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HABEAS CORPUS TO SECURE RELEASE FROM MILITARY SERVICE—RETROACTIVE APPLICATION OF GUTKNECHT v. UNITED STATES

Petitioner’s concern for what he refers to as “visible imperfections in a judicial process” merely highlights the problem inherent in prospective decision-making, i.e., some defendants benefit from the new rule while others do not, solely because of the fortuities that determine the progress of their cases from initial investigation and arrest to final judgment. The resulting incongruities must be balanced against the impetus the technique provides for the implementation of long overdue reforms, which otherwise could not be practically effected. Thus, raising the specter of potential anomalies does not further the difficult decision of selecting the precise event that should determine the prospective application of a newly formulated constitutional principle.¹

It is not often that the Supreme Court of the United States acknowledges in a majority opinion that its own decision may be productive of “incongruities” and “anomalies.” As the above quotation indicates, Mr. Chief Justice Warren was willing to make just such an admission when discussing the policy considerations involved in determining the degree of retroactivity to be accorded new constitutional rules of criminal procedure. The Supreme Court guidelines in this area originated in the case of Linkletter v. Walker;² hence, the rapidly expanding literature of retroactivity³ makes frequent reference to the “Linkletter Doctrine.” This Note will briefly review the history of the Linkletter doctrine, examine one of its possible new areas of application—cases involving invalidated selective service delinquency regulations⁴—and will consider the possibility of new incongruities and anomalies transcending any that have yet arisen.

². 381 U.S. 618 (1965).
Retroactivity in the Supreme Court from Linkletter to DeBacker

In Linkletter v. Walker\(^5\) the issue was the effect of Mapp v. Ohio\(^6\) on defendants who were prosecuted under rules of evidence at variance with Mapp. Mapp had made the federal exclusionary rule on evidence obtained by searches and seizures violative of the fourth amendment mandatory on the states. Linkletter held that Mapp would be applied only to those cases that were open to direct review on the day Mapp was handed down. At the core of Mr. Justice Clark's opinion in Linkletter is the proposition that the Court was constitutionally free to vary the extent of retroactivity in accordance with certain appropriate policy guidelines.\(^7\) In summarizing the factors to be considered, the Court stated that

the effect of the subsequent ruling of invalidity on prior final judgments when collaterally attacked is subject to no set "principle of absolute retroactive invalidity" but depends upon a consideration of "particular relations . . . and particular conduct . . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality"; and "of public policy in the light of the nature both of the statute and of its previous application".\(^8\)

This line of analysis was further refined and applied in subsequent cases dealing with other new constitutional standards.\(^9\) In Stovall v. Denno,\(^10\) the Supreme Court set forth the following abbreviated checklist of relevant considerations:

(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.\(^11\)

This list represents the current status of the Linkletter formulation and has been relied on in subsequent cases dealing with retroactivity.

5. 381 U.S. 618 (1965).
7. This idea was first advanced in Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932), where Mr. Justice Cardozo, addressing himself to the due process ramifications of retroactivity, said, "We think the federal constitution has no voice upon the subject." Id. at 364.
8. 381 U.S. at 627. These considerations are essentially those mentioned in Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 471 (1940), which dealt with the retroactivity of a decision holding a bankruptcy statute unconstitutional. For the position that the use of precedent in the line of retroactivity cases which commenced with Linkletter was specious, see Haddad, supra note 3, at 424-32.
11. Id. at 297.
problems. Last term, in DeBacker v. Brainard, the Court rendered a four page per curiam dismissal of an appeal seeking retroactive application of recent decisions guaranteeing a jury trial in state criminal prosecutions. Linkletter and the other early retroactivity cases were not cited, except in dissent. The majority clearly took it as an article of faith that some cases "should receive only prospective application."

Any summary of the Linkletter doctrine would be incomplete without mentioning that its continued vitality is less than certain. Justices Black and Douglas have consistently dissented in the cases that contributed to the formation and extension of the doctrine. And Justice Harlan, who initially favored the Linkletter technique as a means of limiting the effect of such decisions as Miranda v. Arizona and Escobedo v. Illinois, has recently expressed clear dissatisfaction with the state of the law in this area. Dissenting in Jenkins v. Delaware, Justice Harlan noted definite incongruities created by the Court's varying approach to the retroactivity problem and contended that the only way to minimize such incongruities was to [turn] our backs on the ad hoc approach that has so far characterized our decisions in the retroactivity field and [proceed] to administer the doctrine on principle. . . . [T]he time has come for us to take a fresh look at the whole problem of retroactivity.

Linkletter's New Arena—The Selective Service Delinquent Registrant Cases

In several recent federal district court cases the Department of Justice has argued—unsuccesfully to date—that Linkletter-type reasoning compels denial of the habeas corpus petition of a draftee who

15. 396 U.S. at 34-35.
16. Id. at 30.
22. Id. at 224.
has been ordered to report for induction into the Army as a "delinquent registrant." The legal authority under which the Selective Service System purported to issue such induction orders was called into question in Gutknecht v. United States.24

In each term since 1968 the United States Supreme Court has rendered decisions in cases involving direct challenges to various administrative practices of the Selective Service System. In the majority of these cases the challenges have been sustained.25 Gutknecht followed this trend and struck down, as unauthorized by statute, the Selective Service System's delinquency regulations. This ruling prevents future reclassifications and accelerated inductions on delinquency grounds. Its possible retroactive effect is broad also. In one recent case involving the issue of Gutknecht's retroactivity, the Government admitted that 6,000 men are in the Army due to enforcement of the delinquency regulations.26 In that case the reviewing court granted the inductee's petition for habeas corpus, and the Government has prosecuted an appeal.27 An understanding of the Selective Service framework of such cases is necessary before the opposing views on the retroactivity issue can be fully understood.

In Gutknecht the defendant had participated in an antiwar demonstration during which he deposited his Selective Service credentials on the steps of the Minneapolis Federal Building. After his administrative appeal to be reclassified as a conscientious objector—which was pending at the time of the demonstration—had been decided against him, he was declared "delinquent." Delinquency was predicated on his failure to have in his possession, "at all times," his registration certificate and current classification notice.28 Under the delinquency regulations, a registrant could be declared delinquent by his local board whenever he failed to "perform any duty or duties required of him under the selective service law."29 Another regulation30 specified that delinquents were to be advanced ahead of all others, including volunteers, in the local board's order of call. The consequences in Gut-

27. Id. at 961.
29. The Selective Service System regulations which make this possession mandatory are 32 C.F.R. §§ 617.1, 1623.5 (1970).
30. Id. § 1642.4(a).
31. Id. § 1631.7.
knecht's case were immediate; he received his induction order 5 days after his delinquency notification.\(^{32}\)

Gutknecht refused to take part in the induction processing, and was indicted for failure "to perform a duty required of him"\(^{33}\) under the Selective Service Act. At trial\(^{34}\) and on appeal\(^{35}\) he contended that his accelerated\(^{36}\) induction was effected pursuant to an administrative regulatory scheme not sanctioned by law. Both the trial court and the court of appeals rejected this defense.

The Supreme Court unanimously reversed Gutknecht's conviction. Six of the eight participating\(^{37}\) Justices expressly accepted the proposition that the delinquency regulations went beyond anything Congress had authorized in its selective service legislation.\(^{38}\) The essence of the majority opinion was that the enabling section of the Selective Service Act\(^{39}\)—the section authorizing regulations to imple-

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32. This timing was decisive for two Justices. See note 36 infra.
36. The concept of acceleration depends on the existence of the six categories of 32 C.F.R. § 1631.7 (1970), the order of call regulation. Gutknecht was moved from the third to the first category. The Government conceded that there was an actual advancement: "By virtue of the declaration of delinquency he was moved to the first of the categories which meant, according to the brief of the Department of Justice, that 'it is unlikely that petitioner, who was 20 years of age when ordered to report for induction, would have been called at such an early age had he not been declared a delinquent." 396 U.S. at 299.
37. Justice Stewart, in an opinion in which Chief Justice Berger concurred, stated that he had not reached the question of the legality of the delinquency regulations. These two Justices concurred in reversal on the ground that 32 C.F.R. § 1642.12-13 (1970) afforded one declared a delinquent a 30 day right of appeal, which the local board had denied in Gutknecht's case by its hasty action in ordering the registrant inducted 5 days after the delinquency declaration. 396 U.S. at 314 (concurring opinion). It should be mentioned that Gutknecht did not raise this issue in either the district court or the Eighth Circuit, and that it has rarely been an issue for the lower federal courts which have been confronted with the problems of the Gutknecht case. See, e.g., National Student Ass'n v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969); United States v. Eisdorfer, 299 F. Supp. 975 (E.D.N.Y. 1969).
38. Though such a holding by the Supreme Court is obviously the most significant, a similar result had been reached at least twice earlier by lower courts. Bucher v. Selective Serv. Sys., 421 F.2d 24, 29 (3d Cir. 1970); United States v. Eisdorfer, 299 F. Supp. 975, 987 (E.D.N.Y. 1969); cf. National Student Ass'n v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969), where the widely noted "Hershey Directive" (printed in N.Y. Times, Nov. 9, 1967, at 2, col. 4) was held to be unauthorized by law. The thrust of the directive was that the delinquency regulations should be applied forthwith to "illegal demonstrators."
39. The supposed authorizing passage was found in the Selective Service Act of 1948, ch. 625, § 10, 62 Stat. 618, and its successor, 50 U.S.C. APP. § 460(b) (1964), as
ment the act—did not authorize regulations designed to punish delinquents.\textsuperscript{40}

The Government had pointed to a specific mention of the term "delinquents" in the Selective Service Act. This passage, added by the 1967 amendments to the act, provided that:

As used in this subsection, the term "prime age group" means that 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.\textsuperscript{41}

This usage, described in the majority opinion as "casual,"\textsuperscript{42} was held to refer only to an order of call provision found in another regulation.\textsuperscript{43} The provision had never been implemented because no need for its application had ever arisen.

Against this background the Court discerned a clear congressional intent that punishment for violation of Selective Service laws be limited to criminal sanctions.\textsuperscript{44} In language that clearly manifests a deep concern over the practices of some local boards the Court said:

[T]here is no suggestion that as respects other types of discrimination the Selective Service has free-wheeling authority to ride herd on the registrants using immediate induction as a disciplinary or vindictive measure. . . . We search the Act in vain for any clues that Congress desired the Act to have punitive sanctions. . . . Nor do we read it as granting personal privileges which may be forfeited for transgressions which affront the local board.\textsuperscript{45}

The Court had previously decided that congressionally granted deferments and exemptions may not be withdrawn by administrative action.\textsuperscript{46} Gutknecht extended this rule to include realignments of order of call within the I-A group. The extension was justified on the following grounds:

Deferment of the order of call may be the bestowal of great benefits: and its acceleration may be extremely punitive. . . . [The act's] legislative history, as well as the concern of the Congress that the order in which registrants are inducted be achieved "in an impartial manner," emphasizes a deep concern by Congress with the problems of the order of induction as well as with those of exemptions, deferments, and classifications.\textsuperscript{47}

\textit{amended}, (Supp. V, 1970), both of which simply stated: "The President is authorized—

(1) To prescribe the necessary rules and regulations to carry out the provisions of this title. . . ."

\textsuperscript{40} 396 U.S. at 301.
\textsuperscript{42} 396 U.S. at 302.
\textsuperscript{43} Id., citing 32 C.F.R. § 1631.7(b) (1970).
\textsuperscript{45} 396 U.S. at 306-07.
\textsuperscript{46} Oestereich v. Selective Serv. Local Bd. No. 11, 393 U.S. 233 (1968).
\textsuperscript{47} 396 U.S. at 304-06.
The strictly prospective effects of this holding are obvious: No future inductions will be based on delinquency declarations. And one aspect of the retroactivity problem appears to be no longer in issue. Criminal prosecutions based upon a refusal to report for processing or induction following a delinquency declaration must be dismissed even if convictions were finalized prior to Gutknecht. The first opinions on this issue indicated that the Government advanced vigorous Linkletter-type arguments to forestall retroactive application in the criminal area. But the more recent reports are per curiam dismissals and reversals, indicating universal acceptance of the conclusion of Chief Judge Zavatt:

Since a local board has no power to punish a registrant by depriving him of his exempt or deferred classification and/or by accelerating his induction, it follows, a fortiori, that a failure or refusal to obey a local board's induction order, under such circumstances, cannot constitute the basis of criminal indictment and subsequent conviction thereunder.

A lesser number of cases have considered the effect of Gutknecht on men who submitted to induction following their delinquency classifications and, after the date of the Gutknecht decision, filed habeas corpus petitions for release from military "custody." In Andre v. Resor the petitioner had been inducted into the Army, as a delinquent registrant, in April 1969. This was approximately 9 months prior to Gutknecht. Andre had been declared delinquent for failure to keep his local board informed of his current address. The Government contended at his habeas corpus hearing—and still contends on appeal—that the Linkletter line of cases should apply in such habeas corpus situations, and that the principles laid down in those cases should lead to a conclusion of nonretroactivity. It must be noted that this argument really involves two separate con-

50. E.g., United States v. Broyles, 427 F.2d 358 (9th Cir. 1970); United States v. Troutman, 425 F.2d 261 (8th Cir. 1970); Gregory v. United States, 422 F.2d 1323 (9th Cir. 1970).
53. Habeas corpus has long been recognized as an appropriate remedy for testing the legality of non-penal military "custody." See generally R. Sokol, A HANDBOOK OF FEDERAL HABEAS CORPUS § 5.3, at 24-27 (1965).
tentions, both of which must be accepted before the Government's position can be sustained. Before discussing whether the Linkletter principles preclude retroactive application of Gutknecht in a case like Andre, the threshold question of the Linkletter doctrine's applicability should be taken up.

Applicability of Linkletter to Retroactivity

Problems Raised by Gutknecht

One difference between the Linkletter line of decisions and the post-Gutknecht cases is immediately apparent. While the former dealt with procedural questions of constitutional magnitude, the latter dealt with a substantive issue that turns, after all is said, on construction of the Selective Service Act. It is difficult to assert that this difference should be controlling, given "the Court's confused pattern of retroactivity rules."55 The Linkletter principles have previously been applied in a case concerning the retroactivity of a non-constitutional decision;56 but since that case involved the admissibility, in a state prosecution, of evidence obtained in violation of the Federal Communications Act, the parallel with Mapp v. Ohio57 is so overwhelming as to blur the constitutional/non-constitutional distinction. Suffice to say that there is no Supreme Court decision which has specifically limited the Linkletter doctrine to cases involving constitutional issues. Hence, the question of its applicability in other types of cases is arguably still open.

Another more fundamental difference is the fact that the Linkletter line of cases deal with criminal trials. Many of the post-Gutknecht habeas corpus situations are anything but criminal. As has already been mentioned,58 the problem of Gutknecht's retroactive application in criminal prosecutions for draft refusal seems easy to solve: If the induction order which forms the underpinning of the crime charged is invalid, the substantive allegation of criminal wrongdoing cannot stand. But the Government continues to press for nonretroactivity on the civil side in cases involving “delinquents” who chose to be in-

56. Fuller v. Alaska, 393 U.S. 80 (1968), refusing to extend retroactivity to Lee v. Florida, 392 U.S. 378 (1968). Compare James v. United States, 366 U.S. 213 (1961), where embezzled money was held to be taxable income, overruling Commissioner v. Wilcox, 327 U.S. 404 (1946). The James rule was held to apply only to future cases. But the determining factor was that the prosecution sought review of the old rule, and the element of “willfully” evading taxation could not be established in a situation where a previous Supreme Court decision made the defendant's action not a crime. 366 U.S. at 221-22.
58. See text accompanying notes 47-50 supra.
ducted rather than refuse to cooperate and thereby incur the risk of criminal prosecution. As mentioned in the introduction to this Note, application of the *Linkletter* doctrine in this area might lead to some true anomalies, and this would certainly be one of them: a doctrine developed to manage problems springing from criminal litigation would be invoked, if the Government succeeds on appeal, to deny the benefits of an overruling precedent to civil litigants who have never been criminally indicted. Yet the criminal litigants in the same area would have the full benefits of the *Gutknecht* principle. The Government adverts to this in *Andre*:

Those who have been convicted and are serving prison terms for refusing to obey induction orders issued under such regulations are clearly being prejudiced in their fundamental rights and therefore have a basis for relief under section 2255 of title 28 U.S. C. However, those who had reported for induction pursuant to void induction orders, although initially their rights were violated as a result of their being improperly reclassified on grounds of delinquency, are not being deprived currently of any substantive rights as a result of their military service, which, of course, is not equated with punishment, restraining as military service may be.⁵⁹

The latter half of the quoted passage does not seem to take into account the possible inappropriateness of applying the criminally oriented *Linkletter* doctrine to the noncriminal habeas corpus cases typified by *Andre*. The district court in *Andre*, however, was aware of the contrast:

[T]he court finds that the *Linkletter* doctrine of retroactivity has been used in cases dealing with criminal proceedings where "new standards" are put forth. These standards relate to the procedural protections of a criminal defendant.⁶⁰

But if it is conceded that the *Linkletter*-style nonretroactivity analysis should be brought to bear on the post-*Gutknecht* habeas corpus cases, it is necessary to apply the working guidelines developed by the Supreme Court. As mentioned earlier these are:

(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.⁶¹

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Consideration of "The Purpose to be Served
By the New Standard"

In Andre the court held the purpose of the new standard to be the predominant guideline, stating that
the factors of reliance and burden on the administration of justice
are of significant relevance only when the question of retroactivity
is a close one after the purpose of the new rule is considered.\(^6\)

In this connection the court made a distinction that is encountered in
many of the opinions in this area: Some rights are "essential to a
reliable determination of whether the accused should suffer a penal
sanction,"\(^6\) while others are "interests which are collateral to or rela-
tively far removed from the reliability of the fact finding process at trial."\(^6\)

This distinction originated in such statements as that of Mr. Justice
Clark in Linkletter where he said, in regard to a search and seizure
claim, "All that petitioner attacks is the admissibility of evidence, the
reliability and relevancy of which is not questioned, and which may well
have had no effect on the outcome."\(^6\) Such claims were contrasted with
those concerning rules that directly affect the reliability of the defen-
dant's trial.\(^6\) Mr. Justice Clark then pointed to a pattern of retro-
active application of rules that govern the fairness of the trial.\(^6\) This
pattern, and its subsequent extension, captures the essence of the "pur-
pose" criterion: if the purpose of a new rule is to insure a reliable
determination of guilt, then the rule should be applied retroactively.

This has been denominated the "purpose-reliability" test.\(^6\) Its
concrete applications have been subject to definite criticism,\(^6\) and

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63. Id. at 960 n.3, citing Berger v. California, 393 U.S. 314 (1969); Roberts v.
64. 313 F. Supp. at 960 n.4, citing Halliday v. United States, 394 U.S. 831
66. Id.
67. Id. at 639 n.20, citing Jackson v. Denno, 378 U.S. 368 (1967); Gideon v.
68. See Haddad, supra note 3, at 433.
69. E.g., id. at 434, where it was asserted: "The real objection to the purpose-
reliability test is that the Supreme Court has disregarded it where a majority of the Court
dislikes the result which its application would yield. In at least three instances the Court
has simply chosen to ignore its own articulated rationale for a particular decision when
it has been faced with the problem of determining whether that decision should be ap-
it appears to have been modified perceptibly by language in later Supreme Court decisions. In *Griffin v. California*, superscript 70 for instance, the Court held that a state could not constitutionally permit adverse prosecutorial comment on a defendant's invocation of the self-incrimination privilege. This rule, the Court observed, lessened the probability of conviction of an innocent defendant. superscript 71 Eventually, however, the Court refused to give *Griffin* retroactive application. superscript 72 As was later explained:

[We] denied retroactive application to *Griffin v. California* . . . despite the fact that comment on the failure to testify may sometimes mislead the jury concerning the reasons why the defendant has refused to take the witness stand. We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth determining process at trial. superscript 73

This "other safeguards" modification of the "purpose-reliability" test can profitably be applied to the post-*Gutknecht* situations, in view of the fact that the purpose-reliability test, in its pristine form, is somewhat imprecise and not susceptible of uniform application.

An alternate way of phrasing the argument is to observe that in many cases the purpose-reliability test can be used to support either side of the retroactivity question. Those who would deny retroactivity to *Gutknecht* would maintain that the primary purpose of the rule in that case is to prevent future action by local draft boards of the sort which Mr. Justice Douglas characterized as "administrative absolutism." superscript 74 On the other side, those who favor retroactivity would maintain that the "fairness of the trial" (which, by analogy, would be the local board's determination) was inherently unreliable. This analogy would lead to the conclusion that the *Gutknecht* rule is the type of new rule that is "historically" applied retroactively. superscript 75

The situation becomes less equivocal when "other safeguards" are taken into account. A search and seizure petitioner has the guarantee of a jury trial, with the benefit of counsel, even if the *Mapp* exclusionary rule is not applied retroactively to his case. A *Miranda* or *Es-

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70. 380 U.S. 609 (1965).
71. See id. at 614-15.
74. For the analogue of such a deterrence argument, see Linkletter v. Walker, 381 U.S. 618, 634-35 (1965).
75. Cases cited note 63 supra. For a similar analysis, see Linkletter v. Walker, 381 U.S. 618, 639 n.20 (1965).
petitioner has "our case law on coerced confessions" to fall back on. The delinquent registrant, on the other hand, has virtually no safeguard other than the reliability of the local board's determination. As the court noted in Andre:

The Government admits that petitioner had only two alternatives:
(1) He could have refused induction and faced a possible five years and $10,000 fine; (2) he could have submitted to induction and brought a habeas corpus challenge.\footnote{6}

Given this narrow procedural framework,\footnote{7} it is evident that the most critical determination made in a registrant's processing—his immediate eligibility for induction—was made in a situation bereft of other safeguards. If that critical determination is analogized to the trial process in a criminal case, then a retroactive application of \textit{Gutknecht} is clearly called for.

A further consideration of the purpose of \textit{Gutknecht} should be undertaken in light of the Government's argument that:

[delinquent inductees] are not being deprived currently or any substantive rights as a result of their military service, which, of course, is not equated with punishment, restraining as military service may be.\footnote{8}

This language must be contrasted with Mr. Justice Douglas's statement in \textit{Gutknecht}:

Deferment of the order of call may be the bestowal of great benefits; and its acceleration may be extremely punitive. ... We search the act in vain for any clues that Congress desired the Act to have punitive sanctions apart from the criminal prosecutions specifically authorized.\footnote{9}

This indicates that at least six members of the Supreme Court do in fact view induction into the military under certain circumstances as punishment, and that the \textit{Gutknecht} rule should extend to inductees

\footnote{7} The possibility of preinduction review of a registrant's classification suggests itself here, but that is prima facie barred by section 10(b)(3) of the Selective Service Act of 1967, 50 U.S.C. App. § 460(b)(3) (Supp. V, 1970), which provides, in part: "No judicial review shall be made of the classification or processing of any registrant ... except as a defense to a criminal prosecution. ..." The Supreme Court refused to construe this statute literally in Breen v. Selective Serv. Local Bd. No. 16, 396 U.S. 460 (1970), but that case involved a reclassification from II-S to I-A on "delinquency" grounds. Whether or not \textit{Breen} would be applied to changes in order of call within the I-A class if uncertain, but for a petitioner such as Andre, who of course was inducted prior to Breen, that decision supplies little solace. \textit{See} Donahue, \textit{The Supreme Court vs. Section 10(b)(3) of the Selective Service Act: A Study in Ducking Constitutional Issues}, 17 U.C.L.A. L. Rev. 908 (1970).
\footnote{8} Brief for Appellants at 17, Andre v. Resor, No. 26319 (9th Cir., Aug. 19, 1970).
placed in military "custody" as a result of pre-Gutknecht application of the delinquency regulations.

Consideration of "the Extent of the Reliance By Law Enforcement Authorities on the Old Standard"

A point repeatedly emphasized in Linkletter v. Walker was that Mapp expressly overruled Wolf v. Colorado, in which the Court had declined to make the federal exclusionary rule on search and seizure mandatory on the states. The majority opinion in Linkletter concluded:

The States relied on Wolf and followed its command. Final judgments of conviction were entered prior to Mapp. Again and again this Court refused to reconsider Wolf and gave its implicit approval to hundreds of cases in their application of its rule.

The argument based on "justified reliance" by law enforcement authorities is present in most of the cases that have followed and built on Linkletter. The argument also appeared in the Government's pleadings in Andre v. Resor. In support of the theory that Gutknecht should not be applied retroactively, it was stated:

Further there was a well-placed reliance on this procedure [the delinquency regulations] by the Selective Service for Congress acquiesced for many years in the existence of this policy.

This acquiescence argument is essentially the same argument that failed to convince the Supreme Court in Gutknecht that the delinquency regulations were authorized by statute. The delinquency regulations were first promulgated in 1948. Bolstered by the suggestion of the so-called "Hershey Directive," these regulations came to play a central role in criminal prosecutions for refusal to be inducted. When the prospective inductee defended on the theory that his accelerated induction was illegal, the court tested his claim by reference to the delinquency regulations rather than the statute. Another per-

80. 381 U.S. 618 (1965).
87. See note 37 supra.
88. A typical example is this paragraph in the opinion rendered by the Gutknecht trial court: "In such circumstances the Selective Service Board was authorized to declare the defendant delinquent and to order him to report for induction. 32 C.F.R. §§ 1602.4, 1642.4, 1631.7." United States v. Gutknecht, 283 F. Supp. 945, 948 (D. Minn. 1968), rev'd, 396 U.S. 295 (1970).
spective on reliance is gained when one considers the varying treatment that the Selective Service gave National Students Association, Inc. v. Hershey. It is reported that when the district court rendered the original decree authorizing the Selective Service to deny deferments for illegal activity not covered by the delinquency regulations, General Hershey's office communicated the news to local boards. But when the decree was reversed and the Hershey Directive declared illegal, the news was deliberately withheld from the local boards.

The character of reliance involved thus becomes clearer. The propriety of an induction order proceeding is analyzed within a non-statutory system of administrative control. The proponent of the regulations involved must argue that there has been an unspoken confirmation of the policy in question, that there has been acquiescence. In analyzing such contentions in Gutknecht, the majority of the Court reached the conclusion that:

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

Additionally, it should be recalled that there was substantial judicial precedent, prior to the Supreme Court's decision on the delinquency regulations, which indicated that the regulations were in fact illegal.

Thus the "well-placed" reliance argument advanced in Andre v. Resor seems questionable, especially since the Gutknecht delinquency apparatus was not merely disapproved, but was essentially condemned. The regulations were characterized as an attempt on the part of the Selective Service to exercise free wheeling authority . . . [in] using immediate induction as a disciplinary or vindictive measure.

The power is exercised entirely at the discretion of the local board. It is a broad, roving authority, a type of administrative absolutism not cogenial with our law-making traditions.

Such language is difficult to reconcile with a theory of "well-placed" reliance; it shows that the acquiescence argument on which the reliance theory is based was emphatically rejected in Gutknecht. It follows that even if the reliance factor is to be considered, it is not persuasive given the character of reliance involved in such situations as Andre.

89. 412 F.2d 1103 (D.C. Cir. 1969).
92. See note 37 supra.
Consideration of "The Effect on the Administration of Justice"

The basis of the "possible burden on the administration of justice" factor is undoubtedly the fear of a "legalized mass jail break by rapists, murderers, and other felons." Usually, however, this aspect of the problem is phrased in terms less stark.

Arguments raised to support non-retroactivity for the reason of the effect on the administration of justice often feature robust numbers. In *Thompson v. Parker* for instance, the United States argued against retroactive application of *O'Callahan v. Parker*, which had held that court-martial jurisdiction did not extend to non-service-connected crimes. The Department of the Army maintained in *Thompson* that the four million courts-martial held since 1917 were a substantial reason to deny retroactivity. The court agreed, noting that the reprocessing of many of these military defendants would impose an "awesome burden" on the machinery of military justice.

In other cases it was not possible for the proponents of nonretroactivity to be so precisely—and so impressively—quantitative, but the scope of the burden could be indicated. Discussing the effect of the no-comment rule of *Griffin v. California*, the Supreme Court said "It may fairly be assumed that there has been comment in every single trial in the courts of California, Connecticut, Iowa, New Jersey, New Mexico and Ohio, in which the defendant did not take the witness stand." The Court went on to say that the voiding of all these convictions "would have an impact upon the [states'] administration of . . . criminal law so devastating as to need no elaboration."

It would be truly novel to apply a principle generated by fear of many retrials of criminals to a case involving the potential release of numerous military inductees. It would seem to go without saying that the policy considerations involved here are substantially different than those involved in the case of "rapists, murderers, and other felons."

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97. E.g., Mr. Justice Clark's comment that *Mapp*'s deterrence function would not be served "by the wholesale release of the guilty victims." *Linkletter v. Walker*, 381 U.S. 618, 637 (1965).
99. 395 U.S. 258 (1969). The Supreme Court recently decided a case in which the retroactivity of *O'Callahan* was argued. But the Court refused to apply *O'Callahan* to the factual situation involved. *Relford v. Commandant*, 91 S. Ct. 649 (1971), aff'g 409 F.2d 824 (10th Cir. 1969).
100. 308 F. Supp. at 908.
103. *Id.* at 419.
To the contention that an undue burden on the military administrative machinery would result from the release of the 6,000 men inducted under the delinquency regulations, the district court in Andre v. Resor\textsuperscript{104} had two answers: (1) The quantum of inconvenience attached to 6,000 possible discharges was simply not large enough to constitute "such a compelling national interest so as to override the purpose of Gutknecht"; and (2) when the defendant or petitioner in question is in the Army illegally, such tests as administrative inconvenience are not truly relevant.\textsuperscript{105}

Conclusion

The aftermath of Gutknecht v. United States\textsuperscript{106} has featured efforts by the Government to restrict the scope of its application. This effort has rested on principles drawn from prior cases dealing with the retroactive applicability of new constitutional rules of criminal procedure.

The federal district courts that have considered this question in connection with habeas corpus petitions from military personnel inducted on illegal "delinquency" grounds have refused to adopt the Government's position. The refusal is supportable on either of two grounds.

One might take the position that it is simply inappropriate to apply the doctrine of Linkletter v. Walker\textsuperscript{107} to such selective service cases involving the Gutknecht issue; that it would create an intolerable incongruity to place an inductee on the same footing as a criminal defendant in the earlier retroactivity cases. Consequently, full retroactivity must be afforded Gutknecht and relief given those petitioning for habeas corpus from military service resulting from accelerated induction. An alternative—and equally supportable—conclusion would be that the Linkletter doctrine does apply, but that its constituent principles demand retroactive application of Gutknecht.

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\textsuperscript{104} 313 F. Supp. 957 (N.D. Cal. 1970).
\textsuperscript{105} Id. at 961.
\textsuperscript{106} 396 U.S. 295 (1970).
\textsuperscript{107} 381 U.S. 618 (1965).
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