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JUDICIAL REVIEW IN SELECTIVE SERVICE CASES—
LESSONS FROM VIETNAM

Francis X. Beytagh*

Prologue and Introduction

On December 15, 1972, the Administrative Conference of the United States¹ adopted the following recommendations:

A. Pre-induction Judicial Review

Section 10(b)(3) of the Military Selective Service Act, 50 U.S.C. App. 460(b)(3) (1970), should be amended to delete the nominal prohibition of judicial review of administrative determinations relating to the classification and processing of registrants except as a defense to a criminal prosecution. In lieu thereof the Act should expressly authorize pre-induction judicial review at the behest of any registrant seeking to challenge his classification through a suit for declaratory and injunctive relief brought in a federal district court. Elements of and conditions upon such a suit should include the following:

(1) Reasonable restrictions would be imposed with respect to the timing of the suit. These would be related to the Selective Service System's procedure for designating registrants likely to be drafted considerably in advance of their scheduled induction date and would authorize pre-induction suits within a limited period, e.g., 30 days, after physical examinations had been taken and administrative remedies exhausted.[*]

(2) The mere pendency of a suit would not operate as a stay of induction. If it appeared that a suit could not be finally determined before a scheduled induction, any request for a stay of induction would be ruled upon according to the traditional standards governing interlocutory injunctive relief.

(3) A determination on pre-induction judicial review that the registrant's classification was lawful would be conclusive in any subsequent criminal prosecution.

(4) The President would be empowered to suspend the availability of pre-induction review during any period of declared war or national emergency.

(5) The ordinary requirement of exhaustion of administrative remedies would not be affected.

B. Referral of Conscientious Objector Claims

The Military Selective Service Act should be amended by the addition to Section 6(j), 50 U.S.C. App. Sec. 456(j) (1970), of a provision for the

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¹ The Administrative Conference of the United States, a body created by statute in 1966, is charged to study the “efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate. . . .” to the end “that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest.” 5 U.S.C. §§ 571, 574 (1970).
referral of contested and difficult conscientious objector claims to the appropriate State Director's office for advice. Such referral would be available at the instance of a local board or an appeal board or upon the request of a registrant appealing the denial of a conscientious objector claim by his local board. Consideration of such claims by the State Director's office should be completed within a specified and limited period (for example, 60 or 90 days) unless exceptional circumstances are presented. The response by the State Director's office in such cases should take the form of an advisory opinion or recommendation that would be part of the administrative record to be considered by a reviewing court but would not be binding on the local board or the appeal board.

C. Further Procedural Reforms

The Selective Service System is encouraged to amend its procedural regulations in the following respects:

(1) To allow registrants to be accompanied, represented and advised by counsel or other authorized representatives at local and appeal board appearances.

(2) To provide for the preparation of suitable transcripts of local board and appeal board proceedings involving appearances by registrants. [*]

(3) To provide a permanent staff for the National Appeal Board and to expand the Board's jurisdiction to include discretionary review of any registrant's claim regardless of whether the appeal board considering the case had been unanimous.

[*] The views of the Selective Service System and of the Judicial Conference should be taken into account in the prescription of the period of the limitation.

[**] Transcripts initially could simply take the form of tape recordings, which would be prepared in typewritten form only if necessary for subsequent review. 2

About one month later, on January 27, 1973, the United States signed peace accords ending our involvement in the Vietnam conflict, the longest and one of the most divisive wars in our country's history. Almost immediately, it was announced that involuntary induction of persons into the Armed Forces would be terminated.

Why did the Administrative Conference adopt recommendations relating to judicial review in Selective Service cases and dealing with other suggested procedural reforms at a time when the Vietnam war which occasioned the unpopular draft was ending? Why should we bother ourselves with such problems any further since, after all, are they not substantially moot? Why publish a piece on a subject no longer timely? These are all legitimate questions which deserve, at the very outset of this article, clear and convincing answers.

In the first place, the Administrative Conference gave thorough consideration to the matter of mootness before deciding to go forward with adoption of these recommendations. The reasons underlying its decision are essentially those
Moreover, the Conference had precipitated a study of the subject some 18 months earlier, at a time when the amount of Selective Service litigation was extremely heavy and neither the war nor the draft showed any immediate signs of ending. That study produced a report which, in substance, is reprinted in the following pages, together with the basic recommendations, as set out previously, which the Conference saw fit to adopt. But it was not simply because the Conference had had the matter studied and had some recommendations before it that led it to go forward. Ending of the draft will not result in dismantling of the Selective Service System. Those in the prime-age group will still be subject to a lottery system and significant numbers of them will be physically examined and classified as to their eligibility for induction. In other words, the System intends to maintain its administrative machinery intact and operate on a more or less standby status, even though induction authority will formally expire on June 30, 1973. Thus, there is likely to be a not insubstantial amount of continuing disputation about the correctness of Selective Service classifications.

More fundamentally, however, it seems folly to put our heads in the sand in regard to a matter such as this simply because the proximate cause of the difficulty has, at least for a time, been removed. Given the history of the past few decades and the continuing unsettlement in the world, the likelihood of our country's returning to a partial draft system in which some but not all will be involuntarily called to military service is hardly remote. It is of course an old saw that those who do not learn the lessons of history are destined to repeat the mistakes of the past. This notion could hardly be more pertinent to the subject of this article and the Conference's recommendations. During the heat of an ongoing controversy it is difficult if not impossible to step back and attempt to perceive where one is erring and what changes should be made. In a time of relative repose, after the controversy has died down, a thoughtful nation should reflect upon what experience indicates are the lessons to be learned. If we learn nothing else from Vietnam, and I surely hope we learn more, we should at least conclude that the system used for determining who would be selected to serve involuntarily in the Armed Forces was unfair and capricious and, additionally, that judicial review of Selective Service cases was unnecessarily burdensome, generally ineffective, demonstrably inconsistent and, to a large extent, productive of a great deal of needless injustice. Disrespect for the System and the courts resulted; the whole matter produced scars in our national psyche that are likely to take years to entirely heal. Now is the time to learn from that experience and to make whatever recommendations for changes in approach and procedures that appear to be warranted. That, in essence, is why the Conference proceeded and why the piece which follows remains pertinent.

Commencing in 1965 and coincident with the large-scale employment of American military forces in Southeast Asia, greatly increased numbers of a new

3 The contents of this article do not necessarily represent the views of the Administrative Conference, except as they are stated in the formal recommendation set forth above.
generation were being called to discharge a compulsory military obligation for unclear purposes in a remote part of the world. Many members of this generation protested against the policies employed in Vietnam, and sought to demur from their conscription. Many, perhaps, objected primarily because of selfish reasons only indirectly related to foreign policy or moral considerations. Nonetheless, object they did, in numbers and ways that placed great strains on both the Selective Service System and the courts.

Antidraft and antiwar activity should not, it seems in retrospect, have come unexpectedly, given all the circumstances and a long history of draft resistance in our past.\(^4\) Unfortunately, the country's legal institutions were poorly prepared for the epidemic of draft resistance in the years following 1965. An archaic and unresponsive classification and induction machinery aggravated the national discord. In response to draft-card burnings and like manifestations of resistance, those who so violated the law were declared "delinquent" by the Selective Service System, and were ordered to report for induction without further regard for the exemptions and deferments accorded them by the very statutes they were charged with violating.

It was at this juncture that the courts moved actively into the arena. Starting with the Second Circuit's decision in *Wolff v. Selective Service Board*\(^5\) and through subsequent Supreme Court decisions, the courts have refused to allow the Selective Service System to run rampant without the availability of early and effective judicial review. As the volume of litigation grew apace, three significant problems began to unfold: 1) in view of the vagaries of the administrative process, and the nature of the legal issues, the courts' ability to do justice in Selective Service cases was rendered questionable; 2) since the majority of the cases were criminal, and as such warranted docket priority, the disposition of other federal court cases was delayed; and 3) an already overburdened and delay-plagued federal judiciary system was further clogged, perhaps critically. Between 1966 and 1971, criminal cases involving Selective Service law violations increased from 663 to 4,539. Extrapolation from available statistics as to civil litigation results in an estimated 400 to 500 such cases brought or pending in 1970; most of these took the form of suits to enjoin induction and in-service habeas corpus actions. Thus in a period of only five years, this general category of cases accounted for a rise from a negligible figure to over 5,000 actions in the federal courts per year.\(^6\) Nor has this burden on the courts diminished as the war has wound down. Draft cases pending increased from 733 on June 30, 1967, to 5,305 on the same date four years later, and to a Justice Department estimate of 8,900 as of July 1972. Any workable scheme that would reduce this burden on the judiciary would plainly be desirable, and possible avenues of approach in assuag-

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4 Draft resistance is no new phenomenon, as our experience in the Civil War (e.g., the Gotham Riots, which resulted in violence and over 100 deaths) and World War I, and to a lesser extent in World War II, indicates.

5 372 F.2d 817 (2d Cir. 1967).

6 Data as to criminal prosecutions is obtained from the Detailed Statistical Tables appended to the Annual Reports of the Director of the Administrative Office of the United States Courts for the years 1967-71. Data as to civil litigation is more difficult to obtain and is extrapolated from available statistics, as indicated in the text, coupled with a survey of these kinds of cases culled from the *Selective Service Law Reporter* and other sources.
ing its effects warrant exploration for both the immediate and long-term future.

Any consideration of judicial review of administrative actions must of necessity focus on the whether, the when, and the how. A failure to separate questions of standard, reviewability, ripeness (or timing), and method (or mode) has caused considerable confusion in the Selective Service context. It is unlikely that Congress could do much if anything about narrowing the standard of judicial review without eliminating judicial review entirely. In Selective Service cases, the "basis in fact" test is the applicable one" — only if there is no basis in fact for the registrant's classification should a court interfere. That standard, with some justification, has been called the narrowest known to the law. When and how a court should act is tied, in the Selective Service context, to questions of reviewability, although that is not necessarily the case in all administrative situations. Some factual determinations may (or should) be essentially unreviewable by the courts, but unreviewability always raises serious due process problems. The fact that this issue is submerged in more prosaic considerations in the Selective Service area, however, may create some important difficulties for registrants. Moreover, the timing and the method of judicial review are inextricably interrelated in Selective Service cases. Whether review should be prior to or after ordered induction is, in most cases, tantamount to whether it will occur in civil or in criminal proceedings, and may also bear importantly on its effectiveness.

In revamping the system for judicial review Congress has a variety of options to which it might turn — a specialized court for Selective Service cases and direct review of classification by the courts of appeals have been proposed. For reasons which appear in the following pages, however, it is my opinion that the soundest approach is to allow across-the-board preinduction review in the district courts. Any form that judicial review might take, however, is dependent initially on substantial procedural reform within the Selective Service System itself, a development on which a good start has been made but on which much still remains to be done."

I. Considerations Relating to the Adequacy of Current Review Procedures

Section 10(b)(3) of the Selective Service law was amended in 1967, as a legislative response to the Wolff decision. It reads in pertinent part:

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,

7 Estep v. United States, 327 U.S. 114 (1946).
8 Such a court would have exclusive jurisdiction over all Selective Service cases, with review of its decisions by the Supreme Court on certiorari, like the Emergency Court of Appeals created to deal with wage and price control disputes during World War II.
9 Under such a system, the courts of appeals would have exclusive review authority over Selective Service cases, as in the deportation case situation (see 8 U.S.C. § 1105a), with preinduction review the norm rather than the exception.
10 See pp. 1184-91 infra.
11 The Selective Service System, under the leadership of Director Curtis W. Tarr, abandoned any efforts at punitive reclassification and has sought to bring more uniformity into the System's processes by promulgating policy directives on important matters, such as implementation of recent Supreme Court decisions involving nonreligious conscientious objection; see pp. 1197-99 infra.
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. Provided,
that such review shall go to the question of the jurisdiction herein reserved
to local boards, appeal boards, and the President only when there is no basis
in fact for the classification assigned to such registrant.\textsuperscript{12}

In \textit{Wolff}, the Second Circuit found that two local draft boards acted without jurisdiction in reclassifying to I-A status students who had been engaged in antiwar protest activity. The statutory amendment sought to eliminate all preinduction judicial review in Selective Service cases. The Supreme Court's first brush with the problem came in \textit{Oestereich v. Selective Service Board}.\textsuperscript{18} There a registrant exempt from the draft as a divinity student pursued a preinduction challenge to his reclassification to I-A. As in \textit{Wolff} the reclassification was based on alleged delinquency in returning his draft card to the Government. With the Solicitor General confessing error on the use of the delinquency procedure to reclassify because of "activities unrelated to the merits of granting or continuing [the prior] exemption,"\textsuperscript{14} the Supreme Court evaded the thorny constitutional issues presented in finding the conduct of the reclassifying board "basically lawless." Despite the rather clear expression of congressional intent in amended section 10(b)(3), the Court expressly sanctioned resort to preinduction judicial review, at least in certain cases. That exception was applied and further extended in two subsequent cases—\textit{Gutknecht v. United States}\textsuperscript{15} and \textit{Breen v. Selective Service Board}.\textsuperscript{16}

\textit{Clark v. Gabriel},\textsuperscript{17} however, which was decided along with \textit{Oestereich}, significantly limits the availability of review prior to induction. In pertinent part, the Court there said:

In \textit{Oestereich} the delinquency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the Board. \textit{Oestereich}, as a divinity student, was by statute unconditionally entitled to exemption. Here [in \textit{Gabriel}], by contrast, there is no doubt of the Board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. . . . To allow pre-induction judicial review of such determinations would be to permit precisely the kind of "litigious interruption of procedures to provide necessary military manpower" . . . which Congress sought to prevent when it enacted Sec. 10(b)(3).\textsuperscript{18}

A recent decision confirms the \textit{Gabriel} limitation of \textit{Oestereich}, a distinction implicitly accepted in several Supreme Court cases decided in the interim.\textsuperscript{19} In

\begin{footnotesize}
\begin{enumerate}
\item[14] Id. at 237.
\item[18] Id. at 258.
sum, while carving out an exception to section 10(b)(3)'s preclusion of preinduction review for a limited category of cases, the Court at the same time approved of the statute's application to a significant number of Selective Service cases, even where an illegally punitive reclassification was involved.

A. Section 10(b)(3) and Criminal Prosecution for Failure to Be Inducted

Leaving the matter of assessing the validity of challenges to a Selective Service classification in the main to criminal prosecutions — as Clark v. Gabriel does — presents serious problems for registrants in terms of fairness and justice. A criminal case is a crude and ineffective device for this purpose for a number of reasons. For one thing, some courts have simply refused to convict violators of the draft laws and some have done no more than give suspended sentences for such violations, no doubt reflecting the judges' personal biases about the Vietnam conflict and the draft system. Conversely, other courts have applied the criminal process with a vengeance in this area and have meted out the maximum possible penalties. The effect of this is not simply a lack of uniformity in application of the laws depending on the part of the country, the judge who handles a particular registrant's trial, etc. Many feel that what happened in the late 1960's was to a significant extent a perversion and prostitution of the criminal justice system in this country because of an ideological chasm about the Vietnam situation. These developments disserved the System and the country in general and provide a strong argument for preinduction judicial review. Preinduction review would not eliminate all criminal cases, for some who lost in their civil suit would undoubtedly still choose not to submit to induction. But the current use of criminal process fails to clarify the substantive rights of registrants at a sufficiently early point in time. In many situations registrants are forced to commit a crime in order to challenge their classification. A great nation can and should remedy such an inconsistency.

Another aspect of utilizing the criminal process borders on the farcical: bluntly stated, the laws do not lend themselves to effective enforcement through the criminal process, at least given the existing administrative arrangement. For example, in fiscal year 1970 some 30,000 reported violations of the Selective Service laws resulted in only some 3,800 criminal prosecutions, mainly as the result of procedural errors by System officials and also in part because of prosecutorial discretion. Surely such selective and inefficient enforcement is rife with inequities. Additionally, in light of Oestereich, an alternative to the criminal prosecution route is available to a degree — where violation of the statute by the System is clear-cut and, ironically, where it is least needed to protect a registrant's fundamental rights. But, in view of Clark v. Gabriel's upholding of section 10(b)(3), such an alternative is not available in that whole array of difficult and ambiguous situations where administrative fact-finding has taken place. The result is that those registrants most in doubt about the validity of their claims and their status generally are forced to guess about this matter without the bene-

fit of a preinduction clarification by the judiciary, while those who could more confidently refuse to report for induction and then be vindicated in a criminal proceeding are allowed preinduction review. As Mr. Justice Stewart has pointed out, the effects of the Court's reading of 10(b)(3) are, to say the least, curious.\(^{20}\)

From a fairness standpoint, the inconsistency in approach as to preinduction review resulting from the Supreme Court decisions provides still more urgent reasons for adopting a general alternative to induction under threat of prosecution. Over a four-month period in 1971, less than 10 per cent of all Selective Service cases were brought into the courts through the preinduction review route; about 25 per cent of the cases found their way to the courts through the medium of habeas corpus actions; the remaining cases (with a few exceptions) were criminal prosecutions for refusing induction. Overall, the Department of Justice estimates that approximately 700 preinduction cases were filed during the period from June 1967 to October 1970, and relief was granted in about 180 of them. Thus, while the chink in the armor of section 10(b)(3) is not monumental, neither is it inconsequential. It is simply an anomaly that the criminal process need not be endured when the board's action can be shown to be clearly illegal but not so if the situation is otherwise. The availability of preinduction review according to these criteria is cold comfort to all but the most demonstrably wronged registrants.\(^{21}\)

Moreover, under the present system of defense to a criminal prosecution, postinduction habeas corpus, and limited preinduction review, justice may well be denied to poorly informed registrants who are unaware that they have justifiable and possibly meritorious cases. Accurate legal information about the Selective Service System, despite considerable recent efforts on its part and development of the *Selective Service Law Reporter*, has not been readily available to many registrants, especially those of lower socioeconomic classes and those living in rural areas.\(^{22}\) It is more difficult to evaluate the merits of a registrant's case under the present system of judicial review than if preinduction review were generally available, in view of the timing, knowledge of the cases available to the court, and like factors, although this should be ameliorated to a considerable extent by the boards' following new procedural requirements adopted in 1971. Some of the Selective Service regulations are quite technical and, despite the specialization of a few lawyers in major cities, a substantial Selective Service law bar has not developed, presenting problems in finding competent legal advice in some situations. While this problem would remain to a considerable extent were preinduction review made generally available, the opportunity to obtain an early determination by a court would assist registrants significantly.

More fundamentally, common sense and elementary notions of justice

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\(^{21}\) In its 1971 amendments to the Military Selective Service Act, Congress refrained from disturbing the *Oesterlich-Gabriel* delineation. One wonders whether this signifies, on the one hand, concern for how any further attempts to restrict reviewability would be dealt with by the courts, or whether Congress' failure to react is an indication of satisfaction that preinduction review would be available only where substantially irrelevant because of procedural reform at the agency level.

indicate that Selective Service registrants should be spared having either to sub-
ject themselves to criminal prosecution with the stigma attached thereto or,
alternatively, submit to induction and then seek habeas corpus relief, in order to
obtain judicial review. In no other significant area of the law is a person
required to commit a crime or recant an oath in order to obtain judicial review
of his claim against a government agency. To quote one observer, "It is cor-
rupting. For those who cannot claim religious objection . . . [successfully], only
dishonesty pays. Claim to be a homosexual: be one. Claim to be an addict:
be one. Claim to be psychotic: become. For in the process pretense can become
reality." Surely no such requirement is imposed in the administrative context
generally. For example, contrast the handling of economic interests allegedly ag-
grieved by agency decisions:

Where the legal issue presented is fit for judicial resolution, and where a
regulation requires an immediate and significant change in the plaintiffs'
conduct of their affairs with serious penalties attached to noncompliance,
access to the courts under the Administrative Procedure Act and the De-
claratory Judgment Act must be permitted, absent a statutory bar or some
other unusual circumstance, neither of which appears here.

Statutory bars undoubtedly exist in the Selective Service context, but in the light
of what will be said later, it becomes increasingly difficult to find those "unusual
circumstances" which justify a continuation of the present approach to draft
law enforcement. What is good enough for Abbott Laboratories, or any of the
multitude of corporations affected by administrative action, should a fortiori
be good enough for and accorded to those involuntarily required to serve, fight
and possibly die in our nation's Armed Forces.

As has been pointed out, there is, even within the present framework, a
great lack of uniformity in the application of the law to registrants. Unfair-
ness is bred as well by irreconcilable and ambiguous court decisions as by arbi-
trary local board actions, and it engenders cynicism and disrespect for the entire
system. And something should be said about the fact that draft proceedings may
well be the first time that large numbers of the young citizens of this country come
into significant contact with an arm of "their" government. This country's
recent Nobel laureate, Kenneth Arrow, has written:

Like compulsory chapel or church attendance, which is its closest equivalent,
the draft has a further disadvantage in that while it may at best produce a
grudging and hostile acquiescence in the methods of the society, it frequently
closes the mind to any alternative or to any reorganization of information.
The psychological strains which are produced by compulsory service of any
kind naturally result in displaced aggressions rather than in any reform of
the system which created them. Consequently the draft by the kind of

23 As discussed subsequently (infra, pp. 1173-76), judicial review through postinduction
habeas corpus is rife with problems as well. An individual pursuing such a route must change
status from civilian to military, possibly compromise conscience, perhaps never attain a fair
judicial determination, and, in either expedient, possibly suffer reprisals from what might be
unnecessarily harsh official reaction during the prejudgment period.
indoctrination and hidden frustrations which it produces may be an im-
portant factor in preventing that reevaluation of the national policy and
the national image which is so essential in the modern world if the national
state itself is to survive. The draft therefore is likely to be an enemy of the
survival of the very state in the interests of which it is supposedly involved.\textsuperscript{26}

We must ask ourselves if this might not have been the case in the Vietnam-era
draft. And we must ask what can and should be done to revise the system so
that this will not happen again. Review in criminal cases is surely not the answer.

**B. Petitions by In-Service Personnel**

The habeas corpus proceeding has become an accepted method for in-
service complainants to challenge their classification and involuntary induction,
and can of course be brought immediately upon being drafted. It has nevertheless
proved to be insufficient in many respects. In evaluating the adequacy of habeas
corpus in this context, it is at the outset important to note what section 10(b)(3)
does not say and what the court has not held about it. That provision makes no
reference whatever to the availability of habeas corpus proceedings as a means of
testing the validity of a Selective Service classification. In appearing to limit any
such contention to presentation as a defense in criminal actions, the statutory lan-
guage nonetheless speaks of the registrant's "affirmative or negative" response to
an induction order. Since a criminal prosecution would obviously not lie where a
registrant had responded affirmatively, Congress must have had habeas corpus
proceedings implicitly in mind when it enacted section 10(b)(3), despite the
absence of any other statutory language in that regard. Moreover, as the Su-
preme Court has on several occasions noted, and the Government has con-
sistently conceded, in view of the constitutional prohibition on suspension of the
writ of habeas corpus Congress should not be regarded as having attempted to
do so in enacting section 10(b)(3). Indeed, the legislative history of the statute
indicates recognition of the traditional view that those in military service are
sufficiently restrained of their liberty so that habeas is available.\textsuperscript{27} However,
availability and effectiveness are two very different matters.

Courts have traditionally adopted a laissez-faire attitude when "inter-
ference" with military procedures has been at issue, and thus have granted relief
to an in-service complainant only infrequently. Perhaps the major reason for
the indifference of the courts was the highly emotional aura which clouded
matters relating to the national defense. At one point in time there was a widely
held viewpoint that if the courts began to overturn decisions of the Selective
Service System, the snags in the draft machinery and the resulting effect on our
military manpower would leave the country defenseless. During the 1960's,
however, some courts seemed to become disenchanted with arguments such as
this and liberalized decisions began to appear, at least occasionally. But the


trend was not a universal or uniform one, and the resultant patchwork further complicated judicial predictability in an already overly complex area.

One trouble spot in the habeas corpus proceeding which has produced a fair amount of litigation is the exhaustion of administrative remedies doctrine. A principle of comity rather than a limitation on federal jurisdictional power, this doctrine establishes a requirement that all administrative remedies be exhausted before review by a federal court will be allowed. The weight of authority, though, holds that those remedies do not have to be exhausted if irreparable harm will result.\(^{28}\)

In the in-service habeas corpus context, one specific problem with this "exhaustion" or "delayed jurisdiction" concept has been with the appeal to the Board for the Correction of Military Records (for whatever branch of the service in which the petitioner serves). Most courts have held that this is not an administrative remedy which must be exhausted before habeas will lie.\(^{29}\) However, the Ninth Circuit—which for obvious reasons was the most important court of appeals during the Vietnam conflict—held in *Craycroft v. Ferrall*\(^{30}\) that for the claimant to get his day in court he must first appeal to the Board for the Correction of Military Records. The *Craycroft* decision was subsequently vacated without opinion by the Supreme Court,\(^{31}\) since between the time the case was decided by the Ninth Circuit and the time it found its way to the Supreme Court, the Department of Justice filed a memorandum which clearly indicated its position that administrative remedies had been sufficiently exhausted for purposes of filing a habeas corpus petition without resort to those service boards.

The action taken by the Department of Justice regarding *Craycroft*, as well as that of the Supreme Court, apparently prompted the Ninth Circuit itself to modify its earlier stance.\(^{32}\) This has not entirely cleared the air, though, because prior decisions of a court of appeals can only be overturned by the court sitting en banc. Several problems thus still remain in regard to the exhaustion notion: (1) ambiguities may still arise from the Ninth Circuit’s not having expressly overruled *Craycroft*; (2) the Department of Justice could alter its former position with the influx of new personnel and administration; (3) the individual, in exhausting his in-service remedies, may serve out his military obligation before he obtains judicial review of an unfavorable decision rendered by his board.\(^{33}\)

A second obstacle to the smooth working of habeas corpus proceedings is

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\(^{30}\) 408 F. 2d 587 (9th Cir. 1969).


\(^{32}\) See Bratcher v. McNamara, 448 F.2d 222, 224 (9th Cir. 1971).

found in the jurisdictional requirement that federal courts grant the writ of habeas corpus "within their respective jurisdictions." What happens frequently is that a claimant will be serving his military obligation far from his home base and commanding officer. This can effectively eliminate any chance of his obtaining judicial review because no proper defendant (such as a commanding officer) resides within the territorial jurisdiction of the court.

In *Schlanger v. Seamans* the petitioner was in Operation Bootstrap, at Arizona University, but his home base and commanding officer were in Georgia. He sought habeas corpus in Arizona, naming the Secretary of the Air Force, the Georgia Commanding Officer and the AF ROTC Commanding Officer at Arizona State as defendants. His petition was denied, even though the majority found indications of custody adequate for habeas corpus jurisdiction, because none of the proper defendants were residents of Arizona. The district court, therefore, had no power to entertain a habeas corpus petition in such circumstances; jurisdiction would attach, presumably, only in Georgia.

The effect of the holding in *Schlanger* was reduced, but to an uncertain degree, by the subsequent decision in *Strait v. Laird*. In that case, the Court cut through the fiction of an alleged jurisdictional defect in holding that a California district court had power to hear a habeas corpus application filed by an Army reservist on inactive duty who was domiciled there despite the fact that the individual was under the nominal command of an officer located in Indiana. In distinguishing *Schlanger* the Court pointed out that the individual's application for a conscientious objector discharge had been in fact processed by military authorities in California. Thus, the Court concluded, "Strait's commanding officer is 'present' in California through the officers in the hierarchy of the command who processed this serviceman's application for discharge."

The uncertain breadth of the *Strait* holding becomes apparent when a serviceman is ordered to report to another base. Is the petitioner still considered to be in custody within the jurisdiction where the habeas corpus action is pending? If there has been no demonstrable administrative action taken on a serviceman's application for discharge, will the serviceman's petition be governed by *Schlanger* or *Strait*? Even if there has been no transfer, it is not uncommon for the habeas proceeding to last six months. Such an eventuality restricts the usefulness of the petitioner to the military, and creates just the sort of judicial interference with military affairs which Congress has assiduously sought to avoid. Thus, the jurisdictional problems pertaining to habeas corpus create uncertainty and extreme inconvenience for all parties interested in Selective Service law enforcement.

Beyond the exhaustion and jurisdictional problems which inhere in habeas corpus proceedings, their inadequacy stems from other factors as well. Habeas corpus is *no remedy* at all for genuine conscientious objectors. The acceptance of induction is squarely in opposition to the grounds on which the truly sincere C.O. bases his beliefs; such an individual will refuse induction and accept conviction and possible imprisonment rather than submit himself to even the most

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37 Id., at 345.
limited military supervision and training. In this regard, we need only recall the sad experiences of members of one particular religious sect under the Vietnam draft—a significant percentage of those actually imprisoned for refusal to be inducted in the 1960's were Jehovah's Witnesses. Additionally, given the extraordinary character of the habeas remedy, if a registrant refuses to submit to induction at least he is certain he will have his day in court; however, if he submits and pursues his habeas remedy, he cannot be sure of ever obtaining a forum. Moreover, the courts are limited in their review of classifications to examination of the administrative record. From this the court must ascertain whether or not there is any basis in fact for the classification. A federal court may not be any more qualified than Selective Service boards to make some of the determinations which go to the merits of an exemption or deferment claim. But one must consider the innate fairness of the procedures which provide the information to which the court is restricted in applying such a narrow standard of review. In many cases the habeas court simply will not have effective access to the bases of these administrative determinations.

Finally, one cannot minimize the drastic change in life style which resort to the habeas remedy forces on an individual. He must, in effect, accept a temporary shift from civilian to military life in order to challenge his classification, with the inconvenience and possible deception that this necessarily involves. Petitioning for habeas corpus, in this context, also involves the effective recantation of an oath taken at the time of induction. This fact alone should make the habeas approach reprehensible in the eyes of the law. In addition, "[t]here is little assurance, moreover, that the military will treat [petitioner's] efforts to obtain the writ with sympathetic understanding," as Justice Murphy noted in *Estep v. United States.*

For all of these reasons, reliance upon the habeas remedy can produce immeasurable psychological effects on both the petitioner and the society which has made him. In short, in many situations it is either ineffective or unjust; in some circumstances it suffers from both of these defects.

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40 As indicated previously, habeas corpus ordinarily lies where the registrant is stationed, while his records are likely to be stored at his local board. Given the nature of military life, these two locations are prone to being quite far apart, complicating the court's problem of fairly assessing his claim. Many courts exhibit a rather negative attitude toward such suits in any event; the individual is in the service and has already changed his status in this respect. Maintaining the status quo, it might appear to a court, is achieved by leaving the individual in his present situation—whatever the circumstances of his getting there.
41 327 U.S. 114, 130 (1946) (concurring opinion).
42 Additional complicating factors include potential mootness as well as the cost, complexity and delay that habeas actions involve. An individual might simply not be able to afford litigation on a private's pay. The complexity of the case may make finding effective legal representation at a strange and new location difficult if not impossible, and the habeas proceedings (together with any attendant appeals) may occupy most if not all of the time the individual is required to serve. Moreover, during this time in the military his life is likely to be unpleasant, for he is the "oddball" or "troublemaker"; he will probably engender animosity among his superiors and find little understanding, if not hostility, from his peers. His existence is likely to be a lonely one and his tasks menial and demeaning; the psychological pressures to conform would be great. Figures on the number of in-service suits not brought, or initiated and then dropped, are not available. The numbers are likely to be significant; in short, there are strong practical considerations at work to deter the bringing and pursuing of habeas actions in the Selective Service context.
43 Resort to mandamus, as an alternative form of relief, while attempted with increasing
II. Pros and Cons of Preinduction Judicial Review in All Selective Service Cases

Few would seriously maintain that the Selective Service System seeks to intentionally deprive registrants of essential procedural protections when they attempt to challenge their classifications administratively and in the courts. Yet it is nonetheless true that the System has traditionally taken a niggardly approach to the matter of review of classification determinations. Indeed, it is fair to say that individuals affected by System decisions have been accorded the least amount of procedural protections, both in regard to administrative handling and judicial review, of any persons subject to the authority of a major administrative agency. The justifications for such a "stingy" approach with respect to administrative processing and judicial review are generally grounded on the System's contention that the conscription process must be free from delay and interruption if it is to serve the country effectively. Indeed, this was the major rationale behind the congressional proscription on preinduction judicial review in the 1967 amendment of section 10(b) (3). This rationale, then, appears to present the strongest reason for continuing a system under which preinduction judicial review is generally unavailable and a registrant seeking to contest his classification must do so either through defending a criminal prosecution for failure to report for induction or by bringing a habeas corpus (or similar proceeding) after grudgingly submitting to induction.

Concern about litigious interruptions of the conscription process might well have considerable substance in an all-out war situation where virtually every able-bodied younger male was required to serve his country in the Armed Forces. It has significantly less plausibility in a limited-war context such as we have been involved in for the past decade or so. As a matter of fact, the Marshall Commission specifically recognized this important factor in entitling its report "In Pursuit of Equity: Who Serves When Not All Serve?" Simply stated, we can afford more due process when demands of national security are less pressing; given all the circumstances, we should extend procedural protections to individuals affected by Selective Service System determinations to the maximum extent possible consistent with the national interest in a ready supply of manpower for military service. In deference to the concerns about the effects that the availability of preinduction judicial review might have in an all-out war situation, it would probably be wise to provide, should such legislation be adopted, that entitlement to such judicial review could be suspended upon declaration of
a national emergency by the President so long as Congress did not disagree with a stated period of time, say 30 days. In this manner a mechanism would be provided to avoid any practical problems that a system of freely available preinduction judicial review might be thought to have in a total conscription kind of situation.

There is a more fundamental difficulty with the rationale offered to support the preclusion of preinduction judicial review. Contrary to the implicit assumption of Congress, the System and apparently the Executive branch, there are delays and interruptions necessarily and very much present in the process as it presently is functioning. One who refuses to report for induction and is subjected to criminal prosecution is not available for military service and someone else, who might not otherwise be called, must go in his place. It is true, of course, that some of those who refuse to report might do likewise if they were given preinduction judicial review and had their claims rejected. Nonetheless, it seems likely that, after unsuccessful resort to freely available preinduction review, many registrants who had had their day in court would then agree to submit to induction instead of face an ensuing criminal prosecution. And surely the present system cannot be justified on the ground that many who have meritorious claims for exemption or deferment are effectively coerced into waiving them because of the limited procedural alternatives available to them. Such a justification would condone a system that is unjust and unfair, since some who should not under the law be required to serve in fact end up doing so. Moreover, and importantly, the greatest hardship in this regard is understandably inflicted on the least affluent and poorly educated, while the rich and the knowledgeable pursue whatever remedial paths are available to them.

The alternative of submitting to induction and immediately challenging one's classification in a habeas corpus proceeding has a similar potential for delay and interruption of the functioning of the conscription process. Indeed, it may be even more insidious in this regard, for the Armed Forces at least know that an individual who refuses to report will be unavailable for military service. One who submits to induction and then proceeds to litigate the question whether he should be in the military is generally of little use to the Armed Forces. Most courts will act to preserve the status quo pending determination of the validity of the claim; the individual usually cannot be freely transferred to another base or overseas; he is less available for military duties than for processing his habeas case and the preliminary administrative steps related thereto. In short, resort to habeas proceedings by substantial numbers of inductees presents significant problems not only for the individuals involved, as indicated previously, but is hardly a panacea for the Armed Forces. And, assuming that some of the habeas cases eventually result in the judicial upholding of the inductee's claim, the result is that he must be released from the military after having served for a period in which he is likely to have contributed little if anything. Thus, from a pragmatic point of view the present system does not avoid delay and interruption, as is commonly suggested. Rather, it contributes to delay and interruption as

much if not more than a carefully worked out and administered system allowing for readily available preinduction judicial review.

All things considered, then, a number of reasons argue for preinduction judicial review being made freely available to all registrants, despite the various arguments that have been made against such an approach. Actions of the Selective Service System in classifying men and in rejecting their claims have important and lasting effects on individual lives. Yet we have consistently taken a niggardly and narrow approach toward both administrative consideration and judicial review. Such an approach might have been justified by the circumstances in which it arose—an all-out wartime situation in which every able-bodied young man was needed for military service and the administrative load on the System was phenomenal—and might again be necessary in such circumstances. Special provision should probably be made for suspension of the more elaborate and time-consuming procedures suggested here if such a situation should recur. But in the cold war and limited conflict kinds of situations such as we have been experiencing during the past several decades, an approach that allows for more careful administrative scrutiny and for earlier judicial review seems not only workable but warranted, particularly when comparison is made with the approaches taken in other administrative fields. Prior to 1971, a person was accorded fewer procedural rights in the Selective Service field than in any other administrative context. And in no other significant area is a person required to commit a crime in order to obtain judicial review of his claim that the agency had acted improperly or illegally. In short, granting the weight that the contrary arguments have, on balance there seems little if any reason for us to continue on such an unjustifiable course. As Mr. Justice Stewart aptly pointed out in his dissenting opinion in *Oestereich*, the very people who need preinduction judicial review the most are those whose claims are unclear and debatable; those who are rather sure they will be vindicated in the end can more safely refuse to report for induction or submit to induction and then bring a habeas corpus action. Moreover, the inequities that have resulted between the rich and the poor, the educated and uneducated, the white and the nonwhite from the system as it has been (and to a somewhat lesser extent still is) administered (so far as availability of legal advice and assistance, making of conscientious objector and hardship deferment claims, etc.) are inexcusable and should be eliminated to the greatest extent possible. Allowance of across-the-board preinduction review moves imperfectly in that direction.

It should be made clear that in no wise is it suggested that preinduction judicial review is constitutionally required. The Court settled that rather clearly in *Clark v. Gabriel,* as discussed earlier, and no decision since has impaired that holding. Indeed, the recent decision in *Fein v. Selective Service Board* confirms and builds upon *Gabriel.* Nonetheless, it should be apparent that what is minimally required constitutionally is not a necessary measure of sound and fair procedure. From the registrant's point of view the presently available alternatives for obtaining either administrative or judicial review of his classification are un-

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48 393 U.S. at 251-52.
satisfactory in many respects. Both criminal prosecution and habeas corpus can result in a restriction on an individual's freedom in a variety of ways, in a significant interruption of future plans, in loss of employment, in a daily life clouded with uncertainty about the outcome of his case, and in a reduction in his attractiveness to potential employers (especially the government). Moreover, the period of uncertainty—and possibly unwarranted military service—is usually substantial, since the normal district court proceeding can be expected to last about six months, and, if the case is appealed, the time can extend up to two years or more. If preinduction review were generally adopted there would of course still be some delay and uncertainty. But the registrant's status would be finally determined, and the outline of his legal and moral options would be clearly set out in a comprehensible context following full and complete consideration of his claims. That sort of approach would be eminently more consonant with general notions of due process, even though not constitutionally required.

In view of the changes in Selective Service procedures whereunder individuals in the prime age group with low lottery numbers know rather long in advance that they are likely to be drafted and are given their preinduction physicals at a rather early date, a procedure could rather easily be worked out which would require the filing of preinduction suits immediately upon determination of a registrant's physical fitness. Were this determination made some six months or so prior to the time an individual would actually be expected to report for induction, a district court proceeding could probably be completed prior to the indicated induction date. If the court rejected the registrant's contentions and upheld his classification no delay would result from allowing preinduction review, unless the registrant took an appeal. In that case the court could determine whether to grant a stay pending appeal on the same bases that are ordinarily applied in equitable actions, relying principally on what the chances for success on appeal appeared to be. In that manner the registrant would at least get a determination by one court prior to having to decide whether or not to submit to induction and yet little if any delay would result. Such a procedure would obviously be more palatable to challenging registrants and would hopefully result in a significantly greater degree of respect for the processes of the System and the courts. And such a procedure would, in the long run, benefit the System and the Armed Forces as well, for there would in fact, not simply in theory, be less litigious interruption of the processing of manpower for military service, and less interference with the ongoing operation of the Armed Forces as well. Simply stated, time, expense and effort will be saved by the avoidance of duplicative inductions and unnecessary litigation.

Concentration on the prime age group—registrants who are 19 years of age—and adoption of the lottery system along with a uniform national call should also have significant effects on the level of litigation likely to result. For one thing, there will probably be considerably less questioning of one's obligations (including military service) at this particular stage of an individual's life. For another, there are probably relatively fewer teenagers, as compared with those in their 20's, who would be inclined to initiate a lawsuit challenging their classification in the first place. Many are probably still subject to the constraints of parents who tend to
be more traditional in their outlook than their offspring and who would be unlikely to want to bear the expense of a lawsuit. Of course registrants in many areas will have available to them the services of draft counselors and other groups which have developed to assist individuals in their situation. Nonetheless, for the reasons mentioned the overall amount of preinduction litigation is likely to be considerably less than the System might fear, particularly if its own procedures are further improved.

Admittedly, the timing of freely available preinduction judicial review and the form it should take—given a substantial revision of the System's procedures short of an organizational reworking of its machinery—remain sticky problems. They are, however, probably less difficult problems if such reforms are accomplished than they would be otherwise; indeed, as discussed subsequently, if such reforms are not effected—and many already have been—there is little if any approach that will measurably assist in reducing the burdens attendant to judicial review.

An argument sometimes made against allowing preinduction review on a full-scale basis is that this would result in a clogging of court dockets. This notion suffers from the same fallacy as the one about avoiding delay and interruption of the conscription process. Court dockets are just as clogged by criminal prosecutions and habeas corpus cases as they would be by preinduction suits, as the figures noted earlier\(^\text{50}\) indicate. With the winding down and ending of the war the level of cases will stabilize and start to decline, as a reflection of the significantly smaller draft calls of the past several years. But the reduction in the numbers of those drafted would of course be reflected in the level of preinduction litigation no less than in other forms. One interesting piece on the whole subject concludes that the court-clogging argument is without substance, and, in pertinent part, states as follows:

The argument that the dockets of the courts will be clogged with the bills of litigious registrants asserting frivolous claims is unpersuasive. The truly frivolous claims may be dispensed with quickly by the courts. Furthermore, as the value of litigation as a delaying tactic decreases, the likelihood of a registrant's bringing suit increases with his belief in the merits of his claim. An allegation that is incapable of early dismissal is precisely the type of claim that is worth the inconvenience of the agency and the time and effort of the courts.\(^\text{51}\)

It has also been suggested that to allow preinduction review would create confusion in the whole Selective Service area since divergent court opinions would necessarily result. This, the argument goes, would in turn create uncertainty in the minds of System officials and reduce respect for the System and its determinations. Again, this position suffers from the same general defect as the ones discussed above. Preinduction judicial review is no more likely to create legal confusion in the area than other modes of judicial review. Conflicting court decisions can be (and have been, as the earlier discussion indicates)

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\(^{50}\) See p. 1170 supra.

rendered just as easily in criminal cases and habeas proceedings as in preinduction suits. As to all classes of cases the appellate process would hopefully resolve most of the inconsistencies and differences, and this would occur sooner, not later, if preinduction review were generally allowed. Moreover, improvement of the administrative processes and extensive publication of uniform guidelines are likely to help reduce this amount of inconsistency. Allowing preinduction review at least gives a registrant a chance for a judicial determination (and appellate review in appropriate circumstances) prior to his having to take a definitive step in regard to his pending induction. Apparent inconsistencies are endemic to a judicial review system in any event; thus, this argument hardly provides a sound basis for rejecting preinduction review.

A shift to general availability of preinduction review would resolve existing incongruities and inconsistencies in the law which have, on close inspection, little reason to support them. As a result of the Supreme Court's decisions in the Oestereich and Breen cases, the 10(b) (3) ban on preinduction suits has significant loopholes. Moreover, in enacting the 1971 statute extending the draft and amending the Act in various respects, Congress did not see fit to rewrite section 10(b) (3) or otherwise indicate its disagreement or displeasure with the Court's holdings in those cases. This may result in something short of legislative ratification, but since Congress has tolerated a limited undermining of its effort to rule out preinduction review, the argument that an across-the-board ban is what Congress intended and obtained is unavailing to those who oppose preinduction review on the basis of principle. Across-the-board preinduction review undoubtedly involves a sounder and more acceptable approach to the thorny problem of clarifying a registrant's obligations before he is required to take the definitive step of refusing or accepting induction. And it would achieve this purpose without significant detriment to the System, the Armed Forces or the courts. Arguments against its adoption, as has been demonstrated, are misconceived and unpersuasive. The patchwork system of judicial review that presently prevails is a corrupt and inefficient one; it should be laid to rest and preinduction review—through civil actions brought by registrants in federal district courts—should be substituted in its place.

III. Changes in the Administrative Handling of Selective Service Cases

It is the considered conclusion of this writer that no adjustment of the method or timing of judicial review is likely to be efficacious in significantly ameliorating the burdens placed on the judiciary by the Selective Service litigation, or in substantially enhancing the overall fairness of the process for registrants, unless sweeping changes are made in the related administrative machinery. Some will suggest that extending preinduction review to all registrants would not help measurably since 1) the scope of review is very narrow in any event, and 2) many registrants simply seek to defy the law and such a move would merely delay criminal prosecutions in their cases. As to the former, while the scope of review of Selective Service determinations under the "basis in fact"
test is indeed narrow, this hardly argues against preinduction review, as has been shown. As to the latter point, the fact that preinduction review might provide some registrants with another avenue for delay in seeking to avoid their obligation of military service should not be a reason for denying the benefits of such an approach to the vast majority of registrants who would not abuse it. Frivolous claims could be handled expeditiously and, as indicated earlier, if judicial review is properly administered in regard to timing, little if any delay should result, particularly where the cases have been handled more effectively at the administrative levels. But for a preinduction review system not to interfere significantly with the ordinary operation of the System, there must be proper management in a more general sense. Indeed, if procedural reforms are accomplished so that the administrative process is operating effectively, very few cases should be subject to judicial reversal and relatively few should cause the courts great difficulty. Indeed, the more effective and fair the administrative handling of a case, the less likely it is that judicial review of any kind will even be sought—except by those whose claims, since without merit, can be disposed of readily.

Revision of the System's processes and procedures is thus, in my view, intimately and inextricably related to the problem of judicial review. Others have written at great length about the System and its processes, in legal periodicals, in separate books, and otherwise. There is not, it is fair to say, a complete congruence of opinion, but the overriding sentiment seems to be that the System's machinery is substantially outmoded in its organization and operation. Sweeping changes in this regard, most seem to agree, are necessary for the System to be effective in its task of raising manpower for our Armed Forces within congressional guidelines which presumably reflect national policy while treating, and perhaps more importantly appearing to treat, all registrants fairly. If the System does it job better it will 1) reduce the incentive to seek judicial review since it is unlikely to produce anything but delay and prolonged uncertainty in individual cases, and if these are the registrant's goals, a more effective administrative operation will enable courts to deal expeditiously with the rather frivolous cases in which this is the principal aim, and 2) enable the courts to do their job of review more efficiently since they will a) be working with substantially more informative administrative records than they are getting now and b) have more confidence in the System's decision-making processes and thus the decisions arrived at through those processes.

A number of suggestions for thoroughgoing reform of the Selective Service System have been made by the various commissions and individuals who have studied it during the past few years. It is my view that the approach proposed by the so-called Marshall Commission includes most of the important features that such a revision should entail, and that the legislation proposed by Senator Kennedy (which incorporates many of the Marshall Commission recommen-
dations, although it is less sweeping in scope) provides the best way to deal with the problem. There are, however, sound reasons for proposing a significantly more modest reform of the System than that proposed by the Marshall Commission (and even than that sponsored by Senator Kennedy). One is that it is simply easier to effect small changes than large ones. Second is that many if not all the necessary changes could be made through executive order and the promulgation of revised regulations, without the need for congressional action; indeed, steps in this direction have already been taken, such as the executive elimination of occupational deferments and having registrants report for physically before induction orders are issued. Third, and perhaps most significant, is the political impracticality of any substantial revision of the Selective Service System within the near future, against the background of the so-called Gates Commission's recommendation for an all-volunteer Armed Forces, 54 abandonment of the draft with the end of the Vietnam conflict and the impending expiration of induction authority, and a rather consistent congressional resistance to changes in the System as it has been organized in the past. Moreover, there are significant economic factors involved in any total reworking of the System's machinery.

A. Recent Improvements and Their Effect on the Feasibility of Preinduction Review

Many of the needed modifications in the administrative processes have, as a matter of fact, already been accomplished. Changes in the statute and regulations effected in late 1971 are of significance in two central respects. First, they result in a reduction of the number and kinds of discretionary determinations that Selective Service officials are called upon to make, and thus cut down on the potential number of situations in which judicial review of such determinations might be sought. Second, they provide for a substantial number of procedural protections for registrants that were not previously accorded, and thus, by improving the fairness and reliability of the administrative process, make efforts to obtain judicial review less likely and provide a sounder basis for such review in cases where it is in fact sought.

Although authorized by section 6(h) of the Act 55, occupational deferments were dispensed with by presidential order in April 1970, along with dependency deferments for paternity. Thus, even before enactment of the 1971 statute, no new occupational deferments were available and the range of dependency deferments was reduced considerably so as to include only bona fide hardship situations. Moreover, as part of the 1971 statute, section 6(h)(1), which provided for college student deferments, was entirely repealed. That provision, although not in terms requiring a discretionary determination by local and appeal boards, encompassed a significant number of draft-eligible individuals (between 1.5 and 2 million) and had been the source of continuing controversy between registrants.

and the System. Accordingly, the types of discretionary determinations that System officials are required to make in classifying registrants have now been reduced to two principal ones: 1) conscientious objector and 2) dependency (hardship) deferments.

This is not to suggest that questions will no longer be raised about other sorts of determinations; some registrants may challenge decisions relating to ministerial exemption claims, sole surviving son exemption claims, deferments for membership in reserve components, and determinations involving physical fitness for service. Such claims are not likely to be numerous, however, and their resolution will not ordinarily be a matter of great difficulty for the local and appeal boards. For the future, then, most of the contested situations will involve one of the two aforementioned matters: conscientious objection and dependency deferment claims. As to the latter category the system has a relatively well-developed set of considerations that have apparently lent themselves to generally consistent and comprehensible application by the local and appeal boards, although some complaints have been made about the asserted lack of "definite objective criteria." While the decisions in such cases are in terms discretionary, the standards delineated in 32 C.F.R. § 1622.30 (1972) and related local board memoranda seem to have been spelled out sufficiently so as not to be the source of a significant number of disputed claims. In any event, focusing the draft on the prime age group of 19 should result in a greatly decreased number of hardship deferment claims, and it appears reasonable to assume that this approach will continue to obtain.

Unfortunately, the same cannot be said about the standards governing the granting or denial of claims for conscientious objector status. Decisions and opinions of the Supreme Court in the leading cases of United States v. Seeger and Welsh v. United States have stretched the statutory language almost to the breaking point, have generated an extensive amount of literature attempting to interpret and explain the law as there defined, and have left the System and the local and appeal boards in an almost intolerable situation insofar as application in close, individual cases is concerned. Congress chose not to provide any further guidance or enlightenment in the 1971 statute, however, so the System is faced with the problem of dealing with this large and difficult problem—through regulations, local board memoranda, etc.—in the best way it can devise. Some substantial changes in the way C.O. claims are presently handled seem warranted by statistics showing that such claims comprise a significant and growing source of dispute between the System and registrants. A different and hopefully more workable manner of handling such claims is suggested at a later point, along with the recommendation of other procedural changes that should be made.

A second important change that the 1971 statute and regulations have worked involves the reaffirmation of the random selection (or draft lottery) method along with the adoption of the so-called "uniform national call." In effect, with

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58 See pp. 1197-99 infra.
the drastic reduction (culminating in the elimination) of draft calls during the past several years as the Vietnam conflict has been wound down and the size of the Armed Forces reduced, the System has developed a flexible attitude and equitable approach toward the selection of those who will in fact be called to serve. In short, fewer have been subjected to calls from a larger pool, a one-year exposure through the 19-year-old prime age group concept coupled with the lottery system greatly reduced the period of uncertainty about each individual’s draft status, and the uniform national call tends to reduce inequities that might otherwise result from differing interpretations of the controlling law across the country. Moreover, by conducting the lottery for each year at a point in time substantially before an individual becomes exposed to possible liability for training and service and by creating a new classification category, I-H, the System has gone a long way toward cutting down on the number who might even seek to challenge their classification while increasing the amount of time for planning for the future and (not without some relevance to the earlier discussion) to bringing suits prior to induction. Those classified I-H (termed a “holding classification”) are regarded, because of the unlikelihood of their being called in view of their lottery number, as registrants “not currently subject to processing for induction.” Since these registrants are not classified I-A and are not likely to be so classified during the year of their maximum exposure to the draft, short of a drastic change in our military situation, the number of those registrants even in a position to justifiably and legitimately complain about their classification is considerably reduced. Finally, the System has developed a policy of ordering those likely to be called to report for and take physicals at a relatively early date so that an early determination of whether they are physically and mentally qualified can be made, again providing for an early clarification of the situations of registrants who are actually or potentially (because their lottery numbers are borderline in view of expected draft calls) affected. All in all, the System deserves plaudits for developing various approaches that, by building on existing and changed legislation, both remove the element of uncertainty for as many individuals as possible and provide for an earlier determination of the status of those who are not otherwise exempted from the requirement of service. As pointed out previously, these developments are of obvious significance in considering the feasibility of adopting the approach of freely available preinduction judicial review.

The third major statutory and regulatory development involves the addition in 1971 of a new section 22 at the end of the Act which, for the first time, spells out through legislation a number of procedural rights which are to be accorded to registrants. These rights are amplified to some extent by the regulations thereafter adopted. Section 22(a) provides that “a fair hearing consistent with
the informal and expeditious processing which is required by selective service cases” is thereby guaranteed “to each registrant asserting a claim before a local or appeal board.” The general requirement for a “fair hearing” in Selective Service cases would seem to embody a congressional judgment that certain procedures could be successfully challenged for failure to comply with this standard. More specifically, section 22(b) provides as follows:

(b) Pursuant to such rules and regulations as the President may prescribe—
(1) Each registrant shall be afforded the opportunity to appear in person before the local or any appeal board of the Selective Service System to testify and present evidence regarding his status.
(2) Subject to reasonable limitations on the number of witnesses and the total time allotted to each registrant, each registrant shall have the right to present witnesses on his behalf before the local board.
(3) A quorum of any local board or appeal board shall be present during the registrant’s personal appearance.
(4) In the event of a decision adverse to the claim of a registrant, the local or appeal board making such decision shall, upon request, furnish to such registrant a brief written statement of the reasons for its decision. (emphasis added)

Even though section 22(b) is prefaced by a reference to implementation through regulations, it seems clear that Congress did not intend to leave the question of whether to adopt such regulations up to the System. Rather, the statutory language merely leaves it up to the System (as agent of the President in this regard) to determine what form the implementing regulations should take. Failure to adopt regulations that reflect the underlying intent of Congress would be in conflict with the statutory provisions; indeed, the System did so respond and, after proposing regulations that seemed less than fully reflective of the legislative purpose, adopted amended regulations that more or less adequately do so. Those regulations will be discussed at some length below. For the present it seems appropriate to note what procedural protections Congress intended to confer upon registrants and, through omission, which ones it failed to provide that remain important if not essential to the development of a fair and responsive administrative process in which both registrants and courts can have confidence.

It is worthy of note, at the outset, that Congress has, with the enactment of the 1971 statute, for the first time expressly included specific and enumerated procedural protections in the Selective Service laws. That is no mean accomplishment in itself, in view of the background of legislation in this area and the general antipathy toward meaningful procedural protections for registrants that traditionally has been manifested by both the System and the appropriate congressional committees. Apart from a passing reference to “a system of selection which is fair and just” in 50 U.S.C. App. 451(c) (1970), no previous legislation in the Selective Service field had included any provisions that sought to affirmatively protect the rights of individuals actually or potentially affected by the draft laws. In short, while Congress did not go as far as some proponents of

62 Id. at § 471(b).
reform of the Selective Service statute would have liked, the mere fact that it did take some action along the lines of procedural reform is significant and indicative, it would appear, that legislative provision for additional procedural protections is not out of the question. It might be noted, however, that these procedural provisions were added as floor amendments and thus there is very little legislative history to indicate what the underlying congressional motivation was in adopting them.63

Congressional insistence in section 22(a) that a “fair hearing” be provided to registrants is amplified by the more specific provisions of Section 22(b). Probably the most important of these specific requirements, at least from the point of view of facilitating judicial review, is the one providing for a “brief written statement of the reasons for its decision” by any local or appeal board rendering a determination adverse to a registrant’s claim. Previously there was no requirement whatever that local or appeal boards give reasons for the decisions they made. Thus, in seeking judicial review a registrant was relegated to a speculation contest with the government about why the board denied his claim, and it was a contest in which the cards were stacked heavily against him because of the narrow “no basis in fact” standard for judicial review.

That standard, announced in the Estep v. United States64 case over 25 years ago, as a liberalization of a statute that purported to proscribe judicial review entirely, was incorporated by Congress in section 10(b)(3) of the Act in 1967. In effect, the registrant faced with the burden of showing that “no basis in fact” existed for the board decision but with no statement at all from the board about why it denied his claim could expect to prevail in court only in the clearest cases of board arbitrariness or legal error. All he could do, in constructing a case for a court to consider, was to put together a collection of the materials that he had filed with the board, make some reference to the questions and statements of board members at his personal appearance (if indeed any record of that event was maintained), and hope to convince the court that the board could have done what it did only for improper reasons. In this regard the line of cases involving alleged “punitive reclassification” (such as Oestereich, Gutknecht and Breen) are atypical, as previously suggested, since in that situation General Hershey’s directive to local boards provided the courts with a sound basis for concluding that delinquency declarations and reclassifications had occurred only because of impermissible factors. By way of contrast, the Court’s decision in Clark v. Gabriel, which for all practical purposes approved the statutory preclusion of preinduction judicial review where determinations of a discretionary character are involved, is more indicative of the dilemma facing a registrant who had not been provided with a statement of the reasons for the board’s decision.

Thus, the statutory requirement of a statement of reasons is a large and important step forward in improving the fairness and reliability of the administrative process. Boards cannot act in a vindictive and freewheeling manner, to

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64 327 U.S. 114 (1946).
borrow some of Justice Douglas' language,\(^6\) for they are now required to state reasons in support of what they have done. It is thus reasonable to expect better and more consistent decision-making from the boards simply because they are now required to say why they did what they did. Moreover, particularly in situations involving discretionary determinations, the requirement for a statement of reasons should greatly facilitate judicial review. There is of course always the possibility that the statement provided will not in fact disclose the actual reasons underlying the particular decision. But, assuming good faith compliance with the statutory requirement, this should be the exception and not the rule. In most cases, then, the reviewing court will now know what the board's rationale was and thus the guessing game which previously went on in this regard, and which imposed a serious burden on registrants, should be substantially done away with. In the hopefully few cases where the board has made an error of law in denying a claim the court can readily determine this from its statement of reasons. And in the cases involving discretionary determinations the court can more easily ascertain whether an abuse of that discretion is involved or whether the board instead acted within the proper ambit of its authority. In short, reviewing courts will now have, for the first time, a meaningful record to evaluate when considering challenges to board decisions.

An important caveat regarding the requirement for a statement of reasons should be noted. There has apparently been a tendency, in the short time the requirement has been in effect, for many boards to do nothing more than provide an almost verbatim recital of the language of a pertinent statutory provision or regulation. Obviously this is wholly inadequate to provide any meaningful basis for judicial review. It is not, fairly considered, consistent with the clear congressional mandate, nor calculated to illuminate or engender confidence in the System on the part of registrants. Courts should peremptorily refuse to accept such empty recitals of conclusory language by Selective Service boards. Otherwise, the requirement will be rendered virtually meaningless.

Another important procedural protection provided for by section 22(b) is the right given to registrants to present witnesses on their behalf before local boards; previously, the registrant could file letters, affidavits, etc., with the local board incident to his personal appearance but could not seek to further support his claim with live statements or testimony. Live witnesses are not only likely to make more of an impression on the board members but their presence will provide the board with an opportunity to question them about their views as to the registrant and his claim, and will thereby promote more informed decision-making by the local boards. The value of this protection is reduced somewhat by the statutory authorization for reasonable restrictions on the number of witnesses and the amount of time allotted to each registrant in appearing before the board; under the revised regulations\(^6\) the registrant is given only 15 minutes for his personal appearance (unless the board decides to give him more time) and is limited to three witnesses. Whether the three witnesses' testimony takes up part of the 15 minutes is unclear. In any event, while recognizing the need

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for some reasonable limitations in these respects, it is particularly difficult to justify the 15-minute time restriction (the limitation to three witnesses seems more sensible and supportable). Perhaps flexibility in administration will serve to ensure fairness in the operation of the system but the grudging narrowness of the regulations in this regard is bothersome.

Section 22(b) also gives registrants the right to a personal appearance not only before local boards (which had previously existed under the regulations) but also before appeal boards. This reform, which coupled with the others discussed above, is significant in that it will hopefully tend to make an administrative appeal a less perfunctory procedure, engaged in principally to exhaust administrative remedies so as to be able to seek judicial review, and instead convert it into a meaningful first step in the review process. A right to appear before appeal boards is especially important in view of the perpetuation of the notion that review by appeal boards is de novo in character, as is the aforementioned requirement that appeal boards as well as local boards provide the registrant with a statement of reasons. A more straightforward approach would be to do away with the de novo review concept entirely and recognize that appeal boards are probably applying something akin to a “substantial evidence” standard in reviewing local board decisions. However, the modifications made in the regulations dealing with appeal board procedures, particularly the requirement in 32 C.F.R. 1626.4 (1972) that the board shall consider only “information contained in the record made by the local board,” along with “general information concerning economic, industrial, and social conditions” and the “oral statements of the registrant to the appeal board during his personal appearance,” are helpful and go a considerable way toward blunting the effects of the de novo concept which had heretofore provided the government with a way of shielding erroneous local board decisions from penetrating judicial scrutiny.

A final procedural requirement added by section 22(b) is that a quorum of the members of any local board or appeal board be present during a registrant’s personal appearance. Previously the attendance by one member of a board was regarded as adequate and the registrant was hardly accorded the thoroughgoing consideration by all members of the decision-making body that fairness would appear to dictate. Indeed, it seems strange that it was necessary to incorporate such an elementary requirement into the statute but the practice of many boards, where most decisions were made by the regularly employed clerks and not the members themselves, apparently led Congress to conclude that such inclusion was necessary.

Brief mention should also be made of another not insignificant procedural change incorporated in the 1971 statute, but in a location other than the newly added section 22. That change results, in effect, in application of the basic requirements of the Administrative Procedure Act, relating to rulemaking, to the promulgation of regulations by the Selective Service System, although the APA in terms remains inapplicable to Selective Service proceedings. Section 13(b)\(^{67}\) of the Act was amended to include a provision requiring publication of

\(^{67}\) 50 U.S.C.A. App. § 463(b) (Supp. 1972).
all such regulations in the *Federal Register* and prescribing that they would be ineffective until 30 days thereafter. Moreover, the new provision further states that "any person shall be given an opportunity to submit his views to the Director on such regulation" prior to its becoming effective, although "no formal hearing shall be required on any such regulation." It should be noted, however, that this requirement may be waived by the President in certain specified circumstances in the interest of national defense. As a result, both formal notice of and some opportunity to be heard regarding proposed regulations are now, for the first time, applicable in the Selective Service context as well as in other administrative areas. The result, hopefully, will be better for both registrants and the System.

Most of the significant changes in the pertinent Selective Service regulations either track or implement the statutory provisions and they have already, to a considerable extent, been discussed incident to the discussion of the statutory changes. A few other changes should be noted in passing. One change that appears ill-advised is the shortening of the period within which a registrant must request a personal appearance before a local board from 30 to 15 days after receipt by him of a classification notice. Many registrants will probably seek the advice of an attorney upon receipt of a classification notice which effectively rejects a claim they have asserted. With the board now required to state reasons for its decision, it would seem likely that more registrants will seek personal appearances than before (on a percentage basis). Cutting down on the period of time within which to decide on whether to seek a personal appearance would seem to intensify the temptation to seek such a hearing almost automatically. While restricting the time period might serve the purpose of expedition, it might well invite some registrants to seek a personal appearance where, upon reflection and consideration, and upon the advice of counsel, they might decide not to do so. Also, since the time is now quite short it would seem essential for the board to advise the registrant of the need to take prompt action in order to obtain a personal appearance.

The potential problems created by the regulations dealing with the limitations on the duration of the personal appearance and the number of witnesses that can be used have been discussed previously. One helpful addition to the regulations is a provision requiring local boards to give a registrant a statement of reasons for its refusal to reopen a classification when requested to do so. The time within which to apply to an appeal board from a local board determination has also been shortened from 30 to 15 days; this change is subject to some of the same problems that were discussed above as to the like reduction in seeking a personal appearance before a local board. Moreover, since local boards are now required to state reasons for their decisions, more instead of less time would seem warranted in order to give the registrant and his advisors an opportunity to decide whether to go to an appeal board or not. Experience of the System with these particular revisions in the regulations would seem an important factor, but on the whole the development appears to be unwise.

68 *Id.*
Comment should also be made about several additional procedural changes that have been suggested but were not made, either by statute or regulation. The most significant one involves representation by counsel at local board proceedings. The System has consistently opposed this step and has included a specific provision in the revised regulations that states: “No registrant may be represented before the local board by anyone acting as attorney or legal counsel.”

Apparently the attitude of the System is that allowing representation by counsel at board proceedings would so judicialize them as to interfere with the orderly and expeditious processing of cases. All things considered, that view seems unfounded. Legal representation is allowed to individuals and business entities in an array of situations where the interests potentially affected are of far less consequence than in the Selective Service context. Examples are myriad and need not be detailed. Moreover, the more affluent and better-educated registrant is demonstrably favored by a system which disallows legal representation. Such a registrant can handle himself more effectively before a board, and also can afford to retain counsel to consult and advise him prior to his personal appearance, especially in C.O. cases where the standards are complex and confusing. The poorer and less well-educated registrant, particularly in areas where extensive draft counseling services have not been developed, is almost hopelessly entrapped by the system when seeking to proceed without legal counsel. The so-called government “appeal agents” have never functioned effectively in advising registrants of their rights since they of necessity have a dual allegiance which seems often to be resolved in favor of the interests of the System. Thus, denial of legal representation, or at least the opportunity for consultation with a lawyer, works a significant discrimination against the less affluent and poorer educated registrant. The conscientious objection area, now that ethical and moral beliefs carry significant weight, presents special problems as far as the latter aspect of discrimination is concerned. Certainly, more often than not, the better-educated registrant will have an advantage over the poorer one when he is called upon to justify and substantiate his beliefs.

Whatever hazards to the administrative process might result from allowing legal representation might well be counteracted by a number of companion steps. One might be to ensure that each board had at least one lawyer as a member. It may take some time to accomplish this but, with the cooperation of the organized bar, it can undoubtedly be done. Moreover, reasonable time limitations could still be imposed on personal appearances. Indeed, if thought necessary, at least at the outset, consultation with an attorney present at the proceeding might be allowed but not full-fledged legal representation, in the sense that the lawyer would speak for the registrant to the board. Other similar restrictions that are reasonable in nature might be imposed to ensure that the process is not overly judicialized. At the same time, however, it is unrealistic to seek to maintain that the board members are simply a small and friendly group of neighbors seeking to do what is good for a young man. Proceedings are presently adversary

70 Id. at 21077.
in character, whether the System admits it or not. Counsel is allowed in so many other situations where the effects of the body’s decision on an individual are of far less consequence that it seems grossly incongruous to continue to maintain the system as it has been. The fear of the System in this regard seems irrational and misguided. Some court is likely to hold that counsel is required as a matter of due process in the not too distant future in any event and the System will then be left with less flexibility in shaping the manner in which legal representation will be allowed.

Several final points should be added. Apart from the previously expressed concern about perpetuation of the de novo review concept with regard to appeal board decisions, an additional procedural improvement that seems warranted, along with the allowing of representation by counsel, is ensuring that a transcript of the proceedings before the local and appeal boards be prepared and be made available to registrants. It would appear that this could easily be accomplished by tape-recording such proceedings and then preparing a transcript only in those cases where one was requested. Presumably this would be a small percentage of the cases, when the impact of the procedural reforms already accomplished is considered. Nonetheless, in some cases the ability to prepare a transcript from a tape recording would seem to be of considerable significance for effective administrative and judicial review—the System, the courts and the registrants would appear to benefit from this sort of arrangement at very little cost. Tapes could be preserved for a period of time and then erased and reused. Registrants who could afford to do so would simply be provided with the tape for use in preparing a transcript; those who were financially unable to do so would have transcripts prepared at government expense.

Lastly, steps should be taken to ensure the independence of the National Appeal Board from System officials. In this regard, the appearance as well as reality of independence seems quite important. Registrants who have confidence in the impartiality of the National Appeal Board are less likely to be dissatisfied with its decisions and seek judicial review. Changes in the regulations relating to the National Appeal Board unfortunately appear to do nothing along these lines. Nor do they broaden the jurisdiction of the Board in any significant respect; only the National Director and appropriate State Director can appeal to the National Appeal Board as a matter of right, except in the situation where the state appeal board was not unanimous, in which case the registrant himself can seek National Appeal Board review. Procedural changes in large measure parallel those relating to appeals to state appeal boards; for example, the time within which a registrant entitled to make an appeal must take such action is

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71 Cf. United States v. Weller, 401 U.S. 254 (1971). In Weller the district court had dismissed the prosecution of a registrant for failure to submit to induction on the ground that the Selective Service regulation prohibiting representation by counsel at his personal appearance before his local draft board was inconsistent with the basic statute (309 F. Supp. 50). In so holding the lower court found it unnecessary to reach the defendant’s constitutional argument for counsel in Selective Service proceedings, premised primarily on due process grounds, but it intimated that, had it been required to resolve the constitutional issue, it would have done so in favor of the claim. Finding that it lacked jurisdiction on direct appeal under the then extant provisions of Criminal Appeals Act (see 18 U.S.C. § 3731), the Supreme Court remanded without resolving the merits.

72 32 C.F.R. § 1627.1(a) (1972).
rather short (15 days from the mailing of his Notice of Classification, as with personal appearances before local boards and appeals to state appeal boards). Unless a registrant whose classification is being appealed to the National Appeal Board requests a personal appearance before that body, the regulations provide that the Board "shall proceed forthwith to classify" such an individual. A registrant whose case is being appealed to the Board is allowed to "present evidence, other than witnesses, bearing on his classification," is entitled to 15 minutes for his appearance before the Board, but may not "be represented before the National Board by anyone acting as attorney or legal counsel." Like the local and appeal boards, the National Appeal Board is now required to provide to registrants whose claims are rejected "a brief statement of the reasons" for its decision. Suggestions for improvements of the regulations relating to the National Appeal Board include the following: ensure its independence by providing for its financial and physical support through channels other than the System; broaden its jurisdiction to include, at least on a discretionary basis, appeals from all registrants whose claims were rejected by state appeal boards; allow registrants to be represented by counsel before the Board (even stronger reasons of policy appear to support allowing representation by counsel at appellate board proceedings than at local board appearances); abolish the de novo concept with regard to National Appeal Board action; and lastly and somewhat more tentatively, provide the Board with a functioning permanent staff and give consideration to having its members serve on a full-time rather than part-time basis. A caveat should be noted, however. It might be questioned whether, in light of the apparent move to an all-volunteer Armed Forces, the beefing up of the National Board along the lines suggested is at present an item of high priority.

None of the above suggestions regarding procedural reforms that should, in my judgment, still be accomplished is premised on the notion that due process requires that they be done. Any such constitutional argument was, it would appear, effectively laid to rest by the U.S. Supreme Court in its recent decision in Fein v. Selective Service System. There the Court not only confirmed its upholding of the validity of section 10(b)(3)'s prohibition on preinduction judicial review in situations involving discretionary determinations made by local boards but also had occasion to discuss the procedural changes made incident to the enactment of the 1971 statute and the adoption of implementing regulations. In its opinion the Court expressly quoted the pertinent provisions of section 22 (as discussed previously) and the related regulations, while indicating that neither were intended to have retroactive effect. After reviewing the statutory provisions and regulatory changes the Court stated that they had "alleviated and, indeed, eliminated" most objections to the preexisting procedures based on due process grounds, and similarly concluded that "all, or nearly all, the procedural features

73 Id. § 1627.1(b).
74 Id. § 1627.4(b).
75 Id. § 1627.4(c), (d).
76 Id. § 1627.4(h).
77 See Id. § 1627.4(a).
78 405 U.S. 365 (1972).
about which [petitioner] complains ... have been changed administratively. Mr. Justice Douglas, in his dissenting opinion, focused explicitly on the procedural due process issue, asserting that serious due process questions are raised by the Court's construction of section 10(b)(3). Referring to the "fair and just" system language of section 1(c) of the Act, Justice Douglas skirted the due process question by suggesting that Congress intended that certain procedural requirements be adhered to, even prior to the 1971 amendments to the statute. Since he found that such requirements were not followed he thought that preinduction judicial review was proper, despite section 10(b)(3), under Oestereich. Justices Marshall and Stewart also dissented, but their disagreement with the Court's opinion related to what they regarded as an unduly narrow interpretation and application of Oestereich; they suggested that preinduction judicial review should be allowed where "the registrant [has] challenged a purportedly valid Selective Service rule of general application, the validity of which the administrative process could not completely adjudicate before induction." Noting that where, as in Fein, "Selective Service appellate procedures, implemented under Selective Service regulations ... arguably conflict with the constitutional requirements of the Due Process Clause" an a fortiori case for preinduction review has been made out, the dissenters sought to distinguish Gabriel. Thus, since the dissenting opinions expressly urged the desirability of allowing preinduction review where potential procedural due process issues were presented, it is a reasonable inference that the Court's majority in effect rejected the soundness of any arguments along these lines. Indeed, by reference to the statutory and regulatory changes the Court seemed to be indicating that whatever possible due process questions might be raised had effectively been blunted by intervening developments. Accordingly, the suggestions for further improvements and refinements of the administrative process are not—and cannot be—grounded on the notion that the existing procedures are defective constitutionally. Rather, it is felt that such changes should be made without regard to whether they are constitutionally required as a matter of sound administrative policy and in order to ensure thoroughgoing fairness to all registrants. To reiterate, what is minimally required constitutionally is not, of course, the necessary standard for measuring wisdom or soundness as a matter of policy.

IV. Special Problems Presented by the Administrative Handling of Conscientious Objector Claims

An ancillary but important point relating to the handling of conscientious objector cases warrants discussion. As indicated earlier, I feel quite strongly that the present system for handling C.O. claims is inadequate, ineffective and often unjust. Despite efforts to clarify the guiding legal principles for local boards

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80 405 U.S. at 378.
81 Id. at 387.
82 Id. at 390.
83 Id. at 391.
by the National Director's office, there is still a great amount of uncertainty, arbitrariness and inconsistency in the handling of C.O. claims by local boards (and by some appeal boards as well). The problem is a difficult one since the legal concepts are abstruse and virtually defy comprehensible statement. They derive in large measure from two leading Supreme Court cases of recent years interpreting section 6(j) of the Act, the provision dealing with C.O. claims and ostensibly establishing the standards therefor.\(^{84}\) \textit{Seeger} and \textit{Welsh} are the two villains and they have left the law in such a confused state that few lawyers (or law teachers) will attempt to state the present rules with any feeling of confidence. Simply stated, the Court through a tortured process of statutory construction that in \textit{Welsh} did not commend itself even to a majority of the Justices (Harlan reached the first amendment issue presented, resolved it against the Government, yet voted to uphold the Act on the ground that Congress would have preferred that to a total invalidation of the exemption) extended the language of section 6(j) to include sincere but nonreligious conscientious objection.\(^{85}\)

Earlier, in \textit{Seeger}, the Court had concluded that C.O. status should be accorded, under section 6(j), to a registrant with a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption. . . ."\(^{86}\) That language was written in purported interpretation of the statutory definition of "religious training and belief" which, in pertinent part, stated that Congress intended to include only those with a "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but not . . . [those with] essentially political, sociological, or philosophical views or merely personal moral code."\(^{87}\) Whether the Court's construction properly reflected congressional attitude or not is actually beside the point since, in 1967, Congress deleted any reference to a "Supreme Being" in section 6(j), apparently accepting the Court's test as enunciated in \textit{Seeger}. But if \textit{Seeger} was difficult to comprehend and apply, \textit{Welsh} compounded the problem considerably. There the Court's plurality opinion, while purporting to apply the \textit{Seeger} test, effectively broadened that test to include all sincere though nonreligious C.O.'s. In its opinion the Court attempted at several points, without great success, to articulate the standard it was applying, and stated: "What is necessary under \textit{Seeger} for a registrant's conscientious objection to all war to be 'religious' within the meaning of § 6(j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions."\(^{88}\) Shortly thereafter the Court indicated that "an individual [who] deeply and sincerely holds beliefs which are purely ethical or moral in source and content" was nonetheless within the ambit of 6(j), and later the Court said that those "who hold strong beliefs about our domestic and foreign affairs" or those whose C.O. claim "is founded to a sub-

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\(^{84}\) See text accompanying notes 56 & 57 \textit{supra}.

\(^{85}\) 398 U.S. at 344-67.

\(^{86}\) 380 U.S. at 176.

\(^{87}\) \textit{Id.} at 172.

\(^{88}\) 398 U.S. at 339-40.
substantial extent upon considerations of public policy99 are not as a result excluded from entitlement to C.O. status.89

The confused state in which this left the law was exemplified by the issuance of a directive to local boards on the standards to apply in C.O. cases by the National Director shortly after the Welsh decision. A great amount of criticism was initially levelled against that directive on the ground that it was too narrow in stating the pertinent test, and the directive was withdrawn a month or so later. Finally, another directive, somewhat more liberal in stating the Seeger-Welsh criteria but in a way no less inscrutable than the language in those opinions, was issued. As a consequence, despite considerable effort to avoid the difficulty, it seems rather clear that compliance with these criteria is significantly easier for the articulate, well-educated and affluent than for those not so advantaged. Moreover, it seems plain that local boards simply lack the requisite expertise to resolve C.O. claims in a consistent and sensible fashion. Indeed, the experience of the past several years, exemplified by cases such as that of Muhammad Ali,90 has been one of ineffective, inconsistent and entirely unsatisfactory application of the law by local boards in C.O. cases. Some boards apparently continue to allow only members of recognized “peace churches” to obtain the exemption, others make apparently ad hoc decisions and then recite the language of the directive in support of their conclusions, and others are seemingly doing their best to struggle with the difficult and ambiguous standards they are charged with applying. The only thing that could have exacerbated the situation further would have been a Supreme Court decision in Gillette v. United States91 upholding the “selective” C.O. claim made in that case. However, the Court in that case rejected the contention that limiting the granting of C.O. status to those who oppose participation in all wars was constitutionally infirm; had it decided otherwise it is doubtful that the draft could have continued to function at all, and this pragmatic consideration probably played a large part in the decision reached. The congressional response to these cases was interesting; it did nothing to seek to clarify the situation in the 1971 statute. In all likelihood Congress felt there was little if anything it could do without initiating another round of litigation challenging the constitutionality of its actions and resulting in still further confusion as a result of judicial interpretation.

To my way of thinking the whole system for handling C.O. claims is presently an unconscionable one. It is grossly unfair to registrants since not only are the standards confusing but a distinct preference is given to the affluent and educated. It is similarly unfair to place the entire burden for resolving such cases, some of which defy easy determination under the ambiguous criteria enunciated by the Court and left standing by Congress, on local and appeal boards of the Selective Service System. Results being reached are disparate and this lack of uniformity is not only productive of many of the cases where judicial review is sought but it also tends to undermine confidence in the system. Little if any clarification of the applicable standards can be expected in the near future. Thus,

89 Id. at 342.
it seems incumbent on those concerned about the matter to proceed along the lines of seeking procedural rather than substantive changes. Up until 1967 section 6(j) provided for reference of all appealed C.O. claim cases to a Department of Justice hearing officer who investigated the claim thoroughly and produced an advisory opinion on whether or not the claim had validity. That procedure was abandoned in 1967 through congressional amendment, mainly because it was thought to be too time-consuming and a significant source of delay at a time when our manpower needs were increasing rapidly. It is not suggested that a return to that sort of system would be well-advised; it has a number of problems inherent in it and there is likely to be little if any interest on the part of the System, Congress, the Justice Department or anyone else (except for registrants) in such a step. However, some sort of analogous yet more expeditious procedure for handling difficult C.O. cases seems well-advised and should be given serious consideration. Although such a procedure could probably be established by regulation without congressional authorization, the fact that there was a previous scheme based on congressional mandate and the likely disinterest of the System in any such procedure seem to argue for its accomplishment through legislation.

Such a procedure might take a variety of forms. The objective would simply be to provide local and appeal boards with a more informed judgment on how to resolve troublesome and borderline C.O. claims under the applicable legal standards, difficult and ambiguous as they are. Investigation and recommendation authority might be centralized in the National Director's office, but this would seem to present a number of the same problems that the Justice Department hearing officer procedure did. I would favor an approach that would inject some centralization (and with it legal expertise in the particular area) into the process while maintaining a degree of decentralization at the same time. Thus, I suggest that the focal point of this effort should be the State Director's offices in each state. Lawyers, and perhaps some social scientists (sociologists, psychologists, etc.) as well, might be added to the State Director's staff for the specific purpose of advising local and appeal boards on C.O. cases. Some investigatory personnel might be needed also, but I doubt that it would be necessary to conduct anything like the full-blown sort of inquiry formerly performed by the FBI. As to the mechanics of the procedure, I suggest that two routes be provided for obtaining the advice (and all that would be provided would be an advisory report, not a mandatory determination) of the State Director in contested and difficult C.O. cases: 1) through referral by a local or appeal board at its own instance, or 2) through request by a registrant appealing an adverse decision of a local board to an appeal board (thus paralleling the previous procedure in this respect). A simple and straightforward statutory amendment to section 6(j) to this effect (or to one of the procedural provisions, such as section 10, if thought more appropriate) could easily be accomplished if sufficient congressional interest were stimulated.

92 Especially bothered by the procedure was the FBI, which was charged with doing the detailed investigative work.
An imposing array of materials could be referred to in order to substantiate the procedural mess that presently exists in regard to C.O. cases. Recent court cases—as a quick survey of the Selective Service Law Reporter will indicate—clearly confirm this as well. Thus some procedural change is badly needed and the approach recommended seems to be a feasible and hopefully effective one.

Conclusion

In conclusion, it is recommended that a simple and straightforward pre-induction judicial review procedure be established (or, actually, that access to the civil injunction and declaratory relief approach that has already developed for some cases be broadened and made available to all registrants). In view of the present language of section 10(b)(3), this change would require congressional action which, for a number of reasons, may at the present time be difficult if not impossible to obtain. Nonetheless, if it is explained that such a procedure would build upon a substantially enhanced and more elaborate administrative process, along the lines indicated previously, and would not significantly interfere with the raising of necessary manpower, the proposal seems well worth congressional consideration.

What is suggested, then, in substance, is that significant steps be taken to improve the decision-making processes of the Selective Service System by building on those improvements already made by statute and regulation in the past several years, so as to engender more confidence in its decisions and facilitate judicial review. No change in the standard of review is suggested, although a rather persuasive argument can be made for shifting to a less stringent “substantial evidence” standard instead of the existing “basis in fact” test. Such a shift would probably not be politically acceptable; however, courts can (and likely do) apply whatever standard they want under the guise of applying the one they articulate. With improvement in the System’s decision-making processes, it can reasonably be expected that the problems attendant to judicial review will become less acute. Those registrants who are disposed to litigate will probably do so at whatever point they are allowed to, although it might cynically be argued that review should be delayed in the hope that they will either accept induction or be disqualified physically at a later point. However, as developed fully at an earlier point, it seems basically unfair and discriminatory to force a registrant to be subjected to a criminal prosecution or recant an oath in order to test the correctness of an administrative determination of great importance to him.

Thus, I propose that a simplified review proceeding in the district courts be

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93 Declaratory judgment actions are of course a commonplace of our contemporary civil procedure; it is perhaps not insignificant that, when a draft system was first devised for World War I, the approach in the federal courts was a negative one insofar as declaratory relief was concerned. Only during the 1930's did the Court clarify the matter in holding that declaratory actions were not inconsistent with article III's “case or controversy” limitation. See Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249, (1933), and 28 U.S.C. § 2201 (1970). And only during the last several decades have declaratory actions been used with great frequency in the administrative context.
made available to all registrants who wish to challenge their classification or otherwise question the actions of the System; such a proceeding need not depend on 28 U.S.C. 1331, which awkwardly prescribes a $10,000.00 jurisdictional amount, or 28 U.S.C. 1361, whose coverage may be somewhat uncertain. Rather, a registrant should have access to the appropriate district court to test the validity of the Selective Service System's action in his case in a direct and straightforward way. Such a review proceeding should not be available until after the registrant has received an order to report for induction (though such orders should be issued at an early date, once a registrant has been found physically qualified and it is rather certain that he will in fact be called) except for conscientious objector cases, in which it would be immediately available once the special administrative process for handling such cases (assuming it is established) has been pursued. Once a registrant has been ordered to report for induction and administrative appeals have been exhausted, he should have a relatively short period—say, ten days—within which to initiate such a review proceeding by filing a notice thereof, and then another relatively short period—say, 30 days—within which to file the record and a brief. In all, the proceeding would hopefully take no longer than 90 days to complete and a court decision could hopefully be obtained within another 30 days. Appellate review could be rather perfunctory, and the Supreme Court would intervene only where an incorrect legal standard had been applied or a gross miscarriage of justice had occurred. A registrant could concededly interrupt the induction process and delay his induction by a considerable period through resort to this procedure, and someone would be required to fill his quota and go in his place. But interruptions occur now where individuals refuse to report as ordered and are subjected to criminal prosecution (although only about 12 per cent of reported violations of a serious nature actually result in prosecutions at all, because of System procedural errors, unavailability of evidence, etc.—a rather alarming statistic indeed) and the conviction rate in such prosecutions has been rather low. Moreover, a large number of light or suspended sentences have been and are being handed out by certain judges, further undermining the impact of prosecution as an effective sanction. Additionally, with the prime age group now at 19 and with the lottery system and uniform national call in effect, there would appear to be fewer incentives for registrants to attempt this sort of preinduction delay than previously.

And, finally, the approach suggested would have the distinct advantage of avoiding the subjection of the registrant with a genuinely debatable claim to the burden of having to undergo criminal prosecution in order to test the validity of his position (or, alternatively, submit to induction and bring a rather unsatisfactory habeas corpus action). Predictions on things like this are always hazardous, but I doubt that the overall volume of litigation would be much if any greater if an across-the-board preinduction review course is followed. It is considerably more humane and, coupled with an upgraded administrative decision-making process, will result in a system in which all concerned—registrants, courts and the country generally—will have more confidence. Resolution of the problem in qualitative terms, in short, is probably as, if not more, important than solving it quantitatively.
Epilogue

The Administrative Conference's proposals provide the means by which qualitative reforms may be achieved. Those proposals do not stand as mere outlines on the horizon, applicable to some future large-scale draft situation. The various discussions presented in this article indicate the extent to which alterations in the classification and induction procedures would cope with significant changes in the country's attitudes and needs. Nor should the relative indifference with which the various Vietnam accords have been received by the public since January 27 be allowed to encompass draft reform. The Selective Service System has clearly indicated its intention to continue selection and classification of the nation's young men, even if induction will not be ordered after the current fiscal year and the purpose is to have a standby pool of available manpower. Under the current law, such administrative functioning will be beyond the reach of any judicial review except in the narrow band of classification cases which can be litigated under Oestereich, since no induction will be occurring. Should any large-scale draft ever again be required, the backlog of unreviewed classifications would only re-create the more painful and inefficient, not to mention unfair, experience of the 1960's. Such a result will disserve the interests of the country and again undermine the legitimacy of its governmental processes. The "generation of peace" which is so ardently welcomed should be relieved of that familiar spectre. Here, if nowhere else, we can put the lessons of the decade of Vietnam involvement to the purpose of ensuring that we shall do it better the next time around, should that day come.

94 Indeed, in early March of this year the System again conducted its annual lottery for those registrants whose dates of birth place them in the prime age group for the next fiscal year. At that time System officials indicated that those with the first 95 numbers—approximately 500,000 men—would be processed administratively so that a readily available standby pool of manpower would be available should the draft be resumed. See Washington Post, Mar. 9, 1973, at 2, col. 7-8.