
RESPONSE

SELECTIVE SERVICE AND THE SEPARATION OF POWERS[†]

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[†] An invited response to William J. Aceves, *The Codification Project: Protecting Conscientious Objection as Secular Protest*, 106 B.U. L. REV. 531 (2026).

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INTRODUCTION

The legal history of the U.S. military draft is a case study in creative statutory interpretation. Throughout the twentieth century, this interpretive creativity tended both to expand draft registrants' substantive and procedural rights, and to recalibrate the roles played by Congress, the courts, and various executive branch factions in the governance of tens of millions of young men. Today's Military Selective Service Act ("MSSA") reads much like the law that governed the land when the country last went to war with conscripts during the 1950s and 1960s. But between U.S. entry into the Korean War and its withdrawal from Vietnam, federal judges, draft administrators, and the Department of Justice ("DOJ") lawyers radically transformed the meaning of the statutory text. Most of those changes have never been codified even though the mid-century legal elite viewed them as essential to the legality and legitimacy of conscription. Professor Aceves's urgent and insightful article focuses on one of the best-known examples of creative statutory interpretation: the provision of conscientious objector accommodations to secular draft registrants.¹ But in the event of a future, draft-driven war, the fate of secular conscientious objectors—as well as that of all other draft registrants who contest their classification or induction—will likely turn on an even more significant departure from the statutory text.

As written, the MSSA confines judicial review of classification and induction decisions to criminal prosecutions for refusal to submit to induction.² During the Vietnam War, however, the federal courts and the Solicitor General's Office collaborated to permit a range of preinduction civil suits.³ These suits generally sought injunctive relief in the form of reclassification and stays or cancellations of induction orders. This was the sort of "litigious interruption" of the draft apparatus that Congress had spent decades trying to prevent.⁴ Selective Service ("SS") administrators considered preinduction judicial review catastrophic. Yet, by 1968, the federal justice system had come to view it as a necessary corrective to the illiberalism of draft administration. Professor Aceves's call to codify one set of pivotal Vietnam-era draft law precedents,⁵ thus inviting a broader

¹ William J. Aceves, *The Codification Project: Protecting Conscientious Objection as Secular Protest*, 106 B.U. L. REV. 531, 535-37 (2026).

² Military Selective Service Act, 50 U.S.C. § 3809(b)(3). Post-induction habeas review is also presumptively available in the absence of an explicit suspension of the Great Writ. See James T. Connor & Bert W. Clarke, *Judicial Investigation of Selective Service Action*, 19 TULANE L. REV. 344, 351 (1945) (recounting use of writ of habeas corpus to review selective service action).

³ See source cited *infra* notes 109-11.

⁴ *Falbo v. United States*, 320 U.S. 549, 554 (1944).

⁵ Aceves, *supra* note 1, at 538-40.

conversation about how to reconcile the administration of a future draft with the generally libertarian commitments of post-Vietnam public law.⁶

Scholars of the contemporary “adjudicative state,”⁷ or of the administrative state’s “second face,”⁸ might fairly respond that no such reconciliation is necessary. As in the contexts of immigration⁹ and welfare provision,¹⁰ libertarianism need not apply when it comes to administrative adjudication of large, vulnerable populations. Yet that response would overlook the sociological reality of a national draft, which applies not only to socially marginalized populations, but also to the sons (and maybe the daughters)¹¹ of almost every family in the United States. That very sociological reality fed both draft resistance and its administrative and judicial accommodation over the course of the twentieth century.¹² Indeed, the two-tiered system of administrative law described by the “adjudicative state” and “second face” literature arguably owes its existence to the abolition of the draft. It was the institution of the all-volunteer force that relieved millions of white and comparatively well-to-do young men from the vagaries of summary administrative justice.

A future draft regime would have to either universalize such summary justice or incorporate a variety of mid-century judge-made correctives, including but not limited to the judicial recognition of secular conscientious objection. The second option is undoubtedly more appealing to civil-libertarian-minded lawyers and politicians (as well as many of those required by law to register for

⁶ For those commitments, see generally Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019) and Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014).

⁷ Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1772-73 (2023) (recasting recent shifts in administrative law as endorsement of administrative adjudication with increased presidential control but reduced due process rights for parties).

⁸ Emily R. Chertoff & Jessica Bulman-Pozen, *The Administrative State’s Second Face*, 100 N.Y.U. L. REV. 727, 729-30 (2025) (calling attention to split in administrative state in which one part, subject to extensive judicial review, regulates in interest of general welfare while the other freely uses physical force against certain populations).

⁹ See Cox & Kaufman, *supra* note 7, at 1797-820 (describing judicial deference to immigration enforcement).

¹⁰ See Chertoff & Bulman-Pozen, *supra* note 8, at 733 n.17 (discussing welfare administration as “boundary case”).

¹¹ See Rebecca Patterson & Heidi Urban, *The Recent Push to Expand the Draft to Include Women, and Why It Still Faces an Uphill Climb*, GEO. J. INT’L AFFS. (Apr. 8, 2021), <https://gjia.georgetown.edu/2021/04/08/the-recent-push-to-expand-the-draft-to-include-women-and-why-it-still-faces-an-uphill-climb> [https://perma.cc/P3MQ-FVB8] (recounting debate on including women in draft and calling for their inclusion).

¹² The inequalities introduced by deferments and exemptions did not solve this sociological problem. To the contrary, the availability of deferments and exemptions drove draft counseling, litigation, and eventually, the expansion of judicial review. See *infra* Part II (describing dynamic); AMY J. RUTENBERG, ROUGH DRAFT: COLD WAR MILITARY MANPOWER POLICY AND THE ORIGINS OF VIETNAM-ERA DRAFT RESISTANCE 177 (2019) (“The focus on personal choice encouraged by Selective Service’s policy of manpower channeling enabled the draft counseling that became one of the unique hallmarks of Vietnam-era draft evasion.”).

the draft). But the historical record suggests that judicialization of draft administration is difficult to reconcile with effective management of military manpower.¹³ Given the growing likelihood of a future, draft-driven war,¹⁴ the legal and logistical dilemmas presented by Professor Aceves's article and this Response are disturbingly pressing.

The remainder of this Response is organized as follows. Part I summarizes the dialectic between draft resistance and creative statutory interpretation between World War I ("WWI") and the peacetime draft of the late 1950s. During those decades, executive branch lawyers and federal judges repeatedly departed from the plain meaning of the statute to expand the pool of legitimate conscientious objectors, the procedural protections afforded to all draft registrants, and the availability and scope of judicial review of draft classification decisions. Part II describes how the federal courts and DOJ built on these earlier precedents in order more fully to judicialize draft administration in response to Vietnam-era draft resistance.

I. RESISTANCE AND REVIEW: 1917-1956

The Selective Service Act of 1917 ("SSA") established the first truly national and universal draft in United States history.¹⁵ The SSA provided for no judicial review of classification decisions and purported to subject "[a]ll persons drafted into the service of the United States . . . to the laws and regulations of the Regular Army."¹⁶ Because of this language, draft registrants who refused to report for induction faced court-martial rather than criminal prosecution. In

¹³ See generally LAWRENCE M. BASKIR & WILLIAM A. STRAUSS, CHANCE AND CIRCUMSTANCE: THE DRAFT, THE WAR, AND THE VIETNAM GENERATION (1978) (describing judicialization during 1960s); JOHN T. ELLIFF, CRIME, DISSENT, AND THE ATTORNEY GENERAL: THE JUSTICE DEPARTMENT IN THE 1960'S (1971); Jeremy K. Kessler, *New Look Constitutionalism: The Cold War Critique of Military Manpower Administration*, 167 U. PA. L. REV. 1749 (2019) [hereinafter Kessler, *New Look*] (describing judicialization during 1950s).

¹⁴ See, e.g., Katie Crombe & John A. Nagl, *A Call to Action: Lessons from Ukraine for the Future Force*, 53 PARAMETERS 21, 24 (2023) (arguing if future conflicts have casualty rates similar to Russia-Ukraine War "the 1970s concept of an all-volunteer force has outlived its shelf life and does not align with the current operating environment"); KATHERINE L. KUZMINSKI & TAREN DILLON SYLVESTER, BACK TO THE DRAFTING BOARD: U.S. DRAFT MOBILIZATION CAPABILITY FOR MODERN OPERATIONAL REQUIREMENTS 1 (2024), https://s3.us-east-1.amazonaws.com/files.cnas.org/documents/DraftMobilization_2024_Final-3.pdf ("[T]hreats from great power competitors . . . have the potential to escalate at an order of magnitude that would yield the nation's all-volunteer force (AVF) combat ineffective.").

¹⁵ Although the Union resorted to conscription late in the Civil War, the ability to pay for substitutes and the confinement of conscription to districts that failed to meet volunteer quotas meant that draftees constituted less than 10% of the total fighting force. See JOHN WHITECLAY CHAMBERS II, TO RAISE AN ARMY: THE DRAFT COMES TO MODERN AMERICA 61-62 (1987). The Confederacy relied more heavily on conscripts, but there too application of the law was piecemeal and primarily targeted at extending the enrollment contracts of volunteers. See *id.* at 45-47.

¹⁶ Selective Service Act of 1917, Pub. L. No. 65-12, § 2, 40 Stat. 76, 78.

response, federal district courts began to entertain habeas corpus petitions filed by draft registrants who argued that their induction orders were invalid because their draft boards had blatantly disregarded the SSA's classification criteria.¹⁷ Following induction or court-martial conviction, habeas was also available, but the scope of review was even more limited.¹⁸

As for the right of conscientious objection, the SSA afforded it only to those draft registrants who were "member[s] of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war."¹⁹ At the time of passage, this provision was widely understood to cover only official members of the historic peace churches, such as the Quakers and Mennonites.²⁰ Because of that understanding, the narrow scope of habeas review, and the ideological composition of the federal judiciary at the time, civilian courts offered the nonsectarian war resister little hope of avoiding the rigors of military justice.

A group of politically progressive War Department administrators, however, took it upon themselves to transform the meaning of legitimate conscientious objection. They also created a new, nonjudicial venue for the consideration of would-be conscientious objectors' claims. Days after inductions began, Felix Frankfurter—who was serving as a civilian assistant to Secretary of War Newton Baker—circulated a memo advocating for both innovations.²¹ He acknowledged that neither were authorized by the SSA but argued that efficient management of the nation's anti-war population necessitated a more accommodating conscientious objection regime.²² Secretary Baker agreed and established a Board of Inquiry to interview inductees who had been denied conscientious objector status by their local draft boards.²³ The Board, led by Columbia Law School Dean Harlan Fiske Stone, enjoyed plenary authority to reclassify these inductees and assign them either to noncombatant roles within the army or to alternative civilian service.²⁴ That latter form of accommodation was itself an invention of the War Department, as the SSA provided only for noncombatant military service.²⁵ Later in the war, Secretary Baker also granted Stone's Board de facto appellate authority over court-martial decisions involving would-be conscientious objectors.²⁶

¹⁷ See Connor & Clarke, *supra* note 2, at 351.

¹⁸ For habeas review during WWI, see Note, *Habeas Corpus and Judicial Review of Draft Classifications*, 28 IND. L.J. 244, 247-48 (1953); Connor & Clarke, *supra* note 2, at 350-51; Note, *Military Jurisdiction Over Inductees*, 91 U. PA. L. REV. 751, 751-56 (1943).

¹⁹ § 4, 40 Stat. at 78.

²⁰ See Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083, 1088 n.7 (2014) [hereinafter Kessler, *Administrative Origins*].

²¹ *Id.* at 1111-13, 1118-22.

²² *Id.* at 1118-20.

²³ *Id.* at 1124-33.

²⁴ *Id.* at 1132-36.

²⁵ Selective Service Act of 1917, Pub. L. No. 65-12, § 2, 40 Stat. 76, 78.

²⁶ Kessler, *Administrative Origins*, *supra* note 20, at 1136-41.

Over the two years of its operation, the Board reclassified nearly two thousand men as conscientious objectors and reversed the courts-martial of over a hundred more who had been convicted for refusing orders on conscientious grounds.²⁷ Most significantly for Professor Aceves's argument, the Board disregarded the statutory definition of conscientious objection, instead extending the right to any man who sincerely objected to all war on religious, "political," or "ethical" grounds, regardless of his sectarian affiliation or lack thereof.²⁸

The Selective Training and Service Act of 1940 ("STSA") instituted the first *peacetime* draft in the nation's history, although it did so against the backdrop of likely American involvement in World War II ("WWII").²⁹ The STSA broke with many aspects of the WWI draft law, largely in an effort to accommodate the civil libertarian sensibilities of the era.³⁰ With respect to conscientious objectors, deferment would now be available to any draft registrant who "by reason of religious training and belief, is conscientiously opposed to participation in war in any form."³¹ This was a much broader definition than the formal, sectarian approach taken by the 1917 statute, although it was not on its face as accommodating as the religion-agnostic approach taken by the WWI Board of Inquiry.

Shortly after the STSA's passage, however, DOJ lawyers began to push for an expansive interpretation of "religious training and belief," one that would bring the definition into line with the WWI Board's practices.³² Supreme Court Justice Harlan Fiske Stone also lobbied Attorney General Robert Jackson, urging him to follow the approach Justice Stone had pioneered as a WWI draft administrator.³³ Over the course of WWII, both the DOJ and the federal courts did indeed significantly expand the meaning of "religious training and belief," to the extent that even some secular war resisters received conscientious objector classifications.³⁴

²⁷ *Id.* at 1133-34, 1141.

²⁸ *Id.* at 1134, 1141.

²⁹ Selective Training and Service Act of 1940, Pub. L. No. 76-783, § 3, 54 Stat. 885.

³⁰ See Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1925-56 (2016) (describing those sensibilities).

³¹ § 5(g), 54 Stat. at 889.

³² See, e.g., Letter from Linton M. Collins, Special Assistant Att'y Gen., DOJ, to Richard P. Davidson, Major, Selective Serv. Sys. (Dec. 30, 1941) (on file with Nat'l Archives, Records of the Selective Service System 1940-, Record Group 147, Box 17) (arguing "religious training and belief" should be construed to encompass "all shades of opinion and conscientious conviction, ranging from denial of the existence of a deity to adherence to the dogmas of a particular religion, revealed or otherwise").

³³ See Memorandum from Matthew F. McGuire, Assistant Att'y Gen., DOJ, to Robert Jackson, Att'y Gen., DOJ (Oct. 10, 1940) (on file with Libr. of Congress, Robert H. Jackson Papers, Box 93).

³⁴ See, e.g., *United States ex rel. Reel v. Badt*, 141 F.2d 845, 847 (2d Cir. 1944) (holding draft registrant's "objection 'may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse'" (quoting *United States v.*

The DOJ's early involvement in the interpretation of "religious training and belief" reflected three other structural changes introduced by the STSA. First, the statute made clear that all draft registrants remained civilians prior to the moment of induction.³⁵ A newly created civilian agency, the Selective Service System ("SSS")—rather than the Army's Provost Marshall General—would handle most aspects of the registration and classification process.³⁶ During WWI, furthermore, draft registrants were subject to military justice once ordered to report for induction, and sometimes even prior to an order to report.³⁷ Now, in the event of draft resistance, the DOJ would have exclusive authority to indict registrants and prosecute them in Article III courts.

Second, the 1940 statute created an administrative appeals process tailored to the protection of conscientious objectors. In the event of a draft board's denial of a conscientious objector claim, DOJ lawyers, rather than SS higher-ups, would review the denial and produce a report assessing its factual and legal validity.³⁸ Third, draft registrants with legitimate conscientious objections to all forms of military service, including noncombatant service, would never face induction into the armed forces. Instead, the 1940 law assigned them to alternative, civilian service, codifying another extra-statutory innovation of the WWI Board.³⁹

Taken together, these substantive and structural innovations led the SS Legal Division to conclude that "the new law is vastly more liberal than the 1917 version."⁴⁰ Yet the STSA retained one aspect of the SSA that would strike a small but influential subset of wartime lawyers and judges as disturbingly illiberal: the preclusion of almost all judicial review.⁴¹ As in WWI, petitions for

Kauten, 133 F.2d 703, 708 (2d Cir. 1943)); *United States ex rel. Phillips v. Downer*, 135 F.2d 521, 524 (2d Cir. 1943) (defining "religious belief" as "aris[ing] 'from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe'" (quoting Kauten, 133 F.2d at 708)); *see also* Letter from F. Cleveland Hedrick, Jr., Colonel, Selective Serv. Sys., to Simon Dunkle, Colonel, Selective Serv. Sys. (Aug. 17, 1944) (on file with Nat'l Archives, Records of the Selective Service System 1940-, Record Group 147, Box 67) (discussing DOJ analysis predicting Supreme Court would adopt broader interpretation of "religious training and belief").

³⁵ § 11, 54 Stat. at 894-95; 86 Cong. Rec. 11710, 12039, 12084 (1940).

³⁶ *See* Kessler, *Administrative Origins*, *supra* note 20, at 1105 (describing role of Provost Marshal General as "official responsible for overseeing military discipline").

³⁷ *See* *Falbo v. United States*, 320 U.S. 549, 556 (1944).

³⁸ § 5(g), 54 Stat. at 889; *see* JULIEN CORNELL, *THE CONSCIENTIOUS OBJECTOR AND THE LAW* 25-27 (1943) (describing appeal process in detail).

³⁹ § 5(g), 54 Stat. at 889; *see also* NICHOLAS A. KREHBIEL, GENERAL LEWIS B. HERSHEY AND CONSCIENTIOUS OBJECTION DURING WORLD WAR II 80-118 (2011) (discussing development of Civilian Public Service system).

⁴⁰ Memorandum from A.J. Lewis, Captain, Selective Serv. Sys., to Clarence Dykstra, Director, Selective Serv. Sys. (Oct. 18, 1940) (on file with Nat'l Archives, Records of the Selective Service System 1940-, Record Group 147, Box 1).

⁴¹ *See* § 10(a)(2), 54 Stat. at 893; Jeremy Kessler, *A War for Liberty: On the Law of Conscientious Objection*, in 3 *THE CAMBRIDGE HISTORY OF THE SECOND WORLD WAR* 447,

writs of habeas corpus were to be the sole means by which a draft registrant could challenge SS classification and order-to-report-for-induction decisions. Furthermore, since the new law disclaimed all military control of draft registrants prior to induction, habeas review was understood to be available only *after* a draft registrant submitted to induction in the armed forces, enrolled at the appropriate civilian service camp, or found himself in federal prison following conviction for a draft law violation.⁴²

Between 1940 and 1946, civil libertarian federal judges made the most of this narrow mode of quasi-appellate review, using it to stretch the meaning of “religious training and belief” as far as it would plausibly allow.⁴³ But a more explosive form of creative statutory interpretation introduced a novel avenue of judicial review for all draft registrants, regardless of the deferment or exemption to which they felt entitled: review of the lawfulness of their classification if raised in the context of a criminal prosecution for refusal to submit to induction.⁴⁴ In *United States v. Estep*,⁴⁵ the Supreme Court embraced this supplement to habeas review, arguing that there was no meaningful difference between pre- and post-conviction consideration of the underlying basis of a registrant’s order to report.⁴⁶ In either context, review of the draft board’s jurisdiction was appropriate. Furthermore, Justice Douglas’s majority opinion defined jurisdictional errors expansively. When a draft registrant raised his draft board’s lack of jurisdiction as an affirmative defense to criminal prosecution, the judge should review both the consistency of the draft registrant’s classification with the statutory scheme and the classification’s “basis in fact.”⁴⁷ The lack of a basis in fact for a classification stripped the local draft board of jurisdiction every bit as much as a board’s violation of the statute.

Justice Douglas insisted that “basis in fact” review was much narrower than similar sounding tests that sought to discern the rational basis of, or substantial evidence supporting, a legislative or administrative decision.⁴⁸ Yet leading administrative law scholars could not understand what Justice Douglas meant. As Professor Kenneth Culp Davis wrote shortly after the decision: “To say that

467 (Michael Geyer & Adam Tooze eds., 2015) (describing contemporaneous understanding of finality).

⁴² See Connor & Clarke, *supra* note 2, at 352-53.

⁴³ See sources cited *supra* note 34.

⁴⁴ See, e.g., *Goff v. United States*, 135 F.2d 610, 612 (4th Cir. 1943) (“It would seem . . . that the total invalidity of an order which would be necessary to justify release on habeas corpus would constitute a defense to a criminal action based on disobedience of that order.”); *Chih Chung Tung v. United States*, 142 F.2d 919, 922 (1st Cir. 1944) (vacating criminal conviction for refusal to report where order to report was issued while administrative appeal was pending because such orders are “void and need not be obeyed”).

⁴⁵ 327 U.S. 114 (1946).

⁴⁶ *Id.* at 121-22.

⁴⁷ *Id.* at 122.

⁴⁸ *Id.*

administrators have no jurisdiction to err in finding facts is the same in substance as saying that the reviewing court may substitute its judgment as to the facts.”⁴⁹

The more fundamental puzzle was how to square *any* of the legal and factual inquiries required by *Estep* with Congress’s preclusion of *all* preinduction review. As Chief Justice Stone and Justice Burton noted in dissent, the *Estep* majority’s treatment of habeas review and affirmative defense review as interchangeable clearly contravened the purpose of the STSA’s finality provision.⁵⁰ Two years earlier, Justice Douglas himself had acknowledged that that finality provision was intended to preclude all “litigious interruption” of the classification and induction process.⁵¹ And only a month before *Estep*, the House Military Affairs Committee had re-affirmed that “[u]nder the act as it is now written, registrants who are ordered to submit to induction into the armed forces may not refuse and defend such refusal in a criminal prosecution on the ground that their classifications were not given fair consideration by their boards.”⁵²

A year after *Estep* came down, the *Yale Law Journal* diplomatically suggested that the case was “open to the criticism that it renders statutory provisions for finality of administrative determinations meaningless.”⁵³ Sure enough, the Supreme Court quickly extended *Estep* to permit judicial review in the context of prosecutions of conscientious objectors who had abandoned their alternative service assignments,⁵⁴ and to require judges to consider not only the statutory and factual bases of classification decisions, but also whether the decision-making process had complied with all of the regulatory revisions issued by SS headquarters on a monthly—or sometimes a weekly—basis.⁵⁵

After a brief hiatus between 1947 and 1948, the draft returned in response to the perceived consolidation and increasing militancy of Soviet power in eastern Europe.⁵⁶ When it came to the treatment of resisters, the Selective Service Act of 1948 (“SSA of 1948”)⁵⁷—extended in all relevant respects by the Universal Military Training and Service Act of 1951 (“UMTSA”)⁵⁸—was a mixed bag. With respect to substance, congressional majorities tightened the definition of conscientious objection, taking exception to the judge-driven extension of the

⁴⁹ Kenneth Culp Davis, *Nonreviewable Administrative Action*, 96 U. PA. L. REV. 749, 770 (1948).

⁵⁰ *Estep*, 327 U.S. at 145-46 (Burton, J., dissenting).

⁵¹ *Falbo v. United States*, 320 U.S. 549, 554 (1944).

⁵² H.R. REP. NO. 79-36, at 4-5 (1945).

⁵³ Note, *Restrictions on Judicial Review of Administrative Agencies Exercising Emergency Powers—Duty to Obey Orders Prior to Determination of Invalidity*, 56 YALE L.J. 403, 406 (1947).

⁵⁴ See *Gibson v. United States*, 329 U.S. 338, 360-61 (1946).

⁵⁵ See *Cox v. United States*, 332 U.S. 442, 448-50 (1947).

⁵⁶ See AARON L. FRIEDBERG, *IN THE SHADOW OF THE GARRISON STATE: AMERICA’S ANTI-STATISM AND ITS COLD WAR STRATEGY* 153 (2000); GEORGE Q. FLYNN, *THE DRAFT, 1940-1973*, at 100-08 (1993) [hereinafter FLYNN, *THE DRAFT*].

⁵⁷ Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604.

⁵⁸ Universal Military Training and Service Act of 1951, Pub. L. No. 82-51, 65 Stat. 75.

classification to cover heterodox and even secular objectors. Now, in order to receive conscientious objector status, a registrant's objection to all war would have to be grounded in his "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but . . . not includ[ing] essentially political, sociological, or philosophical views or a merely personal moral code."⁵⁹ This definition would remain the law of the land until 1967, when Congress once again sought to tighten the definition in response to subsequent rounds of creative judicial construction.⁶⁰

Such judicial creativity was enabled by the SSA of 1948's failure to push back against the Supreme Court's expansive interpretation of the 1940 draft law's finality provision. Since that interpretation did not explicitly turn on any constitutional issue, Congress could have clarified that it did in fact intend to preclude all but habeas review. Instead, the new law simply repeated the old law's finality provision, implicitly accepting the *Estep* line of precedent. The Senate Armed Services Committee made this legislative acquiescence explicit.⁶¹ As a result, registrants could continue to disobey SS orders, defend their action on the ground that they had been misclassified, and receive a judicial ruling on the validity of their classification.

Six months into the Korean War, the military's initial reliance on reservists—mostly veterans with steady jobs and families—proved so unpopular that President Truman turned back to the draft.⁶² The resulting takeoff in draft calls launched a new era of classification appeals and refusals to submit for induction. Between 1948 and July 1950, DOJ prosecutors had pursued 204 cases of draft law violation.⁶³ Over the next two years, twenty thousand cases reached the DOJ, and it prosecuted nearly ten thousand.⁶⁴ In addition to these enforcement actions, the DOJ remained responsible for conducting investigations and hearings for every man who appealed his local board's denial of conscientious objector status.⁶⁵ These investigations and hearings could themselves become subject to judicial scrutiny when men raised the invalidity of their classifications as a defense to the charge of draft evasion.

As draft law violations mounted, the DOJ tried to control the quantity and quality of prosecutions. Two DOJ policies especially angered SS Director Lewis

⁵⁹ § 6(j), 62 Stat. at 613.

⁶⁰ See *infra* Part II.

⁶¹ S. REP. NO. 79-1268, at 20 (1948) ("No changes have been made in the nature of judicial review of selective-service classifications. Instead, it is contemplated that the procedure and scope of review defined by the Supreme Court in enforcing the 1940 act will be equally applicable under this legislation."); T. Oscar Smith & Derrick A. Bell, *The Conscientious-Objector Program—A Search for Sincerity*, 19. U. PITT. L. REV. 697, 704-05 (1958) ("Congress evidently approved of the plan [for judicial review announced in *Estep*] for the *Estep* case was 'ratified' during the passage of the 1948 Selective Service Act.").

⁶² See FLYNN, *THE DRAFT*, *supra* note 56, at 113-15.

⁶³ *Id.* at 125.

⁶⁴ *Id.* at 125-26.

⁶⁵ See sources cited *supra* note 38.

Hershey. First, the DOJ directed prosecutors to determine for themselves whether a registrant's classification was legally and factually defensible.⁶⁶ Second, the DOJ reinterpreted the draft law to require a new investigation and hearing every time a local draft board denied a draft registrant's petition for conscientious objector classification—even if several previous petitions had been denied.⁶⁷ Hershey argued that these policies not only allowed registrants to delay and dissimulate indefinitely but also treated SS decisions less deferentially than the federal judiciary itself.⁶⁸ The DOJ disagreed, at least on the latter point, pointing to a growing number of cases in which district courts directed acquittal because of superficial procedural errors, especially in cases involving conscientious objector claims.⁶⁹

Director Hershey was right to worry. In the wake of the Korean War, the Supreme Court shook the SSS to its core, issuing a wave of decisions that: imposed a host of new procedural requirements on the classification of conscientious objectors;⁷⁰ expanded the class of legitimate conscientious objectors;⁷¹ and ramped up judicial scrutiny of all SS fact-finding.⁷² Leading administrative law scholar Louis Jaffe found this last development especially baffling, noting that the Court appeared to be applying the Administrative Procedure Act's increasingly demanding substantial evidence standard to SS classification decisions, despite the fact that Congress had explicitly exempted the agency from that statute's purview.⁷³

The legal assault on the draft led SS leaders to conclude that only major statutory changes would save conscription. Accordingly, in January 1955, they circulated a list of amendments for congressional consideration.⁷⁴ The

⁶⁶ Letter from Lewis B. Hershey, Dir., Selective Serv. Sys., to J. Howard McGrath, Att'y Gen., DOJ (June 22, 1951) (on file with Nat'l Archives, Records of the Selective Service System 1940-, Record Group 147, Box 95).

⁶⁷ Letter from Alexander Nuta, Major, to Daniel O. Omer, Colonel (Sep. 28, 1951) (on file with Nat'l Archives, Records of the Selective Service System 1940-, Record Group 147, Box 95) (noting policy change).

⁶⁸ Letter from Lewis B. Hershey to J. Howard McGrath, *supra* note 66.

⁶⁹ See, e.g., Letter from James M. McInerney, Assistant Att'y Gen., DOJ, to Lewis B. Hershey, Dir., Selective Serv. Sys. (Apr. 30, 1951) (on file Nat'l Archives, Records of the Selective Service System 1940-, Record Group 147, Box 95) (noting judicial trend); Letter from Peyton Ford, Deputy Att'y Gen., DOJ, to Lewis B. Hershey, Dir., Selective Serv. Sys. (Sep. 12, 1951) (on file Nat'l Archives, Records of the Selective Service System 1940-, Record Group 147, Box 95).

⁷⁰ See, e.g., *Bates v. United States*, 216 F.2d 130, 133 (8th Cir. 1954), *rev'd*, 348 U.S. 966 (1955); *Gonzales v. United States*, 348 U.S. 407, 416-17 (1955); *Simmons v. United States*, 348 U.S. 397, 404-06 (1955).

⁷¹ See, e.g., *Sicurella v. United States*, 348 U.S. 385, 390-92 (1955).

⁷² See, e.g., *Witmer v. United States*, 348 U.S. 375, 381-83 (1955); *Dickinson v. United States*, 346 U.S. 389, 395-97 (1953).

⁷³ See Louis L. Jaffe, *Judicial Review: Question of Fact*, 69 HARV. L. REV. 1020, 1048-50 (1956).

⁷⁴ See Kessler, *New Look*, *supra* note 13, at 1755.

amendments had three main goals: to roll back judicial and prosecutorial second-guessing of SS decision-making; to expand the range of evidence that could justify the denial of conscientious objector and ministerial claims; and to make it riskier for registrants to disobey SS decisions. None of these goals, however, found sufficiently powerful champions in Congress or the White House.⁷⁵ The rise in judicial hostility toward the agency during and after the Korean War did not take place in an ideological vacuum. If anything, the political mood had only become more inhospitable to administrative control of the nation's manpower in the wake of the election of the first Republican president in twenty years, Dwight D. Eisenhower.⁷⁶

President Eisenhower's legislative priorities included a significant reduction in the footprint of American military manpower, prioritizing instead the "brainpower" necessary to win what he believed to be an increasingly high-tech and clandestine Cold War.⁷⁷ Director Hershey was understandably reticent about this shift in emphasis from manpower management to brainpower preservation. Yet he eventually realized that it might offer his agency a solution to its problems in court. Hershey had long resisted overtures from "the deferment lobby," the congeries of businessmen, scientists, military modernizers, and other representatives of the burgeoning professional-managerial class who sought to shield better-educated young men from the draft.⁷⁸ As recently as 1953, Hershey had told a group of professional associations seeking "veto power over classification procedures" that "[y]ou can't teach democracy and practice oligarchy of any intellectual sort."⁷⁹ But an especially bruising wave of adverse judicial rulings in March 1955 led Hershey to change his tune.⁸⁰

When the draft law came up for renewal in June, Hershey—"[t]o the surprise of many"—opened his congressional testimony by lauding "the value of the deferment system."⁸¹ Advocating for an amendment that would extend student deferments to all high school and college students and eliminate the restriction on "pyramiding" such deferments year after year, Hershey announced that SS "had a new major task—that of channeling young men into nationally needed careers."⁸² For the remainder of the 1950s, the Director held out his agency as one dedicated to "channeling" brainpower into the private sector rather than

⁷⁵ See FLYNN, *THE DRAFT*, *supra* note 56, at 138.

⁷⁶ See Kessler, *New Look*, *supra* note 13, at 1755-60 (describing domestic anti-administrative implications of Eisenhower's "New Look").

⁷⁷ See *id.* at 1752-55.

⁷⁸ See *id.* at 1776-77.

⁷⁹ GEORGE Q. FLYNN, LEWIS. B. HERSHEY: MR. SELECTIVE SERVICE 202 (1985) [hereinafter FLYNN, MR. SELECTIVE SERVICE].

⁸⁰ See Kessler, *New Look*, *supra* note 13, at 1779-80.

⁸¹ FLYNN, MR. SELECTIVE SERVICE, *supra* note 79, at 208.

⁸² *Id.* at 209.

coercing manpower into the public sector.⁸³ This rebrand brought the SSS into alignment with the military and political economic vision of the New Look.⁸⁴ But it also helped the agency avoid the judicial and prosecutorial second-guessing that had increasingly attended its efforts to identify and induct soldiers.⁸⁵

II. RESISTANCE AND REVIEW: 1956-1973

Less than a year after Hershey's embrace of channeling, the Sixth Circuit Court of Appeals dramatized the danger of being stingy with deferments. The case involved Hayden Townsend, the father of young children who lost his dependency deferment in September 1955 due to a separation from his wife.⁸⁶ When the couple reunited a few months later, the father orally requested reclassification, but his local draft board ignored the request and ordered his induction.⁸⁷ Local lawyers filed a civil suit for injunctive relief on Townsend's behalf. In a literally unprecedented decision, future Supreme Court Justice Potter Stewart invalidated Townsend's induction order and remanded to the agency for a hearing on the request for reclassification.⁸⁸ As for the well-known statutory preclusion of judicial review prior to induction or criminal prosecution, Judge Stewart did not directly address the issue at all. Instead, his opinion implied that it was simply unfair to subject a father credibly entitled to a dependency deferment to prosecution or post-induction habeas review in order to vindicate his rights.⁸⁹

The *Townsend* decision raised the possibility of a novel regime of anti-draft litigation, one that would enable draft resisters to delay their induction indefinitely while avoiding criminal liability. Sure enough, preinduction civil suits filled the federal courts during the Vietnam War.⁹⁰ Both the Supreme Court and Solicitor General Erwin Griswold eventually endorsed the practice, at least in some contexts, despite belated congressional efforts to stem the tide.⁹¹ Although the growing unpopularity of the war undoubtedly contributed to this outcome, judicial disregard for the autonomy of the draft apparatus already had become a fixture of SS caselaw during the 1950s.

Director Hershey understood this state of affairs better than anyone. He correctly predicted that the political branches' decision to curtail the availability

⁸³ See BETH BAILEY, *AMERICA'S ARMY: MAKING THE ALL-VOLUNTEER FORCE* 13 (2009) ("In 1958, [Hershey] told Congress that 'inducting men is now only a collateral, almost, a byproduct of [the SSS's] operation.'").

⁸⁴ See generally RUTENBERG, *supra* note 12, at 96-128.

⁸⁵ See Kessler, *New Look*, *supra* note 13, at 1777-78.

⁸⁶ *Townsend v. Zimmerman*, 237 F.2d 376, 377 (6th Cir. 1956).

⁸⁷ *Id.*

⁸⁸ *Id.* at 377-78.

⁸⁹ *Id.*

⁹⁰ See, e.g., *Oestereich v. Selective Serv. Sys. Loc. Bd. No. 11*, 393 U.S. 233, 235 (1968).

⁹¹ See *infra* notes 109-10 and accompanying text.

and duration of deferments in the summer of 1965 would be met by a wave of draft resistance that would eventually swamp his agency in court. Even before the Vietnam buildup began in earnest, the Supreme Court's decision in *United States v. Seeger*⁹² indicated that the draft-skeptical status quo of the mid-1950s remained in place.⁹³ A decade earlier, the Court had interpreted the UMTSA's conscientious objection provision as preventing draft administrators from inferring from a registrant's willingness to use physical violence that his professed pacifism was insincere.⁹⁴ Now, in *Seeger*, the Court held that the provision's requirement that would-be conscientious objectors trace their pacifism to belief in a "Supreme Being" meant only that their pacifist beliefs had to "occup[y] a place in the[ir] life . . . parallel to that filled by the orthodox belief in God."⁹⁵ This creative act of statutory interpretation extended the possibility of conscientious objector deferment to an unknowably large population of young men about to lose their student deferments.

A few months later, as draft calls soared, Hershey made the fateful decision to try to interdict the looming draft resistance movement.⁹⁶ He did so by launching a "punitive reclassification" program: any violation of the draft law—such as impeding the work of local draft boards or abetting draft evasion—by a draft registrant would result in his reclassification as "delinquent" and thus subject him to immediate induction into the armed forces.⁹⁷ The hope was that this aggressive strategy, which had a plausible statutory basis but was bound to be unpopular in the courts, could rapidly demoralize the draft resistance movement, making long-term recourse to it unnecessary. In retrospect, this plan seems almost comically misguided, a doubling down on the kind of summary justice that had so troubled the federal courts during the 1950s. Hershey's resort to punitive reclassification testified to his certainty, earned from long experience, that he could not rely on federal judges and prosecutors to protect his agency from prolonged draft resistance. To the contrary, such resistance had historically driven increasingly intrusive judicial and prosecutorial review of draft decision-making, bringing the classification and induction process to a crawl.

Hershey's understanding of the resistance-review dynamic was correct, but punitive reclassification only accelerated it. Months after the reclassification campaign, two University of Michigan students challenged their punitive reclassification following their arrest for participating in a sit-in at the offices of

⁹² 380 U.S. 163 (1965).

⁹³ *Id.* at 176, 184-87.

⁹⁴ See *Sicurella v. United States*, 348 U.S. 385, 390-92 (1955).

⁹⁵ *Seeger*, 380 U.S. at 166.

⁹⁶ See ELLIFF, *supra* note 13, at 156-61.

⁹⁷ See, e.g., Letter from Lewis B. Hershey, Dir., Selective Serv. Sys., to Philip A. Hart, Sen., U.S. Senate (Dec. 14, 1965) (on file with Lyndon B. Johnson Presidential Libr., Ramsey Clark Papers, Box 123).

the Ann Arbor draft board.⁹⁸ The students claimed that the SSS lacked the statutory authority to reclassify them for their protest, and that the district court had the authority to grant relief immediately, notwithstanding the long-standing preclusion of judicial review prior to induction or criminal prosecution.⁹⁹ According to the plaintiffs, what distinguished their case from the mine run of misclassification cases was that punitive reclassification immediately violated a draft registrant's First Amendment rights to speak and assemble.¹⁰⁰ Because judicial review after induction or during a criminal prosecution would not cure that injury, the draft law's finality provision should be construed to permit review by preinduction civil suit.

The district judge disagreed, relying on *Estep* and subsequent case law to rule out such injunctive relief.¹⁰¹ But six months later, the Second Circuit Court of Appeals reversed.¹⁰² In a unanimous opinion, Judges Harold Medina, Henry Friendly, and J. Joseph Smith agreed with the Plaintiffs that the First Amendment injury required immediate relief.¹⁰³ But they went further, citing then-Judge Potter Stewart's decision in *Townsend* for the proposition "that when a local board acts in flagrant disregard of the applicable regulations and thus in clear excess of its jurisdiction, the courts may intervene at any time to rectify the situation."¹⁰⁴ The confidence of the opinion was partly attributable to concessions made by the United States Attorney's Office, which declined to defend the legality of punitive reclassification. As one observer noted a few years later, "the Justice Department was waging a quiet battle against General Hershey's directive advising draft boards to reclassify student demonstrators."¹⁰⁵ But the opinion also reflected, and helped to catalyze, more general judicial concerns about the degree to which unreviewable administrative action was impinging upon civil society in politically and economically malignant ways.¹⁰⁶

Hershey was understandably upset. Days after the *Wolff* decision, he begged Solicitor General Thurgood Marshall to take the case to the Supreme Court.¹⁰⁷

⁹⁸ *Wolff v. Selective Sev. Loc. Brd. No. 16*, 372 F.2d 817, 820 (2d Cir. 1967).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 825-26.

¹⁰¹ *Id.* at 820.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 826.

¹⁰⁵ ELLIFF, *supra* note 13, at 168.

¹⁰⁶ Months after the Second Circuit's decision in *Wolff*, the Supreme Court opened the door to pre-enforcement challenges to administrative rulemaking, notwithstanding the government's argument that pre-enforcement review would "delay or impede effective" administration of a food, cosmetics, and drug safety law. *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 154 (1967).

¹⁰⁷ Letter from Lewis B. Hershey, Dir., Selective Serv. Sys., to Thurgood Marshall, Solic. Gen., DOJ (Feb. 6, 1967) (on file with Lyndon B. Johnson Presidential Lib., Office Files of Joseph A. Califano, Box 56).

But Marshall declined to do so.¹⁰⁸ Marshall's successor, Erwin Griswold, was even more critical of SS decision-making. The new Solicitor General confessed error on behalf of incredulous draft administrators time and again before the Supreme Court,¹⁰⁹ refused to defend the lawfulness of punitive reclassification,¹¹⁰ and crafted the complex statutory argument for permitting preinduction civil suits that a majority of Justices adopted between 1968 and 1970.¹¹¹ The complexity of the argument was necessary because only months after the *Wolff* decision, Congress explicitly repudiated its reasoning, amending the draft law to make clear that criminal prosecutions and habeas proceedings were the exclusive mechanisms for judicial review of classification decisions.¹¹²

It was amid this two-pronged assault on the draft apparatus that the Supreme Court extended the statutory right of conscientious objection to purely secular objectors in *Welsh v. United States*.¹¹³ The Court did so despite the fact that Congress had, in another 1967 amendment, expressed disapproval of *Seeger*'s expansive interpretation of "Supreme Being" by simply deleting the phrase.¹¹⁴ Secularization was thus one facet of the legal elite's more general suspicion of the SSS, as well as of Congress's authority to limit regulation of the SSS by the courts.

In the wake of the Supreme Court's latest attacks on SS autonomy and congressional authority, federal judges granted preinduction injunctive relief to scores of draft registrants. The two high court decisions that blessed preinduction review involved punitive reclassification, but the lower federal courts were not so restrained.¹¹⁵ Federal judges began to enjoin inductions on the ground that the

¹⁰⁸ See *Clay v. United States*, 397 F.2d 901, 922 n.21 (5th Cir. 1968) ("The Government did not file a petition for certiorari in the *Wolff* case.").

¹⁰⁹ See, e.g., *Oestereich v. Selective Serv. Sys. Loc. Bd. No. 11*, 393 U.S. 233, 237 (1968) ("The Solicitor General confesses error on the use by Selective Service of delinquency proceedings for that purpose [of punitive reclassification].").

¹¹⁰ See Archbald Cox, *The Lawyer's Independent Calling*, 67 KY. L.J. 5, 22 (1978) (recounting Solicitor General Griswold's refusal to defend punitive reclassification).

¹¹¹ For Griswold's memo, see Memorandum for the Respondents, *Oestereich v. Selective Serv. Sys. Loc. Bd. No. 11*, 393 U.S. 233 (1968) (No. 46). For Griswold's internal criticisms of Selective Service decision-making, see ERWIN GRISWOLD, *OULD FIELDS, NEW CORNE: THE PERSONAL MEMOIRS OF A TWENTIETH CENTURY LAWYER* 276-81 (1992).

¹¹² Military Selective Service Act of 1967, Pub. L. No. 90-40, § 8(c), 81 Stat. 100, 104.

¹¹³ 398 U.S. 333, 343-44 (1970).

¹¹⁴ Professor Aceves suggests that this deletion demonstrated congressional sensitivity to *Seeger*'s suggestion that the unequal treatment of religious and secular objectors might raise a constitutional question. Aceves, *supra* note 1, at 548. But there is substantial evidence in the legislative history that the amendment's goal was to restrict rather than expand the pool of legitimate conscientious objectors. See Megan Threlkeld, "The War Power Is Not a Blank Check": *The Supreme Court and Conscientious Objection, 1917-1973*, 31 J. POL'Y HIST. 303, 316-17 (2019).

¹¹⁵ See Note, *Judicial Review of Selective Service Classifications*, 56 VA. L. REV. 1288, 1309-10 (1970) (documenting pattern of lower courts expanding judicial review of classification decisions). Nor was the Supreme Court restrained in extending its skepticism of

administrative record revealed either “no basis in fact” for the registrant’s classification or a process that was inconsistent with the correct interpretation of the statute and regulations.¹¹⁶ Similarly, the Supreme Court had indicated that preinduction review would not be available to would-be conscientious objectors because conscientious objector classifications turned on fact-intensive inquiries into sincerity.¹¹⁷ Yet some federal judges found a way. They did so by arguing that the alleged invalidity of the conscientious objector denial was premised not on insufficient evidence but rather on procedural error.¹¹⁸

In 1972, an increasingly conservative Supreme Court tried to rein in those federal judges who were granting preinduction relief to would-be conscientious objectors,¹¹⁹ but it was too late. Congress’s two-year extension of the draft in 1971 was understood to be the final one, necessary only to wind down the SSS’s operations and make way for the establishment of the all-volunteer force.¹²⁰ Furthermore, the extension incorporated a novel set of procedural protections for draft registrants that civil libertarians and the Solicitor General’s Office had long endorsed, protections that would require most outstanding conscientious objector denials to be withdrawn and reprocessed anyway.¹²¹ This was the

statutory preclusion to other domains. Two months after the Court ruled that revocations of student deferments could be attacked by preinduction civil suit, notwithstanding the draft law’s finality provision, it cast doubt on implicit preclusions of judicial review more generally. *See Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157-58 (1970).

¹¹⁶ *See, e.g.,* *Foley v. Hershey*, 409 F.2d 827, 828-29 (7th Cir. 1969) (holding denial of second student deferment unlawful); *Bowen v. Hershey*, 410 F.2d 962, 965-66 (1st Cir. 1969) (same); *Nestor v. Hershey*, 425 F.2d 504, 526-27 (D.C. Cir. 1969) (same); *Shea v. Mitchell*, 421 F.2d 1162, 1165-66 (D.C. Cir. 1970) (finding denial of dependency deferment unlawful); *Liese v. Loc. Bd. No. 102*, 440 F.2d 645, 646-47 (8th Cir. 1971) (holding timing of induction order unlawful); *Grosfeld v. Morris*, 448 F.2d 1004, 1013-14 (4th Cir. 1971) (finding denial of dependency deferment unlawful).

¹¹⁷ *See Clark v. Gabriel*, 393 U.S. 256, 258 (1968).

¹¹⁸ *See, e.g.,* *Manes v. Loc. Bd. No. 36*, 459 F.2d 1112, 1113-14 (3d Cir. 1972) (discussing district court decision enjoining induction of would-be conscientious objector because draft board refused to consider reopening file to consider psychiatrist’s letter); *Murray v. Blatchford*, 307 F. Supp. 1038, 1055-57 (D.R.I. 1969) (enjoining induction of registrant whose local board declined to reopen file after registrant claimed to have discovered his conscientious objections subsequent to receipt of induction notice); *Gardiner v. Tarr*, 341 F. Supp. 422, 436 (D.D.C. 1972) (enjoining orders to report for alternative service on ground that military was no longer ordering men to report for combatant or non-combatant duty in armed forces).

¹¹⁹ *See Fein v. Selective Serv. Sys. Loc. Bd. No. 7*, 405 U.S. 365, 376-77 (1972).

¹²⁰ *See BAILEY, supra* note 83, at 31-40.

¹²¹ *See Fein*, 405 U.S. at 381 (noting if registrant “is ever again called for induction” he would be effectively safe from prosecution for failure to report “unless and until the requirements of the new statute and regulations are fulfilled”).

position taken by Solicitor General Griswold himself in yet another extraordinary memorandum.¹²²

SS officials experienced the wave of civil litigation as a terminal crisis.¹²³ They had already accepted that criminal prosecution posed almost no check on the draft resistance movement: The DOJ indicted only 5% of the cases referred to them, won convictions in only 3.5%, and prison sentences less than 2% of the time.¹²⁴ The DOJ dropped 95% of all referrals for prosecution on the grounds of administrative error.¹²⁵ But civil suits were even more disruptive of the day-to-day operations of the SSS. They provided the increasingly well-organized anti-draft bar with a kind of nuclear option, complementing draft lawyers' conventional arsenal of repeated administrative appeals followed by affirmative defenses during criminal trial. Between 1967 and 1971, the fraction of local draft board decisions appealed had risen from 0.4% to more than 10%.¹²⁶ As one draft counselor recalled, "the number of appeals had far outstripped Selective Service's ability to process them."¹²⁷ Once the Supreme Court opened the door to preinduction relief, however, even those appeals that the SSS did successfully process could be immediately second-guessed in district court.

In the end, the draft resistance movement's goals were accomplished not "by members of the legal profession working within, not outside, the 'system.'"¹²⁸ Hundreds of local attorneys drew on the "almost six thousand pages" of caselaw, analysis, and practice notes prepared and disseminated by the "small group of Washington lawyers" who edited the *Selective Service Law Reporter*.¹²⁹ Yet the "immense and provocative results"¹³⁰ achieved by this private-sector, anti-draft legal campaign were underwritten by what one might call the *official* draft resistance of federal judges and DOJ officials. That campaign was already two decades old by the time that drafts calls began to rise, for the last time, in the mid-1960s.

¹²² See Memorandum for the United States on the Merits at 12-14, *Joseph v. United States*, 405 U.S. 1006 (1972) (No. 70-251).

¹²³ See Memorandum from Warren Christopher, Deputy Att'y Gen., DOJ, to Larry Temple (Sep. 7, 1968) (on file with Lyndon B. Johnson Presidential Libr., Larry Temple Papers, Box 3) (describing views of Selective Service headquarters).

¹²⁴ See DAVID CORTRIGHT, *PEACE: A HISTORY OF MOVEMENTS AND IDEAS* 164-65 (2008); Robert A. Seeley, *Vietnam: The War We Cannot Escape*, A FURTHER FLIGHT, https://www.givewings.com/writings/essays_on_war/vietnam.html [<https://perma.cc/G5GE-SAS9>] (last visited Apr. 30, 2026). Seeley was the executive director of the Central Committee for Conscientious Objectors during Vietnam. See Bill Raley, *How Conscientious Objectors Killed the Draft: The Collapse of the Selective Service During the Vietnam War*, 68 CLEV. ST. L. REV. 151, 170 (2020).

¹²⁵ Seeley, *supra* note 124.

¹²⁶ See DAVID S. SURREY, *CHOICE OF CONSCIENCE: VIETNAM ERA MILITARY AND DRAFT RESISTORS IN CANADA* 39 (1982).

¹²⁷ Seeley, *supra* note 124.

¹²⁸ BASKIR & STRAUSS, *supra* note 13, at 67.

¹²⁹ *Id.* at 70-71.

¹³⁰ *Id.* at 68.

By the end of the decade, the legal critique of summary administrative justice had become commonplace across a range of institutional contexts.¹³¹ Why did this critique take hold so strongly, and much earlier, in the context of conscription? One plausible answer is that draft administration affected millions of comparatively well-to-do white men, men who could translate their practical fears and moral denunciations of draft-driven wars into a language native to the mid-century legal elite.¹³² By contrast, summary administrative justice has tended to persist—and even intensify—in contexts where that mode of governance primarily burdens the socially and economically marginalized.¹³³ The abolition of the draft was a precondition of the contemporary status quo, in which summary administrative justice is seen primarily as a tool for governing the poor and socially marginalized. A return to conscription would upend this status quo, opening the door to a new wave of official draft resistance on behalf of the well-to-do.

CONCLUSION

This Response has argued that the secularization of conscientious objection during Vietnam is part of a larger and longer-running story. That story is about pacifists and draft resisters, but it is also about how the military draft destabilized the separation of powers, leading the federal judiciary to encroach upon congressional and administrative authority while fracturing the executive branch. The primary legal weapon deployed in these inter- and intra-branch conflicts was creative statutory interpretation. Congress rarely codified winning interpretations because congressional majorities usually opposed them. Accordingly, the statutory text itself, whether in 1948, 1956, 1965, or today, tells us little about how the federal justice system regulated the draft in light of that system's "underlying concepts of procedural regularity and basic fair play"¹³⁴—if not, explicitly, in light of the Constitution.

If a future Congress heeds Professor Aceves's call to codify *Seeger* and *Welsh*,¹³⁵ it should thus take the opportunity to confront a more fundamental

¹³¹ See generally KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969) (describing critique, its growing popularity, and its applications, including to Selective Service).

¹³² The more conventional explanation—that the general unpopularity of the Vietnam War delegitimized the draft used to fight it—is not substantiated by available polling data. See FLYNN, MR. SELECTIVE SERVICE, *supra* note 79, at 273 (noting January 1969 Gallup poll "indicated that, even if the Vietnam war ended, some 62 percent of the public thought the draft should be continued," and "[o]nly 32 percent preferred an all-volunteer force"); Robert S. Erikson & Laura Stoker, *Caught in the Draft: The Effects of Vietnam Draft Lottery Status on Political Attitudes*, 105 AM. POL. SCI. REV. 221, 222 (2011) ("[P]ublic opinion remained largely against the draft resisters and, until mid-1968, ambivalent about or in favor of the war.").

¹³³ See *supra* notes 7-10 and accompanying text.

¹³⁴ *Gonzales v. United States*, 348 U.S. 407, 411-12 (1955).

¹³⁵ See Aceves, *supra* note 1, at 540.

question: Is the MSSA as written is consistent with our contemporary concepts of procedural regularity and basic fair play? The answer to this question is likely no, precisely because those concepts are consistent with, and at times directly indebted to,¹³⁶ the norms elaborated by judicial and executive draft reformers. Yet to amend the draft law to reflect those norms might frustrate any future war fought with drafted soldiers. As this Response has shown, the legal preferences of judges and DOJ officials played a significant, and perhaps determinative, role in the erosion of the draft's capacity and legitimacy.

For that reason, Congress might reasonably decline to codify the range of reforms imposed by federal judges and DOJ officials between the 1940s and the 1970s. Such a demurrer, however, would not necessarily address the underlying problem. Regardless of congressional action or inaction, judicial and executive actors have used creative statutory interpretation to expand the availability and intensity of review of SS decision-making in response to every instance of prolonged draft resistance since the tail end of WWII. If that historical pattern holds, then the precondition of a successful future draft would be a military conflict that the legal elite believes to be of existential significance to their own lives and families. Neither clearer statutory language nor creative statutory interpretation can supply—or deny—such a conflict.

On the other hand, if Professor Aceves is right about the strength and ideological valence of contemporary textualism,¹³⁷ perhaps federal judges and prosecutors, confronted by an unamended statute, would foreclose preinduction review and construe procedural and substantive rights narrowly—even in the context of a limited war of choice. In doing so, they would depart from the historical pattern, in which judicial and prosecutorial second-guessing of SS decision-making has abetted draft resistance. Bereft of such official assistance, a future draft resistance movement might fail to sustain itself or, to the contrary, prove unprecedentedly violent and internally destabilizing.

Today, appalling casualty rates in Ukraine have led some factions of the military and national security bureaucracy to conclude that the outcome of any prolonged military conflict with Russia, China, or even, perhaps, Iran will depend on drafted soldiers.¹³⁸ Whether such a conflict—or the interpretive methods used to adjudicate resistance to it—would break the post-WWII pattern of official draft resistance is an open question. But the fate of both secular conscientious objectors and the SSS as a whole will depend on the answer.

¹³⁶ See, e.g., RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW* 126-27 (4th ed. 2025) (discussing relevance of draft law precedents to contemporary doctrines concerning administrative exhaustion, ripeness, and finality).

¹³⁷ See Aceves, *supra* note 1, at 537-38, 565-66.

¹³⁸ See sources cited *supra* note 14; see also Kelby Vera, *Karoline Leavitt Isn't Counting Out Future Boots on the Ground in Iran*, AOL (Mar. 8, 2026, at 16:50 ET), <https://www.aol.com/articles/karoline-leavitt-isnt-counting-future-205020429.html> (describing White House's refusal to rule out drafting soldiers to fight in Iran).