JUDICIAL REVIEW OF SELECTIVE SERVICE ACTION: A NEED FOR REFORM

In enacting the Military Selective Service Act of 1967[1] Congress inserted a provision designed to clarify the judicial review available to a registrant who desires to challenge his classification or processing within the Selective Service System. The 1967 Act provides:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, 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.[2]

According to the House Armed Services Committee Report on the bill,[3] the provision merely enunciates the existing rule concerning judicial review of Selective Service classifications.[4]

This Comment will investigate and evaluate the registrant's right to judicial review of Selective Service action under the 1967 Act and make suggestions for change where that right seems inadequate.[5] In order to understand and discuss the 1967 Act provision relating to judicial review, it is necessary first to examine important decisions in this area.

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[1] 81 Stat. 100, 50 U.S.C.A. APP. §§ 451-73 (Supp. 1967).

[2] *Id.* at 104.

[3] H.R. REP. No. 267, 90th Cong., 1st Sess. 7 (1967).

[4] *Id.* The House Armed Services Committee, in explaining its reasons for this amendment, 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.

Id. at 30-31.

[5] This Comment will not, however, explore the constitutional issue of due process in limiting judicial review of Selective Service classifications. In defining the registrant's right to judicial review, the United States Supreme Court has avoided the constitutional question of due process rights to a hearing; instead the Court has answered the question in terms of statutory construction. *See* Estep v. United States, 327 U.S. 114, 119-22 (1946).

I

THE HISTORY OF JUDICIAL REVIEW OF SELECTIVE SERVICE CLASSIFICATIONS

In contrast to the 1967 Act,[6] its predecessors, the draft laws of 1917,[7] 1940,[8] and 1948,[9] did not have an explicit provision concerning judicial review of Selective Service classifications. These draft laws did nonetheless provide that decisions of local and appeals boards were "final."[10] Registrants could obtain judicial review through habeas corpus proceedings after submitting to induction.[11] However, when registrants, under the 1940 Act, challenged their classifications without submitting to induction, the courts faced two issues: First, whether the act permitted judicial review and, second, the point in time at which the registrant could seek such review. The Supreme Court resolved these two issues in *Falbo v. United States*[12] and *Estep v. United States*.[13]

A. Falbo and Estep: Judicial Review and the Exhaustion of Administrative Remedies Doctrine

The question of judicial review of draft classifications was first before the United States Supreme Court in *Falbo v. United States*.[14] The registrant, a Jehovah's Witness, had been convicted of willful failure to obey his local board's order to report for civilian work in lieu of military service. While his local board had classified him a conscientious objector,[15] the registrant argued that because he was entitled to a ministerial exemption[16] his board had erroneously classified him. The Court held

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[6] 81 Stat. 100, 50 U.S.C.A. APP. §§ 451-73 (Supp. 1967).

[7] Act of May 18, 1917, 40 Stat. 76.

[8] Act of Sept. 16, 1940, 54 Stat. 885.

[9] Act of June 24, 1948, 62 Stat. 620, *as amended*, 50 U.S.C. APP. §§ 451-73 (1964).

[10] Act of June 24, 1948, ch. 624 § 3, 62 Stat. 620; Act of Sept. 16, 1940, ch. 720, § 10(a) (2), 54 Stat. 893; Act of May 18, 1917, ch. 15, § 4, 40 Stat. 80. The 1967 Act retains this provision. 81 Stat. 100, 50 U.S.C.A. APP. § 460(b)(3) (Supp. 1967).

[11] Eagle v. United States *ex rel.* Samuels, 329 U.S. 304 (1946); Estep v. United States, 327 U.S. 114, 123-25 (1946).

[12] 320 U.S. 549 (1944).

[13] 327 U.S. 114 (1946).

[14] 320 U.S. 549 (1944).

[15] The Act of Sept. 16, 1940, ch. 720, § 5(g), 54 Stat. 889, provided that those registrants conscientiously opposed to war in any form were either subject to noncombatant military service or, if conscientiously opposed to both combatant and noncombatant military service, were subject to civilian work of national importance. The current Act also maintains the two classes of conscientious objectors. 81 Stat. 100, 50 U.S.C.A. APP. § 456(j) (Supp. 1967).

[16] The Act of Sept. 16, 1940, ch. 720, § 5(d), 54 Stat. 888, exempted ministers from military duty. The current Act also contains the ministerial exemption. 81 Stat. 100, 50 U.S.C.A. APP. § 456(g) (Supp. 1967).

that a registrant cannot obtain judicial review until he has exhausted his administrative remedies when the armed forces or a civilian service camp accepts him.[17] Because he might still have been rejected at the civilian service camp Falbo had omitted a "necessary intermediate step in a united and continuous process designed to raise an army speedily and efficiently."[18]

The Court reasoned that Congress enacted the 1940 law to mobilize manpower rapidly and efficiently in time of national emergency.[19] Because it did not authorize intermediate judicial challenges to the selection process, the Act would not permit "litigious interruption" of Selective Service procedure.[20] Although the Court refused to review the registrant's claim for the ministerial exemption, the majority opinion[21] clearly indicated that the Court would, in a criminal prosecution, review the draft classification of a registrant who had exhausted his administrative remedies.

In *Estep v. United States*,[22] the United States Supreme Court squarely determined the nature and extent of judicial review available in criminal prosecutions of Selective Service registrants. The *Estep* petitioners, like Falbo, were Jehovah's Witnesses whose local boards had denied them the ministerial exemption. Both registrants in *Estep*, after reporting to and being accepted by the military, refused to submit to induction.[23] By following all the required steps in the selection process, they had exhausted their administrative remedies. The *Estep* Court held that, in his criminal prosecution, a registrant who has exhausted his administrative remedies may obtain judicial review by raising the defense that the local board exceeded its jurisdiction in classifying him.[24]

Despite the "finality" the statute seemed to impart to the local board decisions, the Court interpreted the Act to permit judicial review in the form of a defense to the criminal prosecution. The Court stated:

> We cannot read [the Act] as requiring the courts to inflict punishment on registrants for violating whatever orders the local boards might issue. We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define

17 320 U.S. 549, 554 (1944).

18 *Id.* at 553.

19 *Id.* at 551-52.

20 *Id.* at 554.

21 In a concurring opinion, Justice Rutledge argued that the Act precluded judicial review. *Id.* at 555. Justice Murphy dissented on the ground that the registrant is entitled to judicial scrutiny of possible illegal or arbitrary administrative orders. *Id.* at 555-61.

22 327 U.S. 114 (1946).

23 *Id.* at 123.

24 *Id.* at 119-22.

> their jurisdiction. . . . We cannot readily infer that Congress departed so far from the 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. We are loath to believe that Congress reduced criminal trials under the Act to proceedings so barren of the customary safeguards which the law has designed for the protection of the accused.[25]

The Court interpreted "final" to mean that Congress limited the scope of judicial review available.

> ["Final"] means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.[26]

Considered together, *Falbo* and *Estep* allow a registrant to obtain judicial review of his classification in a criminal proceeding without submitting to induction only if he has exhausted his administrative remedies. But the scope of review is very limited: The court will not reverse a local or appeals board's decision, even though erroneous, if there is a basis in fact for the classification.[27] After the registrant has exhausted his remedies, he may obtain judicial review either by submitting to induction into the armed forces and then petitioning for a writ of habeas corpus[28] or, upon refusing to submit to induction, by raising the invalid classification as defense to a prosecution for willful failure to report for induction.[29]

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[25] *Id.* at 121-22. Justice Douglas, in the majority opinion, noted that judicial review might be required by the Constitution. *Id.* at 120. In concurring opinions, Justices Murphy and Rutledge argued that the Constitution requires judicial review of administrative action in a criminal prosecution. *Id.* at 125-32 (Murphy) and 132-34 (Rutledge). Justice Frankfurter, in a concurring opinion, stated that "final means final" and thus Congress did not intend the courts to have judicial review in criminal prosecutions; he concurred in the reversal on grounds of certain procedural errors at the trial. *Id.* at 134-45. Chief Justice Stone and Justice Burton in dissent, agreed with Frankfurter's interpretation of the Act.

[26] *Id.* at 122-23. The 1967 Act explicitly adopts the "no basis in fact" standard of review. 81 Stat. 104, 50 U.S.C.A. APP. § 460(b)(3) (Supp. 1967). For discussion of the standard of review in Selective Service cases see Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123, 2137-41 (1966); Comment, *Fairness and Due Process Under the Selective Service System*, 114 U. PA. L. REV. 1014, 1019-23 (1966).

[27] Estep v. United States, 327 U.S. 114, 122-23 (1946).

[28] Eagle v. United States *ex rel.* Samuels, 329 U.S. 304 (1946). In this case, the Supreme Court also stated that the *Estep* scope of review governed habeas corpus proceedings. *Id.* at 311-12.

[29] Estep v. United States, 327 U.S. 114, 119-22 (1946).

B. Procedure to Exhaust Remedies

Because exhaustion of administrative remedies is often a prerequisite to judicial review of a registrant's classification, it is important to illustrate the procedures that a registrant must follow. Simply stated, to exhaust his administrative remedies the registrant must complete each phase of the selection process without being rejected.

First, the Selective Service System provides several appeals for the registrant who feels that he was unjustly classified. The registrant who is not satisfied with his local board's initial classification[30] may appeal to an appeals board.[31] He may further appeal to the President if at least one member of the appeals board dissented.[32] The registrant who feels that his status has changed since his last classification may request a reopening of the classification.[33] In criminal prosecutions federal courts often have refused to review a registrant's classification because he failed to appeal within the system.[34]

The registrant who has exhausted his right to appeal within the Selective Service System must also complete the requisite physical, mental, and character examinations.[35] One court has refused to review

[30] After the registrant receives his initial classification, he may request a personal appearance before his local board. 32 C.F.R. §§ 1624.1-.2 (1967). No court has held, however, that a registrant who fails to request a personal appearance has not exhausted his administrative remedies.

[31] In most circumstances he must file the notice to appeal within 30 days after the local board has mailed him his notice of classification. 32 C.F.R. § 1626.2(c)(2) (1967).

[32] 32 C.F.R. § 1627.3 (1967). The National Selective Service Appeal Board, consisting of three members appointed by the President, considers these appeals. 32 C.F.R. § 1604.6 (1967).

[33] 32 C.F.R. § 1625.2 (1967). For a detailed description of the administrative structure of the Selective Service System see Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123, 2127-30 (1966).

[34] *See, e.g.*, United States v. Kurki, 384 F.2d 905 (7th Cir. 1967) (defendant failed to appeal I-A classification to appeals board); Evans v. United States, 252 F.2d 509 (9th Cir. 1958) (defendant failed to appeal from local board classification); United States v. Nichols, 241 F.2d 1 (7th Cir. 1957) (same); Skinner v. United States, 215 F.2d 767 (9th Cir. 1954) (same), *cert. denied*, 348 U.S. 981 (1955); United States v. Dorn, 121 F. Supp. 171 (E.D. Wis. 1954) (defendant failed to appeal from local board classification within ten days).

[35] At the examination center, military officials give each registrant a complete physical examination. Armed Forces Examining and Entrance Stations, Army Reg. 601-270, ¶¶ 64-72 (1965). Under current Army Regulations, the registrant must receive a preinduction examination not less than 21 nor more than 180 days before he is scheduled to report for induction. *Id.* at ¶ 32a. If more than 180 days elapse between the date of the physical examination and the scheduled date of induction, the registrant must undergo another complete physical examination. Courts have held that a registrant failed to exhaust his administrative remedies because he did not undergo a second physical examination. See United States v. Balogh, 160 F.2d 999 (2d Cir. 1947); United States v. Wider, 119 F. Supp. 676 (E.D.N.Y. 1954).

Military officials, at the examination center, also must conduct mental tests. Armed

the registrant's claim of invalid classification because he failed to report for his preinduction examination.[36]

It is not clear from the regulations whether the registrant must also obey the order to report for induction at the induction center to exhaust his remedies.[37] The regulations in effect at the time of *Falbo v. United States*[38] provided that the examinations would occur *after* the draft board issued the order to report for induction.[39] Subsequently, however, the regulations were amended so that the examinations would occur *before* the board issues the order.[40] In light of the amended regulations, the Supreme Court held, in *Dodez v. United States*,[41] that a conscientious objector need not report to the public service camp to exhaust his remedies.[42] Current regulations also provide for preinduction examinations before the board issues the order to report for induction.[43] On the basis

Forces Examining and Entrance Stations, Army Reg. 601-270, ¶¶ 49-63 (1965). On the basis of the physical and mental examinations, military officials determine whether the registrant meets current physical and mental standards for induction into the military service.

The registrant completes questionnaires concerning his personal background. On the basis of these questionnaires and, often, further examination into the registrant's background, the Army may disqualify him from military service because he is morally unacceptable, *id.* ¶ 23, or because he is unacceptable for reasons of national security, *id.* ¶ 80.

If a registrant has been convicted of certain criminal offenses, has criminal charges pending against him, or has character traits which render him unfit to associate with other men, he fails to meet the prescribed moral standards unless the Armed Forces Moral Waiver Determination Board waives the disqualification. *Id.* ¶ 23 b, c, d.

Military officials use the Armed Forces Security Questionnaire to screen out those registrants who are unacceptable for national security reasons. *Id.* ¶ 80. The questionnaire lists a number of organizations designated as subversive by the Attorney General; each registrant reads the list and then indicates whether he has ever been associated with any of the organizations. *Id.* App. IV. The Army will not induct a registrant who does not satisfactorily complete the questionnaire pending a thorough investigation into his background. *Id.* ¶ 80(b)(2). Personal Security Clearance, Army Reg. 604-10 (1959) *as amended* (1962), prescribes the procedure for investigating and disposing of security clearance cases.

[36] Olinger v. Partridge, 196 F.2d 986 (9th Cir. 1952).

[37] The preinduction examinations and reporting to the induction center are not additional remedies to assert a claim for deferment or exemption. Rather, they are remedies in the sense that the registrant's claim will be mooted if military officials find him physically or mentally unfit for military service. *See* Jaffe, *The Exhaustion of Administrative Remedies*, 12 BUFF. L. REV. 327, 352 (1963).

[38] 320 U.S. 549, 553 (1944), *discussed* in text accompanying notes 14-21 *supra.*

[39] *See id.* at 552-53. The *Falbo* Court noted that 40% of those examined were rejected. *Id.* at 553 n. 7.

In 1966, the army rejected an equally high percentage: 56% of the Negro inductees and 34% of the white inductees. San Francisco Chronicle, Nov. 3, 1967, at 18, col. 2.

[40] *See* Dodez v. United States, *sub nom.*, Gibson v. United States, 329 U.S. 338, 347 (1946), for the amended regulations.

[41] 329 U.S. 338 (1946).

[42] Dodez v. United States, *sub nom.*, Gibson v. United States, 329 U.S. 338, 350 (1946).

[43] 32 C.F.R. § 1628.10 (1967).

of *Dodez*, it is arguable that the issuance of the order to report for induction terminates the administrative process, and that the registrant, therefore, need not report to the induction center in order to exhaust his remedies. On the other hand, reporting to the induction center arguably is the last significant step in the process because the Army may still reject the registrant at that stage. At the induction center an Army doctor who inspects all inductees for communicable diseases and previous undiscovered physical defects[44] may declare them unfit for military service.[45]

The Supreme Court has not resolved this issue.[46] Therefore, the registrant who seeks judicial review should obey the order to report to the induction center and then refuse to take the one step forward which symbolizes induction into the armed forces.[47]

C. Policies Underlying the Exhaustion of Remedies Doctrine

The courts in limiting review of a registrant's classification have advanced two major reasons for requiring exhaustion of remedies: First, the selection process requires rapid mobilization of manpower; second, courts should not intervene into administrative agency action which may be mooted by subsequent agency action.

The United States Supreme Court has noted that the history of the 1940 Act indicates that Congress wanted a selection procedure which would rapidly and efficiently mobilize manpower to meet military requirements in times of national emergency.[48] Because litigious interruption would create delay in fulfilling manpower requirements, judicial intervention into the selection process was not part of the administrative structure which Congress envisioned.[49] By encouraging the recalcitrant

[44] Armed Forces Examining Entrance Stations, Army Reg. 601-270, ¶ 69 a(2) (1965).

[45] *Id.* at ¶ 69 a(4), (5).

[46] In *Dodez*, the issue was whether a registrant must obey the order to report to a public service camp to exhaust his remedies. See text accompanying note 42 *supra*. Such a registrant cannot obtain favorable administrative action of rejection at the camp. In contrast, the registrant who reports to the induction center might still receive favorable action because the military might reject him on the grounds of physical unfitness. See notes 44-45 *supra* and accompanying text. On those grounds, the Second Circuit has held that a registrant must report to the induction center to exhaust his remedies. United States *ex rel.* Flakowicz v. Alexander, 164 F.2d 139 (2d Cir. 1947), *cert. denied*, 333 U.S. 828 (1948). For thoughtful discussions of this issue, see Daniels v. United States, 372 F.2d 407 (9th Cir. 1967); Leonard & Frantz, *Judicial Review of Selective Service Orders*, 26 THE GUILD PRACTIONER 85, 86-87 (1967).

[47] The ceremonial step is sufficiently definite to prevent the registrant from being inadvertently inducted. The oath of induction states: "You are about to be inducted into the Armed Forces of the United States. . . . You will take one step forward as your name and service are called and such step will constitute your induction into the Armed Forces . . . ." Armed Forces Examining and Entrance Stations, Army Reg. 601-270, ¶ 37 a(1) (1965).

[48] Falbo v. United States, 320 U.S. 549, 551-52 (1944).

[49] *Id.* at 554.

registrant to seek an injunction to prevent induction, judicial review before induction would impede the continuous flow of the selection process. In some instances, the registrant might utilize the courts merely to delay his entry into the armed forces.

Traditional administrative law doctrine also suggests that a person aggrieved by administrative action must exhaust his administrative remedies before seeking judicial review.[50] First, premature intervention would undermine the integrity of the administrative process because people seeking relief would bypass appeals within the agency and because the agency would not have every opportunity to rectify its own mistakes.[51] Second, by intervening early the courts may adjudicate a controversy that may become moot by the subsequent action of administrative officials.[52]

D. Evaluation of Those Policies

General administrative law policies which support the exhaustion of remedies doctrine[53] do not support the limiting of judicial review to criminal prosecutions. Judicial review in a civil proceeding after the registrant has exhausted his administrative appeals would not undermine the integrity of the administrative process: Such judicial review would allow the agency every opportunity to rectify its own mistakes and would not be mooted by subsequent agency action.

On the other hand, because some registrants might utilize the courts to delay induction, judicial review before induction could impede the rapid and efficient administration of the selection process.[54] Limiting judicial review to criminal prosecutions does facilitate the goal of rapid mobilization of manpower because the risk of criminal punishment significantly deters most registrants who wish to challenge the validity of their induction orders. At the same time, the argument that judicial review inhibits rapid mobilization of manpower is misplaced in considering whether a registrant must exhaust his remedies before raising a defense in a criminal proceeding. Because a registrant who has become the subject of a criminal prosecution for refusing induction has already

[50] *See* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 20.01-20.10 (1958); Jaffe, *The Exhaustion of Administrative Remedies*, 12 BUFF. L. REV. 327 (1963).

[51] *See* Jaffe, *supra* note 50, at 352.

[52] Judicial review should focus on issues that are ripe for review and not render opinions on hypothetical questions. *See* 3 K. DAVIS, ADMINSTRATIVE LAW TREATISE § 21.01 (1958). *See also* Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817, 823 (2d Cir. 1967). For example, the registrant who does not receive a deferment or exemption might still fail his mental or physical examination, making him unfit for military service. See note 33 *supra* and accompanying text.

[53] See text accompanying notes 50-52 *supra*.

[54] However, Congress or the courts could introduce a method of judicial review before induction which would minimize delay in the selection process. See text accompanying notes 106-114 *infra*.

permanently disrupted the selection process, judicial review in the criminal trial arguably does not impede that process.[55]

E. The Wolff Exception to the Exhaustion of Remedies Doctrine

Wolff v. Selective Service Local Board Number 16,[56] a case which the Second Circuit decided five months before Congress acted the 1967 Act, introduced an exception to the exhaustion of remedies doctrine in the Selective Service System. The *Wolff* court held that a registrant need not exhaust his administrative remedies before seeking judicial review when the local board's action has a chilling effect on first amendment rights.[57]

In *Wolff*, two University of Michigan students from New York protested American involvement in Vietnam by participating in a sit-in demonstration before a Selective Service local board. Shortly thereafter, the New York City Director of Selective Service wrote the two students' local boards. He requested the local boards to review the students' II-S classifications, which deferred them from induction,[58] on the grounds that their protests violated the Universal Military Training and Service Act.[59] Subsequently, the local boards reclassified both students I-A, making them currently available for military service.[60]

The two students brought suit in the federal district court to enjoin their local boards from inducting them into the armed forces and for a declaratory judgment that the reclassifications violated their first amendment freedom of speech.[61] The district court held that the controversy was not justiciable because the registrants had not exhausted their administrative remedies and because an injunction was not a permissible remedy

[55] Although no one has ever compiled any empirical data on that question, it is unlikely that the possibility of judicial review in a criminal proceeding encourages many registrants to refuse to submit to induction. Justice Murphy has argued that the litigious interruption argument is not tenable. *See* Estep v. United States, 327 U.S. 114, 128-29 (1946) (concurring opinion); Falbo v. United States, 320 U.S. 549, 558 (1944) (dissenting opinion).

[56] 372 F.2d 817 (2d Cir. 1967).

[57] Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817, 825 (2d Cir. 1967). The Ninth Circuit has held that the failure of a registrant to exhaust his remedies did not bar him from attacking his classification in a subsequent criminal prosecution for refusing induction where his objection to classification raised a constitutional issue. Wills v. United States, 384 F.2d 943, 945-46 (9th Cir. 1967).

[58] Those registrants now engaged in studies leading to an undergraduate degree may receive a deferment. 32 Fed. Reg. 9790-91 (1967).

[59] 50 U.S.C. App. § 462(a) (1964), which the students were charged with violating, provides that "any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title . . . shall . . . be punished by imprisonment for not more than five years or a fine of not more than $10,000 . . ."

[60] 32 C.F.R. §§ 1622.2, 1622.10 (1967).

[61] Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817, 820 (2d Cir. 1967).

under the Selective Service Act.[62] The Second Circuit reversed and held that an injunction was a proper remedy under the circumstances.[63] It held, first, that the local boards exceeded their jurisdiction in reclassifying the students I-A because the local boards had no authority to reclassify them on the basis of an alleged violation of the Act.[64]

Second, the *Wolff* court held that the mere threat of reclassifying the registrants I-A had a chilling effect on their first amendment right to voice dissent, which caused irreparable injury both to the two registrants and to others similarly situated[65] and which required immediate vindication by the courts.[66] Furthermore, the court in *Wolff* argued that, because no statute or regulation existed to guide a registrant in deciding whether a protest demonstration would justify reclassification, the uncertainty of the standard which the Selective Service System applied would magnify the chilling effect on the actions of other registrants.[67]

Finally, the court held that the registrants did not have to exhaust their administrative remedies before obtaining judicial review of their classifications.[68] The policies favoring preservation of first amendment rights prevail over the policies favoring judicial nonintervention into the Selective Service process.[69]

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62 The opinion of the district court is not reported, but is contained in Brief for Appellants, App. 11a-17a, Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967).

63 372 F.2d at 820.

64 *Id.* at 822. The local boards contended that the students were "delinquent" because of their alleged violation of the Act. See note 59 *supra*. The Second Circuit, however, asserted that jurisdiction over this particular criminal offense is exclusively granted to the federal courts. 372 F.2d at 821-22. For extensive analyses concluding that local boards cannot deem registrants "delinquents" for participating in a demonstration at a local draft board see Note, *Reclassification of the Sit-In Demonstrator: A Bezoar Stone for the Selective Service*, 19 U. FLA. L. REV. 143 (1966); Comment, *Fairness and Due Process Under the Selective Service System*, 114 U. PA. L. REV. 1014, 1043-47 (1966). Lt. Gen. Lewis Hershey, Director of Selective Service, has not followed the *Wolff* mandate. On October 26, 1967, in a letter to all local draft boards, he stated that any registrant who has violated the draft laws should be reclassified. Thus, illegal sit-in demonstrators, such as the two students in *Wolff*, would be reclassified I-A. N.Y. Times, Nov. 9, 1967, at 2, col. 4. After much criticism of Hershey's letter, U.S. Attorney General Ramsey Clark and Hershey issued a joint statement declaring that no person would be reclassified for lawful protest activity. Only those who commit acts which will permit the local boards to deem them "delinquents" under existing regulations will be reclassified. N.Y. Times, Dec. 10, 1967, at 5, col. 1.

65 372 F.2d at 824. The "chilling effect" rationale is set forth in other cases. *E.g.*, Dombrowski v. Pfister, 380 U.S. 479, 486-89 (1965).

66 372 F.2d at 824.

67 *Id.*

68 *Id.* at 825. The court noted that further appeals within the Selective Service System would have been futile. *Id. Cf.* Wills v. United States, 384 F.2d 943 (9th Cir. 1967).

69 372 F.2d at 825. The court, however, remanded the case to the district court to deter-

The court in *Wolff* created an exception to existing case law in order to prevent Selective Service officials from stifling the free exercise of speech. The court did not, however, introduce a rule that significantly expands judicial review of Selective Service action. Rather, the decision represents a narrow exception to the exhaustion of remedies doctrine: A court may intervene into the Selective Service System, even though the registrant has not exhausted his remedies, when the board's action unconstitutionally impairs first amendment rights and when immediate judicial intervention is necessary to vindicate these rights and to prevent similar action in the future.

Although the 1967 law purports to preclude courts from enjoining impending inductions by limiting judicial review to criminal cases,[70] *Wolff* indicates that the courts have sufficient flexibility to handle those unusual situations in which the Constitution, at least, requires immediate intervention.[71] The decision in *Wolff* might reflect both a trend toward more careful judicial scrutiny of Selective Service activities and dissatisfaction with the present system of judicial review—at least when first amendment constitutional rights are involved.

II

DEFECTS OF THE DOCTRINE AND CURRENT LAW

The 1967 Act does not provide adequate judicial review to ensure that registrants receive fair hearings and proper classifications. Commentators have argued convincingly that under previous legislation a registrant often did not receive a fair hearing and that the Selective Service System did not contain procedural safeguards adequate to protect against arbitrary or prejudicial classifications.[72] Unfortunately, in enacting the 1967 Act, Congress did not significantly alter the administrative

mine whether the appellant-registrants could show the presence of the requisite $10,000 jurisdictional amount in controversy under 28 U.S.C. § 1331 (1964). 372 F.2d at 826.

[70] See note 4 *supra* and accompanying text. One district has followed the Congressional mandate. Carpenter v. Hendrix, 277 F. Supp. 660 (N.D. Ga. 1967).

[71] Despite Congressional intent to prevent judicial review before induction, see note 4 *supra*, the Constitution may require federal courts to enjoin an impending induction where Selective Service action had a chilling effect on the free exercise of first amendment rights which requires immediate vindication. *See* note 66 *supra* and accompanying text. On the other hand, most constitutional rights, such as freedom from racial discrimination, do not require immediate vindication and, thus, for these rights, an injunction is not constitutionally compelled .

[72] *See, e.g.*, Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123 (1966) (contends that registrants are deprived of basic procedural safeguards and suggests various safeguards); Comment, *Fairness and Due Process Under the Selective Service System*, 114 U. PA. L. REV. 1014 (1966) (considers whether the administrative process overemphasizes efficiency at the expense of fairness to individuals).

structure to provide greater safeguards for the registrant.[73] Moreover litigated cases also show that registrants sometimes do not receive the fairness which the system does require. In some cases the local board has violated the applicable statute[74] or regulation;[75] in others, the courts have determined that the local or appeals boards have applied the law erroneously in classifying a registrant.[76] Most often, however, the courts have reversed a classification because the registrant did not receive a fair hearing[77] or because there was no basis in fact to support the board's finding.[78]

Under the 1967 Act,[79] the registrant who seeks judicial review of his classification has two unappealing alternatives. First, he may submit to induction and then petition for a writ of habeas corpus. Although the 1967 Act apparently limits judicial review to criminal proceedings,[80] the legislative history indicates that Congress did not intend to preclude habeas corpus proceedings.[81] The registrant may also obtain judicial review by exhausting his administrative remedies, refusing to submit to induction, and raising the defense of invalid classification in his criminal prosecution.[82] However, neither alternative provides a reasonable remedy

[73] The 1967 Act does state, however, that the President may recommend that criteria for the classification of registrants be administered uniformly whenever practicable. 81 Stat. 103, 50 U.S.C.A. APP. § 456 (h) (2) (Supp. 1967).

[74] *E.g.*, Gonzales v. United States, 348 U.S. 407 (1955) (registrant entitled to receive a copy of Department of Justice's recommendation to appeal board on his conscientious objector claim); Simmons v. United States, 348 U.S. 397 (1955) (Department of Justice failure to furnish registrant with summary of the Federal Bureau of Investigation report on his conscientious objector claim as required by statute); United States v. Crawford, 119 F. Supp. 729 (N.D. Cal. 1954) (failure of local board to grant hearing on conscientious objection claim).

[75] *E.g.*, Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967); Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956).

[76] *E.g.*, Sicurella v. United States, 348 U.S. 385 (1955); United States v. Close, 215 F.2d 439 (7th Cir. 1954).

[77] *See, e.g.*, United States v. Peebles, 220 F.2d 114 (7th Cir. 1955); United States v. Scott, 137 F. Supp. 449 (E.D. Wis. 1956).

[78] *See, e.g.*, Glover v. United States, 286 F.2d 84 (8th Cir. 1961); Batterton v. United States, 260 F.2d 233 (8th Cir. 1958); Annett v. United States, 205 F.2d 689 (10th Cir. 1953).

[79] 81 Stat. 100, 50 U.S.C.A. APP. §§ 451-73 (Supp. 1967).

[80] See note 2 *supra* and accompanying text.

[81] The House Armed Services Committee stated: "Existing law quite clearly precludes such a judicial review [of the classification action of local or appeals boards] until after a registrant has been ordered to report for induction and *has responded either affirmatively* or negatively to such an order." H.R. REP. No. 267, 90th Cong., 1st Sess. 30 (1967) (emphasis added). Congress only intended to enunciate more clearly the existing principle of judicial review. See note 4 *supra* and accompanying text.

Moreover, it is not clear that Congress could constitutionally preclude habeas corpus. *See* Leonard & Frantz, *Judicial Review of Selective Service Orders*, 26 THE GUILD PRACTITIONER 85, 92 (1967).

[82] See note 24 *supra* and accompanying text.

to the average registrant who feels either that he was unfairly treated or that he was entitled to a deferment or exemption.

A. Habeas Corpus Proceedings

At first glance, petitioning for a writ of habeas corpus after submitting to induction presents a fair and workable procedure for judicial review of Selective Service classifications. The registrant can obtain judicial review of his classification without risking criminal sanctions.

However, as Justice Murphy once stated, "this remedy [habeas corpus proceedings] may be quite illusory in many instances."[83] First, military personnel are not likely to be sympathetic toward his efforts to petition for a writ of habeas corpus; he probably will not receive fair treatment from the typical sergeant.[84] Second, the inductee must petition for the writ of habeas corpus in the jurisdiction in which the military is then detaining him,[85] which may be far away from his home and local draft board. Under such circumstances, he would have difficulty obtaining witnesses and a counsel to prove that he was entitled to a deferment or exemption. In addition, the military, by transferring him on a moment's notice to another jurisdiction, may render the judicial proceeding moot.[86] In addition, most sincere conscientious objectors who wish to challenge the denial of a conscientious objector classification will not utilize this procedure.[87] Military service is more obnoxious to them than a possible jail sentence. Furthermore, a person who must enter the armed forces to obtain judicial review suffers many personal inconveniences. He must leave his occupation or business and his home and family for an unnecessary amount of time.[88]

Finally, a person should exhaust his administrative remedies in order to ensure judicial review in habeas corpus proceedings—at least when he is asserting nonconstitutional objections to his classification.[89] The in-

[83] Estep v. United States, 327 U.S. 114, 129 (1946) (concurring opinion).

[84] *See* Estep v. United States, 327 U.S. 114, 130 (1946) (concurring opinion); Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123, 2137 (1966).

[85] Ahrens v. Clark, 335 U.S. 188 (1948).

[86] Estep v. United States, 327 U.S. 114, 130 (1946) (concurring opinion).

[87] A court might doubt the sincerity of the conscientious objector's belief in opposing all war because he submitted to induction into the armed forces. Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123, 2137 n.107 (1966).

[88] *See* Note, *Habeas Corpus and Judicial Review of Draft Classifications*, 28 IND. L.J. 244, 252-53 (1953).

[89] A few courts have stated that a registrant must exhaust his remedies in order to obtain judicial review in the habeas corpus proceeding. Swazkye v. United States, 156 F.2d 17 (1st Cir. 1946); *see* Pickens v. Cox, 282 F.2d 784 (10th Cir. 1960); Sisquoc Ranch Co. v. Roth, 153 F.2d 437 (9th Cir. 1946); *Ex Parte* Hannig, 106 F. Supp. 715 (N.D. Cal. 1952).

ductee who inadvertently fails to exhaust his remedies may have waived the possibility of judicial review on nonconstitutional grounds in a habeas corpus proceeding.[90]

For those reasons, the habeas corpus proceeding does not provide a workable system of judicial review of Selective Service action. Consequently, petitioning for a writ of habeas corpus after induction is not a procedure which registrants often use to challenge their classifications;[91] instead they refuse to submit to induction and then challenge the validity of their classifications in defense of criminal prosecution.

B. Criminal Prosecutions

There are two principal defects in judicial review of Selective Service classifications in criminal proceedings.[92] First, the registrant who inadvertently fails to exhaust his administrative remedies generally cannot obtain judicial scrutiny of his draft classification in a subsequent criminal prosecution. The registrant who desires to exhaust his remedies may well not understand the applicable regulations which govern the selection procedure.[93] Selective Service officials are often reluctant to give helpful advice, and most registrants do not retain lawyers to advise them of their rights under the System.[94] As a consequence, the registrant might discover that he has inadvertently omitted an essential step and thereby waived his defense of misclassification in a criminal prosecution.

Some courts have applied the exhaustion of remedies doctrine to refuse to review the registrant's classification when his failure has been merely negligent or inadvertent.[95] However, better-reasoned cases, recognizing the severity of the criminal prosecution, have allowed review of

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In light of Fay v. Noia, 372 U.S. 391 (1963), however, the inductee arguably need not have exhausted his administrative remedies to obtain judicial review when he is asserting constitutional objections. 372 U.S. at 398-99, 424 n.35.

[90] See text accompanying notes 92-96 *infra*. *See also* Fay v. Noia, 372 U.S. 391, 398-99, 424 n.35 (1963).

[91] Following the decision in Estep v. United States, 327 U.S. 114 (1946), few registrants have utilized habeas corpus proceedings. *See* Tietz, *Jehovah's Witnesses: Conscientious Objectors*, 28 So. CAL. L. REV. 123, 134 (1955).

[92] See note 17 *supra* and accompanying text.

[93] *See* Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123, 2149 n.178 (1966).

[94] *See id.* at 2146-51; Comment, *Fairness and Due Process Under the Selective Service System*, 114 U. PA. L. REV. 1014, 1029-34 (1966).

[95] For example, two registrants did not exhaust their remedies because they did not undergo a second complete physical examination as required by the Army regulations. The regulations stated that a registrant must undergo a complete physical examination if more than a certain number of days have elapsed between the date of the previous examination and the scheduled date of induction. United States v. Balogh, 160 F.2d 999 (2d Cir. 1947); United States v. Wider, 119 F. Supp. 676 (E.D.N.Y. 1954).

the classification even though the registrant failed to exhaust his administrative remedies.[96]

The other major defect of judicial review in criminal prosecutions is that the registrant must risk a jail sentence to challenge his classification judicially. The present method thus discourages from seeking review those registrants who believe that their boards improperly classified or unfairly treated them. Congress designed the Selective Service System to provide a fair as well as an efficient procedure for marshalling the nation's available manpower.[97] To the extent that registrants receive improper classifications the policy of limited judicial review unnecessarily sacrifices fairness.[98]

In relation to the total number of classifications made within the Selective Service System, cases which involve a reversible classification represent a very small percentage. This percentage, however, does not accurately depict how often a local board's prejudicial action denies a registrant a deferment or exemption. The existing limited right of judicial review nurtures the unfairness in the Selective Service System. Rather than risk criminal sanctions to vindicate their rights, most registrants submit to induction; unless they utilize the inadequate habeas corpus proceedings[99] they do not receive redress for the local boards' abuses of discretion.

III

PROPOSED CHANGES IN THE LAW

Current methods of obtaining judicial review of Selective Service action are inadequate. Habeas corpus proceedings often fail to give an inductee a fair hearing on the merits.[100] In addition, conscientious objectors will not use this remedy.[101] The other alternative, judicial review in a criminal proceeding, requires the registrant to commit an act that may

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[96] *See, e.g.*, Wills v. United States, 384 F.2d 943 (9th Cir. 1967); Glover v. United States, 286 F.2d 84 (8th Cir. 1961); United States v. Willard, 211 F. Supp. 643 (N.D. Ohio 1962).

Many courts have stated that failure to exhaust remedies precludes judicial review, but nonetheless have reviewed the facts of the registrant's classification. *See, e.g.*, Donato v. United States, 302 F.2d 468 (9th Cir. 1962); United States v. Grizzard, 223 F. Supp. 890 (S.D. Cal. 1963).

[97] *See* United States v. Nugent, 346 U.S. 1, 9 (1953).

[98] Furthermore, a fairer selection procedure would arguably promote efficiency in the Selective Service System. Registrants who receive a fair hearing and a proper classification are less likely to challenge their classifications. *Cf.* Newman, *The Process of Prescribing "Due Process,"* 49 CALIF. L. REV. 215, 227-31 (1961).

[99] See text accompanying notes 83-87 *supra.*

[100] See text accompanying notes 83-86 *supra.*

[101] See text accompanying note 87 *supra.*

constitute a crime.[102] Furthermore, the exhaustion of remedies doctrine may preclude a registrant from obtaining judicial review in his criminal prosecution.[103]

A. Waiver of Defense in Criminal Prosecutions

When the United States Attorney prosecutes a registrant for refusing to submit to induction, the registrant should be permitted to assert the defense of misclassification or unfairness unless he has deliberately or wantonly failed to exhaust his administrative remedies. Because the registrant faces a possible jail sentence, the courts should review the Selective Service action for reversible error to ensure that the registrant is not unjustly convicted of a federal crime. This would not confound any policies underlying the exhaustion doctrine because the courts would not review a classification when the registrant has deliberately or wantonly ignored possible remedies within the system.

B. *Amendment to Present Method of Judicial Review*

Much as the local board's action in *Wolff* chilled the exercise of first amendment rights,[104] the exhaustion of remedies doctrine and the corresponding limited right of judicial review have a chilling effect on registrants asserting their rights to redress misclassifications and procedural unfairness within the system. That is, limiting judicial review to criminal prosecutions restrains most registrants from asserting their rights because they are unwilling to risk a possible jail sentence. In light of the convincing arguments and findings that the present administrative process does not ensure a fair hearing to the registrant[105] and in light of the cases illustrating improper classification and unfair treatment by the local boards,[106] Congress should reevaluate the present methods of judicial review in an effort to eliminate that chilling effect. It should amend the 1967 law to allow a registrant to challenge his classification without risking a possible jail sentence; the procedure should, however, retain an efficient and expedient selection process.[107] To accomplish these two conflicting interests, the Selective Service law could provide the registrant with an opportunity to challenge the validity of Selective Service action

102 That is, the registrant must refuse to submit to induction, which is a federal crime, in order to assert his rights. 50 U.S.C.A. APP. § 462(a) (Supp. 1967).

103 See notes 92-96 *supra* and accompanying text.

104 See note 65 *supra* and accompanying text.

105 See note 74 *supra*.

106 See notes 74-78 *supra* and accompanying text.

107 One suggested solution would provide a wider right of judicial review during peacetime; during times of national emergency declared by Congress or the President, the existing right of judicial review would be in force. See Comment, *Fairness and Due Process Under the Selective Service System*, 114 PA. L. REV. 1014, 1019 (1966).

before he is scheduled to report for induction, but after the local board has issued his induction order. In this way he would not risk criminal prosecution.

In order to minimize litigious interruption and the possibility that the Army finds the registrant unfit for military service, the court should not allow judicial review under the proposed procedure unless the registrant's induction is imminent. Therefore, before the court should review a registrant's classification, the registrant must have exhausted his administrative appeals, taken his preinduction examinations, and be scheduled to report for induction in the near future with no change in his draft status. Although this procedure bypasses the induction inspection which could render the registrant unfit for military service,[108] the probability is very small that this second physical inspection would uncover any disqualifying infirmities.[109] At this stage he should be able to bring an action to enjoin induction in a federal court. The local board should issue the order to report for induction sufficiently in advance of the scheduled induction date to permit a registrant to file suit and to permit the court to decide whether an injunction should issue.

Permitting such an injunction procedure would increase litigious interruption of the selection process and allow some registrants to delay induction by bringing spurious suits. Congress could, however, devise a system which would ensure a speedy preliminary determination of the merits. The judge could determine whether the claim, if proven, would provide sufficient grounds for reversing or ordering the local board to reconsider the classification. If the judge decided that the registrant's complaint was worthy of further judicial inquiry, he could issue an order temporarily restraining induction pending a full hearing. He could then advance the suit on the calendar for prompt hearing.[110] If, on the other hand, the judge determined that the registrant's claim did not merit further consideration, he would dismiss the motion and deny a stay of induction.[111] The declaratory judgment provision of the Federal Rules of Civil Procedure[112] is sufficiently flexible to permit the trial judges to adopt this procedure.

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108 See note 44 *supra* and accompanying text.

109 The registrant has already had a thorough physical examination during his preinduction examinations. See note 36 *supra*. Furthermore, the registrant arguably is no longer under the control of the Selective Service System when he reports to the induction center, and he can therefore argue that he has exhausted his remedies when he is scheduled to report for induction. *See also* notes 37-47 *supra* and accompanying text.

110 The declaratory judgment provision of the federal rules would permit such an action. 28 U.S.C. APP. Rule 57 (1964).

111 The registrant could still obtain judicial review in habeas corpus proceedings after induction or in a criminal prosecution for willful failure to report for induction.

112 28 U.S.C. APP. Rule 57 (1964): "The procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C., § 2201, shall be in accordance with these rules . . . . The

Such a procedure would also have the advantage of controlling arbitrary and prejudicial behavior of local board members soon after the action occurs. In contrast to a criminal procedure, this expedited procedure would more effectively warn Selective Service personnel that neither the courts nor Congress will tolerate procedural unfairness and arbitrary classifications.

CONCLUSION

Under present law, habeas corpus proceedings and judicial review in criminal prosecutions do not provide adequate judicial scrutiny to ensure that a registrant receives a fair hearing and proper classification. Habeas corpus proceedings after the petitioner has submitted to induction are an inadequate remedy for several practical reasons.[113] Judicial review in criminal prosecutions is inadequate both because the registrant might inadvertently waive his right to assert the defense of misclassification or unfair hearings and because the threat of possible criminal sanctions deters many registrants from pursuing their claims.

Congress, therefore, should expand the right of judicial review available under the 1967 law to permit the registrant to challenge the validity of his classification *before* he must submit to induction so that he does not have to risk criminal prosecution in order to vindicate his rights. Congress, however, should also minimize litigious interruption of the selection process by requiring registrants to exhaust their Selective Service appeals and to submit to the preinduction examinations before permitting them to seek judicial review of their classifications. Furthermore, the courts should not prevent a registrant from raising the defenses of misclassification or procedural unfairness in a criminal prosecution merely because he failed to exhaust his administrative remedies, since they do not thereby ensure that the selection process will be efficient.

The 1967 judicial review amendment[114] is a regression from the stated goal of fairness. An amendment to the Act to permit judicial review outside of criminal and habeas corpus proceedings is necessary to redress this imbalance.

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existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. . . . " 28 U.S.C. § 2201 (1964) provides: "[Any United States court] may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is . . . sought."

28 U.S.C. § 2202 (1964) would permit a court to issue a temporary restraining order: "Further necessary or proper relief based on a declaratory judgment . . . may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

113 See text accompanying notes 83-88 *supra*.

114 81 Stat. 104, 50 U.S.C.A. APP. 460(b)(3) (Supp. 1967). See text accompanying note 2 *supra*.