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Recent Decisions: Armed Services--Judicial Review of Selective Service Decisions--Statutory Exemption [*Oestereich v. Selective Serv. Sys. Local Bd. No. 1.1*, 393 U.S. 233 (1968)]

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liams Court strongly subscribes to the view that the first amendment contains guarantees that insure full and effective exercise of a citizen's political rights. After a long period of desuetude the Court in the reapportionment and voting rights cases established the right to vote in an elementary form — each citizen's vote should have relative equal weight. In an attempt to insure the efficacy of the core right, the *Williams* decision establishes the additional right of a qualified voter to have a candidate of his choice on the general election ballot.

E. E. E., JR.

ARMED SERVICES — JUDICIAL REVIEW OF SELECTIVE SERVICE DECISIONS — STATUTORY EXEMPTION

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

According to the Military Selective Service Act of 1967,[1] a draft registrant can question the validity of his draft classification in two ways: (1) as a defense to a criminal prosecution for failure to submit to induction, or (2) through habeas corpus proceedings, once he is a member of the armed forces.[2] In the recent decision of *Oestereich v. Selective Service System Local Board Number 11*,[3] however, the United States Supreme Court upheld the right of a federal court to review a registrant's classification prior to his actually reporting for induction. This interpretation of the judicial review portion of the act by the Court restrains the local board's use of its delinquency power[4] when such power is used to derrogate the explicit language of the Act.

Through its delinquency provisions the Selective Service System has a particularly effective device for enforcing compliance with its regulations. Under these regulations, if a registrant fails to perform any duty required of him, his local board may declare him delinquent, reclassify him I-A[5] and order him to report for induction. If the registrant loses his single appeal within the system, his name is placed at the top of the list and he becomes available for induction even before existing I-A registrants and volunteers.[6] Oestereich,

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the most offensive are Alabama and Alaska which require that independent nominating petitions be filed before the month of February of the given election year. *See* note 38 *supra.*

having mailed his draft card to his local board as an act of protest against the Vietnam War, was declared delinquent for failing to have his draft card in his personal possession.[7] His local board reclassified him I-A and eventually ordered him to report for induction.

Claiming his ministerial student status[8] as grounds for exemption under the Act, petitioner sought to enjoin his induction and to obtain judicial review of his I-A classification. Of vital importance to the case are the facts that petitioner's qualification for a ministerial student exemption was not questioned and that it was punitive use of the delinquency power which led to his induction order. By holding that under these circumstances pre-induction judicial review of classifications is available, the Court limited the board's use of

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1 50 U.S.C.A. §§ 451-73 (App. 1968).

2 50 U.S.C.A. § 460(b) (3) (App. 1968) 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 . . . ."

3 393 U.S. 233 (1968).

4 Section 1642.4 of the Selective Service System Regulations provides that "[W]henever a registrant has failed to perform any duty . . . required of him . . . other than the duty to comply with an Order to Report for Induction . . . the local board may declare him to be a delinquent." 32 C.F.R. § 1642.4(a) (1969).

5 Class I-A is composed of all men who are not deferred or exempt by the classification process and is one of 18 classes into which draft registrants are placed, depending upon their individual situation at any given time. I-A registrants are deemed available for active duty. 32 C.F.R § 1622.2 (1969). For a description of the various classifications, see Note, *The New Draft Law: Its Failures and Future*, 19 CASE W. RES. L. REV. 292, 306-13 (1967).

6 32 C.F.R. §§ 1631.7, 1642.13, 1642.14(c) (1969).

7 Section 1617.1 of the Selective Service System Regulations requires a registrant to have his draft card on his person at all times. 32 C.F.R. § 1617.1 (1969). However, as of 1967, there were only two reported cases of prosecution for failure to possess a draft card, United States v. Kime, 188 F.2d 677 (7th Cir.), *cert. denied*, 342 U.S. 823 (1951); United States v. Hertlein, 143 F. Supp. 742 (E.D. Wis., 1956). In both cases the registrants mailed in their draft cards as an act of protest, as did Oestereich. Both registrants were prosecuted and convicted for violating the regulations of the Selective Service System. Conviction carries with it a 5-year prison sentence or $10,000 fine, or both. 50 U.S.C. § 462(a) (App. 1964). Yet undoubtedly this regulation is continuously violated by unwitting individuals. In a recent draft card burning case Judge Tyler, denying a motion to dismiss, stated: "[N]or is it of any consequence that almost certainly thousands of men in recent decades, *including the writer*, have ultimately failed to carry their cards at all times without ever having been called to show or produce them." United States v. Miller, Civil No. 27886 (S.D.N.Y., Dec. 16, 1965) (opinion on motion to dismiss) (emphasis added). In the published opinion, the italicized words were omitted. 249 F. Supp. 59, 64 (S.D.N.Y. 1965). *See* Comment, *Fairness and Due Process Under the Selective Service System*, 114 U. PA. L. REV. 1014, 1036-37 (1966).

8 The 1967 draft law gives an exemption to "regular or duly ordained ministers of religion . . . and students preparing for the ministry . . . ." 50 U.S.C. § 456(g) (App. 1964). Petitioner's right to this IV-D exemption was not contested by the Government. Respondent's Memorandum on Petition for Certiorari at 11, Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233 (1968).

its delinquency power when it is used as a punitive measure to override the explicit and unequivocal language of the Act. Hence, in a case of this type the registrant can obtain judicial review of his classification without initially exhausting his administrative remedies.

Traditional administrative law doctrine dictates that a person aggrieved by administrative action must exhaust all possible administrative remedies before he can obtain judicial review of the agency's actions.[9] This principle is based on the policy that premature judicial intervention would undermine the administrative process and prevent the agency from rectifying its own mistakes.[10] Also, by requiring exhaustion of administrative remedies, subsequent agency action may render the controversy moot.[11] However, the Supreme Court has relaxed this rule of self-restraint in cases where the agency has gone beyond its delegated authority[12] or where denying immediate judicial review would result in the sacrifice of a statutory right.[13] It appears that both of the above exceptions to the general exhaustion rule are present in *Oestereich*, thus allowing the Court to ignore the judicial review provision of the Military Selective Service Act.[14]

Under the language of the present and previous conscription statutes, the decision of a local board is said to be final[15] and cannot be questioned prior to a registrant's actual refusal to be inducted. The rationale behind these finality provisions is that any "litigious interruption"[16] with the draft process would impede the rapid mobilization of manpower, thereby frustrating the fundamental purpose of conscription.[17] The finality provision was first enunciated in the 1917 Act. On two occasions toward the end of World War

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[9] *See* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938), where the Supreme Court referred to "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Id.* at 50-51. *See generally* Saint Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (concurring opinion); K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 20.01-20.10 (1959); Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 401, 420 (1958).

[10] *See* Jaffe, *The Exhaustion of Administrative Remedies*, 12 BUFFALO L. REV. 327, 350-53 (1963).

[11] *See* K. DAVIS, *supra* note 9, at § 21.01.

[12] *See* Crowell v. Bensen, 285 U.S. 22 (1932).

[13] *See* Leedom v. Kyme, 358 U.S. 184 (1958).

[14] *See* note 2 *supra.*

[15] The finality of this provision of the 1967 draft law is a reenactment of similar provisions from statutory predecessors: The Selective Service Act of 1948, ch. 625, § 10(b)(3), 62 Stat. 619; The Selective Training and Service Act of 1940, ch. 720, § 10(a)(2), 54 Stat. 893; The Selective Service Act of 1917, ch. 15, § 4, 40 Stat. 80.

[16] Falbo v. United States, 320 U.S. 549, 554 (1944).

[17] *See* S. REP. NO. 209, 90th Cong., 1st Sess. 10 (1967).

II, the Supreme Court interpreted the provision as allowing review both following induction[18] and as a defense to prosecution for failing to submit to induction.[19] The present statutory language, therefore, is an outgrowth of these two Supreme Court decisions interpreting the 1940 Act.[20]

The first challenge to the local board's finality came when a conscientious objector refused to report to a work camp to begin a period of civilian work in lieu of military duty.[21] Claiming that his conscientious objector status was improper under the 1940 Act and that he was exempt from service, the petitioner in *Falbo v. United States*[22] had been convicted of willfully failing to obey a board order to report for civilian service. The Supreme Court refused to pass on the propriety of his draft status, since the petitioner had not exhausted all of his administrative remedies.[23] The Court indicated that judicial review would be available only after a registrant was inducted into the armed services or its civilian counterpart.[24] The

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[18] *See* Falbo v. United States, 320 U.S. 549 (1944), where the Court refused to review the propriety of a board's classification of an individual who willfully refused to report for civilian service. *Id.* at 544. Justice Black stated that "[E]ven if there were . . . a constitutional requirement that judicial review must be available to test the validity of the decision of the local board, it is certain that Congress was not required to provide for judicial intervention *before final acceptance of an individual.*" *Id.* (emphasis added).

[19] Estep v. United States, 327 U.S. 114 (1946).

[20] *See* note 15 *supra.*

[21] The Selective Training and Service Act of 1940, ch. 720, § 5(g), 54 Stat. 889, provided that those registrants conscientiously opposed to war in any form were either subject to noncombatant military service, or for those conscientiously opposed to noncombatant military service, to civilian work of national importance. The modern version is essentially the same. *See* 50 U.S.C.A. § 456(j) (App. 1968).

[22] 320 U.S. 549 (1944).

[23] Justice Black pointed out that Falbo could have failed to pass the physical examination at the work center and could thereby have been classified not qualified for induction. Consequently, by omitting "a necessary intermediate step in a united and continuous process designed to raise an army speedily and efficiently" he had not exhausted his administrative remedies. *Id.* at 553.

[24] "In order to obtain a judicial determination of such issues registrants must first submit to induction and raise the issue by habeas corpus." H.R. REP. NO. 36, 79th Cong., 1st Sess. 5 (1945).

It is significant, however, that under the 1917 Act in only three instances involving wrongful classification did a court actually order a person released from the Army. Arbitman v. Woodside, 258 F. 441 (4th Cir. 1919); *Ex parte* Cohen, 254 F. 711 (E.D. Va. 1918); *Ex parte* Beck, 245 F. 967 (D. Mont. 1917). *See* Note, *Judicial Review of Selective Service Board Classification by Habeas Corpus*, 19 GEO. WASH. L. REV. 827, 828-29 (1942); Comment, *supra* note 7, at 1015.

The concept of constructive custody has been used to allow habeas corpus review of a medical student's I-A classification. *Ex parte* Fabiani, 105 F. Supp. 139 (E.D. Pa. 1952). The district court reasoned that actual physical restraint at the time of filing for habeas corpus was unnecessary, since the limitation on Fabiani's liberty by the order to report for induction was tantamount to physical custody. *Id.* at 148.

question of whether the Court would review a registrant's classification in a criminal prosecution was left unanswered until the 1946 case of *Estep v. United States*.[25]

Unlike *Falbo*, petitioner in *Estep* reported to the induction center and was accepted by the armed forces. Refusing to be inducted, his defense in the resulting prosecution[26] was that the board was without jurisdiction to reclassify him I-A because it had acted arbitrarily and capriciously in denying him exemption from service. The Supreme Court, holding that the validity of a draft classification could come under judicial scrutiny if the board's jurisdiction were drawn into question, stated that the jurisdictional issue was reached "only if there is no basis in fact for the classification which it gave the registrant."[27] "Final" was interpreted to pertain to the scope of judicial review, rather than the availability of such review.[28] Reasoning that not allowing a registrant to raise the issue of an improper classification would result in a mere postponement of the same issue until habeas corpus was available,[29] the Court allowed judicial review of Estep's draft classification prior to his actually being inducted. Though the scope of review permitted by *Estep* was very narrow[30] and though lower federal courts subsequently demanded that the registrant take advantage of every available administrative remedy,[31] a registrant had a vehicle by which a federal court

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The fact remains, nonetheless, that a registrant attempting to obtain habeas corpus relief once he is in the Army will encounter additional difficulties. First, Army personnel are not likely to be sympathetic toward his efforts. Second, the registrant must petition in the jurisdiction in which he is stationed. Moreover, the military, by transferring him to another location, can render the judicial proceeding moot. Therefore, it seems that Mr. Justice Murphy is correct in his assertion that "this remedy [habeas corpus] may be quite illusory in many instances." Estep v. United States, 327 U.S. 114, 129 (1946) (concurring opinion).

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

[26] Estep was indicted under section 11 of the Selective Training and Service Act of 1940 for willfully failing and refusing to be inducted. Conviction under this provision carries a maximum 5-year prison sentence or a fine of $10,000, or both. *See* note 7 *supra.*

[27] 327 U.S. 122-23. In the next term the Court indicated by implication that this narrow scope of review would be controlling in habeas corpus proceedings. *See* Eagle v. United States *ex rel.* Samuels, 329 U.S. 304, 311-12 (1946).

[28] Writing for the majority, Justice Douglas stated that: "[F]inal means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes . . . . The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous." 327 U.S. at 122-23.

[29] *Id.* at 124. The Court was wary of "sending men to jail when it was apparent they would have to be released tomorrow." *Id.* at 125.

[30] The scope of review was thereby limited to the "no-basis-in-fact" test. *See* text accompanying note 28 *supra.*

[31] *See, e.g.*, Woo v. United States, 350 F.2d 992 (9th Cir. 1965); Evans v. United

could review the propriety of his classification at a point before actual induction.[32] Thus, the first step toward liberalized pre-induction review had been taken.[33]

The holdings of *Falbo* and *Estep* have been incorporated into section 10(b)(3) of the present conscription statute.[34] The only major exception to this limited judicial review has been in instances where first amendment rights of free speech have been violated by a punitive use of delinquency classification. In *Wolff v. Selective Service System Local Board Number 16*,[35] two college students with II-S deferments[36] were reclassified I-A[37] as a result of their participation in an anti-war demonstration at the offices of an Ann Arbor, Michigan, draft board.[38] Upon receiving their I-A classifications, petitioners filed suit in district court to enjoin their induction and reinstate their II-S deferments. The Second Circuit Court of Appeals held that where there existed the possibility of a "chilling ef-

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States, 252 F.2d 509 (9th Cir. 1958); United States *ex rel.* Flakewicz v. Alexander, 164 F.2d 139 (2d Cir.), *cert. denied*, 333 U.S. 828 (1947); United States v. Kirschemann, 65 F. Supp. 153 (D.S.D. 1946).

[32] Following *Estep*, the last required step of exhaustion was reporting for induction. In addition, some courts held that even after refusal or submission to induction, a registrant could not raise the question of his draft classification unless he had taken advantage of every remedy available under the Act. Witmer v. United States, 348 U.S. 375 (1955); United States v. Caoson, 347 F.2d 959 (10th Cir.), *cert. denied*, 382 U.S. 911 (1965).

Some courts, however, have allowed the issue to be raised, even though the registrant has not technically exhausted every remedy. Donato v. United States, 302 F.2d 468 (9th Cir. 1962); Glover v. United States, 286 F.2d 84 (8th Cir. 1961).

[33] This initial step was too limited for Judge Jerome Frank who in 1953 cast grave doubts on the validity of the Government's position. Though concurring in the Second Circuit's refusal to enjoin an induction, he noted that under the Government's reasoning, even if a board blatantly exceeded its authority by drafting a Congressman or naval officer on active duty, its action could not be challenged unless the draftee refused or submitted to induction. Manifest lack of jurisdiction, suggested Judge Frank, should be met by immediate judicial relief. Schwartz v. Strauss, 206 F.2d 767 (2d Cir. 1953).

[34] *See* note 2 *supra.*

[35] 372 F.2d 817 (2d Cir. 1967).

[36] Registrants pursuing studies leading to an undergraduate degree may receive a II-S deferment. 32 C.F.R. § 1622.25(a) (1969).

[37] 32 C.F.R. § 1622.10 (1969). The I-A classification made them available for military duty. *See* note 5 *supra.*

[38] The public outcry to a memorandum issued by General Hershey to local boards to re-examine the deferred status of anti-war demonstrators was considerable. *See*, Drummond, *Drafting of Protestors: A Plea to Stop It Now*, N.Y. Herald Tribune, Dec. 15, 1965, at 25, col. 1, *cited in*, Layton & Fine, *The Draft and Exhaustion of Administrative Remedies*, 56 GEO. L.J. 315, 330 n.82 (1967). Letters signed by 108 law professors were sent to the White House protesting the reclassifications and the position taken by General Hershey. Congressman Emanuel Celler, Chairman of the House Judiciary Committee, publicly called upon General Hershey for an explanation of the use of the draft to punish and discourage political dissent. N.Y. Times, Dec. 22, 1965, at 3, col. 6.

fect"[39] on precious first amendment rights, exhaustion of administrative remedies would not be required.[40] It was in response to *Wolff* that Congress enunciated its determination to allow review only under the guidelines of *Falbo* and *Estep*, when it reenacted section 10(b)(3) of the 1967 draft law.[41] Prior to *Oestereich*, therefore, the only proper methods for questioning a draft board's classification were to refuse to be inducted and defend the resulting prosecution on the grounds that the induction order was unlawful (*Estep*), or to be inducted into the armed forces and to raise the issue via habeas corpus (*Falbo*).[42]

The holding of the *Oestereich* Court that where a registrant had a clear and uncontested right to a statutory exemption, his local board could not use its delinquency power to remove him from that exempt category by reclassifying him I-A, represents a weakening of the finality provision of section 10(b)(3). In such an instance the federal courts have jurisdiction to enjoin the registrant's induction and review his I-A classification.[43] The Court, seemingly troubled by the power reserved to the local boards in the delinquency provisions,[44] stressed that these regulations are completely devoid of

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[39] 372 F.2d at 824. The "chilling effect" rationale was developed in Dombrowski v. Pfister, 380 U.S. 479 (1965), where the Court held that if first amendment rights were at stake, it would not abstain from hearing the case, in spite of any unclear questions of state law which might be involved in the Court's ultimate decision. This break from the Court's traditional exercise of abstention in this area was precipitated by a concern for the effect that a delay might have on the rights sought to be protected. *Id.* at 486-89.

[40] 372 F.2d at 825. Though the federal courts had thereby carved out one exception to the exhaustion doctrine of section 10(b)(3), that exception was limited to punitive reclassification when first amendment freedom of speech was drawn into question and, technically, only in the Second Circuit.

The Ninth Circuit, though, has indicated that failure to exhaust one's administrative remedies does not bar a registrant from questioning his classification in a criminal prosecution for refusing induction where his objection to his classification raised a constitutional question. Wills v. United States, 384 F.2d 943, 945-46 (9th Cir. 1967).

[41] "The [Senate Committee on Armed Services] 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." 1967 U.S. CODE CONG. & AD. NEWS 1333. Therefore, the committee rewrote the provision so as to more clearly enunciate this principle. The committee felt that this continued disregard by various courts could seriously affect the administration of the Selective Service System. *Id.*

[42] Other methods of review had been tried but rejected. *See, e.g.*, Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956); Reap v. James, 232 F.2d 507 (4th Cir. 1956) (declaratory judgement and injunction); United States v. Mancuso, 139 F.2d 90 (3d Cir. 1943) (mandamus); Drumheller v. Berks County Local Bd. No. 1, 130 F.2d 610 (3d Cir. 1942) (certiorari); authorities cited in Note, *The Selective Service*, 76 YALE L.J. 160, 172-73 (1966).

[43] Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. at 237 (1968).

[44] 32 C.F.R. § 1642.4(a)(1969). Mr. Justice Douglas, writing for the majority, stressed that to decide that the boards could withhold an exemption from a qualified reg-

statutory backing or guidelines.[45] Since Oestereich was unquestionably entitled to a IV-D ministerial student exemption,[46] to use the delinquency provisions of the Selective Service Regulations to take him out of this exempt category and to reclassify him I-A[47] constituted an irresponsible and unlawful use of power not contemplated by Congress.[48] Indeed, the only mention of delinquency in the Act

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istrant "would make the Board's freewheeling agencies meting out their brand of justice in a vindictive manner." 393 U.S. at 237.

[45] *See* 393 U.S. 236-37 where Justice Douglas stated:

> But Congress did not define delinquency; nor did it provide any standards for its definition by the Selective Service System. Yet Selective Service . . . has promulgated regulations governing delinquency and uses them to deprive registrants of their statutory exemption . . . .
>
> We deal with conduct of a local Board that is basically lawless.

District Judge Dooling scores the delinquency provisions as being unreasonably vague and punitive. "There are no degrees of delinquency. No standards prescribe the particular occasions when the power is to be exerted, or what findings of gravity, of willfullness, or penitence, of reparation are relevant to deciding whether or not to declare a registrant delinquent." Judge Dooling points out that under the Act there are (1) no standards for removal of delinquency status, (2) no right to be removed from such status, (3) no standards of appeal, (4) no statutory authorization, and (5) no Congressional support. Brief for Respondent at 76-77, Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233 (1968), citing United States v. Eisdorfer, No. 67 Cr. 302 (E.D.N.Y June 24, 1968).

[46] 50 U.S.C.A. § 456(g) (App. 1968).

[47] It should be noted that Oestereich was one of 357 persons who returned their draft cards on October 20, 1967. Brief for Petitioner at 16, Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233 (1968). An additional 297 draft cards were returned the following day. N.Y. Times, Dec. 30, 1967, at 2, col. 5. Two days later, General Lewis B. Hershey issued a memorandum to all local boards recommending the reclassification and induction of registrants who had abandoned their draft cards. N.Y. Times, Nov. 9, 1967, at 2, col. 6.

> One of the registrants declared delinquent and reclassified I-A was a 37 year old registrant formerly classified V-A under Reg. § 1622.50 as overage, one had been classified I-Y because "under applicable physical, mental, and moral standards [he is] not currently qualified for service" (Reg. 1622.17), one had been deferred III-A as a parent (Reg. 1622.30), one had been classified IV-A having completed his active military service (Reg. 1622.40), and one had been classified V-A as over the age of liability (Reg. 1622.50). Brief for Petitioner at 18-19, Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233 (1968).

Indeed, these situations seem to support General Hershey's statement that, "I've lived under situations where every decent man declared war first, and I've lived under situations where you don't declare war. We've been flexible enough to kill people without declaring war." *Esquire's Eighth Annual Dubious Achievement Awards*, ESQUIRE, Jan., 1969, at 55.

[48] *See* Peters v. Hobby, 349 U.S. 331 (1955), where the Court said: "Agencies, whether created by statute or Executive Order, must of course be free to give reasonable scope to the terms conferring their authority. But they are not free to ignore plain limiations on that authority." *Id.* at 345; *accord*, United States v. Eisdorfer, No. 67 Cr. 302 (E.D.N.Y. June 24, 1968), cited in Brief for Petitioner at 47 n.25, Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233 (1968), where Judge Dooling stated: "The delinquency regulations, moreover, disregard the structure of the Act; deferments and priorities-of-induction adopted in the public interest, are treated as if they were forfeitable personal privileges." *Id.* opinion at 10.

is in reference to the order of induction provisions putting delinquents at the top of the list of prime inductees.[49] It was this unlawful use of delinquency, coupled with the fact that the local board had not exercised its discretion in reclassifying the petitioner, that led the Court to put this singular limitation on the local board's power.

Oestereich was distinguished on this point in a companion case, *Clark v. Gabriel*,[50] where petitioner was seeking to enjoin his induction, having lost in an effort to obtain a conscientious objector (I-O) exemption.[51] The Court held that his I-A reclassification was not reviewable via injunction because the local board had exercised its discretion in determining whether or not Clark was entitled to a I-O classification. Oestereich's reclassification was distinguished as having been done without "an act of judgment by the board."[52] In such a case, therefore, where the local board does not exercise its discretion, that body cannot use its delinquency power to deny a statutory exemption to an admittedly deserving registrant.

The impact of *Oestereich* may be to extend preinduction judicial review of delinquency reclassification from the area of statutory exemptions to that of Presidential deferments.[53] It seems to follow logically that if the local board cannot reclassify a delinquent registrant out of an exempt category, it cannot subject *deferred* registrants to the same treatment. The boards should be equally loathe to flount Presidential discretion and remove a registrant from a deferred status, as they would be to override a congressional mandate

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[49] 50 U.S.C. § 456 (h)(1)(Supp. 1967).

[50] 393 U.S. 256 (1968).

[51] Classification I-A-O is used for those registrants conscientiously opposed to combatant service. They are subject to noncombatant service. 32 C.F.R § 1622.11 (1969). Classification I-O includes registrants conscientiously opposed to both combatant and non-combatant service. They are required to perform 24 months' civilian service contributing to the national health, safety, and interest. 32 C.F.R § 1622.14 (1969).

[52] 393 U.S. at 258 (1968).

[53] Under the present system an exemption is constitutionally within the discretion of Congress, while deferment is by statute within the discretion of the President. *See* United States v. Macintosh, 283 U.S. 605 (1931); *In re* Kitzerow, 252 F. 865 (E. D. Wis. 1918); Franke v. Murray, 248 F. 865 (8th Cir. 1918); *See also* S. REP. NO. 209, 90th Cong., 1st Sess. 2-3 (1967). For a discussion of the extent of the discretionary power, see Note, *supra* note 23.

> Congress, constitutionally, could have chosen to exempt no class of persons, or . . . [t]he President could have chosen not to authorize personal appearances before local boards, or could have withheld the opportunity for submitting affidavits, or could have limited appeals to a certain class or classes of persons, without exceeding his authority under the law. *Id.* at 833.

For a general listing of classes of registrants who are deferred or exempt, see 1967 U.S. CODE CONG. & AD. NEWS 1318-19; Note, *supra* note 5, at 307-12.

and remove one from an exempt status.[54] Even General Lewis B. Hershey, Director of the Selective Service System, has contended 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."[55] However, in a nebulously reasoned opinion,[56] Judge Friendly, writing for the majority of the Second Circuit Court of Appeals, found a distinction between an exemption and a deferment, thus harmonizing section 6(h)(1) of the 1967 Military Selective Service Act[57] with the delinquency regulations. Claiming that "in the last sentence of section 6(h)(1) Congress expressly recognized the longstanding provision for reclassification and early induction of delinquents,"[58] Judge Friendly avoided the fatal clash between statutory language and delinquency, thereby distinguishing *Oestereich*.[59] Whatever the outcome of the exemption-deferment distinction on appeal, the fact remains that a strong argument can be made on both sides.[60]

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[54] Such an extension was made in a case decided while *Oestereich* was being argued, where a ministerial student claiming a II-S deferment had been declared delinquent for returning his draft card to his local board. Kimball v. Selective Serv. Sys. Local Bd. No. 15, 283 F. Supp. 606 (S.D.N.Y. 1968).

> It is submitted that the distinction attempted to be drawn by the Government between an 'exemption' under § 456(6) and a 'deferment' under § 456(h) is without legal significance. Both sections are provided for by Act of Congress; both promulgate precise rules for the Selective Service Boards to follow; neither allows for judgment or discretion by such boards in carrying out the Congressional Mandate. *Id.* at 608.

[55] Memorandum from General Lewis B. Hershey on Petition for Cert. at 4-5, Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233 (1968).

[56] Breen v. Selective Serv. Sys. Local Bd. No. 16, 406 F.2d 636 (2d Cir. 1969).

[57] Section 6(h)(1) provides for Presidential deferment of college students. 81 Stat. 102.

[58] Breen v. Selective Serv. Sys. Local Bd. No. 16, 406 F.2d 636 (2d Cir. 1969).

[59] A similar distinction was drawn between exemptions and deferments in the Eighth Circuit in Kolden v. Selective Serv. Sys. Local Bd. No. 4, 406 F.2d 631 (8th Cir. 1969). The court in Anderson v. Hershey, 37 U.S.L.W. 2009 (6th Cir. April 11, 1969) also refused to expand the holding of *Oestereich* into the area of deferments. "We therefore see a real difference in the logical nexus between the delinquency approach as applied to those holding [statutory] deferments . . . and such an approach to persons who are exempt." *Id.*

[60] To argue that the holding of *Oestereich* should be extended to deferments, one must remember that there are four different categories of exemptions or deferments: (1) automatic exemptions granted by statute (example: IV-B, elected public officials, IV-D, minister or ministerial student), (2) discretionary exemptions granted by statute (example: I-O, I-A-O, Conscientious objector), (3) automatic deferments granted by statute (example: I-S, student deferment until graduation from high school or completion of college academic year, II-S, deferment of college student pursuing full-time course of instruction), (4) deferments which the President is authorized to grant by statute. Under

Besides representing a first step toward broadening pre-induction judicial review of I-A classifications, the *Oestereich* decision serves to illustrate a major pitfall in the present Selective Service System: the problem of an individual being punished by an administrative agency. It can be argued that by ordering military induction for an alleged breach of agency regulations, the System is depriving citizens of liberty without due process of law.[61] Further, if regulations are to be used in a punitive manner,[62] perhaps certain constitutional safeguards in criminal proceedings should be required in Selective Service proceedings, just as they have been incorporated into disbarment proceedings[63] and juvenile court hearings.[64] Such

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this grant of power, he has promulgated regulations granting (a) automatic deferments (example: III-A, registrant with child or children), (b) discretionary deferments (example: II-A, occupational deferment, III-A, extreme hardship).

If a registrant is denied an automatic exemption, number (1) above, such denial is unlawful under *Oestereich*. Also, if a registrant is denied a discretionary exemption granted by statute, number (2) above, such denial is within the board's authority and is valid under *Clark*. The problem areas, then, are categories number (3) and (4) above — automatic deferments granted by statute and deferments which the President is authorized by statute to grant. Theoretically, one can argue that while the majority opinion in *Oestereich* spoke only of statutory exemptions, its citation to Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956), a case involving a hardship deferment (Number (4), above), suggests that the deferment-exemption distinction is not crucial. Also, in the instance of deferments, one does not have "the numerous discretionary, factual, and mixed law-fact determinations" which would allow the local board to rely on its discretion and which would preclude pre-induction judicial review. Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. at 240 (Harlan, J. concurring). Finally, the chance of the System correcting its own mistakes is as remote in the area of deferments as with exemptions. Thus, it can be argued that the holding of the instant case can be applied to revocation of a registrant's deferment, as well as one's exemption. Motion for Stay of Induction Pending Determination of Appeal at 9, Kaplysh v. Hershey, No. 19,-383 (6th Cir. 1969), on file at *Case Western Reserve Law Review.*

[61] *See* Brief for Petitioner at 56-64, Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233 (1968), where counsel, assuming that the use of delinquency is punitive, argues that in such circumstances the Constitution may require (1) counsel, (2) confrontation and cross-examination, (3) compulsory process, (4) protection against self-incrimination, (5) an impartial tribunal, (6) public trial, and (7) a trial by a jury before a local or appeal board; *accord*, Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 239 (1968) (Harlan, J. concurring); Ginger, *Minimum Due Process Standards in Selective Service Cases — Part I*, 19 HASTINGS L.J. 1313 (1968).

[62] For the Supreme Court's definition of punishment which is strikingly similar to the punitive use of delinquency reclassification, see Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

[63] Spevack v. Klein, 385 U.S. 511 (1967). Viewing disbarment and loss of professional standing, professional reputation, and livelihood as the reward for Spevack's refusal to answer questions of a legal ethics committee, the Court held that these consequences were sufficiently similar to criminal sanctions so as to accord Spevack the fifth amendment right against self-incrimination. *Id.* at 516.

[64] *In re* Gault, 387 U.S. 1 (1967). The Supreme Court incorporated into a juvenile court proceeding the right (1) to notice so as to prepare a defense to charges, (2) to counsel (including assigned counsel), (3) to remain silent, and (4) to confrontation and cross-examination of witnesses.

constitutional problems are cited by Mr. Justice Harlan in his concurring opinion in the instant case.[65] Paradoxically, one of the System's crowning features, decentralization, is viewed by Justice Harlan as constituting its major drawback because it results in a registrant's neighbors passing judgment upon the validity of his claims. However, since the local boards have no authority to pass on the validity or correct interpretation of regulations or statutes, the registrant is faced with the problem of making purely legal claims before a board consisting of part-time, uncompensated laymen.[66] In addition, the registrant is denied the assistance of counsel in his endeavor to persuade the board members of the legal merits of his claim.[67] It would seem that if registrants are to be punished through delinquency reclassification and speedy induction, the handwriting of *Spevack*[68] and *Gault*[69] may well be on the wall for the Selective Service System.

The technique of speedy pre-induction judicial review could be the vehicle by which procedural due process will be injected into the draft classification process. By opening the door to such review when (1) a board uses its delinquency power, (2) in the absence of any use of its lawful discretion, (3) to take a registrant out of a

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[65] Justice Harlan states:

> It is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims . . . .
>
> If petitioner's claim is valid, however, then postponement of a hearing until after induction is tantamount to permitting the imposition of summary punishment, followed by loss of liberty, without the possibility of bail, until such time as the petitioner is able to secure his release by writ of habeas corpus. This would, at very least, cut against the grain of much that is fundamental to our constitutional tradition. 393 U.S. at 243 n.6 (1968) (Harlan, J. concurring).

[66] 32 C.F.R. § 1603.3, 1604.22 (1969). 393 U.S. 243 (1968) (Harlan, J. concurring).

[67] 32 C.F.R. § 1624.1(b) (1967). The experience is recounted of one registrant who was reclassified I-A through delinquency and, thereafter, made a personal appearance before his local board. "The registrant and his parents who accompanied him, were shocked and bewildered to find themselves the targets of verbal abuse from the board members." Among other things, the board challenged the registrant's patriotism, suggested that his father had been a draft dodger and war profiteer, and seemed more interested in vilifying the registrant and his parents than in listening to his legal claims. Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123, 2126 (1966).

The above example may not be commonplace. However, the fact remains that the opportunity for such abuse does exist. Moreover, even if a local board were entirely staffed by highly competent attorneys, they, also, would have to abide by statutory and regulatory interpretation given them by the Director.

[68] *See* note 63 *supra.*

[69] *See* note 64 *supra.*