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New Look Constitutionalism: The Cold War Critique of Military Manpower Administration

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ARTICLE

NEW LOOK CONSTITUTIONALISM: THE COLD WAR
CRITIQUE OF MILITARY MANPOWER ADMINISTRATION

JEREMY K. KESSLER[†]

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INTRODUCTION

Between 1953 and 1960, the United States' overall military and intelligence-gathering capacities grew enormously, driven by President Eisenhower's "New Look" approach to fighting the Cold War. But the distribution of powers within this New Look national-security state, the shape of its institutional structures, and its sources of legitimacy remained up for grabs. The eventual settlement of these issues would depend on administrative constitutionalism—the process by which the administrative state both shapes and is shaped by constitutional norms, often through ostensibly non-constitutional law and policymaking.¹

Constitutional concerns about civil liberties, administrative procedure, and the separation of powers ran highest in those branches of the national-security state responsible for regulating civilian and military manpower, such as the Loyalty-Security Program, an inter-agency effort to root out ideologically deviant federal employees, and the Selective Service System, the civilian agency created in 1940 to register, classify, and select millions of young men for compulsory military service. This Article focuses on the Selective Service System, which has received far less attention from legal scholars despite the fact that it exercised authority over a far larger (and arguably more vulnerable) population than did the Loyalty-Security Program.² Administrative constitutionalism inflected every stage of the New Look draft's development: from the size and composition of draft calls; to the arguments that draft administrators made when lobbying their congressional patrons; to the competing interpretations of the Selective Service System's organic statute and regulations offered by Justice Department and Selective Service lawyers; to judicial review of these interpretations; to how executive

¹ See Gillian Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1900 (2013) ("In practice, administrative constitutionalism . . . encompasses the elaboration of new constitutional understandings by administrative actors, as well as the construction (or "constitution") of the administrative state through structural and substantive measures.").

² Important recent works on the Loyalty-Security Program include SUSAN L. BRINSON, *THE RED SCARE, POLITICS, AND THE FEDERAL COMMUNICATIONS COMMISSION, 1941–1960* (2004); ROBERT M. LICHTMAN, *THE SUPREME COURT AND MCCARTHY-ERA REPRESSION: ONE HUNDRED DECISIONS* (2012); LONDON R. Y. STORRS, *THE SECOND RED SCARE AND THE UNMAKING OF THE NEW DEAL LEFT* (2012); and Karen M. Tani, *Flemming v. Nestor: Anticommunism, the Welfare State, and the Making of "New Property"*, 26 LAW & HIST. REV. 379 (2008). For the legal history of the Selective Service System in this period, see JOSHUA E. KASTENBERG & ERIC MERRIAM, *IN A TIME OF TOTAL WAR: THE FEDERAL JUDICIARY AND THE NATIONAL DEFENSE, 1940–1954* (2016); JEREMY K. KESSLER, *FORTRESS OF LIBERTY: THE RISE AND FALL OF THE DRAFT AND REMAKING OF AMERICAN LAW* (forthcoming); and Megan Threlkeld, "*The War Power is Not a Blank Check*": *The Supreme Court and Conscientious Objection, 1917–1973*, 31 J. POL'Y HIST. 303 (2019).

branch lawyers responded to—and sometimes tried to preempt—judicial criticism by modifying the substance and procedure of draft decisionmaking.

By reconstructing the anxious, constitutional dialogue that shaped the administration of military manpower under President Eisenhower's New Look, this Article explores the role that administrative constitutionalism played in the development of the American national-security state, a state that became both more powerful and more legalistic during the pivotal years of the Cold War.³ The Article also questions the frequent identification of administrative constitutionalism with the relative autonomy and opacity of the federal bureaucracy. The back-and-forth of administrative constitutionalism continually recalibrated the degree of autonomy and opacity that characterized the draft apparatus. This evidence suggests that bureaucratic autonomy and opacity may be more usefully understood as products, rather than preconditions, of administrative constitutionalism.

The remainder of the Article proceeds in four Parts. Part I introduces readers to President Eisenhower's New Look grand strategy, and its relationship to the President's legal, political, and economic commitments on the homefront. Part II looks more closely at the legal and political culture of administrative law reform that blossomed during President Eisenhower's first term, and assesses the threat this culture posed to the Selective Service System. While countervailing Cold War imperatives helped the System avoid new legislative restrictions on its classification and induction authority, the judiciary proved more aggressive.

Part III reconstructs the steady rise of judicial scrutiny of Selective Service decisionmaking over the course of the 1950s. During this period, the federal courts came to identify the administration of civilian and military manpower as a unique threat to civil liberty. Whereas administrative law reformers mounted a wholesale critique of agency governance, the civil libertarian critique of Cold War manpower administration enabled lawyers and judges to target the autonomy and authority of the Selective Service System with more precision. This civil libertarian critique did not only confront draft administrators in the courts. To the contrary, the critique's steady judicial success depended in part on the unwillingness of Justice Department lawyers to counter it. At the heart of Part III, and the Article as a whole, lurks this intra-administrative conflict between Selective Service and Justice Department officials as to the practical importance and constitutional integrity of draft administration.

³ For this periodization of the Cold War, see generally Anders Stephanson, *Cold War Degree Zero*, in *UNCERTAIN EMPIRE: AMERICAN HISTORY AND THE IDEA OF THE COLD WAR 19-49* (Joel Isaac & Duncan Bell eds., 2012).

Part IV traces the Selective Service System's response to these mid-1950s defeats. Having lost the support of both legal professionals and military planners, draft administrators cultivated a new client base by transforming their regulatory agenda. Earlier in the decade, the System had resisted capture by the deferment lobby, the coalition of industrialists, educators, and middle-class families who wanted as much high-quality manpower as possible deferred into the private sector. While the deferment lobby's demands were at odds with the egalitarian vision of veteran draft administrators, the New Look's libertarian legal culture and austere grand strategy had effectively foreclosed that vision. By becoming an agency specializing in deferment, rather than induction, the Selective Service System traded the contentious confines of the courtroom for the sprawling office park and the university quad. This trade gave draft administrators a badly needed infusion of social legitimation and political support. But it also tied the fate of the Selective Service System to the New Look paradigm: should political and military leaders abandon the New Look, and seek to wage another limited war with a conscript army, draft administrators would have to contend not only with the skepticism of the courts and the Justice Department, but also with the anger of a deferment lobby that had come to rely on the Selective Service System's largesse.

I. A NEW LOOK FOR THE SELECTIVE SERVICE SYSTEM

Dwight D. Eisenhower's 1952 presidential victory put a Republican in the Oval Office for the first time in twenty years. Although the Party had chosen Eisenhower for his reputation as a politically moderate war hero, the former Supreme Allied Commander and early Cold War grand strategist ran on a passionately anti-communist, anti-bureaucratic, and civil-libertarian agenda. Given this rhetoric, Republican hopes were high that a full rollback of New Deal and Fair Deal governance might finally be at hand.

According to the 1952 Republican platform, the Roosevelt and Truman administrations had "violated our liberties by turning loose upon the country a swarm of arrogant bureaucrats and their agents who meddle intolerably in the lives and occupations of our citizens."⁴ For too long, Democratic administrators had "arrogantly deprived our citizens of precious liberties by seizing powers never granted" and "worked unceasingly to achieve their goal of national socialism."⁵ During the campaign, Eisenhower declared "his intention to rid Government of the incompetent, dishonest, [and] disloyal."⁶ Although electoral politics encouraged this kind of rhetoric, Eisenhower was

⁴ *Text of the Republican Party's 1952 Campaign Platform Adopted by National Convention*, N.Y. TIMES, July 11, 1952, at 8.

⁵ *Id.*

⁶ JOANNA GRISINGER, *THE UNWIELDY AMERICAN STATE* 197 (2012).

“skeptical of government-by-administration” and openly “question[ed] the constitutionality of the administrative state.”⁷ As he warned his close friend, the textile magnate George Sloan, the “drift toward statism” that had characterized the Truman years “must be halted in its tracks.”⁸ The “individual liberties” of the American people and their “entire system of free government” depended on an administrative counterrevolution.⁹

Putting his words into action, the new President pursued three policies to shrink the federal bureaucracy and to render it more hospitable to the free market. *First*, “Eisenhower sought to replace what he called an ‘exclusive dependence on Federal bureaucracy’ with ‘a partnership of state and local communities, private citizens, and the Federal Government, all working together.’”¹⁰

Second, Eisenhower sought to reform the inner workings of the federal government by changing the sorts of bureaucrats who ran it. This meant opening the doors of the White House to big business, while closing them to alleged subversives. The President “tightened loyalty standards for federal hiring and retention” and fired suspect employees throughout the Internal Revenue Service and the Justice Department.¹¹ He then used his appointment power to place businessmen and other admirers of corporate governance throughout his cabinet and at the top of federal agencies and commissions.¹²

Finally, and most significantly, Eisenhower reined in New Deal and Fair Deal governance by slashing agency budgets. Given the “substantial and immediate budgetary gap for the coming fiscal year,” Eisenhower needed little political cover to do so.¹³ Defense spending had spiked during the Korean War—from thirteen billion dollars in 1950 to forty billion in 1952—and the annual national-security budget was scheduled to break the sixty billion mark in 1955.¹⁴ Veterans’ benefits, debt service, and the costs of running the rest of the administrative state would add another twenty-billion dollars to the annual bill.¹⁵ Although President Truman had pushed through tax increases to cover some of these costs, a reluctant Congress had attached short sunset provisions to the most aggressive—and progressive—revenue-boosting measures.¹⁶ The excess-profits tax, targeting those industries that reaped the greatest benefits from Cold War spending, was set to expire in

⁷ *Id.* at 199.

⁸ Robert Griffith, *Eisenhower and the Corporate Commonwealth*, 87 AM. HIST. REV. 87, 92 (1982).

⁹ GRISINGER, *supra* note 6, at 199 (quoting Eisenhower).

¹⁰ Griffith, *supra* note 8, at 106.

¹¹ GRISINGER, *supra* note 6, at 197.

¹² Griffith, *supra* note 8, at 105-107.

¹³ AARON L. FRIEDBERG, IN THE SHADOW OF THE GARRISON STATE 126 (2002).

¹⁴ *Id.* at 125.

¹⁵ *Id.* at 126.

¹⁶ *Id.*

June 1953.¹⁷ By the spring of 1954, both individual and corporate income-tax rates would “revert to their pre-emergency levels.”¹⁸ An eighteen-billion-dollar shortfall loomed.¹⁹

Eisenhower saw this “ticking fiscal time bomb” as a great opportunity.²⁰ Not only did it provide an ideologically muted argument for scaling back the regulatory ambitions of agencies such as the National Labor Relations Board and the Federal Security Administration, but fiscal retrenchment also harmonized with Eisenhower’s ambitious plans to transform American military strategy. Having witnessed the spread of total war as Supreme Allied Commander during World War II, Eisenhower doubted the viability of limited yet manpower-intensive ground wars, such as the one that he inherited in Korea. He believed that any local conflict with Soviet-backed forces would eventually spiral into a total confrontation decided by nuclear superiority. Rather than training, outfitting, and risking men to serve as prelude to this decisive, devastating contest, Eisenhower preferred to focus military spending on what his Secretary of State John Foster Dulles called “massive retaliatory power.”²¹ An unparalleled nuclear arsenal would make it “possible to get and to share more basic security at less cost.”²² In October 1953, the National Security Council codified Eisenhower and Dulles’s “New Look” approach.²³

The national security agency most directly threatened by New Look’s strategic focus on nuclear weapons, covert operations, and cheap security was the Selective Service System. Since the System’s creation in 1940, Selective Service administrators had registered, classified, and drafted millions of young American men for compulsory military service.²⁴ This work made the draft apparatus a crucial but highly controversial bridge between the welfare and warfare states built by Eisenhower’s Democratic predecessors, exposing draft administrators to a host of critics, from pacifists and civil libertarians to corporate lawyers, business lobbyists, and conservative politicians opposed to

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 126-27.

²⁰ *Id.* at 126.

²¹ See CAMPBELL CRAIG, *DESTROYING THE VILLAGE: EISENHOWER AND THERMONUCLEAR WAR* 48 (1998) (quoting Dulles). For further discussion of Eisenhower’s strategic vision, see generally CAMPBELL CRAIG & FREDRIK LOGEVALL, *AMERICA’S COLD WAR* 139-215 (2013).

²² See GERARD DEGROOT, *THE BOMB: A LIFE* 189 (2004) (quoting Eisenhower).

²³ See generally Executive Secretary on Basic National Security Policy, A Report to the National Security Council, NSC 162/2 (Oct. 30, 1953).

²⁴ See generally GEORGE FLYNN, *THE DRAFT* (1993).

federal supervision of labor relations, education, and the health and safety of vulnerable populations.²⁵

The New Look “put the draft in limbo.”²⁶ Draft calls dropped from 472,000 men in 1953 to 253,000 in 1954 to 153,000 in 1955, and continued to fall thereafter.²⁷ For draft administrators, this collapse in strategic support for conscription could not have come at a worse time, as the Selective Service System was still reeling from the many defeats it had suffered in the federal courts during and after the Korean War. By 1954, Selective Service administrators had come to believe that only a series of bold amendments to their organic statute might push back against the judiciary’s debilitating supervision of the registration and classification process.²⁸ Yet if the Commander-in-Chief no longer saw conscription as an essential weapon in the anti-communist arsenal, would he really stick his neck out to scold federal judges for being too protective of the civil liberties of draft registrants?

II. ADMINISTRATIVE LAW REFORM AND THE SELECTIVE SERVICE SYSTEM

Making matters worse, many legislators felt that President Eisenhower was not doing nearly enough to tame the administrative state, despite his budget cuts, pro-business appointments, and heightened loyalty standards. Influential figures in the legal and business world agreed. In particular, the American Bar Association and its corporate clients warned that neither the Administrative Procedure Act nor its implementation by the federal courts had provided a sufficient corrective to the executive branch’s domination of American social and economic life.²⁹ In July 1953, congressional and private sector critics converged on a provisional solution: the resurrection of the Commission on Organization of the Executive Branch of Government, colloquially known as the Second Hoover Commission.

The First Hoover Commission—named for its chairman, former Republican President Herbert Hoover—operated from 1947 to 1949. As one of the Commission’s Democratic members recalled, Hoover’s goal was to use procedural reform of the executive branch “as a vehicle to overturn the New

²⁵ See generally J. GARRY CLIFFORD & SAMUEL R. SPENCER, JR., *THE FIRST PEACETIME DRAFT* (1986); see also FLYNN, *supra* note 24, at 88-133 (reviewing the major sources of Truman-era criticism).

²⁶ FLYNN, *supra* note 24, at 138; FRIEDBERG, *supra* note 13, at 179-80.

²⁷ FLYNN, *supra* note 24, at 139.

²⁸ See Letter from Col. Omer to Gen. Renfrow, 1-2 (Jan. 31, 1955), NARA, RG 147, Central Files 1948-1963, Box 35 (submitting a series of “desirable amendments” for consideration).

²⁹ See Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 128 HARV. L. REV. 718, 762-772 (reviewing DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE* (2014)).

Deal in substance.”³⁰ Hoover himself denounced the “welfare state” as “a disguise for the totalitarian state.”³¹ The re-election of President Truman in 1948, however, stymied his plans.³² Four years later, with a Republican in the White House, Hoover and his allies felt that the time was ripe to finish the work they had begun in 1947. At the Second Commission’s inaugural meeting, Hoover declared, “This time we will not be deflected from our purpose.”³³

The most radical arm of the Commission was its Task Force on Legal Services and Procedure. Most of the Task Force’s members knew each other from the American Bar Association, where they had spent decades discussing how to impose more court-like procedures and greater judicial review on New Deal and Fair Deal administrators.³⁴ The Task Force’s final report attested to this legal and political vision: “The more closely that administrative procedures can be made to conform to judicial procedures, the greater the probability that justice will be attained in the administrative process.”³⁵ Such statements, however, risked falling afoul of one of the Second Hoover Commission’s purported goals—the improvement of administrative efficiency.

The anti-bureaucratic ideology of the mid-1950s was shot through with this contradiction: on the one hand, critics targeted the administrative state’s sloth and wastefulness; on the other hand, they assailed its lawless, summary decisionmaking.³⁶ The Task Force insisted that these two countervailing critiques were, in fact, compatible: “Formalization of administrative procedures along judicial lines is consistent with efficiency and simplification of the administrative process.”³⁷ If implemented in full, however, the Task Force’s “recommendations would have significantly enlarged administrative staffs . . . slowed down administrative decision making, and vastly increased the work of the federal courts.”³⁸ At nearly every point, the value of efficiency was trumped by the charge that “individual rights were being lost in the administrative process.”³⁹

While this emphasis on “formalization” and individual rights conflicted with the Commission’s charge to balance fairness and efficiency, it harmonized with popular doubts about the legitimacy of administrative

³⁰ GRISINGER, *supra* note 6, at 158 (quoting Rowe).

³¹ *Id.* at 186.

³² *Id.* at 161-78.

³³ *Id.* at 208.

³⁴ *Id.* at 213.

³⁵ COMM’N ON ORG. OF THE EXEC. BRANCH OF THE GOV., TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 138 (1955) [hereinafter TASK FORCE REPORT].

³⁶ See Reuel Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389, 1414-16 (2000).

³⁷ TASK FORCE REPORT, *supra* note 35, at 138.

³⁸ GRISINGER, *supra* note 6, at 215.

³⁹ *Id.*

government. As Louis Jaffe, a prominent critic of many of the Task Force's proposals, acknowledged: "It is now generally conceded that judicial control is a necessary condition of administrative law in this country. The public," Jaffe continued, "demands that there be an independent organ of government to guarantee that the agencies stay within the limits set by statute. This guarantee is important not only to the individual citizen but to the agency if it is to win public acceptance."⁴⁰ The Task Force's main recommendations took the form of a proposed piece of legislation, the Administrative Code, that began circulating in January 1955.

When Selective Service headquarters received a copy on February 1, the Code sparked a panic. Passage of the Code would doom the legislative reforms that draft administrators believed were necessary to repair the damage that a decade of judicial interference had done to the post-WWII Selective Service System. Indeed, the Code affirmatively endorsed even *greater* judicial control of the draft.

The current draft law—the Universal Military Training and Service of 1951—contained language exempting the Selective Service System from most procedural rules and judicial supervision imposed by the Administrative Procedure Act. The APA itself had established this precedent, exempting the 1940 draft law from all its requirements except for the publication of administrative regulations. The newly proposed Administrative Code, by contrast, abolished all such exemptions.⁴¹ According to the Task Force, the purpose of these exemptions had been "to cover emergency functions which were of a temporary nature . . . following World War II."⁴² It no longer made sense, however, to think of "emergency" functions such as conscription as "temporary." Exposing the existential dilemma of a peacetime, Cold War draft, the Task Force concluded that "[c]ontinued exemption of [these] functions . . . is now clearly anomalous."⁴³

On February 23, General Hershey wrote the Second Hoover Commission's executive director to detail the threat that the Code posed to conscription. If "the proposed Code [were] enacted into law," Hershey insisted, "it would be essential" to amend the current draft law "to provide that [its] functions . . . shall be excluded . . ."⁴⁴ Otherwise, the entire registration, classification, and induction process "would be subject to all requirements of the Code," including "formal hearings on all issues, representation by attorneys, and preliminary and final review by the courts

⁴⁰ Louis Jaffe, *Basic Issues: An Analysis*, 30 N.Y.U. L. REV. 1273, 1291 (1955).

⁴¹ See TASK FORCE REPORT, *supra* note 35, at 389-90.

⁴² *Id.* at 141.

⁴³ *Id.*

⁴⁴ Letter from Lewis B. Hershey to John B. Hollister, 1 (Feb. 23, 1955), NARA, RG 147, Box 36.

of all agency actions.”⁴⁵ Such judicial and quasi-judicial impositions would have a devastating impact on the work of “[s]ome 3950 local boards . . . the members of which serve without compensation, and for the most part are laymen not skilled in legal procedures.”⁴⁶ These boards were responsible for upwards of two million “classification actions” every year.⁴⁷ The Code would also impede the “[a]dditional thousands of classification actions . . . completed annually by the 94 appeal boards and by the National Selective Service Appeal Board which acts for the President.”⁴⁸ In short, Hershey concluded the Code “could not be complied with in the Selective Service operation if any men were ever to be promptly available for delivery to the armed forces for induction.”⁴⁹

Thankfully for the Selective Service System, the Task Force’s “revolutionary” project stalled in Congress.⁵⁰ While the full Commission agreed with much of the Task Force’s proposed Code, there was internal disagreement about the most aggressive, anti-bureaucratic measures, such as making judicial review available at every stage of administrative decisionmaking.⁵¹ Some commissioners objected to such provisions as overly “legalistic,” while others approved of them in theory but worried that they would mark the Commission as a body of lawyers unconcerned with the cost and efficiency of government.⁵² So a majority of commissioners declined to embrace the Code in its entirety.⁵³ Instead, the Commission forwarded the Code to Congress for its independent consideration while formally endorsing a smaller set of reforms.⁵⁴

While more modest than the Code’s call for total judicialization of the administrative state, the Commission’s proposals still would, in the words of President Eisenhower’s Budget Bureau, “turn[] the clock back with a vengeance!”⁵⁵ Such an ambitious renovation of the national bureaucracy was too big a gamble during a period of great geopolitical uncertainty. Anti-communist ideology drove the critique of the administrative state, but it also limited the risks political leaders were willing to take when it came to degrading state capacity in the midst of a standoff with the Soviet Union.

⁴⁵ *Id.* at 1.

⁴⁶ *Id.* at 2.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See GRISINGER, *supra* note 6, at 227 (“Consistent opposition from the agencies and a lack of strong pressure in Congress left the bills adrift.”).

⁵¹ *Id.* at 218.

⁵² *Id.* at 220.

⁵³ *Id.* at 219.

⁵⁴ *Id.* at 220.

⁵⁵ *Id.* at 224.

Hobbled by internal doubts and disagreements, the Commission saw its own recommendations, as well as the Task Force's Administrative Code, shelved by Eisenhower and allied legislators.

The spirit of administrative law reform did not, however, require political consensus to thrive. In the seven-year interim between the death of Franklin Roosevelt and the election of Dwight Eisenhower, the federal judiciary had expanded its supervision of the administrative state, implementing in a piecemeal manner many of the doctrinal reforms that the Hoover Commission sought to codify.

Take one of the Commission's more controversial recommendations: the replacement of the APA's substantial-evidence standard for reviewing administrative fact-finding with a more exacting, clearly erroneous standard.⁵⁶ The defeat of this recommendation at the political level only masked the fact that federal judges had already been moving toward a higher standard for some time. As administrative law scholar Bernard Schwartz noted at the time: "Whether or not the [Commission's] recommendation is adopted, that will not alter the fact that the scope of review in federal administrative law has very definitely been tending to approach that which prevails" when appellate courts review the fact-finding of district courts—that is, "clearly erroneous" review.⁵⁷ In other words, at least some courts were already acting like the Commission's recommendations were the law of the land. These courts tended to treat administrative agencies more like inferior judicial bodies than autonomous executive decisionmakers, precisely the approach that Hoover preferred.

Nor were courts necessarily bashful about this changed relationship with administrative agencies. As early as 1952, Schwartz noted, the Fourth Circuit Court of Appeals had declared that "it is difficult to draw the line between the function of an appellate court in passing upon the decision of a trial judge sitting without a jury . . . on the one hand, and the function of the court in reviewing the decision of an administrative tribunal on the other The mental processes of the reviewing authority which are called into action in each situation are so similar that they can hardly be distinguished."⁵⁸

Most striking of all was the fact that even when courts reviewed administrative decisions exempt from the APA—including those of the Selective Service System—they were increasingly likely to imitate the Fourth Circuit's approach, if not its rhetoric. "[I]t is generally agreed today by students of administrative law that the operation of the APA should be

⁵⁶ TASK FORCE REPORT, *supra* note 35, at 416.

⁵⁷ Bernard Schwartz, *Administrative Justice and Its Place in the Legal Order*, 30 N.Y.U. L. REV. 1390, 1393 (1955).

⁵⁸ *Id.* (quoting *NLRB v. Southland Mfg. Co.*, 201 F.2d 244, 250 (4th Cir. 1952)).

uniform throughout the federal administrative process,” Schwartz explained.⁵⁹ “Few outside the immediate agencies concerned do not deplore the exception of individual agencies from the procedure law.”⁶⁰

On March 14, 1955, the Supreme Court decided four draft-law cases that confirmed Schwartz’s analysis. The draft had dodged a bullet when the Second Hoover Commission’s vision of administrative reform proved too risky for the President and many in Congress to support. But the March 14 Supreme Court decisions hit the Selective Service System squarely in the chest. Assessing the damage, draft administrators became more certain than ever before that only a strong political response to the courts would save conscription.

III. THE CIVIL LIBERTARIAN CRITIQUE OF MILITARY MANPOWER ADMINISTRATION

In the wake of the Selective Service System’s widely praised performance during World War II, most American voters and political leaders agreed that an unprecedented regime of “peacetime” conscription was an imperative of the global struggle against communism. Patriotic acceptance of the Cold War draft did not, however, insulate the Selective Service System from the growing suspicion of “New Deal bureaucracy” among legal elites. As this anti-bureaucratic mood spread through the federal courts in the mid-1940s and early 1950s, formerly deferential judges began to embrace the task of assessing the validity of Selective Service decisionmaking. Not only had Congress offered no resistance to this development, it had even flirted with legislation exposing the draft to more judicial control. Meanwhile, the Justice Department became increasingly reluctant to bring draft prosecutions and increasingly skeptical of the Selective Service System’s own practices.

Between 1950 and 1953, the United States’ shooting war against communism on the Korean Peninsula only accelerated these trends. In 1952, the Supreme Court rebuffed the Truman administration’s efforts to extend the practices of emergency governance pioneered during the New Deal and World War II to the more limited context of mobilization for a “limited” military campaign in a single operational theater.⁶¹ Then, in 1953, the high Court responded to a rush of prosecutions of Korean War draft resisters by imposing a higher degree of scrutiny on Selective Service fact-finding.⁶² No longer would federal judges be expected to defer to administrative decisions on a draft registrant’s entitlement to statutory exemptions from military service.

⁵⁹ *Id.* at 1391.

⁶⁰ *Id.*

⁶¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). For the political and military context of the decision, see generally MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE* (1977).

⁶² *Dickinson v. United States*, 346 U.S. 389 (1953).

Given these unfavorable trends, the Supreme Court's decision to hear argument in four major draft-law cases in the Fall of 1954 alarmed Selective Service leaders. All but certain of an unfavorable outcome, they spent the holidays preparing a disciplined administrative response to whatever new, damaging doctrines the Court might announce. In mid-January, General Counsel Daniel Omer began to schedule conferences with state Selective Service directors for "immediately after the Supreme Court renders its decisions."⁶³ At that time, draft administrators would "discuss the effect" of the decisions, and "promote a uniform enforcement policy . . . with respect to the [legal] issues" that the Supreme Court resolved.⁶⁴ Omer believed a uniform enforcement policy to be critical for at least two reasons: first, because uniform enforcement was a hallmark of the rule-of-law values that many draft critics felt the Selective Service System violated; second, because uniform enforcement would make it easier for the General Counsel's Office to manage its case load, controlling when and under what circumstances lower-court judges would get a chance to elaborate—and potentially extend—the Supreme Court's rulings.

On March 14, the Supreme Court confirmed the fears of Omer and his colleagues. Three of the four draft-law decisions handed down that day reversed the convictions of draft registrants who had been denied conscientious-objector status.⁶⁵ Each reversal placed new limits on draft administrators' freedom of action, while legitimating novel legal objections to the draft. The fourth decision, *Witmer v. United States*, at first seemed to cut the other way, affirming the conviction of a Witness who had been denied conscientious-objector status.⁶⁶ But upon closer inspection, the *Witmer* majority opinion delivered more bad news: it signaled a new standard—even more exacting than the one that *Dickinson v. United States* had established two years earlier—for determining when classification decisions had an adequate "basis in fact."⁶⁷

A. *Witmer v. United States: Heightened Scrutiny of Selective Service Fact-finding*

The author of the majority opinion in *Dickinson*, former Attorney General Tom Clark, was also responsible for all four March 14 decisions, including

⁶³ Letter from Col. Daniel O. Omer to Warren Olney III, Assist. Att'y Gen. (Jan. 23, 1955), NARA, RG 147, Central Files 1948-1963, Box 96.

⁶⁴ *Id.*

⁶⁵ *Sicurella v. United States*, 348 U.S. 385, 386 (1955); *Witmer v. United States*, 348 U.S. 375, 383 (1955); *Simmons v. United States*, 348 U.S. 397, 406 (1955); *Gonzales v. United States*, 348 U.S. 407, 417 (1955).

⁶⁶ *Witmer*, 348 U.S. at 383.

⁶⁷ *Id.* at 381-83.

Witmer. In *Dickinson*, Justice Clark had expanded the federal courts' authority to review the fact-finding of Selective Service administrators: whenever a draft resister made a prima facie case that he was entitled to a certain classification, judges should ask whether there was "affirmative evidence" in the administrative record supporting an alternative classification.⁶⁸ If the answer was "no," the resister could not be convicted for refusing to serve.⁶⁹ At the time, legal commentators had noted that *Dickinson's* "affirmative evidence" rule worked much like the "substantial evidence" standard that courts used when reviewing the factual basis of administrative decisions covered by the Administrative Procedure Act.⁷⁰ The draft apparatus, however, was not supposed to be subject to such a searching standard of review. Although Justice Clark's majority opinion insisted that the Court was not altering this deferential status quo but simply elaborating the basis-in-fact standard it had invented seven years earlier in *Estep*,⁷¹ the claim was unconvincing. Draft administrators, Justice Department lawyers, and legal scholars all viewed the *Dickinson* Court's expansion of judicial review as potentially disastrous for future enforcement of the draft law.

Still, there had remained hope that the affirmative evidence rule could be cabined to the particular circumstances of the *Dickinson* case, which involved a registrant who claimed to be a minister, and thus entitled to a statutory exemption. Might denials of conscientious-objector—rather than ministerial—classifications be subject to less searching review? In *Witmer*, the Supreme Court finally answered that question with a resounding "no," even as it affirmed the conviction of a Jehovah's Witness who claimed to be a conscientious objector.⁷² The problem for Philip Andrew Witmer was that there *did* exist "affirmative evidence" sufficient to support an "inference of [his] insincerity or bad faith."⁷³ The record in *Witmer's* case showed that he had made several inconsistent statements, at times even suggesting he would be happy to support the war effort.⁷⁴ This evidence, Justice Clark concluded, "cast considerable doubt" on Witmer's sincerity.⁷⁵ So it had been reasonable for draft administrators to deny his claim to a conscientious-objector

⁶⁸ *Dickinson*, 346 U.S. at 396.

⁶⁹ *Id.* at 397.

⁷⁰ See, e.g., Kenneth Culp Davis, *Unreviewable Administrative Action*, 15 F.R.D. 411, 451 n. 71 (citing *Dickinson* as evidence that the Supreme Court was converging on substantial-evidence-like review even in contexts where administrative decision-making was presumptively unreviewable).

⁷¹ See *Dickinson*, 346 U.S. at 399.

⁷² *Witmer*, 348 U.S. at 384.

⁷³ *Id.* at 382.

⁷⁴ *Id.* at 382-83.

⁷⁵ *Id.* at 383.

deferment.⁷⁶ Yet how Justice Clark arrived at this conclusion was far from deferential to draft decisionmakers.

Justice Clark's majority opinion amounted to nothing less than a searching review of all the evidence presented during Witmer's classification proceedings. This review sought to determine whether the "objective facts" that "cast doubt on the sincerity" of Witmer's conscientious-objector claim outweighed the evidence supporting his sincerity.⁷⁷ As the administrative law scholar Louis Jaffe remarked with surprise, not only was this approach unprecedented in the draft-law context, but it was also "almost identical" to the ever-more-demanding "substantial evidence" standard used by courts in evaluating the fact-finding of agencies covered by the Administrative Procedure Act.⁷⁸ While the Universal Military Training and Service Act explicitly exempted the draft apparatus from the APA-imposed "substantial evidence" standard, such legislative exemptions no longer seemed effective: "Whatever the statutory formula, a court is strongly moved to administer the law according to its idea of the proper function of judicial review."⁷⁹

The *Witmer* Court did reassert that, when reviewing draft-classification decisions, courts should not "look for substantial evidence," but only check for some "basis in fact" supporting the decision.⁸⁰ As though elaborating this narrower standard, Justice Clark explained that where "there was conflicting evidence or where two inferences could be drawn from the same testimony," judges should defer to the Selective Service System.⁸¹ Yet, as Jaffe noted, "almost identical language was used in *Universal Camera*," the case that had put meat on the bones of the "substantial evidence" test.⁸² "Unless I have misconceived the substantial evidence test," Jaffe remarked, "I fail to see how, at least in this case, its application would have differed even in phrasing" from the approach taken by the *Witmer* Court.⁸³ In other words, the Supreme Court was now treating the factual findings of draft administrators with at least as much skepticism as it treated the findings of administrators responsible for purely domestic activities unrelated to military manpower or national security.⁸⁴

⁷⁶ *Id.* at 381-83. See also Note, *The Scope of Review, Due Process, and the Conscientious Objector — Some Unresolved Problems*, 50 NW. U. L. REV. 660, 667 n.45 (1955) (noting that "mere disbelief or doubt by the board of the registrant's credibility do[es] not constitute a basis in fact unless substantiated by evidence of insincerity or bad faith on the record").

⁷⁷ *Witmer*, 348 U.S. at 382.

⁷⁸ Louis Jaffe, *Judicial Review: Question of Fact*, 69 HARV. L. REV. 1020, 1048-50 (1956).

⁷⁹ *Id.* at 1050.

⁸⁰ *Witmer*, 348 U.S. at 381.

⁸¹ *Id.* at 383.

⁸² Jaffe, *supra* note 78, at 1048.

⁸³ *Id.* at 1048-49.

⁸⁴ *Id.*

Jaffe's reading of *Witmer* proved prophetic. By 1958, the Chief of the Conscientious Objector Section of the Justice Department reported that "notwithstanding" the *Witmer* Court's gestures of deference, "courts continue to favor the registrant prosecuted for refusing induction after his conscientious objector claim is denied [W]here there is any doubt concerning the registrant's sincerity or his entitlement to a procedural right, such doubts are generally resolved in the registrant's favor."⁸⁵ A year later, Duke University law professor Robert Kramer announced that "we are witnessing a period of intensive criticism and reappraisal of the entire administrative process."⁸⁶ The realm of national-security administration was no exception. As an example of how willing civilian courts had become to police "military matters," Kramer cited *Witmer*: while judicial review of draft classifications "was initially limited to determining only whether there was any 'basis in fact' for the classification," "later decisions" such as *Witmer* had "approximated review . . . to the substantial evidence test customarily used" outside the draft context.⁸⁷

Selective Service administrators got the message immediately. Ten days after *Witmer* came down, the Selective Service General Counsel circulated a memorandum politely titled "Judicial Decisions Suggesting Legislative Correction."⁸⁸ It began with a list of recent appellate cases in which courts had reversed the convictions of draft resisters because the evidence weighing against their claims of conscientious objection was deemed insufficient to reasonably support an inference of insincerity. *Witmer* had affirmed that this was the right approach for courts to take. The General Counsel's list mapped a minefield of evidence on which draft boards could no longer rely in discerning the insincerity of alleged pacifists. "Insufficient" evidence, for example, now included facts such as willingness to work in a naval shipyard and former membership in the National Guard.⁸⁹

The other three draft-law cases decided by the Supreme Court on March 14, 1955, were as damaging as *Witmer*'s heightened scrutiny of Selective Service fact-finding, if not more so. In each case, the Court reversed a draft resister's conviction because of some procedural error on the part of the Selective Service System. Months before these reversals, the ACLU litigator J.B. Tietz had noted that most draft resisters' victories in the courts were won

⁸⁵ T. Oscar Smith & Derrick A. Bell, *The Conscientious-Objector Program: A Search for Sincerity*, 19 PITT. L. REV. 697, 706 (1958).

⁸⁶ Robert Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 29 FORDHAM L. REV. 1, 1 (1959).

⁸⁷ *Id.* at 19.

⁸⁸ Letter from Wertz & Wixcey to Col. Frank (Mar. 23, 1955), NARA, RG 147, Central Files 1948-1963, Box 96.

⁸⁹ *Id.*

through procedural rather than evidentiary challenges to Selective Service decisionmaking, and that the “increase in number of cases recognizing such” procedural challenges was “startling.”⁹⁰ On March 14, the Supreme Court gave its blessing to this “startling” development.

B. *Simmons v. United States: Heightened Judicial Scrutiny of Justice Department Procedures*

In *Simmons v. United States*, six Justices joined Justice Clark in confirming and extending the Court’s 1953 decision in *United States v. Nugent*.⁹¹ In that case, the Court had required that the Justice Department give conscientious-objector claimants a “fair resume” of the reports that the FBI compiled on them.⁹² The *Nugent* Court based this conclusion on a strong interpretation of the 1951 draft law’s “hearing” provision: “The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith [of each conscientious objector claimant].”⁹³ By “hearing,” the *Nugent* Court argued, Congress had surely meant a *fair* hearing—one in which the registrant could confront and rebut any evidence undermining his “character and good faith.”⁹⁴ Such a fair hearing would only be possible if the registrant was given a “fair resume” of his FBI report. The *Nugent* Court, however, did not make clear what kind of “fair resume” was necessary to render the hearing “fair.” So between 1953 and 1955, federal judges were left to their own devices. They often demanded to see the entire FBI report to determine whether a registrant had, in fact, received a “fair resume” of its contents. Because these reports were considered top secret, Justice Department lawyers usually refused to turn them over, preferring to drop a shaky prosecution rather than sacrifice the autonomy of their FBI investigators.

Two years after *Nugent*, the *Simmons* Court added meat to the bones of the fair-resume requirement. Invalidating the conviction of a Jehovah’s Witness who had received only an oral description of the contents of his FBI report, Justice Clark held: “A fair resume is one which will permit the registrant to defend against the adverse evidence—to explain it, rebut it, or otherwise detract from its damaging force.”⁹⁵ At *Simmons*’s hearing, by contrast, “[t]he [oral] remarks of the hearing officer at most amounted to vague hints [about the contents of the FBI report], and these apparently

⁹⁰ J.B. Tietz, *Jehovah’s Witnesses: Conscientious Objectors*, 28 S. CAL. L. REV. 123, 133 (1955).

⁹¹ *United States v. Nugent*, 346 U.S. 1 (1953).

⁹² *Id.* at 6.

⁹³ *Id.* at 3.

⁹⁴ *Id.* at 5-10.

⁹⁵ *Simmons*, 348 U.S. at 405.

failed to alert [the registrant] to the dangers ahead.”⁹⁶ So the hearing lacked “basic fairness.”⁹⁷

As in *Nugent*, the Supreme Court insisted that no constitutional issues were at stake—only Congress’s (imputed) intent to provide a “fair” Justice Department hearing. Yet both *Simmons* and *Nugent* exemplified the tendency of the Cold War Court to read statutes as requiring heightened procedural protections for administered parties. Without actual statutory language articulating these protections, their most obvious source was the Fifth Amendment’s right to procedural due process.

Yet it was far from clear that even the Fifth Amendment would require a registrant to have an opportunity to confront all adverse evidence at his Justice Department hearing. The outcome of this hearing was merely advisory, as it was the Selective Service appeal board—not the Justice Department—that made the final decision about a registrant’s request for conscientious-objector classification. And unless the appeal board’s denial of this request was unanimous, the registrant could appeal the denial to the Presidential Appeal Board.⁹⁸ Finally, even after a final classification decision was reached, the registrant had the right to ask his local draft board to re-open his case to consider new evidence.⁹⁹

Given these many administrative checks on the validity of the final classification, as well as the advisory nature of the Justice Department’s recommendation, government lawyers argued that the vague summary of Simmons’s FBI report was at worst a “harmless error,” not a constitutional violation. They bolstered this argument with a citation to *Market Street Railway*, a unanimous 1945 decision in which Justice Robert Jackson wrote that the constitutional norm of procedural due process “is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties.”¹⁰⁰

In response to the government’s invocation of *Market Street Railway*, Justice Clark first sought to sidestep the issue, insisting again that the question was not what procedures the Fifth Amendment of the Constitution might impose, but the intentions of Congress—as interpreted by the Court—in requiring a Justice Department “hearing.”¹⁰¹ This argument, however, was undermined by Justice Clark’s second response to the government: *Market Street Railway* and *Simmons*, he reasoned, were distinguished by the fact that

⁹⁶ *Id.* at 397.

⁹⁷ *Id.* at 405.

⁹⁸ *Id.* at 399-403.

⁹⁹ See 32 C.F.R. §§ 1606.32(a)(1), 1606.38(c), 1625.1(a), 1625.2 (2018).

¹⁰⁰ *Market St. Ry. Co. v. R.R. Comm’n of California*, 324 U.S. 548, 562 (1945).

¹⁰¹ *Simmons*, 348 U.S. at 405. Cf. Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1055-1057 (1984) (describing the Cold War Court’s use of aggressive statutory interpretation in lieu of procedural due process analysis in the loyalty-security context).

the first involved the regulation of public-utility companies, while the second involved the conscription of individual citizens, potentially in violation of their deeply held beliefs.¹⁰² This distinction itself, however, implied a constitutional argument: because draft administration threatened rights to bodily security and freedom of belief, rights that were of more constitutional significance than those at play in the economic regulation of utility companies, more process was due.

Whatever the soundness—or basis—of the *Simmons* Court’s reasoning, Justice Department hearing officers would now have to detail all adverse evidence in a registrant’s FBI report. And they would have to do so even if the Selective Service System did not base its final classification decision on that evidence. Otherwise, the procedural error would result in invalidation of the classification and the government’s inability to draft the registrant or to prosecute him for draft evasion.

C. *Gonzales v. United States: Heightened Judicial Scrutiny of Selective Service Procedures*

The third case decided on March 14, *Gonzales v. United States*,¹⁰³ furnished draft resisters with yet another procedural right. A month after registering for the draft, Jose Valdez Gonzales had become a Jehovah’s Witness “minister.”¹⁰⁴ Realizing the weakness of his ministerial claim, however, Gonzales requested a conscientious-objector classification instead. Selective Service denied this request, and the Justice Department then prosecuted Gonzales when he refused to submit to induction.¹⁰⁵ Lacking any better arguments, Gonzales’s lawyer Hayden Covington introduced a novel defense: because Gonzales had not been given a copy of the Justice Department’s advisory opinion on his conscientious-objector claim or an opportunity to file a reply to it, the Selective Service System’s eventual denial of his claim was invalid.¹⁰⁶ This was so, Covington contended, even though Gonzales had never requested the advisory opinion or a chance to rebut it.

Justice Clark and five other Justices agreed with Covington. Although the Universal Military Training and Service Act required no such procedures, these Justices found them to be “implicit” in the draft law’s “hearing” provision, once that provision was “viewed against our underlying concepts of procedural regularity and basic fair play.”¹⁰⁷ Again, it seemed as though the

¹⁰² *Id.* at 405-406.

¹⁰³ 348 U.S. 407 (1955).

¹⁰⁴ *Id.* at 409.

¹⁰⁵ *Id.* at 410-11.

¹⁰⁶ *Id.* at 411.

¹⁰⁷ *Id.* at 412.

Justices were re-writing the draft law to accord with their understanding of the Fifth Amendment's right to procedural due process.

Notably, in *Simmons*, Justice Clark had dismissed the relevance of a 1945 public-utilities decision that set limits on a party's Fifth Amendment right to procedural due process. Yet in *Gonzales*, he himself cited three such Fifth Amendment precedents involving public utilities regulation to explain the "underlying concepts of procedural regularity and basic fair play."¹⁰⁸ The most recent was nearly twenty-years old; the two others predated the New Deal. These precedents, Justice Clark argued, stood for the proposition that "if the registrant is to present his case effectively to the [Selective Service] Appeal Board, he must be cognizant of all the facts before the Board as well as the over-all position of the Department of Justice."¹⁰⁹

As so often happened in the 1940s and 1950s, the Supreme Court was resurrecting old constitutional limitations on economic regulation to constrain national-security regulation that might otherwise threaten an individual's civil liberties. This resurrection was odd in that the *Gonzales* majority insisted that its decision simply reflected the will of Congress, rather than the Justices' own views of what the Constitution required.

In dissent, Justices Reed and Burton marveled at Justice Clark's acrobatics. Insisting that *Gonzales*'s classification process had violated no "express or implied" statutory requirements or administrative regulations, Justices Reed and Burton suggested that the majority's decision could only be understood as imposing on the draft apparatus constitutional norms that had fallen into disrepute decades earlier.¹¹⁰ Justice Sherman Minton—the sole dissenter in all four March 14th decisions—went further, describing the Court's rapid slide from strict deference to invasive supervision of the Selective Service System as legally inexplicable.¹¹¹ Minton recognized that nine years earlier, the *Estep* Court had broken with tradition in holding that registrants could challenge their draft classifications in federal court without first submitting to induction. But the *Estep* majority had justified this decision on the ground that the scope of judicial review would be extremely narrow and deferential. As Minton emphasized, *Estep* directed judges to invalidate Selective Service decisions *only if* the System had acted beyond its jurisdiction—that is, if draft administrators had made a decision with no factual support or in clear violation of the draft law.

Nine years later, however, the Supreme Court held that the Justice Department's failure to give *Gonzales* a copy of its advisory opinion about

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 415.

¹¹¹ *Id.*

his conscientious-objector claim rendered his final classification invalid. This was so even though no law or regulation “require[d] the Department of Justice to send [the registrant] a copy of its advisory report,” and even though the Department’s advisory opinion had no binding effect on the Select Service System’s eventual classification of Gonzales.¹¹² Given these facts, it was hard to see how the Selective Service appeal board had “los[t] its jurisdiction or act[ed] beyond it” in denying Gonzales a conscientious-objector classification.¹¹³ Nor was the Supreme Court’s imposition of its own views of optimal administrative procedure a minor inconvenience. *Gonzales* forced the Selective Service System to reopen all cases in which a draft appeal board had denied a conscientious-objector claim without allowing the registrant to read and respond to the Justice Department’s advisory opinion.¹¹⁴

D. *Sicurella v. United States: Heightened Judicial Scrutiny of
Administrative Statutory Interpretation*

The Court’s final March 14th decision, *Sicurella v. United States*,¹¹⁵ exemplified Minton’s legal and ideological disagreement with the majority’s approach in draft-law cases. Anthony Sicurella was a Jehovah’s Witness who claimed entitlement to a CO classification even though he was willing to fight to defend “Kingdom Interests, our preaching work, our meetings, our fellow brethren and sisters and our property against attack.”¹¹⁶ Because of Sicurella’s belief in the righteousness of certain forms of combat, the Justice Department concluded that Sicurella had “failed to establish that he is opposed to war in any form,” the statutory requirement for CO classification.¹¹⁷ Accordingly, Sicurella was not “entitled to exemption within the meaning of the Act.”¹¹⁸ Seven Justices disagreed with the Justice Department’s legal reasoning and concluded that this legal error invalidated the draft appeal board’s decision.¹¹⁹

The majority reached its conclusion even though there was no evidence that the draft board had denied Sicurella’s claim based on the Justice Department’s legal reasoning. And as the Solicitor General argued, even if Sicurella’s willingness to fight to defend “Kingdom Interests” did not *automatically* disqualify him from a CO classification, the draft board could have reasonably interpreted Sicurella’s views on justified violence as casting

¹¹² *Id.* at 417 (Reed, J., dissenting).

¹¹³ *Id.* at 418 (Minton, J., dissenting).

¹¹⁴ See Letter from Col. Ingold to Willoughby, AFSC (Apr. 1, 1955), NARA, RG 147, Central Files 1948-1963, Box 96 (announcing the decision to reopen all such cases).

¹¹⁵ 348 U.S. 385 (1955).

¹¹⁶ *Id.* at 387.

¹¹⁷ *Id.* at 388.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 392.

doubt on the sincerity of his claim to object to “war in any form.”¹²⁰ But the *Sicurella* majority rejected this argument too, concluding as a matter of law that willingness to fight in what it described as “theocratic war” provided *no* basis for denying a CO classification.¹²¹ In doing so, the majority chose to interpret Sicurella’s testimony as evincing only a commitment to engage in “spiritual” combat. This interpretation contradicted Sicurella’s own testimony that he would fight to defend the perfectly material property interests of the Jehovah’s Witnesses.

Dissenting, Justice Minton bridled at the high-handedness of the majority’s pronouncements. He accused his fellow Justices of arrogating to themselves the lawful authority possessed by draft administrators to determine the most efficient and fair management of military manpower: “It is not our province to substitute our judgment of the facts for that of the Board or to correct the Board’s errors of law unless they are so wanton, arbitrary and capricious as to destroy the jurisdiction of the Board.”¹²² Minton again emphasized that while the *Estep* Court had exposed Selective Service decisions to limited judicial review, it had also insisted that judges should only overturn decisions that were truly beyond the jurisdiction of the Selective Service System—decisions with no basis in fact or statutory support.¹²³ So long as draft administrators stayed within these minimal jurisdictional bounds, *Estep* had called on judges to uphold Selective Service decisions, “even though they may be erroneous.”¹²⁴ In *Sicurella*, however, seven Justices invalidated a classification decision precisely because they believed it to be “erroneous,” not because they found “that the Board acted capriciously and arbitrarily or that the judgment of the Board was not an allowable judgment of reasonable men.”¹²⁵ The *Sicurella* majority simply believed that its legal and factual conclusions were superior to those of the draft board. The majority’s conclusions might well be sound, Minton allowed, but courts lacked the authority and the competence to impose their notion of sound draft policy on the Selective Service System.

Minton’s March 14 dissents focused on the negative impact that the majority’s reasoning would have on the legal and practical integrity of conscription. But they also bore traces of a more general anxiety about the fate of the administrative state that Minton had worked to build as an Indiana public-utilities administrator and a fiercely pro-New-Deal Senator during the 1930s. Back then, Minton had parried constitutional attacks on New Deal

¹²⁰ *Id.* at 390.

¹²¹ *Id.*

¹²² *Id.* at 393.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 394.

administration by arguing that the Constitution was “the people’s creation, designed and intended to bring the greatest good to the greatest number.”¹²⁶ When people were suffering, it was thus an oxymoron to say that the Constitution barred the government from coming to their aid. “You can’t frighten people by talking to them about their loss of liberty as if liberty was something apart from human happiness,” Minton argued during his 1934 Senate campaign. “You can’t frighten people today about the loss of their constitutional rights when they are struggling to live.”¹²⁷

By the mid-1950s, however, Minton’s view of the Constitution as a popular charter that not only authorized but required political institutions to advance the interests of all those Americans “struggling to live” had fallen out of favor. His 1955 draft-law dissents took aim at the increasingly dominant alternative view, one that treated the Constitution as a judicially enforced charter of substantive rights and procedural rules that protected individuals from undue government coercion. While most judges serving in the federal courts in the mid-1950s were, like Minton, Democratic appointees, they had gradually abandoned their New Deal trust in an autonomous administrative state—especially when it came to administrative decisions that risked encroaching on civil liberties.¹²⁸

IV. ALTERNATIVES TO ADMINISTRATIVE AUTONOMY: THE SELECTIVE SERVICE SYSTEM AND THE DEFERMENT LOBBY

This change in the judicial mood only became more apparent in the weeks following the Supreme Court’s March 14, 1955 draft-law decisions. On March 21, Selective Service headquarters began to receive news of draft-law violators who could no longer be “successfully prosecuted” because of newly recognized procedural “defects.”¹²⁹ Two days later, draft administrators reported a slew of judicial decisions holding that a registrant’s suspiciously recent conversion to pacifism was not a proper basis for denying his conscientious-objector claim.¹³⁰ Then, on March 28, the Supreme Court itself reentered the fray. Its unsigned opinion in *Bates v. United States* reversed the National Appeal

¹²⁶ LINDA C. GUGIN & JAMES E. ST. CLAIR, *SHERMAN MINTON: NEW DEAL SENATOR, COLD WAR JUSTICE* 77 (1997).

¹²⁷ *Id.*

¹²⁸ The partial exception was civil liberties cases involving dissenters sympathetic to communism. *See, e.g.,* *Harmon v. Brucker*, 355 U.S. 579, 583 (1958) (Clark, J., dissenting) (demonstrating a willingness to defer to administrative punishment of army reservists where there was evidence of their past communist sympathies).

¹²⁹ Wertz, Memorandum for the File (Mar. 21, 1955), NARA, RG 147, Central Files 1948–1963, Box 96.

¹³⁰ Letter from Wertz & Wixcey to Col. Franck, 2-3 (Mar. 23, 1955), NARA, RG 147, Central Files 1948–1963, Box 96.

Board's denial of a conscientious-objector claim despite ample evidence of insincerity in the registrant's file.¹³¹

Without acknowledging the novelty of its reasoning, the *Bates* Court explained that the National Appeal Board had committed a procedural error when it denied Bates's claim without first forwarding his file to the Justice Department for an advisory opinion. As evidence of the need for this procedure, the Court simply cited the draft-law provision that entitled a registrant to a Justice Department hearing if his local draft board denied his initial conscientious-objector claim.¹³² That provision, however, was not applicable to Bates's case. Bates's local board had in fact granted his initial conscientious-objector claim.¹³³ It was only when Bates refused to comply with the work requirements for conscientious objectors and requested instead a ministerial exemption on dubious factual grounds, that the Presidential Appeal Board concluded that Bates's initial conscientious-objector classification was unwarranted.¹³⁴ The lower courts had found this conclusion to be reasonable given Bates's evasive actions.¹³⁵

The *Bates* decision implied that any time the Selective Service System intended to deny or rescind a conscientious-objector classification—whether at the local draft-board stage or after several requests for alternative classification—the matter had to be referred to the Justice Department before a final administrative decision could be made. Not only would this new requirement slow down the draft classification process, but it was also an utter invention of the Supreme Court, nowhere to be found in the draft law and imposed without explanation. Indeed, it was unclear what the Justice Department was supposed to do after receiving such a case from the National Appeal Board.

The statutory provision cited by the Supreme Court instructed the Department to send its advisory opinion to the registrant's state appeal board. But in *Bates*, the state appeal board had already ruled on the case—denying Bates's ministerial request and affirming his CO request. Was the Justice Department instead expected to send its advisory opinion back to the National Appeal Board? Presumably. But the Supreme Court did not say so. Nor did it say that such a procedure was required by the Constitution. It simply cited a provision of the draft law that did not apply to the case at hand.

At Selective Service headquarters, the *Bates* decision was met with a beleaguered shrug. As two lawyers in the General Counsel's Office reported:

¹³¹ 348 U.S. 966 (1955).

¹³² *Id.*

¹³³ *Bates v. United States*, 216 F.2d 130, 133 (8th Cir. 1954), *rev'd*, 348 U.S. 966 (1955).

¹³⁴ *Id.* at 134.

¹³⁵ *Id.* at 134-135.

“Today the Supreme Court . . . [has] seemed to add one more right to conscientious objectors by holding that [the draft law] requires that where a conscientious objector claim has been denied by the National Appeal Board without [the registrant’s] selective service file having been referred to the Department of Justice for inquiry, hearing and recommendation, the registrant has been denied procedural due process.”¹³⁶ The Court had not explicitly used the language of “procedural due process,” or referred to any other constitutional norm. But, by this time, Selective Service lawyers felt that nothing else could explain the Court’s increasingly outlandish interpretations of the draft law. The Court was not only going out of its way to find procedural errors in the classification process, but it was also writing new procedural requirements into the draft law. Accordingly, the General Counsel’s Office placed its report on *Bates* in an ever-growing file of “Judicial Decisions Suggesting Legislative Correction.”¹³⁷

According to a group of federal judges, such “legislative correction” would be essential if the Selective Service System wanted to slow the courts’ encroachment on the draft apparatus. In mid-April, Daniel Omer, the General Counsel of Selective Service, had asked twelve judges with some of the largest draft-law caseloads in the country to give him a sense of how far lower courts might extend the Supreme Court’s recent decisions. The short answer was “very far.”¹³⁸ For example, eleven of the twelve judges felt that even though the *Simmons* decision did not require the Justice Department to hand over full FBI reports to every would-be conscientious objector, that is what should be done going forward.¹³⁹ These judges believed that withholding the reports was “fundamentally wrong.”¹⁴⁰ Several judges also suggested that a “Government Appeal Agent” be present at every local draft-board meeting to ensure that all of a registrant’s rights were protected.¹⁴¹ Most significantly, a majority of the judges told Omer that if Congress did not take affirmative steps to reject the Supreme Court’s recent interpretations of the draft law, the Selective Service System should “expect all Federal courts to tend toward leniency in the [law’s] enforcement.”¹⁴²

Six weeks before the March 14 Supreme Court decisions, Selective Service Director Hershey and General Counsel Omer had in fact prepared a

¹³⁶ Letter from Wixcey & Wertz to Col. Fran (Mar. 28, 1955), NARA, RG 147, Central Files 1948-1963, Box 96.

¹³⁷ *Id.*

¹³⁸ Letter from Col. Omer to Gen. Hershey (Apr. 22, 1955), NARA, RG 147, Central Files 1948-1963, Box 96.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

memorandum of proposed amendments to the Universal Military Training and Service Act, which was coming up for renewal in June 1955.¹⁴³ Perhaps the two most radical amendments sought to restore an earlier era of judicial deference to Selective Service decisionmaking. The first would reverse the trend of increasing judicial scrutiny of the merits of individual draft classifications: “The decisions of selective service boards should be made final and not subject to judicial review except as to procedural errors involving a denial of due process.”¹⁴⁴ The second would limit the judicial venues in which registrants could challenge their classifications: “The law should conform to early decisions of the Supreme Court under which selective service classifications are reviewed only in habeas corpus proceedings in which the Government may appeal from an adverse decision.”¹⁴⁵

The next group of amendments aimed to empower draft administrators to police the many claims that could qualify someone as a conscientious objector or minister. These amendments responded to recent successes scored by Jehovah’s Witnesses and other unorthodox draft resisters in the courts. First, Omer and Hershey recommended that “[i]n considering claims of conscientious objection, the law should specifically permit selective service boards, in determining registrant’s sincerity, to consider his belief in theocratic warfare, his willingness to kill in self-defense, his humility, and the time when he was converted.”¹⁴⁶ These sorts of beliefs were traditional red flags of an insincere or fair-weather pacifist. Second, in an effort to prevent young men from entering and leaving the ministry when convenient, “[t]he classification of a minister and of a ministerial student should constitute a deferment rather than an exemption so as to extend liability.”¹⁴⁷ Third, “[t]he definition of a minister should exclude ministerial effort in the publication and sale of religious literature,” the sorts of activities in which nearly all practicing Jehovah’s Witnesses were engaged.¹⁴⁸

Hershey and Omer also wanted to make draft resistance a riskier proposition. First, they proposed that convicted draft law violators serve a term of imprisonment “at least equal to the time the violator[s] would have spent in military service if [they] had complied with the law.”¹⁴⁹ This amendment responded to frequent reports of light sentences—sometimes just probation—handed down by judges in draft-law cases. Second, in

¹⁴³ Letter from Col. Omer to Gen. Renfrow at 1-2 (Jan. 31, 1955), NARA, RG 147, Central Files 1948-1963, Box 35.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

response to the tendency of conscientious objectors to buck their alternative-service obligations, Omer and Hershey proposed that “[a]ll penalties which apply to the evasion of military service should be made to apply to evasion of work in lieu of induction; as for example: loss of citizenship for leaving the country to avoid service.”¹⁵⁰

Finally, turning from the courts to problems within the executive branch, Hershey and Omer recommended that “[t]he Director of Selective Service should be given primary responsibility for the enforcement of the law.”¹⁵¹ This proposal was a desperate response to growing mistrust between the Selective Service System and the Justice Department. The Department’s reluctance to prosecute draft-law violators, its willingness to question draft boards’ conclusions, and its resistance to Selective Service influence on litigation strategy were all on the rise.

Hershey and Omer first circulated their list of statutory fixes on January 31, 1955. The next day, however, they received a copy of the Second Hoover Commission’s proposed Administrative Code. At once, their focus shifted from rolling back the courts to keeping Congress at bay. Six weeks later, they were forced to change directions again to triage the impact of the Supreme Court’s mid-March decisions on lower courts, local draft boards, and the Justice Department. In May 1955, even as the threat from the Second Hoover Commission subsided, the Selective Service System was bleeding badly from court-inflicted wounds. The number of draft-law amendments that Congress would need to pass to repair the damage had ballooned since the end of January. Worse still, the legislative will necessary to pass such a raft of amendments was missing.

While Congress had balked at the Second Hoover Commission’s radical proposals for more judicial control of the administrative state, the autonomy of draft administrators was anything but a legislative priority. To the contrary, congressional hearings on the extension of the draft law in June 1955 focused on Director Hershey’s continuing refusal to establish regulations deferring students and scientists en masse. Such regulations would deprive local draft-board administrators of all discretion in determining whether a given registrant’s professional expertise or course of study truly merited a deferment in the interests of national security. Frustrated with Hershey’s intransigence on this score, lobbyists from the education, pharmaceutical, and defense industries, along with their supporters in Congress, pushed for a “special national committee” of twelve outside experts who would have the authority to veto Selective Service deferment policies.¹⁵²

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² GEORGE Q. FLYNN, LEWIS B. HERSHEY: MR. SELECTIVE SERVICE 208 (1985).

To help fend off such a sharp political blow to their agency's autonomy, Hershey and Omer had included in the January memorandum two proposals designed to conciliate the "deferment lobby." These proposed amendments extended the "II-S" student deferment to both high school and college students and expanded the number of years during which men would be eligible for such a deferment.¹⁵³ Neither of these amendments advanced Hershey and Omer's primary goal: preventing lawyers and judges from dictating Selective Service policy in the name of civil liberty. In fact, the deferment amendments would shift draft policy in a more "civil libertarian" direction, entitling draft-aged men to deferments throughout their high school and college careers, with a corresponding decrease in the pool of young Americans subject to compulsory military service. But at least the Selective Service System itself—rather than outside experts—would retain the authority to administer these changes. Hershey "considered it essential to preserve the draft system," even if it meant consigning his agency to a "purgatory of special registrants."¹⁵⁴ The reward for enduring such purgatory might even be political support for some of Hershey and Omer's more high-priority proposals, which aimed to roll back judicial supervision of the draft.

No such reward, however, was forthcoming. In the end, the student-deferment amendments were the only aspect of Hershey and Omer's memorandum that Congress actually adopted. These amendments appealed to influential constituencies: corporations, universities, middle-class families, and military intellectuals who believed the Cold War would be won by "brainpower" rather than manpower. But they were a devil's bargain, marking a major departure from the traditional goal of the Selective Service System: the relatively egalitarian induction of civilians into the armed forces. Selective Service had emerged in World War I as a tool for both mobilizing and uniting the population in an era of class and cultural conflict, and the World War II draft had largely honored this earlier experiment. By the early 1950s, however, many politicians, military modernizers, and private-sector lobbyists were ready to recast conscription as a tool for differentiating citizens in the interests of economic and scientific growth. A repurposed Selective Service System would channel less "talented" young men toward the frontlines when necessary, while encouraging the more "talented" to enter the ranks of a burgeoning white-collar, highly skilled middle class.¹⁵⁵

Director Hershey had resisted this vision of a "meritocratic" draft much longer than most. In 1953, when a "campaign of professional organizations"

¹⁵³ Letter from Wertz & Wixcey to Col. Frank (Mar. 23, 1955), NARA, RG 147, Central Files 1948-1963, Box 96.

¹⁵⁴ FLYNN, *supra* note 152, at 204-07.

¹⁵⁵ FLYNN, *supra* note 24, at 133, 145-48; FRIEDBERG, *supra* note 13, at 183-86.

demanded “veto power over classification procedures” to shield the nation’s better-educated youth from military service, Hershey warned that “[y]ou can’t teach democracy and practice oligarchy of any intellectual sort.”¹⁵⁶ He pleaded with the American Association for the Advancement of Science “to avoid promoting the idea that any civilian activity should provide an exemption from military service.”¹⁵⁷ And he bitterly joked that it was becoming “almost an act of treason to even think of taking” an engineering student out of school, “whether he makes grades or not.”¹⁵⁸ But in 1955, the tide turned for good.

The student-deferment amendments that Selective Service officials proposed as something of a sweetener in January 1955 had become the main course by June. That month, “[t]o the surprise of many,” Hershey opened his congressional testimony on the draft renewal bill by lauding “the value of the deferment system.”¹⁵⁹ He not only championed the student deferment amendments but “began speaking in a positive vein of how the Selective Service had a new major task—that of channeling young men into nationally needed careers.”¹⁶⁰ Behind closed doors, Hershey admitted that he still “had many reservations” about using the draft apparatus to benefit young would-be professionals and their private-sector employers; this kind of government benefit was “highly flavored with escapism,” and risked eroding the integrity and legitimacy of conscription.¹⁶¹ But at least in public, Hershey now celebrated the very aspect of Selective Service—channeling men away from the military—that two years earlier he had bemoaned as “a very foul thing.”¹⁶²

Given the precarious state of the Selective Service System’s legal, political, and military reputation, Hershey could no longer afford to disparage the one aspect of conscription celebrated by both civilian elites and military strategists: its capacity to steer young, well-qualified men toward careers in science, technology, and the study of strategically significant languages and cultures. The agency’s 1957 annual report described the Selective Service System as “a storekeeper of manpower,” and emphasized that the System’s function was “not only to procure manpower for the armed forces, but also to defer them to train for and perform important tasks in civilian life.”¹⁶³ The 1958 annual report went a step further, openly embracing the language of “channeling” to describe the agency’s use of deferments to shape the civilian

¹⁵⁶ FLYNN, *supra* note 152, at 202.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 203.

¹⁵⁹ *Id.* at 208.

¹⁶⁰ *Id.* at 209.

¹⁶¹ *Id.*

¹⁶² *Id.* at 204.

¹⁶³ JAMES M. GERHARDT, *THE DRAFT AND PUBLIC POLICY* 235 (1971).

economy.¹⁶⁴ In September of that year, Director Hershey argued that the draft should be renewed because the Selective Service System was “the only agency now in existence having and exercising authority which induces individuals to train for, enter upon and remain in activities essential to the national economy.”¹⁶⁵

Congress generally approved of the agency’s new focus on boosting entrance of qualified young men into particular civilian professions, rather than the military. One exception was Senator Strom Thurmond, whose main constituency was poor white Southerners, unlikely to benefit from the metastasizing network of deferments. In June 1957, he wrote to Selective Service headquarters to complain about the injustice of this state of affairs.¹⁶⁶ How could draft administrators force some young men to fight for a pittance, Thurmond asked, while encouraging far more to pursue safe, lucrative careers?¹⁶⁷ In reply, Director Hershey first suggested that he was simply applying the law as written. The Universal Military Training and Service Act directed his agency “to provide . . . for the ‘maximum effort in the fields of scientific research and development, and the fullest possible utilization of the Nation’s technological, scientific and other critical manpower resources.’”¹⁶⁸

This language, however, had been on the books since 1948.¹⁶⁹ Only recently had Hershey reconciled himself to implementing the law in such a way as to channel as many men as possible away from boot camp and toward university labs and corporate offices. Traces of this earlier reluctance laced Hershey’s effort to justify “channeling” to Senator Thurmond. “It is not inconsistent with fairness and justice,” the Director somewhat haltingly argued, “that, in the interest of technological and scientific progress and the maintenance of the national economy, some men may temporarily be deferred from performing their obligation to the Nation in the armed forces.”¹⁷⁰ The noble principle of “[u]niversality of service,” it turned out, was open to several interpretations; “practically” speaking, the principle could certainly not mean that “ten out of ten [men] will serve on active duty.”¹⁷¹

Hershey’s letter to Senator Thurmond was one of the “ever more tortured formulations” that government officials used to justify a coercive apparatus whose legitimacy depended on two conflicting demands: that everyone be

¹⁶⁴ *Id.*

¹⁶⁵ Sept. 16, 1958 Memorandum, NARA, RG 147, Central Files 1948–1963, Box 36.

¹⁶⁶ Letter from Senator Strom Thurmond to Lewis B. Hershey (June 1957), NARA, RG 147, Central Files 1948–1963, Box 36.

¹⁶⁷ *Id.*

¹⁶⁸ Letter from Lewis B. Hershey to Senator Strom Thurmond, 1-2 (July 5, 1957), NARA, RG 147, Central Files 1948–1963, Box 36.

¹⁶⁹ FLYNN, *supra* note 152, at 194–95.

¹⁷⁰ Hershey to Thurmond, *supra* note 168, at 11–12.

¹⁷¹ *Id.* at 12.

equally coerced and that no one be coerced at all.¹⁷² The language of “fairness,” often invoked in debates about the draft and the administrative state more generally, tended to paper over this tension between the egalitarian and the libertarian critiques of bureaucracy. Hershey could not take a more egalitarian position on educational and professional deferments because his agency had been battered by libertarian criticisms for so long. Letting students off the hook was one way to alleviate concerns about the threat the draft posed to individual liberty.

As early as the Korean War, polling had suggested that the provision of student deferments would be critical to regulating a restive population. Between 1952 and 1953, eighty-three percent of male college students reported a “negative attitude toward [military] service,” and sixty-two percent of college students either “had reservations” about or “were strongly opposed to the war.”¹⁷³ In this ideological climate, the strictly military case for student deferments—that they ensured a supply of scientific Cold Warriors—was overdetermined by political dissatisfaction with the draft. “By satisfying the demands for preferential treatment of various groups,” one political scientist notes, “the Selective Service System was able to insulate itself from organized and politically effective protest.”¹⁷⁴

Such “insulation,” however, was more of a rearguard action than a preemptive strike. The leaner budgets and private-sector protectionism that came to characterize Selective Service by the late 1950s did mollify some powerful socio-economic factions. Yet, as in other administrative contexts, cost cutting and cooperation with the private sector would never satisfy the strong critics of public manpower management. They believed that only the submission of the draft apparatus to court-like procedures and extensive judicial oversight could preserve individual liberty in a bureaucratic age. These arguments had shrunk the coercive power of the Selective Service System by mid-1957, smoothing the way for draft administrators’ acceptance of a new, more passive role as guardians of the elite, well-educated Cold Warrior.

Historians of the draft have generally attributed Selective Service Director Hershey’s about-face to “political reality.”¹⁷⁵ As George Flynn writes, Hershey was “a realist” who “trimm[ed] his sails” to “accommodate[] the drive for deferments.”¹⁷⁶ Yet the “drive for deferments” was not significantly stronger in the late spring of 1955, when Hershey identified channeling and volunteering as the two main functions of the Selective

¹⁷² FRIEDBERG, *supra* note 13, at 184.

¹⁷³ FLYNN, *supra* note 24, at 144.

¹⁷⁴ FRIEDBERG, *supra* note 13, at 183.

¹⁷⁵ FLYNN, *supra* note 152, at 207.

¹⁷⁶ *Id.* at 208, 213.

Service System, than it had been six months earlier. At that time, Hershey and his General Counsel, Daniel Omer, had proposed a set of amendments relatively light on deferments and long on streamlined induction procedures and stiff penalties for draft resistance. What had changed between January and June was not simply the “political reality” but also the legal landscape—specifically, the March 1955 Supreme Court decisions.

The disposition of these Selective Service cases, the Justice Department’s lackluster performance in arguing them, and the lower courts’ zeal in implementing them all indicated that legal elites had lost faith in the Selective Service System’s traditional functions: the efficient and egalitarian induction of civilians into the armed forces; and the adjudication of individual requests for deferment or exemption. Sustained legal resistance to the draft did not simply represent one threat among many to Hershey’s vision of Selective Service. It also transformed the threat posed by the “deferment lobby” into an opportunity. If the courts were going to keep increasing the costs—in terms of time, resources, and legitimacy—of inducting draft registrants and adjudicating their classification requests, then it might be better, after all, for Selective Service to downsize its induction and adjudication business. The deferment lobby’s call for the Selective Service System to focus on channeling rather than conscription offered the agency a new purpose that could both minimize conflict with the courts and cultivate powerful constituencies elsewhere in the government and civil society.

CONCLUSION

If streamlined administrative adjudication of claims to deferment or exemption from compulsory public service offended the civil libertarian conscience of the 1950s, this was in large part because the civil-libertarian conscience of the 1950s was inextricably bound up with the cause of administrative-law reform. In the eyes of an increasingly bipartisan coalition of reformers, manpower administration on the Selective Service model lacked the procedural protections that supposedly distinguished Anglo-Saxon fairness from communistic fiat. Unelected bureaucrats committed first and foremost to the success of a particular regulatory agenda could not be trusted to preserve the rule of law, let alone the civil liberty of any particular individual.

So federal courts in the mid-1950s radically curtailed the autonomy of the Selective Service System, interpreting the draft law in such a way as to permit more, and more searching, judicial review. Judges also used creative statutory and regulatory interpretation to limit draft administrators’ discretion, requiring them to follow a complex set of procedures and to establish a robust evidentiary record if they wanted their decisions about draft registrants’ eligibility for military service to withstand judicial scrutiny.

This judicial assault on Selective Service autonomy and discretion was a leading indicator of the federal courts' more general turn against New Deal-style administration during the Eisenhower presidency. In an era defined by anti-communism at home and abroad, judges were inclined to view the administrative adjudication of individual rights (whether constitutional *or* statutory in form) as procedurally flawed, substantively indifferent to constitutionally protected civil liberties, and overly driven by the interests of particular agencies and their private sector supporters, rather than the overarching public interest.¹⁷⁷

That the Selective Service System fell victim to this legal transformation more quickly and definitively than many other agencies is both understandable and ironic. Understandable because the peacetime draft represented a particularly extreme example of the threat that administrative decisionmaking could pose to personal liberty. Ironic because most Selective Service leaders in the late 1940s and early 1950s remained unusually committed to the old progressive conception of the "public interest," working to harmonize as best they could the competing demands of military necessity, equality of sacrifice, and cultural pluralism.¹⁷⁸ These leaders also fiercely resisted the capture of the draft apparatus by private-sector interests seeking special treatment for certain groups of draft registrants. It was only the judiciary's singling out of the Selective Service System as a particularly bad actor when it came to procedural fairness and civil liberty that made capitulation to private-sector interests so attractive to draft administrators.

A similar transformation had occurred at other agencies, such as the Federal Communications Commission.¹⁷⁹ But conscription's more totalizing effects on civilian society elicited intense resistance from both the judiciary and the private sector. The result was a wholesale reconstruction—from-within of the Selective Service System's core functions. Draft administrators re-branded themselves as channelers of "brainpower" into private sector professions rather than coercers of "manpower" into public sector service.

By the end of the 1950s, the primacy of channeling, and the deferment system that underwrote it, made the Selective Service System relatively

¹⁷⁷ For the law and ideology of "public interest" critiques of the administrative state, see generally William J. Novak, *Putting the "Public" in Public Administration: The Rise of the Public Utility Idea*, in *ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW* 373 (Nicholas R. Parrillio ed., 2017).

¹⁷⁸ For this progressive conception and its relationship to conscription in particular, see generally Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 *COLUM. L. REV.* 1083 (2014).

¹⁷⁹ See generally BRINSON, *supra* note 2; VICTOR PICKARD, *AMERICA'S BATTLE FOR MEDIA DEMOCRACY: THE TRIUMPH OF CORPORATE LIBERTARIANISM AND THE FUTURE OF MEDIA REFORM* (2014).

popular but also, in Director Hershey's own words, troublingly "soft."¹⁸⁰ If the deferments ever went away, he warned, if draft calls ever rose again to the levels necessary to conduct a real shooting war, the System would lose its base of popular support just as it confronted a new salvo of litigation from draft registrants unwilling to serve.¹⁸¹ Such litigation would, in turn, renew the conflict between the Selective Service System and federal prosecutors and judges. By the mid-1950s, these two groups of legal elites had come to view draft administration as a regrettable departure from the values of civil liberty and the rule of law that distinguished the United States from its communist adversaries. A decade later, their verdict would be even harsher.

¹⁸⁰ FLYNN, *supra* note 152, at 206.

¹⁸¹ *Id.*