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Tigar: Selective Service Law Reporter

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RECENT BOOKS

BOOK REVIEWS

SELECTIVE SERVICE LAW REPORTER. Editor-in-Chief, *Michael E. Tigar*. Washington: Public Law Education Institute. Monthly. Pp. looseleaf. \$42 per year, regular rate; \$36 per year, law school, college, university, bar association, and public libraries; \$18 per year, legal defense and education organizations, legal aid agencies, legal service programs, and attorneys in practice for less than five years.

Increasing numbers of young men registered with the Selective Service System (SSS) are now realizing that they need advice and assistance from persons outside of General Hershey's establishment in determining their rights and obligations under the draft laws. The present law contains a crazy-quilt pattern of exemptions and deferments from military service within a complex procedural framework structured around local boards and state and national appeal boards. Although the Selective Service System places on each registrant the burden "to establish to the satisfaction of the local board . . . that he is eligible for classification in another class" than 1-A,¹ it has never been known for its efforts to keep the young men subject to its jurisdiction informed of their rights. Of course, this phenomenon is complemented by the hesitancy of registrants to contact and question their local boards about their status. All too often, though, contact with the local board is futile; much of the misinformation about the availability of exemptions and deferments, and how and when to claim them, can be traced to the clerks of the local boards.² Although each local board is required to have a government appeal agent³ who renders "legal counsel"⁴ to registrants, more often than not these agents are totally inactive.⁵ Furthermore, a registrant is justifiably cautious in seeking and relying on an appeal agent's advice because appeal agents need not keep any communications in confidence and must be "equally diligent in protecting the interests of the Government and the rights of the

1. 32 C.F.R. § 1622.10 (1968).

2. My own advising of registrants has chiefly involved law students, and I have found that even among this select sample the amount of misinformation is very high. This misinformation is typically the product of student or neighborhood gossip, but all too often its source is the clerk of a local board. Among registrants with fewer educational advantages the situation is far worse. *See, e.g.,* Lockhart v. United States, 1 SEL. SERV. L. REP. 3204 (9th Cir. Oct. 23, 1968) (registrant did not understand what an administrative "appeal" was).

3. 32 C.F.R. § 1604.71 (1968). The agents need not be lawyers.

4. *See* Registration Card, SSS FORM 2, 1 SEL. SERV. L. REP. 2156:1 (1967), which informs registrants that a government appeal agent is "ready and willing to offer any legal counsel on Selective Service matters."

5. NATIONAL ADVISORY COMMISSION ON SELECTIVE SERVICE, IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE? 28-29 (1967) [hereinafter MARSHALL COMMISSION REPORT].

registrant."⁶ A cooperative local board or state SSS director may occasionally render invaluable assistance to an individual registrant, but registrants should realize that the SSS is not a friend. Rather, it is an adversary in a very real sense; its charge is to fill the inexorable monthly quotas from the available manpower pool. Lay counselling services may in many cases clear up basic misunderstandings, but a registrant's problem may well raise difficult legal questions on which he is entitled to a lawyer's judgment.⁷ Still, rendering the necessary assistance to registrants should not be relegated to legal specialists who deal with only the intricacies of the draft. Registrants who encounter difficulties with the SSS should be able to consult an attorney in their community in whom they have developed trust and confidence.

The *Selective Service Law Reporter* (SSLR) is invaluable because it helps make this possible. It is more than just another loose-leaf service performing the vital function of keeping practitioners informed of the most recent developments in their specialties; it is in addition a superbly organized and thought-out collection of materials containing most of the information a lawyer needs to render competent legal assistance in the draft law area.⁸ It is divided into six basic sections: a monthly newsletter which briefly advises subscribers of significant developments during the past month; a practice manual written by editor-in-chief Michael E. Tigar; an up-to-date collection of relevant statutes and regulatory material; the texts (usually edited) of significant recent decisions; articles and comments submitted by lawyers and law students; and an index and bibliography which, unfortunately, is not supplemented on a monthly basis as are the other sections.

The section of statutes and regulations provides the basic source material with which a lawyer must work. SSLR includes the complete text of the present draft statute—the Military Selective Service Act of 1967.⁹ It also contains the complete text of the Selective Service Regulations¹⁰ issued by the President or the Director of Selective Service. These regulations are the basis for the organization and operation of the SSS and spell out the all-important classification process which leads to the exemption, deferment, or in-

6. 32 C.F.R. § 1601.71(d)(5) (1968).

7. In the lay counselling area, special commendation should go to the selfless work of the American Friends Service Committee and the Central Committee for Conscientious Objectors. Lay counselling services almost invariably do not charge for their services, while lawyers normally do. Many young men who would profit from legal counsel may unfortunately be discouraged by the fee. Perhaps Legal Aid Bureaus should play a greater role in the draft law area.

8. Although primarily written for lawyers in private practice, the SSLR should also prove of great value as a research tool and guidebook to all persons who must deal with the SSS and to SSS employees themselves.

9. 50 U.S.C. app. §§ 451-73 (Supp. III, 1965-67).

10. Generally codified in 32 C.F.R. pts. 1600-90.

duction of a registrant. Forms used by the Selective Service System are treated as part of the regulations and are also reprinted following the text of the regulations. Furthermore, SSLR reprints the text of all the Director's Local Board Memoranda and Operation Bulletins in force which contain recommendations and policy guidelines for local boards. The memoranda, otherwise available only through the Government Printing Office, contain detailed instructions to local boards on the administration of the system, interpretations of the law from national headquarters, and special procedures to be followed in prescribed cases. This section closes with several hundred pages of text of important but hard-to-find Army Regulations. These include: the medical fitness standards determined by the Surgeon General of the Army;¹¹ the procedures to be followed at the Armed Forces Examining and Entrance Stations for determining the medical, mental, and moral fitness of registrants and for inducting qualified registrants into the military;¹² the consequences of a registrant's failure to complete the Armed Forces Security Questionnaire;¹³ and the procedure to obtain a discharge for a member of the Army who becomes a conscientious objector while in the service.¹⁴

The importance of the regulations concerning medical, mental, and moral standards cannot be overemphasized. Each year, one fourth to one third of those registrants taking pre-induction examinations are found ineligible for service because of educational or health deficiencies, or both.¹⁵ This surprisingly high percentage of rejected registrants reflects in part the tragic deprivations suffered by many of this country's poorer citizens. However, the statistics also reflect the fact that many registrants are unaware that a number of common physical defects, such as neck and back conditions or asthma in adult life, are of the type that qualify them for medical deferments.¹⁶ In many respects, the military has high entrance standards. Registrants should be informed about these standards, how to establish a claim for a medical deferment, and what procedures are followed at a pre-induction fitness examination. Reprinting these regulations should permit users of the SSLR to advise registrants about medical, mental, and moral standards for induction, a task which the editors have further eased by reprinting in

11. AR 40-501, C1-22, 5 Dec. 1960, chs. 1, 2, 7 (partial), 8, 9, apps. I-IV.

12. AR 601-270, C2, 13 Feb. 1967, chs. 1-4 & relevant apps.

13. AR 604-10, C1, 20 July 1962, §§ I-VI, apps. I & II.

14. AR 635-20, 27 May 1968.

15. MARSHALL COMMISSION REPORT 4. The April 1968 Newsletter of the SSLR quotes Selective Service figures to the effect that 41.6% of those registrants examined at Armed Forces Examining and Entrance Stations between September 1948 and March 1968 were found not qualified for service. 1 SEL. SERV. L. REP. 16 (1968).

16. Franck, *Presenting Medical and Psychiatric Unfitness for Duty Under Draft Law*, 26 GUILD PRACTITIONER 75 (1967).

the November 1968 edition some of the more important forms involved.

The practice manual should prove to be the most valuable section of the book, particularly to lawyers with little experience in the selective service area. As described by its author, Michael E. Tigar, "[t]his Practice Manual is the first book of its kind—an attempt to restate the law of selective service by integrating statutory and regulatory provisions with the cases construing them and with legal literature critically examining the Selective Service System" (vol. 1, p. 1,001). Tigar carries out this task clearly, concisely, and brilliantly. Part I of the manual, entitled "Introduction to Selective Service," discusses the statutory and regulatory bases for selective service and the organization of the SSS. Part II covers "The Selective Service Administrative Process—Registration to Induction," and describes in detail the complexities of the classification system. Part III treats "Criminal Trials under the Selective Service Law";¹⁷ it is of the most immediate importance to practitioners since a registrant almost always seeks legal assistance when the Government institutes criminal proceedings to punish him for noncompliance with the Act. Tigar is at his best in this part. Writing from the point of view of a defense attorney, he discusses the definition and nature of the various criminal offenses and the possible defenses that may be raised. He also outlines federal criminal practice and the special procedural problems encountered in defending selective service cases, and supplies useful advice on the ethical and tactical problems facing the defense lawyer. Interspersed with the discussion of the law are intensely practical suggestions on challenging the sufficiency of indictments, filing pretrial motions, selecting a jury, putting the defendant on the stand, and assisting the defendant at the sentencing stage. Tigar's writing displays a depth of research and a sensitivity of judgment that was lacking in an earlier manual on draft law published by the National Lawyer's Guild.¹⁸ While that volume did fill a void when it appeared, it went astray by suggesting that defense counsel argue points such as the illegality of the Vietnam war, the racial composition of local draft boards, and the denial of counsel to registrants appearing before local boards, without providing reasoned legal analysis to support the arguments or any appraisal of the likelihood of their acceptance by a court. Tigar covers these issues, but he supplies the analysis and appraisal too.

The practice manual should acquaint lawyers with judicial de-

17. Parts I and II came out with the June 1968 supplement to the SSLR; Part III arrived with the October 1968 supplement. Part IV, on judicial review of draft classifications by habeas corpus or affirmative civil litigation, is yet to appear.

18. *THE NEW DRAFT LAW: A MANUAL FOR LAWYERS AND COUNSELORS* (A. Ginger ed. 1967).

cisions rendered prior to the appearance of SSLR. Each month, the recent decisions section contains approximately twenty new decisions, some of them not reported in the West reporting system. The report of the recent case is often brief; for example, it could be an excerpt from the trial transcript on some critical point, such as the imposition of a nonincarcerative sentence.¹⁹ The SSLR seeks to serve as a clearinghouse of information on recent cases; to this end, lawyers in selective service cases are urged to report significant rulings to it.

The SSLR is intended to serve as a lawyer's handbook for draft law problems and not as a weapon for a crusade against the inequities of the draft. But it may prove to be one of the most effective tools presently available for reforming the SSS. The basic problem of the draft is revealed by the word "selective." As succinctly phrased by the Marshall Commission: "Who serves when not all serve?" Because of the baby boom following World War II, nearly two million men now reach draft age each year. The military needs only one half to one third of them, varying with the circumstances.²⁰ In its detailed study, the Marshall Commission found the operation of the draft system wanting and recommended radical changes to insure basic fairness in determining which young men are called to military service. The present system places a disproportionate share of the burden on the poor, the uneducated, and the black. It often imposes harsh penalties on individuals who have the misfortune to be registered with draft boards that are "tough" on anyone seeking conscientious-objector status or an occupational deferment. The Marshall Commission's recommendations for reform included drafting the youngest first (starting with age 19), ending student and occupational deferments, inducting eligible men according to an order of call determined by chance, and restructuring the SSS to achieve a more centralized administration which would issue clear and binding policies, to be applied uniformly throughout the country, concerning classification, exemptions, and deferments. The last recommendation was intended to curtail the tremendous discretion that is presently granted to local boards, since this has often led to arbitrary variations in the treatment accorded to similarly situated registrants in different localities. The Commission's overriding pro-

19. *See, e.g.*, *United States v. Margolies*, 1 SEL. SERV. L. REP. 3125 (D.D.C. June 14, 1968) [suspended sentence and probation for three years under a provision of the Youth Corrections Act, 18 U.S.C. § 5010(a) (1964)].

20. MARSHALL COMMISSION REPORT 3. Only a portion of these must be selected by involuntary induction. Harry V. Marmion draws on Defense Department testimony before the House Armed Services Committee in 1967 to demonstrate that in a post-Vietnam situation the military will require from the available pool of nineteen year olds only one man in three. Taking into account volunteers and members of the pool who are not qualified for military service, only one out of seven draft availables would be drafted. H. MARMION, *SELECTIVE SERVICE: CONFLICT AND COMPROMISE* 50-51 (1968).

posal was "to introduce a new controlling concept into the Selective Service System: the rule of law, to replace the rule of discretion."²¹

Almost all of the Marshall Commission's proposals were ignored. A Presidential Task Force composed of Defense Secretary McNamara, SSS Director Hershey, and Budget Director Schultze was appointed to study the Commission's recommendation on centralizing the SSS, but it rejected all proposals to curtail local board autonomy through uniform national standards. This was not surprising in light of the group's composition; General Hershey tenaciously resisted all suggestions for change. Moreover, his supporters, Representative Rivers and Senator Russell, chairmen of the House and Senate Armed Services Committees, gave Burke Marshall the cold shoulder in the spring of 1967 when hearings were held on the extension of the draft system.²² Congress itself was no more receptive to reform, although this could perhaps be charitably explained on the grounds that it was too busy with other matters—the House on federal aid to parochial schools and the Senate on the censure of Senator Dodd. That the Military Selective Service Act of 1967 contained none of the major reforms recommended by the Marshall Commission can also be blamed on the failure of leading educators, lawyers, and civic groups to make themselves heard before Congress in favor of reform. The present draft statute expires on July 1, 1971. Prior to that date, the proponents of reform must inform the public of the inequities in the present system and demonstrate widespread support before Congress. The SSLR will be extremely valuable if it leads more lawyers to become knowledgeable and involved in this area. Lawyers are notorious for being able to get things done, and when more of them encounter the arbitrariness inherent in the present system they may well become the leaders of the powerful reform movement which is already taking shape. Even more important, the SSLR permits lawyers to do something now in the way of imposing the rule of law on the SSS. Now the system must operate fully in the open; the SSLR makes readily available its regulations and policy pronouncements and closely scrutinizes its operations. Informed lawyers representing registrants can at least make sure the local boards obey SSS rules and can take advantage of judicial decisions that limit local board discretion.²³ An administrative agency (and the SSS is no more than that) should be subject to such checks.

Given the present law, there are serious limitations on the lawyer's role in assisting registrants. Criminal prosecutions have played a

21. MARSHALL COMMISSION REPORT 31.

22. H. MARMION, *SELECTIVE SERVICE: CONFLICT AND COMPROMISE* 104-39 (1968).

23. *E.g.*, *Oestereich v. Selective Serv. Sys.*, 1 SEL. SERV. L. REP. 3215 (U.S. Dec. 16, 1968) (local board may not take away the ministerial exemption of a registrant who turns in his draft card); *Lewis v. Secretary of the Army*, 402 F.2d 813 (9th Cir. 1968) (local board had no basis in fact for denying claim for hardship deferment).

disproportionate role in making draft law because defense of a criminal prosecution for refusal to submit to induction is the principal means by which registrants can obtain judicial review of procedural errors or improper classification by the local boards.²⁴ To obtain judicial review, a registrant must make sure to go to the induction center on the day ordered and follow all the preliminary steps before refusing to take the symbolic step forward to join the military.²⁵ Because of the harshness of forcing a registrant to risk a criminal conviction to test the legality of SSS action, federal courts in criminal prosecutions have closely scrutinized the legality of the administrative process leading to the order the defendant is charged with violating. Properly prepared and informed lawyers are often able to raise a successful defense based on an administrative error which may have resulted in improper denial of a claim for a deferment,²⁶ or which may have prejudiced a registrant in any way.²⁷

Not many registrants, however, have the determination to challenge the draft by inviting a criminal prosecution. Lawyers could render far more effective assistance if they could, through suits for declaratory or injunctive relief, obtain judicial review of board action prior to the time the registrant must report for induction.²⁸ However, Congress and the Supreme Court have all but closed this avenue—at least temporarily. Congress was obviously worried about “litigious interruptions of procedures to provide necessary military manpower,”²⁹ and the 1967 act provides that “[n]o judicial review shall be made of the classification or processing of any registrant . . . except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction”³⁰ This provision was tested in *Clark v. Gabriel*,³¹ in which a registrant sought to enjoin his induction on the grounds that his local board had no basis in fact for denying his claim for conscientious-objector status, that the local board had misapplied

24. *Estep v. United States*, 327 U.S. 114 (1946). Judicial review may also be obtained if the registrant submits to induction into the military and brings habeas corpus in the federal courts.

25. *Falbo v. United States*, 320 U.S. 549 (1944).

26. *E.g.*, *United States v. Singleton*, 282 F. Supp. 762 (S.D.N.Y. 1968) (local board should have reopened the case of a Jehovah's Witness to consider his claim for a ministerial exemption).

27. *E.g.*, *Briggs v. United States*, 397 F.2d 370 (9th Cir. 1968) (failure of Army to give registrant a physical inspection as required by its regulations on date of scheduled induction vitiated prosecution for refusal to submit to induction).

28. Problems of ripeness and exhaustion of administrative remedies as prerequisites for judicial review often would prove difficult but could be overcome in many cases. See *Wolff v. Local Board No. 16*, 372 F.2d 817 (2d Cir. 1967).

29. 113 CONG. REC. 8052 (June 12, 1967) (remarks of Senator Russell), quoted in *Clark v. Gabriel*, 1 SEL. SERV. L. REP. 3220 (U.S. Dec. 16, 1968).

30. Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. app. § 460(b)(3) (Supp. III, 1965-67).

31. 1 SEL. SERV. L. REP. 3220 (U.S. Dec. 16, 1968).

the statutory definition of conscientious objection, and that members of the local board were improperly motivated by hostility and bias against those who claimed to be conscientious objectors. The Supreme Court held that section 10(b)(3)—quoted above—barred the suit:

We find no constitutional objection to Congress' thus requiring that assertion of a conscientious objector's claims such as those advanced by appellee be deferred until after induction, if that is the course he chooses, whereupon habeas corpus would be an available remedy, or until defense of the criminal prosecution which would follow should he press his objections to his classification to the point of refusing to submit to induction.³²

It seems beyond belief that at a time when there is a surplus of manpower to meet military needs we should require young men to make such a fateful choice. The business interests of mammoth drug companies have come off better in the Supreme Court; they have at least been able to obtain judicial review of a Food and Drug Administration labeling regulation—prior to its application—in an action for declaratory judgment and injunction.³³ Prior to instituting their suit, the drug companies were faced with the “dilemma” of complying with the regulation and incurring the costs of changing their promotional material or following their old policies and risking prosecution.³⁴ Surely Congress and the Supreme Court should have as much solicitude for a young man who believes that the SSS has acted improperly and who must decide whether to serve in the military or face criminal prosecution for his refusal to serve.

The fact remains that pre-induction judicial review is unavailable in the great majority of cases;³⁵ thus, what can a lawyer do to assist a registrant who objects to a local board's decision other than to advise him of the likelihood of successfully defending a criminal prosecution if he refuses to submit to induction? Unfortunately, the SSLR practice manual does not provide much of an answer to this question, perhaps because lawyers have had very little experience in the area. It is my opinion that knowledgeable lawyers can be quite helpful in advising a registrant about whether he is entitled to an

32. 1 SEL. SERV. L. REP. at 3220-21.

33. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

34. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967).

35. In *Oestereich v. Selective Serv. Sys.*, 1 SEL. SERV. L. REP. 3215 (U.S. Dec. 16, 1968), the Court did permit pre-induction judicial review where the SSS had employed a delinquency procedure not authorized by statute to deprive a divinity student of his statutory exemption. The Solicitor General conceded that *Oestereich* was entitled to an exemption, and the Court interpreted section 10(b)(3) not to preclude pre-induction judicial review where a registrant has been deprived of a statutory right in a blatantly lawless manner. In *Gabriel v. Clark*, the Court further explained that in *Oestereich* it was not asked to review a board's exercise of judgment or evaluation of evidence but to strike down a procedure which on its face violated the statute. Both

exemption or deferment and in assisting him to obtain it. The lawyer can make sure that the necessary data to support a claim for an exemption or deferment is in the registrant's file at the local board. Most registrants are also unaware that they are entitled to a medical interview with their local board's medical advisor, and this is an important right since the medical advisor is likely to give a claim for a medical deferment closer, more individual attention than it would receive at a pre-induction physical where as many as 1,000 registrants are examined *en masse*. Many local boards seem reluctant to grant medical interviews when asked, even though the regulation is mandatory.³⁶ A letter from the registrant's attorney to the local board or state SSS director citing the regulation often brings action. My limited draft counselling experience indicates that when a lawyer represents a registrant and submits legal arguments to the SSS on the registrant's behalf, the SSS generally gives more thorough consideration to the particular case. When an attorney takes full advantage of the superb collection of materials in the SSLR, he will indeed be an informed adversary. Hopefully, the SSS will be less likely to indulge in its penchant for arbitrariness when it is presented with this kind of reasonable and determined opposition.

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Oestereich and *Gabriel* thus sought to define quite narrowly the area where pre-induction judicial review will be allowed and it does not appear at present that *Oestereich* will have much expansive force.

36. 32 C.F.R. § 1628.1 (1968).