OBJECTORS WITHOUT RECOURSE: THE RIGHTS OF CONSCIENCE AND MILITARY DRAFT REGISTRATION

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I. INTRODUCTION

Under current federal law,[1] all American men must register for a possible military draft when they reach the age of eighteen.[2] Since the registration program began in July 1980, approximately 8,750,000 men have complied with its requirements, and an estimated 674,000 have failed or refused to do so.[3] On August 17, 1982,[4] twenty-year old Enten Eller of Harrisburg, Virginia became the first person to be convicted for a violation of the 1980 draft registration law.

Mr. Eller's defense was that he had refused to register for a military draft because, as a practicing member of the Church of the Brethren, he objects to all wars and to militarism in all forms. At his trial, he testified that he was "obeying God."[5]

There can be little doubt that Mr. Eller's situation is not unique. His case, or another like it, may eventually come before the United States Supreme Court. Any decision by the Court would turn on constitutional grounds. The registration objector would argue that his constitutional rights have been violated because current law affords him no opportunity to assert, or to apply for, conscientious objector status. At the present time, the United States Congress has not mandated the initiation of a military draft. Mr. Eller, and others like him, must register regardless of any well-founded and deeply-held religious aversion to war and militarism.

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[1] *See* Military Selective Service Act, 50 U.S.C.A. app. §§ 451-473 (West 1981 & Cum. Supp. 1982).

[2] Proclamation No. 4771, 3 C.F.R. 82 (1981), *reprinted in* 50 U.S.C.A. app. § 453 at 16 (West 1981).

[3] N.Y. Times, Oct. 5, 1982, at A14, col. 1 (national edition). Failure to register for the draft may result in a maximum prison sentence of five years and/or a $10,000 fine. 50 U.S.C.A. app. § 462 (West 1981 & Cum. Supp. 1982).

[4] United States v. Eller, No. 82-00057 (S.D. Va. filed Aug. 17, 1982).

[5] N.Y. Times, Aug. 18, 1982, at A18, col. 1.

Is such a prospective constitutional argument a strong or a weak one? Is it constitutional to require all young men of a certain age group to register for a possible draft without affording the conscientious objectors the opportunity to exercise their first amendment rights in a tangible manner? Is there a reasonable way in which to provide such men with a mechanism whereby they may voice such beliefs without undermining the central purposes of the registration law?

II. The History of the Current Draft Registration Law

Acting favorably on the recommendation of President Nixon, Congress amended the Military Selective Service Act[6] [MSSA] to preclude conscription in 1973.[7] Draft registration continued, however, until 1975 when President Ford discontinued it.[8] As a result of his alarm at the Soviet invasion of Afghanistan, President Carter decided to ask Congress to reactivate draft registration. Although President Carter sought the authority to require the registration of both young men and young women, Congress agreed only to permit the registration of males.[9]

The purpose of the new military draft registration law was to facilitate any future conscription under the MSSA.[10] Under the law, the President is empowered to issue a proclamation whereby every male citizen and male resident aliens between the ages of eighteen and twenty-six may be required to register for the draft.[11] President Carter issued such an order, effective on July 2, 1980, to all males reaching the age of eighteen.[12] Inasmuch as the Act precludes conscription, President Reagan, or any future president, will have to ask Congress for additional authority in order to renew an actual military draft.[13]

At the time of President Carter's request for authority to renew draft registration, congressional response was immediate. Speaking in favor of the request, for example, Senator Warner told a Senate

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[6] Pub. L. No. 92-129, 85 Stat. 348 (1971) (codified at 50 U.S.C.A. app. §§ 451-473 (West 1981 & Cum. Supp. 1982)).

[7] 50 U.S.C.A. app. § 467(c) (West 1981).

[8] Proclamation No. 4360, 3A C.F.R. 33 (1976), *reprinted in* 50 U.S.C.A. app. § 453 at 15 (West 1981).

[9] *See generally* Rostker v. Goldberg, 453 U.S. 57, 59-61 (1981) (providing background on President Carter's request).

[10] *Id.* at 59.

[11] 50 U.S.C.A. app. § 453 (West Cum. Supp. 1982).

[12] Proclamation No. 4771, 3 C.F.R. 82 (1981), *reprinted in* 50 U.S.C.A. app. § 453 at 16 (West 1981). The proclamation applies to males born on or after January 1, 1960. *Id.*

[13] *See* S. Rep. No. 826, 96th Cong., 2d Sess. 154, 155 (1980).

hearing on the plan that he " 'equate[d] registration with the draft.' "[14] In the United States Senate Armed Services Committee Report on the Carter Administration's bill,[15] it was reported that the Army and the Navy had indicated that in the event of a military mobilization, they would not have sufficient manpower to meet the national emergency requirements.[16] In a specific finding that was later adopted by both Houses of Congress, the report stated that "[If] mobilization were to be ordered in a wartime scenario, the primary manpower need would be for combat replacements."[17]

The provision of the 1980 draft registration act which required men, but not women, to participate was subsequently challenged on constitutional grounds in the federal courts. In *Rostker v. Goldberg*,[18] the United States Supreme Court determined that the disparity of treatment between men and women under the Act was not unconstitutional. The Court held that it did not violate the equal protection clause of the fourteenth amendment.[19]

Justice Rehnquist, writing for the majority in *Rostker*, observed that the Constitution had given Congress the authority "To raise and support Armies," "To provide and maintain a Navy," and "To make Rules for the Government and Regulation of the land and naval Forces."[20] Whenever it is asked to determine the constitutionality of a congressional act, Justice Rehnquist urged, the Supreme Court engages in what Justice Holmes called " 'the gravest and most delicate duty that this Court is called upon to perform."[21] "The Court accords 'great weight to the decisions of Congress.' "[22] Justice Rehnquist noted that the current case arose in the area of national defense and military affairs, an area over which Congress exercises great authority.[23]

In the course of arguing that the Supreme Court was required to defer to the authority of Congress to choose whom as between males and females in the citizenry may be required to register for a military draft, Justice Rehnquist noted that the Court had uniformly acknowl-

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[14] *Dep't of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 Before the Senate Comm. on Armed Services*, 96th Cong., 2d Sess. 154 (1980) (statement of Senator Warner), *quoted in* Rostker v. Goldberg, 453 U.S. 57, 75 (1981).

[15] S. REP., *supra* note 13.

[16] *Id.* at 154.

[17] *Id.* at 160.

[18] 453 U.S. 57 (1981).

[19] *Id.* at 72-74.

[20] U.S. CONST. art. I, § 8, cls. 12-14.

[21] 453 U.S. at 64 (1981) (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927)).

[22] 453 U.S. at 64 (quoting Columbia Broadcasting System v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973)).

[23] *Id.* at 64-65.

edged congressional power "to raise and regulate armies and navies."[24] This constitutional mandate therefore enabled Congress to enact legislation that would achieve such a result.[25] He observed that under the MSSA, registering for the draft would be the initial measure " 'in a united and continuous process designed to raise an army speedily and efficiently.' "[26] In 1980, Congress had provided for the reactivation of draft registration in order to, argued Justice Rehnquist, "provid[e] the means for the early delivery of inductees in an emergency."[27] He therefore concluded that under the MSSA, "induction is interlocked with registration: only those registered may be drafted, and registration serves no purpose beyond providing a pool for the draft."[28] Congressional power to enact legislation requiring all men, but not women, to register for the draft was thus upheld by the Supreme Court.

Under the current draft registration law, all men who are encompassed by President Carter's proclamation, which President Reagan has allowed to remain in force, must register for the draft. Conscientious objectors, and even ordained religious ministers or the theological students, are not exempted from the registration requirement of MSSA.[29] If a draft were to be ordered by the President after Congress had authorized him to do so, then presumably all potentially qualified conscientious objectors could apply for such status through their respective draft boards.[30] There is no manner, however, in which a potential conscientious objector may assert his religiously-based antipathy to war and militarism as a part of the MSSA registration process, save by violating the law in refusing to register.

III. General Statutory and Constitutional Rights of Conscientious Objectors to War

A. *Historical Perspective*

During the early part of American history, there was no legal status for the conscientious objector to war. On occasions such as

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[24] *Id.* at 65.

[25] *Id.* (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)); see Lichter v. United States, 334 U.S. 742, 755-58 (1948).

[26] 453 U.S. at 75 (quoting Falbo v. United States, 320 U.S. 549, 553 (1944)).

[27] *Id.* (quoting S. Rep., *supra* note 13, at 156).

[28] 453 U.S. at 75.

[29] 50 U.S.C.A. app. § 456(g)(1), (g)(2), (j) (West 1981). The MSSA does, however, exempt members of the clergy from training and service, and defers liability for training and service for qualified individuals. *Id.* § 456(g).

[30] 50 U.S.C.A. app. § 456(j) (West 1981). This provision of the MSSA narrowly circumscribes consciencious objector status to include only those persons who "by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form." *Id.*

Indian uprisings, the War for Independence, and the French and Indian War, pacifists were required to pay a tax or to furnish a substitute soldier, but only rarely were they forced to do either.[31] This arrangement continued after the United States achieved independence. In the War of 1812, for example, anyone could be exempted from military service by paying a special tax.[32] Some, though, refused to pay it.

Until the Civil War, there was no federal military conscription law in the United States.[33] When the first conscription bill was passed in March 1863, no provision existed for exemption from the military draft on religious grounds.[34] All men between the ages of twenty and forty-five were declared liable for the draft, except a few who were exempted on other grounds.[35] Any person who was drafted, however, could furnish a substitute soldier, or pay for the location of a substitute.[36]

Due in large part to the energetic lobbying of the peace churches,[37] in February 1864 Congress amended the conscriptive law to make provisions for conscientious objectors.[38] All men who were members of religious denominations that prohibited them from bearing arms would remain subject to the draft, but when drafted, were to be considered non-combatants.[39] These non-combatants were assigned by the Secretary of War to hospital duty, to the care of freed slaves, or they were required to pay a sum of money to be applied towards the care of sick and wounded soldiers.[40] When Northern authorities found that neither the prescribed modes of alternative service nor payment for a substitute was acceptable to a particular religious pacifist, they typically "paroled" him for the duration of the war.[41]

No military conscription law was in effect in the United States between the Civil War and World War I.[42] Under the Selective Draft

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[31] L. SCHLISSEL, CONSCIENCE IN AMERICA: A DOCUMENTARY HISTORY OF CONSCIENTIOUS OBJECTION IN AMERICA, 1757-1967, 18 (1968).

[32] R. Beebe, The War of 1812, in R. Wells, THE WARS OF AMERICA: CHRISTIAN VIEWS 40 (1981).

[33] L. SCHLISSEL, *supra* note 31, at 18.

[34] Act of Mar. 3, 1863, ch. 75, 12 Stat. 731 (1863).

[35] *Id.* The exempted group included certain government officials, persons whose service in the military would present an unusual hardship to their families, and convicted felons. *Id.*

[36] *Id.* § 17, at 734.

[37] L. SCHLISSEL, *supra* note 31, at 98.

[38] Act of Feb. 24, 1864, ch. 13, 13 Stat. 6, 9 (1864).

[39] *Id.*

[40] *Id.*

[41] L. SCHLISSEL, *supra* note 31, at 89.

[42] *See* United States v. Seeger, 380 U.S. 163, 171 (1965).

Act of 1917,[43] however, conscription was virtually universal.[44] Although no provision was made for substitution or commutation fees, conscientious objectors were recognized.[45] As had been the case in the Civil War after 1864, such objectors were required to belong to a recognized religious sect that forbade its members to bear arms.[46] Men thus exempted from combat duty were required to do such alternative service as the President should determine.[47] All men, regardless of their eligibility for conscientious objector status, were required to register for the draft[48] and draft boards were organized to process registrants.[49]

After World War I, the military draft was dormant until 1940, when, at President Roosevelt's request, Congress enacted the Selective Training and Service Act of 1940.[50] Under its provisions, all men between the ages of twenty-one and thirty-six, except military academy cadets, diplomats, and non-citizens, were required to register.[51] Conscientious objectors were exempt from combat duty,[52] much as they were during the Civil War and World War I, but on a somewhat broader basis. To attain conscientious objector status from a local draft board, a draftee did not have to be a member of an organized religious group that proscribed bearing arms, but only had to be "conscientiously opposed to participation in war in any form" by virtue of "religious training and belief."[53] Conscientious objectors were required to have their names listed on a register and were required to do some form of alternative national service.[54]

In 1947 President Truman recommended to Congress that it allow the Selective Service Act to expire.[55] In June 1948, however, Congress enacted the Military Selective Service Act.[56] The World War II "by reason of religious training and belief" qualification for consci-

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[43] Pub. L. No. 65-12, 40 Stat. 76 (1917) (expiring four months after Proclamation of Peace by President as provided by Act of June 15, 1917, ch. 29, § 4, 40 Stat. 217, 217).

[44] *Id.* § 2, at 77-78.

[45] *Id.* § 4, at 78.

[46] *Id.*

[47] *Id.*

[48] *Id.* § 5, at 80.

[49] *Id.* § 4, at 79.

[50] Pub. L. No. 76-783, 54 Stat. 885 (1940) (expiring Mar. 31, 1947).

[51] *Id.* § 2, at 885.

[52] *Id.* § 5(g), at 889.

[53] *Id.*

[54] *Id.*

[55] H. MARMION, SELECTIVE SERVICE: CONFLICTS AND CONSCIENCE 11 (1968). The President recommended that the Act expire in March 1947. *Id.*

[56] Pub. L. No. 80-759, 62 Stat. 604 (1948) (amended 1967).

entious objector status was retained, but a definition was added.[57] The definition read: "Religious training and belief . . . means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."[58] All eligible men, regardless of status, remained required to register for the draft.[59]

The basic provisions of the MSSA regarding conscientious objectors remained unchanged through the Korean and Vietnam Wars.

B. *Current Statutory Law*

There are three subcategories of those who generally can be called conscientious objectors under the draft exemptions of the MSSA.[60] "Regular" or otherwise "duly ordained ministers of religion" are exempt from "training and service but not from registration."[61] An exemption also is provided for theological students.[62] Under the principal conscientious objector provision, a man is not required to be subject to combat training and service if, by reason of "religious training and belief," he is "conscientiously opposed to participation in war in any form."[63] The "religious training and belief" requirement is further refined to make explicit that it does not include "political, sociological, philosophical views, or a merely personal moral code."[64]

The MSSA further mandates that the local draft boards determine whether an individual draft registrant meets the definition of a conscientious objector to war. If he qualifies, the draft board would assign him to a non-combatant military service role.[65] If the registrant objects even to that limited association with the military, he may be assigned to military service in the maintenance of "national health, safety, or interest," as the Director of the Selective Service System deems appropriate.[66]

There is ample federal case law construing those provisions of the MSSA that grant and define conscientious objector status.[67] The Su-

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[57] *Id.* § 6(j), at 612-13.
[58] *Id.* at 613.
[59] *Id.* § 3, at 605.
[60] *See* 50 U.S.C.A. app. § 456(g)(1), (g)(2), (j) (West 1981).
[61] 50 U.S.C.A. app. § 456(g)(1) (West 1981).
[62] 50 U.S.C.A. app. § 456(g)(2) (West 1981).
[63] 50 U.S.C.A. app. § 456(j) (West 1981).
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *See, e.g.*, McGee v. United States, 402 U.S. 479, 490 (1971) (conscientious objector claims turn on factual question relating to nature of registrant's beliefs concerning war, religious basis

preme Court, in *McGee v. United States*,[68] held that conscientious objector claims turn on a factual determination relating to the nature of the registrant's beliefs concerning war, the basis for his objection thereto in his conscience and religion, and the registrant's overall sincerity.[69] In *Parrolt v. United States*,[70] a Ninth Circuit court held that the ultimate issue in such situations is "the sincerity of the registrant in objecting, on religious grounds, to participation in war *in any form.*"[71] The draft boards and the courts, the court in *Williams v. United States*[72] held, are bound to carry out congressional determination that it is more essential to respect a man's religious beliefs than to force him to serve in the armed services.[73] In yet another case,[74] a district court ruled that national policy favored allowing true conscientious objectors to avoid military service.[75]

Other federal case law has established that it is possible for a draft registrant to set forth a *prima facie* case for being granted conscientious objector status.[76] When the registrant clearly shows that he is opposed to war in all forms, that this opposition is grounded in religious training and belief (construed to include a moral, ethical, and religious belief regarding right and wrong which is held with the strength of traditional religious conviction), and that this objection is

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for views, and his sincerity); Williams v. United States, 216 F.2d 350, 352 (5th Cir. 1954) (draft boards and courts are bound to execute the congressionally mandated policy that it is more essential to respect a man's religious beliefs than to compel military service); United States v. St. Clair, 293 F. Supp. 337, 345 (E.D.N.Y. 1968) (registrant who is denied conscientious objector status is entitled to be told why he does not qualify).

[68] 402 U.S. 479 (1971).

[69] *Id.* at 491.

[70] 370 F.2d 388 (9th Cir. 1966).

[71] *Id.* at 391-92 (emphasis added) (citing Witmer v. United States, 348 U.S. 375, 381 (1955)). For cases holding that the ultimate question is the registrant's sincerity, see United States v. Andrews, 446 F.2d 1086, 1088 (10th Cir. 1971); United States *ex rel.* Hemes v. McNulty, 432 F.2d 1182, 1186 (7th Cir. 1970); Kessler v. United States, 406 F.2d 151, 155 (5th Cir. 1969); United States v. Warner, 284 F. Supp. 366, 369 (D. Ariz. 1968); United States v. Wymer, 284 F. Supp. 100, 104 (S.D. Iowa 1968).

[72] 216 F.2d 350 (5th Cir. 1954).

[73] *Id.* at 352.

[74] Nurnberg v. Froehlke, 355 F. Supp. 1187 (S.D.N.Y. 1973), *vacated on other grounds*, 489 F.2d 843 (2d Cir. 1973).

[75] *Id.* at 1198.

[76] *See, e.g.*, Thompson v. United States, 474 F.2d 323, 326 (9th Cir. 1973) (*prima facie* conscientious objector status established by demonstration of sincere belief in a supreme being who requires opposition to war); United States v. Davis, 460 F.2d 792, 796 (4th Cir. 1972) (*prima facie* case requires findings of two ultimate facts: that such objection is based on religious training and belief; and that it encompasses any kind of war); United States v. Hanson, 460 F.2d 337, 340 (8th Cir. 1972) (*prima facie* case requires clear religious as opposed to "political, sociological, or philosophical" opposition to war).

sincere, the registrant is considered to have established a *prima facie* case for the conscientious objector classification.[77]

Timing is an important factor in the consideration of whether conscientious objector status should be granted. In a 1968 ruling,[78] a United States District Court in Maine held that a draft registrant's request for conscientious objector status must be made *before* his actual induction into the Armed Forces.[79] In 1973, however, a federal court of appeals[80] refined this rule. Once a local draft board has received a registrant's request for an application for conscientious objector status, it must permit a sufficient and reasonable period of time in which to file the form before the registrant is ordered to report for military induction.[81]

C. *Constitutional Law*

It is clear that the creation and retention of the conscientious objector exemption from military service is solely the prerogative of Congress. That is because a clear-cut constitutional right to conscientious objection has never been recognized. Nonetheless, constitutional issues have risen in these cases.

The first amendment to the United States Constitution requires that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[82] This key constitutional clause applies to state and federal action by virtue of the incorporation of its principles in the due process clause of the fourteenth amendment to the Constitution.[83] At stake in constitutional cases involving the status of conscientious objectors, then, is the fundamental right to the free exercise of religion. That fundamental right, however, must contend with the compelling national interest in raising armies, an interest that Justice Rehnquist wrote so strongly about in *Rostker*.[84]

The closest the Supreme Court has come to denying that any fundamental right to conscientious objection can withstand the fed-

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[77] United States v. Auger, 337 F. Supp. 342, 346-47 (N.D. Cal. 1972).

[78] United States v. Blaisdell, 294 F. Supp. 1303 (D. Me. 1968).

[79] *Id.* at 1305.

[80] United States v. Salem, 479 F.2d 340 (9th Cir. 1973).

[81] *Id.* at 341.

[82] U.S. CONST. amend. I.

[83] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 813 (1978).

[84] *See Rostker*, 453 U.S. at 70 (1981) (government interest in raising and supporting armies is important and Congress should be afforded deference in exercising its constitutionally delegated authority over military affairs); *see supra* text accompanying notes 24 & 25.

eral Government's interest in raising armies was in *Gillette v. United States*.[85] In *Gillette*, the Court held that those whose religious convictions forbid them to take part in "unjust wars" but allowed them to participate in other conflicts, may be denied the conscientious objector exemption from military conscription.[86] The Court reasoned that the objector's right to the free exercise of religious beliefs was overridden by the Government's compelling "interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies."[87] Significantly, however, the Supreme Court, in dictum in the 1905 case of *Jacobson v. Massachusetts*,[88] recognized that the mesmerizing force involved in overriding the national security interest is such that Congress need not grant exemption from mandatory military service to *any* conscientious objectors.[89]

Constitutional law scholar Laurence Tribe has suggested that, under certain circumstances, the Supreme Court ought to affirm a constitutional right to conscientious objection.[90] "In light of the relative ease with which the conscientious objector exemption has been administered throughout our history without placing a noticeable burden on the country's military manpower needs," Tribe wrote, "a court might well require a concrete showing of threat to such needs in order to justify abolition of the exemption."[91] Professor Tribe points to evidence that he says demonstrated that a constitutional right to conscientious objection "was only mysteriously left out of the Bill of Rights."[92]

Despite Professor Tribe's historical argument, it is clear that the Supreme Court has not recognized a constitutional right to conscientious objection in any form.[93] This places a formidable obstacle in the

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[85] 401 U.S. 437 (1971).

[86] *Id.* at 439, 441.

[87] *Id.* at 462.

[88] 197 U.S. 11 (1905).

[89] *Id.* at 29, 30; *cf.* Welsh v. United States, 398 U.S. 333, 356 (1970) (Harlan, J., concurring) (in complete consistency with the requirements of the Constitution, Congress could eliminate all exemptions for conscientious objectors).

[90] L. TRIBE, *supra* note 83, at 856.

[91] *Id.*

[92] *Id.* at 856 n.54; *see* 1 ANNALS OF CONG. 749-51 (J. Gales ed. 1789); Gianella, *Religious Liberty, Non-establishment, and Doctrinal Development: Part I, The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1412 n.89 (1967). Tribe wrote that the "Committee of the Whole defeated an attempt to strike from the Bill of Rights a clause exempting religious conscientious objectors from service. Inexplicably, the clause was not included in the Bill of Rights finally approved." L. TRIBE, *supra* note 83, at 856 n.54.

[93] *See* Gillette v. United States, 401 U.S. 437 (1971); Welsh v. United States, 398 U.S. 333, 356 (1970) (Harlan, J., concurring); Jacobson v. Massachusetts, 197 U.S. 11 (1905).

path of religious objectors, like Enten Eller,[94] as they fight federal convictions for evading military draft registration.

IV. The Constitutionality of Limiting the Conscientious Objector Exception to Those Who Register for the Draft

A. *The* Bigman *Case*

The statutory and constitutional law discussed in the previous section of this Article is premised on the act of registration for the draft. One cannot become a conscientious objector in the eyes of the law unless he first enters the Selective Service System as a registrant. But what of the potential conscientious objector who sincerely believes that even mere registration is far too great a compromise with a system of militarism he finds abhorrent? One of the more recent federal cases to decide this question in the face of a broadly based constitutional attack on the distinction between registrants and non-registrants was *United States v. Bigman*.[95]

In *Bigman*, the defendant argued that the due process clause of the fifth amendment was violated because the objector exemption was limited to those persons who registered for the draft.[96] Bigman further argued that the registration procedure of the MSSA violated his "First Amendment right to free exercise of his religious beliefs."[97] In its decision, the United States Court of Appeals for the Ninth Circuit found authority for its decision that the discrimination between registrants and non-registrants was not " 'so unjustifiable as to be violative of due process.' "[98] The court pointed also to an unbroken line of authority holding that the registration requirements of the Act do not impermissibly impinge upon constitutionally protected freedom of religion.[99]

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[94] See *supra* text accompanying note 4.

[95] 429 F.2d 13 (9th Cir.), *cert. denied*, 400 U.S. 910 (1970).

[96] 429 F.2d at 14.

[97] *Id.* at 14-15.

[98] *Id.* at 15 (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

[99] 429 F.2d at 15; *see* United States v. Bertram, 477 F.2d 1329, 1330 (10th Cir. 1973); United States v. Toussie, 410 F.2d 1156, 1161 (2d Cir. 1969), *rev'd on other grounds*, 397 U.S. 112 (1970); Richter v. United States, 181 F.2d 591, 594 (9th Cir. 1950); Michener v. United States, 184 F.2d 712, 714 (10th Cir. 1950); United States v. Henderson, 180 F.2d 711, 713 (7th Cir. 1950); Gara v. United States, 178 F.2d 38, 40 (6th Cir. 1949); Warren v. United States, 177 F.2d 596, 599 (10th Cir. 1949); *cf.* United States v. O'Brien, 391 U.S. 367, 372 (1968) (provision that applies to any person "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes his registration certificate" held not unconstitutional); Garman v. United States Postal Service, 509 F. Supp. 507, 509 (N.D. Ind. 1981) (requirement that United States Postal

Also cited in the *Bigman* decision was the ruling in *United States v. O'Brien.*[100] At issue in *O'Brien* was the constitutionality of a federal law that banned the purposeful destruction of military draft registration cards.[101] In that case, the Court observed that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element may be used to justify incidental limitations on First Amendment freedoms."[102] Characterizing the governmental interest that is required in order to meet this burden, the Court noted:

> [A] governmental regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important . . . governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[103]

B. *Distinguishing* Bigman

Upon initial consideration, it would appear that if the *Bigman* precedent[104] were applied directly in a situation similar to that in *Eller,*[105] then the likelihood that Mr. Eller, and others like him, could gain reversals of their convictions on constitutional grounds is indeed scant. Clearly, under *Bigman,* it is permissible for Congress to enact a law making registration for the military draft a condition precedent to the application for legal status as a conscientious objector. Mr. Eller's case, however, may be distinguishable from that of Mr. Bigman in a manner that would benefit him.

From 1948 until 1973, when Congress ended the draft by amending the MSSA to preclude conscription,[106] the law required *both* draft registration and a system of military conscription.[107] This period, of course, encompassed the year of the *Bigman* ruling.[108] Thus, even though all potentially qualified conscientious objectors were required

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Service personnel participate in registration of young men for the draft does not infringe or curtail the religious freedom of those postal employees who object to such tangential participation in the military process).

[100] 391 U.S. 367 (1968).

[101] *Id.* at 370.

[102] *Id.* at 376.

[103] *Id.* at 377.

[104] *See supra* note 99.

[105] *See* N.Y. Times, Aug. 18, 1982, at A18, col. 1.

[106] 50 U.S.C.A. app. § 467(c) (West 1981).

[107] 50 U.S.C.A. app. §§ 451-501 (West 1981 & Cum. Supp. 1982).

[108] *Bigman* was decided in 1970.

to register for the draft, they were all immediately eligible to attain conscientious objector status by applying to their respective local draft boards.[109] Each man who considered himself a conscientious objector, therefore, was given a statutorily prescribed outlet by which he could express his religious objection to war and militarism.

The resumption of draft registration in 1980[110] marked the first time since the end of World War II that registration, but not actual conscription, has been required.[111] The requirement of registration was mandated in case the President should determine that the national security of the United States requires a resumption of conscription.[112] Thus, all potentially qualified conscientious objectors are required to register for the draft, but are not eligible to attain conscientious objector status by making application to local draft boards. This is simply because there is no draft. Registrants such as Mr. Eller, who consider themselves to be qualified conscientious objectors, therefore, have no legal recourse by which they can express their objection to war and militarism.

Eller, then, can clearly be distinguished from *Bigman*. Mr. Bigman had a means to register his objection to war by applying for conscientious objector status under the draft law then in effect.[113] Mr. Eller has no such means by which to register his same objection; he cannot apply for conscientious objector status. Given the nature of the great deference to congressional authority in the area of raising armies announced by Justice Rehnquist in *Rostker*,[114] it is highly unlikely that the present Supreme Court would reverse Mr. Eller's conviction, or one like his, on the ground that the MSSA as applied to him is unconstitutional. Rather it is likely that the Court would follow the rational in *Rostker* which found the disparate treatment of men and women by Congress for purposes of draft registration to be constitutional.[115]

V. Proposal for a Legislative Solution

Although there is no military conscription, the Selective Service System presently provides no means of registering conscientious objec-

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[109] *See supra* text accompanying note 65.

[110] *See* 50 U.S.C.A. app. § 453 (West 1981).

[111] It should be noted that Congress ended the draft in 1973, but registration continued until President Ford suspended it in 1975. 50 U.S.C.A. app. § 467(c) (West 1981); Proclamation No. 4360, 3A C.F.R. 33 (1976), *reprinted in*, 50 U.S.C.A. app. § 453 at 15 (1981).

[112] 50 U.S.C.A. app. § 453 (West 1981 & Cum. Supp. 1982).

[113] *See supra* note 60.

[114] *See supra* text accompanying notes 24-26.

[115] *See supra* text accompanying notes 18-19.

tion to military service. How could such a means be furnished by the law without harming the federal Government's well-recognized compelling interest in securing the draft registrations of those young men whom Congress has required to register for the draft?

It is suggested that Congress amend the conscientious objector status provision of the MSSA to read as follows:

> During such times in which the President has ordered that certain men must register for the military draft, but during which no conscription has been authorized by this Act, the Director of the Selective Service System shall provide that the following language shall appear conspicuously on each draft registration form: "By means of my completion of this draft registration form, I am complying with my legal obligation to register for possible military service. By placing my initials in the box provided for at left, however, I state that if military conscription is commenced at such time at which I am eligible for it, I intend to apply for conscientious objector status because I object, by virtue of my religious training and belief, to all forms of war. I understand, though, that if I choose not to place my initials in the box at left I will not be waiving such right to apply for conscientious objector status."[116]

By providing such language in the MSSA, Congress would be recognizing the status of conscientious objectors, and would be giving those people an opportunity to declare their position before conscription is resumed. Additionally, it would thus afford Congress and the military the opportunity to estimate with a reasonable degree of certainty, the number of people who would apply for conscientious objector status before any draft should occur.

VI. Conclusion

Enten Eller, and others like him, have been wronged. It is ironic that in this time of peace, conscientious objectors are deprived of the privilege of affirming the religious convictions that others like them have enjoyed consistently in times of war. As long as draft registration is required by law, but there is no military conscription, registrants should be afforded an opportunity to voice their intention to apply for conscientious objector status should a draft commence. Provision of such an option would not harm the registration process. At the same time, it would allow earnest conscientious objectors their right to the free exercise of their religious beliefs.

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[116] The proposed statutory language should be codified at the end of 50 U.S.C.A. app. § 456(j) (West Cum. Supp. 1982).

In the absence of the adoption of the amendment to the MSSA that has been proposed in the previous section, the resumption of conscription in a time of national emergency might witness a damaging number of registrants who would refuse to bear arms. By providing the option that has been suggested, the Government would be given both a useful yardstick by which to measure this likely shortage of fighting forces and the chance to make any necessary adjustments in its contingency planning.