

## PRE-INDUCTION JUDICIAL REVIEW

The doctrine that a registrant cannot obtain judicial review of his classification until after he has gone to the "brink" of induction is one of the most durable tenets of selective service law.<sup>1</sup> The underpinning of this rule is the requirement that a registrant must exhaust his administrative remedies before invoking the aid of the courts. Because reporting for induction is the final step in the administrative process, a registrant who wishes to obtain judicial review must, at that point, either submit to induction and challenge his classification in a habeas corpus proceeding or refuse to submit to induction and contest his classification in a subsequent criminal prosecution.

Prior to 1967, the courts, almost without exception, refused to permit judicial review in civil proceedings initiated by a registrant who had not yet reported for induction.<sup>2</sup> Although a few cases recognized exceptions to the orthodox doctrine<sup>3</sup> and allowed pre-induction judicial review,<sup>4</sup> not until 1967 did this occasional heresy threaten serious

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1. In *Estep v. United States*, 327 U.S. 114 (1946), the Supreme Court held that a registrant could defend a criminal prosecution for refusal to submit to induction on the ground that his classification had no basis in fact. However, the Court had previously held that this defense was not available to a registrant who failed to exhaust his administrative remedies by not reporting to the induction center. *Falbo v. United States*, 320 U.S. 549 (1944). Both cases are discussed in the text accompanying notes 13-18 *infra*.

2. See, e.g., *Tamarkin v. Selective Serv. Local Bd. No. 47*, 243 F.2d 108 (5th Cir.), *cert. denied*, 355 U.S. 828 (1957); *Reap v. James*, 232 F.2d 507 (4th Cir. 1956); *Watkins v. Rupert*, 224 F.2d 47 (2d Cir. 1955); *Rumsa v. Hershey*, 212 F.2d 927 (9th Cir.), *cert. denied*, 345 U.S. 1003 (1953); *Feldman v. Selective Serv. Local Bd. No. 22*, 239 F. Supp. 102 (S.D.N.Y. 1964).

3. See, e.g., *Townsend v. Zimmerman*, 237 F.2d 376 (6th Cir. 1956); *Schwartz v. Strauss*, 206 F.2d 767 (2d Cir. 1953) (concurring opinion) (dictum); *Warren v. Abernathy*, 198 F.2d 622 (10th Cir. 1952) (dictum); *Hirsh v. Adair*, 113 F. Supp. 116 (E.D. Pa. 1953); *Ex parte Fabiani*, 105 F. Supp. 139 (E.D. Pa. 1952); *Tomlinson v. Hershey*, 95 F. Supp. 72 (E.D. Pa. 1949).

4. The rubric "pre-induction judicial review," while not altogether accurate, is useful shorthand if it is understood that it is a term of art that denotes judicial review within the context of affirmative civil litigation. A criminal prosecution, which follows when a registrant has refused to submit to induction, is also a "pre-induction" case in a sense. The crucial distinction is that in a civil suit there is no criminal penalty for the registrant's failure to sustain his claim that his classification is invalid. In a criminal prosecution, the sanction for failure is conviction of a felony. The phrase will be used throughout this Comment to refer only to judicial review in civil cases.

A helpful early article on pre-induction judicial review is Leonard & Frantz, *Judicial Review of Selective Service Orders*, 26 THE GUILD PRACTITIONER 85 (1967). The *Selective Service Law Reporter* has recently added a comprehensive section on civil actions. SEL. SERV. L. REP., *Practice Manual* ¶¶ 3001 *et seq.* (1969).

dislocation in the law.<sup>5</sup>

When it did, Congress hastily amended section 10(b)(3) of the Military Selective Service Act of 1967<sup>6</sup> to preclude pre-induction review. Notwithstanding the statutory amendment, the courts were soon deluged with pre-induction cases raising the question section 10(b)(3) purported to answer: When may a registrant obtain judicial review of his classification? The first of these cases merely challenged the legality of punitive reclassification,<sup>7</sup> only incidentally impugning the validity of section 10(b)(3).<sup>8</sup> Other pre-induction suits, following in the wake of the punitive reclassification cases, specifically challenged the constitutionality of restricting judicial review to a criminal prosecution or a habeas corpus proceeding.<sup>9</sup> The constitutional issue has not yet been finally resolved.<sup>10</sup>

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5. Both the courts and Congress largely ignored the occasional departures from strict adherence to the orthodox doctrine until 1967 when the Second Circuit rejuvenated them in a widely publicized pre-induction case. *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817 (2d Cir. 1967). There is little doubt that *Wolff* prompted Congress to repudiate the pre-induction cases. See *Hearings on Extension of the Universal Military Training and Service Act Before the House Comm. on Armed Services*, 90th Cong., 1st Sess. 2636-38 (1967).

6. 50 U.S.C. APP. §§ 451-73 (Supp. IV, 1965-68). For a discussion of the 1967 Act, see Levin, *The New Draft Law Reexamined*, 19 CASE W. RES. L. REV. 912 (1968); Note, *New Draft Law: Its Failures and Future*, 19 CASE W. RES. L. REV. 292 (1968); Comment, *Changes in the Draft: The Military Selective Service Act of 1967*, 4 COLUM. J. OF L. & SOC. PROB. 120 (1968); Comment, *Selective Service and the 1967 Statute*, 40 MILITARY L. REV. 33 (1968).

7. The issue of punitive reclassification—the use of induction sanctions to “punish” selective service registrants—is discussed in note 75 *infra* and accompanying text.

8. The lower federal courts have not decided these cases uniformly. Some courts have enjoined the registrant's induction pending pre-induction judicial review in derogation of the statutory mandate. See, e.g., *Faulkner v. Clifford*, 289 F. Supp. 895 (E.D.N.Y. 1968), *appeal dismissed*, 393 U.S. 1046 (1969); *Kimball v. Selective Serv. Local Bd. No. 15*, 283 F. Supp. 606 (motion to dismiss denied), 293 F. Supp. 266 (S.D.N.Y. 1968) (preliminary injunction granted). Others have refused. See, e.g., *Breen v. Selective Serv. Local Bd. No. 16*, 284 F. Supp. 749 (D. Conn. 1968), *aff'd*, 406 F.2d 636 (2d Cir.), *cert. granted*, 394 U.S. 997 (1969) (No.1144, 1968 Term; renumbered No. 65, 1969 Term); *Oestereich v. Selective Serv. Local Bd. No. 11*, 280 F. Supp. 78 (D. Wyo.), *aff'd per curiam*, 390 F.2d 100 (10th Cir.), *rev'd*, 393 U.S. 233 (1968); *Carpenter v. Hendrix*, 277 F. Supp. 660 (N.D. Ga. 1967). Cf. *Pavloff v. Selective Serv. Local Bd. No. 57*, 288 F. Supp. 535 (N.D. Cal 1967); *Moskowitz v. Kindt*, 273 F. Supp. 646 (E.D. Pa. 1967), *aff'd*, 394 F.2d 648 (3d Cir. 1968), *cert. denied*, 393 U.S. 1014 (1969).

9. See, e.g., *Gabriel v. Clark*, 287 F. Supp. 369 (N.D. Cal.), *rev'd per curiam*, 393 U.S. 256 (1968); *Petersen v. Clark*, 285 F. Supp. 700 (N.D. Cal. 1968), *rev'd per curiam*, 411 F.2d 1217 (9th Cir. 1969).

10. The Supreme Court dealt with the question of pre-induction judicial review in *Clark v. Gabriel*, 393 U.S. 256 (1968), and *Oestereich v. Selective Serv. Local Bd. No. 11*, 393 U.S. 233 (1968). In neither case, however, did the Court squarely confront the constitutional issue. Both cases are discussed in some detail in the text accompanying notes 98-133 *infra*.

This Comment discusses the question of when judicial review should occur in selective service cases. After surveying the current state of the law and examining the basis of the constitutional attack on section 10(b)(3), this Comment concludes that pre-induction judicial review is constitutionally compelled.

## I

### WHEN IS JUDICIAL REVIEW AVAILABLE?

The Selective Training and Service Act of 1940<sup>11</sup> did not expressly provide for any judicial review of selective service classifications. The decisions of the Selective Service System were "final."<sup>12</sup> The Supreme Court first had occasion to consider the availability of judicial review in *Falbo v. United States*.<sup>13</sup> In *Falbo*, petitioner, classified as a conscientious objector, was convicted of failure to report for assignment to work of national importance in lieu of military service. He defended on the ground that he was entitled to a ministerial exemption from service of any kind. Affirming the conviction, the Supreme Court held that a registrant could not challenge his classification without first exhausting his administrative remedies. By failing to report, Falbo had omitted a "necessary intermediate step in a united and continuous process designed to raise an army speedily and efficiently."<sup>14</sup> Even if judicial review were constitutionally required, there was no right to review in a criminal proceeding that occurred before "final acceptance of an individual for national service."<sup>15</sup>

In 1946, in *Estep v. United States*,<sup>16</sup> the Court held that a registrant could defend a criminal prosecution for refusal to submit to induction if he had exhausted his administrative remedies. In *Estep*, petitioners reported for service but refused to submit to induction. Distinguishing *Falbo*, the Court justified its decision by observing that since a registrant could presumably obtain judicial review of his classification by writ of habeas corpus after conviction, the Court preferred a construction of the Act that did not "require the courts to march up the hill when it is apparent from the beginning that they will have to march down."<sup>17</sup> The Court interpreted the provision of the Act making the decisions of the Selective Service System "final" to apply only to the scope

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11. Act of Sept. 16, 1940, ch. 720, 54 Stat. 885.

12. *Id.* § 10(a)(2), 54 Stat. 893. See *Estep v. United States*, 327 U.S. 114, 135-44 (1946) (Frankfurter, J., concurring).

13. 320 U.S. 549 (1944).

14. *Id.* at 553.

15. *Id.* at 554. The exhaustion of administrative remedies doctrine is discussed in notes 254-86 *infra* and accompanying text.

16. 327 U.S. 114 (1946).

17. *Id.* at 125.

of review: the courts could overturn a registrant's classification only if it had "no basis in fact."<sup>18</sup>

For over twenty years, Congress was content with the beguiling logic of the *Estep* doctrine. The Military Selective Service Act of 1967<sup>19</sup> marked the first time that Congress addressed itself to the question of judicial review in selective service cases.

#### A. *The Meaning of Section 10(b)(3)*

Section 10(b)(3) of the Military Selective Service Act of 1967 appears to be explicit on the question of when judicial review is available:

No judicial review shall be made of the classification or processing of any registrant . . . except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form.<sup>20</sup>

This language is hardly unambiguous. It is therefore possible, and tempting, to conjure up arguments that blur the import of the statute.<sup>21</sup>

It is arguable, for example, that since Congress intended to "restate" existing case law,<sup>22</sup> section 10(b)(3) was meant to include all prior case law, including cases that had recognized a right to pre-induction judicial review in certain circumstances.<sup>23</sup> This argument ignores both the language and the legislative history of the section.<sup>24</sup> Professor Griffiths suggests that section 10(b)(3) in terms refers only to judicial review of a registrant's "classification or processing." Since punitive reclassification is wholly outside a draft board's jurisdiction—and hence not "classification or processing"—he argues that section 10(b)(3) does not preclude pre-induction judicial review in such cases.<sup>25</sup> Al-

18. *Id.* at 122-23.

19. 50 U.S.C. APP. §§ 451-73 (Supp. IV, 1965-68).

20. 50 U.S.C. APP. § 460(b)(3) (Supp. IV, 1965-68).

21. *See, e.g.,* O'Neil, *Review of Selective Service Reclassifications*, 37 GEO. WASH. L. REV. 536 (1969).

22. *See* H.R. REP. No. 267, 90th Cong., 1st Sess. 30 (1967).

23. *E.g.,* *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817 (2d Cir. 1967). In *Oestereich v. Selective Serv. Local Bd. No. 11*, 393 U.S. 233 (1968), petitioner argued that Congress intended to codify *Wolff*. He interpreted Congress' obvious dissatisfaction with the implications of that case as a rejection only of "the exhaustion and justiciability aspects of *Wolff* rather than [a] repudiation of its constitutional base." Brief for Petitioner at 11, 43-45.

24. *See* notes 27-29 *infra* and accompanying text.

25. Griffiths, *Some Notes on the Solicitor General's Memorandum in Oestereich: Concerning Punitive Reclassifications and § 10(b)(3) of the Act*, 1 SEL. SERV. L. REP. 4012 (1968).

though the Supreme Court has implicitly approved this reasoning,<sup>26</sup> a reading of the statute certainly does not compel this conclusion.

In spite of some ambiguity, it is difficult to mistake what Congress intended to say when it enacted section 10(b)(3). The purpose of the section is to forbid "litigious interruptions" of the operations of the Selective Service System by pre-induction judicial proceedings, regardless of the circumstances of any particular case.<sup>27</sup> The section expressly precludes judicial review until after the registrant responds to an induction order; there is no evidence that Congress simultaneously intended to imply exceptions. The text of the statute and the legislative history, taken together, make it clear that whatever ambiguity does exist is more probably the result of hasty draftsmanship than a reflection of any congressional uncertainty. In its report to Congress, the House Armed Services Committee stated:

The committee was disturbed by the apparent inclination of some courts to review the classification action of local or appeal boards before the registrant had exhausted his administrative remedies. Existing law quite clearly precludes such a judicial review until after a registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order. In view of this inclination of the courts to prematurely inquire into the classification action of local boards, the committee has rewritten this provision of the law so as to more clearly enunciate this principle. . . . [C]ontinued disregard of this principle of the law by various courts could seriously affect the administration of the Selective Service System.<sup>28</sup>

The Senate committee report echoed this language.<sup>29</sup> The abiding congressional fear is that premature judicial scrutiny will impede conscription. The plain intent of section 10(b)(3) is to foreclose pre-induction judicial proceedings of any kind by restricting judicial review to a criminal prosecution or a habeas corpus proceeding.

There is no doubt that a registrant may obtain judicial review in a criminal prosecution, but the Act itself makes no mention of any other means of obtaining review. When a registrant refuses to submit to induction, he is usually indicted for failing to perform a legal duty.<sup>30</sup> If

26. See *Oestereich v. Selective Serv. Local Bd. No. 11*, 393 U.S. 233 (1968).

27. See 113 CONG. REC. 15426 (1967) (remarks of Sen. Russell).

28. H.R. REP. NO. 267, 90th Cong., 1st Sess. 30-31 (1967).

29. The Senate Armed Services Committee remonstrated:

Until recently, there was no problem in the observance of the finality provision. In several recent cases, however, district courts have been brought into selective service processing prematurely. The committee attaches much importance to the finality provisions and reemphasizes the original intent that judicial review of classifications should not occur until after the registrant's administrative remedies have been exhausted and the registrant presents himself for induction.

S. REP. NO. 209, 90th Cong., 1st Sess. 10 (1967).

30. 50 U.S.C. APP. § 462(a) (Supp. IV, 1965-68).

he has exhausted his administrative remedies, he is entitled to judicial review in the ensuing criminal prosecution.<sup>31</sup> Judicial review most commonly occurs in the criminal forum,<sup>32</sup> and section 10(b)(3) expressly authorizes it.<sup>33</sup> On its face, section 10(b)(3) seems to restrict judicial review of a registrant's classification or processing to a criminal prosecution. The section provides that no review shall be made "except as a defense to a criminal prosecution" and then only "after the registrant has responded affirmatively or negatively to an order to report for induction . . . ."<sup>34</sup> Presumably, however, if a registrant has responded affirmatively by submitting to induction, he could not be prosecuted for "knowingly fail[ing] or neglect[ing] to perform such duty."<sup>35</sup> To obtain judicial review after induction, a registrant would have to proceed by habeas corpus. Notwithstanding the omission of any mention of the availability of habeas corpus in the statute,<sup>36</sup> the legislative history of the section reveals an intention to codify prior case law and that law indisputably included the right to petition for a writ of habeas corpus after induction.<sup>37</sup>

Moreover, it is generally conceded that interpreting the statute to abolish habeas corpus as a remedy would raise serious constitutional questions.<sup>38</sup> No case has yet held that by restricting judicial review

31. *Estep v. United States*, 327 U.S. 114 (1946).

32. See note 70 *infra* and accompanying text.

33. 50 U.S.C. APP. § 460(b)(3) (Supp. IV, 1965-68). In addition, the 1967 Act contains two new provisions to expedite criminal prosecutions. First, the Justice Department, upon the request of the Director of the Selective Service System, must prosecute selective service law violators "as expeditiously as possible" or advise Congress "in writing [of] the reasons for its failure to do so." 50 U.S.C. APP. § 462(c) (Supp. IV, 1965-68). This language was apparently inserted because of complaints by the Selective Service System. See *Hearings on S. 1432 Before the Senate Comm. on Armed Services*, 90th Cong., 1st Sess. 620 (1967) (testimony of General Hershey). Second, trials or appeals of such cases "shall take precedence over all other cases pending before the court to which the case has been referred." 50 U.S.C. APP. § 462(a) (Supp. IV, 1965-68).

34. See text accompanying note 20 *supra*.

35. 50 U.S.C. APP. § 462(a) (Supp. IV, 1965-68).

36. *But see* S. REP. NO. 209, 90th Cong., 1st Sess. 10 (1967): "A registrant who presents himself for induction may challenge his classification by seeking a writ of habeas corpus after his induction. If the registrant does not submit to induction, he may raise as a defense to a criminal prosecution the issue of the illegality of the classification."

37. The availability of this remedy has never been seriously questioned: "Habeas corpus has . . . been consistently regarded by lower federal courts as the appropriate procedural vehicle for questioning the legality of an induction or enlistment into the military service." *Jones v. Cunningham*, 371 U.S. 236, 240 (1963) (dictum).

38. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion . . . ." U.S. CONST. art. I, § 9. See generally H.M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 317-19, 323-25 (1953); Leonard & Frautz, *Judicial Review of Selective Service Orders*, 26 *THE GUILD PRACTITIONER* 85, 92-93 (1967).

solely to a criminal prosecution, section 10(b)(3) implicitly deprives the courts of the power to review a registrant's classification in a habeas corpus proceeding. The absence of any cases applying the statute literally, and the presence of several cases construing it to permit review by habeas corpus,<sup>39</sup> compels the conclusion that habeas corpus is still available to a registrant who submits to induction.

### B. *The Effect of the Statutory Remedies*

Even a cursory examination of the statutory remedies exposes serious practical difficulties and at least tenable constitutional objections. A registrant is often unable to prevail in a criminal prosecution or a habeas corpus proceeding, regardless of the merits of his claim, because of the extremely narrow scope of review. Although this Comment does not focus on the scope of judicial review in selective service cases, a brief discussion can scarcely be omitted, if only because the chance of a registrant's success during his day in court bears importantly on the question of when that day should be.

The Supreme Court first formulated the "no basis in fact" test in *Estep v. United States*.<sup>40</sup> In *Cox v. United States*,<sup>41</sup> the Court made clear exactly what that test meant. In *Cox*, petitioners, Jehovah's Witnesses, were convicted of absence without leave from a civilian public service camp.<sup>42</sup> Affirming the convictions, the Court reiterated its holding in *Estep*. Whatever evidence a registrant might present in support of his claim is immaterial if there is any basis in fact for the board's determination. Consequently, when a court finds a basis in fact for the board's decision, the inquiry is over. "The question of the preponderance of evidence is not for trial anew. It is not relevant to the issue of the guilt of the accused for disobedience of orders."<sup>43</sup> Subsequent opinions merely repeated this definition. The courts do not sit "as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies,"<sup>44</sup> nor do they look for "substantial evidence" to support the board's decision.<sup>45</sup> If there is anything in the record that provides a factual basis for the registrant's classification, the courts will not disturb it. Once the judge has determined that the classification is proper under this standard, the sole

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39. See cases cited note 70 *infra*. See *Oestereich v. Selective Serv. Local Bd. No. 11*, 393 U.S. 233, 238 (1968).

40. 327 U.S. 114 (1946).

41. 332 U.S. 442 (1947).

42. Petitioners, classified as conscientious objectors, claimed they were entitled to ministerial exemptions. *Id.* at 443.

43. *Id.* at 453.

44. *Witmer v. United States*, 348 U.S. 375, 380-81 (1955).

45. *Dickinson v. United States*, 346 U.S. 389, 396 (1953).

issue for the jury is whether the defendant knowingly refused to submit to induction.<sup>46</sup>

Dissenting in *Cox*,<sup>47</sup> Justice Murphy severely criticized the *Estep* standard for permitting the courts to "do little more than give automatic approval to the draft board's action."<sup>48</sup> To Justice Murphy, a registrant's right to review was but a "mere formality" and the trial itself an "empty procedure" if only a "wisp of evidence" was sufficient to establish the validity of the classification.<sup>49</sup> Although other judges may share Justice Murphy's misgivings, no reported case has ever seriously undermined this standard. The courts acknowledge that it is the "narrowest [scope of review] known to the law,"<sup>50</sup> but uphold it with monotonous fidelity.

The "no basis in fact" test does not mean that the courts will defer to any determination of a local board. In *Dickinson v. United States*,<sup>51</sup> the Supreme Court reversed the conviction of a registrant whose board refused to grant him a ministerial exemption from service. Dickinson had established by objective evidence that he was duly ordained in accordance with the ritual of his sect, the Jehovah's Witnesses, and that he regularly, as a vocation, preached the principles of his religion and conducted public worship.<sup>52</sup> The Court denied the power of a local board to reject his request for a statutory exemption "solely on the basis of suspicion and speculation" and required "affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities."<sup>53</sup> When a registrant's claim is buttressed by objective facts, as in *Dickinson*, evidence of disbelief is clearly not sufficient to justify denial. In conscientious objector cases, however, the registrant's sincerity is the only issue.<sup>54</sup> He cannot make out a prima facie case for exemp-

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46. Criminal intent is an essential element of the offense. See, e.g., *Whitney v. United States*, 328 F.2d 888, 889 (5th Cir. 1964); *Silverman v. United States*, 220 F.2d 36, 39-40 (8th Cir. 1955); *United States v. Hoffman*, 137 F.2d 416, 419 (2d Cir. 1943). However, the registrant's defense is rarely that his failure to submit to induction was not intentional. But see *White v. United States*, 403 F.2d 1005 (8th Cir. 1968); *United States v. Rabb*, 394 F.2d 230 (3d Cir. 1968); *Smith v. United States*, 391 F.2d 543 (8th Cir. 1968).

47. 332 U.S. 442 (1947).

48. *Id.* at 457.

49. *Id.* at 457-58.

50. *Blalock v. United States*, 247 F.2d 615, 619 (4th Cir. 1957).

51. 346 U.S. 389 (1953).

52. *Id.* at 395.

53. *Id.* at 396-97.

54. The local board must base its evaluation of the registrant's sincerity on his statements in his application for classification as a conscientious objector, his oral testimony and demeanor during his personal appearance, and supporting letters. SSS Form 150 requires the registrant who claims to be a conscientious objector to answer a series of questions regarding his beliefs, religious experience, and personal history.

tion.<sup>55</sup> Because evidence of disbelief in the registrant's sincerity is the only basis in fact the courts require to sustain the local board's decision,<sup>56</sup> it is virtually impossible for a registrant who claims to be a conscientious objector to prove the invalidity of an adverse determination.<sup>57</sup>

Actually, the courts have not rigidly limited the scope of judicial review to the sole question of whether there is any basis in fact for the board's decision. The registrant may also allege a denial of due process and defend a criminal prosecution on the ground that jurisdictional errors voided his order to report for induction. If the local board violates a provision of the Act<sup>58</sup> or fails to follow its own regulations,<sup>59</sup> the courts do not hesitate to acquit the defendant. Similarly, if the registrant's classification is based on an erroneous interpretation of the law<sup>60</sup> or is marred by procedural irregularities,<sup>61</sup> the order to report

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32 C.F.R. § 1621.11 (1969). Any registrant may request a personal appearance before his local board within 30 days after the board has mailed a Notice of Classification (SSS Form 110). 32 C.F.R. § 1624.1 (1969). During this appearance, he may discuss his classification and supply additional evidence to support his claim. 32 C.F.R. § 1624.2 (1969). SSS Form 150 requests the registrant to list informants who can substantiate his claim or to request them to submit letters in support of his claim to the local board. 32 C.F.R. § 1621.12 (1969).

In addition, Local Board Memorandum No. 41 (July 30, 1968) authorizes the local board to grant an interview to registrants who claim to be conscientious objectors prior to classification. This interview does not take the place of the personal appearance. The local board may also request and receive information from government agencies, 32 C.F.R. § 1621.14 (1969), and subpoena witnesses, 32 C.F.R. § 1621.15 (1969), to determine the proper classification for a registrant. However, there is no evidence that these powers are very often used. The Department of Justice investigation, required by the Selective Training and Service Act of 1940, ch. 720, § 5(g), 54 Stat. 889, no longer exists. 50 U.S.C. APP. § 456(j) (1964), *as amended by Pub. L. No. 90-40, § 1(7)*, 81 Stat. 104 (1967).

For a critique of the changes made by the 1967 Act and a comprehensive discussion of the procedures that do exist, see Reisner, *The Conscientious Objector Exemption: Administrative Procedures and Judicial Review*, 35 U. CHI. L. REV. 686 (1968).

55. *Witmer v. United States*, 348 U.S. 375, 381 (1955); *United States v. Henderson*, 411 F.2d 224, 227 (5th Cir. 1969); *United States v. Corliss*, 280 F.2d 808, 814-15 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960); *United States v. Bornemann*, 298 F. Supp. 1253, 1258-59 (D. Conn. 1969).

56. Disbelief will suffice in conscientious objector cases, but "the record must contain some statement of this disbelief if the classification is to be upheld upon judicial review." *United States v. Washington*, 392 F.2d 37, 39 (6th Cir. 1968). *But see Battered v. United States*, 260 F.2d 233, 237 (8th Cir. 1958).

57. As the court observed in *United States v. Freeman*, 388 F.2d 246, 249 (7th Cir. 1967): "Under these circumstances conviction is almost inevitable, since the Board's refusal to grant the conscientious objector classification is based on an inference as to the sincerity of the registrant's belief and there will almost always be something in the record to support an inference of lack of sincerity."

58. *Simmons v. United States*, 348 U.S. 397 (1955).

59. *E.g.*, *United States v. Carroll*, 398 F.2d 651 (3d Cir. 1968); *United States v. Freeman*, 388 F.2d 246 (7th Cir. 1967).

60. *United States v. Seeger*, 380 U.S. 163 (1965); *Sicurella v. United States*, 348 U.S. 385 (1955).

61. *E.g.*, *Oshatz v. United States*, 404 F.2d 9 (9th Cir. 1968) (no opportunity to

for induction is void.

The possibility of an acquittal because of jurisdictional defects offers scant additional hope to the registrant. He still must submit to a criminal prosecution to test the validity of his contention that his board denied him due process of law. That determination too often depends on a court's own notions of fairness. A registrant who is untutored in the law cannot know whether he has a tenable claim, and unless he is willing to undergo a criminal prosecution, he cannot find out.

The outlook is no less bleak for a registrant who chooses to submit to induction to obtain a writ of habeas corpus. The scope of judicial review in a habeas corpus proceeding is indistinguishable from the scope of review in a criminal prosecution: A registrant's claim is sustained only if his classification has no basis in fact.<sup>62</sup>

To say that the writ of habeas corpus is available to a registrant is not to say that it is a viable remedy. In *Estep*, Justice Murphy expressed the opinion that even if a registrant is willing to submit, habeas corpus is often "quite illusory." After chronicling the obstacles the inductee could expect to face,<sup>63</sup> he concluded that "practical difficulties may thus destroy whatever efficacy the remedy might otherwise have and cast considerable doubt on the assumption that habeas corpus proceedings necessarily guarantee due process of law to inductees."<sup>64</sup> Justice Murphy's objection is well taken. Initially, submitting to induction means total disruption of a registrant's life.<sup>65</sup> In addition, habeas cor-

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execute loyalty questionnaire); *Briggs v. United States*, 397 F.2d 370 (9th Cir. 1968) (failure to give physical inspection at induction center); *Chernekov v. United States*, 219 F.2d 721 (9th Cir. 1955) (no opportunity to "step forward" at induction center); *United States v. Walsh*, 279 F. Supp. 115 (D. Mass. 1968) (failure to meet and act as a board); *United States v. DeMarco*, Crim. No. 42377 (N.D. Cal. Aug. 5, 1969) (failure of local board member to live within jurisdiction of local board).

62. *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 312 (1946). See, e.g., *United States ex rel. Wilkerson v. Commanding Officer*, 286 F. Supp. 290 (S.D.N.Y. 1968) (no basis in fact for board's denial of hardship deferment); *United States ex rel. Goldstein v. McNamara*, 270 F. Supp. 892 (E.D. Pa. 1967) (basis in fact for induction of delinquent reservist); cf. *Gann v. Wilson*, 289 F. Supp. 191 (N.D. Cal. 1968) (no basis in fact for Army's denial of discharge to private on grounds of conscientious objection); *Crane v. Heddrick*, 284 F. Supp. 250 (N.D. Cal. 1968) (no basis in fact for Navy's denial of claim of conscientious objection by apprentice seaman).

63. The Justice observed that since the writ must be filed in the jurisdiction where the inductee is being detained, he "may be thousands of miles removed from his home, his friends, his counsel, his local board and the witnesses who can testify in his behalf." Even if he is not deterred, his efforts are not likely to meet with "sympathetic understanding" and he may be removed even from that jurisdiction, "thus making the proceedings moot." In short, "[n]o more drastic condition precedent to judicial review has ever been framed." 327 U.S. at 129-30 (concurring opinion).

64. *Id.* at 130.

65. It is generally held that a registrant cannot petition for a writ of habeas

pus is a speculative remedy. The inductee may be in a distant jurisdiction faced with the military's understandable reluctance to cooperate and its ultimate power to make the proceedings moot by transferring him to another jurisdiction. If a registrant refuses to submit to induction at least he is certain that he will have his day in court; if a registrant submits, he cannot be sure. Further, habeas corpus is no remedy at all for a conscientious objector. At least one court of appeals has recognized this defect: "[A] sincere claimant for conscientious objector status cannot turn to the habeas corpus remedy because his religious belief prevents him from accepting induction under any circumstances."<sup>66</sup> A court might justifiably regard a willingness to submit to induction for this purpose as persuasive evidence of insincerity. Finally, compliance is a prerequisite to obtaining judicial review. If an induction order is invalid, a registrant should not have to spend even a day in the army in order to obtain relief.<sup>67</sup>

In spite of its availability in selective service cases, then, habeas corpus is not an effective means of obtaining judicial review for many registrants.<sup>68</sup> Pretending that it is, in Professor Hart's terse phrase, "turns an ultimate safeguard of law into an excuse for its violation."<sup>69</sup> Consequently, few registrants, whatever their claims, utilize habeas corpus to challenge their classifications.<sup>70</sup>

Both of these remedies place a heavy burden—arguably an unconstitutional burden—on a registrant. In order to succeed, he must prove that his classification has no basis in fact. It is not enough that

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corpus until he has actually been inducted. See *de Rozario v. Commanding Officer*, 390 F.2d 532 (9th Cir. 1967). But see *Hammond v. Lenfest*, 398 F.2d 705 (2d Cir. 1968) (naval reservist who had been called to duty but had not yet reported for service was "in custody"); *Ex parte Fabiani*, 105 F. Supp. 139 (E.D. Pa. 1952) (registrant ordered to return from abroad or face indictment is in "constructive custody"); cf. *Jones v. Cunningham*, 371 U.S. 236 (1963). See generally Comment, *Federal Habeas Corpus Jurisdiction—The Undeveloped Areas*, 41 WASH. L. REV. 327, 334-35 (1966).

66. *United States v. Freeman*, 388 F.2d 246, 248-49 (7th Cir. 1967).

67. Cf. *Peyton v. Rowe*, 391 U.S. 54, 64 (1968). This Comment does not discuss the pre-induction availability of the writ of habeas corpus based on the not untenable theory that the issuance of the order to report for induction places the registrant in "constructive custody."

68. On balance, it may become clear in many cases that seeking a writ of habeas corpus after induction is preferable to facing a criminal prosecution for refusing to submit to induction. Whenever a registrant is ultimately willing to submit to induction if his classification is upheld, it is perhaps unwise to risk conviction of a felony. A conscientious objector, of course, does not even have this choice.

69. Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1382 (1953).

70. Tietz, *Jehovah's Witnesses: Conscientious Objectors*, 28 S. CAL. L. REV. 123, 134 (1955). However, this remedy is not totally vestigial. See, e.g., *Morgan v. Underwood*, 406 F.2d 1253 (5th Cir. 1969) (petition denied); *Powers v. Powers*, 400 F.2d 438 (5th Cir. 1968) (petition granted); *United States ex rel. Caputo v. Sharp*, 286 F. Supp. 516 (E.D. Pa. 1968) (petition granted) and cases cited note 62 *supra*.

the classification is wrong; a registrant must successfully rebut every piece of evidence underlying the board's decision. Normally, to obtain review at all, he must either face a criminal prosecution for refusing induction, and risk conviction of a felony, or comply with an allegedly invalid order by accepting induction to seek, sometimes unsuccessfully, a writ of habeas corpus.

### C. *The Pre-Induction Cases*

The harshness of requiring a registrant to choose either of these alternatives—a criminal prosecution or a writ of habeas corpus—undoubtedly fostered judicial dissatisfaction with the terms of judicial review in selective service cases even before Congress codified the *Estep* doctrine.<sup>71</sup> Yet, until recently, most judges had never even considered the question of pre-induction judicial review.<sup>72</sup> Only a few courts actually departed from strict adherence to the *Estep* doctrine, and they invariably justified their decisions by emphasizing flagrant violations of the Act or regulations by local boards.<sup>73</sup> Most of the courts that considered the question rejected any justification for pre-induction judicial review.<sup>74</sup>

The current ferment began when the Selective Service System decided to confront the anti-war movement on its own terms. Beginning in 1965, various local boards throughout the country attempted to curtail rising anti-war fervor, especially on the college campuses, by revoking

71. It is impossible to gauge with any accuracy the psychological effects which the selective service cases have had on the federal judiciary. There can be no doubt, however, that many judges are profoundly disturbed by their role in enforcing the draft laws. An unusual example is reported in the San Francisco Chronicle, April 3, 1969, at 1, col. 8. Reflecting on the "distasteful and sometimes heart-rending duty of committing young idealists to jail for refusal to perform duties under the controversial Selective Service Act," Judge Sweigert of the Northern District of California imposed a stiff jail sentence and heavy fine on a 66-year-old businessman for tax evasion. One week later, a United States Attorney refused to prosecute a registrant whose claim for classification as a conscientious objector had been rejected by his local board. Apparently, the attorney's objections were conscientious. San Francisco Chronicle, April 10, 1969, at 1, col. 6.

72. The tremendous increase in the volume of criminal prosecutions for selective service law violations since 1965 is certainly one of the factors which provoked some judges to do so.

Fiscal Year	Total Defendants
1964	276
1965	341
1966	516
1967	996
1968	1,192

Division of Procedural Studies and Statistics, Administrative Office of the United States Courts (1968), on file with the *California Law Review*. See Cooney, *Big Rise in Draft Refusals*, San Francisco Chronicle, Mar. 13, 1969, at 1, col. 4.

73. See cases cited note 3 *supra*.

74. See cases cited note 2 *supra*.

the deferments and exemptions of selective service registrants. Mobilizing the awesome power of the Selective Service System to suppress dissent, its director, General Lewis B. Hershey, publicly approved reclassifying deferred or exempt registrants who participated in anti-war demonstrations.<sup>75</sup> The use of punitive sanctions to stifle protest provoked a wave of pre-induction cases.

### 1. *Wolff v. Selective Service Local Board No. 16*<sup>76</sup>

After participating in a sit-in demonstration at the offices of the Selective Service System in Ann Arbor, Michigan, Wolff, a full-time student, was deprived of his student deferment and reclassified I-A by his local board.<sup>77</sup> Without exhausting his administrative remedies, he brought an action to compel the board to restore his II-S classification. The trial judge dismissed the suit for lack of a justiciable controversy.

The Court of Appeals for the Second Circuit reversed, holding that an injunction would issue on two grounds. First, when a local board reclassifies a registrant I-A solely because of his anti-war activities,

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75. See N.Y. Times, Dec. 22, 1965, at 3, col. 6; Jan. 12, 1966, at 1, col. 1; Feb. 18, 1966, at 10, col. 4. A registrant may be declared delinquent if he "fails or neglects to perform any duty" required of him by the provisions of the selective service law. 32 C.F.R. § 1642.4 (1969). Any delinquent "may be classified into Class I-A, I-A-O, or I-O, whichever is applicable, regardless of other circumstances." 32 C.F.R. § 1642.12 (1969). Delinquents are the first to be inducted. 32 C.F.R. §§ 1631.7(a), 1642.13 (1969). Despite wide-spread controversy, General Hershey reiterated his position in a letter to all members of the Selective Service System on October 26, 1967, N.Y. Times, Nov. 9, 1967, at 2, col. 4, and in Local Board Memorandum No. 85 (October 24, 1967). Shortly thereafter, in a joint statement issued with Attorney General Ramsey Clark, General Hershey tempered his earlier position. N.Y. Times, Dec. 10, 1967, § 1, at 5, col. 1.

On the issue of punitive reclassification, see Griffiths, *Punitive Reclassification of Registrants Who Turn in Their Draft Cards*, 1 SEL. SERV. L. REP. 4001 (1968); Schieser & Benson, *The Legality of Reclassification of Selective Service Registrants*, 53 A.B.A.J. 149 (1967); Norton, *A Rejoinder: Selective Service Reclassifications*, 53 A.B.A.J. 539 (1967); Note, *Reclassification of the Sit-In Demonstrator: A Bezoar Stone for the Selective Service System*, 19 U. FLA. L. REV. 143 (1966). The Supreme Court has already approved pre-induction judicial review of the punitive reclassification of an exempt registrant, *Oestereich v. Selective Serv. Local Bd. No. 11*, 393 U.S. 233 (1968), and has granted certiorari to consider the applicability of section 10(b)(3) to pre-induction review of the allegedly punitive reclassification of a deferred registrant, *Breen v. Selective Serv. Local Bd. No. 16*, 406 F.2d 636 (2d Cir.), cert. granted, 394 U.S. 997 (1969) (No. 1144, 1968 Term; renumbered No. 65, 1969 Term). The Court may finally resolve the problem of delinquency during the 1969 Term. See *United States v. Mallory*, Crim. No. 42742 (N.D. Cal. Nov. 3, 1969) (delinquency regulations are unconstitutional); *United States v. Eisdorfer*, 299 F. Supp. 975 (E.D.N.Y. 1969), appeal docketed, 38 U.S.L.W. 3043 (U.S. July 11, 1969) (No. 330) (same); *United States v. Gutknecht*, 406 F.2d 494 (8th Cir.), cert. granted, 394 U.S. 997 (1969) (No. 1176, 1968 Term; renumbered No. 71, 1969 Term) (priority induction of I-A registrant as delinquent).

76. 372 F.2d 817 (2d Cir. 1967), noted in 81 HARV. L. REV. 685 (1967) and 13 WAYNE L. REV. 722 (1967).

77. See note 75 *supra* and accompanying text.

"the threat to First Amendment rights is of such immediate and irreparable consequences . . . as to require prompt action by the courts to avoid an erosion of these precious constitutional rights."<sup>78</sup> The reclassification exerted a "chilling effect" on the exercise of constitutional rights and forced the court to intervene at once.<sup>79</sup> Second, judicial relief is appropriate when it becomes apparent that a local board has acted in "clear excess of its jurisdiction."<sup>80</sup> Here, the board's action was "in flagrant disregard of the applicable regulations."<sup>81</sup> The court relied on earlier pre-induction cases as authority for the proposition that the courts may intervene prior to induction "where on undisputed facts the board's lack of jurisdiction is manifest."<sup>82</sup> In such circumstances, the courts do not require exhaustion of administrative remedies.<sup>83</sup> Decided before Congress enacted section 10(b)(3), *Wolff* merely rejuvenated the exception to the *Estep* doctrine that earlier pre-induction cases had occasionally approved. In turn, Congress restored the vitality of the orthodox interpretation of *Estep* by implicitly overruling *Wolff* and explicitly depriving the courts of jurisdiction to create exceptions.

## 2. *Petersen v. Clark*<sup>84</sup>

In *Petersen*, the district court felt compelled to consider the constitutionality of section 10(b)(3)'s incursion on the jurisdiction of the federal courts. Plaintiff sought an injunction against his induction until his board reconsidered his request for classification as a conscientious objector. Alleging that numerous procedural errors marred the classification process, he argued that the court should not read section 10(b)(3) to preclude pre-induction judicial review of "procedural deprivations."<sup>85</sup> The court held that section 10(b)(3), properly construed, barred all pre-induction judicial review.<sup>86</sup> Despite this finding, the court denied

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78. 372 F.2d at 820. *But see* Hennessey v. Selective Serv. Local Bd. No. 21, 292 F. Supp. 465 (D. Mont. 1968).

79. 372 F.2d at 824, *citing* Dumbrowski v. Pfister, 380 U.S. 479 (1965).

80. 372 F.2d at 826.

81. *Id.*

82. *Id.* The court cited *Townsend v. Zimmerman*, 237 F.2d 376 (6th Cir. 1956), and Judge Frank's dictum in *Schwartz v. Strauss*, 206 F.2d 767 (2d Cir. 1963) (concurring opinion).

83. "When there is nothing to be gained from the exhaustion of administrative remedies and the harm from the continued existence of the ruling is great, the courts have not been reluctant to discard this doctrine." 372 F.2d at 825. *See* *McKart v. United States*, 395 U.S. 185 (1969); Layton and Fine, *The Draft and Exhaustion of Administrative Remedies*, 56 GEO. L.J. 315 (1967).

84. 285 F. Supp. 700 (N.D. Cal. 1968) (Zirpoli, J.), *rev'd per curiam*, 411 F.2d 1217 (9th Cir. 1969), *noted in* 44 NOTRE DAME LAW. 469 (1968) and 22 VAND. L. REV. 212 (1968).

85. *Petersen v. Clark*, 285 F. Supp. 693, 694 (N.D. Cal. 1968) (convening three-judge court).

86. *Id.* On January 29, 1968, the trial court decided that plaintiff's amended

the government's motion to dismiss for lack of jurisdiction and declared section 10(b)(3) unconstitutional.<sup>87</sup>

The court decided not only that "Congress cannot make Selective Service orders *unreviewable*,"<sup>88</sup> but also that it is "unconstitutional to restrict a registrant to the criminal trial forum to raise the defense that his order to report for induction was invalid . . . ."<sup>89</sup> First, the court stated that the due process clause requires some judicial review. Emphasizing that the authorities were singularly alike in their reluctance to concede that Congress' power to control the jurisdiction of the federal courts was absolute,<sup>90</sup> the court concluded that Congress could not abolish judicial review of coercive administrative action.<sup>91</sup> Second, the court found that it was unconstitutional to defer judicial review to a criminal prosecution. Relying heavily on a long line of administrative ratemaking cases,<sup>92</sup> which hold that it is unconstitutional to force an individual to comply with an allegedly invalid order by conditioning judicial review on the risk of incurring a substantial penalty, the court held that section 10(b)(3) prescribed the same scheme the Supreme Court had declared unconstitutional in other contexts. The court acknowledged that raising armies is a more compelling governmental interest than the state's interest in the ratemaking cases, but noted that the individual's interest is also substantial. On balance, the court concluded, the due process clause compels civil judicial review, even in the selective service context: "Due process is offended by an administrative order which demands compliance or a term of imprisonment."<sup>93</sup> The

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complaint presented a substantial federal question—the constitutionality of section 10(b)(3)—which justified convening a three-judge district court. 285 F. Supp. 693, 697 (N.D. Cal. 1968). 28 U.S.C. § 2282 (1964) provides that an application for an "interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution" must be heard by a three-judge district court. On March 14, the court approved a stipulation by both parties, who believed that *Oestereich v. Selective Service Local Bd. No. 11*, 393 U.S. 233 (1968), raised the same issue, staying further proceedings pending a decision in that case. In April, when it became apparent that *Oestereich* might not decide the issue, as in fact it did not, the government asked to be relieved of the stipulation and filed a motion to dismiss for lack of jurisdiction over the subject matter. Plaintiff filed a motion to enjoin a criminal prosecution for refusing induction. *Petersen v. Clark*, 285 F. Supp. 698 (N.D. Cal. 1968). On May 13, the three-judge court remanded the case to the trial judge. *Id.* The three-judge court ruled that "a three-judge court is not required where the constitutionality of a Congressional statute is merely drawn in question . . . ." *Id.* at 699.

87. 285 F. Supp. 700, 713 (N.D. Cal. 1968).

88. *Id.* at 708.

89. *Id.* at 712.

90. *Id.* at 704-08.

91. *Id.* at 708.

92. See notes 214-23 *infra* and accompanying text.

93. 285 F. Supp. at 708.

government did not immediately appeal from this decision.<sup>94</sup> After the Supreme Court decided *Oestereich v. Selective Service Local Board No. 11*<sup>95</sup> and *Clark v. Gabriel*,<sup>96</sup> the Ninth Circuit reversed.<sup>97</sup>

### 3. *Oestereich v. Selective Service Local Board No. 11*<sup>98</sup>

Oestereich, a divinity student, returned his registration certificate to the government as a symbolic protest against the war in Viet Nam. His draft board promptly declared him delinquent and reclassified him I-A. Unlike Wolff, Oestereich in fact violated the regulations by surrendering his registration card.<sup>99</sup> After an unsuccessful administrative appeal, he brought suit to enjoin his induction. Relying on section 10(b)(3), the district court dismissed the action, and the Tenth Circuit affirmed.<sup>100</sup> The Supreme Court granted certiorari.<sup>101</sup>

Before the Court, Oestereich argued unsuccessfully that he was entitled to pre-induction judicial review in order to vindicate his first amendment right to dissent.<sup>102</sup> In addition, he urged the Court to adopt his view that section 10(b)(3) does not deprive the federal courts of jurisdiction to review "orders issued by Local Boards which are so thoroughly and unarguably lawless that they can be reviewed in pre-induction judicial proceedings, if not simply ignored with impunity,"<sup>103</sup> since Oestereich was unequivocally entitled to an exemption as a divinity student,<sup>104</sup> his local board could not constitutionally or legally use the delinquency regulations to revoke it.<sup>105</sup> In reply, the Solicitor General

94. The government did not appeal because the court did not enjoin plaintiff's induction or the pending criminal prosecution. Brief for Respondents at 22 n.6, *Oestereich v. Selective Serv. Local Bd. No. 11*, 393 U.S. 233 (1968). Plaintiff was subsequently successful on the merits, and the court issued a declaratory judgment that plaintiff had no legal duty to submit to induction. *Petersen v. Clark*, 289 F. Supp. 949 (N.D. Cal. 1968).

95. 393 U.S. 233 (1968).

96. 393 U.S. 256 (1968).

97. *Petersen v. Clark*, 411 F.2d 1217 (9th Cir. 1969), *rev'g* 285 F. Supp. 700 (N.D. Cal. 1968).

98. 393 U.S. 233 (1968), *noted in* 4 LAND & WATER L. REV. 587 (1969); 20 SYRACUSE L. REV. 749 (1969); 10 WM. & MARY L. REV. 992 (1969).

99. A registrant must be in personal possession of his Registration Certificate (SSS Form 2) and his Notice of Classification (SSS Form 110) at all times. 32 C.F.R. §§ 1617.1, 1623.5 (1969).

100. 280 F. Supp. 78 (D. Wyo.), *aff'd per curiam*, 390 F.2d 100 (10th Cir. 1968).

101. 391 U.S. 912 (1968).

102. Brief for Petitioner, *supra* note 23, at 68-84.

103. *Id.* at 42 n.24, 20-45.

104. Section 6(g) of the Act provides:

[S]tudents 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 (but not from registration) under this title.

50 U.S.C. APP. § 456(g) (1964).

105. Brief for Petitioner, *supra* note 23, at 45-68.

conceded that pre-induction judicial review of Oestereich's classification was necessary in order to reconcile section 10(b)(3) of the Act with section 6(g), which grants ministerial students an exemption from service.<sup>106</sup> The Solicitor General specified, however, that this exception to section 10(b)(3) should apply "only to those classes of persons who have been expressly granted an exemption from training and service by act of Congress."<sup>107</sup> The Court formulated its decision on the basis of this convenient harmony.

Ignoring the constitutional issues,<sup>108</sup> the Supreme Court held that section 10(b)(3) does not preclude pre-induction judicial review in punitive reclassification cases when the board's action conflicts with a statutory exemption. First, the Court observed that nothing in the statute authorizes local boards to revoke a statutory exemption "for activities or conduct not material to the grant or withdrawal of the exemption."<sup>109</sup> The board reclassified Oestereich pursuant to delinquency regulations promulgated by the Selective Service System,<sup>110</sup> not by act of Congress. Permitting local boards to withhold a statutory exemption under the guise of ill-defined delinquency regulations "would make the Boards freewheeling agencies meting out their brand of justice in a vindictive manner."<sup>111</sup> Therefore, the Court concluded, once a registrant qualifies for a statutory exemption, a local board cannot attach new terms and conditions to his right to the exemption; the use of the delinquency regulations for this purpose, in plain contravention of the statutory mandate, is "blatantly lawless."<sup>112</sup> Second, the Court found that when a board's action conflicts with a "plain and unequivocal" statutory exemption, to require a registrant either to refuse induction and face a criminal prosecution or to submit to induction and seek a writ of habeas corpus "is to construe the Act with unnecessary harshness."<sup>113</sup> Acknowledging that section 10(b)(3) could not "sustain a literal reading,"<sup>114</sup> the Court held that section 10(b)(3) does not preclude pre-induction judicial review in cases of this type.<sup>115</sup>

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106. Brief for Respondents, *supra* note 94, at 58-68.

107. *Id.* at 58-59, 65. The Selective Service System disagreed. *Id.* at 66-74.

108. Petitioner's constitutional arguments included the contentions that (1) the delinquency procedure did not provide constitutionally mandated procedural safeguards as a prerequisite to imposing punitive sanctions, Brief for Petitioner, *supra* note 23, at 55-64; (2) the local board applied the delinquency procedure in violation of the regulations and the requirements of due process, *id.* at 64-68; (3) the delinquency regulations were themselves constitutionally defective under first amendment tests, *id.* at 73-84.

109. 393 U.S. at 237.

110. 32 C.F.R. § 1642.4 (1969).

111. 393 U.S. at 237.

112. *Id.* at 237-38.

113. *Id.* at 238.

114. *Id.*

115. *Id.* at 239.

The basis of the Court's opinion was a supposed conflict between two explicit statutory provisions.<sup>116</sup> Noting that the continuing availability of the writ of habeas corpus was an implied exception to the literal language of section 10(b)(3), the Court merely read another exception into the statute: When a registrant meets the terms and conditions of a statutory exemption, and his local board withholds it for reasons unrelated to the merits of granting or continuing the exemption, section 10(b)(3) does not preclude pre-induction judicial review. At the same time, the Court laid the groundwork for its decision in *Clark v. Gabriel*,<sup>117</sup> rendered the same day, by making it clear that its construction "leaves § 10(b)(3) unimpaired in the normal operations of the Act."<sup>118</sup>

Justice Harlan, concurring in the result, took the position that Oestereich was not asking the Court to review the "factual and discretionary decisions inherent in the 'classification or processing' of registrants," but was challenging "the validity of the administrative procedure itself."<sup>119</sup> Since the Selective Service System did not have the power to hear and determine the issue petitioner raised, denying pre-induction review would "deprive petitioner of his liberty without the prior opportunity to present to *any* competent forum—agency or court—his substantial claim that he was ordered inducted pursuant to an unlawful procedure."<sup>120</sup> Such a denial would raise "serious constitutional questions."<sup>121</sup>

Justice Stewart, joined by Justices Brennan and White, dissented. Arguing that section 10(b)(3) meant what it said, Justice Stewart did not agree that any exception was justified.<sup>122</sup> Moreover, he did not find anything exceptional about the case at bar: For a registrant, like Oestereich, whose statutory rights are clear, an exception seems "least justified."<sup>123</sup> Finally, if the statute is constitutional, the Court had no right to disregard it simply because it is harsh.<sup>124</sup>

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116. *Id.* at 238. The dissenters did not agree that there was a conflict at all. *Id.* at 249. See note 122 *infra*.

117. 393 U.S. 256 (1968).

118. 393 U.S. at 238.

119. *Id.* at 241-42.

120. *Id.* at 243.

121. *Id.*

122. Justice Stewart did not find any conflict between section 6(g) and section 10(b)(3).

In such a case, it is said, there is a "clash" between the exemption and the provisions of § 10(b)(3). With all respect, I am simply unable to perceive any "clash" whatsoever. Exemptions from service are substantive, while § 10(b)(3) is purely procedural, specifying *when* substantive rights may be asserted. How the Court can conclude that the provisions of § 10(b)(3) somehow do "violence to" the divinity student exemption is a mystery to me.

*Id.* at 249.

123. *Id.* at 251.

124. *Id.* at 250.

#### 4. *Clark v. Gabriel*<sup>125</sup>

Gabriel claimed that he was entitled to classification as a conscientious objector. His local board denied his claim, classified him I-A, and ordered him to report for induction. Gabriel brought suit to enjoin his induction pending proper determination of the merits of his claim for classification as a conscientious objector. He did not allege that the local board had used the delinquency concept to reclassify him; rather, he argued that section 10(b)(3) was unconstitutional. Agreeing that the "statutory formula" in fact results in "a tortuous judicial adventure,"<sup>126</sup> the trial judge followed *Petersen*<sup>127</sup> by holding section 10(b)(3) unconstitutional under "elemental concepts of due process and judicial fairness."<sup>128</sup>

The limited and circumscribed review afforded in a criminal proceeding results in no review at all. It necessarily ascribes to [the defendant] the essential elements and ingredients of criminal conduct, by the very act of his seeking an orderly review of the draft board classification.

Thus, "willfulness" is in legal effect, shifted to [the defendant] once he fails to respond "affirmatively" to the induction order, yet, that is the only method provided in attacking the validity of the order for induction, as well as the legality of the classification.<sup>129</sup>

The court issued a preliminary injunction, and the government appealed directly to the Supreme Court.<sup>130</sup>

The Supreme Court took a different view of the matter. Holding that the result was dictated by *Oestereich*, decided the same day, the Court noted that here "there is no doubt of the board's statutory authority to take the action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment."<sup>131</sup> Pre-induction review in *Oestereich* was justified only because the board's action was "blatantly lawless" and involved "a clear departure by the Board from its statutory mandate."<sup>132</sup> *Oestereich's* right

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125. 393 U.S. 256 (1968), noted in 38 U. CIN. L. REV. 191 (1969).

126. *Gabriel v. Clark*, 287 F. Supp. 369, 371 (N.D. Cal. 1968) (Harris, C.J.), *rev'd*, 393 U.S. 256 (1968).

127. Two other judges in the Northern District of California have also followed *Petersen*. *Rheingans v. Clark*, Civ. No. 50181 (N.D. Cal. Nov. 18, 1968) (Peckham, J.); *Sherbatskoy v. Clark*, Civ. No. 49259 (N.D. Cal. Aug. 2, 1968) (Sweigert, J.). Two have specifically declined to follow it. *Paulekas v. Clark*, 291 F. Supp. 606 (N.D. Cal. 1968) (Burke, J.); *Hodges v. Clark*, 291 F. Supp. 177 (N.D. Cal. 1968) (Carter, J.).

128. 287 F. Supp. at 371.

129. *Id.*

130. 28 U.S.C. § 1252 (1964).

131. *Clark v. Gabriel*, 393 U.S. 256, 258 (1968).

132. *Oestereich v. Selective Serv. Local Bd. No. 11*, 393 U.S. 233, 238 (1968).

to exemption was uncontested, and the board had no statutory authority to deny it. In *Gabriel*, on the other hand, the registrant's right to exemption was not uncontested, and the board's statutory authority to deny it was clear. The Court found no constitutional objection to section 10(b)(3); citing *Falbo* and *Estep*, the Court summarily reversed in a per curiam opinion. Thus, the Court disposed of the constitutional issue without anything more illuminating than an oblique citation to *Falbo* and *Estep*. Neither of those cases, however, dealt with the availability of pre-induction judicial review. The most they decided was that before a registrant was entitled to *any* judicial review, he had to exhaust his administrative remedies. Without even mentioning Judge Zirpoli's well-reasoned opinion in *Petersen* holding section 10(b)(3) unconstitutional, the Supreme Court resolutely avoided confronting the constitutional question that *Gabriel* squarely presented.<sup>133</sup> The ultimate effect of what the Court did in *Oestereich* and *Gabriel* is not yet clear.

#### D. Analysis

Predictably, the lower federal courts have not read *Oestereich* uniformly. In *Breen v. Selective Service Local Board No. 16*,<sup>134</sup> the Second Circuit held that the *Oestereich* exception to section 10(b)(3) does not apply to deferments. Breen, an undergraduate, delivered his registration certificate to a clergyman in protest against the war in Viet Nam. His board declared him delinquent and reclassified him I-A. After initiating an administrative appeal, Breen brought an action to obtain a judgment that his classification was null and void and an injunction against his induction. The district court held that section 10(b)(3) was a bar and dismissed the complaint.<sup>135</sup> On appeal, the Second Circuit granted a stay of induction and deferred decision pending the Supreme Court's decision in *Oestereich*. After *Oestereich* was decided, the Second Circuit affirmed the lower court's dismissal. Writing for the court, Judge Friendly relied on the distinction between an exemption and a deferment. Since Breen had only "a deferment of his obligation," not "an exemption from military service,"<sup>136</sup> the application of the delinquency regulations to him did not create a statutory conflict as it did in *Oestereich*. Hence, there was no justification for pre-induction judicial review. Judge Feinberg, dissenting, rejected this distinction. He argued that if Breen were entitled to a statutory deferment that did not depend, as did the exemption in *Gabriel*, on an act of

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133. See Petition for Rehearing, *Clark v. Gabriel*, 393 U.S. 256 (1968).

134. 406 F.2d 636 (2d Cir.), cert. granted, 394 U.S. 997 (1969) (No. 1144, 1968 Term; renumbered No. 65, 1969 Term).

135. 284 F. Supp. 749 (D. Conn. 1968).

136. 406 F.2d at 638.

judgment by the local board, his right was identical to *Oestereich's*: "Each involves a clear statutory grant by Congress to a specified class of registrants of the right not to be inducted into military service, although in this case the right is referred to as a deferment rather than an exemption."<sup>137</sup> Since Breen's case was clearly distinguishable from *Gabriel*, and equally as clearly indistinguishable from *Oestereich*, Judge Feinberg concluded that the Supreme Court's reasoning in *Oestereich* was controlling.

In *Kolden v. Selective Service Local Board No. 4*,<sup>138</sup> the Eighth Circuit considered a substantially similar set of facts.<sup>139</sup> In this case, however, the plaintiff was a graduate student. The court further refined the distinction between an exemption and a deferment by finding that as a graduate student Kolden could not maintain a pre-induction suit, but implying that an identically situated undergraduate student could.<sup>140</sup> "The statute *requires* the President to provide for undergraduate deferments except in time of necessity," the court noted; in contrast, the statute "only *authorizes* him to do so for graduate students."<sup>141</sup> Since Kolden's deferment was granted solely as a matter of "administrative grace," the court concluded, his claim was not sufficiently analogous to *Oestereich's* to justify pre-induction judicial review.

The *Kolden* court's distinction is at least tenable, although there is little justification for postponing judicial review when a local board illegally applies the delinquency regulations to deprive a registrant of any deferment. The validity of the distinction hinges on the ultimate interpretation of *Oestereich*. The Supreme Court did not specify in *Oestereich* what made the use of the delinquency regulations "blatantly lawless." If delinquency reclassification is lawless only when it conflicts with a statutory right, clearly the *Oestereich* rationale does not apply to *Kolden*. However, delinquency reclassification may be lawless because there is no statutory authorization for the use of the delinquency concept to reclassify registrants. In *Oestereich*, the Court pointed out

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137. *Id.* at 641.

138. 406 F.2d 631 (2d Cir. 1969), *petition for cert. filed*, 37 U.S.L.W. 3357 (U.S. Mar. 19, 1969) (No. 1175, 1968 Term; renumbered No. 70, 1969 Term).

139. Kolden, a graduate student at Harvard, returned his draft card to an officer of the government on October 16, 1967. On November 8, he notified his local board of his action; on December 1, his local board declared him delinquent and reclassified him I-A. On February 8, 1968, the appeal board upheld the reclassification and, on the same day, the local board issued an order to report for induction. At this point Kolden sought an injunction. The district court denied the motion for a temporary injunction on April 9; while his appeal was pending in the court of appeals, his local board ordered him to report for induction on July 17. On July 16, Judge Blackman granted an injunction pending determination of his appeal. *Id.* at 632.

140. *Id.* at 634-35.

141. *Id.* at 634.

that even if Congress had authorized delinquency reclassification "serious questions would arise if Congress were silent and did not prescribe standards to govern the Board's actions."<sup>142</sup> This interpretation finds some support in *United States v. Eisdorfer*.<sup>143</sup> There the trial court held that the defendant's classification was invalid because it rested upon the operation of the delinquency regulations. After reviewing a complex factual record,<sup>144</sup> the court found that whatever the local board might have done,<sup>145</sup> it in fact ordered the registrant to report for induction as a delinquent pursuant to the delinquency regulations. The court's objection was not that local boards invoked the delinquency regulations "unwisely or indiscreetly," but rather that "the local boards are compelled to act on their own uncircumscribed responsibility without the guidance of settled standards in a regime of conscientious anomie."<sup>146</sup> Rejecting the defendant's other contentions, the court concluded that the delinquency regulations are not compatible with the statute and the valid substantive regulations adopted under it. The local board might declare a registrant delinquent whether

the failure [to perform a duty] is the result of innocent inadvertence, reasonable misinterpretation, negligence, willful disobedience rooted in principle, or malign evasion. . . . There are no degrees of delinquency. No standards prescribe the particular occasions when the power is to be exerted, or what findings of gravity, of willfulness, of penitence, of reparation are relevant to deciding whether or not to declare the registrant delinquent. . . . The fault is in the absence of any standard or guide to the evaluation of the importance of the omitted duty and the guilt-character of the omission to perform it.<sup>147</sup>

If the absence of statutory authorization—and standards of application and remission—for delinquency proceedings is the determinant of lawlessness, *Kolden* is arguably within the *Oestereich* exception to section 10(b)(3). Under this analysis, even if the President is only authorized to provide deferments for graduate students, once he has done so, a local board cannot revoke them on the basis of delinquency regulations that are not authorized by statute.

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142. 393 U.S. at 237. It is arguable that there is a dual basis for the Court's holding in *Oestereich*. The structure of the Court's conclusion implies that there is: "[S]ince the scope of the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has granted as a statutory right, or sufficiently buttressed by legislative standards, we conclude that pre-induction judicial review is not precluded in cases of this type." *Id.* at 239 (emphasis added).

143. 299 F. Supp. 975 (E.D.N.Y. 1969), *appeal docketed*, 38 U.S.L.W. 3043 (U.S. July 11, 1969) (No. 330).

144. *Id.* at 977-83.

145. The court suggested that defendant's reclassification and subsequent induction order might have been proper on other grounds. *Id.* at 984.

146. *Id.* at 984.

147. *Id.* at 988-89 (Appendix A).

The *Breen* court's distinction is clearly wrong. If undergraduate students have a statutory right to a deferment, reliance on the technical distinction between an exemption and a deferment seems misplaced.<sup>148</sup> There is language in *Oestereich* to support the conclusion that the *Oestereich* majority would in all probability uphold *Wolff* today, although *Wolff* was undoubtedly the most prominent of the unnamed pre-induction cases that prompted Congress to amend section 10(b) (3). The Court's reasoning in *Oestereich* would seem to apply equally to *Wolff*. "Once a person registers and qualifies for a statutory exemption," the Court stated, "we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption."<sup>149</sup> The function of the Selective Service System is not to punish registrants for such behavior, and "[t]he Solicitor General confesses error on the use by Selective Service of delinquency proceedings for that purpose."<sup>150</sup> *Wolff*'s board revoked his statutory deferment because of "conduct or activities unrelated to the merits of granting or continuing that exemption." Arguably, his case was even stronger than *Oestereich*'s because *Wolff* did not violate the delinquency regulations.<sup>151</sup> In any event, the Court made clear in *Oestereich* that "the scope of the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has granted as a statutory right."<sup>152</sup> Even if distinctions between exemptions and deferments, and among deferments, are tenable,<sup>153</sup> they do not adequately explain the different results in *Oestereich* and *Gabriel*.

The most significant difference between *Gabriel* and *Oestereich* is

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148. See *Oestereich v. Selective Serv. Local Bd. No. 11*, 393 U.S. 233, 249 n.9 (1968) (dissenting opinion). Prior to the Supreme Court's decision in *Oestereich*, lower federal courts had found it difficult to distinguish the rights of ministerial students, 50 U.S.C. APP. § 456(g) (1964), from the rights of conscientious objectors or college students. Conscientious objectors have a statutory exemption from service. 50 U.S.C. APP. § 456(j) (Supp. IV, 1965-68). See *Petersen v. Clark*, 285 F. Supp. 700, 702 n.1 (N.D. Cal. 1968), *rev'd per curiam*, 411 F.2d 1217 (9th Cir. 1969). College students have a statutory deferment. 50 U.S.C. APP. § 456(h)(1) (Supp. IV, 1965-68). See *Kimball v. Selective Serv. Local Bd. No. 15*, 283 F. Supp. 606, 608 (S.D.N.Y. 1968) (the distinction between an "exemption" and a "deferment" is without legal significance). In each case, as with ministerial students, the local board must exercise its judgment. See 50 U.S.C. APP. § 456(k) (1964); 32 C.F.R. § 1625.1(a) (1969).

149. 393 U.S. at 237.

150. *Id.*

151. See text accompanying note 77 *supra*.

152. 393 U.S. at 238-39.

153. The manner of designating certain classes as "exempt" or "deferred" suggests that such distinctions are not tenable. Compare 50 U.S.C. APP. § 456(f) (1964) (government officials) with 50 U.S.C. APP. § 456(a) (Supp. IV, 1965-68) (cadets and midshipmen) and 50 U.S.C. APP. § 456(d) (1964) (ROTC). But see *Anderson v. Hershey*, 410 F.2d 492 (6th Cir. 1969).

the absence of the issue of punitive reclassification in *Gabriel* that in *Oestereich* presented a conflict between two explicit statutory provisions. The *Oestereich* majority stressed that a literal reading of section 10(b)(3) would compel an interpretation out of harmony with the Act as an "organic whole,"<sup>154</sup> and the Court created an exception to avoid that difficulty. Since the issue of punitive reclassification accounted for the Court's construction of section 10(b)(3), it is remarkable that so many of the post-*Oestereich* pre-induction cases have not involved that issue at all.

Reading *Oestereich* broadly, several courts have granted pre-induction judicial review when local boards have made an error of law.<sup>155</sup> Such courts have apparently proceeded on the theory that if a registrant's claim is not simply an attack on his classification or processing, which encompass, in the words of Justice Harlan's concurrence, "the numerous discretionary, factual and mixed law-fact determinations which a Selective Service board must make prior to issuing an order to report for induction,"<sup>156</sup> the holding in *Oestereich* permits pre-induction judicial review. When it is plain on the face of the record that the plaintiff is entitled to relief as a matter of law, these courts have held that section 10(b)(3) is not a bar.

By and large, graduate students have initiated these post-*Oestereich* pre-induction suits.<sup>157</sup> The 1967 Act deprived graduate students of their right to student deferments (II-S) after a moratorium of one year.<sup>158</sup> As a result, several graduate students who were subsequently classified I-A brought civil actions to compel their draft boards to grant

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154. *Oestereich v. Selective Serv. Local Bd. No. 11*, 393 U.S. 233, 238 (1968).

155. See, e.g., *Crane v. Hershey*, 410 F.2d 966 (1st Cir. 1969) (I-S); *Bowen v. Hershey*, 410 F.2d 963 (1st Cir. 1969) (same case); *Ellis v. Hershey*, 302 F. Supp. 347 (E.D. Mich. 1969) (I-S); *Turley v. Selective Serv. Local Bd. No. 134*, 301 F. Supp. 845 (C.D. Cal. 1969) (I-S); *Catano v. Selective Serv. Local Bd. No. 94*, 298 F. Supp. 1183 (E.D. Pa. 1969) (I-S); *Carey v. Selective Serv. Local Bd. No. 2*, 297 F. Supp. 252 (D. Conn.), *aff'd*, 412 F.2d 71 (2d Cir. 1969) (I-S); cf. *Marsano v. Laird*, 412 F.2d 65 (2d Cir. 1969) (habeas corpus). *Contra*, *Rich v. Hershey*, 408 F.2d 944 (10th Cir. 1969) (I-S); *Kraus v. Selective Serv. Local Bd. No. 25*, 408 F.2d 622 (4th Cir. 1969) (III-A); *Schwartz v. Selective Serv. Local Bd. No. 23*, 298 F. Supp. 1238 (D. Ky. 1969) (I-S); *Rosenfield v. Hershey*, 298 F. Supp. 276 (W.D. Pa. 1969) (I-S). See generally Comment, *Eligibility of Graduate Students for Student and Fatherhood Deferments*, 37 *FORD. L. REV.* 617 (1969).

156. 393 U.S. at 240.

157. Recently, President Nixon announced that graduate students would no longer be drafted during the academic year. *San Francisco Chronicle*, Oct. 2, 1969, at 11, col. 1. If this means that local boards will not issue orders to report for induction during the academic year, a graduate student will no longer qualify for a I-S deferment. See note 162 *infra*. On the other hand, if this announcement means only that induction will be postponed until the end of the academic year, a graduate student will still be entitled to maintain a pre-induction suit to compel his board to grant him a I-S deferment, not merely a postponement of induction.

158. See 32 C.F.R. § 1622.26(b) (1969).

them temporary student deferments (I-S) to enable them to complete the academic year.<sup>159</sup> Courts upholding their right to pre-induction judicial relief assumed that because a graduate student has a legal right to such a deferment, his claim falls within the scope of the *Oestereich* exception to section 10(b)(3).<sup>160</sup>

*Armendarriz v. Hershey*<sup>161</sup> is typical. Plaintiff, a second-year graduate student at the University of Texas, brought an action to enjoin his induction, claiming that he was entitled to a I-S deferment as a matter of right under section 6(i)(2) of the Military Selective Service Act of 1967.<sup>162</sup> The court first considered the threshold question of whether Armendarriz could maintain a pre-induction suit. Holding that "an action on Plaintiff's I-S request would involve only legal determinations by the board and should be reviewable under the *Oestereich* rationale,"<sup>163</sup> the court proceeded to resolve the legal issue. The court found that the exceptions to the statutory right to a I-S did not apply to the plaintiff. The pertinent exception in section 6(h)(1)<sup>164</sup> restricts I-S deferments to registrants who have not had II-S deferments under the provisions of that paragraph. The court held that this exception refers only to undergraduate II-S deferments and not to graduate II-S deferments, which are provided for in section 6(h)(2). Since plaintiff had never had a II-S deferment as an undergraduate under the 1967 Act, the court concluded that he was legally entitled to a I-S deferment, notwithstanding that he had had a II-S deferment as a first-year graduate student.<sup>165</sup> The court specifically refused to uphold the validity of Local Board Memorandum No. 87 in which General Hershey took the position that the exception of section 6(h)(1) applied to anyone who had had any II-S deferment under the 1967 Act.<sup>166</sup>

The import of *Armendarriz*, and of other cases that have read

159. 50 U.S.C. APP. § 456(i)(2) (1964).

160. See cases cited note 155 *supra*.

161. 295 F. Supp. 1351 (W.D. Tex.), *appeal dismissed*, 2 SEL. SERV. L. REP. 3109 (5th Cir. June 13, 1969).

162. Section 6(i)(2) provides:

Any person who while satisfactorily pursuing a full-time course of instruction at a college, university or similar institution is ordered to report for induction under this title, shall, upon the facts being presented to the local board, be deferred (A) until the end of such academic year, or (B) until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier . . . .

50 U.S.C. APP. § 456(i)(2) (1964).

163. 295 F. Supp. at 1353.

164. Section 6(h)(1) of the Act reads in pertinent part:

No person who has received a student deferment [II-S] under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree . . . .

50 U.S.C. APP. § 456(h)(1) (Supp. IV, 1965-68).

165. 295 F. Supp. at 1354.

166. *Id.*

*Oestereich* broadly,<sup>167</sup> is that when a registrant has a legal right that does not call for the exercise of judgment or discretion by the local board, his claim is cognizable in pre-induction judicial proceedings. This result is sound. Whenever a registrant's ultimate right to relief is clear,<sup>168</sup> it seems frivolous to relegate him to a criminal forum or a habeas corpus proceeding to obtain judicial review. Such an interpretation of *Oestereich*, however, does not make the constitutional issue moot.

The Court did not decide the constitutional issue in *Gabriel*. Relying on *Oestereich*, the Court reversed *Gabriel* because it did not fall within the ambit of the exception to section 10(b)(3). This seems altogether disingenuous. *Gabriel* is undoubtedly the clearest case for denying pre-induction judicial review in terms of the *Oestereich* analysis; at the same time, it is the clearest case for permitting pre-induction judicial review in terms of a constitutional analysis.

A claim that a local board's action is in derogation of a statutory exemption could be raised as effectively in a criminal prosecution—or by habeas corpus—as any other claim; it would certainly be more likely to succeed.<sup>169</sup> The Court did not confine *Oestereich* to the statutory remedies because, as the Solicitor General noted, the “difficulties” involved make these remedies hazardous: “[The registrant] does not have an opportunity to find out in advance whether he is wrong, and to decide then whether to take the penalty or to accept the legal conclusion as to his status. He must take the risk in order to find out whether he is subject to a penalty.”<sup>170</sup> For *Oestereich*, and those like him, there is little risk.<sup>171</sup> The burden of the statutory remedies falls most heavily on those registrants whose classifications, although they may be legally defective, are not “blatantly lawless.”

The thrust of the constitutional objection to section 10(b)(3) is that pre-induction judicial review should not be available only to those registrants who have been illegally deprived of statutory rights. As the dissenting opinion in *Oestereich* correctly pointed out:

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167. See note 155 *supra*.

168. See *Wiener v. Selective Serv. Local Bd. No. 4*, 302 F. Supp. 266 (D. Del. 1969) (when administrative procedures are so irregular that the probability plaintiff will prevail on final hearing is clear, *Oestereich* permits pre-induction review); *Izccovitz v. Selective Serv. Local Bd. No. 6*, 301 F. Supp. 168 (S.D.N.Y. 1969) (when a local board makes an error of law, *Oestereich* permits pre-induction judicial review).

169. The Selective Service System uses this reasoning to reach the contrary conclusion that since exempt registrants who have been reclassified are likely to be able to defend a criminal prosecution successfully, pre-induction judicial review is not justified at all. Brief for Respondents, *supra* note 94, at 70 n.33. The dissenters in *Oestereich* agreed with this conclusion; see notes 122-23 *supra* and accompanying text.

170. Brief for Respondents, *supra* note 94, at 61.

171. *Oestereich v. Selective Serv. Local Bd. No. 11*, 393 U.S. 233, 251 (1968) (dissenting opinion).

It is upon those registrants whose rights are *not* so clear that § 10 (b)(3) most harshly falls. For it is they who must choose whether to run the serious risk of a criminal prosecution or submit to induction with the uncertain hope of prevailing in a habeas corpus proceeding.<sup>172</sup>

A registrant who claims to be a conscientious objector or a student and alleges that there is no basis in fact for his I-A classification must take the very same risks that justify pre-induction judicial review of the reclassification of a registrant who is clearly exempt or deferred. The ultimate interpretation of *Oestereich* is not clear, but its dimensions are limited. The vast majority of registrants still needs a full and fair hearing on the constitutional issue.

## II

### IS PRE-INDUCTION JUDICIAL REVIEW CONSTITUTIONALLY REQUIRED?

An act of Congress created the federal courts,<sup>173</sup> and no court has ever denied that Congress possesses the discretionary power to control their jurisdiction.<sup>174</sup> Except for the original jurisdiction of the Supreme Court,<sup>175</sup> the federal courts derive their jurisdiction exclusively from statute, and it has been aptly pointed out and consistently held that "[c]ourts created by statute can have no jurisdiction but such as the statute confers."<sup>176</sup> There are very real doubts, however, as to whether Congress can prescribe a scheme of review, or withhold review altogether, without regard to the requirements of due process of law.<sup>177</sup>

172. *Id.* at 251-52.

173. "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. The Judiciary Act of 1789, 1 Stat. 73, established the inferior federal courts.

174. "The Congressional power to ordain and establish inferior federal courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'" *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943), quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845). *Sheldon v. Sill*, 49 U.S. (8 How.) 440, 448 (1850); *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 7, 11 (1799).

175. U.S. CONST. art. III, § 2.

176. *Sheldon v. Sill*, 49 U.S. (8 How.) 440, 448 (1850).

177. In addition to *Petersen v. Clark*, 285 F. Supp. 700 (N.D. Cal. 1968), *rev'd per curiam*, 411 F.2d 1217 (9th Cir. 1969), at least one other selective service case has explicitly recognized the existence of due process limits on Congress' power. *Faulkner v. Clifford*, 289 F. Supp. 895 (E.D.N.Y. 1968), *appeal dismissed*, 393 U.S. 1046 (1969). See *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir.), *cert. denied* 335 U.S. 887 (1948):

We think . . . that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, with-

### A. The Problem of Unreviewability

Congress' original intention, in 1940, was to exclude all judicial review of a registrant's classification, even in a criminal prosecution for refusing to submit to induction.<sup>178</sup> In *Falbo v. United States*,<sup>179</sup> the Supreme Court said: "The [Selective Training and Service] Act nowhere explicitly provides for such review [in a criminal prosecution] and we have found nothing in the legislative history which indicates an intention to afford it."<sup>180</sup> Two years later, in *Estep v. United States*,<sup>181</sup> by interpreting the statute to permit judicial review, although narrowly limited to determining if there is any basis in fact for the registrant's classification, the Court sidestepped the constitutional question of whether Congress had the power to make selective service orders unreviewable. Acknowledging that judicial review "may indeed be required by the Constitution,"<sup>182</sup> the Court nonetheless reconciled the statutory language of finality (and hence unreviewability) with the Court's notions of fairness without passing upon the constitutionality of denying all review.<sup>183</sup>

What judicial review of administrative action is constitutionally required has never been decided.<sup>184</sup> It is generally agreed that there is a

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hold and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law . . . .

*Id.* at 257; *cf.* *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432 (1935); *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 291 (1920); *Prentiss v. Atlantic Coast Line Co.*, 211 U.S. 210, 228 (1908). *But cf.* *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922).

Other Congressional powers are undoubtedly subject to the fifth amendment. *See, e.g., Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935) (bankruptcy power); *Heiner v. Donnan*, 285 U.S. 312, 326 (1932) (tax power); *Hamilton v. Kentucky Distilleries*, 251 U.S. 146, 155 (1919) (war power); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336 (1893) (commerce power).

178. *See* notes 11-12 *supra* and accompanying text.

179. 320 U.S. 549 (1944).

180. *Id.* at 554.

181. 327 U.S. 114 (1946).

182. *Id.* at 120. Concurring, Justice Murphy stated that "judicial review of some sort and at some time is required by the Constitution . . ." *Id.* at 130.

183. The Court stated:

We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by the local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction . . . . We cannot readily infer that Congress departed so far from traditional concepts of a fair trial when it made the actions of the local boards "final" as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency.

*Id.* at 121-22.

184. *See* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.19, at 102 (1958) [hereinafter cited as DAVIS]: "Indeed, the opinions of the Supreme Court in recent decades are completely devoid of any formulation of principle concerning the constitutional minimum of review."

"presumption of reviewability" that may be rebutted by statutory exclusion, subject to constitutional limitations.<sup>185</sup> Beginning with *American School of Magnetic Healing v. McAnnulty*,<sup>186</sup> in which the Court undertook to review a fraud order issued by the Postmaster General prohibiting plaintiff from using the postal system, the Supreme Court has expressed reservations in a number of decisions<sup>187</sup> about the elimination of all review.

In *St. Joseph Stockyards Company v. United States*,<sup>188</sup> plaintiff company brought suit to restrain the enforcement of a rate-fixing order issued by the Secretary of Agriculture. Affirming the district court's dismissal, the Court declined to disturb the administrative findings of fact, but concluded: "Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."<sup>189</sup> Concurring, Justice Brandeis articulated the most often quoted statement of this principle:

The supremacy of law demands that there shall be an opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, a person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality. But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court.<sup>190</sup>

The degree to which administrative discretion is insulated from judicial review is the subject of continuing debate,<sup>191</sup> but the plain

185. See DAVIS, *supra* note 184, at § 28.07; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320-94 (1965) [hereinafter cited as JAFFE].

186. 187 U.S. 94 (1902).

187. See, e.g., *Stark v. Wickard*, 321 U.S. 288 (1944); *Dismuke v. United States*, 297 U.S. 167 (1936); *Gegiow v. Uhl*, 239 U.S. 3 (1915); *Bates & Guild Co. v. Payne*, 194 U.S. 106 (1904).

188. 298 U.S. 38 (1936).

189. *Id.* at 52.

190. *Id.* at 84.

191. For example, see the following caustic exchange: Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965); DAVIS, *supra* note 184, at § 28.16 (Supp. 1965); Berger, *Administrative Arbitrariness—A Reply to Professor Davis*, 114 U. PA. L. REV. 783 (1966); Davis, *Administrative Arbitrariness—A Final Word*, 114 U. PA. L. REV. 814 (1966); Berger, *Administrative Arbitrariness—A Rejoinder to Professor Davis' "Final Word,"* 114 U. PA. L. REV. 816 (1966); Davis, *Administrative Arbitrariness—A Postscript*, 114 U. PA. L. REV. 823 (1966). At this point, the Board of Editors of the *Pennsylvania Law Review* prudently declined to publish further remarks by either author. The antagonists resumed their debate in the *Minnesota Law Review*: Berger, *Administrative Arbitrariness: A Sequel*, 51 MINN. L.

fact is that not all administrative action is reviewable in the courts. For example, after receiving a I-A classification, an individual may be compelled to become part of the military establishment, which, by its very nature, is not subject to close judicial scrutiny. He may be deprived of his liberty, or placed in a position where he may be deprived even of his life, without recourse to the courts. Professor Davis' saturnine narrative of a reluctant soldier's hypothetical military career is a vivid illustration:

Consider the young man during this Viet Nam period whose preference is for the nonmilitary. Discretion creates an international trouble spot. No review. Discretion resorts to military power. No review. Discretion calls up more draftees. No review. Discretion changes a physical requirement so as to include the young man. No review. Discretion sends him to the trouble spot. No review. Discretion orders him into enemy fire. No review. Discretion, after he is wounded, keeps him and uses him again. No review. Discretion denies him the commission he seeks. No review. Discretion withholds the medal or other recognition he wants. No review. Discretion denies him money which he thinks he is entitled to as a disabled veteran. No review. Discretion refuses him admission to St. Elizabeth's Hospital. No review. Discretion denies him burial at Arlington. No review.<sup>192</sup>

Once the registrant is in the military he must obey orders from which there is no right of appeal to a civil court.<sup>193</sup> The benefits and emoluments of military service are "gratuities" that "may be withdrawn by Congress at any time and under such conditions as Congress may impose,"<sup>194</sup> without judicial review.<sup>195</sup> It does not follow, however, that Congress could deprive the federal courts of jurisdiction to review the orders of the Selective Service System that compel him to submit in the first place.<sup>196</sup>

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REV. 601 (1967); Davis, *Administrative Arbitrariness Is Not Always Reviewable*, 51 MINN. L. REV. 643 (1967).

192. Davis, *Administrative Arbitrariness—A Postscript*, 114 U. PA. L. REV. 823, 831-32 (1966).

193. See *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953) ("[J]udges are not given the task of running the Army. . . ."); DAVIS, *supra* note 184, at § 28.15.

194. *Milliken v. Gleason*, 332 F.2d 122, 123 (1st Cir.), *cert. denied*, 379 U.S. 1002 (1964) (pension benefits).

195. See, e.g., *United States v. Babcock*, 250 U.S. 328 (1919): "[W]hen [the United States] creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts." *Id.* at 331. Cf. *Stark v. Wickard*, 321 U.S. 288, 306 (1944); *Switchmen's Union of North America v. National Mediation Bd.*, 320 U.S. 297, 301 (1943).

196. "When we line up the unreviewability cases on a scale, with rights in the nature of benefits at one end and obligations imposed through the governmental program at the other end . . . most of the cases are bunched near the benefit end of the scale, and we find not a single clear-cut authority for unreviewability at the obligation end of the scale." DAVIS, *supra* note 184, § 28.19, at 104.

The Supreme Court has never held that there is a due process right to judicial review of coercive administrative action.<sup>197</sup> In *Lockerty v. Phillips*,<sup>198</sup> a suit to enjoin criminal prosecution for violations of price regulations prescribed under the Emergency Price Control Act of 1942, the Court upheld the Act's withdrawal of equity jurisdiction from the district courts. Although the Act provided for an appeal to the Emergency Court of Appeals and review by the Supreme Court, the appellants did not pursue those remedies, but sought instead to obtain relief in a district court. Denying relief, the Court observed that "There is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court."<sup>199</sup> Although the Court simultaneously reiterated Congress' power to control the jurisdiction of the federal courts in the most unequivocal terms,<sup>200</sup> it is worth noting that the Act clearly provided for judicial review of some sort.

In *Yakus v. United States*,<sup>201</sup> a criminal prosecution for violation of the same Act, the Court denied that the defendants had a right to challenge the order in a criminal prosecution if they had failed to follow the statutory procedure for establishing the order's invalidity.<sup>202</sup> This holding seems to be nothing more nor less than an example of the familiar requirement that administrative remedies (which here included the right to judicial review in a civil proceeding prior to the imposition of criminal sanctions) must be exhausted as a prerequisite to judicial review.

In spite of these cases, there is no compelling judicial support, except for the grandiose assertions of Congress' unlimited power, for the proposition that some judicial review of coercive governmental action is not required by the due process clause. Congress may make the administrative determination of facts final, subject to the right to judicial review enunciated in *St. Joseph Stockyards*.<sup>203</sup> However, in light of *Crowell v. Benson*,<sup>204</sup> even Congress' power to prescribe that the administrative findings of fact shall be final is not absolute. In *Crowell*, plaintiff's recovery of unemployment benefits depended on his status as an employee. The Court observed that the effect of making the administrative determination conclusive, even though without the agency's jurisdiction, "would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic

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197. See note 184 *supra*.

198. 319 U.S. 182 (1942).

199. *Id.* at 187.

200. See note 174 *supra*.

201. 321 U.S. 414 (1944).

202. *Id.* at 446.

203. See text accompanying notes 188-90 *supra*.

204. 285 U.S. 22 (1932).

character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."<sup>205</sup> Whether Congress could make selective service orders unreviewable altogether is questionable. Even cases like *Lockerty v. Phillips* and *Yakus v. United States* imply that due process requires some judicial review of coercive administrative action.<sup>206</sup>

In *Estep*, the Supreme Court strained its interpretation of legislative intent to hold that a registrant's classification is reviewable in the courts—at least to insure that it has a basis in fact.<sup>207</sup> The type of review that *Estep* provides is arguably a constitutional minimum, since if a board's determination had no basis in fact, its subsequent action would be tainted by a defect in jurisdiction<sup>208</sup> and clearly within the rationale of *Crowell v. Benson*.

### B. The Constitutionality of Post-Induction Judicial Review

When a registrant must either comply with a coercive administrative order or risk conviction of a crime in order to challenge it, the effect is to deter him from obtaining judicial review at all.<sup>209</sup> Even if a registrant is hardy enough to risk the penalties of the Act<sup>210</sup> in order to obtain judicial review of his classification, the narrow scope of review compounds this effect by severely circumscribing the courts' power to dispense relief.<sup>211</sup> A remedy so hazardous raises serious constitutional questions;<sup>212</sup> the courts should tolerate it only when there is no other alternative.<sup>213</sup>

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205. *Id.* at 57. The Court noted, however, "the inappropriateness to the present inquiry of decisions with respect to determinations of fact, upon evidence and within the authority conferred, made by administrative agencies which have been created to aid in the performance of governmental functions and where the mode of determination is within the control of Congress." *Id.*

206. "There is no constitutional requirement that that test be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for *judicial review which satisfies the demands of due process . . .*" *Yakus v. United States*, 321 U.S. 414, 444 (1944) (emphasis added).

207. See notes 181-83 *supra* and accompanying text.

208. *Estep v. United States*, 327 U.S. 114, 120 (1946): "It is only orders 'within their respective jurisdictions' that are made final." See generally Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1389-90 (1953).

209. "[C]ommon sense would indicate that the number of those willing to undergo the risk of criminal punishment in order to test the validity of their induction orders, with the attendant difficulties of proof, would be extremely small." *Estep v. United States*, 327 U.S. 114, 129 (1946) (Murphy, J., concurring).

210. See text accompanying note 245 *infra*.

211. See text accompanying notes 40-62 *supra*.

212. See *Petersen v. Clark*, 285 F. Supp. 700, 708 n.7 (N.D. Cal. 1968).

213. As Justice Rutledge observed in his dissenting opinion in *Yakus v. United*

The Supreme Court has considered the constitutionality of restricting judicial review of administrative action to a criminal prosecution in a number of contexts, and the thrust of those decisions is that it violates due process of law.<sup>214</sup> In *Cotting v. Kansas City Stockyards Company*,<sup>215</sup> stockholders of the company filed suit challenging the validity of a state statute that prescribed maximum rates for stockyards doing a specified volume of business and provided for cumulative penalties for each violation. The Supreme Court stated: "[W]hen the legislature, in an effort to prevent any inquiry into the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."<sup>216</sup> The Court did not decide the constitutionality of this scheme in *Cotting*,<sup>217</sup> but seven years later *Ex parte Young*<sup>218</sup> raised the same question.

In *Young*, Minnesota passed legislation establishing the maximum commercial and passenger rates that railroads within the state could charge. Violations were punishable by fine or imprisonment or both.<sup>219</sup> The circuit court enjoined the Attorney General of Minnesota from enforcing the laws. On certiorari, the Supreme Court, observing that the effect of the acts was to preclude a resort to the courts to challenge their validity, held that Minnesota could not constitutionally deter the railroads from testing the law by making such a test costly:

[W]hen the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its

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States, 321 U.S. 414, 485 (1944):

To sanction conviction of a crime in a proceeding which does not accord the accused full protection for his rights under the Fifth and Sixth Amendments, and which entails a substantial legislative incursion on the constitutionally derived judicial power, if indeed this could ever be sustained, would require a showing of the greatest emergency coupled with an inability to accomplish the substantive ends sought in any other way.

214. *Reisman v. Caplin*, 375 U.S. 440 (1964); *Natural Gas Pipe Line Co. of America v. Slattery*, 302 U.S. 300 (1937); *Terrace v. Thompson*, 263 U.S. 197 (1923); *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920); *Missouri Pacific Ry. v. Tucker*, 230 U.S. 340 (1913); *Ex parte Young*, 209 U.S. 123 (1908); *Cotting v. Kansas City Stockyards Co.*, 183 U.S. 79 (1901).

215. 183 U.S. 79 (1901).

216. *Id.* at 102.

217. The Court rested its decision on the alternative ground that by singling out this company, solely because of its volume of business, the act in question conflicted with the equal protection clause of the fourteenth amendment. *Id.* at 102-12.

218. 209 U.S. 123 (1908).

219. *Id.* at 128.

rights.<sup>220</sup>

Similarly, in *Oklahoma Operating Company v. Love*,<sup>221</sup> a laundry company brought suit to enjoin the Oklahoma Corporation Commission from entertaining complaints against the company for violations of orders fixing maximum rates. After noting that the only judicial review of an order fixing rates was in proceedings to punish for contempt, the Court remonstrated: "But the penalties, which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident."<sup>222</sup> The Court concluded:

Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional, without regard to the question of the insufficiency of those rates.<sup>223</sup>

The Court granted a temporary injunction restraining the Commission from enforcing the statutory penalties.

A selective service registrant is placed in exactly the same position as the businessmen in the ratemaking cases. Section 10(b)(3) prescribes a remedy that suffers from an identical constitutional infirmity: Its exercise is burdened with severe penalties for an inability to sustain the claim. Despite obvious similarities, there are several important factual differences between the ratemaking cases and selective service cases; none of them, however, satisfactorily distinguishes the two kinds of cases. First, in the ratemaking cases, the aggrieved businessman had to risk a criminal prosecution in order to obtain judicial review; in selective service cases, the aggrieved registrant may also seek a writ of habeas corpus. As previously noted,<sup>224</sup> the availability of habeas corpus is hardly sufficient to mitigate the effect of section 10(b)(3). Second, in the ratemaking cases, there was no public interest in postponing judicial review; in selective service cases, the national interest in rapid mobilization may justify postponement. Although this is a significant distinction, the assertion that the national interest requires postponement is not sufficient to establish that it does.<sup>225</sup> Third, in the ratemaking cases, the states did not have the power to preclude the intervention of the federal courts; in selective service cases, Congress has explicitly deprived the courts of their equity jurisdiction.<sup>226</sup> The

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220. *Id.* at 147.

221. 252 U.S. 331 (1920).

222. *Id.* at 336.

223. *Id.* at 337.

224. See notes 63-70 *supra* and accompanying text.

225. See notes 254-304 *infra* and accompanying text.

226. See note 20 *supra* and accompanying text.

fact that Congress has done so is no answer to the argument that what they have done is unconstitutional. Although the statutory formula for obtaining judicial review withstood a constitutional challenge in *Clark v. Gabriel*,<sup>227</sup> the Court declined to hear argument in that case. The Court should have at least explained why section 10(b)(3) is distinguishable if, in fact, it is.

### C. Balancing

The Supreme Court has sometimes deferred to the exercise of the war power by Congress,<sup>228</sup> but it has also recognized that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.'"<sup>229</sup> Undoubtedly Congress must be allowed some latitude during times of crisis, but when the reasons for sanctioning a scheme of review that denies a citizen due process of law do not exist, the Court should not uphold it. Cases like *Lockerty v. Phillips*<sup>230</sup> and *Yakus v. United States*,<sup>231</sup> which have upheld Congress' power to restrict the jurisdiction of the federal courts, have often been justified by Congress' role "as the guardian of the public interest of the nation in time of war."<sup>232</sup> Equally pertinent to a constitutional inquiry is Justice Murphy's remonstrance in *Estep*, which retains its original vitality today:

We must be cognizant of the fact that we are dealing here with a legislative measure born of the cataclysm of war, which necessitates many temporary restrictions on personal liberty and freedom. But the war power is not a blank check to be used in blind disregard of all the individual rights which we have struggled so long to recognize and preserve. It must be used with discretion and with a sense of proportionate values.<sup>233</sup>

Before deferring to a Congressional determination that sacrifices the requirements of due process to efficiency, the Court should at least balance the competing interests.<sup>234</sup>

227. 393 U.S. 256 (1968).

228. See, e.g., *Lichter v. United States*, 334 U.S. 742, 754-72 (1948); *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943).

229. *United States v. Robel*, 389 U.S. 258, 263-64 (1967), quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934).

230. 319 U.S. 182 (1943).

231. 321 U.S. 414 (1944).

232. *Id.* at 442.

233. 327 U.S. 114, 132 (1946) (concurring opinion).

234. The Supreme Court has applied a balancing test in the selective service context before. In *United States v. Nugent*, 346 U.S. 1 (1953), the Court held that although the Justice Department need not disclose secret FBI reports, it must furnish a

The Court has long recognized that "‘due process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."<sup>235</sup> The protagonists on both sides of the constitutional debate agree that the competing interests must be balanced; they disagree on what the proper balance is. Although the Solicitor General conceded in *Oestereich* that the statutory scheme "undeniably requires a registrant to incur a serious risk in order to obtain review of his classification," he argued that the congressional determination to postpone review "outweighs any countervailing consideration."<sup>236</sup> Since the "rights of the individual can be vindicated through the availability of post-induction review, Congress has thus struck a balance consistent with the Constitution."<sup>237</sup> In *Petersen v. Clark*,<sup>238</sup> the district court forcefully disagreed and held that the "need" that might justify such postponement did not exist.<sup>239</sup> "In determining whether judicial review satisfies due process, a court cannot totally abdicate the balancing process to Congress."<sup>240</sup> In order to determine what due process requires, it is necessary to balance the conflicting interests.

### 1. *The Registrant's Interest in Pre-Induction Judicial Review*

Little need be said about the registrant's interests, not because they are insubstantial, but because they are obvious. Under section 10(b)(3), a registrant must face the ignominy of a criminal prosecution to obtain judicial review of his classification;<sup>241</sup> if he loses, he risks imprisonment and carries the stigma of a felony conviction for the

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fair résumé to the registrant. Adverting to that case, the Court later remarked: "*United States v. Nugent* represented a balancing between the demands of an effective system for mobilizing the Nation's manpower in times of crisis and the demands of fairness toward the individual registrant." *Simmons v. United States*, 348 U.S. 397, 403 (1955).

235. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring); see *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 367 U.S. 886, 895 (1961).

236. Memorandum for Respondents at 3, *Oestereich v. Selective Serv. Local Bd. No. 11*, 393 U.S. 233 (1968).

237. *Id.* at 4. General Hershey aptly summed up his view of the proper balance between fairness and efficiency in the Senate hearings on the draft law: "It doesn't make any difference how fair it is or how national it is or how anything else it is if you don't get the men it is no good, and that is the thing that nobody talks about much, and this method we use has gotten men." *Hearings on S. 1432 Before the Senate Comm. on Armed Services*, 90th Cong., 1st Sess. 618 (1967). In fairness to General Hershey, it should be added that at the time he was discussing alteration of the present system of selection from state manpower pools.

238. 285 F. Supp. 700 (N.D. Cal. 1968), *rev'd per curiam*, 411 F.2d 1217 (9th Cir. 1969).

239. *Id.* at 711.

240. *Id.*

241. See notes 30-33 *supra* and accompanying text.

rest of his life.<sup>242</sup> Alternatively, he may petition for a writ of habeas corpus.<sup>243</sup> In order to apply for the writ, however, a registrant must submit to induction; even if he is willing to do so, procedural obstacles may frustrate his efforts to obtain judicial review.<sup>244</sup> The effect of the statutory remedies is to coerce compliance by deterring registrants from resorting to the courts.

The penalty for refusing to submit to induction is severe. The statute prescribes a punishment of "imprisonment for not more than five years or a fine of not more than \$10,000, or . . . both such fine and imprisonment."<sup>245</sup> Unless a registrant can bring his claim within the *Oestereich* exception to section 10(b)(3), he must commit this crime to have standing to question the legality of his classification at all. Although the average sentence is less than five years,<sup>246</sup> the trial judge may impose the maximum sentence; and maximum sentences are not at all uncommon.<sup>247</sup> The mere threat of these penalties seems to fall squarely within the ambit of *Ex parte Young*.<sup>248</sup> Undoubtedly many registrants are deterred from questioning their classifications when they must risk imprisonment if they are wrong.

Even if a registrant is not deterred from facing a criminal prosecution, it may be impossible to obtain a fair trial. The registrant does not even have minimal due process rights during the administrative proceedings;<sup>249</sup> consequently, his rights under the fifth and sixth amend-

242. See, e.g., Note, *Admission to the Bar Following Conviction for Refusal of Induction*, 78 YALE L.J. 1352 (1969).

243. See notes 34-39 *supra* and accompanying text.

244. See notes 63-70 *supra* and accompanying text.

245. 50 U.S.C. APP. § 462(a) (Supp. IV, 1965-68).

246. The average sentence is rising.

Fiscal Year	Average Sentence (Months)
1964	20.8
1965	21.0
1966	26.4
1967	32.1
1968	37.3

Division of Procedural Studies and Statistics, Administrative Office of the United States Courts (1968), on file with the *California Law Review*.

247. In fiscal year 1968, 104 of the 1,192 defendants received sentences of five years or more (for multiple counts). *Id.* The breakdown of the statistics reveals striking differences. In the Southern District of Texas, for example, 16 of 22 defendants were convicted. None received probation; 14 received sentences of five years or more. In contrast, in the Northern District of California, 46 of 59 defendants were convicted. 29 received probation, and only one was sentenced to more than three years. *Id.*

248. See notes 218-20 *supra* and accompanying text.

249. See Ginger, *Minimum Due Process Standards in Selective Service Cases* (pts. 1-2), 19 HAST. L.J. 1313 (1968) (pt. 2 unpublished; on file with the Meiklejohn Civil Liberties Library); Comment, *Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123 (1966); Comment, *Fairness and Due Process Under the Selective Service System*, 114 U. PA. L. REV. 1014 (1966).

ments at the trial may come too late. Although the failures of the Selective Service System to accord registrants even elementary rights are legion, two are of crucial significance during the trial. First, there is only a sparse record. The regulations do not require selective service boards to reduce their findings to writing: The local board does not prepare a transcript of a registrant's personal appearance;<sup>250</sup> the appeal board records only the final vote in each case.<sup>251</sup> As a result, it may be difficult, if not impossible, for the court to evaluate the proceedings. Second, a registrant must face his local board without an attorney to protect his rights.<sup>252</sup> At least a few courts have recognized that the right to an attorney during the trial may be a "hollow thing" if the registrant does not have the assistance of counsel during the administrative proceedings.<sup>253</sup>

The registrant must establish his claim to the satisfaction of his local board; if he cannot, he must prove to a court that his classification has no basis in fact. Since registrants are invariably young, usually inexperienced and frequently unable to understand their rights, they should have at least one opportunity to prove it without going to jail if they fail.

## 2. *The Government's Interest in Post-Induction Judicial Review*

The government has two reasons for postponing judicial review. First, it wishes to protect the integrity of the Selective Service System. Therefore, a registrant should exhaust his administrative remedies before seeking judicial relief. Second, it wishes to prevent litigious interruptions of the mobilization of manpower. As a result, a registrant should not impede conscription by a premature resort to the courts.

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250. A notation that the registrant has appeared before the local board is entered on his Classification Questionnaire (SSS Form 100). 32 C.F.R. § 1624.2(a) (1969). The local board is not required to prepare a summary of the appearance or to give reasons for its decision. 32 C.F.R. § 1626.13(a) (1969). The responsibility of preparing a summary of the appearance is left to the registrant. 32 C.F.R. § 1624.2(b) (1969).

251. 32 C.F.R. § 1626.27(a) (1969).

252. 32 C.F.R. § 1624.1 (1969) provides: "[N]o registrant may be represented before the local board by anyone acting as attorney or legal counsel." The courts have consistently upheld this provision. *See, e.g.*, *United States v. Dicks*, 392 F.2d 524 (4th Cir. 1968); *Nickerson v. United States*, 391 F.2d 760 (10th Cir. 1968); *United States v. Capson*, 347 F.2d 959 (10th Cir.), *cert. denied*, 372 U.S. 911 (1965); *United States v. Sturgis*, 342 F.2d 328 (3d Cir.), *cert. denied*, 382 U.S. 879 (1965). *But see United States v. Weller*, Crim. No. 42614 (N.D. Cal. Sept. 19, 1969).

253. *See, e.g.*, *United States v. Wierzchucki*, 248 F. Supp. 788, 789 (W.D. Wis. 1965); *United States v. Weller*, Crim. No. 42614 (N.D. Cal. Sept. 19, 1969). For discussion, see Comment, *Due Process and Right to Counsel in Selective Service Proceedings*, 3 U.S.F. L. REV. 148 (1968); Note, 51 MARQ. L. REV. 407 (1969); Note, 10 WM. & MARY L. REV. 721 (1969).

a. *Exhaustion of Administrative Remedies*

Generally, the courts invoke the doctrine of exhaustion of administrative remedies as a salutary expression of the need for judicial restraint from premature intervention in the administrative process.<sup>254</sup> The doctrine embraces two distinct considerations. First, the courts do not decide controversies that may become moot because of subsequent agency action. Hence, they usually require a plaintiff to pursue his administrative remedies before seeking judicial relief.<sup>255</sup> Second, the courts require controversies that are ripe for judicial resolution. Thus, they ordinarily decline to intervene until after the conclusion of the administrative procedures for resolving disputes.<sup>256</sup> The exhaustion doctrine is not an inflexible rule, however.<sup>257</sup> Recognizing that strict adherence to the rule is particularly inappropriate in selective service cases,<sup>258</sup> some courts have refused to apply it when the circumstances of the case have not warranted it,<sup>259</sup> especially if the administrative

254. See 3 DAVIS, *supra* note 184, § 21.01.

255. See JAFFE, *supra* note 185, at 425: "The exhaustion doctrine is, therefore, an expression of executive and administrative autonomy."

256. Ripeness does not always depend on the final conclusion of the administrative process: "An administrative action may be ripe for review despite the fact that the full impact of the action on the plaintiff may be delayed or the fact that the disputed legal issue could receive further consideration at a later stage of the same or a related proceeding." Jaffe, *Ripeness of Reviewable Orders in Administrative Law*, 61 MICH. L. REV. 1273, 1303 (1963).

257. "The statement the courts so often repeat in their opinions—that judicial relief must be denied until administrative remedies have been exhausted—is seriously at variance with the holdings." 3 DAVIS, *supra* note 184, § 21.01, at 56.

258. Customarily, in deciding whether or not to apply the rule, the courts tend to balance the interests underlying the doctrine against the burden on the individual if he is denied judicial relief. 3 DAVIS, *supra* note 184, §§ 21.01, 21.10; JAFFE, *supra* note 185, 424-58 (1965). In selective service cases, it may be unduly harsh to apply the doctrine rigorously since to do so may deprive the registrant of his only remaining opportunity to avoid going to jail.

259. See, e.g., *Vaughn v. United States*, 404 F.2d 586 (8th Cir. 1968); *Donato v. United States*, 302 F.2d 468 (9th Cir. 1962), *cert. denied*, 374 U.S. 828 (1963); *Glover v. United States*, 286 F.2d 84 (8th Cir. 1961); *Moon v. United States*, 220 F.2d 730 (5th Cir. 1955); *United States v. Carson*, 282 F. Supp. 261 (E.D. Ark. 1968); *United States v. Bryan*, 263 F. Supp. 895 (N.D. Ga. 1967); *United States v. Willard*, 211 F. Supp. 643 (N.D. Ohio 1962); *cf. In re Kelly*, 401 F.2d 211 (5th Cir. 1968); *Hammond v. Lenfest*, 398 F.2d 705 (2d Cir. 1968).

In *Lockhart v. United States*, Crim. No. 21311, 1 SEL. SERV. L. REP. 3204 (9th Cir. Oct. 23, 1968), the Ninth Circuit discussed the rule at length. Lockhart was indicted for failing to report for induction; the trial court refused to consider his defense because he had failed to exhaust his administrative remedies. The Ninth Circuit reversed. Since the registrant did not understand his right to appeal, or the consequences of his failure to do so, the doctrine was at best a "flimsy excuse" for denying review. The court stated that there is nothing in the selective service laws that requires exhaustion. It is court-made rule that the courts may relax in appropriate cases. *Id.* at 3205. Concurring, Judge Browning observed that registrants would be more likely to exhaust their administrative remedies as a result of the court's decision:

process has nothing to contribute to the decision of the issue.<sup>260</sup> At the same time, no court has ever denied that the Selective Service System should have every opportunity the regulations provide for correcting its own errors in administrative proceedings. In fact, when a registrant has ignored available remedies from the outset, or prematurely abandoned them, the courts have not hesitated to invoke the rule against him to deny review.<sup>261</sup> This policy does not and should not mean, however, that the courts must refuse to review until after a registrant commits a crime.

As applied in selective service cases, the doctrine requires a registrant to exhaust his administrative remedies *and* to violate the law in order to obtain judicial review of his classification. This peculiar application of the doctrine is a product and an indispensable bulwark of the decision in *Estep v. United States*,<sup>262</sup> which established the right to judicial review in selective service cases. "In the *Falbo* case," the Court observed, "the defendant challenged the order of his local board before he had exhausted his administrative remedies [by reporting for induction]".<sup>263</sup> Here the aggrieved registrants had reported to the induction center. "Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them;"<sup>264</sup> thus, they had pursued their administrative remedies to the

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It would seem self-evident that denial of judicial review can induce registrants to exhaust administrative appeals only if the registrant is aware of the nature of the remedy, and the penalties for bypassing it, at the time he is called upon to decide whether or not to appeal. By the same token, it would seem indisputable that such knowledge will furnish a strong incentive to exhaust the remedy.

*Id.* at 3205. Judge Ely, dissenting, *id.* at 3208-09, cited a similar case in which the Sixth Circuit had rejected the majority's reasoning, *United States v. McKart*, 395 F.2d 906 (6th Cir. 1968), *rev'd*, 395 U.S. 185 (1969). Although the Supreme Court subsequently reversed *McKart*, the Ninth Circuit had already granted a rehearing en banc in *Lockhart*. Since the facts are distinguishable, it seems likely that *Lockhart* will be reversed.

260. When a registrant raises constitutional objections to his classification, it is arguable that he does not have to exhaust his administrative remedies. See *Oestereich v. Selective Serv. Local Bd. No. 11*, 393 U.S. 233, 242-43 (Harlan, J., concurring); *Wills v. United States*, 384 F.2d 943, 945 (9th Cir. 1967), *cert. denied*, 392 U.S. 908 (1968); *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817, 825-26 (2d Cir. 1967); *United States v. Sisson*, 297 F. Supp. 902, 906 (D. Mass. 1969), *appeal docketed*, 38 U.S.L.W. 3028 (U.S. June 30, 1969) (No. 305); *cf. Fay v. Noia*, 372 U.S. 391 (1963).

261. See, e.g., *United States v. Sinogor*, 411 F.2d 501 (7th Cir. 1969); *Soranno v. United States*, 401 F.2d 534 (9th Cir. 1968); *United States v. McNeil*, 401 F.2d 527 (4th Cir. 1968); *United States v. Kurki*, 384 F.2d 905 (7th Cir. 1967); *Doty v. United States*, 218 F.2d 93 (8th Cir. 1955); *cf. Craycroft v. Ferrall*, 408 F.2d 587 (9th Cir. 1969); *Noyd v. McNamara*, 378 F.2d 538 (10th Cir.), *cert. denied*, 389 U.S. 1022 (1967).

262. 327 U.S. 114 (1946).

263. *Id.* at 123.

264. *Id.*

end. Since *Estep*, the courts have almost uniformly required exhaustion as a prerequisite to obtaining judicial review,<sup>265</sup> and they have repeatedly held that exhaustion includes the duty of reporting to the induction center.<sup>266</sup> As a result, a registrant's right to judicial review is critically flawed.

In order to exhaust his administrative remedies, a registrant must utilize the procedures available within the Selective Service System for appeal of his classification.<sup>267</sup> If his appeal is unsuccessful, he is ordered to report for a physical examination<sup>268</sup> and, subsequently for induction.<sup>269</sup> Rigid adherence to *Estep* has obscured the point in this process when the registrant has in fact exhausted his administrative remedies. Obeying the order to report for induction is not, in any sense, a part of the registrant's administrative appeal.<sup>270</sup> Although the Army may reject an inductee on the basis of the cursory physical inspection at the induction center,<sup>271</sup> this possibility is entirely fortuitous. Unless a registrant has a medical claim, this examination does not involve any administrative consideration of the merits of his case.<sup>272</sup> The order to report for induction marks the conclusion of the administrative process, and a registrant ought to be able to obtain review at that point.<sup>273</sup>

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265. Ordinarily, the courts will not review a registrant's classification if he has failed to exhaust his administrative remedies. See, e.g., *United States v. Grundy*, 398 F.2d 744 (3rd Cir. 1968); *DuVernay v. United States*, 394 F.2d 979 (5th Cir. 1968) *aff'd by an equally divided Court*, 394 U.S. 309 (1969); *Noland v. United States*, 380 F.2d 1016 (10th Cir.), *cert. denied*, 389 U.S. 945 (1967); *Badger v. United States*, 322 F.2d 902 (9th Cir. 1963); *Osborn v. United States*, 319 F.2d 915 (4th Cir. 1963).

266. See, e.g., *Daniels v. United States*, 372 F.2d 407 (9th Cir. 1967); *United States v. Capson*, 347 F.2d 959 (10th Cir.), *cert. denied*, 372 U.S. 911 (1965); *Moore v. United States*, 302 F.2d 929 (9th Cir. 1962).

267. See note 300 *infra*. For discussion of these procedures, see Ginger, *Minimum Due Process Standards in Selective Service Cases—Part I*, 19 *HAST. L.J.* 1313, 1324-35 (1968); Reisner, *The Conscientious Objector Exemption: Administrative Procedures and Judicial Review*, 35 *U. CHI. L. REV.* 686, 693-702 (1968).

268. 32 C.F.R. § 1628.11 (1969). The pre-induction physical may occur at any time during the administrative process.

269. 32 C.F.R. § 1632.1 (1969).

270. At least as to a registrant who has been classified I-O (conscientious objector), the Supreme Court has held that disobeying the order to report for civilian work does not constitute failure to exhaust administrative remedies since there is no possibility of rejection. *Dodez v. United States*, *sub nom.*, *Gibson v. United States*, 329 U.S. 338 (1946). One court of appeals has held that a conscientious objector does not even have to report to the draft board for assignment to civilian work in order to exhaust his administrative remedies. *Daniels v. United States*, 372 F.2d 407 (9th Cir. 1967). *Contra*, *United States v. Camp*, 285 F. Supp. 400 (N.D. Ga. 1967), *aff'd*, 413 F.2d 419 (5th Cir. 1969).

271. Armed Forces Examining and Entrance Stations, Army Reg. 601-270 ¶ 69a (1965); see note 285 *infra*.

272. See Jaffe, *The Exhaustion of Administrative Remedies*, 12 *BUFF. L. REV.* 327, 352 (1963).

273. "Where the administrative process has nothing to contribute to the decision of

*McKart v. United States*<sup>274</sup> represents an interesting development in the doctrine. Petitioner was exempt from military service as the sole surviving son of a father who had been killed in action.<sup>275</sup> Upon the death of his mother, his local board reclassified him I-A on the theory that the "family unit" no longer existed. McKart did not appeal from this reclassification. The trial court convicted him of failure to report for induction and the Sixth Circuit affirmed. Both courts refused to review his classification because he had failed to exhaust his administrative remedies.

After rehearsing the history of the "sole surviving son" exemption,<sup>276</sup> and concluding that the local board erroneously withdrew it, the Supreme Court considered the exhaustion of administrative remedies doctrine. If the rule were applied, the Court noted, McKart would go to jail without any judicial review of an allegedly invalid order: "Such a result should not be tolerated unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed on the registrant if he is denied judicial review."<sup>277</sup> Here the requested exemption depends solely on statutory interpretation; it does not involve administrative expertise or the exercise of discretion. As a result, the Court concluded, judicial review would not be "significantly aided" by additional administrative action.<sup>278</sup> Therefore, McKart's failure to exhaust his administrative remedies does not preclude judicial review.<sup>279</sup> The Court rejected the Government's contention that this erosion of the doctrine would induce registrants to bypass available administrative remedies on two grounds. First, the holding is limited to classifications which do not "require the exercise of discretion or application of expertise."<sup>280</sup> Second, the notion that many registrants are anxious to accelerate a criminal prosecution by deliberately ignoring their administrative remedies is untenable: "In short, we simply do not think that the exhaustion doctrine contributes significantly to the fairly low number of registrants who decide to subject themselves to criminal prosecution for failure to submit to induction."<sup>281</sup>

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the issue and there are no special reasons for postponing its immediate decision, exhaustion should not be required." JAFFE, *supra* note 185, at 440.

274. 395 U.S. 185 (1969).

275. 50 U.S.C. APP. § 456(o) (1964).

276. 395 U.S. at 189-92.

277. *Id.* at 197.

278. *Id.* at 199.

279. McKart's claim seems to fall within the scope of the *Oestereich* exception to section 10(b)(3). Justice Douglas, concurring, took the position that it does. *Id.* at 203-04. The majority noted, however, that a registrant's failure to appeal might have different implications in a pre-induction suit. *Id.* at 199 n.18.

280. *Id.* at 200.

281. *Id.*

*McKart* was a criminal case, not a pre-induction suit, and the Court specifically noted that the question of a "premature resort to the courts" was not at issue.<sup>282</sup> *McKart* failed to appeal, declined to report for a pre-induction physical examination, and refused to report for induction. Since his right to exemption was solely a matter of statutory interpretation, the Court held that his failure to exhaust his remedies did not preclude him from defending a criminal prosecution. Although the Court focused on the harshness of applying the exhaustion doctrine in absolute fashion in a criminal prosecution, the Court also recognized that, "In Selective Service cases, the exhaustion doctrine should be tailored to fit the peculiarities of the administrative system Congress has created."<sup>283</sup> One of the "peculiarities" of that system is the requirement that a registrant must respond to the order to report for induction before he is entitled to judicial review. The reasons for requiring exhaustion do not support the conclusion that a registrant must report for induction to exhaust his administrative remedies.

Section 10(b)(3) itself makes no mention of exhaustion of administrative remedies. Apparently, Congress intended to codify the *Estep* definition of exhaustion by postponing review until after a registrant responds to the order to report for induction. However, the government's interest in postponing review is not weighty. If a registrant has pursued his administrative appeals, he has in fact exhausted his administrative remedies, and his claim is ripe for review.<sup>284</sup> Further, it is unlikely that the induction physical, which supplements the pre-induction physical, will moot his claim.<sup>285</sup> Finally, the registrant's interest in pre-induction review far outweighs the government's interest in preserving its final chance to reject a registrant for service.

Holding section 10(b)(3) unconstitutional would not relieve a registrant of his obligation to exhaust his administrative remedies. If a registrant could bring a pre-induction suit only after exhausting these remedies (but before reporting to the induction center), pre-induction

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282. *Id.* at 196.

283. *Id.* at 195.

284. See note 256 *supra*.

285. When *Falbo* and *Estep* were decided, the only physical examination occurred at the induction center. *Falbo v. United States*, 320 U.S. 549, 552-53 & n.7 (1944). Now the regulations provide for a pre-induction physical examination. 32 C.F.R. § 1628.11 (1969). Since every registrant has already had a complete physical examination prior to reporting for induction, the doctor at the induction center inspects inductees only for communicable diseases and previously undisclosed physical defects. Armed Forces Examining and Entrance Stations, Army Reg. 601-270 ¶ 69a (1965). Thus, there is little chance of rejection. For figures on the small number of inductees actually rejected at the induction center, see Selective Service, Oct. 1968, at 4, col. 2. Still, if the possibility of rejection exists, it would be a simple matter to require an allegation of physical fitness as a prerequisite to bringing a pre-induction suit.

judicial review would not disrupt the Selective Service System any more than a criminal prosecution does: In both cases, the administrative process is over.<sup>286</sup>

#### b. Mobilization

The fear of litigious interruptions of the operations of the Selective Service System has from the very beginning inhibited the development of a scheme of review that is at once fair to the registrant and consistent with the nation's manpower requirements in times of crisis. In *Falbo*, the Supreme Court noted that when the 1940 Act was passed, "The Congress was faced with the urgent necessity for integrating all the nation's people and forces for national defense. That dire consequences might flow from apathy and delay was well understood."<sup>287</sup> In 1940, "To meet the need which it felt for mobilizing national manpower in the shortest practicable period, Congress established a machinery which it deemed efficient for inducting great numbers of men into the armed forces."<sup>288</sup> Then, as now, "Congress apparently regarded 'a prompt and unhesitating obedience to orders' issued in that process 'indispensable to the complete attainment of the object' of national defense."<sup>289</sup> In light of present manpower needs, it is no longer true that "unhesitating obedience," which cannot be deferred even until a court has reviewed a registrant's classification, is essential to the security of this country.<sup>290</sup>

If, as commentators have recently observed,<sup>291</sup> the impediment to

286. The Selective Service System does not mention disruption of the administrative process as a reason for denying pre-induction judicial review. It would have no "objection" if Congress had provided for such review, and if it were possible to obtain "prompt" review in such suits, *i.e.*, review that does not delay induction. Brief for Respondents, *supra* note 94, at 68-69.

287. 320 U.S. at 551.

288. *Id.* at 554.

289. *Id.*

290. In *Ex parte Fabiani*, 105 F. Supp. 139 (E.D. Pa. 1952), the court recognized a change in the character of the United States military establishment. Emphasizing that the almost complete abdication of the judicial function in *Estep* was a product of the gravest national emergency, *id.* at 145-46, the court noted: "The different objective to be achieved by the new Act behooves us to employ a more liberal standard of review, so as better to protect the rights of the individual." *Id.* at 146. The court qualified its holding by acknowledging that should a national emergency again require rapid manpower mobilization, the courts could contract their supervision of the draft to the *Estep* standard. *Id.* at 147. But in the absence of such compelling circumstances, the courts should not refuse to intervene before the registrant is forced "to choose one of two such desperate alternatives [habeas corpus or a criminal prosecution]" in order to obtain judicial review. *Id.* at 143. *Cf.* *United States v. Sisson*, 297 F. Supp. 902, 908-09 (D. Mass. 1969), *appeal docketed*, 38 U.S.L.W. 3028 (U.S. June 30, 1969) (No. 305): "The want of magnitude in the national demand for service is reflected in the nation's lack of calls for sacrifice in any serious way by civilians."

291. See Comment, *Fairness and Due Process Under the Selective Service System*,

recognition of the registrant's right to pre-induction judicial review is a state of "emergency" or "crisis" that requires rapid, efficient and nearly total mobilization, the government's interest is indeed compelling and must weigh very heavily in the balance. Even the war in Viet Nam, however, has required only a fraction of the nation's available manpower.<sup>292</sup> In spite of criticism,<sup>293</sup> the fear of litigious interruptions of the mobilization process has persisted.<sup>294</sup>

In *Petersen v. Clark*<sup>295</sup> the court noted in passing that since "only the timing and not the scope of judicial review will be affected, the number of men who will ultimately be found to have been validly classified will not be changed."<sup>296</sup> Therefore, the court concluded, "no interference with the governmental function of raising armies will result."<sup>297</sup> Undoubtedly this conclusion is oversimplified. It is probable that if any more men seek judicial review in a civil proceeding than would have sought review in a criminal prosecution, the number of men found to be invalidly classified would increase, even if the percentage remains constant. The increase, however, would be composed only of registrants who had been invalidly classified, and the congressional intent with regard to these men is that they should not serve. Certainly a corollary of the government's fear of litigious interruptions is the belief that many more men will seek review merely to postpone induction. Although it is difficult to evaluate this possibility, it may be useful to consider another device for delay, currently available and equally subject to abuse, in order to come to a tentative conclusion.

For a registrant who is classified I-A, filing an application for classification as a conscientious objector is one means of delaying the induction process. When a board receives a request for the special form for conscientious objector claimants,<sup>298</sup> it must send one to the registrant.<sup>299</sup> After the registrant returns this form, he has a right to pursue his claim through a series of administrative procedures<sup>300</sup> that,

114 U. PA. L. REV. 1014, 1019 (1966); 44 NOTRE DAME LAW. 469, 478 (1969); cf. White, *Processing Conscientious Objector Claims: A Constitutional Inquiry*, 56 CALIF. L. REV. 652, 663 (1968).

292. NATIONAL ADVISORY COMMISSION ON SELECTIVE SERVICE, IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE? 3 (1967).

293. See, e.g., Comment, *Fairness and Due Process Under the Selective Service System*, 114 U. PA. L. REV. 1014, 1019 (1966).

294. See, e.g., *United States v. Nugent*, 346 U.S. 1, 10 (1952); *Tamarkin v. Selective Serv. Local Bd. No. 47*, 243 F.2d 108, 109 (5th Cir.), cert. denied, 355 U.S. 825 (1957); *United States v. Wierzchucki*, 248 F. Supp. 788, 790-91 (W.D. Wis. 1965).

295. 285 F. Supp. 700 (N.D. Cal. 1968).

296. *Id.* at 712.

297. *Id.* This reasoning is criticized in 44 NOTRE DAME LAW. 469, 475 (1969).

298. See note 54 *supra*.

299. 32 C.F.R. § 1621.11 (1969).

300. The registrant has a right to request a personal appearance to discuss his

as a practical matter, may take many months.<sup>301</sup> From November 15, 1948 to June 30, 1967, the Department of Justice investigated approximately 18,000 conscientious objector claimants.<sup>302</sup> During the same period, more than four million men were drafted.<sup>303</sup> Apparently, the existence of a means of delay that involved no expense, a relatively small investment of time, and no threat of criminal sanctions for failure to sustain the claim and that enabled a registrant to delay his induction for months or even years, did not induce a large number of frivolous claims.<sup>304</sup>

It is reasonable to conclude that allowing pre-induction judicial review, which invariably would consume significantly less time than the procedures for processing conscientious objector claims, would not unduly impede mobilization by inducing large numbers of men to file spurious suits. Pre-induction judicial review would of course cause some delay, but certainly not enough to impair the procurement of manpower for the military. The interruption that would result from pre-induction judicial review is indistinguishable from the interruption that judicial review in a criminal prosecution causes: The registrant is not available for induction in either case.

#### CONCLUSION

It has by now become apparent that the Selective Service System is not composed of little groups of neighbors selecting registrants for military service "in accordance with a system of selection which is fair and just."<sup>305</sup> There is persuasive evidence that unfairness and in-

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classification. 32 C.F.R. § 1624.1 (1969). The board subsequently notifies the registrant of the result. If it is unsatisfactory, the registrant may appeal to the state appeal board within 30 days. 32 C.F.R. § 1626.2 (1969). If at least one member of the appeal board dissents, the registrant may appeal to the President. 32 C.F.R. § 1627.3 (1969).

301. The board may not issue an order to report for induction during the time allowed for an appeal or while an appeal is pending. 32 C.F.R. §§ 1624.3, 1626.41, 1627.8 (1969).

Under the former law, see note 54 *supra*, the Justice Department investigated every claim for classification as a conscientious objector. This investigation often took more than a year to complete. See Reisner, *The Conscientious Objector Exemption: Administrative Procedures and Judicial Review*, 35 U. CHI. L. REV. 686, 688-90 (1968).

302. Letter from Frank M. Wozencraft, Assistant Attorney General, to the author, November 4, 1968, on file with the *California Law Review*.

303. NATIONAL ADVISORY COMMISSION ON SELECTIVE SERVICE, IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE? 156-57 (1967) (table 5.6).

304. There are no figures available on the total number of conscientious objector claims in recent years. No one would deny that the number has increased, although perhaps not solely because of "those who are neither sincere nor religious and are using a modifiable conscience to escape their obligation of citizenship," as General Hershey would have us believe. Hershey, *Not By Words Alone*, Selective Service, Feb., 1969, at 1, col. 1.

305. 50 U.S.C. APP. § 451(c) (1964).

justice are inherent in the structure and operation of the present system. Although there must be a balance between fairness and efficiency, Congress has almost always determined that efficiency is more important than fairness in the Selective Service System. In this context, judicial review is vitally important to a registrant who feels, often quite properly, that he was incorrectly processed or classified.

Throughout the history of the Selective Service System, Congress and the Supreme Court have been at odds on the role of the courts. But the Supreme Court has avoided a direct confrontation with Congress on the question of judicial review. The 1940 Act did not provide for any judicial review. In *Estep*, the Court professed not to believe that Congress meant what it said: A registrant could obtain judicial review in a criminal prosecution. The 1967 Act provides for judicial review only after a registrant responds to the order to report for induction. In *Oestereich*, the Court held that section 10(b)(3) could not sustain a literal reading: Some registrants can obtain judicial review in pre-induction proceedings. Thus, the history of judicial review in the selective service context is a study in statutory construction.<sup>306</sup> The Court has never squarely confronted the constitutionality of restricting judicial review to a criminal prosecution or a habeas corpus proceeding. In *Gabriel*, the only case to present the constitutional question, the Court relied on its construction of section 10(b)(3) in *Oestereich* to dispose of the issue.

By upholding section 10(b)(3), the Court has relegated the vast majority of registrants to the criminal forum. This in itself is harsh. In the words of Justice Douglas, "courts do law and justice a disservice when they close their doors to people who, though not in jail nor yet penalized, live under a regime of peril and insecurity. What are courts for, if not for . . . adjudicating the rights of those against whom the law is aimed, though not immediately applied?"<sup>307</sup> Moreover, the effect of the statutory formula is to deter aggrieved registrants from obtaining any judicial review; consequently, only the hardy—or the fool-hardy—seek judicial review at all. The Supreme Court has declared such a scheme unconstitutional in other contexts. It seems no less unconstitutional in selective service cases. No doctrine of judicial self-restraint can justify the Court's abdication of its duty to decide—when it must—the ultimate question of constitutionality.

*Franklin R. Garfield*

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306. Compare the Supreme Court's opinion in *United States v. Seeger*, 380 U.S. 163 (1965) (statutory construction) with the opinion of the Second Circuit in the same case, 326 F.2d 846 (2d Cir. 1964) (constitutional analysis).

307. *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 116 (concurring opinion).