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NOTES AND COMMENTS

FREEDOM OF CONSCIENCE AND COMPULSORY MILITARY SERVICE

INTRODUCTION

In tackling the subject matter of this paper we are initially confronted with two apparent antinomies which seem incapable of satisfactory resolution. First: "There is no constitutional right to exemption from military service because of conscientious objection or religious calling."¹ And second:

[N]either a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.²

The current statute governing the basis for exemption by virtue of conscientious objection is as follows:

Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, *by reason of religious training and belief*, is conscientiously opposed to war in any form. Religious training and belief in this connection means an individual's *belief in a relation to a Supreme Being* involving duties superior to those arising from any human relation, but does *not* include, essentially political, sociological, or philosophical views or a merely personal code.³

1. *Richter v. United States*, 181 F.2d 591, 593 (9th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950); see also *In re Summers*, 325 U.S. 561, 572 (1945); *United States v. Macintosh*, 283 U.S. 605, 624 (1931); *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905); *Cannon v. United States*, 181 F.2d 354 (9th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950); *Local Draft Board No. 1 v. Connors*, 124 F.2d 388 (9th Cir. 1941).

2. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). This is perhaps the culmination of judicial thought beginning with *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1871), where the Court in a matter regarding a hierarchical dispute within a Protestant congregation noted: "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." In *Cantwell v. Connecticut*, 310 U.S. 296 (1940) a unanimous Court, speaking through Mr. Justice Roberts, reversed a conviction of a Jehovah Witness for violation of a Connecticut statute requiring a religious cause to obtain a license upon approval of a local agency as a condition precedent for solicitation of funds. The Court noted that "to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." *Id.* at 307. In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the Court held a state statute requiring a compulsory flag salute violative of the first amendment as it required "an affirmation of a belief and an attitude of mind." In *Everson v. Board of Educ.*, 330 U.S. 1 (1947), the Court stated that a state may not exclude a person from receiving benefits of public welfare legislation "because of their faith or lack of it." Finally in *Zorach v. Clauson*, 343 U.S. 306 (1952) we find that government may not prefer the believer over the non-believer or vice versa.

3. 50 U.S.C.A. App. § 456(J) (Supp. 1963). (Emphasis added.) The limitation of religious training and belief by a belief in a Supreme Being was adopted from the dissenting

While the provisions relative to belief in a Supreme Being have withstood constitutional attack in the United States Court of Appeals for the Ninth Circuit,⁴ the Second Circuit, reversing itself,⁵ has struck them down as violative of the establishment clause of the first amendment and the due process clause of the fifth amendment.⁶

For the sake of convenience, we shall first look at the genesis of the present statute. We will examine the World War I exemption statute—both its basis for exempt classification and its success in the courts. Our focus will be on the extent of the war powers of Congress as applicable to our situation. Turning from this, we will study the World War II statute which predicated exemption on “religious training and belief” and the problems which this change brought. While our next logical step would be to discuss the implications of the 1948 amendment which circumscribed religious training and belief by adding the *Supreme Being clause*, we will postpone this consideration until we have seen the mechanics of the process of induction and exemption, *i.e.*, the administrative steps in the Selective Service Act and judicial review. This perusal of the Selective Service and judicial machinery coupled with the historical background of the present statute will allow us to discuss the *Supreme Being clause* in light of past judicial responses and present problems.

THE POWER TO CONSCRIPT—ITS ORIGIN AND ELABORATION

As the United States was drawn into the First World War, the need arose for vast numbers of American troops. Congress responding to these needs passed the Selective Service Act of 1917.⁷ By its terms it allowed the President to conscript citizens and residents of the United States into the military unless otherwise exempted. Exemptions were provided for “duly ordained ministers” and “students who at the time of the approval of this Act are preparing for the ministry in recognized theological and divinity schools.”⁸ Further, exemptions were granted upon religious grounds in that:

[N]othing in this act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a *member of any well-recognized religious sect, or orga-*

opinion of Mr. Justice Hughes in *United States v. Macintosh*, 283 U.S. 605, 633 (1931) where he commented: “The essence of religion is relation to God involving duties superior to those arising from any human relation.” In *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), Mr. Justice Douglas noted that “we are a religious people whose institutions presuppose a Supreme Being.”

4. *Etcheverry v. United States*, 320 F.2d 873 (9th Cir. 1963), *cert. denied*, 375 U.S. 930 (1963); *Clark v. United States*, 236 F.2d 13 (9th Cir. 1956), *cert. denied*, 352 U.S. 882 (1956); *George v. United States*, 196 F.2d 445 (9th Cir. 1952).

5. *United States v. Bendik*, 220 F.2d 249 (2d Cir. 1955).

6. *United States v. Seeger*, 32 U.S.L. Week 2361 (2d Cir. January 20, 1964); see also *United States v. Jakobson*, 32 U.S.L. Week 2257 (2d Cir. November 22, 1963).

7. Act of May 18, 1917, ch. 15, 40 Stat. 76. The effect of the statute was to grant exemption to the historic peace churches, *i.e.*, the Mennonites, Quakers, Brethren in Christ. For a comprehensive analysis of these groups, their tenets and origins see Sibley, *Conscription of Conscience* (1952); *Selective Service System, Conscientious Objection* (1950); Cornell, *Exemption from the Draft: A Study in Civil Liberties*, 56 Yale L.J. 258 (1946).

8. Act of May 18, 1917, ch. 15, 40 Stat. 78.

nization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be non-combatant⁹

The main spring of the effective operation of conscription was relegated to the Selective Service System, which was organized on three levels, consisting of the National Director, the State Director, and the local boards. A board was comprised of at least three local residents and was to be responsible both for classification of individuals and for filling area quotas.¹⁰ The board's powers of classification were subject to review by District Board of Appeals which could either affirm or modify the actions of the local boards. A decision was to be final except as to be qualified by presidential executive orders.¹¹ The initial phase of the process of conscription was the requirement that "all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration"¹² Failure to register was a misdemeanor punishable by up to one year in prison. The federal district court had exclusive jurisdiction over this offense.¹³

This was the setting for the arrest of Albert Jones, who, in 1917, refused to register for the draft. Jones, while awaiting trial for refusing to register, petitioned a federal district court in Georgia for a writ of habeas corpus.¹⁴ The main argument raised by petitioner was that the Act was unconstitutional as demanding involuntary servitude which is proscribed by the thirteenth amendment.¹⁵ The reaction of the trial judge was that:

The Grand Army of the Republic, the Confederate Veterans, and the Sons of Veterans are not maintained to preserve the traditions of slavery. Nations do not pension slaves to commemorate their valor. They do not "give in charge their names to the sweet lyre"; nor does "sculpture in her turn give bond in stone and ever during brass to guard and immortalize the trust."¹⁶

This opinion is important not for the rejection of the involuntary servitude argument but rather as indicative of the attitude of the federal judges who were authorized to mete out impartial justice at a time when war hysteria had engulfed the nation. The *Jones* case reached the Supreme Court the following year and the denial of the writ was upheld not only upon the authority of the *Selective Draft Law Cases*,¹⁷ but also, upon the fact that the habeas corpus writ should not be granted before trial and conviction of the offense.

9. *Ibid.* (Emphasis added.)

10. Act of May 18, 1917, ch. 15, 40 Stat. 79.

11. Act of May 18, 1917, ch. 15, 40 Stat. 80.

12. *Ibid.*

13. *Ibid.*

14. *Story v. Perkins*, 243 F. Rep. 997 (S.D. Ga. 1917).

15. U.S. Const. amend. XIII.

16. *Story v. Perkins*, 243 F. Rep. 997, 999 (S.D. Ga. 1917).

17. *Jones v. Perkins*, 245 U.S. 390 (1918).

In the *Selective Draft Law Cases*, the Supreme Court rebuffed a frontal attack upon the constitutionality of the Act.¹⁸ As to the contention that Congress did not have constitutional power to inflict enforced conscription, the Court replied: "It may not be doubted that the very conception of a just government . . . includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it."¹⁹

The Court refused to consider the question of involuntary servitude and stated that, in effect, to say that serving in the defense and honor of one's nation is involuntary servitude is to rebut the contention by the mere statement.²⁰

Another major argument offered was that the act of drafting members of the state militia²¹ was an unconstitutional infringement of state sovereignty.²² The Court, however, declared that if the State, by drafting its entire citizenry into the militia, could effectively refuse to allow the federal government to draft militiamen, the power of the latter would be a nullity.²³ The Court also found that exemptions for the ministry and theological students were neither the establishment of a religion nor an interference with the free exercise thereof.²⁴ The final objection to be noted was that compulsory conscription is a violation of the privileges and immunities clause as well as the due process clause of the fourteenth amendment. The Court stated that the fourteenth amendment has

broadened the national scope of the Government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, and therefore, operating as it does upon all the powers conferred by the Constitution, leaves no possible support for the contentions made²⁵

This decision highlights the expansive sweep of the war powers and rejects any attack on the bases of the establishment or free exercise clauses of the first amendment, the privileges and immunities or due process clauses of the fourteenth amendment and involuntary servitude under the thirteenth amendment.

The war powers have historically been broadly construed by the courts. It has been held that military law governs the active army and navy even in peacetime, and the Articles for the Government of the Navy, which does not provide for an indictment or grand jury for an infamous crime committed by military personnel during peacetime, does not violate the fifth amendment.²⁶ The

18. *Selective Draft Law Cases*, 245 U.S. 366 (1918).

19. *Id.* at 378.

20. *Id.* at 390.

21. See, e.g., N.Y. Mil. Law §§ 1-24.

22. *Selective Draft Law Cases*, 245 U.S. 366, 371 (1918).

23. *Id.* at 372.

24. *Id.* at 390.

25. *Id.* at 389. This writer fails to find the basis for attacking the war power through the fourteenth amendment since it is applicable to state action rather than federal action. The opinion fails to state the grounds for attack under the fourteenth amendment and assumes the fact that it may be applicable. The correct attack should probably have been via the due process clause of the fifth amendment. *Cf. Kent v. Dulles*, 357 U.S. 116 (1958), where the Court speaks of regulating the word "liberty" as used in the fifth amendment only in accord with legitimate lawmaking functions of Congress.

26. *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857).

civil courts have no jurisdiction to enforce a civil remedy for false imprisonment against a military officer attempting to prevent a sailor from deserting.²⁷ Thus, once a person is inducted as a member of the armed forces, the jurisdiction of the civil courts vanishes.²⁸

Attempts to interfere with conscription by inflammatory speeches may be punished if they create a clear and present danger since they would then be outside the ambit of constitutionally protected free speech.²⁹ Private individuals swearing out false information as to the liability of others for conscription may also be punished.³⁰ The willingness to bear arms, as contained in an oath for naturalization, may properly be a condition precedent to naturalization.³¹ To induce, aid or abet another in defying the Selective Service Act is also a crime.³² The government, therefore, has the right to the military service of all its able bodied citizens, and may, when emergency arises, justly exact that service from all.³³ It can determine without question from any state authority how the armies shall be raised, when by voluntary or involuntary methods, the minimum and maximum ages of required service, the length of service together with the type of activity to be engaged in and the remuneration thereof.³⁴

As we view the Selective Service Act of 1917 as interpreted by the Court, we see an emphatic affirmation of the Congressional powers to draft despite any constitutional attack. The privilege of conscientious objector status was merely a gesture of the sovereign's beneficence to be conditional upon the needs of the nation rather than the needs of the individual. Religious objection to be recognized had to be via membership in a well organized sect. Finally, the power over conscience was unleashed upon citizens of a locality where local intolerance for a specific religious group, *e.g.*, Jehovah's Witnesses, often resulted in gross injustice.³⁵

The main change, for our purposes, in the Selective Training and Service Act of 1940,³⁶ was to no longer demand membership in "a well recognized sect." Rather, the new criterion was established—that of objection based on "religious training and belief."

Nothing contained in this Act shall be construed to require any person

27. *Johnson v. Sayre*, 158 U.S. 109 (1895).

28. *Coleman v. Tennessee*, 97 U.S. 509 (1878).

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

30. *O'Connell v. United States*, 253 U.S. 142 (1920).

31. *United States v. Macintosh*, 283 U.S. 605 (1931); *United States v. Bland*, 283 U.S. 636 (1931).

32. *Ruthenberg v. United States*, 245 U.S. 480 (1918).

33. *In re Grimley*, 137 U.S. 147 (1890). In *Richter v. United States*, 181 F.2d 591 (9th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950) and *Etcheverry v. United States*, 320 F.2d 873 (9th Cir. 1963), *cert. denied*, 375 U.S. 930 (1963) it was held also that drafting during peacetime is not a deprivation of "liberty" as that word appears in the fifth amendment.

34. See, *e.g.*, *United States v. Bland*, 283 U.S. 636 (1931); *United States v. Macintosh*, 283 U.S. 605 (1931); *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871); *United States ex rel. Bergdoll v. Drum*, 107 F.2d 897 (2d Cir. 1939).

35. See Heisler, *The Law Versus the Conscientious Objector*, 20 U. Chi. L. Rev. 441 (1953).

36. 54 Stat. 885 (1940).

to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction.³⁷

The 1940 Act raised several problems relative to an operational definition of the phrase "by reason of religious training and belief." The crucial consideration was whether the terms required a belief in God or a Supreme Being. This problem was far from academic for on March 10, 1941, Mathias Kauten was classified by his local draft board as 1A. On April 3, 1941, he appealed from the board's ruling stating, that his objection rested on the basis of "religious training and belief," and, he was opposed to war in any form by virtue of such belief. The appeal board found with the local board, apparently upon the grounds that Kauten was an atheist. On June 19, 1942, an induction order was issued which Kauten ignored. He petitioned a federal court for a writ of habeas corpus which was denied. On appeal the denial of the writ was sustained on procedural grounds, *i.e.*, the defense of the illegality of the detention was not open upon a writ of habeas corpus prior to induction. The inductee must submit to a prescribed number of pre-induction steps exclusive of taking the oath of service.³⁸ The Second Circuit Court of Appeals, however, laid down this criterion for exemption:

It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe—a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.³⁹

The religious definition in *Kauten* was subsequently employed in the case of Randolph Godfrey Phillips who was opposed to war, *in toto*, based on his belief that "war is ethically and invariably wrong."⁴⁰ He stated that while he may have initially developed his views in formal religious training, he had read widely on the subject but could not specifically say where the source of his belief arose. The Second Circuit reversed the denial of his habeas corpus writ by relying upon

37. Selective Training and Service Act of 1940 § 5(g), 54 Stat. 889 (1940).

38. *United States v. Kauten*, 133 F.2d 703, 706 (2d Cir. 1943).

39. *Id.* at 708.

40. *United States ex rel. Phillips v. Downer*, 135 F.2d 521, 523 (2d Cir. 1943).

the *Kauten* analysis of the religious impulse which by implication negates any necessity for religious belief to be divinely oriented.⁴¹ This view was held in the Second Circuit throughout the Second World War.⁴²

The Ninth Circuit, however, decided that Herman Berman's refusal to be inducted was not justified since he was properly classified as 1A despite his claim to be conscientiously opposed to war in any form "by reason of religious training and belief." Berman relied upon the Second Circuit decisions in *Phillips* and *Badt* and the dictum in *Kauten*. He argued that "a person's philosophy of life or his political viewpoint, to which his conscience directs him to adhere devotedly, or his devotion to human welfare, without the concept of deity, may be religious in nature."⁴³ The Court of Appeals, however, rejected these contentions and found that: "[N]o matter how pure and admirable his standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion in the sense of that term as it is used in the statute."⁴⁴

Congress clarified its position in the Selective Service Act of 1948 as follows: "Religious training and belief in this connection means the individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."⁴⁵ By an act of Congress in 1951, the title of the Selective Service Act of 1948 was changed to the Universal Military Training and Service Act, but the provisions regarding religious belief remained intact.⁴⁶

In summary then, the following: The ultimate question in determining whether an applicant is entitled to conscientious objector status is whether those beliefs are sincerely religious according to that term as defined by the Congress, *i.e.*, both belief in a Supreme Being, and also the objection to war must be *in toto*.⁴⁷ The local Selective Service boards may inquire into such sincerity and good faith in determining classification.⁴⁸ The Selective Training and Service Act of 1948 does not require any particular religious affiliation and even if such affiliation be present, a registrant may be denied conscientious objector status.⁴⁹ Since, however, the Act retains the phrase "by reason of religious training and belief" such affiliation is relevant in determining classification status.⁵⁰ Willingness to engage in a theological war will not preclude conscientious objector

41. *Id.* at 524.

42. United States *ex rel.* Reel v. Badt, 141 F.2d 845 (2d Cir. 1944).

43. Berman v. United States, 156 F.2d 377, 378 (9th Cir. 1946).

44. *Id.* at 381.

45. Selective Service Act of 1948 § 6(j), 62 Stat. 613 (1948).

46. Universal Military Training and Service Act of 1951, 65 Stat. 75-89, 50 U.S.C. App. §§ 451-473 (1958).

47. Witmer v. United States, 348 U.S. 375 (1955).

48. Sicurella v. United States, 348 U.S. 385 (1955).

49. *Ibid.*

50. Simmons v. United States, 348 U.S. 397 (1955). *Cf.* Gonzales v. United States, 348 U.S. 407 (1955).

classification;⁵¹ nor, is the fact that conscientious objection is first claimed at a classification hearing determinative—this fact only going to the question of the good faith of the registrant.⁵² Non-combatant participation in the war effort is not inconsistent with objection to military service.⁵³

JUDICIAL REVIEW OF CLASSIFICATION

At the heart of the Selective Service System is the ability of Congress to register and induct individuals. Registration is not properly part of the inductive process and hence, does not find its source in the war power but rather in the power of Congress to elicit information.⁵⁴ After registration, certain information is given by the registrant to the board. Upon this basis as well as the standards embodied in the Act and the Selective Service Regulations, he is classified and given notice thereof. The registrant may contest this classification by a personal appearance before the draft board, and thence by appeal as enumerated in the statute. Once these administrative procedures are exhausted he is ordered to report for service. If he is found to be liable for combatant or non-combatant military service he is ordered to report for induction. If, however, he is exempted as a conscientious objector, he is ordered to report for alternative civilian duty. The Selective Service process continues until he is accepted for induction or such civilian work by the service or work camp to which he is assigned.⁵⁵ Up to this point of acceptance the question of the legality or illegality of the induction order was not open for review under a writ of habeas corpus. The proper thing to do was for the registrant to exhaust his administrative remedies, and then, when ordered to report for induction, obey the order. After he arrived at the induction center he had to submit to all pre-induction mental and physical tests and do all that was required up to, but not including, the oath. At this instance the writ of habeas corpus is available. After the oath is taken the jurisdiction of the civil courts is superseded by that of the courts martial.⁵⁶

In *Falbo*⁵⁷ the majority, speaking through Mr. Justice Black, held that there can be no judicial review of the propriety of a board's action in a criminal prosecution for a willful violation of an order directing a registrant to report for the last step in the selective process.⁵⁸ The effect of this decision was to leave as the only question, in a criminal prosecution for violation of any of the inter-

51. *Sicurella v. United States*, 348 U.S. 385 (1955).

52. *Ibid.*

53. *Gonzales v. United States*, 348 U.S. 407 (1955).

54. *Sicurella v. United States*, 348 U.S. 385 (1955). The guiding principle which limits the Congressional power to elicit information is whether the information is related to a valid legislative purpose, and only if this is the case, can Congress constitutionally require an individual to disclose his political or religious affairs. See *Barenblatt v. United States*, 360 U.S. 109 (1959); *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958); *Watkins v. United States*, 354 U.S. 178 (1957); *United States v. Rumely*, 345 U.S. 41 (1953); *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).

55. *Falbo v. United States*, 320 U.S. 549 (1944).

56. *Billings v. Truesdell*, 321 U.S. 542 (1944).

57. *Falbo v. United States*, 320 U.S. 549 (1944).

58. *Id.* at 554.

mediate induction steps, whether the order was violated willfully. No other defense was available. The majority's view was premised upon a construction of Act which, in view of the national emergency, held that Congress would not have intended the Selective Service process to be vexed by time consuming litigation.⁵⁹ Mr. Justice Rutledge concurred, by saying in effect that the only grounds for reversal would be the defendant's showing that he had been effectively denied his administrative remedies.⁶⁰ Such not being evidenced by the record he went with the majority. A strong dissent was registered by Mr. Justice Murphy who felt that if in fact the order of the local board was invalid then "common sense and justice dictate that a citizen accused of a crime should have the fullest opportunity to present every reasonable defense. . . . Such a denial is especially oppressive where a full hearing might disclose that the administrative action underlying the prosecution is the product of excess wartime emotions."⁶¹ He rejected the argument that the process of induction would be jeopardized by prolonged litigation since, if the classification was invalid, the citizen would not serve; or, if valid, he would go to prison.

The inadequacies of the *Falbo* decision required the conscientious objector to submit to pre-induction proceedings and thus placed him, although temporarily, under military authority. He was thus "required to violate his conscience as a condition precedent to asserting his right under the act."⁶² The physical examination, being an integral phase of the military process, might be as morally repugnant to the objector as the oath or military service itself. The jurisdiction of the civil courts extended to the last point of the pre-induction process. It therefore, was unnecessary as a matter of administrative convenience to require reporting for induction to contest the ruling of the board since, first, the administrative process is deemed final when the order for induction is issued;⁶³ and second, it is well settled that relief from further reliance upon administrative machinery may be excused when any further steps would be useless or futile.⁶⁴

After the war, the Court re-evaluated *Falbo* in the *Estep* case and decided that classification could properly be interposed as a defense where administrative remedies had been exhausted but the defendant had not reported for induction.⁶⁵ Mr. Justice Douglas speaking for the majority stated that where the local board has acted "so contrary to its granted authority as to exceed its jurisdiction," judicial review will lie.⁶⁶ The test of whether the board has acted contrary to its jurisdiction is not whether there was substantial evidence on the whole record, but only if there was *no basis in fact* for the board's determination.⁶⁷ Mr. Justice

59. *Id.* at 554.

60. *Id.* at 555.

61. *Id.* at 556-57.

62. Note, 32 Geo. L.J. 389 (1944).

63. 54 Stat. 893 (1940) ("[T]he decision of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe.").

64. Note, 32 Geo. L.J. 389 (1944).

65. *Estep v. United States*, 327 U.S. 114 (1946).

66. *Id.* at 120.

67. *Id.* at 122.

Murphy, who dissented in *Falbo*, concurred for three different reasons. First, he felt that any denial of due process by an administrative agency is entitled to review by mandate of the Constitution;⁶⁸ second, that the vexatious litigation argument in *Falbo* was nonsense;⁶⁹ and third, that judicial review by habeas corpus, after complying with all the pre-induction processes required, is inadequate for those who by dictate of conscience refuse to comply.⁷⁰ Mr. Justice Frankfurter concurred in the result upon the grounds referred to in the concurring opinion of Mr. Justice Rutledge in *Falbo*, *i.e.*, the question of the registrant's administrative appeal being effectively frustrated.⁷¹ He, however, disagreed with the majority's determination that the Court may look into whether the jurisdiction of the local board was properly exercised both on the ground of the vexatious litigation theory of *Falbo* and a rejection of the jurisdictional fact doctrine.⁷² The dissent held with Frankfurter's arguments relative to vexatious litigation and the jurisdictional fact question, but disagreed on the question of frustration of administrative review and lined up squarely with *Falbo*.⁷³ While in *Falbo* the Supreme Court indicated that a defense of invalidity of an induction order was unavailable to a criminal defendant on trial for failing to obey the order, *Estep* made clear that a very limited review of an induction order is allowed.⁷⁴ Experience since *Estep* shows that in these cases the courts will scan the record for *some* affirmative evidence to sustain the board's findings or to glean an inference that the registrant was not dealing with sufficient sincerity or candor.⁷⁵ Davis, not being entirely in agreement, concludes:

The Court seems to be striving, with little success, to reduce review to something less than what is customary under the substantial-evidence test, but the reality seems to be that judges in the application of the standard find themselves unable to sustain findings having a basis in the evidence which seems to them less than substantial.⁷⁶

THE ULTIMATE ISSUE—BELIEF IN A SUPREME BEING

As we have seen, the present statute predicates conscientious objector status upon belief in a Supreme Being. The statute would by explicit mandate exclude those groups which do not acknowledge *theism* and those which profess *poly-*

68. *Id.* at 127-28.

69. *Id.* at 128-29.

70. *Id.* at 129-30.

71. *Id.* at 144.

72. *Id.* at 135-43.

73. *Id.* at 145.

74. 1 Davis, *Administrative Law Treatise* § 8.16, at 596 (1958). In Jaffe, *The Exhaustion of Administrative Remedies*, 12 *Buffalo L. Rev.* 327, 352-53 (1963), Professor Jaffe notes that where the failure to exhaust administrative remedies was not "a deliberate and intentional rejection of administrative review," but rather an excusable failure (citing *Donato v. United States*, 302 F.2d 468 (9th Cir. 1962)), or when the defendant "was amply justified . . . in feeling that nothing further could be accomplished by exhaustion . . ." (citing *Glover v. United States*, 286 F.2d 84 (8th Cir. 1961)) the necessity for exhausting administrative review as laid down in *Falbo* was held inapplicable.

75. *Dickinson v. United States*, 346 U.S. 389, 396 (1953).

76. 4 Davis, *Administrative Law Treatise* § 28.12, at 66 (1958).

theism. Is such an exclusion permissible? Although the matter of exemption from military service and the conditions attached thereto are a matter of Congressional grace, such a classification as above may give rise to deprivation of the constitutional rights of those excluded.

If we were to consider "privilege" in the layman's sense, *i.e.*, "a right, immunity, benefit, or advantage granted by others and sometimes detrimental to them,"⁷⁷ we may well conclude that the government may annex any condition it wishes upon that privilege.⁷⁸ Since the individual has no right to the privileged subject matter and may in the first analysis refrain from seeking the privilege, he is merely returned to his original position if such conditions render the exercise or existence of the privilege impossible.⁷⁹ There are, however, boundaries which limit either the conditioning or withdrawal of a privilege once granted by the state. Whether the privilege be teaching school,⁸⁰ practising law,⁸¹ private employment,⁸² tax exemption,⁸³ higher education,⁸⁴ public office,⁸⁵ or using a municipal park,⁸⁶ there is a limit to which the state may condition or restrict. When the aforementioned privileges have been unconstitutionally conditioned, such restrictions have been struck down.

In juxtaposing the instant statute with the Constitution, we find that the former may be in jeopardy. In *Cantwell v. Connecticut*, the Court in discussing the establishment clause stated that "it forestalls compulsion by law of the acceptance of *any* creed or the practice of *any* form of worship."⁸⁷ By inference it would appear that if for purposes of eligibility for exemption only monotheistic sects are considered, an acceptance of a particular creed or form of

77. 2 Webster, *New Twentieth Century Dictionary* 1432 (2d ed. 1956).

78. In *George v. United States*, 196 F.2d 445, 449, 450 (9th Cir. 1952) the Court of Appeals in discussing the extent to which Congress may condition exemption from military service stated: "[W]hatever the government may forbid altogether it may condition even unreasonably. Outstanding in this domain are the cases dealing with intoxicating liquors. Because the government may altogether prohibit production or sale, regulations of the most arbitrary kind will be sustained." (citing *Mugler v. Kansas*, 123 U.S. 623 (1887); *Eberle v. Michigan*, 232 U.S. 700 (1914); *Premier-Pabst Sales Co. v. State Bd. of Equalization*, 13 F. Supp. 90 (S.D. Cal. 1935).) The court also felt that the analogy between the right of conscription and the plenary power of Congress over foreign and interstate commerce allows for the same "strict regulation" and "absolute restriction of the former in the same manner and degree as the latter" (citing: *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949); *North American Co. v. Securities & Exchange Commission*, 327 U.S. 686, 704-06 (1946); *Carolene Products Co. v. United States*, 323 U.S. 18, 27-32 (1944); *United States v. Darby*, 312 U.S. 100, 113-16 (1941); *Kentucky Whip & Collar Co. v. Illinois Central R.R.*, 299 U.S. 334, 346-48 (1937); *Whitfield v. Ohio*, 297 U.S. 431, 439-40 (1936); *Brooks v. United States*, 267 U.S. 432, 436-37 (1925); *United States v. Hill*, 248 U.S. 420, 427 (1919); *Caminetti v. United States*, 242 U.S. 470, 491-92 (1917); *Hipolite Egg Co. v. United States*, 220 U.S. 45, 57-58 (1911); *Buttfield v. Stranahan*, 192 U.S. 470, 492-93 (1904).)

79. See French, *Unconstitutional Conditions: An Analysis*, 50 *Geo. L.J.* 234 (1956).

80. *Shelton v. Tucker*, 364 U.S. 479 (1960).

81. *Schwartz v. Board of Bar Examiners*, 352 U.S. 232 (1957).

82. *Green v. McElroy*, 360 U.S. 474 (1959).

83. *Speiser v. Randall*, 357 U.S. 513 (1958).

84. *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

85. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

86. *Niemotko v. Maryland*, 340 U.S. 268 (1951).

87. 310 U.S. 269, 303 (1940). (Emphasis added.)

worship arises.⁸⁸ Conversely there may be a denial of due process under the fifth amendment for those excluded.⁸⁹

If we compare the instant statute with a religious test for public office, *e.g.*, the signing of a declaration of belief in the existence of God constitutionally required as a qualification for public office, additional problems arise. The instant statute, in effect, makes a monotheistic religion the test for exemption. Both public office and exemption from military service are privileges. The Supreme Court has characterized the aforementioned test for public office as one of free exercise of religion and that such a test unconstitutionally invades one's freedom of belief and religion and is therefore unenforceable.⁹⁰ The aside of Justice Black is worth noting: "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism, *and others.*"⁹¹

We are now faced with a similar situation discussed earlier where the Second Circuit and the Ninth Circuit have taken opposite positions on the Supreme Being question. As we noted earlier, the Supreme Being clause was added in order to clarify the Congressional position on the definition of the phrase "by reason of religious training and belief." *Berman v. United States* was in effect made the law of the land.⁹² Subsequent to the instant statute the Ninth Circuit has followed *Berman* to the present.⁹³ The Second Circuit followed *Berman* in 1955,⁹⁴ but in a recent decision, declared the Supreme Being clause to be violative of the establishment clause of the first amendment and an arbitrary classification, violative of the due process clause of the fifth amendment. The Court

88. See *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

89. By a denial of due process under the fifth amendment, reference is to a violation of substantive due process wherein the courts may find the exclusion of the non-theist to be so arbitrary as to impinge the liberty guarantee of that amendment. Note that in *In re Summers*, 325 U.S. 561, 571 (1945) the Court observed that under the Federal Constitution "men could not be excluded from the practice of law, or indeed from following any other calling, simply because they belong to any of our religious groups, whether Protestant, Catholic, Quaker or Jewish . . ."

90. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

91. *Id.* at 495 n.11. (Emphasis added.)

92. *Berman v. United States*, 156 F.2d 377 (9th Cir. 1946).

93. In *George v. United States*, 196 F.2d 445 (9th Cir. 1952) the Court of Appeals affirmed the content of religious training and belief as embracing the concept of a Supreme Being but for some strange reason ended up by declaring the appellant to lack standing since he admittedly professed such a belief. In *Clark v. United States*, 236 F.2d 13 (9th Cir. 1956), *cert. denied*, 352 U.S. 882 (1956) the appellant completed an SSS Form 150, a special form for conscientious objectors, wherein he answered the question, "Do you believe in a Supreme Being?" by checking the box marked "No," and adding, "I do not know whether a Supreme Being exists." *Id.* at 15. As against the argument that the Supreme Being clause offends the first amendment, the Court considered the question as decided by the *Berman* and *George* decisions. For the same result, see *Etcheverry v. United States*, 320 F.2d 873 (9th Cir. 1963), *cert. denied*, 375 U.S. 930 (1963).

94. In *United States v. Bendik*, 220 F.2d 249 (2d Cir. 1955) the Court found that appellant was in no position to attack the constitutionality of his classification since he had not exhausted his administrative remedies but even if he had the sincerity of his conscientious scruples was immaterial, since admittedly they were not founded on belief in a Supreme Being (citing *Berman*).

of Appeals relied heavily upon *Torcaso* and also buttressed its argument on *Kauten*.⁹⁵

The instant statute presents a retreat from the slowly emerging tendency to recognize and protect conscientious objection. It rejects the reality of the intrinsic diversity of the religious impulse. It substitutes instead, an *a priori*, artificial and limited legislative test of belief in a Supreme Being. In an effort to obtain an objective standard, it ignores the essential subjectivity of religious sensitivity. Even the most outstanding writers on the subject of religion in a pluralistic society recognize the fact that for religion to be religion, it need not be theistic: "In this study I shall regard humanism as a religion along with the three major faiths: Protestantism, Catholicism, and Judaism. This, I submit, is not an unreasonable inclusion. Ethical Culture is exclusively humanist but is generally considered a religion."⁹⁶

CONCLUSION

The problem of conscientious objection has been subjected to Congressional and judicial manipulation for nearly forty years. We are now in peace. The climate is perhaps more appropriate for trying to place the needs of conscience in perspective vis à vis the demand of national citizenship. Personal liberty encompasses many things. The right of free speech, assembly, press, etc. All these, however, must be placed in relation to the national good. Liberty of conscience is no exception. As the arm of the state may punish dictates of conscience which are repugnant to the social order, *e.g.*, polygamy, so also, must it be able to reasonably condition permissible resistance to government by virtue of conscience. It must strive to insure national survival even if there are incidental affronts to religious sensitivity. Discipline over mind and body is inescapable in war. These words apply directly to a democratic society. Democratic peoples are of necessity prone to be conscripted: "It is of the essence of a democratic army to be very numerous in proportion to the people to which it belongs . . . [M]en living in democratic times seldom choose a military life. Democratic nations are therefore soon led to give up the system of voluntary recruiting for that of compulsory enlistment."⁹⁷

The only qualification of the burden of conscription is that it be shared by all.

When military service is compulsory, the burden is indiscriminately

95. In *United States v. Seeger*, 32 U.S.L. Week 2361 (2d Cir. January 20, 1964) the Court was cautious to note that it was dealing only with the narrow question of the constitutionality of the Supreme Being clause under the present circumstance and was not passing upon the validity of legislative classifications in terms of religion in any other context. *Seeger*, by the way, was an admitted agnostic. Cf. *United States v. Jakobson*, 32 U.S.L. Week 2257 (2d Cir. November 22, 1963), decided two months before *Seeger*, where the Court discussed the jeopardy of the statute on both the religious training and belief provision as well as the Supreme Being clause. The Court however never came to grips with either question and dismissed in light of a procedural consideration.

96. Pfeffer, *Creeeds in Competition* 5 (1958).

97. 2 De Tocqueville, *Democracy in America* 271 (Reeve transl. 1904).

and equally born by the whole community. This is another necessary consequence of the social condition of these nations and their notions. The government may do almost whatever it pleases, provided it appeals to the whole community at once; it is the unequal distribution of the weight, not the weight itself, that commonly occasions resistance.⁹⁸

Inasmuch as a democracy must close its ranks in time of danger and become one against the enemy, the plight of the objector becomes almost impossible. We have seen the attempts at categorization run an almost full circle from rigidity to flexibility and back to rigidity. Our analysis started with "well recognized sects" to "by reason of religious training and belief" and ended with the "belief in a Supreme Being." The present law in this area is not satisfactory due to its lack of understanding of the nature of religion and the possibility of being seriously impaired by Supreme Court disapproval.

In the last analysis we find that neither Congress nor the courts have made significant inroads in finding an acceptable solution. The expansion of appellate review has been thwarted by a restrictive legislative act. Until a solution is found liberty of conscience will continue to suffer and perhaps needlessly.

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98. *Id.* at 271.