

# Fortress of Liberty: The Rise and Fall of the Draft and the Remaking of American Law

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## *Introduction: Civil Liberty in a Conscripted Age*

Between 1917 and 1973, the United States fought its wars with drafted soldiers. These conscript wars were also, however, civil libertarian wars. Waged against the “militaristic” or “totalitarian” enemies of civil liberty, each war embodied expanding notions of individual freedom in its execution. At the moment of their country’s rise to global dominance, American citizens accepted conscription as a fact of life. But they also embraced civil liberties law – the protections of freedom of speech, religion, press, assembly, and procedural due process – as the distinguishing feature of American society, and the ultimate justification for American military power. *Fortress of Liberty* tries to make sense of this puzzling synthesis of mass coercion and individual freedom that once defined American law and politics. It also argues that the collapse of that synthesis during the Cold War continues to haunt our contemporary legal order.

## *Chapter 1: The World War I Draft*

Chapter One identifies the WWI draft as a civil libertarian institution – a legal and political apparatus that not only constrained but created new forms of expressive freedom. Several progressive War Department officials were also early civil libertarian innovators, and they built a system of conscientious objection that allowed for the expression of individual difference and dissent within the draft. These officials, including future Supreme Court Justices Felix Frankfurter and Harlan Fiske Stone, believed that a powerful, centralized government was essential to the creation of a civil libertarian nation – a nation shaped and strengthened by its diverse, engaged citizenry. This vision of civil libertarian state-building was, however, resisted by an emerging coalition of military lawyers, intelligence operatives, and preparedness advocates.

Like the civil libertarian progressives within the War Department, these martial progressives saw compulsory military service as a tool of social engineering, but their normative vision of American society was far less tolerant of ideological and ethnic diversity. From their point of view, conscription represented a vital opportunity to repress “un-American” political projects and ethnic identities and to impose in their place a common culture of militant nationalism. Such a culture would countenance only limited participation in – or dissent from – public administration, and look instead to a private sphere of self-disciplining markets and civil associations as the proper locus of individual freedom.

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*Chapter 2: From the First Red Scare to the First Peacetime Draft*

Precipitated by wartime chauvinism, postwar economic turmoil, and the panicked anticommunism that followed the Bolshevik coup in Russia, the First Red Scare brought to the surface of American society the legal and political conflicts that had roiled the draft apparatus during World War I. Debates about the War Department's accommodating approach to anti-war draftees became a major feature of Red Scare polemics, as both civil libertarian and martial progressives pushed to extend their preferred visions of wartime administration into the uncertain peace. By the early 1930s, however, the emergence of a judge-centered vision of civil liberties law complicated this conflict, as it did not neatly track the legal and political commitments of either progressive camp. The first peacetime draft in American history embodied but failed to resolve the tensions between civil libertarian progressives, martial progressives, and judicial civil libertarians.

*Chapter 3: The World War II Draft*

Judicial civil libertarianism began to gain the upper hand during World War II. Chapter Three traces how the identification of government regulation with Nazi and Soviet tyranny led to aggressive judicial review in two seemingly disparate contexts: the federal military draft and the municipal taxation of door-to-door peddling. In both contexts, the Jehovah's Witnesses – whose German brethren were suffering grievously under the Nazis – led the charge. The Witnesses were a small sect of anti-war preachers who considered the sale of religious literature to be a form of ministry. As ministers, they argued that they should be exempt from both the draft and peddling taxes.

Although their comparisons of American and Nazi law often seemed outlandish, the Witnesses received financial and legal aid from the American Bar Association, the American Civil Liberties Union, and the American Newspaper Publishers Association. These well-respected organizations had diverse and often conflicting reasons for supporting judicial review of conscription and taxation, from pacifist worries about militarism to economic worries about the redistribution of wealth. But all three organizations found in the Witnesses' anti-Nazi rhetoric and civil libertarian arguments a highly sympathetic vehicle for advancing their own agendas. With such mainstream support, the Witnesses scored over a dozen victories at the Supreme Court during World War II. By the end of the war, they had successfully identified civil libertarianism with judicial resistance to administrative government, an equation that threatened the long-term viability of the draft as well as the mid-century administrative state as a whole.

*Chapter 4: The Second Peacetime Draft and Cold War Politics*

[attached]

*Chapter 5: The Korean War Draft*

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*Chapter 6: The New Look Draft*

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*Chapter 7: Vietnam and Voluntarism*

In the early 1960s, civil rights and anti-poverty activists tried to reconstruct the military draft on egalitarian grounds. As late as 1966, for instance, the President’s National Advisory Commission on Selective Service recommended that the draft should actually be *expanded* to ameliorate economic and racial inequality. But this last gasp of progressive state building came to naught. Over the previous twenty years, legal elites had grown increasingly uncomfortable with the type of administrative decision-making that the draft represented – too summary, too discretionary, too intrusive, and too insulated from the federal courts. Compulsory military service only survived the second half of the 1950s because it was barely used: a generous system of deferments, a host of new procedural protections for draft resisters, and a dramatic decrease in the size of the army kept actual draft inductions to a minimum. Rising draft calls between 1965 and 1967 exposed a system that had not worked properly for a decade. Even if the Vietnam War had been more popular, or the federal tax base more robust, the legal conditions for running a fair and efficient draft regime no longer existed. The call for a “civil rights draft” was quickly drowned out by a chorus of lawyers and economists who described conscription as the leading indicator of a larger crisis: the domination of civil society by the state. Their activism laid the basis for both draft abolition and a libertarian reconstruction of administrative government in the decades to come.

*Conclusion: Civil Liberty and Big Government Today*

In the wake of conscription, the civil libertarian critique of big government found other targets. The early 1970s saw critics of abortion and contraception describe federal funding of reproductive healthcare as a means of “conscripting” poor women, nurses, and doctors into morally unconscionable acts. These critics successfully curtailed such funding, and established an array of state and federal “conscience clauses” that – on the model of military conscientious objection – exempted medical personnel from providing services that violated their moral or religious beliefs. Meanwhile, a coalition of civil and economic libertarians assailed campaign finance and commercial speech regulations as forms of censorship, pioneering the argument that “money is speech” and winning several major victories at the Supreme Court.

Today, these civil libertarian assaults on social and economic regulation have become mainstream. In policy areas as diverse as campaign finance, health insurance, labor relations, and food and drug advertising, government efforts to regulate economic activity are successfully attacked as conscripting citizens into speaking and acting against their will. Although American liberals look askance at this civil libertarian assault on the welfare state, the uncomfortable truth is that its origins lie in the civil libertarian assault on the warfare state. The legitimacy of the military draft depended on a belief that public administrators could be trusted to respect and even foster civil libertarian values. The American legal community's rejection of that belief doomed the draft and continues to limit political control of the economy.

## Chapter 4 The Second Peacetime Draft and Cold War Politics

When President Roosevelt signed into law the first peacetime draft in American history on September 16, 1940, critics warned of an unprecedented move toward militarism, even totalitarianism. Supporters, however, had overcome these warnings by framing peacetime conscription as a temporary defense *against* the totalitarian governments then sweeping through Europe. Passed during a brief period when Nazi Germany and Soviet Russia were allies, the Selective Training and Service Act of 1940 was sold as a shield against both fascism and communism. Although the Russians broke with the Germans in 1941, going on to play a critical role in the fight against fascism, American officials would come to insist that Soviet communism was every bit as dangerous as Nazism, if not more so. Accordingly, the threat of totalitarianism did not subside after World War II. Neither did the draft. At the dawn of the “Cold War,” peacetime conscription gained a new justification: no longer a temporary, defensive measure, the draft became an essential weapon in the rapidly expanding anti-communist arsenal.<sup>1</sup> With the exception of a fifteen-month period between March 1947 and June 1948, conscription would remain the law of the land for the next three decades.

From one perspective, the persistence of the draft from 1940 to 1973 fits neatly into a larger story about the “militarization” of mid-century American society. It was during the 1940s, 1950s, and 1960s that the United States achieved global military dominance while justifying ambitious domestic reforms – from welfare to racial integration – in terms of military service and sacrifice. Accounts of militarization suggest that the gains in social and economic equality associated with mid-century “liberalism” came at the cost of – and were to some extent constrained by – an increasingly unaccountable “warfare” or “national security” state, helmed by an “imperial” president.<sup>2</sup> The national security apparatus did indeed grow enormously after World War II, taking on a life of its own within the nearly limitless framework of the “Cold War.” And one of the most pervasive features of this apparatus was the Selective Service System, an administrative agency tasked with classifying and tracking tens of millions of American civilians while drafting millions of them directly into the armed forces or other “work of national importance.” Penetrating deep into towns, and homes, and individual lives, Cold War conscription would seem to exemplify the militarization of the United States during the Cold War. Yet the legal history of the Cold War draft actually undermines the militarization thesis. This history paints a more ideologically and legally complex portrait

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<sup>1</sup> For critics and temporary argument, see Flynn XXX; Norman Thomas at congressional hearings; Grenville Clark at hearing. For justifications of the 1940 Act, see congressional hearings XXX [the Clarks]. For the anti-communist justifications of later draft laws, see Flynn XXX.

<sup>2</sup> Cite to Alex Roland on overview of military-industrial complex historiography.

of the Cold War national security state, one characterized by unprecedented weaknesses as well as unprecedented strengths.<sup>3</sup> This confusing state of affairs mirrored the more basic confusion of peace and war that characterized the period between the end of World War II and the end of Vietnam: although tens of thousands of drafted Americans fought and died in military conflicts against communism during these decades, no declarations of war were ever declared. The Cold War was, formally, a time of peace, and the Cold War draft was, formally, a peacetime draft.

As discussed in the previous chapter, the legitimacy of conscription had already come under threat in the waning years of our nation’s last declared war: World War II. This threat only intensified in the postwar years, growing more or less continually until the abolition of the draft in 1973. Year after year, the federal courts, Congress, the Department of Justice, and draft administrators themselves forged new fetters for the draft machinery. Official critiques of the draft as a threat to civil or “personal” liberty began much earlier than is generally understood, and cast significant doubt on the legitimacy of the draft well before the terminal crisis of the Vietnam War. Criticism of the early Cold War draft both reflected and contributed to a more general trend of increasing judicial and lawyerly skepticism toward the administrative state – the network of executive agencies and legislative committees that make and implement national policy, including national security policy. Such skepticism self-consciously forestalled the *potential* – but never fully actualized – militarization of American society. Anti-administrative legal activism also degraded the capacity of the federal government to implement domestic policies that many of its leaders and constituents believed to be essential conditions of “national security,” broadly construed.<sup>4</sup>

While legal attacks on national security administration, and the draft in particular, scored real victories during the Cold War, their success did not indicate a resurgence of the isolationist, pacifist, and left-wing political sentiments that had enjoyed significant popularity before WWII. Rather, newly bi-partisan anxieties about the dangers that a powerful national bureaucracy posed to individual liberty drove the erosion of administrative autonomy and capacity in the realm of national security. These anxieties found their most obvious targets in national security programs such as draft and loyalty administration. But the libertarian critique of bureaucracy was also motivated by the

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<sup>3</sup> For the militarization thesis, see Sherry, *In the Shadow of War*. For “warfare state,” see Sparrow, *Warfare State*. For the expansion of the national security state in the post-WWII period, see Mary Dudziak, *War Time XXX*; Michael Hogan, *A Cross of Iron*; Douglas Stuart, *Creating the National Security State*; Ira Katznelson, *Fear Itself*; Aaron Friedberg, *In the Shadow of the Garrison State*. For the “imperial” presidency, see Schlesinger; Ackerman; Ely. For the origins and chronology of the Cold War, see Craig & Logevall *XXX*; Stephanson, *XXX*.

<sup>4</sup> For important exceptions to the conventional view of the growth of national security autonomy during this period, see Friedberg, *In the Shadow of the Garrison State*; Schiller, “Reining in the Administrative State”; Edward Rubin, “Due Process and the Administrative State”; K.C. Johnson, *Congress and the Cold War*.

exercise of administrative power in more purely “domestic” context such as labor relations and microeconomic management. Most critics of bureaucracy were themselves Cold Warriors; they associated large, centralized government with the Soviet enemy. But even left-wing politicians, activists and lawyers committed to a powerful welfare state used the language of anti-communism to assail those features of the administrative state they found most objectionable: specifically, those features that targeted social minorities and political dissenters in the name of anti-communism itself. In this way, the same logic and rhetoric that justified the expansion of the American administrative state as a bulwark against communism also worked to constrain it.<sup>5</sup>

I.

The Supreme Court’s February 1946 decision in *Estep v. United States* was a harbinger of this anti-communist dialectic. As discussed in the previous chapter, *Estep* imposed a new regime of judicial review on Selective Service decision-making in the name of “personal liberty.” Previously, judges had only been able to examine the validity of Selective Service decision-making in the context of habeas corpus proceedings, after a draftee submitted to induction in the armed forces or was convicted and imprisoned for violating the draft law. Even then, this limited form of judicial review had tended to be extremely narrow in scope and extremely deferential to Selective Service administrators. In contravention of clear congressional intent and a series of earlier Supreme Court decisions, however, *Estep* suggested that judges should now examine the validity of Selective Service decision-making *prior* to induction or imprisonment, any time a registrant was accused of violating the draft law. Furthermore, the bitterly divided *Estep* Court introduced a new, ambiguous standard of review for assessing the validity of Selective Service decisions – whether or not they were supported by a “basis in fact.” Although the author of the *Estep* majority opinion, Justice William Douglas, likened this standard to the narrow one used in the habeas corpus context, he himself had recently called for greater judicial scrutiny of administrative decision-making in habeas corpus proceedings. Consequently, the degree of judicial deference that the “basis in fact” standard would accord to draft administrators remained something of a mystery.

From the perspective of the executive branch, *Estep* represented a legal sea change, one that immediately made enforcement of the draft more difficult and portended even greater judicial supervision in the future. Shortly after his appointment to Attorney

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<sup>5</sup> For the critique of bureaucracy in this period, see Grisinger, *Unwieldy American State*; Edward L. Rubin, *Due Process and the Administrative State*, 72 Cal. L. Rev. 1044 (1984); Schiller, “Reining in the Administrative State”; Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970*, 53 Vand. L. Rev. 1389 (2000); George Shepherd, “Fierce Compromise.”

General in 1945, Tom Clark, who had worked on draft law cases for the Justice Department during the war, ordered all federal prosecutors to refrain from opposing judicial review of the validity of alleged draft law violators' Selective Service classifications. This order extended even to cases where *Estep* might well have been inapplicable, such as those in which the defendant was a conscientious objector who had failed to report to his Civilian Public Service camp or who had simply deserted after doing so. Clark also sought to limit the total numbers of draft law prosecutions. It had long been Selective Service policy that each time a registrant violated a particular Selective Service order, a new prosecution should be brought. But now, Clark directed, all potential repeat prosecutions should be forwarded to Washington for further consideration.<sup>6</sup> Sensing an increasingly hostile judiciary, the Justice Department knew it would have to be more selective in the draft law cases it did prosecute in order to avoid generating further damaging precedents.

The Justice Department's reaction to *Estep* seems overly dramatic when compared to academic assessments of the case. Because the Supreme Court handed down *Estep* six months after the surrender of Japan, legal scholars tended to view the decision's attack on the autonomy of the Selective Service System as a largely emotional response to a long-awaited peace. The *Yale Law Journal*, for instance, described the *Estep* Court's intrusion on draft administration as "an inarticulate reaction to the fact that the war emergency has substantially subsided." Similarly, while the administrative law expert Kenneth Culp Davis was greatly troubled by the decision's actual reasoning – which overrode congressional efforts to protect the military draft from judicial interference with little more than a vague, quasi-constitutional reference to the value of "personal liberty" – he attributed this lofty rhetoric and imprecise logic to a "strong judicial belief in the undesirability of cutting off judicial review in draft cases after the war had been won."<sup>7</sup>

Although these chronological and psychological interpretations of *Estep* have continued to enjoy popularity among legal scholars, they were off base from the start, for at least two reasons. First, by ignoring the earlier draft and immigration cases that paved the way for *Estep*, such interpretations failed to note that judicial skepticism toward the administration of civilian manpower was on the rise well before the conclusion of hostilities with Germany and Japan. Second, academic interpretations of *Estep* were strikingly out of touch with the actual state of military and diplomatic affairs when the case was decided. Contrary to the *Yale Law Journal*'s optimistic assessment, "the war emergency" had not in fact "substantially subsided" by February 1946.

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<sup>6</sup> Tom C. Clark, Attorney Gen., to All U.S. Attorneys (July 19, 1946), 1-2, NARA, RG 147, COGF, Box 96.

<sup>7</sup> Note, 56 *Yale L.J.* 403, 410 (1947); Davis, *Nonreviewable Administrative Action*, 771.



That winter, hundreds of thousands of American troops scattered the globe, occupying enemy nations. No peace treaties had yet been signed, and some in the United State and Britain were already pushing for a new war against Communist Russia, an erstwhile ally rapidly cementing its military and ideological control over Eastern Europe.<sup>8</sup> Even an uneasy peace would require an extended military footprint. And yet there were not enough fresh soldiers to replace the tens of thousands whose overseas tours were formally at an end. On January 1, 1946, over a month before the *Estep* decision, the Selective Service System announced that it had missed its monthly quota of 50,000 men, and that there were few volunteers to be found. Furthermore, the draft was due to expire in May, which would make it even harder to recruit volunteers. As historian George Flynn recalls, “in early 1946 the entire demobilization program verged on collapse because of a crisis in military manpower.”<sup>9</sup>

This crisis extended to the thousands of pacifists assigned to “work of national importance” in Civilian Public Service (CPS) camps or imprisoned for disobeying Selective Service orders. Both groups of men were becoming harder and harder to handle, organizing protests, strikes, and escapes. Throughout 1945 and 1946, Selective Service officials pleaded with the Justice Department to step up its prosecutions of conscientious objectors who broke CPS regulations.<sup>10</sup> But this panicked bid to impose some discipline on the camps fell on deaf ears: Justice Department lawyers were reluctant to take on such cases given how difficult it was becoming to secure convictions in the courts.<sup>11</sup> Similarly, when draft administrators broached the possibility of reclassifying disobedient CPS men as soldiers, the Justice Department responded that the judiciary would likely strike down such punitive reclassifications as illegal.<sup>12</sup> In the absence of federal law enforcement oversight, mass strikes and desertions engulfed the CPS system. Recognizing that they could no longer rely on executive or judicial discipline, Selective Service officials turned to Congress, begging for an accelerated demobilization program to drain the camps. But Congress refused to send home pacifists while veteran fighters still languished on the front lines.<sup>13</sup>

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<sup>8</sup> Flynn, *The Draft, 1940-1973*, at 95.

<sup>9</sup> *Id.* at 92.

<sup>10</sup> Col. Kosch to the Attorney General (May 28, 1946), NARA, RG 147, COGF, Box 95; Gen. Hershey to the Attorney General (Sept. 17, 1946), NARA, RG 147, COGF, Box 96 (protesting DOJ decisions about prosecuting draft law violators).

<sup>11</sup> Carl Donaugh, U.S. Attorney, to Tom C. Clark, Assist. Attorney Gen. (Jan. 27, 1945), NARA, RG 147, COGF, Box 96 (expressing reluctance to prosecute deserters who are not being useful work).

<sup>12</sup> See, e.g., Lt. Col. Dunkle to Col. Kosch (Mar. 30, 1945), 1-2; Col. Kosch to Gen. Hershey (n.d.); James McInerney, Acting Head, Crim. Div., to Carl Donaugh, U.S. Attorney (July 7, 1945) NARA, RG 147, COGF, Box 96. As the Supreme Court would decades later, when the Selective Service System facing an even greater crisis did resort to punitive reclassification. See Chapter 7.

<sup>13</sup> See, e.g., Col. Dunkle to the Attorney General (Feb. 13, 1946), NARA, RG 147, COGF, Box 95 (discussing a threatened walk-out from a CPS facility); Camp Operations Division to Secretary of Agriculture (July 31, 1946) (reporting strikes at Minersville and Glendora camps); Ralph Rudd, Chairman, CPS Union, to all CPS Camps and Units, (Feb. 12, 1945); NARA, RG 147, COGF, Box 96. For

The Selective Service System’s own powerlessness to manage the military manpower crisis did nothing to mollify civil libertarian critics of the draft apparatus. These critics increasingly saw the draft – including its provision of alternative service to pacifists – as an outdated behemoth, dedicated to imposing conformity on the nation’s civilian population. The strikingly negative judgment of John W. Davis – patrician lawyer, fierce opponent of the New Deal, and early supporter of the 1940 draft law – gives some sense of this ideological trend: CPS camps, according to Davis, differed little from “concentration camps under a system of forced labor.”<sup>14</sup> Nor were civil libertarians dissatisfied only by the CPS system. Within months of Japanese surrender, a slew of legal and intellectual luminaries declared any delay in the release of *either* lawful conscientious objectors from CPS camps *or* convicted draft law violators from prison to constitute a form of illegitimate punishment.<sup>15</sup> On December 9, 1945, Davis joined William Draper Lewis, the President of the American Law Institute, and left-leaning notables such as John Dewey and Reinhold Niebuhr in voicing this strikingly bi-partisan civil libertarian consensus in an open letter to President Truman. Decrying the “inadequacies and rigidities of our provisions for conscientious objection,” the letter also called for immediate release of “all of those convicted of violation of the Selective Service Act on the grounds of religious beliefs and conscience.”<sup>16</sup>

If Selective Service officials lacked the institutional authority to meet these demands, President Truman lacked the political capital to do so. In the winter of 1946, with long-serving soldiers stranded overseas and new draft calls on the horizon at home, early release of conscientious objectors and amnesty for draft law violators would have been electoral poison – even if it might have appeased civil libertarian elites.<sup>17</sup> Indeed, on January 21, 1946, just two weeks before *Estep* was decided, President Truman was compelled to ask Congress to renew the draft. The geostrategic situation, Truman explained, was sufficiently dire as to require the institution of peacetime conscription for the first time since 1940 and for only the second time in American history. If the

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congressional reluctance to demobilize conscientious objectors and attendant disciplinary problems, see Flynn, *The Draft, 1940-1973*, at XXX.

<sup>14</sup> William Harbaugh, “Civil Liberties – Conscientious Objection” (n.d.), 2, JWDP, Box 175.

<sup>15</sup> See, e.g., Col. Kosch to R. Zigler, Brethren Service Committee (Nov. 29, 1945), NARA, RG 147, COGF, Box 96. Selective Service administrators themselves felt congressional refusal to demobilize CPS men was both impractical and unfair, and pushed for COs to be treated as much like other draftees as possible when it came to demobilization. *Id.*; Col. Kosch to Lt. Col. Hedrick (July 3, 1945); Lt. Col. Dunkle to Lt. Col. Hedrick (July 2, 1945); NARA, RG 147, COGF, Box 96

<sup>16</sup> William Harbaugh, “Civil Liberties – Conscientious Objection” (n.d.), 1, JWDP, Box 175. Earlier that year, Davis had lamented the “War Department regulations which put [conscientious objectors] in concentration camps under a system of forced labor.” *Id.* at 2.

<sup>17</sup> It would be another year before President Truman appointed an Amnesty Board to consider the early release of draft law violators. He did so during a brief period when the draft itself was suspended. XXX.

President was correct, then it was surely not yet time to pardon men obdurately opposed to the country's military strategists and willing to disobey their lawful commands.

In the light of this protracted military crisis, it is difficult to interpret the Supreme Court's imposition of greater judicial scrutiny on the draft apparatus as responding to a postwar return to normalcy. Rather, Justice Douglas's majority opinion echoed the disquiet about the draft voiced by civil libertarians such as John Davis and John Dewey despite the *persistence* of military crisis. In particular, the opinion embodied growing civil libertarian anxieties about the legitimacy of the mass administration of the civilian population in general, and political dissenters in particular. To the extent that civil libertarians had previously felt that such administration could be justified in a time of national emergency, both the Davis letter and the *Estep* decision indicated a new willingness on the part of elite lawyers outside the executive branch to determine for themselves what truly counted as an emergency. In the Cold War that was rapidly approaching, this willingness to assess the nation's security requirements would become a regular feature of judicial decision-making and a potent libertarian tool, one used to impose a host of new limits on administrative power.

Those forms of administrative power that involved management of the “manpower” of the nation – whether in the context of immigration and naturalization, labor relations, or military service – would bear the brunt of Cold War judicial skepticism. While various social groups might support one or more of these forms of manpower management, a dwindling number supported all of them. As a result, there emerged a growing coalition committed to the restraint of administrative power over the lives of individual Americans.<sup>18</sup> This coalition tended to draw analogies between disfavored administrative practices and totalitarian governance, analogies that proved especially popular in the federal courts. There, lawyers and judges developed new legal arguments for restraining administrative power in the name of individual liberty and anti-totalitarianism. These legal arguments gained ground even as the American administrative state mobilized for an all-out war – however “cold” – with totalitarian Russia.<sup>19</sup>

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<sup>18</sup> Cf. Louis Jaffe, *The Right to Judicial Review*, 71 *Harv. L. Rev.* 769, 784 (1958) (“There is quite obviously a movement in the direction of greater reviewability of military determinations, particularly in peacetime. This probably reflects the fact of the peacetime draft. The impact of military decision on the ordinary citizen is no longer the rare event born of emergency. It intrudes into the civilian's peacetime life and may — witness the dishonorable discharge of the preinduction Communist — importantly affect the conditions of civilian life.”).

<sup>19</sup> Cf. Friedberg, *In the Shadow of the Garrison State* 152-153 (“The confrontation with the Soviet Union . . . raised the tension between the demands of the common defense and the desire for maximum individual liberty to a level unprecedented in American history, and in doing so, it opened in the most fundamental form the question of the appropriate extent of the power of the state over the lives of its citizens.”).

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On March 15, 1946, only five weeks after the Supreme Court handed down *Estep*, the British politician and WWII leader Winston Churchill warned an audience in Fulton, Missouri that an “iron curtain” had fallen across Europe. The Soviet Union, Churchill explained, threatened the world with a dictatorship even more total than the recently defeated Nazis. President Truman agreed, and on April 5 he announced that the US would provide military support if Britain and Russian forces clashed in the Middle East. On May 27, the United States halted payments of reparations from West Germany to Russia. Months after Truman’s initial request for a new round of peacetime conscription, the “Russian situation” finally “convinced senior members of both parties of the need” for one.<sup>20</sup> Accordingly, on June 25, 1946, Congress extended the Selective Training and Service Act of 1940.

Fueled by fears of Communist expansion and the need to relieve WWII veterans still serving abroad, the draft extension passed with wide margins in both houses. Yet the bill that Truman signed into law bore the marks of growing opposition to administrative control of the American citizenry. Set to expire after only nine months, the bill created a “half-a-loaf draft,” one that exempted all 18 year olds and fathers, while placing a two-month moratorium on all inductions. Given these provisions, there was no way the Selective Service System could provide the 300,000 men the military would require over the next year, unless administrators ended all occupational deferments and drafted veterans – options that were both politically and practically dangerous. The bill also provided new funds for volunteer recruitment. Voluntarism was clearly the direction in which many politicians wanted military manpower recruitment to go.<sup>21</sup>

The previous spring, while war still raged in the Pacific, Republican Senator Robert Taft had laid down a marker at the Gettysburg Memorial Day exercises, making his case against a new peacetime draft in vivid, anti-communist terms.<sup>22</sup> “Military conscription,” Taft warned, “is essentially totalitarian”; it meant “the complete regimentation of the individual at his most formative period.” Not only was the draft dangerous to the development of young Americans, it also opened the gateway to new forms of government control of society and the economy: “If we admit that in peacetime we can deprive a man of all liberty and voice and freedom of action, if we can take him from his family and his home, then we can do the same with labor, we can order the

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<sup>20</sup> Flynn, *The Draft 1940-1973*, at 94.

<sup>21</sup> *Id.* at 95-96.

<sup>22</sup> See Jennifer M. Murray, *On a Great Battlefield* 64 (2014).

farmer to produce and we can take over any business. If we can draft men, it is difficult to find an argument against drafting capital.”<sup>23</sup>

Few politicians were willing to go as far as Senator Taft in condemning conscription. His Gettysburg address nonetheless captured the ideological challenge confronted by the Selective Service System on the cusp of the Cold War. This “war” might make “peacetime” conscription essential, as a show of long-term resolve against potential Soviet aggression. Yet, as Taft suggested, an extended peacetime draft would also give the American administrative state enormous control over the social and economic lives of its own citizens. Because such state control was anathema to the ideology of anti-communism, a Cold War draft risked becoming the ironic symbol of the administrative state’s most “communist” tendencies.

In 1946, Congress resolved this tension between the draft’s anti-communist virtues and its communistic vices by agreeing to only a brief and limited extension. The larger context for this ambivalent endorsement of conscription was an ongoing political campaign to “de-communize” the administrative state – that is, to pressure administrative agencies to become more respectful of individual liberty and the “rule of law.” Thus, even as Congress was debating a draft extension, it was also putting the finishing touches on the Administrative Procedure Act, a massive piece of legislation aimed at constraining large swathes of the administrative state in the name of both personal and economic liberty.

Since the early 1930s, anti-New-Dealers had been pushing versions of this law, initially drafted by the American Bar Association. The goal of the ABA and its allies was to impose both more court-like procedures on administrative decision-making and greater judicial scrutiny of administrators’ final decisions. These new procedural and judicial checks would, in turn, limit the New Deal state’s power to regulate social and economic life. Notably, anti-New-Dealers frequently associated such regulation with Communist legal thought. As the ABA’s Special Committee on Administrative Law wrote in 1938:

The antithesis [of greater procedural and judicial protections] is the proposition recently maintained by the jurists of Soviet Russia that in the socialist state there is no law but only one rule of law, that there are no laws – only administrative ordinances and orders. The ideal of administrative absolutism is a highly centralized administration set up under complete control of the executive for the time being, relieved of judicial review and making its own rules. This sort of regime is urged today by those who deny that there is such a thing as law (in the

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<sup>23</sup> Robert Taft, *Compulsory Military Training in Peacetime: Against Fundamental Policy of America* (May 40, 1945), *Vital Speeches*, vol. XI, 554-557.

sense in which lawyers understand the term) and maintain that this lawyer's illusion will disappear in the society of the future.<sup>24</sup>

Before WWII, President Roosevelt had successfully resisted this rhetorical and legal onslaught. In 1939, he established an Attorney General's Committee on Administrative Procedure to draft a less-restrictive alternative to the ABA's proposals, while delaying a final vote on the ABA-supported Walter-Logan bill. By the time Walter-Logan passed both houses of Congress in December 1940, France had fallen to Nazi Germany and peacetime conscription was in effect in the United States. Given these emergency conditions, the President was able to paint the bill as a threat to national security, and happily vetoed it. Walter-Logan, Roosevelt explained in his veto message, would burden agencies that had an "important collateral effect on the defense program" and that its "unintentional inclusion of defense functions . . . require my disapproval at this time."<sup>25</sup>

The veto of Walter-Logan signaled a "wartime break" in legislative debates over "comprehensive administrative reform." Yet anti-bureaucratic forces in Congress actually gained political power during the war.<sup>26</sup> By the summer of 1945, a "revised version of the ABA's bill" was back on the legislative agenda. This bill incorporated some of the pro-New-Deal proposals of the Attorney General's Committee, but it more closely resembled that Committee's minority report – filed by its three most conservative members.<sup>27</sup> Perhaps most significantly, the minority report had called for more – and more searching – judicial review of administrative decision-making. Signed into law on June 11, 1946,

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<sup>24</sup> *Report of the Special Committee on Administrative Law*, ANN. REP. OF THE AM. BAR ASSOC. 63 (1938), 331–68, 343.

<sup>25</sup> Kathryn Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 Admin. L. Rev. 673, 690 (2010). For the anti-New-Deal roots of the Administrative Procedure Act, see Ernst, *Tocqueville's Nightmare*; Grisinger, *Unwieldy American State*; Brazier, "An Anti-New Dealer Legacy"; and Shepherd, "Fierce Compromise," 1561 ("Before 1937, conservatives did not need administrative reform in order to control New Deal agencies. Conservative courts performed this function. However, the beginning of the New Deal in 1933 spurred the American Bar Association and others to begin to develop proposals for reforming administrative procedures. Only in 1937, when the Supreme Court began to refuse to strike down New Deal proposals, did the reform proposals receive broad public interest.").

<sup>26</sup> Grisinger, *Unwieldy American State* 73 ("Conservative victories in the 1942 elections had significantly slimmed down Democratic majorities and further concentrated Democratic power in Southern hands. This Congress was hostile to bureaucracy, as the Byrd Committee's investigation of New Deal programs and the Smith Committee's investigation of the [Office of Price Administration] demonstrated. On the heels of the abolition of the Civilian Conservation Corps, in 1942, the 78th Congress moved to terminate the beleaguered [Works Progress Administration], National Youth Administration, and National Resources Planning Board."). See also Schiller, "Reining in the Administrative State."

<sup>27</sup> Shepherd, "Fierce Compromise," 1648-1649.

the Administrative Procedure Act clearly expanded the availability of judicial review; as interpreted by the courts, the Act would also widen the scope of such review.<sup>28</sup>

For these reasons, President Truman had serious concerns about the APA, and most administrative agencies fought to exempt themselves from its rules. Administrators responsible for military affairs, including the Selective Service System, were particularly worried. While the APA shielded agencies exercising “military, naval, and foreign affairs functions” from its onerous procedural requirements, it exposed most of these functions to newly expansive judicial review. Only administrative decisions made under “military authority exercised in the field in time of war or in occupied territory” or in furtherance of “temporary wartime functions” would be free of such review.<sup>29</sup>

To the relief of draft administrators, this exemption was eventually extended to “functions conferred by . . . the Selective Training and Service Act of 1940.” Later draft laws similarly exempted the Selective Service System from the APA’s requirements.<sup>30</sup> As a result, the draft would remain formally autonomous from the new administrative and judicial regime established by the APA. Yet by the time the APA became law, the Supreme Court had already signaled its willingness to intensify judicial review of draft administration. Indeed, the Court’s February 1946 decision in *Estep*, exposing Selective Service decision-making to an unprecedented degree of judicial scrutiny, had given voice to the same anti-administrative sentiments that drove the June 1946 passage of the APA. Taken together, then, *Estep* and the APA announced a new era of skepticism about administrative power – even when that power was justified on grounds of military necessity.<sup>31</sup>

Such skepticism compelled President Truman to sign the APA, despite his reservations: as “[a]ntibureaucratic sentiment continued to rise during the first half of 1946 . . . Truman could not politically afford to oppose . . . a bill to regulate the bureaucracy.”<sup>32</sup> The President was also expending political capital on a variety of other

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<sup>28</sup> During May 1945 negotiations with the administration, Congress agreed to limit “the scope of review to ‘unsupported by substantial evidence,’ rather than the earlier ‘unsupported by competent, material, and substantial evidence upon the whole agency record as reviewed by the court.’” Shepherd, “Fierce Compromise,” 1657. Yet in 1951, the Supreme Court would read the whole record requirement back into the APA’s “substantial evidence” standard. See *infra* discussion of *Universal Camera v. NLRB*.

<sup>29</sup> Pub. L. 79-404, sec. 2.

<sup>30</sup> *Id.*

<sup>31</sup> Kovacs XXX (“The Walter–Logan Bill’s broad exemption for “any matter concerning or relating to the military or naval establishments” was too narrow, in President Roosevelt’s eyes, for a nation on the brink of war. Yet, shortly after the war ended, Congress willingly subjected military actions to judicial review unless those actions were the result of “military authority exercised in the field in time of war” or fell within one of the APA’s other exceptions. The history of that shift lends insight into how World War II affected Congress’s and the President’s view of the need to control the Fourth Branch, specifically through judicial review of military action.”).

<sup>32</sup> Grisinger, *Unwieldy American State*, 75; Brazier, “An Anti-New Dealer Legacy,” XXX.

fronts, including his efforts to save both the Selective Service System and the Office of Price Administration from postwar extinction. For critics of bureaucracy, these two agencies typified the threat that administrative governance posed to individual liberty.<sup>33</sup> In light of these other, ongoing battles, Truman’s Bureau of the Budget decided that the APA was not “bad enough to justify a veto.”

The fiercest critics of the administrative state were quick to trumpet their ideological victory. For instance, Pat McCarran, the law’s Senate sponsor, hailed the APA as a “comprehensive charter of private liberty and a solemn undertaking of official fairness.”<sup>34</sup> Such rhetoric was partly strategic, as the law’s authors had left much of the “comprehensive charter” intentionally ambiguous in order to secure both congressional and presidential support. Once it was clear that Truman would sign the APA, however, both pro- and anti-administrative forces began to seed the Congressional Record with statements reflecting their preferred interpretation of the law’s many vague provisions.<sup>35</sup> Seeking to preserve an earlier era of judicial deference, Attorney General Tom Clark testified that the Act’s “substantial evidence” standard – which defined the degree of judicial scrutiny of administrative fact-finding – was “merely a restatement of existing law.” The chairman of the Senate Judiciary Committee emphatically disagreed, clarifying “that the new standard would fundamentally expand the existing standard of review.”<sup>36</sup> Such competing legislative history only exacerbated the text’s formal ambiguity. As a result, the “true” meaning of the Act would depend on the outcome of struggles between administrators and private parties in the courts. There, judges would have the last word on how anti-administrative the APA’s commitments to “private liberty” and “official fairness” really were. This state of affairs inevitably benefitted the critics of administrative government. The APA’s judicial elaboration would take place in a context of unprecedented administrative reaction to perceived Communist aggression at home and abroad. As this reaction gave even many Cold Warriors pause, anti-communist attitudes toward administrative government would lead courts to apply the APA’s ambiguous language in an increasingly restrictive manner.

3.

The year 1947 highlighted the contradictory ways in which the Cold War would re-shape the American administrative state. In March of that year, anti-administrative fervor and premature visions of a new, high-tech, low-manpower way of war swept Congress, leading to a brief, bipartisan consensus against the military draft. The shuttering of the Selective Service System coincided with a larger rollback of state

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<sup>33</sup> Grisinger 76; Brazier XXX.

<sup>34</sup> Pat McCarran, “Foreword,” *Administrative Procedure Act: Legislative History*, iii.

<sup>35</sup> Shepherd 1665.

<sup>36</sup> Shepherd 1664.



capacity, largely motivated by conservative criticisms of “New Deal” government. For the first time since 1928, Republicans controlled both houses of Congress, and they “solemnly pledged” to use their power to “return to government by the people instead of by bureaucracy.”<sup>37</sup> Anti-bureaucratic Republicans, joined by Southern Democrats who had long been wary of the New Deal’s potential to disrupt Jim Crow’s racial division of labor, set their sights on agencies capable of advancing a progressive social and economic agenda. In May, Congress took the Office of Price Administration – a powerful tool for managing the domestic economy – off postwar life-support. The next month, the Taft-Hartley Act, co-sponsored by draft critic Robert Taft, severely undercut the ability of the National Labor Relations Board to defend the interests of labor, shackling the Board with new procedural constraints and expanding judicial review of its decision-making.<sup>38</sup>

A year earlier, beset by efforts to abolish the Office of Price Administration and the Selective Service System, President Truman had accepted the Administrative Procedure Act as a political necessity. Now, he lost the OPA and the SSS anyway, and watched as a super-majority in Congress passed Taft-Hartley over his veto.<sup>39</sup> Conservative politicians successfully criticized all three of these agencies – the SSS, the OPA, and the National Labor Relations Board – as actual or potential beachheads of communism.

Yet anti-communism also justified the expansion and centralization of other aspects of the administrative state. In response to Republican charges that his administration was infested with communists, President Truman established the Federal Employment Loyalty Program in March 1947, “a sweeping program” that “require[ed] all federal workers to pass loyalty tests” to prove they were not communists.<sup>40</sup> Pursuant to Truman’s Executive Order 9835, each civilian agency in the executive branch established a Loyalty Board to oversee FBI investigations of every current or potential employee and hold hearings when evidence of disloyalty was uncovered.<sup>41</sup> To help in this anti-communist campaign, the Attorney General codified a “List of Subversive Organizations,” membership in which was *prima facie* evidence of disloyalty. Over the course of the Loyalty Program’s existence, thousands of employees resigned “voluntarily” because of the potentially damaging – and often quite personal –

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<sup>37</sup> Laurence Burd, “House Majority Pledges to Pull U.S. ‘Out of Bog,’” *Chicago Daily Tribune*, Jan. 4, 1947, 2.

<sup>38</sup> See discussion below of judicial implementation of Taft-Hartley and the APA.

<sup>39</sup> Truman’s veto was in part an effort to regain labor’s support after his 1946 threat to draft striking workers. See Maeve Marcus, *The Steel Seizure Case* 18-19.

<sup>40</sup> Landon Storrs, *The Second Red Scare and the Unmaking of the New Deal Left* 84 (2012). See also Ellen Schrecker, *Many Are the Crimes* (1999).

<sup>41</sup> Appeals from Loyalty Board decisions could be taken to the Loyalty Review Board, housed in the Civil Service Commission.

information that came to light during the review process. Hundreds were fired. Thousands more changed their political activities and policy views to avoid suspicion. A disproportionate number of those affected were left-leaning women who had managed to enter the civil service for the first time during the New Deal.<sup>42</sup>

In the summer of 1947, as the loyalty machine began its search for communist sympathizers within the civilian bureaucracy, Congress turned its attention to containing foreign communism. The National Security Act, an ambitious effort to rationalize and strengthen the American military apparatus, “created a National Military Establishment . . . headed by a Secretary of Defense with responsibility for ‘general direction,’ as well as supervision and coordination of the Departments of the Army, Navy, and (newly created) Air Force.”<sup>43</sup> Although the Soviet Union’s first detonation of a nuclear bomb was still two years away, the American press and political class viewed unification of the armed forces as a necessity in the coming age of nuclear conflict. Opponents of unification, the *Washington Post* warned, were actively undermining “national security”: “to think of any service going its separate way in the atomic age is to visualize disaster.”<sup>44</sup> The National Security Act also created the Central Intelligence Agency – expanding and normalizing wartime surveillance and counter-intelligence operations – and the National Security Resources Board “to link the [armed] services with corporations and universities.”<sup>45</sup>

Even as the National Security Act licensed new administrative power and presidential control over the administrative state, it also reflected the willingness of conservative anti-communists to block administrative innovation that could further progressive domestic policy. For example, President Truman’s preferred vision of national security reform involved a truly unified military, “the integration of every element of America’s defense in one department under one authoritative, responsible head.”<sup>46</sup> This integrated approach would insure that military planning advanced the social, economic, and political interests of the nation as a whole. Truman argued that as separate, autonomous services, the Army, the Navy, and the Air Force invariably pursued their own interests, and inefficiently competed with one another for resources. He was particularly worried about the Navy, the “worst offender” when it came to inflated budget requests during WWII and, unsurprisingly, the primary opponent of unification. The Navy, however, had powerful allies in Congress, who assailed Truman’s vision of full integration of service as a totalitarian power-grab. Even Grenville Clark, the architect of the first peacetime draft and long-time proponent of more centralized and rationalized

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<sup>42</sup> Id. at XXX.

<sup>43</sup> Douglas Stuart, *Creating the National Security State* 106 (2008).

<sup>44</sup> Quoted at Stuart 93.

<sup>45</sup> Sherry, *In the Shadow of War* 138.

<sup>46</sup> Quoted at Stuart 86

military manpower policy, warned that the Truman administration seemed to be putting “itself on a new institutional footing for renewed total war.”<sup>47</sup>

While Congress merely watered down Truman’s vision of armed forces integration, it was even more hostile to the other half of the President’s “two-part strategy for improving the nation’s military preparedness” – Universal Military Training (UMT).<sup>48</sup> Truman viewed UMT as a method of military manpower procurement that was more efficient and more egalitarian than either voluntarism or Selective-Service-style conscription. Selective Service worked by drafting some men – those without deferments or exemptions – into the armed forces for relatively long tours of training and active duty (usually 18 to 24 months) based on immediate military needs. Under UMT, all men who met a physical and mental baseline would “undergo a period of basic military training,” likely six months or less, “followed by a number of years of reserve duty.”<sup>49</sup> Being in the reserves would mean a few weeks of training a year, and liability for extended service in the event of a national emergency. UMT would accordingly create a “huge pool of ready reservists” – ensuring both quick mobilization in the event of a shooting war and a relatively small, active-duty military establishment in times of peace.<sup>50</sup>

Fatefully, Truman framed UMT as a crucial component of his “Fair Deal” vision of social and economic reform. A tool of domestic as much as foreign policy, UMT would “develop skills that could be used in civilian life . . . raise the physical standards of the nation’s manpower . . . lower the illiteracy rate . . . develop citizenship responsibilities, and . . . foster the moral and spiritual welfare of our young people.”<sup>51</sup> Indeed, the President went so far as to say that “the military phase [of UMT] is incidental to what I have in mind.” A “thoroughly democratic” mode of manpower administration, UMT promised to make equality the organizing principle of both military and civilian life.

During WWII, most political and military leaders – including President Roosevelt and Secretary of War Henry Stimson – had endorsed post-war universal military training as a means of manpower procurement and a diplomatic tool. From their perspective, UMT would “encourage the other world powers to believe that the United States is not only desirous but is prepared to enforce its determination to outlaw aggression.” Yet the egalitarian, domestic goals that Truman set for UMT doomed it during the first years of the Cold War. Throughout the late 1940s and early 1950s, an “organized, highly vocal

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<sup>47</sup> Nancy Peterson Hill, *A Very Private Public Citizen: The Life of Grenville Clark* 176 (2014).

<sup>48</sup> *Id.* at 87.

<sup>49</sup> Friedberg, *In the Shadow of the Garrison State* 156.

<sup>50</sup> *Id.* at 156-157.

<sup>51</sup> Harry S. Truman, *Memoirs by Harry S. Truman*, vol. 1, *Year of Decisions* (Garden City, NY: Doubleday, 1955), 510.

minority” of right-wing and left-wing critics worked together to re-frame UMT as the twisted path to American totalitarianism.<sup>52</sup>

Although Truman’s emphasis on the egalitarian, civilian nature of UMT “was intended to make it more palatable,” it was precisely the justifications for UMT as a tool of domestic policy that made it so susceptible to charges of communistic social engineering. This anti-totalitarian critique united business conservatives and southern segregationists with labor unions, African-Americans, and anti-militarists across the political spectrum. As political scientist Aaron Friedberg writes, “while many of the societal groups opposing universal conscription came from the liberal and even radical end of the political spectrum, they found allies among the most conservative, and even reactionary, elements in the country and in Congress.”<sup>53</sup>

Thus, when the Ohio Republican Robert Taft called Truman’s UMT proposal “contrary to the whole concept of American liberty,” he appealed to a motley crew of big-city businessmen, rural isolationists, and cosmopolitan pacifists. New Deal politics had sharply divided these social factions during the 1930s: rural isolationists and pacifists generally supported President Roosevelt’s domestic reforms while opposing his increasingly interventionist foreign policies; corporate executives and lawyers, on the other hand, denounced many of Roosevelt’s domestic reforms as “totalitarian,” while celebrating – and often facilitating – the President’s interventionist turn.<sup>54</sup> Yet UMT, a recipe for violence abroad and economic control at home, united these disparate groups.<sup>55</sup> Similarly, Taft’s opposition to UMT gained support both from Southern Democrats, who “feared that a truly universal training program would promote ‘race mixing’ and undermine segregation,”<sup>56</sup> and from African-American leaders, who condemned Truman’s early UMT proposals for failing to explicitly proscribe segregation.<sup>57</sup>

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<sup>52</sup> Friedberg at 169.

<sup>53</sup> Id at 168. Friedberg goes on to draw an analogy to the anti-Vietnam-draft alliance: “On the issue of mandatory military training, pacifists and labor leaders made common cause with racists and anti-statist conservatives. As would happen again in the 1970s, opposition to conscription helped forge an odd alliance of left and right.” Yet there may be more continuity and less analogy than he allows. See Chapter 5.

<sup>54</sup> Jenner, *Roosevelt’s Republicans*, XX. Republican critics of New Deal reform saw UMT as its logical extension. As the Business Men’s Committee wrote to Robert Taft, UMT was one of the “boldest steps toward totalitarianism yet proposed” and would create a “political aristocracy of college-trained new or fair deal thinkers who would have it in their power to perpetuate the chains of dictatorship.” Flynn 124.

<sup>55</sup> Friedberg reports that the “strongest and most consistent congressional opposition . . . came from the Republican party, and in particular from its conservative Midwestern wing.” 167.

<sup>56</sup> Friedberg 168.

<sup>57</sup> See Gary Vaughn Rasberry, *In the Twilight of Jim Crow: African American Literature, Totalitarianism, and the Cold War* (ProQuest 2011). See also News and Editorial Contents (June 16, 1947) (“According to the Fellowship of Reconciliation, the American people should vigorously oppose President Truman’s drive for UMT, which will, through conscription, fasten both racial discrimination and militarism on all American youths at their most impressionable age.”) (quoting Atlanta Daily World, June 8), NARA, RG 147, Alphabetical Subjects File, Box 14.

Unions were also hostile to UMT. Although most had supported the draft during WWII, the labor movement turned against all forms of compulsory service after Truman sought the power to draft striking workers during the manpower crisis of 1946. Truman never went through with the plan, but his willingness to deploy an ostensibly military tool to resolve a political economic conflict at home led labor leaders to adopt their own brand of anti-totalitarian rhetoric. Phillip Murray, the head of the pro-New Deal CIO, had argued, with knowing hyperbole, that Truman’s “sole aim” was “the destruction of the labor movement.”<sup>58</sup> William Green, the President of the more anti-New-Deal AFL, went further: “to compel free workers to remain on the job against their will by drafting them into the armed forces and making them subject to court martial if they refuse is slave labor under Fascism.”<sup>59</sup>

In addition to the bi-partisan lobby that opposed UMT on anti-totalitarian grounds, a few critics rejected Truman’s vision for purely military reasons. They argued that UMT’s guiding strategic assumption – the need for a massive force of ready reserves – was outmoded in an era defined by air and nuclear power. This argument, however, was truly eccentric at the time, more science fiction than hard-headed realism: “For virtually the entire period during which universal training was under serious consideration . . . there was no chance of the United States delivering an atomic ‘knockout blow’ against the Soviet Union.”<sup>60</sup> In 1948, with the age of “nuclear plenty” years away, Secretary of State George Marshall correctly concluded that even if World War III did begin in the air, it would end “in the mud and on the ground.”<sup>61</sup>

UMT, then, offered real strategic advantages; yet it stood no chance of passage in the spring of 1947 due to objections rooted in domestic policy and the inflammatory association of compulsory service with totalitarianism. Recognizing this political landscape, President Truman not only shelved his UMT proposal but also acquiesced to the end of Selective Service. Finding little support to his right for new compulsory service legislation, Truman could not afford to exacerbate tensions with organized labor and African-Americans – groups to his left that were both sharply critical of the draft. (Truman also falsely hoped that UMT might be easier to pass once conscription itself was no longer in operation.<sup>62</sup>) Accordingly, in June 1947, the President signed “liquidation” legislation, directing Selective Service System’s essential personnel, including the Director Lewis Hershey, to transition to a new, smaller agency, the Office of Selective Service Records. Little more than a research center, the OSSR was to maintain the 50

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<sup>58</sup> McClure, *The Truman Administration and the Problems of Postwar Labor, 1945-1948*, at 154.

<sup>59</sup> Quoted in Seidman 237.

<sup>60</sup> Friedberg 159.

<sup>61</sup> Quoted at Friedberg 160.

<sup>62</sup> Flynn 97-99.

million records that had accumulated under the 1940 draft law, and to field requests for information and advice about past draftees and future military manpower policy.<sup>63</sup>

By the summer of 1947, a Congress dominated by Republicans and Southern Democrats had begun to build the Cold War national security state. But the blueprint it used was not the one that officials in the Roosevelt and Truman administrations had designed. Truman's concept of full integration of service was successfully assailed as totalitarian, as was his egalitarian vision of Universal Military Training. To defeat the President's effort to link military preparedness with continued social and economic reform, right-wing critics of big government joined with left-wing groups that mistrusted the President's commitments to peace, racial equality, and union strength. Meanwhile, many of the officials in the Truman administration most sympathetic to those left-wing causes would soon find themselves under investigation by the new federal loyalty apparatus, an administrative response to congressional charges that Truman was insufficiently aggressive in the new war against communism.

4.

While anti-communist rhetoric helped to kill the draft in 1947, the United States' intense opposition to the spread of communism necessitated a panicked return to conscription less than a year later. In February 1948, members of the Communist Party of Czechoslovakia attempted to purge the nation's police force of non-Communist leaders, sparking a parliamentary crisis. On February 25, Prime Minister Eduard Benes capitulated to a new Communist-dominated government. To the north, Finland was also on the brink of striking a deal with the Soviet Union – greater political autonomy for the Finns in return for their refusal to participate in American plans for European economic integration. Meanwhile, in Berlin, where tensions between Russian and Western forces had been building ever since early 1947, the U.S. military governor warned that a “clash with the Soviet Union might now be imminent.”<sup>64</sup>

This upsurge in Soviet militancy cast American preparedness in a harsh light. The advocates of an all-volunteer military had already lost their best on peacetime recruitment, as a historically low unemployment rate meant few incentives for young men to flock to military careers. Even before the string of February 1948 crises, the army needed 30,000 volunteers a month to keep up with American international commitments;

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<sup>63</sup> In this latter capacity, the OSSR continued to work with the Department of Justice on ongoing prosecutions of men who had violated the 1940 Act. See, e.g., Hershey to DOJ (Apr. 25, 1947), NARA, RG 147, Alphabetical Subjects File, Box 11. Hershey and his subordinates also continued to advise other government agencies on military manpower policy. See, e.g., Hershey to President Truman (July 30, 1947) & (Nov. 4, 1947), NARA, RG 147, Alphabetical Subjects File, Box 17.

<sup>64</sup> Frieberg 174.

as of January 1948, it was only getting 12,000.<sup>65</sup> By March, “the army stood 129,000 [men] under its authorized strength of 669,000,” a twenty-percent shortfall, and the “total armed force strength” had dropped from a wartime height of 12 million to less than 1.5 million.<sup>66</sup> Those futurists who had argued in 1946 and 1947 that the American nuclear arsenal would make a large reserve army unnecessary had also bet wrong. Truman himself was surprised to learn that this arsenal “consisted of only a dozen World War II bombs.”<sup>67</sup>

On March 17, facing strategic setbacks abroad and a military capacity that did not match the American political class’s aggressive anti-Soviet rhetoric, President Truman called for new draft, as well as a new system of universal military training and a massive program of international economic aid – the famous “Marshall Plan” – to forestall further Communist advances. Congressional critics of big government had successfully resisted all three of these proposals the previous spring. But the international climate had changed, and it was becoming harder to square a strong stance against communism abroad with anti-communist critiques of big government at home. Seizing the moment, Truman “beat the drum of the Communist menace” in order to get his expansive vision of national security a hearing before a skeptical Congress.<sup>68</sup>

Truman’s advisors did the same. Testifying before the House Armed Services Committee, James Forrestal, the nation’s first Secretary of Defense, compared recent Soviet moves in Eastern Europe to German strategy before the first two world wars: “The situation in the world today finds deadly analogies in the past. At the root of each analogy lies despotic power, uncurbed by firm opposition until too late to prevent the tragedy of war.”<sup>69</sup> Drawing on the same “deadly analogies,” Karl Compton, the chair of the Advisory Committee on Universal Military Training and president of the Massachusetts Institute of Technology, promised Congress that UMT “will be a deterrent to actions by any nation which might provoke war, as it would have been a powerful deterrent against Hitler, Mussolini, and Japan.” “[T]echnological advances in the art of war,” Compton warned, “permit any nation which is planning war to act and move with devastating quickness.” This meant “less to time to prepare” in the event of a Soviet incursion into Western Europe, and UMT “would give us a stock pile of time.”<sup>70</sup>

Congress got the message, or at least the part it was willing to hear. When the Senate Armed Services Committee met to discuss the President’s proposals, Chairman Chan Gurney endorsed the Truman administration’s framing of the situation: “We meet

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<sup>65</sup> Flynn 102.

<sup>66</sup> Flynn 100-101.

<sup>67</sup> Flynn 102.

<sup>68</sup> Flynn 108.

<sup>69</sup> Quoted in Larson 40. Cite to *Haunted by Hitler* XXX.

<sup>70</sup> *Id.* at 41.

today . . . against a back drop of world-wide fear of aggression, a fear which is engendered by the aggressive acts of the Soviet Union. . . . [I]t is clear that the clouds of war are starting to gather.”<sup>71</sup> In early May, the House Armed Services Committee introduced a new draft bill as “the necessary response of this government to specific, aggressive, and dangerous actions on the part of the Government of the Soviet Union.”<sup>72</sup>

Claims that the draft itself represented a form of communism or totalitarianism were, this time, confined to religious, pacifist, and left-wing voices. W. Harold Row of the pacifist Church of the Brethren warned Congress that, “History shows that military conscription is usually the first step away from Christianity and democracy in the direction of tyranny and the absolute authority of the state.”<sup>73</sup> Likewise, Dr. Henry Crane, chairman of the Michigan Council Against Conscription, called peacetime conscription “an unashamed adoption of a technique that is preeminently characteristic of totalitarianism” and “a deliberate step toward a dictatorship.”<sup>74</sup> But Senator Robert Taft, who had recently leveled similar criticisms, voted for the final version of the Selective Service Act of 1948, signed into law by President Truman on June 24.<sup>75</sup> The Economic Cooperation Act, which codified the Marshall Plan, also passed with significant Republican support.<sup>76</sup>

Fear of communism won Truman a new draft and a long-term international economic aid package, but not as egalitarian a draft or as much aid as the President wanted. And universal military training – the centerpiece of Truman’s national security agenda – once again proved to be a non-starter. The internal logic of anti-communism placed a limit on the sorts of government programs that it could justify. To be sure, Soviet aggression demanded some expansions of administrative power. But each time Truman tried to give a progressive social and economic cast to such anti-communist state building, he was accused of flirting with Soviet methods.<sup>77</sup> Thus, while even Senator Taft voted for the return of the Selective Service System in 1948, he and his allies continued to resist UMT on anti-communist grounds.

Even new Selective Service Act embodied skepticism about Truman’s egalitarian agenda. First, the law did not include language explicitly ending racial segregation of the armed forces. Prompted by black militancy during the war years, President Truman had created a Committee on Civil Rights in December 1946 to study “the personal right to safety, the right to citizenship and its privileges, the right to freedom of conscience and

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<sup>71</sup> Quoted in Larson 39.

<sup>72</sup> Quoted on Flynn 108.

<sup>73</sup> Quoted in Larson 42.

<sup>74</sup> Id.

<sup>75</sup> <https://www.govtrack.us/congress/votes/80-1948/s216>.

<sup>76</sup> April 3, 1948

<sup>77</sup> Cite to Storrs for evidence of Marshall Plan administrators being weakened by anti-communist accusations.



expression, and the right to equality of opportunity.”<sup>78</sup> Recognizing wartime expansions in judicial enforcement of the First Amendment, the Committee’s 1947 report, *To Secure These Rights*, found that “the United States had made progress in protecting human liberty” but was sorely behind when it came to racial and economic equality.<sup>79</sup> The Committee was particularly scornful of military segregation: “Prejudice in any area is an ugly, undemocratic phenomenon: In the armed services, where all men run the risk of death, it is particularly repugnant.”<sup>80</sup>

Accordingly, Truman called for desegregation of the armed forces on February 2, 1948. But this public message did not satisfy A. Philip Randolph, who had fought for desegregation of the defense industries during WWII, and founded the post-war Committee against Jim Crow in Military Service and Training. Randolph wanted any new draft law to mandate racial integration, and the President’s own Committee on Civil Rights backed Randolph’s position. In March, the African-American leader told Congress that he would advise all black draftees to refuse to serve if racial integration was not an explicit goal of peacetime conscription. Senator Wayne Morse, a prominent supporter of rights for conscientious objectors, was stunned by Randolph’s threat – “[i]f the nation were at war, warned Morse, such an act would be treason.”<sup>81</sup>

Senator Robert Taft, the pro-business, pro-civil-rights, draft-skeptical Republican, supported Randolph’s goal of an integrated military, but southern Democrats successfully resisted the campaign. In the end, the 1948 law simply repeated the 1940 draft’s antidiscrimination language, neglecting to ban segregation outright. Months later, knowing that he needed African-American support for the peacetime draft and the rest of his political agenda, Present Truman issued Executive Order 9981 mandating “equality of treatment and opportunity for all persons in the armed forces without regard to race, color, religion or national origin.” But the effect of this Order would depend on the cooperation of military commanders and state governors – who were responsible for choosing the members of local draft boards. Such cooperation was not forthcoming, as both military officers and Southern governors did everything they could to violate the spirit, if not the letter, of the Truman’s executive order. As a result, full integration of the armed forces would have to wait until the need for black troops during the Korean War made it a tactical necessity. Southern draft boards, meanwhile, continued to discriminate against blacks for decades.<sup>82</sup>

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<sup>78</sup> Kimberly Phillips, *War! What Is It Good For?* 100 (2012).

<sup>79</sup> *Id.* See also *To Secure These Rights: The Report of Harry S. Truman's Committee on Civil Rights* XXX (1947).

<sup>80</sup> *Id.* at XXX.

<sup>81</sup> Flynn 103.

<sup>82</sup> Phillips XXX-XXX.

In addition to ignoring the problem of racial inequality, the 1948 draft law created new forms of class inequality within the structure of conscription. Led by Vannever Bush, the head of the Office of Scientific Research and Development during WWII, university presidents and industrialists had spent the immediate post-war years lobbying for a vast new network of educational deferments, purportedly to protect young men doing cutting-edge scientific work. They found a steadfast supporter in Secretary of War Robert Patterson, a New York lawyer and leader of the pre-WWII peacetime draft movement. Bush and Patterson pointed to the atomic attack on Japan as proof that the frontier of war was now science, and they pushed the “dubious” claim “that American scientists had been . . . wasted during the [last] war.”<sup>83</sup> If the United States was to survive the nuclear age, Bush warned, the country would have to reject the “shibboleth that all men are to be treated alike regardless of talent.”<sup>84</sup>

The Selective Service System’s Director, Lewis Hershey, well understood the political economic implications of this push for educational deferments. If Bush and the education-science lobby got their way, Hershey warned, the new draft would “discriminate in favor of individuals financially better situated than other persons.”<sup>85</sup> In early 1948, the Office of Selective Service Records and the Department of Defense arrived at a compromise set of recommendations: they rejected “blanket deferment” of all science students and workers, but agreed to a new system by which educational deferments would “be offered on a selective basis. . . . based on academic performance, as measured by a national test and by class ranking.”<sup>86</sup>

This move toward a more “meritocratic” draft opened a schism between the military and the country’s social and cultural elite that would widen over the next several decades. At the same time, the rise of educational deferments signaled the failure of Truman’s own efforts to use military manpower policy as a tool of progressive social and economic reform. While the educational and scientific establishment wanted to keep its young men out of the army, Truman wanted to make sure that as many people as possible benefited from national service. A core goal of his rejected universal training program was the provision of remedial health and education services to those who fell below the army’s minimum induction requirements. To that end, the President’s Committee on UMT had also recommended a nonmilitary form of training for those who did not (yet) meet the minimum mental and physical requirements for military service, as well as for conscientious objectors. Such nonmilitary training would “reach down into the social life

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<sup>83</sup> Flynn 107.

<sup>84</sup> Quoted in Flynn 105.

<sup>85</sup> Quoted in Flynn 107.

<sup>86</sup> Id.

of the nation and influence home, school and health authorities.”<sup>87</sup> But the same lobbyists who pushed for educational deferments within the peacetime draft successfully opposed universal training for the impact it would have on young scientists and engineers.<sup>88</sup> By June 1948, these critics of “romantic concepts of equity and individual equality” had won the first of many victories in their fight to control Cold War conscription.<sup>89</sup>

[BRIEF DISCUSSION HERE OF SECTION 18’S LIMITED INDUSTRIAL SEIZURE PROVISION AND ITS EFFECT ON THE LATER STEEL SEIZURE CASE]

In keeping with the trend toward a weak and patchwork draft, the Selective Service Act of 1948 exempted conscientious objectors from all forms of service. For the first and only time in American history, men classified as COs would simply be deferred. Hershey had objected to this new approach during congressional hearings and after passage of the bill. He worried that lack of alternative service would both encourage insincere claims of conscientious objection and make local boards reluctant to grant even legitimate pacifists conscientious objector status. As he told the White House shortly after the bill’s passage:

The deferment of all persons with conscientious objections to noncombatant service offers loop holes by which men will seek to completely avoid service. Administrative difficulties will arise because of the efforts of some who seek to evade service and because the local boards will be reluctant to classify anyone as a person possessing conscientious scruples against noncombatant service. The boards will hesitate to make such classifications because they will feel that such action will permit otherwise available men to escape all obligations.<sup>90</sup>

Yet Hershey did not push too strongly against CO deferment, admitting that the Selective Service System would itself be better off it had “nothing to do with the troublesome problem” of alternative service.<sup>91</sup> Under the 1940 regime, draft administrators were responsible for building and maintaining Civilian Public Service camps, where conscientious objectors performed non-military service of “national importance.” This bureaucratic responsibility proved a huge headache for Hershey and his staff, as CPS became a focal point of civil libertarian criticism, including criticism from conservative legal and political elites. These latter critics framed the “internment” of conscientious objectors as a particularly extreme example of the threat that the

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<sup>87</sup> Memorandum from the Chairman, Nonmilitary Training Committee (July 29, 1947), 1, NARA, RG 147, Alphabetical Subjects File, Box 14.

<sup>88</sup> Friedberg 175.

<sup>89</sup> Flynn 107.

<sup>90</sup> Hershey to BOB (June 28, 1948), NARA, RG 147, Decimal File 113, Box 36.

<sup>91</sup> Hearings Before the Committee on Armed Services, House of Representatives, 80th Congress, Second Session on H.R. 6274 and H.R. 6401 (Apr. 12-May 3, 1948), 6513.

administrative state posed to all Americans – a symbol of the totalitarianism toward which the administrative state inevitably tended. Thus, the famed Wall Street litigator and New Deal critic John W. Davis described the CPS camps as “concentration camps under a system of forced labor.”<sup>92</sup> And New York Republican Walter Andrews, chairman of the House Armed Services Committee, argued that deferring conscientious objectors from all service was preferable to locking them in “concentration camps.”<sup>93</sup>

This anti-totalitarian critique of CPS was not merely a public relations problem. It also exposed the Selective Service System to new judicial scrutiny, as prosecutions of conscientious objectors who had failed to report to – or deserted from – CPS camps flooded the federal courts. In December 1946, six months after Congress reluctantly renewed the peacetime draft, the Supreme Court held for the first time that CPS resisters and deserters could challenge their draft classifications at criminal trial.<sup>94</sup> The following year, in *Cox v. United States*, three Jehovah’s Witnesses seized on this new legal right: classified as conscientious objectors and prosecuted for deserting their assigned CPS camps, they defended themselves on the grounds that they had been arbitrarily denied ministerial classification. Ministerial classifications were particularly precious, as they entitled registrants to full exemption from both military service *and* alternative service in CPS camps. The Supreme Court disagreed with the Witnesses on the merits, finding that there was a “basis in fact” for denying them ministerial exemptions. In doing so, however, the *Cox* Court opened yet another avenue for judicial oversight of the draft bureaucracy, directing judges to invalidate the decisions of Selective Service officials if they appeared to have misapplied their own administrative regulations.

Such regulations were essential to making the draft law’s vague language work in practice. The product of informal negotiations between draft administrators and a variety of interest groups, from churches to universities to the ACLU, Selective Service regulations tended to be relatively accommodating: defining “ministry” more expansively than a strict reading of the draft law might have required, for instance, and creating additional levels of procedural protection for registrants.<sup>95</sup> Before *Cox*, it had been an open question whether draft administrators had to strictly abide by these liberal

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<sup>92</sup> William Harbaugh, “Civil Liberties – Conscientious Objection” (n.d.), 2, JWDP, Box 175.

<sup>93</sup> National Service Board of Religious Objectors Consultative Council, Minutes (June 29, 1948), 2, Swarthmore College Peace Collection, Records of the Center on Conscience and War, DG 025, Part II, Series A, Box 1.

<sup>94</sup> *Gibson v. United States*, 329 U.S. 338 (1946).

<sup>95</sup> *Cox v. United States*, 332 U.S. 442, 450-451 (1947). See also Box 37 Sept 9 1953 memo to Massachusetts USA re: what evidence is admissible in invalidity defense? “evidence which was in the registrant’s file at the time of the classification”

Includes court excerpts including *Cox v. United States* which – orthogonally – contains the striking statement “In these cases judicial review of administrative action is allowed in the criminal trial. This assures judicial consideration of a registrant’s rights.” Note how directly substantive this sounds.

Includes many good circuit court examples too!

interpretations of the draft law. After *Cox*, every Selective Service regulation could create a new substantive or procedural right to which registrants were entitled. The impact of *Cox* also extended beyond the draft, as courts began to rely on the precedent to police other agencies' compliance with their own internal guidelines.<sup>96</sup> This ripple effect, in which legal challenges to draft decision-making led to increased judicial supervision throughout the administrative state, bolstered the conservative argument that the Selective Service System was simply the most egregious example of administrative lawlessness.

Given the extent to which the the unpopularity of Civilian Public Service contributed to the expansion of judicial review of the Selective Service System and the administrative state as a whole, ending alternative service for pacifists might have seemed like a good way to shield administrative agencies from further judicial encroachment. Top administrators, such as Selective Service Director Lewis Hershey, also likely realized that the anti-totalitarian critique of Civilian Public Service was, at least for the moment, politically unstoppable. Breaking with the principle of some form of national service for every draftee that had guided American conscription since World War I, the 1948 draft law abolished all alternative service requirements. This historical departure was motivated less by growing sympathy for pacifists than by growing antipathy for the administrative state. This state of affairs was clarified by Congress's refusal to adopt a second reform strongly supported by both pacifist groups and the Justice Department: the creation of a new, independent agency to adjudicate conscientious objector claims.

The proposed "National Commission on Conscientious Objectors" was a response to the myriad legal and political difficulties that arose from the 1940 draft law's method for classifying conscientious objectors. Under that law, the Selective Service System and the Justice Department shared responsibility for CO classification: whenever a local Selective Service draft board rejected a registrant's CO claim, it forwarded the case to the Justice Department for FBI investigation and a hearing before one of 131 Special Assistants to the Attorney General. These Justice Department hearing officers would then recommend whether the CO claim should be granted or not, based on evidence the FBI had gathered and the registrant's own testimony. Next, senior Justice Department officials reviewed each hearing officer's recommendation, affirming or reversing it before forwarding a final recommendation to the Selective Service appeals board in the state where the alleged CO was registered. Although the Justice Department's final recommendations were technically advisory, the state appeals boards generally adopted

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<sup>96</sup> See, e.g., Frank C. Newman, *Government and Ignorance: A Progress Report on Publication of Federal Regulations*, 63 Harv. L. Rev. 929, 941 (1950) ("Judge McAllister, answering an argument on behalf of the Housing Expediter that a certain interpretation was 'a confidential office instruction, with the implication that complainant had no right to rely upon it,' commented that the document 'concerns the public, and if such consideration is given to one citizen ... every other citizen is entitled to the same treatment.' A similar argument on behalf of the Director of Selective Service was recently rejected by the Supreme Court.") (citing *Cox*, U.S. 332, at 451). See also late 1947 and early 1948 discussion of pardons and the push for a general amnesty, including from Eleanor Roosevelt directly. Truman Papers, OF 111, XXX.

the Justice Department’s views as their own, and some lower courts even tried to compel appeals boards to adhere to the DOJ’s recommendations.<sup>97</sup> If the end result was denial of CO status, the registrant could file a final appeal with the Presidential Appeals Board in Washington, DC.

Every step of this labyrinthine process invited disagreement within and between agencies, as well as a host of procedural errors and mistaken judgments about the facts and law governing an individual case. Any such misstep might be the basis of a successful legal challenge in federal court. Not only did the WWII system generate a great deal of administrative confusion and judicial skepticism, it also placed the Justice Department in the awkward – and potentially illegitimate – position of acting first as judge of the validity of CO claims and later as prosecutor of those men denied CO status who refused to report for military service. Furthermore, CO advocates argued that the Selective Service System, whose principal responsibility was meeting the army’s demand for fresh soldiers, was intrinsically biased against granting requests for CO classification. Supporters of the National Commission model argued it would correct this bias by removing CO classification decisions from the jurisdiction of Selective Service altogether. The proposed Commission would also relieve the Justice Department of its legally irregular and time-consuming mix of adjudicatory and prosecutorial responsibilities when it came to sorting legitimate from illegitimate pacifists.

By 1944, DOJ lawyers had already concluded that their involvement in the draft classification process was both a waste of time and a threat to the agency’s integrity. That year, the Attorney General reported that draft-related work “continued to occupy a prominent place in Departmental activities,” noting 383,389 FBI investigations to date.<sup>98</sup> Furthermore, violators of the Selective Service Act “constituted the largest single group” of federal prisoners in 1944 – 4,679 out of a total of 18,392.<sup>99</sup> Citing “a number of distinct and troublesome problems” that had emerged in the course of the administration of conscientious objectors, the Attorney General recommended that, in future drafts, Congress establish “a Board to deal especially with conscientious objectors, having full discretion with respect to their proper individual classification as well as their prompt assignment to suitable and useful work.”<sup>100</sup> The 1948 National Commission proposal was an attempt to put this recommendation into practice.

Back when the Attorney General’s Report’s was first released, the American Civil Liberties Union had hailed it as “the first time a high official of the government charged with a responsibility for objectors has concurred” with the Union’s own criticisms of the Selective Service apparatus.<sup>101</sup> And in April 1945, the ACLU’s President, Ernest Angell, warned President Roosevelt that the Report was evidence of “sharp disagreement” between the Justice Department and the Selective Service System as to the adequacy and

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<sup>97</sup> XXX.

<sup>98</sup> Annual Report of the Attorney General of the United States 10-11 (1944), NARA, RG 147, COGF, Box 67.

<sup>99</sup> Id. at 14.

<sup>100</sup> Id. at 13.

<sup>101</sup> Angell to FDR (Apr. 9, 1945), 1, NARA, RG 147, COGF, Box 96.

legitimacy of CO administration.<sup>102</sup> Nor was the ACLU simply ginning up trouble. By war's end, Selective Service lawyers were fed up with what they perceived as the DOJ's slowness in processing CO claims and its reluctance to prosecute draft law violators who had been denied conscientious objector or ministerial status.<sup>103</sup>

Referring explicitly to the Justice Department and ACLU's assessments of WWII draft dysfunction, Senator Wayne Morse, an Oregon Republican, fought to get the National Commission on Conscientious Objectors added to the 1948 draft law. An independent civilian agency staffed by presidential appointees, the Commission would be authorized to "prescribe the conditions under which . . . [alleged conscientious objectors] shall (a) be inducted into the armed forces, (b) be assigned to noncombatant service, (c) be assigned to special service of national importance . . . or (d) be deferred."<sup>104</sup> Although Morse and other supporters correctly argued that this method for dealing with conscientious objection would create a more civil libertarian, less coercive draft,<sup>105</sup> it would also add a new ingredient to the "alphabet soup" of administrative agencies that congressional majorities wanted to water down. Reflecting this impatience with new administrative experiments, Chan Gurney, Chairman of the Senate Armed Services Committee, slammed Morse's call for "fundamental changes" and increased complexity in draft administration. In the end, the Senate rejected the National Commission amendment by a vote of 48 to 22.<sup>106</sup>

Accordingly, Congress built no new administrative apparatus to resolve the "distinct and troublesome problems" that the Justice Department had encountered while enforcing the 1940 draft law. Instead, the 1948 draft sought to mitigate these problems by eliminating the layer of administration required to provide alternative service for conscientious objectors. Yet the more general problem of classifying conscientious objectors remained. It was a problem that the Justice Department did not want, and a continuing source of both intra-branch tension between DOJ and Selective Service officials and inter-branch tension between these executive officials and the federal courts. When Congress reinstated alternative service for conscientious objectors three years later, in the midst of the Korean War, these intra-branch and inter-branch conflicts only intensified.

Two other aspects of the 1948 law also sowed the seeds of further trouble between the Justice Department and the Selective Service System and greater judicial

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<sup>102</sup> Id. at 2.

<sup>103</sup> See material cited in notes 11-13. See also complaints of slowness dating back to 1941 – Hershey to Biddle (July 1941) and Biddle to Hershey (Aug. 1941), NARA, RG 147, COGF, Box 2.

<sup>104</sup> 80 Cong. Rec. 7278, Senate, Second Session (June 3-14, 1948).

<sup>105</sup> Richard Gilliam, "The Peacetime Draft: Voluntarism to Coercion," *Yale Review* 57 (June 1968), 505.

<sup>106</sup> Id. at 7305.

scrutiny of the draft apparatus. First, Congress declined to overrule the expansion of judicial review of draft decision-making that the Supreme Court had announced in *Estep v. United States*. In that 1946 case, the Court had baffled commentators – and several Justices – when it rejected the long-standing interpretation of the 1940 draft law’s statement that Selective Service decisions were “final”: immune from all judicial review other than by writ of habeas corpus after a draftee had entered the military or been imprisoned for refusing to do so. Reversing course, the *Estep* Court reasoned that by declaring Selective Service decisions “final,” Congress had merely meant that – prior to military induction or imprisonment – such decisions should be subject to more deferential judicial review than applied to other kinds of administrative decision. Since this new interpretation relied on Justice Douglas’s acrobatic reading of the statutory text, rather than on any explicit constitutional provision, Congress could have clarified that it did in fact intend to preclude all judicial review prior to military induction or imprisonment. Instead, the 1948 draft law simply repeated the old law’s finality provision, implicitly accepting *Estep*’s outlandish interpretation. The Senate Armed Services Committee made this legislative acquiescence quite explicit, noting that “the procedure and scope of review defined by the Supreme Court of the United States in enforcing the 1940 Act will be equally applicable under this legislation.”<sup>107</sup> As a result, registrants could continue to disobey Selective Service orders, defend their action on the ground that they had been misclassified, and receive a judicial ruling on the validity of their classification. By ratifying *Estep*, Congress empowered federal courts to intervene in the induction process and second-guess Selective Service and Justice Department decision-makers.

Second, even as Congress gave courts a greater role in draft decision-making, it also sought to limit the kinds of registrants who would be entitled to receive ministerial and conscientious objector classifications – whether through the administrative process or judicial review. The 1940 law had exempted all “regular or duly ordained” ministers of religion from national service of any kind. But it did not specify what “regular or duly ordained” meant, leaving Selective Service administrators and federal judges to develop a workable definition.

The Jehovah’s Witnesses were the religious group that pushed hardest for an expansive definition of “minister.” They had no formal ordination process and claimed that their primary ministerial activity was the printing and distribution of religious pamphlets, an activity in which thousands of their members participated, often while maintain secular occupations as well. Accordingly, the Witnesses’ general counsel, Hayden Covington, mailed in massive and ever changing lists of Witnesses he considered

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<sup>107</sup> S. Rep. No. 1268, 89th Cong., 2d Sess. 20 (1948). See also T. Oscar Smith & Derrick A. Bell, The Conscientious-Objector Program: A Search for Sincerity, 19. Pitt. L. Rev. 697, 704-705 (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.”).



to be “regular or duly ordained” ministers. Selective Service headquarters would check these lists against supporting documentation and then send them out to local and appeals boards for advisory purposes. The lists were not, however, supposed to be binding on draft boards, and many Witnesses not on the lists also sought ministerial classification.<sup>108</sup> When denied ministerial status, Witnesses would often refuse to report for duty (whether for military service or alternative service as conscientious objectors), face prosecution, and ask judges to overturn their classifications as invalid.<sup>109</sup> All of the major Supreme Court decisions that expanded judicial review of the draft apparatus during the 1940s – *Falbo, Estep, Gibson, Cox* – involved Jehovah’s Witnesses who claimed that they were improperly denied ministerial status.

The 1948 draft law sought to cut down on this administrative and judicial confusion by defining the meaning of “regular or duly ordained minister of religion” in greater detail. To qualify for a ministerial exemption, a registrant would now have to demonstrate that his “customary vocation” was preaching and teaching the “principles of religion of a church, a religious sect, or organization of which he is a member.”<sup>110</sup> The statute explicitly excluded any “person who irregularly or incidentally preaches and teaches.”<sup>111</sup> This language, it was hoped, would provide statutory support for the Selective Service System’s practice of denying ministerial exemptions to Witnesses and other draftees who held secular occupations but taught, preached, or proselytized in their spare time.<sup>112</sup>

Congress similarly tried to tighten the definition of conscientious objection. The 1940 draft law had offered noncombatant military duty or alternative, civilian service to anyone who “by reason of religious training and belief, is conscientiously opposed to participation in war in any form.”<sup>113</sup> By late 1941, however, “a considerable difference of opinion as to the interpretation” of this language had “arisen throughout the Selective Service System and the Department of Justice.”<sup>114</sup> A year later, this debate spread to the federal courts, where a series of conflicting rulings only exacerbated disagreement within the executive branch. By 1944, however, the Second Circuit Court of Appeals – perhaps the most influential federal appellate court in the country – had gone so far that even the Justice Department came to the Selective Service System’s defense. As Assistant

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<sup>108</sup> See correspondence in NARA, RG 147, COGF, Boxes 7, 24-25, 74.

<sup>109</sup> As Attorney General Frances Biddle reported in 1944, “The special difficulty posed by [the Witnesses] is that they generally decline to accept a conscientious objector classification, maintaining that they are entitled to the absolute exemption accorded to ministers.” Annual Report of the Attorney General of the United States 12 (1944).

<sup>110</sup> Selective Service Act of 1948, 62 Stat. 604, sec. 16(g).

<sup>111</sup> *Id.*

<sup>112</sup> See Report of the Senate Armed Services Committee (May 12, 1948), XXX.

<sup>113</sup> Selective Training and Service Act of 1940, 54 Stat. 885, sec. 6(g).

<sup>114</sup> Major Shattuck to General Hershey (Dec. 31, 1941), 1, NARA, RG 147, COGF, Box 17.

Attorney General Tom Clark, then head of the Justice Department’s Criminal Division, complained:

[T]he Second Circuit has, I believe, considerably expanded the scope of the exemption for conscientious objectors. . . . [Its decision] establishes that the individual can set his conscience, from whatever source derived, against the decision to wage war made by the proper civil authority. . . . it makes easy for anyone to avoid service by calling upon some inward mentor, sparked, perhaps, by consideration for his family, or his business, or just for himself, which tells him that he should not go into the Army.<sup>115</sup>

Clark also noted that Congress in 1940 had specifically rejected an amendment – proposed by the American Civil Liberties Union – that would have offered alternative service to anyone “conscientiously opposed to participation in war in any form” *regardless* of religious training or belief. The effect of the Second Circuit’s decision was thus to “read into the Act the specifically rejected proposal of the American Civil Liberties Union.”<sup>116</sup> On these grounds, Clark recommended that Charles Fahy, the U.S. Solicitor General, ask the Supreme Court to reverse the Second Circuit’s reasoning. Fahy, however, decided to let the matter lie. His reluctance to pursue the case was likely fueled by the emergence of a newly “liberal” five-Justice majority on the Court, one that might have very well affirmed the Second Circuit’s expansive understanding of legitimate conscientious objection. Without Supreme Court resolution of the question, the meaning of “religious training and belief” phrase remained murky at war’s end.

Four years later, Congress sought to clarify matters in the new Cold War draft law.<sup>117</sup> The Selective Service Act of 1948 retained the language of “religious training and belief” but added an explicit definition of the phrase, one that rejected the Second Circuit’s highly pluralistic approach. 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 include[ing] essentially political, sociological, or philosophical views or a merely personal moral code.”<sup>118</sup>

The first part of this definition was something of a jurisprudential throwback: a nearly verbatim from a seventeen-year-old Supreme Court dissent which had objected to

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<sup>115</sup> Quoted in Hedrick to Dunkle (Aug. 17, 1944), 3-4, NARA, RG 147, COGF, Box 67.

<sup>116</sup> *Id.* at 4.

<sup>117</sup> Nearly twenty years later, while serving as a Justice on the Supreme Court, Tom Clark would occlude this history in his majority decision in *United States v. Seeger*. That decision effectively made *Reel v. Badt*’s interpretation of “religious training and belief” the law of the land, despite legislative efforts to marginalize the 2nd Circuit’s WWII decisions.

<sup>118</sup> Selective Service Act of 1948, 62 Stat. 604, sec. 6(j).

the denial of citizenship to a pacifist theologian.<sup>119</sup> Tasked with distinguishing *United States v. Macintosh* from an earlier case in which the Court upheld the denial of naturalization to a *secular* pacifist, then-Chief Justice Hughes, in dissent, had emphasized the religious character of the theologian’s pacifism. Years later, Hughes’s poetic invocation of a “Supreme Being” – taken somewhat out of context – gave rhetorical authority to Congress’s effort to reverse the judicial trend toward a more pluralistic understanding of conscience. The second part of the statutory definition drove the point home, explicitly excluding political views “personal moral code[s]” from the realm of conscience. This exclusionary language closely tracked the narrower interpretation of “religious training and belief” proffered by Assistant Attorney General Tom Clark in 1944. In fact, Selective Service officials told the National Service Board of Religious Objectors (NSBRO), a non-governmental body of pacifist churches, that the new definition had in fact been drafted by the Justice Department, headed by Clark ever since his promotion to Attorney General in 1945.<sup>120</sup>

NSBRO and the ACLU campaigned hard against the 1948 draft law’s newly theistic and anti-political conception of conscientious objection. But they encountered sustained opposition, largely stemming from Cold War politics. On the one hand, religious freedom was a major issue that anti-communists saw as clearly distinguishing the United States from the Soviet Union. In April 1948, for example, Attorney General Clark took to Italian radio to announce that “Communism is the very death of Democracy. It preaches a Godless ideology! Democracy guarantees freedom of worship to all!”<sup>121</sup> On the other hand, many political leaders, including Clark, feared that an overly expansive definition of religion would serve subversive, left-wing interests. As the ACLU noted in its Annual Report: “Continued fear of Congressmen that some loophole might enable Communists to evade service prompted adherence to even narrower definitions of conscience than in the wartime act.”<sup>122</sup>

Released in August 1948, the ACLU’s criticism of the illiberal effects that congressional anti-communism was having on the new draft law fell on deaf ears. That same month, witnesses told the House Un-American Activities Committee that Alger

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<sup>119</sup> That case had involved a pacifist divinity school professor who was denied naturalization as an American citizen for refusing to swear to “bear arms” in defense of his country. Given the obviously sincere and relatively orthodox nature of Macintosh’s pacifist beliefs, and in light of WWI practice, Chief Justice Hughes reasoned that the U.S. government would never ask him to bear arms anyway. The question of secular conscientious objection had not been at issue. XX

<sup>120</sup> NSBRO Consultative Council Minutes (June 29, 1948), 3, SCPC, DG 025, Part II, Series A, Box 1.

<sup>121</sup> Quoted in *High Lights from Addresses, 1945-1948*, by Tom C. Clark, Attorney General of the United States 33 (19XX). For the impact of religious libertarianism on Cold War politics, see generally William Inboden, *Religion and American Foreign Policy, 1945-1960: The Soul of Containment* XXX (2010); *Religion and the Cold War* XXX (Dianne Kirby ed. 2003); Andrew Preston, “The Spirit of Democracy: Religious Liberty and American Anti-Communism during the Cold War,” in *Uncertain Empire: American History and the Idea of the Cold War* 141-163 (Joel Isaac & Duncan Bell eds. 2012).

<sup>122</sup> ACLU, *Annual Report: Our Uncertain Liberties, 1947-1948*, vol. 4, p. 61.

Hiss, a prominent State Department official, was a Communist spy. The ensuing trial would become the “sensation of 1949”: “No other episode in the postwar period did more to convince the public that . . . treason had once reached into high places and perhaps was still there.”<sup>123</sup> Meanwhile, President Truman’s loyalty program was kicking into high gear. The “promising stirrings in the postwar peace movement” that had grown from the rubble of Hiroshima quickly withered in this atmosphere of anti-communist anxiety.<sup>124</sup> Two years after the passage of the 1948 draft law, the pacifist Fellowship of Reconciliation reported that “anti-Communist feeling and hysteria make it far more difficult to get a hearing for the pacifist position now than at any time during World War II, and indications are that this situation is more likely to get worse than to improve.”

Nonetheless, the 1948 draft law’s approach to anti-war citizens embodied the ways in which the ideology of anti-communism could foster both more coercive and more libertarian policies. On the one hand, Congress narrowed the meaning of both ministry and conscientious objection, taking a hard line against forms of belief considered subversive.<sup>125</sup> In doing so, the legislature used the draft apparatus to re-impose a traditional conception of religion, a conception that five years earlier the federal courts had declared outmoded, unacceptable to a “skeptical generation.” On the other hand, Congress ratified the Supreme Court’s expansion of judicial review of Selective Service decisions, including decisions about who was entitled to a conscientious objector or a ministerial classification, and about how best to interpret the statutory language governing those entitlements. The repression of heterodox moral and political beliefs thus went hand in hand with the subjection of the Selective Service System’s own repressive power to greater judicial oversight. The 1948 draft law also released ideologically acceptable conscientious objectors from all alternative service obligations. This libertarian outcome reflected anti-totalitarian disdain for both the old Civilian Public Service approach and President Truman’s more expansive vision of universal military service as a method of progressive social and economic administration. All told, Congress envisioned a post-WWII draft regime that would be less accommodating of the ideological eccentricities of both conscripts and the executive officials who administered them.

5.

Reintroduced in June 1948, the most immediate impact of peacetime conscription was a takeoff in volunteering, as young men rushed to enlist in their preferred branch of

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<sup>123</sup> Matusow XXX.

<sup>124</sup> Lawrence Wittner, *Rebels Against War: The American Peace Movement, 1941-1960*, at 201 (1969).

<sup>125</sup> [cite here to Preston, “The Spirit of Liberty” and Kruse, *One Nation Under God* on the growth and politicization of religiosity in the 1950s – JW’s a Janus-faced religious actor, exemplifying the religiously fervent early Cold War, while breaking with Protestant support for the American Cold War state as vehicle of religious liberty]

the military rather than be subject to the draft. (Most draftees could expect a short but unglamorous and comparatively dangerous stint in the army, followed by a long reserve service obligation.)<sup>126</sup> As a result of this influx of volunteers, inductions would actually be suspended in January 1949. Yet the sheer improbability of coerced military service only magnified the ideological and legal stakes of those cases in which Americans demanded exemption from military service anyway, or refused to participate in the registration and classification process altogether. Selective Service officials would thus be operating under a microscope when it came to administering Cold War dissidents.

The work of draft administration was further complicated by a heightened Cold War obligation to police internal, as well as external, dissent. This obligation stemmed from President Truman's establishment of the Federal Employee Loyalty Program in March 1947. Because the Selective Service System had been "liquidated" that same month, its resurrection just over a year later brought the draft and the loyalty regimes into contact – and conflict – for the first time. On August 30, 1948, pursuant to Truman's Program, Selective Service Director Lewis Hershey appointed an agency-wide Loyalty Board and began to file monthly reports on internal investigations of draft administrators.<sup>127</sup> Yet Hershey remained reticent about such internal policing, and took pains to shield his staff from its potentially corrosive effects.

Months before the passage of the Selective Service Act in June 1948, Hershey had contacted the Loyalty Review Board of the Civil Service Commission, the nerve center of the loyalty program. Hershey's initial goal was to exempt all uncompensated Selective Service personnel from loyalty investigations. As Hershey explained in an April 1948 letter, the pending Selective Service legislation mirrored the structure of previous draft laws in relying on thousands of volunteers to staff "the local boards, appeal boards, medical advisory boards, examining physicians and dentists, government appeal agents, and certain other personnel."<sup>128</sup> "It was estimated," Hershey continued, "that the uncompensated personnel of the Selective Service System will exceed 100,000."<sup>129</sup> To subject such a staff to the rigors of the new loyalty apparatus, Hershey warned, would endanger national security.

As he argued in a second letter that spring, "the inclusion of the uncompensated personnel in the loyalty program would greatly delay the rapid organization of a Selective Service System."<sup>130</sup> Furthermore, delays in military manpower procurement because of

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<sup>126</sup> Flynn XXX; Friedberg XXX.

<sup>127</sup> Hershey to Seth W. Richardson, Chairman, Loyalty Review Board, U.S. Civil Service Commission (Sept. 10, 1948), NARA, RG 147, Decimal File 71A-3785, Box 2.

<sup>128</sup> Hershey to Loyalty Review Board of the Civil Service Commission (Apr. 30, 1948), NARA, RG 147, Decimal File 71A-3785, Box 2.

<sup>129</sup> Id.

<sup>130</sup> Hershey to Seth Richardson, Chairman, Loyalty Review Board, U.S. Civil Service Commission (May 14, 1948), NARA, RG 147, Decimal File 71A-3785, Box 2.

anti-communist anxiety were simply unnecessary: “The loyalty and patriotism of the uncompensated representatives are demonstrated by the very fact that they are willing to undertake, without pay, the work and responsibilities as well as the criticism incident thereto, in attempting to perform their functions in a fair and impartial manner.” Hershey’s campaign was successful. On May 20, 1948, the Civil Service Commission approved the exemption of uncompensated Selective Service personnel from the loyalty program.<sup>131</sup>

Having secured the autonomy of volunteer draft administrators, Hershey next established an agency-wide policy to “protect [salaried] employees against possible unwarranted accusations of disloyalty, and to extend all reasonable assistance and advice relating to their rights and privileges.”<sup>132</sup> As part of this policy, Hershey and his subordinates insisted that any personnel under suspicion should be retained in their positions until “a final adjudication including all appeals” was concluded. Selective Service Headquarters also worked to insure that accused employees be offered assistance when necessary in navigating the loyalty review process. In one case, Hershey asked the State Director for Indiana to “have someone from the System advise and help” a part-time janitor to complete his loyalty paperwork.<sup>133</sup> Further delay, Hershey explained, would mean that his case would have to be forwarded directly to the Civil Service Commission. Under those circumstances, “the subject’s opportunity for further employment with the United States Government would be jeopardized.”

The Selective Service System’s resistance to the loyalty apparatus indicates the complexity of administrative politics during the early Cold War. Both the draft and the loyalty program were hailed – or condemned – as powerful anti-communist tools. Yet draft and loyalty administrators never formed a coordinated program of anti-communist manpower management. Whether for reasons of self-preservation or authentic civil libertarianism, the Selective Service System struggled against the yoke of domestic anti-communism, even as it owed its existence to the (undeclared) war against communism abroad.

Hershey’s effort to mitigate the impact of the loyalty program was consistent with a common desire of bureaucrats to maintain the autonomy of their particular administrative regime.<sup>134</sup> Yet Hershey and his Selective Service staff were also uniquely familiar with the vagaries of investigating the beliefs and sincerity of men. Throughout WWII, they had struggled to manage the classification of anti-war citizens in a manner that passed civil libertarian muster. Despite these good – or at least self-protective – intentions, the Selective Service System had suffered a massive legal and political

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<sup>131</sup> Richardson to Hershey (May 20, 1948), *id.*

<sup>132</sup> Hershey to Col. Paul Armstrong, State Director of Selective Service, Illinois (Jan. 27, 1949), *id.*

<sup>133</sup> Hershey to General Robinson Hitchcock, State Director for Indiana (Aug. 30, 1949), *id.*

<sup>134</sup> See generally Daniel Carpenter, *The Forging of Bureaucratic Autonomy* (2001).

backlash: accusations of totalitarianism, judicial encroachment on decision-making, even abolition of the System itself in 1947.

Selective Service administrators thus had every reason to distinguish themselves from the new loyalty apparatus. The legitimacy of peacetime conscription would depend on the perception that its operations were not just fair but consonant with the respect for civil liberties that had come to distinguish America from its totalitarian enemies. Over the past ten years, prominent members of both the federal judiciary and Congress had suggested that at least some aspects of draft administration failed to meet this anti-totalitarian test. The less Selective Service was associated with the policing of the beliefs of individual Americans, the better.

Even without the burden of internal loyalty policing, Selective Service officials knew they would have their hands full when it came to administering the Cold War draft in a sufficiently civil libertarian manner. The 1948 draft law's unprecedented exemption of conscientious objectors from all forms of service might alleviate some of the tensions that had arisen around the civilian work camps during WWII. Yet new conflicts were on the horizon.

6.

The most immediate was the problem of non-registrants – men who refused to participate in the entire process of Selective Service administration. In such cases, even if a man were entitled to full deferment from military service as a conscientious objector or minister, he would face criminal prosecution for disobeying Selective Service rules, such as the requirement to fill out an initial registration or classification form. This problem was exacerbated by the Selective Service System's commitment to repeat prosecutions. A non-registrant's conviction for a single act of disobedience did not erase his obligation to participate in the registration and classification process. If he refused a second time, he would be prosecuted a second time – or at least that was the executive branch's initial policy.<sup>135</sup> By the fall of 1948, the Department of Justice, the federal courts, and advocates outside the government had begun to push back against repeat prosecutions – and sometimes even first prosecutions – of non-registrants.

On October 27, the Central Committee for Conscientious Objectors (CCCO) announced that “full government prosecutions against non-registrants are now under way.”<sup>136</sup> Funded by pacifist and civil liberties organizations and overseen by veteran anti-war leader A.J. Muste, the CCCO had formed three months earlier in response to the

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<sup>135</sup> See Hershey to McInerney (Oct. 1950); Hershey to Sen. Flanders (Mar. 1951), NARA, RG 147, Central Files 1948-1963, Box 37 (discussing the policy).

<sup>136</sup> Quoted at Larson 81.

return of peacetime conscription. The group’s self-described mission was to give “impetus and assistance to local communities in setting up counselling agencies and cash bail funds, in establishing a network of counsellors [for conscientious objectors] across the country, and in calling for legal advice in planning strategy for challenging the constitutionality of the Selective Service System.”<sup>137</sup>

By January 1949, the CCCO had its hands full as more than fifty prosecutions of non-registrants worked their way through the federal courts. Sentences upon conviction averaged “more than two years apiece” which, as the CCCO pointed out, was “greater than the average sentence for [a] narcotic or liquor law violation, and only a few months less than the average” for slave trafficking.<sup>138</sup>

Although fifty prosecutions of non-registrants might seem insignificant in comparison to the millions who registered for the peacetime draft without complaint, these prosecutions attracted public controversy for at least two reasons. First, several of the cases involved men who had already served as conscientious objectors during World War II.<sup>139</sup> While the 1948 draft law automatically exempted men who had served on active duty during the last war, it denied this automatic exemption to those who had performed alternative service. This denial looked like a punishment for legitimate pacifist beliefs. Second, after the induction process was halted in January 1949 due to a surfeit of volunteers, the only Americans who faced significant draft-related hardships were those who refused to register. Anyone who registered would simply be deferred. Accordingly, it was hard to see refusal to register as anything other than a conscientious and self-sacrificing gesture.

Politicians and the public took note. Days after Democratic Senator Hubert Humphrey took office on January 3, 1949, he sent an open letter to Attorney General Tom Clark protesting the prosecutions of non-registrants. “[O]ur government,” he wrote, “should . . . not stigmatize [the non-registrant] with the same treatment given to ordinary criminals.” He called on Clark to remove from local U.S. Attorneys with limited discretion the responsibility for indicting non-registrants; instead, top Justice Department officials in Washington should determine, on a case-by-case basis, whether an act of draft resistance truly merited indictment and prosecution. That same month, a group of well-known lawyers, academics, and artists – including the founder of the American Law Institute William Draper Lewis, the novelist John Dos Passos, and the future Poet Laureate Louis Untermeyer – distributed a protest letter to the nation’s leading newspapers, arguing that the prosecution of non-registrants was inconsistent with America’s anti-communist stance. “[T]he imprisonment of these young men of peace,”

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<sup>137</sup> CCCO Annual Report XXX (1949), SCPC, DG 073, Series I, Box 1.

<sup>138</sup> Quoted in Larson 81 [find original source].

<sup>139</sup> Larson 105-106 n. 24 (noting that twenty-two of the seventy-eight non-registrants arrested by April 1949 had served in CPS).



they explained, “does not become the government of a nation aspiring to the moral leadership of the world in opposing Russia and her satellites for their oppression of minorities today.” The editors of the *Hartford Courant* echoed this argument, denouncing the prosecution of non-registrants as a “policy of petty spitefulness” that “ill becomes a powerful nation, the supposed citadel of religious freedom.”<sup>140</sup>

Just as the friends of non-registrants protested their treatment on anti-communist grounds, defenders of the prosecutions were also influenced by the country’s geopolitical situation. At the sentencing of four Quakers to over a year in prison for their refusal to register, an Alabama federal judge remarked: “This pacifist crowd would turn this country over to some other government.”<sup>141</sup> And when a New York federal judge sent another non-registrant to prison for a similar term, the prominent newspaper columnist Robert Ruark complained that the sentence was actually too lenient: “I am sick of the dissenters who enjoy the benefits and refuse the penalties of living in this particular land. . . . It has been doubly difficult to sell this current draft to the nation – it will become more difficult if the willful dodgers escape with a slap on the pinky.” The U.S. Parole Board apparently agreed with such sentiments: when Caleb Foote, the CCCO’s Executive Secretary, met with the Board to plead, unsuccessfully, for the early release of convicted non-registrants, he reported that the Board’s members “regard C.O.’s as ‘traitors’ and ‘worse than communists.’”<sup>142</sup>

The case of Larry Gara, a history professor at Bluffton College in Ohio, gave a particularly sensational demonstration of how anti-communism galvanized both sides of the registration refusal debate. Seeking to discourage anti-draft organizing at universities, the Justice Department indicted Gara for aiding and abetting draft resistance on the grounds that he offered encouragement to a student *after* that student refused to register. “The case against Gara was based chiefly on the fact that when FBI men arrested [the student], Gara . . . said to him: ‘Stand by your principles. Don’t let them coerce you into changing your conscience.’”<sup>143</sup> In response to Gara’s arrest, a group of anti-war organizations picketed the White House with leaflets that read:

The American press makes sure that we know of the terrible persecutions in countries dominated by Russia because this helps build support for the cold war.  
BUT [MOST] KNOW NOTHING ABOUT THE ARRESTS IN THE U.S. OF

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<sup>140</sup> Quotes from Larson 83 [find original source]. For the names of the authors of the open letter, see *The Gospel Messenger* (Feb. 19, 1949), 25.

<sup>141</sup> Quotes from Larson 87-88.

<sup>142</sup> CCCO Executive Committee, Minutes (Mar. 18, 1949), SCPC, DG 073, Series I, Box 1.

<sup>143</sup> Caleb Foote, Joint Committee for Gara Demonstration, to President Truman (July 25, 1949), Truman Presidential Library, White House Central Files, OF 111, Box 643.

COLLEGE DEAN LAWRENCE GARA AND 97 OTHER NON-COMMUNIST WAR OBJECTORS.<sup>144</sup>

With the help of the ACLU<sup>145</sup> – which generally wanted nothing to do with non-registration cases – Gara argued that his statements of support to the student were protected speech under the First Amendment. A federal jury disagreed, having been instructed by the judge that speech “may become subject to prohibition when of such a nature and used in such circumstances as to create a clear and present danger that they will bring about the substantive evils which Congress had a right to prevent.”<sup>146</sup> Upholding Gara’s conviction, the Sixth Circuit Court of Appeals announced that, “We take judicial notice of the existence of the so-called ‘cold war’ which in the view of Congress necessitated this peacetime draft.”<sup>147</sup>

7.

When the non-registration controversy began in late 1948, “the existence of the so-called ‘cold war’” was becoming harder and harder to deny. The US-backed, nationalist government in China stood on the brink of defeat, suffering brutal losses at the hands of the communist Mao ze-Dong’s People’s Liberation Army. Much closer to home, on December 2, 1948, former Communist Party member Whittaker Chambers brought congressional investigators to his Maryland farm; there, he revealed photographs of classified documents supposedly passed to him by State Department official and alleged communist spy Alger Hiss. Republicans would soon link the Hiss scandal to the Chinese nationalists’ defeat, arguing that communist sympathizers in the Truman administration had let China fall to Mao. In this environment, many Americans were prepared to view resistance to the nation’s military manpower policy – even on supposedly religious grounds – as not just a crime, but a betrayal.

The Justice Department, however, began to see things differently. In March 1949, Assistant Attorney General Alexander Campbell held a meeting about the prosecution of non-registrants with the CCCO’s Caleb Foote and Norman Thomas, a co-founder of the ACLU who had been advocating for conscientious objectors since World War I. Campbell explained that he and Attorney General Tom Clark agreed that men who had conscientious reasons for refusing to register should not go to prison. Accordingly, the Justice Department had developed a plan to avoid further prosecutions. Under the current

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<sup>144</sup> Fellowship of Reconciliation, Press Release (July 25, 1949), Truman Presidential Library, White House Central Files, OF 111, Box 643.

<sup>145</sup> See ACLU amicus curiae brief.

<sup>146</sup> Quotes in Larson 93.

<sup>147</sup> *Gara v. United States*, 178 F.2d 38, 41 (6th Cir. 1949). The reasoning of the decision was convoluted, establishing only that communist belligerency threatened American security, not that Gara’s words themselves posed a clear and present danger of undermining that security. Although the Supreme Court agreed to hear the case, the Justices split four-to-four, upholding the conviction without opinion. Tom Clark recused himself. XXX.

procedure, the local draft board sent the file of each man who refused to register to the local U.S. attorney, who then brought an indictment against the man for draft resistance. Under the new procedure, Campbell explained, local U.S. attorneys would be instructed to personally fill out draft resisters' registration forms and send them back to the local draft boards, as if no registration refusal had ever occurred.<sup>148</sup>

On May 26, Main Justice announced the new policy. "It is believed," Circular No. 4063 stated, "that a substantial number of convictions for failure of conscientious and religious objectors to register would be obviated if the United States Attorneys were designated to register persons who had refused to submit themselves for registration."<sup>149</sup> Accordingly, the Circular "authorized and directed" all U.S. Attorneys to fill out the defendants' Selective Service paperwork "in any pending religious objector" prosecutions and then "secure the dismissal of the action." So long as the non-registrant agreed "to furnish the information necessary to complete such registration," he would avoid prosecution. Only if the defendant refused *all* cooperation with the U.S. Attorney should the prosecution proceed. Even more significantly, the Circular continued, "Except in the most willful instances, indictments should not be brought in future cases of religious objectors who refuse to submit for registration." What exactly constituted a "most willful instance" of registration refusal would remain a subject of debate both inside and outside the government for years to come.

Nonetheless, the May 1949 Circular made clear that the Justice Department wanted to get out of the business of prosecuting non-registrants, and was willing to look the other way when it came to a fair amount of draft resistance. Not only did the new policy amount to a broad exercise of prosecutorial discretion – a decision to rarely if ever enforce an explicit provision of the Selective Service Act – it also arrogated to the Justice Department significant administrative authority, found nowhere in the 1948 draft law, to determine whether a draft-aged man was, in fact, a sincere objector. Congress had given the authority to grant or deny a registrant's request for CO or ministerial status to the Selective Service System, and established elaborate procedures and substantive guidelines for reaching that decision. These procedures included, if necessary, an FBI investigation and a Justice Department hearing, but Selective Service retained the last word as to the validity of each registrant's claim for exemption.

The Justice Department's new policy short-circuited this system, implicitly directing local U.S. attorneys to assume that any man who refused to register on "conscientious or religious" grounds was entitled to an exemption. Given that assumption, it made little sense to prosecute such men merely for refusing to fill out their

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<sup>148</sup> CCCO, Special Release, Delegation to Justice Department (Mar. 25, 1949), 2, SCPC, DG 073, Series I, Box 8.

<sup>149</sup> Peyton Ford, Assit. to the Att'y Gen, DOJ Circ. 4063 (May 26, 1949), SCPC, DG 025, Part II, Series A, Box 15.

own registration forms – they would never be asked to serve anyway. Once “registered” by U.S. Attorneys, a man could, of course, find his request for exemption denied by the Selective Service System itself. But, at that point, the Justice Department – the agency responsible for gathering evidence in support of such a denial and prosecuting the registrant if he refused to abide by the Selective Service’s final decision – would have already indicated its belief that the registrant deserved an exemption. The May 1949 policy was thus a recipe for inter-agency conflict. It placed the Selective Service System on notice that the Justice Department was prepared to reach its own conclusions about how best to balance national security with individual liberty. And it did so at one of the most anxious moments of the early Cold War.

Four days before the Justice Department lifted the threat of prosecution from men whom many administrators and judges considered subversives, even traitors,<sup>150</sup> a New York Times article asked: “Why do some people become traitors? What turns some native-born Americans, as well as naturalized citizens, into Benedict Arnolds . . . . What motivates them to betray their country and themselves?”<sup>151</sup> These questions would have resonated with Attorney General Tom Clark, whose own employee – Judith Coplin – was in the midst of an espionage trial, accused of passing secrets to the KGB. What’s more, only days after the Justice Department announced the policy of non-prosecution for registration refusal, it began the prosecution of Alger Hiss, who had allegedly lied to Congress about his past communist affiliations. It was thus during one of the fiercest periods of the war against communism that Attorney General Clark decided that men who refused to register for the draft posed little threat to this war – notwithstanding the contrary beliefs of many in Congress, the Selective Service System, and the judiciary.

Given the country’s anti-subversive mood and Clark’s own impatience with the expansive claims of the conscience bar during World War II, his accommodation of draft resisters in the late 1940s is striking. But this apparent change of heart makes more sense in light of Attorney General Clark’s development and dissemination of an intensely *spiritual* style of anti-communism between 1947 and 1949. At the outset of this period, President Truman tasked Clark – his old friend and trusted adviser – with designing, implementing, and defending the Federal Employee Loyalty Program, the administration’s effort to eliminate any communist taint – real or imagined – from the federal bureaucracy. As the public face of Truman’s domestic war on communism, Clark also became one of the President’s chief propagandists, espousing a religiously infused

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<sup>150</sup> When discussing the possibility of a return to an alternative service system for conscientious objectors, for instance, Defense Department lawyer R.H. Eanes, remarked “Of course, personally I am of the opinion that the conscientious objector should be excluded from any special consideration in the Act, and he should be handled by regulations in the armed forces or classified as any other registrant who is doing work of national importance.” Eanes further suggested that the best work of national importance conscientious objectors could provide was “attendance at state mental institutions.” Col. R.H. Eanes to Commander Hayward (Dec. 7, 1949), NARA, RG 147, Central Files 1948-1963, Box 36.

<sup>151</sup> Gertrude Samuels, “American Traitors: A Study in Motives,” N.Y. Times (May 22, 1949)

vision of the anti-communist struggle before audiences across the country and the world. Describing the coming conflict between the United States and the Soviet Union as a “holy war,” Clark defined the opposition between “Communism” to “Democracy” in terms of their vastly different relationships to religion. As the Attorney General told an Italian radio audience in 1948, while “Communism preaches a Godless ideology,” “Democracy guarantees freedom of worship for all!”<sup>152</sup>

In support of this vision, Clark secured private funding for “The Freedom Train,” “a specially built train with railcars designed to house more than 100 key documents in U.S. history, including original versions of the Constitution and the Bill of Rights,” as well as the Massachusetts Bay Psalm Book.<sup>153</sup> This travelling exhibition crisscrossed the nation, allowing millions of Americans to witness firsthand what Clark called “the sacred historical documents” it carried.<sup>154</sup> For the Attorney General, the Freedom Train was not simply a means of civic education but “the springboard of a great crusade for reawakening faith in America.”<sup>155</sup> A spiritual as well as an industrial marvel, the Train’s steel-reinforced, temperature-controlled, shock-absorbing cars housed “American Scripture” and synthesized Clark’s personal antidote to communism – an eclectic blend of patriotism, legalism, divinity, and democracy.<sup>156</sup>

This fusion of liberal nationalism and religious fervor was somewhat unorthodox for a “New Deal lawyer,” one of those young men and women who had come to Depression-era Washington to build a strong, rational, and politically progressive administrative state. But Clark had always been a bit of an outsider in that circle: a graduate of the University of Texas and a private litigator for the oil industry, Clark entered the Roosevelt administration relatively late in the New Deal, precisely at the moment when his political patron, Democratic Senator Tom Connally, broke with President over his plan to pack the Supreme Court. Lacking more progressive – or elite – connections, Clark had to work his way slowly up the Justice Department ladder, and was always closer to Truman, a fellow Southerner, than Roosevelt, a New York patrician. Indeed, Truman and Clark were parishioners in the same Washington, D.C. church, XYZ, an early bastion of Protestant anti-communism. Cementing their politico-religious bond, Clark hailed Truman as the second coming of Abraham Lincoln when the Freedom Train arrived at the eighty-fifth anniversary celebration of the Gettysburg Address. If President Lincoln had been “the steady guiding light of an historic *American* emancipation,” Clark told the assembled crowd, it was now the mission of all Americans to “finish the task” that Lincoln had begun by extending his “ideal of freedom, justice, and equality” across

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<sup>152</sup> Broadcast to the Italian People, Apr. 16, 1948, High Lights 33.

<sup>153</sup> Wohl 125.

<sup>154</sup> Speech to Centre College, Danville, Ky., Nov. 15, 1947.

<sup>155</sup> Wohl 176.

<sup>156</sup> For the train’s construction, see Wohl 125-126. For the quote, see Clark, Rededication Exercises, Gettysburg, Pa., Nov. 19, 1948, High Lights 73.

the globe. Lincoln had waged war against *American* slavery, Clark reminded his audience, but “[t]he burning question facing *us* is world emancipation or *world* slavery.” Thankfully, the United States had found an answer to this question in President Truman, “another earnest, God-fearing man of the people.” “[G]uided by a courageous leader who lives, works and prays for peace,” Americans could confidently march into “Freedom’s last Crusade.” “No atheistic materialism – no vicious ideology – can undermine our cause or our destiny,” Clark proclaimed. The “opportunity for world emancipation” had arrived.<sup>157</sup>

If Clark was a belated and marginal New Dealer, his religious interpretation of the Cold War was ahead of its time. The identification of anti-communism with religious renewal that the Attorney General promoted in the late 1940s would come to dominate American public culture in the 1950s. And it was precisely this identification that made prosecuting men who claimed to resist the draft out of religious devotion so ideologically problematic. The Justice Department’s refusal to indict such men in May 1949, even as it aggressively prosecuted alleged communists, established an ideological and jurisprudential template that Clark would take with him to the Supreme Court later that year. When Justice Frank Murphy died in July, President Truman tapped his devoted Attorney General to fill the vacancy. As we will see, the jurisprudence of Justice Clark mirrored the sharp, ideological distinction that he had drawn in 1949: while according extreme deference to the decisions of federal administrators who regulated suspected communists, Clark scrutinized the decisions of federal administrators who regulated religious or quasi-religious draft resisters.

In the wake of the Justice Department’s 1949 policy shift, the prosecution of men who refused to register for the draft slowed considerably, a fact that even the CCCO acknowledged.<sup>158</sup> Yet CCCO members continued to condemn the few prosecutions that did go forward: those involving the “most willful instances” of refusal. Accordingly, they arranged another meeting with Assistant Attorney General Campbell. Campbell explained that local U.S. Attorneys did have some discretion over what constituted “willfulness,” but he stressed that “even a nod of the head” in response to questioning was sufficient to establish constructive cooperation and avoid prosecution.<sup>159</sup> Only if a man “acts like a mule,” Campbell insisted, would he risk imprisonment. But for the CCCO delegation, this minimum of cooperation was still too much to expect from truly determined draft resisters. Campbell clearly felt that this position was unreasonable and responded that the “non-registrant must now give a little if he is to help himself.” Although the CCCO remained dissatisfied with the Department’s position, the

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<sup>157</sup> Id. at 75.

<sup>158</sup> CCCO, Special Release, Prosecution and Imprisonment of Conscientious Objectors (Aug. 31, 1949), 1, SCPC, DG 073, Series I, Box 8.

<sup>159</sup> Id. at 2.

organization stopped publishing its “Court Reporter” in February 1950, acknowledging that the prosecution of non-registrants had effectively ceased.<sup>160</sup> At year’s end, the National Service Board of Religious Objectors reported only three convictions of non-registrants in all of 1950.<sup>161</sup>

8.

The successful effort to keep registration resisters out of the courts and prisons minimized the Justice Department’s exposure to a new wave of legal and political dissatisfaction with peacetime conscription. By early 1949, legislators, judges, and journalists were increasingly inclined to associate the peacetime draft experiment with unchecked executive power and civil liberties violations. To be sure, few if any Americans faced substantial burdens from the draft, inductions having been halted in January 1949. Yet the classification process chugged on, and prosecutions of registrants who refused to submit to induction *prior* to January 1949 continued to make their way through the courts. There, the trend toward greater judicial scrutiny of the classification process was unabated. In the March 1949 case of *Niznick v. United States*, for instance, the Sixth Circuit Court of Appeals reversed the convictions of two Jehovah’s Witnesses who had refused to report for induction after being denied ministerial status.<sup>162</sup> Referring to the standard laid down by the Supreme Court in *Estep* and subsequent cases, the trial judge had found, on the basis of the Witnesses’ Selective Service files, that there was a “basis in fact” for the draft board’s refusal of ministerial status. But the Witnesses argued that the judge should look beyond the written record. In particular, they testified that draft board members had behaved in a discriminatory manner. One member allegedly said that “[a]nybody [who] refuses to salute the flag, and anyone who refuses to stand up at the National Anthem, or defend their country, they don't have any right under the law.” Another supposedly remarked that “the Jehovah's Witnesses only stir up trouble amongst the people with their teachings.”

The Sixth Circuit interpreted this testimony as making out a *prima facie* case of religious discrimination, prohibited by Section 623.1 (c) of the Selective Service Regulations.<sup>163</sup> In 1947, the Supreme Court had suggested that these regulations were legally binding on all Selective Service administrators.<sup>164</sup> Accordingly, the Sixth Court

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<sup>160</sup> Larson 102.

<sup>161</sup> *Id.*

<sup>162</sup> 173 F.2d 328 (1949).

<sup>163</sup> The regulation read: “In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each registrant shall receive equal and fair justice.” *Id.* at 335.

<sup>164</sup> *Cox v. United States*, 332 U.S. 442, 450-451 (1947). See also Frank C. Newman, *Government and Ignorance: A Progress Report on Publication of Federal Regulations*, 63 *Harv. L. Rev.* 929, 941 (1950) (“Judge McAllister, answering an argument on behalf of the Housing Expediter that a certain interpretation was ‘a confidential office instruction, with the implication that complainant had no right to rely upon it,’

reversed the convictions and ordered a new trial: “If, on the event of a retrial, [the Witnesses’] testimony is disputed [by the government], the case should be submitted to a jury. If appellants’ testimony and evidence . . . should be uncontradicted, appellants would be entitled to an acquittal.”<sup>165</sup>

This decision meant that any time an accused draft resister presented evidence of draft board discrimination – at least in the Sixth Circuit – the government would have to rebut that evidence in a jury trial. This new method of attacking draft classifications would be especially taxing for the government to resist. Accordingly, the Justice Department sought to challenge the Sixth Circuit’s new rule. The Supreme Court, however, declined to hear the case.<sup>166</sup> Facing the potential of a jury trial in every remaining case of induction refusal, it is no wonder that the Justice Department wanted to avoid adding new registration refusal cases to its workload.

Outside the courts, the January 1949 suspension of inductions proved even less helpful to the stability and legitimacy of the Selective Service System. Indeed, politicians cited the suspension as a good reason to eliminate peacetime conscription as soon as possible, even though the Selective Service Act was set to expire anyway – without further action – in June 1950. As early as April 1949, some in Congress were pushing to de-fund the Selective Service System.<sup>167</sup> The next month, Senator Carl Vinson, chairman of the House Armed Services Committee, introduced a bill to repeal the Selective Service Act immediately, dismissing national security concerns with the argument that “we are not inducting” anyone anyway.<sup>168</sup> When Vinson caught wind of President Truman’s intention to ask for a three-year draft extension, he remarked that there was “‘no justification’ for a draft extension on military or other grounds.”<sup>169</sup> Although anti-draft politicians made the practical argument that volunteers seemed to be meeting the military’s needs, their deepest concern was the extent to which the draft empowered the executive branch. If the draft were to survive, “it would be only with the imposition of tight new restrictions on the president’s power to order conscription.”<sup>170</sup>

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commented that the document ‘concerns the public, and if such consideration is given to one citizen . . . every other citizen is entitled to the same treatment.’ A similar argument on behalf of the Director of Selective Service was recently rejected by the Supreme Court.”) (citing *Cox*, U.S. 332, at 451).

<sup>165</sup> *Niznick*, 173 F.2d at 336.

<sup>166</sup> In November 1950, the Witnesses’ lawyer, Hayden Covington, triumphantly attached the *Niznick* opinion to a legal memorandum he sent to the Presidential Appeal Board, outlining the current legal standards that governed the classification of Jehovah’s Witnesses. Memorandum in Reference to the Classification of Jehovah’s Witnesses Under the Act and Regulations 49-50, 58 (1950) (on file); Hershey to Covington (Nov. 24, 1950), NARA, RG 147, Central Files 1948-1963, Box 95.

<sup>167</sup> “House Fund Cut Would Kill Draft System, Hershey Says,” *N.Y. Times* (Apr. 28, 1949), 1.

<sup>168</sup> Hershey to Vinson (June 24, 1949), 2, NARA, RG 147, Central Files 1948-1963, Box 36.

<sup>169</sup> Quoted in Friedberg 176.

<sup>170</sup> *Id.*



By March 1950, Senator Vinson’s proposed “Manpower Registration Act of 1950” was making significant headway. As F. J. Blouin, Director of the Selective Service’s Legislative Division noted, this statute “would, generally speaking, be only a registration and classification law,” giving the President no power to order citizens to perform service of any kind.<sup>171</sup> The “bill does not contain any authority for inductions,” Blouin continued, “not even the sliding provision of allowing [them] upon passage of a joint resolution and/or upon declaration by the President that inductions are necessary.”<sup>172</sup> The Manpower Registration Act would also expand the scope of conscientious objection, eliminating the 1948 draft law’s “Supreme Being” clause. As Blouin, concluded, legitimate “opposition to war might [now] be based on political, sociological or philosophical views.”<sup>173</sup> This change indicated the civil libertarian anxieties that lurked in the background of Vinson’s effort to constrain executive power.

In the late 1940s, the cause of conscientious objection had become a useful vehicle for civil libertarian critiques of executive power unrelated to questions of war and peace. For instance, William Green, the President of the American Federation of Labor (AFL), sent President Truman a resolution on December 21, 1949, requesting an “a proclamation of general amnesty to all war objectors at this Christmas Season.”<sup>174</sup> In 1946, Green had called Truman’s plan to draft striking workers “slave labor under Fascism,” and the AFL remained the labor organization most suspicious of administrative control of the economy. Now, the AFL demanded amnesty as proof of “our nation’s leadership in urging Democratic liberty and justice and in support of the rights of man in the United Nations.” In a similar vein, Robert Hutchins, the Chancellor of the University of Chicago, called for a general amnesty that September.<sup>175</sup> Hutchins was a prominent defender of free speech, but also a tireless Cold Warrior and critic of the legal and political theorists who had justified the New Deal.<sup>176</sup>

Even the Central Committee for Conscientious Objectors (CCCO) sought to link the fate of pacifists under conscription to the more general problem of civil liberty in an age of big government. The CCCO’s October 1949 *News Notes* reported that “New Zealand’s referendum vote [in favor of] military conscription has given resounding evidence of the way the winds are blowing, and also raises interesting conjectures about

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<sup>171</sup> F. J. Blouin to Chief of Naval Personnel (Mar. 8, 1950), 1, NARA, RG 147, Central Files 1948-1963, Box 36.

<sup>172</sup> *Id.* at 2.

<sup>173</sup> *Id.* at 1.

<sup>174</sup> William Green to President Truman (Dec. 21, 1949), Truman Presidential Library, White House Central Files, OF 111, Box 643.

<sup>175</sup> “75 Urge President to Free Pacifists,” *N.Y. Times* (Sept. 13, 1949), Truman Presidential Library, White House Central Files, OF 111, Box 643.

<sup>176</sup> See Andrew Hartman, *Education and the Cold War: The Battle for American Schools* 118-124 (2011); Edward Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* XXX (1973).

the fate of individual liberties in a ‘welfare state.’”<sup>177</sup> The pamphlet commended the protest of a New Zealand Quaker leader: “Amongst the multitude of causes that lead to war . . . there always figures an exaltation of the State as an entity, distinct from its citizens and claiming the right to extend its powers at the expense of individual members. Conscription is the system that crystallizes that philosophy.”

Its political legitimacy weakened by these bi-partisan concerns about the size and scope of the administrative state, conscription once again stood on the brink of extinction. Even as newly communist China signed a defense pact with the Soviet Union and the Russians shot down an American plane over Latvia, the opponents of conscription resisted Truman’s call for a draft extension. They emphasized the dangers of giving the President too much power over the lives of young Americans<sup>178</sup> and the success of volunteer recruitment over the past two years.

To the latter point, the Selective Service System responded, quite persuasively, that most of this voluntarism was draft-induced.<sup>179</sup> Similarly, when draft critics like former Secretary of War Patterson insisted that “only atomic bombs and missiles could contain the communists,” Selective Service Director Hershey countered that “atomic warfare will require that any future mobilization of men be done in days rather than in months.”<sup>180</sup> In the event of such a sudden military emergency, Hershey explained, an existing draft apparatus would provide the only orderly way to manage rapid mobilization of the population. As one intelligence officer at Fort Meade confirmed in a letter to Hershey: “The Selective Service is a national insurance policy. Its being in effect when the emergency arises, total mobilization of our man (and woman?) power begins immediately. We envision months saved and those months could be the difference between victory and defeat.”<sup>181</sup>

It was a sign of the times, however, that the most popular argument for extending the draft in Congress was that it was cheap – a way to fill the army’s ranks “[w]ithout having to offer college scholarships, special bonuses, trips to Europe, and in-service training.”<sup>182</sup> This small-government defense of the draft painted it as a method of recruitment that freed the national government from making new fiscal promises to young Americans. As attractive as this argument was to some, by Friday, June 23 – the date the 1948 draft law was set to expire – Congress had reached no agreement on the

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<sup>177</sup> *News Notes* (Oct. 1949), 3, Truman Presidential Library, White House Central Files, OF 111, Box 643.

<sup>178</sup> Cite to Cong. Rec. XXX.

<sup>179</sup> See Statistics Section, Records & Research Div., Selective Service System, Influence of Selective Service on Enlistments into the United States Army, January 1946 – December 1948 (Jan. 4, 1949), 1-4, NARA, RG 147, Central Files 1948-1963, Box 36.

<sup>180</sup> Flynn 111; Hershey to Vinson (June 24, 1949), 3, NARA, RG 147, Central Files 1948-1963, Box 36.

<sup>181</sup> Col. John Fye to Hershey (Jan. 24, 1950), 2, NARA, RG 147, Central Files 1948-1963, Box 36.

<sup>182</sup> Flynn 111.

future of military manpower policy. It voted for a fifteen-day extension to continue negotiations and then left for the weekend.

That Sunday, however, the military emergency that Hershey and others had asked Congress to imagine became all too real. On June 25, the communist government of North Korea sent its army over the 38th parallel, threatening to extend communist control across the entire Korean peninsula. The American-backed South Korean forces were clearly outmatched, and it looked like a repetition of the Chinese catastrophe was weeks, if not days, away. On Monday, June 26, Truman announced that the United States would not let South Korea fall. A hot war with communism was suddenly in the offing.