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DIRECT JUDICIAL REVIEW OF THE ACTIONS OF THE SELECTIVE SERVICE SYSTEM

Bruce J. Winick*

I. INTRODUCTION

A Selective Service registrant unhappy with the classification¹ given him by his local draft board has several opportunities to challenge that classification within the Selective Service System. He may request a personal appearance before his local board.² If unsuccessful at his personal appearance, or even if he elects not to have a personal appearance, the registrant may appeal to the state appeal board.³ If his plea is rejected by the appeal board with at least one member dissenting, the registrant may appeal further to the National Selective Service Appeal Board.⁴ No additional review is available within the Selective Service System itself. To secure further review of the actions of the Selective Service System, a registrant must resort to the courts.

A registrant may obtain judicial review of Selective Service action in any of three possible ways.⁵ If he submits to induction into the

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1. "Classification is the key to selection" 32 C.F.R. § 1622.1(b) (1970). After registration, "each registrant shall be immediately liable for classification . . . and shall, as soon as practicable following his registration, be so classified" Military Selective Service Act of 1967, 50 U.S.C. App. § 454(a) (Supp. IV, 1965-1968). A registrant classified I-A, 32 C.F.R. § 1622.10 (1970), or I-A-O, 32 C.F.R. § 1622.11 (1970), may be ordered to report for induction into military service. 32 C.F.R. § 1631.7(a) (1970). Unless he can establish eligibility for another classification, each registrant is presumed to be in class I-A and available for service. 32 C.F.R. § 1622.1(c) (1970). See *United States v. Carroll*, 398 F.2d 651 (3d Cir. 1968). The various classifications are described in 32 C.F.R. §§ 1622.10-50 (1970). If a registrant does establish grounds for a classification other than I-A, he must be placed in the lowest class for which he is determined to be eligible, with I-A-O considered the highest class. 32 C.F.R. § 1623.2 (1970). See *Jochim v. McAnaw*, 296 F. Supp. 1305 (D.N.D. 1969). For a thorough discussion of the various classifications and the classification process, see A. TATUM & J. TUCHINSKY, *GUIDE TO THE DRAFT* 28-52, 109-226 (1968); SEL. SERV. L. REP. PRACTICE MANUAL ¶¶ 1016-78 (1968).

2. 32 C.F.R. § 1624.1(a) (1970). See generally A. BLACKMAN, *FACE TO FACE WITH YOUR DRAFT BOARD: A GUIDE TO PERSONAL APPEARANCES* (1969); A. TATUM & J. TUCHINSKY, *supra* note 1, at 58-64; SEL. SERV. L. REP. PRACTICE MANUAL ¶¶ 1079-84 (1968).

3. 32 C.F.R. § 1626.2 (1970). See A. TATUM & J. TUCHINSKY, *supra* note 1, at 64-66; SEL. SERV. L. REP. PRACTICE MANUAL ¶¶ 1085-89 (1968).

4. 32 C.F.R. § 1627.3 (1970). See A. TATUM & J. TUCHINSKY, *supra* note 1, at 67-69; SEL. SERV. L. REP. PRACTICE MANUAL ¶¶ 1090-94 (1968).

5. See generally Tigar, *Judicial Review of Selective Service Decisions*, in *SELECTIVE SERVICE: THE ATTORNEY'S VIEW* 81 (B. Poindexter ed. 1969); Leonard & Frantz, *Judicial Review of Selective Service Orders*, 26 *THE GUILD PRACTITIONER* 85 (1967);

Armed Forces, the registrant may challenge the validity of his induction order by petitioning for habeas corpus.⁶ If the registrant refuses to submit to induction, and is subsequently indicted for that refusal, he may defend the criminal prosecution on the ground that the order for his induction was unlawful.⁷ In addition to these two well-settled methods of obtaining postinduction judicial review, the registrant may have a third alternative. In certain circumstances, he may be able to secure direct review of the legality of his classification prior to the date he is ordered to report for induction.⁸ In order to obtain such preinduction review, a civil suit may be brought in federal district court in the form of an action for a declaratory judgment,⁹ an action for an injunction,¹⁰ or an action in the nature of mandamus.¹¹ Of the three methods available for obtaining judicial review of a draft classification, the preinduction action is the most desirable from the registrant's point of view. If successful, he can secure relief without incurring either the substantial risks of a criminal prosecution¹² or the hardships of induction.¹³ From the

O'Neil, *Review of Selective Service Reclassifications*, 37 GEO. WASH. L. REV. 536 (1969); Comment, *Judicial Review of Selective Service Action: A Need for Reform*, 56 CALIF. L. REV. 448 (1968).

6. *E.g.*, *Billings v. Truesdell*, 321 U.S. 542 (1944); *United States ex rel. Caputo v. Sharp*, 286 F. Supp. 516 (E.D. Pa. 1968). See generally SEL. SERV. L. REP. PRACTICE MANUAL ¶¶ 3026-179 (1969).

7. *E.g.*, *Estep v. United States*, 327 U.S. 114 (1946); *United States v. Rundle*, 413 F.2d 329 (8th Cir. 1969).

8. *E.g.*, *Townsend v. Zimmerman*, 237 F.2d 376 (6th Cir. 1956); *Stevenson v. Selective Serv. Sys. Local Bd. No. 157*, 303 F. Supp. 1254 (W.D. Wis. 1969); *Itzcovitz v. Selective Serv. Bd. No. 6*, 301 F. Supp. 168 (S.D.N.Y. 1969) *appeal dismissed*, 3 SEL. SERV. L. REP. 3063 (2d Cir. 1970). See generally SEL. SERV. L. REP. PRACTICE MANUAL ¶¶ 3501-679 (1969); Donahue, *The Supreme Court vs. Section 10(b)(3) of the Selective Service Act: A Study in Ducking Constitutional Issues*, 17 UCLA L. REV. 908 (1970); Comment, *Pre-Induction Judicial Review*, 57 CALIF. L. REV. 948 (1970); Comment, *Anticipatory Attacks on Selective Service Classifications*, 117 U. PA. L. REV. 899 (1969).

9. *E.g.*, *National Student Assn. v. Hershey*, 412 F.2d 1103 (D.C. Cir. 1969); *Foley v. Hershey*, 409 F.2d 827 (7th Cir. 1969) (per curiam).

10. *E.g.*, *Walsh v. Local Bd. No. 10*, 305 F. Supp. 1274 (S.D.N.Y. 1969); *Faulkner v. Clifford*, 289 F. Supp. 895 (E.D.N.Y. 1968).

11. *E.g.*, *Murray v. Vaughn*, 300 F. Supp. 688 (D.R.I. 1969); *Carey v. Local Bd. No. 2*, 297 F. Supp. 252 (D. Conn.), *aff'd.*, 412 F.2d 71 (2d Cir. 1969).

12. Refusal of induction is punishable by imprisonment for up to five years, a fine of up to \$10,000, or both. Military Selective Service Act of 1967, 50 U.S.C. App. § 462(a) (Supp. IV, 1965-1968). Moreover, the limited scope of judicial review permitted in a criminal prosecution (see notes 28-31 *infra* and accompanying text) makes the registrant's chances for success slight. See *Gabriel v. Clark*, 287 F. Supp. 369, 371 (N.D. Cal.), *rev'd.*, 393 U.S. 256 (1968): "The limited and circumscribed review afforded in a criminal proceeding results in no review at all. It necessarily ascribes to plaintiff the essential elements and ingredients of criminal conduct, by the very act of his seeking an orderly review of the draft board classification." See also Comment, *Judicial Review of Selective Service Action: A Need for Reform*, 56 CALIF. L. REV. 448, 461-62 (1968).

13. See *Estep v. United States*, 327 U.S. 114, 129-30 (1946) (Justice Murphy, concurring):

Selective Service System's point of view, however, this method is potentially the most dangerous to the rapid and efficient administration of the selection process.¹⁴ This Article will consider the availability of preinduction judicial review and the procedural problems incident to such review.

II. AVAILABILITY OF PREINDUCTION JUDICIAL REVIEW

A. *Judicial Review Prior to the 1967 Act*

Before the enactment of the Military Selective Service Act of 1967,¹⁵ the draft law contained no explicit provision relating to judicial review of the actions of the Selective Service System. The Acts of 1917,¹⁶ 1940,¹⁷ and 1948¹⁸ provided simply that decisions of local and appeal boards were to be "final."¹⁹ These provisions were

[The remedy of habeas corpus] may be quite illusory in many instances. It requires one first to enter the armed forces and drop every vestige of civil rights. Military orders become the law of life and violations are met with summary court-martial procedure. No more drastic condition precedent to judicial review has ever been framed. Many persons with religious or conscientious scruples are unable to meet such a condition. But even if a person is inducted and a quest is made for a writ of habeas corpus, the outlook is often bleak. The proceeding must be brought in the jurisdiction in which the person is then detained by the military, which may be thousands of miles removed from his home, his friends, his counsel, his local board and the witnesses who can testify in his behalf. Should he overcome all these obstacles and possess enough money to proceed further, he still faces the possibility of being shifted by the military at a moment's notice into another jurisdiction, thus making the proceeding moot. There is little assurance, moreover, that the military will treat his efforts to obtain the writ with sympathetic understanding. These practical difficulties may thus destroy whatever efficacy the remedy might otherwise have and cast considerable doubt on the assumption that habeas corpus proceedings necessarily guarantee due process of law to inductees.

See also Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1382 (1953); Comment, *supra* note 5, at 460-61.

14. The courts have repeatedly stressed the power of Congress to raise armies speedily. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 381 (1968); *Falbo v. United States*, 320 U.S. 549, 551-52 (1944). Congress' concern that preinduction judicial review "could seriously affect the administration of the Selective Service System," H. R. REP. NO. 267, 90th Cong., 1st Sess. 30-31 (1967), was the principal reason for the 1967 amendment to § 10(b)(3) which explicitly barred such review. Military Selective Service Act of 1967 § 1(8)(c) [amending Universal Military Training and Service Act § 10(b)(3)], codified in 50 U.S.C. App. § 460(b)(3) (Supp. IV, 1965-1968). See notes 47-56 *infra* and accompanying text.

15. 50 U.S.C. App. §§ 451-67 (Supp. IV, 1965-1968).

16. Selective Draft Act of 1917, ch. 15, § 4, 40 Stat. 80.

17. Selective Training and Service Act of 1940, ch. 720, § 10(a)(2), 54 Stat. 893. Prior to the 1940 Act, a registrant was deemed to be under the jurisdiction of the military and subject to court-martial proceedings from the date of the induction order, even if he never submitted to induction. *Franke v. Murray*, 248 F. 865 (8th Cir. 1918). The 1940 Act changed this by providing that a registrant is not subject to military jurisdiction until actually inducted. Ch. 720, § 11, 54 Stat. 895 (1940).

18. Selective Service Act of 1948, ch. 625 § 10(b)(3), 62 Stat. 620, *as amended*, 50 U.S.C. App. § 460(b)(3) (1964).

19. See notes 16-18 *supra*. Moreover, § 13(b) of the 1948 Act, 50 U.S.C. App. § 463(b)

first considered by the Supreme Court in the World War II case of *Falbo v. United States*,²⁰ a criminal prosecution for refusal to report for civilian work.²¹ The Court held that a registrant who had failed to exhaust his administrative remedies²² would not be permitted to raise in such a prosecution the defense that he had been erroneously classified.²³ Since the statute failed to authorize intermediate judicial challenges of orders to report, the Court concluded that Congress must have intended to prohibit such "litigious interruption" of the selective service process.²⁴

In *Estep v. United States*,²⁵ decided after World War II had ended, the petitioners, unlike Falbo, had reported and were accepted for induction before refusing to submit. The Court held that the petitioners could secure judicial review of their draft classifications

(1964), explicitly excludes the Selective Service System from the judicial review to which action by any administrative agency is normally subject under § 10 of the Administrative Procedure Act, 5 U.S.C. § 1009 (1964), as amended, 5 U.S.C. §§ 701-06 (Supp. IV, 1965-1968). See *Moskowitz v. Kindt*, 273 F. Supp. 646, 647 (E.D. Pa. 1967), *aff'd.*, 394 F.2d 648 (3d Cir. 1968), *cert. denied*, 393 U.S. 1014 (1969); *Feldman v. Local Bd. No. 22 of the Selective Serv. Sys.*, 239 F. Supp. 102, 105 (S.D.N.Y. 1964).

20. 320 U.S. 549 (1944).

21. Falbo, a Jehovah's Witness, had been classified as a conscientious objector and ordered to report to a civilian public-service camp pursuant to Selective Training and Service Act of 1940, ch. 720, § 5(g), 54 Stat. 889. He was prosecuted for refusing to appear at the camp. The analogous case for a registrant who did not claim to be a conscientious objector would be a refusal to report to the induction center.

22. Since had he reported he might have been rejected at the civilian camp, thereby mooting the controversy, Falbo was held to have omitted a "necessary intermediate step in a united and continuous process designed to raise an army speedily and efficiently." 320 U.S. at 553. This is actually a problem of ripeness. See *Feldman v. Local Bd. No. 22 of the Selective Serv. Sys.*, 239 F. Supp. 102, 105-06 (S.D.N.Y. 1964). See also *Tigar*, *supra* note 5, at 85-86.

The continued validity of the *Falbo* requirement of exhaustion of administrative remedies has been placed in doubt by the recent decision in *McKart v. United States*, 395 U.S. 185 (1969), in which the Supreme Court held that the doctrine is inapplicable when the question raised is one of statutory construction, and when an application of the doctrine would deprive a criminal defendant of an otherwise valid defense. 395 U.S. at 197-99. See *United States v. Powers*, 413 F.2d 834, 836 n.1 (1st Cir.), *cert. denied*, 396 U.S. 923 (1969); *United States v. Prescott*, 301 F. Supp. 1116, 1118 (D.N.H. 1969). Presumably, the doctrine would have no greater effect in preinduction actions. In *Breen v. Selective Serv. Local Bd. No. 16*, 396 U.S. 460 (1970), a case in which the Court permitted preinduction review, the plaintiff had filed his action in district court prior to the conclusion of his appeal to the state appeal board—a classic case of failure to exhaust administrative remedies. See Comment, *Administrative Law—Selective Service—Pre-Induction Judicial Review Held Unavailable to Registrant Claiming Statutory Deferment*, 44 N.Y.U. L. Rev. 804, 822 (1969).

23. Falbo had defended on the basis that he was a minister, and, as such, should have been exempted from all service pursuant to Selective Training and Service Act of 1940, ch. 720, § 5(d), 54 Stat. 887. 320 U.S. at 550. The ministerial exemption is currently covered in 50 U.S.C. App. § 456(g) (1964).

24. 320 U.S. at 554.

25. 327 U.S. 114 (1946).

since they had exhausted their administrative remedies.²⁶ The Court refused to construe the failure of the statute to provide explicitly for judicial review as a denial of the power of the federal courts to grant relief in the exercise of the general jurisdiction conferred upon them by Congress, especially since such review may be required by the Constitution.²⁷ The Court interpreted the finality provision of the statute as limiting the *scope* of judicial review, but not the *right* to it. In line with this interpretation, the Court held that the provision restricted judicial scrutiny of local board classifications to cases in which there is no basis in fact for the board's classification,²⁸ or in which the board's action is in conflict with the statute²⁹ or the regulations.³⁰ In such cases³¹ the board's action is in excess of its jurisdiction, and therefore subject to judicial review.

In addition to the limited judicial review available in a criminal prosecution, the courts have long held that a registrant can submit to induction and challenge the legality of the induction order by habeas corpus.³² The scope of review in habeas corpus proceedings

26. 327 U.S. at 123.

27. 327 U.S. at 120. The Court rejected as futile a construction of the Act that would have denied a registrant the opportunity to defend in a criminal prosecution on the ground that his local board acted beyond its jurisdiction. Since a registrant who had exhausted his administrative remedies could contest the validity of his induction order by habeas corpus, even after conviction, to construe the statute as making habeas corpus the exclusive remedy would require the courts "to march up the hill when it is apparent from the beginning that they will have to march down again." 327 U.S. at 123-25.

28. 327 U.S. at 122-23. The basis-in-fact standard has been further developed in subsequent cases. *E.g.*, *Witmer v. United States*, 346 U.S. 389 (1953). *See Comment, The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123, 2137-41 (1966). The standard has been codified by the 1967 Act, 50 U.S.C. App. § 460(b)(3) (Supp. IV, 1965-1968), amending 50 U.S.C. App. § 460(b)(3) (1964).

29. *E.g.*, a registrant ordered to report for induction by a board of another state could raise the defense that the board acted beyond its jurisdiction in violation of Selective Training and Service Act of 1940, ch. 720, § 10(a)(2), 54 Stat. 893. 327 U.S. at 120. Section 10(a)(2) is currently covered by 50 U.S.C. App. § 460 (1964).

30. *E.g.*, the refusal of a local board to reopen a registrant's classification upon written request of the state director would be in violation of the regulations and could be raised by a registrant as a defense to a criminal prosecution. 327 U.S. at 121.

Section 10(b)(1) of the 1948 Act, 50 U.S.C. App. § 460(b)(1) (1964), authorizes the President "to provide the necessary rules and regulations to carry out the provisions" of the Act. The President has exercised this authority by issuing Selective Service System Regulations, codified in 32 C.F.R. §§ 1600-90.23 (1970), and by delegating to the Director of Selective Service the authority to issue regulations concerning the administration of the Selective Service System. 32 C.F.R. § 1604.1(a) (1970). *See* 50 U.S.C. App. § 460(c) (1964).

31. The scope of judicial review has since been expanded to include the defense that the statute itself was unconstitutional. *See, e.g.*, *United States v. Seeger*, 326 F.2d 846 (2d Cir. 1964), *aff'd.*, 380 U.S. 163 (1965).

32. *E.g.*, *Billings v. Truesdell*, 321 U.S. 542 (1944); *Application of Kanas*, 385 F.2d

is also limited to cases in which the board has acted beyond the scope of its jurisdiction, such as when the board has made an error of law or when there is no basis in fact for its classification.³³

Prior to 1967, the courts construed the finality provision of the draft law as barring judicial review of Selective Service action except in a criminal prosecution for refusal of induction or on a petition for habeas corpus after submission to induction.³⁴ Direct judicial review, or review prior to either the acceptance or refusal of induction, was, with only a few exceptions, held to be unavailable.³⁵

In two of the cases in which preinduction review was permitted prior to 1967, *Tomlinson v. Hershey*³⁶ and *Townsend v. Zimmerman*,³⁷ the courts did not consider the finality provision. In *Tomlinson*, the district court refused to dismiss a complaint for injunctive and declaratory relief and held, without discussing the question of reviewability, that an order to report for induction was invalid when the local board had failed to act on the plaintiff's request for a deferment. Similarly, in *Townsend*, Judge (now Justice) Potter Stewart's opinion, while setting aside an induction order issued during the pendency of plaintiff's appeal—in violation of the regulations—did not discuss the cases limiting review to either habeas corpus or to a criminal prosecution. In a third case, *Ex parte Fabiani*,³⁸ the plaintiff claimed in a petition for habeas corpus that the issuance of an induction order placed him in constructive custody. The court granted preinduction review and held that the board's reclassification of the plaintiff on the ground that the medical school he attended was in a foreign country was contrary to the regulations and without basis in fact. The court in *Fabiani* rejected the Government's contention that the plaintiff was restricted to the

506 (2d Cir. 1967); *Commanding Officer v. United States ex rel. Bumanis*, 207 F.2d 499 (6th Cir. 1953); *United States ex rel. Phillips v. Downer*, 135 F.2d 521 (2d Cir. 1943); *United States ex rel. Vellrath v. Volatile*, 308 F. Supp. 1025 (E.D. Pa. 1970).

33. *Eagle v. United States ex rel. Samuels*, 329 U.S. 304, 311-12 (1946); *United States ex rel. Colby v. Commanding Officer*, 281 F. Supp. 989, 990 (E.D.N.Y. 1968).

34. *E.g.*, *Witmer v. United States*, 348 U.S. 375, 377 (1955); *Tamarkin v. Selective Serv. Sys. Local Draft Bd. No. 47*, 243 F.2d 108 (5th Cir.), *cert. denied*, 355 U.S. 825 (1957); *Watkins v. Rupert*, 224 F.2d 47 (2d Cir. 1955) (*per curiam*); *Muhammad Ali v. Connally*, 266 F. Supp. 345 (S.D. Tex. 1967).

35. *See* cases collected in Comment, *Anticipatory Attacks on Selective Service Classifications*, 117 U. PA. L. REV. 899, 900 n.10 (1969).

36. 95 F. Supp. 72 (E.D. Pa. 1949).

37. 237 F.2d 376 (6th Cir. 1956).

38. 105 F. Supp. 139 (E.D. Pa. 1952).

"desperate alternatives"³⁹ of either submitting to induction and bringing habeas corpus or refusing induction and defending in a criminal prosecution, since to uphold such a contention would be "exactly that type of judicial circuitry and waste motion which the Supreme Court in the *Estep* decision has counseled us to avoid."⁴⁰

Until 1967, *Tomlinson*, *Townsend*, and *Fabiani* were the only cases allowing judicial review prior to induction.⁴¹ In that year, the Second Circuit decided *Wolff v. Selective Service Local Board Number 16*,⁴² which granted preinduction relief to registrants who had been declared delinquent and reclassified I-A for participating in a demonstration at a local draft board in protest against the Vietnam War. Although the court conceded that in the ordinary case relief prior to induction would be unavailable for a mere adverse classification, it would not agree that this was true when first amendment rights were involved. The court held that punitive reclassification intended to punish activity arguably protected by the first amendment had a chilling effect on such activity within the meaning of *Dombrowski v. Pfister*,⁴³ and therefore required immediate judicial relief notwithstanding the failure of the plaintiffs to have exhausted their administrative remedies.⁴⁴ Reasoning that the local boards lacked authority to use the delinquency power to deal with conduct which under the statute was to be punished exclusively in the federal courts, the court further held that the local boards had exceeded their jurisdiction by reclassifying the plaintiffs.⁴⁵ In dictum, the court indicated that even if first amendment considerations were not present, it would be permissible for the courts to provide relief at any time when a local board acts in flagrant disregard of the regulations and thus clearly in excess of its jurisdiction.⁴⁶

39. 105 F. Supp. at 143.

40. 105 F. Supp. at 143-44.

41. In *Schwartz v. Strauss*, 206 F.2d 767 (2d Cir. 1953), the court affirmed the opinion of the district court which had held that under no circumstances was pre-induction review permissible. However, Judge Frank, concurring, expressed the opinion that such review would be available in a case in which, on undisputed facts, the board's lack of jurisdiction was manifest. 206 F.2d at 767.

42. 372 F.2d 817 (2d Cir. 1967).

43. 380 U.S. 479 (1965). See generally Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

44. 372 F.2d at 823-25.

45. 372 F.2d at 820-22.

46. 372 F.2d at 826. The court cited with approval the case of *Townsend v. Zimmerman*, 237 F.2d 376 (6th Cir. 1956) (see text accompanying note 37 *supra*), and Judge Frank's concurring opinion in *Schwartz v. Strauss*, 206 F.2d 767 (2d Cir. 1953) (see note 41 *supra*).

B. *The 1967 Amendment*

Congressional reaction to the *Wolff* case was immediate. In enacting the Military Selective Service Act of 1967,⁴⁷ Congress amended section 10(b)(3) of the Universal Military Training and Service Act⁴⁸ by inserting a provision explicitly designed to bar preinduction judicial review. The amendment provides:

No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, that such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only where there is no basis in fact for the classification assigned to such registrant.⁴⁹

The Senate version of the 1967 amendment, although including in the legislative history a reaffirmation of the original congressional intent that judicial review prior to induction be unavailable,⁵⁰ left section 10(b)(3) unchanged. The House Armed Services Committee, however, at the urging of the Director of the Selective Service System,⁵¹ deemed it desirable to rewrite the provision in order more clearly to re-enunciate the existing rule of judicial review.⁵² The lan-

47. 50 U.S.C. App. §§ 451-67 (Supp. IV, 1965-1968), *amending* 50 U.S.C. App. §§ 451-73 (1964).

48. Ch. 625, § 10(b)(3), 62 Stat. 618 (1948), *as amended*, 50 U.S.C. App. § 460 (b)(3) (1964). Section 1(1) of the 1967 amendments changed the title of the Act from "Universal Military Training and Service Act" to "Military Selective Service Act of 1967." 50 U.S.C. App. § 451(a) (Supp. IV, 1965-1968), *amending* 50 U.S.C. App. § 451(a) (1964).

49. Military Selective Service Act of 1967 § 1(8)(c) [amending Universal Military Training and Service Act § 10(b)(3)], codified in 50 U.S.C. App. § 460(b)(3) (Supp. IV, 1965-1968).

50. S. REP. No. 209, 90th Cong. 1st Sess. 10 (1967):

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

51. *See Hearings Before the House Comm. on Armed Services*, 90th Cong., 1st Sess. 2636-38 (1967).

52. *See H.R. REP. No. 267*, 90th Cong., 1st Sess. 30-31 (1967):

The committee was disturbed by the apparent inclination of some courts to review the classification action of local or appeal boards before the registrant had exhausted his administrative remedies. Existing law quite clearly precludes such a judicial review until after the registrant has been ordered to report for

guage inserted by the House committee was adopted by the House and accepted by the Senate in conference.⁵³ Although the *Wolff* decision was not mentioned by name, the reference in the Senate report to "several recent cases"⁵⁴ leaves no doubt that the congressional reaction was aimed at that Second Circuit case decided less than four months before.⁵⁵ Congress deemed necessary the elimination of preinduction judicial review such as that permitted in *Wolff*, in the words of the Chairman of the Senate Armed Services Committee, "to prevent litigious interruptions of procedures to provide necessary military manpower."⁵⁶

It is thus clear that the congressional purpose in amending section 10(b)(3) was to overrule by statute any decisions like *Wolff* which tended to expand the concept of preinduction judicial review. The imprecision of the language utilized in the amendment, however, raises the question whether Congress intended to accomplish more than that limited purpose. There is, for example, no reference in the new formulation to the remedy of habeas corpus. By excepting only review as a defense to a criminal prosecution from the bar on judicial review,⁵⁷ could Congress have intended to eliminate review by means of habeas corpus? Although the language of the amendment appears to do this, the legislative history indicates that Congress had no such intention.⁵⁸ In view of this legislative history, and

induction and has responded either affirmatively or negatively to such an order. In view of this inclination of the courts to prematurely inquire into the classification action of local boards, the committee has rewritten this provision of the law so as to more clearly enunciate this principle. The committee was prompted to take this action since continued disregard of this principle of the law by various courts could seriously affect the administration of the Selective Service System.

53. H.R. REP. NO. 346, 90th Cong., 1st Sess. 16 (1967).

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

55. See *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 245 n.7 (1968) (Justice Harlan, concurring).

56. 113 CONG. REC. 15,426 (1967) (remarks of Senator Russell).

57. Although § 10(b)(3) bars review "until after the registrant has responded either affirmatively or negatively to an order to report," the affirmative-response language cannot be deemed to refer to habeas corpus, since that language is modified by the phrase, "except as a defense to a criminal prosecution . . ." 50 U.S.C. App. § 460(b)(3) (Supp. IV, 1965-1968).

58. The Senate committee report stated:

A registrant who presents himself for induction may challenge his classification by seeking a writ of habeas corpus after his induction. If the registrant does not submit to induction, he may raise as a defense to a criminal prosecution the issue of the legality of the classification.

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

In describing the effect of the amendment, the House Armed Services Committee stated that it:

[r]e enunciates the principle already in existing law that the courts cannot review

in view of the serious doubt about the constitutional validity of the statute if it is read to suspend the writ of habeas corpus,⁵⁹ the Government has conceded that section 10(b)(3) does not abolish that remedy,⁶⁰ and the courts have so held.⁶¹

A second problem stemming from the amendment's language concerns the proviso that judicial review shall go to the question of the jurisdiction of the local board "only when there is no basis in fact for the classification assigned."⁶² By failing to include the case in which the board has made an error of law, this proviso appears on its face to change the rules on the scope of review developed in *Estep* and subsequent cases.⁶³ It is unclear whether Congress intended such a major change, since the only reference to this question in the legislative history merely paraphrases the statutory provision.⁶⁴ Thus, aside from the language of the amendment itself, there is no reason to believe that Congress intended anything other than a codification of the *Estep* rule.⁶⁵ For this reason, the courts have held that the amendment does not alter the scope of review.⁶⁶

A further question raised by the language of the amendment is whether the phrase barring review until "after the registrant has responded either affirmatively or negatively to an order to report"⁶⁷ was meant to alter the requirement that a registrant exhaust his

the classification action of the Selective Service System until after a registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order

H.R. REP. NO. 267, 90th Cong., 1st Sess. 7 (1967) (emphasis added). See *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 248 (1968) (Justice Stewart, dissenting).

59. See U.S. CONST. art. I, § 9, and the discussion in Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1396-401 (1953).

60. Brief for Respondents at 22-23, 60, *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233 (1968).

61. E.g., *Morgan v. Underwood*, 406 F.2d 1253 (5th Cir.), cert. denied, 396 U.S. 944 (1969); *United States ex rel. Wilkerson v. Commanding Officer*, 286 F. Supp. 290 (S.D.N.Y. 1968); *United States ex rel. Caputo v. Sharp*, 286 F. Supp. 516 (E.D. Pa. 1968).

62. 50 U.S.C. App. § 460(b)(3) (Supp. IV, 1965-1968).

63. See notes 28-31 *supra* and accompanying text.

64. The conference report states that "[t]his language . . . provides that any such judicial review shall extend only to whether there is any basis in fact for the classification assigned." H.R. REP. NO. 346, 90th Cong., 1st Sess. 16 (1967).

65. See O'Neil, *supra* note 5, at 543.

66. E.g., *United States v. Lybrand*, 279 F. Supp. 74, 77 (E.D.N.Y. 1967): "The language of the statute and its legislative history point to the conclusion that Congress left untouched the power of the courts to consider—in a criminal prosecution—jurisdictional errors other than those dealing with classification." See also *Kurjan v. Commanding Officer*, 3 SEL. SERV. L. REP. 3118 (E.D. Pa. 1970); *United States v. Bey*, 3 SEL. SERV. L. REP. 3097 (N.D. Ill. 1970).

67. 50 U.S.C. App. § 460(b)(3) (Supp. IV, 1965-1968).

administrative remedies. The rule under *Falbo v. United States*⁶⁸ requires a registrant who seeks to challenge his classification in court to report to the induction station and refuse to take the symbolic step forward. Since a registrant who refuses to appear at the induction station can be said to have responded negatively to an order to report, it has been suggested that the amendment modifies the *Falbo* rule.⁶⁹ Despite this ambiguity in statutory language, the legislative history indicates that Congress was concerned merely with the timing of judicial review, and not with the exhaustion question.⁷⁰ The *Falbo* rule was thus left unchanged by the 1967 amendment. However, that rule has been judicially modified more recently.⁷¹

A fourth question concerns the language of the amendment which bars review only of the "classification or processing of any registrant."⁷² It has been suggested, by analogy to cases involving judicial review of National Labor Relations Board certification orders,⁷³ that this language precludes judicial review of the authorized activities of draft boards, but not of acts wholly outside a board's jurisdiction.⁷⁴ Although the limiting words "classification or processing" could in this way provide a textual basis for a narrow reading of the amendment,⁷⁵ such an interpretation would frustrate the Congressional design behind the amendment to section 10(b)(3). Although poorly drafted, the amendment was clearly intended to bar all judicial review prior to induction.⁷⁶

68. 320 U.S. 549 (1944). See notes 20-24 *supra* and accompanying text.

69. *United States v. Lemmens*, 3 SEL. SERV. L. REP. 3185 (7th Cir. 1970). See Tigar, *supra* note 5; Griffiths, Book Review, 77 YALE L.J. 827, 829-30 n.15 (1968).

70. The House conference report states that the amendment is "intended to make clear that there shall be no judicial review of classification except as a defense to a criminal prosecution after a person has exhausted his administrative remedies and presented himself for induction." H.R. REP. No. 346, 90th Cong., 1st Sess. 16 (1967). See *McKart v. United States*, 395 U.S. 185, 206-07 n.2 (1969) (Justice White, concurring).

71. See cases cited in note 22 *supra*.

72. 50 U.S.C. App. § 460(b)(3) (Supp. IV, 1965-1968).

73. *E.g.*, *Leedom v. Kyne*, 358 U.S. 185 (1958). See O'Neil, *supra* note 5, at 544-45.

74. Griffiths, *Some Notes on the Solicitor General's Memorandum in Oestereich: Concerning Punitive Classifications and § 10(b)(3) of the Act*, 1 SEL. SERV. L. REP. 4012, 4013 (1968).

75. The courts in *Bucher v. Selective Serv. Sys. Local Bd. No. 2*, 421 F.2d 24 (3d Cir. 1970), and *National Student Assn. v. Hershey*, 412 F.2d 1103, 1107 (D.C. Cir. 1969), based their decisions allowing preinduction review on a literal interpretation of the "classification or processing" language. See also *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 240 (1968) (Justice Harlan, concurring). *Contra*, *Zigmond v. Selective Serv. Local Bd. No. 16*, 284 F. Supp. 732, 734 (D. Mass.), *stay of induction denied*, 396 F.2d 290 (1st Cir.), *application for stay denied*, 391 U.S. 930 (1968). See notes 212-23 *infra* and accompanying text.

76. See notes 50-56 *supra* and accompanying text. Section 10(b)(3) does not, however, bar actions seeking the production of information which concerns the operations

C. *Judicial Interpretation of Section 10(b)(3)*
Prior to Supreme Court Consideration

Judicial construction of the amended section 10(b)(3) was not long in coming. Several cases attempting to enjoin inductions were filed in the wake of the successful attack by the plaintiffs in *Wolff*.⁷⁷ Furthermore, a directive issued to all local boards by Lieutenant General Lewis B. Hershey, the National Director of Selective Service, recommended the reclassification of registrants who engaged in anti-war protest and other acts in violation of the Selective Service Act and regulations.⁷⁸ The directive resulted in many punitive reclassifications throughout the country,⁷⁹ which in turn led to suits challenging such reclassifications.⁸⁰ The first courts to consider the validity of these reclassifications held section 10(b)(3) effective to bar such preinduction actions.⁸¹ Although one court held the restrictions on judicial review contained in the section to be an unconstitutional violation of due process,⁸² and a few granted relief in

of the Selective Service System. By retaining § 13(b) of the statute, 50 U.S.C. App. § 463(b) (1964), which excludes the Selective Service System from the operation of the Administrative Procedure Act, 5 U.S.C. §§ 1001-11 (1964), as amended, 5 U.S.C. §§ 551-59, 701-06 (Supp. III, 1965-67), except for the public-information section of that Act, 5 U.S.C. § 552 (Supp. III, 1965-1967), amending 5 U.S.C. § 552 (Supp. II, 1965-1966), Congress indicated that freedom-of-information actions were not to be barred by the new judicial review provision. See e.g., *Tuchinsky v. Selective Serv. Sys.*, 418 F.2d 155 (7th Cir. 1969); *Schmidt v. Hall*, 2 SEL. SERV. L. REP. 3320 (W.D. Wis. 1969); *Martin v. Neuschel*, 1 SEL. SERV. L. REP. 3002 (E.D. Pa.), *vacated and remanded*, 396 F.2d 759 (3d Cir. 1968).

77. E.g., *Costas Elena v. President of the United States*, 288 F. Supp. 388 (D.P.R. 1968); *Johnson v. Clark*, 281 F. Supp. 112 (D. Ariz. 1968).

78. Letter from Lt. Gen. Lewis B. Hershey to All Members of the Selective Service System, Oct. 26, 1967, in N.Y. Times, Nov. 9, 1967, § 1, at 2, cols. 3-5, reprinted in *Turley v. Selective Serv. Sys. Local Bd. No. 134*, 301 F. Supp. 845, 848-49 (C.D. Cal. 1969); *Selective Serv. Local Bd. Memorandum No. 85* (Oct. 24, 1967). Both the Hershey letter and Memorandum No. 85 provide for delinquency reclassifications: the memorandum was apparently attached to the letter when it was sent to the local boards. See *National Student Assn. v. Hershey*, 412 F.2d 1103, 1105-06 (D.C. Cir. 1969). The events following the issuance of the now famous "Hershey letter" are discussed in H. MARMION, *SELECTIVE SERVICE: CONFLICT AND COMPROMISE* 162-63 (1968).

79. See L. HERSHEY, *LEGAL ASPECTS OF SELECTIVE SERVICE* 47-48 (4th ed. 1969).

80. E.g., *Zigmond v. Selective Serv. Local Bd. No. 16*, 284 F. Supp. 732 (D. Mass.), *stay of induction denied*, 396 F.2d 290 (1st Cir.), *application for stay denied*, 391 U.S. 930 (1968); *Breen v. Selective Serv. Local Bd. No. 16*, 284 F. Supp. 749 (D. Conn. 1968), *affd.*, 406 F.2d 636 (2d Cir. 1969), *revd.*, 396 U.S. 460 (1970); *National Student Assn. v. Hershey*, 1 SEL. SERV. L. REP. 3026 (D.D.C. 1968), *revd.*, 412 F.2d 1103 (D.C. Cir. 1969) (class action to declare Hershey directive void).

81. E.g., *Carpenter v. Hendrix*, 277 F. Supp. 660 (N.D. Ga. 1967); *Moskovitz v. Kindt*, 273 F. Supp. 646 (E.D. Pa. 1967), *affd.*, 394 F.2d 648 (3d Cir. 1968), *cert. denied*, 393 U.S. 1014 (1969).

82. *Petersen v. Clark*, 285 F. Supp. 700 (N.D. Cal. 1968), *revd.*, 411 F.2d 1217 (9th Cir. 1969) (per curiam). *Accord*, *Gabriel v. Clark*, 287 F. Supp. 369 (N.D. Cal.), *revd.*, 393 U.S. 256 (1968) (per curiam).

preinduction actions,⁸³ most courts sustained the section against constitutional attack⁸⁴ and denied relief.⁸⁵

In one of the early reclassification cases a registrant named Oestereich, who had held a IV-D exemption as a divinity student,⁸⁶ was reclassified I-A delinquent⁸⁷ after he returned his draft card to the Government in protest against American participation in the Vietnam War. After exhausting his administrative appeals and being ordered to report for induction, Oestereich brought suit seeking review of his local board's action and an injunction restraining his induction. The district court dismissed the action, relying on section 10(b)(3),⁸⁸ and the Tenth Circuit affirmed that decision *per curiam*.⁸⁹

Oestereich petitioned the Supreme Court for a writ of certiorari, and the Solicitor General, in an unusual memorandum, urged the Court to reverse the decisions of the two lower federal courts.⁹⁰ Since Oestereich's divinity student exemption was provided by the statute, a decision to deny him preinduction review would have been in direct conflict with the congressional grant of exemption. In order to avoid such conflict, the Solicitor General urged a construction of section 10(b)(3) that would permit review.⁹¹ The Solicitor General argued that section 10(b)(3) should be construed "as applicable to the generality of situations where the local board has applied its judgment, but to exclude purported action of a board which is in fact contrary to an exemption which has been expressly granted by

83. *Faulkner v. Clifford*, 289 F. Supp. 895 (E.D.N.Y. 1968); *Rheingans v. Clark*, 1 SEL. SERV. L. REP. 3380 (N.D. Cal. 1968); *Turley v. Selective Serv. Sys. Local Bd. No. 134*, 301 F. Supp. 845 (C.D. Cal. 1969).

84. *E.g.*, *Hodges v. Clark*, 291 F. Supp. 177 (N.D. Cal. 1968); *Foran v. Weinhoff*, 291 F. Supp. 498 (E.D. Wis. 1968), *appeal dismissed*, 393 U.S. 529 (1969) (*per curiam*).

85. *E.g.*, *Hennessy v. Selective Serv. Local Bd. No. 21*, 292 F. Supp. 465 (D. Mont. 1968); *Boyd v. Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968), *aff'd.*, 393 U.S. 316 (1969) (*per curiam*).

86. *See* 50 U.S.C. App. § 456(g) (1964); 32 C.F.R. § 1622.43 (1970).

87. Oestereich's board declared him a delinquent, pursuant to 32 C.F.R. § 1642.4(a) (1970), for failure to have a registration certificate in his possession as required by 32 C.F.R. § 1617.1 (1970). The board's action may have been in response to the Hershey directive discussed in note 78 *supra* and accompanying text.

88. *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 280 F. Supp. 78 (D. Wyo. 1968).

89. 390 F.2d 100 (10th Cir. 1968).

90. Memorandum for Respondents at 13, *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233 (1968).

91. Several courts enjoined inductions in cases raising issues similar to those presented in *Oestereich*, and those courts based their decisions on the Solicitor General's concession. *E.g.*, *United States v. Imus*, 398 F.2d 816 (10th Cir. 1968); *Kimball v. Selective Serv. Local Bd. No. 15*, 283 F. Supp. 606 (S.D.N.Y. 1968); *Linzer v. Selective Serv. Local Bd. No. 64*, 293 F. Supp. 772 (E.D.N.Y. 1968).

statute."⁹² The Supreme Court granted certiorari in *Oestereich*,⁹³ and also agreed to hear the Government's appeal in *Gabriel v. Clark*,⁹⁴ a decision in which the Federal District Court for the Northern District of California had held section 10(b)(3) unconstitutional and had enjoined the induction of a registrant who claimed he was entitled to classification as a conscientious objector.

D. *The Oestereich and Gabriel Decisions in
the Supreme Court*

On December 16, 1968, the Supreme Court decided *Oestereich*⁹⁵ and *Gabriel*,⁹⁶ in each case reversing the decision of the lower court.

In *Oestereich*, the Court refused to read section 10(b)(3) to preclude preinduction judicial review of the board's "basically lawless" removal of petitioner's "plain and unequivocal" statutory exemption for "activities unrelated to the merits of granting or continuing that exemption."⁹⁷ Noting that section 10(b)(3) purports on its face to remove the remedy of habeas corpus, the Court stated that "no one . . . suggests that § 10(b)(3) can sustain a literal reading."⁹⁸ Such a literal interpretation, the Court reasoned, would do violence to the clear mandate of section 6(g) of the Act,⁹⁹ which requires the exemption of ministerial students. Finding section 10(b)(3) to be "another illustration" of "where literalness in statutory language is out of harmony . . . with an Act taken as an organic whole,"¹⁰⁰ the Court refused to construe it to bar preinduction review in cases involving "a clear departure by the Board from its statutory mandate"¹⁰¹ when there is "no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved."¹⁰² Acknowledging that the literal language of section 10(b)(3) would, despite the concededly unlawful action of *Oestereich's* board,¹⁰³ prevent the petitioner from ob-

92. Memorandum for Respondents at 12, *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233 (1968).

93. 391 U.S. 912 (1968).

94. 287 F. Supp. 369 (N.D. Cal. 1968).

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

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

97. 393 U.S. at 237-38.

98. 393 U.S. at 238.

99. 50 U.S.C. App. § 456(g) (1964).

100. 393 U.S. at 238.

101. 393 U.S. at 238.

102. 393 U.S. at 238.

103. The Solicitor General conceded that *Oestereich's* local board lacked the au-

taining judicial redress prior to induction, the Court refused "to construe the Act with unnecessary harshness,"¹⁰⁴ and held that preinduction judicial review is not precluded "in cases of this type."¹⁰⁵

Justice Harlan concurred in the Court's decision in *Oestereich* on the basis that the "classification or processing" language of section 10(b)(3), although applicable to the "numerous discretionary, factual, and mixed law-fact determinations which a Selective Service board must make,"¹⁰⁶ does not apply to purely legal claims. Justice Harlan found that an interpretation of the provision which barred preinduction judicial review of such claims was not indicated either by the legislative history¹⁰⁷ or by the statute's purpose.¹⁰⁸ Furthermore, he felt that such an interpretation would raise serious constitutional problems since the effect of such a construction would be to "deprive petitioner of his liberty without the prior opportunity to present to *any* competent forum—agency or court—his

thority to reclassify him and order him to report for induction. Brief for the Respondents at 66, *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233 (1968), and the Court so held. 393 U.S. at 237. The Director of Selective Service, however, contrary to the position adopted by the Solicitor General, had contended that the board possessed this authority. Memorandum from Lt. Gen. Lewis B. Hershey, Dir. of Selective Serv., at 7-9, *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233 (1968); Brief for the Respondents at 71-72, *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. at 233 (1968).

104. 313 U.S. at 238. The Court found that it would be overly harsh to restrict a registrant either to a criminal prosecution or to a habeas corpus proceeding after induction in order to secure relief from the basically lawless action of his board. The Government had conceded that such a restriction would be "a very heavy burden to put on the citizen." Memorandum for the Respondents at 13, *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233 (1968).

105. 393 U.S. at 239. For an analysis of the Court's decision as an example of forced statutory construction in the avoidance of a constitutional question, see Donahue, *supra* note 8, at 919-22.

106. 393 U.S. at 240.

107. Although noting that the amendment to § 10(b)(3) was precipitated by *Wolff*, Justice Harlan distinguished that case on the ground that it involved claims of local board maladministration or misapplication of the statutes or regulations, rather than challenges to the validity of the laws themselves. 393 U.S. at 245 n.7. But the court in *Wolff* had upheld claims that the local boards involved acted wholly without jurisdiction and in violation of constitutional rights. *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817, 820-22 (2d Cir. 1967). If there is any distinction between such maladministration and facial invalidity of the laws themselves, the *Wolff* court did not find one; rather, it held that "the justiciability of a given case cannot rest upon a distinction between a statute void on its face and a statute which is being applied in an unconstitutional fashion . . ." 372 F.2d at 824.

108. Justice Harlan reasoned that a claim of facial invalidity can be disposed of on the pleadings without significantly interrupting the orderly processing of registrants. Moreover, he noted, Selective Service boards, as administrative agencies, are wholly unsuitable forums for the adjudication of such constitutional claims. 393 U.S. at 241-43,

substantial claim that he was ordered inducted pursuant to an unlawful procedure."¹⁰⁹

Three Justices dissented, relying on the clear congressional intent to bar review in cases such as *Oestereich*.¹¹⁰ The dissenters could find no clash between the procedural provision concerning the timing of judicial review and the substantive provision creating the exemption for divinity students.¹¹¹ Since the Court did not question the constitutionality of section 10(b)(3), the dissenting opinion could find no justification for disregarding the clear terms of the section simply because they were deemed harsh.¹¹²

In *Gabriel*, decided on the papers without oral argument or briefing, the Supreme Court summarily reversed the district court decision that section 10(b)(3) was unconstitutional and upheld the provision's preclusion of direct judicial review.¹¹³ While the IV-D divinity student classification involved in *Oestereich* was unconditionally mandated by the statute, the I-O conscientious-objector classification sought by the registrant in *Gabriel* was merely authorized by the Act, its issuance being expressly conditioned on the registrant's claim being "sustained by the local board."¹¹⁴ The Court held that section 10(b)(3) barred direct judicial review of the board's refusal to grant Gabriel conscientious-objector status because, unlike the local board's action in *Oestereich*, such action by a local board "inescapably involves a determination of fact and an exercise of judgment."¹¹⁵ *Gabriel* was distinguished from *Oestereich* on the ground that the board action in *Oestereich* "was with-

109. 393 U.S. at 243. The difference between Justice Harlan's approach to § 10(b)(3) and that of the majority of the Court is that the rationale for Justice Harlan's view centers on the requirement of exhaustion of administrative remedies, while that of the majority centers on the concept of ripeness. See Donahue, *supra* note 8, at 934-35.

110. 393 U.S. at 246-48 (Justice Stewart, dissenting, joined by Justices Brennan and White).

111. 393 U.S. at 249. Ironically, as the dissenters in *Oestereich* point out, the harshness found by the majority would be greater for the registrant alleging an erroneous factual determination by his board than for the registrant claiming basically lawless board action. The former would bear a larger risk of conviction should he contest his classification by defending a criminal prosecution for refusal of induction than would the latter. Yet the latter, but not the former, could secure relief prior to induction under the Court's rule. The burden of § 10(b)(3) falls most heavily upon the very case that the Court explicitly ruled would be subject to the section's bar—that of the conscientious objector considered in *Gabriel*. The remedy of habeas corpus after induction would be unavailable to a sincere conscientious objector since his religious beliefs would prevent him from accepting induction under any circumstances. See *United States v. Freeman*, 388 F.2d 246, 248-49 (7th Cir. 1967).

112. 393 U.S. at 250.

113. 393 U.S. 256 (1968) (per curiam), reversing 287 F. Supp. 369 (N.D. Cal. 1968).

114. 50 U.S.C. App. § 456(j) (Supp. IV, 1965-1968).

115. 393 U.S. at 258.

out statutory basis and in conflict with petitioner's rights explicitly established by statute and not dependent upon an act of judgment by the board."¹¹⁶ Since the board in *Gabriel* had exercised its statutory discretion and evaluated evidence, to allow preinduction review of such a determination would be to permit just the kind of "litigious interruption" of the selection process that Congress sought to prevent by enacting section 10(b)(3).¹¹⁷

Read together, *Oestereich* and *Gabriel* establish a construction of section 10(b)(3) that allows preinduction judicial review in cases in which the local board's action violates the statute, but prohibits such review in cases in which the board acts within its statutory authority with respect to a discretionary classification, when such classification involves the exercise of board judgment in determining facts and evaluating evidence. The Court's test is not as judicially manageable as it might be. Although a court may easily distinguish between those classifications that are mandatory and those that are merely permissive, the amount of board fact-finding necessary to place a mandatory classification in the *Gabriel* category rather than in the *Oestereich* exception remains unclear. The Court's distinction is in this regard unsatisfactory. Although the conscientious-objector classification involved in *Gabriel* does require the board to determine facts and exercise judgments, the divinity student classification involved in *Oestereich* is similarly dependent upon local board discretion and fact-finding,¹¹⁸ notwithstanding the Court's statement that it is "not dependent upon an act of judgment by the board."¹¹⁹

The Court's decisions in *Oestereich* and *Gabriel* left unanswered many other questions concerning the availability of early review.

116. 393 U.S. at 258.

117. 393 U.S. at 258-59.

118. See Selective Serv. Local Bd. Memorandum No. 56 (Aug. 18, 1954), in which local boards were instructed concerning the difficult factual judgments required in determining entitlement to the divinity student classification. See also Comment, *supra* note 22, at 813-14 n.60, which criticizes the Court's distinction on the ground that such board determinations of fact are required with respect to both classifications. For a discussion of the difficult determinations a local board is called upon to make in deciding claims for the ministerial exemption, see generally Note, *Ministerial Exemption from Selective Service System*, 19 SYRACUSE L. REV. 996 (1968). For cases dealing with the factual issues involved in determining eligibility for the divinity student classification, see *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 316-17 (1946); *United States v. McGee*, 426 F.2d 691, 694-96 (2d Cir. 1970); *United States v. Bartelt*, 200 F.2d 385, 388 (7th Cir. 1952); *United States ex rel. Levy v. Cain*, 149 F.2d 338, 341-42 (2d Cir. 1945). See text accompanying notes 146-52 *infra*.

119. *Clark v. Gabriel*, 393 U.S. 256, 258 (1968). For other criticisms of the Court's distinction, see Comment, *Pre-Induction Judicial Review*, 57 CALIF. L. REV. 948, 973 (1969); *The Supreme Court 1968 Term*, 83 HARV. L. REV. 7, 264 (1969).

For example, although the rationale used by the Court to distinguish the two cases indicates a broad exception to the bar to review contained in section 10(b)(3),¹²⁰ the Court's repeated reference to "statutory exemption" as well as its disclaimer that its construction "leaves § 10(b)(3) unimpaired in the normal operations of the Act,"¹²¹ may suggest a narrow interpretation of the section which would exclude cases involving deferments.¹²² Furthermore, the two decisions leave open such questions as whether preinduction review would be available in a case in which the board's action has violated the regulations rather than the statute, or in a challenge to board procedures rather than classification decisions, or in an attack on the constitutionality of the statute itself.

E. *Application of the Supreme Court's Standard*

1. *The Exemption-Deferment Distinction*

In the many preinduction suits filed following the *Oestereich* and *Gabriel* decisions, the Government argued that the Court's rule permitting early review should be limited to cases involving statutory exemptions. This argument was supported primarily by the Court's use of the term "exemption" but not of the term "deferment" in its opinion in *Oestereich*.¹²³ Although some of the courts of appeals adopted the Government's distinction,¹²⁴ most rejected it,¹²⁵ and in *Breen v. Selective Service Local Board Number 16*,¹²⁶ decided January 26, 1970, the Supreme Court concluded that there were no "practical or legal differences between exemptions and

120. See notes 115-16 *supra* and accompanying text.

121. 393 U.S. at 238.

122. *But see* *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 249 n.9 (1968) (Justice Stewart, dissenting): "The Court seems to limit its holding to statutory 'exemptions'; yet 'deferments' may just as 'plainly' preclude a registrant's induction."

123. See *Anderson v. Hershey*, 410 F.2d 492, 494 (6th Cir. 1969), *vacated and remanded*, 397 U.S. 47 (1970) (finding a "repeated confinement" of the Court's ruling to exemptions); Brief for the Respondents at 17, *Breen v. Selective Serv. Local Bd. No. 16*, 396 U.S. 460 (1970).

124. *United States v. Troutman*, 412 F.2d 810 (8th Cir. 1969), *vacated and remanded*, 397 U.S. 48 (1970), *revd. on remand*, 425 F.2d 261 (1970); *Anderson v. Hershey*, 410 F.2d 492 (6th Cir. 1969), *vacated and remanded*, 397 U.S. 47 (1970); *Kraus v. Selective Serv. Sys. Local 25*, 408 F.2d 622 (4th Cir. 1969), *vacated and remanded*, 397 U.S. 47 (1970).

125. *Nestor v. Hershey*, 425 F.2d 504 (D.C. Cir. 1969); *United States v. Worstell*, 419 F.2d 762 (3d Cir. 1969); *Carey v. Local Bd. No. 2*, 412 F.2d 71 (2d Cir. 1969) (*per curiam*) (by implication); *Bowen v. Hershey*, 410 F.2d 962 (1st Cir. 1969); *Foley v. Hershey*, 409 F.2d 827 (7th Cir. 1969) (*per curiam*) (by implication); *Rich v. Hershey*, 408 F.2d 944 (10th Cir. 1969).

126. 396 U.S. 460 (1970).

deferments,"¹²⁷ and extended the *Oestereich* rule to cover cases involving deferments.¹²⁸

It was not surprising that the Court in *Oestereich* had referred exclusively to exemptions, for the divinity student classification at issue in that case was an exemption.¹²⁹ Although the Solicitor General's brief in *Oestereich* had urged the Court to limit the proposed exception to section 10(b)(3) to exemptions,¹³⁰ the Court's opinion did not address itself to the question whether its rule should be so limited. Rather than adopting a distinction between exemptions, which were involved in both *Oestereich* and *Gabriel*,¹³¹ and deferments, which were not at issue in either case, the Court rested both cases on the distinction between mandatory classifications which are explicitly required by the statute (*Oestereich*) and discretionary classifications which call for the exercise of local board judgment in determining facts and evaluating evidence (*Gabriel*).

The Court in *Breen* explicitly rejected the Attorney General's argument¹³² that the *Oestereich* exception to section 10(b)(3)

127. 396 U.S. at 466.

128. The Court permitted review in a preinduction case involving the undergraduate-student deferment required by 50 U.S.C. App. § 456(h)(1) (Supp. IV, 1965-1968).

129. Section 6(g) of the Act provides that "students preparing for the ministry" in qualified schools "shall be exempt from training and service . . ." 50 U.S.C. App. § 456(g) (1964).

130. The Government argued that the Court's rule "need not extend to persons who are deferred . . . because they remain liable for service and training, with only the time of service subject to adjustment." Brief for the Respondents at 65, *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233 (1968). The Director of Selective Service, however, in a memorandum filed in the *Oestereich* case, took the position, contrary to that of the Solicitor General, that "there is little, if any, distinction between a case in which a registrant claims the right to complete his course of study in a theological school under a statutory *exemption* and the case of an undergraduate student pursuing any other course who claims a right to a statutory *deferment* to complete his baccalaureate studies," and that "a statutory provision authorizing *deferment* is as binding as one which authorizes *exemption*." Memorandum from Lt. Gen. Lewis B. Hershey, Dir. of Selective Serv. at 4-5, *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233 (1968).

131. Although the statute describes conscientious objection as an exemption, 50 U.S.C. App. § 456(j) (Supp. IV, 1965-1968), as does the Selective Service System's Special Form for Conscientious Objector, SSS Form No. 150 (Aug. 30, 1968), this status is unlike the other classifications which are designated exemptions. Classification as a conscientious objector is not a determination of whether or not a registrant shall serve, but rather of the type of service he will perform. Conscientious objectors are placed either in class I-A-O, the noncombatant military service classification, 32 C.F.R. § 1622.11 (1970), or in class I-O, the civilian alternative service classification, 32 C.F.R. § 1622.14 (1970).

132. The Solicitor General had refused to sign the Government's brief in *Breen*, which was prepared by the Attorney General. This was the first time that a Solicitor General had refused to sign a government brief since 1955. 2 SEL. SERV. L. REP. NEWSLETTER 33 (1969).

should apply only to exemptions. The Court found it misleading to regard an exemption as a removal of liability for service but a deferment as merely a postponement of such liability. Those "exempted" are no more immune from military service than those "deferred." Both types of classification are based on the status of the individual. As long as his status remains unchanged, the registrant is effectively immune from service whether his classification is called a "deferment" or an "exemption," since the Act provides that no deferred or exempted registrant may be inducted.¹³³ "No classification is permanent,"¹³⁴ however, and the Act requires that no exemption or deferment "shall continue after the cause therefor ceases to exist."¹³⁵ Thus, as soon as his status changes, the registrant again becomes liable for service whether his previous classification was labeled a "deferment" or an "exemption."¹³⁶ The undergraduate student given a II-S "deferment" and the divinity student given a IV-D "exemption" alike become liable for induction should they both become graduate students in history after graduation from their respective schools.¹³⁷

The only difference between exemptions and deferments under the selective service law is that the latter, but not the former, extend a registrant's liability for service from age twenty-six to age thirty-five.¹³⁸ But this is a technical difference only, since under the present order of call a registrant over the age of twenty-six whose liability has been extended will not be ordered for induction unless there is a total national mobilization.¹³⁹ The distinction drawn by the statute is of questionable validity even for the limited purpose of determining whether a registrant's liability has

133. 50 U.S.C. App. § 455(a) (1964), *as amended*, 50 U.S.C. App. § 455(a)(1) (Supp. IV, 1965-1968).

134. 32 C.F.R. § 1625.1(1) (1970). *See* Selective Serv. Local Bd. Memorandum No. 55 (Jan. 25, 1957) (calling for a periodic review of classifications).

135. 50 U.S.C. App. § 456(k) (1964).

136. *See* United States v. Stewart, 306 F. Supp. 29 (N.D. Cal. 1969), *appeal dismissed*, 396 U.S. 1066 (1970).

137. *See* Turley v. Selective Serv. Sys. Local Bd. No. 134, 301 F. Supp. 845, 852-53 (C.D. Cal. 1969). Both exemptions and deferments may also be waived or abandoned by the registrant. Pickens v. Cox, 282 F.2d 784 (10th Cir. 1960) (exemption); United States v. Norman, 301 F. Supp. 53, 59 (M.D. Tenn. 1968), *affd*, 413 F.2d 789 (6th Cir. 1969) (deferment).

138. 50 U.S.C. App. § 456(h) (1964), *as amended*, 50 U.S.C. App. § 456(h)(2) (Supp. IV, 1965-1968). *See* Selective Serv. Local Bd. Memorandum No. 38 (Feb. 19, 1965).

139. *See* 32 C.F.R. § 1631.7(a) (1970); Selective Serv. Local Bd. Memorandum No. 67 (Sept. 20, 1966). These regulations establish the random-selection system, and place those over the age of twenty-six fifth in order of call, a category that will not be reached, given the present manpower needs of the Department of Defense and the pool of available men in categories lower than five, unless there is a total national mobilization.

been extended. Why should an elected official¹⁴⁰ be subject to extended liability while a divinity student¹⁴¹ is not? Why should the classification given a member of ROTC¹⁴² be termed a deferment, while that given a cadet at a military academy¹⁴³ is called an exemption? The designation of some classifications as deferments and others as exemptions appears arbitrary. Moreover, some classifications are not designated as either exemptions or deferments,¹⁴⁴ and some appear to be neither.¹⁴⁵ Thus, the Court's decision in *Breen* to reject an exemption-deferment distinction and to extend the *Oestereich* rule to deferments seems to be proper.

The key to the *Oestereich* rule, as enunciated by the Supreme Court, is whether the classification at issue is a clear statutory mandate preventing any exercise of discretion by the board. Whatever distinction there is between exemptions and deferments is simply irrelevant in applying this rule. As the Court found in *Breen*, many exemptions are not absolute;¹⁴⁶ and, as the dissenting opinion in *Oestereich* pointed out, deferments "may just as 'plainly' preclude a registrant's induction" as exemptions.¹⁴⁷ Indeed, some deferments are more "mandatory" than are some exemptions.¹⁴⁸ The IV-D exemption for divinity students found in *Oestereich* to be "plain and

140. 50 U.S.C. App. § 456(f) (1964).

141. 50 U.S.C. App. § 456(g) (1964).

142. Reserve Officer Training Corps, 50 U.S.C. App. § 456(d)(1) (1964).

143. 50 U.S.C. App. § 456(a) (1964), *as amended*, 50 U.S.C. App. § 456(a)(1) (Supp. IV, 1965-1968).

144. *E.g.*, 50 U.S.C. App. § 456(o) (1964) (sole surviving son).

145. *E.g.*, 50 U.S.C. App. § 456(a) (1964), *as amended*, 50 U.S.C. App. § 456(a)(2) (Supp. IV, 1965-1968) (members of the Public Health Service).

146. 396 U.S. at 467.

147. 393 U.S. at 249 n.9 (Justice Stewart, dissenting).

148. Those exempt include ministers and ministerial students (class IV-D), 50 U.S.C. App. § 456(g) (1964) and 32 C.F.R. § 1622.43 (1970); veterans of military service (class IV-A), 50 U.S.C. App. § 456(b) (1964) and 32 C.F.R. §§ 1622.40(a)(1)-(9) (1970); and conscientious objectors (classes I-O and I-A-O), 50 U.S.C. App. § 456(j) (Supp. IV, 1965-1968), *amending* 50 U.S.C. App. § 456(j) (1964), and 32 C.F.R. §§ 1622.11, 1622.14 (1970). Those with mandatory deferments which are as clearly provided for as exemptions include undergraduate students (class II-S), 50 U.S.C. App. § 456(h)(1) (Supp. IV, 1965-1968) and 32 C.F.R. § 1622.25 (1970); students deferred to complete the academic year (class I-S), 50 U.S.C. App. § 456(i) (1964) and 32 C.F.R. § 1622.15 (1970); certain elected officials (class IV-B), 50 U.S.C. App. § 456(f) (1964) and 32 C.F.R. § 1622.41 (1970); and aviation cadet applicants (class I-D), 50 U.S.C. App. § 456(e) (1964) and 32 C.F.R. § 1622.13(c) (1970). Those deferments calling for the exercise of local board judgment include occupational deferments (class II-A), 50 U.S.C. App. § 456(h) (1964), *as amended*, 50 U.S.C. App. § 456(h)(2) (Supp. IV, 1965-1968), and 32 C.F.R. § 1622.22 (1970), and dependency deferments (class III-A), 50 U.S.C. App. § 456(h) (1964), *as amended*, 50 U.S.C. App. § 456(h)(2) (Supp. IV, 1965-1968), and 32 C.F.R. § 1622.30 (1970).

unequivocal"¹⁴⁹ and in *Gabriel* to be "not dependent upon an act of judgment by the Board"¹⁵⁰ involves a great deal of local board discretion and fact-finding.¹⁵¹ By contrast, the IV-B deferment given the Vice President of the United States is unconditional and does not call for any exercise of board discretion.¹⁵²

By rejecting an exemption-deferment distinction, the Court widened the *Oestereich* exception to section 10(b)(3). As restated in *Breen*, the exception applies to all cases in which a board has ordered a registrant to report for military service when that registrant "was required by the relevant law not to be inducted."¹⁵³

2. Review of Local Board Classification Decisions

a. *The I-S cases.* Some of the earliest cases to interpret the *Oestereich* rule involved the I-S deferment granted certain university students to complete the academic year in which they are ordered for induction.¹⁵⁴ Although section 6(i)(2) of the Act¹⁵⁵ clearly

149. 393 U.S. at 238.

150. 393 U.S. at 258.

151. See note 118 *supra*.

152. "The Vice President of the United States . . . shall, while holding . . . [office], be deferred from training and service . . ." 50 U.S.C. App. § 456(f) (1964).

153. 396 U.S. at 467.

154. 50 U.S.C. App. § 456(i) (1964); 32 C.F.R. § 1622.15 (1970). The I-S deferment was created to avoid the hardship and waste of an interrupted academic year and to provide students with "an opportunity to enlist in a branch of service of their choice during such deferment period." H.R. REP. NO. 271, 82d Cong., 1st Sess. 34 (1951).

155. 50 U.S.C. App. § 456(i)(2) (1964). This section provides:

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

There are four exceptions to the requirement of § 6(i)(2). The first two, contained as provisos to § 6(i)(2), apply only to registrants who received certain postponements and deferments under the Selective Service Act of 1948 from 1948 to 1951. The third, also a proviso to § 6(i)(2), states that no registrant may receive more than one I-S deferment in his lifetime. The fourth exception, contained in the fourth sentence of § 6(h)(1) of the Act, 50 U.S.C. App. § 456(h)(1) (Supp. IV, 1965-1968), amending 50 U.S.C. App. § 456(h) (1964), applies to registrants who have been deferred as undergraduates after June 30, 1967, and have received their baccalaureate degrees. Full-time graduate students who completed their undergraduate degrees prior to June 30, 1967, and who have not previously been classified I-S would thus be entitled to deferment in class I-S if they received induction orders during the academic year. See generally Griffiths & Heckman, *Eligibility for I-S of Registrants Holding Graduate II-S Since July 1, 1967*, 1 SEL. SERV. L. REP. 4041 (1968); Comment, *Eligibility of Graduate Students for Student and Fatherhood Draft Deferments*, 37 FORDHAM L. REV. 617 (1969); Comment, *Selective Service Law—Student Deferments—Graduate Student Held To Have Right to I-S Deferment Under Selective Service Act of 1967 Despite Prior II-S Classification*, 44 N.Y.U. L. REV. 1049 (1969). Undergraduates who either do not request or are not entitled to the II-S student deferment and who are ordered for induction during the school year are also entitled to a I-S classification provided they have never before been so deferred. E.g.,

requires that graduate students who had not held an undergraduate II-S deferment after June 30, 1967, be granted a I-S deferment until the end of the academic year, the Director of Selective Service, in a local board memorandum, had excluded such graduate students from classification as I-S.¹⁵⁶ As a result of the Director's memorandum, local boards refused to grant a I-S deferment to such students who had been ordered for induction. Within two months of the Supreme Court's decisions in *Oestereich* and *Gabriel*, such students filed cases in district courts throughout the country in which they sought to have their inductions enjoined and to be reclassified I-S.

The district courts were faced with the question whether section 10(b)(3) of the Act, as interpreted by the Supreme Court, would permit such preinduction actions. Virtually all of the courts took a broad view of the *Oestereich* exception to section 10(b)(3)'s restriction on direct review. Although the I-S cases presented a difficult question of statutory construction, and although some courts concluded that the deferment was discretionary,¹⁵⁷ the vast majority of courts found an absolute statutory right to the I-S deferment.¹⁵⁸ Reading *Oestereich* to authorize preinduction review when the classification sought was made mandatory by the statute, the courts generally granted relief.¹⁵⁹

b. *The II-S cases.* The II-S deferment for college students has also been the subject of several preinduction suits. Unlike the I-S deferment, which permits the student to complete his academic

Turley v. Selective Serv. Sys. Local Bd. No. 134, 301 F. Supp. 845 (C.D. Cal. 1969); *Walsh v. Local Bd. No. 10*, 305 F. Supp. 1274 (S.D.N.Y. 1969).

156. See Selective Serv. Local Bd. Memorandum No. 87 (April 19, 1968), which precluded from the I-S classification not only students who received undergraduate II-S deferments after June 30, 1967, but also students who received graduate II-S deferments after that date.

157. E.g., *Rich v. Hershey*, 408 F.2d 944 (10th Cir. 1969); *Green v. Hershey*, 298 F. Supp. 201 (E.D. Va. 1969); *Rosenfield v. Selective Serv. Sys. Local Bd. No. 19*, 298 F. Supp. 276 (W.D. Pa. 1969). Many of the courts that found the I-S deferment discretionary indicated that review would lie under *Oestereich* had they found the deferment mandatory instead. E.g., *Davis v. Hershey*, 310 F. Supp. 565 (C.D. Cal. 1969), *appeal dismissed*, 3 SEL. SERV. L. REP. 3230 (9th Cir. 1970).

158. E.g., *Bowen v. Hershey*, 410 F.2d 962 (1st Cir. 1969); *Armendariz v. Hershey*, 295 F. Supp. 1351 (W.D. Tex.), *appeal dismissed*, 413 F.2d 1006 (5th Cir. 1969); *Ellis v. Hershey*, 302 F. Supp. 347 (E.D. Mich. 1969).

159. E.g., *Nestor v. Hershey*, 425 F.2d 504 (D.C. Cir. 1969) (per curiam); *Foley v. Hershey*, 409 F.2d 827 (7th Cir. 1969) (per curiam); *Carey v. Selective Serv. Local Bd. No. 2*, 297 F. Supp. 252 (D. Conn.), *affd.*, 412 F.2d 71 (2d Cir. 1969); *Hardenbergh v. Selective Serv. Sys.*, 2 SEL. SERV. L. REP. 3315 (D. Minn. 1969). For courts granting preinduction relief in cases involving undergraduate students entitled to the I-S deferment, see cases cited in note 155 *supra*.

year and is available only after receipt of an induction order,¹⁶⁰ the II-S is the widespread student deferment designed to enable the student to complete an entire course of study found necessary to the national interest.¹⁶¹ Prior to the 1967 amendments, the II-S deferment had been awarded within the discretion of the local board for both undergraduate and graduate students.¹⁶² The new Act, while leaving the graduate II-S deferment discretionary,¹⁶³ made the II-S mandatory for undergraduates "satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution."¹⁶⁴

Several preinduction cases involving II-S deferments arose out of the delinquency reclassification of deferred students for antiwar activities. Since the II-S deferment for graduate students is authorized rather than required by the statute, and is within the discretion of the local board, some courts have held that preinduction

160. 50 U.S.C. App. § 456(i) (1964).

161. 50 U.S.C. App. § 456(h)(1) (Supp. IV, 1965-1968); 32 C.F.R. § 1622.25 (1970).

162. The former section, Selective Service Act of 1948, ch. 624, § 6(h), 62 Stat. 604, 611-12, gave the President discretion to provide for student deferments. The President exercised this authority by authorizing, but not requiring, local boards to place most undergraduate and graduate students in class II-S. 32 C.F.R. § 1622.25 (1966).

163. New § 6(h)(2), 50 U.S.C. App. § 456(h)(2) (Supp. IV, 1965-1968), leaves the deferment of graduate students entirely within the President's discretion. Congress expected that the President would severely curtail the categories of graduate study that would be deferable. *See* S. REP. NO. 209, 90th Cong., 1st Sess. 6 (1967); H.R. REP. NO. 267, 90th Cong., 1st Sess. 26 (1967). The President did in fact curtail these categories with new regulations, promulgated simultaneously with the passage of the new Act, which eliminated all graduate-student deferments except for fields of study identified by the Director of Selective Service on advice of the National Security Council. Exec. Order No. 11,360, 32 C.F.R. § 1622.26(a) (1970). Some months thereafter, the National Security Council declined to identify any such fields. *See* Selective Serv. Local Bd. Memorandum No. 85 (April 19, 1968).

164. The text of 50 U.S.C. App. § 456(h)(1) (Supp. IV, 1965-1968) reads:

. . . the President shall, under such rules and regulations as he may prescribe, provide for the deferment . . . of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution A deferment granted to any . . . [such] person . . . shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action.

Although the report of the Marshall Commission had recommended by a closely divided vote the abolition of all student deferments (NATL. ADVISORY COMM. ON SELECTIVE SERV., IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE? 43 (1967)), the Clark Panel had urged that undergraduate-student deferments be made mandatory (CIVILIAN ADVISORY PANEL ON MILITARY MANPOWER RECRUITMENT, 90th Cong., 1st Sess., REPORT TO THE HOUSE COMM. ON ARMED SERVICES 11-12 (Comm. Print 1967)), and Congress, after hearings and debate, adopted the view of the Clark Panel. H.R. REP. NO. 267, 90th Cong., 1st Sess. 10-12 (1967). *See* H. MARMION, SELECTIVE SERVICE: CONFLICT AND COMPROMISE 123-34, 140, 142-43, 153-54 (1968).

judicial review does not, under the *Oestereich* rule, extend to claims involving the deferment of graduate students.¹⁶⁵ Since the undergraduate-student deferment is statutorily required, however, the Supreme Court in *Breen* held that the *Oestereich* rule permits preinduction review of the removal of that deferment.¹⁶⁶

The lower court in *Breen*¹⁶⁷ had based its decision to deny preinduction review on the language of section 6(h)(1), which provides for the student deferment "under such rules and regulations as . . . [the President] may prescribe."¹⁶⁸ This language, the Second Circuit found, authorized the President to provide for the removal of the deferment on a declaration of delinquency.¹⁶⁹ The Supreme Court rejected the approach of the court of appeals on the ground that section 6(h)(1) provides that an undergraduate-student deferment, once granted, shall continue until the registrant graduates, fails to pursue satisfactorily a full-time course of instruction, or reaches his twenty-fourth birthday,¹⁷⁰ and the Government did not contend that *Breen* had lost his deferment for any of these statutory reasons.¹⁷¹ The "rules and regulations" language relied on by the court below was found by the Supreme Court merely to authorize the President to prescribe procedures for the granting of the deferment. The President's authority was not meant to extend to the removal of the deferment for activities unrelated to its statutory conditions.¹⁷² Moreover, the Court noted, the third sentence of section 6(h)(1) qualifies the President's rule-making power by providing that undergraduate deferments may be restricted or termi-

165. *Kolden v. Selective Serv. Local Bd. No. 4*, 406 F.2d 631 (8th Cir. 1969), *vacated and remanded*, 397 U.S. 47 (1970); *Dickens v. United States*, 308 F. Supp. 1124 (S.D. Iowa 1969).

166. *Breen v. Selective Serv. Local Bd. No. 16*, 396 U.S. 460 (1970). Several cases had reached the same conclusion prior to the Court's decision in *Breen*. *Bucher v. Selective Serv. Sys. Local Bd. No. 2*, 421 F.2d 24 (3d Cir. 1970); *Stevenson v. Selective Serv. Local Bd. No. 62*, 303 F. Supp. 1254 (W.D. Wis. 1969); *United States v. Stewart*, 306 F. Supp. 29 (N.D. Cal. 1969), *appeal dismissed*, 396 U.S. 1066 (1970); *Kimball v. Selective Serv. Local Bd. No. 15*, 283 F. Supp. 606 (S.D.N.Y. 1968). See *Kolden v. Selective Serv. Local Bd. No. 4*, 406 F.2d 631, 635 (8th Cir. 1969), *vacated and remanded*, 397 U.S. 47 (1970) (dictum). *Contra*, *Vasilj v. Local Bd. No. 134*, 422 F.2d 861 (9th Cir. 1969); *Anderson v. Hershey*, 410 F.2d 492 (6th Cir. 1969) (2-1 decision) (adopting the exemption-deferment distinction), *vacated and remanded*, 397 U.S. 47 (1970); *Schwartz v. Local Bd. No. 23, Selective Serv. Sys.*, 298 F. Supp. 1238 (W.D. Ky. 1969).

167. 406 F.2d 636 (2d Cir. 1969) (2-1 decision).

168. 50 U.S.C. App. § 456(h)(1) (Supp. IV, 1965-1968).

169. 406 F.2d at 638.

170. 50 U.S.C. App. § 456(h)(1) (Supp. IV, 1965-1968).

171. 396 U.S. at 464 n.4.

172. 396 U.S. at 464-66.

nated only upon a finding by the President that the needs of the Army require such action.¹⁷³ Since the President had made no such finding of need, the Court refused to uphold the delinquency regulations under the rule-making power provided in section 6(h)(1).¹⁷⁴

Since the Supreme Court found the undergraduate-student deferment to be required by the statute, the Court further concluded that *Oestereich* was controlling in *Breen* and permitted early review.

c. *Other cases challenging classification decisions.* The broad interpretation of *Oestereich* given by the lower federal courts and by the Supreme Court in *Breen* has called for judicial scrutiny of the classification to which the registrant claims entitlement. If the classification sought is statutorily required, then preinduction review will lie under *Oestereich*. Direct review should thus be permitted in cases involving the exemption granted sole surviving sons,¹⁷⁵ the exemption provided for ministers of religion,¹⁷⁶ and the deferment granted certain public officials.¹⁷⁷

On the other hand, if the classification is committed by statute to the discretion of the local board or requires the board to exercise its fact-finding function, then judicial review prior to induction will remain unavailable. Accordingly, direct review will not lie in cases involving a local board refusal to grant the occupational deferment¹⁷⁸ or the dependency deferment for extreme hardship.¹⁷⁹

173. 50 U.S.C. App. § 456(h)(1) (Supp. IV, 1965-1968).

174. 396 U.S. at 465 n.5. The Court also rejected, on the authority of *Gutknecht v. United States*, 396 U.S. 295 (1970), the contention that delinquency induction was authorized by Congress. 396 U.S. at 465-66. One court, in a case decided subsequent to *Breen*, has declined to grant preinduction review of a claim involving a student at a state vocational school since such a school is not plainly a "similar institution of learning" within the meaning of § 6(h)(1). *Evans v. Local Bd. No. 73*, 425 F.2d 323 (10th Cir. 1970).

175. 50 U.S.C. App. § 456(o) (1964); 32 C.F.R. § 1622.40(a)(10) (1970) (class IV-A). See *McKart v. United States*, 395 U.S. 185, 203-04 (1969) (Justice Douglas, concurring) (dictum).

176. 50 U.S.C. App. § 456(g) (1964); 32 C.F.R. § 1622.43 (1970) (class IV-D).

177. 50 U.S.C. App. § 456(f) (1964); 32 C.F.R. § 1622.41 (1970) (class IV-B).

178. 50 U.S.C. App. § 456(h) (1964), as amended, 50 U.S.C. App. § 456(h)(2) (Supp. IV, 1965-1968); 32 C.F.R. §§ 1622.22 (class II-A), 1622.24 (class II-C) (1970). See *Edwards v. Selective Serv. Local Bd. 111*, 2 SEL. SERV. L. REP. 3391 (N.D. Cal. 1969) (dictum). See also *Shiffman v. Selective Serv. Bd. No. 5*, 1 SEL. SERV. L. REP. 3082 (2d Cir.), application for stay denied, 391 U.S. 930 (1968) (decided pre-*Oestereich*), cited with approval in *Anderson v. Hershey*, 410 F.2d 492, 497 (6th Cir. 1969), vacated and remanded, 397 U.S. 47 (1970).

179. 32 C.F.R. § 1622.30(b) (1970) (class III-A). Since the III-A classification for hardship is conditioned on a judgment that the registrant's deferment is "advisable," 50 U.S.C. App. § 456(h) (1964), as amended, 50 U.S.C. App. § 456(h)(2) (Supp. IV, 1965-1968), several courts have held that the denial of the deferment does not entitle

Several classifications, although not required by the statute, are made mandatory by the regulations. The *Oestereich* rule, as restated by the Court in *Breen*, permits direct review whenever the registrant is "required by the relevant law not to be inducted."¹⁸⁰ Since the regulations are a significant part of the relevant law, such review should be available in cases involving classifications which, although only authorized by the statute, are required by the regulations. Accordingly, it has been held that the fatherhood deferment, which is mandatory under the regulations although merely authorized by the statute,¹⁸¹ is within the *Breen* reformulation of the *Oestereich* rule.¹⁸² The same rationale should apply to permit pre-induction review of claims involving the failure to reclassify those registrants who are found to be physically, mentally, or morally unfit for service,¹⁸³ and of claims involving the now-mandatory II-A deferment for those enrolled in junior colleges, trade schools, or apprenticeship-training programs.¹⁸⁴ In an analogous situation, several courts have held that direct review is available in cases involving an exemption required by a treaty, similarly a part of the relevant law.¹⁸⁵

the registrant to direct review. *Gee v. Smith*, 306 F. Supp. 891 (N.D. Ga. 1969); *Ferro v. United States*, 2 SEL. SERV. L. REP. 3260 (E.D.N.Y. 1969).

180. *Breen v. Selective Serv. Local Bd. No. 16*, 396 U.S. 460, 467 (1970).

181. *Compare* 50 U.S.C. App. § 456(h)(2) (Supp. IV, 1965-1968) with 32 C.F.R. § 1622.30(a) (1970) (class III-A). A recent amendment to the regulations restricts mandatory fatherhood deferments to those requested prior to April 23, 1970. Exec. Order No. 11,527, 35 Fed. Reg. 6571 (1970).

182. *Shea v. Mitchell*, 421 F.2d 1162 (D.C. Cir. 1970); *Gregory v. Hershey*, 311 F. Supp. 1 (E.D. Mich. 1969).

183. 50 U.S.C. App. § 456(h) (1964), as amended, 50 U.S.C. App. § 456(h)(2) (Supp. IV, 1965-1968); 32 C.F.R. §§ 1622.17 (class I-Y), 1622.44 (class IV-F) (1970). Although only authorized by the statute, these deferments are required by the regulations for a registrant found unqualified for service in the Armed Forces under applicable physical, mental, and moral standards. 32 C.F.R. §§ 1622.17, 1622.44 (1970). The determination of acceptability is made by the Army itself, not by the Selective Service System. Following an Armed Forces physical examination (*see* 32 C.F.R. §§ 1628.10-25 (1970); Army Reg. 40-501 C22, chs. 1, 2, 9 (Dec. 5, 1960); Army Reg. 601-270 C2, chs. 1-5 (Feb. 13, 1967)), the Army sends the local board a statement of acceptability, DD Form No. 62 (March 1, 1959), indicating whether or not the registrant has been found acceptable. A registrant contesting his acceptability for service would clearly be subject to the bar of § 10(b)(3), *Costa Elena v. President of the United States*, 288 F. Supp. 383 (D.P.R. 1968). But a registrant found unqualified by the Army should be able to bring suit to compel his deferment if the local board disregards the regulations and refuses to reclassify him. *See* *Bucher v. Selective Serv. Sys. Local Bd. No. 2*, 421 F.2d 24, 37 n.7 (3d Cir. 1970) (opinion of Judge Van Dusen, concurring in part and dissenting in part).

184. *See* 32 C.F.R. § 1622.22(b) (1970).

185. *Vasquez v. Attorney General*, 3 SEL. SERV. L. REP. 3240 (9th Cir. 1970); *Itzcovitz v. Selective Serv. Sys. Bd. No. 6*, 301 F. Supp. 168 (S.D.N.Y. 1969), *appeal dismissed*, 3 SEL. SERV. L. REP. 3063 (2d Cir. 1970).

3. Review of Local Board Procedures

Several preinduction suits have challenged the procedures used by local boards in the classification process. The selective service regulations prescribe the procedures that local boards are to follow in the classification and processing of registrants.¹⁸⁶ Although *Oestereich* dealt with a local board classification decision found to be basically lawless, the Court's rationale in that case should extend as well to cases involving any board action that violates either the statute or the regulations.¹⁸⁷ If a local board fails to follow a procedure required by the relevant law, such action is just as lawless as a board's failure to award a registrant a classification to which he is legally entitled.¹⁸⁸

In several recent decisions, courts have adopted this view, and have refused to dismiss preinduction suits challenging board procedures which violated statutory requirements. One group of these decisions involves the delinquency regulations¹⁸⁹ which were recently invalidated by the Supreme Court in *Gutknecht v. United States*.¹⁹⁰ Pursuant to these regulations, many registrants had been declared delinquent by their local boards, reclassified I-A, and ordered for priority induction. The *Gutknecht* decision clearly made such summary processing unlawful. Therefore, the courts have held that any registrant so reclassified or ordered inducted under the now illegal procedures is entitled to obtain preinduction judicial relief.¹⁹¹

186. See note 30 *supra*.

187. The Court's favorable citation in *Oestereich* of *Townsend v. Zimmerman*, 237 F.2d 376 (6th Cir. 1956) (see note 37 *supra* and accompanying text), a case involving the denial of a registrant's appeal rights in violation of the regulations, supports such an extension. 393 U.S. 233, 238 (1968). Justice Harlan's concurring opinion also supports the extension: "[A] challenge to the validity of the administrative procedure itself not only renders irrelevant the presumption of regularity, but also presents an issue beyond the competence of the Selective Service Boards to hear and determine." 393 U.S. at 242.

188. See Comment, *Administrative Law—Selective Service—Pre-Induction Judicial Review Held Unavailable to Registrant Claiming Statutory Deferment*, 44 N.Y.U. L. REV. 804, 811 (1969). But see *Edwards v. Selective Serv. Local Bd. No. 111*, 2 SEL. SERV. L. REP. 3391 (N.D. Cal. 1969). Board failure to follow procedural regulations designed for the protection of the registrant may be a denial of due process of law. See *Walsh v. Local Bd. No. 10*, 305 F. Supp. 1274 (S.D.N.Y. 1969). Cf. *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957).

189. Delinquency is provided for in 32 C.F.R. §§ 1642.1-46 (1970).

190. 396 U.S. 295 (1970). As a result of *Gutknecht*, local boards have been ordered to suspend all processing of delinquents. Selective Serv. Local Bd. Memorandum No. 101 (Jan. 21, 1970).

191. *Shea v. Mitchell*, 421 F.2d 1162 (D.C. Cir. 1970); *McMillen v. Mitchell*, 2 SEL. SERV. L. REP. 3464 (7th Cir. 1970). In *Kolden v. Selective Serv. Bd. No. 4*, 397 U.S. 47 (1970), the Supreme Court vacated the judgments in several cases involving

There have been other cases involving various local board procedural irregularities in violation of the regulations. In one case, direct preinduction review was permitted because the board had engaged in several examples of what the court called "regulatory lawlessness."¹⁹² The local board had violated the regulations by failing to vote on a request for reopening following a board meeting.¹⁹³ The board had also infringed the registrant's due process rights by considering a memorandum placed in his file by a Selective Service official without advising him of the memorandum and providing him an opportunity to rebut its allegations. In addition, the board had violated the regulations by subsequently removing the same memorandum from the registrant's file.¹⁹⁴

In *Wiener v. Local Board Number 4*,¹⁹⁵ the plaintiff's local board had granted him an occupational deferment as a teacher, and the State Director, who had urged local boards to limit teaching deferments to one year, appealed the classification.¹⁹⁶ When the plaintiff was informed that his classification was being appealed, he requested an appointment with a government appeal agent.¹⁹⁷ The local board granted his request. Several days before the day on which the appointment was scheduled, however, the plaintiff's file was forwarded to the state appeal board. The state board met the next day and reclassified the plaintiff I-A. The court held that this procedure deprived the plaintiff of the right to be heard by the appeal board—a right found to be implicit in the regulations—and remanded the case to the appeal board for reconsideration.¹⁹⁸

delinquency reclassifications and remanded them to their respective courts of appeals for reconsideration in light of *Breen v. Selective Serv. Local Bd. No. 16*, 396 U.S. 460 (1970).

192. *Murray v. Blatchford*, 307 F. Supp. 1038, 1058 (D.R.I. 1969). See O'Neil, *Public Employment, Antiwar Protest and Preinduction Review*, 17 UCLA L. REV. 1028 (1970).

193. 32 C.F.R. § 1604.52a(d) (1970) requires such a vote. In a case involving a somewhat similar issue, the court held that preinduction review was warranted where the local board had failed to meet and consider the plaintiff's claim for a deferment. *Edwards v. Local Bd. No. 58*, 313 F. Supp. 650 (E.D. Pa. 1970). Finding the board's failure a violation of the requirement implicit in 32 C.F.R. § 1625.3(b) (1970), the court held that it had jurisdiction to enjoin plaintiff's induction despite § 10(b)(3) of the Act. 313 F. Supp. at 651-52.

194. 32 C.F.R. § 1621.8 (1970) requires that "every paper pertaining to the registrant . . . shall be filed in his Cover Sheet"

195. 302 F. Supp. 266 (D. Del. 1969).

196. 32 C.F.R. § 1626.1 (1970) permits a state director to appeal determinations of a local board at any time.

197. See 32 C.F.R. § 1604.71 (1970).

198. 302 F. Supp. at 270.

In another case involving a regulatory violation,¹⁹⁹ the plaintiff had reported for induction but was found medically unacceptable by the Army. His local board again ordered him for induction one month later, however, and plaintiff filed suit challenging the validity of that induction order. The court found that the board's action violated the regulation requiring the board to reclassify a registrant found unqualified at induction.²⁰⁰ Since this regulation was mandatory, the court entertained plaintiff's preinduction suit and enjoined his induction.

In still another case,²⁰¹ a court enjoined the induction of a registrant under an induction order that had been issued prior to the institution of the random-selection-sequence system and which had then been invalidly postponed until after that time. Since the action of the board was contrary to the regulation dealing with postponement of induction,²⁰² the court held that it had jurisdiction to enjoin the registrant's induction until such time as his sequence number was reached in the regular order of call.

Although local board failure to follow a required procedure should thus entitle a registrant to judicial relief prior to induction, such relief should be denied when the procedure involved is authorized rather than required by the regulations,²⁰³ or when the board action challenged involves an exercise of the fact-finding function which the Court found in the *Gabriel* case to be subject to section 10(b)(3).²⁰⁴ Accordingly, several courts have dismissed preinduction

199. *Rich v. Hershey*, 303 F. Supp. 177 (D. Colo.), *affd.*, 408 F.2d 944 (10th Cir. 1969).

200. 32 C.F.R. § 1632.30 (1970). The regulation was enacted pursuant to 50 U.S.C. App. § 453(a) (1964), which provides: "No person shall be inducted into the Armed Forces . . . until his acceptability in all respects, including his physical and mental fitness, has been satisfactorily determined under standards prescribed by the Secretary of Defense. . . ."

201. *Liese v. Local Bd. No. 102*, 2 SEL. SERV. L. REP. 3688 (E.D. Mo. 1970).

202. 32 C.F.R. § 1632.2 (1970).

203. *See Mulligan v. Selective Serv. Local Bd. No. 64*, 2 SEL. SERV. L. REP. 3686 (E.D.N.Y. 1970) (board failure to follow nonmandatory procedures relating to physical examination held not to entitle registrant to preinduction judicial review).

204. *See Green v. Local Bd. No. 87*, 419 F.2d 813 (8th Cir.), *cert. dismissed*, 397 U.S. 1059 (1970), in which the court held that a preinduction challenge to the validity of an induction order, on the ground that the plaintiff had been ordered for induction out of the required order of call, did not fall within the *Oestereich* exception to § 10(b)(3). The regulations specify the order in which registrants classified I-A or I-A-O and who have been found acceptable for service shall be selected and ordered to report for induction, 32 C.F.R. § 1631.7 (1970), and congressional authorization is required to change the order of call, 50 U.S.C. App. § 455(a)(2) (Supp. IV, 1965-1968) *amending* 50 U.S.C. App. § 455(a) (1964). Failure to follow the required order of call invalidates the induction order, and is a defense to a criminal prosecution for refusal of induction. *United States v. Baker*, 416 F.2d 202 (9th Cir. 1969); *United States v. Lybrand*, 279 F. Supp. 74

actions challenging local board refusals to reopen a registrant's classification.²⁰⁵ The regulations provide that the board "may reopen and consider anew the classification of a registrant . . . upon the written request of the registrant . . . if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification."²⁰⁶ The right to have a classification reopened is especially important to the registrant since this entitles him to all the appeal rights and other procedural consequences that attach to an initial classification.²⁰⁷ While the regulation is not mandatory on its face, the courts have held that reopening is required if the registrant presents information which establishes a prima facie case of qualification for the classification to which he claims entitlement.²⁰⁸ In order to decide whether a prima facie case has been presented, a court would have to review the registrant's Selective Service file to determine whether the board erred in the

(E.D.N.Y. 1967). The plaintiff in *Green* had alleged that ten registrants of his local board who were classified I-A and were older than he had not been called for induction. The court's decision, affirming the dismissal of Green's suit to enjoin his induction out of the order of call, confuses postponement of induction with issuance of the induction order, and implies that the order of call is discretionary—an implication that is clearly wrong. See *Gutknecht v. United States*, 396 U.S. 295 (1970). The result reached by the court can be justified, however, on the ground that the determination whether a registrant has been inducted in the proper order would require the court to review the files of other registrants of the local board to decide whether they had been placed in the proper category of call. Such judicial review of board fact-finding is clearly within the prohibition of § 10(b)(3) as interpreted by the Court in *Gabriel*. See text accompanying notes 113-17 *supra*.

205. *Czepil v. Hershey*, 425 F.2d 251 (7th Cir. 1970), *petition for cert. filed*, 38 U.S.L.W. 3498 (U.S. June 10, 1970); *Brookout v. Thomas*, 3 SEL. SERV. L. REP. 3230 (9th Cir. 1970); *Sloan v. Local Bd. No. 1*, 414 F.2d 125 (10th Cir. 1969); *Gabel v. Hershey*, 308 F. Supp. 524 (E.D. Va. 1970); *Ryan v. Hershey*, 308 F. Supp. 285 (E.D. Mo. 1969); *Reisner v. Lonsdorf*, 306 F. Supp. 481 (E.D. Mo. 1969); *Gee v. Smith*, 306 F. Supp. 891 (N.D. Ga. 1969); *Grosfeld v. Morris*, 303 F. Supp. 227 (D. Md. 1969). *Contra*, *Hunt v. Local Bd. No. 197*, 423 F.2d 576 (3d Cir. 1970); *Lane v. Local Bd. No. 17*, No. 70-913-G (D. Mass. Aug. 4, 1970); *Murray v. Blatchford*, 307 F. Supp. 1038 (D.R.I. 1969); *Barker v. Hershey*, 309 F. Supp. 277 (W.D. Wis. 1969); *Murray v. Vaughn*, 300 F. Supp. 688 (D.R.I. 1969).

206. 32 C.F.R. § 1625.2 (1970). The board may not reopen, however, after it has mailed an induction order, unless it first finds that there has been a change in the registrant's status resulting from circumstances over which he had no control. *Id.* The Supreme Court recently agreed to consider the effect of this provision in a case involving a postinduction-order conscientious-objector claim. *Ehlert v. United States*, 422 F.2d 332 (9th Cir.), *cert. granted*, 397 U.S. 1074 (1970).

207. 32 C.F.R. §§ 1625.11-.13 (1970). See *Mulloy v. United States*, 38 U.S.L.W. 4509 (U.S. June 15, 1970).

208. *E.g.*, *Mulloy v. United States*, 38 U.S.L.W. 4509 (U.S. June 15, 1970); *Davis v. United States*, 410 F.2d 89 (8th Cir. 1969); *Robertson v. United States*, 404 F.2d 1141 (5th Cir. 1968), *rev'd en banc*, 417 F.2d 440 (5th Cir. 1970); *United States v. Freeman*, 388 F.2d 246 (7th Cir. 1967).

application of the prima facie standard. If the classification sought is a mandatory one not involving board fact-finding, and is therefore within the *Oestereich* exception to section 10(b)(3), then preinduction review should be permitted in cases in which the board has refused to reopen. In such cases, judicial review of the question whether a prima facie claim has been presented would involve less time and therefore less interruption of the selection process than would review of the question whether a registrant is entitled to the classification he seeks. On the other hand, when the classification sought is dependent upon board evaluation of evidence, direct review of a refusal by the board to reopen should be unavailable. Since a board decision not to reopen in such a case entails an evaluation of the evidence presented and an exercise of judgment in determining whether a prima facie claim for a new classification has been established, such a decision "inescapably involves a determination of fact and an exercise of judgment" within the meaning of *Gabriel*.²⁰⁹ Accordingly, preinduction review has been denied in several cases involving refusals to reopen in which the registrant sought either classification as a conscientious objector²¹⁰ or deferment for extreme hardship of dependents.²¹¹

A slightly different question from that involved in those cases contesting local board action is presented by the cases that raise a general challenge to the validity of the statute, the regulations, or official policies or procedures of the Selective Service System. Since such cases do not seek to review the "classification or processing of any registrant,"²¹² they do not fall within the literal terms of section 10(b)(3). Moreover, since such cases do not attack the classification of any individual, they do not constitute the "litigious interruptions" of the recruitment process that section 10(b)(3) was intended to prevent.²¹³ Accordingly, an attack challenging the validity on its face of the statute or of a regulation or other Selective Service pro-

209. 393 U.S. 256, 258 (1968).

210. *Czepil v. Hershey*, 425 F.2d 251 (7th Cir. 1969), *petition for cert. filed*, 38 U.S.L.W. 3498 (U.S. June 10, 1970); *Sloan v. Local Bd. No. 1*, 414 F.2d 125 (10th Cir. 1969); *Gabel v. Hershey*, 308 F. Supp. 524 (E.D. Va. 1970); *Ryan v. Hershey*, 308 F. Supp. 285 (E.D. Mo. 1969). *Contra*, *Murray v. Blatchford*, 307 F. Supp. 1038 (D.R.I. 1969); *Barker v. Hershey*, 309 F. Supp. 277 (W.D. Wis. 1969).

211. *Ryan v. Hershey*, 308 F. Supp. 285 (E.D. Mo. 1969); *Gee v. Smith*, 306 F. Supp. 891 (N.D. Ga. 1969); *Grosfeld v. Morris*, 303 F. Supp. 227 (D. Md. 1969). *Contra*, *Hunt v. Local Bd. No. 197*, 423 F.2d 576 (3d Cir. 1970).

212. 50 U.S.C. App. § 460(b)(3) (Supp. IV, 1965-1968). *See* notes 72-76 *supra* and accompanying text.

213. *See* 113 CONG. REC. 15,426 (1967) (remarks of Senator Russell).

nouncement should be within the *Oestereich* exception to section 10(b)(3), especially as that exception was set forth in Justice Harlan's concurring opinion.²¹⁴ The Supreme Court has cast some doubt upon the validity of this approach by its one-sentence per curiam affirmance, citing *Gabriel*, of the decision of a three-judge district court in *Boyd v. Clark*,²¹⁵ dismissing a case in which the plaintiffs challenged the constitutionality of the student deferment provisions of the Act. *Boyd*, however, need not be read to preclude all constitutional attacks in preinduction actions.²¹⁶ The lower court held, in *Boyd*, that the plaintiffs' complaint did not present a justiciable controversy because they had not received induction orders. The Supreme Court's affirmance might thus be read as barring not all constitutional attacks prior to induction, but only those that are not yet ripe for adjudication because an induction order has not been issued.²¹⁷ A broader reading of *Boyd* would be incongruous with *Oestereich*, for it is difficult to believe that board action is "basically lawless"—and therefore subject to direct review—when in violation of the statute but not when in violation of the Consti-

214. See notes 106-09 *supra* and accompanying text.

215. 393 U.S. 316 (1969), *affirming* 287 F. Supp. 561 (S.D.N.Y. 1968). See also *Medeiros v. United States*, 294 F. Supp. 198 (D. Mass. 1968), a case decided prior to *Oestereich*, in which the court found no standing to contest the validity of the Act on the ground that the war in Vietnam was not authorized by Congress.

216. *Contra*, *Steiner v. Commanding Officer*, 304 F. Supp. 1157, 1159 (S.D. Tex. 1969): "the constitutionality of the present Selective Service Act is not justiciable in any purported legal controversy prior to induction or refusal thereof [citing *Boyd v. Clark*]." The rule stated by the court is too broad, however, since the registrant in *Steiner* does not appear to have been ordered for induction. The court's decision thus is not inconsistent with the narrow reading of *Boyd* proposed herein. See also *Murray v. Vaughn*, 300 F. Supp. 688 (D.R.I. 1969), in which the court, although reading *Boyd* to bar constitutional attacks in preinduction cases, enjoined the criminal prosecution of a registrant who claimed that expulsion from the Peace Corps for exercising first amendment rights had resulted in the loss of his occupational deferment. The court acted on the ground that only a court can resolve such a controversy involving different governmental branches. See O'Neil, *supra* note 192.

217. See *Fein v. Local Board No. 7*, 3 SEL. SERV. L. REP. 3231, 3233 (2d Cir. 1970) (Chief Judge Lumbard, dissenting). An attack upon a statute, regulation, or policy that has not yet been applied against the plaintiff will not, as a general rule, present a justiciable case or controversy within the meaning of article III of the Constitution. See *United Pub. Workers v. Mitchell*, 330 U.S. 75, 86-91 (1947); *Feldman v. Local Board No. 22*, 239 F. Supp. 102, 105-06 (S.D.N.Y. 1964). Barring exceptional circumstances, therefore, a preinduction selective service action filed prior to the receipt of an induction order will not be ripe for adjudication. See *National Student Assn. v. Hershey*, 412 F.2d 1103 (D.C. Cir. 1969). For an analysis of *Boyd v. Clark* in terms of the related doctrine of standing, see Donahue, *supra* note 8, at 939-40. For a thoughtful discussion of the serious problems involved in determining whether actions of the Selective Service System prior to the issuance of an order to report for induction can constitute a justiciable controversy, see Recent Case, 83 HARV. L. REV. 690, 692-94 (1970).

tution.²¹⁸ With two apparent exceptions,²¹⁹ the lower federal courts have implicitly rejected a broad reading of *Boyd*. In cases decided after *Boyd*, several courts have adopted a literal interpretation of the "classification or processing" language, and have permitted preinduction adjudication of challenges to the validity of the delinquency regulations,²²⁰ the Hershey directive of October 26, 1967,²²¹ the regulation denying a registrant the right to appeal the refusal of his board to reopen his classification,²²² and the random-selection sequence for 1970.²²³

A question which is somewhat related to these challenges of official policies and procedures of the Selective Service System is raised by cases challenging the validity of the composition of a local board. This issue has been considered in both preinduction and postinduction cases contesting the racial composition²²⁴ and the resi-

218. Such a result would clearly run counter to Justice Harlan's construction of the "classification or processing" language of § 10(b)(3) in his concurring opinion in *Oestereich*: "I do not understand that phrase to prohibit review of a claim . . . that the very statutes or regulations which the Board administers are facially invalid." 393 U.S. 233, 240 (1968).

219. In *Fein v. Local Bd. No. 7*, 3 SEL. SERV. L. REP. 3231 (2d Cir. 1970), the court held that § 10(b)(3) barred an attack on the constitutionality of 32 C.F.R. §§ 1626.1, 1626.12, & 1626.24 (1970), which specify the procedures governing an appeal by the state director. In *Boyk v. Mitchell*, 425 F.2d 263, 264 (6th Cir. 1970), the court held that § 10(b)(3) barred an attack on the constitutionality of the "religious training and belief test for conscientious objection contained in 50 U.S.C. App. § 456(j) (1964), as amended, (Supp. IV, 1965-1968).

220. In *Bucher v. Selective Serv. Sys. Local Bd. No. 2*, 421 F.2d 24 (3d Cir. 1970) (2-1 decision), the court held that the delinquency regulations provided for in 32 C.F.R. §§ 1642.1-46 (1970) violate due process and lack statutory authorization.

221. See note 78 *supra* and accompanying text. The court in *National Student Assn. v. Hershey*, 412 F.2d 1103 (D.C. Cir. 1969) declared the directive invalid in part since it had a chilling effect on the exercise of first amendment rights.

222. In *Hunt v. Local Bd. No. 197*, 423 F.2d 576 (3d Cir. 1970), the court held that 32 C.F.R. § 1625 (1970) was unauthorized since it denies the registrant the right to appeal a local board refusal to reopen although § 10(b)(3) of the statute grants the right to appeal local board decisions.

223. In *Stodolsky v. Hershey*, 2 SEL. SERV. L. REP. 3527 (W.D. Wis. 1969), the court denied a motion to dismiss on grounds that § 10(b)(3) was applicable to a challenge of the randomness of the random-selection sequence established by the December 1, 1969, lottery. Another case permitted a preinduction challenge to the requirement of Selective Serv. Local Bd. Memorandum No. 64 (Sept. 12, 1968) on the ground that civilian work performed in lieu of induction by registrants classified I-O constitutes a disruption of the registrant's normal way of life comparable to that of a registrant inducted into the Armed Forces. *Hackney v. Hershey*, 3 SEL. SERV. L. REP. 3135 (M.D.N.C. 1970). The court, without discussing the jurisdictional problem, held on the merits that the local board memorandum is authorized by 50 U.S.C. App. § 456(j) (1964), as amended, (Supp. IV, 1965-1968).

224. E.g., *Sellers v. McNamara*, 398 F.2d 893 (5th Cir. 1968), cert. denied, 395 U.S. 950, vacated and remanded on other grounds, 396 U.S. 9 (1969); *Clay v. United States*, 397 F.2d 901 (5th Cir. 1968), vacated and remanded, 394 U.S. 310 (1969); *DuVernay v. United States*, 394 F.2d 979 (5th Cir. 1968), affd. by an equally divided Court, 394 U.S.

dential composition²²⁵ of the board. Although the Act provides that "in the interpretation and execution of the provisions of this title, there shall be no discrimination against any person on account of race or color,"²²⁶ members of the Negro race are poorly represented on local draft boards throughout the country.²²⁷ Registrants claiming racial discrimination in the selection of board members have not met with success, however. In some of the cases in which the issue was raised as a defense to a criminal prosecution for refusal of induction, the courts have held that administrative agencies acting under color of law are not subject to such collateral attack.²²⁸ The few courts that have considered the claim on the merits have held that the acts of a discriminatorily selected board, like the acts of a malapportioned legislature but unlike the acts of an unlawfully selected jury, are valid.²²⁹ In one case that raised the issue prior to induction, the district court's dismissal of the action was affirmed by the Fifth

309 (1969). See generally Comment, *Systematic Exclusion of Negroes from Selective Service Boards: Some Proposals for Reform*, 67 MICH. L. REV. 756 (1969); Comment, *Equality in the Selective Service System: The Racial Composition of Draft Boards*, 54 IOWA L. REV. 521 (1968).

225. E.g., *United States v. Brooks*, 415 F.2d 502 (6th Cir. 1969), *cert. denied*, 397 U.S. 967 (1970); *United States v. Beltran*, 306 F. Supp. 385 (N.D. Cal. 1969); *United States v. DeMarco*, 2 SEL. SERV. L. REP. 3204 (N.D. Cal. 1969); *United States v. Fisher*, No. IP-69-CR-43 (S.D. Ind. Jan. 20, 1970), *appeal pending*, No. 18413, 7th Cir., 1970.

226. 50 U.S.C. App. § 455(a) (1964). See also 32 C.F.R. § 1622.1(d) (1970); *United States v. Wingfield*, 2 SEL. SERV. L. REP. 3483 (N.D. Cal. 1970).

227. In 1966 there were no Negro members on the local boards of twenty-three states. NATL. ADVISORY COMM. ON SELECTIVE SERV., IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE? 80 (1967). The situation has generally improved, however. Although in October 1966 only 1.3% of all board members were Negroes, *id.* at 19, the percentage in October 1969 was 6%. SUBCOMM. ON ADMIN. PRACTICE & PROC., SEN. COMM. ON THE JUDICIARY, A STUDY OF THE SELECTIVE SERVICE SYSTEM: ITS OPERATION, PRACTICES & PROCEDURES 76, 80 (1970) [hereinafter SUBCOMM. STUDY].

228. *United States v. Prince*, 398 F.2d 686 (2d Cir.), *cert. denied*, 393 U.S. 967 (1968); *United States v. Richmond*, 274 F. Supp. 43 (C.D. Cal. 1967). See *DuVernay v. United States*, 394 F.2d 979, 983 n.6 (5th Cir.), *affd.*, 394 U.S. 309 (1969). Cf. *Ex parte Ward*, 173 U.S. 452 (1899). Although many of the courts that hold board composition is not subject to collateral attack cite *Ex parte Ward* as authority, the *Ward* case may well have been overruled sub silentio by *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). See *United States v. Lemke*, 310 F. Supp. 1298 (N.D. Cal. 1969).

229. E.g., *Haven v. United States*, 403 F.2d 384 (9th Cir. 1968), *petition for cert. dismissed*, 393 U.S. 1114 (1969); *Clay v. United States*, 397 F.2d 901 (5th Cir. 1968), *vacated and remanded*, 394 U.S. 310 (1969).

For cases upholding the validity of acts by malapportioned legislatures, see *Sailors v. Board of Educ.*, 254 F. Supp. 17 (W.D. Mich. 1966), *affd. on other grounds*, 387 U.S. 105 (1967); *Johnson v. Genessee County*, 232 F. Supp. 567 (E.D. Mich. 1964). For cases holding verdicts by unlawfully selected juries to be invalid, see *Whitus v. Georgia*, 385 U.S. 545 (1967); *Mobley v. United States*, 379 F.2d 768 (5th Cir. 1967); *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966).

Circuit,²³⁰ and the Supreme Court denied certiorari.²³¹ Justice Douglas, dissenting in an opinion joined by Chief Justice Warren and Justice Marshall, argued that certiorari should have been granted since the allegations of racial discrimination in violation of the statute entitled petitioner to review within the *Oestereich* rule.²³²

Registrants in several cases have claimed that their local board, as a result of the residence of its members, was improperly constituted. The regulations provide that local board members "shall be residents of a county in which their local board has jurisdiction and . . . shall also, if at all practicable, be residents of the area in which their local board has jurisdiction."²³³ The failure of a board to meet this requirement has provided registrants with a successful defense and has led to their acquittal in some criminal cases,²³⁴ but most of the courts have held that such a de facto board is not subject to collateral attack in a criminal prosecution,²³⁵ or on a petition

230. *Sellers v. McNamara*, 398 F.2d 893 (5th Cir. 1968). *Accord*, *Gee v. Smith*, 306 F. Supp. 891 (N.D. Ga. 1969).

231. 395 U.S. 950 (1969).

232. 395 U.S. at 953.

233. 32 C.F.R. § 1604.52(c) (1970). The jurisdictional-area residency requirement was recently deleted from the regulations. Exec. Order No. 11,555 35 Fed. Reg. 14,191 (1970). *See also* Registration Certificate, SSS Form No. 2 (April 20, 1967), which informs the registrant that "your local board is composed of citizens of the community in which you live." Selective Service System forms are part of the regulations, 32 C.F.R. § 1606.51(a) (1970), and are therefore binding on the System. The importance to the selective service process of the concept of a local board as a little group of neighbors has long been recognized. *See United States v. Nugent*, 346 U.S. 1, 8 (1953); *Knox v. United States*, 200 F.2d 398, 402 (9th Cir. 1952); J. DAVIS & K. DOLBEARE, *LITTLE GROUPS OF NEIGHBORS: THE SELECTIVE SERVICE SYSTEM* v. 57 (1968) (quoting the remarks of Lt. Gen. Hershey); *SELECTIVE SERV. SYS., OUTLINE OF HISTORICAL BACKGROUND OF SELECTIVE SERVICE AND CHRONOLOGY* 5-6 (1965); *MEMORANDUM OF LT. GEN. HERSHEY, ON PRESENT OPERATIONS OF THE SYSTEM AND LOCAL DRAFT BOARDS*, S. Doc. No. 82, 89th Cong., 2d Sess. 4 (1966).

32 C.F.R. § 1604.52 (1970) was apparently promulgated in response to Congress' adverse reaction to a proposal that the role of local boards in the selective service process be de-emphasized. *See H.R. REP. NO. 267*, 90th Cong., 1st Sess. 32-33 (1967); *S. REP. NO. 209*, 90th Cong., 1st Sess. 9-10 (1967). *See also TASK FORCE ON THE STRUCTURE OF THE SELECTIVE SERV. SYS., REPORT VI-22, X-2* (1967). Notwithstanding the requirement of the regulation, a recent study revealed that at least 8%, and perhaps as many as 25%, of the members of local boards reside outside the area of their board's jurisdiction. *SUBCOMM. STUDY, supra* note 227, at 5, 74.

234. *United States v. Cabbage*, 3 SEL. SERV. L. REP. 3179 (6th Cir. 1970); *United States v. Brock*, 3 SEL. SERV. L. REP. 3125 (N.D. Cal. 1970); *United States v. Beltran*, 306 F. Supp. 385 (N.D. Cal. 1969); *United States v. Machado*, 306 F. Supp. 995 (N.D. Cal. 1969); *United States v. Jones*, 2 SEL. SERV. L. REP. 3392 (C.D. Cal. 1969); *United States v. DeMarco*, 2 SEL. SERV. L. REP. 3204 (N.D. Cal. 1969); *United States v. Lemke*, 310 F. Supp. 1298 (N.D. Cal. 1969). *See United States v. Hinch*, 292 F. Supp. 696, 698 (W.D. Mo. 1968) (dictum).

235. *United States v. Chaudron*, 425 F.2d 605 (8th Cir. 1970); *United States v. Brooks*, 415 F.2d 502 (6th Cir. 1969); *Jessen v. United States*, 242 F.2d 213 (10th Cir.

for habeas corpus.²³⁶ Moreover, the Seventh Circuit recently affirmed the dismissal of a preinduction case presenting a direct attack to the residential composition of a local board.²³⁷

The denial of preinduction review of the composition of a local board might seem appropriate in cases in which the facts are in dispute. In such cases, the court would have to hear evidence and make findings of fact, an exercise which could result in the delay in the selection process which Congress sought to prevent by enacting section 10(b)(3). When the facts are uncontested, however, the rule that local board action in violation of the statute or the regulations will entitle the registrant to judicial relief prior to induction should permit such relief in preinduction actions challenging the composition of the local board.²³⁸ The holdings of several courts that such an attack may not be made collaterally, but may only be raised by a direct attack, gives added weight to the argument that section 10(b)(3) should not be read to bar such cases prior to induction.²³⁹ Indeed, since it may be that the only way to raise the issue would be in a preinduction action,²⁴⁰ an interpretation of section 10(b)(3) which bars such an action may raise serious constitutional problems.²⁴¹

1957); *United States v. Fisher*, No. IP-69-CR-43 (S.D. Ind. Jan. 20, 1970), *appeal pending*, No. 18413, 7th Cir. 1970; *United States v. Nussbaum*, 306 F. Supp. 66 (N.D. Cal. 1969); *United States v. Kaul*, 305 F. Supp. 829 (N.D. Cal. 1969).

236. *United States ex rel. Johnson v. McBee*, 311 F. Supp. 531 (N.D. Ill. 1970).

237. *Czepil v. Hershey*, 425 F.2d 251 (7th Cir. 1970), *petition for cert. filed*, 38 U.S.L.W. 3498 (U.S. June 10, 1970). *Accord*, *Ryan v. Hershey*, 308 F. Supp. 285 (E.D. Mo. 1969). In *Steiner v. Officer in Command*, 304 F. Supp. 1157, 1162 (S.D. Tex. 1969), the court held that the issue could not be considered prior to induction, but based its decision on the ground that the rule in the Fifth Circuit under *Clay v. United States*, 397 F.2d 901 (5th Cir. 1968), precluded such attacks even after induction.

238. The Seventh Circuit apparently did not believe that the issue was barred by § 10(b)(3), since in its opinion in *Czepil v. Hershey*, the court considered the registrant's claim on its merits, reviewed the decision of the district court, and did not affirm the dismissal on jurisdictional grounds. 425 F.2d 251 (7th Cir. 1970).

239. *See Sellers v. McNamara*, 398 F.2d 893, 895 (5th Cir. 1968) (separate opinion of Judge Tuttle), *cert. denied*, 395 U.S. 950 (1969).

240. Several cases have suggested that the composition of a local board may be attacked by proceedings in the nature of *quo warranto* brought against the allegedly disqualified board members to oust them from office. *Czepil v. Hershey*, 425 F.2d 251 (7th Cir. 1970), *petition for cert. filed*, 38 U.S.L.W. 3498 (U.S. June 10, 1970); *United States v. Nussbaum*, 306 F. Supp. 66 (W.D. Cal. 1969). However, since a private individual lacks standing to institute such a proceeding and a United States Attorney may decline to bring such an action, the *quo warranto* remedy is inadequate. *United States v. Lemke*, 310 F. Supp. 1298 (N.D. Cal. 1969). *See United States v. Machado*, 306 F. Supp. 995, 1000-02 (N.D. Cal. 1969).

241. *See Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 243 (1968) (Justice Harlan, concurring); *United States v. Machado*, 306 F. Supp. 995,

F. *The Constitutionality of Section 10(b)(3)*

The power of Congress to limit the jurisdiction of the federal courts is considerable. Article III of the Constitution subjects the appellate jurisdiction of the Supreme Court to such exceptions and regulations as Congress shall make,²⁴² and vests Congress with the power to provide for and establish the inferior federal courts.²⁴³ Although these provisions have been treated as giving Congress plenary control over the jurisdiction of the federal courts,²⁴⁴ it has been recognized that the power of Congress to regulate the jurisdiction of the courts is limited by the requirements of due process of law²⁴⁵ and by the principle of the supremacy of law.²⁴⁶ Thus, Congress could not eliminate all judicial review of the actions of the Selective Service System.²⁴⁷ Section 10(b)(3) does not, however, eliminate judicial review altogether; it merely postpones the timing of such review.

The provision's restriction of review until after induction was found constitutionally unobjectionable by the Supreme Court in *Clark v. Gabriel*.²⁴⁸ Although the Court upheld the statute, it did

1001 (N.D. Cal. 1969). See also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803): "The very essence of a civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."

242. "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2.

243. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. See also U.S. CONST. art. I, § 8: "The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court."

244. See, e.g., *Lockerty v. Phillips*, 319 U.S. 182 (1943); *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922); *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869).

245. See, e.g., *Estep v. United States*, 327 U.S. 114, 127 (1946) (Justice Murphy, concurring); *Yakus v. United States*, 321 U.S. 414 (1944); *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948). See generally C. WRIGHT, *FEDERAL COURTS* § 10 (1963); Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

246. See *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Justice Brandeis, concurring).

247. See *Estep v. United States*, 327 U.S. 114, 125-32 (1946) (Justice Murphy, concurring).

248. 393 U.S. 256 (1968) (per curiam). In *Gabriel*, the Court summarily reversed the decision of a district court which had invalidated § 10(b)(3) on due process grounds. 287 F. Supp. 369 (N.D. Cal. 1968). The court below had agreed with the conclusion of the district court in *Petersen v. Clark*, 285 F. Supp. 700, 711 (N.D. Cal. 1968), *revd.*, 411 F.2d 1217 (9th Cir. 1969) (per curiam), that the statute would offend due process since "judicial review cannot be conditioned on the risk of incurring a substantial penalty or complying with an invalid order." 287 F. Supp. at 371.

not consider the question whether section 10(b)(3) could constitutionally bar preinduction review of a claim involving the violation of constitutional rights. The substantial risks of seeking review in a criminal prosecution²⁴⁹ and the hardships of submitting to induction and petitioning for habeas corpus²⁵⁰ may require the availability of a method of contesting alleged unconstitutional board action prior to induction,²⁵¹ particularly when first amendment rights are involved.²⁵² Ironically, it may well be unconstitutional to apply section 10(b)(3) to a case like the one it was intended to overrule—one involving the chilling effect on first amendment activity found in *Wolff v. Selective Service Local Board Number 16*.²⁵³

III. OTHER JURISDICTIONAL PROBLEMS

A. Federal-Question Jurisdiction

Most preinduction actions have alleged the presence of federal-question jurisdiction under section 1331 of the Judicial Code.²⁵⁴ In

249. See note 12 *supra*.

250. See note 13 *supra*.

251. See Leonard & Frantz, *Judicial Review of Selective Service Orders*, 26 THE GUILD PRACTITIONER 85, 95-97 (1967).

252. Murray v. Blatchford, 307 F. Supp. 1038, 1058 (D.R.I. 1969). See Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 550-51 (1970); Comment, *Judicial Review of Selective Service Action: A Need for Reform*, 56 CALIF. L. REV. 448, 458 (1968); Recent Case, 81 HARV. L. REV. 685, 690 (1968). But see Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 831 (1969).

253. 372 F.2d 817 (2d Cir. 1967). See notes 42-46 *supra* and accompanying text. Although the *Wolff* case, which involved the punitive reclassification of two students, was decided at a time when the undergraduate-student deferment was discretionary, it has since been made mandatory by the 1967 Act. See notes 162-63 *supra* and accompanying text. Thus if *Wolff* occurred today, the registrants would be able to secure preinduction relief on the authority of *Breen v. Selective Serv. Local Bd. No. 16*, 396 U.S. 460 (1970). See notes 126-27, 166-74 *supra* and accompanying text. The *Wolff* situation may arise, however, in a setting in which early review would be unavailable under the Supreme Court's construction of § 10(b)(3). For example, should a local board remove a teacher's discretionary occupational deferment, see note 178 *supra*, for signing a petition in support of draft refusers, this would not be a proper case for early review under *Clark v. Gabriel*, 393 U.S. 256 (1968). Yet, such board action would result in the chilling effect on first amendment rights found present in *Wolff*. It is believed that the application of § 10(b)(3) to bar relief in such a case would be unconstitutional. Several courts have indicated that this constitutional aspect of *Wolff* could not be overruled by Congress. See, e.g., *National Student Assn. v. Hershey*, 412 F.2d 1103, 1108 (D.C. Cir. 1969); *Zigmond v. Selective Serv. Local Bd. No. 16*, 284 F. Supp. 732, 735 n.4 (D. Mass.), *stay of induction denied*, 396 F.2d 290 (1st Cir.), *application for stay denied*, 391 U.S. 930 (1968).

254. 28 U.S.C. § 1331 (1964). Since the federal courts are courts of limited jurisdiction, and since they possess only the jurisdiction that Congress has conferred upon them by statute, *Kline v. Burke Constr. Co.*, 260 U.S. 226, 233-34 (1922), a plaintiff must present a

order to meet the requirements of section 1331, the action must arise under the Constitution, laws, or treaties of the United States²⁵⁵ and involve an amount in controversy in excess of 10,000 dollars.²⁵⁶ Since a selective service action invariably involves a dispute or controversy with respect to the validity, construction, or effect of the Military Selective Service Act, the requirement that the claim arise under federal law is clearly met.²⁵⁷ Whether the jurisdictional-amount requirement is also met raises a more difficult question.

claim that fits within some congressional grant of authority in order to be entitled to bring his action in federal court. *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); *Feldman v. Local Bd. No. 22*, 239 F. Supp. 102, 104-05 (S.D.N.Y. 1964). A litigant seeking judicial review of the actions of a federal administrative agency will usually have little difficulty bringing his action in federal court since most regulatory statutes explicitly authorize such review (see *Developments in the Law—Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 903-04 (1957)), or review is available under § 10 of the Administrative Procedure Act, 5 U.S.C. § 1009 (1964), as amended, 5 U.S.C. §§ 701-06 (Supp. IV, 1965-1968). A registrant challenging the actions of the Selective Service System, however, will be unable to base his action on such a statutory provision (see 50 U.S.C. App. § 460(b)(3) (1964), as amended, (Supp. IV, 1965-1968)), and will have to seek what has been termed "nonstatutory" judicial review. See *Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 321-22 (1967). Such nonstatutory review is often based upon the general federal-question jurisdiction of the district courts. Federal-question jurisdiction, provided for in U.S. CONST. art. III, § 2, is vested in the federal district courts under 28 U.S.C. § 1331(a) (1964): "The district courts shall have original jurisdiction of all civil actions wherein the amount in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States." A plaintiff who files a preinduction selective service action seeking declaratory or injunctive relief must rely on § 1331 or some other jurisdictional grant, since the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1964), does not accord the district court a separate jurisdictional basis on which it can act. *Breen v. Selective Serv. Local Bd. No. 16*, 406 F.2d 636, 637 (2d Cir. 1968), *revd. on other grounds*, 396 U.S. 460 (1970).

255. 28 U.S.C. § 1331(a) (1964). See note 254 *supra*. See generally C. WRIGHT, *FEDERAL COURTS* §§ 16-22 (1963).

256. 28 U.S.C. § 1331(a) (1964). See generally C. WRIGHT, *FEDERAL COURTS* §§ 32-37 (1963). For a discussion of the jurisdictional-amount requirement as it relates to selective service actions, see generally Note, *Draft Reclassifications for Political Demonstrations—Jurisdictional Amount in Suits Against Federal Officers*, 53 CORNELL L. REV. 916 (1968).

257. This "arising under" requirement has generally received a liberal interpretation by the federal courts. See, e.g., *Empresa Hondurena De Vapores, S.A. v. McLeod*, 300 F.2d 222, 226-27 (2d Cir. 1962), *vacated on other grounds sub nom. McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). Although the courts in many selective service cases have been troubled by the jurisdictional-amount requirement, they have not considered the arising-under requirement as presenting any problems. E.g., *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817, 822 (2d Cir. 1967); *Murray v. Vaughn*, 300 F. Supp. 688 (D.R.I. 1969); *Armendariz v. Hershey*, 295 F. Supp. 1351 (W.D. Tex.), *appeal dismissed*, 413 F.2d 1006 (5th Cir. 1969); *Breen v. Selective Serv. Local Bd. No. 16*, 284 F. Supp. 749 (D. Conn.), *affd.*, 406 F.2d 636 (2d Cir. 1968), *revd. on other grounds*, 396 U.S. 460 (1970). Although the district court in *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 280 F. Supp. 78 (D. Wyo.), *affd.*, 390 F.2d 100 (10th Cir.) (*per curiam*), *revd.*, 393 U.S. 233 (1968), found that

The jurisdictional-amount provision of section 1331 has generally been interpreted to require a controversy involving money or some right the value of which can be ascertained in money.²⁵⁸ In some cases, a plaintiff²⁵⁹ in a preinduction selective service action challenging the validity of an induction order will be able to demonstrate that induction will result in a pecuniary loss to him in excess of 10,000 dollars. A plaintiff claiming entitlement to a deferment or exemption, and whose yearly income exceeds military pay by at least 5,000 dollars,²⁶⁰ or who can prove that he would be able to secure employment at such a salary,²⁶¹ should encounter little difficulty in demonstrating a loss of anticipated income equal to 10,000 dollars. An unemployed registrant claiming a student deferment may be able to demonstrate that interruption of his education at a crucial point will result in a pecuniary loss in excess of 10,000 dollars.²⁶² Moreover, since induction into the Armed Forces for two years presumably decreases by two the civilian income-producing years available in a lifetime, a registrant may be able to meet the jurisdictional

neither of the jurisdictional requirements had been met, the Government assumed that the district court had jurisdiction under 28 U.S.C. § 1331 (1964), subject to proof that the jurisdictional-amount requirement was met, and urged the Supreme Court to remand the case so that a hearing could be held on that issue. Brief for Respondents at 66, *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233 (1968); Memorandum for Respondents at 13, *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233 (1968). The Court eventually adopted such a course. 393 U.S. at 239.

258. *E.g.*, *Barry v. Mercein*, 46 U.S. (5 How.) 103 (1847).

259. The Supreme Court has recently held that plaintiffs in class actions under Fed. R. Civ. P. 23 cannot aggregate the amounts of their claims to reach the \$10,000 jurisdictional amount. *Snyder v. Harris*, 394 U.S. 332 (1969). However, under the traditional rule—which was left intact by the Court—claims of different individuals may be aggregated to meet the requirement when those individuals share a common and undivided interest. *C. Wright, FEDERAL COURTS* § 36, at 102 (1963). It may be argued that this rule is met in a selective service case involving an occupational deferment in which the registrant's employer is permissively joined under Fed. R. Civ. P. 20, or in a case involving a dependency deferment in which the registrant's dependents are coparties.

260. Such an approach was utilized in *Rheingans v. Clark*, 1 SEL. SERV. L. REP. 3380 (N.D. Cal. 1968), in which the court held that the jurisdictional-amount requirement was satisfied since plaintiff's current salary for the two-year period would exceed by at least \$10,000 the salary he would earn in the civilian work to which he was ordered to report as a conscientious objector. *See also* *Stone v. Christensen*, 36 F. Supp. 739 (D. Ore. 1940).

261. *See* *Murray v. Vaughn*, 300 F. Supp. 688 (D.R.I. 1969).

262. *See* *Walsh v. Local Bd. No. 10*, 305 F. Supp. 1274 (S.D.N.Y. 1969) (taking judicial notice of the pecuniary rewards of a college education); *Armendariz v. Hershey*, 295 F. Supp. 1351 (W.D. Tex.), *appeal dismissed*, 413 F.2d 1006 (5th Cir. 1969) (student's right to I-S deferment to complete academic year assumed to exceed \$10,000). *Cf.* *Connelly v. University of Vermont*, 244 F. Supp. 156 (D. Vt. 1965) (value of right to complete fourth year of medical school held to exceed \$10,000 in student's action for reinstatement).

amount requirement by making an actuarial calculation of the reduction in lifetime anticipated income discounted to present capitalized value.²⁶³

Many registrants, however, will have difficulty establishing pecuniary loss. They may be able to argue that deprivation of a constitutional or statutory right results in an injury in excess of the jurisdictional amount. Although some nonpecuniary rights have been held capable of pecuniary calculation for purposes of meeting the jurisdictional amount,²⁶⁴ the courts have generally held that federal-question jurisdiction is unavailable unless a monetary value can be ascribed to the deprivation of the rights at issue.²⁶⁵ A plaintiff thus must attempt to express the right in controversy in monetary terms; an allegation that the right is priceless will not suffice.²⁶⁶ It is especially unwise for counsel to concede that no monetary loss is involved. Such a concession was held fatal in a preinduction selective service action challenging the constitutionality of the student deferment provisions of the statute.²⁶⁷ Although it appears anomalous to suggest that constitutional or statutory rights are worth less than property rights,²⁶⁸ prudent counsel should be prepared to dem-

263. This novel approach is suggested in SEL. SERV. L. REP. PRACTICE MANUAL ¶ 3526 (1969). See *Fein v. Local Bd. No. 7*, 3 SEL. SERV. L. REP. 3231, 3233 (2d Cir. 1970) (Chief Judge Lumbard, dissenting).

264. *Giles v. Harris*, 189 U.S. 475, 485 (1903); *Berk v. Laird*, No. 35007 (2d Cir. June 19, 1970); *Howard v. Ladner*, 116 F. Supp. 783 (S.D. Miss. 1953), *revd. sub nom. White v. Howard*, 347 U.S. 910 (1954).

265. *Barry v. Mercein*, 46 U.S. (5 How.) 103 (1847) (custody of a child); *Giancana v. Johnson*, 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965) (invasion of privacy in violation of fourth and fifth amendments); *Carroll v. Somervell*, 116 F.2d 918 (2d Cir. 1941) (federal employee's loss of standing in community due to dismissal for failure to sign noncommunist affidavit); *Ackerman v. Columbia Broadcasting Sys., Inc.*, 301 F. Supp. 628 (S.D.N.Y. 1969) (denial of right to equal broadcasting time in violation of first, fifth, ninth, tenth and fifteenth amendments).

266. *Barry v. Mercein*, 46 U.S. (5 How.) 103, 120 (1847) (The right to custody of a child "is evidently utterly incapable of being reduced to any pecuniary standard of value, as it rises superior to money considerations."); *Giancana v. Johnson*, 335 F.2d 366, 368 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965). ("If, as plaintiff contends, the sum or value cannot be alleged because of the priceless rights involved, how can this court infer that essential element?").

267. *Boyd v. Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968), *affd.*, 393 U.S. 316 (per curiam) (without reaching jurisdictional question). *Accord*, *Guffanti v. Hershey*, 296 F. Supp. 553 (S.D.N.Y. 1969).

268. The court could easily assume that freedom from an unconstitutional discrimination exceeds the sum or value of \$10,000.00. This is not the nineteenth century where property rights were valued over human rights. If a man can sue in federal court on the allegation that the government is injuring his property, he certainly must be allowed to sue on the allegation that the government is oppressing him personally. Although it might be said that human rights are incapable of valuation and hence valueless, it is better to view them as incapable of valuation but only because they are of infinite value. The latter view is, in my

onstrate that the deprivation of such rights results in pecuniary loss. In cases involving constitutional rights, this has been accomplished by employing arguments based on the economic harm that results from the deprivation of such rights and by analogy to tort-like damages.²⁶⁹ Damages for pain and suffering, for defamation, and for invasion of privacy are often highly speculative; and if cases involving such damage routinely meet the jurisdictional-amount requirement, intangible damage resulting from a violation of constitutional or statutory rights should likewise meet that requirement. Although the claim must be capable of valuation in money, this fact should not require plaintiffs to show an economic loss with absolute certainty, especially in view of the rule that a complaint is not to be dismissed for failure to meet the jurisdictional-amount requirement unless it appears "to a legal certainty that the claim is really for less than the jurisdictional amount."²⁷⁰

Although a registrant might thus convince a court that the infringement of his rights has a monetary value in excess of 10,000 dollars, many registrants will no doubt be unable to do this. In such a case, unless the plaintiff can demonstrate that his claim fits within another section of the Judicial Code,²⁷¹ the court must grant a motion to dismiss for lack of subject matter jurisdiction, and may even be under a duty to dismiss sua sponte.²⁷² Although

humble opinion, the only view compatible with the commitment of our nation to a belief in the dignity of men and the inherent worth of a free individual in a free society.

Boyd v. Clark, 287 F. Supp. 561, 568 (S.D.N.Y. 1968) (Judge Edelstein, dissenting).

269. See Note, *Draft Reclassifications for Political Demonstrations—Jurisdictional Amount in Suits Against Federal Officers*, 53 CORNELL L. REV. 916, 922-24 (1968).

270. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938). *Accord*, *Fein v. Local Bd. No. 7*, 3 SEL. SERV. L. REP. 3231, 3233 (2d Cir. 1970) (Chief Judge Lumbard, dissenting); *Berk v. Laird*, No. 35007 (2d Cir. June 19, 1970); *Parker v. Erie-Lackawanna Sys.*, 393 F.2d 229 (7th Cir. 1968); *Murray v. Vaughn*, 300 F. Supp. 688 (D.R.I. 1969). *But see* *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 280 F. Supp. 78, 80 (D. Wyo.) (finding no jurisdictional amount where complaint was concerned with "intellectual freedom rather than economic loss"), *affd.* 390 F.2d 100 (10th Cir.) (per curiam), *revd. on other grounds*, 393 U.S. 233 (1968) (remanded to enable plaintiff to demonstrate that he meets the jurisdictional-amount requirement). See Memorandum for Respondents at 13 n.5, *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233 (1968).

271. *E.g.*, 28 U.S.C. § 1361 (1964) (mandamus jurisdiction). See notes 287-99 *infra* and accompanying text.

272. Although several courts in selective service cases have accepted uncontested allegations that the amount in controversy exceeds \$10,000, apparently on the theory that allegations not denied are deemed established—*e.g.*, *Rich v. Hershey*, 408 F.2d 944 (10th Cir. 1969); *Breen v. Selective Serv. Local Bd. No. 16*, 406 F.2d 636, 637 n.1 (2d Cir. 1968); *Boyd v. Clark*, 287 F. Supp. 561, 568 (S.D.N.Y. 1968) (Judge Edelstein, dissenting)—this procedure is of questionable validity. See *McNutt v. General Motors*

a requirement that a dollar value be specifically averred in cases in which substantial constitutional or statutory rights are involved may appear to exalt form over substance.²⁷³ Congress expressly made the jurisdictional amount a necessary element of federal-question jurisdiction. Unless the requirement is unconstitutional, the federal courts must defer to that legislative determination.²⁷⁴

Some courts have recently indicated a willingness to question the constitutionality of the jurisdictional-amount requirement. In *Murray v. Vaughn*,²⁷⁵ the court, in denying the Government's motion to dismiss for lack of jurisdiction, suggested that the jurisdictional-amount requirement might be unconstitutional if read to prevent a federal district court from reaching the merits of a claim that alleged the infringement of constitutional rights. Since the court thought that such a reading of section 1331 might deprive a plaintiff alleging injury to constitutional rights access to any federal forum, it concluded that the jurisdictional-amount provision might violate both the due process clause of the fifth amendment and article III, section 2 of the Constitution.²⁷⁶ The provision would be even more constitutionally suspect if so applied in a first amendment context,²⁷⁷ particularly if a chilling effect on the exercise of first amendment rights was at stake. If the chilling-effect doctrine can be used to overcome the constitutional requirement of a case or controversy,²⁷⁸ then it certainly can be used to overcome the statutory requirement of jurisdictional amount. In order to avoid such constitutional problems, section 1331 should be liberally construed in cases alleging the infringement of constitutional rights.

The jurisdictional-amount requirement has come under increasing criticism in recent years, especially in its application to cases

Acceptance Corp., 298 U.S. 178 (1936); *Mansfield, Coldwater & Lake Mich. Ry. v. Swan*, 111 U.S. 379 (1884); *FED. R. CIV. P. 12(h)(2)*. In *Ackerman v. Columbia Broadcasting Sys., Inc.*, 301 F. Supp. 628, 633 (S.D.N.Y. 1969), the court found itself "under a duty to raise the issue of the absence of the required jurisdictional amount even if the parties to the litigation have not."

273. See *Giancana v. Johnson*, 335 F.2d 366, 371 (7th Cir. 1964) (Judge Swygert, dissenting).

274. *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817, 826 (2d Cir. 1967). See note 254 *supra*.

275. 300 F. Supp. 688 (D.R.I. 1969).

276. 300 F. Supp. at 695. See also *Boyd v. Clark*, 237 F. Supp. 561, 568 (S.D.N.Y. 1968) (Judge Edelstein, dissenting).

277. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 550-51 (1970).

278. *National Student Assn. v. Hershey*, 412 F.2d 1103 (D.C. Cir. 1969).

involving claims against federal officers.²⁷⁹ Two rationales have been given in support of the requirement, neither of which applies to cases brought against the federal government alleging deprivation of federal constitutional or statutory rights. One rationale is grounded on notions of federalism and deference to state courts,²⁸⁰ and these considerations have no place in actions against the Selective Service System. The other rationale is based on the desire to keep petty controversies out of the federal courts,²⁸¹ and no one would suggest that an alleged deprivation of federal rights is petty or insubstantial.²⁸² Indeed, it is questionable whether Congress itself intended the jurisdictional-amount requirement to apply to cases against federal officers.²⁸³ Commentators have urged that the requirement be abrogated for cases that meet the requirement that the controversy arise under federal law,²⁸⁴ and the American Law Institute has proposed a substitute for section 1331 which contains no jurisdictional-amount requirement.²⁸⁵ Although there are no

279. See Note, *Draft Reclassification for Political Demonstrations—Jurisdictional Amount in Suits Against Federal Officers*, 53 CORNELL L. REV. 916 (1968).

280. See *Healy v. Ratta*, 292 U.S. 263, 269-70 (1934):

From the beginning suits between citizens of different states, or involving federal questions, could neither be brought in the federal courts nor removed to them, unless the value of the matter in controversy was more than a specified amount. Cases involving lesser amounts have been left to be dealt with exclusively by state courts, except that judgment of the highest court of a state adjudicating a federal right may be reviewed by this Court.

281. The purpose for raising the jurisdictional amount to \$10,000 in 1958 was explained in the Senate report accompanying the bill:

The recommendations of the Judicial Conference regarding the amount in controversy, which this committee approves, is based on the premise that the amount should be fixed at a sum of money that will make jurisdiction available in all substantial controversies where other elements of Federal jurisdiction are present. The jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies.

S. REP. NO. 1830, 85th Cong., 2d Sess. 3-4 (1958).

282. *Walsh v. Local Bd. No. 10*, 305 F. Supp. 1274 (S.D.N.Y. 1969).

283. Congress has provided in separate statutes for judicial review without regard to jurisdictional amount in so many types of federal-question cases (C. WRIGHT, *FEDERAL COURTS* § 32, at 91 (1963)) that the committee reports accompanying the 1958 amendment state that "the only significant categories of 'Federal question' cases subject to the jurisdictional amount are suits under the Jones Act and suits contesting the constitutionality of State statutes." S. REP. NO. 1830, 85th Cong., 2d Sess. 6 (1958).

284. See Friedenthal, *New Limitations on Federal Jurisdiction*, 11 STAN. L. REV. 213, 216-18 (1959); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 225-26 (1948).

285. The proposed § 1331(a) provides:

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction without regard to amount in controversy of all civil actions, including those for a declaratory judgment, in which the initial pleading sets forth a substantial claim arising under the constitution, laws or treaties of the United States.

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current proposals before Congress to amend the section, it is possible that the attention focused on the problem by recent selective service cases will cause Congress to consider plugging this "unfortunate gap in the statutory jurisdiction of the federal courts."²⁸⁶

B. *Mandamus Jurisdiction*

Since a registrant must demonstrate that his local board violated its statutory mandate in order to bring his case within the *Oestereich* exception to section 10(b)(3), a plaintiff seeking preinduction review should be able to establish the presence of mandamus jurisdiction under section 1361 of the Judicial Code.²⁸⁷ Section 1361 vests the federal district courts with "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."²⁸⁸ The purpose of this provision, enacted in 1962, was to enable litigants, who previously had been restricted to the courts of the District of Columbia, to bring actions in federal district courts throughout the country seeking to review and compel official action.²⁸⁹ The phrase "in the nature of mandamus" was added to make clear that the jurisdiction conferred by section 1361 "is limited to compelling a Government official or agency to perform a duty owed to the plaintiff or to make a decision, but not to direct or influence the exercise of discretion of the officer in the making of the decision."²⁹⁰ It has been recognized, however, that mandamus is available to provide relief against administrative action which, even though within the authority granted, has gone beyond any rational exercise of discretion.²⁹¹

(Official Draft 1969). Also relevant are the ALI comments concerning the proposed § 1331. *Id.* at 172-76.

286. *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817, 826 (2d Cir. 1967).

287. 28 U.S.C. § 1361 (1964). See generally Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967).

288. 28 U.S.C. § 1361 (1964).

289. *Smith v. United States*, 333 F.2d 70 (10th Cir. 1964); Byse & Fiocca, *supra* note 287, at 318-19. The statute also added liberal venue and service-of-process provisions. 28 U.S.C. § 1391(e) (1964). See notes 300-11 *infra* and accompanying text.

290. S. REP. NO. 1992, 87th Cong., 2d Sess. 1-2 (1962). See *Guffanti v. Hershey*, 296 F. Supp. 553 (S.D.N.Y. 1969), in which the court held that mandamus was unavailable to compel the Director of Selective Service to rescind a local board memorandum and to issue a new one.

291. *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371 (2d Cir. 1968). See Byse & Fiocca, *supra* note 287, at 333-35. Although some courts have persisted in carrying over the ministerial-discretionary distinction of common-law mandamus, e.g., *Prairie Band of Pottawatomie Tribe of Indians v. Udall*, 355 F.2d 364 (10th Cir.), *cert. denied*, 385 U.S. 831 (1966), this tendency has been severely criticized. See Byse & Fiocca, *supra* note 287, at 349-51.

A litigant relying on section 1361 in a preinduction selective service action would have to demonstrate that the defendant local board had failed to perform a duty imposed by the Constitution,²⁹² the statute,²⁹³ the selective service regulations,²⁹⁴ or a treaty of the United States.²⁹⁵ The duty owed the plaintiff must be clear, but the fact that the duty becomes clear only after administrative or judicial construction of the provision involved does not preclude mandamus relief.²⁹⁶ The remedy of mandamus is equitable in nature, and a court may decline to exercise its discretion to issue mandamus relief when other adequate remedies are available.²⁹⁷ A court should not decline to exercise its jurisdiction on this ground, however, since the only alternatives to a preinduction action would be criminal prosecution for refusal of induction or habeas corpus proceedings following induction.

The "arising under" and the "amount in controversy" requirements for federal-question jurisdiction under section 1331 do not apply to mandamus jurisdiction based on section 1361.²⁹⁸ Moreover, once section 1361 jurisdiction is established, it provides an independent basis for jurisdiction to grant injunctive or declaratory relief.²⁹⁹

IV. VENUE

Included in the 1962 amendments to the Judicial Code was a liberal provision for venue and service of process in actions against federal officers or agencies sued in their official capacity.³⁰⁰ Before this provision was added, an action against a subordinate government official who resided in the judicial district where suit was filed

292. *E.g.*, *Murray v. Vaughn*, 300 F. Supp. 688, 697 (D.R.I. 1969).

293. *E.g.*, *Hardenbergh v. Selective Serv. Sys.*, 2 SEL. SERV. L. REP. 3315 (D. Minn. 1969); *Armendariz v. Hershey*, 295 F. Supp. 1351 (W.D. Tex. 1969).

294. *E.g.*, *Turley v. Selective Serv. Sys. Local Bd. No. 134*, 301 F. Supp. 845 (C.D. Cal. 1969); *Murray v. Vaughn*, 300 F. Supp. 688, 707 (D.R.I. 1969).

295. *See Itzcovitz v. Selective Serv. Bd. No. 6*, 301 F. Supp. 168 (S.D.N.Y. 1969), *appeal dismissed*, 3 SEL. SERV. L. REP. 3063 (2d Cir. 1970).

296. *Carey v. Local Bd. No. 2*, 297 F. Supp. 252 (D. Conn.), *affd.*, 412 F.2d 71 (2d Cir. 1969).

297. *Carter v. Seamans*, 2 SEL. SERV. L. REP. 3082 (S.D. Tex. 1968), *affd.*, 411 F.2d 767 (5th Cir. 1969).

298. *Byse, Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1516-17 (1962). *See Knutson v. Selective Serv. Sys. Local Bd. No. 36*, 304 F. Supp. 730 (D. Minn. 1969).

299. *See Weppeler v. Hershey*, 308 F. Supp. 447 (N.D. Ill. 1969); *Medoff v. Freeman*, 246 F. Supp. 125 (D. Mass. 1965), *affd.*, 263 F. 2d 472 (1st Cir. 1966). A contrary implication in *Prairie Band of Pottawatomie Tribe of Indians v. Udall*, 355 F.2d 364 (10th Cir.) (dictum), *cert. denied*, 385 U.S. 831 (1966), has been criticized as "clearly incorrect." *Byse & Fiocca, supra* note 287, at 350-51.

300. 28 U.S.C. § 1391(e) (1964).

was often dismissed because the doctrine of indispensable parties required joinder of the officer's superior over whom the district court lacked venue and process.³⁰¹ Congress eliminated this problem not by changing the indispensable-superior doctrine, but by adding section 1391(e), which allows the plaintiff to join the superior in an action brought locally against the subordinate.³⁰²

Since all of the defendants in a selective service action will be federal officers, employees, or agencies, venue may now be laid in a federal district where any of the defendants reside.³⁰³ Under section 1391(e), personal service may be made upon such a defendant,³⁰⁴ with service by certified mail made upon the nonresident defendants.³⁰⁵

Some plaintiffs in selective service cases have had their inductions transferred to local boards where they were temporarily residing,³⁰⁶ and have attempted to gain the advantages of section 1391(e) by naming the transferee board as a defendant. Although this approach has worked in several cases,³⁰⁷ a few courts have ruled that the

301. *E.g.*, *Sorenson v. Selective Serv. Sys.*, 203 F. Supp. 786 (E.D. Pa. 1962). *See* Byse, *supra* note 298, at 1493-99.

302. 28 U.S.C. § 1391(e) (1964) provides:

(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedures except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

303. Although § 1391(e) does not apply in cases in which any of the defendants is not a federal official or agency, the court in such a case may sever the nonfederal defendant and retain the case. *Town of East Haven v. Eastern Airlines, Inc.*, 282 F. Supp. 507, 511-12 (D. Conn. 1968).

304. FED. R. Civ. P. 4(d)(5).

305. Although § 1391(e) is a venue provision, it extends the extraterritorial jurisdiction of the district courts as well. *Metz v. United States*, 304 F. Supp. 207 (W.D. Pa. 1969); *Brotherhood of Locomotive Engrs. v. Denver & Rio Grande W.R.R. Co.*, 290 F. Supp. 612, 615-16 (D. Colo. 1968), *aff'd.*, 411 F.2d 1115 (10th Cir. 1969); *Powelton Civic Home Owners Assn. v. Department of HUD*, 284 F. Supp. 809, 832-34 (E.D. Pa. 1968).

306. Such transfers for induction are provided for in 32 C.F.R. § 1632.9 (1970).

307. *Barker v. Hershey*, 3 SEL. SERV. L. REP. 3134 (W.D. Wis. 1970). In most of the cases in which this approach has been successful, venue was not questioned. *E.g.*, *Foley v. Hershey*, 409 F.2d 827 (7th Cir. 1969) (*per curiam*); *Rich v. Hershey*, 303 F. Supp. 177 (D. Colo.), *aff'd.*, 408 F.2d 944 (10th Cir. 1969). The plaintiff in *Foley*, a registrant with a Massachusetts local board, had his induction transferred to an Indiana local board in the area of the university he was attending. He then filed suit in the district court in Indiana, naming as defendants the local boards and state directors of both states and the National Director. *Foley v. Hershey*, No. IP-69-C-77 (S.D. Ind. Feb. 20,

joinder of such a nominal defendant is insufficient to meet the requirements of section 1391(e).³⁰⁸ Venue clearly can be laid in the federal district where a plaintiff's local board is located, however, on the ground either that the board members reside there or that the cause of action arose there. Moreover, when the action challenges the validity of a Selective Service pronouncement issued by the National Director, the suit may be filed in the Federal District Court for the District of Columbia.³⁰⁹ Since no real property would be involved in a selective service suit, the action may be brought, pursuant to section 1391(e)(4), in the district where plaintiff resides.³¹⁰ Residence for purposes of venue is the equivalent of domicile,³¹¹ and a transitory or temporary place of abode will not, therefore, meet the requirements of section 1391(e).³¹²

V. FORMS OF RELIEF

A. *Injunctive Relief*

The principal reason for challenging Selective Service action prior to induction is the avoidance of the "Hobson's choice"³¹³ of either complying with the allegedly illegal order and accepting induction or disobeying that order and facing a criminal charge. Since a selective service case will not ordinarily be ripe for adjudication until an induction order has been issued,³¹⁴ a registrant challenging a board classification decision or procedure will be unable to file suit until he has been ordered to report for induction. How-

1969). The venue issue was not considered by the court, however. *See Robinson v. Hershey*, 2 SEL. SERV. L. REP. 3191 (7th Cir. 1969). Unlike subject matter jurisdiction, venue is merely a personal privilege which may be waived if timely objection is not raised. 28 U.S.C. § 1406(b) (1964); FED. R. CIV. P. 12(b), 12(h).

308. *Robinson v. Hershey*, 2 SEL. SERV. L. REP. 3191 (S.D. Ind. 1969), *injunction pending appeal denied*, 2 SEL. SERV. L. REP. 3191 (7th Cir. 1969) (expressing no opinion on the venue question); *Nelson v. Local Bd. No. 1*, 2 SEL. SERV. L. REP. 3192 (D. Conn. 1969).

309. *Fine v. McGuire*, 2 SEL. SERV. L. REP. 3687 (D.C. Cir. 1970); *Nestor v. Hershey*, 425 F.2d 504 (D.C. Cir. 1969).

310. *See note 302 supra*.

311. "Domicile" consists of physical presence plus the intent to remain indefinitely. *E.g.*, *New England Mut. Life Ins. Co. v. Lauffer*, 215 F. Supp. 91, 97 (S.D. Cal. 1963); *Eastern Metals Corp. v. Martin*, 191 F. Supp. 245, 250 (S.D.N.Y. 1960).

312. *Robinson v. Hershey*, 2 SEL. SERV. L. REP. 3190 (S.D. Ind. 1969) (school residence); *Nelson v. Local Bd. No. 1*, 2 SEL. SERV. L. REP. 3192 (D. Conn. 1969) (school residence). *See King v. Wall & Beaver St. Corp.*, 145 F.2d 377 (D.C. Cir. 1944); *Champion Spark Plug Co. v. Karchmar*, 180 F. Supp. 727 (S.D.N.Y. 1960).

313. *See United States v. Stewart*, 306 F. Supp. 29 (N.D. Cal. 1969), *appeal dismissed*, 396 U.S. 1066 (1970).

314. *See note 217 supra*.

ever, the time between the issuance of such an order and the date of induction is usually no more than a few weeks.³¹⁵ Therefore, in order to prevent a case from being mooted by the plaintiff's induction,³¹⁶ provisional relief in the form of a temporary restraining order or preliminary injunction of plaintiff's induction will be necessary.³¹⁷

Injunctions are issued within the discretion of the court in cases in which plaintiff can establish that such relief is necessary to prevent immediate and irreparable injury, that he has a substantial likelihood of success on the merits, that he has exhausted his administrative remedies, and that the equities between the parties balance in his favor.³¹⁸ A plaintiff in a preinduction selective service action should have little difficulty meeting these requirements. An unsuccessful personal appearance and appeal will meet the exhaustion requirement.³¹⁹ Irreparable harm has been found when plaintiff's induction is imminent, since unless enjoined, the induction will render the case moot.³²⁰ Moreover, there is no countervailing interest in inducing a registrant on one particular day rather than

315. Although an Order to Report for Induction, SSS Form No. 252 (April 28, 1965) (the form is reproduced in A. TATUM & J. TUCHINSKY, *supra* note 1, at 80-81), must be mailed at least ten days before the date of induction, 32 C.F.R. § 1632.1 (1970), the registrant is rarely given more than a few weeks. He may be able to gain extra time by seeking a postponement of induction for emergencies beyond his control, 32 C.F.R. § 1632.2 (1970), or a transfer of his induction to a local board in the area in which he is currently located, 32 C.F.R. § 1632.9 (1970).

316. *E.g.*, Martel v. Hershey, 2 SEL. SERV. L. REP. 3110 (S.D. Ind. 1969).

317. If sufficient time is available, the plaintiff should seek a preliminary injunction, a motion for which is heard on notice and with opportunity for the defendant to be heard. FED. R. CIV. P. 65(a)(1). The court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application for a preliminary injunction. FED. R. CIV. P. 65(a)(2). A temporary restraining order may be issued ex parte if it is shown by affidavit or verified complaint that immediate and irreparable harm will result before a hearing for a preliminary injunction can be held, and the efforts to provide notice to defendant have been set forth. FED. R. CIV. P. 65(b). If possible, the plaintiff should attempt to obtain a preliminary injunction rather than a temporary restraining order, since orders denying or dissolving a preliminary injunction are appealable, C. WRIGHT, FEDERAL COURTS § 102, at 400-01 (1963), while orders involving a temporary restraining order are not. *Shiffman v. Selective Serv. Bd. No. 5*, 1 SEL. SERV. L. REP. 3082 (2d Cir.), *application for stay denied*, 391 U.S. 930 (1968).

318. *See* W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1431 (1968); 3 K. DAVIS, ADMINISTRATIVE LAW §§ 23.04-06 (1958).

319. *See* notes 2-3 *supra* and accompanying text.

320. *E.g.*, Germonprez v. Director, 3 SEL. SERV. L. REP. 3133 (D.D.C. 1970); Walsh v. Local Bd. No. 10, 305 F. Supp. 1274 (S.D.N.Y. 1969); Davis v. Hershey, 310 F. Supp. 565 (C.D. Cal.), *complaint dismissed*, 2 SEL. SERV. L. REP. 3194 (C.D. Cal. 1969) (finding no right to deferment), *appeal dismissed*, 3 SEL. SERV. L. REP. 3230 (9th Cir. 1970). One court has held that the harm to a registrant is irreparable if he is unlawfully required to choose among submitting to induction, submitting to induction and seeking release by habeas corpus, or refusing induction and incurring criminal prosecution. *Stodolsky v. Hershey*, 2 SEL. SERV. L. REP. 3527 (W.D. Wis. 1969).

another, since the Selective Service System has consistently provided the Armed Forces with more men than the monthly quota it is called upon to supply.³²¹ Accordingly, the courts have not hesitated to exercise their discretion to enjoin inductions found to be contrary to law.³²²

B. *Declaratory Judgment*

In addition to having his induction enjoined, a plaintiff in a preinduction action may seek relief in the form of a declaratory judgment. Declaratory judgments are provided for in sections 2201 and 2202 of the Judicial Code,³²³ and the procedure for obtaining such relief is set out in rule 57 of the Federal Rules of Civil Procedure. The declaratory-judgment procedure has been utilized with some success in preinduction selective service actions by plaintiffs seeking to have the court declare them to be entitled to a particular classification,³²⁴ and to declare invalid certain Selective Service procedures or pronouncements.³²⁵

321. A presidential commission reported that in 1966 and 1967 the Selective Service System actually inducted in an average month more than 103% of the call levied on it. TASK FORCE ON THE STRUCTURE OF THE SELECTIVE SERV. SYS., REPORT X-1, X-2 (1967). See also NATL. ADVISORY COMM. ON SELECTIVE SERV., IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE? 156-57 (1967).

322. *E.g.*, *Rich v. Hershey*, 303 F. Supp. 177 (D. Colo. 1969); *Keller v. Hershey*, 309 F. Supp. 687 (S.D. Fla. 1969). For cases in which courts have declined to exercise their discretion, see, *e.g.*, *National Student Assn. v. Hershey*, 412 F.2d 1103, 1123-24 (D.C. Cir. 1969) (refusing to enjoin application of Hershey directive because "[t]he practical problems of enforcing an injunction against every local and appellate draft board are staggering."); *Shiffman v. Selective Serv. Bd. No. 5*, 1 SEL. SERV. L. REP. 3082 (2d Cir. 1968) (upholding a district court's refusal to issue a temporary restraining order because of plaintiff's unreasonable delay after receiving his induction order in applying for relief); *Kahn v. Secretary of HEW*, 302 F. Supp. 178 (D. Mass. 1969) (failure to show reasonable probability of success on the merits).

323. Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1964).

324. *E.g.*, *Foley v. Hershey*, 409 F.2d 827 (7th Cir. 1969) (*per curiam*); *Walsh v. Local Bd. No. 10*, 309 F. Supp. 687 (S.D.N.Y. 1969).

325. *E.g.*, *National Student Assn. v. Hershey*, 412 F.2d 1103 (D.C. Cir. 1969). But see *Becker v. Hershey*, 309 F. Supp. 487 (D. Conn. 1969), in which the court, although basing its decision on lack of jurisdiction over the plaintiffs' local boards, expressed a reluctance to grant a declaratory judgment that all graduate students who have received their baccalaureate degrees prior to July 1, 1967, are entitled to the I-S classification. It is noteworthy that the same district judge had granted such declaratory relief to an individual student in *Carey v. Local Bd. No. 2*, 297 F. Supp. 252 (D. Conn.), *aff'd.*, 412 F.2d 71 (2d Cir. 1969). The plaintiffs in *Becker* had brought a class action in which they sought to secure relief for themselves and others similarly situated. The court declined to provide such relief, without prejudice to the plaintiffs' filing individual actions, on the ground that "a stable body of national law is the role of the Supreme Court and the Courts of Appeals, not that of a single federal district judge." 309 F. Supp. at 489. But *Becker* would appear to have been a perfect case for a class action. The class of graduate students involved is so numerous as to make individual joinder impracticable, the questions of law are common to the class, repeated litigations might establish inconsistent standards for the Selective Service System

C. *Mandamus*

A third form of relief that may be sought in a preinduction action is relief in the nature of mandamus under section 1361 of the Judicial Code.³²⁶ This provision enables the court to compel a federal officer or agency to perform a duty owed to the plaintiff. The courts have granted mandamus relief in several selective service cases, and have ordered local boards to cancel induction orders³²⁷ and to grant registrants particular classifications.³²⁸

D. *Enjoining the Enforcement of an Act of Congress*

A three-judge federal district court must be convened whenever a plaintiff seeks to enjoin the enforcement of an act of Congress alleged to be unconstitutional.³²⁹ The request to convene a three-judge court is initially made to a district judge who must determine whether the constitutional question raised is substantial and whether the complaint at least formally alleges a basis for equitable relief.³³⁰ A challenge to the constitutionality of section 10(b)(3) has been held not to require the convening of a three-judge court on the ground that the constitutionality of the provision, although drawn into question, was not central to plaintiff's primary claim to enjoin

to apply to students who should be treated alike, and the system has refused to grant the deferment to such students on grounds generally applicable to the class. *See* FED. R. CIV. P. 23. One court has granted declaratory relief in class actions involving the I-S deferment, *Ellis v. Hershey*, 302 F. Supp. 347 (E.D. Mich. 1969), and the III-A deferment, *Gregory v. Hershey*, 311 F. Supp. 1 (E.D. Mich. 1969), 2 SEL. SERV. L. REP. 3604 (E.D. Mich. 1970) (supplemental order). For a discussion of class actions under rule 23, a procedure which would seem particularly appropriate in selective service preinduction actions, see generally Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1967); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, pt. 1, 81 HARV. L. REV. 356, 375-400 (1967).

326. 28 U.S.C. § 1361 (1964). *See* notes 287-99 *supra* and accompanying text.

327. *E.g.*, *Hardenberg v. Selective Serv. Sys.*, 2 SEL. SERV. L. REP. 3315 (D. Minn. 1969); *Itzcovitz v. Selective Serv. Bd. No. 6*, 301 F. Supp. 168 (S.D.N.Y. 1969), *appeal dismissed*, 3 SEL. SERV. L. REP. 3063 (2d Cir. 1970).

328. *E.g.*, *Knutson v. Selective Serv. Sys.*, 304 F. Supp. 730 (D. Minn. 1969); *Carey v. Local Bd. No. 2*, 297 F. Supp. 252 (D. Conn.), *affd.*, 412 F.2d 71 (2d Cir. 1969).

329. 28 U.S.C. §§ 2282, 2284 (1964). *See generally* Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964).

330. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962); *Del Bourgo v. Mansfield*, 300 F. Supp. 500, 501 (N.D. Cal. 1967), *vacated and dismissed for mootness*, 300 F. Supp. 502 (N.D. Cal. 1968). A claim "lacks substantiality if prior decisions foreclose the subject or if the question raised obviously is without merit." *O'Hair v. United States*, 281 F. Supp. 815, 820 (D.D.C. 1968). *See* *Medeiros v. United States*, 294 F. Supp. 198 (D. Mass. 1968) (claim that Selective Service Act would subject plaintiff to involuntary servitude found to lack substantiality); *Smith v. Leach*, 294 F. Supp. 862 (N.D. Ga. 1968) (claim that § 10(b)(3) is unconstitutional found to lack substance since it merely codifies the *Estep* case); *Katz v. United States*, 287 F. Supp. 29 (S.D.N.Y. 1966) (claim that Selective Service Act violates ninth amendment found to be "obviously without merit").

his induction.³³¹ A three-judge court may be assembled only when the operation of an entire statutory scheme is sought to be enjoined;³³² it may not be convened merely to test the acts or regulations of an administrative agency.³³³ Once a three-judge court has been designated, only that court may grant a preliminary or permanent injunction,³³⁴ although the single district judge to whom the original application is made may grant a temporary restraining order.³³⁵

E. *Injunction Pending Appeal*

If the district court dismisses a preinduction selective service action and the plaintiff decides to appeal that decision, an injunction forbidding induction pending appeal will be necessary to prevent the appeal from becoming moot. Such an injunction should be sought initially from the district court.³³⁶ If the court denies relief, or if application to the district court is impracticable, a motion for such relief may be made to the court of appeals or to a judge thereof.³³⁷ Such a motion should be supported by a memorandum setting forth the reasons for the relief requested and the facts relied on. It should include affidavits if the facts are in dispute and relevant portions of the record. Reasonable notice of the motion should be given to the defendant.³³⁸

In ruling on whether to grant an injunction during the pendency of an appeal, the courts consider, among other things, the probability of success on the merits, the threat of irreparable injury if

331. *Faulkner v. Clifford*, 289 F. Supp. 895 (E.D.N.Y. 1968); *Petersen v. Clark*, 285 F. Supp. 698 (N.D. Cal. 1968).

332. *E.g.*, *Boyd v. Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968) (three-judge court convened to consider constitutionality of student deferment section of statute), *affd.*, 393 U.S. 316 (1969) (per curiam).

333. *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939); *Del Bourgo v. Mansfield*, 300 F. Supp. 500 (N.D. Cal. 1968) (attack on constitutionality of special form for conscientious objector); *Breen v. Selective Serv. Local Bd. No. 16*, 284 F. Supp. 749 (D. Conn.) (attack on constitutionality of Hershey directive), *affd.*, 406 F.2d 636 (2d Cir. 1968), *revd. on other grounds*, 396 U.S. 460 (1970).

334. 28 U.S.C. § 2282 (1964).

335. 28 U.S.C. § 2284(3) (1964).

336. *FED. R. CIV. P.* 62(c). *E.g.*, *Mulligan v. Selective Serv. Local Bd. No. 64*, 2 *SEL. SERV. L. REP.* 3686 (E.D.N.Y. 1970) (stay pending appeal granted).

337. *FED. R. APP. P.* 8. *E.g.*, *Bowen v. Hershey*, 410 F.2d 962 (1st Cir. 1969) (stay pending appeal granted); *Foley v. Hershey*, 409 F.2d 827 (7th Cir. 1969) (injunction pending appeal granted); *Zigmond v. Selective Serv. Local Bd. No. 16*, 396 F.2d 290 (1st Cir. 1968) (stay pending appeal dissolved).

338. *See* H. LEVY, *HOW TO HANDLE AN APPEAL* 406-10 (1968). For a discussion of a similar notice requirement with respect to temporary restraining orders, see Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, pt. 2, 81 *HARV. L. REV.* 591, 609 (1968).

immediate relief is denied, the harm resulting to the adversary if the relief is granted, and the effect upon the public interest.³³⁹ A plaintiff's motion should make a strong showing that he is likely to prevail on the merits. He should attempt to demonstrate that immediate and irreparable injury will result if his induction is not enjoined, since induction will render his appeal moot and may deprive him of the statutory right he seeks to vindicate.³⁴⁰ Furthermore, a plaintiff should contend that this irreparable harm is extreme when measured against any inconvenience to the public interest caused by the delay of his induction,³⁴¹ a contention which is especially reasonable since delay in the plaintiff's training as a soldier would also result from his refusal to submit to induction or from a habeas corpus attack from within the Armed Forces. Moreover, a plaintiff should argue that the public interest would be furthered by judicial resolution of the substantial controversy that his case presents.³⁴²

Should the court of appeals deny the request for an injunction pending appeal, the plaintiff's final recourse is to seek that relief from the Supreme Court.³⁴³ An application for a stay is addressed to an individual Justice of the Supreme Court—usually the Justice assigned to the federal judicial circuit in which the case arose³⁴⁴—in his capacity as Circuit Justice.³⁴⁵ If that Justice denies relief, the plaintiff may renew his application to any other Justice, although such renewed applications are not favored.³⁴⁶ A lower court refusal

339. *Virginia Petroleum Jobbers Assn. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Covington v. Schwartz*, 230 F. Supp. 249 (N.D. Cal. 1964), *modified*, 341 F.2d 537 (9th Cir. 1965).

340. *E.g.*, a registrant claiming the right to a student deferment whose induction is not enjoined can accept induction and then bring habeas corpus to vindicate his right. But such relief can come only after an interruption of study, which would frustrate the very right granted by the statute. If the student refuses induction, he will be arrested and prosecuted for his refusal. Even though he might ultimately be acquitted, the criminal proceedings will similarly interrupt the student's education.

341. See note 321 *supra* and accompanying text.

342. It is a "federal policy to grant stays where . . . denial of the stay will do irreparable harm to the applicant . . . [and where] [s]ubstantial and unresolved questions . . . are presented." *Smith v. Ritchey*, 89 S. Ct. 54 (1968) (Douglas, Circuit Justice).

343. SUP. CT. R. 50. See R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 563-84 (4th ed. 1969). *E.g.*, *Kaplysh v. Hershey*, 394 U.S. 901 (1969) (stay denied); *Shiffman v. Selective Serv. Local Bd. No. 5*, 391 U.S. 930 (1968) (stay denied); *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 1 SEL. SERV. L. REP. 3027 (1967) (stay granted).

344. SUP. CT. R. 50(4).

345. See generally Note, *The Powers of the Supreme Court Justice Acting in an Individual Capacity*, 112 U. PA. L. REV. 981 (1964).

346. SUP. CT. R. 50(4). But see *Morse v. Boswell*, 393 U.S. 802 (1968), in which Justice Douglas had granted interim stays after Chief Justice Warren and Justice Black had

to grant a stay is given great weight,³⁴⁷ but the presence of real and irreparable injury, the possibility of mootness if the stay is denied, the likelihood that the Court will hear the case, and the significance and novelty of the issues raised may make the case appropriate for the granting of a stay.³⁴⁸

VI. CONCLUSION

The history of preinduction judicial review in selective service cases dates, for the most part, from the 1967 *Wolff* case. Although Congress, concerned with the efficiency of the selection process, attempted to prevent early review by amending section 10(b)(3), the Supreme Court's interpretation of that section in *Oestereich* and *Breen* has resulted in the expansion of such review.

The very heart of the Selective Service System consists of the nearly 4,100 local draft boards that comprise it.³⁴⁹ The vast discretion lodged in these boards and the low public visibility of their operations make them particularly susceptible to abuses—abuses which are intolerable when committed by those entrusted with the grave responsibility of conscripting our nation's young men into the Armed Forces.³⁵⁰ Permitting early judicial scrutiny of alleged board deprivations of the rights of registrants will, more than any other safeguard, serve to prevent such abuses. Such review will deter local board misconduct far more than will postinduction judicial relief which may not come until long after the classification process is at an end. The threat of such preinduction relief will cause the board to proceed more carefully and to seek advice from state and national headquarters more often.³⁵¹ Moreover, the early review permitted under the *Oestereich* rule defers to local board expertise and will not result in judicial interference with the discretion committed to the board. Although a registrant's induction can be delayed by filing a preinduction action, the courts can be relied on to refuse

denied such applications. See the discussion of *Morse* in *Winters v. United States*, 89 S. Ct. 34, 35 (1968) (Harlan, Circuit Justice).

347. *Magnum Import Co. v. Coty*, 262 U.S. 159, 164 (1923).

348. See *Zigmond v. Selective Serv. Local Bd. No. 16*, 391 U.S. 930, 932 n.3 (1968) (Justice Douglas, dissenting). R. STERN & E. GRESSMAN, *supra* note 343, at 577-84.

349. See J. DAVIS & K. DOLBEARE, *LITTLE GROUPS OF NEIGHBORS: THE SELECTIVE SERVICE SYSTEM* 54 (1968); Rabin, *A Strange Brand of Selectivity: Administrative Law Perspectives on the Processing of Registrants in the Selective Service System*, 17 UCLA L. REV. 1005, 1006-11 (1970).

350. See *Walsh v. Local Bd. No. 10*, 305 F. Supp. 1274 (S.D.N.Y. 1969).

351. Tigar & Zweben, *Selective Service: Some Certain Problems and Some Tentative Answers*, 37 GEO. WASH. L. REV. 510, 530-31 (1969).

injunctions in frivolous actions. The delay of induction is slight in any case since essentially legal rather than factual judicial determinations are involved. Moreover, the slight delay that does exist does not substantially interfere with the selection process, since the Selective Service System always more than fills its quota. Nor will such a delay enable a registrant to escape liability for service by becoming older, since an induction order, once issued, remains outstanding.³⁵² Preinduction judicial review, therefore, without hindering the efficient process of conscription, promotes a "system of selection which is fair and just."³⁵³

352. 32 C.F.R. §§ 1632.14, 1632.2(d) (1970). *See Stella v. Selective Serv. Local Bd.* No. 66, 427 F.2d 887 (2d Cir. 1970).

353. 50 U.S.C. App. § 451(c) (1964).