HABEAS CORPUS AND JUDICIAL REVIEW OF DRAFT CLASSIFICATIONS

The existence, and probable continuance, of the first extensive peacetime military conscription in United States history underscores the need for a means of securing court review of draft classifications which will adequately protect individual liberties without unduly hampering rapid mobilization. During the last two wars the usual means for obtaining review of a classification was through habeas corpus proceedings after induction into the service.[1] Following World War II, in 1946, the Supreme Court held that alleged invalidity of a draft classification may be used as a defense in a criminal prosecution for failure to report for induction.[2] A recent district court case[3] has attempted to improve these methods of obtaining review by adopting the constructive custody concept which permits review by habeas corpus before either induction or indictment for failure to submit to induction. The inadequacy of the established remedy is evident, but the efficacy of the latest proposal requires close scrutiny.

Despite usual rigidity of the judicial attitude in this area, a tendency toward liberality has been manifested in the decisions since World War II. Possibly the current trend[4] owes its impetus to the nature of the present conscription situation—a peacetime draft—which is unique when viewed in relation to the history of compulsory military service in the United States.[5]

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1. *Ex parte* Stewart, 47 F. Supp. 410 (S.D. Cal. 1942); Filomio v. Powell, 38 F. Supp. 183 (D.N.J. 1941); United States v. Mitchell, 248 Fed. 997 (E.D.N.Y. 1918); *Ex parte* Hutflis, 245 Fed. 798 (W.D.N.Y. 1917); Angelus v. Sullivan, 246 Fed. 54 (2d Cir. 1917); see also Connor and Clarke, *Judicial Investigation of Selective Service Action*, 19 TULANE L. REV. 344, 349 (1945).

2. Estep v. United States, 327 U.S. 114 (1946).

3. *Ex parte* Fabiani, 105 F. Supp. 139 (E.D. Pa. 1952). Petitioner for habeas corpus was attending an Italian university as a medical student, which he alleged made him eligible for a statutory exemption from service. However, he was classified 1-A and received orders to report for induction. He did not report, was placed on a delinquent list, and a United States Attorney directed him to return to the United States or be indicted. Fabiani returned and petitioned for habeas corpus to test the validity of his classification. The writ was contested on the grounds that habeas corpus should not lie until the petitioner had been inducted and was in physical custody of the armed services. The court found the existing custody sufficient and granted the writ.

4. See note 51 *infra*, and accompanying text.

5. This history is as old as that of the Republic itself. Compulsory service was endorsed by Hamilton. THE FEDERALIST, No. 29 (Hamilton). In the Revolution conscription was utilized by Virginia and Massachusetts; see 6 ENCYC. BRITTANICA 285 (1946). There was no uniform draft throughout the Confederation, although the Continental Congress recommended that the states employ a draft to fill their battalions of Continental troops. 10 JOURNALS OF THE CONTINENTAL CONGRESS 200 (United States Government Printing Office, 1908). That was the furthest that the strong feeling of

Required military service in this nation traditionally has been of an emergency character as opposed to the large standing army system utilized by most of the continental countries.[6] Not only has there been a distinction concerning conscription as contrasted with other countries, but the nature of compelled military service in the United States has varied from war to war. In the Civil War Congress permitted an eligible selectee to buy a substitute to fight in his place for $300;[7] moreover, compulsory service was invoked only in those localities which failed to enroll their enlistment quotas.[8] An understandable resentment arose among those unable to purchase an alternate,[9] and there were occasional riots and demonstrations protesting the conscription. Furthermore, a nationwide draft was not put into effect until 1863[10] when there was a definite manpower shortage[11] which engendered a severe attitude toward those who attempted to evade service.

The framers of the 1917 Selective Service Act seemingly took cognizance of the errors in the 1863 conscription system for they succeeded in developing a program which received public support. The Act[12] permitted no substitutes and was applied equally to the entire nation rather than merely to certain localities. To instill confidence in the fairness of the procedures used, and in order that local situations might be considered, the classification task was delegated to uncompensated workers in the county where the registrants resided. An intra-system method of appeals for challenging these classifications was inaugurated.[13]

Once more, however, selective service legislation was not enacted until a pronounced need for rapid mobilization materialized.[14] Hence, this too was an emergency enactment, and recalcitrant registrants consequently received a minimum of leniency. Indicative of the stigma attached to one who failed to volunteer were the methods employed by

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sovereignty in each of the states would permit drafting to extend. See Upton, MILITARY POLICY OF THE UNITED STATES 33, 35 (United States Government Printing Office, 1912).

6. See Connor, *Due Process and the Selective Service System*, 30 VA. L. REV. 435, 458 (1944).

7. 1 PROBLEMS OF SELECTIVE SERVICE 8 (Selective Service System, 1952).

8. *Id.* at 16.

9. 1 MORISON AND COMMAGER, GROWTH OF THE AMERICAN REPUBLIC 705 (4th ed. 1950) and see also 1 PROBLEMS, *op. cit. supra* note 7, at 17.

10. 12 STAT. 731 (1863). Prior to this the President was authorized to "enroll" men between 18 and 45 in state militias. 12 STAT. 597 (1862).

11. 1 Problems, *op cit. supra* note 7, at 16.

12. 40 STAT. 76 (1917).

13. *Id.* at 79 (1917).

14. 1 MORISON AND COMMAGER, *op. cit. supra* note 9, at 478.

the Selective Service System, such as "slacker raids" in public places where draft-age males were required to show credentials.[15]

When World War II loomed imminent, Congress, in 1940, enacted another Selective Service Act.[16] It served as the model for the 1951 statute,[17] and resembled the 1917 Act in that classifications were determined by "neighbors" of the registrants and a similar mode of appeal was utilized.[18] Unlike previous conscription statutes, the 1940 Act became effective before voluntary enlistments proved inadequate. The perilous world situation in 1940 left no question as to the nature and purpose of the Act—it was an emergency measure designed to rapidly increase United States military strength. Indicative of the temper of the times was the persistence of local and appeal boards in adhering to the standards of the 1917 Act with regard to conscientious objectors,[19] even though the 1940 Act considerably liberalized those provisions.[20]

The Act declared classification determinations of local boards to be final, except for appeals within the System.[21] Maximum utilization of a nation's manpower is a monumental task, however, and the classifications created by the Selective Service Regulations were necessarily complex. Adherence to congressional direction involved categorizing men as ministers and divinity students, agricultural workers, conscientious objectors, family hardship cases, and those supporting the national health, safety, or interest. Since the boards were composed of laymen, erroneous classifications were inevitable.[22] These difficulties, coupled

15. 1 Problems, *op. cit. supra* note 7, at 18.
16. 54 STAT. 885 (1940).
17. 50 U.S.C. APP. § 460 (1951).
18. 54 STAT. 893 (1940) (§ 10(a)(2)).
19. United States *ex rel.* Phillips v. Downer, 135 F.2d 521, 524 (2d Cir. 1943). The court pointed out that a provision similar to that in the 1917 statute was in the original bill for the 1940 Act, but that the bill was amended to its present more lenient form both for the benefit of individuals and for ease of administration. See H.R. REP. No. 10,132, 76th Cong., 3rd Sess. 1, 201-211 (1940); 86 CONG. REC. 10, 106 (1940).
20. *Compare* 54 STAT. 889 (1940) (§ 5(g)) *with* 40 STAT. 79 (1917) (§ 4).
21. 54 STAT. 893 (1940). The 1948 and 1951 Acts made the same provision. 62 STAT. 619 (1948); 50 U.S.C. APP. § 460(b)(3) (1951).
22. The nature of the task is necessarily difficult because fact situations are bound to arise which are not easily classed in any preconceived category. Probably most litigation stemmed from dissatisfaction with classification of conscientious objectors and ministers. An investigation of the governing statutes and regulations will give an indication of the possible borderline cases that might appear. A part of the statute states, "[n]othing in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 54 STAT. 889 (1940). The Regulations of the Selective Service System recognize two types of ministers of religion, "regular" and "duly ordained." " 'A regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having

with a sometimes perverse attitude on the part of the boards, made apparent a need for review apart from appeals within the administrative hierarchy. Thus, the courts, adopting World War I decisions, early decided that the statutory provisions calling for administrative finality did not completely foreclose resort to the judiciary for review of local board orders.[23]

The judicial disposition toward availability of review of an allegedly invalid classification has not been static. It has stretched from a temper of extreme inclemency, resulting in the imprisonment of registrants for failure to submit to induction although the classification was admittedly invalid,[24] to a marked propensity for liberality, exemplified by the constructive custody concept which permits a registrant to challenge his classification[25] prior to induction by writ of habeas corpus. Within these

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been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister. A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs these duties." 32 Code Fed. Regs. § 1622.19 (1949).

It is not difficult to imagine the latitude sometimes exercised in interpretation of such words and phrases as, "religious training and belief," "participation in war in any form," "[c]hurch, religious sect, or religious organization" and "public worship." An example of how complex these situations can become is United States *ex rel.* Phillips v. Downer, 135 F.2d 521 (2d Cir. 1943), where the court granted habeas corpus to the petitioner as a conscientious objector wrongfully classified 1-A and inducted into the service. The decision rested on the meaning of the phrase, "by reason of religious training and belief is opposed to war in any form." The court investigated such aspects of the situation as whether the petitioner's belief was humanitarian and philosophical, and had the essence of religious belief, or was merely a political conviction; whether he was opposed to war in general or merely to the then existing conflict. The court went into a detailed examination of a dramatic piece, written by the petitioner, condemning war. Situations like this are complex, even for the courts, but to expect draft boards staffed with laymen to decide such intricate factual problems successfully and consistently is to demand a great deal. This problem is dealt with in United States v. Kose, 106 F. Supp. 433 (D. Conn. 1951), where the court declared a classification invalid because the draft board members did not correctly understand the statute.

23. United States *ex rel.* Zucker v. Osborne, 147 F.2d 135 (2d Cir. 1945); United States *ex rel.* Filomio v. Powell, 38 F. Supp. 183 (D.N.J. 1941).

24. United States v. Kauten, 133 F.2d 703, 706 (2d Cir. 1943) affirms a conviction for failing to report for induction. Augustus Hand, speaking for the court, declared: "Even though tbe Local Draft and Appeal Boards may have committed an error of law in classifying a conscientious objector as a man available for combat service his rights under § 5(g) are not abridged in any practical sense until he is subjected to military 'training and service' after formal induction into the Army. . . . The justification for the burden upon the individual of subjecting him to such proceedings instead of stopping them at the outset by injunctive or other relief in the courts lies in the absence of an alternative consistent with the orderly conduct of the government's business, and in this particular case, in the want of any suitable alternative method of selecting the personnel of a large Army." Possibly the suitable alternative is adopted in *Ex parte* Fabiani, 105 F. Supp. 139 (E.D. Pa. 1952).

25. *Ex parte* Fabiani, *supra* note 24.

boundaries of opinion there have been diverse attitudes among lower courts toward judicial review in this area.

One determinate ramification of the various viewpoints espoused was the establishment of a doctrine which made habeas corpus available to a registrant to contest his classification following induction.[26] Other procedures for judicial review were attempted subsequent to the 1940 Selective Service Act[27] but habeas corpus after induction emerged as the only acceptable method short of the nebulous remedy of challenging the validity of the classification as a defense to a criminal prosecution for refusal to submit to induction.

The United States Supreme Court did not readily commit itself concerning the availability of judicial review in this area. Two years after the 1940 Act the Court held that certain Selective Service System records were not available to a registrant in a criminal trial for failing to report for induction,[28] thus evading the question of the availability of invalid classification as a defense in such a trial. In a dictum,[29] however, the Court did state that habeas corpus after induction was the proper method of review. Not until 1944, in *Falbo v. United States,*[30] did the Supreme Court directly hold that an erroneous classification was not a defense; the sole question for the trial court was whether or not the defendant submitted to induction as ordered.

The *Falbo* opinion, singularly in accord with the vast majority of lower court cases,[31] expressed a philosophy possibly owing its existence to its frame of reference, a country experiencing the third of four difficult war years. That was a time when one might be tempted to believe that neither did the current moral pattern demand, nor did military expediency allow, leniency to those who sought to avoid military service. It is reasonable to so speculate with regard to the underlying elements fostering the *Falbo* decision, because shortly after the cessation

26. See note 1 *supra*.

27. Methods of review unsuccessfully attempted were declaratory judgments, injunction, and writs of certiorari and mandamus. There is a compilation of these cases in Connor and Clarke, *supra* note 1, at 349.

28. Bowles v. United States, 319 U.S. 33 (1942).

29. *Id.* at 35.

30. 320 U.S. 549 (1944).

31. Broneman v. United States, 138 F.2d 333 (8th Cir. 1943); United States v. Kauten, 133 F.2d 703 (2d Cir. 1943); Fletcher v. United States, 129 F.2d 262 (5th Cir. 1942); United States v. Grieme, 128 F.2d 811 (3rd Cir. 1942). These cases advance various rationales for their decisions, *e.g.*, the menace of war and nature of the draft function, that there exists adequate possibility of review both within the System itself and by habeas corpus after induction.

of hostilities the Court executed what amounted to a judicial pirouette by declaring, in *Estep v. United States*,[32] that the invalidity of a classification may be introduced as a defense in a trial for failure to submit to induction; it is for the trial court to decide if there was a basis in fact for the board's classification. The Court attempted to distinguish the *Falbo* case by viewing that decision as resting on the defendant's failure to exhaust his administrative remedies because he could have pursued the avenues of appeal within the Selective Service System.[33]

Granting the technical validity of the Court's basis for distinguishing the *Falbo* and *Estep* cases, it cannot be denied that the philosophies underlying the two decisions are basically incompatible. Illustrative of the narrow approach implicit in the *Falbo* opinion is the rationale that "surely if Congress had intended to authorize interference with that process [Selective Service] by intermediate challenges of orders to report, it would have said so."[34] In contrast with this naive approach, the Court in the *Estep* case indicated its realization of the scope of the problem by stating: "We are dealing here with a question of personal liberty,"[35] and later, the Court "cannot readily infer that Congress departed so far from the traditional concepts of fair trial when it made the actions of the local boards 'final' as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency."[36]

This demonstration of judicial ability to cope with a change in situation was not quickly reflected by the lower courts. Divers theories arose concerning the extent to which administrative remedies must be exhausted prior to securing judicial review of a board ruling. A Tenth Circuit case[37] held that a registrant must report for induction even though he need not submit to the induction process; another court of appeals[38] and a district court[39] refused to review classifications because the registrants, due to peculiar circumstances, could have demanded physical examinations at the induction center, after which they might have been declared unfit for service. The decisions which indicated an attempt to distinguish *Estep v. United States* are largely confined to the

32. 327 U.S. 114 (1946).
33. *Id.* at 116, 123.
34. Falbo v. United States, 320 U.S. 549, 554 (1944).
35. Estep v. United States, 327 U.S. 114, 122 (1946).
36. *Ibid.*
37. Hudson v. United States, 157 F.2d 783 (10th Cir. 1946).
38. United States v. Balogh, 160 F.2d 999 (2d Cir. 1947).
39. United States v. Kirschenman, 65 F. Supp. 153 (S.D.S.D. 1946).

year following that case; however, today most courts accept the *Estep* rule without offering either criticism or justification.[40]

The *Estep* decision expressed a cogent philosophy—allowing judicial review before induction—but applied it in an unduly stringent manner by requiring that a registrant submit to criminal prosecution to obtain such review. Although most lower courts have recognized and followed the ruling of the *Estep* decision, only recently has the basic principle been fully effectuated. In *Ex parte Fabiani,*[41] petitioner was held to be in constructive custody; the court reasoned that actual physical restraint at the time habeas corpus is requested is unnecessary because the limitations placed upon one's liberty by the order to report for induction are tantamount to physical custody.[42] The court's justification for its invocation of constructive custody was that the registrant would otherwise be subjected to unwarranted hardship.[43] This theory, when initially propounded in 1944 in *Biron v. Collins,*[44] was rejected on appeal because the concept deviated from traditional habeas corpus doctrine.[45]

Constructive custody is not so far removed from past practice in the Selective Service area as superficial examination might indicate. Both the Selective Service System[46] and the judiciary[47] have permitted convicted registrants to choose induction into the service as an alternative to imprisonment. This practice, in effect, converts the criminal trial into a mere pre-induction review of the draft board's actions, a result also reached in the *Fabiani* case with the important difference that the petitioner avoids the humiliation of being indicted and tried for a felony.

There is obviously an adequate body of prior decision upon which to base a reversal of the *Fabiani* case. But the nature of the evolution of judicial attitudes regarding review has been toward leniency to the registrant. Furthermore, congressional approval of the tendency to make review more readily available is evident from the legislative

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40. United States v. Strebel, 103 F. Supp. 628 (D. Kan. 1952); United States v. Everngam, 102 F. Supp. 128 (S.D. W.Va. 1951). So well has the *Estep* rule been accepted that there have been no cases directly questioning the availability of the defense in a criminal proceeding of invalid classification on the appellate level during the past three years.

41. 105 F. Supp. 139 (E.D. Pa. 1952).

42. *Id.* at 148; Biron v. Collins, 56 F. Supp. 357, 361 (S.D. Ala. 1944).

43. *Supra* note 41, at 144. Biron v. Collins, 56 F. Supp. 357, 360 (S.D. Ala. 1944).

44. 56 F. Supp. 357 (S.D. Ala. 1944).

45. Biron v. Collins, 145 F.2d 759 (5th Cir. 1944).

46. 32 CODE FED. REGS. § 643.1-642.11 (Cum. Supp. 1946).

47. See Connor and Clarke, *supra* note 1, at 370.

history of the 1948 Selective Service and Training Act.[48] Although previously accepted methods of review should be augmented by a more sensible procedure, the question of the advisability of the *Fabiani* approach requires resolution.

In the past both the legislature[49] and the judiciary[50] have based their review policy on the gravity of the need for immediate mobilization, a consideration that undoubtedly influenced the district court to propose in 1952 a concept which had seemed inadvisable in the war year 1944. The courts have recently reinforced this pragmatic attitude with the underlying philosophy that Selective Service statutes and regulations should be interpreted in a manner involving the least hardship for registrants allegedly classified incorrectly.[51] The *Fabiani* case is singularly in harmony with this philosophy.

The courts, in considering controversies which arose under the 1940 Selective Service Act, referred to World War I cases for guidance.[52] There they discovered the rule that the proper procedure for

48. The committee report on the Act makes this legislative acceptance somewhat obvious: "No changes have been made in the nature of judicial review of the Selective Service classifications. Instead, it is contemplated that the procedure and scope of review defined by the Supreme Court in enforcing the 1940 Act will be equally applicable under this legislation." The report then cites the *Falbo* and *Estep* cases. SEN. REP. No. 1268, 80th Cong., 2d Sess. 20 (1948).

49. Judge McGranery, in the *Fabiani* opinion, calls attention to committee reports to make this point clearer: "Later in his message he [the President] recommended the temporary reenactment of Selective Service, pointing out that our armed forces lack the necessary men to maintain their authorized strength and that *their necessary strength cannot be maintained by voluntary enlistments*' (Italics ours)." SEN. REP. No. 1268, 80th Cong., 2d Sess. (1948), quoted in *Ex parte* Fabiani, 105 F. Supp. 139, 146 (E.D. Pa. 1952). "'It [the 1951 Act] will enable the armed forces to immediately raise and maintain an armed force of sufficient size, as determined by the Joint Chiefs of Staff, to meet our *minimum security requirements*' . . . (emphasis ours)." H.R. REP. No. 271, 82d Cong., 1st Sess. (1951), quoted in *Ex parte* Fabiani, 105 F. Supp. 139, 146 (1944).

50. That this factor is a consideration is evident from even *Falbo v. United States:* "When the Selective Training and Service Act was passed September, 1940, most of the world was at war. The preamble of the Act declared it 'imperative to increase and train the personnel of the armed forces of the United States.' The danger of attack by our present enemies, if not imminent, was real, as subsequent events have grimly demonstrated. The Congress was faced with the urgent necessity of integrating all the nation's people and forces for national defense. That dire consequences might flow from apathy and delay was well understood. Accordingly the Act was passed to mobilize national manpower with the speed which that necessity and understanding required." 320 U.S. 549, 555 (1944).

51. United States v. Strebel, 103 F. Supp. 628 (D. Kan. 1952); United States v. Romano, 103 F. Supp. 597 (S.D.N.Y. 1952); *Ex parte* Barrial, 101 F. Supp. 348 (S.D. Cal. 1951); United States v. Everngam, 102 F. Supp. 128 (S.D. W.Va. 1951); a particularly strong statement of this philosophy is found in Mr. Justice Murphy's concurring opinion, Estep v. United States, 327 U.S. 114, 129, 130 (1946).

52. United States *ex rel.* Zucker v. Osborne, 147 F.2d 135 (2d Cir. 1945); United States v. Grieme, 128 F.2d 811, 814 (3rd Cir. 1942); United States *ex rel.* Filomio v.

review of a classification was to petition for a writ of habeas corpus after induction into the service. In applying this rule, however, no consideration was given to the fact that under the 1917 Act the registrant became subject to *military* law when he received orders to report,[53] while the 1940 Act provided that civil law governed until the induction ceremony.[54] As a consequence of this judicial oversight the World War II registrant was unable to challenge the draft board ruling before he was in physical custody of the service.

Although review after induction was not an inequitable remedy by the standards of the 1917 statute,[55] its adequacy under the statutes of 1940, 1948, and 1951 is certainly questionable, as the *Fabiani* decision recognizes. Delay in the availability of review until the registrant is in physical custody of the armed services, or is indicted as a felon, has a significant impact on the individual concerned. Review by habeas corpus prior to induction would release erroneously classified registrant from many unwarranted hardships.

It is indeed an extreme attitude to expect a registrant to undergo criminal prosecution in order to challenge his classification; and the alternative that he must submit to induction before bringing habeas corpus also involves difficulties of no mean consideration.[56] Once inducted, a man will generally be sent to a training center distant from his counsel and witnesses. A more potent consideration is the fact that after induction the draftee will be removed for an unknown length of time from his business or profession,[57] and, if he is a farmer, an absence from his crops for even a relatively short period may prove disastrous. Even though a registrant petitions for habeas corpus after induction it is not certain that the writ will be granted. He is therefore faced with a dilemma, whether or not to wind up his personal and business affairs. Nor is the personal inconvenience suffered by one wrongfully inducted an insignificant factor; regardless of his occupation, he

Powell, 38 F. Supp. 183 (D.N.J. 1941). See Estep v. United States, 327 U.S. 114, 124, n.17.

53. The 1917 Act provided that, "[a]ll persons drafted into the service of the United States . . . shall, from the date of said draft or acceptance, be subject to the laws and regulations governing the Regular Army. . . ." 40 STAT. 77 (1917). The Articles of War then in force had substantially the same effect. 39 STAT. 619 (1916) (Art. II(a)). Franke v. Murray, 248 Fed. 865 (8th Cir. 1918), and United States *ex rel.* Feld v. Bullard, 290 Fed. 704 (2d Cir. 1923) sustained charges of desertion though the petitioners had never been in custody of the armed services.

54. 54 STAT. 885 (1940).

55. See Connor and Clarke, *supra* note 1, at 351.

56. See Note, 32 VA. L. REV. 618, 642 (1946).

57. This is forcefully expressed in Mr. Justice Murphy's concurring opinion, Estep v. United States, 327 U.S. 114, 130 (1946).

will be removed from his home and family for what the *Fabiani* case points out is an unnecessary time.

Added to these adversities imposed upon the registrant is the fact that review of a classification before induction places no greater burden on the draft board, the government attorneys, or the court than one after induction.

But despite its equitableness, its accordance with an existing philosophy of fairness, and its recognition of the military demands of the time, the *Fabiani* rule makes judicial review more readily available, and arguments can be made questioning the desirability of such an alteration.

In reversing the *Biron* case in 1944 the appellate court declared that "decisions must be followed,"[58] and, therefore, the writ of habeas corpus could not be utilized in the absence of actual physical restraint. Admittedly, an impressive body of case law requires physical custody before a writ will issue; therefore, acceptance of the constructive custody principle would be an extension of the historical office of habeas corpus. But, no *a priori* reason requires that this extension should not be undertaken. Indeed, the function of the writ has been constantly expanded since the time of the Tudors, and its added flexibility has resulted in increased usefulness in obvious ways.

During the Tudor reign habeas corpus was used solely by the Common Law courts to challenge the jurisdiction of rival tribunals such as Chancery, Court of Requests, Admiralty, and the High Commission.[59] Then the writ became the proper method of testing the validity of imprisonment without cause by the executive.[60] Later its use was authorized to challenge restraint by private individuals.[61] And though habeas corpus was suspended in 1863 during the Civil War by Presidential proclamation[62] it was utilized in 1944 during World War II to test the legality of detaining people of Japanese ancestry in Relocation Centers[63] and resulted in the release of all American citizens from such detention.[64] The growth of habeas corpus is a manifestation of the concept that law should be more concerned with ends than with origins. In light of past employments of the writ of habeas corpus it is evident

58. Biron v. Collins, 145 F.2d 758, 759 (5th Cir. 1944).
59. Wyzanski, *The Writ of Habeas Corpus,* 243 ANNALS 101 (1946).
60. *Ibid.* This usage was originally denied in the courts, Darnel's case, 3 S.T. 1 (1627) but was declared valid in the Petition of Right in 1628.
61. 56 Geo. III, c. 100 (1816).
62. 1 MORISON AND COMMAGER, *op. cit. supra* note 10, at 699.
63. *Ex parte* Endo, 323 U.S. 283 (1944).
64. Wyzanski, *supra* note 59, at 106.

that the constructive custody concept would not involve an extension inconsonant with the history of the writ.

Simply stated, another of the arguments against the *Fabiani* rule is the flood of litigation theory, which asserts that the proposed method of review would result in such an influx of litigants to the courts that the change would prove inadvisable. Admittedly, a registrant should, and presumably must, utilize as far as he can the appeal procedure available within the System itself. It is not certain that acceptance of the *Fabiani* proposal would bring this increase in litigants. But even assuming so, *arguendo,* the advent of such a flood does not of itself, validate the argument.

There is no basis in fact to believe that the nature of the additional claims will be dilatory, *i.e.,* actions brought by validly classified registrants seeking merely to delay induction into the armed services. This conclusion is reached inductively by the fact that there has been in the past a paucity of such claims coupled with increased acceptance by young men of the idea that some military service is inevitable. Also worthy of consideration is the fact that a frivolous challenge of a draft classification would result in a social stigma; this psychological factor seems adequate to prevent a significant number of dilatory claims.

There is, furthermore, a strong possibility that the extension will permit a review for numerous invalidly classified registrants who would neither subject themselves to prosecution as a felon nor find it practicable to petition for habeas corpus once in the service. If this proves to be the case, the constructive custody doctrine would be justified despite an increase in litigation. It is unwise to invoke an argument based upon the hardships on the courts arising from such an increase if the challenged classifications are in fact invalid. If experience demonstrates that the increased number of claims adds to the already heavy case load on the courts, there are at least two feasible remedies.

The first alternative is to revise the Selective Service System to expand the present appeals procedure so that much of the potential litigation may be satisfactorily resolved within the administrative framework. Such reorganization would require very careful consideration in order to avoid the possibility of destroying the present System's public acceptance, one of the primary reasons for which has been the method of classification by neighbors of the registrants. A second possibility would be to establish special "ad hoc" courts for the purpose of litigating these issues. There is precedent for such tribunals; the Customs

Court and the Court of Claims were created on the theory that the organization of the judiciary should be adjusted to cope with the amount of litigation, rather than to permit an inflexible judicial organization to stifle the volume of litigation.[65]

Though the desirability of the *Fabiani* principle is not lessened by the possibility of increased litigation, superficial merit exists in the contention that constructive custody would permit "litigous interruption" of the Selective Service process.[66] But the argument is rendered largely insignificant by the impotence of the flood of litigation assertion. Yet, opponents of the constructive concept might counter that *any* litigious interruption is inadvisable. To properly evaluate this contention the existing manpower situation must be studied. When the courts refused to adopt the constructive custody proposal in 1944 the United States was experiencing a manpower shortage coupled with a need for immediate mobilization. Since that time, however, external conditions have changed.

At present, the country does not face what might properly be called a manpower shortage, as is emphasized by the increased leniency in granting draft deferments in the past few years.[67] Furthermore, with the present reservoir of trained reserves, there is little likelihood of any sudden necessity for unavailable manpower;[68] this situation is indicative of the gradual change in the character of compulsory service in this country, *i.e.*, the shift from emergency conscription to the Continental standing army system.

In addition, the litigious interruption argument deteriorates further since it can also be proposed against the long accepted policy of the *Estep* case.

Another contention might be that since it is within the power of Congress to do away with all exemptions inasmuch as they are mere concessions of a benevolent legislature, there is little need to make judicial review as readily available as does the *Fabiani* rule. But having recognized the need for judicial review in this area, surely the legislature should not be subjected to the gratuitous imputation that they intended to deny its effective implementation. In light of the foregoing discus-

65. See HURST, THE GROWTH OF AMERICAN LAW 433 (1950).

66. This argument was also asserted against review of classification in a criminal proceeding, Falbo v. United States, 320 U.S. 549, 554 (1944).

67. An example of this is the policy of the System to allow college students deferments. 38 CODE FED. REGS. § 1622.15 (Cum. Supp. 1951).

68. Judge McGranery cited General George C. Marshall concerning this point in *Ex parte* Fabiani, 105 F. Supp. 139, 146 (E.D. Pa. 1952).

sion the *Fabiani* rule appears the most efficacious method thus far propounded.

So, the last of the propositions that may be asserted against constructive custody appears as inapplicable as those preceding it. Moreover, positive justification exists for the suggested extension, since earlier availability of judicial review will more fully protect the registrant's individual liberty without obstructing realization of the country's mobilization goals.

FEDERAL VENUE AND THE CORPORATE PLAINTIFF: JUDICIAL CODE SECTION 1391 (c)

In 1948 Congress revised the Judicial Code with the passage of the Judicial and Judiciary Act; Section 1391(c) treats the difficult problem of corporate venue in the federal courts.[1] A court must, before it can adjudicate, gain jurisdiction over the subject matter and the parties involved. With jurisdiction obtained, the question of proper venue must be settled. While Section 1391(c) explicitly allows a corporation, in diversity of citizenship cases, to be sued in a federal district where it is incorporated, licensed to do, or is doing, business, it raises a question with regard to its meaning for the corporate plaintiff.

The persistent problem of reconciling the migratory nature of corporations with an inclination to confine their efficacy has plagued the courts since the nation's founding. An indelible and virtually unchallenged theory of non-migration prevailed until *Ex Parte Schollenberger*[2] "displaced metaphor with common sense."[3] In the light of acquiescence

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1. 28 U.S.C. § 1 *et seq.* (Supp. 1952).

"(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

"(c) *A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.*"

28 U.S.C. § 1391 (Supp. 1952). (emphasis added)

2. 96 U.S. 369 (1877). This case was based on two earlier opinions. Chicago and Northwestern Ry. v. Whitton, 13 Wall. 270 (U.S. 1871); Baltimore & Ohio R.R. v. Harris, 12 Wall. 65 (U.S. 1870).

3. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 169 (1939).