

1968

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Recommended Citation

John Ritter, *New Draft Law: Its Failures and Future*, 19 Case W. Rsrv. L. Rev. 292 (1968)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol19/iss2/8>

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NOTES

New Draft Law: Its Failures and Future

"[I]n a free society the obligations and privileges of serving in the armed forces . . . should be shared generally, in accordance with a system of selection which is fair and just."¹

INCREASED DRAFT CALLS during the past 2 years have suddenly disrupted the lives of many young men who thought they were beyond the reach of the draft. The new draft law² has taken several steps to eliminate the uncertainties which had existed under the former law,³ but has retained the most serious inequity of that law — the local board system with its loosely drawn deferment standards and widely varying interpretations of Selective Service regulations. It is estimated that 170,000 men who would have been deferred from service under the old law will now be liable for induction.⁴ The Selective Service System which, on the one hand, has been characterized as "the most democratic process ever devised"⁵ and, on the other, as "an administrative obstacle course with more legal pitfalls and frustrations than anything in American bureaucracy,"⁶ remains the same. As it now exists, the Selective Service System has the power to take 2 years of the liberty⁷ of every

¹ 50 U.S.C. § 451(c) (App. 1964).

² Military Selective Service Act of 1967, 1967 U.S. CODE CONG. & AD. NEWS 1342.

³ Under the former law a man was uncertain whether he would be drafted during the entire period between ages 18½ and 26. The regulations pursuant to the new law eliminate this uncertainty by giving the Secretary of Defense the authority to call for inductees within specified age groups. 32 C.F.R. § 1631.4(b), *as amended*, Exec. Order No. 11,360, 32 Fed. Reg. 9793 (1967). The plan is to call those within the 19 to 20 age group first. After a year of potential liability, a registrant will pass out of the age group subject to induction. If not ordered to report for induction by then, he will be free from liability except in time of emergency. It is expected that this plan will not be implemented until January 1969. *20 Questions About Draft Answered*, U.S. NEWS & WORLD REP., July 10, 1967, at 36. See also PRESIDENTIAL MESSAGE TO CONGRESS ON THE DRAFT, H.R. DOC. NO. 75, 90th Cong., 1st Sess. 7 (1967).

⁴ *20 Questions About Draft Answered*, U.S. NEWS & WORLD REP., July 10, 1967, at 36.

⁵ Interview with Colonel Edward Toth, Ohio State Selective Service Liaison Officer, in Cleveland, Ohio, Sept. 29, 1967.

⁶ Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123, 2124 (1966).

⁷ The draft can take not only a man's personal liberty but also his life. Toward the end of 1967, 15,000 men were listed as killed or missing in action in Vietnam. The

man between 18½ and 26 years of age.⁸ It is therefore essential that the law and regulations are properly understood by every young man planning his family and career.

This Note will describe the process of Selective Service under the new law, examine the inequities within the System as well as the inequity of the draft itself, and analyze the legal basis for conscription under the Constitution.

I. THE MILITARY SELECTIVE SERVICE ACT OF 1967

The past 27 years of conscription⁹ in the United States have nullified any tradition against large standing armies and compulsory military service which this nation may once have had. The present draft law is best understood in the light of its antecedents.

A. *History of Conscription in the United States*

The two previous draft laws in United States history were enacted to meet emergencies and each lasted only 2 years.¹⁰ Prior to these two acts, the United States had resisted compulsory military service each time it was proposed. In 1790, President Washington's Secretary of War proposed a federal militia on the theory that all men owed a "military duty for the defence of the state."¹¹ His plan was not only rejected in Congress, but Rhode Island, which had not yet ratified the Constitution, recommended an amendment "[t]hat no person shall be compelled to do military duty, otherwise than by voluntary enlistment . . ."¹² In 1815, a conscription law was proposed which provoked Daniel Webster's famous attack resulting in defeat of the bill.¹³

draft may also take his property: consider the fact that an inductee receives \$96 per month for a salary.

⁸ Any person who has ever been deferred from service between the ages of 18½ and 26 remains liable until age 35. Thus, a large group of men are subject to induction until age 35; however, in practice this has little effect because men who attain age 26 are automatically placed in a low priority group which has not been called for processing since World War II. 32 C.F.R. § 1631.7(a) (1967). This is not true for doctors, dentists, veterinarians, and those with allied skills for they are often called until age 35.

⁹ The term "conscription" was first used when the Conscription Law of 1798 was enacted by the National Assembly in France. J. SCHAPIRO, *MODERN AND CONTEMPORARY EUROPEAN HISTORY* 696 (rev. ed. 1931).

¹⁰ Federal Enrollment Act of 1863, ch. 75, 12 Stat. 731; Selective Service Act of 1917, ch. 15, 40 Stat. 76.

¹¹ 7 NILE'S REGISTER 296 (1815).

¹² J. ELLIOT, *DEBATES ON THE FEDERAL CONSTITUTION* 372 (2d ed. 1836).

¹³ 14 WRITINGS AND SPEECHES OF DANIEL WEBSTER 55-69 (1903).

The emergency of large-scale internal rebellion produced the first draft law in United States history,¹⁴ the Federal Enrollment Act of 1863.¹⁵ It called for enrollment of all able-bodied men between the ages of 20 and 45 who would then be drafted if enlistments in a district did not fill the district's quota. When called for induction, a man could avoid liability either by paying \$300 or sending a substitute in his place. The order of call in each district was determined by a jury wheel type of public lottery and the entire draft machinery was administered by the military. Antidraft riots occurred in many Northern cities amid charges of fraudulent lottery drawings and favoritism of the rich.¹⁶

During the 50 years following the Civil War, including the period during the Spanish-American War, volunteer enlistments were relied on by the military. One month after the declaration of war against Imperial Germany,¹⁷ Congress passed "an Act to Authorize the President to Increase Temporarily the Military Establishment of the United States" which became known as the Selective Service Act of 1917.¹⁸ This was the model for today's Selective Service Law.¹⁹ It did not contain detailed provisions on the operation of the system, but left these details to be promulgated by the President in Executive orders. Local draft boards composed of three civilians were established in every county. These boards were responsible for registration, deferment, physical examination, induction, and transportation of registrants. The bounties and substitutes of the Civil War draft were prohibited; however, a lottery method of determining relative order of induction was borrowed from the Civil War administration. Exempted from the Act were duly ordained ministers of religion, students preparing for the ministry, and members of any well-recognized religious sect whose principles forbade its members to participate in war in any form. Twenty-four million men between the ages of 18 and 45 were registered; 2,910,296 of the reg-

¹⁴ Cf. Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253 (1942).

¹⁵ 12 Stat. 731 (1863). It should be noted that the Confederacy enacted a draft law 1 year prior to the Union. A.B. MOORE, *CONSCRIPTION AND CONFLICT IN THE CONFEDERACY* 13-14 (1924).

¹⁶ See L.B. HERSHEY, *OUTLINE OF HISTORICAL BACKGROUND OF SELECTIVE SERVICE AND CHRONOLOGY* 5 (rev. ed. 1965).

¹⁷ April 6, 1917.

¹⁸ 40 Stat. 76 (1917).

¹⁹ See *Local Draft Bd. No. 1 v. Connors*, 124 F.2d 388, 390 (9th Cir. 1941) (holding the 1940 Act to be modeled after the 1917 Act).

istrants were inducted during the 1½ years of the Act's existence.²⁰ Unlike the present Act, a man was subject to military jurisdiction immediately after registration, and it required an action of habeas corpus to obtain judicial review of a classification resulting in induction.²¹ The 1917 statute's constitutionality was upheld in *Arver v. United States*.²² The United States Supreme Court found that the power to compel military service was authorized by Congress' power to declare war, to raise and support armies, and by virtue of the necessary and proper clause.²³ The Court found no illegal delegation of legislative or judicial power to draft boards; the exemption extended to members of certain religious sects was held not to violate the prohibition of the first amendment against establishment of religion; and compulsory military duty was construed not to constitute involuntary servitude under the 13th amendment.

After the German occupation of Poland, Belgium, the Netherlands, and France, and the German siege of England, the United States turned to conscription for a rapid military buildup. On September 16, 1940, the Selective Training and Service Act became effective.²⁴ This is the Act which established the basis of the Selective Service System in force today. All male citizens and aliens residing in the United States between the ages of 21 and 36 were required to register at a local board. After Pearl Harbor, the Act was amended to broaden the registration age limits from 18 to 65, and to extend military service liability for the duration of hostilities.²⁵ Under the Act quotas of inductees were determined for each State, territory, and the District of Columbia. Exempted from the requirements to register were duly ordained ministers of religion and divinity school students preparing for the ministry. Deferments from induction were authorized for men whose employment in industry, agriculture, or other occupations was considered necessary to the national health, safety, or interest. Students were de-

²⁰ 1 SELECTIVE SERVICE SYSTEM, BACKGROUNDS OF SELECTIVE SERVICE 81 (1947).

²¹ See *Franke v. Murray*, 248 F. 865 (8th Cir. 1918).

²² 245 U.S. 366 (1918). This decision is often cited as *The Selective Draft Law Cases* because it decided five cases consolidated on appeal to test all constitutional aspects of the law. This case has been recently criticized as outdated constitutional law and its value as a precedent for peacetime conscription disputed because it rested on a premise of national emergency evidenced by a congressional declaration of war. Bernstein, *Conscription and the Constitution: The Amazing Case of Kneedler v. Lane*, 53 A.B.A.J. 708, 711 (1967).

²³ U.S. CONST. art. I, § 8, cls. 12-13, 18.

²⁴ 54 Stat. 885 (1940).

²⁵ 55 Stat. 844 (1941).

ferred on a conditional basis, and those who by reason of religious training and belief were conscientiously opposed to participation in war in any form were excluded from combatant training. The President was authorized to prescribe the necessary rules and regulations to carry out the provisions of the Act and to create and establish a Selective Service System.²⁶ The keynote of the System's organization was decentralization.²⁷ The President, in late 1940, delegated to the Director of Selective Service the authority to issue rules and regulations governing the operation of the System's activities.²⁸ The regulations enabled the draft law to operate with flexibility to carry out its basic purpose of providing manpower for changing military needs. The regulations today are substantially unchanged from the 1940 Act.

After the cessation of hostilities, the Act was extended to May 1946,²⁹ then to July 1946,³⁰ and finally through March 31, 1947³¹ when the Act expired. With the termination of compulsory military liability, the Office of Selective Service Records was created to preserve and service records,³² undoubtedly with the further purpose of reinstating its operations in the future.

Compulsory military service was restored 16 months later by Congress' enactment of the Selective Service Act of 1948.³³ This is the Act which, with subsequent amendments, governs today. Essentially, it followed the pattern and framework of the 1940 Act. All male citizens and aliens residing in the United States between 18 and 26 years of age were required to register with the local draft board nearest their residence.³⁴ A Selective Service System was established with a national headquarters and a district headquarters for each State to direct the local draft boards.³⁵ The keynote of the System was again decentralization. The regulations promulgated pursuant to the Act were substantially the same as under the 1940 Act. In 1951, the title of the Act became the Universal Military

²⁶ Selective Service Act of Sept. 16, 1940, § 10, 54 Stat. 885.

²⁷ L.B. HERSHEY, *supra* note 16, at 12.

²⁸ Exec. Order No. 8553, 3 C.F.R. 226 (Supp. 1940); Exec. Order No. 8559, 3 C.F.R. 223 (Supp. 1940).

²⁹ 59 Stat. 166 (1945).

³⁰ 60 Stat. 181 (1946).

³¹ 60 Stat. 341 (1946).

³² 61 Stat. 31 (1947).

³³ 62 Stat. 604 (1948), *as amended*, 50 U.S.C. §§ 451-71 (App. 1964).

³⁴ 62 Stat. 605 (1948), *as amended*, 50 U.S.C. § 453 (App. 1964).

³⁵ 62 Stat. 618 (1948), *as amended*, 50 U.S.C. § 460 (App. 1964).

Training and Service Act; age of induction was lowered to 18 years and 6 months, and the period of military duty was made 24 consecutive months.³⁶ The 1951 Act was intended to expire at the end of 4 years, as has every Act since. This intentionally results in the occurrence of extension debates in noncongressional, nonpresidential election years.³⁷ The result has been automatic extensions of the draft every 4 years since 1951.³⁸ The most recent extension occurred only after widespread public concern with the System's inequities brought into focus by the Vietnam War with its rising casualty figures.³⁹

B. *The New Law*

Notwithstanding four extensive congressional committee hearings⁴⁰ and two blue ribbon panel advisory reports,⁴¹ the recently enacted Military Selective Service Act of 1967 has made few changes in the institution which has drafted nearly 14 million men into the military in the past 26 years. The new law extends the Universal Military Training and Service Act another 4 years, renaming it the Military Selective Service Act of 1967;⁴² it extends the Dependents

³⁶ 65 Stat. 80 (1951), as amended, 50 U.S.C. §§ 451-71 (App. 1964).

³⁷ See *Hearings on the Manpower Implications of Selective Service Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 17 (1967) (remarks of Gen. Hershey).

³⁸ 69 Stat. 209 (1955); 73 Stat. 13 (1959); 77 Stat. 4 (1963).

³⁹ Almost every major magazine in the nation published essays on the draft law during the year prior to its expiration. See, e.g., Baldwin, *The Draft Is Here to Stay, But It Should be Changed*, N.Y. Times, Nov. 20, 1966, § 6 (Magazine), at 48; Chapman, *Selective Service and National Needs*, THE REPORTER, June 16, 1966, at 15; Curtis, *Conscription and Commitment*, PLAYBOY, Feb. 1967, at 89; Johnson, *Who Should Serve?*, ATLANTIC MONTHLY, Feb. 1966, at 63.

⁴⁰ *Hearings on the Extension of the Universal Military Training and Service Act Before the House Comm. on Armed Services*, 89th Cong., 2d Sess. (1966); *Hearings on the Manpower Implications of Selective Service Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. (1967); *Hearings on S. 1432 Before the Senate Comm. on Armed Services*, 90th Cong., 1st Sess. (1967); *Hearings on the Selective Service System Before the House Comm. on Armed Services*, 90th Cong., 1st Sess. (1967).

⁴¹ NATIONAL ADVISORY COMMISSION ON SELECTIVE SERVICE, IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE? (1967) [hereinafter cited as ADVISORY COMMISSION REPORT]. This is the report of the presidential commission appointed by Exec. Order No. 11,289, 3 C.F.R. 131 (1966), to consider the functioning of Selective Service. The Commission's report is based on surveys of local and appeal board members, draft board records, and draft statistics, all of which are published in the report. See also STAFF OF HOUSE COMM. ON ARMED SERVICES, 90TH CONG., 1ST SESS., REPORT OF THE CIVIL ADVISORY PANEL ON MILITARY MANPOWER PROCUREMENT (Comm. Print 1967). This is the report of the panel appointed by the House Armed Services Committee.

⁴² § 1(a), 1967 U.S. CODE CONG. & AD. NEWS 1342.

Assistance Act of 1950⁴³ and the Doctors Draft Law for an additional 4 years while eliminating deferments for doctors who serve in the Peace Corps, Office of Economic Opportunity, or the Food and Drug Administration.⁴⁴ It also permits the possibility of a large increase in military manpower by suspending ceilings on the numerical strength of the armed forces.⁴⁵

The most important change in the law is that of permitting 19-year-olds to be drafted first.⁴⁶ For the first time the President, through the Secretary of Defense, may designate the prime age group from which men shall be inducted. This was done by Executive order, rather than congressional amendment, illustrating an important aspect of the draft law — the wide range of discretion placed in the President.⁴⁷ Some Presidential discretion, however, was removed by the new law when Congress prohibited the President from effecting any substantial change in the order of induction for registrants within age groups unless authorized by Congress.⁴⁸ This precludes him from establishing a national lottery for order of

⁴³ 50 U.S.C. §§ 2201-16 (App. 1964), authorizing payment of allowances for housing of enlisted men with dependents.

⁴⁴ 37 U.S.C. §§ 302-03 (1964), providing for special pay to physicians, dentists, and veterinarians. This law is regarded as an important incentive to voluntary recruitment of medical personnel who are liable until age 35 to be specially selected on the basis of their professional skills. See § 6(a)(2), 1967 U.S. CODE CONG. & AD. NEWS 1344, providing for certain public health exemptions.

⁴⁵ 10 U.S.C. §§ 3201, 5401-02, 8201 (1964).

⁴⁶ There were three reasons for the unanimous decision to fill draft calls from 19-year-olds before reaching into higher age groups. The primary concern was to eliminate the long period of uncertainty and job discrimination existing when all men classified I-A from 18½ to 26 are subject to draft calls. The second reason involved the preference of military leaders for younger draftees because they "make better soldiers than older ones." *Hearings on the Extension of the Universal Military Training and Service Act Before the House Comm. on Armed Services*, 90th Cong., 1st Sess. 2338 (1967). Finally younger registrants have fewer deferments than older registrants. Twenty-seven percent of all 24-year-old registrants have either a dependency or occupational deferment, while only about 5 percent of the 19-year-olds have such deferments. *Id.* at 2339.

⁴⁷ Section 10(b) of the new Act delegates broad discretionary power to the President to prescribe all necessary rules and regulations to carry out the purpose of the Act. This power is so broad that it was agreed in one congressional investigating committee that "[w]ith one or two exceptions, nearly all of the changes that have been advocated so vigorously before this committee are possible under existing law by regulations approved by the President . . ." *Hearings on S. 1432 Before the Senate Comm. on Armed Services*, 90th Cong., 1st Sess. 613 (1967).

⁴⁸ § 5(a), 1967 U.S. CODE CONG. & AD. NEWS 1342. This was done to prevent the President from issuing an Executive Order changing relative order of selection to a lottery system for each age group called "Fair and Impartial Random Selection" (FAIR) as announced in his PRESIDENTIAL MESSAGE TO CONGRESS ON THE DRAFT, *supra* note 3, at 9. H.R. DOC. NO. 75, 90th Cong., 1st Sess. 9 (1967). Congressional committees found no advantages in such a system and preferred retaining the 26-year-old method of selecting the oldest-first-by-birth-dates.

selection. Congress also removed Presidential discretion to end student deferments by writing a 4-year deferment for undergraduate college students into the Act.⁴⁹ Present student undergraduate deferments are mandatory for persons "satisfactorily pursuing a full-time course of instruction at a college, university or similar institution of learning," but the student now has the duty to request a student deferment and insure that his school furnishes proof of his student status. The new regulations define "satisfactorily pursuing a full-time course of instruction" as earning 25 percent of the credits toward a baccalaureate degree during a 12-month period.⁵⁰ However, the new law restricts any person who has ever received an undergraduate student deferment from subsequent deferment because he is married and has children.⁵¹ This change is designed to prevent a commonly used method by which young men formerly obtained deferments for college, marriage, and then fatherhood until liability ceased. A further restriction on undergraduate deferments denies return to student deferment status after discontinuation of a satisfactory pursuit of a course of instruction. Thus, a student who drops out of college for one term can still return and complete 25 percent of his 4-year requirements within the 12-month period, but a student who drops out for a full year cannot regain a deferred status. A loophole still exists after a 4-year student deferment since a deferment is available for extreme hardship to dependents,⁵² graduate study, or employment in a critical industry.⁵³ Upon graduation from college a registrant returns for 1 year to the prime age group available for military service even though he is older than the age group being called.

The new law also eliminates all use of examinations or class

⁴⁹ § 6(h)(1), 1967 U.S. CODE CONG. & AD. NEWS 1345. Congress reacted in this way because the President had announced his intention to end undergraduate student deferments by Executive Order. However, testimony before congressional committees demonstrated that colleges were not "havens for draft-dodgers" as many had charged, but that a higher percentage of college students eventually saw military service than noncollege students. See *Hearings on the Selective Service System Before the House Comm. on Armed Services*, 89th Cong., 2d Sess. 9642 (1967). Further testimony emphasized that the original rationale behind student deferments was to avoid impeding scientific and technological developments such as resulted from drafting students during World War II. *Hearings on the Extension of the Universal Military Training and Service Act Before the House Comm. on Armed Services*, 90th Cong., 1st Sess. 2662 (1967). The Soviet Union's draft law also exempts all college students under the same rationale. See *N.Y. Times*, Oct. 22, 1967, § E, at 7, col. 1.

⁵⁰ Exec. Order No. 11,360, 32 Fed. Reg. 9790-91 (1967).

⁵¹ § 6(h)(1), 1967 U.S. CODE CONG. & AD. NEWS 1345.

⁵² *Id.*

⁵³ 32 C.F.R. § 1622.22, as amended, 32 Fed. Reg. 9790 (1967).

standings for deferment of students.⁵⁴ Deferments for graduate students are intended to be reduced under the new law⁵⁵ rather than eliminated as recommended by the President in his message to Congress.⁵⁶ The new law does not affect those who were beyond their first year of postbaccalaureate study in any field on October 1, 1967. Such graduate students are deferred until completion of their masters, doctoral, or professional degrees, but for no more than a 5-year total of graduate study.⁵⁷ Upon completion of study a graduate student is not put in the prime age group for induction, but remains potentially liable for duty until age 35 with a lowered induction priority at age 26. Those graduate students who were beginning their first year of study in October 1967, are deferred for only 1 year. This is for the purpose of providing a transitional period during the present year. After this period, graduate student deferments shall be granted only for those "satisfactorily pursuing a course of graduate study in medicine, dentistry, veterinary medicine, osteopathy, or optometry, or in such other subjects necessary to the maintenance of the national health, safety, or interest as are identified by the Director of Selective Service upon the advice of the National Security Council."⁵⁸ Graduate students, like undergraduates, may not obtain dependency deferments after ending their student status.

The new law attempts to limit conscientious objector claims under the Supreme Court's interpretation of the law in *United States v. Seeger*⁵⁹ by eliminating the reference to belief in a Supreme Be-

⁵⁴ § 6(h)(2), 1967 U.S. CODE CONG. & AD. NEWS 1346-47. The College Qualification Test Program of nationwide examinations to aid in granting student deferments had been used since 1951 with widely varying application of test results by draft boards. ADVISORY COMMISSION REPORT 167 (1967).

⁵⁵ The committee reports anticipated few graduate student deferments outside of medical and allied professions. H.R. REP. NO. 267, 90th Cong., 1st Sess. 27 (1967).

⁵⁶ PRESIDENTIAL MESSAGE TO CONGRESS ON THE DRAFT, H.R. DOC. NO. 75, 90th Cong., 1st Sess. 8 (1967).

⁵⁷ Exec. Order No. 11,360, 32 Fed. Reg. 9791 (1967).

⁵⁸ *Id.* The Director of Selective Service, by January 1, 1968, had not issued criteria for determining what graduate study would be in the "national interest." However, he shall be under strong pressure from graduate schools and the public to grant deferments not only for study in scientific areas, but in the social sciences and humanities as well. N.Y. Times, Dec. 14, 1967, § 2, at 46, col. 1 (City ed.).

⁵⁹ 380 U.S. 163 (1965). The statute has always exempted from combatant service those men conscientiously opposed to participation in combatant service or war by reason of "religious training and belief." Under the former statute "religious training and belief" was defined as "belief in relation to a Supreme Being involving duties superior to those arising from any human relation . . ." 50 U.S.C. § 456(j) (App. 1964). The *Seeger* case adopted a broad construction of these words, permitting a sincere and

ing.⁶⁰ The new law has closed up two additional escapes: conscientious objector appeals are no longer referred to the Department of Justice for investigation;⁶¹ and any member of the Ready Reserve who is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve may be ordered to active duty.⁶²

The new law codifies the rule that judicial review of a classification is to be limited to the question of whether it had any basis in fact.⁶³ It also seems to limit judicial review to cases of criminal prosecution, thereby eliminating habeas corpus review of a classification after a man has been inducted.⁶⁴ A later section directs the

meaningful belief which occupies a place in the life of its possessor parallel to that filled by the God of those admittedly qualifying for the exemption. 380 U.S. at 176.

⁶⁰ § 6(j), 1967 U.S. CODE CONG. & AD. NEWS 1347. The statute now states that "religious training and belief" does not include essentially political, sociological or philosophical views, or a merely personal moral code." Legislative history indicates an intent to limit conscientious objector claims to traditionally "religious" ones. *Hearings on the Extension of the Universal Military Training and Service Act Before the House Comm. on Armed Services*, 90th Cong., 1st Sess. 2636 (1967). However this seems superfluous because *Seeger* interprets the entire section in the only way possible while still being consistent with the establishment clause of the first amendment. 380 U.S. 163, 188 (1965) (concurring opinion). The Selective Service regulations themselves prohibit a strict reading of the conscientious objector section. 32 C.F.R. § 1622.1(d) (1967) states that there shall be no discrimination for or against a registrant because of his membership in a religious group. The Supreme Court this term refused to elaborate on the requirements for conscientious objector status. See *United States v. Gearey*, 379 F.2d 915 (2d Cir.), cert. denied, 36 U.S.L.W. 3199 (U.S. Nov. 16, 1967).

⁶¹ Exec. Order No. 11,360, 32 Fed. Reg. 9792 (1967), rescinding 32 C.F.R. §§ 1626.24(b)(3), 1626.24(b)(4), 1626.25. Legislative intent was to eliminate conscientious objector appeals which could be prolonged for 2 years by the former process. The 2700 cases still being processed by the Department of Justice are being handled under the previous regulations.

⁶² § 673(a), 1967 U.S. CODE CONG. & AD. NEWS 1349. This amendment was proposed because some 50,000 individuals in reserve units were not being trained. *Hearings on the Extension of the Universal Military Training and Service Act Before the House Comm. on Armed Services*, 89th Cong., 2d Sess. 9652 (1966). It forces reservists to enter an active reserve unit.

⁶³ § 10(b)(3), 1967 U.S. CODE CONG. & AD. NEWS 1347-48. This was Congress' attempt to prohibit cases such as *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817 (2d Cir. 1967), where the court enjoined a board's reclassification from II-S to I-A of a University of Michigan sit-in demonstrator. It is doubtful, however, that Congress can so restrict judicial review when local boards exceed their jurisdiction. See text accompanying notes 164-78 *infra*.

⁶⁴ Habeas corpus was the only remedy for judicial review of classification until the Supreme Court upheld reviewability in a defense to a criminal prosecution for failure to submit to induction in *Estep v. United States*, 327 U.S. 114 (1946). Since then habeas corpus has fallen into disuse. See *Cahoon v. United States*, 155 F.2d 158 (8th Cir. 1946) (holding that the same questions may be considered in trial for refusal to submit to induction as may be heard on habeas corpus). It is doubtful, however, that Congress can entirely foreclose use of habeas corpus because there are likely to be registrants who wish to contest induction without being forced to incur a criminal arrest record and the expense of bail. As authority for the suspension of habeas corpus, see Bernstein, *supra* note 22, at 711 (discussing President Lincoln's suspension of habeas corpus which occasioned a State court test of the Federal Civil War draft law).

Department of Justice to prosecute or appeal all draft cases upon the request of the Director of Selective Service or advise Congress in writing of its failure to do so. This, in conjunction with the direction that federal courts shall give docket preference to draft cases, signals an increase in prosecutions under the Act. It also places more power in an Executive agency which at present accords only minimal protection to those under its authority.⁶⁵

The Selective Service System is still not subject to the Federal Administrative Procedure Act and its protections.⁶⁶ Thus, it is an administrative bureaucracy whose approximately 34 million registrants must be classified and selected for induction under its own complex set of rules and regulations. Every man is presumed to know these regulations and to have waived them if not properly exercised.⁶⁷ Failure to observe them may subject a man to immediate induction,⁶⁸ or fine and imprisonment.⁶⁹ Upon seeking a legal remedy a registrant finds that he has a duty to serve with no correlative right to deferment.⁷⁰

II. THE DRAFT IN OPERATION

A. *The Selective Service Process*

Although the Selective Service statute and its regulations are complex, every man is subject to criminal prosecution or immediate induction for failure to exercise any duty under them.⁷¹ The new law imposes a 2-year military service liability upon all men between the ages of 18½ and 26 which attaches at age 18½ and applies to every male citizen and alien who has remained in the United States 1 year or more.⁷² Whether or not one actually serves is determined

⁶⁵ §§ 12(a), (c), 1967 U.S. CODE CONG. & AD. NEWS 1348.

⁶⁶ 5 U.S.C. § 1002 (1964).

⁶⁷ 32 C.F.R. § 1641.1 (1967).

⁶⁸ *Id.* §§ 1642.4, 1642.13, 1631.7.

⁶⁹ Military Selective Service Act of 1967, § 12, 1967 U.S. CODE CONG. & AD. NEWS 1348.

⁷⁰ The theory of the draft law is that every man owes his Government the duty to help defend it merely because he is living in this country. Therefore, exemptions and deferments are not a matter of right but of governmental grace. A man who is wronged by the classification process receives only limited judicial review because he never had a legal right not to serve. See, e.g., *Clark v. United States*, 236 F.2d 13, 23 (9th Cir.), *cert. denied*, 352 U.S. 882 (1956); *Richter v. United States*, 181 F.2d 591 (9th Cir.), *cert. denied*, 340 U.S. 892 (1952); *Self v. United States*, 150 F.2d 745 (4th Cir. 1945).

⁷¹ 32 C.F.R. §§ 1641.1-.2, 1642.4, 1642.13 (1967).

⁷² The liability lasts until age 35 for those who have been deferred and for those in medical or allied specialist categories. Exec. Order No. 11,360, 32 Fed. Reg. 9789 (1967). However, probability of induction for this class decreases after age 26. See 32 C.F.R. § 1631.7 (1967).

by the process of Selective Service in which every person who registers is classified and selected on the basis of his classification.⁷³ The basic statutory duty is to register within 5 days of attaining the age of 18 at any one of the 4,080 local boards of the Selective Service System.⁷⁴ Regardless of where he registers or later moves, the board for the area where the registrant resided at age 18 retains continuing jurisdiction over him. Failure to give truthful statements on the registration form and failure to keep one's local board advised of any change in mailing address are violations of the regulations which can result in a declaration of delinquency,⁷⁵ and automatically place the registrant on the list of men next to be inducted.⁷⁶ Within 10 days after registration, a young man receives his registration certificate with his permanent Selective Service number. The law places a duty on every person required to register to have an unaltered registration certificate in his personal possession.⁷⁷

Classification is the basic phase of the Selective Service process. Shortly after receiving his registration card, the registrant receives a classification questionnaire which must be completed and returned to his local board within 10 days from the date it was mailed to him.⁷⁸ On this form or attached to it he must present all written information which he believes necessary to assist the local board in classifying him. Any affidavits or depositions relevant to the classification should be attached to the questionnaire. Registrants are selected for induction, deferment, or exemption from military service on the basis of the information in the classification questionnaire. Employers and dependents have the right to file a written request with the local board for a registrant's deferment from ser-

⁷³ See text accompanying notes 98-141 *infra*.

⁷⁴ 50 U.S.C. § 453 (App. 1964).

⁷⁵ 32 C.F.R. § 1642.4 (1967).

⁷⁶ 32 C.F.R. § 1631.7, *as amended*, Exec. Order No. 11,360, 32 Fed. Reg. 9793-94 (1967).

⁷⁷ 32 C.F.R. § 1617.1 (1966). The regulation requires the certificate to be in ones "personal possession;" however, Selective Service Form No. 2 (registration certificate) states "on his person." Since a card could be in one's *personal possession* without being on one's person, the law is unclear. To subject a person to arrest for mere failure to have his draft card on his person seems far beyond the intent and purpose of the law. However, while the regulation remains unclear, it remains available as a potent device in the hands of police to harass nonconformists upon the pretext of insuring that they have draft cards on their persons and jailing them if they do not. See, *e.g.*, Cleveland Press, March 31, 1967, § A, at 19, col. 3.

⁷⁸ If the registrant intends to ask for a conscientious objector classification, he must request a Special Form For Conscientious Objectors (SSS Form 150) requiring detailed information on his background and beliefs.

vice.⁷⁹ The questionnaire and any other written information goes into the registrant's folder and is referred by the local board clerk to the board members for classification. The board members study the facts in the folder in relation to the current classification regulations and any national guidelines recommended by the President.⁸⁰ However, under the deliberate decentralization policy of the local board system,⁸¹ board members often do not follow the regulations and recommendations of the President.⁸² Thus, a registrant who is deferred from service by one local board for hardship to his dependents or occupation in a critical industry might find himself inducted under identical circumstances by a different local board.⁸³ This is accepted policy by the System under the theory that "no two cases are exactly alike"⁸⁴ and that the right to a personal appearance and appeal is adequate protection against injustice. Each registrant is placed by the board into one of 18 classes⁸⁵ arranged in order from the class of highest probability of selection for induction (I-A), through deferred and exempt classes, to that of lowest probability of induction (V-A). Normally, within 2 months of registration, the board notifies the registrant of his classification on a form which tells him of the steps he can take if he feels he has been improperly classified. These steps include request for a personal appearance

⁷⁹ 32 C.F.R. § 1621.12 (1967).

⁸⁰ The lack of national guidelines was one of the strongest criticisms of the Selective Service System. ADVISORY COMMISSION REPORT 35. The new law establishes clear standards for all undergraduate students and directs the National Security Council to coordinate local advisory committees on critical occupations and skills to be deferred. The President is directed to recommend national criteria to be administered uniformly throughout the nation for deferment of graduate students and those training in critical skills. § 6(h), 1967 U.S. CODE CONG. & AD. NEWS 1345-47.

⁸¹ See L.B. HERSHEY, OUTLINE OF HISTORICAL BACKGROUND OF SELECTIVE SERVICE AND CHRONOLOGY 12 (rev. ed. 1965).

⁸² This was true under the former regulations and will undoubtedly be true under the new. Criteria such as "critical skills" vary by necessity from area to area depending on the type of industry and skills in demand. Local boards are also disposed toward liberal application of deferment standards when the number of I-A registrants on their lists is high.

⁸³ See Johnson, *supra* note 39, at 63, reporting an incident of two college graduates of the same age who were working within identical positions for the Department of Commerce in Washington and who applied for occupational deferments to their local boards. One received a deferment and the other did not. Each board made its decisions on its own terms, in its own local context, while coming to opposite conclusions.

⁸⁴ *Hearings on S. 1432 Before the Senate Comm. on Armed Services*, 90th Cong., 1st Sess. 614 (1967). The statutory language "that no person within any such category shall be deferred except upon the basis of his individual status" is a codification of the theory. § 6(h)(2), 1967 U.S. CODE CONG. & AD. NEWS 1346.

⁸⁵ See text accompanying notes 98-141 *infra*.

before the local board or filing notice of appeal within 30 days. Either step, or both, may be taken. All men who are not deferred or exempted by classification are deemed available for military service (I-A). This does not mean they will be inducted, for the local board must send them to an Armed Forces physical examination center for a preinduction physical to determine whether they meet the physical, mental, and moral standards of the Armed Forces. This normally takes place between 6 months to a year after registration,⁸⁶ and is required of those classified as conscientious objectors,⁸⁷ as well as those available for military service.⁸⁸ This is a significant step in the classification and selection process because a consistent 40 percent of those otherwise available for service are deferred for failing to meet physical, mental, or administrative standards.⁸⁹ Those who fail to meet the standards are reclassified into a deferred group.⁹⁰ Failure to report for a preinduction physical can result in a declaration of delinquency and an order to report for immediate induction.⁹¹ Following the preinduction physical, a man who has met the Armed Forces standards is mailed a statement of acceptability by the local board. The number of men now remaining in the local board's class of those available for military service determines how many shall be called for induction. The quota for each state is allocated pro rata among the local boards depending on how many I-A's the board has.⁹² The new authority and directive to

⁸⁶ When the Secretary of Defense begins calling the 19- to 20-year-old age group, physicals will probably be taken at a period closer to registration. See note 3 *supra*.

⁸⁷ Conscientious objectors are selected for induction along with other registrants and ordered either to noncombatant military service or civilian work in the national health, safety, or interest. See text accompanying notes 107-10 *infra*.

⁸⁸ Any registrant may be ordered for a preinduction physical. For example, in 1966 many registrants with student deferments were so ordered. This does not signify imminent induction, but merely advance planning by the Department of Defense. See 32 C.F.R. § 1628.11(c) (1967).

⁸⁹ Over 700,000 were rejected as below standard in 1966. Fifty-five percent of those rejected failed for physical reasons, 42 percent failed the AFQT (mental test), and 3 percent failed the moral qualifications. The latter include homosexuality, criminal record, subversive record, and present civil restraint. See *Hearings on S. 1432 Before Senate Comm. on Armed Services*, 90th Cong., 1st Sess. 631-35 (1967), where the Armed Forces regulations on moral standards are printed. See also *Hearings on the Manpower Implications of Selective Service Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 16 (1967), for the Director of Selective Service's concern over inability to stop registrants from intentionally failing the mental test.

⁹⁰ These individuals are reclassified I-Y (deferred from service except in time of national emergency), or IV-F (exempted from service even in time of national emergency).

⁹¹ 32 C.F.R. § 1642.13 (1967).

⁹² For example, if the total available registrants in a State were 10 percent of those

induct by age group, with youngest first, means that the man classified I-A after his preinduction physical will either be ordered to report for induction before he is age 20 or be free from liability if not inducted by then.⁹³ His period of jeopardy will last for 1 year and then his uncertainty will be ended, barring a national emergency. With the present high calls for manpower, most I-A's are being selected for induction as soon as they pass their physicals.⁹⁴ Under the new regulations, when the State Director of Selective Service places a call with the local draft board for a number of men in an age group, the relative order of those selected within the age group will be determined by birth date in order from the oldest to the youngest. Upon selection, a registrant is mailed a notice to report for induction, but never to report less than 21 days from the date of mailing of his notice of acceptability.⁹⁵ He must report for induction on the designated day, submit to the induction process normally lasting one-half of a day, and if found qualified, is inducted immediately into the Armed Forces by a short swearing-in ceremony. A registrant who does not intend to serve and who has exhausted his administrative appeals remedies within the Selective Service System⁹⁶ must wait until this point, refuse to submit to the induction ceremony and be arrested and prosecuted under section 12 of the Act before he can assert his legal arguments.⁹⁷

B. Classification

The theory of the common law is that for every wrong there is a remedy. United States courts have held that compulsory military

available in the nation as a whole, the State's quota would be 10 percent of the manpower "call." If the local board reported 5 percent of the total available pool in the State, then its quota would be 5 percent of the State's quota. See note 188 *infra* and accompanying text, explaining how States which process papers more slowly have smaller quotas of men.

⁹³ Men will still be called up to age 26 under the oldest-first system until the youngest-first plan is implemented in about January 1969. 20 *Questions About Draft Answered*, U.S. NEWS & WORLD REP., July 10, 1967, at 36.

⁹⁴ Even without the new regulations having been implemented, local boards in the Cleveland, Ohio area are presently ordering registrants for preinduction physicals at 18 years 11 months, and ordering those who pass for induction as soon as possible, generally at age 19. Interview with Col. Edward Toth, Ohio State Selective Service Liaison Officer, in Cleveland, Ohio, Sept. 29, 1967. The date of induction cannot be less than 21 days from the date of the board's mailing a statement of physical acceptability; however, any delinquent may be ordered for induction immediately, regardless of whether he has received a statement of acceptability or even taken a physical. 32 C.F.R. 1631.7 (1967).

⁹⁵ 32 C.F.R. § 1631.7 (1967).

⁹⁶ See text accompanying notes 152-57 *infra*.

⁹⁷ § 8(c), 1967 U.S. CODE CONG. & AD. NEWS 1348.

service is not a wrong in itself, resulting in restriction of the remedy of judicial review of the classification and induction process.⁹⁸ However, the draft law does recognize that military service is more of a hardship to some men than others, and has accordingly established an elaborate system of exemptions and deferments from military service. To keep from being selected for induction, a man may obtain classification within an exempt or deferred class by presenting evidence to the local board that he should fall within a certain class. This may be done either in the initial classification questionnaire or in a request for reclassification at any time before a registrant has been ordered to report for induction.⁹⁹ A registrant's classification may be reopened at any time upon his request, the request of any of his dependents, his employer, or upon the motion of the local board.¹⁰⁰ The essence of classification is individual status¹⁰¹ and not membership in a group. This is the source of local board discretion and the reason that the System does not expect local boards to act alike. The existing classification process starts with the assumption that each registrant will be considered available for military service until his eligibility for deferment or exemption is clearly established.¹⁰² Thus, every man is classified I-A and available for induction until he is classified in one of 18 exempt or deferred classes. It is important to remember that a classification is never permanent, but may change with an alteration in an individual's status. Every registrant is under a continuing duty to keep his local board informed of changes in his status.¹⁰³ Failure to do so may result in a declaration of delinquency and an order to report for immediate induction.¹⁰⁴

There are five general classes of deferments and exemptions ranging from Class I with the highest probability for induction, to Class V with the lowest probability.

Conscientious objectors exempted from combatant military ser-

⁹⁸ *Arver v. United States*, 245 U.S. 366 (1918); see *United States ex rel. Goodman v. Hearn*, 153 F.2d 186 (5th Cir.), *cert. denied*, 329 U.S. 667 (1946); cf. *United States ex rel. Woodward v. Deahl*, 151 F.2d 413 (8th Cir. 1945). See also note 70 *supra*.

⁹⁹ 32 C.F.R. § 1625.2 (1967).

¹⁰⁰ *Id.* Reopening of a classification is permissive and a request may be denied. However, denial of a request for reclassification is treated as a classification subject to appeal to the State appeal board.

¹⁰¹ § 6(h)(2), 1967 U.S. CODE CONG. & AD. NEWS 1346.

¹⁰² 32 C.F.R. § 1622.1(c) (1967).

¹⁰³ *Id.* § 1641.7.

¹⁰⁴ *Id.* § 1642.13.

vice are placed in Class I-A-O.¹⁰⁵ This is not really a deferred class since its members are subject to the same physical, mental, and moral standards of I-A's and are called along with I-A's. Instead of ordinary military duty, however, they are ordered to units which train for the quartermaster corps, medical corps, or as chaplain's assistants.¹⁰⁶

Class I-O contains those objectors exempted from all military service.¹⁰⁷ These registrants are liable to be called for 2 years of alternate civilian work in the national interest, which is usually hospital or social welfare work.¹⁰⁸ I-O's may be declared delinquent for failure to report for an Armed Forces physical,¹⁰⁹ and may be prosecuted under the Act for failure to submit to induction.¹¹⁰ Those I-O's who are drafted for civilian work are placed in Class I-W.¹¹¹

Conscientious objectors are placed in both Class I-A-O and Class I-O on the basis of information supplied to the local draft board on a special Form 150 which must be requested from the board. The general requirement for this classification is conscientious opposition to participation in war in any form (I-O) or to combatant service in war (I-A-O) by reason of religious training and belief. Sincerity of belief, the criterion used by draft boards in granting the classifications, is by its nature extremely difficult to judge. The two factors most often relied upon by the boards are the length of time the registrant has held his pacifist views and the extent to which he has made these views public.¹¹² Under the former regulations, appeals from local board denials of conscientious objector classifica-

¹⁰⁵ *Id.* § 1622.11.

¹⁰⁶ These are the traditional noncombatant military service categories.

¹⁰⁷ 32 C.F.R. § 1622.14 (1967).

¹⁰⁸ *See id.* § 1660.1.

¹⁰⁹ *Id.* §§ 1628.16, 1642.4.

¹¹⁰ This is a problem classification because in many cases the local board may allow a I-O classification where the registrant insists that he is entitled to a ministerial exemption (IV-O). In most instances, a Jehovah's Witness will reject a I-O classification and risk imprisonment if he is not accorded classification as a minister. This leads to considerable litigation under the Act. *See, e.g.,* United States v. Osborn, 319 F.2d 915 (4th Cir. 1963); United States v. Willard, 312 F.2d 605 (6th Cir. 1962), *cert. denied*, 372 U.S. 960 (1963). The Black Muslim religion is currently presenting similar problems. *See* Muhammed Ali v. Connally, 266 F. Supp. 345 (S.D. Tex. 1967).

¹¹¹ 32 C.F.R. §§ 1622.16, 1660.20, 1660.21, 1660.31 (1967).

¹¹² Summary of Interview by George Wilson, *University of California Law Review*, with Berkeley, California draft board official, Aug. 15, 1966, on file with the *University of California Law Review*.

tion were referred to the Justice Department for FBI investigation; however, this procedure has been eliminated under the new Act.¹¹³

Class I-C contains registrants in the Armed Forces, including men in the Environmental Science Services Administration, the Public Health Service, and the four service academies.¹¹⁴

Class I-D contains registrants "satisfactorily serving" in National Guard units, ROTC programs, Ready Reserve units, Standby Reserve, and Retired Reserve.¹¹⁵ A registrant who is I-A may enlist in a Reserve program at any time until he is ordered to report for induction. However, if the Governor of a State has proclaimed that the strength of the National Guard cannot be maintained by ordinary enlistment, or the President has determined that the Reserve strength cannot be maintained by ordinary enlistment, a registrant below the age of 26 who has been issued orders to report for induction may enlist or accept appointment in the Guard or Reserve up until his scheduled date of induction and obtain a I-D deferment from active duty.¹¹⁶

High school students between the ages of 18 and 20, and college students who are ordered to report for induction are classified I-S.¹¹⁷ Under this classification, a student may be deferred until the end of the academic year; however, the only college students who would be ordered to report for induction are those who have dropped out and subsequently returned to college.

The I-Y classification includes one of the largest groups of deferred men.¹¹⁸ These are registrants not presently qualified for military service because of physical, mental, or moral deficiencies, but who would be called in a national emergency.¹¹⁹ Fifty-five percent of this group is deferred for minor physical defects. Forty-two percent fail to achieve a passing mark of 31 percent on the Armed Forces Qualification Test.¹²⁰ Three percent are deferred for moral

¹¹³ 32 Fed. Reg. 9792 (1967), *rescinding* 32 C.F.R. § 1626.25.

¹¹⁴ 32 C.F.R. § 1622.12 (1967).

¹¹⁵ *Id.* § 1622.13.

¹¹⁶ 32 Fed. Reg. 9789 (1967). At present the Reserve and National Guard waiting lists are so long that there would be no likelihood of enlistment after receiving orders for induction. See *TIME*, Oct. 20, 1967, at 24. The change is probably aimed at the potential need to increase Guard strength in the event of civil disorder.

¹¹⁷ 32 C.F.R. § 1622.15(b), *as amended*, 32 Fed. Reg. 9790 (1967).

¹¹⁸ As of May 31, 1967, 2,416,685 registrants out of a total 34,111,146 were I-Y. *Selective Service News*, July 1967, at 4, col. 2.

¹¹⁹ 32 C.F.R. § 1622.17 (1967).

¹²⁰ See *ADVISORY COMMISSION REPORT* 204-05. The passing mark has recently been lowered.

reasons which include such things as homosexuality, a criminal record, or being under civil restraint.¹²¹

Class II includes registrants whose contribution to civilian activities in the national health, safety, or interest warrants deferring them from military service while such activity continues.

Class II-A contains irreplaceable men employed in essential civilian occupations. The general criteria for these employee deferments vary from board to board because of varying local employment conditions. The practice in urban communities is to retain a committee of citizens from industry who recommend criteria and classification of individuals who apply for II-A deferment.¹²² The newest regulations permit the Director of Selective Service, upon the advice of the National Security Council, to designate needed professional and scientific personnel.¹²³ This seems to be a trend toward some uniform national criteria for II-A deferments. Apprentices in training for critical skills also may obtain deferment in this class if the skills for which they are preparing have been identified as critical by the Director of Selective Service upon the advice of the National Security Council.¹²⁴

Registrants deferred because of irreplaceable employment in the production of agricultural goods for market are classified II-C.¹²⁵ A shortage or surplus of an agricultural commodity may be considered by a draft board in deciding whether an agricultural worker should obtain this classification.

Class II-S contains undergraduate and graduate college students "satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning"¹²⁶ until graduation, attainment of age 24, or termination of their education before obtaining a degree.¹²⁷

Class III-A contains the largest group of deferred registrants —

¹²¹ *Id.*

¹²² Every appeal district has an Advisory Committee on Scientific, Engineering, and Other Specialized Personnel composed of prominent men from business and industry in the area.

¹²³ 32 C.F.R. § 1622.22, *as amended*, Exec. Order No. 11,360, 32 Fed. Reg. 9790 (1967). Until this is done, the general guide remains the list of Critical Occupations and Essential Activities of the United States Department of Labor.

¹²⁴ *Id.*

¹²⁵ 32 C.F.R. § 1622.24 (1967).

¹²⁶ A "similar institution of learning" would probably include junior colleges whose students were classified II-A under the former regulations.

¹²⁷ For a discussion of student classification, see text accompanying notes 49-58 *supra*.

those with dependents.¹²⁸ Two separate criteria which are not mutually exclusive exist to determine the deferment. (1) Any registrant who has a child or children with whom he maintains a bona fide family relationship, and who does not have a medical or allied degree, nor has ever received a II-S deferment is classified III-A.¹²⁹ A registrant who is classified I-A may obtain III-A reclassification any time before the local board has mailed him an order to report for induction if he files with his board a statement of a licensed physician that his wife is pregnant. After an order to report for induction has been mailed, the right to obtain deferment is lost. (2) Evidence that extreme hardship to dependents would result from induction into the Armed Forces also results in III-A classification.¹³⁰ This is one of the most difficult areas for setting uniform standards; therefore, criteria are left largely to local board discretion.¹³¹

All registrants who have completed service and all who are sole surviving sons of a family in which the father, a son, or a daughter was killed in line of duty are placed in a IV-A category.¹³²

Class IV-B contains all elected officials and all judges of the United States, a State, territory, or possession.¹³³ On May 31, 1967, only 71 registrants out of 34 million were in this class primarily because most of these officials have either completed service or are over the age of liability.

Aliens who have been in the United States a total of less than 1 year are categorized IV-C.¹³⁴ All aliens who have been admitted to the United States for permanent residence or have been in the country a total of 1 year or more are liable until age 26, or until 35 if ever deferred, like all other citizens. Alien registrants in a medi-

¹²⁸ 3,836,487 out of a total of 34,111,146 registrants. Selective Service News, July 1967, at 4, col. 2.

¹²⁹ 32 C.F.R. § 1622.30(a), as amended, 32 Fed. Reg. 9791 (1967).

¹³⁰ *Id.* § 1622.30(b); see Selective Service News, July 1967, at 1, col. 4.

¹³¹ See *Hearings on the Extension of the Universal Military Training and Service Act Before the House Comm. on Armed Services*, 90th Cong., 1st Sess. 2635 (1967). The National Advisory Commission's survey of local board members indicates that the most important criteria used in determining "hardship" deferments are: (1) the existence of other people to support dependents, (2) existence of other income to dependents, (3) total amount of income supplied dependents, (4) extent to which registrant can document the conditions of the claimed hardship to dependents. ADVISORY COMMISSION REPORT 117.

¹³² 32 C.F.R. § 1622.40 (1967).

¹³³ *Id.* § 1622.41.

¹³⁴ *Id.* § 1622.42.

cal, dental, or allied specialist category are liable for induction until age 35.¹³⁵

Class IV-D consists of personnel exempted because they are duly ordained ministers or students satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school.¹³⁶ Approximately 100,000 of 34 million registrants held this classification as of May 31, 1967. Full-time secular employment precludes a ministerial exemption.¹³⁷

Class IV-F contains one of the largest groups of deferred registrants.¹³⁸ These are registrants found not qualified for any service for failure to meet applicable physical, mental, or moral standards.¹³⁹

V-A is the largest exempted class.¹⁴⁰ It includes all who are over the age of liability for military service — age 26 if the registrant has never been deferred and age 35 if he was ever deferred.

C. *Reclassification*

A registrant's status usually changes several times during the 8- to 17-year period of liability. Therefore, the procedures for reopening of classifications affects a significant number of registrants.

Every registrant is under a continuing duty to inform his local board of any change in his occupational, family, or military status, his physical condition, his address, and receipt of any professional degree in a medical or allied category, within 10 days after such change occurs.¹⁴¹ The local board may then reopen a classification on its own motion or upon the motion of the registrant, a dependent, or an employer.¹⁴² Reopening a classification is considered a reclassification and is appealable even if the local board retains

¹³⁵ 32 C.F.R. § 1622.42, *as amended*, Exec. Order No. 11,360, 32 Fed. Reg. 9792 (1967).

¹³⁶ 32 C.F.R. § 1622.43 (1967). This exemption has recently been a subject of criticism for favoring religion and it will probably be challenged as respecting an establishment of religion on the ground that constitutional interpretation has changed since this argument was rejected in *Arver v. United States*, 245 U.S. 366 (1918).

¹³⁷ See *United States v. Capehart*, 237 F.2d 388 (4th Cir. 1956), *cert. denied*, 352 U.S. 971 (1957).

¹³⁸ As of May 31, 1967, it contained 2,457,776 out of a total 34,111,146 registrants. *Selective Service News*, July 1967, at 4, col. 2.

¹³⁹ 32 C.F.R. § 1622.44 (1967).

¹⁴⁰ As of May 31, 1967, it contained 15,081,025 out of a total 34,111,146 registrants. *Selective Service News*, July 1967, at 4, col. 2.

¹⁴¹ 32 C.F.R. § 1641.7 (1967).

¹⁴² *Id.* § 1625.2.

the same classification.¹⁴³ A board may deny a request for reopening a classification on the ground that new information received would not justify a change in classification.¹⁴⁴ Thus, by refusing to reopen a classification, the board seems able to avoid an appeal and judicial review on whether the classification had any basis in fact. Some courts have upheld this denial to reopen as within the discretion of the board.¹⁴⁵ However, others have looked behind the local board's use of the term "denial of a reopening" to insure that the registrant was afforded all the procedural safeguards of a reclassification.¹⁴⁶ It seems logical that the denial of a reopening should be an appealable order since the board must evaluate and rule on the registrant's request in order to deny a reopening. A further problem here is that most registrants are unlikely to appeal from the denial of a request to reopen a classification. The average registrant, without legal counsel or advice, is likely to take the board's notice as final because of his natural respect for what appears to be an official order. The appointment of advisors to registrants is provided for in the regulations;¹⁴⁷ however, the regulation is permissive rather than mandatory and has been rarely used to date.¹⁴⁸ It is hoped that the new regulations making government appeal agents available to local boards will help more registrants to learn of their rights.¹⁴⁹ Unfortunately this will probably not have the desired effect because many government appeal agents have tended to identify with the local board.¹⁵⁰

D. Appeals

The registrant is entitled to both a personal appearance before the local board and an appeal to the State appeal board, the appeal

¹⁴³ *Id.* § 1625.11.

¹⁴⁴ *Id.* § 1625.4.

¹⁴⁵ See, e.g., *Smith v. United States*, 157 F.2d 176 (4th Cir.), *cert. denied*, 329 U.S. 776 (1946); *United States v. Messerman*, 128 F. Supp. 759 (M.D. Pa. 1955).

¹⁴⁶ See, e.g., *Olvera v. United States*, 223 F.2d 880 (5th Cir. 1955); *United States v. Ransom*, 223 F.2d 15 (7th Cir. 1955); *United States v. Scott*, 137 F. Supp. 449 (E.D. Wis. 1956).

¹⁴⁷ 32 C.F.R. §§ 1604.41, 1604.71 (1967).

¹⁴⁸ The National Advisory Commission concluded that the low incidence of appeals in some States indicates a failure to inform registrants of appeal rights. ADVISORY COMMISSION REPORT 107 (1967).

¹⁴⁹ 32 C.F.R. § 1604.71 (1967), *as amended*, Exec. Order No. 11,360, 32 Fed. Reg. 9788 (1967). See PRESIDENTIAL MESSAGE TO CONGRESS ON THE DRAFT, H.R. DOC. NO. 75, 90th Cong., 1st Sess. 11 (1967) where the President stated he would instruct that advisors and appeals agents be made readily available to all registrants.

¹⁵⁰ See Comment, *Fairness and Due Process Under the Selective Service System*, 114 U. PA. L. REV. 1014, 1030 (1966).

right not being preconditioned on the making of a personal appearance.¹⁵¹ At a personal appearance, the registrant may present to local board members, either orally or in writing, reasons why he should be granted a deferment or exemption.¹⁵² The board can permit other persons to appear on behalf of a registrant, but under no condition is he entitled to be represented by an attorney.¹⁵³ The board need not make a record of what is said at a personal appearance,¹⁵⁴ nor is the board required to give an explanation for the actions it takes.¹⁵⁵ If the local board persists in denying the deferment or exemption following the personal appearance, the registrant may then file notice of appeal with the local board within 30 days as a matter of right. When the registrant's current place of residence or employment is outside the area over which his local board has jurisdiction, the appeal will be forwarded to the appeal board having jurisdiction over such place.¹⁵⁶

Upon filing a notice of appeal, the local board assembles the registrant's file and forwards it for review to the appropriate State appeal board. The appeal board considers only the information in the file, and the registrant has no right to appear. Results of the appeal are forwarded to the registrant by the local board. If the appeal is denied, there is no further relief in the Selective Service System unless one or more members of the appeal board dissent¹⁵⁷ or the State director believes that a further appeal is in the national interest or is necessary to avoid injustice.¹⁵⁸ In these events the registrant is entitled to appeal to the President's National Selective

¹⁵¹ 32 C.F.R. § 1626.2 (1967).

¹⁵² *Id.* § 1624.2(b).

¹⁵³ *Id.* § 1624.1(b); see *United States v. Sturgis*, 342 F.2d 328 (3d Cir.), *cert. denied*, 382 U.S. 879 (1965), giving as the reason for denial of counsel "the non-judicial, non-criminal" nature of the proceedings. This is a weak rationale in light of recent cases like *In re Gault*, 387 U.S. 1 (1967).

¹⁵⁴ See *Ayers v. United States*, 240 F.2d 802, 809 (9th Cir. 1956), *cert. denied*, 352 U.S. 1016 (1957). The general practice seems to be for the local board clerk to take notes of the personal appearance and type a summary for the registrant's folder. Summary of Interview by George Wilson, *University of California Law Review*, with Berkeley, California draft board official, Sept. 12, 1966, on file with the *University of California Law Review*.

¹⁵⁵ *Reap v. Shambora*, 241 F.2d 803, 808 (5th Cir. 1957); *United States v. Greene*, 220 F.2d 792, 794 (7th Cir. 1955).

¹⁵⁶ See 32 C.F.R. §§ 1626.11, 1626.13(b) (1967). There is no similar right to have a personal appearance transferred to the local board where a registrant currently resides or works.

¹⁵⁷ *Id.* § 1627.3 (1967).

¹⁵⁸ *Id.* § 1627.1(a).

Service Appeal Board.¹⁵⁹ If this appeal fails, the registrant will then be subject to induction unless he fails to meet established physical and mental standards, or unless new conditions arise before he receives his induction order.¹⁶⁰ Many registrants take advantage of the appeals process to gain added time for a change in condition¹⁶¹ or for arrangements to serve in a branch of the armed forces other than the Army. Once a registrant receives his order to report for induction he is prohibited from appealing. The appeals process can also be used by a person who is reclassified I-A while age 25 and wishes to delay being ordered for induction until age 26 when he will be shifted into a lower priority.¹⁶²

E. *Judicial Review*

The Selective Service Act declares that rulings of the appeal boards on classification of registrants shall be final unless an authorized appeal is undertaken in accordance with presidentially prescribed regulations;¹⁶³ that no judicial review shall be made of the classification of a registrant except as a defense to a criminal prosecution for failing to submit to induction;¹⁶⁴ and such review shall be limited to the question of jurisdiction of a board only when there is no basis in fact for the registrant's classification.¹⁶⁵ This is a much narrower scope of review than that accorded other federal administrative orders under the Administrative Procedure Act.¹⁶⁶ Under the permitted scope of review a registrant contesting his classification must show more than mere error in the pro-

¹⁵⁹ *Id.* §§ 1627.1, 1627.3.

¹⁶⁰ Section 1625.2 prohibits reopening of a classification after having received the order to report for induction.

¹⁶¹ This entitles the registrant to reopen his classification. 32 C.F.R. §§ 1625.1, 1641.7 (1967). A reopening cancels any order to report for induction. *Id.* § 1625.14.

¹⁶² Summary of Interview by George Wilson, *University of California Law Review*, with Northern California Appeal Board official, Aug. 27, 1966, on file with the *University of California Law Review*. The alternative service sought is usually the National Guard or Reserves; however, with the current long waiting lists, many registrants would need more time than the 90 days which could be gained by stringing out the appeal process. The House-Senate Conference Report states that any registrant who prolongs *litigation* of his classification beyond age 26 shall remain liable for induction. However, since litigation is expressly precluded by the Act until the point when a registrant refuses to be inducted, prolonging the administrative appeals process beyond age 26 cannot have the same effect.

¹⁶³ § 8(c), 1967 U.S. CODE CONG. & AD. NEWS 1348.

¹⁶⁴ See note 64 *supra* on the question of whether habeas corpus is prohibited.

¹⁶⁵ § 8(c), 1967 U.S. CODE CONG. & AD. NEWS 1348. This is merely a codification of the judicial rule stated in *Witmer v. United States*, 348 U.S. 375 (1955).

¹⁶⁶ 5 U.S.C. § 1031-42 (1964). This is the "substantial evidence" test.

ceedings. Deprivation of basic procedural safeguards, an assertion of power to act beyond the authority granted the agency, or action without evidence to support an order are examples of the showing which is necessary to obtain judicial review.¹⁶⁷ Controversy has existed over the point at which judicial review may be obtained, and debate will undoubtedly continue under Congress' newest attempt to preclude any judicial review until the point at which a registrant classified I-A has been ordered to report for induction and refuses to submit.¹⁶⁸ This rule had previously been followed under the doctrine of exhaustion of administrative remedies.¹⁶⁹ However, the Second Circuit Court of Appeals has found no difficulty in avoiding it by holding that when a draft board acts in excess of its jurisdiction under the regulations a court may intervene at any time to rectify the situation.¹⁷⁰ The same court also held that the policy of nonintervention in Selective Service affairs must yield to a registrant's claim that a draft board used its reclassification power to suppress free speech.¹⁷¹ The legislative history of the recent amendment indicates a clear intent to prohibit cases of injunctions against draft board classifications.¹⁷² The present Director of Selective Service seems to be relying on that intent in recommending that draft boards reclassify antiwar demonstrators for immediate induction,¹⁷³ the very action which the Second Circuit held to be outside the board's jurisdiction. Legislative intent certainly cannot limit constitutionally protected free speech; thus, the Second Circuit's ruling would seem to remain intact, and any draft board which attempts to reclassify a registrant for demonstration of his political views would seem subject to an injunction. The reason that a registrant must wait for judicial review until ordered to report for induction has some validity in that he may be reclassified

¹⁶⁷ *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 311-12 (1946).

¹⁶⁸ See H.R. REP. NO. 267, 90th Cong., 1st Sess. 31 (1967), citing its rationale as "continued disregard of this principle of the law by various courts . . ."

¹⁶⁹ *E.g.*, *Coch v. Zuiebach*, 194 F. Supp. 651 (S.D. Cal. 1961) (holding that an injunction will not lie to restrain a board from denying an exemption).

¹⁷⁰ *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817 (2d Cir. 1967); *cf.* *Townsend v. Zimmerman*, 237 F.2d 376 (6th Cir. 1956) (injunction against board for exceeding authority under regulations); *Schwartz v. Strauss*, 206 F.2d 767 (2d Cir. 1953) (injunction against board for flagrant disregard of regulations).

¹⁷¹ *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817 (2d Cir. 1967).

¹⁷² H.R. REP. NO. 267, 90th Cong., 1st Sess. 31 (1967).

¹⁷³ Selective Service System, Memorandum to Local Boards, Oct. 26, 1967; see N.Y. Times, Dec. 10, 1967, at 1, col. 6 (city ed.), for a formal statement by the Director of Selective Service joining with the United States Attorney General to partially retract the memorandum.

I-Y or IV-F in the process, or he may never be selected for induction.¹⁷⁴ However, the very fact that registrants with I-A classification face employers who are reluctant or refuse to hire them,¹⁷⁵ as well as the uncertainty of not knowing when they will be ordered for physicals or whether they will be called, demands judicial review immediately upon classification. It is extremely doubtful that Congress can validly give legal effect to its intent to postpone judicial review of a board action in violation of the regulations.

Failure to exhaust administrative remedies, including an appeal within 30 days of classification bars judicial review of a local board's classification.¹⁷⁶ However, an order to report for induction is invalid when issued before a registrant has had reasonable opportunity to pursue all available administrative remedies.¹⁷⁷

III. INEQUITIES OF SELECTIVE SERVICE

In a legal system which often appears preoccupied with personal liberty and due process, 27 years of conscription seems anomalous. The recent controversy over inequities in the draft law¹⁷⁸ is a tribute to our citizenry. However, the lack of substantial change is a tribute only to the military's satisfaction with the old law and the power of the military over Congress. After major studies of inequities in the Selective Service System and evidence of alternatives to the draft,¹⁷⁹ the primary emphasis in the law is still efficient production of military manpower. General Lewis B. Hershey, Director of Selective Service, identified the relationship between fairness and efficiency in the draft when he told the Senate Armed Services Committee: "It doesn't make any difference how fair it is or how national it is or how anything else it is if you don't get the men . . . and this method we use has gotten men."¹⁸⁰ The implication is plain that

¹⁷⁴ This will be especially true when the Secretary of Defense begins placing calls by age groups of youngest first. See note 3 *supra*.

¹⁷⁵ Testimony of Secretary of Labor Willard Wirtz in *Hearings Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 61 (1967).

¹⁷⁶ *Dory v. United States*, 218 F.2d 93 (8th Cir. 1955); *Olinger v. Partridge*, 196 F.2d 986 (9th Cir. 1952); see *Pickens v. Cox*, 282 F.2d 784 (10th Cir. 1960); *United States v. Kurki*, 255 F. Supp. 161 (E.D. Wis. 1966).

¹⁷⁷ *Chih Chung Tung v. United States*, 142 F.2d 919 (1st Cir. 1944) (order to report for induction is void while appeal is pending).

¹⁷⁸ See notes 39 & 40 *supra*.

¹⁷⁹ See *Hearings on the Extensions of the Universal Military Training and Service Act Before the House Comm. on Armed Services*, 90th Cong., 1st Sess. 2105-48 (1967).

¹⁸⁰ *Hearings on S. 1432 Before the Senate Comm. on Armed Services*, 90th Cong., 1st Sess. 618 (1967).

manpower comes first and fairness second. As a result, Congress eliminated a highly regarded Department of Justice investigation procedure for conscientious objector appeals,¹⁸¹ limited judicial review, retained the local board system with its widely varying applications of deferment criteria, extended the President's conscription power to allow men to be drafted into the Reserve and National Guard,¹⁸² and suspended ceilings on armed forces numerical strength.

The following section examines inequities within the Selective Service System which will exist another 4 years unless Congress amends the Act.¹⁸³ The final section examines the constitutional basis of the Selective Service Act.

A. *Inequities Within the System*

One of the most exhaustive field studies on the Selective Service System concludes that no meaningful reform of the draft can be made if Congress does not abolish the local board system.¹⁸⁴ The first recommendation of the National Advisory Commission's report on the Selective Service System was to consolidate and centralize Selective Service in order to make the controlling concept of the system the "rule of law, rather than a policy of discretion."¹⁸⁵ However, Congress elected to follow the recommendation of General Hershey and others who believe that the System's strength is in its decentralization,¹⁸⁶ and therefore retained the local board apparatus. As a result there will continue to be varying application of classification criteria from board to board and State to State.¹⁸⁷

¹⁸¹ 32 C.F.R. § 1626.25, rescinded by Exec. Order No. 11,360, 32 Fed. Reg. 9792 (1967).

¹⁸² This would be necessary only in event they were called to active duty. At present the Reserves and National Guard are filled to capacity because their members are deferred from the draft.

¹⁸³ The Act will also remain unchanged unless the President issues Executive Orders which alter existing regulations.

¹⁸⁴ Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123, 2177 (1966).

¹⁸⁵ ADVISORY COMMISSION REPORT 4.

¹⁸⁶ General Hershey, Director of Selective Service, believes so strongly in local autonomy that he has claimed he cannot tell the local boards to do anything. 20 *Questions About Draft Answered*, U.S. NEWS & WORLD REP., Jan. 10, 1966, at 43. However, General Hershey could force the boards to follow his directives because local boards are subject to "such rules and regulations as the President may prescribe." 50 U.S.C. § 460(b)(3) (1964), and General Hershey issues the rules and regulations as the President's delegate.

¹⁸⁷ The National Advisory Commission made a special study of variability in local board performance and found that as a result of the emphasis on local autonomy, ad-

Varying standards of efficiency from board to board lead to one of the basic inequities of the local board System — geographic discrimination and lower likelihood of selection in urban areas. A local board's monthly quota is determined by the number of qualified I-A's in the community. Thus, if a board is slower than others in processing the papers of its young men, it will have a smaller pool of I-A's and a smaller quota of men to be called.¹⁸⁸ In many urban areas large numbers of the "available" men volunteer, thereby helping the board to meet its quota and giving other registrants a better chance to escape the draft, while nonurban boards with fewer volunteers must call whole categories of men who would not be reached elsewhere.¹⁸⁹

The need for speed and efficiency in the System is given as the reason to deny procedural safeguards such as attorneys at the local board appearances and written records stating reasons for denying a deferment.¹⁹⁰ This would not be so serious were it not for the limited judicial review of a board's actions. By the time a registrant gets into court he finds that the question of the board's action is limited to whether it had any basis in fact,¹⁹¹ or he may also find that he has no right to obtain judicial review because he failed to exhaust his administrative remedies.¹⁹² The courts are likely to find limited review of local and appeal board proceedings to be a growing area of challenge because of changing attitudes toward the fairness required in nonjudicial proceedings.¹⁹³ When it is recognized that they may result in a man being deprived of life, liberty,

vice from some State headquarters on deferments was often contrary to advice from other State headquarters. Within the States, the local boards ignore, modify, or interpret the regulations and directives as they see fit. ADVISORY COMMISSION REPORT 31, 83, 167-73 (1967). Language in the new statute calling for uniform national criteria is belied by Congress' retention of the local board System and limited judicial review of board actions.

¹⁸⁸ For example, in Michigan, 17,210 men were inducted during 1966, while in Texas where the draft-age manpower configuration is almost identical to Michigan's and the population is 2.25 million larger, only 15,156 men were inducted. Chapman, *Selective Service and National Needs*, THE REPORTER, June 16, 1966, at 15, 16.

¹⁸⁹ This results from the order in which men within the I-A class are called to fill the board's quota. Volunteers are used to fill the quota, the remainder to be selected from nonvolunteers. See 32 C.F.R. § 1631.7, as amended, Exec. Order No. 11,360, 32 Fed. Reg. 9793-94 (establishing the priority of selection).

¹⁹⁰ See 32 C.F.R. §§ 1624.1(b), 1626.13 (1967).

¹⁹¹ § 8(c), 1967 U.S. CODE CONG. & AD. NEWS 1348.

¹⁹² Many registrants never know of their appeal rights and are probably never informed of them. See ADVISORY COMMISSION REPORT 107 (1967).

¹⁹³ See *In re Gault*, 387 U.S. 1 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967).

or property,¹⁹⁴ there is no reason to overlook the lack of procedural protections.

While the local board system has been the subject of criticism as a source of racial discrimination,¹⁹⁵ the statistics show that Negroes are not underrepresented in the Armed Services.¹⁹⁶ Although racial discrimination does exist in the local board makeup,¹⁹⁷ steps are now being taken to appoint more Negroes to local boards.¹⁹⁸ The more flagrant racial inequity exists in the Reserves where 15.5 percent of whites who see military service enlist as compared to 3 percent of Negroes.¹⁹⁹ The National Advisory Commission recommended exposing Reserve and National Guard enlistees to the draft if they enlist after being classified I-A,²⁰⁰ but this proposal was rejected by Congress.

The most valid charge of inequity in the draft is that it discriminates against the whole male sex.²⁰¹ Since the majority of military jobs are noncombatant,²⁰² and since women now make up a major part of the civilian work force, there is no reason other than tradition, why they should not be drafted.²⁰³ That tradition is being changed by law in the area of employment discrimination²⁰⁴ and many argue that it must be changed in the military.²⁰⁵

The argument for drafting women is based on one of the most necessary inequities in the draft: the high physical and mental stand-

¹⁹⁴ See note 7 *supra*.

¹⁹⁵ It has been disclosed that the head of one local board in New Orleans is an official of the Ku Klux Klan. *Hearings on the Administration and Operation of the Selective Service System Before the House Comm. on Armed Services*, 89th Cong., 2d Sess. 9920 (1966). The NAACP in Mississippi threatened during the summer of 1966 to advise Negroes to resist induction if Negroes were not appointed to local boards. *N.Y. Times*, May 7, 1967, at 42, col. 1. The New Mexico State Senate has adopted a resolution condemning the draft for discriminating against minority groups. *Hearings on the Manpower Implications of Selective Service Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 305 (1967).

¹⁹⁶ ADVISORY COMMISSION REPORT 9 (1967).

¹⁹⁷ *Id.*

¹⁹⁸ See PRESIDENTIAL MESSAGE TO CONGRESS ON THE DRAFT, H.R. DOC. NO. 75, 90th Cong., 1st Sess. 11 (1967).

¹⁹⁹ ADVISORY COMMISSION REPORT 53 (1967).

²⁰⁰ *Id.* at 54.

²⁰¹ Bird, *Let's Draft Women Too*, SATURDAY EVENING POST, June 18, 1966, at 10.

²⁰² The estimates range from 70 to 90 percent. *Hearings on S. 1432 Before the Senate Comm. on Armed Services*, 90th Cong., 1st Sess. 578 (1967).

²⁰³ Plato challenged the tradition to no avail in the fourth century B.C. 1 PLATO, *THE REPUBLIC*, app. bk. III (Modern Library ed. 1944).

²⁰⁴ Civil Rights Act of 1964, 42 U.S.C. § 2000(e)(2).

²⁰⁵ See Mead, *The Case for Drafting Girls*, REDBOOK, Sept. 1966, at 40.

ards of the Armed Services. While the modern Army increasingly emphasizes its technological and supply functions, it still requires the same physical abilities of clerks, cooks, and radar technicians as it does of frontline riflemen. Conversely, it requires the same educational standards of a rifleman as it does of a radio repairman. Recent efforts indicate a trend away from this inefficiency;²⁰⁶ however, the entire System must be streamlined and standards established commensurate with the job to be done before any meaningful savings in wasted manpower can be made.²⁰⁷

One of the most potentially severe restrictions of the draft law is hidden in the regulations. This is the requirement that a registrant obtain a permit if he intends to leave the United States.²⁰⁸ Lack of compliance is widespread because of general ignorance of the requirement. The extent of its enforceability in light of recent cases on the personal right to travel is doubtful²⁰⁹ but still dangerous despite the doubt. Presumably, a registrant whether I-A or III-A, could be declared delinquent and ordered for induction²¹⁰ for traveling to Canada or Mexico without a permit from his board. Although border enforcement is unlikely, the prospect of having draft cards and permits inspected at the border, with the possibility of dire consequences, is not so remote when one views the desire of Congressmen and Selective Service officials for more vigorous enforcement of the law and punishment of draft evaders.²¹¹

²⁰⁶ The Department of Defense initiated "Project 100,000" in 1966. It revised mental and physical standards to admit volunteers into the military who would previously have been disqualified because of educational deficiencies or minor medical ailments. See PRESIDENTIAL MESSAGE TO CONGRESS ON THE DRAFT, *supra* note 198, at 5. The program has reportedly worked well and may lower significantly the number of men who must be drafted. N.Y. Times, Oct. 14, 1967, at 3, col. 1.

²⁰⁷ The wasted manpower in our draft system is more evident than the German system which had 10 subclasses of men available for service. The highest subclass was the equivalent of our I-A class; however, nine other subclasses existed for men with major and minor defects who were still drafted and used in noncombatant capacities. See *Hearings on S. 1432 Before the Senate Comm. on Armed Services*, 90th Cong., 1st Sess. 579 (1967). See also Statement of the National Federation of the Blind, in *Hearings on the Extension of the Universal Military Training and Service Act Before the House Comm. on Armed Services*, 90th Cong., 1st Sess. 2297 (1967) (arguing for the right of the blind to participate in the Armed Forces).

²⁰⁸ 32 C.F.R. § 1621.16 (1967).

²⁰⁹ Cf. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (travel restriction cannot go beyond legitimate purposes of Act).

²¹⁰ 32 C.F.R. § 1642.13 (1967).

²¹¹ See, e.g., *Hearings on S. 1432 Before the Senate Comm. on Armed Services*, 90th Cong., 1st Sess. 15 (1967).

B. *The System Itself*

The most surprising thing about recent criticism of draft inequities is not the concern over fairness *within* the System but the lack of concern over the fairness of the System itself.²¹² In a nation which values personal liberty as highly as the United States, no system of compulsory military service should be readily accepted when there may be valid alternatives. It restricts all those liberties which have been held essential to the orderly pursuit of happiness by free men.²¹³ Military service is the highest duty that a nation can require of a citizen. Therefore, it is natural for the citizens to expect its use only when the highest need exists. Past cases have upheld draft laws on the basis of necessity in the defense of our nation,²¹⁴ however, the implementation of the present law is suspect when draftees are used not for our national defense but for the support of vaguely worded foreign policy goals.²¹⁵ When there is evidence that an alternative to the draft exists,²¹⁶ then its premise of necessity becomes even weaker.

There is no doubt that Congress has the power to draft men for military service to carry on a war²¹⁷ or when national survival is threatened. While this may be so, it is questionable whether our national survival is actually threatened by the Vietnam involvement and whether the draft should be utilized to carry on a conflict that is not a declared war. Although the recent Act was passed on the premise that our national defense or preparation for defense was involved,²¹⁸ the question remains whether the draft may be utilized to provide high manpower calls for Vietnam in light of the President's statement that the war is being fought not for our defense, but for the "defense of freedom in the world."²¹⁹ On the other hand, it may be argued that the freedom of the United States is dependent upon world freedom, and thus a defense of this freedom is

²¹² The inequities in the draft are examined in text accompanying notes 184-211 *supra*.

²¹³ See *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (freedom from bodily restraint, freedom to contract for work and wages, to engage in common occupations of life, to marry and live with one's wife and children, and to freely speak and assemble).

²¹⁴ *United States v. Nugent*, 346 U.S. 1 (1953); *Arver v. United States*, 245 U.S. 366 (1918); *Kneedler v. Lane*, 45 Pa. 238 (1863); see note 22 *supra*.

²¹⁵ See PRESIDENTIAL MESSAGE TO CONGRESS ON THE DRAFT, *supra* note 198, at 4.

²¹⁶ See text accompanying note 222 *infra*.

²¹⁷ *Billings v. Truesdell*, 321 U.S. 542 (1944); *Arver v. United States*, 245 U.S. 366 (1918).

²¹⁸ See *United States v. Lambert*, 123 F.2d 395 (3d Cir. 1941) (upholding peacetime conscription as necessary to preparation for defense).

²¹⁹ PRESIDENTIAL MESSAGE TO CONGRESS ON THE DRAFT, *supra* note 198, at 4.

a defense of the United States. Secretary of State Rusk has stated that the United States has 40 worldwide commitments to military intervention.²²⁰ These statements emphasize that we are no longer justifying conscription as national defense or even preparation for national defense unless world defense is essential to our survival. We are justifying it on the grounds of affirmative foreign policy which has not been clearly defined.

Admittedly, the Executive's foreign policy power is extensive; however, the extent to which it can be used to restrict the personal liberty of millions of men to carry on a "police action" such as in Vietnam demands a constitutional test which it has not yet received.²²¹

A further constitutional weakness of the Selective Service Act is the increasing evidence that an alternative exists in a volunteer military which would be more effective than our present conscripted one.²²² There are many who have testified that the present Selective Service System is wasteful and inefficient.²²³ Personnel practices which discourage reenlistment and salaries which are so low that servicemen's families have been found on welfare relief²²⁴ discourage enlistment, causing one to question whether the present draft is really necessary or whether perhaps the military bureaucracy is overly resistant to change. The constitutionality of a statute which restricts fundamental liberties must depend on the overbalancing need for it. Previous draft laws have been upheld on this rationale.²²⁵ This need must be determined by the legislature on the basis of facts which are constantly changing, and these legislative facts are subject to judicial consideration.²²⁶ The Supreme Court has in the past upheld extreme restrictions on liberty because

²²⁰ *Hearings on S. 1432 Before the Senate Comm. on Armed Services*, 90th Cong., 1st Sess. 143 (1967).

²²¹ *Cf. Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963).

²²² *See Hearings on S. 1432 Before the Senate Comm. on Armed Services*, 90th Cong., 1st Sess. 425 (1967); *Hearings on the Extension of the Universal Military Training and Service Act Before the House Comm. on Armed Services*, 90th Cong., 1st Sess. 2105-47 (1967).

²²³ *See Hearings on S. 1432 Before the Senate Comm. on Armed Services*, 90th Cong., 1st Sess. 507 (1966).

²²⁴ Curtis, *Conscription and Commitment*, PLAYBOY, Feb. 1967, at 89, 167.

²²⁵ *Arver v. United States*, 245 U.S. 366 (1918); *Kneedler v. Lane*, 45 Pa. 238 (1863).

²²⁶ *See Alfgange, The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637 (1966).

of a wartime exigency,²²⁷ and then held later that the same law could be unconstitutional if the exigency no longer existed.²²⁸ The necessity for the law is a factual matter subject to judicial scrutiny when a law limits personal liberties. "[E]ven though the governmental purpose is legitimate, that purpose may not be achieved by means which broadly stifle fundamental personal liberties when the end can be more narrowly achieved."²²⁹ It is submitted that the law's end can be achieved more narrowly and more consistently with personal liberty through a system of volunteer enlistment, thus rendering the military Selective Service Act unconstitutionally broad. Because Congress has rejected attempts to adequately study the necessity for a peacetime draft and alternatives to it,²³⁰ the federal courts themselves should not be precluded from examining the legislative facts upon which compulsory military service exists and determining the necessity for it. It is submitted that the exigencies which existed in 1940²³¹ and 1951²³² are not present today, that the "defense of freedom in the world" is not a sufficient necessity to compel substantial sacrifice of personal liberty, and that there is an alternative system to the draft which renders it an unconstitutionally broad statute.

C. *Recommendation*

The many inequities still existing within the Selective Service System emphasize the necessity for reform before its 4-year existence expires. An independent investigating office should be established to protect against procedural and substantive unfairness in the System. Congress recognized such a need when the House of Representatives proposed a Deputy Director of Selective Service for Public Information to investigate the System and keep the public informed on its operation.²³³ The final bill properly excluded this provision because an investigator, to be effective, must be independ-

²²⁷ *Block v. Hirsh*, 256 U.S. 135 (1921) (District of Columbia rent control law upheld because of wartime exigency).

²²⁸ *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924) (remanded case for determination of legislative facts of exigency).

²²⁹ *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964); *Shelton v. Tucker*, 364 U.S. 479, 488 (1963).

²³⁰ H.R. 422, 90th Cong., 1st Sess. (1967); see ADVISORY COMMISSION REPORT 12 (1967).

²³¹ Act of Sept. 16, 1940, ch. 720, §§ 1-18, 39 Stat. 166.

²³² Universal Military Training and Service Act, 50 U.S.C. § 451 (1951).

²³³ H.R. REP. NO. 267, 90th Cong., 1st Sess. 33 (1967).

ent of the administration he is investigating. Similar needs in the administrative system have occasioned the recommendation for creation of a permanent office to make continuing studies of ways to strengthen administrative fairness and to investigate specific complaints about administrative action, especially "in that part of administration which is unprotected either by procedural safeguards or by judicial review."²³⁴ This is Professor Kenneth Culp Davis's recommendation for the creation of an office similar to that of Ombudsman in Sweden and Denmark.²³⁵ Congress should test this plan by creating such an office in the Selective Service system. This would be the most meaningful step Congress could take to show it wants to change "the inclination of the public to believe that gross unfairness prevails throughout the draft system."²³⁶

IV. CONCLUSION

This Note has examined the draft law and its inequities. However, the draft must be seen in its proper national perspective. Without it, the vast United States Military Establishment could not exist. Officials in high positions have warned against the power which has been concentrated in the military today.²³⁷ It is not a new danger to history. One of the grievances set forth in the Declaration of Independence was the keeping of standing armies in the Colonies in time of peace. When the Constitution was submitted to the States for ratification, each convention recorded its opposition to any interpretation which would permit large federal standing armies, and some States even demanded an amendment prohibiting them.²³⁸ The current justification of the large military as necessary for national security is nothing new. James Madison warned the Constitutional Convention in 1789 that "throughout all Europe, the armies kept up under the pretext of defending, have enslaved the people."²³⁹ Disproportionate power in the executive through a

²³⁴ See Davis, *Ombudsman in America: Officers to Criticize Administrative Action*, 109 U. PA. L. REV. 1057, 1072 (1961).

²³⁵ See Christensen, *The Danish Ombudsman*, 109 U. PA. L. REV. 1100 (1961); Jagerskiold, *The Swedish Ombudsman*, 109 U. PA. L. REV. 1077 (1961).

²³⁶ H.R. REP. NO. 267, 90th Cong., 1st Sess. 33 (1967).

²³⁷ Farewell Address by President Dwight D. Eisenhower, January 17, 1961, in N.Y. Times, Jan. 18, 1961, at 22, col. 5 (city ed.).

²³⁸ 86 CONG. REC. 5206 (App. 1940).

²³⁹ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 465 (M. Ferrand ed. 1937).

large military is as much a danger to this nation's freedom as the draft law is to the freedom of the men it "selects." Even if conscription can be justified on the basis of defending our freedom or world freedom, the federal government must realize the incongruity of denying individual liberty in an effort to protect national freedom.

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