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# Administrative Law--Selective Service--Supreme Court Rules Selective Service System's Delinquency Regulations Not Congressionally Authorized

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ADMINISTRATIVE LAW—SELECTIVE SERVICE—SUPREME COURT RULES SELECTIVE SERVICE SYSTEM'S DELINQUENCY REGULATIONS NOT CONGRESSIONALLY AUTHORIZED.—David Earl Gutknecht, after duly registering with his local selective service board a few days subsequent to his eighteenth birthday, was initially classified 1-A.[1] Gutknecht later entered college, and therefore received a II-S deferment.[2] Upon leaving school he notified his local board by letter, although prior to this time Gutknecht had filed an application for exemption as a conscientious objector. This application was denied, but Gutknecht noted his appeal.

On October 16, 1967, as part of a nation-wide protest against United States involvement in Vietnam, Gutknecht left his registration certificate and his notice of classification on the steps of the Federal Building in Minneapolis with a statement explaining the basis of his protest. On November 22, 1967, Gutknecht's conscientious objector appeal was denied, and five days later he received notice of his reclassification to I-A. He was declared delinquent[3] and was ordered to report for induction[4] on January 24, 1968. Gutknecht did report, but he signed a statement to the effect that he refused to take part in any or all of the prescribed processing.

Consequently indicted for wilfully and knowingly failing and neglecting "to perform a duty required of him" under the Selective Service Act of 1967,[5] Gutknecht was tried without a jury, found guilty, and sentenced to four years imprisonment.[6] A federal court of appeals affirmed the conviction,[7] holding in accord with *O'Brien v. United*

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[1] Under 32 C.F.R. § 1622.10 (1962) a 1-A classification is reserved for those who are not otherwise deferred or exempt and who meet all the requirements for immediate induction into the service.

[2] 32 C.F.R. § 1622.25 (Supp. 1966) provides for the temporary deferment of students.

[3] 32 C.F.R. § 1642.4 (1962) allows a local board to declare a registrant to be a "delinquent" whenever he "has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153)." Gutknecht was declared a delinquent for failing to have his registration certificate (SSS Form No. 2) and his current classification notice (SSS Form No. 110) in his personal possession at all times, as required by 32 C.F.R. § 1617.1 (1962) and 32 C.F.R. § 1623.5 (1967) respectively.

[4] At the time Gutknecht was declared delinquent the order of call was set out in six categories in 32 C.F.R. § 1632.7 (1962). According to this provision delinquents were to be inducted first, even ahead of volunteers. Therefore, when he was declared delinquent, Gutknecht was moved from the third to the first category, thus speeding up his induction.

[5] Military Selective Service Act of 1967, 50 U.S.C.A. App. §§ 451.473 (1967).

[6] United States v. Gutknecht, 283 F. Supp. 945 (D. Minn. 1968).

[7] 406 F.2d 494 (8th Cir. 1969).

*States*[8] that Gutknecht's surrender of his draft card was not protected by the first amendment, that the accelerated induction as a delinquent was not "lawless or irregular," and that the facts alleged in the indictment had been proved. The Supreme Court of the United States then granted certiorari.[9] *Held* Reversed. The administratively promulgated delinquency regulations of the Selective Service System are not authorized by Congress, and therefore can not be used to speed up petitioner's induction into the armed services. *Gutknecht v. United States*, — U.S. —, 90 S. Ct. 506 (1970).

Under the 1917 Selective Service Act[10] every male between the ages of 21 and 30 was required to fill out a registration form. If one failed to do so, his name was forwarded to the Army, which subsequently sent him his draft notice.[11] A person failing to report was court-martialed as a deserter.[12] Thus the enforcement of the draft laws was initially left principally to the military, with local boards and civilian prosecutorial officials playing a reporting and policing role.[13] The Selective Training and Service Act of 1940[14] put the duty for enforcing compliance with the new conscription statute and for punishing those who declined to report for or submit to induction within the jurisdiction of the civil courts.[15] Therefore one was no longer subject to military jurisdiction on the date he was ordered to report, but could appeal to the courts up to the time he was actually inducted.

The regulations issued pursuant to the 1940 Act were the first to mention the term "delinquent."[16] Under these regulations a local board's determination of whether or not a delinquent's "intent" was wilful was the primary administrative decision involved in determining whether to invoke the criminal process.[17] In 1943, the regulations were altered radically and the definition of a delinquent was changed to mean "anyone liable for training and service who does not perform any duty required of him."[18] A delinquent nonregistrant could be brought before the board, registered, and classified in a class available

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[8] 391 U.S. 367 (1968). In *O'Brien* the Court ruled that draft card burning was symbolic speech, but that the government's interest in maintaining an efficient draft system outweighed the free speech interest.

[9] 394 U.S. 997 (1969).

[10] Selective Draft Act of 1917, ch. 15, 40 Stat. 76.

[11] United States *ex rel.* Bergdoll v. Drum, 107 F.2d 897 (2d Cir. 1939).

[12] *Id.*

[13] Brief for Petitioner at 19, Gutknecht v. United States, — U.S. —, 90 S. Ct. 506 (1970).

[14] Act of Sept. 16, 1940, ch. 720, 54 Stat. 885.

[15] Billings v. Truesdell, 321 U.S. 542 (1944).

[16] 32 C.F.R. §§ 642.1-642.8 (Supp. 1940).

[17] *Id.* § 642.3.

[18] 32 C.F.R. § 601.5 (Supp. 1943).

for service.[19] Also, these regulations empowered a board to reclassify as available for service any registrant who failed to perform a duty required under the draft law and regulations, and to induct him as soon as possible without regard to the order of call established elsewhere in the regulations.[20] Again, a major consideration in the board's action was whether a person had knowingly become a delinquent. If so, he was to be retained in a class available for service; if not, he was to be classified in the usual manner after an appeal, and his delinquency was to be disregarded.[21]

The Selective Service Act of 1948[22] contained no reference to delinquency or delinquents, but the regulations continued to survive virtually intact. Not until the passage of the Selective Service Act of 1967 did Congress actually mention "delinquents," but this reference concerns only the order-of-call provision which institutes a call by age groups "after delinquents and volunteers."[23] The precise provision has never been used.

Then on October 24, 1967, General Lewis B. Hershey, Director of the Selective Service System, issued Local Board Memorandum No. 85 and on October 26, 1967, a letter, the gist of which was that local boards should use the delinquency regulations to reclassify and/or speed up the inductions of those who had surrendered or mutilated their draft cards or who had engaged in such other activities thought to be "disruptive of the Selective Service System or not in the national interest."[24]

Thus, as characterized by the petitioner Gutknecht in his brief to the Supreme Court in the instant case,

> . . . [T]he history of the delinquency provisions shows an evolution by administrative regulatory fiat away from a simple reporting system, through a standardized coercive mechanism giving a local board quite limited discretion, to today's utterly standardless system subject only to occasional administrative or judicial correction.[25]

Petitioner, therefore contended that the authority of the Selective

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[19] 32 C.F.R. § 622.51 (Supp. 1943).
[20] 32 C.F.R. § 642.13(a) (Supp. 1943).
[21] 32 C.F.R. § 642.14(c) (Supp. 1943).
[22] Act of June 24, 1948, ch. 625, 62 Stat. 604.
[23] Military Selective Service Act of 1967, 50 U.S.C.A. App. § 456(h) (1) (1967).
[24] For a discussion of the justiciability of the legality of the "Hershey directive" before enforcement see 83 HARV. L. REV. 690 (1970).
[25] Brief for Petitioner at 25, Gutknecht v. United States, — U.S. —, 90 S. Ct. 506 (1970).

Service System concerning the use of the delinquency regulations has snow-balled through the years to a point where today it has arrogated extensive power and discretion to itself without congressional mandate.

The Court earlier had denied enforcement of the delinquency regulations, without facing the question of their validity, in *Oestereich v. Selective Service System Local Board No. 11.*[26] In that case, the Court ruled that a divinity student with a statutory exemption who had turned in his registration certificate and was consequently declared delinquent and reclassified I-A could not be deprived of his draft status for conduct not related to the merits of his exemption. In the instant case, however, Gutknecht was already classified I-A, having no statutory exemption or deferment, and thus the Court had to either follow the concurring view of Mr. Justice Stewart that the local board had violated the very regulations it claimed to be enforcing[27] or meet the validity of the delinquency regulations head on.

Choosing to do the latter, the majority of the Court in *Gutknecht* reasoned that Congress, rather than authorizing the reclassification of exempt and deferred registrants for punitive purposes and providing for the accelerated induction of delinquents, had merely reaffirmed its intention under § 12 of the 1967 Act to punish delinquents through the criminal law. Thus, the majority ruled that the delinquency regulations lacked congressional authorization and struck them down, despite the strong argument of the government that Congress, by its mention of delinquents in the 1967 Act, had taken notice of delinquency regulations and had authorized them by reenacting the draft laws without overruling any delinquency provision.[28] The statutory reference being that delinquents are to be the first inductees, it can be powerfully argued that Congress was aware of the impact, as well as merely the existence, of the regulations. However, the majority termed this a "passing reference" when measured against explicit congressional provision for criminal punishment of those who violate the draft laws,[29] congressional provision for exemptions and defer-

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[26] 393 U.S. 233 (1968).

[27] Gutknecht v. United States, — U.S. —, —, 90 S. Ct. 506, 515 (1970). In his concurring opinion Mr. Justice Stewart did not reach the question of whether the delinquency regulations were congressionally authorized, he being able to dispose of the case on this even narrower ground.

[28] Brief for Respondent at 33, Gutknecht v. United States, — U.S. —, 90 S. Ct. 506 (1970).

[29] Military Selective Service Act of 1967, 50 U.S.C.A. App. § 462 (1967). This section specifically provides for a fine of $10,000 or a prison term for not more than five years, or both, for a person convicted of a draft law violation.

ments,[30] and congressional expressions concerning the desire for an impartial order of call.[31]

Also, the Court concluded from reviewing legislative history for a complete view of congressional intent that the great concern of Congress in the section in which the reference was made was with the order of call and the selection of persons for military service in an impartial manner, for in that year Congress struck out against the grant of power to the President to initiate "a random system of selection."[32] The Court's reasoning was explained when Mr. Justice Douglas said for the majority:

> It is difficult to believe that with that show of resistance to the grant of a more limited power, there was acquiescence in the delegation of a broad, sweeping power to Selective Service to discipline registrants through the delinquency device.[33]

Even though the random system for induction has since been put into force by proclamation, pursuant to an act of Congress repealing the provision requiring the President to select from the oldest first within the designated prime age group for induction,[34] legislative history, according to the majority in *Gutknecht,* again points to the concern of Congress with the problems of the order of induction.[35]

Summarizing its reasoning, the Court said:

> The power under the regulations to declare a registrant delinquent has no statutory standard or even guidelines. The power is exercised entirely at the discretion of the local board. It is a broad roving authority, a type of administrative absolutism not congenial to our law-making traditions . . . . We search the Act in vain for any clues that Congress desired the Act to have punitive sanctions apart from the criminal prosecutions specifically author-

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[30] *Id.* § 456. This section sets out in detail all circumstances under which a registrant may be exempted or deferred from service in the armed forces.

[31] *Id.* § 455. This provision specifically requires that "the selection of persons for training and service . . . be made in an impartial manner . . . ." It further provides that there be no discrimination on account of race or color, that no person under the age of nineteen shall be called unless there are not a sufficient number of persons available for induction within the jurisdiction of the local board, that the President cannot change the method of determining the relative order of induction for registrants within each age group unless authorized by law (now repealed; *see* note 34 *infra,* and accompanying text), and that an impartial quota system be established.

[32] H.R. REP. No. 346, 90th Cong., 1st Sess. 9-10 (1967).

[33] Gutknecht v. United States, — U.S. —, —, 90 S. Ct. 506, 511 (1970).

[34] The repeal of this provision of the Military Selective Service Act of 1967, 50 U.S.C.A. App. § 455(a) (2) (1967), by an Act of Nov. 26, 1969, Pub. L. No. 91-124, 83 Stat. 220, enabled President Nixon to issue Proclamation 3945, 34 Fed. Reg. 19017 (Nov. 29, 1969), putting a random system for induction into effect.

[35] Gutknecht v. United States, — U.S. —, —, 90 S. Ct. 506, 511 (1970).

> ized. Nor do we read it as granting personal privileges which may be forfeited for transgressions which affront the local board.[36]

The decision in *Gutknecht* is a definite blow to the Selective Service System and its self-styled "speedy and efficient operation." Despite repeated avowals by officials that the purpose of the delinquency regulations was to bring reluctant registrants into compliance with the draft regulations and thus supply young men for military service and not for criminal prosecutions, the effective result of the use of the delinquency regulations was to stifle dissent—meaningful, unlawful, or otherwise. The Supreme Court by declaring the regulations unauthorized has now forced the use of criminal prosecutions for violations of the draft laws and regulations.

> While the draft process has certain unique problems, it still should provide, wherever possible, the same procedural safeguards deemed necessary in other areas of the administrative process. It is no answer to say that all have a military obligation, and thus errors in classification are of little consequence. The draft process is still a creature of law, and Congress—through the act and by delegating authority to the Selective Service to promulgate regulations *not inconsistent* with it—has provided that certain situations must be treated in certain ways. It is the responsibility of the courts to control the process through which this is accomplished.[37] (Emphasis added.)

A possible consequence of the *Gutknecht* decision may be the specific authorization by Congress of new delinquency regulations. Then the Court would be unable to follow, as it did in *Gutknecht,* its old accepted tenet of disposing of cases, if possible, before reaching constitutional questions.[38] One issue that would then arise would be the issue of symbolic speech in such delinquent acts as disposing of one's draft card. The Court would seemingly follow the *O'Brien* decision, however, and rule that the legitimate interest of the government in the need for the orderly administration of the raising of an

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[36] *Id.*

[37] Note, *Fairness and Due Process Under the Selective Service System,* 114 U. PA. L. REV. 1014, 1048 (1966).

[38] Mr. Justice Harlan's view was more narrow than the majority opinion in *Gutknecht.* He stated in his concurring opinion that he saw nothing wrong with classifying as I-A a registrant who failed to provide his local board with information pertinent to whether or not he qualified for a deferment or exemption. Thus, as he saw it, existing legislation does not authorize accelerated induction to punish past infractions, but "it may well authorize acceleration to encourage a registrant to bring himself into compliance with the rules essential to the operation of the classification system." *Gutknecht v. United States,* — U.S. —, —, 90 S. Ct. 506, 514 (1970).

army outweigh the first amendment argument that the returning of draft cards is a protected vehicle of speech.[39]

Furthermore if statutorily authorized regulations are eventually formulated, they will have to be sufficiently narrow in scope and clear in meaning so as to set up standards by which the legality of a "delinquency" declaration can be judged. "And the regulations, when written, would be subject to the customary inquiries as to infirmities on their face or in their applications . . . ."[40] Thus, even regulations sanctioned by Congress would probably be challenged on the ground that they had a punitive effect on the exercise of constitutional rights.

No matter what the future holds, the *Gutknecht* decision represents a triumph over an overbroad, discretionary administrative power —a vindictive sort of power used to silence those who would dare to confront the System.

> [Thus] courts are beginning to evidence a belief that the current administrative procedure of the System is inadequate to guarantee full protection of all those affected by it. The issue will no longer be settled by urging the courts to respect the sanctity of the Selective Service; constitutional questions have superseded more administrative considerations . . . . [I]f Congress fails to fill the gap in the statutory structure, the courts will undoubtedly continue to assume an innovative role in an effort to prevent administrative abuse, by the Selective Service and others, of basic constitutional liberties.[41]

*J. Gary Bale*

ADMINISTRATIVE LAW—JUDICIAL REVIEW—DUE PROCESS.—Susan Hohnke was arrested and indicted on July 22, 1966 for the unlawful possession of lysergic acid diethalamide [hereinafter LSD], classified in Kentucky as a narcotic drug[1] by a regulation promulgated by the State

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[39] *Accord,* United States v. Kime, 188 F.2d 677 (7th Cir. 1951), United States v. Hertlein, 143 F. Supp. 742 (E.D. Wis. 1956). In these lower federal court cases the legality of the regulations forbidding nonpossession of draft cards was upheld.

[40] Gutknecht v. United States, — U.S. —, —, 90 S. Ct. 506, 512 (1970).

[41] Jones, *Draft Reclassification for Political Demonstrators—Jurisdictional Amount in Suits Against Federal Officers,* 53 CORNELL L. REV. 916, 934 (1968).

[1] The unlawful possession of a narcotic drug is prohibited in KY. REV. STAT. [hereinafter cited as KRS] § 218.020 (1936).