MEMORANDUM CONTAINING POINTS FOR, AND ARGUMENT SUPPORTING, MOTION FOR JUDGMENT OF ACQUITTAL WHERE DEFENDANT HAS BEEN ORDERED TO DO CIVILIAN WORK IN LIEU OF INDUCTION

To Attorneys Representing Jehovah's Witnesses:

Many prosecutions under the draft law now involve refusal to perform civilian work. This work is ordered to be done as an alternate service and is a substitute for induction into the armed forces. In each case the registrant has been finally classified in I-O. He has been ordered to perform civilian work, but has refused.

The file of each registrant should be searched and studied to determine whether any procedural rights have been denied. Has he been denied a hearing? Did the board comply with the personal appearance regulations? Has the board posted the name of advisers for the registrant?

It may be that the registrant is a full-time minister and the board has denied that exemption without basis in fact. Did the board refuse to reopen the classification if and when the defendant filed proof that he had changed from full-time secular work to the full-time ministry? This failure to reopen or to send the file to the appeal board, if any was requested, may be a complete basis for an acquittal.

Whatever grounds that are relied upon should be specified in a written or oral motion for judgment of acquittal. In addition to the grounds that might be found from a search of the file the following grounds and arguments are always present in each case of a person prosecuted for failure to perform the civilian work:

POINT ONE

THE ORDER OF THE LOCAL BOARD FOR DEFENDANT TO PERFORM CIVILIAN WORK AT THE STATE HOSPITAL AND SECTIONS 1660.1 AND 1660.20 OF THE SELECTIVE SERVICE REGULATIONS ARE IN CONFLICT WITH THE ACT, BECAUSE THE WORK IS NOT NATIONAL OR FEDERAL WORK AS REQUIRED BY THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT.

Section 1660.1 of the Selective Service Regulations reads as follows:

> "1660.1 *Definition of Appropriate Civilian Work.*—(a) The types of employment which may be considered under the provisions of section 6(j) of title I of the Universal Military Training and Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O shall be limited to the following:
>
> "(1) Employment by the United States Government, or by a State, Territory, or possession of the United States or by a political subdivision thereof, or by the District of Columbia.
>
> "(2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof.
>
> "(b) Except as provided in subparagraph (2) of paragraph (a) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O."

Section 456(j) of the Universal Military Training and Service Act (50 U. S. C. App. §456(j), 65 Stat. 83, approved June 19, 1951) provides:

> ". . . (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate. . . ."

The key word here is "national," as distinguished from state, city or county.

The word "national" has a very important and definite connotation in federal jurisprudence. A reading of the index to the United States Code Annotated shows page after page with references to laws relating to national organizations and laws. There are "national" parks as distinguished from "state" park, "national" banks as distinguished from "state" banks, "national" and "state" labor relations boards, "national" and "state" housing administrations. These all show that the word "national" has a distinctive federal meaning.—See *Words and Phrases*, Volume 28, at pages 21-25.

The word "national" is defined in Volume 65 of *Corpus Juris Secundum*, at pages 38-39. There it is stated that the word "national" is an adjective, which means "pertaining or relating to a nation as a whole; commonly applied in American law to institutions, laws or affairs of the United States or its government, as opposed to those of the several states."—65 C. J. S. 38-39.

Bouvier's Law Dictionary, Baldwin's Century Edition (Cleveland, Banks-Baldwin Law Publishing Company, 1940), defines "national" thus: "Belonging to, affecting, or pertaining to, a particular nation: as, national domicile, the national government. Often opposed to State, and nearly synonymous with Federal: as, in national bank (*q. v.*), or national banking association."

Webster's New International Dictionary, Second Edition (G. & C. Merriam Co., 1950), at page 1629, defines "national." It says: "Of or pertaining to a (or the) nation; common to a (or the) whole nation; . . . Of or pertaining to a politically united people or state (a nation in sense (4)) . . . as, national debt."

Under "Crimes," 18 U. S. C. A., Section 709, at page 75, it appears that the use of the word "national" is prohibited for all except the federal government. It is a crime to use the word "national"-as part of the business or firm name, etc., except as permitted by the laws of the United States. In the 1954 Pocket Parts of 18 U. S. C. A., Section 709, the section is extended to National Housing or Public Housing Administration. The punishment is $1,000.00 fine, imprisonment for not more than one year, or both. Violation may also be enjoined at suit of the United States Attorney.

The annotation shows that the First National Corporation of Boston, a Massachusetts corporation with brokerage powers, is not entitled, by reason of the inhibitions of former section 583 of Title 12, to use the word "national" in its title. (See 32 Op. Att'y Gen. 473 (1921).) *Byers* v. *United States*, C. A. Kansas 1949, 175 F. 2d 654, cert. denied 70 S. Ct. 183, 338 U. S. 887, 94 L. Ed. 545, holds that the courts will take judicial notice of the fact that a bank with the word "national" in its title is one organized pursuant to the laws of the United States.

The word "national" cannot be used as part of the name of any bank unless the bank is chartered under the laws of the United States and courts take judicial notice of such fact. —See *Wedding* v. *First National Bank*, 133 S. W. 2d 931, 280 Ky. 610 (1939); *First National Bank* v. *First State Bank*, Tex. Com. App. 1927, 291 S. W. 206.

In the case where a registrant is ordered to work for the state or a state hospital, this is not a national or federal institution. It is, on the contrary, a state institution and not "national" or "federal" work. The work does not pertain to the "national" interest or welfare. It relates exclusively to "local" or "state" welfare. The work's not being in the "national" interest consequently is not that which Congress intended or could constitutionally order to be performed by conscientious objectors.

A reasonable interpretation of the statute by the Court is due, indulging all reasonable doubts concerning the meaning of the act in favor of the rights of one indicted thereunder. (*Harrison* v. *Vose*, 50 U. S. 372, 378) It has been said that a sensible construction should be placed on an act so as to avoid oppression, absurd consequences or flagrant injustice. It will be presumed that Congress intended to avoid results of such a character. (*United States* v. *Kirby*, 7 Wall. 482, 486-487; *United States* v. *American Trucking Ass'n*, 310 U. S.

534) Where a statute is susceptible of two constructions "by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." (*United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408) The argument of the Government requires the court to place an unreasonable construction upon the act. Additionally it raises "a succession of constitutional doubts as to such interpretation."—*Harriman* v. *Interstate Commerce Comm'n*, 211 U. S. 407, 422.

If the statute is not interpreted in such a way as to afford the defendant the right to make this defense then grave doubts arise as to the constitutionality of the prescribed forced labor procedure. To avoid such consequences, the interpretation here suggested should be accepted.

The final order to perform the work at the state hospital and Sections 1660.1 and 1660.20 of the Selective Service Regulations, authorizing such order, are in conflict with the statute. They are, therefore, void. It is submitted that a motion for judgment of acquittal should be granted for this reason.

POINT TWO

THE ACT, AS CONSTRUED AND APPLIED BY THE REGULATIONS AND THE ORDER, CALLS FOR A PRIVATE NONFEDERAL LABOR DRAFT FOR THE PERFORMANCE OF SERVICES THAT ARE NOT EXCEPTIONAL OR RELATED TO THE NATIONAL DEFENSE, IN VIOLATION OF THE THIRTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The act, as construed and applied, calls for a labor draft for private or nonfederal purposes. This complaint is entirely outside the field of unlimited authority of Congress to raise and maintain an army or provide for alternative service of a civilian nature. The defendant agrees that an examination of the law on this subject will reveal that the Thirteenth Amendment is no ban on the performance of military service. It also does not prohibit alternate civilian work for the Government or work for a federal agency, as in taking over industry by the Government, or work under control of the federal system.

All of the cases where the subject of the performance of civilian work ordered to be done by draft boards has been determined by the courts are not in point here; such do not control here. The cases have been considered under the Thirteenth Amendment as related to work done for the National Director of Selective Service in civilian public service camps—federal agencies. Such camps were not private camps but were federal. (See *United States* v. *Brooks*, 54 F. Supp. 995 (S. D. N. Y.), affirmed *Brooks* v. *United States*, 147 F. 2d 134, cert. denied 324 U. S. 878; *Weightman* v. *United States*, 142 F. 2d 188 (1st Cir.); *Zucker* v. *Osborne*, 54 F. Supp. 984 (D. C. W. D. N. Y.); *Hopper* v. *United States*, 142 F. 2d 181 (9th Cir.).) None of these cases involved orders placing a conscientious objector in nonfederal employ or in the employ of private persons. It is seen that there exists here an obvious distinction between the orders under the present law and the work required under the 1940 Act. This is a real and substantial distinction. It is not one without a difference.

It must be admitted that there is no constitutional right of exemption from any kind of work that is within the discretion of Congress and the President to order a conscientious objector to perform. The defendant does not argue that a conscripted conscientious objector has a greater choice of work to perform than a person conscripted for ordinary military service. He does not. They are both on the same level. Neither may set his choice of service up against the discretion of the President acting under a proper law of Congress. The discretion and power of choice as vested in the President by the scope of the war power given to him through the act by Congress are unlimited. The objection here is that the order to do work for a nonfederal agency is not within the scope of the Universal Military Training and Service Act. If it is argued that it is, then it is the defendant's position that Congress does not have authority to conscript labor for a private employer or for a nonfederal project. In other words, the order in this case to perform civilian work is like a labor draft for private employers. It was not for the performance of service in the war effort of the nation.

The best way to emphasize this point to the court is to make an analogy. It will be conceded that men can be drafted to perform military service, notwithstanding the Thirteenth Amendment. But it seems that a very substantial and different question arises here. The Thirteenth Amendment prohibits the President from taking those men and *putting them to work* for private industry, even engaging in war work, which is not done by the Federal Government. It must be admitted that a soldier cannot be put to work by the Government in a private defense industry. It follows that a conscientious objector may not be ordered to do work for a private employer not engaged in federal work as an agency of the Government. If a soldier cannot be ordered to do private work for a private employer then a conscientious objector cannot be compelled to do such work. The question is as simple as that! It must not be mixed up with a maze of complex questions of war powers of the President.

There are no cases where the labor draft for private employment has been determined by the federal courts. No federal labor draft has yet been passed by Congress. The action of the President in taking over the railroads and putting them in the hands of the army to prevent strikes is an evident interpretation of the Thirteenth Amendment, that it must be federal employment to give the power. While this is not directly in point it is of persuasive weight that the Government has no unlimited control over the relationship of private employer and employee but it does over its own employees. It is true that there are laws that authorize federal injunctions against strikes in certain national industries engaged in commerce. But that situation is not in point. The right to strike is one thing. Involuntary servitude is another.

The cases involving the civilian public service camps (*United States* v. *Brooks*, 54 F. Supp. 995 (S. D. N. Y.), affirmed *Brooks* v. *United States*, 147 F. 2d 134 (2d Cir.), cert. denied 324 U. S. 878; *Weightman* v. *United States*, 142 F. 2d 188 (1st Cir.); *Hopper* v. *United States*, 142 F. 2d 181 (9th Cir.); *Zucker* v. *Osborne*, 54 F. Supp. 984) should be put aside in one broad sweep. It is obvious that such cases did not involve a drafting for a private labor for nonfederal agencies.

All of the civilian public service camps were operated at the expense of the Government. They were under the control of General Hershey and subject to the Selective Service Regulations promulgated by the President. It could not be successfully argued that the Thirteenth Amendment reached labor in such camps. It was alternate conscription service of a civilian nature performed for the Government. It is true that some of the camps were run by religious groups, but they were not privately owned and operated. They were federal camps. They were under federal control. There were elaborate regulations made and published by General Hershey, the Director of Selective Service. The religious camp directors of the different religious camps were acting as agents of General Hershey. They were, therefore, agents of the Government. The conscientious objectors in the camps were, therefore, working for the Government and not for private or nonfederal employers.

Let us turn now to a consideration of the leading cases on the Thirteenth Amendment to the Constitution. The draft law cases, although not in point, shall be considered first.

In the *Selective Draft Law Cases* (*Arver* v. *United States*), 245 U. S. 366, Chief Justice White (at page 390) held, without discussion, that compulsory military service did not violate the Thirteenth Amendment.

Angelus v. *Sullivan*, 246 F. 54 (Cir. Md.), held that the 1917 Act did not illegally interfere with the rights of the person contrary to the Thirteenth Amendment.

United States v. *Brooks*, 54 F. Supp. 995 (S. D. N. Y.), involved a question of whether the provisions of the Selective Training and Service Act requiring civilian work in a public service camp was invalid. The United States Court of Appeals for the Second Circuit sustained the holding of the lower court that the act was valid. (147 F. 2d 134) The same holdings were made in *Weightman* v. *United States*, 142 F. 2d 188 (1st Cir.), and in *Heflin* v. *Sanford*, 142 F. 2d 798 (5th Cir.).

In *United States* v. *Brooks*, 54 F. Supp. 997 (S. D. N. Y.), the Thirteenth Amendment argument was based "on the treatment by the defendant of the provisions for work of national importance as completely severed and independent from the comprehensive mobilization contemplated by the Selective Training and Service Act." The court said that it must be treated as a part of the mobilization of all manpower. The argument of defendant was reduced to an absurdity. The court said the registrant contended he could be inducted into the army but could not be put in a camp in recognition of conscientious objectors. Defendant seemed to make the argument that the conscientious objector was singled out and discriminated against. The court said that the fact that the work was under civilian direction was immaterial because such work could be directed by either a civilian or the military. "Nor does it

matter that the actual labor performed by the assignees is not directly in aid of the defense of the United States or of its military establishment. It is sufficient that in the judgment of Congress such labor is of national importance; that its performance by assignees releases others for services more directly concerned with military action; and that assignment of conscientious objectors tends to deter others from asserting a claim to exemption."—Page 997.

The Second Circuit held in *Brooks* v. *United States*, 147 F. 2d 134, as follows: "The federal government in the exercise of its undoubted power to raise and maintain armed forces for the protection of the country could have disregarded the appellant's conscientious scruples against participating in such service and conscripted him for any military service for which he was mentally and physically fit. . . . Congress could in the exercise of its incidental power do whatever was reasonably necessary and appropriate to raise and maintain armed forces provided that those who were given exemption from such service be required to perform such work of national importance as they were able to perform under reasonable rules and regulations. There are many good reasons which may have let Congress so to provide but it is enough that such action may have been considered needed during a great national emergency for its effect upon the moral of those who do serve in the armed forces."—Pages 134-135.

Weightman v. *United States*, 142 F. 2d 188 (1st Cir.), involved an attack against the constitutionality of the 1940 Act in its provisions for treatment of conscientious objectors. The power of the President to designate the forestry work and the low pay, described as slavery and imprisonment in the conscientious objector camps, were questioned. The court rejected all arguments. The court, among other things, said: "Possibly the system established 'may be condemned by some as unwise or illiberal or unfair' (Cardozo, J., concurring in *Hamilton* v. *Regents*, 293 U. S. 245, 266, 55 S. Ct. 197, 205, 79 L. Ed. 343), but this is no basis for holding the system unconstitutional. Since the situation presented by the Act called for 'the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.' *Kiyoshi Hirabayashi* v. *United States*, 320 U. S. 81, 93, 63 S. Ct. 1375, 87 L. Ed. 1774. Under the circumstances we do not believe that the action taken with respect to conscientious objectors has exceeded constitutional bounds. In accord see *Hopper* v. *United States*, 9 Cir., 142 F. 2d 181; *United States* v. *Van Den Berg*, 7 Cir., 139 F. 2d 654, and cases cited."—Page 192.

In *Hopper* v. *United States*, 142 F. 2d 181 (9th Cir.), the requirement for civilian work at a public service camp was attacked. It was claimed to be involuntary servitude. The court said: "These propositions, in one guise or another, have been advanced again and again, both in this and in the first World War, and have been uniformly met with rejection." —Page 186.

The defendant's claim that the work camp requirement violated the Thirteenth Amendment in *United States* v. *Van Den Berg*, 139 F. 2d 654 (7th Cir.), was rejected with the following statement: "Defendant's claims that his assignment to a conscientious objectors' camp amounted to imposition of involuntary servitude in violation of constitutional rights; . . . have all been considered fully by this court and denied in *United States* v. *Mroz*, 7th Cir., 136 F. 2d 221."—Page 656.

Exceptional service such as labor in the federal maritime service or the Navy may be compelled without a violation of the Thirteenth Amendment. It is the same as the right of the federal Government to conscript manpower for military service. A consideration of the cases on the point shows that such services are, like military service, exceptional. They may be compelled as an exception to the general rule commanded by the Thirteenth Amendment.

Robertson v. *Baldwin*, 165 U. S. 275, 282-283, held that the federal statute authorizing justices of the peace to issue warrants to arrest deserting seamen did not violate the federal Constitution, Thirteenth Amendment. This is also the old common law rule. The Supreme Court said: "It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional; such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards. The amendment, however, makes no distinction between a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, where shall the line be drawn? We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview." (165 U. S., at page 282) Mr. Justice Harlan dissented. Much of what he says applies as argument in favor of the defendant here.—See pages 288-303.

The compulsory road work law of Florida was held not to violate the Thirteenth Amendment because the services called for were exceptional and akin to the usual compulsory duties that every citizen owed the government. The work was likened to military service and jury duty, which are not forbidden by the Thirteenth Amendment. (*Butler* v. *Perry*, 240 U. S. 328, 333) The Court said: "The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers. *Slaughter House Cases*, 16 Wall. 36, 69, 71, 72; *Plessy* v. *Ferguson*, 163 U. S. 537, 542; *Robertson* v. *Baldwin*, 165 U. S. 275, 282; *Clyatt* v. *United States*, 197 U. S. 207; *Bailey* v. *Alabama*, 219 U. S. 219."

A case similar in its holding is *Plessy* v. *Ferguson*, 163 U. S. 537. That case involved a Louisiana law that provided for separate but equal accommodation for both black and white passengers traveling on railroads in the state. The Court held that the law did not violate any of the rights of a railroad employee convicted under the law.—163 U. S., at pages 542-543.

Mr. Justice Black in *United States* v. *Petrillo*, 332 U. S. 1, 13, stated that the criminal sanctions of the Communications Act punishing coercion in broadcasting did not violate the Thirteenth Amendment on its face. He indicated that the application of the statute may present the question. Thus it is a question whether it is void as construed and applied.

A New York statute making it a crime for a landlord not to provide usual apartment house services on an equal basis to all tenants did not violate the Thirteenth Amendment. (See *Marcus Brown Holding Company, Inc.* v. *Feldman*, 256 U. S. 170, 199.) The Court said: "It is true that the traditions of our law are opposed to compelling a man to perform strictly personal services against his will even when he has contracted to render them."

In *Auto Workers* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, it was held that the law for collective bargaining between the employer and union did not violate the Thirteenth Amendment. The statute was sustained because it did not make it a crime to quit a job.—336 U. S., at page 251.

In all the cases quoted from above (except in the case of the seaman, which is special—finding its background of exemption from the rule in the common law) none of them involved service performed for a private person. They all involved forced service of an exceptional or emergency or special nature, to the state.

The peonage cases are directly in point here. They will not be considered in this section of the argument. But, before they are stated, let a few general remarks be made to show that they apply.

It was compulsory private labor that was prohibited by the Thirteenth Amendment and the Anti-Peonage Law. In every case there was involved a state law or custom that produced the forced labor for private purpose. Had the laws been passed by the Congress instead of the state governments the results would have been the same. The Thirteenth Amendment would have invalidated the custom or laws even by the Federal Government compelling the work either directly or indirectly.

What is done by the Congress here is identical to that which was done by the state governments and condemned in the peonage cases. Here there is compulsory work of a nature that does not come within the recognized exception of the Thirteenth Amendment, such as military service. The peonage cases would prohibit the drafting of young men as soldiers and putting them to work on the King Ranch or in the Nieman-Marcus Store. Soldiers could not be put in the state hospital to take care of mentally ill people without its being a violation of the principle of the peonage cases by the Supreme Court. Since a soldier cannot be thus drafted for compulsory labor without a violation of the Thirteenth Amendment, then the President also violates the Amendment when he orders a conscientious objector to work in the state hospital. The Amendment and peonage cases prohibit what is done in this case by the order made under Section 1660.1 of the Selective Service Regulations.

Let us turn our attention now to a consideration of the peonage cases.

A very good discussion of the Thirteenth Amendment, its background and the earlier decisions under it appears in *Pollock* v. *Williams*, 322 U. S. 4, 7-13. The Court, at page 17 of the opinion, held that the Florida law imposed peonage upon certain persons under certain conditions. The statute made one who obtained an advance of money upon an agreement to render service guilty of a misdemeanor. The law provided for a presumption of fraud on the showing of obtaining the money on such agreement. This case involved the federal act passed to implement the Thirteenth Amendment. It is the law against peonage. (322 U. S., at page 8) The Thirteenth Amendment, without a special act, has teeth against an act of Congress. (See *Hurd* v. *Hodge*, 334 U. S. 24, at pages 31-32.) Mr. Justice Jackson for the majority of the Court said: "The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States. Forced labor in some special circumstances may be consistent with the general basis system of free labor. For example, forced labor has been sustained as a means of punishing crime, and there are duties such as work on highways which society may compel."—*Pollock* v. *Williams*, 322 U. S., at pages 17-18.

In the *Slaughter House Cases*, 16 Wall. 36, the Court held that the Thirteenth Amendment was not limited to protection of the Negro or to a prohibition of slavery.—See 16 Wall., at pages 69, 71-72.

The other peonage cases, like *Pollock* v. *Williams*, 322 U. S. 4, lay down the rule that there can be no indirect violation of the Thirteenth Amendment. Criminal sanctions cannot be used to punish one who refuses to do forced labor or violates a labor contract. By force of the same reason the Amendment prohibits the use of the war-powers section of the police power of the state to be used to compel performance of work not of an exceptional character coming strictly under the old common law practice of service to the state of a nature which can be compelled. If the service does not relate directly to the war effort it cannot be said to be exceptional. It is not, therefore, an exception from prohibited forced labor under the Thirteenth Amendment purely because it was attached to a war law. It is fundamental that the Constitution deals with realities and not with shadows. (*Cummins* v. *Missouri*, 4 Wall. 277, 325; Ex parte *Milligan*, 4 Wall. 2, 120-121) And there must be a direct relationship between the end aimed at and the power exercised.

Indirect and remote purposes or ends cannot be sustained purely because Congress has chosen to say they are to be done. Compare the other peonage cases (*Bailey* v. *Alabama*, 219 U. S. 219, and *Taylor* v. *Georgia*, 315 U. S. 25) with *Pollock* v. *Williams*, 322 U. S. 4.

Hodges v. *United States*, 203 U. S. 1, involved an indictment seeking enforcement of the criminal sanctions clause of the Civil Rights Act. While the dismissal of the indictments was ordered the court wrote on the subject of "involuntary servitude" words used in the Thirteenth Amendment. The Court said: "The meaning of this is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the Nation. It is the denunciation of a condition and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the Nation it commits every race and every individual thereof."—203 U. S., at pages 16-17.

It is submitted, therefore, that the order for the defendant to perform work at a state hospital and the regulations authorizing such order constitute a construction and application of the statute which makes it unconstitutional, because it is brought into conflict with the mandate of the Thirteenth Amendment.

POINT THREE

THE ACT, AS CONSTRUED AND APPLIED BY THE REGULATION AND THE ORDER, IS UNCONSTITUTIONAL BECAUSE IT DEPRIVES THE DEFENDANT OF DUE PROCESS OF LAW CONTRARY TO THE FIFTH AMENDMENT TO THE CONSTITUTION.

The due process clause under the Fifth Amendment, as stated under Section 684 of Volume 12 of *American Jurisprudence* on "Constitutional Law," requires "* * * that the law shall not be unreasonable, arbitrary or capricious and that *the means selected shall have a real and substantial relation to the object sought to be attained.*"—Emphasis added.

The Court's attention is called to the case of Ex parte *Mitsuye Endo*, 323 U. S. 283. This case held habeas corpus proper to secure the release of a concededly loyal citizen who was being illegally detained by the War Relocation Authority under presidential executive power. The Supreme Court, speaking through Justice Douglas, after calling attention to the constitutional safeguards against improper exercise of the war power, one of these being "due process" under the Fifth Amendment (see page 299), ruled that a concededly loyal citizen presents no problem of espionage or sabotage and since the power to detain is derived from the power to protect the war effort against espionage and sabotage, the detention, which had no relation to that objective, is unauthorized. The force of the reasoning in that case falls upon this case here before the Court.

It is to be noted that the Supreme Court of the United States as early as Ex parte *Milligan*, 4 Wall. 2, 120-121, has held that the Fifth Amendment is a valid bar against the improper exercise of the war power. The *Milligan* case involved the release on habeas corpus of a civilian who had been sentenced to death upon a military trial during the Civil War in the state of Indiana, where federal court trial was available. —Compare *Cummins* v. *Missouri*, 4 Wall. 277, at page 325.

While some of the cases dealing with the exercise of the war power speak of the presumption of regularity attaching to presidential and other official acts, nevertheless, the Supreme Court itself has recognized such presumption will be of no avail where a presidential war order is clearly shown to be arbitrary and repugnant to the Federal Constitution.—See *Highland* v. *Russell Car & Plow Co.*, 279 U. S. 253, at pages 261 and 262.

A Selective Service case deemed worthy of mention on this question is *United States* v. *Emery*, (2d Cir. 1948) 168 F. 2d 454. The prosecution was under the 1940 Act for a conscientious objector's *leaving detached service "for which he had volunteered."* He had previously been hired out as a *volunteer laborer* from a Civilian Public Service Camp "to do private dairy herd testing." The prevailing wages for this farm-out laborer were paid to his employer, the Federal Government. Out of his wages he was paid the $15.00-a-month Civilian Public Service Camp allowance by the Federal Government. The balance of his wages was paid into a separate fund of the United States Treasury.

The defendant was not a volunteer. The *Emery* case, *supra*, is not in point. It is to be noted that the United States Court of Appeals for the Second Circuit held that, as to the wages paid the defendant, his rights under the First and Fifth Amendments had not been violated. The court at 168 F. 2d 454, page 456, said: "* * * The conscientious objector cannot refuse to perform his work of national importance even if he thinks he is being underpaid and acts on conscientious scruples to avoid what he considers the status of contract labor." The language was dictum, since the defendant was in no position to assert the defenses because he had volunteered for the work he later questioned. Had it been without his consent the case would have been different. Also the points on forced labor were not presented in that case, as they have been here, which distinguishes that case.

It is submitted that inasmuch as the defendants in these cases do not consent to the work and since they are ordered to do work that is not in the "national" or "federal" interest or welfare as distinguished from "state" or "local" welfare, and because the work is against their wishes, it is plain that they have been deprived of their rights contrary to the due process clause of the Fifth Amendment to the Constitution.

There may be other grounds to raise. The only way to determine this is to read the draft board file in advance of trial. The defendant should get a photostatic copy of the file. This is obtained by the defendant and his attorney writing letters to both the State Director and the National Director of Selective Service requesting it. A reason for its being promptly supplied should be stated, as it is needed to prepare for trial. This is usually supplied at little or no cost to the defendant. If there is time to do so before the trial, counsel may mail the file to me and I should be glad to see what, if anything, can be found in addition to the above points.

Please keep me informed of developments.

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