

# New Draft Law a Manual for Lawyers and Counselors

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**The New Draft Law: A Manual for Lawyers and Counselors.** ANN FAGAN GINGER (ED.). Berkeley, California: NATIONAL LAWYER'S GUILD. 1967. Pp. 135. \$10.00.

A method of hunting employed in primitive cultures presents a grotesque analogy to the operation of the Selective Service System. Snares and pitfalls are set and dug along jungle trails permitting hunters to obtain sufficient meat and hides to satisfy their needs from the few unlucky animals who happen to get caught in the snares or fall in the pits. If the need is particularly great, beaters may be employed to increase the number of animals and to cause them to run over the trails in a state of panic. The older, more experienced and wily animals will be the most likely to escape; conversely, the young will predominate among those who blunder into the pits.

Consider the Selective Service System. Local board quotas are based, in part, on the number of local enlistments. In the past, enlistees have come mainly from recent high school graduates. Enlistments are induced, in very large measure, by fear of being drafted. An enlistee is told that he has a greater opportunity to choose his occupation while in the military. The present order-of-call rule makes it relatively less likely that this year's high school graduates will be drafted; to the extent that they realize this, they will not be motivated to enlist, and older registrants will be drafted to fill the quotas. The point is that most of these young people do *not* know the facts and will continue to enlist because they believe they will be drafted eventually anyway. Somewhat ironically, counseling efforts, such as those at Cornell, are directed to the more sophisticated college student.

For good or ill, the Vietnam War is increasingly unpopular. Many college students, already alienated from their elders on several grounds, view the war and the draft as especially noxious evils. It is an oversimplification to tell them that military service is a patriotic duty and that the draft is designed to apportion that duty fairly. Last fall's executive decision to take the oldest first from the 19 through 25 year-old age group raises particular havoc among college graduates and law students, since they are the most likely to be called this summer. Many of these older registrants are desperately seeking draft alternatives or at least methods to minimize the draft's impact.<sup>1</sup>

What is lacking at all levels is information. There sometimes seems to be a deliberate policy of withholding information or obscuring the operations of the Selective Service System.<sup>2</sup> This makes it extraordi-

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<sup>1</sup> American Council on Education, Higher Education and National Affairs Newsletter, vol. 16, no. 38, Dec. 1, 1967, at 6-7.

<sup>2</sup> See Selective Service Regs. §§ 1606.55-1606.61, 32 Fed. Reg. 14328 (1967); Krauthamer,

narily difficult to counsel draft registrants on their status, their "rights" under the draft law, or avenues available within the law to minimize the draft's disruptive impact upon them.

Although a number of helpful law review comments were published both before and after the 1967 draft law revision, the National Lawyer's Guild book, *The New Draft Law—a manual for lawyers and counselors*, edited by Ann Fagan Ginger, is the only book in print to which a lawyer might turn in counseling or representing a Selective Service registrant. A large portion of the book consists of extended quotations from basic sources such as the Military Selective Service Act of 1967, the amended federal regulations, the Surgeon General's List of Medical Fitness Standards, and the *Handbook for Conscientious Objectors*. The Manual is the product of several hands, principally Guild lawyers experienced in Selective Service matters. It contains a number of omissions, a few out-and-out misstatements of the law, and some questionable and sometimes polemic suggestions on tactics which less daring or less politically sympathetic attorneys may choose to ignore. Even with all of these reservations, the Guild Manual is an absolutely essential tool for draft counseling.<sup>3</sup>

The Manual begins with some general observations on the legal sanctions for counseling or abetting draft evasion. Although these are important considerations, there are also professional and ethical considerations.<sup>4</sup> A draft counsel is in a situation like that of the tax counselor who must constantly be aware of the shadowy line between tax avoidance and tax evasion. A major difference, however, is that telling business clients how to avoid taxes is fair game, but advising young people on ways to avoid the draft—even where one's advice relates to the processing of a legitimate claim for a physical deferment—runs the risk of censure from clients and even from some of our fellow practitioners. Yet the need for information, advice, and occasional legal assistance is enormous. It is no answer to say that a registrant can get all the information and advice he needs from Selective Service personnel.

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*We Have the Right to Know*, 20 Central Comm. for Conscientious Objectors News Notes, No. 2, March-April 1968.

<sup>3</sup> The author and a faculty colleague, Professor Bertram F. Willcox, were joined by members of the Cornell chapter of Law School Civil Rights Research Council (LSCRRRC) in preparing memoranda on draft counseling. The manual was a major source of material, but in each case verification, expansion, and updating were accomplished through additional statutory, periodical and case material.

<sup>4</sup> See ABA CANONS OF PROFESSIONAL ETHICS 15 (How Far a Lawyer May Go in Supporting a Client's Cause) & 16 (Restraining Clients from Improprieties). See also ABA OPINIONS ON PROFESSIONAL ETHICS 56-62 (1967); DRINKER, LEGAL ETHICS 82, 137, 145, 152 (1953); Note, *The States, the Federal Constitution, and the War Protesters*, 53 CORNELL L. REV. 528 (1968).

In many instances, Selective Service employees are incapable of answering complicated questions; more dangerously, their advice is sometimes heavily biased by their prime objective—filling their quotas.

The book offers a bibliography of readily available legal tools. However, one of the source materials, the *Manual for Use of Government Appeal Agents*, is not available from the New York State Director of Selective Service. My efforts to obtain a copy to be used in a counseling service run by the Cornell Law School were rebuffed.<sup>5</sup> As with several other items, it may be necessary to seek the material through unofficial channels. The local board memoranda issued by General Hershey's office may be obtained from the Government Printing Office.<sup>6</sup> A booklet on the legal aspects of the Selective Service System, about to be reissued by General Hershey's office in revised form, should be added to the Guild book's bibliography. Hopefully, this too will be obtainable from government sources.

A number of law review commentaries should be added to the bibliography.<sup>7</sup> A lawyer wishing to keep informed of the rapidly changing rules in this field should scan the Armed Services headnotes in the federal advance sheet indices, subscribe to the Selective Service Law Reporter<sup>8</sup> and the CCGO newsletter, *News Notes*,<sup>9</sup> and obtain supplementary materials from the ACLU and National Lawyers Guild.

The Manual is divided into eight parts. Parts I through III are of a general character including the "ground rules" and bibliography mentioned above; parts IV through VIII deal with different types of counseling or representation situations. Part IV, entitled "Assisting Registrants During Administrative Process," comprises roughly half the book, and was of primary interest to the Cornell counseling group.<sup>10</sup>

<sup>5</sup> See Selective Service Reg. § 1606.56(a), 32 Fed. Reg. 14328 (1967).

<sup>6</sup> This material may be obtained from: Superintendent of Documents, Gov't Printing Office, Washington, D.C. 20402 for \$4.00.

<sup>7</sup> E.g., Comment, *The Selective Service System; An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123 (1966). Comment, *Fairness and Due Process Under the Selective Service System*, 114 U. PA. L. REV. 1014 (1966); Comment, *Selective Service*, 76 YALE L.J. 160 (1966); Note, *Judicial Review of Selective Service Action: A Need for Reform*, 56 CALIF. L. REV. 448 (1968); Note, *New Draft Law: Its Failures and Future*, 19 CASE W. RES. L. REV. 292 (1968); *Changes in the Draft: The Military Selective Service Act of 1967*, COLUM. J. OF L. & SOC. PROBS., Dec. 15, 1967, at S-Three; J. Griffiths, *The Draft Law*, April 1968 (Yale Daily News and Yale College Council of Masters).

<sup>8</sup> The address is: SELECTIVE SERVICE LAW REPORTER, 1029 Vermont Ave., N.W., Suite 508, Washington, D.C. 20005.

<sup>9</sup> The address is: CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS, 2016 Walnut St., Philadelphia, Pa. 19103 (west coast office: 514 Mission St., San Francisco, Cal., 94105).

<sup>10</sup> The Cornell counseling group chose as research topics: (1) physical deferments, (2) student hardship and occupational deferments, (3) selective service administrative procedures and due process, (4) aliens and the draft, (5) travel abroad and expatriation, (6)

Parts V, VI, VII and VIII deal respectively with "Filing Suits Testing Constitutionality of Act," "Defending Criminal Charges of Refusing Induction," "Representing Members of Armed Forces in Courts Martial," and seeking CO discharges.<sup>11</sup>

The Guild Manual devotes insufficient coverage to the problems most frequently raised by college students. For example, although the Manual contains the Surgeon General's list of grounds for medical disqualification and some helpful suggestions for handling physical claims, its treatment of this important subject is cursory.<sup>12</sup> An important stratagem not mentioned is to take the initiative by seeking an interview with the local board's medical advisor at the earliest possible opportunity. Such an interview is normally available only after reclassification to I-A, I-A-O, or I-O,<sup>13</sup> but some boards are willing to arrange them while registrants are still classified II-S. This is an excellent example of how the local board's autonomy permits diametrically opposed policy considerations to produce widely varying results and occasionally roughshod treatment of legitimate physical claims. Neither the Manual nor related materials shed much light on this area.

In an effort to "clear the decks" for large scale induction of students this summer (and for planning purposes), many boards have ordered students to report for preinduction physicals during the school year. A medical interview, in which the doctor and the registrant spend a half hour or more on the registrant's claimed incapacity, insures a more complete exploration of the claim than a mass-production preinduction physical. The provision for an interview with the medical advisor recognizes this. The granting of such an interview, however, is within the board's discretion and any opportunity to obtain such an interview is lost after a preinduction physical. Thus, the mass preinduction physicals conducted this spring have foreclosed the possibility of such interviews, allowing the registrant to press his claim only during the preinduction physical.

Several arguments militate against medical interviews: (1) interview appointments with unpaid, volunteer medical advisors are long delayed; (2) registrants occasionally utilize the medical interview as a

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conscientious objection, and (7) litigation. The order of the topics corresponds to the number of direct inquiries or referrals from other draft counseling agencies. They were discussed in weekly, non-credit seminars. Information memoranda were produced under faculty supervision for distribution to inquiring members of the Cornell community.

<sup>11</sup> Pp. 80-130. See also, Comment, *God, the Army, and Judicial Review: The In-Service Conscientious Objector*, 56 CALIF. L. REV. 379 (1968).

<sup>12</sup> Some amplification can be found in the articles by Franck and Blumenfeld in the special issue of THE GUILD PRACTITIONER [Summer 1967] on Selective Service.

<sup>13</sup> 32 C.F.R. § 1628.2 (1967).

delaying tactic; and (3) the boards must fill quotas and sincerely believe that important physical disqualifications will appear in the preinduction physical—as “assembly-line” as it may sometimes be. This method of dealing with physical disqualifications is an obvious breeding ground for trouble and disenchantment. Thus, we should not be surprised to find additional friction and alienation resulting from the handling of even more subjectively determined claims—such as critical occupations (the few that remain), hardship, and, particularly, conscientious objection.

The Guild Manual contains a couple of errors or at least questionable statements of law. For example: (1) On page 27 the Manual states that a registrant is now entitled to a III-A (fatherhood) deferment if: (a) he has not requested and has not had a student deferment (I-S or II-S) since July 1, 1967. As a matter of fact, the proposition should be stated conversely (suggesting entitlement to a much larger group of registrants), *i.e.*, a registrant is entitled to III-A unless he has *both* requested and been granted a student deferment since July 1, 1967.<sup>14</sup> (2) Also, page 75 states that an appeal to the President, staying induction, may be taken notwithstanding a unanimous decision by the appeal board. This has no basis in the regulations other than the long-shot possibility of persuading the Director of Selective Service (General Hershey) or the State Director of Selective Service to take that appeal on the registrant's behalf.

Finally, I question both the desirability of following several of the tactical suggestions made to registrants and the viability of several of the suggested appellate legal arguments. When counseling a young person—including a draft-resister—I view the attorney's function as helping the client, not the “movement”; I take a dim view of attorneys who utilize idealistic, impressionable youngsters as “cannon fodder” for *their* causes. Some passages of the manual, however, give the impression that the cause is more important than the client.<sup>15</sup>

Obviously a registrant should avoid unreasonably bugging Selective Service personnel unless a suggested tactic is well calculated to attain his objective. For example, a suggested form letter seeking a

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<sup>14</sup> Local Board Memorandum No. 84. *See also* Military Selective Service Act of 1967 § 6(h)(1), 81 Stat. 100, 1 U.S. CODE CONG. & AD. NEWS 109 (1967) and 32 C.F.R. § 1622.30(a) (1967). A similar result ought to follow in the case of an unrequested II-S given to a registrant after July, 1967, the registrant thereafter reaching his 26th birthday.

<sup>15</sup> An important distinction can be drawn between the normal draft case and those situations where one or more selected “test cases” involving viable constitutional arguments are “taken” by such organizations as the NAACP or ACLU. *See* ACLU: *Friend of the Court or Counsel to the Accused*, CIVIL LIBERTIES, No. 254, March-April 1968, at 6.

personal appearance also requests permission to bring counsel (specifically prohibited by 32 C.F.R. § 1624.1(b) (1967), as the Manual points out), present witnesses, and make a tape recording. Notwithstanding my belief in broadening due process in the Selective Service System, the probable refusal of such requests is not likely to result in a court's overturning a continued 1-A classification, and the request itself may well cause the board to exercise its enormous discretion adversely.

This is particularly true if the Manual's suggestions for "conduct of applicant at personal appearance" are also followed. The following excerpt speaks for itself:

The registrant may wish to open the appearance by introducing himself to each member of the board, and asking his name. He may also want to ask about the member's occupation, place of residence, and length of service on the board, since these are all matters discussed in the *1967 Commission Report* as being of some importance. The board members may react to such questions in a variety of ways.

The registrant may wish to repeat his requests for presence of counsel, affirmative witnesses, negative witnesses, and a person to transcribe the proceedings, explaining why he feels these requests are essential to a meaningful and fair hearing.<sup>16</sup>

Some of the suggested legal arguments—described as "legal problems" frequently present in Selective Service cases<sup>17</sup>—which I find legally questionable are:

1. The entire system is faulty because it puts the burden unfairly on the registrant.<sup>18</sup>
2. Conscription without representation is tyranny.
3. The entire system is invalid because fundamentals of due process are denied and arbitrary and capricious board actions are encouraged.
4. Conscription violates the constitutional prohibition against "involuntary servitude."
5. A person who conscientiously believes that the U.S. is fighting an illegal war, violative of the *Nurnberg Judgment*, cannot be punished.

Although the first two arguments are politically persuasive, they are not legal grounds for overturning a conviction for refusing induction.

The absence of "due process" may indeed have persuasive legal force when delinquency reclassifications are involved, as in *Wolff*,<sup>19</sup>

<sup>16</sup> P. 72.

<sup>17</sup> P. 81.

<sup>18</sup> *Id.*, citing 32 C.F.R. § 1622.1(c) (1967).

<sup>19</sup> *Wolff v. Selective Serv. Local Bd. 16*, 372 F.2d 817 (2d Cir. 1967).

and even in some non-delinquency cases where the perimeters of due process are gradually shifting. Consequently, it may be possible, where an appropriate groundwork has been laid,<sup>20</sup> to argue for reversal on the basis of a denial of due process in one or more particulars.

The involuntary servitude argument was recently considered in a lower federal court decision,<sup>21</sup> apparently because of an ABA JOURNAL article on the subject in August 1967.<sup>22</sup> The court's elaborate but firmly negative handling of the argument suggests a long, hard road ahead to achieve even the "honorable mention" status which the "illegal war" argument has attained.<sup>23</sup>

My overall evaluation of the Manual is that it is a good, and possibly essential, tool. The few errors noted suggest that important questions should be checked against the statute and regulations. Because of several recent policy decisions by General Hershey's office, and because many new cases have appeared since the publication of this Manual, I hope that a supplement or revised edition will be forthcoming. The Guild has filled a desperate need for information and has performed an important public service.

*Norman Penney\**

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<sup>20</sup> Selected groundwork for selected cases as distinct from wholesale employment of tactics was criticized. Pp. 12-13.

<sup>21</sup> *United States v. Richmond*, 274 F. Supp. 43 (C.D. Calif. 1967). See *Badger v. United States*, 322 F.2d 902 (9th Cir.), cert. denied, 376 U.S. 914 (1963); *United States v. Hoepker*, 126 F. Supp. 118 (E.D. Ill.), aff'd, 223 F.2d 921 (7th Cir.), cert. denied, 350 U.S. 841 (1955).

<sup>22</sup> Bernstein, *Conscription and the Constitution: The Amazing Case of Kneedler v. Lane*, 53 A.B.A.J. 708 (1967).

<sup>23</sup> See *Mora v. McNamara*, 389 U.S. 934 (1967) (Stewart & Douglas, JJ., dissenting); *United States v. Mitchell*, 386 U.S. 972 (1967) (Douglas, J., dissenting).

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