Chapter 14: Developments in Selective Service Law

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CHAPTER 14
Developments in Selective Service Law
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§14.1. Introduction. The 1970 Survey year has witnessed the growth of a new field of practice for many Massachusetts lawyers—the representation of Selective Service registrants in the federal courts and before the administrative agency. This growth stems from the increased disrepute of the draft and the war in Indochina, as an ever-increasing number of registrants are actively seeking means to avoid military service and, in many cases, refusing induction.

An inevitable consequence of this increased activity has been a substantial growth in litigation dealing with the legality of the draft law and its administration. A number of significant cases have risen through the federal courts to the Supreme Court, generating critical decisions which have altered many previously held notions about the law. This chapter seeks to outline and discuss those developments of greatest consequence to the draft law. For convenience of presentation, the following division of subject matter is made: (1) judicial review of Selective Service rulings; (2) substantive developments in the definition of deferments and exemptions; (3) procedural due process developments; (4) challenges to the constitutionality of the draft.

First, however, a basic outline of the Selective Service law and its operation is offered in the hope that the developments in the law discussed herein might more readily be placed in proper legal perspective. The Military Selective Service Act of 1967 requires the registration for Selective Service of all male citizens and certain classes of male aliens who are at least eighteen years old. The purpose of that requirement is to subject registrants to liability for military service. To be certain, the act does not require that all so serve, but rather provides for various classifications which effectively excuse qualified registrants from the obligation of service. These categories are labeled deferments and exemptions, and include such statuses as conscientious objector, high school or college student; there are also deferments for certain jobs, for family hardship, etc. Thus, the administration of

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the act fundamentally involves the processes of registering men over eighteen, the process of classification—determining whether they are entitled to be deferred or exempted from military service—and, if not so entitled, processing them for induction into the military service.

To accomplish the ends of the act, Congress has created a Selective Service System composed of local and state draft boards, a national draft board (Presidential Appeal Board), and a national administration with state branch offices to assist these boards. The act places the responsibility for registration, classification, and induction initially in the hands of the local board, subject to the appellate review of the state boards and the national board. These local boards, usually composed of three to five members, register the youths over whom they have jurisdiction and make the primary determinations concerning classification. A registrant unsatisfied with his classification can request a hearing before the board (termed a personal appearance) or appeal the local board's action to the appropriate state board. If he elects the former procedure and its result is also adverse, the registrant still might exercise his right of appeal to a state board after the hearing. Should the decision of the state appeal board remain objectionable to him, the registrant, under certain circumstances, may exercise a right of appeal to the Presidential Appeal Board.

Judicial activity in the operation of the Selective Service Act is circumscribed both by the statute itself and by judicial custom. The resultant limitations are discussed more fully in the following section but, for purposes of the basic outline, it is important to note that courts have not viewed their collective role to be that of a "super draft board," but have confined their review to determinations of whether a given draft board fully complied with the procedural requisites of the law and whether there existed any "basis in fact," no matter how small, for the board's classification decision. Thus, the scope of judicial review of board classification decisions is considerably more constrained than that permitted by the orthodox "substantial evidence" test.

A. JUDICIAL REVIEW

§14.2. Timing of review. A frequently litigated issue in recent Selective Service cases has been the availability of preinduction judicial review. Since World War II, it has been the view of most courts that a registrant could not obtain judicial review of draft board action except as a defense to prosecution for refusal to submit to induction or by habeas corpus after submission to induction. While wartime and immediate postwar draft legislation did not specifically demand such a view, the United States Supreme Court, in *Falbo v. United States*.

§14.2. 1 320 U.S. 549 (1944).
and Estep v. United States,\textsuperscript{2} interpreted the “finality” provisions of the law to require strict adherence to the doctrine of “exhaustion of administrative remedies.” In the context of the draft, “exhaustion” was construed to mean no review until the registrant had either refused or complied with his induction order. This concept of the law, and the Court’s general reluctance to allow judicial interruptions of the process of raising armies, combined to fashion a generally accepted trend against the allowance of preinduction judicial review.

The rule, however, was not without exception. In 1967, the United States Court of Appeals for the Second Circuit allowed preinduction review in a much-publicized case.\textsuperscript{3} This decision inflamed certain powerful members of Congress and prompted a new provision in the 1967 Military Selective Service Act which, if read literally, would clearly prohibit preinduction review. The section reads as follows:

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 when there is no basis in fact for the classification assigned to such registrant.\textsuperscript{4}

The foregoing provision occasioned a flurry of judicial action as local boards, with increasing frequency, answered burgeoning dissent to the Vietnam War with orders for induction. Lower courts struggled with the statute’s constitutionality and proper administration until the question finally reached the United States Supreme Court, which addressed the problem in two pivotal decisions, Clark v. Gabriel\textsuperscript{5} and Oestereich v. Selective Service System Local Board No. 11.\textsuperscript{6} In summarily deciding Gabriel, the Court, in a per curiam opinion, held (1) that the statute applied so as to prevent preinduction judicial review of registrant’s classification, and (2) that there is no constitutional objection to Congress’ thus requiring that assertion of a conscientious objector’s claims such as those advanced by appellee be deferred

\textsuperscript{2} 327 U.S. 114 (1946).

\textsuperscript{3} Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967).

\textsuperscript{4} 50 U.S.C. App. §460(b)(1) (Supp. 1967); hereinafter referred to as §10(b)(1) of the Military Selective Service Act of 1967.

\textsuperscript{5} 393 U.S. 256 (1968).

\textsuperscript{6} 393 U.S. 233 (1968).
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.7

On the same day, the Supreme Court held in Oestereich that the same statutory provision—Section 10(b)(3) of the Military Selective Service Act of 1967—should not be interpreted to preclude preinduction judicial review when a local board, without authority, used the regulations governing delinquency8 to strip the petitioner of his statutory exemption because of various "activities or conduct not material to the grant or withdrawal of the exemption."9 Thus, the threshold question facing the practitioner today necessitates a determination of which cases are appropriate for preinduction review (i.e., not precluded by statute) and which are not. Resolution of this question entails an examination of these Supreme Court opinions and subsequent lower court decisions.

To understand the operative scope of Section 10(b)(3), it is important to distinguish the precise issues involved in Gabriel and Oestereich. In Gabriel, the petitioner claimed that his local board had wrongfully denied his application for classification as a conscientious objector. Significantly, the case did not raise a challenge to the authority of the board to make such a decision, but rather sought review of what was alleged to be a wrongful exercise of local board discretion. Specifically, Gabriel alleged that the rejection of his claim to conscientious objector classification "had no basis in fact, that the Board has misapplied the statutory definition of conscientious objector, and that the members of the Board were improperly motivated by hostility and bias against those who claim to be conscientious objectors."10 Conversely, in Oestereich, the petitioner claimed that the board had no authority at all to divest him of his statutory exemption—that the board's action was beyond the scope of any discretionary power it possessed. Agreeing that the board's use of the delinquency procedure to reclassify Oestereich was "basically lawless," the Court held that, under these circumstances, Section 10(b)(3) cannot be read to preclude preinduction judicial review.

Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption. . . . It is no different in consti-

7 393 U.S. 256, 259 (1968).
9 393 U.S. 233, 236 (1968).
10 393 U.S. 256, 257 (1968).
tutional implications from a case where induction of an ordained minister . . . is ordered (a) to retaliate against the person because of his political views or (b) to bear down on him for his religious views or his racial attitudes or (c) to get him out of town so that the amorous interests of a Board member might be better served.\textsuperscript{11}

The crucial distinction between the cases resides in the Court's recognition that certain types of claims of wrongful board action are simply not suited for administrative determination within a system principally composed of uncompensated, part-time personnel — the local board members — while certain other types of claims are. Thus, in \textit{Oestereich}, the Court was unwilling to construe the act so literally and severely as to require a person lawlessly deprived of his statutory exemption to either submit to induction, later to raise his protest in a habeas corpus proceeding, or refuse induction and defend his refusal when criminally prosecuted. District courts, therefore, are not foreclosed from offering preinduction review of allegedly illegal local board action.

In \textit{Gabriel}, on the other hand, wherein local board action was alleged to be merely erroneous, not illegal, the Court would not countenance judicial interference. Where local boards are indisputably authorized to exercise discretion in the formulation of factual determinations essential to decisions of whether a particular registrant is qualified for a particular classification, the Court, pursuant to Section 10(b)(3) of the act, would not allow district courts to review the basis in fact for those determinations until induction has been effected.

In the wake of the Supreme Court's disposition of \textit{Gabriel} and \textit{Oestereich}, disputes arose as to other possible limitations upon the exception to Section 10(b)(3) carved out by the cases. Some lower courts adverted to the fact that \textit{Oestereich} had involved the question of an "exemption" and, therefore, could not be applied in cases of "deferments."\textsuperscript{12} The Supreme Court later indicated, however, that such distinctions are invalid, and that "lawless" board action in cases of deferments as well as exemptions invites preinduction judicial review.\textsuperscript{13} Also, a reading of the majority opinion in \textit{Oestereich} suggests that the Court may have been particularly vexed by the fact that the board action had been one to remove a \textit{previously granted} favorable status. While judicial distinctions have been based upon whether a case involves removal from a favorable status as opposed to refusal to grant such a status, such distinctions have not been honored by the majority of lower court decisions applying the \textit{Oestereich} exception to Section 10(b)(3).\textsuperscript{14}

\textsuperscript{11} 393 U.S. 233, 237 (1968).
\textsuperscript{14} For example, numerous lower courts have allowed preinduction review of
Another limitation which suggests itself from a reading of Oestereich and Breen v. Selective Service System Local Board No. 16\textsuperscript{15} is that preinduction review should only be allowed when the local board action is alleged to be unlawful in that it deprives a registrant of a statutorily-mandated deferred or exempt status. However, this limitation has not been adopted by several lower courts applying the Oestereich exception for "lawless," nondiscretionary board action. In Murray v. Vaughn,\textsuperscript{16} the United States District Court for the District of Rhode Island allowed pre-prosecution review of "lawless" local board action which deprived the registrant of a II-A occupational deferment, a status created not by Congress but by presidential order. Likewise, in Gregory v. Hershey,\textsuperscript{17} a class action, the United States District Court for the Eastern District of Michigan held that Section 10(b)(3) does not bar preinduction review of a claim of an illegal denial of a III-A fatherhood deferment, a classification mandated by the regulations, not the statute.

Nor does it seem, from reading the opinions of some courts, that denial of either statutory or regulatory classifications is essential to the concept of "lawless" board action. Review has been allowed when claims of "lawless" board action have been based upon denial of substantial procedural rights of the registrant. Two recent decisions of the United States District Court for the District of Massachusetts are illustrative. In Lane v. Selective Service System Local Board No. 17,\textsuperscript{18} Judge Garrity held that Section 10(b)(3) did not bar preinduction review of a claim that a board had denied a registrant his right of administrative appeal by refusing to reopen his classification upon presentation of a prima facie case for reclassification. Judge Caffrey, in a similar case, adhered to the Lane rationale in Lubben v. Local Board No. 27.\textsuperscript{19} To the same effect is the recent decision of the United States District Court for the Eastern District of Pennsylvania in Gallagher v. Local Board,\textsuperscript{20} permitting preinduction review of a board's failure to afford a registrant a medical interview as required by the then-obtaining regulations. In Wiener v. Selective Service System Local Board refusal to grant requested 1-S(c) deferments: Bowen v. Hershey, 410 F.2d 962 (1st Cir. 1969); Carey v. Selective Serv. Sys. Local Bd. No. 2, 412 F.2d 71 (2d Cir. 1969); Foley v. Hershey, 409 F.2d 827 (7th Cir. 1969). Contra, Rich v. Hershey, 408 F.2d 944 (10th Cir. 1969).

\textsuperscript{15} 396 U.S. 360 (1970). Breen held, inter alia, that Congress had not authorized draft boards to punish a registrant with a II-S deferment for surrendering his draft card by declaring him "delinquent," reclassifying him 1-A, and ordering him to report for induction.


\textsuperscript{20} Civ. No. 70-1440 (E.D. Pa., filed June, 1970).
Board, No. 4, the United States District Court for the District of Delaware allowed preinduction review of certain board action infringing upon such rights of the registrant on appeal as presenting his own arguments in support of a II-A classification and knowing the state director's arguments against such classification by registrant's local board. And, in Edwards v. Local Board No. 58, the United States District Court for the Eastern District of Pennsylvania held that the failure of the local board to meet and consider a registrant's claim to a I-S student deferment violated the implicit regulatory requirement that the board at least consider whether facts have been presented which establish a right to such deferment. Accordingly, the court enjoined induction until those facts had been considered by the local board.

Other courts have not taken such a broad view of Oestereich. For example, the United States Court of Appeals for the Eighth Circuit, in Green v. Local Board, barred preinduction review of a claim that a local board had violated the proper order of call in issuing an induction order to the petitioner.

§14.3. Exhaustion of administrative remedies. Basic to an understanding of the nature of judicial review in Selective Service cases, whether pre- or postinduction, is the doctrine of "exhaustion of administrative remedies." This doctrine, a keystone in the jurisprudence of administrative law, provides that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

In the context of the Selective Service System, this doctrine has been applied to prohibit review of claims of erroneous classifications unless and until the registrant first avails himself of the rights to personal appearance before the local board and/or appeal to the state board. Furthermore, in Falbo v. United States, the doctrine was held to preclude judicial review if the registrant fails to attend scheduled physical examinations since he would be denying the agency an opportunity to reject him for service and thus render court action unnecessary.

Application of the exhaustion doctrine has often generated harsh consequences in the Selective Service field. Many registrants are unaware of their rights to appeal and, thus, do not exercise them. Additionally, very few, if any, registrants have a knowledge or appreciation of the importance of exhaustion in terms of eventual judicial review. Decisions to appeal or not to appeal are made without realizing the critical importance of exhausting administrative remedies even when

23 32 C.F.R. §§1604.52a(d) and 1625.3(b).
24 419 F.2d 813 (8th Cir. 1970).

2 §20 U.S. 549 (1944).
the likelihood of relief seems remote. Accordingly, the all-too-familiar result has been that registrants refuse induction only to find themselves sentenced to substantial prison terms without ever having the opportunity to raise the defense of wrongful classification.

The severity of this result has prompted sympathetic response from several federal courts, including the Supreme Court. In *McKart v. United States*, the Supreme Court responded in the case of a defendant who had not appealed from a local board’s denial of his claim for exemption as a "sole surviving son." The defendant also failed to attend his preinduction physical examination. The Government raised both failures as bars to judicial review of his defense of erroneous classification. The Court, through Justice Marshall, refused to accept the Government’s position and held that the doctrine of exhaustion did not preclude judicial consideration of the registrant’s defense.

The Supreme Court’s decision in *McKart* begins with the observation that the Selective Service statute does not itself require exhaustion but rather that the doctrine is of judicial creation in the Selective Service field. The Court then proceeded to expound a principle of tremendous consequence: the doctrine of exhaustion should not be tolerated in criminal cases "unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon the registrant if he is denied judicial review." The Court then held that, in the instant case, wherein the registrant’s claim before the agency involved solely a dispute of statutory interpretation and did not call for a determination of factual issues, the failure to invoke an appeal to the state board did not warrant application of the exhaustion rule. Underlying that conclusion is the recognition that Selective Service boards are ill-fitted to decide such interpretative questions of law; hence, judicial review would not be significantly aided by an additional agency determination where the agency in question has no expertise to resolve questions of law. In addition, the Court held as a matter of law that the failure to attend a preinduction physical no longer should be considered a ground for invoking the doctrine of exhaustion of administrative remedies, thus rejecting the notion that the interest in having cases administratively mooted was compelling enough to warrant the imposition of the doctrine. As to the precedential effect of *Falbo* and *Estep v. United States*, the Court said:

> We do not view the cases of [*Falbo* and *Estep*], insofar as they

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4 Id. at 197.
5 This portion of the McKart decision has also been held to preclude the application of the exhaustion doctrine for failure to report for induction: United States v. Powers, 413 F.2d 834 (1st Cir. 1969); Callison v. United States, 413 F.2d 133 (9th Cir. 1969).
6 327 U.S. 114 (1946).
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Concern the exhaustion doctrine, as a bar to today's holding. Neither those two cases, nor any of the other cases decided by this Court, stand for the proposition that the exhaustion doctrine must be applied blindly in every case. Indeed, those cases all involved ministerial or conscientious objector claims, claims that may well have to be pursued through the administrative procedures provided by the Selective Service laws.7

While limiting the scope of the exhaustion doctrine in McKart, the Court did not say the doctrine had no place in Selective Service law:

... And today's holding does not apply to every registrant who fails to take advantage of the administrative remedies provided by the Selective Service System. For, as we have said, many classifications require exercise of discretion or application of expertise; in these cases, it may be proper to require a registrant to carry his case through the administrative process before he comes into court.8

This observation by the Court has prompted several lower courts to reaffirm their adherence to the exhaustion doctrine in cases of knowing waiver of administrative appeals involving issues of fact and local board discretion.9 McKart was also used by the United States Court of Appeals for the Ninth Circuit in Lockhart v. United States10 to hold, in part, that a registrant whose sole excuse for not appealing his local board's evaluative classification was that he did not realize that such failure would bar any later challenge to that classification is subject to the requirement of exhaustion. On the other hand, noting that McKart had tarnished "[s]ome of the sanctity that the inferior federal courts have seemed to put around the judge-made doctrine of exhaustion," the United States Court of Appeals for the Fourth Circuit, in United States v. Davis,11 held that the exhaustion doctrine is no bar to a registrant whose local board fails to inform him of the availability of a government appeal agent to advise him of his legal rights, including the right of appeal.

B. SUBSTANTIVE CLASSIFICATION DEVELOPMENTS

§14.4. Conscientious objection. One of the most persistent issues in Selective Service law has been the definition of conscientious objection. Section 456(j) of the Selective Service Act provides in part that,

8 Id. at 200.
9 United States v. Powers, 413 F.2d 834 (1st Cir. 1969); United States v. McGee, 426 F.2d 691 (2d Cir. 1970); United States v. Smoger, 411 F.2d 501 (7th Cir. 1969).
10 420 F.2d 1143 (9th Cir. 1969).
11 413 F.2d 148, 150 (4th Cir. 1969).
in order to qualify for conscientious objector status, a registrant's beliefs must be religious in basis and not based upon a "political, sociological, philosophical, or personal moral code." In 1965, the United States Supreme Court in United States v. Seeger interpreted this section to include beliefs based upon other than formal, orthodox religious doctrines as long as such beliefs occupy a place in the life of the claimant parallel to that filled by God in a more orthodoxically religious person. The Court arrived at its decision by investing the phrase "religious training and beliefs" with a considerably broader scope than previously obtained.

Utilizing a similar approach to statutory interpretation, the Supreme Court clarified and reaffirmed its Seeger opinion in the recent case of Welsh v. United States. In this case, the Court specifically held that religiousness under the statute is to include strongly held moral or ethical beliefs. The Court avoided a contradiction of that section of the statute prohibiting conscientious objector status for those registrants whose beliefs are solely based upon "personal moral codes" or "philosophy" by reading that language to apply to beliefs based solely upon considerations of policy, pragmatism, or expediency. Thus, through novel, if somewhat strained, statutory interpretation, the Court was able to circumvent the constitutional issue of the section's validity vis-à-vis the religious clauses of the First Amendment.

Another question regarding the requisites of conscientious objector status is posed by the issue of "selective objection." This question appears less susceptible to resolution by statutory interpretation as there can be little doubt that, through Section 456(j), Congress intended to exclude objectors to particular wars as opposed to all wars. Two district court opinions in the last year addressed this issue and resolved the argument against the constitutionality of the Section 456(j) prohibition against selective objection. In United States v. Sisson, Judge Wyzanski in Massachusetts ruled that the prohibition against selective objection in a time of undeclared war violates a registrant's right to substantive due process of law; the Military Selective Service Act of 1967 unconstitutionally discriminates against registrants who claimed conscientious objector status on other than religious grounds. In United States v. McFadden, Judge Zirpoli in California held, in the case of a Catholic registrant claiming that his objection stemmed from the Catholic Church's "just war" theory, that the prohibition against selective objection violates the free exercise of religion and the establishment of religion clauses of the First Amendment. The Supreme Court has yet to decide the issue; jurisdictional problems prompted

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The denial of certiorari in United States v. Sisson. However, in its per curiam order, the Court noted that certiorari had been granted in two other cases also raising the selective objection issue. Thus, the Court will in all likelihood resolve this important issue during the 1971 Survey year.

§14.5. Other deferments and exemptions. Significant developments clarifying or expanding the range of eligibility for other deferments and exemptions have also occurred. In United States v. McKart, the Supreme Court held that a registrant could qualify as a "sole surviving son" even in the absence of a surviving parent.

Perhaps the most that can be said in these circumstances is that Congress had multiple purposes in mind in providing an exemption for a sole surviving son. Depriving petitioner of an exemption might not frustrate one of these purposes, but it certainly would frustrate several of the others. Therefore, given the beneficent basis for section 6(o), we cannot believe that Congress intended to make one factor, the existence of a "family unit," crucial. Accordingly, the death of petitioner's mother did not operate to deprive him of his right to be exempt from military service. The local board erred in classifying petitioner 1-A and ordering him to report for induction.

A majority of the circuit courts, including the United States Court of Appeals for the First Circuit, has ruled that a registrant who has held a graduate student deferment since the date of the current statute is eligible to receive a II-S(c) deferment despite regulations to the contrary. Similarly, in Gregory v. Hershey and Plotner v. Resor, district courts have held that such persons are entitled to III-A fatherhood deferments despite regulations to the contrary. Of course, it is important to note that, through action of the president, new deferments for occupation and fatherhood have now been eliminated.

C. PROCEDURAL DUE PROCESS DEVELOPMENTS

§14.6. Reopening classifications. Most draft litigation is usually centered upon some claim of procedural irregularity and probably most decisions are rendered on the same basis. Not surprisingly, the 1970 Survey year has seen several very important developments in the area of draft board procedure.

One of the most noteworthy cases involving procedural due process
was *Mulloy v. United States*. Petitioner sought Supreme Court review of a local board's refusal to reopen his classification despite the fact that he presented a nonfrivolous prima facie case for reclassification from I-A to I-O conscientious objector status. Preliminary to a discussion of the Court's disposition of *Mulloy*, a cursory sketch of the specific procedure at issue is in order. It should be noted that a registrant is considered to be in class I-A (available for service) unless he establishes his eligibility for another status. In order to do so, the registrant must file with his local board a claim for reclassification. Upon such filing, the board appraises the claim and exercises its discretionary power under the regulations either to open or refuse to open the case for consideration. The board's decision at this stage is not directed to the question of whether the registrant is actually entitled to the new classification, but solely to the question of whether the claim warrants local board action at all. Thus, local boards quite frequently decide to reopen registrants' cases but refuse to change their classifications.

The local board's decision whether to reopen a registrant's case is of tremendous significance to the registrant, because only an affirmative decision gives rise to the right to a hearing before the local board and/or an appeal to the state board. There can be no appeal from the board's decision not to reopen a case for consideration.

In *Mulloy v. United States*, the local board refused to reopen the registrant's case upon presentation of a claim for conscientious objector classification. The Court, in examining the propriety of such refusal, held that the local board's action was an abuse of its discretion granted under the reopening regulations and a violation of the registrant's due process rights. In so holding, the Court established standards for the exercise of this discretion.

Where a registrant makes nonfrivolous allegations of facts that have not been previously considered by his board, and that, if true, would be sufficient under the regulation or statute to warrant granting the requested reclassification, the board must reopen the registrant's classification unless the truth of these new allegations is conclusively refuted by other reliable information in the registrant's file.

The significance of the *Mulloy* case lies not so much in the creation of new procedural law relative to the reopening process — since the decision adhered to the majority of lower court formulations on the subject — as in the reflection of the Court's deep concern that the process of administrative review in the Selective Service System be made to operate in a fair manner for the registrant. It is submitted that this concern for the securing of procedural fairness stems from the Court's

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2 Id. at 416.
realization of the limited nature of judicial review in draft cases and its unwillingness to expand that review into areas involving substantive board decisions. Indeed, Mulloy makes direct reference to the Court's decision in Clark v. Gabriel as a basis for acting to ensure the preservation of the registrant's rights to a hearing and administrative appeal.

Because of the narrowly limited scope of judicial review available to a registrant [citing Clark v. Gabriel], the opportunity for full administrative review is indispensable to the fair operation of the Selective Service System.

The Court moreover indicates that the need to ensure administrative fairness should not be compromised by the possibility that registrants will abuse the rights granted them and thereby frustrate the manpower recruitment program. The Court suggests that, rather than allow a punitive atmosphere to pervade the operation of the regulations themselves, the criminal penalties provided by the draft statute be utilized to prevent abuse.

Thus, though overshadowed in the public consciousness by Welsh v. United States, decided on the same day, Mulloy may well prove to be the more consequential case if it stimulates the growth of further case law providing the registrant due process safeguards in the administrative process.

§14.7. Other requisites of procedural due process. Foreshadowing these developments are recently decided cases involving the registrant's right to counsel at his personal appearance and his right to a board stipulation of its reasons for rejecting his claim(s). For example, in United States v. Weller, the United States District Court for the Northern District of California held that the registrant had a right to be represented by counsel at his personal appearance; regulations to the contrary were held to be unauthorized by the statute. The Government has appealed this case directly to the Supreme Court, and a decision on the merits is expected during the 1971 survey year.

The related procedural question of requiring local boards to specify in writing the reasons for denial of deferment claims has been examined by several circuit courts of appeals. The United States Court of Appeals for the Ninth Circuit, in United States v. Haughton, 3

§14.7. 1 399 U.S. 256 (1968).


3 This concern with eliminating "punitiveness" in the administration of the draft law was also demonstrated by the Court in Gutknecht v. United States, 396 U.S. 882 (1970), and Breen v. Selective Service Sys. Local Bd. No. 16, 396 U.S. 360 (1970).


6 245 F.2d 736 (9th Cir. 1969).
and the Court of Appeals for the Fourth Circuit, in *United States v. Broyles*,\(^6\) have each held that due process requires the written specification of such reasons. The United States Court of Appeals for the Second Circuit, in *United States v. Morico*,\(^4\) has held that boards do *not* have to provide reasons. The United States Court of Appeals for the First Circuit, in *United States v. Curry*,\(^5\) has held that, in the absence of a showing of prejudice to a registrant, reasons need *not* be given.

Recent cases have also been litigated over issues touching upon the quality of administrative review granted by draft boards. In a recent case, *United States v. Wallen*,\(^6\) a Minnesota district court directed attention to the fact that an appeal board had devoted only an average of 59 seconds to each case on the day it considered that of the defendant. This not unusual practice was held to violate the registrant's right to a meaningful appeal—a right protected by the due process clause of the Fourteenth Amendment. The same concern for protecting the right to a meaningful appeal prompted the United States District Court for the District of Delaware, in the case of *Weiner v. Local Board No. 4*,\(^7\) to hold that a registrant had the right to prior notice of the state director's reasons for appealing his classification from a favorable disposition of the registrant's local board.

Another important development in the procedural area relates to the question of proper draft board composition. In *United States v. Belfran*,\(^8\) *United States v. Jones*,\(^9\) and *United States v. DeMarco*,\(^10\) federal district courts granted acquittals upon showings that the respective draft boards did not meet the requirement that members live within the jurisdictional area of the board "if at all practicable." These decisions were rendered in light of evidence that members of other boards resided in the challenged boards' areas, thus rebutting the presumption of administrative regularity. *United States v. Nussbaum*,\(^11\) on the other hand, supports the proposition that such attacks cannot be raised collaterally in prosecutions for refusal to submit to induction.

Finally, it is important to note the action of the Supreme Court in *Gutknecht v. United States*,\(^12\) whereby the regulations allowing for immediate induction of registrants who are delinquent in their responsibilities under the act or accompanying regulations were stricken as

\(^3\) 423 F.2d 1299 (4th Cir. 1970).
\(^4\) 415 F.2d 138 (2d Cir. 1969).
\(^5\) 410 F.2d 1297 (1st Cir. 1969).
\(^7\) 302 F. Supp. 266 (D. Del. 1969).
\(^12\) 396 U.S. 882 (1970).
unauthorized by the statute. The Court was unwilling to find that Congress intended such punitive power to reside with the local board, in light of the fact that the act also provided for severe criminal penalties for conduct constituting "delinquency."

D. CONSTITUTIONAL ATTACKS ON CONSRIPTION

§14.8. Decisional and statutory approaches. Despite the dynamism of case law on the draft, evidenced by cases discussed in previous sections, the system of conscription itself continues to withstand constitutional attacks. During the First World War, the Supreme Court, in the Selective Draft Law Cases,\(^1\) held that a system of compulsory military service was within the authority of Congress to authorize under its war powers. Several recent cases have attempted to distinguish the Selective Draft Law Cases on the theory that conscription during a period of "undeclared" warfare, for example, the war in Southeast Asia, is beyond the scope of congressional war-making power. These efforts have failed at the lower court level; and the Supreme Court, in United States v. Holmes\(^2\) and Hart v. United States,\(^3\) has refused to grant certiorari. Similarly, the Supreme Court has refused to grant certiorari in a case challenging conscription, not on the ground that Congress lacks the power to order conscription, but rather that conscription in the present time, when compared to the alternative of a voluntary military service, is not "necessary and proper" implementation of congressional war-making power.\(^4\) Finally, a challenge to conscription has been made in United States v. Zimmerman\(^5\) based upon the claim that the power of Congress to conscript under Article I, Section 8 of the Constitution does not authorize a draft in time of peace (that is, without a congressional declaration of war). As of this writing, the Supreme Court has not yet had the opportunity to decide whether it would review this contention, although it seems clear that at least two members of the Court, Justices Stewart and Douglas, would grant review.\(^6\)

The Supreme Court may well feel compelled to eventually confront the issue of the legality of the draft by the action of the Massachusetts General Court in enacting the so-called Shea Bill during the 1970 Survey year.\(^7\) The act basically provides that no Massachusetts resident

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\(^1\) 245 U.S. 366 (1918).  
\(^2\) 391 U.S. 936 (1968).  
\(^3\) 396 U.S. 916 (1969).  
can be ordered to serve in the military forces engaged in combat hostilities outside the United States unless Congress has officially declared war. The act also authorizes the attorney general of the Commonwealth to bring an original suit against the United States in the Supreme Court to implement the act. This suit was filed, *Massachusetts v. Laird,* and, on November 9, 1970, the Supreme Court refused to hear argument on the Commonwealth’s preliminary motion for leave to file a complaint during the fall of 1970. Attorney General Robert Quinn will attempt to present the issue of the war’s constitutionality to the Supreme Court through the federal courts during the 1971 *Survey* year.

9 For further discussion of Chapter 174 of the Acts of 1970, see Chapter 12.