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In-Service Conscientious Objection: Courts, Boards and the Basis in Fact

DONALD N. ZILLMAN*

I. INTRODUCTION

As American military involvement in Vietnam ends, a myriad of problems remain for the armed services of the 1970's. Drugs, race, "fragging" and dissent provide much of the front page news concerning the military. Less publicized, but equally symptomatic of the uncertain state of the military in American society, is the existence of the conscientious objector in uniform. The problems of the in-service CO have taxed not only military commanders but military administrative bodies, courts-martial, and the federal courts. One characteristic of this area of law is its newness. The authorization for discharge of in-service objectors is but a decade old. A corresponding characteristic is its rapidity of change. During that decade the military administrative policies have changed to reflect the changing Supreme Court attitudes, primarily those concerning

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the nature of "religious training and belief." More recently, the military has found its administrative decisions challenged with increasing success in the federal courts. Finally, the administrative decisions have also been challenged in the military courts by way of a defense to certain combat related disobedience offenses.

What has resulted is a confrontation between administrative and judicial procedures regarding the discharge of military conscientious objector claimants. An increasingly common scenario has resulted. The conscientious objector claimant files his request for discharge with the military. After a series of interviews, a final decision is made by the appropriate Service Secretary or his delegate. If the decision is unfavorable to the applicant, the alleged CO may appeal the supposedly "final" administrative decision through habeas corpus relief from a federal district court. Success can lead to a court-ordered honorable discharge on the grounds of conscientious objection.

This article will examine the administrative and judicial treatment of the in-service conscientious objector. Considerable attention will be devoted to examining federal court review of military administrative actions. In recent years, many of the significant decisions regarding the proper scope of civilian court intervention in military actions have involved the conscientious objector area. Precedents drawn from the military CO cases will doubtless influence judicial attitudes towards other military decisions, such as court-martial convictions and undesirable discharge determinations, brought for civilian court review.¹ So too the military experience will influence continued civilian thought on how best to respect the individual's conscience and yet provide for the legitimate needs of national defense. To this goal, a few concluding suggestions will be offered.

II. THE MILITARY RECOGNIZES CONSCIENTIOUS OBJECTION

The Department of Defense first recognized the possibility of in-service conscientious objectors' discharge from the military in its

1. A comprehensive summary of one area of interrelation is provided in Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities*, 54 MIL. L. REV. 1 (1971).

Directive 1300.6² of August 1962.³ At the time, the Korean build-up was a decade in the past, and South Vietnam, a New Frontier exercise in nation building. The Supreme Court decisions in *United States v. Seeger*⁴ and *Welsh v. United States*⁵ had not yet effectively removed the religious tests for qualification as a conscientious objector. Federal courts showed little inclination to question the Supreme Court mandate of *Orloff v. Willoughby* that judges were not in the business of running the military.⁶ In short, the military entered the conscientious objector area at a time when it could be assumed that few cases would confront it,⁷ that reasonably clear standards would govern their resolution, and that the decisions made by the services would be final.

The new directive, binding on all armed services, noted the congressional policy that “deemed it more essential to respect a man’s religious beliefs than to force him to serve in the Armed Forces. . . .”⁸ Consistent with this policy, conscientious objection by members of the armed forces was to be recognized “to the extent practicable and equitable.”⁹ Barred from consideration under the Directive were soldiers who had failed to make a timely CO claim to their Selective Service board and ones whose claims had been denied by Selective Service prior to induction.¹⁰ Those applicants who were eligible were to be considered “on an individual basis, with final determination made at the departmental headquarters

2. Department of Defense Directive 1300.6 (21 Aug. 1962) [hereinafter cited as 1962 DOD Dir.].

3. Previously Department of Defense policy had provided for recognition of in-service objectors and for their reassignment to noncombatant military duties. See Department of Defense Directive 1315.1 (18 Jun. 1951).

4. 380 U.S. 163 (1965).

5. 398 U.S. 333 (1970).

6. 345 U.S. 83, 93-94 (1953). “[J]udges are not given the task of running the Army. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.”

7. Department of the Army statistics released 19 January 1972 show the growth in applications for discharge on the grounds of conscientious objection.

YEAR	APPLICATIONS	APPROVALS
1963	69	29
1964	62	30
1965	101	26
1966	118	5
1967	185	9
1968	282	70
1969	943	194
1970	1106	357
1971	1525	879

8. 1962 DOD Dir. at III B.

9. *Id.*

10. *Id.* at III C.

of the individual's service in accordance with the facts and circumstances of the particular case"¹¹ Selective Service System standards would be used in evaluating claims.¹² Further, "in order to insure the maximum practicable uniformity," a Selective Service advisory opinion was to be sought in cases involving a possible I-O classification and discharge for members with less than two years of active service.¹³ A soldier receiving a recommendation for I-O classification by the Selective Service would be "considered for discharge by reason of . . . conscientious objection to military service."¹⁴

Later revisions¹⁵ of the Directive provided a well-defined procedure for evaluating in-service conscientious objector claims. In abbreviated form, the sequence ran as follows:¹⁶ (1) Applicant submits appropriate forms and documentation detailing his claim to his immediate commander.¹⁷ (2) From that time until a final administrative decision is reached, the applicant is to be "employed in duties which involve the minimum conflict with his asserted beliefs" to the extent practicable.¹⁸ (3) The applicant is given mandatory interviews with a chaplain and a psychiatrist. The chaplain is to comment on the "sincerity of the applicant in his belief" and

11. *Id.* at III D.

12. *Id.* at III F. A recent reiteration of conscientious objector standards appeared in *Clay v. United States*, 403 U.S. 698 (1971). In order to qualify for the exemption an applicant must satisfy three tests: (1) he must be "conscientiously opposed to war in any form"; (2) his opposition must be "based on religious training and belief"; and (3) he must "show that this objection is sincere." A fourth requirement, that the applicant comply with reasonable timeliness regulations for filing his claim, is suggested by the language of *Ehlert v. United States*, 402 U.S. 99 (1971).

The most significant military "timeliness" regulation bars granting CO status to an applicant whose beliefs were fully formed or "crystallized" before receipt of his induction order or his voluntary entry into the military.

See also *Turpin v. Resor*, 452 F.2d 240 (9th Cir. 1971); *Grubb v. Birdsong*, 452 F.2d 516 (6th Cir. 1971).

13. *Id.* at III G.

14. *Id.* at V D 1.

15. Department of Defense Directive 1300.6 (10 May 1968) [hereinafter cited as 1968 DOD Dir.].

16. The 1968 DOD Dir. was replaced by a revised Directive in October 1971. Because most of the cases discussed *infra* were decided under the 1968 Directive, reference to it is made here. The procedures described here were modified only slightly by the 1971 Directive.

17. 1968 DOD Dir. at section VI B 1.

18. *Id.* at section VI B 2.

state "an opinion as to the source of the belief."¹⁹ The psychiatrist's primary function is apparently to comment on the applicant's suitability for discharge on psychiatric grounds. The applicant is also entitled to choose to appear "before an officer in the grade of O-3 (Army or Air Force captain, Navy lieutenant), or higher, who is knowledgeable in policies and procedures relating to conscientious objector matters."²⁰ At this O-3 hearing, the applicant is entitled to speak in support of his claim. The O-3 officer may make "such other inquiry into the merits of the application as he considers appropriate" and shall "enter his recommendation and the reasons therefor into the file."²¹ At the O-3 hearing the applicant is entitled to the presence of retained counsel. (4) The complete file is returned to the immediate commander who may offer his views and recommendations. (5) The file proceeds through normal command channels to the appropriate Service Secretary, where the decision to grant or deny conscientious objector status is made.²²

Particularly since 1967 the military review provisions have compared favorably with those provided by the Selective Service Act for the civilian CO claimant. As noted earlier, the substantive requirements for qualification were the same.²³ Procedurally, the Selective Service Act required a conscientious objector claim to be filed with the registrant's local draft board.²⁴ Prior to the 1967 revision of the Selective Service laws, if the local board denied a registrant's CO application, the registrant's appeal to his state board would automatically trigger a fact-finding hearing under the auspices of the Department of Justice.²⁵ Specially qualified hearing examiners met with the registrant and rendered findings as to sincerity and the religious nature of beliefs. The state board then made its decision typically relying heavily on the Justice Department's recommendation.

The 1967 Act eliminated the Justice Department's hearing, apparently due to the volume of claims facing the Selective Service System.²⁶ This left the applicant with but a single interview with his local board and a right to a non-personal-appearance appeal to

19. *Id.* at VI B 8 b.

20. *Id.* at VI B 4.

21. *Id.* at VI B 4 a.

22. *Id.* at VI B 5.

23. *See* note 12, *supra*.

24. 50 U.S.C. App. § 456(j) (1970).

25. 50 U.S.C. App. § 456(j) (1964).

26. *See*, H.R. REP. No. 267, 90th Cong., 1st Sess. 45-46 (1967); H.R. REP. No. 346, 90th Cong., 1st Sess. 15 (1967).

his state board. No expertise was required on the part of local board members, and few guidelines governed the length or nature of the registrant's personal appearance to discuss his CO application.²⁷ Considering the complexity of the issue, the fact-finding procedure was sadly lacking.

By its fifth anniversary in 1967, the DOD Directive and in-service conscientious objection had undergone significant change. The war in Vietnam had become a major conflict and one regarded as abhorrent by increasing numbers of draft-age men and military personnel. Secondly, the decision two years earlier in *United States v. Seeger*²⁸ had opened the way for an expanded definition of "religious training and belief." The Supreme Court interpreted the conscientious objector statute to include a belief which occupies "a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."²⁹ A further change involved the beginning of federal court review of military administrative decisions regarding conscientious objection; this in the face of the DOD Directive's language that the Service Secretary's decision was to be "final with respect to the administrative separation" of the applicant.³⁰

III. CONSCIENTIOUS OBJECTION AND THE FEDERAL COURTS

The initial cases seeking federal court review of an administrative CO denial raised three grounds of attack:³¹ (1) the established regulations were constitutionally or procedurally inadequate to fairly consider a CO claim; (2) in the particular case the military had failed to follow its own regulations; and (3) the decision reached by the military was lacking in any factual basis.³² While

27. The 1971 amendments to the draft law have not changed the CO application process. See Pub. L. No. 92-129, § 101(a)(21) (28 Sep. 1971).

28. 380 U.S. 163 (1965).

29. *Id.* at 166.

30. 1968 DOD Dir. at VI E.

31. An excellent examination of the early federal court review of administrative action in in-service CO cases appears in Hansen, *Judicial Review of In-Service Conscientious Objector Claims*, 17 U.C.L.A. L. REV. 975 (1970) [hereinafter cited as Hansen]. See also Comment, *God, The Army, and Judicial Review: The In-Service Conscientious Objector*, 56 CALIF. L. REV. 379 (1968).

32. In keeping with the expansive powers of the Selective Service System the Supreme Court has held that local board decisions should be up-

initial court decisions showed some willingness to examine such claims, typically, the soldier or sailor was denied the relief he sought. Two cases are illustrative. *In re Kanewske*³³ involved a CO application from a Navy enlisted man. Under the procedures then applicable, the Selective Service System was asked for an advisory recommendation. It recommended disapproval of Kanewske's application. The Navy concurred and Kanewske requested habeas corpus relief from the United States District Court for the Northern District of California. Shortly thereafter, Kanewske's adherence to his conscientious objector beliefs led him to a violation of naval regulations for which court-martial charges were brought.

At the habeas hearing Kanewske argued that the procedural defects of the Navy evaluation proceeding denied him due process. Specifically, he cited the lack of a hearing³⁴ and the use of a Selective Service advisory opinion. The District Court was unimpressed. It found no showing of entitlement to a discharge from the Navy in Kanewske's claim and noted that the "practicable and equitable" language of the Directive preserved considerable discretion to the service concerned.³⁵ The court also spoke of Kanewske's voluntary enlistment in the Navy as a fact distinguishing him from a Selective Service litigant. Kanewske's habeas application was denied.

An Army applicant had no more success in *Brown v. McNamara*.³⁶ Brown's CO beliefs were formed two weeks after he reached Fort Dix for basic training. After interviews, both the chaplain and Brown's commanding officer recommended disapproval of the application. Their conclusion appeared to turn on the fact that Brown's beliefs were not religiously based, but rather stemmed from his participation in pacifist organizations. Shortly thereafter, Brown was charged under military law with disobedience of a lawful order and sought habeas corpus relief from the local U. S. District Court. He claimed that the Army procedures violated due process and equal protection, that the procedures were not followed in his case and that the Department of the Army

held by reviewing courts if they rest on any basis in fact. *Estep v. United States*, 327 U.S. 114, 122-23 (1946). Such standard of review was legislatively adopted for Selective Service review, 50 U.S.C. App. § 460(b)(3) (1970), and has generally been adopted in in-service CO cases. *United States ex rel. Donham v. Resor*, 436 F.2d 751, 753 (2d Cir. 1971); *Pitcher v. Laird*, 421 F.2d 1272, 1278-79 (5th Cir. 1970); *United States ex rel. Brooks v. Clifford*, 409 F.2d 700, 705 (4th Cir. 1969).

33. 260 F. Supp. 521 (N.D. Cal. 1966).

34. The Directive and Navy regulation did not provide for the O-3 hearing at this time.

35. 260 F. Supp. at 524.

36. 387 F.2d 150 (3d Cir. 1967).

had no basis in fact for denying his claim to CO status. The district and circuit courts ruled against Brown on all grounds. Initially, they found it "perfectly rational" to treat voluntary enlistee Brown differently than a civilian facing Selective Service induction. On these terms, the DOD Directive was not constitutionally violative.³⁷ Further, the court found the denial of the application was not "arbitrary, or capricious, or irrational."³⁸ The appellate court cited the chance that Brown's beliefs had formed prior to entrance into service and the non-religious nature of his beliefs as providing a basis in fact. In summary, the court held that while it could, under the proper circumstances, review the military action in a conscientious objector case, there were not sufficient grounds to interfere in Brown's.³⁹

Hammond v. Lenfest, decided in 1968, cleared the way for full-fledged court review of military CO applications.⁴⁰ Hammond was a Navy reservist whose application for CO discharge was denied. His immediate commander had interviewed him, recognized his sincerity, and recommended discharge. At the Secretarial level the discharge was denied, primarily on the basis of the negative Selective Service advisory opinion. After the denial Hammond refused to attend reserve meetings and was ordered to active duty. Prior to reporting, he petitioned for habeas corpus relief, claiming denial of due process and equal protection and that the Navy's decision lacked a basis in fact. The District Court rejected Hammond's arguments. Hammond was more successful, however, at the Second Circuit Court of Appeals. The circuit held that Hammond satisfied custody requirements for habeas corpus and need not exhaust his military remedies by waiting for the results of a court-martial.⁴¹ Specifically, the court noted that no case indicated that Hammond could defend a disobedience charge at a court-martial with the claim that his conscientious objector application should have been approved.⁴² The court next flatly rejected the argument that the

37. *Id.* at 152.

38. *Id.* at 153.

39. Judge Maris, dissenting, would have granted Brown relief on the basis that the Army had erred in holding that his beliefs did not have a religious basis.

40. 398 F.2d 705 (2d Cir. 1968).

41. *Id.* at 710-15.

42. Subsequent military judicial decisions would for a time provide the remedy the court found lacking in 1968. See section IV, *infra*.

DOD Directive involved matters of unreviewable administrative grace. While not required to promulgate CO regulations, the services were required to follow their directives once they had been promulgated.⁴³ Finally, the court rejected any contention that Hammond's application was denied on "practicable" or "equitable" grounds. Nothing in the records supported a denial on these grounds. Based on the above considerations the circuit initially remanded the case to the district court for determination of the existence of a basis in fact.⁴⁴ Possibly more significantly, they ordered Hammond released from custody pending the hearing, based on the circuit's failure to find any grounds supporting the denial of his CO claim.⁴⁵

Despite encouraging language in *Hammond* and other cases, the in-service conscientious objector had little real reason for optimism regarding federal court review through the end of 1968. CO applicants were getting favorable procedural rulings from the courts but not honorable discharges.⁴⁶ In practice the applicant was asked to overcome a significant number of hurdles: (1) the general reluctance of federal courts to intervene in military matters;⁴⁷ (2) the willingness of some courts to resolve custody or exhaustion of remedies contentions against the applicant;⁴⁸ (3) a judicial willingness to narrowly construe the "any basis in fact" standard of review.⁴⁹ The "basis in fact" test, a product of the Selective Service System procedures, proved particularly difficult when applied to conscientious objector claimants.⁵⁰ The nature of a man's religious, moral or ethical beliefs and the sincerity with which he holds them are obviously incapable of exact proof.⁵¹ Given the

43. *Hammond v. Lenfest*, 398 F.2d 705, 715 (2d Cir. 1968). See generally *Service v. Dulles*, 354 U.S. 363, 372 (1957); *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

44. *Hammond v. Lenfest*, 398 F.2d 705, 717 (2d Cir. 1968).

45. On rehearing several months later the court noted that new Navy regulations "made major improvements" in the processing of CO claims. Accordingly, the mandate was changed to send Hammond's case back to the Navy for re-evaluation. *Id.* at 718.

46. See litigation discussed in Hansen, *supra* note 31.

47. See note 6, *supra*.

48. See generally Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 VA. L. REV. 483 (1969); Hansen, *supra* note 31, at 977-88.

49. See generally White, *Processing Conscientious Objector Claims: A Constitutional Inquiry*, 56 CALIF. L. REV. 652 (1968).

50. See note 32, *supra*.

51. The problem was well articulated by the Supreme Court in *Witmer v. United States*, 348 U.S. 375, 381-82 (1955). "Here [in CO cases] the registrant cannot make out a prima facie case from objective facts alone, because the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war

amount of paper generated regarding the applicant in the course of complying with the Directive, reviewing courts with a willingness to defer to military judgments could usually find some basis in fact for the denial of CO status.

IV. FEDERAL COURT REASSESSMENT

Starting in 1969, a number of significant decisions reversed the unspoken presumption against the conscientious objector applicant. *United States ex rel. Brooks v. Clifford*⁵² was one of the first of the new wave. Army volunteer Brooks had sought conscientious objector status. The O-3 hearing officer had found his beliefs grounded partially in religious and partially in personal attitudes. Brooks' commanding officer had opposed discharge since Brooks had already completed advanced infantry training. After receiving a negative Selective Service opinion, the Secretary of the Army's Conscientious Objector Review Board (CORB) denied the application. Brooks fared no better at the district court level. There the judge found a basis in fact grounded in the "personal moral code finding" of the O-3 officer. The Fourth Circuit reversed and ordered that Brooks be released from service with an honorable discharge. While conceding the existence of the "practicable" and "equitable" limitations in the DOD Directive, the court refused to allow them to protect arbitrary and capricious action from judicial review.⁵³ Reviewing the facts the court found that Brooks' objection did have a valid religious basis despite the possible simultaneous existence of a personal basis.⁵⁴ Accordingly, there was no basis in fact for denying Brooks' administrative request for discharge.

An unusual request from a Coast Guardsman for CO discharge allowed the First Circuit to express its views on the basis in fact

in any form. In these cases, objective facts are relevant only insofar as they help in determining the sincerity of the registrant in his claimed belief, purely a subjective question. In conscientious objector cases, therefore, any fact which casts doubt on the veracity of the registrant is relevant." Writing in 1968, one author argued that *Witmer* allowed local boards unchallenged power to deny CO status based on the appearance of unreliability. "Thus, under present law a finding of insincerity is in practice simply not reviewable." White, *supra* note 49, at 652-53.

52. 409 F.2d 700 (4th Cir. 1969).

53. *Id.* at 706.

54. *Id.* at 707-08.

test. Plaintiff in *Bates v. Commander*⁵⁵ had received a favorable recommendation from the interviewing chaplain and had the additional support of three other clergymen. The O-3 hearing officer, however, found no religious basis and recommended denial. The secretarial review board cited the hearing officer's conclusion, the negative Selective Service recommendation, and the lack of any prior statement of CO beliefs in denying Bate's application.⁵⁶ The circuit found that the O-3 officer clearly misunderstood the *Seeger* ruling in assuming that a conventional religious belief was required. Further, the review board's finding of no prior statement of CO beliefs was not in itself a ground for denying CO status. Finally, the existence of anti-Vietnam War statements by Bates were of no significance in evaluating the nature and sincerity of conscientious objector beliefs.⁵⁷ These findings eliminated any basis in fact that may have existed for the denial of Bates' application. The requested writ of habeas corpus was granted.

Two cases involving medics helped place the Fifth Circuit in line with the changing judicial attitudes towards in-service conscientious objection. In *Pitcher v. Laird*,⁵⁸ the plaintiff had enlisted as a non-combatant medical corpsman and then requested discharge after discovering that his beliefs would not allow participation in any form of military activity. He received a favorable chaplain's recommendation. An indecisive O-3 evaluation noted it was difficult to determine Pitcher's sincerity and commented unfavorably on the rapidity of change in beliefs. The Army CORB denied Pitcher's application, finding the objection "based on a personal moral code and not upon religious beliefs."⁵⁹ The reviewing district court found a basis in fact. The Fifth Circuit reversed, finding a religious basis was stated and that all evidence established sincerity of the claim.⁶⁰ Similarly, in *United States ex rel. Healy v. Beatty*⁶¹ the CORB found no religious basis for Healy's beliefs. The district court at the habeas hearing reached the opposite conclusion, and its decision was affirmed by the circuit court.

The Second Circuit followed the *Hammond* lead in granting some relief to a West Point cadet in *United States ex rel. Donham v. Resor*.⁶² Reviewing the denial of Donham's claim, the circuit re-

55. 413 F.2d 475 (1st Cir. 1969).

56. *Id.* at 477.

57. *Id.* at 479.

58. 421 F.2d 1272 (5th Cir. 1970).

59. *Id.* at 1276.

60. *Id.* at 1280-81.

61. 424 F.2d 299 (5th Cir. 1970).

62. 436 F.2d 751 (2d Cir. 1971).

quired the Army to base its findings on objective evidence. In fact, the circuit found a possible basis in fact for denial based on Donham's claim that he delayed filing his petition for fear of losing credit for the West Point school year.⁶³ However, the court observed that the hearing officer was totally unaware of the appropriate conscientious objector regulations and also lacked the necessary objectivity to provide a fair hearing.⁶⁴ In addition, there was no recommendation from petitioner's unit commander. Accordingly, further proceedings by the Army were ordered.⁶⁵

Influencing, and at times being influenced by, the in-service CO decisions were those involving judicial review of civilian Selective Service CO denials. Typical was *United States v. Broyles*.⁶⁶ There the registrant's CO claim was denied by his local board. The board refused to provide the registrant any reason for the denial. In reversing Broyles' conviction for refusing induction, the Fourth Circuit, sitting en banc, held that "effective review requires an explicit finding of insincerity if that is to be the sole basis for rejection of the conscientious objection claim."⁶⁷ Elaborating further, the court held that where the registrant has made a prima facie case, the board must "state its basis of decision and the reasons therefor, i.e., whether it has found the registrant incredible, insincere, or of bad faith, and why."⁶⁸

Three Supreme Court cases decided in 1970 and 1971 provided further guidance for both CO applicants and the administrative and judicial decision makers. *Welsh v. United States*⁶⁹ largely completed the work of *Seeger* in removing a requirement for "religious" belief. Unlike *Seeger* who expressed uncertainty as to the religious nature of his views, *Welsh* flatly stated that religious attitudes were not relevant to his beliefs.⁷⁰ The Court agreed, further torturing the language of the conscientious objector statute to include

63. *Id.* at 754.

64. *Id.*

65. *Id.* at 755.

66. 423 F.2d 1299 (4th Cir. 1970) (en banc).

67. *Id.* at 1303.

68. *Id.* at 1304. See also *Mulloy v. United States*, 398 U.S. 410 (1970); *United States v. Houghton*, 413 F.2d 736 (9th Cir. 1969); *United States v. Lemmens*, 430 F.2d 619 (7th Cir. 1970); *United States v. James*, 417 F.2d 826 (4th Cir. 1969).

69. 398 U.S. 333 (1970).

70. *Id.* at 337.

those whose "consciences spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."⁷¹ Nine months later the Court did narrow the field of eligible conscientious objectors by rejecting "single war" or "selective" conscientious objection.⁷² Shortly thereafter the Court recognized in-service conscientious objector proceedings in *Ehlert v. United States*.⁷³ At issue in *Ehlert* was a Selective Service registrant's right to file a conscientious objector claim with his local board after receiving a notice to report for induction. The Court held that Selective Service regulations could require Ehlert's CO claim to have been filed with his local board *before* the receipt of his order to report.⁷⁴ Significant in the Court's decision, however, was its understanding that Ehlert's CO claim would be fully and fairly evaluated within the military after his induction.⁷⁵

What in 1969 was a novelty had by 1972 become commonplace in federal courts. In the majority of reported cases the CO applicant was successful in securing either an order for discharge or a remand to the military for another hearing. Reversal of the military administrative action was typically based on one of three grounds. The first, and most unusual, was the failure of the service to follow its procedural regulations. Among the errors requiring reversal were the failure to provide a hearing officer properly versed in the current CO requirements,⁷⁶ the denial of the right to appear with counsel,⁷⁷ the denial to a reservist of the procedural rights protected by Army regulations,⁷⁸ and the failure to inform the applicant that he was participating in the O-3 hearing.⁷⁹

The majority of reversals were based on the military's failure to find a valid basis in fact for the denial of the applicant's request for CO status. Cases were overturned in which the applicant made a *prima facie* case and was rebutted by mere conclusory statements regarding the nature of his beliefs or sincerity.⁸⁰ Courts demand-

71. *Id.* at 344.

72. *Gillette v. United States*, 401 U.S. 437 (1971).

73. 402 U.S. 99 (1971).

74. *Id.* at 102.

75. *Id.* at 103-04.

76. *Hollingsworth v. Balcom*, 441 F.2d 419 (6th Cir. 1971); *United States ex rel. Donham v. Resor*, 436 F.2d 751 (2d Cir. 1971); *Bates v. Commander*, 413 F.2d 475 (1st Cir. 1969).

77. *Hollingsworth v. Balcom*, 441 F.2d 419 (6th Cir. 1971).

78. *Friedberg v. Resor*, 453 F.2d 935 (2nd Cir. 1971). See Army Regulation 15-6.

79. 441 F.2d at 424.

80. *Zemke v. Larsen*, 434 F.2d 1281 (9th Cir. 1970) (remand to conscientious objector review board to clarify reason for denial); *Decker v.*

ing "hard, provable, reliable facts"⁸¹ found such holdings inadequate.

More significantly, the courts rejected a substantial list of "hard, provable, reliable facts" as being inadequate *by themselves* to warrant denial of a prima facie CO case. A number of factors such as belief in self-defense,⁸² willingness to engage in a theocratic war,⁸³ and the existence of a police record of previous minor offenses⁸⁴ had been rejected as bases in fact by prior opinions in Selective Service cases. The in-service CO cases greatly expanded the list. Among factors held *per se* inadequate to defeat a CO claim were: prior ROTC or OCS experience;⁸⁵ sentiments opposing the Vietnam War;⁸⁶ completion of some combat training;⁸⁷ the rapidity of change of beliefs;⁸⁸ youthful doubts as to organized religion;⁸⁹ the receipt of orders to Vietnam;⁹⁰ political and sociological views opposing war;⁹¹ membership in allegedly subversive groups;⁹² an expressed

Wheeler, 331 F. Supp. 347 (D. Minn. 1970); Pinkus v. Pearson, 449 F.2d 162 (9th Cir. 1971); Owens v. Commanding General, 307 F. Supp. 285 (N.D. Cal. 1969); see also Kemp v. Bradley, 457 F.2d 627 (8th Cir. 1972) (rejecting lack of depth of convictions as grounds for denial); Howe v. Laird, 456 F.2d 233 (5th Cir. 1972); Pekat v. Lutz, 451 F.2d 366 (4th Cir. 1971).

81. The language is from Helwick v. Laird, 438 F.2d 959, 963 (5th Cir. 1971). "For example, the Board is not at liberty merely to disbelieve the claimant. There must be some facts in his application—hard, provable, reliable facts—that provide a basis for disbelieving the claimant."

82. See, e.g., United States v. Davila, 429 F.2d 481 (5th Cir. 1970); United States v. James, 417 F.2d 26 (4th Cir. 1969); United States v. Haughton, 413 F.2d 736 (9th Cir. 1969); Jessen v. United States, 212 F.2d 897 (10th Cir. 1954).

83. See Sicurella v. United States, 348 U.S. 385 (1955); United States v. Brown, 423 F.2d 751 (3d Cir. 1970); Kretchet v. United States, 284 F.2d 561 (9th Cir. 1960); Bouziden v. United States, 251 F.2d 728 (10th Cir. 1958); United States v. Wilson, 215 F.2d 443 (7th Cir. 1954).

84. See Rempel v. United States, 220 F.2d 949 (10th Cir. 1955); Chernenkoff v. United States, 219 F.2d 721 (9th Cir. 1955).

85. Packard v. Rollins, 422 F.2d 525 (8th Cir. 1970) (OCS commission); United States *ex rel.* Greenwood v. Resor, 439 F.2d 1249 (4th Cir. 1971) (ROTC graduate); Carney v. Laird, 326 F. Supp. 741 (D. R.I. 1971) (Navy ROTC graduate); Rautenstrauch v. Secretary of Defense, 313 F. Supp. 170 (W.D. Tex. 1970) (ROTC participation and OCS enlistment).

86. Bates v. Commander, 413 F.2d 475 (1st Cir. 1969).

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

88. Pitcher v. Laird, 421 F.2d 1272 (5th Cir. 1970); Frisby v. Larsen, 330 F. Supp. 545 (N.D. Cal. 1971).

89. Helwick v. Laird, 438 F.2d 959 (5th Cir. 1971).

90. Christensen v. Franklin, 456 F.2d 1277 (9th Cir. 1972).

91. Packard v. Rollins, 422 F.2d 525 (8th Cir. 1970).

92. Carney v. Laird, 326 F. Supp. 741 (D. R.I. 1971).

desire to "get out of the military regardless of the consequences;"⁹³ the fact of having sought draft counseling information;⁹⁴ and a hearing officer's conclusion that an applicant's statement as to his beliefs seemed to be the product of rote learning.⁹⁵

Two district court cases are particularly illustrative of the government's burden in finding an acceptable basis in fact. In *Frisby v. Larsen*,⁹⁶ the petitioner entered service with a noncombatant's CO classification. He then sought a I-O classification and discharge from service. His case was rejected on grounds of insincerity. The Army cited his demeanor at the O-3 hearing, the suddenness of his decision to seek discharge, and the O-3 officer's expressed conclusion that Frisby's answers seemed the product of rote learning and that his attitude suggested that it would be nice to be out of the military. The district court found no basis in fact, referring to the government's evidence as a "thin straw."⁹⁷

An even stronger basis in fact case was rejected in *Champ v. Seamans*.⁹⁸ To rebut Champ's admittedly prima facie case the government cited the following factors: (1) the O-3 officer's independent investigation suggested petitioner had not read certain books that he cited as influencing his beliefs; (2) petitioner's contacts with a minister, alleged to be the strongest influence on his beliefs, were less recent and less intense than his application implied; (3) prior CO applications had been based on solely religious grounds while the current one incorporated *Welsh* non-religious grounds; (4) Champ's first application was not filed until he began training as a Vietnamese language specialist. Despite commending the O-3 officer on the energy of his investigation, the court found these factors either singly or taken as a whole insufficient to provide a basis in fact. Habeas corpus relief and discharge were granted to Champ.

While the *Frisby* and *Champ* opinions illustrate that a hearing officer's unfavorable recommendation is not fatal to habeas relief, a number of cases seem impliedly to turn on the favorable reports of hearing officers.⁹⁹ A finding of sincerity or a recommendation

93. *Helwick v. Laird*, 438 F.2d 959 (5th Cir. 1971); see also *Kemp v. Bradley*, 457 F.2d 627 (8th Cir. 1972).

94. *United States ex rel. Greenwood v. Resor*, 439 F.2d 1249 (4th Cir. 1971).

95. *Frisby v. Larsen*, 330 F. Supp. 545 (N.D. Cal. 1971).

96. *Id.*

97. *Id.* at 549.

98. 330 F. Supp. 1127 (M.D. Ala. 1971).

99. See, e.g., *United States ex rel. Tobias v. Laird*, 413 F.2d 936 (4th Cir. 1969) (favorable recommendations from all interviewers); *Owens v. Commanding General*, 307 F. Supp. 285 (N.D. Cal. 1969) (all interviewers

that CO status be granted is of great help to the applicant before the reviewing court.

An examination of cases in which a basis in fact *has been found* offers some guidance in a confused area. Several cases have turned wholly or in part on a finding that the applicant's beliefs were based on selective objection to participation in war.¹⁰⁰ Other affirmances relied on multi-factor denials. In *Kaye v. Laird*,¹⁰¹ the petitioner had completed basic training, had sought to cancel orders to Vietnam on non-conscientious objector grounds, and had filed his CO application the day before he was to report at an overseas replacement station. The Third Circuit found sufficient facts to support the CORB's conclusion of insincerity. In *Brown v. Laird*¹⁰² a CORB finding of insincerity was upheld based on evidence of applicant's lack of familiarity with authors of literary works cited in his application, the application's failure to speak of conscientious objection, and the applicant's previous vigorous attempts to secure a reserve unit appointment. The Ninth Circuit found sufficient grounds to deny a I-O discharge in *Bratcher v. McNamara*¹⁰³ based on Bratcher's voluntary enlistment, his efforts to secure release from service through acts of misconduct, and the evidence that the commanding officer's negative recommendation was based on considerable knowledge of Bratcher's record.

One of the closer cases was *Lovallo v. Resor*.¹⁰⁴ Despite a number of sincerity findings by reviewing officers, Lovallo's application was denied on sincerity grounds by the Army CORB. The district court found no basis in fact and granted habeas relief.

favorable); *Bohnert v. Faulkner*, 438 F.2d 747 (6th Cir. 1971) (all recommendations favorable); *Packard v. Rollins*, 422 F.2d 525 (8th Cir. 1970) (all recommendations favorable); *Application of Tavlos*, 429 F.2d 859 (5th Cir. 1970) (all recommendations favorable or inconclusive except immediate commander's); *Decker v. Wheeler*, 331 F. Supp. 347 (D. Minn. 1970) (two recommendations favorable, other inconclusive).

100. *Kurtz v. Laird*, 455 F.2d 965 (5th Cir. 1972); *Dix v. Resor*, 449 F.2d 319 (2d Cir. 1971). Despite the fact that both CO applications were filed prior to the Supreme Court's rejection of selective objection in *Gillette v. United States*, 401 U.S. 437 (1971), both applicants contended that their views encompassed objection to all wars. Note also the restrictive Second Circuit interpretation of the "basis in fact" test. *Dix v. Resor*, 449 F.2d 317, 318 (2d Cir. 1971); *Lovallo v. Resor*, 443 F.2d 1262, 1264 (2d Cir. 1971).

101. 442 F.2d 440 (3d Cir. 1971).

102. 329 F. Supp. 242 (E.D. Pa. 1971).

103. 448 F.2d 222 (9th Cir. 1971).

104. 443 F.2d 1262 (2d Cir. 1971).

Facing the Second Circuit on the Army's appeal were the following facts: (1) Lovallo's immediate commander had opposed discharge partly due to the fact that several letters supporting Lovallo's claim were dated a few days before Lovallo claimed his views crystallized; (2) the chaplain reported that Lovallo did not know the number of the Commandment enjoining killing; (3) a sworn statement filed by a personnel clerk indicated Lovallo's surprise and displeasure at being transferred to Korea instead of Germany; and (4) Lovallo had expressed a belief in an individual's right to distinguish just from unjust wars. The Circuit found the first two factors insufficient to provide a basis in fact. The latter factors, however, "furnished a sufficient factual basis . . . to decide that Lovallo was claiming the right to pick and choose the war in which he would engage . . ." ¹⁰⁵

Clearly in the field of the non-criminal CO, judicial attitudes have changed. While the courts still adhere to the basis in fact requirement, they have specified that a considerable number of common occurrences *cannot* provide a basis in fact.¹⁰⁶ What had previously been an almost impossible obstacle course for the CO applicant has become an almost impossible obstacle course for the military department attempting to justify a CO denial.¹⁰⁷

The extent of the burden upon the military becomes clearer after closer examination of the application procedures.¹⁰⁸ Initially, the applicant is required to make a prima facie showing of his eligibility for CO discharge.¹⁰⁹ However, as Judge Friendly of the Second Circuit has recognized, this is hardly a burdensome requirement.¹¹⁰ Probably a mere parroting of the words of the statute and the leading Supreme Court cases would suffice. At this point the reviewing

105. *Id.* at 1265.

106. *See* notes 82-96, *supra*.

107. *See, e.g.*, Judge Wood's comments in *Hackett v. Laird*, 326 F. Supp. 1075 (W.D. Tex. 1971). ". . . [I]t is impossible for this Court to imagine how any petition for discharge from the military on conscientious objector grounds could practically be denied by the Review Board." *Id.* at 1081.

108. *See generally* 1968 DOD Dir. and Army Regulation No. 635-20.

109. *See, e.g.*, *Mulloy v. United States*, 398 U.S. 410 (1970); *United States v. Broyles*, 423 F.2d 1299, 1301 (4th Cir. 1970); *United States v. Haughton*, 413 F.2d 736 (9th Cir. 1969); *Frisby v. Larsen*, 330 F. Supp. 545 (N.D. Cal. 1971). In *Clay v. United States*, 403 U.S. 698 (1971), the Court restated the requisites for conscientious objector status: attitudes based on *Seeger-Welsh* training and belief; opposition to all wars; and sincerity.

110. *Paszal v. Laird*, 426 F.2d 1169, 1174 (2d Cir. 1970). Discussing a pre-*Ehlert* case involving crystallization of CO beliefs after receipt of an induction notice, Judge Friendly spoke of the "ease with which a prima facie case [for conscientious objection] can be articulated."

authorities are forced to produce the objective basis in fact to deny applicant's claim.

*Seeger*¹¹¹ and *Welsh*¹¹² have made attack on the "religious training and belief" criteria extremely difficult. To emphasize pertinent court statements on religion: (1) applicant need have no formal religious training or belief;¹¹³ (2) if applicant does claim beliefs arising from the teachings of an established sect, his attitudes need not follow those of his church;¹¹⁴ (3) purely personal political and social views do not disqualify the applicant if qualifying religious training and belief is present.¹¹⁵ In short, a finding that religious training and belief does not motivate the applicant would be extremely difficult to sustain in court.¹¹⁶

The second element of the prima facie case is that the opposition be to participation in all wars. The *Gillette* decision¹¹⁷ has clearly placed admitted objection to only the Vietnam War outside the scope of the DOD Directive. Some courts have gone behind applicants' contentions that they were opposed to all wars to find essentially single war objection.¹¹⁸ Further expansion of the *Gillette* holding as a commonly relied-on basis in fact, however, may be difficult. Young servicemen's experiences with the military and war have been experiences with the Vietnam War. Court decisions have emphasized that valid conscientious objector beliefs can co-exist with more specific beliefs opposing the moral, political, or military aspects of the Vietnam conflict.¹¹⁹ Probably courts will require hard facts showing single war objection only to rebut the applicant's contention of objection to all wars. Additionally, well-counseled post-*Gillette* applicants will be alert to avoid suggesting single war or selective objection positions in their applications.

111. *United States v. Seeger*, 380 U.S. 163 (1965).

112. *United States v. Welsh*, 398 U.S. 333 (1970).

113. *Id.*; *United States v. Seeger*, 380 U.S. 163 (1965).

114. *United States v. Seeger*, 380 U.S. 163, 184-85 (1965); *Decker v. Wheeler*, 331 F. Supp. 347, 349 (D. Minn. 1970).

115. *See, e.g., Packard v. Rollins*, 422 F.2d 525 (8th Cir. 1970); *Bates v. Commander*, 413 F.2d 475 (1st Cir. 1969).

116. Writing in 1970, John Hansen noted that the trend in the military was away from denying CO claims on the basis of religious training and belief. *See Hansen, supra* note 31, at 998.

117. *Gillette v. United States*, 401 U.S. 437 (1971).

118. *Kurtz v. Laird*, 455 F.2d 965 (5th Cir. 1971); *Lovallo v. Resor*, 443 F.2d 1262 (2d Cir. 1971).

119. *See cases cited in note 115, supra.*

That leaves sincerity. Here, too, the previously discussed court decisions have invalidated many of the logical attacks on the registrant's sincerity.¹²⁰ What is obvious is that the record before the appropriate CORB is woefully inadequate to determine such a complex question. Much of the paper record is of the applicant's own creation.¹²¹ Given minimal counseling, his application will have been screened both to assure that it states a prima facie case,¹²² and to avoid any comments that reflect negatively upon sincerity. Similarly, any letters accompanying the application are subject to screening.¹²³ An unfavorable letter, or one which may unintentionally cast doubt on sincerity or timing,¹²⁴ can simply be omitted from the application. Further, given monetary and time considerations, the applicant can probably be confident that no further examination of his character references will occur.

At the various hearings, the applicant may be examined as to the nature of his beliefs.¹²⁵ In this way some reflections on sincerity may be possible. However, absent complete transcripts, the interviewing officers' recommendations regarding sincerity may be conclusory and subject to differing interpretations.¹²⁶ While nothing in the Directive prevents the O-3 officer from calling other witnesses, nothing in the regulation encourages such a practice.¹²⁷ Clearly he lacks deposition power over non-military witnesses. Further, there is no express authority to pay any incident cost.

120. See notes 82-95, *supra*.

121. Department of Defense Directive 1300.6, VI A (20 Aug. 1971). The revised Directive [hereinafter cited as 1971 DOD Dir.] is substantially the same as the 1968 DOD Dir. in this respect.

122. Recall Judge Friendly's comments at note 110, *supra*; and see *Hackett v. Laird*, 326 F. Supp. 1075 (W.D. Tex. 1971).

123. 1971 DOD Dir., VI A 2, lets the applicant include with his application "[a]ny other items which an applicant desires to submit in support of his case."

124. A well-meaning reference can jeopardize a CO application by suggesting that the applicant's attitudes toward war have been formed well before receipt of an induction notice. Such crystallized views should have been presented to the Selective Service and are not eligible for consideration under the Directive. 1971 DOD Dir. IV A.

125. *Id.* at VI C and D 2.

126. *Id.* at VI D 2 d does not require a verbatim record of the 0-3 hearing. While the applicant is authorized to arrange for a verbatim record he must bear the expense. The 1968 DOD Dir. did not discuss a verbatim record.

127. 1971 DOD Dir. VI D 2 c authorizes the applicant to present witnesses in his own behalf and requires the installation commander to "render all reasonable assistance in making available military members . . . requested by the applicant as witnesses." A similar power is not spelled out for the 0-3 officer although he may assume such a power from the language of VI D 2 that he "ascertain and assemble all relevant facts." Again the 1968 DOD Dir. did not spell out such rights.

In fact, the O-3 officer may have little opportunity to investigate even the on-post sources which may shed light on the applicant's sincerity. Finally, those servicemen-lawyers serving as O-3 officers may feel somewhat uncomfortable in assuming the role of "prosecutor" in what is stated to be a non-adversary proceeding.¹²⁸

What results in the case of the well counseled CO applicant is a rather one-sided presentation of character. The applicant is largely free to present favorable data. If he desires he can exclude any unfavorable references. At the various hearings it is typically to his advantage to reiterate the information in his written application. In most cases the O-3 examiner will be unable to challenge the applicant's contention that his attitudes towards participation in war are founded in *Seeger-Welsh* "religious training and belief." Further, in light of *Gillette*, it will be the unusual applicant who phrases his beliefs in terms of opposition to a single war. Denial of the application must thus be on the basis of sincerity. The courts have both insisted on hard objective evidence and at the same time disqualified much of the hard evidence that the hearing officer would be likely to have in his possession. The result comes perilously close to that predicted by one federal district judge: ". . . [I]t is impossible for this Court to imagine how any petition for discharge from the military on conscientious objector grounds could practically be denied by the Review Board."¹²⁹

V. COURT-MARTIAL REVIEW OF CONSCIENTIOUS OBJECTOR DETERMINATIONS

Military conscientious objector proceedings are denominated as administrative rather than judicial. However, the denial of a serviceman's administrative claim for conscientious objector status may be only a short step removed from subsequent criminal proceedings. In an often confusing series of cases, the military court-martial review courts have struggled with the consequences of erroneous CO administrative actions on subsequent judicial proceedings. While the effect of the most recent decision has yet to be fully measured, it appears as though conscientious objection as a defense to a court-martial charge has been severely curtailed if not eliminated.

128. 1971 DOD Dir. VI D 2 b.

129. *Hackett v. Laird*, 326 F. Supp. 1075, 1081 (W.D. Tex. 1971).

It is hardly surprising that the conscientious objector can run afoul of the military criminal law. The failure to obey lawful orders of a superior is a punishable offense under the Uniform Code of Military Justice.¹³⁰ Typically the soldier whose CO discharge request has been denied and who has not found shelter under the restraining order of a federal court finds himself confronted with an order that violates his beliefs. Obedience may force him to admit the insincerity of his previously asserted beliefs. Disobedience subjects him to criminal prosecution. In many instances the soldier's response is disobedience. Military law provides that the illegality of an order is a complete defense to its disobedience.¹³¹ Yet in most instances the violated order involving the conscientious objector is a common one in the military—to participate in weapons training, to wear the uniform, to obey movement orders overseas—and one normally considered lawful. Does the wrongfully denied CO claim change matters?

The Court of Military Appeals,¹³² the highest military review court, considered the effect of an improper denial of a CO application on a subsequent court-martial in *United States v. Noyd*.¹³³ Air Force Captain Noyd had been denied conscientious objector status on the basis of his objection solely to the Vietnam War.¹³⁴ Subsequently he disobeyed an order to serve as a flying instructor training pilots for Vietnam duty. At his court-martial Noyd contended that he should have been administratively discharged from the Air Force as a conscientious objector and accordingly should not have had to face the conscience-testing order for which he was court-martialed. The law officer, predecessor of the military judge, held that he would "have no hesitancy in ruling on a proper showing that the Secretary of the Air Force abused his discretion."¹³⁵ However, the law officer found no such abuse in the Secretary's decision. On review, the three judges of the Court of Military

130. See UNIFORM CODE OF MILITARY JUSTICE, arts. 90-91, 10 U.S.C. §§ 890-91 (1971) [hereinafter cited as UCMJ].

131. MANUAL FOR COURTS-MARTIAL, UNITED STATES, paras. 57b, 169b (rev. ed. 1969) [hereinafter cited as MCM 1969]. The Manual was promulgated as a Presidential executive order pursuant to UCMJ article 36's command to prescribe court-martial procedures.

132. The Court of Military Appeals is a three-member court exercising final review powers over specified categories of military cases. By statute the members of the court are drawn from the civilian rather than the military sphere. See generally UCMJ art. 67, 10 U.S.C. § 867 (1970).

133. 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1969).

134. Today, Noyd's claim would, of course, be rejected because of the *Gillette* case. *Gillette v. United States*, 401 U.S. 437 (1971).

135. *United States v. Noyd*, 18 U.S.C.M.A. 483, 487, 40 C.M.R. 195, 199 (1969).

Appeals groped their way to an affirmance of the conviction. Judge Quinn spent the majority of his time assessing Noyd's contention that he was erroneously denied CO status by the Secretary of the Air Force. Essentially, Judge Quinn sought to answer two questions: (1) was the Secretary's action in violation of the Air Force conscientious objector provisions, and (2) if in fact it was, of what consequence was this to Noyd's court-martial? Judge Quinn first considered the second issue. He noted that an order "may be invalid for many reasons."¹³⁶ Most pertinently: "An order, apparently valid on its face, may also be illegal because it is based on, or has its generating source in, an unlawful command of a superior."¹³⁷ The single case cited involved a prosecution for violation of an Army regulation which violated a Department of Defense Directive.¹³⁸ Judge Quinn then continued with a long discussion of the legal sources of conscientious objection and the duty to obey military orders. Shifting tracks, he rejected the government contention that even if the Secretary's decision was wrong as a matter of law that ruling "had absolutely nothing to do with the order the accused chose to disobey."¹³⁹ Treating the issue as one of fact, Judge Quinn found that the Secretary's ruling was clearly connected to the order disobeyed. The judge observed that applicable service regulations required that Noyd be provided with duties minimally conflicting with his professed beliefs while his conscientious objector application was pending. Testimony at trial from Noyd's commander indicated that the order violated was given only after the application for separation had been denied. Thus, according to Judge Quinn, "[t]he validity of the order, therefore, depended upon the validity of the Secretary's decision. . . . If the Secretary's decision was illegal, the order it generated was also illegal."¹⁴⁰

Having found that Noyd had recourse from an improper administrative ruling, Judge Quinn then noted that Noyd's status as a selective objector took him outside the ambit of the Air Force regulation. He rejected Noyd's contention that the regulations disre-

136. *Id.* at 489, 40 C.M.R. at 201.

137. *Id.*

138. *United States v. Voorhees*, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954). At issue was an Army regulation attempting to control review of manuscripts by military personnel.

139. 18 U.S.C.M.A. at 492, 40 C.M.R. at 204.

140. *Id.*

garding the selective objector involved an "arbitrary and unreasonable" deprivation of constitutional equal protection. Looking only to the in-service objector, Judge Quinn found "enormous problems" involved in the recognition of selective objectors.¹⁴¹ Apparently these provided reasonable grounds for the questioned difference in treatment. Accordingly, it was found that Noyd's application was properly denied by the Secretary of the Air Force and his conviction for disobedience was affirmed.

Judge Darden concurred without opinion.¹⁴² Judge Ferguson concurred in the result. He found Noyd clearly ineligible for relief under the Air Force regulations and saw no need to "involve ourselves in the lengthy discussion of what occurred in connection with his petition for departmental relief or the effect thereof on his trial."¹⁴³

Two years later the Court of Military Appeals re-examined its position on the effects of a wrongful administrative CO denial in *United States v. Stewart*.¹⁴⁴ As in *Noyd*, Stewart raised the CO denial at his court-martial for disobedience of an order. The law officer refused to take evidence on the matter and Stewart changed his plea to guilty. On appeal Judges Darden and Quinn voted to affirm the conviction. Judge Darden, however, implicitly urged overruling of the *Noyd* holding. He found ". . . claimed conscientious objection or a Secretary's denial of a discharge application by a conscientious objector is a defense to a court-martial proceeding only if the Constitution, a statute, or a regulation so provides."¹⁴⁵ Judge Darden found no such authority. He noted further the practical problem involved in a court making an administrative decision.¹⁴⁶

Judge Quinn reaffirmed his position in *Noyd* that an ". . . order by a subordinate military authority, which has its origin in, and takes its content from, an illegal action by a Service Secretary is not a lawful order, and cannot be the foundation [for a disobe-

141. *Id.* at 492-94, 40 C.M.R. at 204-06.

142. *Id.* at 494, 40 C.M.R. at 206.

143. *Id.* at 495, 40 C.M.R. at 207.

144. 20 U.S.C.M.A. 272, 43 C.M.R. 112 (1971).

145. *Id.* at 275-76, 43 C.M.R. at 115-16.

146. *Id.* at 276, 43 C.M.R. at 116. "If in a collateral way a court-martial can declare an order is illegal because under a discretionary regulation the Secretary has denied an application for a discharge, the Secretary would have no practical alternative except to discharge the member. A member of the armed forces who could with impunity refuse any order is more than useless. Such a procedure would transfer the authority to decide who should be discharged from a military department to a court that is without legislative authority to decide such questions."

ence charge]."¹⁴⁷ Looking at the trial record Judge Quinn found no abuse of Secretarial discretion and accordingly affirmed the court-martial conviction. Judge Ferguson joined Judge Quinn in reaffirming the *Noyd* principle, but felt that a reversal for rehearing was proper.¹⁴⁸

Three months later in *United States v. Larson*¹⁴⁹ the three-way split again appeared. Larson contended that the Army procedural requirements were not followed in processing his eventually unsuccessful CO application. Specifically, he observed that his interview with the chaplain came before the filing of his application. The regulations specified the interview should take place after the filing. Judge Darden found the question irrelevant since the questioned irregularity could have no effect on the subsequent court-martial charges for disobedience.¹⁵⁰ Judge Quinn implied that in the proper case a procedural irregularity could provide a court-martial defense. Here, however, "at most a technical violation of the regulation"¹⁵¹ was involved since the interviewing chaplain had apparently made himself fully knowledgeable of Larson's application before recommending disapproval.

Judge Ferguson again dissented.¹⁵² He found that the Army Court of Military Review had made a finding of fact that the law officer precluded determination of Larson's challenge to the CO proceedings. According to statutory standards of review such a determination was binding on the Court of Military Appeals unless found to be arbitrary or capricious. In addition, Judge Ferguson examined the testimony of the chaplain and found that he incorrectly assumed that a belief in God was required of a conscientious objector. Under the circumstances the judge felt a rehearing was in order.

While the *Noyd* line of cases has been cited by civilian federal courts as authority for the proposition that military judicial review of improper CO denials is possible,¹⁵³ a variety of Court of

147. *Id.* at 277, 43 C.M.R. at 117.

148. *Id.* at 277-78, 43 C.M.R. at 117-18.

149. 20 U.S.C.M.A. 565, 43 C.M.R. 405 (1971).

150. *Id.* at 569, 43 C.M.R. at 409.

151. *Id.* at 568, 43 C.M.R. at 408.

152. *Id.* at 570-72, 43 C.M.R. at 410-12.

153. See, e.g., *Parisi v. Davidson*, 435 F.2d 299 (9th Cir. 1970), *rev'd on other grounds*, 405 U.S. 34 (1972).

Military Review decisions¹⁵⁴ have tightly defined the use of the defense. Most importantly, the issue reviewed by military judicial authorities is not whether the defendant was a conscientious objector at the time of the court-martial offense, but whether his application for CO discharge or reassignment has been improperly denied.¹⁵⁵ In short, the serviceman must have used the established service discharge procedures. Secondly, he has to point to error in the processing of or decision on his application. The defendant at trial is not allowed to bolster a previously denied CO application with further evidence of religious training and belief or sincerity. The court-martial rules only on the information before the Service Secretary.

Clearly implied is the serviceman's right to file his CO application and have it considered through the appropriate channels. The refusal to accept or process an application is improper and provides a court-martial defense.¹⁵⁶ In some instances military superiors and personnel must actively assist the serviceman specifically requesting assistance in filing an application.¹⁵⁷ Also subject to judicial review is the soldier's activity while his application was pending.¹⁵⁸ According to the Directive an applicant shall be assigned such duties as minimally conflict with his asserted beliefs.¹⁵⁹ Even Judge Darden, the strong opponent of reviewing administrative procedures in a court-martial, has stated that a violation of this regulation would provide a valid court-martial defense.¹⁶⁰

The efficacy of military judicial review of the processing of a court-martial claim has been further limited by the offense involved. The only crimes to which the wrongful denial defense can be raised are those involving the disobedience of orders. The military courts have not adopted the attitude "but for the improper administrative action, I would have been discharged from the mili-

154. The Courts of Military Review are the intermediate military appellate courts. See 10 U.S.C. § 866 (1970).

155. *United States v. Noyd*, 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1969); *United States v. Avila*, 41 C.M.R. 654 (ACMR 1969); *United States v. Kent*, 40 C.M.R. 404 (ABR 1968).

156. *United States v. Blake*, 40 C.M.R. 781 (ABR 1969); *United States v. May*, 41 C.M.R. 663 (ACMR 1969); *United States v. Sigmon* (unreported ABR decision, 2 Jan. 1968), discussed in *United States v. Kent*, 40 C.M.R. 404, 405-06 (ABR 1968).

157. *United States v. May*, 41 C.M.R. 663 (ACMR 1969); *United States v. Sigmon* (unreported ABR decision, 2 Jan. 1968), discussed in *United States v. Kent*, 40 C.M.R. 404, 405-06 (ABR 1968).

158. *Id.*

159. 1968 DOD Dir. VI B 2; 1971 DOD Dir. VI H.

160. See *United States v. Stewart*, 20 U.S.C.M.A. 272, 276, 43 C.M.R. 112, 116 n.1 (1971).

tary and not subject to military jurisdiction for subsequent offenses." Thus a soldier who goes AWOL during the pendency of his CO application has no defense at his AWOL court-martial even if he can show a wrongful CO application denial.¹⁶¹

The wrongful CO denial is not even a defense to *all* disobedience offenses. Essentially, the military courts have adopted the "minimally conflicting duties" test of the DOD Directive. If an order could have been validly given while the man's CO application was pending, it cannot be disobeyed after denial in reliance on the wrongful denial as defense.¹⁶² Conversely, the defense is applicable to the kind of order that could not have been given while the application was pending without causing a significant conflict with the applicant's beliefs.¹⁶³ To cite the more common examples the wrongful denial defense at court-martial would apply to orders to take weapons training,¹⁶⁴ to go on combat patrol, and probably to ship out to a combat zone.¹⁶⁵ The defense would not apply to orders to wear the uniform,¹⁶⁶ to get a regulation military haircut,¹⁶⁷ or to clean quarters.¹⁶⁸

The interjection of the conscientious objector issue into court-martial proceedings pleased few military trial judges. Standards of review were uncertain and the prospect of a serviceman judicially disqualified from obeying certain orders was equally disturbing. At the same time, the existence of the *Noyd* defense could work against the conscientious objector applicant by raising another military remedy to be exhausted prior to seeking federal civilian court review.¹⁶⁹

161. *Jones v. Lemond*, 18 U.S.C.M.A. 513, 40 C.M.R. 225 (1969).

162. *See, e.g., United States v. Avila*, 41 C.M.R. 654 (ACMR 1969); *United States v. Kent*, 40 C.M.R. 404 (ABR 1968); *United States v. Goguen*, 20 U.S.C.M.A. 527, 43 C.M.R. 367 (ACMR 1970).

163. *See, e.g., United States v. Larson*, 20 U.S.C.M.A. 565, 43 C.M.R. 405 (1971); *United States v. Stewart*, 20 U.S.C.M.A. 272, 43 C.M.R. 112 (1971); *United States v. Blake*, 40 C.M.R. 781 (ABR 1969).

164. *United States v. May*, 41 C.M.R. 663 (ACMR 1969).

165. *United States v. Larson*, 20 U.S.C.M.A. 565, 43 C.M.R. 405 (1971); *United States v. Stewart*, 20 U.S.C.M.A. 272, 43 C.M.R. 112 (1971); *United States v. Blake*, 40 C.M.R. 781 (ABR 1969).

166. *United States v. Goguen*, 20 U.S.C.M.A. 527, 43 C.M.R. 367 (ACMR 1970).

167. *United States v. Kent*, 40 C.M.R. 404 (ABR 1968).

168. *See Parisi v. Davidson*, 435 F.2d 290, 305-06 & n.12 (9th Cir. 1970).

169. *See* 1968 DOD Dir. IV A.

Indicative of the inter-action of court-martial and federal civilian court remedies is *Parisi v. Davidson*.¹⁷⁰ There, despite favorable reports of the chaplain and hearing officer, Parisi's request for CO discharge was denied. His efforts to secure federal court injunctive relief to stop his shipment to Vietnam were unsuccessful. When the Vietnam orders came, he disobeyed them and was convicted by court-martial for disobedience. While military appellate proceedings, including Parisi's claim of wrongful denial of CO status, were pending, he sought further federal court relief. Upholding the action of the district court, the Ninth Circuit held that Parisi was required to exhaust his military judicial remedies. The circuit felt that the military cases indicated that a remedy was available in wrongful denial cases.¹⁷¹ The court did point out, however, that Parisi was required to exhaust his remedies only after court-martial proceedings had actually begun. In the absence of such proceedings the federal court could have immediately reviewed the military administrative action.¹⁷²

Two decisions in early 1972 helped resolve some of the confusion. On February 23rd, the Supreme Court in a unanimous 7-0 decision overturned the Ninth Circuit decision in *Parisi*.¹⁷³ The Court found Parisi's compliance with all Army administrative requirements fully met the demands of the exhaustion doctrine. The Court did not see the issue facing the federal district court as a "direct intervention in a case arising in the military court system." Rather, it viewed the issue as one of comity between court systems. The Court held that the district court ". . . should stay its hand only if the relief the petitioner seeks—discharge as a conscientious objector—would also be available to him with reasonable promptness and certainty through the machinery of the military judicial system in its processing of a court-martial charge." Such was not the case. Noting the limited scope of the *Noyd* defense, the Court found that, at best, it could ". . . entitle the defendant to only an acquittal—not to the discharge . . . that he seeks in the habeas corpus proceeding."

The effect of *Parisi* on the Court of Military Appeals was not long in coming. On April 21st the court in *United States v. Lenox*,¹⁷⁴ while not expressly overruling *Noyd*, virtually gutted its holding. Judge Duncan, who replaced Judge Ferguson after the 1971 term of court, wrote for the majority. Private Lenox's appli-

170. 435 F.2d 299 (9th Cir. 1970).

171. *Id.* at 305-06.

172. *Id.* at 303.

173. 405 U.S. 34 (1972).

174. 21 U.S.C.M.A. 314, 45 C.M.R. 88 (1972).

cation for CO discharge was denied by the Army and the denial upheld by the United States District Court for the Northern District of California. Two weeks after the latter denial Lenox was charged with refusing movement orders to Vietnam. At court-martial Lenox challenged his administrative CO proceedings on both improper processing and basis in fact grounds. At different times in the court-martial the military judge upheld the military's action on the merits and rejected out of hand consideration of the CO issue as an affirmative defense. On review the Court of Military Appeals discussed *Parisi* at length and "re-examine[d] the holding in *United States v. Noyd*" In essence Judge Duncan adopted much of Judge Darden's reasoning in *Stewart*, finding that no statute or regulation made conscientious objection a defense to a court-martial charge. In the penultimate paragraph Judge Duncan summarized the new rule.

After the Secretary of the Army has denied an accused's application for discharge from military service as a conscientious objector and when no application for discharge as a conscientious objector was pending on the date of the alleged offenses, a claim of error in the Secretary's decision cannot be interposed as a defense to charges of missing movement and wilful disobedience of a lawful order.

Judge Quinn continued to "adhere to the Noyd decision" but found facts supporting a denial of Lenox's conscientious objector application.

Where does the disappointed CO applicant stand in light of *Parisi-Lenox*? Certainly, if he seeks further review of the military's administrative decision, his thoughts should be directed toward federal court. *Parisi* established that the military's decision-making process ends with the Service Secretary's decision. While further military relief is possible, the Supreme Court has recognized it as neither likely nor mandated by the exhaustion of remedies doctrine.¹⁷⁵

175. One possible source of relief is the appropriate military Board for Correction of Military Records. See 10 U.S.C. § 1552(a). In *Craycroft v. Ferrall*, 397 U.S. 335 (1970), the Supreme Court held that exhaustion of remedies did not require seeking relief from a military record correction board. Further, certain relief may still be available at a post-*Lenox* court-martial. Judge Duncan's opinion in *Lenox* would seem to still allow a serviceman to allege that an order given *during the pendency* of his administrative application improperly tested his beliefs. Here the language

VI. THE NEW DOD DIRECTIVE

Faced with increasing litigation of the administrative CO discharge denials, the Department of Defense issued a revised Directive dated 20 August 1971. Buoyed by recent court decisions, the new Directive begins with an expanded set of definitions. Conscientious objection itself is defined as "a firm, fixed and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and belief."¹⁷⁶ Religious training and belief is further defined as belief "in an external power or being or deeply held moral or ethical belief, to which all else is subordinate or upon which all else is ultimately dependent, and which has the power or force to affect moral well-being."¹⁷⁷ *Seeger* and *Welsh* language is incorporated, excluding the validity of "a belief which rests solely upon considerations of policy, pragmatism, expedience, or political views."¹⁷⁸ The Directive continues to refer to the "discretionary" nature of the administrative discharge and its granting "to the extent practicable and equitable."¹⁷⁹ The applicant possessing CO beliefs before entering military service remains ineligible for classification.¹⁸⁰ However, a separate sub-heading allows processing of the *Ehlert* objector's claim where (1) beliefs crystallized after receipt of an induction notice, (2) he was unable to file his claim with the Selective Service, and (3) he made application for CO status within 72 hours of induction.¹⁸¹

The Directive next notices the "personal and subjective nature" of conscientious objection, cautioning against the application of "inflexible objective standards and measurements on an 'across-the-board' basis."¹⁸² Section V spells out the familiar criteria for classification: "(1) conscientiously opposed to participation in war in any form; (2) opposition is found on religious training and belief; and (3) position is sincere and deeply held."¹⁸³ Not surprisingly, sincerity receives most emphasis. Sincerity is to be determined "by an impartial evaluation of the applicant's thinking and living in its totality, past and present."¹⁸⁴ Information presented

of the regulation would have been directly violated. A closer question might involve the refusal to process or forward a serviceman's application under the provisions of the appropriate service regulation.

176. 1971 DOD Dir. III A.

177. *Id.* at III B.

178. *Id.*

179. *Id.* at IV A.

180. *Id.* at IV A 1.

181. *Id.* at IV A 2.

182. *Id.* at IV B.

183. *Id.* at V A. The Directive's articulation is similar to that spelled out by the Supreme Court in *Clay v. United States*, 403 U.S. 698 (1971).

184. 1971 DOD Dir. V C 2.

by the claimant should be "sufficient to convince that the claimant's personal history reveals views and actions strong enough to demonstrate that expediency or avoidance of military service is not the basis of his claim."¹⁸⁵ Relevant factors to be considered include "training in the home and church; general demeanor and pattern of conduct; participation in religious activities; whether ethical or moral convictions were gained through training, study, contemplation or other activity comparable in rigor and dedication to the processes by which traditional religious convictions are formed; credibility of the applicant; and credibility of persons supporting the claim."¹⁸⁶ The Directive next spells out many of the factors responsible for overturning CO determinations: church membership is not required; conversely mere church affiliation is not determinative; an applicant may disagree with some tenets of his church; and conscientious objector views may influence views towards national, domestic or foreign policies.¹⁸⁷

The burden of establishing eligibility for CO discharge remains on the applicant. He must establish "by clear and convincing evidence"¹⁸⁸ his eligibility for classification. The claimant has the burden of specifying the exact nature of his request, whether for separation from service or reassignment to noncombatant duties.¹⁸⁹

The most significant change in the Directive involves the establishment of explicit procedures for consideration of CO claims. The procedures of application filing, advisement as to effects of CO discharge,¹⁹⁰ chaplain's interview, psychiatrist's interview, and O-3 officer's interview remain the same. The new Directive adds a variety of requirements including: (1) The chaplain or psychiatrist is to note in the record if the applicant refused to participate or was uncooperative.¹⁹¹ (2) The O-3 hearing is now mandatory.¹⁹² (3) The O-3 officer is required to "review the applicable

185. *Id.*

186. *Id.* at V C 2 b.

187. *Id.* at V C 2 c.

188. *Id.* at V D.

189. *Id.*

190. 38 U.S.C. § 3103 (1970), bars discharged conscientious objectors from receiving most Veterans' Administration benefits.

191. 1971 DOD Dir. VI C.

192. *Id.* at VI D. The new directive notes that an applicant's failure to submit to questioning at the hearing "may be considered" by the O-3 officer in making his recommendation. An applicant's failure to appear altogether

service regulations” regarding conscientious objection, and to “obtain all necessary legal advice from the local Staff Judge Advocate” prior to conducting the hearing.¹⁹³ (4) The purpose of the O-3 hearing is stated to be “to afford the applicant an opportunity to present any evidence he desires in support of his application; to enable the investigating officer to ascertain and assemble all relevant facts; to create a comprehensive record; and to facilitate an informed recommendation by the investigating officer and an informed decision on the merits by higher authority.”¹⁹⁴ (5) All oral testimony shall be under oath but other statements may be received in keeping with the informal nature of the hearing. Criminal rules of evidence do not govern the hearing.¹⁹⁵ (6) The applicant is specifically given the right to question other witnesses who appear and to examine all items in the file.¹⁹⁶ At his own expense he may provide for a verbatim record of the proceedings. Should he not desire to do so, he has the right to examine and note exceptions to the investigating officer’s summary of the testimony.¹⁹⁷ (7) Requirements for the O-3’s report are specified in detail. In particular, the report must summarize witnesses’ testimony, note the explanation to the applicant of the purpose of the hearing, state the investigating officer’s “conclusions as to the underlying basis of the applicant’s conscientious objection and the sincerity of the applicant’s beliefs, including his reasons for such conclusions,” and recommend with reasons either denial of any CO classification, classification as a I-A-O conscientious objector, or classification as a I-O conscientious objector.¹⁹⁸

Following the completion of the investigating officer’s report the entire file is forwarded to the headquarters of the officer who appointed the O-3 officer “where it shall be reviewed for completeness and legal sufficiency.”¹⁹⁹ If necessary, further investigation of the case is authorized. Subsequently, the entire record is forwarded to the headquarters of the service concerned for a decision based on the entire record.²⁰⁰ Any additional information consid-

is deemed to waive his right to appearance. It remains to be seen whether a reviewing court would regard a failure to appear or cooperate at the 0-3 hearing as in itself a basis in fact for denying the applicant’s CO claim. Certainly, the presence of the mandatory 0-3 hearing strengthens the military’s position.

193. *Id.* at VI D 1.

194. *Id.* at VI D 2.

195. *Id.* at VI D 2 b.

196. *Id.* at VI D 2 c.

197. *Id.* at VI D 2 d.

198. *Id.* at VI D 3.

199. *Id.* at VI E.

200. *Id.*

ered must be referred to the applicant for his comment.²⁰¹ As under the old Directive, during the processing period every effort will be made to provide the applicant with duties which "conflict as little as possible"²⁰² with asserted beliefs. However, ". . . applicants will be expected to conform to the normal requirements of military service and to perform satisfactorily such duties to which they are assigned." Violators may be disciplined under the Uniform Code of Military Justice.²⁰³

The new Directive and the implementing service regulations reflect the military's concern with judicial overturning of administrative CO determinations. The more explicit requirements for the O-3 hearing are the best evidence of the increased formalization of CO proceedings. So, too, the extended discussion of religious training and belief indicates a desire to adhere more closely to judicial precedent. Certainly the review of the record by post legal authorities will be helpful in this regard.

A major disappointment, however, is the failure to provide for a mandatory verbatim record of at least the O-3 hearing. As noted earlier, this is the critical stage of the fact-finding proceedings. Typically, if a basis in fact exists for denying a CO application, it will surface on questioning from the O-3 officer. To rely on the applicant to provide a transcript assumes both his financial ability and his desire for an exact record. Many applicants, having made a prima facie written case, may prefer to have only the O-3 officer's inexact summary with the opportunity to note exceptions to his facts and conclusions. A reviewing board or court may demand something more than the interviewing officer's language that "applicant's answers were inconsistent" or "applicant showed little depth of knowledge regarding his beliefs." Certainly, in what is already a badly deficient fact-finding process, a transcript of this face-to-face encounter should be a requisite.²⁰⁴

VII. RECOMMENDATIONS AND CONCLUSION

A decade of war, protests, and court decisions have markedly

201. *Id.* at VI F.

202. *Id.* at VI H.

203. *Id.*

204. The Fifth Circuit has urged such a transcribed interview in *Rothfuss v. Resor*, 443 F.2d 554 (5th Cir. 1971).

changed the scope of the Department of Defense's policy toward conscientious objectors. What was in all probability conceived of as an informal proceeding involving few service personnel has become a significant factor in the military-federal court inter-relationship. Once-clear standards have become clouded. A proceeding, once assumed to terminate upon the Service Secretary's decision, now cannot be considered final until the Supreme Court has denied a petition for certiorari to review a lower court's habeas corpus denial. "Zero draft" and "VOLAR" may be the guidelines for the seventies; but the military still spends inordinate time and money to keep reluctant soldiers on duty.

Most assuredly neither the courts, the military, nor the individual applicants find the present in-service conscientious objector proceedings satisfactory. Seen from one perspective, the failure of the military to sustain even half of its CO denials challenged by petition for habeas corpus bespeaks the failure of the military's conscientious objector discharge regulations. Seen from a different perspective, the courts have forced impossible standards of proof on the military and effectively promised discharge from service for both the qualified CO who can articulate his claim and the discontented but non-qualifying objector whose counsel has read his cases and regulations. While the new Directive should improve matters somewhat, it does not solve the fundamental problems.

The rise of the Volunteer Army concept, if not the Volunteer Army itself, should encourage a rethinking of the role of the conscientious objector in the military. One approach would be to further improve the fact-finding process for determining who is and is not a true conscientious objector. As has been suggested, a soldier's conscientious objector claim can be processed through military administrative procedures, the military courts, and the federal courts without reaching a determination of the man's "religious training and belief" and the sincerity of his views based on anything more than the man's own statements.

Critical to an improved fact-finding procedure would be a recognition that the proceeding is to some extent an adversary one. The serviceman wants out; the military presumes he should stay in. The applicant and his witnesses should appear at the transcribed hearing and be subject to examination by the military's legal representative. Fairness would also require that the military be given the investigative capabilities to locate witnesses unfavorable to the applicant's claims. Given the scope of the sincerity question, testimony from anyone—from childhood religious leaders to current barracks mates—may be relevant. Further, given the in-

exactness of verbal expression in the area, cross-examination should be used to clarify and particularize. The "sincerity" decision resulting from such a hearing, while not infallible, would at least offer the opportunity for a fuller and fairer resolution of the question: What are this man's beliefs and do they exempt him from further military service?

This approach would, of course, simply expand past CO determination practices. Almost assuredly it would cost the military more money and lengthen the proceedings to the disadvantage of the sincere objector.

A preferable solution to the problem would go to the other extreme. It would simply take the serviceman at his word and classify him as a conscientious objector upon request. Such a procedure might require the applicant to sign a statement that his beliefs correspond with present conscientious objector qualifications and that he understands he is waiving certain service benefits and reenlistment rights.²⁰⁵ To avoid ill-considered actions the potential conscientious objector could be required to appear before a chaplain or other officer versed in conscientious objector practice. This officer could be authorized to require a short period of delay, possibly up to a week, in cases where he felt the applicant was uncertain as to his wishes or acting impetuously. Further exceptions could limit the discharge of servicemen doing essential duty in a combat zone. Aside from these limits, however, the serviceman signing a statement of his CO views and requesting discharge would be immediately placed in duties minimally conflicting with his beliefs and discharged as soon as possible. Gone would be the fact-finding process, the court review, the delay and the burden on both the serviceman and the military.

Such a proposal would admit that under present standards the applicant is the best person to determine whether he is a conscientious objector. Having reached that determination, it is questionable whether the military's benefit in forcing him to perform the remainder of his service could possibly outweigh the military's expenditure of effort to keep him on duty. A common complaint of lower level military commanders is that the time spent with the five per cent of their command who are strenuously opposed to

205. See note 185, *supra*.

military life and discipline could be far better spent with the ninety-five per cent who desire to perform their missions to the best of their abilities. Almost certainly no national interest would have been jeopardized if each of the Army's 1500 CO applicants in 1971 had been discharged upon request.

The greater concern would be that the new CO procedure would open the gates to a mass exodus from the military, releasing not only bona fide conscientious objectors but all sorts of individuals who simply do not like the military. In a situation involving a critical manpower crisis, such a criticism may have some validity. However, now, when low draft calls are anticipated, the loss to the services would seem minimal. The goal of the Volunteer Armed Force is clearly to retain militarily motivated, career-oriented individuals, the very opposite of the conscientious objector claimant. Therefore, even if every seriously dissatisfied soldier lied as to his beliefs and took discharge as a conscientious objector, the loss to military efficiency would seem minimal.

More realistically, it is probably grossly inaccurate to assume that every discontented draftee or enlistee would seek CO status. The serviceman granted military CO status early in his tour of duty would still be liable to selective service assignment to alternate service. Further, a great variety of factors including community attitudes, family traditions, and perceived service benefits would continue to make the decision to seek conscientious objector classification a serious and rarely chosen one. Wrong though it may be, many Americans still view all conscientious objectors as figures of questionable patriotism and courage. Even assuming a favorable reaction from friends and family toward conscientious objection, the average serviceman's own integrity would probably prevent him from falsifying his beliefs to obtain classification as a conscientious objector.

In-service conscientious objection in 1973 little resembles that of a decade ago. Sometimes reluctantly, sometimes imaginatively, the military has struggled to keep pace with fast-changing judicial standards and public attitudes. Now that some of the bitterness of the Vietnam War has subsided, further evaluation should be given to the role of the conscientious objector in uniform. Re-drafting military regulations along the lines suggested would emphasize the nation's commitment to freedom of conscience within the framework of intelligent military preparedness.