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Draft Reclassification for Political Demonstrations Jurisdictional Amount in Suits Against Federal Officers

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DRAFT RECLASSIFICATION FOR POLITICAL DEMONSTRATIONS—JURISDICTIONAL AMOUNT IN SUITS AGAINST FEDERAL OFFICERS

I

INTRODUCTION

On October 15, 1965, Peter Wolff and Richard Shortt, two New Yorkers attending the University of Michigan, participated in a demonstration opposing American policy in Vietnam. The demonstration took place at the offices of the local Selective Service Board in Ann Arbor. Subsequently, each was reclassified from II-S to I-A by his local board, acting at the request of the New York City Director of Selective Service. Wolff and Shortt sought relief in federal court, alleging that the local boards had "acted wholly without jurisdiction and in violation of their First Amendment rights of free speech and assembly," and asking for an order directing the return of their student deferments. The district court dismissed for lack of a justiciable controversy.[1]

In holding that the claims were premature, the court apparently relied upon *Estep v. United States*,[2] where the Supreme Court held that no judicial review of a classification by the Selective Service System was possible unless the claimant had exhausted all his administrative remedies under the System *and* had precipitated an indictment by refusing to be inducted into the military.[3] The registrant could then assert misclassification as a defense in the district court if he could show that there was "no basis in fact" for the classification.[4] On appeal,

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1 *See* Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817, 820 (2d Cir. 1967).

2 327 U.S. 114 (1946).

3 Military Selective Service Act of 1967, § 12(a), 62 Stat. 622 (1948), 50 U.S.C.A. Appendix § 462(a) (Supp. 1967), provides for indictment, *inter alia*, of

> any person who . . . evades or refuses registration or service in the armed forces . . . or who knowingly counsels, aids, or abets another to refuse or evade registration or service . . . or who . . . shall knowingly fail or neglect or refuse to perform any duty required of him under . . . this title . . . or . . . who shall knowingly hinder or interfere . . . with the administration of this title . . . shall . . . be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . .

4 Estep v. United States, 327 U.S. 114, 122-23 (1946). Section 10(b)(3) of the Military Selective Service Act of 1967 states that, subject to the appeals procedure authorized by the act and the rules and regulations of the President, the "decision of [a] local board shall be final . . . ." 81 Stat. 104, 50 U.S.C.A. Appendix § 460(b)(3) (Supp. 1967). Until recently, no statute permitting judicial review of the administrative acts of the system

the Court of Appeals for the Second Circuit found that the case presented an exception to the *Estep* rule. The local board had acted outside its jurisdiction,[5] clearly intending to "punish" the plaintiffs for their protest. The court held that the board's action constituted a denial of the plaintiffs' first amendment rights and thus presented a justiciable controversy without resort to the *Estep* tests.[6] In one stroke, the Second Circuit expanded the scope of judicial review over the Selective Service far beyond the narrow *Estep* doctrine. Nevertheless, it remanded the case for determination of whether the plaintiffs could establish an amount in controversy sufficient for federal jurisdiction.[7]

It seems unwise to require a showing of proper jurisdictional amount when injunctive relief is sought to protect constitutional rights from infringement. But the federal courts are courts of limited

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had ever been enacted. *Estep* thus created a judicial exception to the statutory language. Estep was a Jehovah's Witness who claimed to be a minister and therefore entitled to a IV-D classification. After exhausting his administrative appeals, he refused to be inducted and was indicted under what is now § 12(a) of the Military Selective Service Act of 1967, 50 U.S.C.A. Appendix § 462(a) (Supp. 1967). Since a question of personal liberty was involved, the Supreme Court found that it could not

> readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local boards "final" as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency.

327 U.S. at 122. After more than 20 years, the *Estep* doctrine has finally received congressional sanction. Military Selective Service Act of 1967, § 10(b)(3), 50 U.S.C.A. Appendix § 460(b)(3) (Supp. 1967).

The *Estep* doctrine is more fully explored in the literature on the courts and the Selective Service. *See, e.g.*, Note, *Military Service—Judicial Review of Draft Classification*, 34 N.C.L. REV. 375, 380 (1956); Note, *Fairness and Due Process Under the Selective Service System*, 114 U. PA. L. REV. 1014, 1015-19 (1966); Note, *Judicial Review of Draft Board Orders*, 10 WYO. L. REV. 208, 210-11 (1956). With respect to the operation of the Selective Service, see Note, *The Selective Service*, 76 YALE L.J. 160 (1966).

[5] Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817, 822 (2d Cir. 1967). The court reasoned that a local board can only reclassify a registrant as a delinquent if he balks at his own service. The criminal provisions of § 12(a) of the Military Selective Service Act of 1967, 50 U.S.C.A. Appendix § 462(a) (Supp. 1967), are directed at anyone who interferes with the operation of the Selective Service, and encompass general interference as well as interference with one's own service. But jurisdiction for the criminal action under § 12(a) lies in the district court alone. Since Wolff and Shortt did not interfere with their own service, but rather picketed another local board, their action was, if anything, a criminal violation under § 12(a), not a violation that would allow their local boards to reclassify them as I-A delinquents.

[6] 372 F.2d at 824. The court also found the doctrine of exhaustion of administrative remedies inapplicable, since plaintiffs are not required to pursue all possible administrative remedies before resorting to judicial action "where there is nothing to be gained" from such a pursuit. *Id.* at 825. With respect to the substantive holdings of the case, see 31 ALBANY L. REV. 349 (1967); 13 WAYNE L. REV. 722 (1967); 81 HARV. L. REV. 685 (1968).

[7] 372 F.2d at 826.

jurisdiction, deriving their power from acts of Congress,[8] and a plaintiff seeking to enter a federal forum must fit his claim within some congressional grant of authority.[9] Section 1331 of the Judicial Code provides that claims arising under the Constitution, laws, or treaties of the United States are cognizable only if the matter in controversy exceeds $10,000.[10] The monetary limitation has been strictly construed, and even federal equity jurisdiction, which is frequently invoked because the potential damage is difficult to evaluate, depends upon the presence of "money, or some right the value of which can be estimated and ascertained in money, and which appears by the record to be of the requisite pecuniary value."[11] Although suits involving nonmonetary claims have caused difficulty, the Supreme Court, in several landmark decisions (none of which have involved civil rights), has indicated that valuation is both possible and necessary.[12] Moreover, two members of the majority in *Hague v. CIO*[13] stated that the valuation requirement of section 1331 also applied to claims involving the alleged violation of first amendment rights.[14]

8 Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376 (1940); Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1922).

9 Lockerty v. Phillips, 319 U.S. 182, 188 (1943).

10 28 U.S.C. § 1331(a) (1964) provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

11 South Carolina v. Seymour, 153 U.S. 353, 357 (1894) (discussing an earlier jurisdictional statute that required a jurisdictional amount). *Accord,* Barry v. Mercein, 46 U.S. (5 How.) 103, 120 (1847); McGuire v. Amrein, 101 F. Supp. 414, 418 (D. Md. 1951); Collins v. Public Serv. Comm'n, 129 F. Supp. 722, 726 (W.D. Mo. 1955) (dictum).

12 KVOS, Inc. v. Associated Press, 299 U.S. 269, 277-79 (1936); McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 181-82 (1936); Healy v. Ratta, 292 U.S. 263, 268-70 (1934). With respect to the evaluation of damages in nonmonetary suits involving alleged damage to economic interest generally, see Comment, *Federal Jurisdiction: Amount in Controversy in Suits for Nonmonetary Remedies,* 46 CALIF. L. REV. 601 (1958); Note, *Federal Jurisdictional Amount: Determination of the Matter in Controversy,* 73 HARV. L. REV. 1369 (1960); Note, *Federal Jurisdictional Amount Requirement in Injunction Suits,* 49 YALE L.J. 274 (1939).

13 307 U.S. 496, 507-08 (1939).

14 In *Hague,* however, jurisdiction was found under another section of the Judicial Code (the predecessor to 28 U.S.C. § 1343(3) (1964)), which grants jurisdiction without matter in controversy where "state action" threatens federal rights. *See* note 16 *infra.* In cases such as *Wolff,* the problem involved is the deprivation of federal rights by *federal* action.

In the *Hague* case, the plaintiff labor organizers were expelled from Jersey City, New Jersey, pursuant to a local anti-leafleting ordinance, which they alleged violated their first amendment rights. Seven Supreme Court Justices heard the case. Announcing the Court's decision, Justices Roberts and Black found no federal jurisdiction under the predecessor to § 1331, because plaintiffs failed to show the value of the rights infringed,

The $10,000 requirement in federal question cases has been circumscribed by many statutory exceptions.[15] One section of the Judicial Code provides civil rights jurisdiction regardless of amount in controversy, but only in cases of deprivation of federal rights by persons acting under color of state law.[16] Another section provides for mandamus jurisdiction in the district courts,[17] but mandamus is not available to compel an officer to perform a discretionary act.[18] Since classifi-

although, as noted above, jurisdiction was found under the predecessor to § 1343(3). 307 U.S. at 507-08, 512-13. Relief was granted on the ground that the type of activity engaged in by petitioners constituted free speech protected under the privileges and immunities clause of the fourteenth amendment.

Two other Justices, Stone and Reed, preferred to rely upon the due process clause of the fourteenth amendment as the basis for protecting this type of free speech, *id.* at 519, but agreed that § 1331 should not preclude jurisdiction under § 1343(3). *Id.* at 529-30. The broad statement in *Hague* that no matter in controversy is required for civil rights claims is confined to claims within the latter section; for others, *e.g.*, suits for deprivation of federal rights under color of federal law, it cannot be supported. This was clarified in a subsequent opinion by Justice Stone, holding that § 1343(3) provides jurisdiction over suits brought under the Civil Rights Act, *i.e.*, suits for deprivation of federal rights under the color of state law. Douglas v. City of Jeannette, 319 U.S. 157, 161 (1943). Other courts have cited the *Hague* opinion in speaking broadly of the "invaluable" character of civil rights, *e.g.*, Jordan v. Hutcheson, 323 F.2d 597, 599, 601 (4th Cir. 1963), but always in the context of state action. At least one court appears to have realized that the *Hague* holding concerning matter in controversy dealt only with state action cases. *See* Fischler v. McCarthy, 117 F. Supp. 643, 647 (S.D.N.Y.), *aff'd per curiam*, 218 F.2d 164 (2d Cir. 1954) (action against "federal official" must comply with § 1331).

15 *E.g.*, 28 U.S.C. §§ 1336 (Interstate Commerce Commission orders), 1337 (commerce and antitrust regulations), 1338 (patents, copyrights, trademarks, and unfair competition), 1339 (postal matters). Jurisdictional statutes are occasionally scattered elsewhere throughout the United States Code. *See, e.g.*, INT. REV. CODE OF 1954, § 7402(c), which provides jurisdiction for suits by internal revenue officers for injury sustained while acting within the scope of their duties.

16 The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . .

. . . .

(3) To redress the deprivation, under color of any State law, statute, ordinauce, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .

28 U.S.C. § 1343(3) (1964).

17 "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361 (1964).

18 Under the classical mandamus theory, an act is "ministerial" when the officer is bound to perform it. It is "discretionary" when the officer is vested with authority to decide whether or not to perform it. Mandamus lies to compel an officer to perform an act of the former variety. This distinction was made as long ago as Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170-71 (1803), and reiterated in Wilbur v. United States *ex rel.* Kadrie, 281 U.S. 206, 218-19 (1930). The cases that grant mandamus involve forcing the

cation is at the discretion of the local board, mandamus would not lie to order reclassification.[19]

These exceptions and others have narrowed the zone of the section 1331 requirement of jurisdictional amount, so that:

> The only significant classes of federal-question cases in which the presence of a jurisdictional amount is required are cases involving constitutionality of state statutes; cases based on the Jones Act . . . and cases against federal officers for alleged infringement of federal constitutional rights.[20]

The actions by Wolff and Shortt clearly fall within the last category. *Giancana v. Johnson*[21] presented a similar controversy. Suit was brought for an injunction against the FBI on the ground that its continuous and harassing surveillance invaded the plaintiff's right of privacy, as protected by the fourth and fifth amendments. The plaintiff argued that he need not allege an amount in controversy, since the rights involved were "priceless." The Seventh Circuit held that the plaintiff must value his rights, and dismissed the complaint for failure to allege the jurisdictional amount.[22]

It should be pointed out, however, that although "suits against federal officers" covers a large area, the $10,000 requirement is oper-

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defendant to perform some clerical or administrative duty within the scope of his authority, such as compelling the delivery of a writ or the payment of a pension. On the other hand, an officer might act outside the scope of his authority, abusing his discretion and injuring a plaintiff. Again, as long ago as *Marbury*, the courts realized that redress could be provided for such an unlawful act. 5 U.S. (1 Cranch) at 170. The applicable relief, however, would in all likelihood be injunctive. *See, e.g.*, Bell v. Hood, 71 F. Supp. 813, 819 (S.D. Cal. 1947), *on remand from* 327 U.S. 678 (1946), where this distinction is made. It would seem that § 1361 deals with the former situation, the legal writ of mandamus, and not with the latter, equitable injunction, for which § 1331 may be the only provision.

The rationale for the distinction appears to be that judicial interference with discretionary acts of an executive officer may violate the constitutional concept of separation of powers. On the other hand, a ministerial act is a duty owed by the executive to the petitioner, and courts may interfere to protect the petitioner's rights.

19 The courts have confirmed that mandamus will not lie against the Selective Service. *See* United States v. Mancuso, 139 F.2d 90, 91 (3d Cir. 1943). Although mandamus would not be available in *Wolff*, reclassification was there employed by the Board as a weapon, so it was possible to seek an injunction to protect constitutional rights.

20 Note, *Federal Jurisdictional Amount: Determination of the Matter in Controversy*, 73 HARV. L. REV. 1369, 1378 n.53 (1960) (citations omitted).

21 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965).

22 *Id.* at 368-69. Other cases in which either lack of or failure to allege the jurisdictional amount has proven fatal are Jackson v. Kuhn, 254 F.2d 555, 560 (8th Cir. 1958) (suit to enjoin Army from policing Little Rock schools), and Fischler v. McCarthy, 117 F. Supp. 643, 647 (S.D.N.Y.), *aff'd per curiam*, 218 F.2d 164 (2d Cir. 1954) (suit to enjoin production of records at Senate hearing).

ative in a much narrower sector. Judicial review of the action of many administrative agencies is permitted without regard to matter in controversy once all administrative remedies have been exhausted. For example, the statutes creating the Securities and Exchange Commission, the National Labor Relations Board, the Federal Communications Commission, and all those agencies that operate under the review provisions of the Administrative Procedure Act[23] provide for judicial review of agency action.[24] Other agencies, however, have no such provision. The Selective Service Act provides that decisions reached by the System at the conclusion of the administrative processes are "final,"[25] and almost no judicial review is permitted.[26] The Supreme Court has never held such limitations unconstitutional.[27] If a plaintiff claims that his rights have been infringed by an officer of an agency that lacks a judicial review provision, such as the Selective Service System, he must be able to demonstrate an appropriate "matter in controversy" or his claim will fail.

There are three alternative means of extricating plaintiffs from the dilemma of having to value priceless rights: (*1*) liberal federal court interpretation of what facts are sufficient to meet the requirement of "matter in controversy," (*2*) state court action to enjoin federal officials where the requisite jurisdictional amount cannot be shown, and (*3*) possible amendment of the jurisdictional statutes to allow these claims without an allegation of jurisdictional amount.

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23 5 U.S.C. §§ 551-59 (Supp. II 1966).

24 *E.g.*, Securities Act of 1933, § 9, 15 U.S.C. § 77i (1964) (Securities and Exchange Commission); Labor Management Relations Act, § 10(f), 29 U.S.C. § 160(f) (1964) (National Labor Relations Board); Communications Act of 1934, § 402, 47 U.S.C. § 402 (1964) (Federal Communications Commission).

25 Military Selective Service Act of 1967, § 10(b)(3), 81 Stat. 104, 50 U.S.C.A. Appendix § 460(b)(3) (Supp. 1967), provides in pertinent part: "The decisions of such local board shall be final, except where an [administrative] appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe."

26 The scope of review was expanded by Estep v. United States, 327 U.S. 114 (1946), and the result has recently been codified. *See* note 4 *supra*. Statutory language making administrative action "unreviewable" or "final" raises complex problems in administrative law, beyond the scope of this Note. It should be pointed out, however, that even when a court occasionally circumvents a statutory mandate of finality, full judicial review does not necessarily become available. For instance, contrast the "review" permitted under the *Estep* doctrine with that permissible under the judicial review procedure authorized in Title 5 of the United States Code. When a court expands the statutory scope of review, it does so only in a very limited way, and only for the most compelling reasons.

27 "[T]he plain fact remains that the Supreme Court has never held that denial of a limited review is a denial of due process of law." 4 K. DAVIS, ADMINISTRATIVE LAW § 28.19, at 106 (1958).

II

AVOIDING THE PROBLEM: PROOF OF JURISDICTIONAL AMOUNT UNDER SECTION 1331

In some cases plaintiffs have succeeded in "valuing" their constitutional rights.[28] No case has held that these rights are incapable of evaluation. The complaint in *Giancana v. Johnson*[29] was dismissed for failure to *allege* the jurisdictional amount. In *Wolff*[30] the court merely remanded for a showing of the required sum. Some plaintiffs have based their claims upon the actual economic harm resulting from violation of civil rights. For example, in *Gobitis v. Minersville School District*,[31] the plaintiff alleged as a matter in controversy the cost of sending his children to a private school after their expulsion from public school for refusing, on religious principles, to salute the flag. Other plaintiffs have successfully alleged tort-like damages, *i.e.*, recovery for noneconomic harm designed to make the plaintiff whole. In *Wiley v. Sinkler*,[32] for example, the Court stated that damages could be awarded for deprivation by election officials of the plaintiff's right to vote.[33] Case law seems to support an analogy between claims of civil rights violations and simple tort cases. The Supreme Court in *Hague* spoke of "tortious invasions of alleged civil rights,"[34] and the district court in *Bell v. Hood*[35] pointed out that the Bill of Rights stemmed from a desire to protect the citizenry from what were essentially tortious actions at common law.[36] Thus, a federal court may be expected to treat

28 *See* cases cited notes 31-33 *infra*.

29 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965).

30 Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967).

31 24 F. Supp. 271, 275 (E.D. Pa. 1938). *Gobitis* is the famous flag-salute case, reversed by the Supreme Court on constitutional rather than jurisdictional grounds. Minersville School Dist. v. Gobitis, 310 U.S. 586, 600 (1940). The Supreme Court later overruled itself on the constitutional issue. Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

32 179 U.S. 58 (1900).

33 *Id.* at 64-65. The claim was dismissed, however, because the plaintiff failed to allege that he was registered to vote. Other tort-like cases include Giles v. Harris, 189 U.S. 475, 485 (1903) (*Wiley v. Sinkler* reaffirmed as to possibility of estimation of political and social rights), and Hynes v. Briggs, 41 F. 468, 471 (E.D. Ark. 1890) (false imprisonment by sheriff acting pursuant to illegal state statute). All these cases involved state action and would now fall under § 1343(3). In each, however, a civil right was valuated.

34 Hague v. CIO, 307 U.S. 496, 507 (1939).

35 71 F. Supp. 813 (S.D. Cal. 1947), *on remand from* 327 U.S. 678 (1946).

36 The right to be free from unreasonable searches and seizures is a common-law right. . . . Thus the Fourth Amendment did not create a new right, but merely gave a pre-existing common-law right constitutional protection from invasion by the Federal Government.

Id. at 816.

civil rights claims, for jurisdictional amount purposes, in much the same manner as it treats tort actions. And modern tort damages frequently have an aura of speculation about them.

Damages for pain and suffering provide a clear example of the speculative nature of tort damages. Although it may be clear that the plaintiff has suffered some injury for which he should be recompensed, the amount of damages is largely a matter of guesswork. Claims for invasion of privacy, defamation, and assault and battery all share this quality. If analogous treatment is accorded to claims of those who suffer deprivation of a constitutional privilege, the fact that the amount of damage is unascertainable should not preclude successful allegations of an amount in controversy. If physical and psychological damage can be translated into dollar amounts with sufficient certainty to meet the $10,000 jurisdictional minimum, intangible damage to one's civil rights should be similarly translatable. That the claim "must be money, or some right the value of which can be . . . ascertained in money"[37] should not require an economic loss shown with absolute certainty.

Using the analogy of civil rights claims to tort claims, plaintiffs such as Wolff and Giancana arguably could assert valid claims that would entitle them to a hearing for an injunction in the federal courts. In Giancana's case, the claim could be predicated on the value to him of his right to privacy. Wolff might base his claim on the fact that, without immediate reclassification, he must run the risk of a criminal trial in order to assert his first amendment rights. Since, to avoid dismissal on the ground that the jurisdictional amount is clearly lacking, the plaintiffs must show only that it does not "appear *to a legal certainty* that the claim is really for less than the jurisdictional amount,"[38] they should be able to withstand such a motion by defendants. For damages to be insufficient to a "legal certainty," it must appear that, as a matter of law, the plaintiff cannot recover the damages he claims.[39]

If the defendant's answer denies the jurisdictional amount, the plaintiff is put to his proof in a summary hearing that may be under-

37 South Carolina v. Seymour, 153 U.S. 353, 357 (1894).

38 St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938) (emphasis added). *Accord,* Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 353 (1961); Muller v. Groban, 346 F.2d 263, 265 (7th Cir. 1965).

39 In Parmelee v. Ackerman, 252 F.2d 721 (6th Cir. 1958), a diversity-of-citizenship case, the plaintiff claimed damages for unintentional mental anguish. Since recovery on these grounds was not permitted under the applicable law (Ohio), and since without this claim the alleged damages were below the jurisdictional requirement, it appeared to a "legal certainty" that the requisite matter in controversy did not exist. Accordingly, the court dismissed for want of jurisdiction. *See also* Trail v. Green, 206 F. Supp. 896, 900 (D.N.J. 1962).

taken by affidavits.[40] If the required proof were strict, many plaintiffs might not succeed. But in the summary hearing there is no need to prove the precise damages claimed in cases where the nature of the right infringed makes such precision difficult.[41] Indeed, the plaintiffs themselves are not required to know the exact value.[42] Rather, if the plaintiff can show a "good faith" claim not stated solely for jurisdictional purposes, it should be sustained.[43] Although "good faith" has been variously defined, one court has summed up the law by stating:

> The test is not so much the actual amount of the recovery that might be had but whether, when the suit was brought, the plaintiff may have been reasonably entitled to recover an amount in excess of the jurisdictional requirement.[44]

If imprecision can be tolerated for cases involving pain and suffering,[45] it can be tolerated for claims of deprivation of civil rights by federal officers.[46]

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40 *See* Lowe's, Inc. v. Martin, 10 F.R.D. 143, 145 (N.D. Ohio 1950).

41 Food Fair Stores, Inc v. Food Fair, Inc., 177 F.2d 177, 182 (1st Cir. 1949).

42 Loew's, Inc. v. Martin, 10 F.R.D. 143, 145 (N.D. Ohio 1950).

43 *E.g.*, A.C. McKoy, Inc. v. Schonwald, 341 F.2d 737, 738 (10th Cir. 1965); Norwood Lumber Corp. v. McKean, 153 F.2d 753, 754 (3d Cir. 1946). Actually, the "good faith" and "legal certainty" tests are quite similar. One court said:

> The end of clarity will be furthered . . . if the first test [good faith] is seen to be but a linguistic variant of the second [legal certainty], for, as one authority has noted, "unless it appears to a legal certainty that plaintiff cannot recover the sum for which he prays, how can it be held that his claim for that sum is not in good faith?"

Deutsch v. Hewes St. Realty Corp., 359 F.2d 96, 99 (2d Cir. 1966), *quoting* C. WRIGHT, FEDERAL COURTS § 33, at 95 (1963). For a discussion of other cases involving the "good faith" rule, see Note, *Good Faith Pleading of Jurisdictional Amount*, 48 IOWA L. REV. 426 (1963). *See also* Note, *Determination of Federal Jurisdictional Amount in Suits on Unliquidated Claims*, 64 MICH. L. REV. 930 (1966).

44 Odlivak v. Elliott, 82 F. Supp. 607, 610 (D. Del. 1949).

45 *Cf.* Cohen v. Proctor & Gamble Distrib. Co., 16 F.R.D. 128, 130-31 (D. Del. 1954).

46 The jurisdictional amount requirement poses a unique difficulty for the courts. If the matter in controversy does not exceed $10,000, then logically no jurisdiction should exist. Yet the determination of the actual amount of damages may involve a trial on the merits. Both time-consuming sham allegations and dismissals of meritorious issues should be avoided. The "legal certainty" test thus seems to strike a balance between the two conflicting goals. Deutsch v. Hewes St. Realty Corp., 359 F.2d 96, 98-100 (2d Cir. 1966). It is arguable that when there is a "genuine dispute . . . as to the applicable law in determining the damages to be allowed," the plaintiff should be entitled to go to the jury. Muller v. Groban, 346 F.2d 263, 265 (7th Cir. 1965). This question on the merits should not be determined on motion to the court. On the other hand, Congress has recognized the undesirability of a time-consuming trial on the merits, followed by a dismissal for lack of jurisdictional amount. In 1958, in an attempt to cut down on blatantly exaggerated unliquidated claims, Congress established a penalty, to be used at the court's discretion, where the damages actually awarded were below the jurisdictional sum: the plaintiff could be required to bear the costs. 28 U.S.C. § 1331(b) (1964). Commentators

But, although Wolff might successfully allege the jurisdictional amount, the solution is far from ideal. It still requires placing a monetary value on rights that should be guaranteed against infringement regardless of the actual damage. Not every plaintiff will be able to allege the jurisdictional sum in good faith. As Justice Stone recognized, evaluation of civil rights damages is exceedingly difficult, and without special jurisdictional statutes a "large proportion" of the actions would not be maintainable.[47] The federal courts are not likely to attempt a more liberal interpretation of "matter in controversy" for civil rights purposes. Rather, they view themselves as creatures of the statutes that grant their jurisdiction, and are unwilling to extend their jurisdiction beyond the statutory limitations.[48]

Furthermore, the federal courts themselves undoubtedly support the congressional objective of keeping petty suits out of federal courts.[49] And even though a desire to prevent injustice in civil rights suits might tempt the courts to ease the requirements, they must recognize the implications of such action. Increased pressure to relax the requirements in all cases would doubtless ensue. Moreover, disregarding the mandate of a jurisdictional statute might threaten the principles of separation of powers and federalism.[50]

The courts should therefore not be expected to grant any special consideration to civil rights cases brought under section 1331. Yet, without special treatment, many civil rights claims could not be brought, because sufficient consequential damages could not in good faith be

entertain serious doubts as to the propriety and workability of the measure. *See, e.g.*, Cowen, *Federal Jurisdiction Amended*, 44 VA. L. REV. 971, 975-78 (1958).

47 Hague v. CIO, 307 U.S. 496, 530 (1939).

48 *See, e.g.*, Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941); Healy v. Ratta, 292 U.S. 263, 270 (1934); Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845).

49 The desire to cut down the workload of the federal courts by raising the jurisdictional amount to exclude "petty suits" seems to have been the major, if not the only, reason behind the 1958 increase from $3,000 to $10,000. Act of July 25, 1958, 72 Stat. 415, 28 U.S.C. § 1331(a)(1964). *See* 58 COLUM. L. REV. 1287, 1289-91 (1958).

50 For a separation of powers argument, see, *e.g.*, Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845), where the Court stated:

> To deny this position [that Congress may set the jurisdiction of the inferior federal courts] would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely. It follows, then, that the courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them.

For a federalism argument, see, *e.g.*, Healy v. Ratta, 292 U.S. 263, 270 (1934), where it is stated: "Due regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined."

alleged. The anomaly of requiring an allegation of monetary damages for a civil rights claim remains. Section 1343 of the Judicial Code protects persons against the dilemma where state action is involved; similar protection is needed where federal action violates an individual's civil rights.

Since federal court initiative in relaxing the jurisdictional amount requirement is both unlikely and undesirable, the remaining alternatives of state court action and a new statutory remedy must be examined.

III

STATE COURT INJUNCTIONS

In theory, federal and state courts have "concurrent" jurisdiction in federal question cases,[51] but during the last century the theory has broken down where claims are brought against federal officers. It is clear that state courts can prosecute federal officials for criminal behavior that violates state law. It is equally clear that state courts lack the power of mandamus over federal officers.[52] State courts may enter a money judgment against federal officials for wrongful action outside the scope of their authority,[53] but their power to enjoin such wrongful action is doubtful.[54]

A line of New York cases has culminated in a holding that state courts do not have the power to enjoin federal officials.[55] Federal courts have followed the same reasoning in cases removed to a federal forum by the federal officer.[56] In these cases, removal has been followed by dismissal in the federal court on the ground that the state court was originally without jurisdiction, and that the federal court therefore lacked derivative jurisdiction. The Supreme Court, in *Brooks v. De-*

51 *See In re* Green River Drainage Area, 147 F. Supp. 127, 134 (D. Utah 1956). *See also* Cullison, *State Courts, State Law, and Concurrent Jurisdiction of Federal Questions*, 48 IOWA L. REV. 230 (1963).

52 Arnold, *The Power of State Courts To Enjoin Federal Officers*, 73 YALE L.J. 1385, 1391-93 (1964).

53 Teal v. Felton, 53 U.S. (12 How.) 284, 292 (1851). *Accord*, Leroux v. Hudson, 109 U.S. 468, 476-77 (1883).

54 *See* Arnold, *supra* note 52, at 1397; Note, *Limitations on State Judicial Interference with Federal Activities*, 51 COLUM. L. REV. 84, 91-93 (1951). For the distinction between mandamus and injunction, see note 18 *supra*.

55 Wasservogel v. Meyerowitz, 300 N.Y. 125, 133-34, 89 N.E.2d 712, 716-17 (1949); Armand Schmoll, Inc. v. Federal Reserve Bank, 286 N.Y. 503, 508-09, 37 N.E.2d 225, 226-27 (1941); Fox v. 34 Hillside Realty Corp., 87 N.Y.S.2d 351, 352-53 (Sup. Ct. 1949).

56 *See, e.g.*, Pennsylvania Turnpike Comm'n v. McGinnes, 179 F. Supp. 578, 582-83 (E.D. Pa. 1959), *aff'd per curiam*, 278 F.2d 330 (3d Cir.), *cert. denied*, 364 U.S. 820 (1960); cases cited and discussed in Arnold, *supra* note 52, at 1393-94.

war,[57] declined to answer the question. State court injunctions thus appear to be an uncertain remedy at best.

At stake in state court actions against federal officers is the power of the federal government to act within its sphere, free of state interference. The supremacy clause of the Constitution,[58] and the corollary that "the activities of the federal government are free from regulation by any state,"[59] effectively insulate federal officers from control by the states.[60]

Some authors have argued that state courts should be granted the power of injunction over federal officials.[61] Since state and federal jurisdiction is theoretically "concurrent," state courts should be permitted to act in all federal question cases where exclusive jurisdiction has not been given to the federal courts by statute.[62] Accordingly, state courts should have the power to issue injunctions against infringement of civil rights by federal officials. It has also been urged that withholding injunctive power from the state courts is not essential to protect federal officials, since the available defenses, such as sovereign immunity, provide adequate protection.[63] Moreover, since monetary damages may be as obstructive as an injunction, the latter should be available in state courts on the same terms as is the former.[64] Nor should it be assumed that state courts are so disloyal and disruptive that they will use civil rights suits brought by individuals as a guise for a campaign to obstruct and interfere with the federal government.[65]

57 313 U.S. 354, 359-60 (1941).

58 U.S. CONST. art. VI, § 2, provides in pertinent part that the Constitution, laws, and treaties of the United States are "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

59 Mayo v. United States, 319 U.S. 441, 445 (1943).

60 *See, e.g.*, Tennessee v. Davis, 100 U.S. 257, 263 (1879); Tarble's Case, 80 U.S. (13 Wall.) 397, 409 (1871). The distinctions mentioned above, *e.g.*, allowing criminal prosecutions but forbidding habeas corpus, become more understandable in this context. Habeas corpus clearly interferes with the control of the federal government over its prisoners, whereas a federal officer committing a criminal act is clearly acting beyond the scope of his authority.

61 *See* Arnold, *The Power of State Courts To Enjoin Federal Officers*, 73 YALE L.J. 1385 (1964); Note, *Limitations on State Judicial Interference with Federal Activities*, 51 COLUM. L. REV. 84, 91-94 (1951); 34 GEO. WASH. L. REV. 171, 176-78 (1966).

62 Arnold, *supra* note 61, at 1401. Examples of such exclusive jurisdiction include matters of bankruptcy, 28 U.S.C. § 1334 (1964), and patents and copyrights arising under any act of Congress. 28 U.S.C. § 1338(a) (1964). In these areas, the states are of course preempted.

63 Arnold, *supra* note 61, at 1402.

64 34 GEO. WASH. L. REV. 171, 178 (1966).

65 *See* Arnold, *supra* note 61, at 1406, *quoting* Minnesota v. Brundage, 180 U.S. 499, 503 (1901).

The possibility of such a campaign is also weakened by the right of removal given to federal officers[66] and by the Supreme Court's power of ultimate review in these actions.[67]

There are, however, arguments to the contrary. First, the issues in these cases are exclusively federal in nature—federal officers acting under federal authority pursuant to federal law. A federal court presumably has a special competence and concern in these matters.[68] Although state courts do have concurrent jurisdiction of all federal question suits that Congress has not explicitly reserved to the federal courts,[69] simple efficiency proscribes the creation of fifty separate centers of control over the conduct of federal officials.

Second, the desire to avert obstructionism is, after all, a valid reason for barring states from enjoining the acts of federal officers. The possibility of such obstruction is readily apparent. In *Jackson v. Kuhn*,[70] a suit was brought to enjoin the Army from policing the schools of Little Rock, Arkansas, during the integration crisis, but the complaint was dismissed for failure to allege the jurisdictional amount. As Professor Wechsler expressed the problem, "the danger of hostility within the states to [a] particular federal affirmation" is an argument in favor of allowing these cases in federal court regardless of jurisdictional amount.[71]

Both the power of federal officers to remove state court suits against them and the ultimate appellate review by the Supreme Court may theoretically prevent obstruction.[72] But these protections may not be fully effective.

> An unsympathetic state court may impede the assertion of a federal right by delay. One case, in which a federal defense was raised against a state law claim, was finally decided by the United States Supreme Court on the merits . . . after eight years of litigation and three previous decisions of the Supreme Court.[73]

While all state courts might not be so inclined to interfere with the

66 28 U.S.C. § 1442 (1964).

67 *See* Arnold, *supra* note 61, at 1402.

68 ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 60-63, 69 (Tent. Draft No. 5, 1967) [hereinafter cited as ALI Draft No. 5].

69 *See In re* Green River Drainage Area, 147 F. Supp. 127, 134 (D. Utah 1956); Cullison, *supra* note 51, at 240.

70 254 F.2d 555 (8th Cir. 1958).

71 Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 225 (1948).

72 *See* p. 927 & notes 66-67 *supra*.

73 ALI Draft No. 5, *supra* note 68, at 63, referring to NAACP v. Alabama, 377 U.S. 288 (1964).

activities of federal officers, still it might be far better to prevent this possibility by at least depriving state courts of the opportunity to make use of the injunction, rather than relying on remedies such as removal that might afford little relief to an obstruction campaign.

Nor is it persuasive to argne that monetary damages are potentially as obstructive as the proposed injunctive relief. In suits for money damages, the act complained of has already been committed, and the only question is whether to reimburse the plaintiff for his alleged losses. Injunctive relief, however, could delay an essential undertaking. Yet, if state court injunctive relief is unavailable, plaintiffs such as Wolff and Shortt, who have clearly been deprived of a federal right and hence have a legitimate claim, may have no remedy.

IV

STATUTORY CHANGE

A. *A Statute of General Jurisdiction*

Statutory change to eliminate the jurisdictional amount requirement appears to be the most feasible means of affording protection to plaintiffs such as Wolff and Shortt who are deprived of a constitutional right through the actions of federal officers. Yet, despite the apparently favorable attitude of Congress toward civil rights suits,[74] it has not seen fit to remove the matter in controversy requirement in the federal officer situation. Commentators have none the less urged that the requirement be dropped for cases that otherwise qualify for federal question jurisdiction under section 1331.[75] Most notably, the American Law Institute, in its *Study of the Division of Jurisdiction Between State and Federal Courts*,[76] has proposed a substitute for section 1331 in which no jurisdictional amount would be required for federal question

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74 One possible indication of this attitude might be gleaned from S. REP. No. 1830, 85th Cong., 2d Sess. 6 (1958). While the report states that the purpose of the jurisdictional amount requirement is to exclude petty claims, it also indicates that Congress has provided many exceptions that permit federal courts to hear claims regardless of the amount in controversy. Included among the exceptions is "civil rights," an obvious reference to 28 U.S.C. § 1343. Section 1343 applies only to deprivations under color of state law, *see* note 14 *supra*, but by referring generally to "civil rights," the report may indicate that Congress would consider that suits involving civil rights should be maintainable regardless of jurisdictional amount.

75 *See* Friedenthal, *New Limitations on Federal Jurisdiction*, 11 STAN. L. REV. 213, 217-18 (1959); Wechsler, *supra* note 71, at 225-26.

76 ALI Draft No. 5, *supra* note 68, at 5. Tentative Drafts 3-5 reach the same conclusions concerning the matter in controversy requirement.

cases.[77] The comments to the draft note the inappropriateness of requiring a matter in controversy in a federal question case, "since the effect of such a requirement is to deny a federal forum in cases where the federal courts have a special expertness and a special interest."[78] It is true that a "substantial portion of federal question jurisdiction does involve 'petty controversies,' in terms of the amount in controversy," but "[w]here the right relied on is federal, the national government should bear the burden of providing a forum to parties who wish to be heard in federal court."[79] It is also argued that the jurisdictional amount requirement may be an insult to the state courts:

> Congress has the power to require state courts to hear federal question cases, but to exercise that power in such fashion as to force small claims into state courts, while reserving larger claims for federal courts, would smack too much of regarding the state courts as inferior tribunals, rather than a coordinate system.[80]

The comments point out that the various exceptions to section 1331, which often permit "petty" suits in the federal courts, express Congressional recoguition of the propriety of providing a federal forum for federal claims.

Finally, the comments state:

> There are apparently a few other instances, besides those mentioned at the time of the 1958 amendment, in which no special statute is applicable and thus the requirement of 28 U.S.C. § 1331 as to amount in controversy must be satisfied. . . . But it is clear that the amount requirement of § 1331 is largely illusory, and that it has no significant impact on the workload of the federal courts.[81]

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77 ALI Draft No. 5, *supra* note 68, at 5. The proposed § 1311(a) states:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction without regard to amount in controversy of all civil actions in which the initial pleading, whether for coercive relief or for a declaratory judgment, sets forth a substantial claim arising under the Constitution, laws, or treaties of the United States.

Concerning the other changes made by the section, most notably the additions to the "arises under" clause of 28 U.S.C. § 1331(a) (1964), the draft states:

> This subsection is intended to be declaratory of existing doctrine as to when a case is within the original federal question jurisdiction, while using somewhat different language than does the present statute in order to emphasize that the statutory grant is not coextensive with that of the Constitution.

ALI Draft No. 5, *supra* note 68, at 72. Cases such as *Wolff*, which do raise a bona fide first amendent issue, pose no problems in this regard.

78 ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 49 (Tent. Draft No. 4, 1966).

79 *Id.* at 49-50.

80 *Id.* at 50.

81 *Id.* at 202.

The future of the ALI proposal obviously hinges upon Congress's estimate of the wisdom of removing the matter in controversy requirement. There is some merit in a shift from requiring the jurisdictional amount in all cases not specifically excepted to requiring it only where a specific statute so provides. But there may be strong reasons to retain the requirement, despite the conclusions of the ALI study. Protection of the federal administrative machinery, laboriously built up over the past several decades, may be the most important consideration. It is not very difficult to transform an adverse administrative ruling into a claim of deprivation of civil liberties; a flood of such injunctive suits could easily impair the working of the federal administrative agencies.

The jurisdictional amount requirement, coupled with the denial of state injunctive power, thus serves as a partial buffer against harassing claims. Congress can decide, agency by agency, when judicial review should be permitted.[82] Failure to provide for judicial review of the actions of some agency officers may reflect a determination that the activities of these agencies are too essential and delicate for review.[83] Thus, the various "buffers" against judicial review of their actions, including the jurisdictional amount requirement, have been left intact.

It is true that if a statute were passed extending federal jurisdiction over all federal question cases regardless of amount in controversy, some constraints on judicial review would still remain. For example, the doctrine of exhaustion of administrative remedies would enable courts to turn away claims brought merely to avoid normal agency channels. The exhaustion concept is flexible enough to protect civil rights as well as to ensure the orderly procedure of administrative

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82 *See* the examples given in note 24 *supra.*

83 Certainly this is the case with the Selective Service System. In Falbo v. United States, 320 U.S. 549 (1944) (later distinguished in Estep v. United States, 327 U.S. 114 (1946)), the Court stated:

> The circumstances under which the Act was adopted lend no support to a view which would allow litigious interruption of the process of selection which Congress created. . . . Congress apparently regarded "a prompt and unhesitating obedience to orders" issued in that process "indispensable to the complete attainment of the object" of national defense.

320 U.S. at 554. And the *Wolff* court itself, though it took a broad view of the power of the courts to act against the Selective Service, stated:

> Irrespective of the existence of the power to do so, the courts, and particularly this Court, have been extremely reluctant to bring any phase of the operation of the Selective Service System under judicial scrutiny. The very nature of the Service demands that it operate with maximum efficiency, unimpeded by external interference.

Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817, 822 (2d Cir. 1967).

agencies.[84] In addition, the concepts of ripeness and standing are similarly useful.[85]

But none of these doctrines is as mechanically efficient as the jurisdictional amount requirement. The applicability of the other doctrines, and thus the outcome of possible harassing suits, would depend upon court interpretation. Litigation would have to proceed on those issues and on the merits of each claim. Jurisdictional amount, on the other hand, can be determined in a summary proceeding on motion to dismiss.[86] Arguably, then, it might be preferable to continue the approach of creating exceptions allowing redress against federal officers on an agency-by-agency basis, rather than to abolish altogether the efficient jurisdictional amount requirement.

B. *Statutes Conferring Limited Jurisdiction*

It might be argued, therefore, that any congressional efforts to remedy the inadequacies of existing protection against actions of federal officers ought to follow the established pattern of excepting suits challenging actions of specific agencies from the jurisdictional amount requirements of section 1331. In this way, the scope of civil rights protection can be broadened in a moderate and controlled manner.

For example, a statute might be devised to deal with civil rights claims against the Selective Service, probably by amending the mandate of finality[87] to allow judicial review of board action. Although the Selective Service performs a vital function that cannot stand extensive tampering,[88] courts have gradually indicated that the exemption of its administrative structure from judicial review cannot be allowed to infringe constitutional rights.[89] A statute must both protect those rights and defend the Service from undue interference.

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84 Exhaustion will not be required where it serves no purpose. In *Wolff*, for example, both the national appeal board and the National Director had repeatedly stated that the reclassifications were proper. "When there is nothing to be gained from the exhaustion of administrative remedies and the harm from the continued existence of the administrative ruling is great, the courts have not been reluctant to discard this doctrine." 372 F.2d at 825.

85 The basic principle of ripeness is that "[j]udicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote." 3 K. DAVIS, *supra* note 27, § 21.01, at 116. Standing has caused greater difficulty, but it has been asserted that "[o]ne who is in fact adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable." *Id.* § 22.18, at 291.

86 *See* pp. 923-24 & note 40 *supra*.

87 Military Selective Service Act of 1967, § 10(b)(3), 50 U.S.C.A. Appendix § 460(b)(3) (Supp. 1967). *See* note 25 *supra*.

88 *See* note 83 *supra*.

89 The progression from Falbo v. United States, 320 U.S. 549 (1944), which denied

The great majority of Selective Service determinations do not involve constitutional rights. In such cases the Service clearly acts within its authority in determining a registrant's classification, and the ordinary administrative processes should be able to deal with the problem sufficiently. Accordingly, Congress might enact a statute that would subject the Selective Service System to judicial review regardless of jurisdictional amount, but only in cases where the System exceeds its jurisdiction and infringes a constitutional right. The arduous case-by-case testing and harassment that might result under a statute completely abolishing the jurisdictional amount would thus be avoided. Nevertheless, the proposed statute would protect the civil liberties of registrants with a minimum dislocation of the current system.

The question remains whether the enactment of such a statute is politically feasible. Obviously, in time of war, the System must be permitted to operate without undue interference. Nor is there any indication of congressional sympathy for plaintiffs such as Wolff and Shortt. But if the protection of civil liberties offers no inducement to Congress to alter the draft law in this regard, consideration of its position in the federal system ought to provoke at least some thought. In a sense, congressional obstinacy has already cost that body the initiative in this matter, for it is apparent that the courts are expanding the area of inquiry into the administrative behavior of the Selective Service. Although the House committee that considered the 1967 draft law stated that the purpose of amending section 10(b)(3)[90] was to enunciate clearly "the principle already in existing law"[91]—the *Estep* doctrine—the report did not state that the "existing law" was made by the courts over twenty years ago, and not by Congress. Congress has thus been passed by, for reasons of "personal liberties,"[92] in its initial attempt to control the jurisdiction of the federal courts over the Selective Service.

Yet at least one branch of Congress seems content to let this state of affairs continue. In its report[93] on the Military Selective Service Act of 1967,[94] the House Committee on Armed Services spoke ill of courts, like that in *Wolff*, that "prematurely inquire into the classification

judicial review of a draft classification, through Estep v. United States, 327 U.S. 114 (1946), to Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967), illustrates the trend.

90 Military Selective Service Act of 1967, § 1(8), 50 U.S.C.A. Appendix § 460(b)(3) (Supp. 1967), *amending* Universal Military Training and Service Act § 10(b)(3), 50 U.S.C. Appendix § 460(b)(3) (1964).

91 H.R. REP. No. 267, 90th Cong., 1st Sess. 46 (1967).

92 Estep v. United States, 327 U.S. 114, 121-22 (1946).

93 H.R. REP. No. 267, 90th Cong., 1st Sess. (1967).

94 81 Stat. 100 (1967), 50 U.S.C.A. Appendix §§ 451-71 (Supp. 1967).

action of local boards . . . ."[95] At the same time, the judicial future appears to be plainly marked out. Courts are beginning to evidence a belief that the current administrative procedure of the System is inadequate to guarantee full protection to all those affected by it.[96] The issue will no longer be settled by urging the courts to respect the sanctity of the Selective Service; constitutional questions have superseded mere administrative considerations. An attitude of resistance by Congress can only increase the danger that the System's operations will be disrupted, as aggrieved parties are permitted to litigate their civil rights through ordinary channels. The courts, as was tacitly done in *Wolff*, have indicated that they might be willing to run this risk, if it is essential to the protection of civil liberties. Yet Congress can regain the initiative by enacting a statute that overcomes these constitutional objections by providing for speedy, efficient judicial review of such claims. The courts should then feel constrained to follow the review statute closely, as they do in all cases where Congress grants jurisdiction to the inferior federal courts.[97] But if Congress fails to fill the gap in the statutory structure, the courts will undoubtedly continue to assume an innovative role in an effort to prevent administrative abuse, by the Selective Service and others, of basic constitutional liberties.

Alfred C. Jones, III

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95 H.R. REP. No. 267, *supra* note 91, at 31.

96 *But see* Breen v. Selective Serv. Local Bd., —— F. Supp. —— (D. Conn. 1968). 1968).

97 *See* cases cited note 48 *supra.*