Cleveland State Law Review

Volume 31 | Issue 1 Article

1982

Conscientious Objection to War: The Background and a Current Appraisal

Richard P. Fox

CONSCIENTIOUS OBJECTION TO WAR: THE BACKGROUND AND A CURRENT APPRAISAL

RICHARD P. FOX*

I. INTRODUCTION

> Military Service is a patriotic obligation of every citizen who desires to share in the benefits and protections . . . of the United States.[1]

THIS STATEMENT ON MILITARY SERVICE is derived from the Air Force regulation pertaining to conscientious objectors to war.[2] One might question the propriety of the Air Force officially defining the "patriotic" obligations of citizens; however, most Americans would probably agree with the statement set forth by the Air Force.

No person has been inducted into the Armed Forces through the Selective Service since 1973. The requirement to register for the draft was ended and the long-familiar neighborhood draft boards closed their doors. Then, during the summer of 1980, young men were again required to register with the Selective Service System.[3] The response to the 1980 registration requirement was not as extreme as the anti-draft activism during the Vietnam era since the United States was at peace. The government only required that young men, aged eighteen to twenty, fill out a simple form at their local post offices. Even this slight move toward resuming conscription, however, caused many youths to examine their beliefs regarding participation in war.

Conscientious objection has not been a dead issue since the termination of hostilities in Southeast Asia. Department of Defense regulations[4] have provided for those in the Armed Forces to request C.O.[5]

---

*B.A., University of California at Los Angeles; M.A. (Ethics), Pepperdine University; J.D., Loyola University School of Law, Los Angeles; Major, Infantry, U.S. Army Reserve (retired). This article is partially based on the author's forthcoming book, THE AMERICAN CONSCIENTIOUS OBJECTOR TO WAR: FROM THE BEGINNING TO THE 1980's.

[1] 32 C.F.R. § 888e.6 (1980).

[2] A "conscientious objector" is defined by statute as one "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form . . . the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code." 50 U.S.C. app. § 456j (1980).

[3] Proclamation No. 4771, 45 Fed. Reg. 45,247, 48,130 (1981), under authority of 50 U.S.C. app. §§ 451, 453-56, 458-71(a) (1981).

[4] 32 C.F.R. § 75 (1971) and its predecessors have provided for in-service conscientious objection since 1962. *Id.*

[5] "C.O." will be used occasionally throughout this Article for "conscientious objector."

status. During 1981, the Army processed 136 such applications.[6] In the Navy, 175 members formally asked to be declared conscientious objectors,[7] as did 38 Marines[8] and 100 Air Force personnel.[9]

A substantial body of C.O. case law has been developed over the past decade. These decisions virtually all relate to habeas corpus petitions filed by in-service conscientious objectors. However, they will be citable precedent if conscription resumes and an expectable plethora of C.O. cases are litigated.

First, this article reviews the legal history of conscientious objection to war in the United States. Then the current status of the law and the 1982 Selective Service Regulations[10] are discussed and appraised. It is hoped that some of the popular misconceptions regarding conscientious objection will be dissipated by this article.

II. BACKGROUND

The religious obligation of those subscribing to the Judeo-Christian faiths to participate or not in war has been debated by theologians and ethicists for thousands of years. At least since the Vietnam era, all major Christian denominations and the three branches of Judaism (Orthodox, Conservative and Reformed) have published official statements pertaining to conscientious objection.[11] Without exception, these statements support those who feel constrained to apply for conscientious objector status.

In 1952, Justice William O. Douglas stated that Americans "are a religious people whose institutions pre-suppose a Supreme Being."[12] In his dissent in *Engel v. Vitale*,[13] Justice Potter Stewart set out in some detail many of "the religious traditions of our people, reflected in countless practices of the institutions and officials of our government."[14] One of these American traditions and practices, although not mentioned by Justice Stewart, is recognition of conscientious objection to war.

---

[6] Letter from Department of the Army, Office of the Chief of Public Affairs to the author, undated.

[7] Letter from D.P. Klauer, Naval Military Personnel Command to the author (November 3, 1981).

[8] Letter from D.R. Mabry, Headquarters, U.S. Marine Corps to the author (November 23, 1981).

[9] Letter from Lieutenant Colonel Eric M. Solander, Air Force Office of Public Affairs to the author (November 3, 1981).

[10] 32 C.F.R. §§ 1602, 1605, 1609, 1618, 1621, 1624, 1627, 1630, 1636, 1639, 1642, 1645, 1648, 1651, 1653 (1982).

[11] S. PERRY, WORDS OF CONSCIENCE (9th ed. 1980).

[12] Zorach v. Clauson, 343 U.S. 306, 313 (1952).

[13] 370 U.S. 421, 444-50 (1962).

[14] *Id.* at 446.

Prior to 1775, the American colonies enacted 600 laws governing their militias, most of which contained provisions for the exemption of conscientious objectors.[15] Between the time the Constitution was first drafted and ultimately ratified, four of the thirteen original colonies—Virginia, North Carolina, Pennsylvania and Rhode Island—indicated a desire for a constitutional exemption from military service for C.O.'s.[16] James Madison proposed to the First Congress a constitutional amendment granting conscientious objectors an exemption from military service.[17] The amendment was rejected on various grounds, none of which stated that conscientious objection was not an important right of constitutional magnitude.[18]

The 1787 Constitution granted Congress the power to "raise and support armies."[19] Wasting little time, Congress established a War Department in August of 1789, and in September 1789 authorized the President to induct state militiamen into federal service if Indians attacked frontier settlements.[20] Actually, involuntary military service was a minor issue until the Civil War, with its tremendous personnel requirements. In August 1862, when Lincoln requested 300,000 volunteers for nine months service, only 87,000 men were recruited.[21] America's first Selective Service law was then enacted in 1863.[22] Only 255,373 of the 2,690,401 men who served in the Union Army from 1861 to 1865, however, were draftees.[23]

Although the Union draft laws contained so many provisions for avoidance that its chief administrator declared it "essentially a law not to secure military service, but to exempt men from it,"[24] some conscientious objectors did find themselves members of the Grand Army of the Republic. There is evidence that these men were harassed; some were hung by their thumbs and others were stabbed with bayonets. At least

---

[15] Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH. L. REV. 409, 412-13 (1952) [hereinafter cited as Russell].

[16] Brahms, *They Step to a Different Drummer: A Critical Analysis of the Current Department of Defense Position Vis-a-Vis In-Service Conscientious Objectors*, 47 MIL. L. REV. 1, 5 (1970) [hereinafter cited as Brahms].

[17] *Id.* at 6-7, *citing* I ANNALS OF THE CONGRESS OF THE UNITED STATES 434-35 (1834).

[18] *Id.* at 8.

[19] U.S. CONST. art. I, § 8.

[20] M. KREIDBERG & M. HENRY, HISTORY OF MILITARY MOBILIZATION IN THE UNITED STATES ARMY 26 (1955) [hereinafter cited as KREIDBERG & HENRY].

[21] Shaw, *Selective Service: A Source of Military Manpower*, 27 MIL. L. REV. 35, 42 (1961) [hereinafter cited as Shaw].

[22] Act of March 3, 1863, ch. 75, 12 Stat. 731 (1863). The Act was upheld against constitutional challenge in Kneedler v. Lane, 45 Pa. 295 (1864).

[23] Shaw, *supra* note 21.

[24] L. LERIWILL, THE PERSONNEL REPLACEMENT SYSTEM IN THE U.S. ARMY 95 (1954).

one—Cyrus Guernsey Pringle—was allegedly tied to the ground and exposed to the rain and hot sun.[25]

For more than a half century following the Civil War, the United States had no conscription. The occasion for resuming the draft was, of course, World War I. Congress enacted a Selective Service law in 1917.[26] For conscientious objectors this statute provided for assignment to noncombatant duties while in the Armed Forces, not for exemption from military service.[27]

To obtain noncombatant assignment, the burden was on the registrant to show membership in a "well-recognized religious sect or organization" whose tenets forbade participation in war in any form.[28] Draft boards responsible for classification of registrants, however, were not furnished with any approved list of sects or organizations meeting the legal requirements for C.O. status.[29] During the World War I draft, 64,693 men applied for conscientious objector status; 56,830 applications were approved.[30] Sixteen hundred C.O.'s were convicted of the criminal offenses of failure to report or failure to cooperate in assigned noncombatant work.[31]

In his dissent in *Ehlert v. United States*,[32] Justice Douglas described the treatment of some C.O.'s by the armed forces during World War I. Conscientious objectors were shot, imprisoned for long terms, subjected to violence and indignities and hung by their fingers.[33] One Amish C.O. refused to wear a military uniform and as a result he was imprisoned;[34] he later contracted pneumonia and died. His corpse was dressed in an Army uniform and sent home to his parents.[35]

After winning World War I, America reverted to all-volunteer armed forces. The next mobilization requiring conscription was in 1940. The World War II Selective Service Act, the Burke-Wadsworth Bill,[36] was in effect from September 16, 1940 to March 31, 1947.[37] During this period

---

[25] J. KINCHY, THOSE WHO SAY NO 19 (1976) [hereinafter cited as KINCHY].

[26] Act of May 18, 1917, ch. 15 § 3, 40 Stat. 76 (1917) (repealed 1919).

[27] Act of May 18, 1917, ch. 15 § 4, 40 Stat. 78 (1917) (repealed 1919). "Noncombatant duties" for members of the Armed Forces are such jobs as medical corpsman, not entailing the use of weapons. *Id.*

[28] *Id.*

[29] KREIDBERG & HENRY, *supra* note 20, at 275. This discretion led some boards to treat religious and even nonreligious C.O.'s in the same manner. Welsh v. United States, 398 U.S. 333, 366-67 n.19 (1970) (Harlan, J., concurring).

[30] *Id.*

[31] Shaw, *supra* note 21, at 64.

[32] 402 U.S. 99, 108-18 (1971).

[33] *Id.* at 110.

[34] KINCHY, *supra* note 25, at 51-52.

[35] *Id.*

[36] Act of Sept. 16, 1940, ch. 720, 54 Stat. 885 (1940) (repealed 1947).

[37] Shaw, *supra* note 21, at 51-52.

fifty million men were registered, but ten million men were actually inducted.[38] Conscientious objectors represented only about 0.15% of all registrants.[39]

The Burke-Wadsworth Bill contained many features of the Selective Service System which persisted through the Vietnam era. Men registered with local boards composed of their neighbors, filled out questionnaires and were classified by their boards pursuant to Selective Service regulations.[40] A registrant had procedural rights including a personal appearance before his local board, further review by an appeals board and, under certain circumstances, an appeal to the President.[41]

A historic first of the 1940 Act was its provision for trial by the civilian federal courts for alleged violators.[42] Under the 1917 Act, a draftee was considered a member of the armed forces subject solely to military court-martial as of the date established for induction in his order to report.[43] Unlike its predecessors, however, the 1940 Draft Act provided for both those C.O.'s who objected to any service whatsoever as members of the armed forces and those who objected only to combatant duties.[44] There is a distinct and extraordinary difference between these two classifications. The former is an exemption from military service;[45] the latter is a mere duty limitation after entry into the armed forces.

Under the 1940 Act, the local board had to determine that an applicant for either type of C.O. status held an objection based on "religious training and belief." Selective Service National Headquarters issued guidance to local boards, stating that "religious training and belief" in the C.O. context was pertinent "regardless of . . . sect or creed."[46] Therefore, the 1940 Act with the Selective Service Headquarters interpreta-

---

[38] *Id.* at 52.

[39] Russell, *supra* note 15, at 432.

[40] Shaw, *supra* note 21, at 52, citing from a summary of the Selective Service System by Justice Hugo Black in Falbo v. United States, 320 U.S. 549 (1949) (affirming conviction of a C.O. who failed to report for alternative civilian service).

[41] *Id.*

[42] Act of Sept. 16, 1940, ch. 720, § 10(a), 54 Stat. 893 (1940) (repealed 1947).

[43] Shaw, *supra* note 21, at 48; *see* Annot., 129 A.L.R. 1171, 1198-200 (1940).

[44] Act of Sept. 16, 1940, ch. 720, § 5(g), 54 Stat. 889 (1940), Selective Service Regs. §§ 364-65 (1940). Since before the Vietnam era to the present, a 1-O C.O. is one determined to be opposed to military training and service, both combatant and noncombatant. 32 C.F.R. § 1630.17 (1982). The 1-A-O is opposed only to combatant service. He can be inducted and assigned to noncombatant duties. 32 C.F.R. § 1630.11 (1982).

[45] The 1-O C.O. is exempt from induction into the Armed Forces but has always been and is required to perform government-assigned civilian work contributing to the national health, safety or interest for a period of time equal to that which he would have served in the military. 50 U.S.C. app. § 456j (1980). In the author's experience, such work is typically a lowly paid job, e.g. hospital orderly, located far from the C.O.'s usual residence.

[46] Selective Service National Headquarters Release No. 128 (Nov. 23, 1940).

tion, shifted the religious aspect of the test for C.O. classification from proven membership in a recognized pacifist denomination to a registrant's individual beliefs.[47]

Men refusing induction under the 1940 Act were tried in federal district court and because the test for C.O. classification was based on a registrant's individual beliefs rather than his membership in a pacifist faith, the courts were faced with deciding the "religious" aspect of conscientious objection. During 1943, in *United States v. Kauten*,[48] the Second Circuit held it unnecessary to attempt a definition of "religion" to decide Kauten's appeal; nonetheless, the court curiously went on to define it as "a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets . . . ."[49]

The author of *Kauten*, Judge Augustus Hand, alluding to Socrates, Luther, Menander and Wordsworth, interpreted the 1940 Act as "more generous" toward C.O.'s than the 1917 Act because it took into account the characteristics of "a more skeptical generation."[50] However, the criminal conviction of Kauten, an artist and admitted atheist or agnostic,[51] was upheld. *Kauten* was significant in that the court held the Selective Service System could find a registrant entitled to C.O. status despite a lack of traditional religious belief in a Supreme Being.

In 1943, the Second Circuit also granted a habeas corpus petition filed by the mother of a conscientious objector draftee who had accepted induction in *United States ex rel. Phillips v. Downer*.[52] This decision followed *Kauten* by reiterating that "religious training and belief" meant an individual belief which could rest upon moral or philosophical ideas.[53]

However, the Ninth Circuit decided the matter differently in *Berman v. United States*,[54] a case decided after the end of World War II. Despite a brilliant dissent by Judge Denman,[55] the *Berman* court held qualification for conscientious objector status demanded a belief in a deity.[56] The

---

[47] Comment, *Selective Service System—Scope of the Conscientious Objector Exemption after* Welsh v. United States, 19 KAN. L. REV. 231, 233 (1971).

[48] 133 F.2d 703 (2d Cir. 1943).

[49] *Id.* at 708.

[50] *Id.*

[51] *Id.* at 707 n.2.

[52] 135 F.2d 521 (2d Cir. 1943).

[53] *Id.* at 524.

[54] 156 F.2d 377 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946), *reh'g denied*, 329 U.S. 833 (1947). One of Berman's attorneys, J.B. Tietz of Los Angeles, would have his position in Berman vindicated twenty-four years later in his representation of the petitioner C.O. in Welsh v. United States, 398 U.S. 333 (1970).

[55] 156 F.2d 382-85.

[56] *Id.* at 381.

court attempted to define "religion" by comparing it to science,[57] but finally relied upon Funk and Wagnall's dictionary definition[58] rather than works of philosophy or theology.

During World War II some conscientious objectors denied C.O. status by Selective Service accepted induction rather than face a criminal trial. There were also those, presumably, whose consciences crystallized only after entry into the Armed Forces.[59] Justice Douglas, in his dissent in *Ehlert v. United States*,[60] discussed treatment of these men. Apparently World War II C.O.'s were handled more leniently than those of World War I.[61] There were instances, however, of conscientious objectors being court-martialed with sentences including death.[62]

After World War II, Congress allowed the Selective Service Act to expire on March 31, 1947.[63] All volunteer Armed Forces, however, lasted only a matter of months. In 1948 conscription was restored.[64] This peacetime draft precipitated demonstrations, pre-shadowing the massive resistance of the Vietnam era. On February 12, 1947, 500 youths in several cities either publicly destroyed their draft cards or mailed them to President Truman.[65] By 1949, forty men had been imprisoned for refusing to register with the Selective Service.[66]

The Korean era involved two Selective Service Acts, those of 1948[67] and 1951.[68] To eliminate the possibility of the courts following the liberal *Kauten* definition of "religious training and belief," the 1948 Act specifically required belief in a Supreme Being.[69] This, of course, presented serious constitutional problems: If Congress, for any purpose,

---

[57] *Id.* at 380-81.

[58] *Id.* at 381-82.

[59] "Crystallization" of conscience in the C.O. context is defined by the Selective Service as "becoming conscious of the fact that he is opposed to participation in war in any form." 32 C.F.R. § 1636.1(b)(1) (1982).

[60] 402 U.S. 99, 111 (1971).

[61] *Id.*

[62] KINCHY, *supra* note 25, at 56.

[63] Act of June 29, 1946, ch. 522, § 7, 60 Stat. 341-42 (extending, amending and repealing the Selective Training and Service Act of 1940).

[64] Selective Service Act of 1948, ch. 625, 62 Stat. 604 (codified as amended at 50 U.S.C. app. §§ 451, 453-56, 458-71(a) (1981)).

[65] M. FERBER & S. LYND, THE RESISTANCE 3 (1971).

[66] *Id.*

[67] Selective Service Act of 1948, ch. 625, 62 Stat. 604 (codified as amended at 50 U.S.C. app. §§ 451, 453-56, 458-71(a) (1981)).

[68] 1951 Amendments to the Universal Military Training and Service Act, ch. 144, 65 Stat. 75 (amending the Universal Training and Service Act of 1948, ch. 625, 62 Stat. 604).

[69] Selective Service Act of 1948, ch. 625, § 6(j), 62 Stat. 604, 612-13. The provision was retained in the 1951 Act, 1951 Amendments to the Universal Military Training and Service Act, ch. 144, § 1(g), 65 Stat. 75, 86.

can require belief in a Supreme Being, why could not Congress require belief in a particular Supreme Being? Would it be the spiritual, transcendent, omnipotent and omniscient God of Judeo-Christianity? Would the Supreme Being of Congress also include the deistic god who might have died, and the pantheistic god who is in all living things?

Cases brought under the Korean conflict conscription laws dwindled and then ceased. The Vietnam era was about to begin. Aside from the "religious training and belief" requirement, much of the law of conscientious objection had been clearly established as it still stands in 1982. To qualify as a C.O., an applicant had to be opposed to participation in any war in any form. This requirement excluded "selective objectors" who are individuals objecting only to a particular war. According to the *Kauten*[70] court, such individuals are really political objectors.

The Supreme Court, in reversing the conviction of a conscientious objector in 1955,[71] settled any possible misunderstanding of the "opposition to all war" requirement for C.O. status. "War" was defined as "actual military conflict between nations of the earth in our time—wars with bombs and bullets, tanks, planes and rockets."[72] Furthermore, the Court held that a conscientious objector need not be opposed to war itself, but only to his personal participation in war.[73]

Again in 1955, the Supreme Court held that the essential test for conscientious objection was the applicant's sincerity "in objecting, on religious grounds, to participating in war in any form."[74] Finally, in 1955, the Supreme Court decided two cases[75] involving procedural rights for C.O. applicants. The Court held that a conscientious objector had to be furnished with a copy of any adverse material placed in his file which was used to deny his application.[76] In addition, procedural due process for C.O.'s has included the right to a meaningful hearing at which the applicant must be permitted to comment upon and possibly rebut any unfavorable information in his file since 1955.[77] Courts would enforce procedures established by Selective Service law and regulations designed to be "fair and just."[78]

Also fixed in Selective Service law, as the Vietnam era dawned, was the doctrine of "exhaustion of remedies."[79] This judicially-created rule

[70] 133 F.2d 703, 708 (2d Cir. 1943).

[71] Sicurella v. United States, 348 U.S. 385 (1955).

[72] *Id.* at 391.

[73] *Id.* at 390.

[74] Witmer v. United States, 348 U.S. 375, 381 (1955).

[75] Simmons v. United States, 348 U.S. 397 (1955); Gonzales v. United States, 348 U.S. 407 (1955).

[76] 348 U.S. at 403-05, 413-14.

[77] *Id.* at 415-16.

[78] *Id.* at 417.

[79] *See* Estep v. United States, 327 U.S. 114 (1946); Falbo v. United States, 320 U.S. 549 (1944). Both Falbo and Estep were conscientious objectors.

meant that a registrant on trial for failure to report for induction[80] was precluded from raising a defense of Selective Service illegality unless he had taken all available administrative appeals and reported for induction, refusing only to take the final step necessary to change his status from civilian to soldier.[81] If a registrant believed his classification had no basis in fact,[82] he had the option of reporting for and accepting induction[83] and then petitioning for a writ of habeas corpus.[84] Choosing this unattractive course of action meant serving in the military throughout the time while a court was petitioned, held a hearing and decided the case in the registrant/soldier's favor and ordered his release from custody.

III. THE VIETNAM ERA: AN OVERVIEW

As of December 1, 1964, there were 28,994,334 men registered and classified by the Selective Service.[85] Of these, 10,414 were classified as 1-0 conscientious objectors, exempt from military service, but not from alternative civilian service.[86] Another 19,000 men were not draftable because of their employment in agriculture and 84,899 were exempt as ministers and divinity students.[87]

In 1965, the Supreme Court began to resolve the "Supreme Being" issue involved in conscientious objector cases.[88] Daniel Andrew Seeger stated in his C.O. application that he held a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed sense."[89] The sincerity of Seeger's belief was not questioned.[90]

The *Seeger* Court set forth a new test for the "religious training and

---

[80] "Induction" here means either entry into the Armed Forces or, in the case of a man already classified as a 1-O C.O., reporting for alternative civilian service.

[81] Estep v. United States, 327 U.S. at 123; Falbo v. United States, 320 U.S. at 553. A fairly complete discussion of the procedures necessary to exhaust remedies as of 1967 is in Comment, *Judicial Review of Selective Service Action: A Need for Reform*, 56 CAL. L. REV. 448, 452-54 (1968).

[82] The "basis in fact" test was established by Estep v. United States, 327 U.S. at 122-23.

[83] *See* note 80 *supra*.

[84] Estep v. United States, 327 U.S. at 123-24. This was considered a "quite illusory remedy in many instances." *Id.* at 129 (Murphy, J., concurring).

[85] Comment, *Selective Service Ramifications in 1964*, 29 MIL. L. REV. 123, 125 (1965), *citing* Monthly Bulletin of National Headquarters, Selective Service System.

[86] *Id.* In fact, 2,286 C.O.'s were performing alternative civilian service on Dec. 1, 1964, and 5,981 were classified as having completed such service.

[87] *Id.*

[88] United States v. Seeger, 380 U.S. 163 (1965).

[89] *Id.* at 166.

[90] *Id.*

belief" requirement for conscientious objector status: "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."[91] The decision caused predictable consternation in the military establishment. A 1966-67 advisory panel headed by General Mark W. Clark warned that *Seeger* would generate "an ever-increasing number of unjustified appeals for exemption from military service."[92]

The principal statute under which most Vietnam era C.O.'s would be processed was enacted on June 30, 1967.[93] As of that date, 34,235,023 men were registered and classified, of which 10,364 were 1-0 conscientious objectors.[94] The number classified as exempt ministers and divinity students had risen to 101,474.[95]

The 1967 Act, to accord with *Seeger*,[96] contained no reference to a "Supreme Being," but continued to exclude from the definition of "religious training and belief," "essentially political, sociological, or philosophical views, or a merely personal moral code."[97] Both the 50-year-old statutory prohibition against pre-induction judicial review of Selective Service actions[98] and the judge-made "exhaustion of remedies" requirement[99] were respectively continued and made explicit. The 1967 Act provided that:

> [n]o judicial review shall be made of the classification or processing of any registrant . . . except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form. [1-0].[100]

---

[91] *Id.* at 176.

[92] Tarr, *Selective Service and Conscientious Objectors*, 57 A.B.A. J. 976, 977 (1971) [hereinafter cited as Tarr].

[93] Military Selective Service Act of 1967, Pub. L. No. 90-40, 81 Stat. 100 (amending the Universal Military Training and Service Act of 1948, ch. 625, 62 Stat. 604).

[94] Comment, *Selective Service and the 1967 Statute*, 40 MIL. L. REV. 33, 34 (1968).

[95] *Id.*

[96] United States v. Seeger, 380 U.S. 163 (1965).

[97] Military Selective Service Act of 1967, Pub. L. No. 90-40, § 7, 81 Stat. 100, 104.

[98] Act of May 18, 1917, ch. 15, § 4, 40 Stat. 76, 79-80; continued in the Selective Training and Service Act of 1940, ch. 720, § 10(a)(2), 54 Stat. 885, 893, and the Selective Service Act of 1948, ch. 625, § 10(b)(2), 62 Stat. 604, 620. "Pre-induction judicial review" in connection with Selective Service cases pertains to the filing of petitions for extraordinary writs, usually in the nature of injunction or mandamus, by registrants in the federal district courts.

[99] *See* notes 79-84 *supra* and accompanying text.

[100] Military Selective Service Act of 1967, Pub. L. No. 90-40, § 8(c), 81 Stat. 100, 104. This remains unchanged as of 1982. 50 U.S.C. app. § 460(b)(3) (1980).

The use by Selective Service of its "delinquency" regulations to accelerate induction was ultimately halted by the Supreme Court in 1970. The case, *Gutknecht v. United States*,[101] involved a student who surrendered his draft card as an act of protest.[102] Gutknecht was declared delinquent, then ordered for induction which he refused.[103] The Court held that the Selective Service had no "freewheeling authority to ride herd on the registrants using immediate induction as a disciplinary or vindictive measure."[104]

The Supreme Court also resolved the issue of pre-induction judicial review by court injunction under the 1967 Act in three cases: *Oestereich v. Selective Service Board*,[105] *Breen v. Selective Service Board*[106] and *Clark v. Gabriel*.[107] These cases are currently definitive since the statutory prohibition of pre-induction judicial review continues to be present.[108] Oestereich and Breen were student protestors against whom Selective Service had taken punitive reclassification action. Gabriel was a C.O. whose application was denied by the Selective Service System. Divinity student Oestereich returned his draft card to the government as an act of protest. The Court held he had a right to pre-induction judicial review, not on first amendment grounds, but because the Selective Service delinquency regulations were not broad enough to allow withdrawal of Oestereich's statutory classification as a divinity student.

Breen was the holder of an ordinary student deferment at the time the Selective Service invoked its delinquency regulations to reclassify him for his dissent.[109] The Court did not agree with the government's attempt to distinguish Breen from divinity student Oestereich and held that Breen was also entitled to pre-induction judicial review.[110] However, conscientious objector Gabriel was not as fortunate. The Court held that C.O.'s, unlike students, have no right to pre-induction judicial review because entitlement to conscientious objector status involves "determination of fact and an exercise of judgment" by local boards.[111]

Insight can be gained into the Selective Service and Department of Justice positions on conscientious objectors during much of the Vietnam

---

[101] 396 U.S. 295 (1970).

[102] *Id.* at 297.

[103] *Id.*

[104] *Id.* at 306.

[105] 393 U.S. 233 (1968).

[106] 396 U.S. 460 (1970).

[107] 393 U.S. 256 (1968).

[108] 50 U.S.C. app. § 460(b)(3) (1980).

[109] 396 U.S. at 462.

[110] *Id.* at 467-68.

[111] 393 U.S. 258; *accord* Fein v. Local Board No. 7, 405 U.S. 365 (1972).

era by the 1969 Ninth Circuit decision in *United States v. Haughton*.[112] The government unsuccessfully argued that C.O. applicants were not entitled to reasons for denial of their applications[113] and that conscientious objector status required complete personal pacifism.[114] Despite Haughton's avowed "equivalent" belief in a Supreme Being[115] and his reliance upon Bible reading as well as other religious studies,[116] the government claimed Haughton's beliefs were based on a "personal moral code."[117] The basis for this contention was that Haughton's C.O. application frequently referred to morality.[118] The court observed that morality and religion are not mutually exclusive.[119] Finally, the court held the fact that Haughton belonged to and supported anti-war groups was consistent with conscientious objection and was not, as the government claimed, evidence of insincerity.[120]

Welsh v. United States[121] was decided during the Vietnam era and proved to be the capstone case regarding conscientious objection. The Court was sharply divided in reversing the conviction of a C.O. who refused induction.[122] Welsh explicitly was not "religious" in any commonly-accepted use of that term;[123] however, he was opposed to war in any form[124] and he was found to be sincere in this belief.[125] The *Welsh* decision made not only those holding non-theistic beliefs parallel to those held by traditional C.O.'s eligible for C.O. status,[126] but even those whose beliefs were purely ethical or moral. A conscientious objector could be one who believed, as did Welsh, that taking anyone's life is morally wrong.[127]

In Justice Harlan's opinion, *Welsh* totally eliminated religious content as a requirement for conscientious objector status.[128] The Selective Ser-

[112] 413 F.2d 736 (9th Cir. 1969).

[113] *Id.* at 739, 742-43.

[114] *Id.* at 741-42. The government's position was clearly contrary to the pronouncements of Sicurella v. United States, 348 U.S. 385 (1955).

[115] *Id.* at 739.

[116] *Id.* at 740.

[117] *Id.* at 742.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] 398 U.S. 333 (1970).

[122] Black, J., wrote the opinion in which Douglas, Brennan, and Marshall, J.J., joined. Harlan, J., concurred in a separate opinion. Dissenting were Burger, C.J., White and Stewart, J.J. while Blackmun, J., did not take part in the decision. *Id.*

[123] *Id.* at 341.

[124] *Id.* at 336-37.

[125] *Id.* at 337.

[126] United States v. Seeger, 380 U.S. 163 (1965).

[127] 398 U.S. at 343.

[128] *Id.* at 345.

vice Memorandum implementing *Welsh* stated that "religious training and belief" may include moral or ethical concepts, even though an applicant may think his beliefs are not religious.[129]

The year 1971 witnessed an amended Selective Service Act[130] and several important decisions on conscientious objection from the Supreme Court that still stand. The first of these cases, *Clay v. United States*,[131] involved the then-heavyweight boxing champion of the world, Muhammed Ali. In reversing Clay's conviction, the Court unequivocally set forth the *prima facie* elements required for conscientious objector status:[132] (1) conscientious opposition to war in any form, based on religious training and belief as construed in *Seeger*[133] and *Welsh*,[134] and (2) sincerity.

Another important 1971 case was *Gillette v. United States*.[135] The Court made its final pronouncement denying C.O. status to a selective objector.[136] *Gillette* made clear that cases involving in-service conscientious objectors would be interpreted under the same standards as Selective Service cases.[137] Finally, the Court set to rest the erroneous idea, held by many Selective Service and military personnel, that conscientious objection requires complete personal pacifism.[138]

The 1971 MSS Act[139] effected several amendments to its predecessor. Significantly, for conscientious objectors, the 1971 Act incorporated that part of *Haughton*[140] requiring that reasons for denial of classifications be furnished to applicants, upon request, by local and appeal

---

[129] Tarr, *supra* note 92, at 979.

[130] Military Selective Service Act, Pub. L. No. 92-129, 85 Stat. 348 (1971) (amending the Military Selective Service Act of 1967, Pub. L. No. 90-40, 81 Stat. 100). Although again amended in 1979, Department of Defense Authorization Act, Pub. L. No. 96-107, §§ 811-12, 93 Stat. 803, 815-16 (1980); and in 1980, Act of Dec. 23, 1980, Pub. L. No. 96-584, § 3, 94 Stat. 3377, this statute is essentially the current Military Selective Service Act (MSS Act), 50 U.S.C. app. §§ 451, 453-56, 458-71(a) (1981).

[131] 403 U.S. 698 (1971). An interesting description of how the decision was reached is found in B. WOODWARD & S. ARMSTRONG, THE BRETHREN 157-60 (1979).

[132] 403 U.S. at 700.

[133] 380 U.S. 163 (1965).

[134] 398 U.S. 333 (1970).

[135] 401 U.S. 437 (1971).

[136] *Id.* at 422-43.

[137] *Id.* at 442.

[138] *Id.* at 447-48.

[139] Amendments to Military Selective Service Act of 1967, Pub. L. No. 92-129, 85 Stat. 348 (1971).

[140] *See* note 112 *supra* and accompanying text. *See also* United States v. Speicher, 439 F.2d 104 (3d Cir. 1971); United States v. Stetter, 445 F.2d 472 (5th Cir. 1971).

boards. Until the 1971 Act, the Selective Service had never been compelled by statute to furnish reasons for its decisions.[141]

IV. THE IN-SERVICE C.O.

Since 1962, regulations of the Department of Defense have provided conscientious objector processing for members of the armed forces.[142] In-service requests for C.O. status were few during the first years that these regulations were in effect. During 1965, the earliest year for which statistics are available, only 669 applications were made by all armed forces members.[143] Of these, 335 were approved to grant noncombatant status and 109 C.O. discharges were issued—an over sixty-six percent rate of approval.[144] In 1966 and 1967, only about thirty percent of the 1300 conscientious objector applications submitted were approved.[145]

As troop strength in Vietnam rose and anti-war activity increased, both the number of in-service C.O. applications and their approval rate kept pace. By 1971, the armed forces were processing 4,381 C.O. applications and approving more than sixty-three percent of them.[146] During 1972, over seventy-seven percent of the 2,673 conscientious objector claims submitted were granted.[147]

There are several possible reasons for the increase of favorable consideration by the military departments of conscientious objector claims during this period. The armed forces may have realized that a denied C.O. in military rank does not make an effective soldier;[148] or perhaps the government was merely responding to the federal courts increasingly liberal attitude during this period in granting petitions for writs of habeas corpus to in-service conscientious objectors.

When courts first considered cases brought by armed forces personnel who had been denied C.O. status under the in-service conscientious objector regulations, there was a grave question regarding reviewability.[149] In 1968, the issue was finally decided by the Second Circuit in

---

[141] United States *ex rel.* Zehman v. Carpenter, 457 F.2d 621, 622 n.1 (2d Cir. 1972); *see* Joseph v. United States, 405 U.S. 1006 (1972).

[142] Department of Defense Directive 1300.6, August 21, 1962, codified at 32 C.F.R. § 75 (1981). The regulation allows for applications for discharge (1-O) or for assignment to noncombatant duties (1-A-O).

[143] 1 S.S.L.R. 6027 (1973).

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] Brahms, *supra* note 16, at 18.

[149] In Gilliam v. Reaves, 263 F. Supp. 378 (W.D. La. 1966), and *In re* Kanewske, 260 F. Supp. 521 (N.D. Cal. 1966), the courts had no problem in determining that they had jurisdiction to decide in-service C.O. cases. *Contra* Chavez v. Fergusson,

Hammond v. Lenfest.[150] Judge Kaufman, writing for himself and Judge Waterman, conclusively held that administratively denied, in-service conscientious objectors were subject to writs of habeas corpus. The *Hammond* court settled the question of judicial review by pointing out that the court was bound by validly promulgated regulations of the government.[151] Therefore, even if conscientious objector status was a matter of mere "legislative grace" rather than a constitutional right, to allow the military complete discretion to deny C.O. applications would render the applicable regulations nugatory.[152] *Hammond* also established the "based in fact standard" as the test for judicial review in in-service C.O. claims.[153]

Although *Hammond v. Lenfest* settled the issue of judicial review of in-service C.O. claims, the government still used "exhaustion of remedies" arguments in an attempt to avoid decisions on the merits of these cases. One argument was that a denied, in-service conscientious objector had a statutory "remedy" existing of an application to the military Board for Correction of Records,[154] which had to be "exhausted" before the matter was ripe for judicial review. During 1969, the Ninth Circuit agreed with this proposition in *Craycroft v. Ferrall.*[155] However, upon the Solicitor General's admission that the Board for Correction was an illusory remedy, the Supreme Court remanded.[156]

In *Crane v. Hedrick*,[157] the government argued that an in-service C.O. should be required to undergo criminal trial by court-martial to exhaust "administrative remedies." The court observed that neither Congress nor "the majority of federal courts" had deemed it necessary for an in-

---

266 F. Supp. 879 (N.D. Cal. 1967); Brown v. McNamara, 263 F. Supp. 686 (D.N.J. 1967). An appeal by Brown resulted in three separate opinions from the Third Circuit, 387 F.2d 150, one affirming non-reviewability and the other two judges holding that there was jurisdiction to consider Brown's petition. By the time Chavez's case reached the Ninth Circuit, he had been discharged and his cause was moot. 395 F.2d 215 (9th Cir. 1968). Meanwhile, the Tenth Circuit found in-service C.O. cases to be non-reviewable in Noyd v. McNamara, 378 F.2d 538 (10th Cir.), *cert. denied*, 389 U.S. 1022 (1967).

[150] 398 F.2d 705 (2d Cir. 1968).

[151] *Id.* at 715. *See* Crotty v. Kelly, 443 F.2d 214 (1st Cir. 1971), in which the court found it unnecessary to consider the "basis in fact" test, limiting its review to the military's compliance with regulations.

[152] *Id.* at 715.

[153] *Id.* at 716.

[154] 10 U.S.C. § 1552 (1960).

[155] 408 F.2d 587 (9th Cir. 1969).

[156] 397 U.S. 335 (1970). A description of the workings of the Board for Correction of Records is contained in Rew v. Ward, 402 F. Supp. 331 (D.N.M. 1975).

[157] 284 F. Supp. 250 (N.D. Cal. 1968). The government's position was based on inferences from Noyd v. McNamara, 267 F. Supp. 701 (D. Colo.), *aff'd*, 378 F.2d 538 (10th Cir.), *cert. denied*, 389 U.S. 1022 (1967), and Brown v. McNamara, 387 F.2d 150, 153 n.5 (3d Cir. 1967).

service C.O. to commit a crime in order to test the legality of his detention in military service as a conscientious objector.[158] During 1972, the Supreme Court conclusively ruled out the necessity of court-martial as "exhaustion" in *Parisi v. Davidson*.[159]

The Armed Forces were still free, however, to use plain and simple administrative delays to impede processing of in-service C.O.'s. For example, during 1972, David Beaucage accepted induction in reliance upon the Army's assurances to the Supreme Court in *Ehlert v. United States*[160] that his in-service conscientious objector claim would be given full and fair consideration.[161] Army processing of Beaucage's application consumed nine months and nine days, almost forty percent of the total time he was obligated to serve.[162]

Procedures for processing in-service C.O. claims have always been elaborate.[163] The conscientious objector first submits a detailed written application, including general information and essay-type answers to six questions.[164] Then personal interviews of the C.O. applicant are conducted by a psychiatrist, a chaplain and an investigating officer.[165] All interviewers are commissioned military officers. If the in-service C.O. applicant desires, he may be represented by counsel at the applicant's own expense at the hearing before the investigating officer.[166]

Following the interviews, the investigating officer makes a written report including findings and recommendations with reasons therefore.[167] The complete record of the case is furnished to the applicant for possible rebuttal to any item in the file.[168] The record is further reviewed by a military attorney who looks for "completeness and legal sufficiency."[169] After this requirement is satisfied, a higher commander

---

[158] Crane v. Hedrick, 284 F. Supp. 250, 253 (N.D. Cal. 1968).

[159] 405 U.S. 34 (1972).

[160] 402 U.S. 99 (1971). *See* Musser v. United States, 414 U.S. 31 (1973), reiterating the faith of the Supreme Court in Army C.O. processing.

[161] 5 S.S.L.R. 79 (1972).

[162] *Id.*

[163] Evolution of in-service procedures can be divined from Comment, *God, the Army, and Judicial Review: The In-Service Conscientious Objector*, 56 CAL. L. REV. 379, 405-08 (1968); Brahms, *supra* note 16, at 18-28 (1970); Gales, *Conscience Vis-a-Vis Contract; The Dilemma Confronting Citizen and System, Airmen & Air Force: An Analysis of the Most Recent AFR 35-24, Disposition of Conscientious Objectors*, 14 JAG J. 239, 247-56 (1973). Currently the procedures are prescribed by 32 C.F.R. § 75.6 (1971). Selective Service processes C.O.'s under 47 Fed. Reg. 4640 (1982) (to be codified at 32 C.F.R. § 1636).

[164] 32 C.F.R. § 75.9 (1981).

[165] *Id.* § 75.6(c), (d).

[166] *Id.* § 75.6(d)(2)(i).

[167] *Id.* § 75.6(d)(3).

[168] *Id.*

[169] *Id.* § 75.6(e).

makes a personal recommendation and forwards the record "to the headquarters of the military service concerned."[170] The military department makes a decision to grant or deny C.O. status.[171] However, if the decision-making headquarters considers any adverse information additional to the administrative file and the service member's service record, the applicant is again given opportunity to comment or rebut such information.[172] If the final decision is adverse to the applicant, reasons must be provided.[173]

In contrast to this intricate and time-consuming regulatory scheme is the Selective Service conscientious objector processing.[174] After applying for C.O. status, the requested classification may be granted upon the documents in the registrant's file and evidence presented during a personal appearance before a local board.[175] In the author's experience, from the last era of the draft a local board would often perfunctorily classify young men who were Jehovah's Witnesses, Seventh Day Adventists or members of other pacifist denominations as conscientious objectors.

The time required for administrative processing and final decision-making for in-service C.O.'s may take several months.[176] In the author's experience, the Air Force is the most dilatory service in handling conscientious objectors. During 1977, the Air Force admitted that C.O. processing had reached an average time of five months.[177] Further inquiry was made regarding why the Air Force required this length of time to process conscientious objectors while only about six weeks were needed to process discharges for alleged homosexuals. The response was, *inter alia*, that the Air Force needed five months to process C.O.'s "to insure that the rights of the individual and the interests of the Air Force are protected to the maximum extent."[178] The Air Force went on to explain that its policies and procedures "are designed to provide for the full and equitable protection of its members' rights and to necessarily protect its own best interests."[179]

---

[170] *Id.*

[171] *Id.* § 75.6(f).

[172] *Id.*

[173] *Id.*

[174] 47 Fed. Reg. 4,640 (1982) (to be codified at 32 C.F.R. § 1636).

[175] 47 Fed. Reg. 4,460 (1982) (to be codified at 32 C.F.R. § 1636.8).

[176] Of all services, only the Army, by regulation, establishes any time limit for processing C.O. claims. AR 600-43 (1977), ¶ 2-1b, states "it is expected" active duty C.O. claims "should require under normal conditions, less than 3 months." *Id.*

[177] Letter from Colonel R.W. Haguer, USAF, Headquarters, United States Air Force, to the author (Aug. 30, 1977) (on file with author).

[178] Letter from Colonel Ronald J. Skorepa, USAF, Office of the Secretary of the Air Force to Congressman Anthony Beilenson (Feb. 2, 1978) (on file with author).

[179] *Id.* Apparently, however, the Air Force managed to protect itself and its

If the final decision by the armed forces is to deny C.O. status to an applicant, the member has the right to petition a federal district court for a writ of habeas corpus. Time consumed by the courts for considering such a petition over the post-Vietnam years has greatly increased. For example, during 1971, in *Taylor v. Chaffee*,[180] a hearing was set on a petition for habeas corpus by a denied conscientious objector within about three weeks after filing. The court issued the writ from the bench and later issued its written decision.[181] By 1977, in *Ramos v. Stetson*,[182] the same California District Court that decided *Taylor* consumed seven months to render a decision on an in-service C.O. habeas corpus petition.

In *Kuisle v. Stetson*,[183] an in-service C.O. petition filed with the court on July 25, 1978 was decided on June 9, 1980; in *Taylor v. Claytor*,[184] decided by the Ninth Circuit in 1979, the petitioner had *completed* his two years of obligated service by the time the appeal of his denied C.O. claim was heard. Taylor had applied for conscientious objector status before he entered active duty.

It should be noted that if certain Department of Defense planners had had their way in 1972, the regulation allowing for separation of in-service conscientious objectors would have been abolished.[185] One reason stated for this idea was the "federal courts' preoccupation with individual rights and administrative due process."[186] Another reason for proposing an end to C.O. discharges was that the Vietnam war was nearing its end, thus diminishing a need for "a conscientious objector privilege."[187] This reasoning is faulty since the armed forces' *raison d'etre* is to be prepared for combat at any time. A peacetime Army containing an unknown number of C.O.'s who would presumably be eligible for discharge upon the outbreak of war would be grossly unprepared. The Department of Defense planners who advocated the elimination of conscientious objector discharges lost their bid, and the man who

---

C.O.'s by processing applications in an average of seventy-six days in 1970, according to Letter from Colonel James J. Shepard, USAF, Office of the Secretary of the Air Force to Congressman Ronald F. Dellums (Nov. 1, 1973) (on file with author).

[180] 327 F. Supp. 1131 (C.D. Cal. 1971).

[181] *Id.*

[182] No. 77-2467 DWW(P) (C.D. Cal., Feb. 7, 1978). The Air Force had consumed six months in processing petitioner's C.O. claim, but had still not decided it at the time the court action was filed.

[183] No. 78-M-742 (D. Col., June 9, 1980).

[184] 601 F.2d 1102 (9th Cir. 1979).

[185] Draft, Dept. of Defense Directive 1300.6, undated, to have been effective Jan. 1, 1973 (on file with author).

[186] *Id.*

[187] *Id.*

becomes a C.O. subsequent to entry into the armed forces remains eligible to obtain either noncombatant status (1-A-O),[188] or separation (1-O).[189]

V. CURRENT APPRAISAL

A. *Selective Service*

On February 1, 1982, the Selective Service System published major revisions to its regulations.[190] Under the new regulations, conscientious objector applications usually may be submitted by registrants only after an order to report for induction has been issued.[191] Selective Service will return any C.O. applications to men who submit them prior to receipt of an induction order.[192]

The requirements for conscientious objector status remain unchanged since they were established by statute and case law during the Vietnam era. These requirements are incorporated into the Selective Service regulations. Registrants must be sincerely opposed to participation in any form. The claim may be founded either on "strictly religious beliefs" or upon personal ideals, purely ethical or moral, occupying "a place parallel to that filled by belief in a Supreme Being for those holding more traditionally religious views" in the registrant's life.[193] C.O. classification will be denied to those who are found to be insincere; whose objection "rests solely upon considerations of policy, pragmatism, expediency, or their own self-interest or well-being"; or who are selective objectors.[194]

All C.O. applicants are required to be scheduled for a personal appearance before local draft boards.[195] The exceptions to this requirement are registrants who have been separated from the armed forces as C.O.'s.[196] If a registrant fails to meet with the board, he will be rescheduled for a second personal appearance.[197] Failure to keep this ap-

---

[188] 32 C.F.R. § 75.3(a)(2) (1971).

[189] *Id.* § 75.3(a)(1).

[190] 47 Fed. Reg. 4,640 (1982) (to be codified at 32 C.F.R. §§ 1602, 1605, 1609, 1618, 1621, 1624, 1627, 1630, 1633, 1636, 1639, 1642, 1648, 1645, 1651, 1653).

[191] 47 Fed. Reg. 4,640 (1982) (to be codified at 32 C.F.R. § 1636.2).

[192] *Id.*

[193] 47 Fed. Reg. 4,656 (1982) (to be codified at 32 C.F.R. § 1636.3) (1-A-O Classification); 47 Fed. Reg. 4,656 (1982) (to be codified at 32 C.F.R. § 1636.4) (1-O Classification).

[194] 47 Fed. Reg. 4,656 (1982) (to be codified at 32 C.F.R. § 1636.5).

[195] 47 Fed. Reg. 4,651 (1982) (to be codified at 32 C.F.R. § 1648.3(a)). Procedures for personal appearances are established by 47 Fed. Reg. 4,661 (1982) (to be codified at 32 C.F.R. § 1648.5).

[196] 47 Fed. Reg. 4,661 (1982) (to be codified at 32 C.F.R. § 1648.3(a)); 47 Fed. Reg. 4,652 (1982) (to be codified at 32 C.F.R. § 1637).

[197] 47 Fed. Reg. 4,661 (1982) (to be codified at 32 C.F.R. § 1648.4(b)).

pointment, without good cause, forfeits the claim to C.O. classification.[198]

A registrant denied conscientious objector classification by a local board must be furnished with reasons for the denial.[199] The reasons must be supported by evidence in the registrant's file.[200] If the denial is predicated upon inconsistency or insincerity, the statement of reasons "should" offer a full explanation.[201] In other words, a "basis in fact" for denial must be articulated.

The registrant who is denied C.O. status by a local board has the right to appeal.[202] The appellate rights include a personal appearance before the appeals board.[203] If the appeal is denied, the registrant is entitled to the reasons therefor.[204] A denial of the appeal that is less than unanimous gives rise to a right of presidential appeal.[205]

The new Selective Service regulations afford registrants the right to an advisor at personal appearances before both local boards and appeal boards.[206] However, the role of the registrant's advisor is limited to conferring with the registrant before he responds to a board member's inquiry or statement.[207] The superseded regulations precluded representation of a registrant at any board hearing by "anyone acting as attorney or legal counsel."[208] This provision has been upheld against constitutional challenges.[209] As a practical matter, if registrants were permitted legal representation at Selective Service board hearings, the government could claim the same right, transforming personal appearances into full-blown adversary proceedings (at least for registrants able to afford skilled attorneys).

At the time of writing, the only legal action pending under the MSS Act[210] is the threatened prosecution of young men for failure to register under the 1980 Presidential Proclamation and implementing regulation.[211] Upon any resumption of conscription, there would

---

[198] 47 Fed. Reg. 4,661 (1982) (to be codified at 32 C.F.R. § 1648.4(c)).

[199] 47 Fed. Reg. 4,657 (1982) (to be codified at 32 C.F.R. § 1636.10(a)).

[200] *Id.*

[201] 47 Fed. Reg. 4,657 (1982) (to be codified at 32 C.F.R. § 1636.10).

[202] 47 Fed. Reg. 4,662 (1982) (to be codified at 32 C.F.R. § 1651.1(b)).

[203] 47 Fed. Reg. 4,662 (1982) (to be codified at 32 C.F.R. § 1651.3(c)).

[204] 47 Fed. Reg. 4,663 (1982) (to be codified at 32 C.F.R. § 1651.4(p)).

[205] 47 Fed. Reg. 4,663 (1982) (to be codified at 32 C.F.R. § 1653.1(b)).

[206] 47 Fed. Reg. 4,661 (1982) (to be codified at 32 C.F.R. § 1648.5(f)); 47 Fed. Reg. 4,663 (1982) (to be codified at 32 C.F.R. § 1651.4(g)). The term "advisor" appears to include attorneys or legal laypeople. *Id.*

[207] 47 Fed. Reg. 4,663 (1982) (to be codified at 32 C.F.R. § 1651.4(g)).

[208] 32 C.F.R. §§ 1624.4(d), 1626.4(d), 1627.4(d) (1972).

[209] United States v. Sturgis, 342 F.2d 328 (3d Cir.), *cert. denied*, 382 U.S. 879 (1965); Steele v. United States, 240 F.2d 142 (1st Cir. 1956).

[210] 50 U.S.C. app. §§ 451, 453-56, 458-71(a) (1981).

[211] 45 Fed. Reg. 45,247, 48,130 (1981). Defenses available in these cases are

necessarily arise challenges to the Selective Service System by both civil actions[212] and by the interposing of defenses to criminal offenses established under the MSS Act.[213]

The current state of the law regarding pre-induction judicial review remains that as detailed in 1972 by the Second Circuit in *Naskiewicz v. Lawver*.[214] Although the MSS Act prohibits pre-induction judicial review of Selective Service classification or processing of its registrants except as a defense to criminal prosecution,[215] there are limited exceptions. The first exemption exists when a registrant can show a clear statutory right to an exemption or deferment which involves no discretion by the local board.[216] This avenue for pre-induction judicial review, however, is closed to conscientious objectors.[217]

The second exception to the statutory prohibition of pre-induction judicial review which may apply to conscientious objectors lies in a situation wherein the Selective Service System violates its own regulations.[218] Although *Naskiewicz v. Lawver* did not involve a conscientious objector, the court cited from in-service C.O. decisions.[219]

Furthermore, the years since the end of conscription have witnessed an increasing recognition by federal courts of the duty of all govern-

---

described in M. VEILUVA, REGISTRATION AND THE MSS ACT: CRIMINAL PENALTIES FOR INDIVIDUAL AND COLLECTIVE RESISTANCE TO REGISTRATION (1980) and W. SMITH, LEGAL DEFENSES IN NON-REGISTRATION CASES UNDER THE MSS ACT (May 23, 1981) (Selective Service Law Panel of Los Angeles).

[212] For a brief description of possible affirmative civil litigation on behalf of registrants, *see* Goldberger, *Non-Criminal Legal Challenges to the Draft*, ON WATCH 1 (February 1981).

[213] 50 U.S.C. app. § 462 (1980), prescribes imprisonment for not more than five years, a fine of $10,000, or both for any violation of the MSS Act and its implementing regulations. Such duties have been held to include: failure to register, Kaohelaulii v. United States, 389 F.2d 495 (9th Cir. 1968); failure to report for a physical examination, United States v. Irons, 369 F.2d 557 (6th Cir. 1966); failure to inform Selective Service of change of address, United States v. Haynes, 515 F.2d 275 (4th Cir.), *cert. denied*, 423 U.S. 897 (1975); making false statements in connection with draft status, United States v. Lucke, 431 F.2d 359 (5th Cir. 1970); and failure to possess Selective Service documents, United States v. Couming, 445 F.2d 555 (1st Cir. 1971).

[214] 456 F.2d 1166 (2d Cir. 1972).

[215] 50 U.S.C. app. § 460(b) (1980).

[216] Breen v. Selective Service Board, 396 U.S. 460 (1970); Carey v. Local Board No. 2, 412 F.2d 71, 72 (2d Cir. 1969); Oestereich v. Selective Service Board, 383 U.S. 233 (1968).

[217] Fein v. Local Board No. 7, 405 U.S. 365 (1972); Clark v. Gabriel, 393 U.S. 256 (1968).

[218] Naskiewicz v. Lawver, 456 F.2d 1166 (2d Cir. 1972); Liese v. Local Board No. 102, 440 F.2d 645, 646 (8th Cir. 1971); Hunt v. Local Board No. 197, 438 F.2d 1128, 1135 (3d Cir. 1971). None of these cases, however, involved a conscientious objector.

[219] 456 F.2d 1166, 1168 (2d Cir. 1976).

ment agencies to follow their own regulations.[220] There is no logical reason why a Selective Service registrant should be barred from pre-induction judicial review of denial of conscientious objector status except by refusing induction and standing trial as a criminal, whereas the in-service C.O. is not required to exhaust his remedies through a criminal trial, i.e., a court-martial.[221]

The standard of judicial review for conscientious objector cases remains the "basis in fact" test, the "narrowest range of review known to the law."[222] Reasons for denial of C.O. status must be furnished to the registrant[223] and the government is bound to these reasons.[224] The court will not rummage through a record to uphold what the government has done.[225] Procedures prescribed by applicable regulations must be followed exactly or the government cannot lawfully deny a C.O. application.[226]

If and when prosecution of conscientious objectors resumes under the MSS Act, the historic prejudice against them may be expected to continue. One comment received on the Selective Service proposed regulations in 1981 stated that C.O.'s should be required to demonstrate that they would rather go to jail than serve in the military.[227] During 1980, Congressman Robert Kastenmeir obtained and released a Selective Service report indicating near-paranoia about conscientious objection in any future draft.[228] The report assumed that so many registrants would apply for C.O. status during any future conscription that the System would be unable to cope with them.[229] The document recommended abolishing the privilege to apply for C.O. status or at least eliminating the requirement for draft boards to give reasons for their decisions.[230] Another recommendation was that

---

[220] *See, e.g.*, United States v. Nixon, 418 U.S. 683, 695-96 (1974); Morton v. Ruiz, 415 U.S. 199, 235 (1974). Regarding the military: Matlovich v. Secretary of the Air Force, 591 F.2d 852, 857-59 (D.C. Cir. 1978); Hall v. Fry, 509 F.2d 1105, 1109 (10th Cir. 1975) (citing in-service C.O. cases).

[221] Parisi v. Davidson, 405 U.S. 34 (1972).

[222] United States v. Turcotte, 487 F.2d 417, 419-21 (5th Cir. 1973); Estep v. United States, 327 U.S. 114, 119-23 (1946) (citing many in-service C.O. cases).

[223] *Supra* notes 199, 204; 50 U.S.C. app. § 471(b)(4). The "basis in fact" requirement is separate from the government's obligation to furnish reasons for denial of C.O. status. The former is a judge-made standard for deciding C.O. cases, the latter stems from the constitutional right to due process of law. For a penetrating analysis of this see Drake v. Stetson, 5 MIL. L. REP. (PUB. L. EDUC. INST.) 2321 (E.D. Cal. 1977).

[224] United States *ex rel.* Checkman v. Laird, 469 F.2d 773, 783 (2d Cir. 1972).

[225] United States v. Bautista, 497 F.2d 1196 (9th Cir. 1974).

[226] United States v. Heffner, 420 F.2d 809, 811-12 (4th Cir. 1969).

[227] Proposed Selective Service Regulations, 46 Fed. Reg. 56,438 (1981) (to be codified at 32 C.F.R. § 16) (proposed November 17, 1981).

[228] Seely, *Selective Service Panics Again*, 32 CCCO NEWS NOTES 4 (1980).

[229] *Id.*

[230] *Id.* at 5.

> [c]onscientious objectors could well be subjected to special tax assessments in lieu of military or alternate service. This might include, for example, a property tax taking all property owned in any amount exceeding $500 (excluding work tools, etc.), coupled with an income tax amounting to a virtual forfeiture of all income of more than $5,000 per year for a period of anywhere from five to 20 years.[231]

Although the government may be more hostile toward conscientious objection than during the last conscription, religious groups appear to be more sympathetic than during the Vietnam era. In 1980, the Mennonites began gathering funds to assist draft resisters, and Methodists provided youths with cards to register as C.O.'s with their churches.[232] The Lutheran Council published a letter to Lutheran pastors abjuring them to support "with counselling and love" those men who refused to register on grounds of conscience.[233]

Some form of conscription, or at least a classification of registrants, may commence as early as during 1983. If so, conscientious objectors can expect to find their paths made difficult by the historic hostile attitude toward them by the government and the general population. However, there probably will be more support for C.O.'s by religious and other groups than existed during the Vietnam era.

B. *In-Service Conscientious Objection*

Currently, the in-service C.O. has the burden to set forth a *prima facie* claim consisting of a non-frivolous allegation of opposition to all war. This allegation must be based on religious training and belief or a personal moral and ethical code which is sincere.[234] Once this *prima facie* claim has been submitted, the burden shifts to the government to show a "basis in fact," consisting of hard, provable, reliable facts justifying denial of the requested status.[235] Such facts must constitute more than a mere scintilla of evidence and must substantially blur the "picture painted" by the applicant.[236]

Before final decision is made upon the in-service conscientious objector's claim, the applicant must be given an opportunity to read, comment upon and rebut adverse information in the file.[237] All officials acting

---

[231] *Id.*

[232] Mackey, *Churches Go On Offensive Over Draft Registration*, CHRISTIANITY TODAY 74 (Sept. 15, 1980).

[233] *Id.*

[234] Clay v. United States, 403 U.S. 698 (1971).

[235] Shaffer v. Schlesinger, 531 F.2d 124 (3d Cir. 1976); Chilgren v. Schlesinger, 499 F.2d 204 (8th Cir. 1974); Smith v. Laird, 486 F.2d 307 (10th Cir. 1973); Ward v. Volpe, 484 F.2d 1230 (9th Cir. 1973); Helwick v. Laird, 438 F.2d 959 (5th Cir. 1971).

[236] United States *ex rel.* Checkman v. Laird, 469 F.2d 773, 778 (2d Cir. 1972).

[237] Crotty v. Kelly, 443 F.2d 214 (1st Cir. 1971). Selective Service C.O.'s have

upon a conscientious objector application must reach their conclusions by a rational process, not by speculation or hunch.[238]

The mere fact that a C.O. application is submitted subsequent to other requests for discharge or deferment does not *per se* provide a basis for concluding that the applicant is insincere.[239] The armed forces may not rely on actions of the applicant prior to crystallization of conscience as a basis for a finding of insincerity.[240] However, if the armed forces can show that an applicant was a C.O. prior to entry, either by induction or enlistment, in the Armed Forces, the application may be lawfully denied.[241] This is the "waiver provision," discussed extensively by the Second Circuit in *Foster v. Schlesinger*.[242]

Perhaps the most frequently used basis for a finding of insincerity by the armed forces, when the applicant applies for C.O. discharge prior to entering active duty from inactive Reserve status, is "lateness in filing."[243] The government contends that because an applicant waited to apply for C.O. status until a call to active duty was imminent, the applicant was insincere. "Lateness in filing," standing alone, however, is not a sufficient "basis in fact."[244] On the other hand, if the in-service applicant in any way indicates a crystallization of conscience subsequent to induction or enlistment but some months before submitting a C.O. application, the armed forces often maintain that the applicant is insincere because he waited too long to apply.[245] This is an example of the Hobson's choice reasoning to which the armed forces are partial when dealing with in-service conscientious objectors.[246]

When the officers who actually interview a C.O. applicant find him to be sincere and recommend approval, there is a heavy burden on the armed forces to justify denial of the claim.[247] However, as the United

---

had this right since 1955. Gonzales v. United States, 348 U.S. 407 (1955) (decided on concepts of procedural regularity and basic fair play).

[238] Peckat v. Lutz, 451 F.2d 366 (4th Cir. 1971); Bates v. Commander, 413 F.2d 475 (1st Cir. 1969).

[239] *See, e.g.*, Capobianco v. Laird, 424 F.2d 1304 (2d Cir. 1970).

[240] United States *ex rel.* Brooks v. Clifford, 409 F.2d 700, 707 (4th Cir. 1969).

[241] 32 C.F.R. § 75.4(1) (1981).

[242] 520 F.2d 751 (2d Cir. 1975).

[243] Most inactive Reserve applicants for C.O. discharge in the 1970's were "Berry Plan" physicians, commissioned under 32 C.F.R. § 58. An inordinate number of circuit courts of appeals C.O. decisions during the 1970's involved C.O. claims made by these physicians.

[244] *See, e.g.*, La Franchi v. Seamans, 536 F.2d 1259 (9th Cir. 1976); Christensen v. Franklin, 456 F.2d 1277 (9th Cir. 1972).

[245] *See, e.g.*, Benbow v. Alexander, No. C-78-2567 SAW (N.D. Cal., Mar. 12, 1979).

[246] Goldstein v. Middendorf, 535 F.2d 1339 (1st Cir. 1976); United States *ex rel.* Greenwood v. Resor, 439 F.2d 1249 (4th Cir. 1971).

[247] La Franchi v. Seamans, 536 F.2d 1259 (9th Cir. 1976); Lobis v. Secretary of

States moved towards conservatism in the late 1970's and 1980, three courts of appeals held against such conscientious objectors, all physicians.[248]

In two of these cases, *Young v. Middendorf*[249] and *Naill v. Alexander*,[250] the courts held, in effect, that the appointed military investigating officers did not know the law and regulations regarding conscientious objection when they recommended approval of the applications after conducting a hearing and investigation. This is contrary to the well-established "presumption of regularity" attached to actions by government officials; i.e., an officer is presumed to perform appointed duties in accordance with law and regulations.[251]

In *Taylor v. Claytor*,[252] the Ninth Circuit cited *Dickinson v. United States*[253] to allow a judicial search of the record to support the government's denial of C.O. status to the petitioner. Ignored was the Ninth Circuit's own decision in *United States v. Bautista*[254] and the distinguishing of *Dickinson* by *United States v. Haughton*[255] as largely inapposite to conscientious objector cases.

In *Naill v. Alexander*,[256] the Tenth Circuit, despite its own decision in *Fleming v. United States*,[257] found a heavy burden on conscientious objectors to prove the existence of religious beliefs.[258] Perhaps even more troublesome for present and future C.O.'s was the accordance by the Tenth Circuit of a higher status to military regulations than to applicable case law.[259]

---

the Air Force, 519 F.2d 304 (1st Cir. 1975); Chilgren v. Schlesinger, 499 F.2d 204 (8th Cir. 1974); Tressan v. Laird, 454 F.2d 761 (9th Cir. 1972); Tellez v. Chaffee, 467 F.2d 218 (9th Cir. 1972); Cubbison v. Laird, 464 F.2d 1393 (9th Cir. 1972); Strait v. Laird, 464 F.2d 205 (9th Cir. 1972); Miller v. Chafee, 462 F.2d 335 (9th Cir. 1972); Robinson v. Laird, 457 F.2d 741 (7th Cir. 1972); Clement v. Laird, 447 F.2d 1404 (9th Cir. 1971); Rastin v. Laird, 445 F.2d 645 (9th Cir. 1971); Tobias v. Laird, 413 F.2d 936 (4th Cir. 1969); Brooks v. Clifford, 409 F.2d 700, 705, 708 (4th Cir. 1969); Singer v. Secretary of the Air Force, 385 F. Supp. 1369 (D.C. Colo. 1974); Nachand v. Seaman, 328 F. Supp. 753 (D.C. Md. 1971); Taylor v. Chaffee, 327 F. Supp. 1131 (D.C. Cal. 1971); Talford v. Seaman, 306 F. Supp. 941 (D.C. Md. 1969); Reitemeyer v. McCrea, 302 F. Supp. 1210 (D.C. Md. 1969).

[248] Naill v. Alexander, 631 F.2d 696 (10th Cir. 1980); Taylor v. Claytor, 601 F.2d 1102 (9th Cir. 1979); Young v. Middendorf, No. 77-1375 (7th Cir., Oct. 20, 1977).

[249] No. 77-1375 (7th Cir., Oct. 20, 1977).

[250] 631 F.2d 696.

[251] *See, e.g.*, Sanders v. United States, 594 F.2d 804, 814 (Ct. Cl. 1979).

[252] 601 F.2d 1102 (9th Cir. 1979).

[253] 346 U.S. 389, 396 (1953).

[254] 497 F.2d 1196 (9th Cir. 1974).

[255] 413 F.2d 736 (9th Cir. 1969). *Dickinson* involved entitlement to a ministerial exemption, not conscientious objection.

[256] 631 F.2d 696.

[257] 344 F.2d 912, 915-16 (10th Cir. 1965).

[258] 631 F.2d at 698.

[259] *Id.* at 698-99.

The applicable Department of Defense regulation prescribes that C.O. applicants must "establish by clear and convincing evidence" their claims to conscientious objector status.[260] This flies in the face of decisions by five United States courts of appeals,[261] all of which held that the applicant's only burden is to set forth a *prima facie* claim, whereupon the burden shifts to the government to provide a legally sufficient basis in fact for denial.

The regulatory "clear and convincing evidence" burden of proof has been used recently by the Army,[262] Navy[263] and Air Force[264] in attempts to deny conscientious objector claims. These challenges to the burden of proof established by case law[265] have been approved by the Department of Justice.[266]

Over the past five years, *Young*, *Naill* and *Taylor*[267] evince a trend by courts of appeals to hold against conscientious objectors. However, some decisions by district courts show an opposite disposition; *Rogers v. Alexander*[268] and *Nickles v. Alexander*[269] are on point.

First Lieutenant Rogers and Major Nickles were both graduates of the United States Military Academy (West Point). Both officers had subsequently attended and graduated from medical school under Army auspices. Nickles had even completed residency training in internal medicine at an Army hospital prior to requesting discharge as a conscientious objector.

The Army, quite understandably, found the C.O. claims submitted by Rogers and Nickles unappealing, to say the least, since they had received much education at government expense. Despite recommendations for conscientious objector discharge by the officers appointed to investigate Rogers' and Nickles' applications, the Army denied their requests.[270]

---

[260] 32 C.F.R. § 75.5(d) (1981).

[261] *See* note 235 *supra* and accompanying text.

[262] Nickles v. Alexander, 9 MIL. L. REP. (PUB. L. EDUC. INST.) 2129 (W.D. Tex. 1981).

[263] Selinger v. Claytor, No 78-722-F (D. Mass. filed Jan. 21, 1978) (Petition for Habeas Corpus still *sub judice*, with preliminary injunction granted Jan. 30, 1978, restraining petitioner's order to active duty).

[264] McCorkell v. Orr, 10 MIL. L. REP. (PUB. L. EDUC. INST.) 2300 (W.D. Wash. 1982) (Habeas Corpus granted on other grounds).

[265] *See* note 235 *supra* and accompanying text.

[266] Letter from John H. Davitt, Internal Security Section, Criminal Division to the author, Nov. 14, 1978. Mr. Davitt's section is charged with Department of Justice supervision of in-service C.O. litigation.

[267] *See* note 248 *supra* and accompanying text.

[268] 9 MIL. L. REP. (PUB. L. EDUC. INST.) 2127 (W.D. Tex. 1981).

[269] 9 MIL. L. REP. (PUB. L. EDUC. INST.) 2129. Although the author represented both Rogers and Nickles and both officers were stationed at the same El Paso, Texas, Army Installation, they had no connection with each other.

[270] *Id.*

The district court, however, granted habeas corpus to Rogers and Nickles, conditioning discharge from the Army upon their reimbursement to the government of the educational funds expended on them.[271]

A similar case, *McCorkell v. Orr*,[272] was decided in late 1981. Again the administratively unsuccessful C.O. was a physician who had received educational benefits from the government in exchange for a commitment to serve in the Armed Forces. Habeas corpus was granted to Dr. McCorkell, who was ordered to reimburse the government for its expenditures on his education.

The decisions ordering C.O. discharges for Drs. Rogers, Nickles and McCorkell evidence a current tendency by district courts to regard military agreements to serve in exchange for educational benefits as personal service contracts. Substantial justice to the parties is done by requiring restitution of the value of the schooling if the military members cannot complete obligated service for reasons of conscience.[273]

VI. CONCLUSION

If conscription resumes in the future, this author believes improvements can be made in the handling of conscientious objectors. Such improvements could benefit both the objectors and the United States. Instead of requiring C.O.'s to submit written applications, appearing before local and appeal boards with witnesses and advisors, why not merely require them to submit a simple affidavit to National Headquarters, Selective Service System?

The registrant applying for 1-0 status could be required to attest that he is sincerely opposed to participation in war in any form, based upon religious or personal beliefs. Registrants would have to express a willingness to perform alternative civilian service for a period of time equivalent to that their non-C.O. peers were being required to serve in the armed forces. A similar form could be used for registrants desiring 1-A-O, noncombatant classification. These men would be required to express a willingness to serve in the armed forces as noncombatants.

---

[271] Prior to court hearing, Rogers and Nickles made written settlement offers of $20,000 and $25,000, respectively. These were rejected by the Army and Department of Justice. Since the court only ordered Rogers to pay $12,864 and Nickles to pay $2,036.50, the adamance of the government cost the U.S. Treasury a total of over $30,000. This did not include the cost to the taxpayers of litigation. The Army flew one of its lawyers from Washington, D.C., to El Paso, Texas, to argue the *Rogers* and *Nickles* cases.

[272] 10 MIL. L. REP. (PUB. L. EDUC. INST.) 2300 (W.D. Wash. 1982).

[273] The older view was that a judgment conditioning a C.O. discharge was of questionable validity. Smith v. Laird, 486 F.2d 307 (10th Cir. 1973); McCullough v. Seamans, 348 F. Supp. 511 (E.D. Cal. 1972).

Such a procedure may appear to make it "too easy" to obtain C.O. classification. However, statistics cited in this article[274] prove that Americans have never applied for conscientious objector status in numbers nearly large enough to affect military mobilization. This was true even during the United States longest and most unpopular war, Vietnam. Peer and parental opinion, the desire to prove "manhood" and patriotism have all precluded any truly massive resistance to military service by Americans throughout our national history. And the only time in American history that all available males of military age were even needed by the armed forces was at the height of World War II.

The government would benefit from greatly simplified C.O. procedures. Besides eliminating a costly administrative burden on the Selective Service System and the armed forces, judicial and United States attorneys' time would be conserved. The Army would not be receiving men to utilize as combat troops who, denied C.O. status, only accepted induction as an alternative to prison. Such men obviously do not make effective soldiers.

Service in the armed forces of the United States is a privilege, at least in the sense that medical, moral and mental standards are so high that a large segment of the population cannot qualify. It is time for members of Selective Service local and appeals boards to realize these rather obvious facts. It is also time to assure that no longer will people sit on draft boards who believe part of their mission is to "sentence" men to serve in the Army for the unwritten "crime" of vehemently objecting to so doing.

If the government persists, as is likely, in requiring C.O. applicants to appear before draft boards, a detailed directive should be published governing the range of questions relevant to conscientious objection. When local boards last interviewed C.O.'s, many of their queries were—quite bluntly—silly. For example, there was the "rape your grandmother" question, well-known to draft lawyers and counsellors. Board members would ask whether the registrant would come to the aid of a female relative if she were being attacked. The question proceeded from the ridiculous but widespread idea that "opposition to all war" required a man to stand idly by while his mother was being violently accosted. Such questions may be viewed as an attempt to humiliate a man because of his religious or ethical beliefs.

For in-service conscientious objectors, there is currently a need for amendments to the governing Department of Defense regulation[275] to preclude the worsening dilatoriness by the military departments in processing applications.[276] The Department of Defense could merely require

---

[274] *See* notes 30, 39 and 94 *supra* and accompanying text.

[275] 32 C.F.R. § 75 (1981).

[276] In its Return to Order to Show Cause in Salcedo v. Orr, No. CV 82-0349-TJH (C.D. Cal. filed Jan. 26, 1982), the government admitted that after

that C.O. claims be processed to final decision within ninety days from date of application. In *Withum v. O'Connor*,[277] the court would not countenance a Navy claim that more than eight months was needed to act on an application for administrative discharge based on recruiter fraud. It is suggested that the same rationale should be applied to habeas corpus petitions by in-service C.O.'s. Such petitions should be granted if a *prima facie* case has been established and inexcusable procedural slowness by the armed forces has been shown.

In a 1973 article, Air Force Captain Robert Robinson Gales, pointed out the fallacy of the regulatory demand that a C.O.'s beliefs be the "primary controlling force" in the applicant's life.[278] This requirement, wrote Captain Gales, "is unique to the Department of Defense" and is additional to any requirements of case law or statute.[279] During 1977, in *Drake v. Stetson*,[280] the Air Force unsuccessfully argued that the regulatory "primary controlling force" language was a necessary part of the *prima facie* claim to conscientious objector status. Yet, in 1982, in-service C.O.'s were still under a burden, manufactured by the military, to show their beliefs to be "the primary controlling force" in their lives.[281] This requirement should be eliminated. It has no basis in law.

Since the regulatory burden of proof upon in-service conscientious objectors to establish their claims by "clear and convincing evidence"[282] is contrary to the weight of well-established case law,[283] it should also be eliminated. In fact, if the military were privileged to deny C.O. applications on the grounds that "clear and convincing" evidence had not been submitted, the regulatory right to in-service conscientious objection would be rendered nugatory.

Finally, the requirement that in-service C.O.'s be interviewed by a psychiatrist[284] should be eliminated. The mandatory psychiatric evaluation has little purpose except to humiliate conscientious objectors by its implicit assumption that C.O.'s have mental problems. During 1981, the armed forces processed 449 C.O. claims.[285] Assuming the psychiatric in-

---

more than eight months from its submission, a C.O. application still had not left the initial processing headquarters. This time included more than two months during which the Air Force lost the applicant's file.

[277] 506 F. Supp. 1374 (D.P.R. 1981).

[278] *Conscience Vis-a-Vis Contract; the Dilemma Confronting Citizen & System, Airman & Air Force*, 14 JAG J. 239, 246 (1973).

[279] *Id.*

[280] 5 MIL. L. REP. (PUB. L. EDUC. INST.) 2321 (E.D. Cal. 1977).

[281] 32 C.F.R. § 75.5(c) (1981).

[282] *Id.* § 75.5(d).

[283] *See* cases cited in note 235 *supra*. *Contra* Naill v. Alexander, 631 F.2d 696 (10th Cir. 1980).

[284] 32 C.F.R. § 75.6(c) (1981).

[285] *See* notes 6-9 *supra* and accompanying text.

terview consumed one-half hour for each of these objectors, 224.5 hours of military psychiatric time was wasted.[286]

One may or may not agree with this Article's initial proposition that military service is a patriotic obligation of all American citizens. However, it is undeniable that shabby treatment and lack of respect has generally been the lot of the American conscientious objector.

Conscientious objector status should be granted more liberally in the future both by the Selective Service and the Armed Forces. The C.O. certainly should be respected as someone not unpatriotic, but perhaps loving God and neighbor more or in a different manner than those whose consciences permit combatant military service.

---

[286] In only two of the hundreds of in-service cases handled by the author from 1970-1982 did an examining psychiatrist recommend separation on psychiatric grounds. In both cases, the psychiatrists' recommendations were ignored.