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Military Service—Judicial Review of Draft Classification

A Pennsylvania Quaker named Palmer was a member of a religious study group in California when he became subject to the Selective Service Act of 1948.¹ He wrote his California local board that his religious opposition to war was so total that he could not with conscience submit himself to military jurisdiction—not even to the extent of registering with the civilian selective service authorities.² Nothing happened. Upon returning to Pennsylvania in 1950, Palmer wrote the California board of his change of address; he also wrote his local board in Pennsylvania of his presence there, stating his views on refusal to register.³ Shortly afterward, the Pennsylvania local board wrote Palmer to come to discuss the matter. He replied that he was aware of a regulation permitting him to be registered on the basis of information gained from an interview, without his signing the registration form;⁴ therefore he declined to be interviewed. As a result, Palmer was convicted of the crime of refusal to register, and served a year and a day in federal prison.

Under a regulation making prison wardens draft registrars of inmates never previously registered,⁵ Palmer was registered against his will the day he left prison and the form was forwarded to his Pennsylvania board.⁶ The board sent Palmer in December, 1951, the standard classi-

¹ 62 STAT. 604 (1948) (later amended by 65 STAT. 75 (1951), 50 U. S. C. APP. §§ 451-73 (1952), as amended, 50 U. S. C. A. APP. §§ 454, 454a, 454c-54e, 456, 459, 467 (Supp. August 1955)). The 1951 amendment changed the name of the act to Universal Military Training and Service Act.

² The Society of Friends has made the following statements as a result of official meetings: "We believe that every young man who, under a sense of religious compulsion, feels that he must refuse to comply with the Draft Law, at any point, should follow the supreme authority of his inner guide." Also: "... Friends are urged . . . to support Young Friends and others who express their opposition to conscription either by non-registration, or by registration as conscientious objectors Nevertheless, we hold in respect and sympathetic understanding all those men who in good conscience choose to enter the armed forces." *United States v. Palmer*, 122 F. Supp. 938, 941, n. 7 (E. D. Pa. 1954). Cf. *Gara v. United States*, 178 F. 2d 38 (6th Cir. 1949), *aff'd by an equally divided court* 340 U. S. 857, *rehearing denied* 340 U. S. 893 (1950) (defendant was convicted of knowingly counseling and aiding and abetting another to refuse or evade registration).

³ Palmer wrote that he was "a Quaker and a Christian pacifist." "[I] feel that I should inform you of my presence in the area of your jurisdiction, in case any inquiries should be made on my case, or any action is desired to be taken against me." *United States v. Palmer*, 223 F. 2d 893, 903 (3d Cir. 1955) (appendix to opinions).

⁴ 32 C. F. R. § 1613.13 (c) (1954).

⁵ 32 C. F. R. §§ 1611.6, 1613.41 (a) (1954).

⁶ 32 C. F. R. § 1613.41 (d) (1954). In the light of § 1642.31, however, it would seem §§ 1611.6 and 1613.41 were primarily intended to apply to those who were in prison when they first became subject to registration. Section 1642.31 provides for more than mere registration; it requires also the filling out of all forms (including the special one for conscientious objectors) and permits a physical examination to be given. This is to be done when the prisoner is *first* taken into custody. If a man will not sign the forms, the warden may sign for him. Had this procedure been followed, Palmer might have been spared later grief. *But see* § 1642.3 (compliance with any or all the procedures of Part 1642 not a condition precedent to prosecution).

fication questionnaire,⁷ which was forwarded from his home address to him in Oberlin, Ohio, where he was a student in the Graduate School of Theology of Oberlin College. The next day after receiving the questionnaire, Palmer returned it unexecuted but with an accompanying letter informing the board of his student status. He said in the letter that his refusal to execute the questionnaire was but a continuation of his prior refusal to register;⁸ that he was sorry to hamper the board members in doing what they conceived to be their duty.⁹ Since one of the items on the questionnaire concerned religious beliefs, he also enclosed a lengthy "court statement" that he had made during his trial for refusal to register concerning the exact nature of his religious beliefs. Two days after Palmer mailed this letter, the Dean of the Graduate School of Theology at Oberlin wrote the local board to clarify Palmer's selective service status.¹⁰ The Dean said that Palmer was a first year student who had entered the school on a competitive scholarship, and that he was taking a full time regular course.¹¹

In January, 1952, the board ordered Palmer to report on February 15 for a pre-induction physical examination. On February 12, however, the board on its own motion sent him the special classification form for conscientious objectors.¹² Yet on February 14, without waiting for the return of the new form or to see if he would report for the physical examination, the board classified Palmer I-A.¹³ He did not, of course, report for the examination; instead, that day he mailed to the board his conscientious objector questionnaire unexecuted but with another accompanying letter. The letter answered substantially every item of

⁷ SSS Form No. 100. See 32 C. F. R. § 1621.9 (1954).

⁸ *United States v. Palmer*, 223 F. 2d 893, 895, 897 (3d Cir. 1955) (both majority and dissent agreed that failure to register and failure to report for induction were separate crimes).

⁹ *Id.* at 904 (appendix to opinions): "Please understand that this was not, and is not, intended personally, that I sympathize with your desire to follow the regulations which you are set up to enforce. I do not intend by my actions any criticism whatever of you in your position."

¹⁰ 32 C. F. R. § 1621.12 (b) (1954): "Any person other than the registrant may request the deferment of a registrant by filing such request in writing with the local board together with any information in support of his request. . . ." This section is probably not applicable, however, because the Dean did not label his letter as a request. *But cf.* *United States v. Vincelli*, 215 F. 2d 210, *rehearing denied* 216 F. 2d 681 (2d Cir. 1954) (board should have known from context of letter that "appeal" meant request that classification be re-opened rather than an actual appeal).

¹¹ 62 STAT. 611 (1948), as amended, 50 U. S. C. APP. § 456 (g) (1952), grants full time students in recognized theological schools a full exemption from training and service.

¹² SSS Form No. 150. See 32 C. F. R. § 1621.11 (1954).

¹³ 32 C. F. R. § 1622.1 (c) (1954): ". . . registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established . . ." Section 1623.1 (b): ". . . and in the absence of any other information, when the registrant has failed to furnish such information within the time prescribed, [board has the power] to classify the registrant as available for military service."

information required on the official form,¹⁴ referring to the "court statement" previously submitted as containing the necessary detailed statement of his religious concepts.¹⁵

In April he was again ordered to report for a physical examination; the order was ignored. In May he was ordered to report for induction into the armed services; Palmer failed to report. Except for copies of the board's letters and orders to Palmer and correspondence between the board and the Department of Justice concerning Palmer's prior criminal status, the above mentioned letters and the registration form completed by the prison warden¹⁶ comprised the only information in his selective service file.¹⁷

The Department of Justice indicted Palmer for refusal to submit to induction¹⁸ in compliance with the May order. The district court convicted; on appeal, the court of appeals sitting *en banc* affirmed¹⁹ the conviction in a four-to-three decision.²⁰ The United States Supreme Court denied Palmer's petition for a writ of certiorari.²¹

Before discussing the reasoning of the opinions in this case, it is helpful to investigate some of the legal background having a bearing on the decisions reached. World War I draft cases established that no one has any constitutional right to exemption from the draft.²² Exemptions, whether for public officials, factory workers, ministers of religion, or conscientious objectors, are purely a matter of legislative grace. As a practical matter, exemptions have always been granted certain classes; nevertheless Congress may exempt or refuse to exempt

¹⁴ United States v. Palmer, 122 F. Supp. 938, 939 (E. D. Pa. 1954).

¹⁵ See *Witmer v. United States*, 348 U. S. 375, 378 (1955).

¹⁶ See 32 C. F. R. § 1613.41 (b) (1954): "... warden . . . shall be careful not to indicate that the inmate was registered in an institution or by an official thereof. . . ."

¹⁷ 32 C. F. R. § 1623.1 (b) (1954): "The registrant's classification shall be determined solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file; . . . oral information shall not be considered unless it is summarized in writing and the summary placed in the registrant's file. . . ."

¹⁸ 62 STAT. 622 (1948), 50 U. S. C. APP. § 462 (a) (1952).

¹⁹ United States v. Palmer, 223 F. 2d 893 (3d Cir. 1955), *affirming* 122 F. Supp. 938 (E. D. Pa. 1954).

²⁰ The majority opinion was written by Goodrich, Circuit Judge, in which concurred Biggs, Chief Judge, and Kalodner and Staley, Circuit Judges. The dissenting opinion was written by Maris, Circuit Judge, in which concurred McLaughlin and Hastie, Circuit Judges.

²¹ Palmer v. United States, 350 U. S. 873 (1955).

²² Selective Draft Law Cases, 245 U. S. 366 (1918). No cases testing the constitutionality of conscription reached the U. S. Supreme Court during the Civil War. Lincoln, speaking of the express constitutional power to raise and support armies, said this: "The power is given fully, completely, unconditionally. It is not a power to raise armies if State authorities consent; nor if the men to compose the armies are entirely willing; but it is a power to raise and support armies given to Congress by the Constitution without an if." *George v. United States*, 196 F. 2d 445, 455, n. 3 (9th Cir.), *cert. denied* 344 U. S. 843 (1952).

whomever it chooses.²³ Congress sold exemptions for three hundred dollars during the Civil War.²⁴ As early as colonial times legislatures have exempted conscientious objectors from service in the militia.²⁵ Yet Congress later could validly require civilian or non-combatant military service from the conscientious objector rather than grant a complete exemption.²⁶

Congress may also foreclose judicial review of any draft classification.²⁷ The current Universal Military Training and Service Act, like the acts of 1917 and 1940, makes classification by the local board "final," subject to appeal within the selective service system; and where there is an appeal, the classification resulting from this is "final" too.²⁸ The object of Congress in providing for this administrative finality is to prevent any court action from impeding swift and steady conscription during wartime or any time of emergency.²⁹ This object is legitimate under the war powers of the Constitution of the United States; with the power existing, it may be exercised in peacetime in contemplation of any future emergency.³⁰

Nevertheless, the federal courts have not completely given up their power to aid draft registrants deprived of substantial due process by the selective service authorities. The Selective Draft Act of 1917³¹ was construed to allow federal courts to review by writ of habeas corpus the draft status of those who claimed that they had been illegally drafted. The theory used was analogous to that employed by the courts in granting habeas corpus writs to aliens under deportation orders and to military prisoners whose court martial had lacked jurisdiction.³² Under the 1917 Act the registrant became subject to military law immediately upon receiving his notice to report; failure to report was the offense of

²³ *United States v. Sugar*, 243 Fed. 423, 429-30 (E. D. Mich. 1917) (exemption of certain classes from military service does not make conscription laws invalid as class legislation).

²⁴ Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH. L. REV. 409, 418 (1952).

²⁵ Russell, *supra* note 24, at 412-14. The conscientious objector, however, often had to provide a substitute or pay a commutation fee.

²⁶ The 1863-64 Act provided for either noncombatant service or payment of the commutation fee; the 1917 Act provided for noncombatant service; the 1940 Act provided for either noncombatant service or civilian work of national importance; the 1948 Act (during peacetime) granted complete exemption, but the 1951 amendment substantially restored the provisions of the 1940 Act. Russell, *supra* note 24, at 418-28.

²⁷ *Cf. Yakus v. United States*, 321 U. S. 414 (1944).

²⁸ 62 STAT. 620 (1948), as amended 50 U. S. C. APP. § 460 (b) (3) (1952).

²⁹ *Falbo v. United States*, 320 U. S. 549 (1944).

³⁰ *United States v. Henderson*, 180 F. 2d 711 (7th Cir.), *cert. denied* 339 U. S. 963, *rehearing denied* 340 U. S. 846 (1950).

³¹ 40 STAT. 76 (1917).

³² See *United States ex rel. Toth v. Quarles*, 350 U. S. 11 (1955); *cf. Shaughnessy v. Pedreiro*, 349 U. S. 48 (1955); *Davis, Unreviewable Administrative Action*, 15 F. R. D. 411, 433-39 (1954).

desertion, to be tried before a military court.³³ Although the temper of the times had infected even the judiciary to the extent that it was generally futile to ask for a writ of habeas corpus, the registrant was able to do so immediately upon being subjected to military jurisdiction by receipt of the notice to report.³⁴

The Selective Service and Training Act of 1940³⁵ changed procedure, however. Military jurisdiction did not attach until the actual induction.³⁶ Failure to report for or submit to induction was made a felony to be tried in the federal courts. The first cases, though, tended to apply the World War I precedents; it was generally held no defense to this newly created crime that the classification and resulting induction order may have been issued contrary to the regulations.³⁷ Congress had said the classification by the selective service authorities was final, and the courts interpreted this to mean that the registrant must first be inducted and then ask for a writ of habeas corpus before any sort of judicial review was possible.³⁸

The United States Supreme Court did not treat the issue of invalidity of classification and the resultant induction order raised as a defense in the criminal trial until 1944 in *Falbo v. United States*.³⁹ Falbo contended that as a Jehovah's Witness he was a minister; he disputed his classification as a conscientious objector, and refused to report to the civilian public service camp to do work of national importance. At the time Falbo was ordered to report, he *might* have been rejected either at a military induction center or at a work camp as the result of his physical examination; the order to report was not the last possible step in the draft process. Stress was laid upon the "connected series of steps"⁴⁰ contemplated by the statute which was not to be broken by any

³³ *Franke v. Murray*, 248 Fed. 865 (8th Cir. 1918). The 1917 Act said those lawfully classified became subject to military jurisdiction upon receipt of the draft notice. The court did not investigate the merits of the classification; the only question was whether the military had gained jurisdiction through lawful classification procedure on the part of the draft authorities.

³⁴ See *Billings v. Truesdell*, 321 U. S. 542, 546 (1944); *United States ex rel. Feld v. Bullard*, 290 Fed. 704 (2d Cir. 1923) (notice language in the latter case at page 710 as to "waiver" resulting from failure to claim exemption).

³⁵ 54 STAT. 885 (1940).

³⁶ *Billings v. Truesdell*, 321 U. S. 542 (1944).

³⁷ See *Ex parte Catanzaro*, 138 F. 2d 100 (3d Cir. 1943) *cert. denied* 321 U. S. 793 (1944).

³⁸ See *Billings v. Truesdell*, 321 U. S. 542 (1944) (registrant at induction center refused to take oath; oath was read to him; *held*, the military did not acquire jurisdiction). *But see Russell*, *supra* note 24, at 424, n. 65, saying regulations were changed shortly after this case to circumvent that result. *Quaere* whether voluntary submission to induction would be a waiver of the right to challenge the validity of the draft classification; *cf. Gibson v. United States*, 329 U. S. 338 (1946) (involved reporting to civilian camp rather than military center and the Government claimed waiver).

³⁹ 320 U. S. 549 (1944).

⁴⁰ *Falbo v. United States*, 320 U. S. 549, 553 (1944).

"litigious interruption";⁴¹ there was to be no "judicial intervention before final acceptance"⁴² of the registrant. The Court said that even if the defense of invalidity were admissible, Falbo's refusal to obey had been premature and was a failure to exhaust his administrative remedies. The case did not specify how far the registrant would have to go to exhaust his remedies. However, this case was universally interpreted by the lower federal courts as holding that the registrant would have to go at least as far as submitting to induction and that the only possible judicial review of a draft classification could be by writ of habeas corpus after induction.⁴³

Then in 1946, the war being over, *Estep v. United States*⁴⁴ announced a doctrine permitting review of the draft classification upon the felony trial. Mentioning that the defendants had pursued their administrative remedies to the point of going to the induction center (but refusing to be sworn in), the Court held that it was proper to consider whether the local board had had jurisdiction in the premises.⁴⁵ Saying that the writ of habeas corpus would be available to the defendant in jail after conviction because of the invalidity of all subsequent proceedings stemming from an invalid classification, the majority thought it would be foolish to put a man in jail one day only to have to let him out the next.⁴⁶ The test announced was this: "The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."⁴⁷

Subsequent cases have refined the rule permitting this limited judicial review. When the regulations were changed to provide for pre-induction physical examinations, the Court found it was no longer necessary to report to the induction center to exhaust administrative remedies.⁴⁸

⁴¹ Falbo v. United States, 320 U. S. 549, 554 (1944).

⁴² *Id.* at 554.

⁴³ United States v. Flakowicz, 146 F. 2d 874 (2d Cir.), cert. denied 325 U. S. 851 (1945); Rinko v. United States, 147 F. 2d 1 (7th Cir.), cert. denied 325 U. S. 851, rehearing denied 325 U. S. 894 (1945); cf. Sunal v. Large, 332 U. S. 174 (1947); Gibson v. United States, 329 U. S. 338 (1946).

⁴⁴ 327 U. S. 114 (1946).

⁴⁵ The Court said that *Falbo v. United States*, *supra* note 39, had been construed to mean more than it had actually held.

⁴⁶ *But see* Sunal v. Large, 332 U. S. 174 (1947) (defendants who had exhausted their administrative remedies and were convicted under the "erroneous" view of *Falbo v. United States*, *supra* note 39, yet were denied habeas corpus because they had not appealed—despite the fact that an appeal seemed absolutely futile at the time).

⁴⁷ *Estep v. United States*, 327 U. S. 114, 122-23 (1946). This "basis in fact" test of jurisdiction seems broader than that applied in some of the wartime habeas corpus cases, which did not review facts but merely looked to see if procedural opportunity to a hearing had been afforded the registrant. Moreover the registrant carries a greater burden of proof in the habeas corpus proceedings; since *Estep v. United States*, *supra*, the remedy has been little used. See Tietz, *Jehovah's Witnesses: Conscientious Objectors*, 28 So. CALIF. L. REV. 123, 134 (1955).

⁴⁸ Gibson v. United States, 329 U. S. 338 (1946).

The Court soon held that whether or not the local board had any "basis in fact" for making the classification was a matter of law for the judge, rather than a jury, to determine.⁴⁹ In reviewing the classification, the court may not review additional evidence not considered by the local board and made part of the registrant's file.⁵⁰ But where all the evidence in the file supports the registrant's claim, the board may not deny the classification "solely on the basis of suspicion and speculation";⁵¹ the board must have affirmative evidence in the file showing why it disbelieves the claim.⁵² The more recent cases have stressed procedural due process, requiring local boards and appeal boards to give the registrant notice of any adverse information so that he may rebut it.⁵³ Where a local board failed to notify the registrant that it had declined to re-open his classification as requested and kept him in the same category, it was held that this deprived him of procedural rights.⁵⁴ And the "basis in fact" test has been broadened to the extent that convictions have been reversed where, even though the board may have had some factual basis

⁴⁹ *Cox v. United States*, 332 U. S. 442 (1947). But even where the court finds some basis in fact for the classification, the jury may determine whether the board had acted arbitrarily or capriciously. *Imboden v. United States*, 194 F. 2d 508 (6th Cir.), *cert. denied* 343 U. S. 957 (1952).

⁵⁰ *Cox v. United States*, 332 U. S. 442 (1947).

⁵¹ *Dickinson v. United States*, 346 U. S. 389, 397 (1953).

⁵² *Dickinson v. United States*, 346 U. S. 389 (1953). The board here was determining the "objective fact" whether or not the registrant was a regular or duly ordained minister. Conscientious objection, however, is a matter of personal belief and the board's decision necessarily rests in part upon the appearance and conduct of the registrant and the credibility of his claim—whether contradicted or not. Because of this personal element, the appeal procedure for a conscientious objector is different from that for all others, with an F. B. I. report being a standard feature. The courts, though, seem to require the affirmative evidence in conscientious objector cases as well as any others, perhaps mainly so that the courts will have a written record to review. *Weaver v. United States*, 210 F. 2d 815 (8th Cir. 1954). *But see* *Campbell v. United States*, 221 F. 2d 454 (4th Cir. 1955) (relying in part on *United States v. Simmons*, 213 F. 2d 901 (7th Cir. 1954), *rev'd on other grounds* 348 U. S. 397 (1955)). It has been suggested the board might satisfy the affirmative evidence requirement merely by indicating in the file its unfavorable reaction to the registrant's behavior or demeanor or to certain inconsistencies of the evidence supporting his claim. *Witmer v. United States*, 348 U. S. 375, 382 (1955); *United States v. Hagaman*, 213 F. 2d 86, 89 (3d Cir. 1954).

⁵³ *Gonzales v. United States*, 348 U. S. 407 (1955); *Simmons v. United States*, 348 U. S. 397 (1955); *United States v. Nugent*, 346 U. S. 1 (1953) (registrant had no right to see the adverse information contained in confidential F. B. I. reports, but that he did have the right to a "fair résumé"). Problems have arisen as to whether the résumé given was a fair one; thus one court ordered the report into evidence (with names deleted) for the purpose of comparison. *United States v. Stasevic*, 117 F. Supp. 371 (S. D. N. Y. 1953), *rev'd on other grounds sub nom* *United States v. Vincelli*, 215 F. 2d 210, *rehearing denied* 216 F. 2d 681 (2d Cir. 1954).

⁵⁴ *United States v. Vincelli*, 215 F. 2d 210, *rehearing denied* 216 F. 2d 681 (2d Cir. 1954) (there was strong basis in fact for disbelieving the claim, but the procedural error was held to warrant acquittal). *But cf.* *Campbell v. United States*, 221 F. 2d 454, 458 (4th Cir. 1955) (held board was justified in refusing to re-open classification under parallel regulation).

for denying the claim, it appeared the selective service authorities acted upon mistaken assumptions of law.⁵⁵

It would seem clear that the courts have greatly relaxed much of the former strictness shown in reviewing draft classifications.⁵⁶ Nevertheless there are still only two ways in which the registrant may obtain this judicial review: (1) submit to induction and apply for a writ of habeas corpus; (2) refuse to submit and raise the defense of invalid classification in the felony trial.

In the principal case of *United States v. Palmer*,⁵⁷ the four-to-three split of opinion emphasizes the growing inclination of the courts to broaden the scope of their review. The dissenting opinion could cite no holdings really in point, but relied upon tendencies found in series of cases or upon analogous decisions.⁵⁸ The majority did cite a case which had bare facts more or less similar to those here, but there was at least a vast psychological difference between the two cases.⁵⁹

The majority thought that it seemed somewhat strange to talk of exhausting administrative remedies since Palmer had not availed himself of any at all, and expressly affirmed the conviction upon policy grounds reminiscent of the *Falbo* decision. (The district court had held the exhaustion of remedies the controlling factor.) Whether the local board's classification was arbitrary or illegal was an issue not reached under this disposition. Instead, the majority spoke of the vital importance of a procedure for the efficient and orderly conscription of millions of men, and that no one man may set himself above the necessary and reasonable procedures of the selective service system.⁶⁰

⁵⁵ *Annett v. United States*, 205 F. 2d 689 (10th Cir. 1953); cf. *Sicurella v. United States*, 348 U. S. 385 (1955) (selective service authorities thought as a matter of law a member of the Jehovah's Witnesses could not be a conscientious objector because of their belief in self defense and "theocratic wars"; held: Congress had meant present day wars fought with real bullets).

⁵⁶ *Shiple, Conscientious Objection: A Problem of Proof*, 25 OKLA. B. A. J. 1596 (1954).

⁵⁷ 223 F. 2d 893 (3d Cir. 1955), affirming 122 F. Supp. 938 (E. D. Pa. 1954), cert. denied 350 U. S. 873 (1955).

⁵⁸ See *Ex parte Fabiani*, 105 F. Supp. 139 (E. D. Pa. 1952) (registrant was permitted judicial review by writ of habeas corpus although under no restraint; "constructive custody" theory applied).

⁵⁹ *Doty v. United States*, 218 F. 2d 93 (8th Cir. 1955). Doty and his three brothers were convicted of refusal to register; out of prison on parole, the Doty brothers ignored the correspondence from the local board. Doty wrote the board only once, saying they were "not subject to whims of the local board" since they were on parole. Doty's form filled out by the warden gave his occupation as "rail"—meaning locomotive fireman. Shortly before Doty reached his 26th birthday, the board deferred him as a "locomotive engineer." The granting of this temporary deferment rendered Doty subject to the draft for nine more years, until the age of 35. Doty claimed the board was "acting out of pique." The board then classified Doty and his brothers all I-A and ordered them to submit to induction. In affirming the conviction, the court mentioned, among other things, that the Doty brothers had failed to exhaust their administrative remedies.

⁶⁰ "There were on June 30, 1954, about fifteen and a half million young men registered . . . [with] boards . . . composed of citizens only some of whom are

The dissenting judges thought the affirming of the conviction exalted form above substance, pointing out that Palmer did in fact supply the board with enough information to have received one of several classifications lower than I-A.⁶¹ Since he was a ministerial student, he would have been properly placed in Class IV-D (complete exemption)⁶² or Class I-S (student deferment until end of academic year).⁶³ Since he had served more than a year in prison, the board could, in its discretion, have placed him in Class IV-F (complete deferment; physically, mentally, or morally unfit).⁶⁴ Since he was a complete conscientious objector, he could have been placed in Class I-O (available for civilian work contributing to the maintenance of the national health, safety or interest)⁶⁵ or, failing that, Class I-A-O (induction into the military service as a noncombatant).⁶⁶

The dissenting opinion indicated that the classification by the local board was positively illegal, since the regulations required the board in classifying to "receive and consider"⁶⁷ all pertinent information submitted—both that on the official forms and "other written information"⁶⁸ in the file. The dissent thought that the exclusion of remedies doctrine

lawyers and all of whom serve without pay It . . . demands a high degree of co-operation from everyone involved No man has a constitutional right to be free from a call to military service. . . . However, a sympathetic Congress, desirous to afford a maximum of freedom of conscience, has provided for [exemptions and deferments]. It has also provided for a rather elaborate machinery for appeal If rules must be laid down for the handling of court business, as they are, and the proceedings of administrative bodies, as they are, there is even greater reason for the establishment of orderly procedure with nearly four thousand volunteer boards handling the cases of more than fifteen million young men. . . . It would only be a step further for this or some other young man to say that he is so much against war that he will not pay taxes to a government which spends the majority of its income to maintain a military establishment. It is only one step further . . . to say . . . that he feels no moral obligation to obey anything [the government] says. . . . In other words, he wants this department of the government run his way. . . . We do not say for a moment that this defendant is like the rat-like characters who so often come into criminal courts. He may be the prophet of a new day or he may be more dangerous than some of the rat-like characters because his type of refusal to co-operate, if sufficiently widespread, would make organized society impossible." *United States v. Palmer*, 223 F. 2d 893, 895-97 (3d Cir. 1955); *cf. Hamilton v. Regents of the University of Cal.*, 293 U. S. 245, 265-68 (1934) (concurring opinion of Cardozo, J.).

⁶¹ A person with grounds for more than one classification is to be placed in the lowest one. 32 C. F. R. § 1623.2 (1954).

⁶² 32 C. F. R. § 1622.43 (a) (3) (1954).

⁶³ 32 C. F. R. § 1622.15 (b) (1954). Palmer was ordered to report May 20, 1952; this was shortly before the end of his academic year.

⁶⁴ 32 C. F. R. § 1622.44 (c) (1954). But it would be strange to say that one of Palmer's moral fibre is morally unfit because of the prison sentence.

⁶⁵ 32 C. F. R. § 1622.14 (1954).

⁶⁶ 32 C. F. R. § 1622.11 (1954). But it is hardly likely that Palmer would have submitted to noncombatant service—or even civilian service under the aegis of the selective service.

⁶⁷ 32 C. F. R. § 1622.1 (c) (1954).

⁶⁸ 32 C. F. R. § 1623.1 (b) (1954). *But see* § 1621.12 (a) (anyone asking for a deferment must present written information to be "included in or attached to" the official form).

should be relaxed in hardship cases, but did not really apply here. In support of this thesis, it pointed out that in the *Falbo* case the language as to the exhaustion doctrine had been applied to the situation where further possible remedies were open to the registrant at the time the order had been disobeyed.⁶⁹ Yet by the time Palmer refused to obey the order the classification had become final and unappealable within the selective service system, thereby making Palmer's case ripe for judicial review.⁷⁰

Both the majority and dissent in the principal case are persuasive.⁷¹ They illuminate problems of construing the Universal Military Training and Service Act⁷² that will continue to perplex the courts. Congress adopted the basic act in 1948 during peacetime, retaining substantially the same language as that in the 1940 Act as to the finality of classification by the draft authorities. The legislative history shows this was expressly done so that the *Falbo* and *Estep* doctrines of limited court review would continue to apply.⁷³

The 1951 amendments, enacted during the Korean War, changed the name of the act from "selective" to "universal"; also, conscientious objectors were deprived of the complete exemption granted in 1948 and the "work or fight" provision was restored.⁷⁴ On the basis of legislative intent it might seem that Congress meant for courts to interfere only to a very limited extent with the selective service machinery—machinery to be kept in readiness for high speed functioning without any clogs or obstructions. Although the 1951 amendments did not change the language relating to administrative finality, at that time *Falbo* and *Estep* were still substantially unmodified.⁷⁵ It was only later that the crop of Korean War cases began reaching the appellate level with the result that inroads were made upon the original strict doctrine.⁷⁶

Viewed as a matter of policy, apart from any assumed Congressional

⁶⁹ But the language used by the Court there and in succeeding decisions was broad enough (and often harsh enough) to include a case of this type.

⁷⁰ 32 C. F. R. § 1641.2 (b) (1954) (waiver of rights not exercised). The limited right of appeal for special reasons after the expiration of the time limit exists only until the order to report for induction is mailed. 32 C. F. R. § 1626.2 (d) (1954). The same is true of the right to request that the classification be re-opened. 32 C. F. R. § 1625.2 (Supp. 1955).

⁷¹ It should be repeated that the majority opinion did not affirm on the technical basis of the exhaustion of remedies rule but rather for pure policy reasons. The dissent, on the other hand, used "legal" reasoning in determining that Palmer should not have been convicted.

⁷² 62 STAT. 604 (1948), as amended, 50 U. S. C. APP. §§ 451-73 (1952), as amended, 50 U. S. C. A. APP. §§ 454, 454a, 454c-54e, 456, 459, 467 (Supp. August 1955).

⁷³ S. REP. NO. 1268, 80th Cong., 2d Sess. 2008 (1948).

⁷⁴ 65 STAT. 86 (1951), 50 U. S. C. APP. § 456 (j) (1952).

⁷⁵ *E.g.*, *Dickinson v. United States*, 346 U. S. 389 (1953) (note date; settled that boards must "build" a record for review).

⁷⁶ For example, the principal case was not finally decided until 1955, although Palmer's refusal to report was in May, 1952.

intent,⁷⁷ there would seem to be some need for court review on an expanded basis. Court opinions are carefully read in the Department of Justice, which plays a major part in the draft process.⁷⁸ This unquestionably has had the effect of reducing arbitrary decisions and potential administrative tyranny.⁷⁹ Even under emergency conditions the concept of certain minimum standards of due process and fair dealing, for the nonconformist as well as the conformist, forms a part of our tradition of liberty.⁸⁰

LEWIS POINDEXTER WATTS, JR.

Operation of Pathological and X-Ray Facilities by Charitable Hospital as Corporate Practice of Medicine

A decision¹ of national significance was recently handed down by the district court of Iowa in an action involving the right of 170 hospitals, which comprise plaintiff—Iowa Hospital Association, to continue to operate pathology and X-ray laboratories and collect for these services from patients.² The court ruled that the hospitals, in purveying these services to patients, were illegally engaged in the practice of medicine.

⁷⁷ 62 STAT. 620 (1948), as amended 50 U. S. C. APP. § 460 (b) (3) (1952), has not been changed insofar as it relates to administrative finality; yet Congress has amended or added several sections to the act, e.g., 1955 Amendments to the Universal Military Training and Service Act, Act of June 30, 1955, c. 250, 69 STAT. 223 (codified in scattered sections of 50 U. S. C. APP.). Note also 69 STAT. 602 (1955), 50 U. S. C. A. APP. §§ 454 (d) (3), 456 (c) (2), (d) (1)-(2) (Supp. August 1955).

⁷⁸ Shipley, *Conscientious Objection—A Legal Right*, 13 FED. B. J. 282, 286 (1953) (Mr. Shipley is listed as a Special Assistant to the Attorney General of the United States).

⁷⁹ Cf. *United States v. Hagaman*, 312 F. 2d 86, 89 (3d Cir. 1954): "[I]n recent months Courts of Appeals have had to consider a whole series of rather similar cases where unexplained orders of the national board changing the classification of Jehovah's Witnesses from 1-0 to 1-A make sense only if they represent a consistent administrative application of this understandable, if mistaken, legal theory [that Jehovah's Witnesses are as a matter of law not conscientious objectors because of their belief in 'theocratic war']. See note 55 *supra*."

Tietz, *Jehovah's Witnesses: Conscientious Objectors*, 28 So. CALIF. L. REV. 123, 135-36 & nn. 38-39 (1955), tells of the use of suspended sentences to prevent injustice. The District Court suspended Palmer's sentence rather than send him to prison a second time. Tietz mentions that one Jehovah's Witness has been prosecuted four times.

⁸⁰ See *Falbo v. United States*, 320 U. S. 549, 555-61 (1944) (dissenting opinion of Murphy, J.).

¹ *Iowa Hospital Association, et al., v. Iowa State Board of Medical Examiners; et al., Iowa State Medical Society, Intervenor*, an unreported decision of the District Court, Ninth Judicial District of Iowa, Des Moines, Iowa, No. 63095, Equity, decided 28 Nov., 1955.

² Plaintiffs, because of a ruling of the Attorney General of Iowa dated 19 February, 1954, to the effect that operation by hospitals of laboratory and X-ray facilities, with billing of the patients by the hospitals, violated the Iowa Medical Practice Acts (Iowa Code, ch. 147), sought a declaratory judgment. In addition to the defendant and intervenor, the suit was defended by the Attorney General of Iowa.