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# CONSCIENTIOUS OBJECTION IN AN ALL-VOLUNTEER MILITARY\*

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## I. INTRODUCTION

Conscientious objection to military service is not a new concept. It dates back to the founding of this nation and beyond. During the drafting of the Bill of Rights, James Madison originally proposed a version of the Second Amendment exempting persons "religiously scrupulous of bearing arms" from compelled military service.<sup>1</sup> Although this version was not adopted, its mere proposal demonstrates the Founding Fathers' respect for the principle of conscientious objection.<sup>2</sup>

Yet even the Founding Fathers looked at conscientious objection only as it related to conscripted military service. They never

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\* The views expressed in this article are those of the authors, and do not reflect the official policy or position of the United States Government, the Department of Defense, the Department of the Navy, or the United States Marine Corps.

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<sup>1</sup> 1 ANNALS OF THE CONG. 451 (Joseph Gales ed., 1834). Madison's original version of the Second Amendment read: "That the right of the people to bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; *but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.*" *Id.* (emphasis added).

<sup>2</sup> See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1468-80 (1990). That Congress ultimately deleted the language regarding conscientious objection from the Second Amendment does not belie the Founding Fathers' respect for this principle. The Founding Fathers had many heated debates about whether to include a Bill of Rights at all and feared that enumerating certain rights would eliminate others by omission, or would limit each enumerated right to its language in the amendment. *See id.*

contemplated a volunteer force such as exists today. Their idea of an all-volunteer force was the Minutemen, who would simply grab their rifles and go to fight when the bell was sounded; a far cry from the relationship volunteer military servicemembers have to their respective services today. Conscientious objection among the Minutemen was a logical absurdity.

The Persian Gulf War presented the first wartime situation in which conscientious objection was raised in the modern brand of all-volunteer United States military. Conscientious objection in this new all-volunteer force is problematic at best. All volunteer servicemembers are screened and must affirm, prior to entry into the military, that they are not conscientious objectors.<sup>3</sup> One could argue that this should be all the protection conscientious objectors need in an all-volunteer force—if you are opposed to participation in war, do not join the military. The Department of Defense has seen fit, however, to accommodate the needs of those servicemembers who have a legitimate change of heart after joining the military by establishing procedures for receiving and evaluating claims of conscientious objection.<sup>4</sup>

## II. INTERNATIONAL STANDARDS FOR CONSCIENTIOUS OBJECTION

In contrast to the comprehensive conscientious objector system in place in the United States today, it is surprising that the international community has never really taken an in-depth look at this issue. The United Nations Charter does not address it, nor do any United Nations resolutions or regulations. This lack of guidance is due to the absence of an international consensus on what a nation can and should do to ensure itself an adequately staffed armed force.

Consider the case of Muslim fundamentalist theocracies where military service is a religious duty. The idea of conscientious objection simply does not apply in these countries because the people and their national leadership are supposed to be in moral and religious agreement. When the national religious leaders of Iran, for instance, call for a "holy war," the common soldier does not object on religious grounds. In communist countries, on the other hand, military service is an accepted part of political indoctrination and,

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<sup>3</sup> Department of Defense Form 1966, *Record of Military Processing, Armed Forces of the United States 2* (1989).

<sup>4</sup> See 32 C.F.R. pt. 75 (1991).

since Marxism rejects religion, religion-based conscientious objection has no accepted place in these societies.

The *International Covenant on Civil and Political Rights*<sup>5</sup> indirectly addressed the conscientious objector issue in its prohibition of "forced or compulsory labor."<sup>6</sup> The definition of "forced or compulsory labor" specifically excludes military service, even for countries that do not allow conscientious objection.<sup>7</sup> Forced military service is apparently not considered forced labor. For countries that do allow conscientious objection, mandatory alternative civilian service is also not considered "forced or compulsory labor."<sup>8</sup> This document aside, the lack of international review of the conscientious objector issue would seem to suggest that most of the world considers military service to be an issue best left to individual sovereign nations to resolve according to their own standards of moral conduct.

Amnesty International ("AI"), an organization of international influence, takes a different tack with the conscientious objector issue. AI took a very active role in the conscientious objector debate during the Persian Gulf War, declaring several Marine Corps applicants "prisoners of conscience" after these Marines were court-martialed for various desertion and unauthorized absence offenses.<sup>9</sup> AI's approach is quite perplexing given its definitions of "conscientious objector" and "prisoner of conscience."

AI defines a conscientious objector as "a person *who may be drafted for military service* and who, for reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian, philosophical, political, or similar motives, refuses to perform armed service or participate directly or indirectly in wars or armed conflicts."<sup>10</sup> Under this definition, no United States ser-

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<sup>5</sup> International Covenant on Civil and Political Rights, Mar. 23, 1976, art. 8, 999 U.N.T.S. 171, 175. The United States is a signatory to this covenant, but it has never been consented to by the Senate. It was submitted to the Senate by the President on February 23, 1978.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See *United States of America: Amnesty International Takes up Conscientious Objector as Prisoner of Conscience*, AMNESTY INT'L NEWS RELEASE, Feb. 7, 1991; Letter from Dina Coloma, America's Research Department, Amnesty International, to Robert L. Larsen, Captain, U.S. Marine Corp. Reserve (Apr. 22, 1991) (on file with authors) [hereinafter Letter].

<sup>10</sup> THE AMNESTY INTERNATIONAL HANDBOOK (Marie Staunton et al. eds., 1991) (emphasis added).

vicemember could be a conscientious objector because the United States simply no longer uses a draft.

AI's definition of a "prisoner of conscience" also speaks of "conscription" and "persons liable to conscription."<sup>11</sup> AI defines "prisoners of conscience" as individuals who are jailed for refusing military service or refusing to register for conscription, and who meet one of several other criteria.<sup>12</sup> One of these criteria is that "there is not a right to alternative service which is of purely civilian character and under civilian control."<sup>13</sup> The United States, of course, has such alternative service—IBM or Exxon, for example, or anywhere else in the civilian world one may choose to work if one chooses not to join the military. Given its definitional framework, it is not surprising that AI's attempts to apply its standards to the United States military often do not comport with the realities of the situation.<sup>14</sup>

### III. CONSCIENTIOUS OBJECTION IN AN ALL-VOLUNTEER ARMED FORCE

Federal courts have consistently upheld the military's position that "there is no constitutional right to exemption from military service because of conscientious objection or religious calling."<sup>15</sup> Immunity from military service arises solely through congressional or executive grace. In pursuance of the traditional American policy of deference to conscientious objection,<sup>16</sup> Congress has included provisions for conscientious objection by draftees in the Military Selective Service Act of 1948<sup>17</sup> and the Secretary of Defense has

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<sup>11</sup> Amnesty International, International Secretariat, *Conscientious Objection to Military Service* 1 (1991).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Private First Class Erik Larsen, United States Marine Corps Reserve, was declared a "prisoner of conscience" by Amnesty International prior to his court-martial, while under no form of pretrial restraint. Several other Marines were declared "prisoners of conscience" despite their guilty pleas to the offenses for which they were imprisoned.

<sup>15</sup> *Richter v. United States*, 181 F.2d 591, 593 (9th Cir.), *cert. denied*, 340 U.S. 892 (1950). The Ninth Circuit noted in *Richter* that Congress can compel military service by a citizen whenever necessary or when an emergency exists. *Id.* at 593. The court rejected the claim of exemption based on freedom of religion, emphasizing that "[t]he rights of religion are not beyond limitation." *Id.* at 594; *see also* *United States v. Bertram*, 477 F.2d 1329, 1330 (10th Cir. 1973) (right to freedom of religion not "an unbridled one in that it is subject to the power of Congress to raise and support armies").

<sup>16</sup> *See Richter*, 181 F.2d. at 593; *Rase v. United States*, 129 F.2d 204 (6th Cir. 1942).

<sup>17</sup> Military Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604, 612-13 (codi-

established a conscientious objector system for volunteers.<sup>18</sup>

### A. *Judicial Standards for Conscientious Objection*

The conscientious objector application system in place in the United States military today was forged from the Military Selective Service Act of 1948 and the federal caselaw that reviewed that Act. Section 456(j) of the Act exempts from conscripted combatant training and service any person who "by reason of religious training and belief, is conscientiously opposed to participation in war in any form."<sup>19</sup> Under the definition of "religious training and belief," "essentially political, sociological, or philosophical views, or a merely personal moral code" may not serve as a basis for an exemption under the Act.<sup>20</sup> Extensive judicial review of this provision has resulted in a detailed framework for examination of conscientious objector applications.

#### 1. Criteria for Conscientious Objection

The federal courts have created three basic criteria an applicant must meet to establish a "prima facie case" for conscientious objector status. The applicant "must demonstrate that he is opposed to war in any form, that this opposition is rooted in 'religious training and beliefs,' and that he is sincere in his beliefs."<sup>21</sup> The Department of Defense has codified and utilized these requirements in processing conscientious objector applications.<sup>22</sup> Following the Supreme Court's decision in *United States v. Seeger*, the Department of Defense Directive on Conscientious Objectors

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fied as amended at 50 U.S.C. app. §§ 451-473, 456(j) (1988)).

<sup>18</sup> U.S. DEP'T OF DEFENSE, DIRECTIVE ON CONSCIENTIOUS OBJECTORS, No. 1300.6 (Aug. 20, 1971) (codified at 32 C.F.R. pt. 75 (1991)) [hereinafter DoDDir 1300.6].

<sup>19</sup> 50 U.S.C. app. § 456(j) (1990).

<sup>20</sup> *Id.* The original Act also required a belief "in a relation to a Supreme Being" as part of an individual's "religious training and belief." Military Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604, 613. This requirement was removed from the statute after the Supreme Court interpreted it to require that the belief "occup[y] 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." *United States v. Seeger*, 380 U.S. 163, 166 (1965).

<sup>21</sup> *Goodrich v. Marsh*, 659 F. Supp. 855, 857 (W.D. Ky. 1987) (summarizing Supreme Court case law) (citing *Gillette v. United States*, 401 U.S. 437 (1971) (opposition to war in all forms); *Welsh v. United States*, 398 U.S. 333 (1970) (opposition rooted in religious training and belief); and *United States v. Seeger*, 380 U.S. 163 (1965) (sincerity of belief)); see also *Taylor v. Clayton*, 601 F.2d 1102, 1103 (9th Cir. 1979) (noting same three requirements).

<sup>22</sup> See 32 C.F.R. § 75.5(a) (1991).

has expanded the reach of the term "religious training and beliefs" to include "solely moral or ethical beliefs even though the applicant himself may not characterize these beliefs as 'religious' in the traditional sense, or may expressly characterize them as not religious."<sup>23</sup> These moral and ethical beliefs must, however, be held with the "strength and devotion of traditional religious conviction" and may not rest "solely on considerations of policy, pragmatism, expediency, or political views."<sup>24</sup>

In addition to the three court-imposed requirements, the Department of Defense has imposed an oft-overlooked fourth criterion for conscientious objector status. To be eligible for conscientious objector status, an applicant's beliefs must not have crystallized prior to the applicant's entry into military service.<sup>25</sup> No one is forced to join the United States military, so it makes no sense for conscientious objectors to join the service in the first place. If they do join despite their alleged beliefs, two inferences arise. First, they are trying to deceive the Government by joining the military with no intention to fight if called to do so. Second, their alleged beliefs are insincere, since they are willing to put them aside for the sake of military pay and benefits.

## 2. Burden of Proof and Standard of Review

An applicant for conscientious objector status must establish his or her prima facie case by clear and convincing evidence.<sup>26</sup> Once this is done, the burden shifts to the reviewing authority (the Government) to establish a rational basis in fact for denying the application.<sup>27</sup>

Judicial review of the rational basis in fact standard is "the narrowest review known to the law."<sup>28</sup> Because the fundamental

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<sup>23</sup> DoDDIR 1300.6, *supra* note 18, at para. III(B) (codified at 32 C.F.R. § 75.3(b) (1991)).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at para. IV(A)(1) (codified at 32 C.F.R. § 75.3(b) (1991)).

<sup>26</sup> *Id.* at para. V(D) (codified at 32 C.F.R. § 75.5(d)(1991)).

<sup>27</sup> *Taylor v. Clayton*, 601 F.2d 1102, 1103 (9th Cir. 1979) (finding no basis in fact for government's finding of insincerity); *Shaffer v. Schlesinger*, 531 F.2d 124, 127 (3d Cir. 1976) (holding that petitioner's objection to some, but not all, wars was sufficient basis in fact to deny application); *Nurnberg v. Frochlke*, 489 F.2d 843, 848 (2d Cir. 1973) (ruling sufficient basis in fact to deny application where petitioner's conscientious objection crystallized before enlistment).

<sup>28</sup> *Taylor*, 601 F.2d at 1103 (quoting *Sanger v. Seamans*, 507 F.2d 814, 816 (9th Cir. 1974)).

right to freedom of religion is involved, one might expect an elevated standard of review. The Supreme Court has recognized, however, that "it is the primary business of armies and navies to fight . . . wars should the occasion arise."<sup>29</sup> By providing broad discretion to the military, the continued use of this lower standard of review takes into account the national security considerations created by conscientious objection.

The rational basis in fact test is not entirely without teeth, though. A court reviewing a denial of a conscientious objector application must still "carefully scrutinize the logic and reasoning of the [tribunal that denied the application]."<sup>30</sup> As one court stated:

A basis in fact will not find support in mere disbelief or surmise as to the applicant's motivation. Rather, the Government must show some hard reliable, provable facts which would provide a basis for disbelieving the applicant's sincerity, or it must show something concrete in the record which substantially blurs the picture painted by the applicant.<sup>31</sup>

Thus, a mere suspicion of insincerity is an inadequate basis in fact to deny a conscientious objector application.<sup>32</sup>

### 3. Insufficient Bases for Denial

In the process of determining what the Government must rely on in denying a conscientious objector application, the courts have also identified certain impermissible grounds for denying these applications. The timing of the conscientious objection claim, the applicant's belief in the use of force in certain circumstances, and the applicant's belief in a spiritual war have been determined by the courts to be improper or insufficient bases for denying conscientious objector applications.

#### *a. Timing*

The timing of an application "is not by itself a basis-in-fact for rejecting as insincere an otherwise acceptable C.O. claim, al-

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<sup>29</sup> United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).

<sup>30</sup> Reinhard v. Gorman, 471 F. Supp. 112, 113 (D.D.C. 1979) (careful examination of Board's reasoning revealed lack of factual basis for doubting petitioner's sincerity).

<sup>31</sup> Hager v. Hanscom, 938 F.2d 1449, 1454 (1st Cir. 1991) (quoting Smith v. Laird, 486 F.2d 307, 310 (10th Cir. 1973)).

<sup>32</sup> Shaffer v. Schlesinger, 531 F.2d 124, 131 (3d Cir. 1976).



though, together with other evidence, it may be given weight."<sup>33</sup> In other words, the mere fact that someone files for conscientious objector status the day before his or her unit is to deploy to the front is not a sufficient basis to deny the application. To hold otherwise would make it next to impossible to gain approval of a conscientious objector claim during wartime when, arguably, the right to conscientiously object is most important. On the other hand, to discount this factor entirely ignores the reality that suspect timing is often a reflection of improper motives in filing for conscientious objector status.

*b. Use of Force in Certain Circumstances*

In general, "[a]greement that force can be used to restrain wrongdoing, especially as the last alternative, has little bearing on an attitude toward war."<sup>34</sup> Support for the use of force in civilian law enforcement work is, for example, consistent with a conscientious objector claim.<sup>35</sup> This is not to say, however, that an applicant's attitude toward the use of force is never relevant. For instance, if an individual claims a total aversion to the use of guns as a basis for his or her conscientious objection, but holds a civilian law enforcement job that requires the individual to carry a weapon, that fact is certainly relevant to the issue of sincerity. Also, keeping a handgun in the home for one's own protection may be consistent with conscientious objection. If, however, an individual keeps a virtual arsenal of warlike weaponry at home, this fact may be relevant to a determination of whether this individual is a genuine conscientious objector.

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<sup>33</sup> Goldstein v. Middendorf, 535 F.2d 1339, 1344 (1st Cir. 1976).

<sup>34</sup> United States v. Purvis, 403 F.2d 555, 563 (2d Cir. 1968). In *Purvis*, an eighteen-year-old Quaker boy refused to submit to conscription into the United States armed forces. *Id.* at 556-57. Purvis contended, as a conscientious objector, that military authorities should have exempted him "from all military service rather than from combatant service alone." *Id.* at 556. The Department of Justice relied on the objector's admission that "he would bear arms . . . and even kill if necessary to defend the United States against an aggressive attack by an armed enemy." *Id.* at 558. In addition, the Justice Department cited Purvis's "belie[f] in the use of force only if it is used as the only alternative to restrain an individual from doing wrong." *Id.* at 563. In upholding Purvis's "long-held convictions" and "sincere religious belief," the court noted that the statutory "exemption for conscientious objectors does not speak of objection to force, but rather of conscientious objection to 'participation in war in any form.'" *Id.*

<sup>35</sup> See *Goodrich v. Marsh*, 659 F. Supp. 855, 858 (W.D. Ky. 1987).

c. *Belief in a Spiritual War*

Under Defense Department procedures, “[a] belief in a theocratic or spiritual war between the powers of good and evil does not constitute a willingness to participate in ‘war’.”<sup>36</sup> We processed some conscientious objector applications in which members of the Islamic faith relied on this exception to explain why the apparent sanction of “holy wars” by their religion is consistent with their claim of conscientious objection. They claimed they could be both Muslims and conscientious objectors because the *Koran* only requires them to answer the call to a spiritual holy war. They were, therefore, still opposed to participation in any physical manifestation of war. It should be noted, that conscientious objection is a deeply personal matter, and conscientious objector applications are not bound by *all* the tenets of their religion.

B. *Current Department of Defense Procedures*

Current Department of Defense procedural rules and policy for handling conscientious objector applications were promulgated by *Department of Defense Directive 1300.6, Conscientious Objectors*,<sup>37</sup> issued on August 20, 1971. This Directive, first issued on August 21, 1962, and amended in 1967 and 1971, was the first document to extend to in-service conscientious objectors the rights afforded draftees by the Military Selective Service Act of 1948. As such, it was the first document to allow for conscientious objection by volunteers. Each service has its own order or regulation governing conscientious objection, which may expand upon, but not contradict, the Department of Defense Directive.<sup>38</sup>

The process begins when a servicemember applies for conscientious objector status in writing.<sup>39</sup> A written application requires at least some degree of forethought on the part of the servicemember and has the advantage of committing the servicemember to a specific course of action. Once the application is in writing, the applicant is hard pressed to deny its authenticity. Many conscientious objector applicants are simply frightened

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<sup>36</sup> DoDDir 1300.6, *supra* note 18, at para. V(B)(2) (codified at 32 C.F.R. § 75.5(b)(2) (1991)).

<sup>37</sup> DoDDir 1300.6, *supra* note 18.

<sup>38</sup> 32 C.F.R. § 75.2 (1991) (procedures for conscientious objector processing govern “Army, Navy, Air Force, and Marine Corps and all Reserve components thereof”).

<sup>39</sup> *Id.* § 75.6(a).

young men and women facing their own mortality for the first time. Requiring them to put their beliefs down in writing puts them on notice that the conscientious objection process is not a simple quick fix for their problems—and is not without negative consequences.

An applicant may apply for either 1-0 or 1-A-0 status.<sup>40</sup> A class 1-0 conscientious objector is one who, “by reason of conscientious objection, sincerely objects to participation of any kind in war in any form.”<sup>41</sup> A class 1-A-0 conscientious objector is one who, “by reason of conscientious objection, sincerely objects to participation as a combatant in war in any form, but whose convictions are such as to permit military service in a non-combatant status.”<sup>42</sup>

Department of Defense policy provides that “[t]o the extent practicable under the circumstances, during the period applications are being processed, and until a decision is made, . . . every effort will be made to assign applicants to duties which will conflict as little as possible with their asserted beliefs.”<sup>43</sup> On the other hand,

an applicant shall be required to comply with active duty or transfer orders in effect at the time of his [or her] application or subsequently issued and received. During the period applications are being processed, applicants will be expected to conform to the normal requirements of military service and to perform such duties as are assigned.<sup>44</sup>

The procedures regarding compliance with active duty and transfer orders generated considerable controversy during the Persian Gulf War, and resulted in different policy formulations in each of the armed services. The services agree on one point, however: neither the Department of Defense directive, nor any of the individual service regulations proscribe deploying applicants to hostile fire zones with their units; and that has been a major point of contention in the conscientious objection debate.

After receiving the application, the commanding officer arranges for the applicant to see a chaplain and a psychiatrist. The psychiatric interview is fairly perfunctory and is designed primarily to determine if the individual is psychiatrically fit for duty. The

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<sup>40</sup> *Id.* § 75.3.

<sup>41</sup> *Id.* § 75.3(a)(1).

<sup>42</sup> *Id.* § 75.3(a)(2).

<sup>43</sup> *Id.* § 75.6(h).

<sup>44</sup> *Id.*

psychiatrist's recommendation usually amounts to nothing more than a determination that the applicant is fit for duty. Occasionally, however, an application for conscientious objector status is a manifestation of some mental irregularity, rather than an expression of a legitimate moral or religious awakening or conversion. These cases are screened out so that mentally infirm servicemembers can receive appropriate medical attention, which is not provided by the conscientious objector process.

The chaplain's interview serves a much different and more important purpose. The chaplain is a commander's duty expert on religious and moral issues. Because of this expertise, the chaplain is the most competent person in the command to probe the sincerity and depth of an individual applicant's beliefs. Chaplains can use their knowledge and training to explore the applicant's understanding of the moral, ethical, or religious code he or she has adopted. A proper chaplain's recommendation will address each of the criteria for conscientious objector status and make an ultimate recommendation of approval or disapproval of the application. Because the chaplain is considered an expert, and is one of the few people in the process to meet and talk with the applicant firsthand, a chaplain's recommendation is given great weight in subsequent consideration of conscientious objector applications.

In addition to scheduling the psychiatric and chaplain interviews, the applicant's commanding officer appoints an officer to act as the investigator and hearing officer for the application.<sup>45</sup> The investigating officer must be senior in rank to the applicant, and at least a paygrade O-3 (captain or Navy lieutenant).<sup>46</sup> To avoid any potential conflict of interest, the investigating officer may not be in the applicant's chain of command.<sup>47</sup> Investigating officers need not be lawyers, but lawyers are often chosen for their superior understanding of quasi-judicial processes.<sup>48</sup>

Investigating officers gather all the relevant evidence they deem necessary to formulate a recommendation for approval or disapproval of the application. They consider the chaplain and psychiatric interviews. They either personally interview or collect

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<sup>45</sup> *Id.* § 75.6(d).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *See id.* Although legal training is not required, the investigating officer must review applicable service regulations and obtain "all necessary legal advice from the local Staff Judge Advocate or legal officer." *Id.* § 75.6(d)(1).

written statements from the applicant's commanding officer, members of the applicant's unit, civilian friends and family of the applicant, the applicant's civilian co-workers if any, and anyone else deemed to have an opinion or information relevant to the sincerity of the applicant's beliefs. Finally, the investigation officer may consider relevant information from the applicant's service record.

Once the information is collected, the investigating officer conducts a hearing at which the applicant may respond to or rebut any of the information collected.<sup>49</sup> The applicant may also submit any new information he or she deems relevant to the process and may make a sworn or unsworn statement, and present witnesses on his or her own behalf.<sup>50</sup> In addition, the applicant may be represented by counsel at his or her own expense.<sup>51</sup> Rules of evidence do not apply at these hearings, thus the statements of any witnesses not present may be sworn or unsworn; however, oral testimony presented must be under oath or affirmation.<sup>52</sup> A verbatim transcript of the hearing is not required, but the applicant may provide a stenographer at his or her own expense to transcribe the hearing.<sup>53</sup> In the absence of a verbatim record, the investigating officer summarizes the testimony of the witnesses.<sup>54</sup> The applicant may address, on the record, any perceived discrepancies in the investigating officer's summaries.<sup>55</sup>

Upon completion of the hearing, the investigating officer prepares his or her report, which will form the administrative record for the conscientious objector process. The report will contain all of the statements and information considered by the investigating officer in making his or her recommendation, the transcript or official summary of the hearing, and portions of the applicant's official service record.<sup>56</sup> The report must also contain the investigat-

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<sup>49</sup> *Id.* One of the primary purposes of the hearing is "to enable the investigating officer to ascertain and assemble all [of the] relevant facts." *Id.* § 75.6(d)(2). Such a comprehensive record facilitates "an informed recommendation by the investigating officer and an informed decision on the merits by [a] higher authority." *Id.* Any failure by the applicant to cooperate at the hearing will be reflected in the investigating officer's evaluation. *Id.* In addition, if an applicant is inexcusably absent from the hearing, the investigating officer may proceed with the process. *Id.*

<sup>50</sup> *Id.* § 75.6(d)(2)(iii).

<sup>51</sup> *Id.* § 75.6(d)(2)(i).

<sup>52</sup> *Id.* § 75.6(d)(2)(ii). In general, the hearing is not an adversarial process. *Id.*

<sup>53</sup> *Id.* § 75.6(d)(2)(iv).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* § 75.6(d)(3).

ing officer's analysis of each of the three criteria for conscientious objector status,<sup>57</sup> and a specific recommendation for approval or disapproval with supporting rationale.<sup>58</sup>

Copies of the report are forwarded to the applicant and the commanding officer who appointed the investigating officer.<sup>59</sup> The applicant is notified that he or she may submit a rebuttal statement within a specified time regarding any of the material contained in the record.<sup>60</sup> If no rebuttal is submitted, that fact is noted for the record. If the applicant does submit a rebuttal, it becomes part of the record, along with any response the investigating officer or the commanding officer makes to the allegations in the rebuttal. The commanding officer reviews the report for completeness and legal sufficiency.<sup>61</sup> If the report and investigation are deficient, the commanding officer may order further investigation, a new hearing, or a rewrite of the report.<sup>62</sup> If the report is sufficient, the commanding officer will endorse it up the chain of command along with his or her specific recommendation of approval or disapproval.<sup>63</sup>

The report proceeds up the chain of command, with each officer in that chain completely reviewing the record, and making a specific recommendation for approval or disapproval. The applicant may be given an additional opportunity to rebut the endorsements of the chain of command before the report is forwarded to the service headquarters for final action.<sup>64</sup> This rebuttal is the applicant's last chance to affect the decision-making process.

At the service headquarters level, the report is submitted to a review board. This board, whose existence is neither mandated by law nor by Department of Defense directive, is informal and purely advisory in nature. The board considers the application, with endorsements from the chain of command, and makes a final recommendation to the individual who has been delegated the authority to make a final determination. The board may consult legal and chaplain representatives to assist in making an informed recommendation, although these are also not required by law or Depart-

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<sup>57</sup> *Id.* § 75.6(d)(3)(iv); see *supra* notes 40-42 and accompanying text.

<sup>58</sup> *Id.* § 75.6(d)(3)(v).

<sup>59</sup> *Id.* § 75.6(d)(3)(vi).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* § 75.6(e).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* § 75.6(f).

ment of Defense directive.

The conscientious objector process will result in one of three possible outcomes. First, if an application for 1-O conscientious objector status is approved, a letter is sent to the applicant's commanding officer directing that officer to effect a discharge.<sup>65</sup> The discharge will be characterized as either honorable or general based on the applicant's service record.

Second, if an application for 1-A-O noncombatant status is approved, the applicant may be retained or discharged depending upon the needs of the applicant's service.<sup>66</sup> If the applicant is already serving in a noncombatant billet, he will generally remain in that billet, but his or her duties and training will be adjusted to comply with his or her religious beliefs. If the applicant is serving in a combatant billet, his or her military occupational specialty may be voided and he or she may be placed in a new noncombatant billet. On the other hand, if retaining the applicant would not meet the needs of the service, the service has the option of discharging the applicant, even though he or she only applied for noncombatant status.<sup>67</sup>

Finally, if either type of application is disapproved, the applicant is returned to his or her normal duties. The servicemember's application for conscientious objector status may be considered in determining his or her potential for future service. The application may not, however, be used as a basis for harassment or punitive action. Of course, any statements contained within the administrative record that relate to alleged criminal conduct by anyone may be used in investigating and prosecuting such conduct.

At all times prior to an actual discharge, conscientious objector applicants remain subject to the Uniform Code of Military Justice,<sup>68</sup> and may be disciplined for violations thereof.<sup>69</sup> The application process need not be stopped by disciplinary or administrative separation proceedings that could result in a discharge.<sup>70</sup> Any discharge received as a result of a court-martial or an administrative separation proceeding, however, will take precedence over any con-

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<sup>65</sup> *Id.* § 75.7(a).

<sup>66</sup> *Id.* § 75.7(b).

<sup>67</sup> *Id.*

<sup>68</sup> 10 U.S.C. §§ 801-940 (1988).

<sup>69</sup> 32 C.F.R. § 75.6(g) (1991); *see supra* notes 43-44 and accompanying text (applicant must continue to obey orders).

<sup>70</sup> *Id.*

scientious objector discharge. Therefore, an applicant may not receive a conscientious objector discharge until all disciplinary action has been resolved.<sup>71</sup>

Conscientious objectors who refuse to perform military duty, wear the uniform, or otherwise comply with lawful orders lose all of their veterans' benefits.<sup>72</sup> They also forfeit all rights to National Service Life Insurance,<sup>73</sup> Serviceman's Group Life Insurance,<sup>74</sup> and to naturalization through active duty service in the military during a time of hostilities.<sup>75</sup>

#### IV. CONSCIENTIOUS OBJECTION DURING THE PERSIAN GULF WAR

##### A. Statistics

A great deal of misleading information was disseminated regarding the armed forces' handling of conscientious objectors during the recent Persian Gulf War. A quick glance at statistics from the war reveals a far different picture than the "witchhunt" portrayed in some quarters.

In reality, the United States military approved more applications than it disapproved in the year following the start of Operation Desert Shield. Specifically, out of 473 applications received, 270 were approved and 203 were disapproved.<sup>76</sup> The actual approval rate for applications received at service headquarters during the Gulf War period was only about eight percent lower than the

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<sup>71</sup> *Id.* If, however, a nexus exists between *improper* denial of a conscientious objector application and disciplinary action, for example, missing the movement of one's unit or refusing to obey deployment orders, a U.S. district court will not abstain from ordering an immediate discharge from the armed forces. *Parisi v. Davidson*, 405 U.S. 34 (1972). In addition, the Court of Military Appeals has suggested that this improper denial will be a defense to disciplinary action, provided that the offense in question was specifically generated by the denial of the application itself. *See United States v. Lenox*, 45 C.M.R. 88 (C.M.A. 1972); *United States v. Noyd*, 40 C.M.R. 195 (C.M.A. 1969); *United States v. Ashley*, 48 C.M.R. (A.F.C.M.R. 1973).

<sup>72</sup> 38 U.S.C. § 5303 (1988).

<sup>73</sup> 38 U.S.C. § 1911 (1988).

<sup>74</sup> 38 U.S.C. § 1973 (1988).

<sup>75</sup> *See* 8 U.S.C. § 1440(a) (1988).

<sup>76</sup> The following statistics were provided by the Office of the Assistant Secretary of Defense (Force Management and Personnel), September 19, 1991 and represent approximate figures of conscientious objector applications received by service headquarters as of July 31, 1991:



average approval rate during the previous five years.<sup>77</sup> This is true despite the fact that the *application* rate was nearly two and one-half times higher during the Persian Gulf War than during comparable peacetime periods.<sup>78</sup>

### B. Issues Raised During the Persian Gulf War

In addition to being the first large scale "test case" for conscientious objection to an all-volunteer United States armed force, the Persian Gulf War raised a number of other interesting conscientious objection-related issues.

#### 1. Selective Conscientious Objection

During and after the Persian Gulf War, some organizations and individuals called for a change to Department of Defense policy to eliminate the requirement that a conscientious objector be opposed to any and all wars.<sup>79</sup> These critics argued that individuals, as thinking human beings, should be allowed to apply their own moral codes to each war and determine whether they were justified in fighting each war individually.<sup>80</sup>

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*CONSCIENTIOUS OBJECTOR DISCHARGE STATISTICS  
AUGUST 1, 1990 TO JULY 31, 1991*

<u>MILITARY SERVICE</u>	<u>RECEIVED</u>	<u>APPROVED</u>	<u>DISPROVED</u>
Army	255	139	116
Navy	94	64	30
Marine Corps	88	42	46
Air Force	<u>36</u>	<u>25</u>	<u>11</u>
DoD Total	473	270	203

Approval Rate—approximately 57 per cent

*CONSCIENTIOUS OBJECTOR DISCHARGE STATISTICS  
FISCAL YEAR 1985 TO FISCAL YEAR 1989*

Approximately 127 applications per year approved Department of Defense-wide

Approval rate—approximately 65 per cent.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Letter, *supra* note 9 (proposing right to object to participation in a particular war); see also *Detroit Bishop Asks for Conscientious Objectors*, L.A. TIMES, Nov. 12, 1990, at 13 (bishop requests statement asking Roman Catholics to be "selective conscientious objectors" against Desert Storm).

<sup>80</sup> This argument closely parallels the Just War Theory of St. Thomas Aquinas, the great Catholic theologian. See WILLIAM V. O'BRIEN, *THE CONDUCT OF JUST AND LIMITED WAR* 13-37 (1981). Just War theorists have set forth conditions necessary for permissible war. *Id.* at 13. These conditions include the existence of a just cause, an examination of the comparative justice between the parties, a probability of success outweighing the proportionate loss, the exhaustion of peaceful remedies and right intention. See William V. O'Brien, *Desert*

Muslims in the United States military raised the issue of selective conscientious objection to the Persian Gulf War based on specific religious grounds, rather than individual application of a moral code. According to the *Koran*, Muslims will be banished to hell for all eternity if they kill another Muslim believer.<sup>81</sup> Muslim servicemembers who firmly believe this admonition are thus subject to a sharp conflict between their religion and military duties whenever the United States is involved in a military dispute with a Muslim nation.<sup>82</sup>

War protesters in and out of the armed forces also raised selective objections to the Gulf War on various ideological and pragmatic grounds. For example, nine days before the ground war and only six kilometers from the Saudi-Kuwait border, a would-be Marine conscientious objector wrote to his commander as follows:

And like the Ex-President Jimmy Carter, who now teaches History at the University of Georgia, I believe sanctions and patient compromise would have caused Iraq to withdraw from Kuwait and that partial sanctions should always be held against a country like Iraq. This I believe would save many lives and still cut Iraq's plans to invade any other country. I also believe that the job of a Superpower is promoting peace and advancement like we can do better than any other country with our resources. Sir, I believe a Superpower should not promote rash wars of needless destruction for political gains as the U.S. is doing with having 90% of the troops in the region. I think, Sir, that we are disguising the excuse of fighting to rid crazy aggressors for our real intent of gung ho capitalistic political control.<sup>83</sup>

Unfortunately for selective conscientious objectors, the concept is unrealistic in any armed force and particularly so in an all-volunteer armed force. Selective conscientious objection poses too great a risk of disrupting the kind of teamwork, cohesiveness, and effectiveness the world witnessed by United States forces in Operation Desert Storm. Selective conscientious objection has also been squarely rejected by the Supreme Court as a matter of constitu-

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*Storm: A Just War Analysis*, 66 ST. JOHN'S L. REV. 797, *passim* (1992).

<sup>81</sup> See generally IGNAZ GOLDZINER, INTRODUCTION TO ISLAMIC THEOLOGY AND LAW (1981) (discussing development of Muslim law and theology).

<sup>82</sup> See, e.g., Harriet Chaing, *Gulf War Objector Turns Himself In—Oakland Marine Reservist Faces Court-Martial*, S.F. CHRON., May 16, 1991, at 18 (Muslim conscientious objector applicant).

<sup>83</sup> United States v. Cöok, No. 92-0053, at App. Ex. VI (N.M.C.M.R. filed Jan. 8, 1992).

tional law in *Gillette v. United States*,<sup>84</sup> a Vietnam-era case.

In *Gillette*, the petitioners selectively objected to the Vietnam war as an "unjust" war on religious grounds,<sup>85</sup> and asserted that the Government's unwillingness to recognize their objection impermissibly discriminated among religious beliefs and interfered with their right to free exercise of religion.<sup>86</sup> In rejecting both claims, Justice Marshall found valid and neutral reasons for limiting conscientious objection to those who object to all wars. Observing that selective conscientious objection is "intrinsically a claim of uncertain dimensions,"<sup>87</sup> Justice Marshall reasoned that even the attempt to administer a selective conscientious objector program "would involve a real danger of erratic or even discriminatory decision making."<sup>88</sup> Additionally noting that selective conscientious objection depends in part "upon particularistic factual beliefs and policy assessments that presumably were overridden by the government that decides to commit lives and resources to a trial of arms,"<sup>89</sup> Justice Marshall echoed the prevalent concern that selective conscientious objection would "'open the doors to a general theory of selective disobedience to law' and jeopardize the binding quality of democratic decisions."<sup>90</sup>

Operating together, Justice Marshall believed these concerns could create a pernicious synergy destructive of the "spirit of public service and the values of willing performance of a citizen's duties that are the very heart of free government."<sup>91</sup> These same concerns apply with even more force in the separate society of the armed forces, where the overriding demands of discipline and duty are more sensitive to dissension. When an individual joins the United States armed forces, he is entrusting the Government with the task of deciding what fight is the right fight. Indeed, the oath of office for military personnel begins with the promise to "support and defend the Constitution of the United States against *all* enemies, foreign and domestic."<sup>92</sup>

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<sup>84</sup> 401 U.S. 437 (1971).

<sup>85</sup> *Id.* at 439, 448-49.

<sup>86</sup> *Id.* at 439.

<sup>87</sup> *Id.* at 455.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 459.

<sup>90</sup> *Id.* at 459-60.

<sup>91</sup> *Id.* at 460.

<sup>92</sup> 5 U.S.C. § 3331 (1988) (emphasis added).

## 2. Administration of Conscientious Objector Applicants

The Persian Gulf War required a lightning-like operational transition from peace to war on the part of the United States military. In addition, the armed forces mobilized reservists for the first time since 1968. But it is safe to say that the services found themselves with regulations for conscientious objectors that had been published with peacetime scenarios in mind. As a result, the Marine Corps and the Army quickly learned some lessons regarding the administration of conscientious objectors during a war.

When the Marine Corps began mobilizing its reservists, its conscientious objector regulation had a provision in effect that read: "A Marine reservist who applies for conscientious objector status will not normally be ordered to involuntary active duty until the application is resolved."<sup>93</sup> In the absence of the Department of Defense Directive on conscientious objectors, the Marine Corps regulation could have been read to prevent the mobilization of a reservist until his conscientious objector application had been finally adjudicated. Of course, as already mentioned, the Department of Defense directive requires conscientious objector applicants to "comply with active duty or transfer orders in effect at the time of [their] application or subsequently issued and received."<sup>94</sup>

The Navy-Marine Corps Court of Military Review addressed this apparent conflict in *Lwin v. Cooper*.<sup>95</sup> On August 23, 1990, pursuant to an Executive Order, the Secretary of Defense authorized the activation of reserve units.<sup>96</sup> The Secretary's guidance memorandum required unconditional reporting for active duty by reservists. Only after reporting for active duty were reservists to be considered for release.<sup>97</sup>

On November 24, 1990, the Marine Corps mobilized Company "F", 2d Battalion, 25th Marine Regiment, located in Fort Schuyler (Bronx), New York.<sup>98</sup> Lance Corporal Maung M. Lwin, United States Marine Corps Reserve, who had applied for conscientious objector status on November 9, refused to report for duty even though he had allegedly been advised to report notwithstanding

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<sup>93</sup> Marine Corps Order 1306.16E, *Conscientious Objectors*, para. 6k (Nov. 21 1986).

<sup>94</sup> DoDDIR 1300.6, *supra* note 18, at para. VI(I) (codified at 32 C.F.R. § 75.6(h) (1991)) (emphasis added); *see supra* notes 43-44.

<sup>95</sup> 33 M.J. 666 (N.M.C.M.R. 1991)

<sup>96</sup> *Id.* at 667.

<sup>97</sup> *Id.* Members were required to report unless "physically unable to do so." *Id.*

<sup>98</sup> *Id.*

his pending conscientious objector application.<sup>99</sup>

Lwin was later convicted by special court-martial of the military offenses of unauthorized absence and missing movement through design.<sup>100</sup> Lwin petitioned the Navy-Marine Corps Court of Military Review for a writ of habeas corpus.<sup>101</sup> The court denied the writ for two reasons. First, the court found that the Secretary of Defense's mobilization guidance requiring reservists to report for duty before submitting applications for release from active duty was a valid exercise of the Secretary's authority which would supersede any inconsistent requirements in the Marine Corps regulation.<sup>102</sup> Secondly, the court seized on the word "normally" in the Marine Corps regulation and concluded that "Marine Corps personnel procedures were not operating 'normally' when the armed forces were in the midst of a large scale mobilization."<sup>103</sup>

By implicitly holding that the term "normally" did not refer to the applicant's circumstances, but rather the service's, the court reached an outcome in accord with the original intent of the provision. This intent could only have been to avoid burdening the Regular Marine Corps establishment with processing conscientious objector applications from reservists involuntarily activated for unsatisfactory drill participation in peacetime.<sup>104</sup>

During the Persian Gulf War, the Army reinstated an administrative measure originally devised to regulate conscientious objector applications during the Vietnam era. On October 19, 1990, the Army published a message change to its conscientious objector regulation that temporarily precluded soldiers who had received notices of reassignment from submitting conscientious objector applications until they deployed with their units.<sup>105</sup> The term "reassignment" was defined to include a unit deployment.<sup>106</sup> In *Pruner v. Department of the Army*,<sup>107</sup> a soldier in the 1st Infantry Division at Fort Riley, Kansas, sought a temporary restraining order and preliminary injunction against enforcement of the Army's

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<sup>99</sup> *Id.* at 668.

<sup>100</sup> *Id.* at 667; see 10 U.S.C. §§ 886-87 (1988).

<sup>101</sup> *Lwin*, 33 M.J. at 666.

<sup>102</sup> *Id.* at 668.

<sup>103</sup> *Id.*

<sup>104</sup> See 10 U.S.C. § 673a (1988).

<sup>105</sup> See U.S. Army, Personnel Message, Oct. 19, 1990, HQDA. The Army subsequently rescinded the change on January 2, 1991. See U.S. Army, Personnel Message, Jan. 2, 1991.

<sup>106</sup> *Id.*

<sup>107</sup> 755 F. Supp. 362 (D. Kan.), *aff'd*, 946 F.2d 892 (5th Cir. 1991).

changed procedure.<sup>108</sup> Unable to find irreparable harm, the district court denied relief.<sup>109</sup> The court pointed out that the plaintiff soldier still had the right to have his application considered while he was deployed in Saudi Arabia and was entitled to a duty assignment providing minimum practicable conflict with his asserted beliefs.<sup>110</sup> The court also rejected the oft-raised argument that the applicant would be irreparably harmed because he would be denied access to counsel if deployed to the Arabian peninsula. While recognizing that geographic dislocation makes attorney-client communication less convenient, the court found no deprivation of the right to counsel.<sup>111</sup>

Although not referred to in *Pruner*, a district court faced the same situation twenty-one years earlier in *United States ex rel Crane v. Laird*.<sup>112</sup> In *Crane*, a Vietnam-bound soldier challenged a 1970 Army regulation change, made by telegram, that effectively terminated the practice of allowing Vietnam-bound soldiers to await final action on their conscientious objector applications in the continental United States.<sup>113</sup> The 1970 Army regulation was virtually identical to the one at issue in *Pruner*. The *Crane* court denied the soldier relief, indicating that the court should presume that the change was a "reasonable and fair way to deal with the Army's recurring problem of conscientious objections surfacing for the first time at the port of embarkation."<sup>114</sup> The court also followed *Kimball v. Commandant Twelfth Naval District*,<sup>115</sup> that established the still valid rule that the federal judiciary will require only that a claim of conscientious objection be processed without creating any geographical restrictions on military personnel assignments.<sup>116</sup>

In sum, both the Marine Corps and the Army entered the Persian Gulf War with conscientious objector regulations that may have created expectations that merely filing a conscientious objector application would prevent mobilization or overseas deployment pending the outcome of the application. Both services would be

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<sup>108</sup> *Id.* at 363.

<sup>109</sup> *Id.* at 365.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> 315 F. Supp. 837 (D. Ore. 1970).

<sup>113</sup> *Id.* at 839.

<sup>114</sup> *Id.* at 840.

<sup>115</sup> 423 F.2d 88 (9th Cir. 1970).

<sup>116</sup> *Id.* at 91.

well-advised to consider specifically incorporating the principles of *Kimball* and the Department of Defense directive on conscientious objectors into their regulations. Such changes would make it clear that merely filing a conscientious objector application will not prevent mobilization, reassignment, or overseas deployment of the applicant.

## V. CONCLUSION

In looking back on conscientious objection in the Gulf War, three points are worthy of comment. First, the rigorous criteria for conscientious objection serves as a reminder that this exemption from military service is an *accommodation of religion*— and nothing more. Although the scope of the religious belief required has been expanded to embrace moral or ethical beliefs, our nation's conscientious objection policy has always been designed to accommodate only those "religiously scrupulous of bearing arms." It is not feasible to accommodate any other class of objector.

Second, the results from the Gulf War vindicate both the all-volunteer armed forces and their conscientious objection policy. Even though the ranks of the armed forces were augmented by thousands of reservists, the war produced only about 350 additional applications for conscientious objector status from both the regular and reserve components of the armed forces. Standing alone, this fact substantially refutes any implication that the ranks of the armed forces were filled with soldiers, sailors, airmen, and Marines who had been fraudulently induced to enter the service through promises of training and benefits or promises that they would never have to fight. On the contrary, the men and women of the all-volunteer armed forces were ready, willing, and, in many cases, eager to fight in the Gulf War.

For their part, the armed forces kept their doors open to conscientious objector applications, even though they had no guarantees that the war would be conducted swiftly, produce minimal casualties, or enjoy widespread popular support. One might have expected the rate of disapproval of conscientious objector applications to have soared because of a tougher stance by the armed forces and more insincere applications; but this did not happen either. The application approval rate only declined from approximately sixty-five percent to about fifty-seven percent. This fact, in turn, suggests that the armed forces have managed a fair accommodation between the overriding demands of duty and discipline,

on the one hand, and conscientious objection to war, on the other.

Finally, as long as the armed forces are willing to discharge servicemembers on the basis of conscientious objection—including those whose beliefs crystallize on the eve of battle—the policy will be a lightning rod for controversy. This is true because those who object to our nation's war aims, war strategy, the ethnic line-up of a particular war, separation from their families or work, or who simply have no stomach for fighting, normally have no other way out. How often have we seen a young servicemember suddenly appear on television and tell us with apparent conviction that he is not going to fight for "big oil" or "U.S. imperialism," and that, by the way, he is a "conscientious objector?" Of course, he is no more a conscientious objector than the general who violently disagrees with the war aims decided upon by the National Command Authorities.<sup>117</sup> Few would think that mere disagreement with war aims should be the basis for exemption from military service.

Superficially at least, this problem of stretching the concept of conscientious objection could be cured if military authorities would abandon the overbreadth of the term "conscientious objection" and authorize an exemption or discharge from military service only for "religious beliefs." However, so long as our nation is obligated to resort to the force of arms, war protesters in the service will continue to claim they are conscientious objectors, and the armed forces will be called upon to carefully sort out their claims.

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<sup>117</sup> The National Command Authorities are the President and the Secretary Of Defense. DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (JOINT PUB 1-02) 243 (1989).



