NOTE

Military Jurisdiction Over Inductees

During and after the First World War, there was much confusion regarding military jurisdiction over inductees into military service. The Selective Draft Act of 1917 [1] did not make clear at which point in the process of induction military jurisdiction attached. Lower federal court decisions conflicted and none was decided by the Supreme Court of the United States. After the cessation of hostilities the problem was academic for a number of years but with the enactment of the Selective Service and Training Act of 1940 [2] it again became important.

It is of considerable significance whether an inductee is amenable to civil or military law. There is no constitutional guarantee of trial by jury at military trials,[3] and the ordinary rules of procedure and evidence are not followed;[4] the members of the court-martial are not necessarily persons trained in the law,[5] and there is no civil review of the decision of the court-martial, except that its jurisdiction may be tested by habeas corpus.[6] So in view of the unusual manner in which courts-martial are conducted,[7] and the limited review of their decisions, the question whether or not a person is subject to military law and jurisdiction is one that should be considered very thoroughly, in the interests of obtaining a just, uniform, and workable rule, and in fairness to the individuals concerned.

> "The induction of a civilian into military service is a grave step, fraught with grave consequences. It means, among other things, that he is subject to military law instead of to the ordinary common and statutory law. A new status is taken on; he becomes a soldier; new responsibilities are assumed; failure to meet these responsibilities is followed by extreme punishment. All this is quite right and necessary, and meets no criticism at our hands. But what we emphasize is the necessity that all the steps prescribed by statute, and by regulations having the force of law, shall be strictly taken before it can be held that a person has been lawfully inducted into the military service." [8]

World War I

The Selective Draft Act of 1917 provided: "All persons drafted into the service of the United States . . . shall, from the date of the said draft . . . , be subject to the laws and regulations of the regular army." [9] This was ineffective as a workable rule to determine at what point military juris-

1. 40 Stat. 76 (1917), 50 U. S. C. A. § 201 (Supp. 1942).
2. 54 Stat. 894 (1940), 50 U. S. C. A. § 311 (Supp. 1942).
3. U. S. Const. Art. III, § 2 (3); *In re* Vidal, 179 U. S. 126 (1900).
4. A Manual for Courts-Martial, U. S. Army, 1928 (U. S. War Dep't 1936).
5. Article of War 4, 41 Stat. 788 (1920), 10 U. S. C. A. § 1475 (1927).
6. *In re* Grimley, 137 U. S. 147 (1890); Collins v. McDonald, 258 U. S. 416 (1922).
7. The inductee, when sought by civil authorities for violation of the draft act, and at the same time by the military authorities for desertion, will seek to evade military jurisdiction, even though it means standing trial in the civil courts.

"Q. Why do you prefer the civil courts since there are two options? Why do you prefer the civil courts rather than the court martial of this army?

"A. I think the civil courts are more objective and more fair; that they will convict me of what I am actually guilty of, for refusing to serve." *Ex parte* Billings, 46 F. Supp. 663, 665 (D. Kan. 1942).

8. Ver Mehren v. Sirmyer, 36 F. (2d) 876, 881 (C. C. A. 8th, 1929).
9. 40 Stat. 77 (1917), 50 U. S. C. A. § 202 (Supp. 1942).

diction began. Interpretations of this clause could, and did, differ widely, for the terms "drafted" and "from the date of said draft" raise several questions. The customary process of the draft in the first war, as well as in this, includes several different steps—registration under the draft act, receipt of a questionnaire in which the registrant may make claim for any exemptions to which he may be entitled, notice to report for a physical examination, acceptance of the registrant by the military authorities as fit for military service, taking the oath of allegiance by the selectee, and finally reporting for active service. The exact point in this sequence of events where military jurisdiction replaces the civil cannot be determined by a clause in the draft act to the effect that one "drafted" shall be subject "from the date of said draft".

Franke v. Murray [10] is generally considered the leading case on the point. Franke was duly registered and enrolled under the Selective Draft Act of 1917,[11] and upon notice that he had been drafted into service in the military establishment of the United States, he appeared before his local draft board, and claimed exemption as a conscientious objector.[12] This exemption was denied by the board, and being found physically fit for service, he was ordered to report for entrainment to a military camp. On his failure to appear, he was arrested and taken into custody on a charge of desertion. A writ of habeas corpus, testing the jurisdiction of the military authorities, was discharged by the district court and the eighth circuit court of appeal. Franke alleged that he was not subject to military service, as he had not taken the oath nor been sworn in as a soldier in accordance with Article of War 109.[13] The court held that Franke, although never having been sworn in as a member of the military forces, and never having been in a uniform of one of the armed services of the United States, had nevertheless lost his civilian status, and was subject to military authority. Not content to rest its decision on the clause of the Selective Draft Act quoted above,[14] the court relied also on Article of War 2 [15] which provides:

> "The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law', or 'persons subject to military law', whenever used in those articles . . . a) All officers and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft or order to obey the same." [16]

The court pointed out that Article 109 applied only to persons enlisting in the service, and not to those drafted into service without their consent; that

10. 248 Fed. 865 (C. C. A. 8th, 1918).

11. 40 STAT. 80 (1917), 50 U. S. C. A. § 205 (Supp. 1942).

12. ". . . and nothing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations." 40 STAT. 78 (1917), 50 U. S. C. A. § 204 (Supp. 1942).

13. 39 STAT. 668 (1916), 41 STAT. 809 (1920), 10 U. S. C. A. § 1581 (1927).

14. See note 9 *supra*.

15. The Articles of War were enacted as a part of the statutory law of the United States. 39 STAT. 650 (1916).

16. 39 STAT. 651 (1916), 41 STAT. 787 (1920), 10 U. S. C. A. § 1473 (1927).

in Article 2 there is no mention of the necessity of taking the oath as regards persons drafted into service; and that therefore Franke had been "lawfully called, drafted or ordered into service." [17]

But although the application of Article 2 of the Articles of War in *Franke v. Murray* provided a logical and adequate solution of the problem there involved; *i. e.,* failure to take the oath as a defense to subjection to military authorities, it is not to be thought that the case provided a solution for all difficulties in determining the incidence of military jurisdiction. One of the greatest difficulties lay in determining what kind of notice, if any, was necessary to bring the draftee within the reach of military jurisdiction.

There are several cases arising out of World War I involving notice as a necessary preliminary to military jurisdiction. In *United States ex rel. Feld v. Bullard,*[18] Feld had duly registered in accordance with the Selective Draft Act, and left the country with permission of the War Department, to conduct business in Brazil, renewing his passport with the Consul General at Buenos Aires every six months until after the cessation of hostilities.[19] In January, 1918, a questionnaire was sent to his New Jersey address, filled out and returned to the local board by his father. On April 5, 1918, a notice to report in 10 days was sent to the same address, containing the customary provision that unless orders rescinding the present orders were issued, the registrant was in military service as of the date specified.[20] No such countermanding orders were ever issued and on his return to the United States in 1921, Feld was arrested by military authorities and charged with desertion. On appeal from an order granting a writ of habeas corpus, it was held that Feld was subject to military jurisdiction, although he had never received actual notice of his orders to report. Again Article 2 was invoked as the test, and the issue turned on whether Feld was "lawfully" ordered to duty. The mailing of the post card was held to be sufficient notice, even though it was never received by the registrant. In *Ex parte Bergdoll* [21] petitioner was away on a vacation trip when the post card was mailed notifying him to report. He failed to appear on the date set for his physical examination and was subsequently arrested and convicted by court-martial of desertion.[22] Here also it was held that receipt of the notice was not necessary to military jurisdiction. Indeed, the mere record of the mailing in the records of the draft board will raise a

17. In an analogous situation, a member of the Ohio National Guard, whose enlistment contract contained an obligation to defend the Constitution of the United States, and obey the orders of the President, was called into Federal service by the President, as was authorized by the National Defense Act of 1916, 39 STAT. 201 (1916). He was held to be within the military jurisdiction, even though he had not consented to be mustered into the military forces of the United States. *Ex parte* Dostal, 243 Fed. 664 (D. C. N. D. Ohio 1917).

18. 290 Fed. 704 (C. C. A. 2d, 1923), *cert. denied,* 262 U. S. 760 (1923).

19. The court rejects this permission to leave the country, and extension thereof, as a defense, on the ground that only the local draft board had authority to exempt petitioner in this manner. It is urged, however, that the issuance and extension of the passport be matters in mitigation of the offense. At page 711.

20. "Unless, upon so reporting to this office, orders rescinding the present orders are issued, then from and after the date just specified you shall be in the military service of the United States."

21. 274 Fed. 458 (D. Kan. 1921).

22. Bergdoll escaped from military prison and fled to Germany, where he remained until 1939, when he returned to this country and was retaken by military authorities. A second writ of *habeas corpus* was dismissed on the ground that he was properly within military jurisdiction. United States *ex rel.* Bergdoll v. Drum, 107 F. (2d) 897 (C. C. A. 2d, 1939), *cert. denied,* 310 U. S. 648 (1940).

presumption virtually impossible to rebut, that the notice was mailed.[23] The result of this rule would seem to be particularly unfair to the registrant in some cases. The post card notice might be lost in the mails, or never mailed at all because of the oversight of a clerk of the draft board, and still there would be the presumption of notice, and the registrant would be "lawfully" called into service. In civil law jurisdiction based on constructive notice [24] is subject to well recognized limitations and has never been extended to include the power to deprive of personal liberty. In *United States ex rel. Feld v. Bullard* it would appear to have been virtually impossible for Feld to avoid the charge of desertion, even if he had made an extreme effort to report as ordered ten days from the time his notice was mailed.

In *Farley v. Ratliff* [25] the court refused to consider constructive notice sufficient, and granted a writ of habeas corpus to petitioner seeking to evade military jurisdiction on the grounds that he failed to receive notice of his induction. The opinion, however, is not a strong one because of confused dictum regarding the offense of desertion,[26] whereas the only issue in habeas corpus proceedings is the jurisdiction of the authority from which petitioner is seeking to be relieved.[27] Petitioner was a farm boy who had passed his physical examination and was told to expect his notice to report; the notice was properly mailed, but mislaid by a member of the household other than the petitioner between the post office and the farm. And yet it was held petitioner was not notified of his orders to report and therefore not subject to military jurisdiction. In *Rome v. Marsh,*[28] on facts substantially identical with those of *United States ex rel. Feld v. Bullard,* it was held that reasonable notice must be given before induction had occurred: "It is . . . clear that there cannot be an induction on default, unless the person so inducted had reasonable notice and a reasonable opportunity to appear before being defaulted. This is required by the Constitution in order to constitute 'due process of law', and the right to such notice and opportunity in all proceedings affecting one's liberty is a matter of the plainest and most fundamental justice." [29]

The notice has been held invalid when it was misaddressed and sent to the wrong town,[30] and where the registrant had left town, and the draft board, instead of sending the notice to the address under which he had registered, sent it to an address where it was mistakenly thought he was living at the time.[31]

Thus while there was agreement that some form of notice of induction was necessary to a lawful induction, within the meaning of the Selective Draft Act of 1917, and within the meaning of Article 2 of the Articles of War, there was extensive disagreement as to just what constituted the

23. United States v. McIntyre, 4 F. (2d) 823 (C. C. A. 9th, 1925); United States *ex rel.* Helmecke v. Rice, 281 Fed. 326 (S. D. Tex. 1922).

24. RESTATEMENT, CONFLICT OF LAWS (1934), § 75, comment *c.*

25. 267 Fed. 682 (C. C. A. 4th, 1920).

26. Desertion is triable by military courts only. Martin v. Mott, 12 Wheat. 19 (1827); *In re* White, 17 Fed. 723 (C. C. Cal. 1883).

27. The decision is further discredited by the unwarranted statement that because the war had been over more than a year, and the selective service draft boards had long been discontinued and dissolved, "a citizen was entitled preferentially to a hearing in the courts of his country with the right of trial by jury, rather than in a military tribunal by court-martial." At page 685.

28. 272 Fed. 982 (D. Mass. 1920).

29. *Id.* at 984.

30. *Ex parte* Goldstein, 268 Fed. 431 (D. Mass. 1920).

31. Allen v. Timm, 1 F. (2d) 155 (C. C. A. 7th, 1924).

notice. Today the *Feld* and *Bergdoll* cases are more frequently cited than the others as representing the rule of World War I.

A non-declarant alien was not subject to service under the Selective Draft Act of 1917,[32] although he was required to register.[33] In *Ex parte Romano*,[34] a native of Italy, who had never declared his intention to become a citizen of the United States, registered, and was called for a physical examination. He went before his local draft board, and because his knowledge of English was very limited, and because the conference was "hurried and unsatisfactory," [35] was unable to make clear his alien status as a claim for exemption, and was subsequently called into service. On discovering his error, the chairman of the draft board told Romano to report at Camp Devens, and seek relief there. Romano failed to report, was arrested for desertion, and sought a writ of habeas corpus to evade military jurisdiction. The writ was denied, even though the induction of the petitioner was a violation of the law.[36] The theory of the court was that although the decision of the draft board was unjustified and irregular, it was not void until so declared by a proper court. During the time of the alleged desertion, petitioner was subject to military jurisdiction, and so the military authorities had the right to hold him for desertion. The court expressly states that "he would, if not under arrest, be entitled either to a hearing in this court on his right to exemption, or to have the proceedings suspended, and to be discharged, unless accorded a fair hearing by the draft tribunals." [37] And yet because he was arrested before he had sought the habeas corpus action, he is adjudged subject to military jurisdiction for the purpose of the desertion. The logic of the court's position is questionable for under the express terms of the statute [38] Romano was not "lawfully drafted" and if he was not in the army he could not be a deserter. Nevertheless, the general policy of requiring one who would test the validity of military orders to comply with them until they are judicially declared invalid is defensible and is well established in other situations.[39]

In all of the cases mentioned above, the petitioner seeking to be relieved from military jurisdiction had registered under the Selective Draft Act. In *Ex parte* Dunn,[40] however, petitioner had not so registered, and upon refusal to report for service was arrested and detained by military authorities. It was there held that he was subject to the military authorities, although he was under indictment for failure to register under the Selective Draft Act. The decision rests primarily upon the ground that civil pro-

32. 40 STAT. 77 (1917), 50 U. S. C. A. § 202 (Supp. 1942).
33. 40 STAT. 80 (1917), 50 U. S. C. A. § 205 (Supp. 1942).
34. 251 Fed. 762 (D. Mass. 1918).
35. *Id.* at 763.
36. See also *Ex parte* Tinkoff, 254 Fed. 912 (D. Mass. 1919); and *Ex parte* Kerekes, 274 Fed. 870 (D. C. E. D. Mich. 1921).
37. At page 764.
38. Articles of War 2, see page 752 *supra*.
39. When a minor enlisted, and was charged with desertion, it has been held that although his enlistment was invalid, he was subject to military jurisdiction and could be convicted of desertion by court-martial. *In re* Cosenow, 37 Fed. 668 (C. C. E. D. Mich. 1889).
"The [enlistment] contract may be void, and he may be entitled to his discharge; but it does not follow that he is to be his own judge, and to discharge himself by desertion. Any person detained by military authorities or military force may obtain his discharge, if he is entitled to it, by application to the proper civil authorities. But a soldier in actual service cannot be allowed to desert at pleasure." Wilbur v. Grace, 12 Johns. (N. Y.) 68, 72 (1814); *cf.* Hoskins v. Pell, 239 Fed. 279 (C. C. A. 5th, 1917).
40. 250 Fed. 871 (D. Mass. 1918).

ceedings for violation of the draft act did not bar military proceedings on the charge of desertion. But the non-registration of petitioner is the most striking feature of the case.

This then is the heritage of decisional law left to posterity from World War I on the subject of military jurisdiction over inductees and prospective inductees. It is not surprising that the cases come to no conclusion which may be called the rule of the last war. The span of most of the cases is only from 1918 to 1925,[41] and few legal questions are settled in so short a time. None of the cases was decided by the Supreme Court of the United States, and so there is not a single decision by a court of last resort which might be pointed to as authoritative. The bulk of the cases hold that military authority commences at the time when notice to report for military service required the registrant to so report. This test was essentially that of the Articles of War governing persons subject to military law, and on its face would appear to be a workable one, providing an easily determinable and definite time. But the courts differed on their interpretation of notice, and handed down some decisions unfair to the party involved, thereby casting doubt on the efficacy of the rule itself. With this in mind, we proceed to the cases arising out of the present conflict.

World War II

The Selective Service and Training Act of 1940[42] provides:

> "No person shall be tried by any military or naval court-martial in any case arising under this Act, unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court-martial under laws in force prior to the enactment of this Act."[43]

This makes the induction of the registrant the criterion of military jurisdiction. This test will require expansion and explanation, as did "called, drafted, or ordered into . . . service"[44] in the last war, but it has to date proven more satisfactory, and indications are that it will continue to be so. For the Army Regulations, issued by the Secretary of War,[45] and which have the force of law,[46] have further defined "induction" as follows:

> "d) Induction.—Upon completion of the physical examination and after certification by a medical officer, selectees found to be physically and mentally fit for general military service will be inducted. e) Induction ceremony. (1) The induction will be performed by an officer in a short dignified ceremony in which the men are administered the oath, Article of War 109 . . . (4) They will then be informed that they are now members of the Army of the United States and given an explanation of their obligation and privileges. In the event of refusal to take the oath (or affirmation) of allegiance by a declarant alien or citizen, he will not be required to receive it, but will be in-

41. Exceptions are Ver Mehren v. Sirmyer, 36 F. (2d) 876 (C. C. A. 8th, 1929); and United States *ex rel.* Bergdoll v. Drum, 107 F. (2d) 897 (C. C. A. 2d, 1939), *cert. denied*, 310 U. S. 648 (1940).

42. Hereinafter called the Selective Service Act.

43. 54 Stat. 894 (1940), 50 U. S. C. A. § 311 (Supp. 1942).

44. Article of War 2, see page 752 *supra*.

45. September 1, 1942.

46. United States v. Eliason, 16 Pet. 291 (1842); Nordman v. Woodring, 28 F. Supp. 573 (D. C. W. D. Okla. 1939).

formed that this action does not alter in any respect his obligation to the United States." [47]

Even this, of course, does not definitively declare a particular point in time to be the moment of induction, when the draftee instantly loses his civilian status, and acquires that of a soldier. But the current act [48] as supplemented by the Army Regulations seems to eliminate many of the problems which harassed the courts after the last war; and in addition, this criterion has many aspects which will not result in apparent injustice to the registrant. If the requirement of a physical examination is a prerequisite to induction, it may be expected that there will be no decisions where constructive notice to the registrant to appear is held to be sufficient. The registrant will at least be aware of his call to arms and will not be charged with "desertion" when in fact he had no knowledge that he was in service.

The courts have wisely chosen to adopt a more beneficial policy toward this problem by interpreting the Selective Service Act in terms of the regulations,[49] and not following the World War I test of notification. The latter course was available to the courts had they chosen to pursue it; in *Ex parte Thieret,* a case in 1920, there was a ready-made definition of induction as follows: "In contemplation of law appellant was inducted into the military service of the United States . . . when he received his preliminary instructions and his order to report for entrainment. Failure to so report subjected appellant to military law." [50] From our enlightened position, two and one-half years after the passage of the Selective Service Act, it seems incredible that a court might have adopted this definition. But for a court meeting the problem of interpreting "inducted" in the statute for the first time, this definition of "inducted" might well have been persuasive. This is particularly so in view of the fact that a plausible construction of the statute would have directed the court to the same conclusion. The last clause of the provision in the act suggests that one may be tried by a military court-martial if "he is subject to trial by court-martial under laws in force prior to the enforcement of this Act." [51] Article 2 of the Articles of War is still in force, wherein all persons lawfully called, drafted or ordered into service are subject to military law.[52] Therefore, the provision of the draft act requiring induction before military jurisdiction, could have been conveniently disregarded, and the rule of World War I continued into this, even if the courts were not disposed to accept the *Ex parte Thieret* definition. In speaking of the statutory construction suggested above, it has been declared that "such a construction would render meaningless the prior provision 'unless such person has been actually inducted for the training and service prescribed under this Act';" [53] if such

47. Army Regulations No. 615-500. See United States v. Smith, 47 F. Supp. 607, 608, 609 (D. Mass. 1942).

48. It is interesting to note that the Senate bill provided that persons who failed to report for duty should be tried by the district courts of the United States unless inducted or subject to court-martial under laws in force prior to the bill. The House amendment gave the courts-martial and the district courts concurrent jurisdiction, and made failure of persons to report for duty subject to military law and regulations from the date they were required by the terms of the order to obey them, even though they had not actually been inducted, essentially the test of the last war. The Senate provision was accepted by the conference report. 86 CONG. REC. 12039.

49. Army Regulations No. 615-500, page 756 *supra;* see also Selective Service Regulations, 633.1-633.9.

50. 268 Fed. 472, 478 (C. C. A. 6th, 1920).

51. See page 756 *supra.*

52. See page 752 *supra.*

53. United States v. Rappeport, 36 F. Supp. 915, 918 (D. C. S. D. N. Y. 1941).

a provision was put into the act, a change from the 1917 act, such a provision must have been included to serve some useful purpose. Fortunately, the courts have chosen to break with the past and institute a new policy, postponing the incidence of military jurisdiction until the selectee has actually been inducted.

As the courts have rejected the earlier step in the draft procedure contained in Article of War 2 as the commencement of military jurisdiction, the problem is now resolved into a determination of what constitutes induction. The most acceptable current interpretation is that in *Ex parte Billings:*[54] "Induction is completed upon acceptance by the government and irrespective of the desires, acts and mental attitudes of the party affected. Upon acceptance by the government, induction occurs by operation of law. It is something over which the party affected . . . has no control. It is not the acceptance by him of the oath, but the acceptance by the government of him as a soldier."[55] In this case petitioner had claimed exemption as a conscientious objector,[56] been refused, subjected to a physical examination, and notified of his acceptance for service in the Army. He refused to take the oath of allegiance, and on arrest and detention for desertion, sought to be taken out of military jurisdiction by a writ of habeas corpus on the ground that he could not be inducted without first taking the oath of allegiance. The petition was dismissed, and petitioner's argument rejected, following the early decision of *Franke v. Murray.* The taking of the oath was held not a prerequisite to induction, and on very practical grounds. For in time of national emergency, when it is the duty of every citizen to defend his country, and when Congress has declared that "the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service,"[57] the option should not be in the individual to avoid induction by refusal to take the oath; this would endanger the whole selective service system and the welfare of the country. The current situation must be distinguished from peacetime, when members of the armed forces are volunteers, and must take the oath at the time of their enlistment in order to be subject to military jurisdiction.[58] Persons drafted under the Selective Service Act do not enlist[59] in the armed forces, but are compelled to enter by law, provided, of course, that they do not qualify under a recognized exemption. Therefore, it seems a wise rule that the government's acceptance of the draftee be the criterion of induction, rather than the converse. At the time of the decision in *Ex parte Billings,*[60] the Army Regulations quoted above[61] were only recently issued,[62] and were not used in the opinion;[63] but in *United States v. Smith,*[64] decided on facts substantially similar, the holding of *Ex parte Billings* was approved, and reinforced by the later regulations.

54. 46 F. Supp. 663 (D. Kan. 1942), (1942) 91 U. of PA. L. REV. 366; *aff'd,* — F. (2d) — (C. C. A. 10th, April 30, 1943).
55. *Id.* at 667, 668.
56. 54 STAT. 887, 50 U. S. C. A. § 305g (Supp. 1942).
57. 54 STAT. 885, 50 U. S. C. A. § 301b (Supp. 1942).
58. *In re* Davidson, 21 Fed. 618 (C. C. N. Y. 1884).
59. United States v. Smith, 47 F. Supp. 607 (D. Mass. 1942).
60. September 11, 1942.
61. See page 756 *supra.*
62. September 1, 1942.
63. The opinion makes use of certain pertinent Selective Service Regulations, emphasizing that they carry no provision for the giving of the oath as an incident to induction. See Selective Service Regulations 633.1-633.9.
64. 47 F. Supp. 607 (D. Mass. 1942).

Stone v. Christensen [65] was an action seeking a declaratory judgment that petitioner was under no obligation to register under the Selective Service Act, and to have a criminal prosecution for failure to register restrained. In arguing that compulsory registration deprived him of due process [66] and subjected him to involuntary servitude [67] petitioner contended that registration would subject him to military law. The court rejected this contention although suggesting that this was the law in the last war.[68] "If he had registered he would not be subject to military law nor liable to court-martial until after induction, which includes swearing allegiance." [69] There can, of course, be no doubt that the principal holding of the case is correct, that the mere act of registration will not *per se* subject the registrant to military law; but the dictum that induction includes swearing allegiance is unfortunate, in that it serves only to cloud a generally accepted rule to the contrary, both in the last war and this; but the case was decided shortly after the passage of the Selective Service Act, and the dictum may be considered overruled by the subsequent decisions mentioned above.

The World War II test, although in general superior to that of World War I, does work a hardship in one type of case. It is settled law that the decision of a draft board may be reviewed by civil authorities after the draftee has exhausted his administrative remedies,[70] *i. e.,* by pursuing his case through the draft boards of appeal,[71] but that the only phase of the board's decision which may be reviewed on appeal is the fairness of the hearing before the board; [72] if the action of the draft board was erroneous, arbitrary or capricious, its decision may be set aside by a civil court. This is a wise policy, and will protect the rights of the draftee against draft board officials who may not have given proper consideration to the draftee's plea for exemption,[73] or whose decision may have been prompted by personal feelings or a false impression of the law.[74] But it also has been held that the only method whereby the draftee may contest the decision of the draft board is to submit to its orders and become subject to military jurisdiction by induction, and then seek to be released from the military authorities by an action of habeas corpus.[75] Induction is a prerequisite to a petition by habeas corpus to test the draft board's decision. Although in a majority of instances, the postponing of military jurisdiction until later in the draft process is of benefit to a draftee contesting such jurisdiction, an anomalous stuation is created in the case of a conscientious objector, who, must, if his claim for exemption be denied, subject himself to induction and military authority, though he need not take the oath, before he can contest the draft board's decision. This forces him to submit to that

65. 36 F. Supp. 739 (D. Ore. 1940).

66. U. S. CONST. AMEND. V.

67. U. S. CONST. AMEND. XIII, § 1.

68. *Contra: Ex parte* McDonald, 253 Fed. 99 (D. C. E. D. Wis. 1918).

69. 36 F. Supp. 739, 741 (D. C. Ore. 1940).

70. Johnson v. United States, 126 F. (2d) 242 (C. C. A. 8th, 1942).

71. Selective Service Regulations, Vol. I, § 6.

72. Benesch v. Underwood, 132 F. (2d) 430 (C. C. A. 6th, 1942); Seele v. United States, 133 F. (2d) 1015 (C. C. A. 8th, 1943); Angelus v. Sullivan, 246 Fed. 54 (C. C. A. 2d, 1917).

73. Application of Greenburg, 39 F. Supp. 13 (D. C. N. Y. 1941).

74. United States v. Bowles, 131 F. (2d) 818 (C. C. A. 3d, 1942).

75. United States v. Grieme, 128 F. (2d) 811 (C. C. A. 3d, 1942); Fletcher v. United States, 129 F. (2d) 263 (C. C. A. 5th, 1942); *contra: Ex parte* Stewart, 47 F. Supp. 410 (D. C. S. D. Cal. 1942).

to which he objects, and if sincere, he is entitled to that objection under the law. In World War I he was considered subject to military authority on notification to report, and could at that time have recourse to the civil courts.

Conclusion.

It is reasonable to expect that the courts will continue the intelligent policy of postponing the incidence of military jurisdiction until the government has defintely decided to accept the selectee, and yet not until after the selectee is aware of such a decision. It is still possible that there would be no notification to the draftee, but the chances of its occurrence are slight. Before the government can have chosen to accept the selectee, he will have been made aware of the decision the government is to make, if not of its outcome. There seems little doubt that a decision such as that in *United States ex rel. Feld v. Bullard,* where a selectee was held subject to military jurisdiction although out of the country and unaware of his call, would be impossible. Loopholes, including refusal to take the oath of allegience, whereby the selectee might seek to evade induction, have been plugged by making the essence of induction an act of the government, not of the individual; and yet the rights of the individual are afforded more adequate protection than during the last war. This policy appears to comply with the needs of the military situation; it deserves to be continued. *G. S. P.*