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ELIGIBILITY OF GRADUATE STUDENTS FOR STUDENT AND FATHERHOOD DRAFT DEFERMENTS

I. INTRODUCTION

In the Military Selective Service Act of 1967,¹ Congress expressly provided statutory deferment from military training and service for undergraduate college students (Class II-S),² high school students (Class I-S),³ and those collegiate

1. 50 U.S.C. App. §§ 451-71 (Supp. III, 1968), formerly ch. 144, 65 Stat. 75 (1951). The legislative origin of the modern concept of "selective service" may be traced to the Selective Service and Training Act of 1940, ch. 720, 54 Stat. 885, which expired in 1947 in the wake of the Second World War. No draft was in effect until the following year when Congress enacted the Selective Service Act of 1948, ch. 625, 62 Stat. 604, which remained viable until substantially amended by the Universal Military Training and Service Act of 1951, ch. 144, 65 Stat. 75. The latter remained in effect until Congress enacted the present act which went into effect on July 1, 1967. 50 U.S.C. App. §§ 451-71 (Supp. III, 1968) [hereinafter cited as 1967 Act]. For a history of military conscription in the United States see L. Hershey, *Outline of Historical Backgrounds of Selective Service and Chronology* (rev. ed. 1965); *Selective Service L. Rep.* ¶ 2 (1968) [hereinafter cited as SSLR]. For the administrative structure and operation of the Selective Service System see Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 Calif. L. Rev. 2123 (1966); Note, 76 Yale L.J. 160 (1966). See also Levin, *The New Draft Law Reexamined*, 19 Case W. Res. L. Rev. 912 (1968); *Changes in the Draft: The Military Selective Service Act of 1967*, 4 Colum. J.L. & Soc. Probs. 120 (1968).

2. 1967 Act § 6(h)(1); see 32 C.F.R. § 1622.25 (1968); notes 13-32 and accompanying text *infra*. "Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board." 32 C.F.R. § 1622.1(c) (1968). "Classification is the key to selection and it must be accomplished in the spirit of the Military Selective Service Act of 1967 . . ." *Id.* at § 1622.1(b). 32 C.F.R. § 1622.2 (1968) sets out the requisite system of classification:

Class I

- Class I-A: Available for military service.
- Class I-A-O: Conscientious Objector available for noncombatant military service only.
- Class I-C: Member of the Armed Forces of the United States, the Coast and Geodetic Survey or the Public Health Service.
- Class I-D: Member of reserve component or student taking military training.
- Class I-O: Conscientious Objector available for civilian work contributing to the maintenance of the national health, safety or interest.
- Class I-S: Student deferred by statute.
- Class I-W: Conscientious Objector performing civilian work contributing to the maintenance of the national health, safety or interest.
- Class I-Y: Registrant not eligible for a lower class who would be qualified for military service in time of war or national emergency.

Class II

- Class II-A: Registrant deferred because of civilian occupation (except agriculture and activity in study).
- Class II-C: Registrant deferred because of agricultural occupation.
- Class II-S: Registrant deferred because of activity in study.

or graduate students ordered to report for induction during the academic year (Class I-S).⁴ In addition, Congress expressly authorized the President to issue regulations providing for the deferment of, among others, graduate students (Class II-S)⁵ and registrants with dependent children (Class III-A).⁶ At the same time, however, Congress conditioned the right to claim a I-S deferment based upon college or graduate study or a III-A fatherhood deferment by providing that the requested receipt of a prior student deferment under the provisions of the 1967 Act bars a registrant from receiving either a I-S classification or a III-A deferment based upon paternity.⁷ At first glance, an interpretation of section 6(h) of the 1967 Act suggests that Congress meant to bar any registrant from receiving either a subsequent I-S or III-A fatherhood deferment who had previously received a requested II-S student deferment, whether for *graduate or undergraduate* activity since the effective date of the 1967 Act. In point of fact this has been the restrictive interpretation accorded this section by the President⁸ and the Director of Selective Service.⁹ A literal reading of this provision and further inquiry into the circumstances surrounding the enactment of the 1967 Act, however, creates serious doubt as to the validity of such a restrictive interpretation.¹⁰ A literal approach strongly suggests that the conditions imposed

Class III

Class III-A: Registrant with a child or children; and registrant deferred by reason of extreme hardship to dependents.

Class IV

Class IV-A: Registrant who has completed service; sole surviving son.
 Class IV-B: Officials deferred by law.
 Class IV-C: Aliens.
 Class IV-D: Minister of religion or divinity student.
 Class IV-F: Registrant not qualified for any military service.

Class V

Class V-A: Registrant over the age of liability for military service.

Regulations are normally issued by the President, but he may delegate his authority to do so to the Director of Selective Service who may then issue such regulations pursuant to 32 C.F.R. § 1604.1(a) (1968); 1967 Act § 10(c); see SSLR ¶ 32.

3. 1967 Act § 6(i)(1); see 32 C.F.R. § 1622.15(a) (1968).

4. 1967 Act § 6(i)(2); see 32 C.F.R. § 1622.15(b) (1968); notes 40-42 and accompanying text *infra*.

5. 1967 Act § 6(h)(2); see 32 C.F.R. § 1622.26 (1968); notes 34-39 and accompanying text *infra*.

6. 1967 Act § 6(h)(2); see 32 C.F.R. § 1622.30 (1968); notes 43-48 and accompanying text *infra*. Note also that III-A deferments are also granted for "extreme hardship." See note 27 *infra*.

7. 1967 Act § 6(h), (i).

8. 32 C.F.R. §§ 1622.15(b), 1622.30(a) (1968); see Exec. Order No. 11360 § 5(k)(1), 3 C.F.R. 301 (Supp. 1967).

9. Local Board Memo. No. 87 (Apr. 19, 1968), SSLR at 2200 (interpreting 32 C.F.R. § 1622.15(b) (1968)). Local Board Memoranda are issued by the Director of Selective Service in regard to the administration of the system and interpretation of presidential regulations. SSLR ¶ 33.

10. See Section III *infra*.

upon the right to claim a subsequent I-S or III-A fatherhood deferment were meant by Congress to apply only to those registrants who have requested and received a previous II-S student deferment as an *undergraduate* since 1967.¹¹ Thus, those registrants deferred as *graduate* students under the 1967 Act should not be prevented from receiving a I-S student deferment, or a III-A fatherhood deferment, assuming they meet the other applicable criteria.¹² Furthermore, the difficulties surrounding judicial review of a registrant's classification should not be overlooked.¹³

11. See, e.g., note 65 and accompanying text *infra*.

12. See Section III *infra*.

13. 1967 Act § 10(b)(3) provides in part: "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 instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction . . . : Provided, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant." In *Oestereich v. Local Bd. No. 11*, 393 U.S. 233 (1968), the Court stated that "[t]o hold that a person deprived of his statutory exemption in such a blatantly lawless manner must either be inducted and raise his protest through habeas corpus or defy induction and defend his refusal in a criminal prosecution is to construe the Act with unnecessary harshness." *Id.* at 238. In *Oestereich*, petitioner had been deprived of his IV-D ministerial exemption after he had returned his registration certificate to his local board in protest over United States military involvement in Vietnam. The Court reasoned that since "there is no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved," judicial review under such circumstances was appropriate. *Id.* at 238. On the other hand, in *Clark v. Gabriel*, 393 U.S. 256 (1968), a companion case to *Oestereich*, the Court refused to grant judicial review of a registrant's I-A classification where he claimed that he was entitled to a I-O classification based upon conscientious objection. The Court distinguished *Oestereich* by stating that the registrant's eligibility for deferment as a conscientious objector "inescapably involves a determination of fact and an exercise of judgment," whereas "*Oestereich*, as a divinity student, was by statute unconditionally entitled to exemption." *Id.* at 258. Since the holding in *Oestereich* concerned statutory "exemptions," lower federal court cases have recently distinguished that decision by reasoning that since deferments are not exemptions, judicial review in such instances is precluded by § 10(b)(3). See *Kolden v. Local Bd. No. 4*, 406 F.2d 631 (8th Cir. 1969) (II-S graduate deferment); *Breen v. Local Bd. No. 16*, 406 F.2d 636 (2d Cir. 1969) (II-S undergraduate deferment) cert. granted, 37 U.S.L.W. 3407 (U.S. Apr. 28, 1969); *Rosenfield v. Local Bd. No. 19*, Civil No. 69-156 (W.D. Pa., Feb. 13, 1969) I-S deferment; *Kaplish v. Hershey*, No. 69 Civ. 82 (N.D. Ohio, Feb. 7, 1969), application for stay of induction denied, 37 U.S.L.W. 3335 (U.S. Mar. 10, 1969) (I-S deferment). But see 393 U.S. at 249 n.9 where the dissent in *Oestereich* pointed out that "[t]he Court seems to limit its holding to statutory 'exemptions,' yet 'deferments' may just as 'plainly' preclude a registrant's induction"; *Foley v. Hershey*, 37 U.S.L.W. 2597 (7th Cir., Apr. 8, 1969); *Bowen v. Hershey*, 37 U.S.L.W. 2581 (1st Cir., Mar. 26, 1969); *Carey v. Local Bd. No. 2*, 1 SSLR 3326 (D. Conn., Feb. 13, 1969), appeal docketed, No. 33418, 2d Cir., Apr. 1969; *Armendariz v. Hershey*, 295 F. Supp. 1351 (W.D. Tex. 1969). *Carey*, *supra*, clearly shows that the real distinction is not whether the classification is termed an exemption or a deferment, but rather whether the classification is one of local board discretion, or a matter of right to the registrant.

II. THE MILITARY SELECTIVE SERVICE ACT OF 1967

A. II-S: Undergraduate Student Deferments

Congress was quite explicit in the 1967 Act to provide for the mandatory deferment from military training and service of all undergraduate students.¹⁴ In furtherance of this announced policy,¹⁵ it specifically required the President to issue regulations providing for the deferment of undergraduates.¹⁶ Such deferments could "be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action."¹⁷

Eligibility for a II-S undergraduate deferment depends upon the satisfactory pursuit of a "full-time course of instruction at a college, university, or similar institution of learning."¹⁸ In addition, the student must request such a deferment from his draft board.¹⁹ The deferment expires when "such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs."²⁰

Although the undergraduate's right to claim a deferment has been made absolute,²¹ provided, of course, that he meets the applicable requirements, Congress was also motivated by alleged inequalities in the draft system²² to prevent students from "stacking"²³ deferments in order to postpone or avoid

14. 1967 Act § 6(h)(1). Under prior law a student (whether graduate or undergraduate) was deferred only when his "activity in study . . . [was] found to be necessary to the maintenance of the national health, safety or interest" by the President. Universal Military Training and Service Act of 1951 § 6(h), as amended 50 U.S.C. App. § 456(h)(1) (Supp. III, 1968).

15. See, e.g., Senate Comm. on Armed Services, Amending and Extending the Draft Law, S. Rep. No. 209, 90th Cong., 1st Sess. 6-7 (1967) [hereinafter cited as 1967 Senate Rep.]; House Comm. on Armed Services, Amending and Extending the Draft Act and Related Laws, H. R. Rep. No. 346, 90th Cong., 1st Sess. 11-15 (1967) [hereinafter cited as 2d House Rep. (1967)].

16. 1967 Act § 6(h)(1); see 32 C.F.R. § 1622.25 (1968) (regulation issued deferring undergraduate students pursuant to the statute).

17. 1967 Act § 6(h)(1).

18. *Id.* The definition of "satisfactorily pursuing a full-time course of instruction" is found in 32 C.F.R. § 1622.25(c) (1968).

19. 1967 Act § 6(h)(1); see note 30 and accompanying text *infra*.

20. 1967 Act § 6(h)(1).

21. See note 15 and accompanying text *supra*.

22. See Civilian Advisory Panel on Military Manpower Procurement, Report to the House Comm. on Armed Services, 90th Cong., 1st Sess. (1967) (Clark Panel); Nat'l Advisory Comm'n on Selective Service, In Pursuit of Equity: Who Serves When Not All Serve? (1967) (Marshall Comm'n); President's Message to the Congress, 3 Weekly Comp. Pres. Docs. 385 (March 6, 1967). An excellent comparison of the principal proposals of the above three reports is found in 1967 Senate Rep. at 10-15. See also Hearings on Extension of the Universal Military Training and Service Act Before the House Comm. on Armed Services, 90th Cong., 1st Sess. (1967).

23. "Stacking" of deferments, for example, results when a registrant who was deferred

eventual induction by providing that "[n]o person who has received a student deferment under the provisions of this paragraph [section 6(h)(1)] shall thereafter be granted a deferment under this subsection [section 6(h)]; nor shall any such person be granted a deferment under subsection (i) of this section [6] if he has been awarded a baccalaureate degree, except for extreme hardship to dependents . . . or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest."²⁴ Thus, Congress has effectively precluded the undergraduate who received a requested II-S student deferment under the provisions of the 1967 Act from receiving a subsequent I-S student deferment,²⁵ or a III-A fatherhood deferment.²⁶ Nevertheless, the request and receipt of a II-S undergraduate deferment is not a bar to receiving a subsequent III-A deferment based upon hardship,²⁷ a II-S graduate deferment,²⁸ a II-A occupational deferment, or a II-C agricultural deferment.²⁹

The receipt alone of the II-S deferment is not a bar to obtaining a subsequent I-S student deferment or a III-A fatherhood deferment for, as previously mentioned, the registrant must have specifically requested such deferment.³⁰

as an undergraduate continues to receive deferments for graduate work until he has passed the age of twenty-six. Although any registrant who receives a II-S deferment remains liable for induction until age thirty-five, those aged twenty-six or older are placed in a much lower order of call, thereby virtually insulating themselves from induction. 32 C.F.R. § 1631.7 (1968); see authorities cited in note 22 supra.

24. 1967 Act § 6(h)(1). The deferment under subsection (i) that is specifically referred to in this provision is the I-S student deferment provided for by § 6(i) of the 1967 Act. See notes 40-42 and accompanying text *infra*.

25. See notes 40-42 and accompanying text *infra*.

26. See notes 43-48 and accompanying text *infra*.

27. The President is authorized under section 6(h)(2) of the 1967 Act "to provide for the deferment from training and service . . . of any or all categories of persons in a status with respect to persons (other than wives alone, except in cases of extreme hardship) dependent upon them for support which renders their deferment advisable . . ." This is the statutory basis for the III-A hardship deferment. See 32 C.F.R. § 1622.30(b) (1968); SSLR ¶ 1061; note 6 supra.

28. See notes 34-39 and accompanying text *infra*.

29. The President is authorized under section 6(h)(2) of the 1967 Act "to provide for the deferment . . . of any or all categories of persons whose employment in industry, agriculture, or other occupations or employment, or whose continued service in an Office . . . is found to be necessary to the maintenance of the national health, safety or interest . . ." This is the statutory basis for the II-A occupational deferment and the II-C agricultural deferment. See 32 C.F.R. §§ 1622.22-1622.24 (1968); SSLR ¶¶ 1054-56.

30. See note 19 supra. Local Board Memo. No. 84 (1) (Oct. 23, 1967), SSLR at 2199 (interpreting 32 C.F.R. §§ 1622.25, 1622.26, 1622.30 (1968)), provides: "A registrant must file a written request for student deferment with his local board in order to be considered for Class II-S on the basis of his activity in study, including graduate or professional study. This request may be made by an undergraduate student on Request for Undergraduate Student Deferment (SSS Form 104) or in letter form; graduate or professional students may make such request by letter." Note that SSS Form 104, SSLR at 2156:7, contains the pertinent language of § 6(h)(1) of the 1967 Act to advise the signatory of his disabilities

The Director of Selective Service has interpreted this statutory requirement to mean that one who does not request a II-S deferment but nevertheless validly receives one shall not be barred from receiving a I-S student deferment, or a III-A fatherhood deferment. Apparently the rationale behind this is that a registrant who does not "request" the deferment is deemed to be unaware of the subsequent disabilities accorded to its receipt.³¹ A further disability attached to the request and receipt of a II-S undergraduate deferment is that the registrant, upon termination of the deferment, shall revert to the "prime age group,"³² so as to become liable for induction irrespective of his actual age, if the President designates a "prime age group," a designation he has so far failed to make, with the result that induction has continued to proceed on an oldest-first basis.³³

B. II-S: Graduate Student Deferments

As previously mentioned, in order to prevent registrants from "stacking" deferments by remaining in school as full-time students until they passed age twenty-six and were subsequently placed in a lower order of call,³⁴ Congress

should he request such a deferment. In contrast, SSS Form 103, Graduate or Professional College Student Certificate, contains no such language from section 6(h)(1), nor from any other section of the 1967 Act, and it states specifically that "submission of this form does not constitute a request for deferment." Thus, graduate students who did not make a separate written request for a II-S graduate deferment but who received one anyway, according to Local Board Memo. No. 84, will not be barred from receiving a III-A fatherhood deferment. In addition, SSS Form 109, Student Certificate, the immediate predecessor of SSS Form 104 (i.e., until July 1, 1967) likewise contained none of the relevant language from the Draft Law as found in the present SSS Form 104 and cannot be construed as a request. This form was used merely as a certification by the registrant's college or university that the student was satisfactorily pursuing a full-time course of instruction and was employed for both graduate and undergraduate study until the introduction of SSS Forms 103 and 104 in 1967. SSS Form 109 thus performed the same function that the present SSS Form 103 performs—merely to certify that the graduate student is pursuing a course of instruction at the named institution. Even if, therefore, the dubious argument that one who requested and received a II-S undergraduate deferment under the prior law is barred from receiving a subsequent I-S or III-A fatherhood deferment should be held valid (see section III-A *infra*), the fact that the present graduate student completed a SSS Form 109 as an undergraduate will not prohibit him from receiving a subsequent I-S or III-A fatherhood deferment unless he made a separate written request for a II-S deferment under the old law.

31. Local Board Memo. No. 84(2), *supra* note 30, provides: "If a registrant has been classified in Class II-S under the provisions of the Military Selective Service Act of 1967 without having requested such classification, he is not barred from classification in Class III-A on the basis of fatherhood, and will not revert to the prime age group or groups when such group or groups are designated by the Secretary of Defense."

32. 1967 Act § 6(h)(1) provides: "As used in this subsection [§ 6(h)], the term 'prime age group' means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers."

33. See 32 C.F.R. § 1622.7 (1968) for the present order of call of registrants.

34. See note 23 and accompanying text *supra*.

severely limited eligibility for II-S graduate deferments. Under section 6(h)(2) of the 1967 Act the President is authorized to defer only those graduate students "whose activity in graduate study, research, or medical, dental, veterinary, optometric, osteopathic, scientific, pharmaceutical, chiropractic, chiropodal, or other endeavors is found to be necessary to the maintenance of the national health, safety, or interest."³⁵ The President was to make a factual determination as to precisely which fields of graduate study are essential to the national health, safety, or interest. It has been decided, however, upon the advice of the National Security Council, that graduate study in non-medically oriented fields is not in the national interest, and the scope of graduate deferments has been restricted to include only some of the medically-oriented endeavors listed in the statute by Congress.³⁶ In spite of this determination eliminating universal eligibility for graduate deferments which existed under prior law,³⁷ the following provisions were promulgated for students already pursuing graduate or professional study as of October 1, 1967:

Any registrant who is entering his second or subsequent year of post-baccalaureate study without interruption on October 1, 1967, may be placed in Class II-S if his school certifies that he is satisfactorily pursuing a full-time course of instruction leading to his degree; but such registrant shall not be deferred for a course of study leading to a master's degree or the equivalent for more than one additional year, or for a course of study leading to a doctoral or professional degree or the equivalent (or combination of master's and doctoral degrees) for more than a total of five years, inclusive of the years already used in such course of study, or for one additional year, whichever is greater. Any registrant enrolled for his first year of post-baccalaureate study in a graduate school or a professional school on October 1, 1967, or accepted for admission involving enrolled status as of October 1, 1967, may be placed in Class II-S if he has entered the first class commencing after the date he completed the requirements for admission and shall be deferred for one academic year only, or until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier.³⁸

Thus, Congressional policy and Selective Service determination have spelled the end of graduate school deferments, except for those in relatively restricted fields.

35. 1967 Act § 6(h)(2). Heated debate evolved over the total abolition of all graduate deferments, even for those pursuing graduate study in medically oriented fields. The House, however, rejected such a proposal by a vote of 140 to 41. See 113 Cong. Rec. 6286-96 (daily ed. May 25, 1967) (amendments of Rep. Pike of New York). Note also that section 6(h)(2) of the 1967 Act makes no requirement of requesting a graduate deferment.

36. 32 C.F.R. § 1622.26(a) (1968): "In Class II-S shall be placed any registrant who is satisfactorily pursuing a course of graduate study in medicine, dentistry, veterinary medicine, osteopathy or optometry, or in such other subjects necessary to the maintenance of the national health, safety or interest as are identified by the Director of Selective Service upon the advice of the National Security Council." See Local Board Memo. No. 95 (Apr. 19, 1968) SSLR at 2200:3-5; Nat'l Security Council, Memorandum of Advice Respecting Occupational and Graduate School Deferments, SSLR at 2200:3-5.

37. Under prior law, graduate deferments were dispensed upon the same grounds as undergraduate deferments, that is, full-time study in any field was considered "to be necessary to the maintenance of the national health, safety, or interest." See 32 C.F.R. §§ 1622.25, 1622.25(a) (1967), as amended 32 C.F.R. §§ 1622.25, 1622.26 (1968); note 14 supra.

38. 32 C.F.R. § 1622.26(a) (1968).

C. I-S: Student Deferments

In section 6(i) of the 1967 Act, aside from the statutory provisions concerning the deferment of high school students,³⁹ Congress provided that:

Any person who while satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution is ordered to report for induction under this title, shall, upon the facts being presented to the local board, be deferred (A) until the end of such academic year, or (B) until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier: *Provided*, That any person who has heretofore had his induction postponed under the provisions of section 6(i)(2) of the Selective Service Act of 1948; or any person who has heretofore been deferred as a student under section 6(h) of such Act; or any person who hereafter is deferred under the provision of this subsection, shall not be further deferred by reason of pursuit of a course of instruction at a college, university, or similar institution of learning except as may be provided by regulations prescribed by the President pursuant to the provisions of subsection (h) of this section.⁴⁰

The obvious purpose of this provision was to permit students who were not otherwise deferred to receive a statutory I-S student deferment in order to complete at least the academic year they had entered when called for induction. Eligibility for a I-S student deferment is expressly conditioned on the student meeting the requirements contained in the provisos, discussed *infra*.⁴¹ Practically, the only graduate students who might qualify for this deferment are those who were matriculated in graduate school before October 1967. Since those who were not enrolled in graduate school as of that date have presumably received a II-S undergraduate deferment under section 6(h)(1) of the 1967 Act, they are clearly precluded from a subsequent I-S deferment.⁴²

D. III-A: Fatherhood Deferments

In addition to authorizing the President to issue regulations deferring registrants on grounds of extreme hardship,⁴³ Congress also authorized the Chief Executive "to provide for the deferment . . . of any or all categories of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes."⁴⁴ "Child" is defined to include illegitimates, adopted children, step-children, foster-children and dependents under eighteen years supported by the registrant in a relationship similar to parent and child.⁴⁵ Children not yet born but whose conception is verified in writing by a physician may also provide eligibility for a III-A fatherhood deferment.⁴⁶ Written confirmation of the pregnancy, however, must be filed with the local board before

39. See note 3 *supra*.

40. 1967 Act § 6(i)(2); see 32 C.F.R. § 1622.15(b) (1968); SSLR ¶ 1050.

41. See the discussion in Section III *infra*.

42. See note 24 and accompanying text *supra*.

43. See notes 6 & 27 *supra*.

44. 1967 Act § 6(h)(2).

45. 32 C.F.R. § 1622.30(c)(1) (1968).

46. *Id.* § 1622.30(c)(3).

any valid order to report for induction has issued.⁴⁷ Again, however, eligibility for a III-A fatherhood deferment is negated by the requested receipt of a deferment under section 6(h)(1) of the 1967 Act referring to *undergraduate* student deferments.⁴⁸

III. GRADUATE STUDENTS AND THE RIGHT TO SUBSEQUENT

III-A FATHERHOOD OR I-S STUDENT DEFERMENTS

A. *The I-S Student Deferment*

As noted above, the statutory right to a I-S student deferment is set forth in section 6(i) of the 1967 Act.⁴⁹ Paragraph (2) of this subsection deals with college or university students. The language of this paragraph is couched in mandatory rather than discretionary terms, for the student, once he has established that he is "satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution"⁵⁰ . . . shall⁵¹ be given this deferment. In only four circumstances is the registrant not entitled to a I-S deferment.

The first two of these exceptions relate to the Selective Service Act of 1948.⁵² "[A]ny person who has heretofore had his induction postponed under the provisions of section 6(i)(2) of the Selective Service Act of 1948; or any person who has heretofore been deferred as a student under section 6(h) of such Act . . . shall not be further deferred by reason of pursuit of a course of instruction at a college, university, or similar institution of learning . . ."⁵³ The Selective Service Act of 1948 was only in effect from 1948 until 1951 when it was amended and its title changed to the Universal Military Training and Service Act.⁵⁴ The latter Act contained precisely the same proviso as the 1967 Act in this regard, disqualifying those who had "heretofore" been so deferred.⁵⁵ It thus seems

47. *Id.* But see SSLR ¶ 1060 & n.2.

48. See Section III. B *infra*.

49. 1967 Act § 6(i); see 32 C.F.R. § 1622.15 (1968); note 41 and accompanying text *supra*.

50. See notes 17 & 29 *supra*, for a discussion of the procedure by which a registrant establishes a student deferment.

51. 1967 Act § 6(i)(2); see 32 C.F.R. § 1622.15(b) (1968).

52. Ch. 625, 62 Stat. 604; see the historical context of this Act in note 1 *supra*.

53. 1967 Act § 6(i)(2); see 32 C.F.R. § 1622.15(b) (1968).

54. See note 1 *supra*; Griffiths & Heckman, Eligibility for I-S of Registrants Holding Graduate II-S since July 1, 1967, 1 SSLR 4041, 4042 (1968); 1 SSLR 17-18 (1968).

55. Pursuant to the 1951 Act the following regulation was promulgated: "[E]xcept that no registrant shall be placed in Class I-S under the provisions of this paragraph (1) who has previously been placed in Class I-S thereunder, or (2) who, prior to June 19, 1951, had his induction postponed under section 6(i)(2) of the Selective Service Act of 1948, as amended, or was deferred as a student under section 6(h) of such Act." 32 C.F.R. § 1622.15(b) (1967). The apparent reason for the exclusion from the I-S deferment under both the old and new law of those registrants who had received a student deferment under the 1948 Act was that the 1948 Act did not provide for the extension of liability to age thirty-five for those who had been deferred as students. This extension of liability was added in the 1951 Act and is in effect under the 1967 Act so that a single student deferment will no longer result in non-exposure to the draft. See *Carey v. Local Bd. No. 2*, 1 SSLR 3326, 3327 n.5

clear that these two exceptions exclude only those registrants who had received either I-S or II-S deferments between 1948 and 1951 and not all holders of student deferments before July 1, 1967.⁵⁶

The third exception to the right to a I-S deferment merely provides that "any person who hereafter is deferred under the provision of this subsection [6(i)]"⁵⁷ cannot receive a further deferment for study except as may be provided by the President pursuant to subsection (h) of the section.⁵⁸ The clear meaning of and policy⁵⁹ behind this exception are that the registrant is entitled to only one I-S deferment under this section and thus may not stack one upon another.

The fourth exception to the statutory right to a I-S deferment is found in paragraph (1) of section 6(h) which reads: "[N]o person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection [6(h)]; nor shall any *such* person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents . . . or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest."⁶⁰ A graduate student who is pursuing a course of study deemed "necessary" by the President, pursuant to the authorization of section 6(h)(2), would obviously not be barred from obtaining I-S classification by this exception. The student engaged in other "less essential" graduate or professional study is, however, faced with a problem.⁶¹

(D. Conn., Feb. 13, 1969), appeal docketed, No. 33418, 2d Cir., Apr. 1969; Griffiths & Heckman, *supra* note 54. But see, e.g., *Minnis v. Commanding Officer*, No. 69 Civ. 492 (S.D.N.Y., Feb. 17, 1969), upholding the interpretation of the Selective Service System that the 1948 Act remained in effect until 1967, thus precluding any registrant who received a II-S deferment until 1967, and not just 1951.

56. See Griffiths & Heckman, *supra* note 54; 1 SSLR 17-18 (1968). This view was upheld in two recent cases. *Carey v. Local Bd. No. 2*, 1 SSLR 3326 (D. Conn., Feb. 13, 1969), appeal docketed, No. 33418, 2d Cir., Apr. 1969; *Armendariz v. Hershey*, 295 F. Supp. 1351 (W.D. Tex. 1969). *Contra*, *Rosenfield v. Local Bd. No. 19*, Civil No. 69-156 (W.D. Pa., Feb. 13, 1969); *Kaplish v. Hershey*, No. 69 Civ. 82 (N.D. Ohio, Feb. 7, 1969). The two latter cases take the view that because the registrant had received an undergraduate deferment prior to 1967 pursuant to the former subsection 6(h), he is barred from a I-S deferment by the language of section 6(i)(2). If this is what Congress had intended, the reference in the paragraph would have been to the Universal Military Training and Service Act of 1951, rather than to the 1948 Act, which was only in effect until 1951.

57. 1967 Act § 6(i)(2); see 32 C.F.R. § 1622.15(b) (1968).

58. See 32 C.F.R. §§ 1622.26(a), (b) (1968).

59. See, e.g., House Comm. on Armed Services, H.R. Rep. No. 267, 90th Cong., 1st Sess. (1967). See also note 22 *supra*.

60. 1967 Act § 6(h)(1) (emphasis added). It must be kept in mind, however, that the disability which is attached to section 6(h)(1) extends only to those who have requested such a deferment. See note 30 *supra*. Local Board Memo. No. 84, *supra* note 30, stated that the registrant who received such a deferment without a request therefor is not prohibited from receiving a III-A fatherhood deferment. By analogy, this same rule should apply to the I-S deferment since that disability arises in the same context.

61. This group would include all graduate students who are not engaged in fields of

The statutory right to a I-S deferment, as set forth in section 6(i)(2), has been interpreted by a regulation which states that no person is to receive such a classification who has previously been placed in Class I-S thereunder, or who has been deferred as a student in Class II-S and has received a baccalaureate degree.⁶² The Director of Selective Service has attempted to clarify this regulation by stating that the exclusion "refers to a registrant who has been placed in Class II-S after June 30, 1967, and has a baccalaureate degree."⁶³ The Director's interpretation, however, appears to conflict with the statutory language of section 6(h)(1). The word "such" in the language "nor shall any such person be granted a deferment under subsection (i)" plainly refers to the "person" mentioned in the preceding clause, "[n]o person who has received a student deferment under the provisions of this paragraph . . ."⁶⁴ The paragraph referred to is paragraph (1) of subsection (h),⁶⁵ and it is manifestly clear that this paragraph concerns only undergraduate deferments.⁶⁶ Hence, the

study which have been found essential to the national interest as set forth in 32 C.F.R. § 1622.26(a) (1968). Those registrants in any field of graduate study as of October 1, 1967 were given limited deferments under the same authority in section 6(h)(2) by which the President deferred those graduate students in medically-oriented fields. See text at note 39 supra. In denying the right to a I-S deferment to the plaintiff, the court in *Rosenfield v. Local Bd. No. 19, Civil No. 69-156 (W.D. Pa., Feb. 13, 1969)* stated that 32 C.F.R. § 1622.26(b) (1968) which granted a deferment for one year to those graduate students enrolled in their first year of graduate study on October 1, 1967, was issued pursuant to the authority set out in section 6(i)(2) which states that "[n]othing in this paragraph shall be deemed to preclude the President from providing, by regulations prescribed under subsection (h) of this section, for the deferment . . . of students for such periods of time as he may deem appropriate." Under this interpretation, then, the registrant may not receive a I-S deferment since he had received a deferment under the provisions of section 6(i). If the President, however, were so to act, as he did in the regulation set forth above, it would be pursuant to authority granted him by subsection (h) and not subsection (i), and in this interpretation, the court was manifestly in error. All that the above statement found in subsection (i) meant to do was to make explicit that the language of subsection (i) would in no way interfere with that authority delegated to the President in subsection (h). Subsection (i) contains no positive grant of power to the Chief Executive to issue regulations deferring students—these are found exclusively in subsection (h).

62. 32 C.F.R. § 1622.15(b) (1968).

63. Local Board Memo. No. 87 (Apr. 19, 1968), SSLR at 2200 (interpreting 32 C.F.R. § 1622.15(b)(2) (1968).

64. 1967 Act § 6(h)(1).

65. Note that the law prior to July 1, 1967 provided for the deferment of all students on the same criteria and in the same subsection. Universal Military Training and Service Act of 1951 § 6(h), ch. 144, 65 Stat. 75 (1951). See note 14 supra. That law contained only a subsection (h) and no paragraph (1); subsection (h) was not divided into paragraphs until the 1967 Act. The reference, therefore, to this "paragraph" has application only to the 1967 Act since the paragraph has no predecessor in the prior act, and hence the exclusion only applies to those receiving a II-S undergraduate deferment under the new law, i.e., since July 1, 1967.

66. The deferment granted by paragraph (1) of subsection 6(h) "shall continue until [the person receiving such deferment] completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-

exclusionary language has application only to those registrants who have received *undergraduate* student deferments under section 6(h)(1) since the effective date of the Act, July 1, 1967.⁶⁷ If Congress had intended this exclusion to apply to those receiving graduate deferments under the new law, it surely would have specified that the bar applied to those who had received a student deferment under this "subsection" instead of under this "paragraph." Any graduate or professional student, therefore, regardless of whether he is entitled to a II-S deferment, who had completed his undergraduate studies prior to July 1, 1967 and who was never deferred under paragraph 6(h)(1), should be entitled to a I-S deferment if called during the academic year in spite of the memorandum misconstruing the Act.⁶⁸ This reasoning was recently accepted by several federal courts⁶⁹ which found no authority for the position taken in the Director's memorandum or the regulation, and ruled in favor of registrants who had never received *undergraduate* II-S deferments under section 6(a)(1), *i.e.*, under the new law since July 1, 1967, but had received *graduate* deferments under section 6(h)(2) of the new law. The courts observed that the exclusion in section 6(h)(1) referred only to *undergraduate* deferments and that the registrants had a "statutory right" to the I-S deferment, assuming they were not disqualified by any of the other three exceptions. A "statutory right" cannot be taken away by "Administrative fiat."⁷⁰

fourth anniversary of the date of his birth." 1967 Act § 6(h)(1). Hence, in no event can a deferment under paragraph (1) continue beyond reception of a baccalaureate degree. On the other hand, in paragraph (2) the President is authorized to provide for the deferment of those registrants "whose activity in graduate study . . . is found to be necessary to the maintenance of the national health, safety, or interest." *Id.* § 6(h)(2); see 1967 Senate Rep. at 6-7; H.R. Rep. No. 267, Military Selective Service Act of 1967, 90th Cong., 1st Sess. 22-27 (1967); 2d House Rep. (1967), at 11-15; 113 Cong. Rec. 6279, 6287 (daily ed. May 25, 1967) (remarks of Reps. Rhodes and Stratton respectively).

67. Local Bd. Memo. No. 87 does not conflict with the language of the statute, if it is read as barring the I-S deferment to a registrant "who has been placed in Class II-S after June 30, 1967," and has thereafter received a baccalaureate degree. See *Carey v. Local Bd. No. 2*, 1 SSLR 3326 (D. Conn., Feb. 13, 1969).

68. Although there are set forth in section 6(i)(2) three exceptions by which a registrant is prevented from receiving a I-S classification, and there is a further exception contained in 6(h)(1), the court in *Kaplish v. Hershey*, No. 69 Civ. 82 (N.D. Ohio, Feb. 7, 1969) carved out a totally unwarranted fifth exception by stating that since plaintiffs had received a "discretionary" deferment for one year under 32 C.F.R. § 1622.26(b) (1968), they were not entitled to an additional deferment by being given a I-S classification. There is no statutory language which justifies this construction.

69. *Foley v. Hershey*, 37 U.S.L.W. 2597 (7th Cir. Apr. 8, 1969); *Bowen v. Hershey*, 37 U.S.L.W. 2581 (1st Cir. Mar. 26, 1969); *Carey v. Local Bd. No. 2*, 1 SSLR 3326 (D. Conn., Feb. 13, 1969); *Armendariz v. Hershey*, 295 F. Supp. 1351 (W.D. Tex. 1969).

70. *Id.* at 1354. "To uphold this additional exception 'would be to hold that it may be imposed by regulation which, of course, the law does not permit.'" *Carey v. Local Bd. No. 2*, 1 SSLR 3326, 3328 (D. Conn., Feb. 13, 1969), appeal docketed, No. 33418, 2d Cir., Apr. 1969, quoting *Commissioner v. Acker*, 361 U.S. 87, 92 (1959).

B. *The III-A Fatherhood Deferment*

Pursuant to the authority vested in the President in section 6(h)(2) of the Act,⁷¹ the Chief Executive has issued regulations deferring those registrants "who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes."⁷² There is no statutory right to a deferment on such grounds, as is the case with a II-S undergraduate deferment, but the statute does expressly authorize the President to make such a classification, and since such authority has been exercised, a registrant who qualifies should be entitled to this deferment as a matter of right, not as a matter of discretion as is the case with III-A hardship deferments.⁷³

The regulations providing for the fatherhood deferment, however, contain an exception by which many registrants are precluded from obtaining deferment on paternity grounds. The regulation excludes "a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967."⁷⁴ This proviso purportedly implements section 6(h)(1) of the 1967 Act which provides that "no person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection."⁷⁵ Since the provision authorizing the President to defer registrants because of paternity is contained in subsection (h) of section 6, it is evident that a registrant who has received a deferment under the provisions of the specified *paragraph* is barred from receiving a III-A fatherhood deferment. As noted above, however, paragraph (1) of subsection (h) refers only to undergraduate deferments which have been received at the specific request of the registrant under the 1967 Act.⁷⁶ In spite of this, the regulations issued by the Selective Service System construe this language to bar the III-A deferment for any registrant who is classified II-S after the date of enactment of the Military Selective Service Act of 1967.⁷⁷ Once again it appears that this interpretation is erroneous since paragraph 6(h)(1) applies only to undergraduate students.⁷⁸ Nowhere in paragraph (2) of section 6(h), the paragraph which authorizes graduate II-S deferments, does there appear a clause similar to that in paragraph (1), which causes the graduate II-S recipient to lose any further right to a III-A deferment based upon paternity. Furthermore, even under the interpretation of the Selective Service System, the disability pertains only to those who have requested, and not merely received, a II-S deferment.⁷⁹

71. 1967 Act § 6(h)(2).

72. 32 C.F.R. § 1622.30(a) (1968).

73. 1967 Act § 6(h)(2); see 32 C.F.R. § 1622.30(b) (1968).

74. 32 C.F.R. § 1622.30(a) (1968).

75. 1967 Act § 6(h)(1).

76. *Id.*; see Local Board Memo. No. 84, *supra* note 30.

77. See Local Board Memo. No. 87, *supra* note 63.

78. See note 65 *supra*.

79. See Local Board Memo. No. 84, *supra* note 30.

IV. CONCLUSION

A correct interpretation of the 1967 Act reveals that the prohibition on subsequent I-S student deferments and III-A fatherhood deferments contained in section 6(h)(1) are applicable only to undergraduate student deferments granted since the effective date of the 1967 Act. Thus, the current graduate student, who has not received an undergraduate student deferment since July 1, 1967 should retain his eligibility for a I-S or a III-A fatherhood deferment.⁸⁰ Although Congress clearly meant to deprive the undergraduate who received a II-S deferment under the 1967 Act from claiming a subsequent deferment, no reasonable statutory construction justifies the interpretation that the present graduate student was also meant to suffer these disabilities.

80. Since the right to these deferments is an absolute one so long as the registrant does not fall under any of the specific exceptions, the thorny problem of obtaining judicial review may be obviated. See note 13 *supra*.