never really decided the objection. Rather, it observed that since there were "multitudinous possibilities" for deferment, it was unnecessary to pursue the issue. There was no further attempt to justify the order of call.

On appeal,[6] the conviction was reversed. The majority held that, although the court will presume regularity of order of call, where defendant has adduced evidence of apparent irregularity, the burden of proving regularity will be placed on the Government. Since there was no proof of regularity other than Neilson's oral testimony, the prosecution had not sustained its burden of proof. The Government argued that since the lack of proof was an "invited error" occasioned by defendant's own objection, he should not be allowed to benefit from it. Although the dissenting opinion agreed with the Government, the majority dismissed the argument stating:

> We have serious doubt that the court's observation, in effect a ruling, was motivated by the objection. Rather, the record suggests that the court held the mistaken view that a proper order of call was not an essential element of the offense.[7]

Although the need for regularity is not disputed there is some dispute as to whether regularity must be pleaded affirmatively by the Government. In *Greer v. United States*,[8] the court held that the regularity of a local board's order need not be set out in the indictment. The law will presume regularity unless the defendant chooses to plead irregularity in his defense. Six months later, *United States v. Lybrand*[9] held that the proper order of call is such an essential element of the offense that it must be affirmatively pleaded by the prosecution. The court was of the opinion that such a presumption may be unconstitutional, and it had "grave doubts" as to its propriety. However, the better and more practical approach, followed in *Yates v. United States*,[10] *Little v. United States*,[11] and *Baker*, requires that defendant place in issue the regularity of call if he wishes to avail himself of that defense.[12]

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6 United States v. Baker, 416 F.2d 202 (9th Cir. 1969).

7 *Id.* at 205.

8 378 F.2d 931 (5th Cir. 1967).

9 279 F. Supp. 74 (E.D.N.Y. 1967). *But see* United States v. Sandbank, 403 F.2d 38 (2d Cir. 1968).

10 404 F.2d 462 (1st Cir. 1968).

11 409 F.2d 1343 (10th Cir. 1969).

12 Note that in this case, Baker *did* have actual evidence of an apparent irregularity. Although regularity may be placed in issue without such evidence, the more firmly established rule in Government prosecutions is that the court will not divest the Government of the right to have regularity presumed if all the defendant can show is mere disbelief

Baker's primary significance is its holding that the defendant's objection to the oral testimony was well taken. The ruling was based on the fact that no showing was made that the written records were unavailable. Without such showing, Neilson's oral testimony was incompetent. Furthermore, the court expressed doubt whether *any* court would allow secondary evidence in this situation, even if waiver of privilege could not be obtained.[13] Since the burden of proving regularity rested with the Government and could not be sustained without producing the confidential files, their production became vitally important to the prosecution's success.

There would be no problem in satisfying this production requirement when the records sought are those of the defendant. The law restricting production and privilege does not apply to a registrant who is a party to litigation with the Government.[14] However, when the crucial records are those of a registrant not involved in a government prosecution, the law expressly prohibits production, unless the registrant concerned or the State Director of Selective Service consents, in writing, to a waiver of the privilege.[15]

Although *Baker* is a case of first impression, several other cases have indicated that investigation into collateral files is improper. In affirming a conviction for refusing induction, the court in *United States v. Parker*[16] stated that the trial court "was [properly] confined to a review of Parker's file in deciding whether a basis in fact existed . . . . It was not to look for substantial evidence to support the determination of the local or appeal board."[17] This notion is derived from the rationale of *Estep v. United States*,[18] which held that the decisions of a

in the accuracy of the local board's decision. *See* United States v. Sandbank, 403 F.2d 38 (2d Cir. 1968).

13 416 F.2d at 206, n.2.

14 32 C.F.R. § 1606.34 (1969) provides for automatic waiver of privilege of all records of any registrant who files a claim against the Government involving Selective Service matters, and his records may be produced in response to a subpoena. 32 C.F.R. § 1606.35(a) provides: "In the prosecution of a registrant . . . for a violation of the Military Selective Service Act . . . or regulations . . . all records of the registrant shall be produced in response to the subpena . . . of the court . . . ."

15 32 C.F.R. § 1606.35(b) (1969) provides: Except as provided in paragraph (a) of this section, no officer or employee of the Selective Service shall produce a registrant's file . . . or testify regarding any confidential information contained therein, in response to a subpena . . . without the consent, in writing, of the registrant concerned, or of the Director of Selective Service.

16 307 F.2d 585 (7th Cir. 1962).

17 *Id.* at 587; *accord*, United States v. Jackson, 359 F.2d 936, 938 (4th Cir. 1966).

18 327 U.S. 114 (1946). This case is the leading authority for the proposition that the federal courts are not super draft boards who will substitute their judgment for that of the local board. The courts will only sit to determine if the local board has acted reasonably, with some factual basis for its decision.

local board, made in conformity with regulations, will be deemed final, even if erroneous, unless the court finds no "basis in fact" for the decision. Since the quantum of fact necessary to find that a "basis in fact" existed can be obtained from the defendant's own file, the courts have found it both unnecessary and improper to go beyond the defendant's own case history in determining whether the local board acted reasonably. Thus, it would seem that *Baker* has gone beyond established precedent by allowing investigation into collateral records to determine validity of local board orders.[19] Indeed, *Baker* would go so far as to make these records essential to the proof of the indictment. It must be noted, however, that the unique fact situation in *Baker* may have been a factor in requiring production of non-party files. Clearly, if Baker had access to no file other than his own, he would have had no chance of success. Understandably, non-party registrants may be unwilling to allow their personal files to be deposited in court to become part of a public record. Since the statute governing privilege[20] gives the registrant the right to waive his privacy, such refusal would seem to be a proper exercise of that option. Further, the Director of Selective Service, who can also waive privilege,[21] may be reluctant to do so if the registrant has no real interest in the litigation. Since the statute is designed to protect the privacy of the registrant and not the Director, the collateral issue of whether the Director has the constitutional right to disregard a registrant's express desire to refuse waiver may arise.

Since *Baker* requires production of collateral files, necessary to rebut evidence of apparent irregularity, and the statute expressly prohibits production without consent, what happens if waiver is unobtainable? Must the Government's prosecution fail? That failure to produce certain documents germane to the Government's case will force dismissal of a criminal prosecution is now an established principle in federal courts. The leading case of *Jencks v. United States*[22] involved the production of confidential government evidence specifically gathered for Jencks' prosecution. The court's approbation of the Government's refusal to produce files containing statements of witnesses called at trial was ruled reversible error. Thus, it is clear that the Government may be forced to expose its files or drop criminal proceedings.

It must be noted, however, that *Jencks* and the legislation it en-

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19 Little v. United States, 409 F.2d 1343 (10th Cir. 1969); Yates v. United States, 404 F.2d 462 (1st Cir. 1968); United States v. Lybrand, 279 F. Supp. 74 (E.D.N.Y. 1967); none of the above cases contain language to support *Baker's* ruling.

20 32 C.F.R. § 1606.35(b) (1969).

21 32 C.F.R. § 1606.35(b) (1969).

22 353 U.S. 657 (1957).

gendered[23] pertain to government records gathered expressly for purposes of prosecution and is further limited to statements, written or otherwise, made by witnesses who have testified as to their contents. In *Baker*, the records in question are not of that nature and would appear not to be within the purview of the statute. These records are confidential information gathered for purely administrative purposes and only collaterally bear on the prosecution. Although *Baker* cites *Jencks*[24] as authority for requiring production, it would appear that the latter is distinguishable and does not provide a basis for broadening the production rule to an extent that may involve possible violation of a personal, statutory right to privacy.[25]

However, rigid protection of a non-party registrant's right to have his files remain confidential could lead to frustration of a legitimate prosecution, under the *Baker* rule. This situation could easily occur in local board jurisdictions which cover large numbers of men. In such jurisdictions, it is quite probable that some registrants who would normally be called before others might not be called because of any one of a number of legitimate reasons. Knowledge of this situation by any registrant at or near the bottom of a monthly quota would be sufficient evidence to force the Government to go to court to prove that the order to report was valid; and this could only be done by producing these non-party files. Although the production requirement might occasionally expose certain capricious and arbitrary action by a local board, it could easily lead to unnecessary litigation and also prevent properly founded prosecution.

It should be noted, however, that conflict between a defendant's right to know the nature of the evidence against him and the right to privacy of records only arises when the registrant challenging the action of the local board has concrete evidence of some apparent irregularity. If he has none, he may still place its validity in issue; but the regularity of call may be easily established for the record by oral testimony of any local board official, usually the clerk. Such testimony will ordinarily meet the burden of proof without any further investigation.[26]

By expanding the production requirement under the Jencks Act

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[23] Following the decision in *Jencks*, Congress enacted 71 Stat. 595, 18 U.S.C. § 3500 (1957), referred to as the Jencks Act. The Act provides for compulsory production of all recorded statements made by witnesses who have testified against the defendant. If the Government refuses to produce the statements for defendant's examination, the testimony will be stricken.

[24] 416 F.2d at 206, n.2.

[25] 32 C.F.R. § 1606.31 (1969).

[26] *See* Yates v. United States, 404 F.2d 462, 466 (1st Cir. 1968).

to include confidential files of non-party registrants, Baker may have opened Pandora's Box. The dissenting opinion, recognizing that the majority had expressed a novel view, would not go so far as to force confrontation between the Department of Justice and the statutes controlling Selective Service files.

Safeguarding a registrant's privacy and insuring freedom from discriminatory practices of local draft boards are noble goals not to be taken lightly; thus, one goal should not be sacrificed for the other. But if organizations as complex and vital as the Selective Service and the Department of Justice are to function effectively, they must be free from unnecessary vexation. In an attempt to balance justice, privacy, and practicality in criminal prosecutions of draft violators, *Baker* may have tipped the scales too much in one direction.