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Accelerated Induction—The End of the Old Fast Shuffle: Gutknecht v. United States

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ACCELERATED INDUCTION—THE END OF THE OLD FAST SHUFFLE:

GUTKNECHT v. UNITED STATES[1]

David Earl Gutknecht at the time he refused induction into the armed forces was just another young person among a growing number who have registered disenchantment with the present draft system in the United States. He has since played a major role in upsetting the Selective Service System's ability to exercise a "broad, roving authority, a type of administrative absolutism not congenial to our law-making traditions."[2]

Gutknecht registered with his local board and was classified I-A. After he notified the local board of his student status, he was reclassified II-S. Over a year later he informed the board that he was no longer a student and was reclassified I-A. He also asked for an exemption as a conscientious objector. When this request was denied, his I-A classification was reaffirmed. On October 16, 1967, during the appeal of that classification, Gutknecht, in an expression of opposition to the Vietnam War, turned in his notice of classification and registration certificate by leaving them on the steps of the Federal Building in Minneapolis.[3] His appeal was denied on November 22, 1967, and five days later he was again notified of his I-A status. On December 20, 1967, Gutknecht was declared delinquent by his local board pursuant to the Selective Service Regulations[4] for failure to comply with duties imposed by the Military Selective Service Act.[5] On December 26, only six days later, he was ordered to report for induction. As a result of the declaration of delinquency, Gutknecht's induction had been accelerated.[6]

Gutknecht appeared at the induction center when scheduled, but refused to take part in the processing. Subsequently he was indicted and prosecuted under the Selective Service Act.[7] Gutknecht, tried without a jury, was found guilty of "wilfully and knowingly failing and neglecting 'to perform a duty required of him' under the Act."[8] He was sentenced to four years in pris-

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1 396 U.S. 295 (1970).

2 *Id.* at 306.

3 *Id.* at 297.

4 32 C.F.R. § 1642.4 (1971).

5 50 U.S.C. § 462 (1964).

6 The Government conceded that it was unlikely that Gutknecht, at age 20, would have been called at such an early date without the declaration of delinquency. 396 U.S. at 317-18.

7 Section 12 of the Act calls for punishment by "imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, ..." 50 U.S.C. App. § 462 (Supp. V, 1970).

8 396 U.S. at 297.

on. The court of appeals affirmed his conviction.[9] The Supreme Court of the United States reversed the conviction and held that the delinquency provisions used to accelerate Gutknecht's induction were not authorized by the Selective Service Act.

To understand and ascertain the role of delinquency in the Selective Service System it is imperative that one acquaint oneself with the historical development of enforcement within the System. The history of the Selective Service System dates back to the Selective Draft Act of 1917.[10] The Act provided that a registrant was under the jurisdiction of the military courts from the date he received his notice of induction.[11] Those who were ordered to report for induction and failed to do so were apprehended and dealt with according to the military laws proscribing desertion.[12] The utilization of the civilian legal process came into play only with regard to conspiracies to obstruct the draft.[13] Under the 1917 Act enforcement was primarily attained through the military while the local boards exercised a reportorial function as to Draft Act violations.

The Selective Training and Service Act of 1940,[14] however, served to severely limit the power of the military courts over the conscription process. The Supreme Court in *Billings v. Truesdell*[15] held that the Act vested jurisdiction solely in the civil courts from the time notice of induction was received until the date of actual induction.[16]

The term "delinquent" was injected into selective service law in the regulations issued pursuant to the 1940 Act.[17] Basically, a delinquent was any man required under the Act to register who failed to do so without a valid excuse or any registrant who failed to perform any duty imposed on him by the Selective Service System without a valid reason.[18] Under the 1940 delinquency regulations, the board was to notify the delinquent and have him report to the local board. The local board was still performing a reportorial function, for it was obligated to investigate the suspected delinquency and if it determined that the delinquency was effected by wrongful intent, the case was to be turned over to the United States Attorney. If the board found that the delinquent was "innocent of any wrongful intent", it was to process him as it would any other registrant.[19]

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9 United States v. Gutknecht, 406 F.2d 494 (8th Cir. 1969).

10 Act of May 18, 1917, ch. 15, 40 Stat. 76.

11 *Id.* § 2, 40 Stat. at 77-78.

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

13 Schenck v. United States, 249 U.S. 47 (1919).

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

15 321 U.S. 542 (1944).

16 *Id.* at 546.

17 Petitioner's Brief for Certiorari at 20, Gutknecht v. United States, 396 U.S. 295 (1970), *citing* 32 C.F.R. ch. VI (Supp. 1940).

18 *Id., citing* 32 C.F.R. § 601.106 (Supp. 1940).

19 *Id.* at 21, *citing* 32 C.F.R. § 603.390 (Supp. 1940).

From 1940 to 1943 the local board served as an effective reporting device, but in 1943 the delinquency regulations were drastically changed. The procedure of accelerated induction was introduced[20] "to provide for the administrative penalty to a delinquent of prompt classification . . . for service, in addition to the existing criminal sanction."[21] An individual who was subject to conscription and failed to register was registered and classified as available for service. The board was empowered to reclassify in a class available for service and induct as soon as possible any registrant who failed to perform a required duty, notwithstanding the order of call established in the regulations.[22] A registrant who lost an exemption or deferment under the above procedure was granted the rights of appeal and personal appearance.[23] With respect to individuals who were already I-A when declared delinquent, the local board had the option of "reopening" the classification and granting appeal and personal appearance prior to induction. If the registrant had become delinquent "knowingly", the board was ordered not to reopen his classification.[24] Thus, the result of the 1943 amendment was to give to the local board the power to send a man into military service for a violation of the law or regulations. This same summary power of the local board survived both the passage of the Selective Service Act of 1948,[25] and the Military Selective Service Act of 1967.[26]

The local board's function in dealing with delinquents had thus developed from a strictly reportorial one into a coercive induction process. In 1968, in *Oestereich v. Selective Service Board*,[27] the Supreme Court held that there was no legislative authority to withhold a statutory exemption as a result of conduct which in no way affected the merits of such an exemption. This began a trend limiting the coercive power of the local boards. The reversal of Gutknecht's conviction was a later and more significant manifestation of that trend.

Actually, the decision in *Gutknecht*, holding that there is no legislative authorization for induction of an individual inconsistent with his place in the order of call,[28] is a logical extension of the rule handed down in *Oestereich*.

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[20] *Id.* at 23, *citing* 32 C.F.R. § 642.13(a) (Supp. 1943).

[21] SELECTIVE SERVICE SYSTEM, ENFORCEMENT OF THE SELECTIVE SERVICE LAW 13, 56 (1950).

[22] Petitioner's Brief for Certiorari, *supra* note 17, at 23, *citing* 32 C.F.R. § 642.13(a) (Supp. 1943).

[23] *Id.* at 23, *citing* 32 C.F.R. § 642.14 (Supp. 1943).

[24] *Id.* at 24, *citing* 32 C.F.R. § 642.16(b) (Supp. 1943).

[25] Act of June 24, 1948, ch. 625, 62 Stat. 604. *See* Petitioner's Brief for Certiorari, *supra* note 17, at 25, *citing* 32 C.F.R. Part 1642 (1948).

[26] 50 U.S.C. App. §§ 451-71 (Supp. V, 1970). At the time Gutknecht was declared delinquent the local board had the power to declare a registrant delinquent for failure to perform a duty required under Selective Service law. 32 C.F.R. § 1642.4(a) (1971); *See generally* Petitioner's Brief for Certiorari, *supra* note 17, at 17-25.

[27] 393 U.S. 233 (1968).

[28] 396 U.S. at 304-06.

Therefore, similar to *Oestereich*, an administrative agency which acts at its own discretion in withholding what can be a "bestowal of great benefits"[29] because of reasons that do not affect those benefits, will not be allowed to continue to do so without congressional authority.

Justice Douglas, writing for the majority, was called upon to determine the legality of the accelerated induction regulations enacted by the Selective Service System. Several preliminary problems confronted him. He resolved the first by observing that the doctrine of exhaustion of administrative remedies did not preclude the defense upon which the appeal was based; further, he assumed rather than analyzed an element crucial to his determination of the issue of intent—that the regulations were punitive rather than remedial. Had the regulations been analyzed and found remedial, it is likely that, in view of the broad powers given the President to enforce the Selective Service Act, those regulations would have been found authorized. Finally, Justice Douglas not only held that no evidence had been presented to show that Congress intended to legitimize accelerated induction, but in fact determined that the legislature sought to limit tampering with the order of call.

Justice Harlan and Justice Stewart, joined by Chief Justice Burger, filed separate concurring opinions.

Before the Court decided the case on the merits, it addressed itself to the doctrine of exhaustion of administrative remedies. The regulations provide for appeal if the registrant "is classified in or reclassified into Class I-A, Class I-A-O or Class I-O . . . ."[30] Justice Stewart, concurring, argued that when Gutknecht was moved forward unnaturally in the order of call he was "classified in" Class I-A within the meaning of the regulation, and appeal as a matter of right was available to him. As the majority pointed out, however, delinquency status is declared and not classified.[31] Therefore, the Court held that a delinquent who has been moved ahead in the order of call is not governed by the regulation and is only entitled to appeal at the discretion of his local board.[32] Since there was no administrative appeal open to the petitioner as a matter of right, he was not barred from raising the invalidity of delinquency provisions in his defense.

The majority's conclusion that no administrative remedy was available to Gutknecht was proper. A correct reading of the regulation leads one to believe that "classified in", read with "reclassified into", would establish that "classify in" refers to a registrant not previously classified at all.

The Court might well have made this distinction to show the discretionary nature of delinquency provisions; it was not necessary to the defense. In *McKart v. United States*,[33] where the petitioner was challenging his I-A

[29] *Id.* at 304.
[30] 32 C.F.R. § 1642.14 (1971).
[31] 396 U.S. at 300, *citing* 32 C.F.R. § 1642.4 (1967).
[32] *Id.* at 300.
[33] 395 U.S. 185 (1969).

classification, the Court held that the doctrine of exhaustion of remedies was inapplicable where the question raised was one of statutory interpretation. Justice Douglas, in a footnote, recognized the significance of *McKart.*[34] Clearly, that holding could have been applied to *Gutknecht;* the lack of statutory authorization in the instant case is a question of statutory interpretation.

Having assumed delinquency regulations leading to accelerated induction are punitive in nature, the Supreme Court framed its decision around one central issue: the legislative authorization of such regulations. The assumption of the punitive nature of accelerated induction is tenuous at best and requires deeper analysis. The Court found that the *punitive* accelerated induction procedure was not authorized by Congress. However, had the Court found the procedure to be regulatory as opposed to punitive, it may well have been authorized under the broad grant of authority given the President to enforce the 1967 Act.[35]

The concurring opinion of Justice Stewart suggested that provisions for accelerated induction are part of a regulatory scheme and not punitive.[36] If indeed such is the case, the regulations must pass the tests set forth in *Kennedy v. Mendoza-Martinez.*[37] Within the confines of this decision the Supreme Court established the basis for finding whether a certain procedure is punitive in the absence of legislative history. The test is

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter,* whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.[38]

It can be argued that induction into the military has characteristics of affirmative disability or restraint, but possibly the regulations would not be classified punitive under this indicator since this change in status from civilian to soldier is exactly what happens to registrants who are not characterized as delinquents. Induction itself, however, is not in issue. The real question relating to affirmative restraint is the acceleration of induction. As a result of a declaration of delinquency, a registrant suffers an affirmative disability. But for the accelerated induction, the inductee would have been able to plan his education, his family life, and the solution of his personal obligations in reliance upon his expected induction date in the order of call. In fact,

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[34] 396 U.S. at 300 n.3.

[35] 50 U.S.C. App. § 460 (1964), *as amended* 50 U.S.C. App. § 460(b) (Supp. V, 1970).

[36] 396 U.S. at 314-19.

[37] 372 U.S. 144 (1963).

[38] *Id.* at 168-69. (footnotes omitted).

without accelerated induction some registrants would never be forced to serve. It is apparent that a governmental scheme which precludes the planning of one's life beyond the immediate future effects a loss of personal liberty.

The second criterion for finding an act punitive is whether historically it has been regarded as punishment. A creature unique to the modern day Selective Service System, accelerated induction lacks historical development. Even though in the United States induction itself has been deemed an honor or at least an accepted duty of citizenship, this factor of the *Kennedy* test has little value as an indicator.

The third indicium of the penal nature of a provision is scienter. To say that scienter is required in delinquency proceedings is an unprovable proposition, for the local board is not required to make findings of fact but need only express its decision by a classification symbol. The theory could be advanced, however, that since the Act requires scienter for a finding of guilt in a criminal prosecution for failure to perform a duty,[39] the local board must pay heed, to some extent, to the registrant's intent. On the other hand, the regulations do not require a knowing dereliction of duty, but only a violation of duty.[40] The Government argued, in another context, that it would be a breach of discretion on the part of the local board not to cure a delinquency incurred in good faith.[41] That may be so, but scienter is nowhere required for the declaration of delinquency in the first instance. Despite the Government's inadvertent admission, there is nothing determinative in an analysis of this indicium.

The traditional aims of punishment are also achieved through the deterrent effect of the acceleration process. Given the burdensome character of life in the military and the peril to one's safety when in combat, it is natural that many would wish to delay as long as possible or even avoid service altogether.[42] Therefore, the penalty of accelerated induction certainly deters those who would otherwise avoid duties imposed by the Selective Service System. The failure to provide for a delinquent's absolution save in the local board's discretion permits the local board to accelerate induction for a past act which a delinquent can in no way remedy, and contains elements of both deterrence and retribution. Nor can it be denied that the behavior to which the regulations apply is already a crime under section 12 of the Military Selective Service Act of 1967.[43]

An important aspect of the *Kennedy* test which points away from the punitive nature of accelerated induction is whether there is an alternative purpose and whether in relation to that alternative, the regulation appears exces-

39 50 U.S.C. App. § 462 (Supp. V, 1970).
40 32 C.F.R. § 1642.4(a) (1971).
41 396 U.S. at 301 n.4.
42 Brief for Respondent at 44, Gutknecht v. United States, 396 U.S. 295 (1970).
43 50 U.S.C. App. § 462 (Supp. V, 1970).

sive. The alternative purpose assigned to accelerated induction is both rational and non-excessive. The raising of an army is a valid constitutional goal. The Selective Service System was put into effect to implement that goal. The provision for accelerated induction compels cooperation with the System. If every minor breach of duty had to be prosecuted in the courts, the Selective Service System would become overburdened at best and completely ineffective at worst.[44] Another non-punitive reason for accelerated induction is to keep up the morale of the many millions of registrants who attempt in good faith to comply with the Selective Service Regulations. In fact, the dissenters in *Kennedy* recognized that maintenance of morale of those in the Armed Forces is a reasonable alternative purpose.[45]

The foregoing analysis does not clearly indicate whether or not delinquency is really punishment as set out in *Kennedy*. The application of the test is not conclusive, but rather indicative of the nature of an act. In the present application there is no clear indication one way or another. In *Anderson v. Hershey*,[46] the court concluded that depriving one of citizenship, the sanction involved in *Kennedy*, is much harsher, and induction is much less punishment.[47]

As the Government noted, regulation of licensing, deportation and disbarment, although having punitive aspects, has been consistently held remedial.[48] Therefore, the Court could have found arguments to support the proposition that delinquency provisions are regulatory. However, the Selective Service System itself recognized accelerated induction as punitive, labeling such a procedure an administrative penalty to be used "in addition to the existing criminal sanction."[49] Perhaps this admission is the basis of the Court's evasion of the issue. In any case, a better reading of the accelerated induction provision in conjunction with the *Kennedy v. Mendoza-Martinez* test —considering the loss of personal liberty effected and the element of de-

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[44] Brief for Respondent, *supra* note 42, at 47-49. Many thousands of men have been declared delinquent for "minor" breaches of duty. Criminal prosecutions of all those registrants would be a difficult task indeed.

[45] *Kennedy* dealt with a denationalization statute invoked when one departed from or remained outside the United States in time of war or national emergency in order to avoid training and service in the armed forces; *Gutknecht* involved a conscription statute. They are not mutually exclusive. The dissenters in *Kennedy* felt that the use of a denationalization statute was a valid effort by Congress to uphold the morale of men who did not leave the United States to avoid their military obligations. 372 U.S. at 209-10.

[46] 410 F.2d 492 (6th Cir. 1969), *vacated*, 397 U.S. 47 (1970). The case was remanded in light of Breen v. Selective Service Bd., 396 U.S. 460 (1970), which relied to some degree on *Gutknecht*. A reference to *Anderson*, therefore, is not inappropriate in any critical analysis of *Gutknecht*.

[47] 410 F.2d at 498.

[48] Brief for Respondent, *supra* note 42, at 59-61.

[49] SELECTIVE SERVICE SYSTEM, *supra* note 21, at 13, 56.

terrent involved—leads to the conclusion that the purported regulations are, in fact, punitive.

The Court's decision in *Gutknecht*, labelling the regulations as punitive, can be questioned. Arguments can be advanced as to the regulatory nature of delinquency. Yet the affirmative restraint involved appears to have been too harsh for the Court to accept accelerated induction as regulatory. The Court, by not even discussing why it considered the regulations punitive, suggested that the punitive aspects of the provisions outweigh the regulatory aspects. The majority is in error by not discussing the remedial nature of the regulations, because, even though its decision is supportable, the labelling of accelerated induction as punitive is by no means incontrovertible. However, having found the delinquency provisions to be punitive as opposed to remedial, the Court has preempted the argument that the delinquency provisions may be deemed authorized pursuant to section 10 of the 1967 Act allowing the President "to prescribe the necessary rules and regulations to carry out the provisions of this [Act]."[50]

As the majority pointed out, "[d]eferment of the order of call may be the bestowal of great benefits; and its acceleration may be extremely punitive."[51] Justice Douglas proceeded to the arguments surrounding the validity of the procedure. The Court stated that although the delinquency regulations have their basis in the Selective Service Act of 1948, the term delinquency is not mentioned in the Act.[52] Simply, the Court concluded that Congress in 1948 did not expressly provide for accelerated induction of delinquents.[53]

The first and only statutory mention of delinquency comes in the Military Selective Service Act of 1967 in a provision defining "prime age group"[54]: "[S]elections for induction into the Armed Forces are first to be made after delinquents and volunteers."[55]

Justice Douglas began his interpretation of the 1967 Act with the observation that Congress still had not addressed itself specifically to the delinquency issue.[56] The Court stood on a solid foundation when arguing that Congress intended to punish only under criminal law as set out in the Act;[57] since accelerated induction is punishment, Congress has therefore impliedly disapproved it. The House of Representatives, for example, wanted violations of draft law ascertained and quickly prosecuted.[58] The recommendation was made that draft violations be given priority on court docket sche-

50 50 U.S.C. App. § 460(b)(1) (1964).
51 396 U.S. at 304.
52 Act of June 24, 1948, ch. 625, 62 Stat. 604.
53 396 U.S. at 307.
54 50 U.S.C. App. § 456(h)(1) (Supp. V, 1970).
55 *Id.*
56 396 U.S. at 304-05.
57 50 U.S.C. App. § 462 (Supp. V, 1970).
58 H.R. REP. No. 267, 90th Cong., 1st Sess. 46-47 (1967).

dules.[59]

The House also expressed the intent that the order of call must be conducted in an impartial manner.[60] The Court pointed to that section of the House report indicating resistance to random selection. The House sought to preserve the "oldest first" concept which was the basis of the existing order of call, and in so doing manifested an intent to limit the President's power to tamper.[61] Accelerated induction, being inconsistent with the "oldest first" rule was logically, therefore, an option not intended to be open to the President.

A counter argument might be made that Congress implicitly recognized and approved of the delinquency procedure of accelerated induction. The House report, in discussing order of call, first made note of the one provision on delinquency in the Act, and later recommended that in the area of order of call, the President's discretion should be somewhat limited.[62] A reading of the two together suggests the argument that Congress did not want wholesale tampering with the order of call, but impliedly recognized delinquency regulations as a possible exception. It should be noted, however, that reading these two sections together requires taking one or the other out of context.

Since Congress did not address itself specifically to accelerated induction, the most that reasonably can be said is that Congress had no manifest intent with respect to delinquency provisions. If that is the case, it is this negative proposition that supports the *Gutknecht* result. Since there was no intent to authorize delinquency procedures, there is no actual statutory basis for their legality.

The Court found more than just the defect of lack of authorization for the delinquency provisions. Even if accelerated induction were permitted, there would be no standards or guidelines to avoid the administrative absolutism so incompatible with a free system of government.[63] The Court in *Kent v. Dulles*,[64] for example, refused to allow the Secretary of State to exercise unbridled discretion in deciding to withhold a passport. It went on to state that whenever

> activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as [the right to] travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen.[65]

If the Court strictly construes a statute involving freedom of travel, one involving accelerated induction in the military must also fall under such a

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59 *Id.* at 46.

60 *Id.* at 28.

61 396 U.S. at 305, *citing* H.R. REP. No. 346, 90th Cong. 1st Sess. 9-10 (1967).

62 H.R. REP. No. 267, *supra* note 58, at 17, 43 (1967).

63 396 U.S. at 306.

64 357 U.S. 116 (1958).

65 *Id.* at 129 (citations omitted).

strict construction rule. In *Kent v. Dulles* restraint of the right to travel was involved. In *Gutknecht* the restriction is no less harsh. An accelerated inductee is compelled to abandon his plans and repattern all of the elements of his life, including, almost incidentally, the right to travel.

In addition, the local board's function is characterized by the same lack of standards that was fatal to the Secretary of State in *Kent*. Prior to *Gutknecht* a selective service registrant who inadvertently delayed in reporting a change of address,[66] or did not carry either his registration certificate[67] or classification notice at all times[68] violated a duty required by the Selective Service. Whenever a registrant failed to perform a duty, his local board could (at its own discretion) declare him delinquent.[69] Such a declaration led in many cases to accelerated induction. Should the registrant have failed to perform a minor duty such as those mentioned above, he could, at the discretion of his local board, suffer a severe loss of liberty.

The rule of strict construction as stated in *Kent v. Dulles*, must be applicable to the case of one who, by exercise of delinquency procedures can be forced into the military long before he might otherwise be required to go. Realistically, the Court which announced the rule of *Kent v. Dulles* could not allow an administrative system to exist which has no standards describing when the power of delinquency is to be exerted or what findings of gravity, or wilfulness are relevant as to whether to declare a registrant delinquent.[70] "The fault is in the absence of any standard or guide to the evaluation of the importance of the omitted duty and the guilt-character of the omission to perform it."[71]

The Supreme Court in *Commissioner of Internal Revenue v. Estate of Noel*[72] has indicated that where there is a longstanding established administrative procedure instituted pursuant to a statute which has been reenacted many times, the procedure "is deemed to have received congressional approval and has the effect of law."[73]

The delinquency regulations were enacted in 1948 and are basically the same as those in 1943. The inaction of Congress is even more amplified by the realization that from 1943 until the present, the Selective Service Act has been either reenacted or revised in 1946, 1948, 1951 and 1967.[74] Congress during this twenty-five year period neither revised nor

66 32 C.F.R. § 1641.3 (1971).
67 *Id.* § 1617.1.
68 *Id.* § 1623.5.
69 *Id.* § 1642.4.
70 United States v. Eisdorfer, 299 F. Supp. 975 (E.D.N.Y. 1969).
71 *Id.* at 988-89.
72 380 U.S. 678 (1965).
73 *Id.* at 682.
74 The Selective Training and Service Act of 1940 (54 Stat. 885), the conscription statute in effect during World War II, was expressly reenacted in 1946 except as to specified provisions (Act of June 29, 1946, § 1, 60 Stat. 341). The 1946 Act

questioned the validity of the delinquency provisions. There is weight to the argument that congressional inaction as to delinquency implies approval of those provisions. *Estate of Noel* does not stand alone; other cases similarly hold that Congress, by reenacting a statute previously construed by an administrative agency in a certain way, will be deemed to have accepted such a construction.[75]

The *Gutknecht* Court did not consider the doctrine of implied congressional approval. Perhaps, had a substantial liberty not been at stake, the concept would have played a more important role. The strict construction doctrine of *Kent v. Dulles*, however, minimizes the importance of implied intent. A logical extension of *Kent*, as applied to *Gutknecht*, might be that Congress must expressly grant authority to an administrative agency that purports to restrict the freedom of an individual. Justice Douglas, while admitting delinquency regulations as they now stand are an accepted and long established feature of Selective Service, refused to ratify the provisions. The Court, obviously feeling the necessity to strike down the provisions, would not search out a way to uphold them.

The imposition of a punitive sanction requires certain procedural safeguards guaranteed by the Constitution.[76] Justice Douglas, in finding these regulations unauthorized, did not need to discuss the constitutional validity of accelerated induction. However, he warned Congress that even if express authority were given to delinquency provisions, they "would be subject to the customary inquiries as to infirmities on their face . . . ."[77] Apparently, punitive regulations, to be constitutionally valid, must include rights granted a defendant in a criminal prosecution but presently denied a delinquent.

The constitutional rights which are denied the delinquent and guaranteed to a defendant are numerous, and are dealt with in the Fifth and Sixth Amendments to the United States Constitution. The right to confront and cross examine the witnesses against him is guaranteed to the defendant in a criminal proceeding,[78] but the delinquency regulations provide for no such right.[79] Likewise, the Sixth Amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ."[80] The delinquent does

expired by operation of law on March 31, 1947 (§ 7, 60 Stat. 342), but fifteen months later Congress reactivated the draft with the enactment of the Selective Service Act of 1948 on June 24 of that year (62 Stat. 604). In 1951, the 1948 Act was broadly amended and redesignated the Universal Military Training and Service Act (65 Stat. 75). In 1967, the Act was again substantively revised and renamed the Military Selective Service Act of 1967 (81 Stat. 100).
Brief for Respondent, *supra* note 42, at 35 n.20.

[75] NLRB v. Gullett Gin Co., 340 U.S. 361 (1951); Francis v. Southern Pac. Co., 333 U.S. 445 (1948).

[76] Bucher v. Selective Serv. Bd., 421 F.2d 24, 30 (3d Cir. 1970).

[77] 396 U.S. at 307.

[78] U.S. CONST. amend. VI.

[79] 32 C.F.R. § 1642 (1971).

[80] U.S. CONST. amend. VI.

not enjoy this right, as the local board is invested with subpoena power[81] while the registrant is not. The Sixth Amendment further guarantees the rights of counsel,[82] public trial[83] and a jury trial;[84] all of which are circumvented by the delinquency proceeding. Thus had the Supreme Court found the delinquency regulations to be authorized, it would have been faced with the seemingly insurmountable task of justifying the circumvention of constitutionally guaranteed safeguards in a proceeding culminating in the imposition of severe punitive sanctions.

It can be seen that the Supreme Court in *Gutknecht v. United States* made the logical choice based on the worth of the arguments that could have been, and in fact were, presented. If it rightly found no authorization for the delinquency regulations, what of the concurring opinions of Justices Harlan and Stewart? The former added only the observation that:

> [T]he President might promulgate new regulations, restricted in application to cases in which a registrant fails to comply with a duty essential to the classification process itself, that provide for accelerated induction under the existing statute.[85]

Justice Harlan saw the need to make the delinquency regulations analogous to civil contempt, by providing a mechanism through which a registrant facing accelerated induction would have the right to avoid any sanction by future compliance.[86] While Justice Harlan concurred in the majority opinion, he did not seem to limit its scope, but rather provided a suggestion for a practical alternative procedure pertaining to delinquency provisions.

Justice Stewart agreed with the Court's result only because the petitioner had merely five days,[87] as opposed to thirty, to seek a personal appearance and perfect an appeal. Having found it unnecessary to reach the question of whether Congress has authorized the delinquency provisions, Justice Stewart made the assertion that the delinquency regulations are remedial, and that the entire procedure is analogous to the civil contempt theory.[88] Although both Justices Stewart and Harlan spoke of civil contempt, the latter recognized that under the present regulations the civil contempt theory must fail. Under that theory the individual who suffers from its sanctions had the conditional right to free himself from such sanctions by conforming with the court's decree.

In his discussion of civil contempt, Justice Stewart took cognizance of one of the respondent's arguments. While it is admitted that both a decla-

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81 32 C.F.R. § 1621.15 (1971).
82 Gideon v. Wainwright, 372 U.S. 335 (1963).
83 U.S. CONST. amend. VI.
84 *Id.*; Cheff v. Schnackenberg, 384 U.S. 373 (1966).
85 396 U.S. at 313.
86 *Id.* at 313-14.
87 *Id.* at 314.
88 *Id.*

ration of delinquency and removal therefrom are discretionary,[89] the Justice seized upon the Government's argument:

> [T]he board would abuse its discretion if it refused such remedial relief [reopening and removal from delinquency status] to a registrant who breached his duty inadvertently or carelessly, or who sought to correct the breach, even if originally willful, and to return to compliance with his obligations.[90]

Apparently the Government offered the Court the proposition that the unfettered discretion of the local board to commit a man to involuntary confinement in the military is fine and just, for the unfettered discretion of the local board is subject to review by the United States Attorney, who in turn exercises a discretion free from any standard or guideline. Obviously the Court would not accept an argument which would allow an administrative agency to exercise a broad discretion checked only by another administrative agency exercising the same degree of discretion.

The full range and scope of the *Gutknecht* decision cannot be fully appreciated without recourse to recent cases applying the decision. Many cases have been remanded for reconsideration in light of *Gutknecht*.[91] It is apparent from the decisions reported that the courts are not hesitant in applying the decision, and do not go out of their way to distinguish *Gutknecht* on the facts. There are two specific lines of cases which seem to have developed and delineated, to some degree, the scope and range of the *Gutknecht* decision.

The first line of cases established a presumption of accelerated induction when the defendant has been inducted pursuant to delinquency regulations. This theory has evolved from the Ninth Circuit case of *United States v. Thomas*.[92] Further, in *United States v. McClintock*,[93] the showing required to rebut the presumption was specified. The defendant in that case argued that he was inducted pursuant to the delinquency regulations and thus invoked the presumption of acceleration. The Government countered with the argument that the delinquent would have been inducted regardless of the declaration of delinquency, and therefore no acceleration occurred. The court found for the defendant:

> The plaintiff could not show precisely how many men had been called earlier and how many, not otherwise deferred, remained to be called after the date set for the defendant's induction. Without such information it is impossible to come to a certain conclusion regarding acceleration.[94]

It is evident from the language of this case that the *Gutknecht* decision, as in-

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89 32 C.F.R. § 1642.4(a), (c) (1971).

90 396 U.S. at 316.

91 Kolden v. Selective Serv. Bd., 397 U.S. 47 (1970); Troutman v. United States, 397 U.S. 48 (1970); Batiste v. United States, 397 U.S. 48 (1970); Peet v. United States, 399 U.S. 523 (1970).

92 422 F.2d 1327 (9th Cir. 1970).

93 311 F. Supp. 1119 (N.D. Cal. 1970).

94 *Id.* at 1120-21.

terpreted by the *Thomas* and *McClintock* courts, has saddled the Government with an oppressive burden.

The second line of cases revolves around the retroactive application of *Gutknecht v. United States.* It has been given retroactive application in three situations arising from habeas corpus proceedings. In *Bradley v. Laird*[95] the defendant's court-martial was held invalid because, as a result of *Gutknecht*, the defendant's acceleration into the army had been illegal. In *Andre v. Resor,*[96] the petitioner sought a writ of habeas corpus for release from the army because his induction had been accelerated pursuant to the delinquency regulations. The court, in applying *Gutknecht* retroactively, held the petitioner should be immediately discharged.[97] In *United States v. Kelly,*[98] the petitioner was successful in having his conviction for refusal to comply with induction reversed.

The court in *Kelly* discussed the procedure for invoking retroactivity and held *Gutknecht* was the type of holding which required its application.[99] The test for such application can be gleaned from the case of *Linkletter v. Walker,*[100] and consists basically in analyzing the purpose of the new rule, reliance by the police and the courts on the old rule and the effect retroactive application will have on the administration of justice. As the purpose of the rule is given the greatest weight in determining retroactive application,[101] the courts have allowed such application with little or no hesitancy in accelerated induction cases. The justification for giving *Gutknecht* retroactive application can be seen from the following statement:

> Since delinquency induction was not authorized, the petitioner is in the army illegally. In view of this the factors of law enforcement reliance and administrative convenience are entitled to almost no weight in the balancing process . . . .[102]

Kelly holds that proper application of *Gutknecht* is a retroactive application.[103] The focus of *Gutknecht* is not with the facts leading to a conviction, but rather that the trial should never have been held.[104] When *Gutknecht* is viewed in that light, no conviction based on refusal to submit to induction after it had been accelerated can stand. The registrant is convicted for refusing an induction which never should have been ordered.

There are thousands of men in the armed forces or in prison as a result of accelerated induction pursuant to delinquency regulations. As to whether

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95 315 F. Supp. 544 (D. Kan. 1970).
96 313 F. Supp. 957 (N.D. Cal. 1970).
97 *Id.* at 958.
98 314 F. Supp. 500 (E.D.N.Y. 1970).
99 *Id.* at 509.
100 381 U.S. 618 (1965).
101 *See* Desist v. United States, 394 U.S. 244, 249 (1969).
102 Andre v. Resor, 313 F. Supp. 957, 961 (N.D. Cal. 1970).
103 314 F. Supp. at 510.
104 *Id.* at 509.

any or all of these men will seek and obtain release based on a retroactive application of *Gutknecht,* only time will tell, but the prospects look bright, for *Gutknecht* truly marked the end of the old fast shuffle.

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