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Pre-Induction Review (Naskiewicz v. Lawyer)

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strictive approach, the Second Circuit has diluted the provisions of the FOIA and may have so severely blunted the thrust of the entire Act as to prevent its use as a weapon in the fight against the "curse of bigness" in governmental agencies.

PRE-INDUCTION REVIEW

Naskiewicz v. Lawyer

When a potential Army inductee objects to his draft board's decision to deny him a deferment, he usually finds that immediate recourse to the courts is not available. As a general rule, Congress has prohibited pre-induction judicial review of Selective Service orders.[24] However, in *Naskiewicz v. Lawyer*,[25] the Second Circuit held that, where a registrant has been denied the benefits of Selective Service regulations enacted for his benefit, a district court has jurisdiction to review.[26]

The petitioner had been given an ophthamological examination at the Cleveland office of the Armed Forces Entrance Examining Station (AFEES) and was found unfit for military service after originally

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[24] 50 U.S.C. App. § 460(b)(3) (1970) reads:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution . . . .

Prior to the enactment of this legislation, the draft law contained no specific provision pertaining to judicial review of Selective Service board decisions. However, the Supreme Court, in two important cases, considered this problem. In Falbo v. United States, 320 U.S. 549 (1944), an appeal of a criminal prosecution of a Jehovah's Witness who had refused to report for the mandatory civilian work alternative to military service, the Court refused to review the local board's decision on the grounds that the applicant had failed to exhaust his administrative remedies. In Estep v. United States, 327 U.S. 114 (1946), where the problem of exhaustion of remedies did not exist, the Court ruled that, in the event of a criminal prosecution, it will have jurisdiction to review a decision of a draft board. *Id.* at 123. The Court, in defining the scope of its jurisdiction to review in such proceedings, stated that "[t]he question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." *Id.* at 122-23. *See also* Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123 (1966).

It was the Second Circuit's decision in Wolf v. Selective Service Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967) that aroused Congress to enact § 460(b)(3). *See* Oestereich v. Selective Service System Local Bd. No. 11, 393 U.S. 233, 244 n.7 (1968) (Harlan, J., concurring). In *Wolf*, which involved registrants who were reclassified I-A as a result of their participation in an anti-Vietnam war rally, the court of appeals ruled that the restrictions on judicial review of a board's decision did not apply when first amendment rights were involved. In order to prevent such an expansion of the judiciary's power to review Selective Service Board opinions, which power was felt to cause unnecessary and costly delays to the induction system (113 Cong. Rec. 15, 426 (1967) Conf. Rep. No. 346 (June 18, 1967) 1 U.S.C.C.A.N. 1360 (1967)), Congress moved to restore the stricter "criminal prosecution" principle resulting in § 460(b)(3).

[25] 456 F.2d 1166 (2d Cir. 1972).

[26] *Id.* at 1168. The district court had dismissed the appellant's action on the ground that it lacked jurisdiction.

being classified as qualified by his local draft board which had not given him such an examination.[27] The Cleveland AFEES then forwarded its findings to the Syracuse, N.Y., draft board, the office nearest plaintiff's residence, whereupon the plaintiff's records were further reviewed and he was again classified as medically fit for service in the Armed Forces.

The court held that such a procedure was in clear violation of the Selective Service's own regulations.[28] Agreeing with the registrant, the court stated that he was indeed prejudiced because of the unwarranted extra review of his medical file by the Syracuse AFEES and, therefore, the induction order based on the results of the improper procedure must be ruled invalid.[29] The district court was instructed to direct the petitioner's local draft board to forward his files directly to the United States Army Recruiting Command, excluding the extra, unwarranted evaluation by the Syracuse office, for de novo decision as to Naskiewicz's medical qualification.[30]

The Second Circuit based its finding that jurisdiction exists to review and overrule, prior to induction, a Selective Service determination on the principle that a court can intervene in the induction process when the Selective Service has acted in a "basically lawless" manner.[31] Since the Supreme Court has declared that administrative bodies must adhere to their own regulations as well as to statutes,[32] the court rea-

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27 Naskiewicz was permitted, after repeated requests, to take an ophthalmological examination in Cleveland instead of at his local Syracuse office because he was employed in Cleveland at the time of the classification proceedings. *See* Local Bd. Memorandum No. 121 § III(c) (June 25, 1971) which provides in part:

> If the registrant is away from his local board area, he should have the opportunity to apply for transfer for necessary consultation and reexamination under the same criteria applicable to transfer for Armed Forces pre-induction examination.

456 F.2d at 1169 n.6.

28 Local Bd. Memorandum No. 121 § III(c) continues:

> The AFEES to which the registrant is delivered for required reexamination or consultation must receive all medical records and copies of correspondence and other documents as appropriate in order to identify the reexamination or consultation as a part of the procedure outlined in this local board memorandum and submit for final review to Headquarters, USAREC . . . . Upon completion of the review of medical records or accomplishment of reexamination or consultation by the AFEES, the inquiry, together with the registrant's medical records, all information and tenative determination will be forwarded to Headquarters, USAREC, by the AFEES.

456 F.2d at 1169 n.6.

29 456 F.2d at 1169.

30 *Id.* at 1169-70.

31 Oestereich v. Selective Service System Local Bd. No. 11, 393 U.S. 233 (1968).

32 *See* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954), where a review was granted because the Board of Immigration had failed to exercise its discretion, contrary to existing valid regulations. *See also* Service v. Dulles, 354 U.S. 363 (1957), where the discharge of a Foreign Service officer was held invalid because it violated regulations of the Department of State which mandated an unfavorable finding by the Department's

soned that a natural extension of the "basically lawless" rationale would include application of the rule where a registrant has been denied the benefits of Selective Service regulations that have been enacted for his benefit.[33]

In taking this position,[34] the court aligned itself with the Third[35] and Eighth[36] Circuits which have recently reached similar conclusions. This position is, however, contrary to that of the Fourth Circuit which chose to read the non-review statute literally and, in *Blatt v. Local Bd. No. 116*,[37] held that the plaintiff's claim that he was not medically

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Loyalty Security Board or the Deputy Under Secretary before a dismissal for security reasons.

The Second Circuit has also indicated that post-induction jurisdiction exists to order the Armed Forces to obey their regulations developed for the protection of servicemen. United States *ex rel.* Donham v. Resor, 436 F.2d 751 (2d Cir. 1971).

[33] 456 F.2d at 1168.

[34] In Martire v. Selective Service Bd. No. 15, 442 F.2d 895, 896 (2d Cir. 1971), the Second Circuit implied that it would review the decision of the draft board if the applicant was in fact denied a medical interview on the ground that such action would be considered "basically lawless" and thus within the bounds of the exception carved out by *Oestereich v. Selective Service.* This decision was completely rejected by the Fourth Circuit in Blatt v. Local Bd. No. 116, 493 F.2d 304 (4th Cir. 1971), discussed in notes 37 & 38 and accompanying text *infra.*

[35] Hunt v. Local Bd. No. 197, 438 F.2d 1128 (3d Cir. 1971). The draft board failed to reopen the case of the registrant after he notified them of his impending fatherhood which would entitle him to a III-A classification. The court ruled that since Hunt was prima facie entitled to such a deferment, the board's failure to reopen his case in violation of 32 C.F.R. § 1625.4 (1969) constituted a "basically lawless" act necessitating judicial review.

[36] Liese v. Local Bd. No. 102, 440 F.2d 645 (8th Cir. 1971). The registrant was ordered to report for induction in December, 1969. Prior to that time, he was arrested during a peace demonstration and ordered to stand trial in February, 1970. When he notified his local board, he was told not to report as scheduled and to inform the board of the outcome of the criminal case. The board did not send Liese the written form for postponement of induction or any other written notice that he was not to report, said omission being in direct violation of 32 C.F.R. § 1632.2 (1962). The court felt that such a violation of federal regulations was indeed sufficient to fall within the "basically lawless" exception, and also to qualify under the doctrine advocated in its own previous decision in Zerillo v. Local Bd. No. 102, 440 F.2d 136 (8th Cir. 1971). There the court stated that Section 460(b)(3) should not be read literally so as to preclude review in all instances other than that specifically mentioned and ruled that review is possible when there exists a clear departure from statutory mandate.

In a separate dissent, Judge Gibson argued that a failure to precisely follow the federal regulation should not qualify under either definition. *Id.* at 647.

[37] 443 F.2d 304 (4th Cir. 1971). About to lose the student deferment that he possessed, Blatt hoped to obtain a medical exemption. Although the board was in receipt of his medical information it failed to schedule a medical interview for Blatt either prior to or immediately after classifying him I-A. The board's failure to so schedule an interview was in violation of 32 C.F.R. § 1628.2 which provides:

> Registrants to be given medical interview
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> * * * * * *
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> (b) Whenever a registrant who is in Class I-A . . . claims that he has one or more of the disqualifying medical conditions or physical defects . . . the local board shall order him to present himself for interview with the medical advisor to the local board at the time and place specified by the local board. . . .

qualified for service in the armed forces was not subject to review until offered as a defense in a criminal prosecution for refusal to report or as the basis of a habeas corpus proceeding after induction. The court refused to reach the merits of the registrant's claim that federal regulations had been violated since it concluded that jurisdiction did not exist to review the decision of the draft board. It felt that the basic issue involved was a factual one, not one of law, although Blatt had attempted to frame it as a question of law through use of a procedural irregularity argument. The factual question, according to the Fourth Circuit, was simply whether or not the applicant was medically qualified for military service. The court reasoned that, since the determination was subject to board discretion, the petitioner was not entitled to pre-induction review.[38]

The difference between the Second and Fourth Circuits evolves from the distinction that the Supreme Court drew in the companion cases of *Oestereich v. Selective Service*[39] and *Clark v. Gabriel*,[40] where it first carved out the "basically lawless" exception. In *Oestereich*, the Court held that pre-induction review was available to a divinity student who was stripped of his ministerial exemption since a denial of such a

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38 The Court cited Lane v. Local Bd. No. 17, 445 F.2d 850 (1st Cir. 1971), where review was denied a registrant who, after receiving an induction notice, claimed conscientious objector status and was denied it. In *Blatt*, the Fourth Circuit ruled that the board's decision was within its discretion as a question of fact and, as a result, not subject to judicial review until the initiation of a criminal prosecution for refusal to be inducted or through the use of a habeas corpus petition after induction. Such a decision, the court reasoned, was the only logical one in light of the Supreme Court's 1968 holdings in Oestereich v. Selective Service, 393 U.S. 233, and Clark v. Gabriel, 393 U.S. 256, discussed in text accompanying notes 39 & 40 *infra*. *Oestereich* and *Clark*, in the eyes of the Fourth Circuit, permit review only when a clear statutory mandate is violated. In support of this proposition, the court cited Winick, *Direct Judicial Review of the Actions of the Selective Service System*, 69 MICH. L. REV. 55, 75 (1970). However, the court failed to mention that the author attacked what he felt to be the flaw in this principle and, in fact, called for expanded review of the Selective Service. *See* note 42 *infra*.

39 393 U.S. 233 (1968). Petitioner Oestereich had been enrolled in a divinity school and held the applicable exemption. As a result, his draft board revoked his exemption and reclassified him I-A. The Court ruled that, since the applicant had a clear statutory right to such an exemption, the board, by refusing to reinstate that exemption, had acted in a "basically lawless" manner, thus permitting judicial review.

40 393 U.S. 256 (1968). The registrant applied for and was denied a conscientious objector deferment. The Court ruled that no judicial review was possible here since the board was authorized to grant conscientous objector status only upon its satisfaction that the applicant had fulfilled the necessary criteria. The Court reasoned that, as long as the board was involved in a matter subject to its discretion, it would not review the board's decision.

Read together, the two cases establish the principle that, when a decision of a draft board is in violation of a clear statutory mandate concerning a matter not subject to administrative discretion, review is permitted. However, if the subject matter is within the realm of administrative discretion, review is not possible.

classification was not within the power of the draft board. In *Clark*, on the other hand, it was held that, where the exemption was subject to the discretion and judgment of the board, the petitioner could obtain review only as provided by statute. In distinguishing *Oestereich*, the Court in *Clark* stated that the denial of the exemption in the latter case ". . . inescapably involves a determination of fact and an exercise of judgment."[41]

The Court's decision to distinguish the two cases by noting that one involved a matter of discretion while the other did not has been criticized. It has been pointed out that the ministerial exemption, like that of conscientious objector, requires a local board to weigh the facts in order to reach a proper determination.[42] Thus, the ultimate question is whether the registrant has presented such a degree of proof that the board, by denying the classification, has abused its discretion in the face of that overwhelming proof.

In any event, the distinction between *Oestereich* and *Clark* should not be deemed to preclude the Second Circuit's holding in *Naskiewicz*. On the contrary, the general principle enunciated in *Oestereich* justifies the Second Circuit's extension of the "basically lawless" doctrine.

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41 393 U.S. at 258. These cases could have been more easily distinguished. That is, *Oestereich* involved the revocation of an exemption and a subsequent reclassification while the action in *Clark* was simply an initial classification. However, had the Court chosen this mode of distinction, the impact of *Oestereich* would have been severely restricted.

42 Winick, *Direct Judicial Review of the Actions of the Selective Service System*, 69 MICH. L. REV. 55, 71 (1970). The author states that regardless of the statement by the Court that the classification in *Oestereich* was not discretionary (393 U.S. at 258), the classification was dependent on local board discretion and fact-finding to the same extent as the determination in *Clark*.

In addition, the author advocates an even greater degree of judicial review of the Selective Service since he contends that, contrary to the arguments of the advocates of administrative finality, the delay created would be slight and the military would still be able to reach its manpower requirements. Furthermore, Mr. Winick argues that the threat of review by the courts would make local boards act more carefully and would thus prevent misconduct which broad discretionary power often encourages. *Id.* at 109-10. *See also* Note, *Pre-Induction Judicial Review*, 57 CALIF. L. REV. 948, 994 (1969), where it is argued that limiting review to cases of criminal prosecution is too harsh. The author cites Mr. Justice Douglas for support:

> [C]ourts do law and justice a disservice when they close their doors to people who, though not in jail, nor yet penalized, live under a feeling of peril and insecurity. What are courts for, if not for . . . adjudicating the rights of those against whom the law is aimed, though not immediately applied.

Public Officers Ass'n, Inc. v. Rickover, 369 U.S. 111, 116 (1962) (Douglas, J., concurring).

Another writer suggests that a specialized Selective Service Court, analogous to the current Tax Court, be established. This court would have the double benefit of protecting the rights of individuals and permitting speedy action so as to avoid any delay in the functioning of the Selective Service System. Donahue, *The Supreme Court v. Section 10(b)(3) of the Selective Service Act: A Study in Ducking Constitutional Issues*, 17 U.C.L.A. L. REV. 908, 955-68 (1970).

Indeed, the fact of violation of Selective Service regulations in *Naskiewicz* could not, even through the use of the most perverted logic, result in the conclusion that such an action was discretionary. Whether or not the *underlying* question is one of fact and, therefore, subject to the local board's discretion (the issue the Fourth Circuit thought decisive), is irrelevant when a regulation is violated. Jurisdiction to review is sought not to insure a particular result, but, more fundamentally, to insure that the result be reached in a lawful manner.