Recommendation 72-7

Preinduction Review of Selective Service Classification Orders and Related Procedural Matters

(Adopted December 15, 1972)

Section 10(b)(3) of the Military Selective Service Act, 50 U.S.C. App. § 460(b)(3) (1970), in terms forbids judicial review of administrative determinations relating to the classification and processing of Selective Service registrants, except as incident to criminal prosecutions. In fact, the writ of habeas corpus is available to a registrant who submits to induction and wishes to challenge the classification resulting in his induction, and the Supreme Court has held that Section 10(b)(3) does not preclude preinduction judicial review in those cases where it is alleged that a classification or other Selective Service administrative action is clearly contrary to statute. Discretionary determinations based upon the facts of particular cases remain subject to the Section 10(b)(3) proscription of preinduction review. Almost the only such discretionary determinations today that are likely to be litigated are those involving claims of conscientious objector status. Amendments to the Act in 1971 reduced the number and kinds of discretionary determinations made by Selective Service officials. Those same amendments and consequent amendments of regulations have established new procedural protections for registrants that reduce the pressure for judicial review of Selective Service determinations and at the same time facilitate review in cases where it is had.

Principles of fairness and efficiency strongly urge that preinduction judicial review should be available generally in Selective Service cases, subject to certain qualifications. In addition, there should be established a procedure whereby local draft boards and appeal boards may obtain expert advice on conscientious objector claims, the resolution of which is among the most difficult problems known to our legal system. Finally, the Selective Service System should be encouraged to make additional reforms in its procedures in specific respects in order further to reduce the need for and facilitate judicial review. The present Recommendation is addressed to all of these concerns.

Recommendation

A. *Preinduction Judicial Review*

Section 10(b)(3) of the Military Selective Service Act, 50 U.S.C. App. § 460(b)(3) (1970), should be amended to delete the nominal prohibition of judicial review of administrative determinations relating to the classification and processing of registrants, except as a defense to a criminal prosecution. In lieu thereof the Act should expressly authorize preinduction judicial review at the behest of any registrant seeking to challenge his classification through a suit for declaratory and injunctive relief brought in a federal district court. Elements of and conditions upon such a suit should include the following:

(1) Reasonable restrictions would be imposed with respect to the timing of the suit. These would be related to the Selective Service System's procedure for designating registrants likely to be drafted considerably in advance of their scheduled induction date and would authorize preinduction suits within a limited period, e.g., 30 days, after physical examinations had been taken and administrative remedies exhausted.[1]

(2) The mere pendency of a suit would not operate as a stay of induction. If it appeared that a suit could not be finally determined before a scheduled induction, any request for a stay of induction would be ruled upon according to the traditional standards governing interlocutory injunctive relief.

(3) A determination on preinduction judicial review that the registrant's classification was lawful would be conclusive in any subsequent criminal prosecution.

(4) The President would be empowered to suspend the availability of preinduction review during any period of declared war or national emergency.

(5) The ordinary requirement of exhaustion of administrative remedies would not be affected.

B. *Referral of Conscientious Objector Claims*

The Military Selective Service Act should be amended by the addition to Section 6(j), 50 U.S.C. App. § 456(j) (1970), of a provision for the referral of contested and difficult

[1] The views of the Selective Service System and of the Judicial Conference should be taken into account in the prescription of the period of the limitation.

conscientious objector claims to the appropriate State Director's office for advice. Such referral would be available at the instance of a local board or an appeal board or upon the request of a registrant appealing the denial of a conscientious objector claim by his local board. Consideration of such claims by the State Director's office should be completed within a specified and limited period (e.g., 60 or 90 days) unless exceptional circumstances are presented. The response by the State Director's office in such cases should take the form of an advisory opinion or recommendation that would be part of the administrative record to be considered by a reviewing court, but would not be binding on the local board or the appeal board.

C. *Further Procedural Reforms*

The Selective Service System is encouraged to amend its procedural regulations in the following respects:

(1) To allow registrants to be accompanied, represented and advised by counsel or other authorized representatives at local and appeal board appearances.

(2) To provide for the preparation of suitable transcripts of local board and appeal board proceedings involving appearances by registrants.[2]

(3) To provide a permanent staff for the National Appeal Board and to expand the Board's jurisdiction to include discretionary review of any registrant's claim regardless of whether the appeal board considering the case had been unanimous.

Citations:

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Note: This recommendation was not published previously in the Federal Register.

[2] Transcripts initially could simply take the form of tape recordings, which would be prepared in typewritten form only if necessary for subsequent review.

Separate Statement of Henry N. Williams

In accord with 5 U.S.C. § 575(a)(1) (1970), and the first clause of section 2(a) of the Bylaws of the Conference, I record my dissent to this recommendation.

The Assembly, in making this recommendation, requests the Congress to reconsider important and sound recent judgments and urges the Director of Selective Service to accomplish by regulation that which the Congress has repeatedly and wisely declined to do by legislation. A majority of the members of the Assembly have committed the prestige of the Conference to a recommendation that, at best, can only be characterized as most unfortunate.

Were the principal features of this recommendation to be implemented our courts would be further burdened, "informal and expeditious processing which is required in selective service cases" would be impossible, and great unfairness to the overwhelming majority of registrants of the Selective Service System would inevitably result without substantial compensating benefits.