HABEAS CORPUS AND THE RELUCTANT SOLDIER

A Thesis

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The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U.S. Army, or any other governmental agency. References to this study should include the foregoing statement.

by

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SCOPE

An analysis of the legal efforts of Americans, unwilling to fight for their country for reasons of conscience and other reasons, to avoid military service by use of the writ of *habeas corpus*, devoting particular emphasis to the vacillating limits of judicial review of military actions and the changing concepts in defining and dealing with conscientious objection.

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CHAPTER I

INTRODUCTION

The reckless permissiveness that pervades all elements of our society begets a disorderly society. This disorder subverts justice, the noblest of tenets and makes a mockery of mercy, the most sublime. Disorder prohibits the existence of ordered liberty. Ordered liberty in a complex society is a prerequisite for justice. Admittedly, order can exist without justice but justice cannot exist without ordered liberty. Without order, justice has no chance to develop, it has no direction, no head, its neck just grows up and hairs over! Man is not born just, he is born biting, scratching, clawing and climbing over his siblings. That is not to say that the seeds of goodness and fair play are not within him, but he exists in a state of random, satisfying appetites. He is not just, he just is! He needs an orderly milieu in which he can nuture and develop his sense of fairness and justice, if at last on no nobler basis then it is in his own self-interest. Having reached a state of ordered liberty and

reduced again to disorder, which we seem to be approaching, justice cannot thrive. It cannot thrive where each may do whatever he wishes and none are required to do anything. And so the slayer is left undisturbed in the midst of his base deed observed by the furtive voyeur eyes of a dozen witnesses. Disorder permits the casual, negligent, almost unintentional disregard and violation of the liberty of others. The callous, the insensitive and the slovenly soil themselves at the altar of Everyman. What recourse for the modest and bewildered -- withdrawal or clawing, biting and soiling oneself revisited?

The unwillingness of a significant number of American men to fight for their country is symptomatic of this state of reckless permissiveness. It is not necessary to adhere to this premise to find validity in that which follows for this paper does not deal with causation but rather with what is and what will or ought to be.

There are and always have been men who were unwilling to fight for their country. Man has avoided military service by maiming himself, hiding from authority or leaving the homeland. Man has also resorted to legal means to avoid service. In this country the noble writ of *habeas*

corpus has been the chief and ultimate test of the legality of compulsory military service. It is the purpose of this paper to examine resort to this writ. After a brief consideration of the American man's historical aversion to military service, the various objectors to military service (reluctant soldiers in a broad sense) are categorized for presentation as pre-service objectors, in-service objectors, reluctant reservists, and miscellaneous objectors.

Before presenting these categories of objectors, it should be noted that conscientious objectors will be found in several of the above-mentioned categories and indeed they comprise the largest group of objectors who find their way to the courts. If the greatness of man be measured by his willingness to be kind, then too few who deal with conscientious objectors can be considered great by this yardstick. While Congress has long recognized that liberty of conscience is worthy of protection, with notable exceptions, the courts and individual members of the executive departments and the public dealing with conscientious objectors have been less than kind in their dealings until recently. In the first place, they do not understand the objector's viewpoint so they are not enamoured with his exemption from

military service. Secondly, while accepting Congress' mandate (grudgingly for they must), they just do not believe that the particular individual under scrutiny truly holds that belief.

It is timely now to consider briefly the American man's historical aversion to military service before examining the various categories of objectors.

CHAPTER II

VOLUNTEERS AND CONSCRIPTS

The casual observer viewing the American scene might well conclude that Americans are willing to fight for anything but their country. The evidence is overwhelming. We see the university is stormed, the dean imprisoned, the people are mugged in the streets and the city is gutted to the exhortation of "Burn, baby, burn!" Ships of the line are confronted by canoes. There is a crusade for the right to destroy one's sensibilities or sharpen one's mind before impairing it with transcendental substances. There is a willingness to do battle with every idea and proposal and turn on opposing ideas and counter proposals with equal venon. No one's idol is safe! The iconoclasts and insensitive prevail. The only code to live by is to do one's own "thing." Couple this sweet state of the nation with the many means (from the crude to the sophisticated) that individuals employ to avoid military service and it is difficult not to conclude that the people are willing to fight for anything but their country. This proposition,

of course, is refuted by the fact that millions of Americans have fought and are fighting courageously and gallantly for their country. The degree of willingness, however, can remain disputed. This issue is not to be resolved. A degree of unwillingness to fight for country exists, it is not a new phenomenon, it always existed.

There is a common misconception in the minds of many Americans that in time of war and national emergency we band together, shoulder to shoulder, and get the job done. Nothing could be further from the truth. The myth of the citizen-army composed of willing volunteers is belied by the facts.

In the Revolutionary War the number of volunteers never exceeded two-thirds of the strength first authorized for the Continental Army (20,000). Although there were some 400,000 enlistments, the largest Army ever commanded by Washington was less than 20,000 men. At one time he commanded a mighty host of no more than 2,000 men. This was despite bounties as high as $750, a suit of clothes, and 100 acres of land. This was no mean inducement in those days particularly in light of the fact that when

the militia was called out, it was for a period of from three days to 12 months![1]

The War of 1812 was a mean and base little war. It was a triumph after no achievement, and an engagement teaching no lessons. This rather cavalier characterization of that unhappy circumstance may be disputed, but the role of the militia is not in dispute. At the outbreak of the War, the actual strength of the Regular Army was 6,700 out of an authorized strength of 35,000. The call for volunteers was never more than one-half filled. These militia men were opposed by a British force on the Continent that probably never exceeded 4,500. A force of 4,400 such soldiers abandoned Washington, D.C. to a British force of 3,500![2]

The Mexican War is generally looked upon as a war of aggression against a weak neighbor. That may be a correct proposition. From the standpoint of "enlighted" self-interest however, it was probably the most

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[1]E. FITZPATRICK, UNIVERSAL MILITARY TRAINING 144-145 (1945).

[2]T. H. WILLIAMS, AMERICANS AT WAR 22-30 (1960).

justifiable war since the Revolution, adding California and the Southwest at such a modest cost. This war was fought with competent leadership, particularly Gen. Winfield Scott, and a small force of volunteers. However, General Scott had to send home 40% of his Army whose six-month enlistments had expired on his march to Mexico City. This permitted the enemy force which was nearly destroyed to regroup and reinforce.[3]

The volunteer system failed completely in the Civil War. This failure seems natural and predictable in view of the nature and extent of the conflict. Hence the first draft. The Enrollment Act, passed in March of 1963,[4] made men, with certain exceptions, between the ages of 20 and 45 liable for military service. This act was not effectively administered and the chief result was to force sufficient enlistments to fill the ranks. Under that law service could be avoided by providing a substitute or purchasing a discharge for $300. Professional substitutes sold themselves over and over,

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[3] T. H. WILLIAMS, AMERICANS AT WAR 35-37 (1960).

[4] 12 Stat. 731 (1863).

deserting after each sale. Men enlisted for bounties, deserted and enlisted again for new bounties.[5] As decentralized and as ineffective as this Act was, it still precipitated the worst civil disturbance this country has ever seen.

The Draft Riot of 1863 in New York exceeded in savagery, brutality and dimension any of the domestic disturbances taking place in this country in the 1960's (or at any other time). While it was precipitated by the draft, it was more the result of underlying economic and social conditions of the time. One significant difference from the current disturbances is that the Negro was not a participant or part of the mob in 1863 but rather a major object of its violence. It began on a Monday of a week in July of 1863 and except for scattered incidents, it was over on Friday of the same week. In those few days *1500* rioters were killed according to best estimates! How many more subsequently died of their wounds is unknown for no one wished to explain the circumstances of their wounds or the death

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[5]E. Fitzpatrick, *supra* note 1 at 148.

of their loved ones. The administration of burial permits broke down in the month of July 1863, but there was a significant excess of deaths and burials for the month. There were 217 deaths from "sunstroke" reported during the riot week and the week following. The number of police and military deaths were many but the figures were unknown.[6]

The mob was guilty of gross atrocities. An orphan asylum was sacked and burned; people beaten to death and mutilated (by women as well as men); the ladies-in-waiting of a bawdy house were stripped and tortued; Sue the Turtle, keeper of another establishment, unable to flee because of her prodigious proportions, was beaten to death. Prominent political, military and social figures were special objects of the mob's affection. They threatened to hang Horace Greely should they find him. He imprudently ventured into their grasp and was buffeted about a bit, but nothing worse befell him for he went unrecognized.[7] He may well have acutely wished that he had followed his own sage advice to go west. Yet he survived, stayed east and made another million dollars.

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[6] W. O. STODDARD, THE VOLCANO UNDER THE CITY 293-295 (1887).

[7] J. McCAGUE, THE SECOND REBELLION 93-99 (1968).

The riots were blamed on the criminal element in New York City, convicted criminals, "unconvicted" criminals, all those who were convicted in Europe, the convicted criminals from the "interior" who allegedly flowed into New York and those "morally prepared for" criminal acts. This element was stirred up by "criminal demagogues" and "seditious journals" in both the United States and Europe.[8] No wonder then that the police acted in such a manner as to make present Chicago police practices look like local safety patrol antics. Guns and clubs dispatched countless rioters and police orders at one point were to "take no prisoners." As for the Army, repeated discharges of grape shot and cannister from field guns and howitzer from close quarters left the streets running with blood. "Give them grape and plenty of it...." was the cry.[9]

So the volunteer system never was greatly successful, even with substantial inducement to get the number of men needed. Additionally, the draft has never been a

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[8] W. O. Stoddard, *supra* note 6 at 7-24.

[9] J. McCague, *supra* note 7 at 76, 133.

"popular" measure and we have had dissenters from these laws since the first enactment.

CHAPTER III

WHAT IS A CONSCIENTIOUS OBJECTOR?

The most significant unsettled question today in the area of conscientious objection is the definition of that term. The trend is to define it so broadly that soon anyone who truly objects to military service will qualify for exemption.

The liberty of conscience has a moral and social value to our society that ought to be protected by the state. Accordingly, our law makers have always recognized conscientious objection to participation in war in our conscription laws. The dilemma of conscience was recognized by the colonies and later in state statutes and constitutions. During the Civil War members of religious denominations opposed to bearing arms were permitted to perform substitute service or pay $300 to avoid military service.[10] The Draft Act of 1917,[11] exempted from combat service "a

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[10] 13 Stat. 9 (1864).

[11] 40 Stat. 76, 78 (1917).

member of any well-recognized religious sect or organization at present organized and existing and whose creed or principles forbid its members to participate in war in any form."[12] The test for conscientious objection was liberalized in the Selective Service Act of 1940 so it was no longer necessary to belong to a pacifist sect. The Act exempted from military service a person who "by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[13] Again noncombat duties or work of national importance could be required. Two Court of Appeals cases construing the language of the 1940 Act held that "religious training and belief" did not include philosophical, social or political views.[14] The draft law was amended in 1948 and language was added defining "religious training and belief" as "an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human

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[12]This Act was held constitutional in *Arver v. United States*, 245 U.S. 366, 389-390 (1918).

[13]54 Stat. 889 (1940).

[14]*United States v. Kautan*, 133 F.2d 703 (2d Cir. 1943); *Berman v. United States*, 156 F.2d 377 (9th Cir. 1946).

relation but not including essentially political sociological or philosophical views or merely a personal moral code."[15] This change in language was motivated by the two Court of Appeals cases,[16] but created a new issue for the courts to consider, the "Supreme Being" test. This test was emasculated by the Supreme Court in *United States v. Seeger*[17] in 1965. Seeger was convicted for having refused to submit to induction. He defended on the ground that he should be exempt by reasons of conscientious objection. He professed a religious belief and faith, and while not disavowing his belief in a Supreme Being, he did state that the "cosmic order" suggests a creative intelligence and he bewailed the "tremendous spiritual price" that a man must pay for taking human life. The Supreme Court unanimously overturned his conviction in the lower courts. The Court held that in using the expression "Supreme Being" rather than "God," the statute was merely clarifying the meaning of religious training and

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[15] 62 Stat. 613 (1948).

[16] S. Rep. No. 1268, 80th Cong. 2d Sess. 14 (1948).

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

belief "so as to embrace all religions and to exclude essentially political, sociological, or philosophical views." The test of a belief "in relation to a Supreme Being" is whether that belief is sincere and occupies a place in one's life parallel to that filled by an orthodox belief in God. The Court said that Seeger met this test. Justice Douglas, concurring, noted that any other construction of the statute would violate the "free exercise clause" of the First Amendment and be a denial of equal protection by showing a preference for some religions over others.

When Congress enacted the Selective Service Act of 1967, the "Supreme Being" language was omitted and the test that remains is objection based on religious training and belief and not on political, sociological, or philosophical views or a personal code.[18] While the Supreme Being test is out, the philosophical approach to what is a conscientious objector raised by *Seeger* is by no means settled. The time is near when this permissive society will allow an individual who objects to war for any reason to avoid military service provided he can clothe his objection in a sufficiently

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[18] 50 U.S.C. App. § 456(j) (Supp. III, 1967).

sophisticated manner to convince the courts that he really does not want to serve. On the way to this view is the United States District Court for Maryland which recently decided that an avowed atheist could be a conscientious objector.[19] The court found that while petitioner called himself an atheist, his conscientious objection was really based on beliefs that were the result of his early religious training.

Judge Wyzanski's decision in the case of one John H. Sisson, Jr., if sustained by the Supreme Court, will practically close the ring (more appropriately open wide the door) in this area. The Judge ruled the Selective Service Act of 1967 unconstitutional (a violation of the First Amendment) insofar as it discriminates against atheists, agnositics and others who, whether they are religious or not are motivated in their objection to military service "by profound moral beliefs which constitute the general convictions of their beings."[20]

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[19] *United States v. Shacter*, 27 U.S.L.W. 2349 (U.S. D.C. Md., 12 Dec. 1968).

[20] See article entitled, *Judge Holds Draft Unfair to Objectors*, The Washington Post, April 2, 1969, A-1, Col 3.

CHAPTER IV

PRESERVICE OBJECTORS AND JUDICIAL REVIEW

The struggle of the preservice objector to avoid military service by legal means is largely a struggle to get the court to review Selective Service decisions. Consideration of this struggle will be confined chiefly to this question.

There can be no doubt that since World War I, Congress has always intended that decisions made by the Selective Service System on the classification and processing of inductees be final and not subject to judicial review until the individual has either submitted to induction or refused to be inducted.[21] The courts have always modified or disregarded this intent to some degree. Under the 1917 Act these decisions were not subject to review unless the board was without

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[21]Selective Draft Act of 1917, 40 Stat. 76 (1917); The Selective Training and Service Act of 1940, 54 Stat. 993 (1940).

jurisdiction; a fair hearing was denied; or their action was arbitrary or unlawful.[22] The 1940 Act provided that decisions of the local boards would be final except where appeals within the system were authorized. The courts interpreted the language of the statute, which was imprecise, to mean that review was proper only in a defense to a criminal prosecution following a refusal to be inducted or in a *habeas corpus* proceeding initiated after induction.[23] Over the years some federal courts allowed exceptions to these general rules.[24] Then came *Wolf v. Local Board No. 16*[25] in which the Second Circuit granted review to a number of registrants who had been reclassified under General Hershey's Selective Service Regulations because of their part in a sit-in demonstration at a local draft board office. The Court of Appeals

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[22] *Franke v. Murray*, 248 F. 865 (8th Cir. 1918); *Pascher v. Kincaid*, 250 F. 692 (3d Cir. 1918); *Angelus v. Sullivan*, 246 F. 54 (2d Cir. 1917), *Ex parte Platt*, 253 F. 413 (E.D. N.Y. 1918); *Brown v. Spelman*, 254 F. 215 (E.D. N.Y. 1918); *Arbitman v. Woodside*, 258 F. 441 (2d Cir 1919).

[23] *Witmar v. United States*, 348 U.S. 375 (1954); *Estep v. United States*, 327 U.S. 114 (1945); *Billings v. Trusesdell*, 321 U.S. 542 (1944); *Falbo v. United States*, 320 U.S. 549 (1943).

[24] *Townsend v. Zimmerman*, 237 F.2d 376 (6th Cir. 1956); *Schwartz v. Strauss*, 206 F.2d 767 (2d Cir. 1953); *Ex parte Fabiani*, 105 F.Supp. 139 (E.D. Pa. 1952); *Thomlinson v. Hershey*, 95 F.Supp. 72 (E.D. Pa. 1949).

[25] *Wolf v. Local Bd. No. 16*, 372 F.2d 817 (2d Cir. 1967).

granted relief. Thereafter Congress enacted the Military Selective Service Act of 1967.[26] Section 10(b)(3) of that Act provides:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President except as a defense to a criminal prosecution instituted under Section 12 of this title, 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: Provided, that such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

It is manifestly clear that this action prohibits review except in defense of a criminal proceeding and if there is a review it will be confined to the issue of whether there is any basis in fact for the classification. It is equally clear from the committee reports of both houses that Congress was disenchanged with the

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[26] 50 U.S.C. App. § 460(b)(3), Supp. III, (1968).

review of those decisions by the federal courts.[27]

Again this Congressional intent has been disregarded by a federal court, in *Oesterreich v. Selective Service System.*[28] This case involved a petitioner exempt from military service as a theological student who returned his registration certificate to the Government "for the sole purpose of expressing dissent from the participation by the United States in the War in Vietnam." Thereafter he was declared delinquent by the draft board for not having a registration certificate in his possession and failure to provide the board with notice of his status.[29]

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[27] S. Rep. No. 209, 90th Cong., 1st Sess., 10 (1967).

"The Committee attaches much importance to the finality provisions and reemphasizes the original intent that judicial review of classifications should not occur until after the registrant's administrative remedies have been exhausted and the registrant presents himself for induction."

H.R. Rep. No. 267, 90th Cong., 1st Sess., 30 (1967).

"Existing law clearly precludes such a judicial review until after the registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order. In view of this inclination of the courts to prematurely inquire into the classification action of local boards, the Committee has rewritten this provision of the law so as to more clearly enunciate this principle. The committee was prompted to take this action *since continued disregard of this principle by various courts* [emphasis supplied] could seriously affect the administration of the Selective Service System."

[28] *Oesterreich v. Selective Service System,* 391 U.S. 912 (1968).

[29] These are breaches of Selective Service Regulations 1642.4, 32 CFR 1642.4a.

He was reclassified, his administrative appeal was denied and he was ordered to report for induction. His suit in the District Court to restrain induction was dismissed and the dismissal was affirmed by the Court of Appeals for the 10th Circuit. The Supreme Court granted *certiorari*. In a six to three decision the Court granted the petitioner relief. The majority opinion, by Justice Douglas, skirts the impact of Section 10(b)(3) by finding that their construction of that section leaves the normal operation of the act unimpaired. The Court held that there was no authorization for the delinquency determination by Selective Service for Congress had not empowered the boards to revoke statutory exemptions by delinquency determinations and even if it had, no standards were prescribed to govern such a determination. The whole thrust of the majority opinion is that to hold that a person deprived of a statutory exemption must either be inducted and bring *habeas corpus* or defend himself for refusing induction in a criminal action is to construe the Act with unnecessary harshness.[30] Justice Harlan, concurring in the result, is more specific and his opinion rests on a somewhat different analysis. He does not speak of

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[30] *Oesterreich v. Selective Service System*, 37 U.S.L.W. 4054 (Sup. Ct. Dec. 16, 1968).

harshness but rather finds that the Selective Service Regulation providing for delinquency classifications is unlawful. It is inconsistent with the statutory exemption of ministerial students and unconstitutional whether or not the regulations are approved by Congress. He also finds that Section 10(b)(3) is not violated by the Court holding. That Section defers judicial review until after induction of board determinations that are individualized and discretionary, and those determinations that are factual or mixed law and fact determinations. These decisions are presumed to be in accordance with applicable laws and regulations. Where, however, the registrant claims that a procedure is invalid on its face, a court may generally dispose of this matter on the pleadings. Such a review is proper because there can be no presumption of regularity if the procedure is illegal and because such a review would work no havoc on the orderly processing of registrants. Further, the constitutionality of congressional acts is not a matter that can be decided by administrative agencies. Particularly the Selective Service System cannot decide purely legal claims for the very good reason that the denial of counsel before these boards is predicated on the ground that these are not judicial

proceedings. Thus, says Harlan, due process prohibits an individual being deprived of his liberty without prior opportunity to present to some competent forum his claim that the procedure is unlawful.[31]

Justice Stewart, speaking for the dissent (joined by Justice Brennan and Justice White) had no difficulty finding that Section 10(b)(3) was designed to allow judicial review of draft classifications only in connection with criminal prosecutions or in *habeas corpus* proceedings, even though it may be plain on the record that a statutory exemption has been granted. Also, regardless of any "unnecessary harshness" of the Act, the point is that the Court is not free to disregard the statute simply because it is harsh. The statute is either constitutional or not and its constitutionality has been affirmed by the Court.[32] Granting that the majority of the Court has left the normal operation of

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[31] *Oesterreich v. Selective Service System*, 37 U.S.L.W. 4055, 4056 (Sup. Ct., Sep. 16, 1968).

[32] *United States v. O'Brien*, 391 U.S. 367 (1968) holding return of registration certificate not protected as free speech.

the statute unimpaired, it certainly has carved out an exception to the statute. This exception seems the least justified and applicable to the individual in least jeopardy. The individual with a clear statutory exemption has the least to fear from this "harsh" act. "It is upon the individual whose rights are not so clear that the burden falls most harshly."[33]

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[33] *Oesterreich v. Selective Service System*, 37 U.S.L.W. 4057, 4058 (Sup. Ct. Sep. 16, 1968).

CHAPTER V

THE IN-SERVICE OBJECTOR

A. The Conscientious Objector

As we have seen, Congress has always protected the dictates of conscience within bounds set by it, but until the early 1960's, there were no procedures for granting relief to individuals who became bona fide conscientious objectors after having entered active duty. In 1962 the Secretary of Defense issued a directive on this matter.[34] This directive permitted the discharge of bona fide in-service conscientious objectors, who became so after entry in the service "to the extent practicable and equitable." The regulation provided pertinently that "no vested right exists for any individual to be discharged from military service at his own request before the expiration of his term of service." Implicit in this language, as the government later argues, is the

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[34]Department of Defense Directive 1300.6, "Conscientious Objectors" August 21, 1962.

proposition that this is a privilege, not a right and any decision on this matter is final. While the courts were not to be overwhelmed by this argument, it apparently euchred the troops out of the courts for several years for there are no reported cases litigating the issue until 1966.

The first reported case was *In re Kanewske*,[35] a *habeas corpus* proceeding in a California District Court by a petitioner who was confined in a Navy brig pursuant to a court-martial for refusing to obey certain orders. This unhappy circumstance followed his absence without leave for some two months after his request for discharge as a conscientious objector had been disapproved by the Navy.[36] Petitioner claimed he was denied due process of law for not receiving a hearing. The court found this point without merit without discussion. He next contended that he was denied due process because the decision

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[35] 260 F.Supp. 521 (N.D. Cal. 1966).

[36] His application had been processed under Bureau of Naval Personnel Instruction 1616.6, Nov. 15, 1962, issued pursuant to the DOD Directive.

was based on an advisory opinion of the Selective Service. This was held equally without merit, the court noting that the procedure outlined in the Department of Defense was followed. The court also noted that under the directive conscientious objectors would be recognized to the extent practicable and equitable and there is no requirement that they must be discharged. The court denied the petition. The conclusion to be drawn from the case is that the court infers it has the right to review such a case by its consideration, however briefly, on the issues. This conclusion is made tenuous by the court's language that having disposed of the petitioner's claim that he was arbitrarily denied a discharge the court was of the opinion that the Navy had jurisdiction over the petitioner. "This being our only function," relief was denied.[37]

In *Gilliam v. Reaves*[38] the petitioner applied for discharge from the Army on the ground of conscientious

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[37] *In re Kanewske*, 260 F.Supp. 521, 524 (N.D. Cal. 1966).

[38] 263 F.Supp. 378 (W.D. La. 1966).

objection. It was denied because it was decided that his professed belief was not truly held.[39] Before a California District Court, petitioner's contention was that the Army had placed a premium on church membership in their decision which violated the rule of *Seeger*. The Court reviewed the case and agreed with the Army's finding that his religious belief was not truly held. More significantly the court found that the scope of review of the Army's determination was to be the same utilized in reviewing Selective Service Board actions. Thus the courts should not "sit as super draft boards, substituting their judgment on the weight of the evidence for those of the designated agencies."[40] The court viewed its scope of review as very narrow.

In *Brown v. McNamara*,[41] petitioner voluntarily enlisted in the Army and after two weeks of basic training his conscientious objection was "crystallized" to the extent that he applied for discharge on that

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[39]Gilliam was processed under Army Regulations 635-20 which implemented DOD Directive 1300.6, Aug. 21, 1962.

[40]*Gilliam v. Reaves*, 263 F.Supp. 778, 779 (W.D. La. 1966).

[41]*Brown v. McNamara*, 387 F.2d 150 (3d Cir. 1967).

ground. This application was denied. Petitioner then refused to proceed with combat training and when confined a second time by sentence of a court-martial for refusing to obey orders, he brought a *habeas corpus* proceeding. He contended the decision violated substantive due process for it was arbitrary and without basis in fact; it violated procedural due process; and it denied equal protection of the laws for no hearing was provided as in the case of preservice objectors. The District Court declined review citing the leading case of *Orloff v. Willoughby,*[42] a 1953 case which stands for extremely narrow review of military matters. The court asserted it did not wish to foster a situation which "results in having part of what is supposed to be our active force immobile and entangled in litigation."[43] Even the "no basis in fact" test was rejected. The court felt that even this narrow scope of review could result in the disruption of military operations. "It is our feeling that the benefits to be derived from the

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[42] 345 U.S. 83 (1953).

[43] *Brown v. McNamara,* 263 F.Supp. 686, 692 (D. N.J. 1967).

added safeguard of having us review the administrative determination are outweighed by the burdens on the military which would result. Consequently, we refuse to accept jurisdiction to pass on the factual accuracy of administrative decision."[44] The Court of Appeals affirmed agreeing with the result but it hedged on the issue of reviewability pointedly not deciding what they considered to be the proper scope of review.[45]

In *Chavez v. Fergusson,*[46] Pvt. Chavez, not a conscientious objector when he joined the Army in late 1965, became opposed to war in any form soon thereafter. His belief was so strong that he was court-martialed three times for refusing to obey orders which conflicted with this belief. Chavez sought relief after charges had been filed for the third time asking for a stay of court-martial proceedings and a declaratory judgment recognizing his status as a conscientious objector entitled to discharge. The court settled the first question quickly by finding that the federal courts would not review the acts of a court-martial unless it

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[44] *Brown v. McNamara,* 263 F.Supp. 693 (D. N.J. 1967).

[45] *Brown v. McNamara,* 387 F.2d 150, 152 (3d Cir. 1967).

[46] 266 F.Supp. 879 (N.D. Cal. 1967), appeal docketed No. 21,944 9th Cir. June 27, 1967.

appears that the military tribunal is acting in excess of its jurisdiction.[47] The court was equally short with the request for declaratory judgment holding that the court was without jurisdiction, noting that the courts should and must stay out of running military affairs citing this proposition as the lesson of *Orloff v. Willoughby*.[48]

This was the same court (although a different presiding judge) that decided *In re Kanewske*. Here the court adhered to the principle of very narrow review. In the former case, there was an inference of reviewability because the court reviewed the evidence to the point where it found that the government had followed its own regulations. That inference seems weakened by this latter case.

Noyd v. McNamara[49] is a case of "selective" conscientious objection. Capt. Noyd, a regular Air Force

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[47] *Citing Smith v. Whitney*, 116 U.S. 168 (1885) and *Burns v. Wilson*, 346 U.S. 137 (1953).

[48] *Orloff v. Willoughby*, 345 U.S. 83 (1953). "Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters."

[49] *Noyd v. McNamara*, 378 F.2d 538 (10th Cir. 1967) *cert. denied*, 389 U.S. 1002 (1967).

officer with over eleven years service, was assigned to the Air Force Academy as an Asst. Professor in Psychology. He submitted his resignation for the "best interest" of the service stating he was opposed to the war in Vietnam for political reasons and belief in "ethical humanism." He was not a true pacifist but believed only in the use of force to deter or repel totalitarian aggression. His request was denied. Thereafter he sent a second letter requesting reassignment that would not conflict with his beliefs, having learned he was to be transferred to duty preparing him (or he preparing others) for combat duty. He then submitted a third letter requesting discharge as a conscientious objector. These requests were denied and he received orders reassigning him to a tactical fighter wing. Noyd then brought an action seeking *habeas corpus* and other relief. He contended that the denial of his request for discharge as a conscientious objector violated his rights under the Constitution and statute; that the Air Force regulation lacked minimum criteria of procedural due process; and that the Air Force did not follow its own regulations. The court did not address itself to any of these issues but found that it had no jurisdiction to entertain the suit or grant

the relief. The court quoted generously from *Orloff* and its basis for decision was simply the principle of nonreviewability. The court spoke in terms of "exhaustion of remedies" but it is difficult to separate this argument from the issue of nonreviewability. The Court of Appeals adopted the District Court's rationale with little comment except to affirm a strict application of the nonreviewability doctrine. *Certiorari* was denied.[50]

Hammond v. Lenfest[51] seems to drastically attack the basic attitude of the Federal courts that their jurisdiction is most limited in relationship to the military. Yet a careful analysis indicates that any departure from the established rule is slight. In the area of reviewability, it stands for the rule that the scope of review is severely limited to the standard "no basis in fact." The case is also informative on the question of "custody" and exhaustion of remedies. Petitioner Hammond joined the United States Naval Reserve while in high school and was attached as an inactive reservist to the *U.S.S. Coates* in New Haven. In 1964, he entered the University of Connecticut and became a

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[50] *Noyd v. McNamara*, 389 U.S. 1002 (1967).

[51] 398 F.2d 705 (2d Cir. 1968).

believer in the tenets of the Society of Friends. Thereafter he sought to be discharged as a conscientious objector. His request was denied. Then Hammond refused to attend drills and was ordered to active duty for his failure to perform satisfactorily. Hammond then petitioned the District Court of Connecticut for a writ of *habeas corpus* and a show cause order was entered one week before he was to report to active duty. Petitioner claimed that there was no basis in fact for the decision and the decision was violative of the due process and equal protection clauses of the Constitution. The District Court did not have jurisdiction to do so.[52] On appeal to the 10th Circuit, the government urged an additional ground for affirmance, that Hammond is not in "custody" within the meaning of the federal *habeas corpus* statute.

The Court of Appeals, first announcing that "they are aware of the lessons of history and precedent to the effect that judges are not to run the Army," proceeds

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[52] *Citing Orloff v. Willoughby*, 345 U.S. 83 (1953); *Brown v. McNamara*, 387 F.2d 150 (3d Cir. 1967) and that Hammond had failed to exhaust his available remedies *citing Noyd v. McNamara*, 378 F.2d 538 (10th Cir. 1967) *cert. denied*, 389 U.S. 1002 (1967).

to decide the petitioner's contentions. The first issue disposed of was the question of custody. The view of the court was that the grand writ is not a static remedy and there are other restraints on a man's liberty, besides physical imprisonment which are sufficient to support the issuance of the writ.[53]

The court then turns to the government's contention that *habeas corpus* is not available because he has not exhausted his available remedies by presenting his claim as a conscientious objector as a defense to a court-martial proceeding, relying on *Noyd v. McNamara*. To the extent *Noyd* suggests that a court-martial is prerequisite to review by the Federal Courts, the Second Circuit rejects *Noyd*. The court says it is possible to read *Noyd* as an applicance of the "settled doctrine that the

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[53]On the question of custody, *see Jones v. Cunningham*, 371 U.S. 236 (1963) (*Habeas corpus* to petitioner on parole); *Carafas v. La Vallee*, 391 U.S. 234 (1968) (*habeas corpus* available although petitioner was released from prison after writ is filed). But *compare In re Green*, 156 F.Supp. 174 (S.D. Cal. 1957) (appeal dismissed as moot 264 F.2d 63 (9th Cir. 1959); *United States ex rel. Altieri v. Flint*, 142 F.2d 62 (2d Cir. 1944) (member in the reserve); *Ex parte Fabiani*, 105 F.Supp. 139 (E.D. Pa.1952) (petitioner ordered to return to United States for pre-induction procedures or face indictment); *Shaughnessy v. United States, ex rel. Mezei*, 345 U.S. 206 (1953) (aliens refused entry to United States).

federal courts will not interfere with duty assignments of persons lawfully in the Armed Forces." The court finds no need for Hammond to be court-martialed before his claim is ripe for adjudication.[54]

The government's last contention is that the denial of conscientious objector status pursuant to DOD Directive No. 1300.6 is not subject to judicial review because the discharge Hammond seeks is a matter of executive grace rather than a right. The court rejects this argument. Their decision hinges on the very narrow issue that there was no basis in fact for the decision under the regulations. They conclude that a validly promulgated regulation binds the government whether or not the action is discretionary.[55] The court further notes that the Supreme Court has not accepted the "finality" arguments in other similar contexts.[56] The

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[54]For another case where the courts have discarded the exhaustion of remedies doctrine, *see Wolff v. Selective Service*, 372 F.2d 817, 825 (2d Cir. 1967), *cf. Townsend v. Zimmerman*, 237 F.2d 376 (6th Cir. 1956).

[55]*Service v. Dulles*, 354 U.S. 363 (1957); *Vitarelli v. Seatow*, 359 U.S. 535 (1959); *Dunmar v. Ailes*, 121 U.S. App. D.C. 45 (1965).

[56]*Estep v. United States*, 327 U.S. 114 (1946) (decisions of local draft boards even though "final" does not bar limited judicial review). *Gusik v. Schilder*, 340 U.S. 128, 132 (1950) (decision of the Judge Advocate General made binding upon all departments, courts, agencies, and officers of the United States does not preclude *habeas corpus* jurisdiction).

finding of no basis in fact was grounded on the Navy's sole reliance on Selective Service's advisory opinion.

Having made their departure on reviewability the court then wishes to make it clear that their decision in no way interferes in legitimate military matters or "improperly interjects the judiciary in questions of national defense." So that the decision does not hold that refusal to discharge based on needs of the service is subject to judicial review. "The federal courts have neither appropriate judicial standards nor the capacity to deal with such questions."[57] The court remanded the proceeding to the Circuit Court for adjudication on the merits noting the review is severely limited to the standard "no basis in fact" used in judicial review of Selective Service classifications.

After all this, however, on a petition for rehearing by the government, the Court of Appeals remanded the case to the District Court to return the matter to Naval authorities. Hammond was to be processed for discharge under new regulations which made major improvements in the procedures to be followed.[58]

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[57] *Hammond v. Lenfest*, 398 F.2d 705, 716 (2d Cir 1968).

[58] *Hammond v. Lenfest*, 398 F.2d 705, 718 (2d Cir 1968).

Subsequent to *Hammond v. Lenfest*, the U. S. District Court, Northern District of California in *Gann v. Wilson*,[59] and in *Crane v. Hedrick*[60] applied the test of *Hammond* and found no basis in fact for the denial of discharge for conscientious objection. Both decisions rested solely on the advisory opinion of General Hershey. The Second Circuit in *United States v. Mankiewicz*[61] in considering the case of a Naval reservist on active duty whose discharge as a conscientious objector was denied returned the case to the Navy for processing under new procedures.

B. The Floater

The task of accounting for personnel is a vexious one. Whether it be an anxious mother gathering her brood, a cubmaster culling his curs from some tent city or a large commercial or military organization impersonally harnassing its hordes, there are always times when through intention, neglect, or the breakdown of administration, members of the group are unaccounted for.

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[59] 289 F.Supp. 191 (N.D. Cal. 1968).

[60] 284 F.Supp. 250 (N.D. Cal. 1968).

[61] 399 F.2d 900 (2d Cir. 1968).

Nowhere perhaps is the combination of these factors more likely to produce chaos in accountability than in a military personnel replacement center. Anyone who has processed through such a place realizes that it is often difficult to move to final destination by orderly and interrupted passage, even when one earnestly wishes to be on his way. How easy is it then where there is even the slightest breakdown in administration, for the wily wayfarer, by design, to make himself unavailable to military control for a period of time. I daresay that there are few "old soldiers" that have not spent an extra day or two in a replacement center sometime in their careers. How justifiable it becomes to have time for one more visit with a loved one before a long and often dangerous period of separation, and how irrestible it is to ride out a winning streak in barracks 777 in the game of one's choice, or just enjoy beating the system in a small way. One who does beat or get lost in the system is called, among other things, a "floater." He floats from barracks to barracks, sleeps here one night, there the next. He soon floats in and out of camp returning periodically to see if his absence is noted or his presence specifically required. No doubt

he expects to be accounted for sooner or later, at which time he contends that he has been there all the time ready and willing to move on, or he says nothing. Some, however, are so successful (a tribute to the ingenuity of the American soldier, no blind obedience for him) that weeks pass and months lengthen into years. Most are eventually picked up by law enforcement authorities or turn themselves in. Perhaps some are lost for all time. There is nothing new about the floater as a product of the personnel replacement system. What is new, however, is resort (unsuccessfully) to the writ of *habeas corpus* by an individual in this circumstance.

On February 8, 1966, one Bruce A. Webster was inducted into the Army, trained as a cook and subsequently ordered to the Overseas Processing Detachment at Ft. Dix, New Jersey, for further shipment to Germany. He reported to that unit on 19 August 1966. During the next 18 months, Webster existed in a state of blissful and illusive anonymity. He came and went as he pleased and no military authority was or could be exercised over him for he was unknown to his superiors. On 9 February 1968 which was one day after his normal tour of active duty would have ended, an attorney accompanying Webster and

carrying his records, appeared at the transfer station at Ft. Dix seeking an honorable discharge and back pay for his client. At this time Webster was advised by counsel to remain silent and make no statement.

Later Webster claimed that he had been there the entire time and slept in different barracks. He declined to answer further questions. The records and an investigation indicated otherwise. He did not draw his pay during the 18 months and there were no entries in his personnel records for the period. Mandatory formations were normally held five times daily in his unit. These and occasional formal musters did not disclose his presence. The records of a tavern proprietor established that he was employed on the average of approximately four days a week in his home town some 300 miles from his duty station for 32 weeks of the 18-month period! It is noted here that the reason that Webster was able to lose himself so successfully was because at that time a person's accountability was apparently dependent on a single data processing card. It is easy to see that if this card were lost, stolen, or purchased (as here it was hypothesized but not alleged) a member would be unaccounted for unless he made his presence known or he were discovered by chance.

After it was apparent that the Army was not going to release Webster, he petitioned for a writ of *habeas corpus* in the United States District Court, District of New Jersey, alleging unlawful restraint beyond his term of service. The petition was dismissed on 19 March 1968 for failure to show sufficient facts to entitle petitioner to relief.[62]

Thereafter, Webster filed a complaint against the Commanding Officer of the United States Army Personnel Center, Ft. Dix, New Jersey, alleging unlawful detention by the U. S. Army. His complaint was investigated and a board of officers recommended that his complaint be disapproved. This recommendation was approved on 24 May 1968. Webster was then tried by court-martial for absence without leave and was acquitted, apparently because of the government's failure to prove the time of inception of the absence. Subsequently, an administrative determination (which is independent of any consideration regarding trial by court-martial and need only be supported by substantial evidence as opposed to proof beyond a reasonable doubt) was made finding Webster absent without leave for administrative purposes. This

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[62]JAGA 1968/4286 (11 Jul. 68).

18-month period, therefore, is "time lost" under the provisions of Section 972 of Title 10, United States Code, and Webster is liable to serve for an additional period equal to the time lost. Subsequently, Webster made two more unsuccessful bids to secure his discharge by writ of *habeas corpus*.[63]

C. The Reluctant Reservist

At the end of the Revolutionary War, Washington wrote a treatise, *Sentiments on a Peace Establishment*.[64] In it he envisioned the country's first line of defense as a small professional regular force supplemented by a large citizen army when needed, composed of the militia of the States. This militia was to be at all times under national supervision and trained by officers educated at a national military academy. Congress was fearful of any increase in the military establishment and the militia no doubt was content with its largely ceremonial and social role. At any rate, Washington's plan was not adopted for some years, and then only with many modifications. But we now do have our citizen army

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[63] 69-1 JALS 35 (DA Pam. 27-69-1).

[64] E. Fitzpatrick, *supra* note 1 at 130.

in our Reserve components of the Army; the Army National Guard of the United States and the Army Reserve. During times when there is no draft these components are composed of true volunteers, have high morale, good esprit d'corps and perform effectively when called to active duty. During periods of conscription, their ranks are filled with "volunteers" who are avoiding longer periods of active duty. Morale is not so high, esprit d'corps somewhat lower, yet when called to active duty they still perform effectively. Notwithstanding, there are a small number of refractory reservists who cannot satisfactorily perform this lesser military service. The Reservist spends up to six months on active duty undergoing first general military training and then advanced training in some military occupational specialty. Then he returns to the warmth of his hometown, where he is called upon to attend weekly drills and a two-week frolic each summer. This demand is so onerous and ignominious that some "fail" to perform. Because of this there must be sanctions otherwise the program would surely falter and fail for no wise man could expect such a program to be sustained by a sense of duty, honor, or other puerile precepts.

The original sanction provided that an attendance level of 90% must be maintained, otherwise the member was liable to be recalled to active duty for a period of 45 days or be reported to Selective Service for priority induction.[65] Later legislation provided that the unsatisfactory participant could be ordered to active duty until his total service on active duty equaled 24 months.[66] The earlier sanction was employed from time to time and the errant soldier performed his 45 days duty, not without much distress in some cases no doubt, yet none of these truculent troopers made recourse to the holy writ. When the sanction was increased calling for service until active duty and active duty for training totaled 24 months there were still a number obviously unimpressed. When these few were called to an extended period of active duty they did resort to the courts for relief, principally with a petition of *habeas corpus*. Examination of several decisions will serve to explain the outcome of this joinder in battle.

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[65] 10 U.S.C. § 270(c) (1961).

[66] Defense Appropriation Act of 1967, Public Law 89-687, 80 Stat. 980, 10 U.S.C. 673a.

In *Pfile v. Corcoran*[67] petitioner alleged he was illegally detained on active duty and was entitled to be returned to a reserve status. He was called to active duty for training in July 1967 under the provision of 10 U.S.C. § 673a.[68]

It has been noted that prior to the enactment of 10 U.S.C. § 673,[69] two procedures were available to deal

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[67]Civ. Action No. C-824, USCD D. Col. (Aug. 17, 1968).

[68]This statute first enacted as 89-687, 70 A Stat. 11, 161 October 15, 1966, provides:

"673a Ready Reserve: members not assigned to or participating satisfactorily in, units

(a) Notwithstanding any other provision of law, the President may order to active duty any member of the Ready Reserve of an armed force who--

(1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve;

(2) has not fulfilled his statutory reserve obligation; and

(3) has not served on active duty for a total of 24 months.

(b) A member who is ordered to active duty under this Section may be required to serve on active duty until his total service on active duty equals 24 months. If his enlistment or other period of military service would expire before he has served the required period under this section, it may be extended until he has served the required period."

[69]The President delegated the authority given him to the Secretary of Defense first by Executive Order 11, 327, February 17, 1967 and later by Executive Order 11, 366, August 4, 1967.

with delinquent reservists, a call to active duty for 45 days by the service, or a report to Selective Service for priority induction. With the sanction added by P.L. 89-687, now 10 U.S.C. § 673, the service could bypass Selective Service by calling up the reservist for two years total active duty time without processing him through the Selective Service System for a two-year induction. However, since the service must give the member credit for his prior service, the statute is an ameriolating measure in a limited sense. In this case petitioner enlisted in the Army Reserve prior to the enactment of 10 U.S.C. § 673a and the "Statement of Acknowledgement of Understanding of Service Requirements" specified the two sanctions available at the time and was silent as to any effect of future law. Petitioner contended that this statement which represents his contract of enlistment is unaffected by subsequent law. Respondent contended that this document merely stated the law at that time, was no contract, and had no legal effect except to indicate the individual knew what the law was at the time of enlistment. Respondent further claimed that the oath of enlistment was the enlistment contract.[70] The court found that the more

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[70] *Pfife v. Corcoran*, 287 F.Supp. 554 (D. Col. 1968).

specific and comprehensive language of the statement of understanding was the enlistment contract "to the extent that petitioner's enlistment is governed by contract terms...." Before proceeding to the court's further consideration, two cases that were decided a few months earlier should be noted. *Gion v. McNamara*[71] questioned by writ of *habeas corpus* the validity of a call to active duty under 10 U.S.C. 673a, because of unsatisfactory reserve participation in the Marine Corps Reserve. There the contract could have been interpreted to incorporate future law, but the court did not interpret it so, found the Reservist's status was based on contract and the application of 10 U.S.C. 673a violated that contract and contravened the due process clause of the Fifth Amendment. In *Winters v. United States*,[72] a New York Court, affirmed by the Second Circuit, held that the language of the enlistment contract (here the same enlistment contract as in *Gion*) adequately provided that the enlistment was subject to

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[71]Civ. Action No. 67-1563-ED USDC, (C.D. Cal. 1968).

[72]*Winters v. United States*, 281 F.Supp. 289 (E.D. N.Y. 1968) affirmed 390 F.2d 879 (2d Cir. 1968).

future changes in law.[73] The rationale of the *Winters* case was that if the "United States Marine Corps Enlistment Contractual Record" (containing the language 'when otherwise prescribed by law') and the "Statement of Understanding Upon Enlistment" (containing the language 'as the law may require') were construed not incorporating future law, they would operate as a fetter and embarrassment to the President and the Secretary of Defense in adopting uniform and practical regulations for the administration of the Armed Forces and on Congress itself.[74]

Returning to *Pfile v. Corcoran*, we then remember that the enlistment contract was completely silent concerning the applicability of future law. Still the court considered the reasoning of *Winters* applicable to the present reserve contract (the Army and Congress would be hamstrung if law changes could not affect

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[73] *Winters v. United States*, 281 F.Supp. 289 (E.D. N.Y. 1968) at 291.

The "United States Marine Corps Enlistment and Contract Record" read in part:

"I may not be ordered to active duty without my consent except in time of war, or when in the opinion of the President a national emergency exists or when otherwise prescribed by law...."

Winters "Statement of Understanding" also included the language, 'or that I may be required to serve at such other times as the law may require.'

[74] *Id.*

existing contracts) but it did not consider it controlling and went on to discuss what they considered the crucial issue, whether this contract was subject to the subsequent act of Congress. The court found, by reference to congressional debates and the language of the statue that it was obviously intended to apply to persons already in the Reserve. They next considered whether the statute could legitimately alter the sanction provision of the petitioner's contract and subject him to the new sanction. They noted that the legislature, as an attribute of sovereignty, may pass laws which alter existing contracts, but the power to pass laws retroactively is qualified. This abrogation of contracts is permissible where it occurs through the exercise of some paramount power and that abrogation serves to further the ends sought by that exercise. The court found that the statute was within the war powers of Congress[75] and validly applicable to the petitioner even though it abrogates his enlistment contract. The court felt it was unnecessary to determine

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[75] *Pfile v. Corcoran*, 287 F.Supp. 554 (D. Col. 1968). Congress' power "to declare war" Const. Art. I Sec 8, Cl. 11, "to raise and support armies." Const. Art I, Sec 8, cl 12, and "to make rules for the governmental and regulation of the land and naval forces," Const. Art. Sec 8, cl. 14.

whether a state of war exists but found it was "sufficient to note that the condition is scarcely a state of peace, and that the action of Congress is in the interests of national security." Thus, the contract "always stands in the shadow of the exercise by Congress of positive paramount sovereign powers." Subsequent to *Pfile v. Concoran*, *Winters* petitioned the Supreme Court to review the Second Circuit Court's decision and grant temporary relief. (Winters was about to be sent to Vietnam.) Justice Harlan denied interim relief on the grounds that petitioner's chance of ultimately prevailing on the merits was not substantial. Justice Douglas granted a stay pending referral to the full Court. The full Court dismissed, Justice Douglas dissenting. Petitioner appealed in the same manner a second time, Harlan denied relief, Douglas granted a stay pending decision by the full Court, and the Court dismissed, Douglas dissenting.[76] For some reason the Marine Corps released Winters from active duty on 16 April 1968 and reactivated him again on 29 April on the same ground of unsatisfactory performance, claiming clerical error. Once again Winters petitioned

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[76] *Winters v. United States*, 390 U.S. 993 (1968); 391 U.S. 910 (1968).

for relief. Again Harlan denied relief, Douglas granted a stay and the case will be decided by the full Court.[77] The foregoing reflects the current status of individual reservists called to active duty.

Section 101(e) of P.L. 89-687, Title I, October 15, 1966, 80 Stat. 981 also authorized the President to activate "any unit of the Ready Reserve of an armed force for a period not to exceed 24 months." The President delegated this power to the Secretary of Defense[78] who delegated the power to the Service Secretaries. The Secretary of the Army called several units of the Ready Reserve and their members to active duty. Within a short time members of these units unsuccessfully sought release from active duty by writ of *habeas corpus*. Justice Douglas granted an interim stay (the members were to be shipped to Vietnam) pending action of the full Court. The application for stays were denied, Douglas dissenting.[79] Respondents' and Douglas' position

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[77] *Winters v. United States*, 21 L. Ed. 2d 76 (September 23, 1968) and 21 L. Ed. 2d 80 (October 21, 1968).

[78] Exec. Order No. 11, 406,33 Fed. Reg. 5735 (1968).

[79] *Morse v. Boswell*, 289 F. Supp. 812 (D. Md. 1968) aff'd 401 F.2d 544, *cert. denied*, U.S. (1969).

is first, that the call up (if valid) can be only for 24 months for the unit, and the members must be given credit for prior service as there are when called up as individuals under 10 U.S.C. 673a. No such provision is made for credit when units are called. If credit were given this would render ineffective the call up of many of most units. Many Reserve units especially National Guard units are composed of individuals who have several years of service, especially the officers and senior NCO's.

Respondents' and Douglas' second point is raised in *Winters* concerning the conflict between the terms of the enlistment and the subsequent act of Congress. As previously noted the Court denied without opinion the application for stays.[80]

The case of *Schonbrun v. Commanding Officer*[81] brings the reluctant reservist to his final ignominy. Here petitioner anticipated a call to active duty and applied

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[80]Other cases involving the issue of the call up of reservists in which the court ruled adversely to petitioners, Douglas dissenting, *see Holmes v. United States*, 391 U.S. 963 (1968); *Hart v. United States*, 391 U.S. 956 (1968); and *McArthur v. Clifford*, 37 U.S.L.W. (Dec. 9, 1968).

[81]*Schonbrun v. Commanding Officer*, 37 U.S.L.W. 2286 (2d Cir. 1968).

for exemption before he was called. After his application was denied, he petitioned for a writ of *habeas corpus*. The petitioner was denied relief on the ground that the decision was not reviewable (based somehow on a determination that the Administrative Procedure Act was inapplicable) yet the Court assumed the requisite custody before the individual was called upon to do anything!

CHAPTER VI

SUMMATION

A significant segment of the American population is willing to fight for or against many causes, but it is not willing to fight for its country. The latter phenomenon is not new--it has existed throughout our history. The volunteer system was never greatly successful and it failed completely in the Civil War. At that point and thereafter members had to be drafted into military service. A significant segment has always resisted the draft. The largest group in this segment have been those who are opposed to war because of reasons of conscience. However, there are other objectors to military service who do not wish to serve for many reasons. Since military service became compulsory during the Civil War and thereafter, those who have tried to avoid military service by legal means have relied chiefly on the noble writ of *habeas corpus* for relief, although injunction, declaratory judgment and other procedures are often used.

Many try resorting to the courts before they are inducted into the Service. This brings them into direct

confrontation with the intent of acts of Congress. From World War I to the present it is clear that Congress has always intended that decisions of the Selective Service System on the classification and processing of inductees be final and not subject to judicial review until the individual has either submitted to induction or refused to be inducted. It is equally clear that the Courts have always distinguished or disregarded this intent to some degree. In the years between World War I and World War II these decisions were reviewed in very limited instances. The 1940 draft act was interpreted by the courts to permit judicial review of draft classifications only in a defense to a criminal prosecution or in a *habeas corpus* proceeding initiated after induction. Over the years some federal courts granted exceptions to these general rules. When Congress enacted the Military Selective Service Act of 1967, it re-enunciated the principle and indicated in the committee reports its intent to do so. The principle was made even stronger. There shall be no review until the registrant has been inducted or refused induction and even then, the review will be limited to the situation where there was no basis in fact for the decision. Nonetheless, the Supreme Court

decided a case before a petitioner had been inducted or refused induction. The Court did not invalidate the statute, but carved out an exception to the statute. This Court did limit itself to the "no basis in fact" test, and found none.

Reluctant soldiers already in the service also resort to the writ of *habeas corpus* to secure their release. Many of these are conscientious objectors. While Congress has always protected the dictates of conscience of those liable to be inducted, there were no procedures for the release of individuals who became *bona fide* conscientious objectors after entering service until 1962. At this time the Secretary of Defense made it permissible. Although the inservice conscientious objector was afforded the right to apply for discharge in 1962, no reported cases were litigated until 1966. Quite a few have been litigated since that time. The main issue that runs through all these cases is the issue of reviewability. The courts cannot seem to make up their minds what is their scope of review. The traditional view is that their jurisdiction is most limited, but they vacillate. Often the courts will discuss the issues and then state quite firmly that there

is no jurisdiction to review. This is seized on by proponents of wider reviewability as an inference of reviewability. I see it as an opportunity to pontificate which cannot be resisted. Another issue that runs through these cases is exhaustion of remedies. It is often difficult to separate this issue from the issue of reviewability. I would opine, however, that any argument is fatuous that suggests submitting to court-martial is a remedy which must be exhausted prior to judicial review. At this point the scope of review is not far from the traditional rule and if review is granted, it is confined to the "no basis in fact" test.

Miscellaneous objectors include the reluctant reservists, the selective objector, and the floater. These have all resorted to the writ of *habeas corpus* and have all been unsuccessful to date. There have been two cases, *Seeger* and *Orloff*, with selective objections to service and one case of the individual who gets lost in the system. There have been many reluctant reservists, including those who fail to perform satisfactory reserve drills; those who object to their call to duty; and those who object that they may be called to duty.

An important consideration that is unsettled is what is a conscientious objector. In 1917 it was a member of a "well-recognized religious sect or organization" that was opposed to war. By 1940 there was no longer any requirement to belong to a pacifist sect. The objection had to be "by reason of religious training or belief." In 1948, as a result of two Federal cases excluding exemption for philosophical views, Congress in reenacting legislation defined religious training and belief in terms of a "Supreme Being." The Supreme Court in *Seeger* construed "Supreme Being" to be anything paralleling an orthodox belief in God. In reenacting draft legislation Congress omitted the Supreme Being test leaving only the "by reason of religious training or belief" test. A recent Federal court case found that an avowed atheist was a conscientious objector because of early religious training. If Judge Wyzanski's recent decision is to stand, anyone who has profound moral beliefs opposed to war will qualify for exemption.

CHAPTER VII

CONCLUSION

The reluctant soldier is a product of history. His reluctance is a reflection of both noble and base elements in man. When aversion to war, for reasons of conscience, opposes love of country, no matter which sentiment is victorious, neither is ignoble. When greed, cowardice, hate or disdain for country justify refusal to serve, each is mean and base.

Presently those who refuse to serve do not place this country in any grave danger. The reservists have had their day in court, lost, and are serving. The "floater" and others who are lost in the personnel pipeline are lost because of maladministration. The solution is better administration. Even acknowledging breakdowns in administration will continue, this situation can be remedied by placing specific directions in the special instructions section of special orders to guide the soldier who is neglected or forgotten. Draft resisters as a group including the conscientious objector have never constituted more than a fraction of a percent of

draft eligibles. If the present trend of the law continues, however, the question of conscience may endanger the security of this country or drastically alter its course, for good or evil.

The magnitude of the conscientious objector's aversion to war has been permitted to prevail over the magnitude of the country's need for his military service. Initially, it was a statutory right for those who had not yet entered military service. It was made a regulatory privilege for those already in service in 1962, or so its proponents intended. The courts ignored this intention and the military services acquiesced. To preclude or be sustained by judicial review of their decisions, the military procedures have been changed so they are approaching conformity to the statutory rights of preservice objectors. Those rights are now being elevated to the status of constitutional rights. Additionally, the term conscientious objection has been so broadened that it will soon encompass any objection to war based on a belief of any nature. When this point is reached what reason remains to discriminate between the individual who by reason of conscience truly objects to a particular war rather than all wars. The point will be reached where every

individual has a constitutional right not to serve his country.

This sets the stage for a massive assertion of this right, the effect of which is potentially dangerous or may lead to good. When men finally decide that they will not war against each other, who will deny this is good. When the people of a large powerful country refuse to go to war against a small nation that also may be good. But if the people of a super power will not war on another super power who is so bent and not similarly restrained, it is an invitation to national disaster. Such may be our fate. Until that time, however, we must continue to deal with the practical problems that arise in determining how to deal with the question of conscience. The courts will continue to review administrative decisions on conscientious objectors despite congressional intent or an agency's distress, until procedures are uniform and fair. The question becomes not one of principle but one of mechanics. The most difficult procedures to establish are those that will fractionate the sincere from the spurious claim. To do this, consideration should be given to establishing one agency to pass on claims for exemption of preservice and

inservice objectors. This agency should have an investigatory arm to gather evidence and supervise the preparation of the case file; a judicial arm to decide the case; and an appellate body to review the decisions. Thereafter, resort to the Federal courts should be permitted in the same manner as is generally available to individuals before other government agencies. While the Selective Service System would be a likely candidate for this role, it might require an infusion of new personnel or new attitudes toward the conscientious objector in order to provide the necessary fair and uniform treatment (an unscientific conclusion based on personal observation and opinion). This is not to say that the present dichotomy between handling inservice and preservice objectors should be abandoned but rather that the one agency concept should be explored. In doing so both systems in existence would have to be restudied and the good and poor features of each laid bare.

Finally, while procedures dealing with the exemption from military service by reason of conscience must be fair and uniform, this freedom of conscience is only worthy of protection at all so long as its corrosive effect on the freedom of the nation is minimal. This corrosive effect is not likely to

continue to be minimal if the Supreme Court decides that conscience is not only something akin to a celestial spark in man but also something that is as easily activated by terrestrial cinders.

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