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BENEFITS FOR CONSCIENTIOUS OBJECTORS?*

Two recent cases at opposite ends of the country, one in Massachusetts and the other in California, deal with the question of whether conscientious objectors who have performed the required two years "alternative service . . . in the national interest"¹ should be deemed eligible to receive veterans' educational benefits.² In *Robison v. Johnson*,³ the United States District Court in Massachusetts ruled that the veterans' educational benefits legislation was violative of the due process clause of the fifth amendment because it excluded performers of alternative service whose lives, in the court's view, are disrupted to the same extent as veterans of active military service. Faced with the option of invalidating the legislation or judicially extending it⁴ to include alternative service performers, the court chose to follow the latter course and declared that "plaintiff [conscientious objector] and the members of his class . . . are to be considered 'eligible', . . . to receive [educational] benefits . . . to the same degree and extent as veterans of 'active duty' . . ."⁵ This decision has been appealed to the Court of Appeals for the First Circuit.

In *Hernandez v. Veterans Administration*,⁶ the District Court for the Northern District of California dismissed, on jurisdictional grounds,⁷ an

* This article is a student work prepared by Arthur A. Silverstein, a member of the ST. JOHN'S LAW REVIEW and the St. Thomas More Institute for Legal Research.

¹ 50 U.S.C. APP. § 456(j) (1970).

² 38 U.S.C. § 1661(a) (1970).

³ 352 F. Supp. 848 (D. Mass. 1973).

⁴ In recognizing this option, the court relied on Mr. Justice Harlan's concurrence in *Welsh v. United States*, 398 U.S. 333 (1970). Justice Harlan was of the view that it would more nearly accord with Congress' wishes to "recast" unconstitutional legislation than to discard it altogether:

Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusions.

Id. at 361 (Harlan, J., concurring). See note 39 *infra*.

⁵ 352 F. Supp. at 862.

⁶ 339 F. Supp. 913 (N.D. Cal.), *aff'd per curiam*, 467 F.2d 469 (9th Cir. 1972), *cert. granted*, 41 U.S.L.W. 3605 (U.S. May 14, 1973).

⁷ 38 U.S.C. § 211(a) (1970) provides that no United States court has jurisdiction to review decisions by the Administrator of the Veterans Administration on "questions of law or fact

action by conscientious objectors who had fulfilled their alternative service requirements for injunctive relief from the Veterans Administration's denial of educational benefits, and mandamus, requiring the Veterans Administration to pay these benefits. The court also denied a request that a three-judge court be impaneled to hear claims that the veterans' educational benefits statute is unconstitutional on first and fifth amendment grounds, ruling that the claims were without merit or substance because of the "manifest difference" between military veterans and performers of alternative service. The Ninth Circuit affirmed this decision.⁸ The Supreme Court has granted certiorari.⁹

As will be shown, the modes of reasoning of the two district courts differ on the basic question of whether the grant of benefits to one group and the denial of the same benefits to the other is justifiable on constitutional grounds. First, however, it will be helpful to discuss the background of (1) the conscientious objector status, (2) the corresponding requirement of performance of alternative service, and (3) the veterans' educational benefits legislation in question.

CONSCIENTIOUS OBJECTION

The right to refuse to bear arms is not constitutionally guaranteed; it stems from acts of Congress, which "may grant or withhold the exemption [from military service] as in its wisdom it sees fit."¹⁰ However, that a statutory exemption from military service should be provided for those who are religiously opposed to bearing arms has been recognized in this country since colonial times. Both the individual colonies¹¹ and the Continental Congress¹² sought to provide this exemption. Shortly after the Revolution, the question, in the form of a proposed amendment, was presented and debated at the first Congress before being abandoned.¹³

The first Federal Draft Act was passed at the height of the Civil War.¹⁴

under any law administered by the Veterans Administration." The *Robison* court overcame this hurdle because there plaintiffs sought only a favorable declaratory judgment rather than affirmative relief. 352 F. Supp. at 859 n.13.

⁸ 467 F.2d 469 (9th Cir. 1972).

⁹ 41 U.S.L.W. 3605 (U.S. May 14, 1973).

¹⁰ *United States v. Macintosh*, 283 U.S. 605, 624. (1931). See also *Hamilton v. Regents of the Univ. of Calif.*, 293 U.S. 245 (1934). See generally Conklin, *Conscientious Objector Provisions: A View in the Light of Torasco v. Watkins*, 51 GEO. L.J. 252, 263-269 (1963); Kurland, *Of Church and State and the Supreme Court*, 29 UNIV. OF CHICAGO L. REV. 1, 23-25 (1961).

¹¹ The states and statutes are enumerated in *Macintosh v. United States*, 42 F.2d 845, 847-48 n.1 (2d Cir. 1930), *rev'd*, 283 U.S. 605 (1931).

¹² See Conklin, *Conscientious Objector Provisions: a View in the Light of Torasco v. Watkins*, 51 GEO. L.J. 252, 256-57 (1963).

¹³ See Cohen and Greenspan, *Conscientious Objection, Democratic Theory, and the Constitution*, 29 U. PRR. L. REV., 389, 390 n.3 (1968).

¹⁴ Act of March 3, 1863, ch. 75, § 2, 12 Stat. 731.

It provided no exemption for conscientious objectors other than a general "substitution" provision which allowed for a payment not exceeding \$300 in lieu of performance of military duty.¹⁵ However, negative reaction was so strong that the Act was amended in 1864 to provide for the non-combatant military service of conscientious objectors who could sufficiently prove their religious motivation for seeking the exemption.¹⁶

The Draft Act of 1917¹⁷ provided an exemption from military service only for members "of any *well-recognized* religious sect or organization . . . whose existing creed or principles forbid its members to participate in war in any form. . . ."¹⁸ While the statute in this form provided an objective standard by which the sincerity of the individual's belief could be measured, its effect was to deny exemptions to truly sincere persons whose religious tenets were strong but were not "well-recognized." This potential constitutional infirmity was tested in *The Selective Draft Law Cases*,¹⁹ a group of appeals from convictions of draft evasion. The defendants claimed that the statute, as written, violated the establishment and free exercise clauses of the first amendment. The contention was summarily answered by Chief Justice White, speaking for a unanimous court:

And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more.²⁰

Perhaps a due process argument (*i.e.*, that the statute arbitrarily and unjustifiedly distinguished between those who were members of well-recognized sects and those whose religious beliefs, though equally sincere, were not a consequence of membership in a "well-recognized" group) would have compelled a more detailed justification for the classification scheme embodied in the statute. However, as the contentions were phrased in first, rather than fifth, amendment terms, the Court was not faced with having to either justify or invalidate the exemption scheme on this ground.

The Selective Training and Service Act of 1940²¹ eliminated the requirement of membership in recognized pacifist sects and organizations. The exemption was thus extended to anyone who, by reason of religious

¹⁵ *Id.* § 13, 12 Stat. 733.

¹⁶ Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 9.

¹⁷ Act of May 18, 1917, ch. 15, 40 Stat. 76.

¹⁸ *Id.* § 4, 40 Stat. 78 (emphasis added).

¹⁹ 245 U.S. 366 (1918).

²⁰ *Id.* at 389-90.

One prominent commentator has said that "[t]he decision is as sound as the reason given for it." Kurland, *Of Church, and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 22 (1961).

²¹ Act of Sept. 16, 1940, ch. 720, 54 Stat. 885.

training and belief, was conscientiously opposed to participation in war of any form.²² In addition, this statute provided that the conscientious objector may either be assigned to non-combatant service or, if the objector is opposed to performing such non-combatant service, he may instead be assigned to "work of national importance under civilian direction."²³

In 1948 Congress sought to clarify its meaning of "religious training and belief" by adding the following language in its new Selective Service Act:²⁴

Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

The requirement that the belief have relation to a "Supreme Being" came into question in 1965 in *United States v. Seeger*.²⁵ Seeger came from a Roman Catholic home and was a student of Quaker beliefs. Although he did not explicitly disavow any belief in a "Supreme Being" and, indeed, acknowledged that "the cosmic order does, perhaps, suggest a creative intelligence,"²⁷ Seeger refused to assert a simple belief or disbelief in existence of a deity. Rather, he preferred to leave the question of the existence of God open, explaining that "skepticism or disbelief in the existence of God did not necessarily mean lack of faith in anything whatsoever."²⁸ He supported this view by noting that Aristotle, Plato, and Spinoza envisioned ethical systems of intellectual and moral integrity "without belief in God, except in the remotest sense."²⁹

The Supreme Court, speaking through Justice Clark, affirmed the reversal by the Court of Appeals for the Second Circuit of Seeger's conviction for refusal to submit to induction.³⁰ The Second Circuit had held that the classification between kinds of religious belief drawn by the line of the "Supreme Being" requirement was violative of the due process clause of the fifth amendment.³¹ The Supreme Court vitiated the statute's literal discrimination between religious beliefs with the following test: whether the applicant for the conscientious objector exemption has "[a] sincere and meaningful belief which occupies . . . a place parallel to that filled

²² *Id.* § 5(g), 54 Stat. 889.

²³ *Id.*

²⁴ Selective Service Act of 1948, ch. 625, Stat. 604.

²⁵ *Id.* § 6(j), 62 Stat. 613.

²⁶ 380 U.S. 163 (1965).

²⁷ *Id.* at 187.

²⁸ *Id.* at 166.

²⁹ *Id.*

³⁰ 326 F.2d 846 (2d Cir. 1964).

³¹ *Id.* at 854.

by the God of those admittedly qualifying for the exemption"³² Accordingly, the Court held that Seeger's "belief" constituted a belief sufficiently parallel to the belief in a traditional God held by those unquestionably qualified for the exemption and was therefore sufficient to satisfy the requirements of the statute.³³

The 1967 amendment to the Selective Service Act³⁴ eliminated the "Supreme Being" clause, while retaining the requirement of religious training and belief and the language excluding from the conscientious objector exemption those whose beliefs are "essentially political, sociological, or philosophical views, or a merely personal moral code."³⁵

Three years later this blanket exclusion was ruled invalid in *Welsh v. United States*,³⁶ in which the Supreme Court held that the *Seeger* requirement of "belief occupying in the life of its possessor a place parallel to that filled by God" may well be satisfied by beliefs of those "whose consciences, spurred by deeply held moral, ethical or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."³⁷ The Court sought to disclaim any intention of extending the *Seeger* ruling,³⁸ pointing out that opposition to war stemming from moral or ethical beliefs held with the strength of religious conviction was "religious" and, as such, entitled the registrant to the conscientious objector exemption.³⁹

³² 380 U.S. at 176.

³³ *Id.* at 187.

The validity of the reasoning in *Seeger* is questioned in Lurie, *Conscientious Objection: The Constitutional Questions*, 73 W. VA. L. REV. 138, 141 (1971). He suggests that "the Court stretched the statutory language to include him [Seeger] only to avoid the constitutional infirmities that his exclusion might present."

³⁴ Act of June 30, 1967, Pub. L. No. 90-40, 81 Stat. 100, 50 U.S.C. APP. §§ 451 *et seq.* (1970).

³⁵ 50 U.S.C. APP. § 456(j) (1970).

³⁶ 398 U.S. 333 (1970).

³⁷ *Id.* at 344.

³⁸ "We vote to reverse this conviction because of its fundamental inconsistency with *United States v. Seeger*." *Id.* at 335.

³⁹ Mr. Justice Harlan concurred in the result but not in the reasoning of the majority. He objected that the majority's definition of a non-religious belief as "religious" if held with sufficient intensity contradicted the obvious intent of Congress; *i.e.*, to distinguish between non-religious and religious beliefs. Indeed, Justice Harlan refers to *Seeger* as "a feat of judicial surgery" in removing the theistic requirement of the statute, and further characterizes the majority opinion in *Welsh* as a "lobotomy" in removing the distinction between religiously acquired beliefs and those acquired from secular studies. 398 U.S. at 351 (Harlan, J., concurring). Concluding that "the common denominator must be the intensity of moral conviction with which a belief is held," Justice Harlan would have decided that the statute as written was offensive to the Establishment Clause as under-inclusive, and that this inherent unconstitutionality must be either eliminated or the statute must be expanded to cure this Constitutional infirmity. 398 U.S. at 358. Finally, he argued that the more satisfactory choice and that more nearly in accord with the will of Congress would be judicial expansion so as to include non-religious conscientious objectors, like *Welsh*, within the ambit of the exempting statute. 398 U.S. at 361-67.

Today, then, to qualify for classification as a conscientious objector, the registrant must show that he objects to all war in any form,⁴⁰ and that his opposition is based upon religious training and belief. That religious training and belief need not relate to the belief in the existence of a specific deity (*Seeger*) but where the opposition is sincere and deeply held the training and belief need only occupy a place in life parallel to that of a traditional theology *even if* based on moral, philosophical or ethical grounds (*Welsh*).⁴¹

The great significance of the *Welsh* decision may be attested to by the large volume of commentary material that it fostered. The following is but a sampling of the more important articles that have been written with specific reference to *Welsh*: Brandon, *The Conscientious Objector Exemption*, 40 GEO. WASH. L. REV. 274 (1971); Denno, *Welsh Reaffirms Seeger: From a Remarkable Feat of Judicial Surgery to a Lobotomy*, 46 IND. L.J. 37 (1970); Note, *Conscientious Objectors: Recent Developments and a New Appraisal*, 70 COLUM. L. REV. 1426 (1970); Note, *Justice Hugo Black: A Question of Conscience and Conspiracy: Welch v. United States*, 17 LOY. L. REV. 105 (1971).

⁴⁰ *Gillette v. United States*, 401 U.S. 437 (1971).

⁴¹ That the high premium placed on sincerity and belief in something more than a merely personal code may well work a hardship on the less articulate, educationally disadvantaged poor and minority groups was acknowledged by Dr. Curtis W. Tarr, the National Director of Selective Service. At a news conference held the day after the *Welsh* decision, Dr. Tarr said that the likelihood of gaining draft exempt status increases "the better trained a man is and the more sharpened his intellect in the matter of religion and philosophy." N.Y. Times, June 17, 1970, at 13, col. 1.

Indeed, the *Welsh* test is criticised by Brandon, *The Conscientious Objector Exemption*, 40 GEO. WASH. L. REV. 274 (1971), primarily on these grounds:

[Because the test is subjective], [t]he difficulty is compounded where the applicant is uneducated. Inarticulate claims are viewed by local boards as insincere. Poor registrants cannot afford to hire legal counsel to prepare an adequate C.O. claim or a subsequent appeal. Nor is free draft counselling generally available in poor urban or rural areas. Minority applicants, who are generally poor and uneducated, carry the heaviest burden of discrimination. Not only must they often face the racial prejudice of largely white local draft boards, but also their political views may find disfavor among conservative members. The *Welsh* test, therefore, places a disproportionately heavy burden upon those in our country already overburdened with injustice—the poor, the minorities, and the uneducated.

Id. at 275-76.

Brandon also focuses on, among other things, the problems facing the inarticulate who seek to demonstrate sincerity, the question of the "registrant's demeanor as a significant indication of his sincerity," and problems raised where a claimant's beliefs are "incomprehensible," unorthodox, or unfamiliar to members of local boards. *Id.* at 283-87.

But see Local Board Mem. No. 107, 4 SEL. SERV. L. REP. 2200:16, 17 (1970).

Boards are not free to reject beliefs because they consider them 'incomprehensible.'

Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they govern his actions both in word and deed.

Local Board Mem. 107, *Criteria for Classification of Conscientious Objectors*, July 6, 1970, set out in full as 4 SEL. SERV. L. REP. 2200:16 (1970) was promulgated to assist the Selective Service local boards in defining the increasingly subjective criteria of eligibility for the conscientious objector exemption. It provides, in part:

ALTERNATIVE SERVICE

The successful claimant for the conscientious objector exemption must, in lieu of induction pursuant to the random lottery selection,⁴² perform alternative service for a twenty-four month period.⁴³ Alternative service requirements for conscientious objectors have been sustained time and again against thirteenth amendment (involuntary servitude) challenges⁴⁴

4. The primary test that must be used is the test of sincerity with which the belief is held. The board should be convinced by information presented to it that the registrant's personal history reveals views and actions strong enough to demonstrate that expediency is not the basis of his claim.

5. The belief upon which conscientious objection is based must be the primary controlling force in the man's life.

6. The term "religious training and belief" as used in the law may include solely moral or ethical beliefs, even though the registrant himself may not characterize these beliefs as "religious" in the traditional sense, or may expressly characterize them as not "religious."

7. The registrant need not believe in a traditional "God" or a "Supreme Being" to be considered favorably.

8. The registrant's conscientious objection to war must stem from his moral, ethical, or religious beliefs about what is right and should be done and what is wrong and should be shunned, and he must hold these beliefs with the strength of traditional religious conviction.

9. In order for the local board to find that a registrant's moral and ethical beliefs are against participation in war in any form and are held with the strength of traditional religious conviction, the local board should consider the nature and history of the process by which he acquired such beliefs. The registrant must demonstrate that his ethical or moral convictions were gained through training, study, contemplation, or other activity, comparable in rigor and dedication to the processes by which traditional religious convictions are formulated.

For a critical analysis of these guidelines, particularly the training requirement in paragraph 9, see Silard, *Comments: Invalid Conscientious Objector Classification Criteria of Local Board Memorandum 107: The Asserted Training Requirement*, 4 SEL. SERV. L. REP. 4009 (1971).

⁴² 32 C.F.R. § 1660.4(a) (1972):

A non-volunteer will not be ordered to perform alternative service in lieu of induction before registrants with his RSN (Random Selection Number) who are classified in Class 1-A or 1-A-0 are ordered for induction.

⁴³ 50 U.S.C. APP. § 456(j)(1970) in part provides:

Any person claiming exemption . . . because of . . . conscientious objections whose claim is sustained by the local board . . . shall, . . . in lieu of . . . induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform . . . such civilian work contributing to the maintenance of the national health, safety or interest as the local board pursuant to Presidential regulations may deem appropriate . . .

Of course, prior to such selection the conscientious objector may voluntarily seek to perform alternative service, 32 C.F.R. § 1660.3 (1972), such action being roughly analogous to enlisting for military service as opposed to being conscripted.

⁴⁴ See, e.g., *United States v. Holmes*, 387 F.2d 781 (7th Cir. 1968), cert. denied, 391 U.S. 936 (1968); *Howze v. United States*, 272 F.2d 146 (9th Cir. 1959); *Hefin v. Sanford*, 142 F.2d 798 (5th Cir. 1944); *United States v. Thorn*, 317 F. Supp. 398 (E.D. La. 1970).

as well as against first amendment challenges.⁴⁵

Among other things, the regulations governing alternative service⁴⁶ provide that appropriate employment be limited to employment by a political subdivision of the United States, or by a non-profit organization primarily engaged in either a charitable activity conducted for the benefit of the general public or a program for the improvement of the public health or welfare, or such an activity thereof although not within the context of a formal "program."⁴⁷ The acceptability of a specific job shall be based on consideration of the following factors (the final three of which may, at the discretion of the State Director, be waived):

- (1) *National . . . health, . . . safety or . . . interest.* The job must fulfill specifications of the law and regulations.
- (2) *Noninterference with the competitive labor market.* The registrant cannot be assigned to a job which is applied for by other qualified people who are not registrants in Class 1-0
- (3) *Compensation.* The compensation will provide a standard of living to registrant reasonably comparable to the standard of living the same man would have enjoyed had he gone into the service.
- (4) *Skill and talent utilization.* A registrant may use his special skills.
- (5) *Job location.* A registrant will work outside his community of residence.⁴⁸

The registrant must submit up to three SSS Forms 156, on which he suggests jobs that may be suitable. Disapproval by the State Director of any or all of the proposed jobs may be reviewed on one occasion by the National Director. If no acceptable job has been found and sixty days have elapsed from the time of the registrant's application for alternative service, the local board may assign the registrant to a job selected by the State Director.⁴⁹

The requirements for alternative service have been viewed by at least one court as a Congressional attempt "to alleviate the unfairness which results if conscientious objectors continue to enjoy the fruits of civilian life while their fellow citizens are conscripted for onerous and sometimes hazardous duty."⁵⁰ That is not to say, however, that the disruption *must* approximate that caused by entry into military service, as was suggested by a Local Board Memorandum⁵¹ issued by then-Director Lewis B. Hershey in 1962 and amended in 1968. Such a rule was struck down in the

⁴⁵ See, e.g., *United States v. Milligan*, 457 F.2d 916 (8th Cir. 1972); *United States v. Boardman*, 419 F.2d 110 (1st Cir. 1969), cert. denied, 397 U.S. 991 (1969).

⁴⁶ 32 C.F.R. §§ 1660 et seq. (collected at 36 Fed. Reg. 23384 (1971)).

⁴⁷ 32 C.F.R. § 1660.5(a)-(c) (1972).

⁴⁸ 32 C.F.R. § 1660.6(a) (1)-(5) (1972).

⁴⁹ 32 C.F.R. § 1660.7 (1972).

⁵⁰ *United States v. Boardman*, 419 F.2d 110, 112 (1st Cir.), cert. denied, 397 U.S. 991 (1969).

⁵¹ Local Board Mem. No. 64 (as revised 1968), rescinded Feb. 8, 1972, 4 SEL. SERV. L. REP. 2183 (1972).

Fourth Circuit in *Hackney v. Tarr*,⁵² where a New York City resident who had worked as an inhalation therapist supervisor in a medical center applied to his local board to be permitted to continue this work as his alternative service. His application was rejected because it "would not disrupt the registrant's way of life."⁵³ He was then ordered to report to a Greensboro, North Carolina hospital where his duties were "menial and did not require any education or training of the sort [he] had."⁵⁴ The court ruled that the Local Board Memorandum appeared to "require disruption solely for the sake of disruption" and "subvert[ed] the expressed statutory purpose [of work performed in the national interest] and general design of the [Military Selective Service] Act,"⁵⁵ and concluded that "vindictiveness for the sake of vindictiveness and disruption for the sake of disruption have no place in the execution of a statute which provides the public interest as the exclusive standard for administration."⁵⁶

Nevertheless, the local board retains great discretion in passing upon the suitability of suggested alternative service jobs. For example, a local board in Spring Valley, New York, promulgated its own "rule of thumb" for compliance with the requirement that the applicant perform alternative service outside of his own community—its rule provided that the site of the alternative service must be at least fifty miles away. Pursuant to this "rule of thumb," the board mandated that a conscientious objector who had been doing inner city work with young boys through a religious program in the Bedford-Stuyvesant section of Brooklyn, forty-five miles from Spring Valley, leave this job and perform his alternative service requirement at Ellis Hospital in Schenectady, New York, 150 miles away.⁵⁷

Availability of judicial review of local board decisions, particularly in the area of job selection for fulfillment of alternative service requirements, is a controversial topic.⁵⁸ By statute, pre-induction judicial review of classification of processing of draft registrants is available only as a defense to a criminal prosecution.⁵⁹ However, case law, although denying review of a

⁵² 460 F.2d 575 (4th Cir. 1972).

⁵³ *Id.* at 576, citing local draft board decision.

⁵⁴ *Id.*

⁵⁵ *Id.* at 578-79.

⁵⁶ *Id.* at 579.

⁵⁷ N.Y. Times, Dec. 23, 1970, at 29, col. 3. See also, Walkup, "Swords Into Plowshares": Alternative Service Requirements for Conscientious Objectors, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 505, 506-17 (1971); Silard, *Invalid Disruption Rules for Conscientious Objector Alternative Service*, 3 COLUM. SURVEY OF HUMAN RIGHTS LAW 136, 149-54 (1971).

⁵⁸ On the general topic of judicial review of Selective Service activities and procedures, see Winick, *Direct Judicial Review of the Actions of the Selective Service System*, 69 MICH. L. REV. 55 (1970).

⁵⁹ Military Selective Service Act of 1967, § 10(b)(3), 50 U.S.C. APP. § 460(b)(3) (1970).

Of course, the registrant who does submit to induction may challenge the validity of his induction order by petitioning for habeas corpus. See Winick, *supra* note 58 at 56.

discretionary action of a local board,⁶⁰ indicates that pre-induction review will be available where the draft board has exceeded its authority through a clear departure from its statutory mandates.⁶¹

Clearly, then, the conscientious objector does not enjoy entirely clear sailing. He remains subject to the intricacies of an extremely complex administrative agency from which errors and irregularities are almost expected,⁶² and must comply with all "reasonable" requirements of his alternative service employer,⁶³ or else "be deemed to have knowingly failed or neglected to perform a duty required of him under the Military Selective Service Act."⁶⁴ A criminal conviction pursuant to the Selective Service Act may result in up to five years imprisonment, a \$10,000 fine, or both.⁶⁵

VETERANS' BENEFITS LEGISLATION

While various forms of veterans' benefit legislation have been implemented in the United States since colonial times, the prerequisite for acquisition of these benefits in most instances was an injury sustained in defense of the state or country such as would render the recipient incapable of earning a living. Such benefits were not intended to provide general vocational assistance for all those who returned from military service, but rather, were intended basically as compensation for economic losses directly sustained as a result of physical injury suffered by the soldier.⁶⁶ Indeed, the Vocational Rehabilitation Act of 1918⁶⁷ provided assistance in restoring vocational opportunity for veterans. However, eligible veterans fell into only two categories—first, those whose service-sustained injuries "prevented resumption of former occupations or the successful entry into new ones, but whose vocational rehabilitation was feasible;" and second, those "whose service-connected disabilities did not prevent their return to

⁶⁰ *Clark v. Gabriel*, 393 U.S. 256 (1968).

⁶¹ *Ostereich v. Selective Service System*, 393 U.S. 238 (1968). See Walkup, *supra* note 57 at 520-21, and Winick, *supra* note 58 at 72. See also, *Naskiewitz v. Lawyer*, 456 F.2d 1166 (2d Cir. 1972), *commented on in Second Circuit Note*, 47 ST. JOHN'S L. REV. 219, 229 (1972).

⁶² *United States v. Chaudron*, 425 F.2d 605, 608 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970):
[E]rrors in processing a registrant for induction or alternative civilian work are not infrequent; *Oshatz v. United States*, 404 F.2d 9, 12 (9th Cir. 1968). Even the most casual glance at the case law will reveal a staggering array of deviations from the regulations.

⁶³ In *United States v. Burns*, 450 F.2d 44 (10th Cir. 1971), the court held that a request that the alternative service performer cut his hair, although the hospital at which the service was being performed had no rule prohibiting male employees from wearing long hair, was a "reasonable" work rule that had to be obeyed. See also *United States v. Phillips*, 423 F.2d 1134 (5th Cir. 1970).

⁶⁴ 32 C.F.R. § 1660.8 (1971).

⁶⁵ 50 U.S.C. APP. § 462(a) (1970).

⁶⁶ See, *Legislative History of Veterans' Benefits*, 38 U.S.C. (1959).

⁶⁷ Ch. 107, 40 Stat. 617 (1918).

gainful occupation."⁶⁸ It will be noted that the common denominator of the members of these two groups is that service-connected injuries had been sustained. It was not until World War II that legislation was developed to assist the re-entry into civilian life of all returning servicemen.⁶⁹

By the Servicemen's Readjustment Act of 1944,⁷⁰ popularly known as the "GI Bill," comprehensive legislation for the readjustment of returning veterans into the mainstream of civilian life was finally enacted. Its primary thrusts were in the areas of education, vocational counselling, and placement, and federally guaranteed loans for purchase of personal and business property. Similar benefits for veterans of the Korean conflict were provided by the Veterans' Readjustment Act of 1952.⁷¹

Finally, consolidation of all laws relating to veterans' benefits was achieved with the enactment of Title 38 of the United States Code in 1958.⁷² However, the provisions relating to educational assistance were only applicable to those who served in the armed forces during the time of the Korean conflict.⁷³ It was not until 1966 that these provisions were repealed⁷⁴ and replaced by those of the Veterans' Readjustment Benefits Act of 1966,⁷⁵ which sought to provide educational assistance and home loan benefits to men serving in the military after the termination of the Korean conflict.

Educational assistance is now to be provided to "eligible veterans,"⁷⁶ which term is defined as "any veteran who (A) served on active duty for a period of more than 180 days . . . or (B) was discharged or released from active duty . . . for a service-connected disability."⁷⁷ "Active duty" is defined as full-time duty in the armed forces or as a commissioned officer of the Regular or Reserve Corps of the Public Health Service or of the National Oceanic and Atmospheric Administration (with certain minor qualifications), or service as a cadet or as a midshipman at a military

⁶⁸ Legislative History of Veterans' Benefits, 38 U.S.C. §§ 1,34 (1959).

⁶⁹ Statement on Servicemen's Readjustment Act of 1944; President's Message to Congress, 78th Cong., 2d Sess., U.S. CODE CONG. SERV. 1400 (1944).

⁷⁰ Act of June 22, 1944, ch. 268, 58 Stat. 284.

⁷¹ Act of July 16, 1952, ch. 875, 66 Stat. 663.

⁷² Act of Sept. 2, 1958, Pub. L. No. 85-857, 72 Stat. 1105. The new Title 38 included fields covered by The Veterans' Benefits Act of 1957, Pub. L. No. 85-56, 71 Stat. 83 and, as such, became the completely consolidated codification of all Veterans Administration and veterans' benefits law.

⁷³ The educational benefits chapter, Chapter 33 of the original Title 38, was entitled "Education of Korean Conflict Veterans," and the subchapter of definitions, § 1601, made specific that the chapter related only to those who served in the armed forces during the period of the Korean conflict. 38 U.S.C. § 1601 (1959), repealed by Act of March 3, 1966, Pub. L. No. 89-358, § 4(a), 80 Stat. 12, 23.

⁷⁴ Act of March 3, 1966, Pub. L. No. 89-358 § 4(a), 80 Stat. 12, 23.

⁷⁵ Pub. L. No. 89-358, § 2, 80 Stat. 12, 38 U.S.C. §§ 1651 *et seq.*

⁷⁶ 38 U.S.C. § 1661(a) (1970).

⁷⁷ 38 U.S.C. § 1652(a)(1) (1970).

academy.⁷⁸ It is these definitional sections that are the bones of contention in the cases with which we are dealing, as they make no provision for performers of alternative service prescribed for those men classified as conscientious objectors. The claim of the present plaintiffs is that this exclusion renders these statutes unconstitutional, as discriminatorily denying to them benefits to which they claim to be equally entitled.

THE FIFTH AMENDMENT AND EQUAL PROTECTION

The obvious problem when the courts are confronted with federal legislation is that the fifth amendment contains no equal protection clause, and only those classifications which are so discriminatory as to violate the due process clause are struck down.⁷⁹ A brief look at the standards of judicial review in discrimination cases is a prerequisite to understanding the *Robison* and *Hernandez* decisions.

In testing the constitutionality of legislative classifications, the Supreme Court has evolved two standards of review: the "strict," or "rigid scrutiny" standard and the "restrained review" or "rational basis" standard.⁸⁰ The subject matter of the classification generally determines which standard is applicable. Strict scrutiny has been used by the Court in determining the validity of two types of classifications: those which create a "suspect classification" and those which affect a "fundamental interest." Such classifications are said to deny equal protection unless justified by a "compelling governmental interest."⁸¹ Racial classifications are frequent targets of strict scrutiny. In the words of Mr. Justice Black:

[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.⁸²

Other groups of suspect classifications are those based upon national ancestry, or alienage.⁸³

⁷⁸ 38 U.S.C. § 101(21) (1970).

⁷⁹ See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

⁸⁰ See generally Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-1132 (1969).

One of the earliest suggestions of a dual standard of review appeared in a footnote dictum in *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938).

⁸¹ In his dissenting opinion in *Shapiro v. Thompson*, 394 U.S. 618 (1969), Justice Harlan provides a critical analysis of the Court's use of strict scrutiny. Believing that "the more recent extensions have been unwise," he would reserve the compelling interest doctrine only for suspect racial classifications. 394 U.S. at 659 (Harlan, J., dissenting).

⁸² *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

⁸³ See, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971); *Takahashi v. Fish & Game Comm'n.*, 334 U.S. 410 (1948); *United States v. Khan*, 336 F. Supp. 354 (E.D. Pa. 1971).

Also subject to rigid scrutiny are classifications infringing upon "fundamental interests." This category is more problematical, since the question of what constitutes a fundamental interest is almost always open to debate.⁸⁴ Beyond the fundamental rights specifically enumerated in the first ten amendments, some of the fundamental interests recognized by the Court to date include aspects of voting,⁸⁵ procreation,⁸⁶ and interstate travel.⁸⁷ Education had been considered a candidate for such treatment, but a recent Supreme Court pronouncement has now precluded such a development.⁸⁸

Restrained judicial review has also been referred to as "permissive review," the "reasonableness test," and the "rational relationship test."⁸⁹ Unlike those cases in which strict scrutiny is utilized, the government has no burden to establish a compelling state interest for the classification. It is the party challenging the statute who must demonstrate that the classification is arbitrary and unreasonable, and furthers no legitimate state goal.⁹⁰ Where inherently suspect classifications or fundamental interests are not at stake, the courts defer more readily to legislative judgment, stepping in only where a statute is so unreasonable as to be beyond the power of sovereignty.

It is unnecessary to say that the "equal protection of the laws" required by

⁸⁴ Justice Rehnquist recently echoed Justice Harlan's misgivings about the use of strict scrutiny. See note 81 *supra*. In *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972), the Supreme Court held that denial of workmen's compensation benefits to illegitimate children violated the equal protection clause of the fourteenth amendment, as such discrimination relating to status of birth was "justified by no legitimate state interest, compelling or otherwise." *Id.* at 176. In the course of his dissenting opinion, Justice Rehnquist pondered "[How] is the Court to know when it is dealing with a 'fundamental personal right'?" 406 U.S. at 181 (Rehnquist, J., dissenting).

Indeed, in *Lindsey v. Normet*, 405 U.S. 56 (1972), the Court rejected plaintiffs' contention that "the right to decent housing" was a fundamental interest protected by the Constitution. 405 U.S. at 74. Clearly, the criteria for "fundamental interests" are decided on an ad hoc basis. See Comment, *New Tenets in Old Houses: Changing Concepts of Equal Protection in Lindsey v. Normet*, 58 VA. L. REV. 930 (1972).

⁸⁵ *Bullock v. Carter*, 405 U.S. 134 (1972) (excessive filing fees for candidates seeking a place on the ballot in local primary elections); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (excessive poll tax).

⁸⁶ *Skinner v. Oklahoma*, 315 U.S. 535 (1942).

⁸⁷ *Shapiro v. Thompson*, 394 U.S. 618 (1969) (one-year residency requirement for entitlement to state welfare benefits held to be a burden on the freedom of interstate travel).

⁸⁸ *San Antonio Independent School Dist. v. Rodriguez*, 93 S. Ct. 1278, 1295-1302 (1973). Of course, the arguments in the *Robison* and *Hernandez* cases were made prior to the *San Antonio* case and, not surprisingly, the brief for the conscientious objector in *Robison* challenged the denial of educational assistance as an interference with a fundamental interest. Brief for Petitioner at 13-16.

⁸⁹ See HARV. L. REV., *supra* note 80.

⁹⁰ *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

the Fourteenth Amendment does not prevent the States from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.⁹¹

When reviewing legislation under this test, the Court must consider the purpose of the legislation and the relevance of the classification to that purpose. The inquiry focuses upon the degree to which individuals are "similarly circumstanced" and whether the legislature has acted rationally in treating them differently. In *Tigner v. Texas*,⁹² for example, certain anti-trust legislation was enacted, excluding from its scope activities in agricultural products and livestock. Justice Frankfurter conceded that agriculture price and production might pose a threat to the community through combination but stated that:

. . . [I]n our national economy, agriculture expresses functions and forces different from the other elements in the total economic process. Certainly these are differences which may be acted upon by the lawmakers.⁹³

Justice Frankfurter recognized that persons who are similarly situated in respect to one purpose of a statute may be differently situated in other respects, and therefore dissimilar legislative treatment may be tolerated.

Since the demise of substantive due process the Supreme Court has consistently yielded to legislative judgment in the fields of economics and social welfare. Justice Cardozo, along with Justices Holmes and Brandeis, was a staunch defender of Congressional judgment in such areas:

The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment "When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress."⁹⁴

More recently, Justice Stewart announced that "in the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."⁹⁵

⁹¹ *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

⁹² 310 U.S. 141 (1940).

⁹³ *Id.* at 147. See Tussman and tenBroek, *supra* note 80, at 365-66.

⁹⁴ *Helvering v. Davis*, 301 U.S. 619, 640 (1937) *citing* *United States v. Butler*, 297 U.S. 1, 67 (1936); see *Royster Guano Co. v. Virginia*, 253 U.S. 412, 417-18 (1920) (Holmes and Brandeis, JJ., dissenting). Particularly in the area of state regulation of business activities, the Supreme Court has deferred to legislative wisdom. Since 1941, in only one case, *Morey v. Doud*, 354 U.S. 457 (1957), has the Court invalidated economic regulatory legislation on equal protection grounds. W. LOCKHART, Y. KAMISAR, J. CHOPER, *THE AMERICAN CONSTITUTION* 323 (1964).

⁹⁵ *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). In *Dandridge*, the Court was confronted

As noted earlier, the fifth amendment, unlike the fourteenth, does not on its face embody the element of equality. However, the courts have reasoned that an arbitrary congressional classification acts as a denial of due process, and equal protection guidelines are freely borrowed.⁹⁶ For example, in *Bolling v. Sharpe*⁹⁷ it was held that the denial of an integrated school environment in the District of Columbia was such an "arbitrary deprivation of liberty" as to be violative of due process.⁹⁸ In *Flemming v. Nestor*,⁹⁹ however, an allegedly discriminatory provision of the federal social security program was upheld against the due process challenge. This provision provided that where an immigrant is deported pursuant to certain paragraphs of the Immigration and Nationality Act he forfeits his social security benefits.¹⁰⁰ In its holding, the Court stated that the alleged penalty was not unreasonable:

[A] person covered by the [Social Security] Act has not such a right in benefit payments as would make every defeasance of "accrued" interests violative of the due process clause of the fifth amendment.¹⁰¹

After a brief discussion of possible congressional purposes,¹⁰² the Court concluded that "this provision of the [Social Security] Act cannot be condemned as so lacking in rational justification as to offend due process."¹⁰³

The extent of the "equal protection element" of the fifth amendment

with a Maryland family welfare program which produced a disparity in grants. A maximum limit was established on the amount of money that could be received by an individual family unit. In a large family, the "standard of need" based in part on the number of members in the family, would exceed the maximum grant that the family could receive under the regulation. In effect, then, the amount received per person decreased as the number of persons within the family increased. In holding that the state's action was rationally-based and "free from invidious discrimination," the Court said:

[T]he Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.
Id. at 486-87.

⁹⁶ *Bolling v. Sharpe*, 347 U.S. 497 (1954).

[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Id. at 499.

⁹⁷ 347 U.S. 497 (1954).

⁹⁸ *Id.* at 500.

⁹⁹ 363 U.S. 603 (1960).

¹⁰⁰ 42 U.S.C. § 402(n) (1969).

¹⁰¹ 363 U.S. at 611.

¹⁰² *Id.* at 611-12.

¹⁰³ *Id.* at 612.

has not, as yet, been definitively determined. However, there is no reason to assume that equality is any less essential to due process than liberty.¹⁰⁴ But for now the words of Judge Garrity in *Robison* will summarize the situation:

[T]he appropriateness of subjecting federal legislation to equal protection analysis can only be determined on a case-by-case basis.¹⁰⁵

THE ROBISON AND HERNANDEZ DECISIONS

Central to the *Robison* and *Hernandez* decisions is whether the general scheme of the Veterans' Readjustment Benefits Act of 1966, in which certain benefits are to be conferred upon "eligible veterans," defined so as to exclude conscientious objectors who have fulfilled their alternative service requirements, violates the due process clause of the fifth amendment. That is, is the exclusion of conscientious objectors rationally related to the purposes of the Act? Both courts applied the rational basis standard of review (since neither suspect classification nor fundamental interest was involved) but reached opposite results. The *Robison* court viewed the exclusion as bearing no rational relationship to the purposes of the legislation in question, thus rendering the legislation unconstitutional. Meanwhile, the *Hernandez* court, as noted earlier,¹⁰⁶ held that the manifest differences between conscientious objectors and members of the armed forces warrant separate classifications for the purposes of Congress, and that, therefore, "the classification scheme is neither arbitrary nor unreasonable" and is thus not violative of the fifth amendment.¹⁰⁷

Conveniently, for the purposes of the present discussion, the aims of the Veterans' Benefits Act are enumerated in the act itself as follows:

- (1) enhancing and making more attractive service in the Armed Forces of the United States,
- (2) extending the benefits of a higher education to qualified and deserving young persons who might not otherwise be able to afford such an education,
- (3) providing vocational readjustment and restoring lost educational opportunities to those service men and women whose careers have been interrupted or impeded by reason of active duty after January 31, 1955, and
- (4) aiding such persons in attaining the vocational and educational status which they might normally have aspired to and obtained had they not served their country.¹⁰⁸

It will be noticed that (2), (3) and (4) are basically variations on a

¹⁰⁴ See generally Tussman and tenBroek, *supra* note 80.

¹⁰⁵ *Robison v. Johnson*, 352 F. Supp. 848, 855 (D. Mass. 1973).

¹⁰⁶ See text accompanying note 6 *supra*.

¹⁰⁷ 339 F. Supp. 913, 915 (N.D. Cal. 1972).

¹⁰⁸ 38 U.S.C. § 1651 (1970).

single theme: extending educational benefits to young persons whose normal educational progress has been impeded by national service. Thus, the present discussion refers to the two purposes of the Act—one, making service in the Armed Forces more attractive, and two, providing compensation for lost educational opportunities.¹⁰⁹

The *Robison* court began its analysis by examining whether the exclusion of conscientious objectors who have completed alternative service bears a rational relation to the first purpose of the statute. The question is, does the granting of benefits to military veterans and not to conscientious objectors attract any men into the military service who would otherwise seek alternative service?

An affirmative answer presupposes that both courses are available to them. However, one who is genuinely sincere in conscientiously objecting to his participation in war due to a "religious" belief will not sway and join the military simply because educational benefits will become available to him if he does. Thus, the exclusion of conscientious objectors will increase membership in the military only to the extent that insincere claimants for the exemption will be dissuaded from pursuing that course because of educational benefits offered to military personnel. That is, to this group the military becomes more attractive.

However, as Judge Garrity stated in *Robison*, "this group, if it indeed exists, is surely a small one, for its members are largely irrational people."¹¹⁰ Selective Service regulations and procedures are designed to separate the truly sincere claimant for the conscientious objector exemption from the insincere claimant, whose application for the exemption is based solely on personal desire to avoid military service.¹¹¹ One cannot but seriously doubt that it was Congress' intent to grant educational benefits in order to test the sincerity of the potential conscientious objector.

The *Robison* court therefore concluded that it did not appear plausible that the exclusion of objectors who have performed alternative service bears any reasonable relation to the purpose of the statute of making the military more attractive. The second purpose of the Act, to compensate those who have performed national service for educational opportunities that they have lost, presents more relevant consideration. Here the necessary question is whether the two groups are "similarly situated" with regard to this purpose of the legislation, and, if so, whether there is valid justification for different treatment of the two groups with regard to this purpose.

The question of whether the alternative service performed constitutes

¹⁰⁹ The *Robison* court deems the second purpose to be primary, citing the legislative history of the Act. See 352 F. Supp. at 857 n.10.

¹¹⁰ 352 F. Supp. at 857.

¹¹¹ See note 41 *supra*.

a disruption to normal educational opportunity equal to that sustained by a member of the armed forces is difficult to answer with any certainty. The *Robison* court concluded that it did. The *Hernandez* court, on the other hand, called the differences between the two groups “manifest,” “recognizable,” and “sufficient to warrant separate classification.”¹¹² However, the necessity of relating the differences or similarities of the two groups to the purpose of the legislation was recognized in *Robison* but not in *Hernandez*. The examples of differences between the two groups given in *Hernandez* are of a general nature: “The status of a soldier creates greater limitations on personal freedom and greater potential for hazardous duty than the status of conscientious objector. The soldier is further limited in his actions as compared to the conscientious objector by the restrictions of the Uniform Code of Military Justice.”¹¹³ Valid as they may be, these distinctions have nothing to do with the disruption of educational careers. It is submitted that the *Hernandez* opinion would have been strengthened by mention, for example, that the alternative service performer is more likely to be in a position to attend school on a part-time basis in the vicinity of his alternative service employment than the member of the Armed Forces, who, even if stationed in the continental United States, may, at a moment’s notice, be given a duty assignment of a temporary or permanent nature that would absolutely preclude educational pursuits.

The *Robison* opinion, meanwhile, examined the issue of equality of disruption with reference to the purpose of the legislation. The court determined that the disruption with regard to educational pursuits sustained by the members of both groups is equal, and that therefore the performers of alternative service are entitled to the same benefits as provided by the Veterans’ Benefits Act. Consequently, the court concluded, the denial of these benefits to the members of one group is unconstitutional.

The Senate Committee on Labor and Public Welfare Report¹¹⁴ was cited extensively by the *Robison* court as evidence of the intent of the legislators to compensate for lost time from civilian life and for the consequent disadvantage faced when competing with “civilian contemporaries who generally pursue educational objectives.”¹¹⁵ What was not cited by the *Robison* court, however, is the frequent reference in the Report to “persons sacrificing civil lives for military duty,”¹¹⁶ to the total military obligation which “generally extends over a period of six years,”¹¹⁷ to service “in the

¹¹² 339 F. Supp. 913, 915.

¹¹³ *Id.*

¹¹⁴ SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, COLD WAR VETERANS’ READJUSTMENT ASSISTANCE ACT, S. REP. No. 269, 89th Cong., 1st Sess. 1 (1966).

¹¹⁵ *Id.* at 10.

¹¹⁶ *Id.* at 2.

¹¹⁷ *Id.* at 6.

Armed Forces throughout troubled parts of the world, thereby subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service . . ."¹¹⁸ and to "extended tours of active military service."¹¹⁹

CONCLUSION

Although the alternative service is obligatory, it is performed as a civilian. Although there are limitations as to appropriate employment,¹²⁰ the conscientious objector may submit three choices of alternative service jobs¹²¹ or, perhaps, retain a job that he had taken "anticipating that it might later be approved as alternative service."¹²² Although he may be required to work outside his community of residence,¹²³ the alternative service performer will (unless he successfully joins the Peace Corps, which action would be voluntary)¹²⁴ work within the United States. Finally, as suggested above,¹²⁵ the alternative service performer, whose assignment will not change unless at his volition, or unless the State Director of Selective Service decides that the job that had been suitable for alternative service has since ceased to be acceptable,¹²⁶ will more likely be able to attend school on a part-time basis once his job schedule is established than the soldier on active duty, who is far more subject to instant relocation. It is conceivable, then, that the *Robison* court erred in finding that the members of the two groups are equally burdened and that benefits available to the one must constitutionally be made available to the other. Thus, while it is clear that the *Robison* court presents a correct legal analysis, it is not so clear that it reached the correct result.

On the other hand, the *Hernandez* decision, in its terseness, apparently failed to adequately consider the controlling principles but possibly, in this case at least, reached the proper result. The court looked at only one of the purposes of the legislation—that of making the military more attractive—and, although it concluded that there are differences between conscientious objectors who have performed alternative service and military veterans, the dissimilarities were not examined in light of the legislative purposes of the statute.¹²⁷ Nevertheless, the conclusion reached, that

¹¹⁸ *Id.* at 8.

¹¹⁹ *Id.*

¹²⁰ 32 C.F.R. §§ 1660.5, 1660.6 (1972).

¹²¹ 32 C.F.R. §§ 1660.3, 1660.7(b) (1972).

¹²² 32 C.F.R. § 1660.7(d) (1972).

¹²³ 32 C.F.R. § 1660.6(a)(5) (1972).

¹²⁴ 32 C.F.R. § 1660.6(a) (2) (1972).

¹²⁵ See text following note 113 *supra*.

¹²⁶ 32 C.F.R. § 1660.9(d) (1972).

¹²⁷ The *Hernandez* court termed the benefits in question as "fringe benefits." The court may have been inferring that these benefits constituted merely a part of wages paid *for services*

the statute should be upheld against constitutional challenge, may very well be correct, although for reasons not appearing within the course of the opinion.

rendered. Clearly the services rendered to the nation by these groups are different. Equally as clear is the power of Congress to pay greater compensation to those whose services it deems intrinsically more valuable. That is, the value of different services is a question of legislative judgment into which no court should justifiably delve. But this purpose was not expressly set forth by Congress in the Act and, apparently at least, neither court was willing to deem this an implied purpose of Congress. The *Hernandez* court, rather, saw this as a *means* by which to accomplish one of the recognized purposes, *i.e.*, to make the military more attractive.

