University of Michigan Journal of Law Reform

Volume 2

1968

Constitutionality of the Illinois Draft Card Burning Act

Robert J. Dyer III
University of Michigan Law School

CONSTITUTIONALITY OF THE ILLINOIS DRAFT CARD BURNING ACT

*Robert J. Dyer III**

> A person who knowingly destroys or mutilates a valid registration certificate or any other valid certificate issued under the Federal 'Military Selective Service Act of 1967' shall be fined not more than $10,000 or be imprisoned in the penitentiary for not more than five years, or both.
>
> *Illinois H.B. 2597, enacted on August 20, 1968.*

> Any person . . . who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such [Selective Service] certificate shall, upon conviction, be fined not to exceed $10,000, or be imprisoned for no more than five years, or both. . . .
>
> *50 U.S.C.A. §462(b), Universal Military Training Act (1948, Amended 1965 and 1967)*
> *[Italics indicate 1965 Amendments].*

I. Introduction

Pre-emption, a doctrine based on Article VI of the United States Constitution (the "Supremacy Clause"), considers ". . . the validity of state laws in the light of . . . Federal laws touching on the same subject."[1] Where state and federal laws embrace the same subject matter the question is whether Congress intended to preclude state legislative participation in the area or to allow concurrent power.[2] If Congress did intend to preclude state legislation on the subject, the state law must be struck down as a violation of Article VI. Where there is no directly expressed Congressional intent the Court must discover that intent, and as Justice Black noted in *Hines v. Davidowitz:* "There is not — and from the nature of the problem there cannot be — any rigid formula or rule which can be used as a

---

*Mr. Dyer is a member of the staff of *Prospectus.*

[1] Hines v. Davidowitz, 312 U.S. 52 at 67, (1941).

[2] Rice v. Santa Fe Elevator Corp., 331 U.S. 218 at 223, (1946).

universal pattern to determine the meaning and purpose of every Act of Congress."[3]

Nevertheless, the Court has developed several guidelines to ascertain Congressional intent in a particular area. These guidelines, enunciated primarily in cases involving the Commerce Clause,[4] were summarized into three succinct tests and applied to a criminal statute in *Pennsylvania v. Nelson*.[5] In that case the Supreme Court held a Pennsylvania sedition law void because the sedition area had been pre-empted by the federal government. The tests established by the Supreme Court in *Nelson* were whether: "First, '[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"[6]; "Second, the federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject' "[7]; and, "Third, the enforcement of state . . . acts presents a serious danger of conflict with the administration of the federal program."[8] An analysis of the Illinois "Draft Card Burning" Act, in light of these three tests, requires the conclusion that the Illinois law falls within an area pre-empted by the federal government and is therefore unconstitutional.

II. Pervasiveness of Federal Regulation

In the *Nelson* case three federal statutes directed to the sedition and subversion area[9] were cited by the Court as evidence of pervasive federal regulation sufficient to pre-empt state regulation in the field. The Court reached this conclusion despite the fact that the state and federal statutes were worded dissimilarly and aimed at somewhat different crimes.[10] By

---

[3] 312 U.S. at 67.

[4] *See* Mr. Justice Douglas' history of the doctrine in Rice v. Santa Fe Elevator Corp. 331 U.S. at 229.

[5] 350 U.S. 497 (1956). This case "... is apparently the first case in which the Supreme Court has held that a federal criminal statute, not involving a regulatory scheme under the Commerce Clause, supercedes, in the absence of conflicting provisions, the enforceability of a concurrent state criminal statute." Cramton, *Pennsylvania v. Nelson: A Case Study in Federal Pre-Emption*, 26 U. CHI. L. REV. 85, 86, (1958).

[6] Pennsylvania v. Nelson, 350 U.S. at 502, Brackets in original.

[7] *Id.*, at 504, Brackets in original.

[8] *Id.*, at 505.

[9] *Id.*, at 499-504. The Statutes in question: THE SMITH ACT, 18 U.S.C. § 371 (1921): THE INTERNAL SECURITY ACT, 50 U.S.C. § 781 (1950); THE COMMUNIST CONTROL ACT, 50 U.S.C. § 841 (1954).

[10] *Compare* for example the then Pennsylvania Sedition Law which included, inter alia:

> PENNSYLVANIA PENAL CODE § 207
> The word "sedition," as used in this section shall mean:
> Any writing, publication, printing, cut, cartoon, utterance, or conduct, either individually or in

connection or combination with any other person, the intent of which is:

(a) To make or cause to be made any outbreak or demonstration of violence against this State or against the United States.

(b) To encourage any person to take any measures or engage in any conduct with a view of overthrowing or destroying or attempting to overthrow or destroy, by any force or show or threat of force, the Government of this State or of the United States.

(c) To incite or encourage any person to commit any overt act with a view to bringing the Government of this State or of the United States into hatred or contempt.

* * *

(f) Any writing, publication, printing, cut, cartoon, or utterance which advocates or teaches the duty, necessity, or propriety of engaging in crime, violence, or any form of terrorism, as a means of accomplishing political reform or change in government.

* * *

Sedition shall be a felony. Whoever is guilty of sedition shall, upon conviction thereof, be sentenced to pay a fine not exceeding ten thousand dollars ($10,000), or to undergo imprisonment not exceeding twenty (20) years, or both.

with the United States Code

18 U.S.C. § 2385

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence or attempts to do so;

* * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

contrast, the federal and Illinois "Draft Card Burning" laws are identical in language and in the conduct prohibited. Moreover, the federal statute in this area is augmented by a Selective Service Regulation providing that "Every person is required to . . . have in his possession at all times his registration certificate . . . prepared by his local board."[11]

The Supreme Court, in a recent case[12] challenging the constitutionality of the federal prohibition of draft card destruction, considered the relationship between the federal statute and the federal regulation. The Court said:

> . . . a comparison of the regulation with the 1965 amendment indicates that they protect overlapping, but not identical, governmental interests and that they reach somewhat different classes of wrongdoers.[13]

This judicial recognition of the overlapping quality of the two federal policies in the draft card burning area supports the argument that Congress evidenced a pre-emptive interest in the area.

The pervasiveness of the federal policy is highlighted further by reference to the narrow scope of the Illinois law. The Illinois statute prohibits only the destruction or mutilation of a draft card. The federal statute has prohibited this same conduct since 1965; however, it also goes far beyond and prohibits the forgery or alteration of a draft card and even the mere refusal to carry one.[14] Certainly the pervasiveness of the Congressional policy in the draft card area is at least as great, if not greater, than it was in the sedition area where the Court has struck down state legislation.

III. Dominance of Federal Interest

The Court in *Nelson* found that the dominance of the federal interest was apparent in view of the "all embracing program"[15] that the federal government had enacted in the sedition area. In the draft card burning area the dominance of federal interest is even more apparent.

The Constitution charges the federal government with the duty to provide for the national defense, and more specifically, Congress is given the power to raise and support Armies.[16] The "War Power" includes the power to establish a manpower registration system: "[the] power of Congress to classify and conscript manpower is 'beyond question' . . . [and] Congress may establish a system of registration for individuals liable for

---

[11] 32 C.F.R. § 1617.1 (1962), *amended* January 1, 1968.
[12] United States v. O'Brien, _____ U.S. _____ 20 L.Ed.2d 672 (1968).
[13] *Id.*, at 680.
[14] *See* 50 U.S.C. §462 (1967).
[15] 350 U.S. at 504.
[16] Article I, §8 of the UNITED STATES CONSTITUTION.

training and service, and may require such individuals, within reason, to cooperate with the registration system."[17] A necessary corollary is that Congress has the power to preserve and protect the registration system, its procedures and certificates.[18] Accordingly, it seems to follow that the implementation and protection of the Congressionally established Selective Service System is as much within the paramount federal area as national defense itself.

The phrase "dominance of federal interest" implies a balance of state and federal interests. The Supreme Court has recognized that where there is a *sufficient* threat to the peace or security of the state, then federal and state legislation on the same subject matter may co-exist even though similar. In *Uphaus v. Wyman*[19] the Supreme Court held that the federal sedition statute did not pre-empt the field so as to prevent a state from enacting legislation regarding investigation of domestic subversive activities. The Court noted that the federal statute dealt with subversive activity directed against the federal government while the state statute dealt with subversion directed at the state itself.[20] In the earlier case of *Gilbert v. Minnesota*[21] the Supreme Court upheld a conviction under a state statute which made it illegal for ". . . any person in a public place . . . to advocate . . . that men should not enlist in the military forces . . . of the United States or the state of Minnesota."[22] The Court felt that pre-emption did not apply because of the local interest in preservation of the peace.[23] The Court stressed that during the speech in controversy, "there were protesting interruptions . . . accusations . . . threats . . . disorder and intimidations of violence."[24]

However, the rationale of neither of these cases is applicable in the draft card burning area. In the first place the state has no interest in the pro-

---

[17] United States v. O'Brien, *supra* note 12 at 680.

[18] *Id.*

[19] 360 U.S. 72 (1959).

[20] *Id.*, at 77.

[21] 254 U.S. 325 (1920).

[22] *Id.*

[23] The court in *Gilbert* did not base its holding only on the "local interest" rationale. For example, the court's language was very broad at 331:

> We concur . . . that the state is not inhibited from making the national purposes its own purposes, to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes.

However, in the *Nelson* case at 501 the Supreme Court narrowly interpreted the *Gilbert* case as turning only on the presence of a local interest. The *Nelson* Court felt the *Gilbert* Court had concluded that the state act did not relate "to the raising of armies for the national defense, nor to rules and regulations for the governing of those under arms [a constitutionally exclusive federal power]. It [was] simply a local police measure."

[24] Gilbert v. Minnesota, note 21 *supra* at 331.

tection of the certificates themselves.[25] Draft cards serve a purely federal function; they are printed at federal expense, distributed by a federal agency,[26] and required by Congress to insure a successful national defense program. Thus the state's interest must stem from some concern with the conduct itself. Unlike the sedition in *Uphaus,* draft card burning poses no threat to the security of the state itself. It is a crime directed at the National Government. It is not a protest of local policies; it is not directed at local government. Likewise draft card burning does not seem to be an internal threat sufficient to trigger the peace and order justification that the Court found so persuasive in *Gilbert.*[27] Admittedly the Illinois interest in preventing breaches of the peace might be used to support a "Draft Card Burning" Act. However, this state interest can be dismissed as insufficient. First, the availability of other state laws to deal with any disorders that arise reduces the state's need for this particular statute. Second, the Illinois statute proscribes draft card burning in private as well as in public. The former conduct is of no interest to the state since it poses no threat to its peace or security. By contrast, as pointed out above,[28] the *O'Brien* Court felt that there was a strong federal interest in preventing draft card burning even if done in private. Furthermore, the *Gilbert* case involved a statute that proscribed conduct only in a "public place." Although neither *Gilbert* nor *Nelson* mentioned the factor at all, it is arguable that such language supports an interpretation that the statute was aimed more at a local interest than a national one. Thus the fact that the Illinois "Draft Card Burning" Act is not limited to "public" conduct weakens the argument that the statute was designed to deal solely with local peace and order. It would thus appear that the federal interest in the draft card area dominates whatever state interest exists.

IV. Conflict of Administration

In *Nelson* the Court observed: "should the states be permitted to exercise a concurrent jurisdiction in the [sedition] area, federal enforcement

---

[25] The *O'Brien* Court stated that a draft card served four purposes, all of which were federal functions. These were:

> 1) Proof that the individual had registered for the draft; 2) Facilitation of communication between the registrant and his local board; 3) a reminder to the registrant to notify his local board of any changes of address or condition; and 4) easy detection of forgeries and alterations. 20 L.Ed2d at 680.

It should be noted that such purposes would be thwarted equally by a private or public burning of the draft card.

[26] *See* 50 U.S.C. App. §460(a)(1) 1967).

"There is established in the executive branch of the government an agency to be known as The Selective Service System . . ."

[27] *See* note 23 *supra* and accompanying text.

[28] *See* note 25 *supra.*

would encounter . . . the difficulties . . . [and] the added conflict engendered by different criteria of substantive offenses."[29] The same holds true in the draft card burning area. Where state and federal statutes are as similar in wording and purpose as these are, adjudication by both state and federal courts could produce differing results with attendant uncertainty as to the substantive meaning of both statutes. As Mr. Justice Jackson said in *Garner v. Teamsters, Chauffeurs, and Helpers Local Union No. 776,* "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."[30] Dual enforcement can only lead to contradictory enforcement. In an area as politically charged as draft card burning the Justice Department may very well decide not to prosecute particular violators. Such a decision, made by the departments charged with insuring the defense of our Nation, ought not be subject to a possible veto by each of the fifty states in their discretion.

V. Conclusion

In applying the *Nelson* tests to the draft card burning field it is clear that the federal interest is manifest; that Congress has legislated broadly and directly; and that a conflict in the administration of state and federal laws could hamper the operation of the Selective Service System and contradict the planned application of federal law. It would seem that Congress has so occupied the field that any state interest which might exist would be insufficient to support parallel regulation. The Illinois "Draft Card Burning" Act therefore seems unconstitutional.

---

[29] 350 U.S. at 509.
[30] 346 U.S. 485, 490 (1953).