REPORT IN SUPPORT OF RECOMMENDATION 72–7

JUDICIAL REVIEW IN SELECTIVE SERVICE CASES

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Information and Background

1. Although a detailed breakdown of all of the pertinent figures is unavailable, it seems rather clear that Selective Service litigation has significantly increased during the past five years and that this increase in litigation has placed a substantial burden on the federal judiciary. Figures as to criminal prosecutions are easy to obtain, and they indicate a tremendous growth in the number of Selective Service cases that the courts have had to handle. During fiscal year 1970, for example, prosecutions for Selective Service law violations constituted approximately ten percent of all the criminal cases commenced in the federal courts, with over 3700 cases. Data as to civil litigation is more difficult to obtain, but extrapolation from available statistics, coupled with a survey of these kinds of cases taken from the Selective Service Law Reporter and other sources, results in estimate of some 400–600 such cases (preinduction injunctive suits and in-service habeas corpus actions) having been brought in fiscal 1970. Thus, in a period of only five years this one category of cases in the federal courts rose from a virtually negligible figure to over 4000; the implications for the already overburdened federal courts are obviously serious. Any workable approach that would cut down on this burden on the judiciary would plainly be desirable, for the effect of all this litigation is threefold: 1) it renders questionable whether the courts are able to do justice in the individual Selective Service cases before them; 2) since the majority of the cases are criminal, which are given docket priority, it delays the disposition of other, non-criminal cases; and 3) it further clogs an already overburdened and delay-plagued federal judicial system.

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Before discussing various approaches toward the matter of judicial review in Selective Service cases, it is important to ask why there has been such a substantial increase in litigation and what the existing system of judicial review entails. In short, commencing in 1965 and coincident with the substantial buildup of American military forces in Southeast Asia, draft calls were significantly increased. A new generation was being called upon in great numbers to enter the armed forces involuntarily and possibly fight in a remote part of the world for purposes that were rather unclear to them and the nation generally. Accustomed to demonstrations and confrontations, it should not be surprising that this generation, in substantial numbers, protested against the draft and the Vietnam conflict. Coupled with the difficulty of understanding the reasons why they were being called upon to serve in this manner was the archaic and unresponsive administrative mechanism through which they were called and processed. Anti-draft and anti-war activity should not, it seems in retrospect, have come unexpectedly, given all the circumstances. Indeed, draft resistance is no new phenomenon, as our experience in the Civil War and World War I, and to a lesser extent in World War II, indicates.

Yet, the country and its legal institutions were little prepared for the burning of draft cards and the refusals to report for induction that began in increasing numbers in 1965 and 1966. The response of the Selective Service System was direct and easy to comprehend. Those who violated the law were not entitled to the exemptions and deferments that they had been accorded, and they should be declared delinquents, reclassified I–A, and ordered to report for induction as promptly as possible. It was at this juncture that the courts got actively into the arena. Starting with the Second Circuit's decision in the *Wolff* case in 1967, and through the Supreme Court's decisions in the *Oestereich*, *Breen & Gutknecht* cases, the courts simply refused to allow the Selective Service System to run rampant without the availability of early and effective judicial review. Congress had responded to the *Wolff* decision by amending Section 10 (b) (3) in 1967 to preclude preinduction judicial review, or so it thought. At the urging of the Solicitor General Griswold and despite the rather clear intendment of Congress, the Supreme Court, understandably avoiding the thorny constitutional issues presented, concluded as a matter of statutory interpretation that Congress had not actually precluded all forms of preinduction judicial review. Where the System had acted contrary to statute, a court could intervene immediately, since the local and appeal boards had lacked jurisdiction; there was no statutory sanction for delinquency regulations or punitive reclassification procedures, the Court concluded. Where, however, the System determina-

tion is essentially factual in character, such as in the conscientious objector type of situation, the Court concluded that the preclusion of Section 10(b)(3) was applicable and, at least presumably, was constitutional—in the *Gabriel* case, decided along with *Oestereich*. Decisions in later cases such as *McKart*, *Mulloy*, *Ehlert* and *McGee* cast some additional light on the Court's attitude, but the *Oestereich-Gabriel-Breen-Gutknecht* line basically chart the law as it presently exists.

Administrative reaction to those decisions has produced a situation in which fewer opportunities for preinduction judicial review are afforded; no new delinquency procedures have been adopted and the System, under the leadership of its new Director, Dr. Curtis W. Tarr, has abandoned any efforts at punitive reclassification and has sought to bring more uniformity into the System's processes by promulgating policy directives on important matters, such as implementation of the Court's decision in the *Welsh* case, involving non-religious conscientious objection. Moreover, although a considerable amount of litigation continues in the lower federal courts, attempts to have the courts move beyond the line delineated in the earlier cases have largely been unsuccessful. Thus, although again figures to substantiate this are not readily available, it seems apparent that the amount of preinduction judicial review has started to decrease rather significantly over the past year. In addition, and probably resulting from the fact that the numbers of those called for the draft have been steadily decreasing as our nation's involvement in Southeast Asia is being reduced, the number of criminal cases has stabilized and, during the next fiscal year, is likely to decrease somewhat also. Nonetheless, the overall amount of Selective Service litigation remains substantial, and possible avenues of approach in reducing it warrant exploration—both for the immediate and the long-term future.

2. Any consideration of judicial review of administrative action must of necessity focus on the whether, the when and the how (and how much). A failure to separate questions of reviewability, ripeness (or timing) and method (as well as standard) has caused considerable confusion in the Selective Service context. Some factual determinations may (or should) be essentially unreviewable by the courts, but unreviewability always raises serious due process problems. When a court should act (prior to induction or not until after failure to report or, alternatively, unwilling acquiescense in induction) happens to be tied, in the Selective Service context, to the method of judicial review (by civil injunctive suit, criminal prosecution, or habeas corpus action), but that is not necessarily the case in all administrative situations; the fact that it is in this area may have some important conse-

quences. Finally, what standard of review a court should apply is always a difficult and important problem. In Selective Service cases, first as a result of the Supreme Court's decisions in the *Falbo* and *Estep* cases, as refined by *Witmer* and *Dickinson*, the "basis in fact" test became the applicable one. Only if there were no basis in fact for the registrant's classification could a court interfere. That standard, called by one court the narrowest know to the law, was confirmed by Congress in the 1967 amendments to the Selective Service statute. These considerations have some significance with respect to what might be done in the way of revamping the existing system of judicial review. Congress might seek to make more determinations unreviewable, thus precluding judicial review entirely, though serious constitutional problems would undoubtedly be raised. Congress could attempt again to postpone the timing of judicial review so that all such review occurred after a registrant had responded affirmatively or negatively to an induction order, and hope that this time—given the somewhat different circumstances—that the Court would honor its mandate and find such an approach constitutionally permissible. However, it is unlikely that Congress could do much if anything about narrowing the standard of judicial review (though some think the courts have in fact been applying a "substantial evidence" test while stating that they are adhering to the "basis in fact" standard) without eliminating judicial review entirely, in view of the existing narrow scope of review. But considerable flexibility does exist with regard to selecting the method or methods of judicial review (as distinguished, for the moment, from the matter of timing). In this regard, Congress has a variety of options that it might turn to, including (but not limited to) a) creating a specialized court which would have exclusive jurisdiction over all Selective Service cases, with review of its decisions by the Supreme Court on certiorari, b) giving courts of appeals exclusive review authority over Selective Service cases, as in the deportation case situation, with preinduction review the norm rather than the exception, or c) flatly prohibiting all preinduction review and leaving registrants to assertion of their claims of improper classification or procedures in post-induction proceedings (criminal prosecutions where the individual fails or refuses to report, and habeas corpus actions where he does report but immediately contests his induction). Other possible approaches might involve some combination of those suggested above, with a certain type of review provided for particular classes of cases, and a variety of others that have been suggested but do not appear to warrant serious consideration.

3. It is the considered conclusion of this writer that no adjustment of the method or timing of judicial review is likely to be efficacious in

significantly ameliorating the burdens placed on the judiciary by Selective Service litigation unless sweeping changes are made in the administrative machinery. There is of course nothing novel about the suggestion that the Selective Service System's machinery and processes are in great need of wholesale revamping. The Selective Service System has probably been the most studied and written-about administrative agency in the past few years. At least four major reports have been issued as a result of in-depth studies of the System, and various congressional committees have conducted substantial studies of the System as well. Others have written at great length about the System and its processes, in legal periodicals, in separate books, and otherwise. There is not, it is fair to say, a complete congruence of opinion, but the overriding sentiment seems to be that the System is substantially outmoded in its organization and operation and that sweeping changes in this regard are necessary for the System to be effective in its task of raising manpower for our armed forces consistent with congressional guidelines which presumably reflect national policy while treating, and perhaps more importantly appearing to treat, all registrants fairly.

Revision of the System's processes and procedures is thus, in my view, intimately and inextricably related to the problem of judicial review. If the System does its job better it will 1) reduce the incentive to seek judicial review since it is unlikely to be productive of anything but delay and interruption of the process, and if the latter are the registrant's goal, a more effective administrative operation will enable courts to deal expeditiously with the rather frivolous cases in which this is the principal aim, and 2) enable the courts to do their job of review more efficiently since they will a) be working with substantially more informative administrative records than they are getting now and b) have more confidence in the System's decision-making processes and thus the decisions arrived at through those processes. A number of suggestions for reform of the Selective Service System have been made by the various commissions and individuals which have studied it during the past few years. It is my view that the approach proposed by the so-called Marshall Commission includes most of the important features that such a revision should entail, and that the legistlation proposed by Senator Kennedy (S. 483, 92d Cong., 1st Sess., which incorporates many of the Marshall Commission recommendations, although it is less sweeping in scope) provides the best way to deal with the problem. There are, however, sound reasons for proposing a significantly more modest reform of the System than that proposed by the Marshall Commission (and even than that sponsored by Senator Kennedy). One is that it is simply easier to effect smaller changes than larger ones. Second is that many if not all the necessary changes could

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be made through executive order and the promulgation of revised regulations, without the need for congressional action; indeed, steps in this direction have already been taken, such as the executive elimination of occupational deferments and having registrants report for physicals before induction orders are issued. Third, and perhaps most significant, is the political impracticality of any substantial revision of the Selective Service System within the near future, against the background of congressional consideration of the so-called Gates Commission recommendation for an all-volunteer armed forces and congressional resistance to changes in the System as it has been organized in the past, coupled with the significant economic factors involved.

4. Against this background a series of suggestions, in the form of a "tentative and summary report," was filed with the Committee on Judicial Review of the Administrative Conference in September, 1971. That report recommended, in essence, that substantial improvement of the administrative process was an essential first step in dealing with the problems relating to judicial review; that, with the use of better administrative procedures, the number of cases in which judicial review would be sought would be significantly fewer and the records in those cases would provide a better basis for more expeditious judicial consideration of the issues presented; and, finally, that, for a variety of reasons, preinduction judicial reveiw of Selective Service claims should be allowed on an across-the-board basis.

At its December 1971 meeting the Conference's Committee on Judicial Review discussed these recommendations and asked for further study and elaboration on various aspects of the proposals. In addition, the Committee directed attention to the question of the adequacy of habeas corpus proceedings in lieu of providing for the general availability of preinduction judicial review. Accordingly, the purpose of this memorandum is to respond to the Committee's inquiry about the sufficiency of habeas corpus, to discuss the pros and cons of providing for preinduction judicial review, and to recommend those changes in administrative procedures that still appear warranted. As to the latter point, an effort will be made to assess the effect of the changes made in the 1971 statutory amendments and the recently revised regulations of the Selective Service System in regard to both the reliability and fairness of the administrative process and to the significance of these developments with respect to the feasibility of preinduction review. As a matter of format, it appears logical to consider the administrative process matter first, then the habeas corpus issue, and lastly the general question of whether preinduction judicial review should be generally allowed in Selective Service cases. Consideration will then be given to the special problem presented in regard to

administrative handling of conscientious objection claims. Finally, suggestions for Committee and Conference recommendations will be included.

I. IMPROVEMENTS IN THE ADMINISTRATIVE PROCESS AND RELATED CHANGES IN THE LAW; EFFECT OF SUCH CHANGES ON THE AVAILABILITY OF PREINDUCTION REVIEW; REMAINING CHANGES THAT SHOULD BE MADE.

Changes in the statute and regulations effected in late 1971 are of significance in two central respects. First, they result in a reduction of the number and kinds of discretionary determinations that Selective Service officials are called upon to make, and thus cut down on the potential number of situations in which judicial review of such determinations might be sought. Second, they provide for a substantial number of procedural protections for registrants that were not previously accorded, and thus, by improving the fairness and reliability of the administrative process, make efforts to obtain judicial review less likely and provide a sounder basis for such review in cases where it is in fact sought. In this latter regard, it still appears that the administrative procedures can be improved upon in several significant respects, the result of which would be to further cut down on and to facilitate judicial review where sought. Reference will be made to the additional steps which might be taken to further improve the administrative process, particularly with respect to representation by counsel at and the availability of transcripts of administrative proceedings and, independently, conscientious objector claims.

Although authorized by Section 6(h) of the Act (50 U.S.C. App. 456(h), as amended), occupational deferments were dispensed with by presidential order in April 1970, along with dependency deferments for paternity. Thus, even before enactment of the 1971 statute, no new occupational deferments were available and the range of dependency deferments was reduced considerably so as to include only bona fide hardship situations. Moreover, as part of the 1971 statute, Section 6(h)(1), which provided for college student deferments, was entirely repealed. That provision, although not in terms requiring a discretionary determination by local and appeal boards, encompassed a significant number of draft-eligible individuals (between 1.5 and 2 million) and had been the source of continuing controversy between registrants and the System. Accordingly, the types of discretionary determinations that System officials are required to make in classifying registrants have now been reduced to two principal ones: 1) conscientious objector and 2) dependency (hardship) deferments.

This is not to suggest that no questions will be raised about other sorts of determinations; some registrants may challenge decisions relating to ministerial exemption claims, sole surviving son exemption claims, deferments for membership in reserve components, and determinations involving physical fitness for service. Such claims are not likely to be numerous, however, and their resolution will not ordinarily be a matter of great difficulty for the local and appeal boards. For the future, then, most of the contested situations will involve one of the two aforementioned matters: conscientious objection and dependency deferment claims. As to the latter category the System has a relatively well developed set of considerations that have apparently lent themselves to generally consistent and comprehensible application by the local and appeal boards, although some complaints have been made about the asserted lack of "definite objective criteria." While the decisions in such cases are in terms discretionary, the standards delineated in 32 C.F.R. 1622.30 and related local board memoranda seem to have been spelled out in a sufficient enough fashion so as not to be the source of a significant number of disputed claims. In any event, focussing the draft on the prime age group of 19 should result in a greatly decreased number of hardship deferment claims, and it appears reasonable to assume that this situation will continue to exist.

Unfortunately, the same cannot be said about the standards governing the granting or denial of claims for conscientious objector status. Decisions and opinions of the Supreme Court in the leading cases of *Seeger* and *Welsh* have stretched the statutory language almost to the breaking point, have generated an extensive amount of literature attempting to interpret and explain the law as there defined, and have left the System and the local and appeal boards in an almost intolerable situation insofar as application in close, individual cases is concerned. Congress chose no to provide any further guidance or enlightenment in the 1971 statute, however, so the System is faced with the problem of dealing with this large and difficult problem in the best way it—through regulations, local board memoranda, etc.—can devise. Some substantial changes in the way C.O. claims are presently handled seems warranted by statistics showing that such claims comprise a significant and growing source of dispute between the System and registrants. A different and hopefully more workable manner of handling such claims is suggested below, along with the recommendation of other procedural changes that should be made.

Another important change that the 1971 statute and regulations has worked involves the reaffirmation of the random selection (or draft lottery) method along with the adoption of the so-called "uni-

form national call." In effect, with the drastic reduction of draft calls during the past year or so as the Vietnam conflict has been wound down and the size of the Armed Forces reduced, the System has developed a flexible attitude and equitable approach toward the selection of those who will in fact be called to serve. In short, fewer are being called from a larger pool, a one-year exposure through the 19 year old prime age group concept coupled with the lottery system greatly reduces the period of uncertainty about each individual's draft status, and the uniform national call tends to reduce inequities that might otherwise result from differing interpretations of the controlling law across the country. Moreover, by conducting the lottery for each year at a point in time substantially before an individual becomes exposed to possible liability for training and service and by creating a new classification category—I–H, the System has gone a long way toward cutting down on the number who might even seek to challenge their classification while increasing the amount of time for planning for the future and (not without some relevance to the later discussion) to bringing suits prior to induction. Those classified I–H (termed a "holding classification") are regarded, because of the unlikelihood of their being called in view of their lottery number, as registrants "not currently subject to processing for induction." Since these registrants are not classified I–A and are not likely to be so classified during the year of their maximum exposure to the draft, short of a drastic change in our military situation, the number of those registrants even in a position to justifiably and legitimately complain about their classification is considerably reduced. Finally, the System has developed a policy of ordering those likely to be called to report for and take physicals at a relatively early date so that an early determination of whether they are physically and mentally qualified can be made, again providing for early clarification of the situations of registrants who are actually or potentially (because their lottery numbers are borderline in view of expected draft calls) affected. All in all, the System is to be congratulated for developing various approaches that, by building on existing and changed legislation, both remove the element of uncertainty for as many individuals as possible and provide for an earlier determination of the status of those who are not otherwise exempted from the requirement of service.

The other major statutory and regulatory development in 1971 involves the addition of a new Section 22 at the end of the Act which, for the first time, spells out through legislation a number of procedural rights which are to be accorded to registrants, which rights are amplified to some extent by the regulations thereafter adopted.

Section 22(a) provides that "a fair hearing consistent with the informal and expeditious processing which is required by selective service cases" is thereby guaranteed "to each registrant asserting a claim before a local or appeal board." The general requirement for a "fair hearing" in Selective Service cases would seem to embody a congressional judgment that certain procedures could be successfully challenged for failure to comply with this standard. More specifically, Section 22(b) provides as follows:

> (b) Pursuant to such rules and regulations as the President may prescribe—
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> (1) Each registrant shall be afforded the *opportunity to appear in person before the local or appeal board* of the Selective Service System to testify and present evidence regarding his status.
>
> (2) Subject to reasonable limitations on the number of witnesses and the total time allotted to each registrant, each registrant shall have the *right to present witnesses on his behalf before the local board.*
>
> (3) A quorum of any local board or appeal board shall be present during the registrant's personal appearance.
>
> (4) In the event of a decision adverse to the claim of a registrant, the local or appeal board making such decision shall, upon request, furnish to such registrant a *brief written statement of the reasons for its decision.* [Emphasis added.]

Even though Section 22(b) is prefaced by a reference to implementation through regulations, it seems clear that Congress did not intend to leave the question of whether to adopt such regulations up to the System. Rather, the statutory language merely leaves it up to the System (as agent of the President in this regard) to determine what form the implementing regulations should take. Failure to adopt regulations that reflect the underlying intent of Congress would be in conflict with the statutory provisions; indeed, the System has so responded and, after proposing regulations that seemed less than fully reflective of the legislative purpose, adopted amended regulations that more or less adequately do so. Those regulations will be discussed at some length below. For the present it seems appropriate to note what procedural protections Congress intended to confer upon registrants and, through omission, which ones it failed to provide that remain important if not essential to the erection of a fair and responsive administrative process in which both registrants and courts can have confidence.

It is worthy of note, at the outset, that Congress has, with the enactment of the 1971 statute, for the first time expressly included specific and enumerated procedural protections in the Selective Service laws. That is no mean accomplishment in itself, in view of the background of legislation in this area and the general antipathy toward meaning-

ful procedural protections for registrants that traditionally has been manifested by both the System and the appropriate congressional committees. Apart from a passing reference to "a system of selection which is fair and just" in 50 U.S.C. App. 451(c), no previous legislation in the Selective Service field had included any provisions that seek to affirmatively protect the rights of individuals actually or potentially affected by the draft laws. In short, while Congress did not go as far as some proponents of reform of the Selective Service statute would have liked, the mere fact that it did some action along the lines of procedural reform is significant and indicative, it would appear, that legislative provision for additional procedural protections is not out of the question. It might be noted, however, that these procedural provisions were added as floor amendments and thus there is very little legislative history to indicate what the underlying congressional motivation was in adopting them.

Congressional insistence in Section 22(a) that a "fair hearing" be provided to registrants is amplified by the more specific provisions of Section 22(b). Probably the most important of these specific requirements, at least from the point of view of facilitating judicial review, is the one providing for a "brief written statement of the reasons for its decision" by any local or appeal board rendering a determination adverse to a registrant's claim. Previously there was no requirement whatever that local or appeal boards give reasons for the decisions they made. Thus, in seeking judicial review a registrant was relegated to a speculation contest with the government about why the board denied his claim, and it was a contest in which the cards were stacked heavily against him because of the narrow "no basis in fact" standard for judicial review. That standard, announced in the *Estep* case (327 U.S. 114) over 25 years ago—as a liberalization of a statute that purported to proscribe judicial review entirely—was incorporated by Congress in Section 10(b)(3) of the Act in 1967. In effect, the registrant faced with the burden of showing that "no basis in fact" existed for the board decision but with no statement at all from the board about why it denied his claim could expect to prevail in court only in the clearest cases of board arbitrariness or legal error. All he could do, in constructing a case for a court to consider, was to put together a collection of the materials that he had filed with the board, make some reference to the questions and statements of board members at his personal appearance (if indeed any record of that event was maintained), and hope to convince the court that the board could have done what it did only for improper reasons. In this regard the line of cases involving alleged "punitive reclassification" (such as *Oestereich* (393 U.S. 233), *Gutknecht* (396 U.S. 295) and *Breen* (396 U.S. 460)) are atypical, since in that

situation General Hershey's directive to local boards provided the courts with a sound basis for concluding that delinquency declarations and reclassifications had occurred only because of impermissible factors. By way of contrast, the Court's decision in *Clark* v. *Gabriel*, 393 U.S. 256, which for all practical purposes approved the statutory preclusion of preinduction judicial review where determinations of a discretionary character are involved, is more indicative of the dilemma facing a registrant who had not been provided with a statement of the reasons for the board's decision.

Thus, the requirement for a statement of reasons is a large and important step forward in improving the fairness and reliability of the administrative process. Boards cannot act in a high-handed and free-wheeling manner, to borrow some of Justice Douglas' language, for they are now required to state reasons in support of what they have done. It is thus reasonable to expect better and more consistent decision-making from the boards simply because they are now required to say why they did what they did. Moreover, particularly in situations involving discretionary determinations (mainly conscientious objector and hardship deferment claims, as explained previously), the requirement for a statement of reasons should greatly facilitate judicial review. There is of course always the possibility that the statement provided will not in fact disclose the actual reasons underlying the particular decision. But, assuming good faith compilance with the statutory requirement, this should be the exception and not the rule. In most cases, then, the reviewing court will now know what the board's rationale was and thus the guessing game which previously went on in this regard, and which imposed a serious burden on registrants should be substantially done away with. In the hopefully few cases where the board has made an error of law in denying a claim the court can readily determine this from its statement of reasons. In the cases involving discretionary determinations the court can more easily ascertain whether an abuse of that discretion is involved or whether the board instead acted within the proper ambit of its authority. In short, reviewing courts will now have, for the first time a meaningful record to evaluate when considering challenges to board decisions. An important caveat regarding the requirement for a statement of reasons should be noted. There has apparently been a tendency, since the requirement has been in effect, for many boards to do nothing more than provide an almost verbatim recital of the language of a pertinent statutory provision or regulation. Obviously this is wholly inadequate to provide any meaningful basis for judicial review. It is not, fairly considered, consistent with the clear congressional mandate nor calculated to illuminate or engender confidence in the System on

the part of registrants. Courts should peremptorily refuse to accept such empty recitals of conclusory language by Selective boards. Otherwise, the requirement will be rendered virtually meaningless.

Another important procedural protection provided for by Section 22(b) is the right given to registrants to present witnesses on their behalf before local boards; previously, the registrant could file letters, affidavits, etc. with the local board incident to his personal appearance but could not seek to further support his claim with live statements or testimony. Live witnesses are not only likely to make more of an impression on the board members but their presence will provide the board with an opportunity to question them about their views as to the registrant and his claim, and will thereby promote more informed decision-making by the local boards. The value of this protection is reduced somewhat by the statutory authorization for reasonable restrictions on the number of witnesses and the amount of time allotted to each registrant in appearing before the board; under the revised regulations (32 C.F.R. 1624.4, as amended) the registrant is given only 15 minutes for his personal appearance (unless the board decides to give him more time) and is limited to three witnesses. Whether the three witnesses' testimony takes up part of the 15 minutes is unclear. In any event, while recognizing the need for some reasonable limitations in these respects, it is particularly difficult to justify the 15-minute time restriction (the limitation to three witnesses seems more sensible and supportable). Perhaps flexibility in administration will serve to ensure fairness in the operation of the system but the grudging narrowness of the regulations in this regard is bothersome.

Section 22(b) also gives registrants the right to a personal appearance not only before local boards (which had previously existed under the regulations) but also before appeal boards. This reform, which coupled with the others discussed above, is significant in that it will hopefully tend to make an administrative appeal a less perfunctory procedure, engaged in principally to exhaust administrative remedies so as to be able to seek judicial review, and instead a meaningful first step in the process of review of local board determinations. A right to appear before appeal boards is especially important in view of the perpetuation of the notion that review by appeal boards is *de novo* in character, as is the aforementioned requirement that appeal boards as well as local boards provide the registrant with a statement of reasons. A more straightforward approach would be to do away with the *de novo* review concept entirely and recognize that appeal boards are probably applying something akin to a "substantial evidence" standard in reviewing local board decisions. However, the modifications made in the regulations dealing with appeal board procedures, par-

ticularly the requirement in 32 C.F.R. 1626.4, as amended, that the board shall consider only "information contained in the record made by the local board," along with "general information concerning economic, industrial, and social conditions" and the "oral statements of the registrant to the appeal board during his personal appearance," are helpful and go a considerable way toward blunting the effects of the *de novo* concept, which had heretofore provided the government with a way of shielding erroneous local board decisions from penetrating judicial scrutiny.

A final procedural requirement added by Section 22(b) is that a quorum of the members of any local board or appeal board be present during a registrant's personal appearance. Previously the attendance by one member of a board was regarded as adequate and the registrant was hardly accorded the thoroughgoing consideration by all members of the decision-making body that fairness would seem to dictate. Indeed, it seems strange that it was necessary to incorporate such an elementary requirement into the statute but the practice of many boards, where most decisions were made by the regularly employed clerks and not the members themselves, apparently led Congress to conclude that such inclusion was necessary.

Most of the significant changes in the pertinent Selective Service regulations either track or implement the statutory provisions and they have already, to a considerable extent, been discussed incident to the discussion of the statutory changes. A few other changes should be noted in passing. One change that appears ill-advised is the shortening of the period within which a registrant must request a personal appearance before a local board from 30 to 15 days after receipt by him of a classification notice. Many registrants will probably seek the advice of an attorney upon receipt of a classification notice which effectively rejects a claim they have asserted. With the board now quired to state reasons for its decision, it would seem likely that more registrants will seek personal appearances than before (on a percentage basis). Cutting down on the period of time within which to decide on whether to seek a personal appearance would seem to intensify the temptation to seek such a hearing almost automatically. While restricting the time period might serve the purpose of expedition, it might well invite some registrants to seek a personal appearance where, upon reflection and consideration, they might decide not to do so. Also, since the time is now quite short it would seem essential for the board to advise the registrant of the need to take prompt action in order to obtain a personal appearance.

The potential problems created by the regulations dealing with the limitations on the duration of the personal appearance and the num-

ber of witnesses that can be used have been discussed previously. One helpful addition to the regulations is a provision requiring local boards to give a registrant a statement of reasons for its refusal to reopen a classification when requested to do so. The time within which to apply to appeal board from a local board determination has also been shortened from 30 to 15 days (32 C.F.R. 1626.2, as amended); this change is subject to some of the same problems that were discussed above as to the like reduction in seeking a personal appearance before a local board. Moreover, since local boards are now required to state reasons for their decisions, more instead of less time would seem warranted in order to give the registrant and his advisors an opportunity to decide whether to go to an appeal board or not. Experience of the System with these particular revisions in the regulations would seem an important factor, but on the whole the development appears to be unwise.

Brief comment might be made about several additional procedural changes that were suggested but were not made, either by statute or regulation. The most significant one involves representation by counsel at local board proceedings. The System has consistently opposed this step and has included a specific provision in the revised regulations (32 C.F.R. 1624.4(e)) that states: "No registrant may be represented before the local board by anyone acting as attorney or legal counsel." Apparently the attitude of the System is that allowing representation by counsel at board proceedings would so judicialize them as to interfere with the orderly and expeditious processing of cases. All things considered, that view seems unfounded. Legal representation is allowed to individuals and business entities in any array of situations where the interests potentially affected are of far less consequence than in the Selective Service context. Examples are myriad and need not be detailed. Moreover, the more affluent and better-educated registrant is demonstrably favored by a system which disallows legal representation. Such a registrant can handle himself more effectively before a board, and also can afford to retain counsel to consult and advise him prior to his personal appearance, especially in C.O. cases where the standards are complex and confusing. The poorer and less well-educated registrant, particularly in areas where extensive draft counseling services have not been developed, is almost hopelessly entrapped by the system when seeking to proceed without legal counsel. The so-called government "appeal agents" have never functioned effectively in advising registrants of their rights since they of necessity have a dual allegiance which seems often to be resolved in favor of the interests of the System. Thus, denial of legal representation, or at least the opportunity for consultation with a lawyer, works a significant discrimination against the less affluent

and poorer educated registrant. The conscientious objection area, now that ethical and moral beliefs carry some weight, presents special problems as far the latter avenue of discrimination is concerned. Certainly, more often than not, the better-educated registrant will have an advantage over the poorer one when he is called upon to justify and substantiate his beliefs.

Whatever hazards to the administrative process might result from allowing legal representation might well be counteracted by a number of companion steps. One might be to ensure that each board had at least one lawyer as a member. It may take some time to accomplish this but, with the cooperation of the organized bar, it can undoubtedly be done. Moreover, reasonable time limitations could still be imposed on personal appearances. Indeed, if thought necessary, at least at the outset, consultation with an attorney present at the proceeding might be allowed but not full-fledged legal representation, in the sense that the lawyer speaks for the registrant to the board. Other similar restrictions that are reasonable in nature might be imposed to ensure that the process is not overly judicialized. At the same time, however, it is unrealistic to seek to maintain that the board members are simply a small and friendly group of neighbors seeking to do what is good for a young man. Proceedings are presently adversary in character, whether the System admits it or not. Counsel is allowed in so many other situations where the effects of the body's decision on an individual is of far less consequence that it seems grossly incongruous to continue to maintain the system as it has been. The fear of the System in this regard seems irrational and misguided. Some court is likely to hold that counsel is required as a matter of due process in the not too distant future in any event (cf. *Weller*, which the Supreme Court disposed of on jurisdictional grounds), and the System will then be left with less flexibility in shaping the manner in which legal representation will be allowed. Several final points should be added.

Apart from the previously expressed concern about perpetuation of the *de novo* review concept with regard to appeal board decisions, an additional procedural improvement that seems warranted, along with the allowing of representation by counsel, is ensuring that a transcript of the proceedings before the local and appeal boards be prepared and be made available to registrants. It would appear that this could easily be accomplished by tape recording such proceedings and then preparing a transcript only in those cases where one was requested. Presumably this would be a small percentage of the cases, when the impact of the procedural reforms already accomplished is considered. Nonetheless, in some cases the ability to prepare a transcript from a tape recording would seem to be of considerable signifi-

cance for effective administrative and judicial review—the System, the courts and the registrants would appear to benefit from this sort of arrangement at very little cost. Tapes could be preserved for a period of time and then erased and reused. Registrants who could afford to do so would simply be provided with the tape for use in preparing a transcript; those who were financially unable to do so would have transcripts prepared at government expense.

Finally, as discussed in the previous memorandum, steps should be taken to ensure the independence of the National Appeal Board from System officials. In this regard, the appearance as well as reality of independence seems quite important. Registrants who have confidence in the impartiality of the National Appeal Board are less likely to be dissatisfied with its decisions and seek judicial review. Changes in the regulations relating to the National Appeal Board unfortunately appear to do nothing along these lines. Nor do they broaden the jurisdiction of the Board in any significant respect; only the National Director and appropriate State Director can appeal to the National Appeal Board as a matter of right (32 C.F.R. 1627.1(a), as amended), except in the situation where the State appeal board was not unanimous, in which case the registrant himself can seek National Appeal Board review. Procedural changes in large measure parallel those relating to appeals to State appeal boards; for example, the time within which a registrant entitled to take an appeal must take such action is rather short (15 days from the mailing of his Notice of Classification, as with personal appearances before local boards and appeals to State appeal boards) (32 C.F.R. 1627.1(b)). Unless a registrant whose classification is being appealed to the National Appeal Board requests a personal appearance before that body, the regulations provide that the Board "shall proceed forthwith to classify" such an individual (32 C.F.R. 1627.4(b)). A registrant whose case is being appealed to the Board is allowed "to present evidence, other than witnesses, bearing on his classification," is entitled to 15 minutes for his appearance before the Board, but may not "be represented before the National Board by anyone acting as attorney or legal counsel" (32 C.F.R. 1627.4(c)), (d)). Like the local and appeal boards, the National Appeal Board is now required to provide to registrants whose claims are rejected "a brief statement of the reasons" for its decision (32 C.F.R. 1627.4(h)). Suggestions for improvement of the regulations relating to the National Appeal Board would include the following: ensure its independence by providing for its financial and physical support through channels other than the System; broaden its jurisdiction to include, at least on a discretionary basis, appeals from all registrants whose claims were rejected by State appeal boards; allow registrants to be represented by

counsel before the Board (even stronger reasons of policy appear to support allowing representation by counsel at appellate board proceedings than at local board appearances); abolish the *de novo* concept with regard to National Appeal Board action (see 32 C.F.R. 1627.4(a)); and lastly and somewhat more tentatively, provide the Board with a functioning permanent staff and give consideration to having its members serve as a full-time rather than part-time basis (although this latter recommendation should probably be given serious thought only if the all-volunteer Army concept which some suggest may be achieved by mid-1973 is not in fact accomplished).

None of the above suggestions regarding procedural reforms that should still be accomplished is premised on the notion that due process requires that they be done. Any such constitutional argument was, it would appear, effectively laid to rest by the U.S. Supreme Court in its recent decision in *Fein* v. *Selective Service System*, 92 S. Ct. 1062 (1972). There the Court not only confirmed its upholding of the validity of Section 10(b)(3)'s prohibition on preinduction judicial review in situations involving discretionary determinations made by local boards, but also had occasion to discuss the procedural changes made incident to the enactment of the 1971 statute and the adoption of implementing regulations. In its opinion the Court expressly quoted the pertinent provisions of Section 22 (as discussed previously) and the related regulations, while indicating that neither were intended to have retroactive effect. After reviewing the statutory provisions and regulatory changes the Court stated that they had "alleviated and, indeed, eliminated" most objections to the preexisting procedures based on due process grounds, and similarly concluded that "all, or nearly all, the procedural features about which [petitioner] complains . . . have been changed administratively." Justice Douglas, in his dissenting opinion, focused explicitly on the procedural due process issue, asserting that serious due process questions are raised by the Court's construction of Section 10(b)(3). Referring to the "fair and just" system language of Section 1(c) of the Act, Justice Douglas skirts the due process issue by suggesting that Congress intended that certain procedural requirements be adhered to, even prior to the 1971 amendments to the statute. Since he found that such requirements were not followed he thought that preinduction judicial review was proper, despite Section 10(b)(3), under *Oestereich*. Justices Marshall and Stewart also dissented, but their disagreement with the Court's opinion related to what they regarded as an unduly narrow interpretation and application of *Oestereich*; they suggested that preinduction judicial review should be allowed where "the registrant [has] challenged a purportedly valid Selective Service rule of general application, the validity of which the administrative process could not

completely adjudicate before induction." Noting that where, as in *Fein*, "Selective Service appellate procedures, implemented under Selective Service regulations . . . arguably conflict with the *constitutional* requirements of the Due Process Clause" in a *fortiori* case for preinduction review has been made out, the dissenters sought to distinguish *Gabriel*. Thus, since the dissenting opinions expressly urged the desirability of allowing preinduction review where potential procedural due process issues were presented, it is a fair inference that the Court's majority in effect rejected the soundness of any arguments along these lines. Indeed, by reference to the statutory and regulatory changes the Court seemed to be indicating that whatever possible due process questions might be raised had effectively been blunted by intervening developments. Accordingly, the suggestions for further improvements and refinements of the administrative process cannot—and are not—grounded on the notion that the existing procedures are defective constitutionally. Rather, it is felt that such changes should be made without regard to whether they are constitutionally required as a matter of sound administrative policy and in order to ensure thoroughgoing fairness to all registrants. What is minimally required constitutionally is not, of course, the necessary standard for measuring wisdom or soundness as a matter of policy.

II. CONSIDERATIONS RELATING TO THE ADEQUACY OF HABEAS CORPUS PROCEEDINGS IN LIEU OF PROVIDING FOR PREINDUCTION JUDICIAL REVIEW

Section 10(b)(3) of the Act provides that "[n]o judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President [i.e., the National Appeal Board], except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form," and "[t]hat such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant." Added in 1967, this language states the basic congressional preclusion on preinduction judicial review with which the Supreme Court and lower courts have had to struggle since its enactment, as exemplified by cases such as *Oestereich*, *Gabriel*, *Breen* and *Fein*. The latter part of the provision reflects the judicial liberalizing of the rule of finality as to Selective Service System administrative determinations reflected first in *Estep* and carried on in subsequent cases; in other words, Congress finally gave its

explicit approval to the "no basis in fact" standard for judicial review that courts had been applying for over 20 years. More pertinent, however, to the matter of the adequacy or inadequacy of habeas corpus proceedings as a substitute for preinduction judicial review is the earlier language of Section 10(b)(3).

At the outset it is important to note what 10(b)(3) does not say and what the Court has not held about it. That provision makes no reference whatever to the availability of habeas corpus proceedings as a means of testing the validity of a Selective Service classification; rather, it appears to limit any such contentions to criminal prosecutions. Yet, the statutory language speaks about the registrant responding "either affirmatively or negatively" to an induction order. Obviously a criminal prosecution would not lie where a registrant had responded affirmatively; thus, at least by implication, Congress must have had habeas corpus proceedings—which had for a long time been approved as a way of testing a registrant's classification—in mind in writing Section 10(b)(3), however inartfully it might be drawn. Moreover, as the Court on several occasions noted and the government has consistently conceded, in view of the constitutional prohibition on suspension of the writ of habeas corpus Congress should not be regarded as having attempted to do so in enacting Section 10(b)(3). Indeed, the legislative history of the statute appears to bear this out, for recognition was given to the traditional approach of regarding those in military service as being sufficiently restrained of their liberty so that habeas would lie. *E.g.*, *United States ex rel. Samuels* v. *Eagles*, 329 U.S. 304.

Although the habeas corpus proceeding, then, has become an accepted method for in-service complainants to challenge government action, it nevertheless has proved to be insufficient in many respects. Courts have traditionally adopted a laissez-faire attitude when interference with military procedures has been at issue. Perhaps the major reason for the indifference, if not aloofness, of the courts' involvement was the highly emotional aura which clouded areas such as military defense. At one point in time there was a fairly widely held viewpoint that if the courts began to check decisions of the Selective Service System, then snags in the draft machinery would leave the country defenseless.

Certain courts, however, seemed to become disenchanted with arguments such as this and liberalized decisions began to see more frequency. This trend, of course, did not occur universally or uniformly. What has happened instead has been the deliverance of decisions in a patchwork manner, a process which has further complicated the courts' predictability in an already overly complex area.

One trouble spot in the habeas corpus proceeding which has produced a fair amount of litigation is the exhaustion of administrative remedies doctrine. A principle of comity rather than a limitation on federal jurisdictional power, this doctrine establishes a requirement that all administrative remedies be exhausted before review by a federal court will be allowed. The weight of authority, though, holds that these remedies do not have to be exhausted if irreparable harm will result. See Davis, *Administrative Law Text* § 20.01 (1959), and Jaffe, *Judicial Control of Administrative Action* 424, 426 (1965).

The specific problem in these "exhaustion" or "delayed jurisdiction" cases has been with the appeal to the Board for the Correction of Military Records (for whatever branch of the service in which the plaintiff serves). Most courts have held that this is *not* an administrative remedy which must be exhausted before habeas will lie; *Patterson* v. *Stancliff*, 330 F. Supp. 110 (1971); *Bouthillette* v. *Commanding Officer*, 318 F. Supp. 1143 (1970), for example. The Ninth Circuit, however, has held that for the claimant to get his day in court he must first appeal to the Board for the Correction of Military Records. *Craycroft* v. *Ferrall*, 408 F. 2d 587 (1969).

The *Craycroft* decision was subsequently met with much disapproval and it was vacated by the Supreme Court at 397 U.S. 335 (1970). Between the time the case was decided by the Ninth Circuit and the time it found its way to the Supreme Court, the Department of Justice filed a memorandum which clearly indicated its position that administrative remedies did not have to be exhausted before a court could assume jurisdiction over a habeas corpus petition.

The action taken by the Department of Justice, as well as that of the Supreme Court, apparently prompted the Ninth Circuit itself to modify its earlier stance. *Bratcher* v. *McNamara*, 448 F. 2d 222, 224 (1971). This has not entirely cleared the air, though, because prior decisions of a court of appeals can only be overturned by the court sitting en banc.

Several possibilities might conceivably result from the exhaustion of remedies' syndrome:

(1) ambiguities may still arise from the inability of the Ninth Circuit to expressly overrule *Craycroft;*

(2) the Department of Justice could alter its former position with the influx of new personnel and administration;

(3) the individual, by exhausting his in-service remedies, may serve out his military obligation before he obtains judicial review of an unfavorable decision rendered by his board. See Hansen,

Judicial Review of In-Service Conscientious Objector Claims, 17 U.C.L.A. L. Rev. 975, 983, (1970) [1]

A second obstacle in the smooth working of habeas corpus proceedings is found in the jurisdictional requirement that federal courts grant the writ of habeas corpus "within their respective jurisdictions." 28 U.S.C. § 2241(a).

What happens frequently is that a claimant will be serving his military obligation far from his home base and commanding officer. This can effectively eliminate any chance of his obtaining judicial review because *no proper defendant* (such as a commanding officer) resides within the territory of the court.

In *Schlanger* v. *Seamans*, 401 U.S. 487 (1971), the petitioner was in Operation Bootstrap at Arizona University, but his home base and commanding officer were in Georgia. He sought habeas corpus in Arizona, naming the Secretary of the Air Force, the Georgia commanding officer and the AF ROTC commanding officer at Arizona State as defendants. The Supreme Court denied his petition because none of the proper defendants were residents of Arizona.[2] The petitioner's custodian was the commanding officer in Georgia; the AF ROTC commander had no control over him nor was he in the petitioner's "chain of command."

Justice Douglas, speaking for the majority, hinted that under *Donigian* v. *Laird*, 308 F. Supp. 449 (1969), *Schlanger* would be considered to be "in custody" even though the control over him was exercised from another state. That question was never reached, however, because the custodian was not present within the jurisdiction of the Arizona District Court. The district court, therefore, had no power to entertain the suit.

Though *Schlanger* was admittedly a chain of command problem, the Supreme Court did not clearly define that phrase. In *Gregory* v. *Laird*, 326 F. Supp. 704 (1971), the court was a little more explicit in attempting to establish the meaning of those words.

Gregory was based at a temporary duty station. At 9:30 A.M. on March 31, 1971, he was given orders to report to his permanent duty station. At 4.00 P.M. on the same day he petitioned the district court

[1] On the whole problem of exhaustion in the Selective Service context, albeit at the preinduction stage, compare the Supreme Court's decision in *McKart* (395 U.S. 185) and *McGee* (402 U.S. 479).

[2] A result similar to *Schlanger* was reached in *Still* v. *Commanding Officer, U.S. Army Reserve Comp. P.C.*, 334 F. Supp. 617 (1971), and in *Strait* v. *Laird*, 445 F. 2d 843 (1971). For a case which finds jurisdiction despite the above cases, see *Arlen* v. *Laird*, 451 F. 2d 684 (1971). The court felt in *Arlen* that since the petitioner was an unattached inactive reservist, the argument that he could not sue in New York because his commanding officer was technically in Indiana was specious. The court stated that the military's contacts in New York were sufficient to witness a "nominal presence" (451 F. 2d at 687).

for a writ of habeas corpus, naming the commander of the temporary duty station as defendant [3] pursuant to 28 U.S.C. §§ 2242 and 2243. In denying the writ the court said this:

> The Supreme Court did not expressly define the phrase "chain of command" in the *Schlanger* decision. Within the military establishment that relatively simple phrase is used to describe a hierarchy of responsible parties. But it is readily apparent that there are numerous chains of command organized to serve different functions, and that certain individuals fits into more than one such chain. *Schlanger*, however, was concerned with that chain of command which has the power to control the commissioner—that chain of command made up of people against whom a writ could be spent. From the evidence presented to the court, it does not appear that Vice-Admiral Bringle, in his capacity as COMNAVAIRPAC [commander of the temporary duty station], fits within that chain of command. (326 F. Supp. at 708).

The court then went on to suggest what controls would be adequate to determine a complainant's custodian or one in the chain of command. They include the following: (1) the authority to order a change in permanent duty stations; (2) the authority to discharge conscientious objectors; and (3) the authority to order a unit commander to transfer a member of his command to another unit. (*ibid.*)

An additional jurisdictional problem has been noted by the courts in dealing with habeas petitions: What happens when a serviceman, as in *Gregory*, is ordered to report to another base? Is the petitioner still considered to be in custody within the jurisdiction where the petition is filed, assuming *arguendo* that it is filed in the judicial district which contains the temporary station?

The Army will generally argue that once a serviceman receives his departure order he is no longer in custody at the issuing post. See *Laxer* v. *Cushman*, 300 F. Supp. 920 (1969). The court ruled in favor of the plaintiff there, but nevertheless the Army may make similar assertions in future cases.

This custody problem is compounded when an officer is the party seeking relief. For one thing, officers' files travel with them and also they may not be assigned to a particular overseas replacement station before leaving the country. This could conceivably result in the complainant not having an available forum in which to seek a remedy. See generally 17 U.C.L.A. L. Rev. 992–993, *supra*.

In *Jarrett* v. *Resor*, 426 F. 2d 213 (1970), the plaintiff, an officer, after receiving jungle training in the Canal Zone, was granted leave and ordered to report (after leave) to an Air Force base in California

[3] The commanding officer named was the only alleged defendant who resided in the judicial district of the issuing court. He therefore, would be the only feasible defendant under 28 U.S.C. §§ 2241–2243.

where he would eventually board a plane for Vietnam. No date was set for the "port call" report to the Air Force base. During the interim period, Jarrett filed a request for discharge from the Amy on grounds of conscientious objection.

Upon receiving a denial of his request for discharge, he sought declaratory relief "in the hope of avoiding the difficult jurisdictional problems which [he believed], under the circumstances of this case would have to be confronted were he to institute a habeas proceeding." (*Id.* at 215)

The district court, on its own initiative, determined that the action would have to be considered as a habeas corpus proceeding. Subsequently the court found that it lacked jurisdiction over the action, anyway. In affirming this finding, the court of appeals stated:

> Although Lt. Jarrett is physically present within the territorial limits of the Northern District of California, he has never been assigned to an Army post within that district. He was free to go to his home in Berkeley, but he was not required to do so. Accordingly, he is *not being held in custody* by the named defendants in the territorial confines of the Northern District of California. It follows that the district court did not err in holding that it lacked jurisdiction on this ground (*id.* at 217) [Emphasis added].

In addition to the many jurisdictional problems which typify habeas corpus proceedings, there are several policy reasons which argue for the inadequacy of the habeas remedy:

(1) The registrant faces an extremely difficult *burden of proof.* He must prove that his classification has no basis in fact by rebutting every piece of evidence which supports the board's decision.

(2) *Scope of review.* The courts are limited in their review of classification cases to examining the board's record. From this the court must ascertain whether or not there was a basis in fact for the board's determination. *Brown* v. *Laird*, 329 F. Supp. 242 (1971).

"The scope of review in draft cases is very limited, and the range of the review is the narrowest known to the law." *Robertson* v. *United States*, 417 F. 2d 440, 444 (1969).

While no one advocates that courts sit as "super draftboards," one can ask whether or not a court might be more qualified than a hearing officer to make some of the determinations which go to the merits of the registrant's claim, rather than to simply serve as a review board.

(3) Habeas corpus is *no remedy* at all for genuine conscientious objectors. The acceptance of induction is squarely in opposition to the grounds upon which a conscientious objector bases his

beliefs. Such an individual will accept conviction and possible imprisonment rather than subject himself to military authority.

(4) *Mootness.* Habeas corpus proceedings can be made moot by the military's transfer of the inductee to another jurisdiction. As Justice Murphy said in *Estep* v. *United States*, 327 U.S. 114: The proceeding must be brought in the jurisdiction in which the person is then detained by the military, which may be thousands of miles removed from his home, his friends, his counsel, his local board and the witnesses who can testify in his behalf. Should he overcome all these obstacles and possess enough money to proceed further, he still faces the possibility of being shifted by the military at a moment's notice into another jurisdiction, thus making the proceeding moot. There is little assurance, moreover, that the military will treat his efforts to obtain the writ with sympathetic understanding. These practical difficulties may thus destroy whatever efficacy the remedy might otherwise have and cast considerable doubt on the assumption that habeas corpus proceedings necessarily guarantee due process of law to inductees. (*id.* at 130) One writer has posed the dilemma this way:

> If a registrants refuses to submit to induction at least he is certain that he will have his day in court; if a registrant submits, he cannot be sure. Note, *Pre-Induction Judicial Review*, 57 Cal. L. Rev. 948, 958 (1969).

(5) *Nature of habeas itself.* The nature of habeas forces a change from civilian to military life. This, of course, can often produce immeasurable psychological effects upon one assumedly unwilling to make the change.

(6) *Time and inconvenience.* It is not uncommon for the habeas proceeding to last 6 months. During this time the registrant is still serving as a member of the military and is subject to appropriate custodial restraints.

Habeas is also known to be a very inconvenient process. It ordinarily lies where the registrant is stationed. His records, however, are stored at his local board. See Justice Murphy's concurring opinion in *Estep*, *supra.*

(7) *Cost.* The complexity and confusion which has traditionally surrounded the Selective Service laws has virtually made it necessary for specialists to appear in this area. Common sense would indicate that "draft lawyers" might provide better representation than a lawyer who takes an occasional case dealing with Selective Service matters. Common sense also would indicate that specialists are not inexpensive.

(8) *Lack of alternate remedy compels habeas.* For many people habeas is not a choice but a necessity. Practically speaking,

the availability of mandamus as an alternate form of relief—although attempted with increasing frequency—has enjoyed very little success in Selective Service cases. Mandamus is an extraordinary remedy which is to be utilized only in the most urgent cases. See, *e.g.*, *Ex Parte Collett*, 337 U.S. 55, 72 (1949). The issuance of a mandamus decree is left to the discretion of the court. *CMAX Inc.* v. *Hall*, 300 F. 2d 265 (1969). More importantly, if there exists another remedy, mandamus will not lie. See *Carter* v. *Seamans*, 411 F. 2d 757 (1969). Though its jurisdictional requirements are complex, habeas corpus generally exists as an alternate form of relief, thus destroying the grounds for mandamus. See, *e.g.*, *Strait* v. *Laird*, 445 F. 2d 843 (1971).

III. PROS AND CONS OF THE PREINDUCTION JUDICIAL REVIEW IN ALL SELECTIVE SERVICE CASES; SPECIAL PROBLEMS PRESENTED BY THE ADMINISTRATIVE HANDLING OF CONSCIENTIOUS OBJECTOR CLAIMS; SUGGESTED COMMITTEE RECOMMENDATIONS

1. Few would seriously maintain that the Selective Service System seeks to intentionally deprive registrants of essential procedural protections when they attempt to challenge their classifications administratively and in the courts. Yet it is nonetheless true that the System has consistently taken a niggardly approach to the matter of review of classification determinations. Indeed it is fair to say that individuals affected by System decisions are accorded the least amount of procedural protections, both in regard to administrative handling and judicial review, of any persons subject to the authority of a major administrative agency. The justifications for such a "stingy" approach with respect to administrative processing and judicial review are generally grounded on the System's contention that the conscription process must be free from delay and interruption if it is to serve the country effectively. Indeed, this was the major rationale behind the congressional proscription on preinduction judicial review in the 1967 amendment of Section 10(b)(3). See 113 Cong. Rec. S8052 (June 12, 1967; Sen. Russell). This rationale, then, appears to present the strongest reason for continuing a system under which preinduction judicial review is generally unavailable and a registrant seeking to contest his classification must do so either through defending a criminal prosecution for failure to report for induction or by bringing a habeas corpus (or similar) proceeding after grudgingly submitting to induction.

Concerns about litigious interruptions of the conscription process might well have considerable substance in an all-out war situation

where virtually every able-bodied younger male was required to serve his country in the Armed Forces. It has significantly less plausibility in a limited-war context such as we have been involved in for the past decade or so. As a matter of fact, the Marshall Commission specifically recognized this important factor in entitling its report "In Pursuit of Equity: Who Serves When Not All Serve?" Simply stated, we can afford more due process when demands of national security are less pressing; given all the circumstances, we should extend procedural protections to individuals affected by Selective Service System determinations to the maximum extent possible consistent with the national interest in a ready supply of manpower for military service. In deference to the concerns about the effects that the availability of preinduction judicial review might have in an all-out war situation, it would probably be wise to provide, should such legislation be adopted, that entitlement to such judicial review could be suspended upon declaration of a national emergency by the President so long as Congress did not disagree within a stated period of time, say 30 days. In this manner a mechanism would be provided to avoid any practical problems that a system of freely available preinduction judicial review might be thought to have in a total-conscription kind of situation.

There is more fundamental difficulty with the rationale offered to support the preclusion of preinduction judicial review. Contrary to the implicit assumption of Congress, the System and apparently the Executive branch, there is delay and interruption necessarily and very much present in the process as it presently is functioning. One who refuses to report for induction and is subjected to criminal prosecution is not available for military service and someone else, who might not otherwise be called, must go in his place. It is true, of course, that many of those who refuse to report might do likewise if they were given preinduction judicial review and had their claims rejected. Nonetheless, it seems likely that, with freely available preinduction review, many registrants who had had their day in court would then agree to submit to induction intsead of face an ensuing criminal prosecution. And surely the present system cannot be justified on the ground that many who have meritorious claims for exemption or deferment are effectively coerced into waiving them because of the limited procedural alternatives available to them. Such a justification results in a system that is unjust and unfair, since some who should not under the law be required to serve in fact end up doing so. Moreover, this factor probably inflicts the greatest hardship on the less affluent and poorly educated, while the rich and the knowledgeable pursue whatever remedial paths are available to them.

The alternative of submitting to induction and immediately challenging one's classification in a habeas corpus proceeding has a similar potential for delay and interruption of the functioning of the conscription process. Indeed, it may be even more insidious in this regard, for the Armed Forces at least know that an individual who refuses to report will be unavailable for military service. One who submits to induction and then proceeds to litigate the question whether he should be in the military is generally of little use to the Armed Forces. Most courts will act to preserve the status quo pending determination of the validity of the claim; the individual usually cannot be freely transferred to another base or overseas; he is less available for military duties than for processing his habeas case and the preliminary administrative steps related thereto. In short, resort to habeas proceedings by substantial numbers of inductees presents significant problems not only for the individuals involved, as indicated previously, but is hardly a panacea for the Armed Forces. And, assuming that some of the habeas cases eventually result in the judicial upholding of the indictee's claim, the result is that he must be released from the military after having served for a period in which he is likely to have contributed little if anything. Thus, from a pragmatic point of view the present system simply does not avoid delay and interruption, as is commonly suggested. Rather, it contributes to delay and interruption as much if not more than a carefully worked out and administered system allowing for readily available preinduction judicial review.

At this point it seems appropriate to repeat the points made in support of making preinduction judicial review freely available to Selective Service registrants in the previous memorandum:

> "The timing of freely available preinduction judicial review and the form it should take—given a substantial revision of the System's procedures short of an organizational reworking of its machinery—remain sticky problems. They are, however, probably less significant problems if such reforms are accomplished than they would be otherwise; indeed, as indicated previously, if such reforms are not effected there is little if any approach that will measurably assist in reducing the burdens atendant to judicial review. I would favor making preinduction judicial review available to all registrants despite the various arguments that have been made against such an approach. Actions of the Selective Service System in classifying men and in rejecting their claims have important and lasting effects on individual lives. Yet we have consistently taken a niggardly and narrow approach toward both administrative consideration and judicial review. Such an approach might have been justified by the circumstances in which it arose—an all-out wartime situation in which every able-bodied young man was needed for military service and the administrative load on the System was phenomenal—and might again be necessary in such circumstances. Perhaps special provision should be made for suspension of the more elaborate and time-consuming procedures suggested here if such a situation should

recur. But in the cold war and limited conflict kinds of situations such as we have been experiencing during the past several decades, an approach that allows for more careful administrative scrutiny and for earlier judicial review seems not only workable but warranted, particularly when comparison is made with the aproaches taken in other administrative fields. In no other area is a person accorded fewer procedural rights before the agency than in the Selective Service field. And in no other area is a person required to commit a crime in order to obtain judicial review of his claim that the agency had acted improperly or illegally. In short, granting the weight that the contrary arguments have, on balance there seems little if any reason for us to continue on such an unjustifiable course. As Mr. Justice Stewart aptly pointed out in his dissenting opinion in *Oestereich*, the very people who need preinduction judicial review the most are those whose claims are unclear and debatable; those who are rather sure they will be vindicated in the end can more safely refuse to report for induction or submit to induction and then bring a habeas corpus action. Moreover, the inequities that have resulted between the rich and the poor, the educated and the uneducated, the white and the non-white from the System as it has been (and to a somewhat lesser extent still is) administered (so far as availability of legal advice and assistance, making of conscientious objector and hardship deferment claims, etc.) are inexcusable and should be eliminated to the greatest extent possible."

It should be made clear that in no wise is it suggested that preinduction judicial review is constitutionally required. The Court settled that rather clearly in *Clark* v. *Gabriel*, as discussed earlier, and no decision since has impaired that holding. Indeed, the recent decision in *Fein* confirms and builds upon *Gabriel*. Nonetheless, it should be apparent that what is minimally required constitutionally is not a necessary measure of sound and fair procedure. From the registrant's point of view the presently available alternatives for obtaining judicial review of his classification are unsatisfactory in many respects. Both criminal prosecution and habeas corpus can result in a restriction on an individual's freedom in a variety of ways, in a significant interruption of future plans, in loss of employment, in a daily life clouded with uncertainty about the outcome of his case, in a reduction in his attractiveness to potential employers (especially the government), and, if the habeas route is followed, in the in-service difficulties discussed previously. Moreover, the period of uncertainty—and possibly unwarranted military service—is usually substantial, since the normal district proceeding can be expected to last about 6 months, and, if the case is appealed, the time can extend up to 2 years or more. If preinduction review were adopted generally there would of course still be some delay and uncertainty. But the registrant's status would be finally determined prior to his having to make a very difficult choice having substantial personal consequences. Thus, that sort of approach would be far more consonant with general motions of due process.

And, in view of the changes in Selective Service procedures whereunder individuals in the prime age group with low lottery numbers know rather long in advance that they are likely to be drafted and are given their pre-induction physicals at a rather early date, a procedure could rather easily be worked out which would require the filing of preinduction suits immediately upon determination of a registrant's physical fitness. Were this determination made some six months or so prior to the time an individual would actually be expected to report for induction, a district court proceeding could probably be completed prior to the indicated induction date. If the court rejected the registrant's contentions and upheld his classification no delay would result from allowing preinduction review, unless the registrant took an appeal. In that case the courts could determine whether to grant a stay pending appeal on the same bases that are ordinarily applied in equitable actions, relying principally on what the chances for success on appeal appeared to be. That way the registrant would get at least a determination by one court prior to having to decide whether or not to submit to induction and, in addition, little if any delay would result. Such a procedure would obviously be more palatable to challenging registrants and hopefully result in a significantly greater degree of respect for the processes of the System and the courts. Registrants would be spared having either to subject themselves to criminal prosecution with the stigma attached thereto or submit to induction and then seek habeas corpus relief, thereby changing status from civilian to military, possibly compromising conscience, maybe never obtaining a fair judicial determination, and possibly suffering reprisals from what might be rather hostile Armed Forces personnel.

Concentration on the prime age group of those registrants who are 19 years of age and adoption of the lottery system along with a uniform national call are also likely to have significant effects on the level of litigation likely to result in preinduction judicial review is made generally available. For one thing, there will probably be considerably less questioning on one's obligations (including military service) at this particular stage of an individual's life. For another, there are probably relatively fewer teenagers, as compared with those in their 20's, who would be inclined to initiate a lawsuit challenging their classification in the first place. Many are probably still subject to the constraints of parents who tend to be more traditional in outlook than their offspring and who would be unlikely to want to bear the expense of a lawsuit. Of course registrants in many areas will have available to them the services of draft counselors and other groups which have developed to assist individuals in their situation. In any event, for the reasons mentioned, the overall level of preinduction litigation is likely

to be considerably less than the System might fear, particularly if its own procedures are further improved. Moreover, something might be said about the fact that this may well be the first time that most of these young men have come into significant contact with an arm of the government. Should not the experience be one that seeks to inspire confidence in the fairness and workability of our governmental processes, one that is reasonable and is accompanied by adequate procedural safeguards? And, as noted earlier, preinduction review, if properly managed, might well save the System time and expense by avoiding duplicative inductions.

Another argument sometimes made against allowing preinduction review on a full-scale basis is that this would result in a clogging of court dockets. This notion suffers from the same fallacy as the one about avoiding delay and interruption of the conscription process. Court dockets are just as clogged by criminal prosecutions and habeas corpus cases as they would be by preinduction suits, as the figures noted in the previous memorandum indicate. The level of cases appears now to have stabilized and started to reduce, but this is in large part a reflection of the significantly smaller draft calls of the past several years. The reduction in the numbers of those drafted would of course be reflected in the level of preinduction litigation no less than in other forms. One interesting piece on the whole subject concludes that the court-clogging argument is without substance, and, in pertinent part, states as follows:

> "The argument that the dockets of the courts will be clogged with the bills of litigious registrants asserting frivolous claims is unpersuasive. The truly frivolous claims may be dispensed with quickly by the courts. Furthermore, as the value of litigation as a delaying tactic decreases, the likelihood of a registrant's bringing suit increase with his beliefs in the merits of his claim. An allegation that is incapable of early dismissal is precisely the type of claim that is worth the inconvenience of the agency and the time and effort of the courts." Note, *Judicial Review of Selective Service Classifications*, 56 Va. L. Rev. 1288, 1320 (1970).

It has also been suggested that to allow preinduction review would create confusion in the whole Selective Service area since divergent court opinions would necessarily result. This, the argument goes, would in turn create uncertainty in the minds of System officials and reduce respect for the System and its determinations. Again, this position suffers from the same general defect as the ones discussed above. Preinduction judicial review is no more likely to create confusion in the law in the area than other modes of judicial review. Conflicting court decisions can be (and have been, as the habeas discussion indicates) rendered just as easily in criminal cases and habeas proceedings as in

preinduction suits. As to all classes of cases the appellate process would hopefully resolve most of the inconsistencies and differences, and this would occur sooner, not later, if preinduction review were generally allowed. Moreover, improvement of the administrative processes and extensive publication of uniform guidelines is likely to help reduce the amount of inconsistency. More fundamentally, there is at present a great lack of uniformity in the application of the pertinent law to registrants, running all the way from arbitrary local board actions to irreconcilable and ambiguous appellate court decisions. This situation not only results in substantial unfairness to a number of registrants but breeds disrespect for and cynicism about the entire system. Allowing preinduction review at least gives a registrant a chance for a judicial determination (and appellate review thereof, in appropriate circumstances) prior to his having to take a definitive step in regard to his status with the System. Inconsistencies are endemic to any judicial review system in any event, so this argument hardly provides a sound basis for rejecting preinduction review.

What is even more disturbing in this regard, and argues strongly for across-the-board preinduction review, is the fact that, as a result of the Supreme Court's decisions in the *Oestereich* and *Breen* cases, the 10(b)(3) ban on preinduction suits has significant loopholes. Under that line of decisions where a registrant is statutorily entitled to an exemption or deferment but has been reclassified by his local board and ordered to report for induction. Section 10(b)(3) has no application—in spite of its apparently clear, unambiguous and all-encompassing language. The Court's rationale is that Congress could not have intended the preinduction review preclusion to apply in such situations, although it seems rather plain that that was just what Congress did intend. In any event, whether as a reaction to General Hershey's punitive reclassification policy or in order to avoid having to face a difficult constitutional issue (or a combination of these two considerations), the Court has carved out a substantial niche in the apparently blanket ban on preinduction review. Under *Gabriel* and subsequent cases that ban extends to and applies in cases where discretionary determinations based on factual findings are made by instrumentalities of the System, but not in situations such as those in *Oestereich* and *Breen.* Moreover, in enacting the 1971 statute extending the draft and amending the Act in various respects, Congress did not see fit to rewrite Section 10(b)(3) or otherwise indicate its disagreement or displeasure with the Court's holdings in those cases. This may result in something short of legislative ratification but it does show a congressional approach of "hands off" in regard to the matter of preinduction judicial review. Thus, since Congress has toler-

ated a limited undermining and overturning of its effort to wholly rule out preinduction review, the argument that an across-the-board ban is what Congress intended and has obtained is unavailing to those who would question the soundness of adopting the opposite approach—a general authorization of preinduction review in all classes of cases. As Justice Stewart has pointed out, the effects of the Court's reading of 10(b)(3) are, to say the least, curious. Preinduction judicial review is available in the clear-cut cases where it is least needed to protect a registrant's fundamental rights, but is unavailable in that whole array of difficult and ambiguous situations where administrative fact finding has taken place. The result is that those registrants most in doubt about the validity of their claims and their status generally are forced to guess about this matter without the benefit of a preinduction court decision, whereas those who could more safely refuse to report for induction and then be vindicated in a criminal prosecution are allowed preinduction judicial review. The entire situation is incongruous and confusing and, quite frankly, makes little if any sense when analyzed carefully. This inconsistency in approach as to preinduction review resulting from the aforementioned Court decisions thus provides still another reason for adopting a general authorization of preinduction judicial review which would place all registrants, regardless of the nature of their claim, on the same footing insofar as remedies are concerned. Over a four-month period in 1971 less than 10 percent of all Selective Service cases were brought into the courts through the preinduction review route; about 25 percent of the cases found their way to the courts through the medium of habeas corpus actions; and the remaining cases (with a few exceptions) were criminal prosecutions for refusing induction. Overall, the Civil Division of the Department of Justice estimates that approximately 700 preinduction cases were filed during the period from June 1967 to October 1970, and relief was granted in about 120 of them. Thus, while the chink in the armor of Section 10(b)(3) is not monumental, neither is it inconsequential. It is simply an anomaly that early review is available when the board's action can be shown to be clearly illegal but not so if the situation is otherwise. If anything the converse should prevail, it would seem. In sum, a move to general availability of preinduction review would resolve the existing incongruity and inconsistency in the law which has, on close inspection, little substance to support it.

Moreover, under the present system of defense to a criminal prosecution, post-induction habeas corpus, and limited preinduction review, justice may well be denied to poorly informed registrants who are unaware that they have justifiable and possibly meritorious cases.

Accurate legal information about the Selective Service System, despite considerable recent efforts on its part and development of the Selective Service Law Reporter, is still not readily available to many registrants, especially those of lower socio-economic classes and those living in rural areas. See Donahue, *The Supreme Court* vs. *Section 10(b)(3) of the Selective Service Act: A Study in Ducking the Constitutional Issues*, 17 U.C.L.A.L. Rev. 908, 957 (1970). It is more difficult to evaluate the merits of a registrant's case under the present system of judicial review than if preinduction review were generally available, in view of the timing, knowing the court, etc., although this should be ameliorated to a considerable extent by the board's following the new procedural requirements. Some of the Selective Service regulations are quite technical and, despite the specialization of a few lawyers in major cities, a substantial Selective Service law bar has not as yet developed, presenting problems in finding competent legal advice in some situations. While this problem would remain to a considerable extent were preinduction review made generally available, the opportunity to obtain an early determination by a court would assist registrants significantly.

Moreover, there is a substantial problem in leaving the matter of assessing the validity of challenges to a Selective Service classification in the main to criminal prosecutions. It is a crude and ineffective device for this purpose in a number of ways. For one thing, a number of courts have simply refused to convict violators of the draft laws and some have done no more than give suspended sentences for such violations, reflecting their personal biases about the Vietnam conflict and the draft system no doubt. On the other hand, other courts have applied the criminal process with a vengeance in this area and have meted out the maximum possible penalties. The effect of this is not simply a lack of uniformity in application of the laws depending on part of the country, which judge handles a particular registrant's trial, etc. What is happening to a significant extent is a perversion and prostitution of the entire system of criminal justice in this country because of an ideological chasm about the Vietnam situation. This disserved the system and the country in general and argues further for preinduction judicial review. Again, preinduction review would not eliminate all criminal cases, for some who lost in their civil suit would undoubtedly still refuse to submit to induction. But it would clarify the rights of registrants at an earlier point in time and tend to cut down considerably on the need to resort to the criminal process.

Another aspect of utilizing the criminal process borders on the farcical. Bluntly stated, the laws do not lend themselves to effective enforcement through the criminal process, at least given the existing administrative arrangement. For example, in fiscal year 1970 some

30,000 reported violations of the Selective Service laws resulted in only some 3,800 criminal prosecutions, mainly as the result of procedural errors by System Officials and also in part because of prosecutorial discretion. Surely such selective and inefficient enforcement is rife with inequities.

Some may suggest that extending preinduction review to all registrants would not help measurably since 1) the scope of review is so narrow in any event, and 2) many registrants simply seek to defy the law and such a move would merely delay criminal prosecutions in their cases. As to the former, while the scope of review of Selective Service determinations under the "basic in fact" test is indeed narrow, this hardly argues against allowing preinduction review. If anything, it supports such review since, if the administrative process is operating effectively, very few cases should be subject to judicial overturning. Properly managed, then, a preinduction review system should not interfere greatly with the ordinary operation of the System while still allowing for early review and correction of error in the few meritorious cases. As to the latter point, it is surely true that in some areas of the country there has been a wholesale defiance of the draft; for example, at one point between 40 and 50 percent of those ordered to report for induction in California were failing to show up. Although this percentage is unusually high and outright resistance to the draft has reduced somewhat in the past year or so, this may be little more than a reflection of the lower calls and the changed system for determining which individuals are called. In any event, the fact that preinduction review might provide some registrants with another avenue for delay in seeking to avoid their obligation of military service should not be a reason for denying the benefits of such an approach to the vast majority of registrants who would not abuse it. As indicated earlier, frivolous claims could be handled expeditiously and, if properly administered in regard to timing, little if any delay in such cases should result, particularly where the cases have been handled more effectively at the administrative levels.

A multitude of additional points could be made in support of allowing preinduction judicial review on an across-the-board basis. For the most part these arguments have been thoroughly developed by the Marshall Commission report in 1967, in hearings conducted by Senator Kennedy in 1969, and in countless books and periodical articles, most of which are referred to in the accompanying bibliography. Restating the points made in my previous memorandum in regard to the format which such preinduction review might take as well as in summarizing the reasons supporting such an approach can most effectively be accomplished by an extended quote therefrom.

There, in concluding the memorandum and formulating a recommendation in this regard, I wrote:

> "Thus, it is recommended that a simple and straight-forward preinduction judicial review procedure be established (or, actually, the civil injunctive and declaratory relief approach that has already developed for some cases be sanctioned and perpetuated). In view of the present and contemplated language of Section 10(b)(3), this change would require congressional action and that may be difficult if not impossible to obtain. Nonetheless, it is explained that such a procedure would build upon a substantially enhanced and more elaborate administrative process, along the lines indicated previously, and would not significantly interfere with the raising of necessary manpower, congressional approval seems at least possible. Preinduction judicial review might take a number of forms, but it is suggested that, when all things are considered, the most sensible and practicable course would be to leave jurisdiction precisely where it is now in the situations where it is available—in the district courts in the first instance. . . . Registrants and the public generally would have many reasons to be suspicious of . . . a specialized court [for Selective Service cases] and its decisions might well lack the credibility that those of established courts would have, even with prestigious jurists (though they may be hard to find for this purpose) serving on the body. As now refined, the Selective Service area is not one in which a great amount of judicial expertise is required, and this would be even more so if administrative procedures were improved significantly, as suggested earlier. Over and above all these are the practical political obstacles to getting such a court established, given the framework in which we are presently situated. I just do not think Congress would be receptive to such an idea at this time; liberals would oppose it for fears of how the court would operate and the possibility of its working as a handmaiden of the System; conservatives would oppose it for budgetary reasons and because they dislike creating any new agencies of government when so many already exist; many from both sides of the fence would think the time inopportune with the winding down of the Vietnam conflict and the prospect of an all-volunteer armed forces to be considered."

After discussing an alternative approach of having the federal courts of appeals review Selective Service determinations in the first instance, as in the deportation area, the prior memo stated:

> "Whatever appeal the judicial review aspects of this approach might have, in terms of expedition, seem substantially counterbalanced by the difficulties inherent in placing an additional and potentially sizeable load of cases on three-judge court of appeals panels for review in the first instance. One of the most significant problems in judicial administration is the rapidly increasing case load of the federal courts of appeals. Any step that would add substantially to that burden seems ill-advised at the present time. Thus, although the approach might appear sound in the abstract, it seems undesirable in view of existing circumstances with respect to court of appeals dockets."

Concluding, the memorandum further stated:

> "Other possible schemes for judicial review do not seem to warrant extended discussion, for they are simply variants of either the existing system

or those considered above. What is suggested, then, is substance, is that significant steps be taken to improve the decision-making processes of the Selective Service System, so as to engender more confidence in its decisions and facilitate judicial review. No change in the standard of review is suggested, although a rather persuasive argument can be made for shifting to a less stringent "substantial evidence" standard instead of the existing "basis in fact" test; such a shift would probably not be politically acceptable, and courts can apply whatever standard they want under the guise of applying the one they articulate. With improvement in the System's decision-making processes, it is expected that the problems attendant to judicial review will become less acute. Those registrants who are disposed to litigate will probably do so at whatever point they are allowed to, though there is an argument for delaying review in the hope that they will either accept induction or be disqualified physically at a late point. Moreover, it seems unfair to force a registrant to be subjected to a criminal prosecution in order to test the correctness of an administrative determination of great importance to him. Thus, I suggest that a simplified review proceeding in the district courts be made available to all registrants who wish to challenge their classification or otherwise question the actions of the System; such a proceeding need not depend on 28 U.S.C. 1331, which awkwardly prescribes a $10,000.00 jurisdictional amount, or 28 U.S.C. 1361, whose coverage may be somewhat uncertain. Rather, a registrant should have access to the appropriate district court to test the validity of the Selective Service System's action in his case in a direct and straightforward way. Such a review proceeding should not be available until after the registrant has received an order to report for induction [though such orders should be issued at an early date, once a registrant has been found physically qualified and it is rather certain that he will in fact be called] except for conscientious objector cases, in which it would be immediately available once the special administrative process for handling such cases had been exhausted. Once a registrant has been ordered to report for induction and administrative appeals have been exhausted, he should have a relatively short period—say, ten days—within which to initiate such a review proceeding by filing a notice thereof, and then another relatively short period—say, 30 days—within which to file the record and a brief. In all, the proceeding would hopefully take no longer than 90 days to complete and a court decision could hopefully be obtained within another 30 days. Appellate review could be rather perfunctory, and the Supreme Court would intervene only where an incorrect legal standard had been applied or a gross miscarriage of justice had occurred. A registrant could interrupt the induction process and delay his induction by a considerable period by resort to this procedure, and someone would be required to fill his quota and go in his place. But interruptions occur now where individuals refuse to report as ordered and are subjected to criminal prosecution (although only about 12 percent of reported violations of a serious nature actually result in prosecutions at all, because the System procedural errors, unavailability of evidence, etc.—a rather alarming statistic indeed) and the conviction rate in such prosecutions has been rather low, together with a number of light or suspended sentences by certain judges, further undermining the impact of prosecution as an effective sanction. Moreover, with the prime age group now at 19 and with the lottery system in effect, there would appear to be fewer incentives for registrants to attempt this sort of preinduction delay than previously. And the approach suggested would avoid subjecting the registrant

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with a genuinely debatable claim to the burden of having to undergo criminal prosecution in order to test the validity of his position (or, alternatively, submit to induction and bring a rather unsatisfactory habeas corpus action). Predictions on things like this are always hazardous, but I doubt that the overall volume of litigation will be much if any greater if an across-the-board preinduction review course is followed. It is considerably more humane and, coupled with an upgraded administrative decision-making process, will result in a system in which all concerned—registrants, courts and the country generally—will have more confidence. Resolution of the problem in qualitative terms, in short, is probably as if not more important than solving it quantitatively. And, if my predictions are correct, solving it qualitatively will go a long way toward solving it quantitatively as well."

2. An ancillary but important point relating to the handling of conscientious objector cases warrants discussion. As indicated earlier, I feel quite strongly that the present system for handling C.O. claims is inadequate, ineffective and often unjust. Despite efforts to clarify the guiding legal principles for local boards by the National Director's office, there is still a great amount of uncertainty, arbitrariness and inconsistency in the handling of C.O. claims by local boards (and by some appeal boards as well). The problem is a difficult one since the legal concepts are abstruse and virtually defy comprehensible statement. They derive in large measure from two leading Supreme Court cases of recent years interpreting Section 6(j) of the Act, the provision dealing with C.O. claims and ostensibly establishing the standards therefor. *Seeger* and *Welsh* are the two villains and they have left the law in such a confused state that few lawyers, or law teachers, will attempt to state the present rules with any feeling of confidence. Simply stated, the Court through a tortured process of statutory construction that in *Welsh* did not commend itself even to a majority of the Justices (Harlan reached the First Amendment issue presented, resolved it against the government, yet voted to uphold the Act on the ground that Congress would have preferred that to a total invalidation of the exemption) has extended the language of Section 6(j) to include sincere but non-religious conscientious objection.

In *Seeger* the Court had concluded that C.O. status should be accorded, under Section 6(j), to a registrant with a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption . . ." (380 U.S. 160, 176). That language was written in purported interpretation of the statutory definition of "religious training and belief" which, in pertinent part, stated that Congress intended to include only those with a "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but . . . not . . . [those with] essentially political, sociological, or philosophical views or a merely personal moral code." Whether the Court's construc-

tion properly reflected congressional attitude or not is actually beside the point since, in 1967, Congress deleted any reference to a "Supreme Being" in Section 6(j), apparently accepting the Court's test as enunciated in *Seeger*. But if *Seeger* was difficult to comprehend and apply, *Welsh* compounded the problem considerably. There the Court's plurality opinion, while purporting to apply the *Seeger* test, effectively broadened that test to include all sincere though non-religious C.O.'s In its opinion the Court attempted at several points, without great success, to articulate the standard it was applying, and stated (398 U.S. 333, 339) ; "What is necessary under *Seeger* for a registrant's conscientious objection to all war to be 'religious' within the meaning of § 6(j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious beliefs." Shortly thereafter the Court indicated that "an individual [who] deeply and sincerely holds beliefs which are purely ethical or moral in source and content" was nonetheless within the ambit of 6(j), and later the Court said that those "who hold strong beliefs about our domestic and foreign affairs" or those whose C.O. claim "is founded to a substantial extent upon considerations of public policy" are not as a result excluded from entitlement to C.O. status. The confused state in which this left the law was exemplified by the issuance of a directive to local boards on the standards to apply in C.O. cases by the National Director shortly after the *Welsh* decision, a great amount of criticism levelled against that directive on the ground that it was too narrow in stating the pertinent test, the directive's withdrawal a month or so later, and finally another directive which was somewhat more liberal in stating the *Seeger-Welsh* criteria but was no less inscrutable than the language in those opinions. Despite considerable effort to avoid the difficulty, it seems rather clear that compliance with these criteria is significantly easier for the articulate, well-educated and affluent than for those not so advantaged. Moreover, it seems plain that local boards simply lack the requisite expertise to resolve C.O. claims in a consistent and sensible fashion. Indeed, the experience of the past several years, exemplified by cases such as that of Muhammed Ali, has been one of ineffective, inconsistent and entirely unsatisfactory application of the law by local boards in C.O. cases. Some boards apparently continue to allow only members of recognized "peace churches" to obtain the exemption, others make apparently *ad hoc* decisions and then recite the language of the directive in support of their conclusions, and others are seemingly doing their best to struggle with the difficult and ambiguous standards they are charged with applying. The only thing that could have exacerbated the situation further would have been a Supreme Court decision in the *Gillette* case (401 U.S. 437) upholding the

"selective" C.O. claim made in that case. However, the Court rejected the contention that limiting the granting of C.O. status to those who oppose participation in all wars was constitutionally infirm; had it decided otherwise it is doubtful that the draft could have continued to function at all, and that pragmatic consideration probably played a part in the decision it reached. The congressional response to these cases was interesting; it did nothing to seek to clarify the situation in the 1971 statute. In all likelihood Congress felt there was little if anything it could do without initiating another round of litigation challenging the constitutionality of its actions and resulting in still further confusion as a result of judicial interpretation.

To my way of thinking the whole system for handling C.O. claims is presently an unconscionable one. It is grossly unfair to registrants since not only are the standards confusing but a distinct preference is given to the affluent and educated. It is similarly unfair to place the entire burden for resolving such cases, some of which defy easy determination under the ambiguous criteria enunciated by the Court and left standing by Congress, on local and appeal boards of the Selective Service System. Results being reached are disparate and this lack of uniformity is not productive of many of the cases where judicial review is sought but it also tends to undermine confidence in the system. Little if any clarification of the applicable standards can be expected in the near future. Thus, it seems incumbent on those concerned about the matter to proceed along the lines of seeking procedural rather than substantive changes. Up until 1967 Section 6(j) provided in reference of all appealed C.O. claim cases to a Department of Justice hearing officer who investigated the claim thoroughly and produced an advisory opinion on whether or not the claim had validity. That procedure was abandoned in 1967 through congressional amendment, mainly because it was thought to be too time-consuming and a significant source of delay at a time when our manpower needs were increasing rapidly. It is not suggested that a return to that sort of system would be well-advised; it has a number of problems inherent in it and there is likely to be little if any interest on the part of the System, Congress, the Justice Department (especially bothered by the procedure was the FBI, which was charged with doing the detailed investigative work), or anyone else (except for registrants) in such a step. However, some sort of analogous yet more expeditious procedure for handling difficult C.O. cases seems well-advised and should be given serious consideration. Although such a procedure could probably be established by regulation without congressional authorization, the fact that there was a previous scheme based on congressional mandate and the likely disinterest of the

System in any such procedure seem to argue for its accomplishment through legislation.

Such a procedure might take a variety of formats. The objective would simply to be to provide local and appeal boards with a more informed judgment on how to resolve troublesome and borderline C.O. claims under the applicable legal standards, difficult and ambiguous as they are. Investigation and recommendation authority might be centralized in the National Director's office, but this would seem to present a number of the same problems that the Justice Department hearing officer procedure did. I would favor an approach that would inject some centralization (and with it legal expertise in the particular area) into the process while maintaining a degree of decentralization at the same time. Thus, I suggest that the focal point of this effort should be the State Director's offices in each State. Lawyers, and perhaps some social scientists (sociologists, psychologists, etc.) as well, might be added to the State Director's staff for the specific purpose of advising local and appeal boards on C.O. cases. Some investigatory personnel might be needed also, but I doubt that it would be necessary to conduct anything like the full-blown sort of inquiry formerly performed by the FBI. As to the mechanics of the procedure, I suggest that two routes be provided for obtaining the advice (and all that would be provided would be an advisory report, not a mandatory determination) of the State Director in contested and difficult C.O. cases: (1) through referral by a local or appeal board at its own instance, or (2) through request by a registrant appealing an adverse decision of a local board to an appeal board (thus paralleling the previous procedure in this respect). A simple and straightforward statutory amendment to Section 6(j) to this effect (or to one of the procedural provisions, such as Section 10, if thought more appropriate) could easily be accomplished if sufficient congressional interest were stimulated. Some of the materials referred to in the accompanying Bibliography substantiate the procedural mess that presently exists in regard to C.O. cases, as do the recent court cases themselves, which a quick survey of the Selective Service Law Reporter will quickly indicate. In sum, some procedural change is badly needed and the approach recommended seems to be a feasible and hopefully effective one.

3. Thus, for the reasons developed herein and also in the previous memorandum, it is suggested that the Committee recommend to the Conference and that the Conference in turn recommend that:

(1) Section 10(b)(3) be amended so as to provide for the general availability of preinduction judicial review in all Selective Service cases, subject to the safeguards discussed previously;

(2) Section 6(j) be amended so as to provide for the referral of contested and difficult conscientious objection claims to the State Director's office for expert advice, at the instance of a local or appeal board or upon request of a registrant appealing the denial of a C.O. claim by his local board; and

(3) The Selective Service System is encouraged to amend its procedural regulations in the respects discussed herein so as to further improve upon the administrative handling of Selective Service cases.