

the three years, to Virginia Morsey; the Nathan Burkan Memorial Competition Prize, to the senior submitting the best thesis on copyright law, to Nathan Ben Kaufman. Final Honors were awarded to Virginia Morsey, Ray T. Sample, and John R. Stockham.

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## NOTES

### THE CONSCIENTIOUS OBJECTOR IN LAW

#### INTRODUCTION

With the entrance of the United States into the present War the position of the conscientious objector in the law once again needs clarification. It is the purpose of this note to show the historical development of this exemption from military service, and to explore the legal aspects of the status of conscientious objector.

#### LEGISLATIVE BACKGROUND

##### *I. Conscription Generally*

As early as 1777 Virginia passed an act providing that if a certain number of men were not raised for the continental army by a certain date, there should be a draft from the militia.<sup>1</sup> This act was never attacked in the courts. The Constitution of the United States gives Congress the power to "raise and support armies,"<sup>2</sup> but the Second Amendment recognizes the right of the states to a "well-regulated militia."<sup>3</sup> Pursuant to this grant the states have constitutional provisions providing for an active state militia of a voluntary nature, but reserving the right, by placing every citizen in the militia, to call any or all of them if needed.<sup>4</sup>

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1. 9 Hen. Stat. at Large, 275 and 337; 10 Hen. Stat. at Large, 82, 214, 259, 333; 11 Hen. Stat. at Large, 14.

2. U. S. Const. (1787) Art. I, sec. 8, cl. 12.

3. U. S. Const. (1787) Amend. II; see also Art. I, sec. 8, cl. 16.

4. Ala. Const. (1901) Art. XV, sec. 271; Ariz. Const. (1912) Art. XVI, sec. 1; Ark. Const. (1874) Art. XI, sec. 1; Colo. Const. (1876) Art. XVII, sec. 1; Fla. Const. (1887) Art. XIV, sec. 1; Ga. Const. (1877) Art. X, sec. 1, par. 1; Idaho Const. (1890) Art. XIV, sec. 1; Ill. Const. (1870) Art. XII, sec. 6; Ind. Const. (1851) Art. XII, sec. 6; Iowa Const. (1857) Art. VI, sec. 2; Kan. Const. (1861) Art. VIII, sec. 1; Ky. Const. (1891) sec. 220; Me. Const. (1876) Art. VII, sec. 5; Md. Const. (1867) Art. IX, sec. 1; Mich. Const. (1908) Art. XV, sec. 1; Miss. Const. (1890) Art. IX, sec. 1; Mo. Const. (1875) Art. XIII, sec. 1; Mont. Const. (1889) Art. XIV, sec. 1; Neb. Const. (1875) Art. XIV, sec. 1; N. Hamp. Const. (1784) Part I, Art. 13; Nev. Const. (1926) Art. XII, sec. 156; N. C. Const. (1876) Art. XII, sec. 1; N. D. Const. (1889) Art. XIII, sec. 188; Ore. Const. (1859) Art. X, sec. 2; S. C. Const. (1895) Art. XIII, sec. 1; S. D. Const.

During the Civil War the muster of troops into the state militia was held to be subordinate to the federal calls, since every citizen was constructively in the federal army, and therefore that army's service commanded priority.<sup>5</sup> Since the Civil War the importance of the state militia as a fighting force separate from the United States Army has decreased, but most of these state statutory and constitutional provisions remain.

During the Civil War both the United States<sup>6</sup> and the Confederate<sup>7</sup> Governments passed conscription acts. These acts were attacked several times in the courts, but they were uniformly held to be a valid exercise of the power to "raise armies."<sup>8</sup> Again during the last War<sup>9</sup> and after the passage of the present Conscription Act<sup>10</sup> attempts have been made to deny the power of conscription to Congress, but all have failed. The grounds for attack have generally been that the power of conscription is not included in the power to "raise armies," or that it violates the provisions of the Constitution against slavery or involuntary servitude.

The power of conscription probably goes further than any of these acts. In a Civil War case, *Parker v. Kaughman*,<sup>11</sup> the power to draft labor for the armed services was held to be included in the power of general conscription. That case involved a baker who claimed that since he was exempt from active duty, he could not be called to bake in an army kitchen. The court held that there is no invariable rule for the construction of an army, and that the power to draft this man as a baker existed in the power to "raise armies." It now seems entirely possible that Congress can conscript labor not only for the armed forces, but for munitions and other war work as well. And there is language in a recent case decided by the Supreme Court of the United States saying that Congress may conscript industry.<sup>12</sup>

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(1889) Art. XV, sec. 7; Tenn. Const. (1870) Art. I, sec. 28; Tex. Const. (1876) Art. XVI, sec. 47; Vt. Const. (1793) Chap. I, Art. 9; Wash. Const. (1889) Art. X, sec. 6; Wyo. Const. (1889) Art. XVII, sec. 1.

5. The State, ex rel. Graham, In re Emerson (1864) 39 Ala. 437.

6. (1863) 12 Stat. 731, c. 75.

7. Matthews, *Statutes at Large of the Confederate States of America* (1st Congress, 1st Session, 1862) 29.

8. *Jeffers v. Fair* (1862) 33 Ga. 347; *Kneedler v. Lane* (1863) 45 Pa. 238; *Ex parte Coupland* (1862) 26 Tex. 387; *Burroughs v. Peyton* (1864) 16 Gratt. (57 Va.) 470.

9. Selective Draft Law Cases (1918) 245 U. S. 366; *Claudius v. Davie* (1917) 175 Cal. 208, 165 Pac. 689.

10. *United States v. Lambert* (C. C. A. Pa. 1942) 123 F. (2d) 395; *United States v. Rapoport* (D. C. N. Y. 1941) 36 F. Supp. 915.

11. (1865) 34 Ga. 136.

12. *United States v. Bethlehem Steel Corporation* (1942) 62 S. Ct. 581, 590; 86 L. Ed. 521, 529; see also (1940) 54 Stat. 892, c. 720, sec. 9, 50

## II. Conscientious Objectors

The state constitutions generally grant to the legislature the power to exempt conscientious objectors,<sup>13</sup> but some specifically exempt them in time of peace—generally on condition that payment of an equivalent for military service be made,<sup>14</sup> and a few grant exemption in time of war as well.<sup>15</sup> Generally these constitutional provisions define a conscientious objector as a member of a recognized religious sect whose tenets condemn war,<sup>16</sup> but a few allow the broader definition of anyone having conscientious scruples against war.<sup>17</sup>

Pursuant to these constitutional provisions most states have passed statutes making provision for exemption of conscientious objectors. In these statutes the legislatures have tended to restrict the definition of conscientious objection, making it religious only,<sup>18</sup> and to restrict the exemption itself, by requiring the objector to perform non-combatant service when called upon.<sup>19</sup>

During the Civil War the conscription statute of the United States<sup>20</sup> did not provide for exemption because of conscientious objection, but perhaps it was felt that the provision for sending a substitute would avoid any difficulty on this score.<sup>21</sup> At any

App. U. S. C. A. sec. 309, a *statute* empowering the President of the United States to conscript industry.

13. Ala. Const. (1901) Art. XV, sec. 271; Ariz. Const. (1912) Art. XVI, sec. 1; Ark. Const. (1874) Art. XI, sec. 1; Colo. Const. (1876) Art. XVII, sec. 1; Ga. Const. (1877) Art. X, sec. 1, par. 1; Kan. Const. (1861) Art. VIII, sec. 1; Ky. Const. (1891) sec. 220; Me. Const. (1876) Art. VII, sec. 5; Mich. Const. (1908) Art. XV, sec. 1; Mont. Const. (1889) Art. XIV, sec. 1; Neb. Const. (1875) Art. XIV, sec. 1; Nev. Const. (1926) Art. XII, sec. 1; Wyo. Const. (1889) Art. XVII, sec. 1.

14. Idaho Const. (1890) Art. XIV, sec. 1; Ill. Const. (1870) Art. XII, sec. 6; Iowa Const. (1857) Art. VI, sec. 2; N. D. Const. (1889) Art. XIII, sec. 188; Ore. Const. (1859) Art. X, sec. 2; S. D. Const. (1889) Art. XV, sec. 7.

15. Ind. Const. (1851) Art. XII, sec. 6; Mo. Const. (1875) Art. XIII, sec. 1; N. Hamp. Const. (1784) Part I, Art. 13; N. C. Const. (1876) Art. XII, sec. 1; S. C. Const. (1895) Art. XIII, sec. 1; Tenn. Const. (1870) Art. I, sec. 28; Tex. Const. (1876) Art. XVI, sec. 47; Vt. Const. (1798) Chap. I, Art. 9; Wash. Const. (1889) Art. X, sec. 6.

16. Me. Const. (1876) Art. VII, sec. 5.

17. S. C. Const. (1895) Art. XIII, sec. 1.

18. Kans. Gen. Stat. (1935) sec. 48-102; 1 Ann. Laws of Mass. (1932) c. 33, sec. 4 [this provision omitted, (1939) c. 33]; Ore. Code (1930) sec. 52-105.

19. Ala. Code (1932 Supp.) sec. 1600 (81); Fla. Comp. Gen. Laws (1927) sec. 2016; Carroll's Ky. Stat. (1936) sec. 2711a-146; Dart's La. Stat. (1939) sec. 4507; Rev. Stat. N. J. (1937) 38: 1-2; N. C. Code (1935) sec. 6795; Throckmorton's Ohio Code Ann. (1940) sec. 5177; Ore. Code (1930) sec. 52-105.

20. (1863) 12 Stat. 731, c. 75.

21. *Ibid.*, sec. 13.

rate no cases seem to have arisen involving persons with an objection to war. In the Confederate States, however, while the conscription statute<sup>22</sup> provided for sending substitutes, members of specified religious sects were granted exemption, if they furnished substitutes or paid \$500.<sup>23</sup> This was the first "federal" recognition of this belief.

The Selective Service Act of 1917<sup>24</sup> allowed exemption from combatant duty to conscientious objectors, but restricted the definition to members of "any well-recognized religious sect or organization at present organized and existing \* \* \*."<sup>25</sup> These individuals were subject to non-combatant duty.

The Selective Service Act of 1940<sup>26</sup> contains the most liberal provision of all. It allows exemption not only to members of religious organizations opposed to war, but also to individuals who have conscientious scruples against war, and under it these persons may apply either for non-combatant duty,<sup>27</sup> or assignment to "work of national importance under civilian direction."<sup>28</sup> The differences between the Act of 1917 and the Act of 1940 are readily apparent: the 1940 Act contains a broader definition of a conscientious objector and provides for a specialized exemption from military service entirely. The latter as worked out in practice consists of sending the objector to camps where work similar to that of the Civilian Conservation Corps is done. However, the payment of approximately thirty-five dollars per month for the

22. Matthews, *Statutes at Large of the Confederate States of America* (1st Congress, 2d session, 1862) 77, 78.

23. Under this act were exempted " \* \* \* all persons who have been and now are members of the society of Friends and the association of Dunkards, Nazarenes and Mennonists, in regular membership in their respective denominations: *Provided*, Members of the society of Friends, Nazarenes, Mennonists and Dunkards shall furnish substitutes or pay a tax of \$500 each into the public treasury."

24. 40 Stat. 76, c. 15.

25. *Ibid.*, sec. 4.

26. 54 Stat. 885, c. 720; 50 App. U. S. C. A. sec. 305.

27. What is non-combatant duty? According to a War Department Public Relations Release dated Jan. 18, 1941, non-combatant conscientious objectors may be assigned to the following fields: any unit of the Medical Department; any unit of the Quartermaster Corps except those organically assigned to divisions or smaller units; decontamination companies *only* of the Chemical Warfare Service; construction units, photographic units, depot units, repair units, or pigeon units of the Signal Corps; any unit of the Corps of Engineers except combat units, general service units, separate battalions, pontoon battalions; any units or installation of Corps Area Service Commands or War Department Overhead except Replacement Center units of the Infantry, Cavalry, Field Artillery, Coast Artillery Corps, Air Corps, Ordnance Department, Armored Force, and Military Police Units. (C. C. H., *War Law Service*, sec. 18,804.)

28. 54 Stat. 885, c. 720, sec. 5(g); 50 App. U. S. C. A. sec. 305.

cost of maintenance in the camps is required of the individual. Thus it may deprive some of the privilege of claiming conscientious objection because of the monetary consideration involved, but nevertheless it is a very liberal provision.<sup>29</sup>

#### JUDICIAL APPROACH

It can be seen from the above analysis of the constitutional and statutory history of conscientious objectors that the legislatures have been granted and have exercised a wide discretion with regard to them. The legislatures have restricted, however, the objector's "rights" to a varying degree. But one way or another a conscientious objector has always had some opportunity to be relieved of military service, either because that service was voluntary or because there was some procedure to allow him exemption, if he proved his "right" to exemption. The courts have, by judicial interpretation, further restricted that "right."

The premise of the courts has been the rule that "It is the duty of every citizen to bear arms when called upon to do so."<sup>30</sup> Since this duty is universal, the courts argue, any exemption from it amounts to a privilege, determinable by the legislature in

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29. The procedure to be followed under the 1940 Act by one claiming to be a conscientious objector is interesting. As explained in a Department of Justice Release, May 6, 1941 (C. C. H., *War Law Service*, sec. 18,810), the registrant asking for exemption must first apply to his local draft board. If that board does not grant him exemption, he may appeal to the District Board, which follows a specialized procedure. This procedure involves six steps: 1) the Appeal Board transmits the case to the United States Attorney in the District; 2) the United States Attorney gives the case to the Federal Bureau of Investigation, if he thinks that the Bureau has jurisdiction; 3) the Federal Bureau of Investigation makes an investigation and report, which it transmits to the United States Attorney, who in turn passes it to the local Hearing Officer; 4) the Hearing Officer fixes a time and place for a hearing; 5) after the hearing, the Hearing Officer makes a report to the Department of Justice consisting of, a) a statement of the findings of fact which he made, and, b) his recommendation for disposal of the case; 6) the Department of Justice then transmits its recommendation to the Appeal Board for disposition. It will be seen at once that this procedure involves discretion in many places, and that the registrants will have little to say in the result. But it must be remembered that conscientious objection is not measurable by a rigid set of standards, as other grounds for exemption are. It is a mental state which is difficult of ascertainment, and is susceptible to abuse, and therefore should be carefully considered.

30. In *United States v. Schwimmer* (1929) 279 U. S. 644, the Court said emphatically at page 650, " \* \* \* it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises;" and in *Jacobson v. Massachusetts* (1904) 197 U. S. 11, the Court said (page 29), " \* \* \* and yet he [the citizen] may be compelled, by force if need be, against his will and without regard to his personal wishes or his peculiar interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense."

any way, and revocable at will. Since its control is in the hands of the legislature, and that body sets up its administration, the courts will do little to interfere with the expression of the legislative fiat. And since the nature of the draft procedure is administrative, the long-established rule applies that courts will not investigate a hearing before an administrative tribunal other than to determine the tribunal had jurisdiction and that there was a fair hearing.

Some examples of the seeming antipathy of the courts toward conscientious objectors may be noted in the decided cases. These cases fall into three classifications: naturalization, student, and conscription cases.

### I. Naturalization Cases

The importance of the naturalization cases, *United States v. Schwimmer*<sup>31</sup> and *United States v. Macintosh*,<sup>32</sup> in regard to conscientious objectors to war and their exemption from military service lies in the fact that they did not involve administrative law technicalities, and that both had a clear set of facts.

The *Schwimmer* case, decided in 1929, near the height of the pacifistic feeling which swept the United States between the last War and the present conflict, is a good example. In the naturalization proceeding, one of the things to be done by the applicant for citizenship is the filling out of a questionnaire. In accordance with that part of the Naturalization Act of 1906<sup>33</sup> which reads,

He [the applicant] shall \* \* \* declare on oath \* \* \* that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same,

the naturalization officials had placed on the questionnaire a question reading, "If necessary, are you willing to take up arms in defense of this country?" Rosika Schwimmer, the applicant, answered this question, "I would not take up arms personally." When asked to expand this answer, she said she was an uncompromising pacifist, that she had no nationalist sense, only a "cosmic consciousness of belonging to the human family." In spite of her sex and the probability that she would never be asked or required to bear arms, the Court denied citizenship to her. Justices Holmes and Brandeis dissented vigorously, Justice Holmes saying that she should not be denied citizenship merely

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31. (1929) 279 U. S. 644.

32. (1931) 283 U. S. 605.

33. 34 Stat. 596, c. 3592, sec. 4(3); U. S. C. Tit. 8, sec. 381.

because she believed "more than some of us do in the teachings of the Sermon on the Mount."<sup>34</sup>

The *Macintosh* case was a more bitterly fought decision. Here, under similar circumstances, was a Canadian Baptist Minister seeking naturalization. He was a professor of divinity at Yale University, of great intellectual repute, and was over the military age when he answered the same question Mrs. Schwimmer had been asked, "Yes, but I should want to be free to judge of the necessity." Here, too, the Court denied citizenship to the applicant. Justices Holmes, Brandeis, and Stone concurred in a dissent written by Justice Hughes.

Both of these cases can be justified under the law, in view of the plenary power of Congress over aliens. If Congress desired every alien seeking naturalization to take an oath to bear arms if necessary, there is no doubt that it had the power to do so. The Court merely decided that Congress had shown such a desire. A conditional citizenship is infeasible from a political science viewpoint, and if it is a duty of every citizen to bear arms when called upon, these applicants could not logically be admitted on the limited, qualified or conditional basis that *they* should not have to bear arms if called upon—this may be another explanation of the cases. But under the facts of each case it might be urged that Congress had not expressed a desire that all applicants for citizenship take such an oath, and that these applicants were not seeking conditional citizenship, but rather the rights of ordinary citizens of the United States, who have the "privilege" of conscientious objection, but not the "right."<sup>35</sup> It should be noted that in both cases distinguished Justices dissented, the gist of their arguments being essentially what is outlined above, indicating that the cases were not, perhaps, incontrovertible.<sup>36</sup>

34. 279 U. S. 644, 655.

35. There is a clear expression of this in *United States v. Macintosh* (1931) 283 U. S. 605, on page 624, "The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution, but from the acts of Congress." The Georgia court made two nice expressions of this idea during the Civil War. In *Daly v. Harris* (1864) 33 Ga. (Supp.) 38 the court said that exemption is not a right vested by contract, which Congress may not violate or impair, but such exemption is a gratuitous privilege, revocable at the will of the legislature that granted it. In *Barber v. Irwin* (1864) 34 Ga. 27 the court said (and it applies very well to similar remarks in federal courts), "There is in the Confederate Constitution no delegation of power, express or implied, to grant individual citizens irrevocable exemption from military service." (Note: the Confederate Constitution in this regard was very similar to the United States Constitution; see Confed. Const. (1861) Art. I, sec. 8, Cl. 12-17.)

36. For additional holdings the same way in naturalization cases, see *United States v. Bland* (1931) 283 U. S. 636 (registered nurse who had

## II. Student Cases

In addition to the above naturalization cases the student R. O. T. C. cases may be mentioned. *Hamilton v. Regents of the University of California*,<sup>37</sup> decided by the Supreme Court of the United States, followed an earlier state case, *University of Maryland v. Coale*,<sup>38</sup> decided by the Court of Appeals of Maryland. Both cases are essentially alike, and a discussion of the *Hamilton* case will suffice for illustration. In the *Hamilton* case theological students of the Methodist Episcopal faith, who were conscientiously opposed to war, attempted to gain admission to the University of California without being required to take the military training which was compulsory for all male students, under an order of the Board of Regents of the University. The regents were acting in compliance with an act of Congress requiring military training in land-grant colleges.<sup>39</sup> The students claimed that this requirement abridged their privileges and immunities as citizens of the United States under the Fourteenth Amendment, and also that it violated Article I of the Kellogg-Briand Treaty,<sup>40</sup> which said, "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies \* \* \*." The court decided that the privileges and immunities of these students were not abridged, because

Government, federal and state, each in its own sphere owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law. And every citizen owes the reciprocal duty, according to his capacity, to support and defend the government against all enemies.<sup>41</sup> [Italics ours.]

The alleged violation of the Treaty was briefly dismissed as of no merit. This dismissal has been criticized,<sup>42</sup> but it is possible

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spent nine months in France nursing wounded soldiers); In re Roper (D. C. D. Del. 1921) 274 Fed. 490 (court said an alien with conscientious scruples against bearing arms could not take the oath of allegiance without mental reservations); Clarke's Case (1930) 301 Pa. 321, 152 Atl. 92 (petitioner wished to qualify the oath of allegiance, to obey the laws of this country "so far as they are in accord with the moral law of Jesus Christ").

37. (1934) 293 U. S. 245.

38. (1933) 165 Md. 224, 167 Atl. 54. The student was denied admission.

39. (1862) 12 Stat. 503, c. 130, sec. 4.

40. (1928) 46 Stat. 2343.

41. 293 U. S. 245, 262, 263.

42. Irion, *The Legal Status of the Conscientious Objector* (1939) 8 Geo. Wash. L. Rev. 125, 127.



that the Court could have decided that this was a political matter and not open to judicial review.

### III. Conscription Cases

The conscription cases are not as excellent in illustrating the judicial attitude toward conscientious objectors as the naturalization and student cases. Most of these conscription cases turn on procedural points, or other technicalities of the law.

In the early Massachusetts case of *Lees v. Childs*<sup>43</sup> the question of conformity with a statute<sup>44</sup> providing exemption for members of the Quaker Church was the deciding factor. The statute required the statement that the individual "is conscientiously scrupulous of bearing arms," before exemption could be granted. The applicant omitted these words in the application, merely certifying that he was a member of the Quaker Church and frequently and usually attended. It was signed by certain prescribed religious officials, who undoubtedly knew the purpose to which it was to be put. The court required him to pay the fine for non-attendance at musters because the omission indicated he might not have conscientious scruples against war. Under the same statute a certificate was filed by another Quaker, but he failed to state that he was a "member" and "frequently and usually" attended, merely stating that he attended. This was held, in *Commonwealth v. Fletcher*,<sup>45</sup> to be an insufficient compliance with the statute.

In these two cases the Massachusetts court seems to have been just a little wary in dealing with conscientious objectors. Merely the fact that a man was a Quaker did not, to them, establish, or even tend to establish, that he disavowed war. They were careful to point out that many Quakers fought during the Revolutionary War in contravention of the principles of their church. This fact, it seems, put the court on guard against anyone claiming exemption from militia duty because he was a Quaker.

But in two other cases, decided in different states, there seems to have been an entirely different approach to the problem. The Maine court, in *Dole v. Allen*,<sup>46</sup> allowed a certificate which stated that the applicant "measurably" conformed to the tenets of the Quaker Church. The word "measurably" was held to be a substantial compliance with the statute, and judgment was given accordingly. And in *White and Voorhies v. M'Bride*,<sup>47</sup> decided

43. (1821) 17 Mass. 351.

44. Mass. Stat. 1809, c. 108, sec. 2.

45. (1815) 12 Mass. 441.

46. (1827) 4 Me. 527.

47. (1815) 4 Bibb. (7 Ky.) 61.

in Kentucky in 1815, the court seems to have adjudicated completely the rights of the conscientious objector. The Constitution of Kentucky allowed exemption from militia duty to all who had religious scruples against war. Fines assessed by a court martial for failure to attend musters could not be collected under the court's decision, because plaintiffs proved themselves to be members of the Friends Church. This case is completely out of line.

There are no cases involving conscientious objectors arising under the United States conscription act during the Civil War, since it made no provision for them. The Confederate States, however, did make such provision.<sup>48</sup> In *Ex parte Stringer*,<sup>49</sup> a case arising under the Confederate statute allowing exemption to members of certain religious sects, the court refused to exempt petitioner from military duty. The exact nature of petitioner's claim cannot be gleaned from the opinion, although he seems to have had conscientious scruples against war, but did not belong to one of the sects mentioned in the act. The court denied exemption to him, but in doing so makes this curious remark:

Conscientious scruples against bearing arms, unless the party entertaining them belong to one of the religious sects mentioned in the statute presents to the courts of the country no legal ground for declaring the petitioner exempt from military duty.

If the court meant what it said here, this proposition might indicate that there could be a judicial determination of the exemption if the applicant made out a claim that he did belong to one of the sects. This view could be criticized, but a companion case decided by the same court, *Ex parte Hill*,<sup>50</sup> clearly indicates the court's attitude toward this matter. There it was said that courts have no authority to inquire as to whether or not a person was legally liable to conscription, since the question of amenability to conscription is in the hands of authority established by the legislature, and the problem is outside the jurisdiction of courts so long as within the scope of the authority exercised. This is the modern view.

In *Franke v. Murray*,<sup>51</sup> where petitioner sought habeas corpus to free him as a prisoner of the army, on the ground that he was a conscientious objector within the provisions of the Selec-

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48. *Supra*, notes 22 and 23.

49. (1863) 38 Ala. 457.

50. (1863) 38 Ala. 429.

51. (C. C. A. 8, 1918) 248 Fed. 865.

tive Service Act of 1917,<sup>52</sup> the court denied the writ. Here was a clear statement of the present judicial attitude toward the problem. The court said,

The claim of appellant that he is a member of a well-recognized religious sect or organization, whose creed and principles forbid the members participating in war in any form \* \* \* was a question to be determined under the act of Congress, first by the local board, and upon appeal by the district board. That provisions of this nature constitute due process of law, under the constitutional guaranty, has been frequently and uniformly held. [Citing cases.] It is only when the action of such a board was without jurisdiction, or if, having jurisdiction, it failed to give the party complaining a fair opportunity to be heard and present his evidence, that the action of such a tribunal is subject to review by the courts.<sup>53</sup>

This case would be followed at the present time.

A search of the authorities has revealed no cases decided on this point under the present conscription act.

The "judicial rights" of a conscientious objector may be summed up thus: In any political organization, there are two opposing interests, the interest of the individual, or citizen, and the interest of the community, or state. The individual has certain privileges, which in a democracy may be crystallized into what we call "rights," among which may be listed the right of freedom of religion. In addition the individual may have duties, of which the duty to bear arms when called upon is an example. On the other hand the community has certain powers, and among these is the war power. As a corollary of the war power the community has the power of conscription. It is at this point that the interest of the individual and the interest of the community meet, with the individual accepting his duty to bear arms and the community requiring him to do so. At the point where the state requires all citizens to perform their duty of bearing arms, certain considerations enter into the problem. The first is the interest of the state, which for its own benefit does not want certain citizens to perform this duty. For example, exemp-

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52. 40 Stat. 76, c. 15, sec. 4.

53. 248 Fed. 865, 869.

54. For a discussion of the terminology here, see Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (1920); Radin, A Restatement of Hohfeld (1938) 51 Harv. L. Rev. 1141; Hoebel, *Fundamental Legal Concepts as Applied in the Study of Primitive Law* (1942) 51 Yale L. J. 951.

tion is granted to workers in occupations vital to the war effort because they will better serve that effort there than in the trenches. And again citizens below a certain physical standard are not desired *by the state* for a similar reason. On the other hand the citizen has certain privileges granted to him by the state; among these is exemption from military service because of conscientious objection to war. However, *all these exemptions are merely privileges which are granted by the state.*<sup>55</sup> The underlying fact remains that it is the duty of every citizen to bear arms when called upon to do so. It is for these reasons that the courts are loath to consider the claim of a citizen who asserts a "right" to exemption.

### CONCLUSION

While there may have been a time when the conscientious objector was given an opportunity to be heard in judicial tribunals, at the present time those tribunals will listen to only two pleas: 1) lack of jurisdiction; 2) lack of fair hearing. The present attitude toward the problem is that the opportunity to be heard occurs in an administrative tribunal set up by the only authority having the power to grant the exemption, namely, the legislature, and that if the application is denied in that tribunal the courts have no business disturbing its decision. The harshness of that attitude may depend upon how one views the subject of conscientious objection. If one is friendly to such a belief the judicial attitude may seem violative of due process; if unfriendly the attitude may well be regarded as just.<sup>56</sup>

Whether the guarantee of freedom of religion in the First Amendment, which was interpreted by Jefferson as including freedom of *conscience*, requires Congress to make *some* provision for conscientious objectors is a moot question. Certainly as the provisions stand today the courts would not allow a claim of denial of the right to freedom of religion. But considering the part some of the various religious organizations which condemn

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55. See note 35, *supra*.

56. Some of the reluctance of the courts to accept conscientious objectors may be due to the influence of the Espionage Cases of the last War. Many of these involved conscientious objectors who violated the terms of the Espionage Act [(1917) 40 Stat. 217, c. 30] by attempting to incite insurrection in the armed forces. The leading case was *Schenk v. United States* (1918) 249 U. S. 47, where opposition leaflets to the draft were held not protected by the guaranty of freedom of speech in the Constitution, because of the state of war which existed. Justice Holmes, in his dissent in the case of *United States v. Schwimmer* (1929) 279 U. S. 644, pointed out that the majority were influenced by a fear that Mrs. Schwimmer would be another Schenk.

war, such as the Society of Friends, have played in our history since the Revolution, it is doubtful that Congress would ever recede to a position where a member of a religious organization with convictions against war would be unable to obtain exemption from military service.

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