NOTES

IN DEFENSE OF THE CONSCIENTIOUS OBJECTOR: THE CONSTITUTIONAL RIGHT TO A TRIAL DE NOVO

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The conflagration in Vietnam has swelled the ranks of the "Establishment's" critics and unleashed a bitter debate not only on the moral and ethical differences between a war against Adolf Hitler and a war against Ho Chi Minh but also on the propriety of the agency that provides such a war with its physical sustenance.[1] In the hands of and subject to the discretion of the Selective Service System lies the fate of every young man between the ages of 18 and 26. Each is presumed to be qualified for immediate induction unless he can demonstrate to the satisfaction of his local board that he qualifies for a statutory exemption.[2] Increasingly, the most litigated of these is that of the conscientious objector exemption.[3] The purpose of this note is to examine recent cases which have dealt with the judicial review of selective service action concerning conscientious objectors and to analyze the decisions within the framework of other cases and sound principles of constitutional law.[4]

The problems relating to the availability and scope of judicial review of selective service action were initially settled in *Estep v. United States*,[5] where the Supreme Court held that section 10(b) of the Selective Train-

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[1] *See* Just, *Notes on a Losing War*, ATLANTIC, Jan. 1969, at 39.

[2] 32 C.F.R. § 1622.1 (Supp. 1969).

[3] Although there are no available statistics regarding the actual number of decisions involving conscientious objectors, it appears that the claim of conscientious objection is by far the most litigated of the statutory exemptions.

The Annual Report of the Director of the Administrative Office of the United States Courts reveals some interesting statistics regarding the prosecution of Selective Service Act offenders. In fiscal year 1964 there were 287 Selective Service Act violations filed in the district courts. This figure increased to 380 in 1965, 663 in 1966, 1,335 in 1967, and 1,826 in 1968. The increase of 36.8 percent in the figure between 1967 and 1968 represented by far the greatest increase in the categorized offenses reported by the Director, the closest increase being the 22.3 percent increase in federal narcotics laws prosecutions. The number of Selective Service Act violations was reported to be the largest since the Second World War. 1968 DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 121.

[4] Although there may be some question of the constitutionality of conscription in time of undeclared war, *e.g.*, United States v. O'Brien, 391 U.S. 367 (1968) (Douglas J., dissenting), for the purpose of this note, the Selective Service System will be treated as constitutional under the war power, available in time of peace as well as war.

The only decisions dealing specifically with the constitutionality of conscription are the Selective Draft Law Cases (Arver v. United States), 245 U.S. 366 (1918), which deal with war time conscription. In these cases, conscription was upheld as a valid exercise of the war power, in spite of the thirteenth amendment's proscription of involuntary servitude. Presumably, the question remains open with respect to peace time conscription.

[5] 327 U.S. 114 (1946).

ing and Service Act of Sept. 16, 1940,[6] making actions of the Selective Service System "final,"[7] did not fully insulate selective service action from judicial review. Notwithstanding the apparent congressional attempt to divest the federal courts of all power of inquiry into selective service action, Mr. Justice Douglas, speaking for the Court, stated:

> We are loath to believe that Congress reduced criminal trials under the Act to proceedings so barren of the customary safeguards which the law has designed for the protection of the accused.[8]

The Court found that rather than prohibiting review of the findings of the administrative board, the statute merely limited review to a scope more narrow than that traditionally recognized in review of administrative action. While the decision of the local board may be erroneous, it must stand, said the Court, unless there was *no basis in fact* for its conclusion.[9]

Through 20 years of invocation, however, the "no basis in fact" standard has proven itself heir to the traditional deficiencies of all tests thought to be talismanic. Presumably the intent of the Court in adopting this standard was to provide a scope of review that was considerably narrower than either the traditional "substantial evidence" test used in review of other administrative actions,[10] or the "clearly erroneous" test used in a variety of other situations.[11] The Court attempted to explain the distinction in *Witmer v. United States*[12] where it stated that the reviewing court should not look for "substantial evidence;" that where "there was conflicting evidence or where two inferences could be drawn from the same testimony,"[13] the finding of the board must stand. As Professor Jaffe has pointed out,[14] however, the latter statement is of little determinative value because almost the same language was used by Mr. Justice Frankfurter in *Universal Camera Corp. v. NLRB*[15] to explain the application of the "broader" test of "substantial weight of the evidence." Confusion is not rampant however because it is at least plain that the substantial evidence test provides a broader scope of review. In an heroic attempt to synthesize the decisions, Professor Jaffe suggests that the test "could perhaps be expressed in the formula that the inference from isolated or tenuous evidence may prevail against robust evidence to the contrary."[16]

In 1967, Congress adopted in terms the *Estep* test as the statutory

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[6] Ch. 720, 54 Stat. 885.
[7] Ch. 720, § 10(b), 54 Stat. 885 (1940).
[8] 327 U.S. at 122.
[9] *Id.*
[10] *E.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).
[11] *See* Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239 (1955).
[12] 348 U.S. 375, 381 (1955).
[13] *Id.* at 383.
[14] Jaffe, *Judicial Review: Question of Fact*, 69 HARV. L. REV. 1020, 1048 (1956).
[15] 340 U.S. 474 (1951).
[16] Jaffe, *supra* note 14, at 1049.

limitation upon judicial review of selective service actions.[17] This express limitation upon the jurisdiction of the federal courts has been adhered to by the courts of appeals with no apparent dissatisfaction.[18]

Notwithstanding this consensus there are compelling arguments for a reexamination of this established rule of law, particularly as it has been applied to those seeking the conscientious objector classification. The inherent complexity of an argument challenging this scope of review as dictated by Congress requires a brief summary at the oustet. First, it will be argued that the existing review afforded by the Selective Service System lacks fundamental procedural safeguards necessary to a fair and just administration of the allowable exemptions. This deficiency is particularly significant when applied to registrants claiming exemption as conscientous objectors, especially if one accepts the proposition that exemption of conscientious objectors from military service is constitutionally compelled. In spite of considerable opinion to the contrary, it can be vigorously asserted that the latter proposition cannot be allowed to yield to the power of Congress to raise armies and declare war.

Once established that this exemption is indeed a constitutional right, certain ramifications necessarily follow. Most significantly, Article III of the Constitution, together with the fifth amendment, demands that the federal courts provide an expanded basis for review of those claims which involve constitutional rights. Although Article III empowers Congress to restrict the jurisdiction of the federal courts, and under the Military Selective Service Act of 1967[19] Congress has so restricted jurisdiction, there are implicit limitations upon this power. Those limitations and the basic liberties that they protect are the subject of this note. The first step in the determination of the validity of present judicial review of selective service action must properly begin with an examination of the administration of the existing system.

Administrative Review Available Within the Selective Service System

Each male citizen is required to register with the Selective Service System upon his 18th birthday.[20] The local draft board then initiates the classification procedure by mailing to the registrant a questionnaire containing inquiries relative to probable classifications.[21] After the form is returned to the local board, the registrant is assigned a classification[22]

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17 Military Selective Service Act of 1967, 50 U.S.C.A. APP. § 460(b) (1968).

18 For example, in Hunter v. United States, 393 F.2d 548 (9th Cir. 1968), the Ninth Circuit utilized the "no basis in fact" test to deny review of a I-A classification to a registrant who had defended his prosecution for failure to submit to induction by asserting that his local draft board had wrongfully refused to classify him as a conscientious objector.

19 50 U.S.C.A. APP. § 460(b) (1968).

20 Military Selective Service Act of 1967, 50 U.S.C.A. APP. § 453 (1968).

21 32 C.F.R. 1621.9-14 (Supp. 1969).

22 *Id.* § 1622.

which typically is either I-A[23] or II-S.[24] However, no classification is permanent[25] and the registrant is subject to reclassification upon either the initiative of the board[26] or his own request.[27]

Once the registrant is classified, he is informed by mail of his classification and the courses of action he may pursue if he believes that he has been improperly or unjustly classified.[28] If the registrant does believe he has been erroneously classified, he may request, within 30 days after the mailing of the notice of classification, a personal appearance before the board.[29] Moreover, whether or not the registrant requests a personal appearance, he may request an appeal,[30] and he generally has 30 days from the date of mailing of the notice in which to do so.[31] Both courses of action are available as a matter of right. Although the appeal is not conditioned upon the personal appearance of the registrant before the local board, the scope of the appeal board's decision is limited to the material contained in the registrant's file.[32] The normal course, therefore, is for the registrant to first make his personal appearance and then appeal the decision. The first manifestation of the inequities of the Selective Service System occurs at this stage of the proceedings.

At the registrant's personal appearance, the board, in its discretion, may allow others to appear on his behalf.[33] However, the regulations specifically prohibit the appearance of counsel.[34] This provision is generally explained on the basis that the proceedings are informal and in the

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[23] *Id.* § 1622.10. The I-A classification indicates that the registrant is available for immediate induction.

[24] *Id.* § 1622.25. The II-S classification indicates that the registrant is deferred to obtain an education.

[25] *Id.* § 1625.1.

[26] *Id.* § 1625.2(b).

[27] *Id.* § 1625.2(a).

[28] *Id.* § 1623.4.

[29] *Id.* § 1624. This thirty day period may not be extended.

[30] *Id.* § 1626.

[31] *Id.* § 1626.2. Longer time limits are allowed if the registrant, on the date of mailing, is outside the continental United States, Alaska, Hawaii, Puerto Rico, the Virgin Islands, Guam, the Canal Zone, Canada, Cuba, and Mexico. It is also possible to obtain an extension if the failure to appeal is due to a lack of understanding of the right to appeal or to some cause beyond the control of the registrant.

[32] *Id.* § 1626.24(b). The regulation provides:

> (b) In reviewing the appeal and classifying the registrant, the appeal board shall not receive or consider any information other than the following:
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> (1) Information contained in the record received from the local board.
>
> (2) General information concerning economic, industrial and social conditions.

[33] *Id.* § 1624.1(b). The regulation provides:

> (b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: . . . *And provided further,* That no registrant may be represented before the local board by anyone acting as attorney or legal counsel.

[34] *Id.* It has been held that there is no sixth amendment right to counsel in selective service hearings. United States v. Capson, 347 F.2d 959 (10th Cir. 1965).

fashion of a meeting of neighbors and friends to discuss equitable solutions to the problems of the particular registrant.[35] In support of the concept of informality, the local board is designed to represent a cross section of the community, rather than the expert panel found in other administrative agencies. It is evident that the composition of the board is of critical importance, inasmuch as this is the only opportunity for the registrant to appear in person, and, in the case of the conscientious objector, is his only opportunity to personally demonstrate his sincerity. Thus, in theory, the board resembles a jury, allowing the registrant to be judged by his peers; in practice, however, it bears little resemblance to the ideal. In *Haven v. United States*,[36] a Jehovah's Witness defended a criminal prosecution for failure to submit to induction on the ground that members of his religious sect had been systematically excluded from service on local draft boards, citing *Avery v. Georgia*[37] and *Bolling v. Sharpe*.[38] The trial court entertained the defense but found that no prima facie showing of systematic exclusion had been made. Although the Ninth Circuit found that the finding was supported by the evidence, it rested its decision upon "broader grounds":

> We find no support in administrative law or in constitutional law for a contention that the composition of the membership of an administrative board, comprised under laws which are not themselves void for constitutional infringement, may be attacked by showing that certain groups or classes of persons, racial, religious or otherwise, have never been privileged to serve on such a board. We see no fair analogy between the composition of a jury, required by the Sixth Amendment to be fair and impartial, where systematic and deliberate exclusion of classes of persons will destroy the constitutional qualification of the tribunal, and the composition of an administrative board in the executive department of the Government.[39]

The impact of this decision is particularly startling when considered in light of the local board's jury-like determination of the questions of fact relating to the classification of the registrant. In the case of the conscientious objector, the *only* significant finding that the board must make is whether the alleged belief of the registrant is sincerely held. This unique function of the local board should distinguish its composition from

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[35] Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 CAL. L. REV. 2123, 2132-34 (1966).

[36] 403 F.2d 384 (9th Cir. 1968).

[37] 345 U.S. 559 (1953).

[38] 347 U.S. 497 (1954).

[39] 403 F.2d at 386. In sharp contrast to this provocative comment is the report of the Task Force on the Structure of the Selective Service System which stated:

> A Local Board having the advantage of the documentation in a registrant's file as well as a personal appraisal of his reactions, responses, demeanor, et cetera, in somewhat the same manner a witness' credibility is tested by a jury, should be entirely competent to test the sincerity of a registrant's belief. TASK FORCE ON THE STRUCTURE OF THE SELECTIVE SERVICE SYSTEM VIII-3 (1967).

the composition of other administrative agencies, which of necessity require specially qualified personnel.[40]

Previous challenges to the composition of local boards have been few in number. In 1945, the board's composition was attacked in *United States ex rel. Lawrence v. Commanding Officer*[41] on the ground that there was no farmer present. The court found, however, that there was representation by people who understood farm problems and the challenge failed. More recently in *Muhammad Ali v. Breathitt*[42] the complainant sought a declaratory judgment that the systematic exclusion of Negroes from local draft boards and appeal boards rendered the composition provisions of the Military Selective Service Act unconstitutional. The court, however, declined to consider the question because the complainant, having refused to comply with the order to report for induction, had failed to exhaust his administrative remedies and therefore lacked proper standing. One wonders, however, whether this type of a claim, directed at the heart of the civil rights controversy, would have met the same unceremonious fate of the *Haven* challenge had it been presented by one with proper standing.

The significance of the *Haven* decision is compounded when applied to a board already proven inadequate as a trier of fact. A recent study of the conscientious objector exemption concluded that the typical local board was composed of veterans with a military-service oriented brand of patriotism.[43] The study further revealed that the treatment that a conscientious objector could expect from the board was far from the desired standards of objectivity. The treatment was generally found to be either cold and skeptical or exceedingly hostile.[44] The prescribed personal interview generally lasted between 10 and 20 minutes, and the board was generally unfamiliar with the registrant's file at the commencement of the interview, resulting in much wasted time while basic facts were repeated.[45] It was also determined that partially because of ignorance and partially because of hostility the standards set by the Supreme Court in *Seeger v. United States*[46] for conscientious objector qualification are largely ignored at the local board level.[47]

An examination of the appeal boards found the system somewhat improved. They were better informed, less biased, and in no way felt bound by the findings of fact made by the local board.[48] This independ-

[40] Compare the *Haven* decision to the statutory composition requirements of the appeal board in 32 C.F.R. § 1604.22 (Supp. 1968).
[41] 58 F. Supp. 933 (D. Neb. 1945).
[42] 268 F. Supp. 63 (W.D. Ky. 1967).
[43] Rabin, *The Conscientious Objector Exemption*, 1967 WIS. L. REV. 642, 688.
[44] *Id.*
[45] *Id.* at 662.
[46] 380 U.S. 163 (1965). For a discussion of *Seeger* see notes 82-86 and accompanying text *infra.*
[47] Rabin, *supra* note 43, at 670.
[48] Rabin, *supra* note 43, at 673-75.

ent finding of fact may be deceptive, however, unless it is remembered that the registrant does not appear before the appeal board, so there is no opportunity for the board to observe demeanor and judge sincerity from personal observation. In this respect the review is necessarily confined to information contained in the file, and the local board is not obligated to make any record of the personal interview other than entering the fact of its occurrence in the minutes of the meeting.[49] Although the registrant may make additions to the file by submitting them to the local board in writing,[50] the discouragement of legal assistance and the general hostility of the board to the conscientious objector inhibits the full utilization of this right.

After the appeal board has reached a decision, the judgment is returned to the registrant via the local board.[51] The registrant then has the right to appeal to the President's Appeal Board, but significantly, he may do so only if there was a dissent from the opinion of the appeal board.[52] Review is again limited to the information contained in the file. When the decision of the President's Appeal Board is made, the administrative appeal process is at an end. Under the present scope of available judicial review, any factual errors not corrected in this perfunctory system of appeals are accepted so long as there existed a "basis in fact" for the classification.

Any examination of the propriety of the Selective Service System and its satisfaction of the requirements of due process must include a comment upon its greatest inherent weakness—the conflict of interest imposed by draft quotas.

Under the regulations of the Selective Service System, it is the responsibility of each local board to respond to nationally imposed quotas with the designated number of inductees.[53] Thus each time the local board allows a registrant to avoid or postpone conscription, the difficulty of meeting the requirements for the quota is increased. Within this context, the board is expected to act both as a trier of fact, aloof and impartial, and as adversary, whose stated interest is against the allowance of any draft deferment. Anticipating considered justice from a system with such basic conflicts would be similar to expecting a fair and impartial hearing from a judge and jury who were obligated to maintain penal institutions at capacity.[54]

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[49] 32 C.F.R. § 1604.58 (Supp. 1969).
[50] *Id.* § 1624.2(b).
[51] *Id.* § 1626.31(a).
[52] *Id.* § 1627.3. The registrant may also appeal to the Director who has a right to carry the appeal to the President's Appeal Board.
[53] *Id.* § 1631.
[54] While perhaps startling, this analogy is not altogether inapposite. In his concurring opinion in Oestereich v. Selective Service, 89 S. Ct. 414 (1968), Mr. Justice Harlan, commenting upon the prohibition of pre-induction review, stated:

> [P]ostponement of a hearing until after induction is tantamount to permitting the imposition of summary punishment, followed by loss of liberty,

Exhaustion of Administrative Remedies

In order to obtain even the limited form of judicial review presently available in the federal courts, the registrant must first exhaust his administrative remedies.[55] This requires that he appeal the classification of the local board and report for induction.[56] When the registrant reports he must either submit to or refuse induction.[57] Only then has he exhausted his administrative remedies. In most cases this process leaves the registrant with only two choices — he may obtain judicial review of his classification as a defense to criminal prosecution for failure to submit to induction,[58] or he may obtain habeas corpus relief after he has been inducted.[59] In either case, however, the scope of review is precisely the same—the court is limited to the "no basis in fact" test.[60]

The limited availability and scope of judicial review allowed the federal courts under *Estep* and the Military Selective Service Act of 1967 have been justified by Congress as being a proper exercise of the war power. The statutory limitations were "to prevent litigious interruptions of procedures to provide necessary military manpower."[61] Although the argument that the availability of pre-induction review would create a subterfuge through which a registrant could postpone and possibly avoid conscription has merit, it is certainly less persuasive when used to justify the *scope* of the permitted review. And when the permitted scope of review is applied to the unique problems of the conscientious objector, the argument becomes irreconcilable.

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without possibility of bail, until such time as the petitioner is able to secure his release by a writ of habeas corpus. *Id.* at 420 n.6.

[55] Daniels v. United States, 372 F.2d 407 (9th Cir. 1967); Woo v. United States, 350 F.2d 992 (9th Cir. 1965); Watkins v. Rupert, 224 F.2d 47 (2d Cir. 1955).

[56] Wills v. United States, 384 F.2d 943 (9th Cir. 1967); Dunn v. United States, 383 F.2d 357 (1st Cir. 1967); Woo v. United States, 350 F.2d 922 (9th Cir. 1965).

[57] United States v. Freeman, 388 F.2d 246 (7th Cir. 1967); Moore v. United States, 302 F.2d 929 (9th Cir. 1962).

It should be noted at this point that there are significant exceptions which have recently been allowed to the rule requiring the exhaustion of administrative remedies. In Lockhart v. United States, — F.2d — (9th Cir. 1968), the appellant did not know that he was entitled to an appeal, and consequently did not exhaust his remedies. This, however, did not preclude the judicial review of his classification in a defense to a criminal prosecution for failure to submit to induction.

More recently in Oestereich v. Selective Service, 89 S. Ct. 414 (1968), the Supreme Court held that when the action of the local board was inherently lawless, the registrant did not have to report for induction as a prerequisite to judicial review of his classification.

[58] *E.g.*, Moore v. United States, 302 F.2d 929 (9th Cir. 1962). There have been some intriguing challenges to this rule, however. In Petersen v. Clark, 285 F. Supp. 700 (N.D. Cal. 1968), Judge Zirpoli held that the statute prohibiting judicial review of selective service orders, except as a defense to a criminal prosecution, violated due process of law. Any possibility of success for this argument was eliminated, however, by the Supreme Court's subsequent decision in Clark v. Gabriel, 89 S. Ct. 424 (1968).

[59] *E.g.*, United States v. Freeman, 388 F.2d 246 (7th Cir. 1967).

[60] United States v. Freeman, 388 F.2d 246 (7th Cir. 1967); Moore v. United States, 302 F.2d 929 (9th Cir. 1962).

[61] 113 CONG. REC. 58052 (daily ed. June 12, 1967) (Senator Russell).

History of the Conscientious Objector Exemption

The first act of conscription was passed by Congress in 1863,[62] and while making liberal provision for avoidance of duty by either replacement or bounty, it allowed no exemption for conscientious objectors. However, when the act was revised in 1864[63] and in every subsequent act of conscription, the exemption for conscientious objectors has been carefully provided for. Moreover, with each renewal of the exemption, there has been a gradual relaxation of the formal requirements of religious affiliation. For example, the Draft Act of 1917[64] exempted members of

> any well-recognized religious sect or organization . . . whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war.[65]

This restrictive language was broadened in the Selective Training and Service Act of Sept. 16, 1940,[66] which exempted anyone "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[67] Although the language of the statute was capable of a broader interpretation, Congress' intent clearly was to continue to require a "traditional" basis of religious belief to qualify for the exemption; at the same time, it was willing to forgo the previous requirement of "peace church" affiliation.[68]

The origin of the conflict and uncertainty regarding the legal status of conscientious objectors lies in the interpretation of the 1940 statute by the federal courts. The basic disagreement concerned the breadth of the permissible exemption. The Second Circuit in *United States v. Kauten*[69] denied relief to a young atheist on the ground that he had not completed the requisite steps in the administrative process by reporting for induction. Speaking for the court, however, Judge Augustus Hand suggested that an individual could be exempted under the statute whose conscientious objection to war in any form is the "response of the individual to an inward mentor, call it conscience or God . . . ."[70] This interpretation, acknowledging the sanctity of individual conscience, be-

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[62] Act of March 3, 1863, ch. 75, 12 Stat. 731.

[63] Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 9. The exemption at this time produced little controversy, possibly due to the relative ease by which a young man could avoid conscription. The Act provided for deferment if he could procure a replacement or pay $300.

[64] Act of May 18, 1917, ch. 15, 40 Stat. 76.

[65] *Id.* § 4 at 78. One year later, by Executive Order No. 2823 (1918), the exemption was extended to a conscientious religious objector regardless of his non-affiliation with one of the three traditional peace churches, *i.e.* Mennonites, Quakers, or Society of Friends.

[66] Ch. 720, 54 Stat. 885.

[67] *Id.* § 5(g).

[68] *Hearings on H.R. 10132 Before the House Comm. on Military Affairs*, 76th Cong., 2d Sess. 191, 211 (1940). *See* Conklin, *Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins*, 51 GEO. L.J. 252 (1963).

[69] 133 F.2d 703 (2d Cir. 1943).

[70] *Id.* at 708.

came the law of the Second Circuit in *United States ex rel. Reel v. Badt*,[71] and set the foundation for the present law of conscientious objection.

The Ninth Circuit refused to recognize such an "inward mentor" however, and in *Berman v. United States*[72] held:

> There are those who have a philosophy of life, and who live up to it. There is evidence that this is so in regard to appellant. However, no matter how pure and admirable his standard may be, and no matter how devotedly he adhered to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion in the sense that term is used in the statute.[73]

In spite of this conflict among the circuits and the provincial view of the Ninth Circuit,[74] the Supreme Court refused to review the decision[75] and left the circuits in conflict until Congress revised the draft laws in 1948.

In the Universal Military Training and Service Act of June 24, 1948,[76] Congress adopted the Ninth Circuit's view, defining for purposes of the statute, "religious training and belief" as "an individual's belief in relation to a Supreme Being."[77] After this congressional endorsement of the *Berman* rule, the circuits did not again disagree on the requirements for the conscientious objector exemption until 1964.[78] In *United States v. Seeger*[79] the Second Circuit was confronted with the problem of a young man, unquestionably sincere in his beliefs and opposed to war in any form, but who did not profess a traditional belief in a supreme being. Daniel Seeger expressed his "religion" thusly:

> Personally, I do not believe that life derives any meaning from cosmic design but I do believe that a person can give his life meaning by doing something worthwhile with it, i.e. by relating his existence in a constructive and compassionate way to the problems of his social environment. In this sense pacifism, among other things, is for me a transcendent concern and it is in this respect that I consider myself religious.[80]

This type of "religious belief" brought the court to grips with the constitutionality of the exemption provision as revised in 1948. The Gov-

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[71] 141 F.2d 845 (3d Cir. 1944); *accord*, United States *ex rel.* Phillips v. Downer, 135 F.2d 521, 524 (2d Cir. 1943) (allowing the exemption to a non-theistic humanist).

[72] 156 F.2d 377 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946).

[73] 156 F.2d at 381.

[74] Provincial because of its apparent unwillingness to consider beliefs such as Buddhism a religion — Buddhists profess no belief in a supreme being as it has been traditionally understood by Western religions.

[75] 329 U.S. 795 (1946).

[76] Ch. 624, 62 Stat. 604.

[77] *Id.* § 6(j).

[78] Both the Second and the Ninth Circuits accepted the limitation of the statute until 1964. *E.g.*, Clark v. United States, 236 F.2d 13 (9th Cir.), *cert. denied*, 352 U.S. 882 (1956); United States v. Bendik, 220 F.2d 249 (2d Cir. 1955).

[79] 326 F.2d 846 (2d Cir. 1964), *aff'd*, 380 U.S. 163 (1965).

[80] Record at 99, United States v. Seeger, 380 U.S. 163 (1965).

ernment, arguing in favor of the provision's constitutionality, suggested that the statute was merely a congressional reconciliation of the dilemma of complying with both the establishment and the free exercise clauses of the first amendment. The Government further argued that the provision was a statement of neutrality regarding religion and that the requirement of a supreme being was merely an attempt to provide an objective criterion by which to judge the sincerity of the questioned belief. Although the court found the Government's first amendment argument persuasive, it held the exemption to be an unconstitutional discrimination among religions in violation of the fifth amendment.

The Government appealed, and it appeared that the Supreme Court would be forced to decide the constitutionality of the conscientious objector exemption. However, the Court chose to decide the case by way of statutory construction. Writing the opinion for a unanimous court, Mr. Justice Clark found that Daniel Seeger's "religion" fell within the protective scope of the exemption as enacted.[81] To explain this, the Court found that the requirement of a belief in a supreme being was merely a modification of the word "religious" and did not change the effect of the exemption from that allowed under the statute in 1940.[82] The basis for this incredible feat of statutory construction is explained by Justice Douglas in his concurring opinion:

> If I read the statute differently from the Court, I would have difficulties. For then those who embraced one religious faith rather than another would be subject to penalties; and that kind of discrimination, as we held in Sherbert v. Verner [citation omitted] would violate the Free Exercise Clause of the First Amendment. It would also result in a denial of equal protection by preferring some religions over others—an invidious discrimination that would run afoul of the Due Process Clause of the Fifth Amendment.[83]

The *Seeger* opinion represents the latest pronouncement by the Court of the requirements for exemption as a conscientious objector. Although constitutional implications permeate the opinion, the Court avoided making a statement regarding the constitutionality of the exemption. The constitutional status of the exemption, however, may be determined from an examination of related decisions of the Supreme Court.

The Constitutional Basis for Conscientious Objection

The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Despite this language, and the recognition by both the Court and Congress of the exemption from military service for those religiously

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[81] United States v. Seeger, 380 U.S. 163 (1965).
[82] *Id.* at 176.
[83] *Id.* at 188.

opposed to war, the Supreme Court on several occasions has stated in dictum that there is no constitutional right to be so excluded but that the exemption was rather one of legislative grace.[84] There has never been a concrete explanation of why the exemption was so regarded, and the Court has avoided significant opportunities to rule directly on the question.[85]

Despite the absence of an authoritative explanation for the legislative grace theory, the supporting arguments are not difficult to comprehend. In a world where war involving great nations is the rule and interludes of peace the exception, the power of a nation to defend itself in time of need would have to stand among those powers essential to the endurance of any government. In theory, should the existence of any individual right seriously threaten the power of this nation to effectively defend itself from its enemies, it surely would be the right and not the power that would yield. Indeed, several times in our history the war power has swept away lesser rights in the interest of national defense and security.

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[84] *See In re* Summers, 325 U.S. 561 (1945); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 261 (1934); United States v. McIntosh, 283 U.S. 605, 623 (1931); United States v. Schwimmer, 279 U.S. 644 (1929); Selective Draft Law Cases (Arver v. United States), 245 U.S. 366 (1918).

[85] *See, e.g.*, United States v. Seeger, 380 U.S. 163 (1965). Shortly before publication, Judge Wyzanski of the Federal District Court of Massachusetts, in United States v. Sisson, 5 CRIM. L. RPTR. 2021 (Apr. 9, 1969), held that the use of the 1967 Military Selective Service Act to punish a "non-religious" objector to the war in Vietnam for his refusal to submit to induction violated the free exercise clause of the Constitution. It was also held that the Act violates the first amendment by its discrimination between "religious" and "non-religious" conscientious objectors. Although acknowledging the stated limitation in *Seeger*, the court held that an objector with deep and sincere convictions, such as those possessed by the defendant Sisson, was entitled to first amendment protection. The court acknowledged the power of government to override such freedoms in case of conflicting national interest, but held that the conflict in Vietnam presented no such overriding national interest. The court stated:

> This court's assumption that Congress has the general power to conscript in time of peace is not dispositive of the specific question whether that general power is subject to some exception or immunity available to a draftee because of a constitutional restriction in favor of individual liberty. . . .
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> . . . .
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> The statute as here applied creates a clash between law and morality for which no exigency exists, and before, in Justice Sutherland's words, 'the last extremity' or anything close to that dire predicament has been glimpsed, or even predicted, or reasonably feared.
>
> When the state through its laws seeks to override reasonable moral commitments it makes a dangerously uncharacteristic choice. The law grows from the deposits of morality. Law and morality are, in turn, debtors and creditors of each other. The law cannot be adequately enforced by the courts alone, or by courts supported merely by the police and the military. The true secret of legal might lies in the habits of conscientious men disciplining themselves to obey the law they respect without the necessity of judicial and administrative orders. When the law treats a reasonable, conscientious act as a crime it subverts its own power. It invites civil disobedience. It impairs the very habits which nourish and preserve the law. *Id.*

On appeal to the Supreme Court, this case is likely to force the Court to face the constitutional issues in the conscientious objector claim which have in the past been so studiously avoided.

The thirteenth amendment freedom from involuntary servitude has yielded, at least in time of war, to the power of the Republic to conscript an army.[86] Invidious discrimination by the federal government, although prohibited under the fifth amendment,[87] was upheld when such discrimination was found to be a reasonable exercise of the war power.[88] Freedom of speech and press, considered by some to be inviolable, also were subordinated when they threatened national defense and security.[89] And though there have been no cases directly in point, it is presumably the war power which justifies chaplains and churches in the armed forces[90] and missionary aid to Indians[91]—acts which otherwise would appear to run afoul of the prohibitions of the first amendment.

In light of this precedent, it is entirely conceivable that in times of extreme national emergency, Congress could find constitutional justification for withdrawing the conscientious objector exemption. It is doubtful, however, whether such an act by Congress could pass constitutional muster absent such an emergency.

The Supreme Court enunciated the standard for permissible state infringement of religious freedoms in *Sherbert v. Verner*.[92] The Court held that a Sabbatarian could not be compelled to consent to Saturday labor, in violation of her religious beliefs, as a condition for the receipt of unemployment benefits.

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' [citation omitted]
>
> [I]t would plainly be incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.[93]

The Court, however, has allowed infringements upon religious freedoms when presented with overriding conflicting state interests. For instance, the state may constitutionally require vaccination on the basis of the interest in curtailing the spread of contagious disease despite conflicting religious beliefs.[94] The state interest in a uniform day of rest was sufficient to uphold Sunday closing laws although this meant the Sabbatarian claimant would have to violate either the dictates of his

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86 Selective Draft Law Cases (Arver v. United States), 245 U.S. 366 (1918).
87 Bolling v. Sharpe, 347 U.S. 497 (1954).
88 *E.g.*, Korematsu v. United States, 323 U.S. 214 (1944).
89 *E.g.*, Schenck v. United States, 249 U.S. 47 (1919); *see* United States v. O'Brien, 391 U.S. 367 (1968).
90 *See* L. PFEFFER, CHURCH STATE AND FREEDOM 618-25 (rev. ed. 1967).
91 *Id.*
92 374 U.S. 398 (1963).
93 *Id.* at 406-07.
94 Zucht v. King, 260 U.S. 174 (1922); Jacobsen v. Massachusetts, 197 U.S. 11 (1905).

religion or lose his business.[95] Blood transfusions have created a greater problem but have been allowed by lower courts in spite of the religious wishes of a non-consenting recipient.[96] The Court has also held the social interest in monogamy sufficient to override the conflicting practice of the Mormon Church.[97]

The Supreme Court, however, has refused to tolerate the attempts of the state to compel an individual to salute the flag[98] or serve on a jury[99] in violation of sincerely held religious beliefs. On the basis of those decisions, the Arizona requirement that individuals must stand for the national anthem was declared unconstitutional by a federal district court when such action violated religious tenets.[100]

It is most difficult to synthesize these decisions so as to discover a definitive line separating the permissible from the prohibited government act; however, certain conclusions are apparent. Before an infringement upon religious freedom can be tolerated, an overriding state interest must be demonstrated. And when the acts of a state seek to force an individual to *affirmatively* violate religious scruples the interest of the state must be compelling—generally involving the safety of the community or the actual life of the individual or his family. Of course, unless it is decided that there is a constitutional right involved in the sincere conscientious objection to war, the absence of an overriding state interest would have little rhetorical value. It is significant in this respect that the constitutional claim of a conscientious objector need not rest solely upon the first amendment.

Amidst much debate, the Constitution was ratified by the states without any of the existing amendments, but with the understanding that the First Congress would submit a bill of rights for subsequent ratification. The matter of which particular human freedoms were to receive specific constitutional protection received extensive consideration. The proposal that conscientious objectors be excluded from all personal service in the military received prominent support, and was submitted independently by several groups.[101] Significantly, the right was never suggested in the context of the religious freedoms that ultimately became the first amendment, but rather as an exception to the proposed amendments which would guarantee the right to maintain a militia and the right of the

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[95] Braunfeld v. Brown, 366 U.S. 599 (1961).

[96] Application of the President and Directors of Georgetown College, Inc., 331 F.2d 1000, *petition for rehearing en banc denied*, 331 F.2d 1010, *cert. denied*, 377 U.S. 978 (1964). *See also* State v. Perricone, 37 N.J. 463, 181 A.2d 751, *cert. denied*, 371 U.S. 890 (1962).

[97] Reynolds v. United States, 98 U.S. 145 (1878).

[98] Board of Educ. v. Barnette, 319 U.S. 624 (1943).

[99] *In re* Jennison, 375 U.S. 14 (1963) (per curiam).

[100] Seldon v. Fannin, 221 F. Supp. 766 (D. Ariz.), *appeal dismissed*, 372 U.S. 228 (1963).

[101] *See* E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 19, 23, 40 (1957).

people to bear arms.[102]

The minority report of the Maryland committee recommended that "no person with conscientious scruples be compelled personally to serve as a soldier."[103] More importantly, the influential Virginia delegation, under the direction of James Madison, proposed that conscientious objectors be "exempted upon payment of an equivalent to employ another to bear arms in his stead."[104] Madison demonstrated the strength of his convictions by personally making an additional proposal of rights to the Congress, wherein his seventh item stated "that the right to bear arms shall not be infringed, but no conscientious objector shall be compelled to render military service in person."[105] The effect of this support for the protection of conscientious objectors was the ultimate inclusion of an exemption in the proposed bill of rights passed by the House of Representatives. The proposed fifth amendment stated:

> A well regulated militia, composed of the body of the People, being the best security of a free state, the right of the People to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.[106]

It is difficult to determine the precise reasons for the demise of this particular provision, but when both houses of Congress finally agreed upon a bill of rights the specific protection of conscientious objectors was notably absent. A comparison of the provisions which were retained with those rejected is quite informative, however. Another of the amendments proposed by the House of Representatives and ultimately discarded stated:

> No *State* shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press.[107] (emphasis added).

These two discarded amendments are strikingly similar; both are concerned with the specific protection of individual conscience and both restrict the operation of the *states* rather than the federal government. Although the Constitution contemplated the existence of a federal army, there is no evidence that there was significant thought regarding federal conscription at that time. It was not until 1863 that Congress first passed an act of federal conscription; prior to that time the primary responsibility for the army was vested in the states.[108] It is therefore not unreasonable to assume that the proposed amendment protecting the rights of conscientious objectors was discarded in the final analysis, not

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102 *Id.*
103 *Id.* at 23.
104 *Id.* at 23.
105 *Id.* at 36.
106 Passed August 24, 1789; DUMBAULD, *supra* note 101, at 213.
107 DUMBAULD, *supra* note 101, at 214.
108 Note 63 *supra.*

because of any adversion to the nature of the right on the part of Congress, but rather because of its proposed restriction upon the powers of the states. Indeed, the Constitution recognized the freedom of conscience in the form of religion in the first amendment, but nowhere in the Bill of Rights was there a limitation upon the power of the states.

It is also material to note that subsequent to the action of the First Congress, in 1790, Article VI of the proposed Pennsylvania Constitution provided:

> II. The freemen of this commonwealth shall be armed and disciplined for its defence. Those, who conscientiously scruple to bear arms, shall not be compelled to do so; but shall pay an equivalent for personal service.[109]

From the wording of this provision, it is clear that compelled military service was contemplated by Pennsylvania over 70 years prior to federal conscription.

From the circumstances surrounding the adoption of the Bill of Rights, some meaning may perhaps be cast into the adumbral ninth amendment. If nothing more, the adoption of the ninth amendment demonstrated that there existed specific unenumerated rights protected by the Constitution. The stated concern of the First Congress for the right of conscientious objection suggests that it was among the rights sought to be silently protected by the ninth amendment.

Apart from any of the ancestoral opinions regarding the sanctity of the conscientious objector, there exists the most persuasive modern authority for the proposition that among those rights that are deemed fundamental to civilized man is the freedom of conscience. The Universal Declaration of Human Rights, adopted by the United Nations in 1948, provides:

> Everyone has the right to freedom of thought, *conscience*, and religion; this right includes freedom to change his religion and belief, and freedom, either alone or in community with others, and in public or private to *manifest* his religion or belief in teaching, practice, worship and observance.[110] (emphasis added).

Although this language is somewhat broader than that of the first amendment, it is significant in terms of the ninth. That the United States voted in favor of its adoption of course has no constitutional significance, but rather denotes recognition of fundamental rights of man that extend beyond the pale of the first eight amendments. One may reasonably assume that the intent of the framers when drafting the ninth amendment was to include such rights within the panoply of constitutional protection without the necessity of inclusive delineation.

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[109] 2 Z. CHAFFEE, DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 226 (1963).
[110] UNIVERSAL DECLARATION OF HUMAN RIGHTS § 18.

Inasmuch as the right to be exempted from military service as a conscientious objector is constitutionally protected—by the ninth amendment, the first amendment, or both—for the federal government to legally infringe those rights would demand a demonstration of the most urgent national need. Statistics and previous experience suggest that no such demonstration of urgency can be made. The National Advisory Commission on Selective Service reports that less than .06 percent of the total number of registrants are classified as conscientious objectors,[111] and that neither the war in Vietnam nor the *Seeger* decision have increased the number of registrants seeking the exemption.[112] The Commission further reported that the total number of conscientious objectors has decreased in proportion to the total classifications since the outset of the war.[113] These figures support the proposition that the conscientious objector exemption creates no particular logistical problem to the national security. Moreover, the fact that Congress has consistently granted the exemption is a strong indication that no such problem is anticipated. Nonetheless, the mere *anticipation* of conflict between personal liberty and national defense should be unpersuasive. The delicacy of minority rights requires the particular solicitude of the courts in time of crisis. The paradox of subverting personal freedoms in the name of national defense has never been more eloquently stated than by Chief Justice Warren in *United States v. Robel*:[114]

> [T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit . . . . [T]his concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries our country has taken singular pride in the democratic ideals enshrined in its Constitution . . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.[115]

The Constitutional Requirement of a Trial de Novo

There are many ramifications of placing the exemption of conscientious objectors on constitutional rather than statutory footing. The most significant consideration for the purposes of this discussion is the effect of such a decision upon the present scope of judicial review.[116]

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111 REPORT OF THE NATIONAL ADVISORY COMMISSION ON SELECTIVE SERVICE 136-45 (1967).

112 *Id.*

113 *Id.* *See* L. HERSHEY, 1963 ANNUAL REPORT OF THE DIRECTOR OF SELECTIVE SERVICE 52-55 (1964).

114 389 U.S. 258 (1967).

115 *Id.* at 263-64.

116 The problems of the existing scope of judicial review have been discussed

Crowell v. Benson[117] is strong support for the proposition that if conscientious objection is a constitutional right the federal court must hold a trial de novo when presented with an objector's claim in a criminal prosecution or upon habeas corpus review of induction. Mr. Chief Justice Hughes, writing for the majority of the Court in *Crowell* stated:

> In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. . . .
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> . . . .
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> We think that the essential independence of the exercise of the judicial power of the United States, in the enforcement of *constitutional rights* requires that the federal court should *determine such an issue upon its own record and the facts elicited before it.* (emphasis added).[118]

This language was to a large extent merely a reiteration of an existing principle previously set forth in *Ohio Valley Water Company v. Ben Avon Borough*[119] and *Ng Fung Ho v. White.*[120] As set forth, an independent judicial determination of administrative agency findings was required when constitutional rights were involved. Had the doctrine of *Crowell* not been so widely disparaged since 1932, there would be little doubt that its unequivocal holding would defeat considerations of a narrower scope of review in draft cases involving conscientious objectors. The Supreme Court has never overruled nor diminished the effect of *Crowell,* but inasmuch as the decision sets forth standards for review of administrative action, it has been widely ignored by the lower federal courts. Justice Frankfurter, dissenting in *Estep,* suggested that the review provisions of *Crowel* had long since fallen into disuse.[121] Professor Davis, in his treatise on administrative law, states that the doctrine of *Crowell* and *Ben Avon* has been largely eroded.[122] Alaska Supreme Court in *Keiner v. City of Anchorage*[123] stated that the doctrine of *Ben Avon* no longer possessed any vigor as a principle of constitutional law.

In spite of this considerable opinion to the contrary, more recent opinions suggest that the doctrine of *Crowell v. Benson* is as viable today as it was in 1932. When presented with the determination of constitutional rights the Supreme Court has consistently refused to defer factual

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at notes 55 and related text.

The constitutional status of the conscientious objector presents ramifications which are not part of this discussion, but which should be considered. Selective conscientious objection is admirably treated in Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace,* 54 VA. L. REV. 1355 (1968).

117 285 U.S. 22 (1932).

118 *Id.* at 60, 64.

119 253 U.S. 287, 291 (1920).

120 259 U.S. 276, 285 (1922). *But see* United States v. Ju Toy, 198 U.S. 253 (1905).

121 327 U.S. 114, 142 (1946).

122 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.08 (1958).

123 378 P.2d 406, 409 (Alas. 1963).

determinations to inferior bodies. In *Jacobellis v. Ohio*[124] the Court refused to accept the state court's findings of fact in determining the obscenity of the material in question. The language of the Court is significant:

> Hence we reaffirm the principle that in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected.[125]

The Court then added the following footnote:

> Nor do we think our duty of constitutional adjudication in this area can properly be relaxed by reliance on a 'sufficient evidence' standard of review. *Even in judicial review of administrative agency determinations, questions of 'constitutional fact' have been held to require de novo review.* Ng Fung Ho v. White, 259 U.S. 276, 284-85; Crowell v. Benson, 285 U.S. 22, 54-65. (emphasis added).[126]

The determination of obscenity presents a unique problem to a court upon review because the legal issues cannot be severed from the issues of fact as they can in more typical situations. Lest this distinction might segregate the *Jacobellis* decision from other constitutional issues, *Ker v. California*[127] should aid in placing the *Crowell* doctrine in its proper perspective. Concerned with the fourth amendment limitations upon search and seizure, the Supreme Court stated:

> While this Court does not sit as in *nisi prius* . . . it will, *where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record* so that it can determine for itself whether in the decision as to reasonableness the fundamental — *i.e. constitutional*—criteria established by this Court have been respected. (emphasis added).[128]

This standard of review was also applied to the fifth amendment in *Davis v. State of North Carolina*.[129]

> It is our duty in this case, however, as in all of our prior cases dealing with the question whether a confession was voluntarily given, to examine the entire record and make an independent determination of the ultimate issue of voluntariness.[130]

In the light of the approving citation of *Crowell* in *Jacobellis* and the tacit recognition of its principle in *Ker* and *Davis*, it would be difficult to

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124 378 U.S. 184 (1964).
125 *Id.* at 190.
126 *Id.* at 190 n.6.
127 374 U.S. 23 (1963).
128 *Id.* at 33, 34. *See also* New York Times v. Sullivan, 376 U.S. 254 (1964).
129 384 U.S. 737 (1966).
130 *Id.* at 741-742.

convincingly argue that the doctrine of *Crowell v. Benson* is no longer a viable force in constitutional law. Making a similar observation about *Crowell*, Professor Jaffe has stated:

> [I]t is probably not without significance that, despite many opportunities to do so, the Supreme Court, though it has done a great deal to make the doctrine innocuous in the situations where it could do the most damage, has never expressly overruled it. It is as if the Court had concluded that it would be wise to retain the case in its armory of implements against the day when an exceptional situation might demand its application.[131]

Even if the *Crowell* doctrine had fallen into the state of desuetude suggested by Professor Jaffe, the present status of the Selective Service System, particularly the minimal "due process" afforded conscientious objectors, seems to be the "exceptional situation" which should properly demand the disinterment of the forgotten doctrine.

Apart from all considerations of the doctrine of *Crowell v. Benson* and *Ben Avon*, a trial de novo for conscientious objectors is demanded by fundamental concepts of American democracy. One of the basic reasons underlying the tripartite separation of power is the protection of minority rights from the whims and moods of the electorate. Article III of the Constitution, by guaranteeing that federal judges be insulated from the political process, delegates final responsibility for the protection of individual freedoms to the judiciary. Absent this protection the political process and the will of the majority could quickly sweep away the rights of unpopular minorities in time of national stress. This concept of "majority tyranny" was one of the inherent weaknesses of democracy that the founding fathers attempted to remedy in structuring the American governmental process.[132]

There is perhaps no minority more criticized and abused than the conscientious objector in time of war. For the judiciary to abdicate constitutional responsibility and allow the executive or legislative branch to make the final determination of eligibility for the guaranteed exemption would be to deny what is perhaps the most important function of the judiciary in our system of constitutional democracy. To state the problem most bluntly, the rights of minority groups in any form cannot reasonably be entrusted solely to an elected branch of government with any adequate assurance that they will be respected. Elected officials, by definition, must represent the interests of their constituents. When minority interests conflict with those of the majority, it is the interests of the minority that must yield.

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[131] Jaffe, *Administrative Law: Burden of Proof and Scope of Review*, 79 HARV. L. REV. 914, 918 n.14 (1966). It is interesting to note that Professor Jaffe was quoting himself in the cited statement. The original statement in L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 651 (1965), referred not to *Crowell* but to *Ben Avon*. The "slip" merely points out the similarity of the two doctrines.

[132] *See* THE FEDERALIST Nos. 78-81 (Hamilton).

Congressional Limitation of the Article III Power of the Courts

Before it can be concluded that an expanded scope of judicial review is warranted for conscientious objectors, another complex constitutional issue must be considered. Article III of the Constitution provides that:

> The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .
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> . . . .
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> [T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Congress therefore possesses the constitutional power to limit the appellate jurisdiction of the Supreme Court and is free to establish the lower federal courts with specific limitations upon their jurisdiction. For the purpose of this discussion, it must be determined what limits exist, if any, to this power to limit federal jurisdiction. In addition it must be determined whether Congress has exceeded those limitations in the Military Selective Service Act of 1967.

The Act specifically defines the permissible limits of federal court jurisdiction:

> *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 prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *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. (emphasis added).[133]

Congress has stated that the federal courts shall serve as judges to determine guilt or innocence of defendants accused under the provisions of the Act, and that in so doing they shall take as fact that the defendant was properly classified by the Selective Service System. In the case of a conscientious objector, the finding of fact that he was properly classified is tantamount to the detrmination of guilt. When a conscientious objector finds himself confronted by criminal prosecution for failure to submit to induction, his only defense is that he *is* in fact a conscientious objector. However, under the Military Selective Service Act of 1967 the courts are directed to accept the finding of the Selective Service System that the defendant is *not* in fact a conscientious objector. For all practical purposes, the courts have been directed by Congress to find that the

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[133] Military Selective Service Act of 1967, 50 U.S.C.A. APP. § 460(b)(3) (1968).

defendant is guilty of a crime as charged. May the Congress issue that directive?

In 1850, the Supreme Court in *Sheldon v. Sill*[134] first recognized the power of Congress to control the jurisdiction of the lower federal courts. The Court there suggested that because of the wording of Article III, any statute which set limitations upon the power of the judiciary a fortiori could not be unconstitutional. This concept was destined to undergo substantial revision in later years, however.

In the case of *Ex parte McCardle*[135] the petitioner was being held in custody by the military for trial before a military commission upon charges of libel. The petitioner applied to a circuit court for habeas corpus, basing his application upon the Act of February 5, 1867,[136] which authorized the grant of such writs "in all cases where any person may be restrained of his or her liberty in violation of the Constitution . . . ."[137] After denial of the petition in the circuit court, petitioner appealed directly to the Supreme Court as provided in the same statute. After the case had been argued, but before a decision had been reached by the Court, Congress repealed that portion of the 1867 statute which granted the applicable appellate jurisdiction to the Supreme Court. The Court, in spite of the fact that jurisdiction had already been exercised, acknowledged the power of Congress to withdraw it and dismissed the case.

The effect of *McCardle*, when viewed alone, would appear to grant almost unlimited power to Congress to withdraw jurisdiction from the federal courts. *McCardle*, however, must be read in light of *Ex parte Yerger*[138] in which the Supreme Court, after the *McCardle* decision, granted certiorari in a similar case acknowledging that it lacked the appellate jurisdiction which previously had been granted by the 1867 statute. The effect of *Yerger* then is to seriously diminish the impact of *McCardle* on the power of Congress to limit the jurisdiction of the federal courts. What appeared to be an acknowledgment by the Supreme Court of the power of Congress to withdraw complete jurisdiction was in fact merely the allowance by the Court of the withdrawal of one route to judicial review while leaving an effective alternative unmolested.[139]

United States v. Klein[140] provides additional clarity to the determination of what restrictions exist upon the congressional power to with-

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134 49 U.S. (8 How.) 441 (1850).
135 74 U.S. (7 Wall.) 506 (1869).
136 Ch. 28, §§ 1, 2, 14 Stat. 385.
137 *Id.* at § 1.
138 75 U.S. (8 Wall.) 85 (1869).
139 It should be noted that the validity of *McCardle* was questioned recently in Glidden Co. v. Zdanok, 370 U.S. 530, 605 n.11 (1962) (Douglas and Black J.J., dissenting). Justice Douglas stated: "There is a serious question whether the *McCardle* case could command a majority view today." There is, however, some question whether this statement refers to the withdrawal of Art. IV. jurisdiction or the dismissal of the *McCardle* case *sub judice*.
140 80 U.S. (13 Wall.) 128 (1872).

draw jurisdiction. After the Civil War, in order to recover for the Government's confiscation of goods, it was incumbent upon the claimant to demonstrate that he had not collaborated with the enemy during the war. The Supreme Court had previously declared that a presidential pardon was sufficient evidence to sustain the burden of proof that there had been no collaboration. On this basis the plaintiff obtained judgment in the Court of Claims and the Government appealed. While the appeal was pending, however, Congress passed an act which stated that such a pardon was to be taken as conclusive proof that the petitioner had aided the rebellion. In such cases the Court of Claims was to dismiss for want of jurisdiction. The Supreme Court held the law unconstitutional stating that Congress could not allow the courts to attach jurisdiction in a certain class of cases and then direct how it was to be exercised. The Court stated that in so legislating "Congress has inadvertently passed the limit which separates the legislative from the judicial power."[141]

While *Yerger* indicated in 1872 that there was a line which Congress could not cross in its limitation of federal court jurisdiction, it was not until 1944 that the Supreme Court, in *Yakus v. United States*[142] suggested where the line could be found. The petitioners were convicted by a federal district court for selling beef at prices which exceeded the maximum prescribed by regulations established under the authority of the Emergency Price Control Act.[143] They argued that the regulations were unconstitutional as a deprivation of property without due process of law. The statute provided for attack on the regulations by filing a protest with the Administrator and allowing review of his adverse decision in the Emergency Court of Appeals, composed of federal district and circuit judges. That court was declared to have exclusive jurisdiction to determine the validity of the regulations. The Supreme Court held the jurisdictional limitation constitutional, stating:

> [T]he present statute provides a mode of testing the validity of a regulation by an independent administrative proceeding. There is no constitutional requirement that that test be made in one tribunal rather than in another, *so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process* . . . . (emphasis added).[144]

That there are limits upon congressional power to limit federal jurisdiction was also emphasised by the Second Circuit in *Battaglia v. General Motors Corporation.*[145]

> While Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it may not so exercise that power as to deprive any per-

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141 *Id.* at 147.
142 321 U.S. 414 (1944).
143 Ch. 26, 56 Stat. 23 (1946).
144 321 U.S. at 444.
145 169 F.2d 254 (2d Cir. 1948),

> son of life, liberty, or property without due process of law or to take private property without just compensation.[146]

Despite the vagueness of the limitations, certain conclusions can be reached. Congress cannot limit federal jurisdiction in a manner which would deny "due process" in the adjudication of individual rights. Were Congress to attempt to limit federal jurisdiction to prevent the judicial determination of the basic rights of individuals without providing for acceptable alternatives, the proposed limitation would have to fall as violative of Art. III and the fifth amendment. Precisely such a situation is presented by the congressional limitation upon jurisdiction set forth in the Military Selective Service Act of 1967. Congress in effect has denied the federal courts the jurisdiction to determine whether a defendant is in fact a conscientious objector and therefore entitled to constitutional exemption from military service. Moreover, Congress has failed to provide an adequate system to replace the role of the federal judiciary in this constitutional determination.[147] Had Congress offered some more viable alternative to the withdrawl of jurisdiction, the constitutional objections would be less persuasive, but the essentials of fairness have yielded to efficiency within the system — thus sacrificing the rights of the individual registrant. Recently in *Oestereich v. Selective Service System*,[148] Justice Harlan, commenting upon the procedural difficulties inherent in the present system, noted:

> It is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent *fully* to adjudicate his claims.[149] (emphasis added).

Without fear of exaggerating, one may confidently state that the Selective Service System does not represent a "tribunal competent fully to adjudicate claims."

The Ramifications of an Expanded Scope of Judicial Review

Before it can be determined that the constitutional right to be exempted from military service as a conscientious objector need not yield to the war power, the effect of an expanded judicial review of the classification proceedings must be examined.

In *Clark v. Gabriel*[150] the Supreme Court recently entertained a challenge to section 10(b)(3) of the Military Selective Service Act of 1967 on the ground that the Act's preclusion of preinduction review of classifi-

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146 *Id.* at 257. *See also* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 312 (1953), for an excellent analysis of the conceptual problem involved in the withdrawal of jurisdiction.

147 See the discussion of the inadequacies of the Selective Service System's methods of fact determination and review at notes 20 to 54 and related text *supra*.

148 89 S. Ct. 414 (1968).

149 *Id.* at 419 n.6.

150 89 S. Ct. 424 (1968).

cations rendered the act unconstitutional as applied to conscientious objectors. In a per curiam opinion the Court stated:

> To allow preinduction judicial review of such determinations would be to permit precisely the kind of 'litigious interruptions of procedures to provide necessary military manpower . . . which Congress sought to prevent when it enacted § 10(b)(3).
>
> We find no constitutional objection to Congress' thus requiring that assertion of a conscientious objector's claims such as those advanced by appellee be deferred until after induction, if that is the course he chooses, whereupon habeas corpus would be an available remedy, or until defense of the criminal prosecution which would follow should he press his objections to his classification to the point of refusing to submit to induction.[151]

If every registrant could have his induction delayed by the amount of time that it would take for a judicial determination of his status, the power to conscript an army in time of national crisis could indeed be substantially impaired. However, this result does not necessarily follow from an expanded scope of review. Review should be available only to those registrants who have applied for and been denied administrative classification as conscientious objectors, and who have exhausted their available administrative remedies. The existing requirements for exhaustion of remedies need not be modified. Judicial review of classification would then be available only in the manner that it is available today, either as a defense to a criminal prosecution or by way of habeas corpus after induction. In either case the only additional delay that would be available to the registrant who might seek judicial review as a method postponing induction would be the length of the trial, which should be minimal. Admittedly some challenges might be made that would otherwise have been forgone, but the additional expenditure of time does not seem too great a price to pay for the integrity of the system of conscription.

Conclusion

The exemption from military service of conscientious objectors is a constitutionally protected freedom that can be subverted only in the face of a substantial countervailing national interest. Absent a showing that the power of Congress to raise an army would be substantially impaired by the recognition of this constitutional right, it could not be subjugated by the war power. The traditional recognition by Congress of the exemption is persuasive authority for the proposition that there is no such conflict of national interest.

Where constitutional rights are being determined by an administrative agency the constitutional basis of government demands there also be

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[151] *Id.* at 426.

procedural safeguards which insure the registrant due process of law. The present Selective Service System provides no such safeguards, but the demand may be met in at least two ways: a trial *de novo* as prescribed in *Crowell v. Benson*, or a substantially expanded form of review.

That the Court is concerned here only with the personal freedoms of a very small minority may perhaps make the judicial determination of their rights seem insignificant in light of the prodigious problems which constantly face that august tribunal. But here numbers should play no part in the ultimate decision of whether to act or to abstain. Should the Court fail to respond to a single case in which the rights of a single individual were unconstitutionally threatened by an act of Congress, the personal freedoms of each of us would somehow stand less secure.