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Conscientious objection to military training and service in peacetime and to active participation in combat is not a novel phenomenon of our times. In this study, Rev. Costanzo reviews the historical and legal perspective of the problem by projecting it against a summary review of the history of conscription in Europe and America. By this process he attempts to ascertain the moral and legal grounds by which the political community, particularly the United States, grants exemption from the military requirements of a nation to the protestors.

CONSCRIPTION AND THE CONSCIENTIOUS OBJECTORS

*Joseph F. Costanzo**

CONSCRIPTION

Western Europe

PRIOR to the French Revolution, the system of universal military training and service was unknown. Liability to military duty by every able-bodied male citizen is as ancient as the civil society that wills to survive against conquest or defeat by foreign forces. This call to duty has always rested on the principle that everyone who chooses to enjoy the benefits of civil peace, order, and security, is reasonably obligated to come to the defense of that community. As George Washington observed:

It may be laid down as a primary position . . . that every citizen who enjoys the protection of a free government, owes not only a portion of his property, but even of his personal services to the defense of it.

In the middle of the fifteenth century, Charles VII organized from the mercenaries who had served under him in the Hundred Years' War, the *compagnies d'ordonnance*, and thereby laid the foundation of the national standing army in

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France.¹ In Spain, the regular army developed with the Italian wars of the sixteenth century. Atkinson notes: "The oldest regiments of the present Spanish army claiming descent from the *tercios* date from 1535." The organization of regular armies at the disposal of the sovereign, trained in accordance with professional standards of military experience, and adaptable to needs as defined in a nascent military science occurred in both France and Spain during the sixteenth century.

The development of standing armies in Europe proceeded at first differently in the various nation states but each was quick to learn and imitate from the undoubted military effectiveness of the other countries. Spain maintained a "relatively high" effective peace strength. The only regular troops in France down to 1660 were comprised of royal guards, some squadrons of "gendarmerie," and some regiments of infantry called significantly "les vieux." In most other countries the only permanent forces kept under arms by their sovereigns included select personal guards, small garrisons, and not infrequently a limited regular army to serve as a nucleus.

If France is to be credited with the rudimentary beginnings of the national standing army, to her must also be attributed important radical innovations in military organization which were undertaken under the direction of the Marquis de Louvois, the celebrated Minister of War, upon the accession of Louis XIV to the French throne.

The all-out effort of the French Revolutionaries to guard their new born Republic against threatened invasion from a coalition of encircling inimical forces as well as against internal peril brought about a radical innovation in French military history that may be labelled as "the nation in arms." Subject to the regular army and navy forces poised against foreign armed might and the troops assigned to internal policing, the First Republic enrolled all citizens and children capable of shouldering arms in the national guard which could be summoned to supplement the public force. The debates in the

1. ATKINSON, II, *ENCYCLOPEDIA BRITANNICA*, 592-625 (ed. 11, 1910); D' AUMALE, *DUC, LES INSTITUTIONS MILITAIRES DE LA FRANCE* (Paris, 1867). *THE ANNALS OF THE AMERICAN ACADEMY* (1945); ATKINSON, *A HISTORY OF GERMANY* (London, 1908) MAUDE, *CONSCRIPTION*, in *ENCYCLOPEDIA BRITANNICA* (11 ed.) PHIPPS, *THE ARMIES OF THE FIRST FRENCH REPUBLIC*.

French Assembly especially from 1789 to 1793 reveal the dilemma posed on the one hand by the insistence of the French libertarians such as Mirabeau, the Duc de Liancourt, and others to recruit a regular army by volunteer enlistment, most of whom had never had any previous military training and service, and on the other, the dire necessity of obviating the patent defects of such a plan by compulsory universal training and service—in a word, by national conscription. By 1793 the libertarian plan had been tried and found gravely ineffective. On August 23, 1793, the French Convention decreed² what may rightly be designated as the first formal official plan of compulsory military training and service. Ironically, national conscription was born of the need to defend the liberty and security of the French Republic and not from the demands of an all powerful royal sovereign. There is no doubt but that this national conscription and mobilization of French manpower resources must be credited with the survival of the French Republic and the complete collapse of foreign danger.

With the security of the Republic now beyond doubt its aggressive capabilities became manifest by Bonaparte's successes of 1796. Certain apparent inequities of recruitment of the decree of 1793 were corrected by the law of September 5, 1798 in which the term "conscription" was first used to describe compulsory military service.

If France has to this point been responsible for the succession of military organizations that culminated in the system of conscription, it was left to Prussia to develop and perfect the system as a permanent peacetime program. After Napoleon crushed the Prussian armies at Jena in 1806, he sought to make sure that Prussia would not regenerate her former military strength by limiting her armed forces to a mere 42,000 by the terms of the Treaty of Tilsit of 1807. But these restrictions were ingeniously circumvented by the "Krumper

2. ANDERSON, CONSTITUTIONS AND OTHER SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF FRANCE, 184-185 1789-1907, (Minneapolis, 1908).

1. "From this moment until that in which the enemy shall have been driven from the soil of the Republic of France, all Frenchmen are in permanent requisition for the service of the armies. The young man shall go into battle; the married men shall forge arms and transport provisions."
3. "The levy shall be general. The unmarried citizens and widowers without children from eighteen to twenty-five years, shall march first."

system" contrived by General Scharnhorst. The limit of 42,000 set by the Treaty of Tilsit was never exceeded at any one time but by the device of substituting three to five new recruits for an equal number withdrawn each month, Prussia had by 1813, a reserve of 270,000 trained soldiers. When the new Prussian army had attested by its military triumphs to the effectiveness of the short-term compulsory service and reserves, several important advantages, civilian in character, were also vindicated. A truly broad national army had been formed whose patriotism for the Fatherland proved to be superior in ardor and dedication to that of the traditional professional lifetime soldier. Further, by its process of gradual turnover, civilian commitments, personal and familial were not disrupted seriously for any intolerable length of time, nor were any of the industries and requirements of commerce and agriculture seriously thrown off balance. What had been an emergency contrivance of Scharnhorst to circumvent the restrictions of the Treaty of Tilsit became the first scientific military law for universal peacetime military service on September 3, 1814.³

If any persuasion was needed to point to the superior effectiveness of the Scharnhorst-Boyer military system, it was painfully and most convincingly borne home by the Prussian victories over Denmark (1864), Austria (1866), Napoleon III (1870). One after the other European states adopted the program of peacetime conscription so that, with the exception of England, practically every country drawn into the vortex of World War I had a sizeable army of citizen soldiers already trained for combat through peacetime conscription. The standing reserve of large national forces trained and ready for combat by peace-time conscription and built up by a short term turn-over program had served more than one advantage. On the one hand, it avoided the prohibitive cost of maintaining large armies of long-term professional volunteers; and, on the other, it was a silent show of strength in the diplomatic power plays. But like a two-edged sword, these advantages gave way to armageddon when ready trained forces were mobilized by rival nations crowding each other geographically.

3. Ford, *Boyer's Military Law*, AMERICAN HISTORICAL REVIEW, April, 1915. The law is usually referred to as "Boyer's Law".

England

Great Britain alone of all the Great Powers of Europe has, partly owing to reliance on its maritime ascendancy and to its separation from contiguous foreign borders, and partly from a supposed aversion to conscripted standing armies⁴ relied almost entirely upon volunteer enlistment for her needs of land warfare and upon impressment in the navy for her requirements of her farflung empire. The two conscription bills of 1704 and 1707 were rejected by Parliament as unconstitutional. But in the 1750's, Parliament adopted two acts for the forcible induction of vagrants, "the idle poor and disorderly, without means of support." Whether the exemption of the nobility and the gentry, and of the middle class who had a vote in the election of members of Parliament should suggest that conscription was unbecoming for such as these, free and economically *independent* men, and, on the other hand, becoming and beneficent for free but *burdensome* Englishmen, is a matter of conjecture. In 1914 volunteer recruitment failed to fulfill the higher quotas necessary for continental warfare and England stumbled to compulsory military training and service through a succession of poorly conceived and administered experiments at raising troops by the draft system. With the conclusion of the war, England reverted to the volunteer system until April 27, 1923, when England again had recourse to compulsory training and service after the signing of the Munich Pact.

United States

The history of military service in the United States has steadily veered from the earlier prevailing tradition of volunteer recruitment to the draft in time of war until it has become today generally an unquestioned policy of national defense. The sore point of contemporary controversy is compulsory training and service in peacetime in an undeclared war. The American colonials, heirs of the traditional English loose system, were for the most part satisfied with the ability of colonial militia to cope with enemy assaults upon closely-grouped

4. TASWELL-LANGMEAD, *ENGLISH CONSTITUTIONAL HISTORY*, 747-756 Houghton Mifflin, (1946) May, Thomas, E. *Constitutional History of England* (cf. p. 219).

settlements. That volunteer military service even in time of war was the prevailing mind is attested to in several ways by the set of grievances in the Declaration of Independence protesting not only the presence of standing armies in times of peace without the consent of colonial legislatures, the independence and superior status of the military over the civil, and the quartering of armed troops among the colonials, but also—more to the point—“He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country. . . .” But the experience of the American Revolution made only too patent the weakness of the militia system for united defense. At least nine of the States adopted constitutions during the Revolutionary War which sanctioned compulsory military service.⁵ But with the exception of Massachusetts and Virginia, which resorted to conscription, the American Revolutionary War was fought and won by volunteer recruits. However, the weaknesses of the militia system for united defense, for the more complex organizational requirements of maneuvering against an enemy marshalled in large numbers and proceeding according to planned military strategies, were almost tragically revealed during the American Revolution.

The Continental Congress authorized a regular force, but did not (could not) compel recruitment. At best, their authorizations carried no more weight than urgent recommendations to the colonies that they provide for the common cause. Undoubtedly, the Revolutionary War would have been concluded in less time and with less casualties, had Washington's protest against the militia system been heeded. Surely, a permanent armed force with substantially the same men trained and disciplined for combat and committed for the war's duration was to be preferred to the annual shift of fresh recruits, untrained and inexperienced in the contemporary military engagements. The Articles of Confederation spoke of the necessity of a minimal “body of forces” for the defense of each state in time of peace (Article VI) and of land forces “raised by any state for the common defense” (Article VII) without specifying how each state should recruit and without confer-

5. Selective Draft Law Cases (*Arver v. United States*), 245 U.S. 366, 380 (1918); *Cox v. Wood*, 247 U.S. 3 (1918).

ring upon the Confederacy any power of recruitment. The Constitution of 1789 set down that the Congress shall have power to declare war, raise and support armies, provide and maintain a navy, call forth the militia and provide for their organization and arming (Article I, Sec. 8) without explicitly saying whether that meant a national recruitment, voluntary or compulsory, separate from and in addition to the "calling forth of the state militia." This inattention may be due, as Story explained (*Commentaries*, No. 1187), to the mind at the Federal Convention that the legislative branch of government be designated as the sole power to raise armies⁶ in time of peace as well as during a period of armed conflict. Even so, a sort of check was placed upon the Congress by the constitutional provision that "no appropriation of money to that use shall be for a longer term than two years." (Article I, sec. 8, cl. 12). We may note here that Rhode Island, which was the last of the thirteen original states to ratify the Constitution, made earnest effort to get an amendment that would bar conscription.

Scarcely a year after his inauguration, President Washington, who had known the dangerous uncertainties of an impermanent and inexperienced army during the War of Independence, proposed to the Congress on January 21, 1790, the cultivation of a well-regulated militia through universal training for young men between eighteen and twenty. The trainees were to spend approximately a month in camp for the first two years and only ten days, the third year. Congress was not amenable to the presidential recommendation.⁷ The War of 1812 disclosed only too patently the tragic shortcomings of the untrained volunteers of the militia. But the proposal in 1814 for the conscription of men for the Army by James Monroe, then Secretary of War, was strongly attacked by Daniel Webster in the Senate and widely unpopular with the people. The war ended with the Treaty of Ghent (Christmas Eve,

6. Undoubtedly English history motivated the delegates at the Federal Convention to our constitutional formula. In England, prior to the Revolution of 1688, the King's prerogative power to raise armies in times of peace posed real threats to the exercise of liberties. The Bill of Rights of 1688, resolved the problem not by prohibiting standing armies altogether in times of peace but by making their existence and maintenance contingent upon Parliamentary consent.

7. PALMER, WASHINGTON, LINCOLN, WILSON: *THREE WAR STATESMEN* (Doubleday, Doran, 1930).

1814) before the bill could be enacted.⁸ A summary presentation of the challenge to the constitutionality of conscription can be found in the Report and Resolutions of the Hartford Convention of January 4, 1815.⁹

The war with Mexico in 1847 proved again the inefficacy of short-term volunteers. While General Scott was halfway to Mexico City approximately 40 per cent of his men returned home because their enlistments had expired. While he waited for replacements, Santa Anna was able to recoup his badly beaten army and again a war had been needlessly prolonged for want of a trained army.

At the outbreak of the Civil War, the States had their militia and the Federal Government a standing army of 16,000 troops, which were stationed mostly on the frontier. Congress was not in session and would not convene for three months. President Lincoln called for 75,000 volunteers for three months service, scarcely adequate time to train men for actual combat. By April, 1862 the Southern Confederacy acknowledged it had failed to realize its military requirements by volunteer enlistments for a full year's service and adopted universal conscription. The failure of the Union states to provide the necessary militia forced the Congress a year later to pass the Enrollment Bill on March 3, 1863, the "Draft Act" as it was called.¹⁰ Riots broke out in New York City and elsewhere. Ninety-eight Federal registrants were killed or wounded in the first four months as they attempted to enforce the registration and enrollment. Although by the conclusion of the war, 1,120,000 were drafted by the Federal government,

8. Selective Draft Law Cases (*Arver v. United States*), 245 U.S. at 385.

9. DWIGHT, HISTORY OF THE HARTFORD CONVENTION, p. 368 ff

The effort to deduce this power from the right of raising armies is a flagrant attempt to pervert the . . . Constitution. The armies of the United States have always been raised by contract, never by conscription, and nothing can be wanting in a government possessing the power thus claimed to usurp the entire control of the militia in derogation of the authority of the states, and to convert it by impressment into a standing army.

10. While the conscription system both for the North and South made available larger resources of manpower and offered obviously better opportunities for discipline and training, it was marred by serious defect—substitutions for service, monetary commutation in lieu thereof, exemptions for religious conscientious objectors. In the North, the oppressive nature of the draft was unfortunately underscored by assigning its operation to the military. Modern draft systems have completely eliminated the military from local administration of the draft and assigned to local civilian boards the task of determining the order of service and the application of exemptions.

only 42,347 were actually inducted into service. The preponderance of the Union forces were volunteers who had joined either in anticipation of the draft or in expectation of generous bounties.

Prior to America's participation in the first World War, efforts were made to provide some stabilized resource of volunteer military service, notably by the Act of 1903¹¹ and the National Defense Act of 1916.¹² The first war-time conscription in American history was established by the Selective Service Act of May 18, 1917. In addition to the nearly three million who were inducted through the Selective Service Act, approximately one million enlisted voluntarily in the Army, while almost the entire Navy and Marine Corps as well were made up of volunteers. Volunteer recruiting has always been and still remains the primary source and the core of American military manpower as a matter of traditional and cherished *principle*; conscription is designed to supplement it and is by now a fixed *policy* of national defense in time of war, questioned only by those who would restrict such a policy to the status of a declared war but not agree to it for an undeclared war. The Act of 1940 was the first peacetime selective service law enacted in the shadow of war. Apart from the second World War, American combat participation in Korea and Vietnam has taken place under the status of undeclared wars. Active military combat by United States armed forces in undeclared wars are not a rarity in American history. But the military requirements of manpower were always sufficiently provided for without any recourse to compulsory service. What distinguishes our contemporary combat service is that it takes place in that gray area of "peacetime" and undeclared

11. The Act of 1903, defined the militia as inclusive of all able-bodied male citizens, from the age of 18 to 45, and every able-bodied male alien within the same age range, who had declared his intention to become a citizen. The militia was distinguished into two categories, the Organized Militia and the Reserve Militia. The former comprised the National Guard of the States whose components were to be trained in encampments and drills. Military schools for the training of officers were to be established. The Organized Militia was the first actual similitude to George Washington's plan of January 21, 1790, for a "trained militia". The Reserve Militia comprised all male citizens from 18 to 45 years and in its comprehensiveness it is suggestive of a selective service system. The President of the United States was empowered to call any part of the militia for active service up to nine months for the purposes of executing Federal law, repel invasion or suppress rebellion.
12. Though this Act was passed scarcely a year before America's entry into the war, it still did not provide for national mobilization.

war status by the requirements of a compulsory military training and service law. This has contributed to doubly compound the problematics of the conscientious objector, as we shall observe later on. Be that as it may, consideration of peacetime conscription has been cast within a modern context of the multiple mutual defense treaties, numbering almost fifty, by which our nation through its Presidents and the Senate has committed itself to go to the military defense of its signatory allies in the interest of national security. The precarious peace that may be and has been instantly shattered at different places without any formal declarations of war and at times even against reasonable expectation has made even more urgent the need for preparedness for such eventualities. While our draft policy has emerged almost exclusively from actual wars, today it is related to the immediate prospects of undeclared wars. Whatever tentative conclusions one may come to as to the compatibility of compulsory military training and service laws in peacetime for a democratic society, it would be a serious and misleading misconstruction of the question to relate these laws to a chauvinist militarism or militant nationalism or the arrogance of power of nineteenth century Europe and of ancient Empires.

THE CONSTITUTIONALITY OF CONSCRIPTION

The discussion about the constitutionality of conscription is directed to two distinct problems. The first raises the question whether Congress has the constitutional power to enact such laws. The second, while conceding that Congress is empowered by the Constitution to enact compulsory military training and service laws, insists that the exercise of such a power must not violate personal rights guaranteed to the individual by the same Constitution.

Kneedler v. Lane, 45 Pa. St. 238 (1863)¹³

First, the question whether Congress is invested by the Constitution with the legal power to conscript men into military service.

13. Cf. BERNSTEIN, *Conscription and the Constitution: The Amazing Case of Kneedler v. Lane*, 53 A.B.J. 708-712, August, 1967. I have relied on this article for the excerpts from the *Kneedler* case.

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The Civil War draft law of 1863 was put into operation without any challenge in the federal courts, but it was brought before the bar of the Pennsylvania State Supreme Court in a proceeding that may be unmatched for its bizzare turn of circumstances. Henry S. Kneedler, Francis B. Smith and William Francis Nickels sought injunctions to restrain the Enrolling Board of the Fourth Congressional District of Pennsylvania from inducting them into the Union army. They contended that the conscription act of 1863 was unconstitutional because the Federal Government was without power to compel military service by direct action upon a citizen, an action which only the states could lawfully take in recruiting state militias. The constitutional empowerment of Congress to raise armies, they maintained, operates upon the citizen only by volunteer enlistment.

On November 9, 1863, all five members of the Pennsylvania Supreme Court wrote separate and lengthy opinions and split three to two against the constitutionality of the draft act. Chief Justice Lowrie, in the opinion of the court, maintained that the congressional power to raise armies (Art. I, Sec. 8, cl. 12) and the "ancillary power to pass 'all laws which shall be necessary and proper for that purpose'" (cl. 18) were the directly relevant premises controlling the constitutional issue. He found that not even the necessity to suppress insurrection and to repel invasions constitutionally warranted the federal government to conscript armed forces since even these emergencies were explicitly and specifically provided for by "calling forth the militia." (cl. 15) The Tenth Amendment sets down that "powers not delegated to the United States . . . are reserved to the States respectively. . . ." Arguing on a narrow construction of the Constitution, he concluded that powers not granted are reserved and none should be implied. In a word, any forced levy of the military by the Congress must be through the States from the state militias under their own state officers and not by any direct action upon the citizens. He also considered the issue independently of the emergency situations of rebellion and invasions (for which cl. 15 specifies the definite mode of federal suppression). Forced levies, he wrote, in order to recruit the regular army, is still not warranted by any constitutional

grant of power. Exploring the question further, he would not allow that the mode of coercion of the draft law of 1863 to be constitutional even if *arguendo* it be assumed that the regular army may be recruited from forced levies. The ultimate catalyst is really the lurking argument of implied powers which the court's opinion rejects in its narrow construction in accordance with the rule of the common law. One would have supposed that by 1963 the Hamiltonian-Marshall doctrine of implied powers had surely by then become unquestioned. Perhaps in an effort to ward off this supposition, he held that the explicit provisions of the Constitution were such on this matter that an implied power interpretation was foreclosed. Chief Justice Lowrie resorted to history. The militia was a state institution and it was called "the militia of the several states." (Article II, section 2, cl. 1) The right of the states to its own militia was unaffected by the constitutional grant of powers to the federal government. On the contrary, the Constitution specifically defines the manner of suppressing insurrections and repelling invasions by "calling forth the militia." Chief Justice Lowrie objected that the draft law was "an unauthorized substitute for the militia of the states." Its provision, whereby all able-bodied men within certain age groups "are 'declared to constitute the national forces' . . . , covers the whole ground of the militia, and exhausts it entirely." On the telling question of the jurisdiction of the state supreme court to adjudicate the litigation, he maintained that a federal officer no less than a state officer could be sued in the state courts. Besides, President Lincoln's suspension of the privilege of the writ of habeas corpus removed the federal avenue to the United States Supreme Court and only the state courts were available to afford relief.

Both of the concurring opinions of Justices Woodward and Thompson stressed the undoubted influence of the English tradition upon the thinking of the framers of our constitution. "Assuredly!" wrote Justice Woodward, "the framers of our constitution did not intend to subject the people of the states to a system of conscription which was applied in the mother country only to paupers and vagabonds. On the contrary, I infer that the power conferred on Congress was the power to raise armies by the ordinary English mode of vol-

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untary enlistments." Besides, he emphasized, the true test of constitutional government is to preserve its provisions in the very time of crisis.

Times of rebellion, above all others, are the times when we should stick to our fundamental law, lest we drift into anarchy on one hand, or into despotism on the other. The great sin of the (present) rebellion consists in violating the constitution, whereby every man's civil rights are exposed to sacrifice.¹⁴

Justice Thompson repeated much the same argument, the continuity with the English tradition, and wrote with expression of deeply felt emotion how on his recent visit to the slopes of Runnymede, the memory of the English past "sent a thrill to my heart in admiration of those old barons who stood up there and demanded from a tyrannical sovereign that the lines between power and right should be then and there distinctly marked. . . Our forefathers marked those lines in the federal constitution. I must adhere to them."¹⁵

Both of the separate dissenting opinions of Justices Strong and Reed argued, on the contrary, to the constitutionality of the draft with reliance upon the doctrine of implied powers. They would not allow that the federal government could have a lesser power to draft men than the states had. They noted that while there are limitations upon the means which may be used for the support of the army the government, for example, could not arbitrarily seize private property for the maintenance of the army nor could an appropriation be longer than the explicitly prescribed two year span there were no restrictions set upon the means of raising an army.

The *Kneedler* case is a bizarre curiosity in the history of constitutional law. The restraining injunctions set by the Pennsylvania Supreme Court majority upon the federal offices on November 9, 1863 were vacated on January 16, 1864 by the conversion of the former minority into a new majority when Justice Agnew succeeded to the bench upon the retirement of Chief Justice Lowrie. To the despair of the hapless

14. Excerpts are taken from the lengthier quotations in Mr. Bernstein's article.

15. *Id.*

new minority, the court now held by benefit of the newly formed majority that the state did not have the legal power to interfere by injunction, even if the draft law were deemed beyond the constitutional delegation of power to the Congress. As to the propriety of vacating a court decree by a numerical shift of concurrence after the decree has been put into final form and without benefit of new facts to warrant reconsideration, we leave that to the academic disquisitions of scholars of American law. The *Kneedler* case was the only court test of the legality of the first wartime military draft and the action of the federal government prevailed simply by a routine exchange of personnel on the bench. Despite the fact that the *Kneedler* case covers approximately one hundred pages in the Pennsylvania reports, it received no more than a short allusion to it from Chief Justice White in his opinion in the *Selective Draft Law Cases* in 1918 and without any notice at all of the bizarre reversal of the first decision by the second.

Selective Draft Law Cases—World War I

It was not until 1918 that the constitutional power of the federal government to conscript able-bodied men into the armed forces was upheld by the United States Supreme Court ruling in the *Selective Draft Law Cases*.¹⁶ Conscription was attacked on several grounds: it operated to preempting the states of their right to "a well-regulated militia," that the power which the constitution confers upon the Congress to require compulsory service is that of "calling forth the militia" which is immediately related to three specifically designated objectives—"to execute the laws of the union, suppress insurrections and repel invasions" (Article I, section 8, cl. 15) without any mention of military combat service abroad, and thirdly, that conscription imposes involuntary servitude in violation of the Thirteenth Amendment. In addition, it was contended that the Draft Act was in contravention of the religious clauses of the First Amendment, since the Act provided exemption to religious conscientious objectors and to ministers of religion and theological students.

16. *Cf. Arver v. United States*, 245 U.S. 366, 380 (1918); *Cox v. Wood* 247 U.S. 3 (1918).

17. It is interesting to note that the objections raised by the defendants are strikingly similar to the ones raised in the *Kneedler* case of 1863.

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(This later charge was summarily rejected out of hand by the Court without any direct confrontation with and consideration of the issue raised.¹⁸) The Supreme Court responded that the powers of the states to raise militia must be viewed subject to the superior power of the federal government to raise and support armies; that the congressional power to raise an army is a separate empowerment from the constitutional authorization for "calling forth the militia" and being independent of it, is in no way limited by it. (The *a minus a maius* argument of *Kneedler* appears here reversed for a more effective defense of national power.)

The constitutionality of conscription is based then squarely upon the power of the Congress "to raise and support armies," an empowerment that the Supreme Court declares to be separate and independent of the constitutional delegation of power to the Congress "to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel [sic] invasions." A great number of litigations while conceding the validity of compulsory service have challenged the legality of a specific law because it was alleged it violated certain constitutional rights. In every instance lower federal courts have upheld the constitutionality of the law and its application.¹⁹

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18. The Court evidently felt satisfied that it had already disposed of this sort of argument completely to its own satisfaction by anticipating it in an earlier ruling prior to the American entry to the First World War. *Butler v. Perry*, 240 U.S. 328, 333 (1916). On the intent of the Thirteenth Amendment to it had said:

It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers.

19. See *LEGAL ASPECTS OF SELECTIVE SERVICE*, Revised January 1, 1963, Selective Service System, Washington, D.C., pp. 3-5.

"Unquestionably the Congress has the power to enlist the manpower of the nation by conscription both for the prosecution of the war and for a peace-time army, and it may subject to military jurisdiction those who are unwilling as well as those who are eager to come to the defense of their nation. It is within the power of Congress to call everyone to the colors, and no one under the jurisdiction of the Sovereign nation, whatever his status, is exempt from military service except by the grace of the Government. Aliens may properly be required to forfeit any future opportunity to become citizens of the United States, in order to secure exemption.

Furthermore, the Congress has power to seek information through registration or otherwise in peacetime, to prepare for an intelligent exercise of the power to raise armies by conscription; and in the present

CONSCIENTIOUS OBJECTORS UNDER AMERICAN LAW

A Historical-Legal Conspectus

In discoursing on conscientious objectors, we are focusing primarily on the moral claim they make upon legal protection for the immunity and inviolability of their claim of conscience, which, practically, means not to be coerced to combat duty. There are of course other related questions, whether they ought also to be excused from noncombat participation in military operations, or even against assignment to civilian services outside the military. There is too the very troublesome question of selective conscientious objection to a particular war. Cognate to the discussion but not agnate to it is the question of the preferential status that follows upon ministerial exemption. This too poses a vexing constitutional problem. If on the one hand, religion is defined in the traditional sense of ontological and moral relations of man to God, a transcendental Being, the Creative Author of all reality, who is to be worshipped, loved, and obeyed, then a minister or divinity student of such a creed who is exempted from military service is surely being preferred over leaders of or official representatives of non-religious congregations, v.g. such as the Secular Humanist. If on the other hand, religion be widely understood as ultimate belief without any requirement that the ultimate be related to an Absolute Being distinct from and superior to the human conscience, as was first proposed directly in *Torcaso v. Watkins*,²⁰ and earlier and less directly in the dictum in

phase of history, marked by wars undeclared, failure to register the manpower of the country would be a failure to provide for the common defense.

The power to wage war successfully is not limited to combat action, but extends to every matter and every activity related to war which affects its conduct and progress, and the Congress is the judge as to whether a clear and present danger exists requiring the enactment of a selective service law.

The selective service law does not violate the constitutional principle that equality of duties is based on equality of rights, nor does it violate the constitutional provision against involuntary servitude. It does not provide for an invalid delegation of powers, either with respect to conscientious objectors or otherwise, and it does not deny freedom of religion, freedom of speech, or due process of law. Neither is it objectionable as class legislation. An assignment to civilian work is not in violation of the Thirteenth Amendment. Cf. footnote references to specific court decisions, numbers 32 to 49".

20. Cf. *Torcaso v. Watkins*, 367 U.S. 488, (1961).

Everson v. Board of Education,²¹ then a different complexus of problems arise.²²

Prior to the formation of the National Government, sensitive concern for the inviolability of the religious conscientious objector to the bearing of arms reaches back to the earliest collective resistance on the part of the colonies. Scarcely two weeks after the First Continental Congress had issued its Declaration of the Causes and Necessity of Taking Up Arms (July 8) for the protection of their rights, the Congress on July 18, 1775 passed a resolution advising—(it could do no more)—the colonists to respect the rights of conscience of those who were opposed to the bearing of arms because of their religious beliefs. Since it would yet be another year before the Colonists would break definitely with England this respectful counsel to exemption takes on added significance when projected against the need of an effective resort to armed resistance to secure their rights. But this should not be too surprising. The Continental Congress was acting within a traditional frame of mind on the matter which was already widely expressed during the earlier revolutionary period by constitutional provisions or by statutes.²³ The proffered exemption—in some instances restricted to christians and in others extended to non-christians—was accompanied by the requirement that the beneficiary of this exemption engage in some charitable or purely civil service as the circumstances warranted. Strikingly anticipatory of the first federal draft act of 1863, the exempted conscientious objector was generally required to obtain a substitute or provide funds in order to pay for a substitute.²⁴

21. *Cf. Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).

"The establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religion, or prefer one religion over another."

Cf. CORWIN, "THE SUPREME COURT AS NATIONAL SCHOOL BOARD", 14 Law and Contemporary Problems, 3, 10 (1949) for a critical appraisal of these statements.

22. Among which, must be included, by an ironic twist of logical precession, the question, what happens to the wall of separation of the absolute separationists? Separation supposes some significant distinction which the undifferentiated monism of the novel meaning of religion now excludes as a preferential status for the purposes of law.

23. *Cf. Macintosh v. United States*, 42 F. 2d 845, 847-848, rev'd, 283 U.S. 605 (1931), wherein the circuit court refers to numerous colonial statutes and constitutional provisions.

24. *Cf. KURLAND, THE BIRTH OF THE BILL OF RIGHTS*, University of North Carolina Press, 1955. p. 15, conscription for military service outside the

The Annals of the First Congress, which undertook, at Madison's insistence, to fulfill the pledge given on a Bill of Rights, disclose nothing more than tentative considerations on incorporating a provision for religious conscientious objectors each of which was cancelled by critical objections that prevailed over the proffered suggestions.²⁵ Whether or not the final rendering of the religious clauses of the first amendment embodied any congressional intent for the protection of those conscientiously scrupulous of bearing arms is a question that receives some light but no definite settlement from the amendment which the House tagged on to the Senate Federal Draft Bill of 1814 which James Monroe as Secretary of War had proposed to the Congress for the more effective

colony was barred by the Massachusetts Body of Liberties (1641), p. 47. Conscientious dissenters were exempted from military service upon payment of a fee by the Pennsylvania Declaration of Rights (1776) Article VIII. p. 62, New York Constitution (1777) excused Quakers from militia duty, as non-believers in armed resistance, upon the payment of an exemption fee. Cf. SOURCES OF OUR LIBERTIES. Edited by Richard L. Perry. American Bar Foundation, 1952, p. 329. A Declaration of the Rights of the Inhabitants of the Commonwealth, or State of Pennsylvania. Article VIII. "Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent . . ." As early as 1673 those who had conscientious scruples were exempted from military service in Rhode Island very likely because it had come largely under the control of Quakers. Cf. THOMAS and RICHARD, HISTORY OF THE SOCIETY OF FRIENDS IN AMERICA, (American Church History Series, Vol. XII), p. 211.

25. Cf. KURLAND, THE BIRTH OF THE BILL OF RIGHTS, on Madison's champion-ship of a Bill of Rights against the sluggish reaction of his fellow congressmen in the House of Representatives.

Madison initiated the discussions on the amendments on Monday, June 8, 1789, Cf. 1 Gales Annals of Congress 424 ff.

"The right of the people to keep and bear arms shall not be infringed; 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 service in person." The wording of Madison's proposal "in person" would on its face allow substitution or fiscal commutation to pay for service by another.

On Monday, August 17, 1789, the House resolved itself into a committee with Mr. Boudinot presiding. The whole discussion on religious dissenters to the bearing of arms is dispensed with in approximately two columns. Cf. Gales, *ibid*, 749-751. Mr. Gerry proposed to confine the exemption "to persons belonging to a religious sect scrupulous of bearing arms." Mr. Jackson, while he did not expect everyone to "turn Quakers or Moravians", some would be defenders of the others. So he recommended that the exemption be conditioned "upon paying an equivalent to be established by law". Mr. Smith thought that the religious objectors "were to be excused provided they found a substitute". Mr. Sherman countered that the religious objection of the dissenters "are equally scrupulous of getting substitutes or paying an equivalent. Besides, he noted that exemption on credal sectarian grounds would not be fair to Quakers who would chose to fight for their country. Mr. Benson brought the whole summary exchange to a close by moving that the whole clause be omitted. He would rather that the matter of religious scruples to the bearing of arms be left "to the benevolence of the Legislature". The whole clause was voted out, 24 to 22. So much for the debates on conscientious objectors at the time of the Bill of Rights were being formulated in the first Congress.

prosecution of the War of 1812. The House amendment stipulated exemption from military conscription for the religious conscientious objectors because of their membership in a "religious sect or denomination of Christians."²⁶ Though the proposed Draft Act did not pass both houses of Congress, the overwhelming vote of the House of Representatives to the amended Senate version would suggest that the near contemporaries of the founders of the Republic had not inherited a conclusive mind on the specific coverage of the conscientious objectors by the first amendment.

At the outbreak of the Civil War, both the Union and the Confederacy gathered the manpower for its armed forces indirectly by stipulating the quotas that each state must provide from its militia. Consequently the conditions for exemption from military service were regulated by the state constitutions or statutory laws. As we have already noted, the ineffectiveness of this circuitous system of fulfilling the requirements of military manpower was first acknowledged by the Southern Confederacy when it resorted to universal conscription in April, 1862, and a year later by the Union, when it passed the Enrollment Bill on March 3, 1863. In the debates on the first federal draft act of 1863, broadly three approaches were discussed on how to cope with the problem of the conscientious objector. Should the federal government be regulated by the already existent state proviso on the matter; should the federal government have its own law providing exemption for those whose consciences on military participation was regulated by the creed of a religious sect; the third approach, more involved than the first two, required that the conscientious objector should first petition a federal court and seek relief upon proof of sincerity.²⁷ None of these approaches to the problem survived the critical objections levelled against each and consequently the Act of March 3, 1863 became law without any exemption for the conscientious objector save that of substitution or commutation upon payment of \$300.00. In response to wide public protest against the monetary commutation

26. 28 Annals of Congress 774-775 (1815) (1789-1824).

27. Cf. CONG. GLOBE, 37th Congress, 3d Session 994, 1389-90 (1863).

27a. Cf. WRIGHT, CONSCIENTIOUS OBJECTORS IN THE CIVIL WAR, Philadelphia, (1931), p. 301, notes that figures are not available to show the total number of conscientious objectors in the different denominations. Mennonites seem to predominate, with the Friends, second.

clause, the Act was amended the following year, February 24, 1864, to provide for noncombatant service to the conscientious objector who has given sufficient proof of his religious motivation.²⁷

Less than a year before the United States entry into World War I, the Congress enacted the National Defense Act of June 3, 1916, which, in view of the gathering probability of American involvement in the European theatre, surprisingly did not establish the machinery or the organization for an overall national mobilization. The Act authorized exemption from military service for religious ministers and conferred upon the President the power to regulate the exemption for objectors who are motivated by religious beliefs and whose claim could be reasonably ascertained to be conscientiously authentic. Such a one was nonetheless required to fulfill certain designated noncombatant services.

The Draft Act of May 18, 1917 was the first wartime *national* conscription in American history as compared with the sectional conscription of the Southern Confederacy and of the North during the Civil War. It committed the nation to a full mobilization of manpower and resources. Its broad basis was the "liability to military service of all male citizens" and its plan was a "selecture draft" of citizens between 21 and 31 years of age for military service for the duration of the emergency. It authoritatively disowned once and for all the earlier practices of bounties, substitutions and fiscal commutation for the payment of a substitute. There were several categories of the exempted: ministers, students of divinity, some higher public officials, men engaged in essential occupations as the President might in his discretion regulate, and serious obligations of dependency. As to the conscientious objector in the bearing of arms, the Draft Act of 1917 restricted their exemption to those religious scruples which were related to membership in a recognized pacifist sect.²⁸ The Act authorized the President to designate noncombatant services

28. Act of May 18, 1917, ch. 15, #4, 40 Stat. 78. That the exemption was available only to those whose objecting conscience was religiously ground can be reasonable inferred with certainty from the fact that a proposed amendment which founded exemption upon a broader basis other than the specifically defined as membership in "any well-recognized sect or organization . . . whose existing creed or principles forbid its members to participate in war in any form. . . ." *ibid.*

which the exempted could be required to fulfill. The obviously narrow restriction of the exempted to affiliation with an historic pacifist church was considerably widened by presidential regulation which defined the noncombatant military services to which the exempted could be assigned and which was expressed in such a way as to include religious conscientious objectors without the concomitant requirement of membership in a historic pacifist sect.²⁹

On August 3, 1919 almost a year after the signing of the Armistice (on November 11, 1918), Newton Baker, then Secretary of War, recommended to the Congress a bill which proposed three months of compulsory military training for those between the ages of 18 and 19. Representative Julius Kahn and Senator Chamberlain at first urged that all young men undergo six months training and to be subject to additional training for five more years. Later, as a part of the Army Reorganization Act, which they too sponsored, the requirements were reduced to four months military training for 19 year olds and enrollment in the organized reserves for five years with subsequent refresher courses for two summers, but they were not liable to any military service. These provisions were defeated along party lines.³⁰ In what eventually became the National Defense Act of 1920, the compulsory provisions were replaced by voluntary enlistments.

The Act of 1940 was the first peacetime selective service law. It differed from the 1917 Draft Act in several aspects. It lacked the urgency of the World War I Act which was passed after the declaration of war. Consequently, it was a training and service act with emphasis on training. But what is more to our study, the word "deferment" in the Act of 1940, with its implication of an abiding duty to serve, replaces the employment of the word "exemption" which had appeared in earlier draft law of 1917. Since the two Supreme Court de-

29. Exec. Order No. 2823, March 20, 1918. Undoubtedly the terms of the Draft Act in specifically restricting exemption to adherence to a sect conferred a preferential legal benefit to religious objectors who were members of a pacifist church as against religious objectors who were not. That however was not the intent of the Congress. The intent of the Congress was to provide some objective norm of sincerity and presumptively membership in such a sect seemed to provide some such evidence.

30. Cf. DICKINSON, *THE BUILDING OF AN ARMY*, (1922) Ch. XI, "The Army Act of 1920". Also, PALMER, *AMERICA IN ARMS* (1921).

cisions that are related indirectly or directly to the conscientious objector are the 1917 and the 1948 draft acts and several lower court rulings are interpretive of the 1940 draft law, it suffices to note now that since 1917 there have been the 1940, 1948, and recently, the Military Selective Service Act of 1967, which took cognizance of the Supreme Court's constructive interpretation of religious scruples in the *Seeger* case of 1964. Congressional legislative provisions on conscientious objectors will be examined in the light of judicial review.

The Conscientious Objector and the Decisional Law

The constitutionality of the 1917 Draft Act was challenged in the *Selective Draft Law Cases*. In declaring that act constitutional, the United States Supreme Court summarily dismissed the argument that the exemption clause was violative of the first amendment's establishment and free exercise clauses.

We pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clause of the act . . . because we think its unsoundness is too apparent to require us to do more.³¹

Since in fact the 1917 Act provided for religious objectors affiliated with a historic peace church, and a claim under that statutory definition would be upheld, it is interesting to conjecture what regard the Court would have for the inviolability of the religious objector to war whose religious denomination or church did not forbid participation in war in any form. Or, further, whether the legislative phrase of a member "of any *well-recognized* sect or organization" (whose "existing creed or principles forbid its members to participate in war in any form") was not a precarious contingency on the significance of a believer's sect to others not of his sect. Or, again, what of the churches whose creed did not forbid arms bearing but who adopted vigorous statements in support of the right of

31. *Selective Draft Law Cases* is the title given by the official reporter to five consolidated appeals (*Arver v. United States*), 245 U.S. 366, 389-390, (1918).

individual Church members to be conscientious objectors.³² Since none of these issues were directly placed before the Court for review, the summary disposition of the conscientious objector in the complex problematics that could be raised under the religious clauses of the First Amendment is tolerably acceptable since it was technically correct. That particular issue was not directly before the Court. To the charge that conscription was violative of the Thirteenth Amendment proscription of involuntary servitude the Court, as if to express its opinion of how seriously it thought it should regard this constitutional challenge, disposed of this issue in the concluding part of its opinion.

Finally, we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as a result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.

To begin with, the response obviously skirts around the question of the conscientious objector, which technically is not before the Court. The reference to duty to defend a nation in a declared war, while *prima facie* may raise a distinction between the sense of duty for a declared war and an undeclared war, would by today be an academic question. True, in the past, voluntary enlistments were able to cope with any number of undeclared wars. Today, that would be seriously questionable. Further, whether a declared war has greater demands than an undeclared war, might be hedged today with a number of collateral considerations. The immediacy with which the Commander-in-Chief may have to respond to an obligation

32. This did constitute an actual concrete problem from 1930 to 1940. Cf. III STOKES, CHURCH AND STATE IN THE UNITED STATES, 294. Among such churches who defend the right of individual Church members to be conscientious objectors in public statements whose official creed did not forbid participation in war were: The American Unitarian Association, 1933, 1940; the Northern Baptist Convention, 1934; the Presbyterian Church of the United States of America, 1934, the Protestant Episcopal Church, 1934, the Congregational Christian Churches, 1939; the International Convention of the Disciples of Christ, 1939; the Methodist Church, 1939, 1940; the Reformed Church in America, 1939; and the United Lutheran Church in America, 1940.

incurred under a mutual defense treaty, and the subsequent congressional enactment of draft laws and monetary appropriations directly related to the bellicose engagement, may have reduced the solemnity and technicality of a formal declaration of war to less than an invalidating norm.³³ Chief Justice White did allude to the Civil War *Kneedler* case and found therein an identity of ruling with the instant one. He did not aver, as we have already noted earlier, to the bizarre way in which the first ruling in *Kneedler* was reversed by a sudden shift of court personnel. Though he did not mention that *Kneedler* preceded the Thirteenth Amendment, a fact that would not have any significant bearing on the question of conscription, the referral of the 1863 decision to a formal declaration of war as compared with present day conscription for an undeclared war would not, again it seems to us, hold any telling significance upon the merits of the issue.

A number of Supreme Court and lower court rulings intervening between the *Selective Draft* cases of 1918 and the Selective Training and Service Act of 1940³⁴ have established that decisional law holds to date that exemption from bearing arms because of religious scruples is a matter of congressional grace and not a constitutional right whose inviolability is guaranteed by the first amendment. Historically, there is much that is debatable and on either side of the question, a position of inference may be drawn neither of which may be said to be conclusively persuasive. The fragmentary and summary accounts of the debates on the conscientious objector in the first Annals of Congress which formulated the Bill of Rights leads us to no certainty on the matter. It was thought of and discussed and dropped for the legislatures to decide as a matter "of benevolence"—whether that benevolence was a tactical posture to counter all practical objections or a denial of constitutional right cannot be settled with any degree of

33. In an earlier ruling, the Supreme Court took direct cognizance of the relation of the Thirteenth Amendment to duties that a government may impose upon those within its jurisdiction. See *Butler v. Perry*, 240 U.S. 328, 333 (1916):

"It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers."

34. 54 Stat. 885.

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certainty. The House amendment to the proposed federal draft act of 1814 provided exemption from conscription for the conscientious objector who was scrupulous of bearing arms because of his affiliation with a religious sect. This may indicate, on the one hand, that the Congress of 1814 did not think that the first amendment provided such a protective coverage for the dissenter, and, on the other, it may be that the House took upon itself to resolve what the first Congress did not resolve. How much of the widespread opposition to the contemplated conscription act of 1814, which never actually became law, and in particular the strongly worded remonstrance against it by the Hartford Convention express what the constitutional law was understood to be or should be is again an unresolved question. The provision for substitution or exemption upon payment of \$300.00 in the conscription law of 1863 may be used as an argument for either side. It might indicate a constitutional right to exemption conditioned by some compensatory action or it simply affirms the right of the government to require a certain number of servicemen no matter how forthcoming. The emendation of a year later in the Act of February 24, 1864 which allowed the dissenter the alternate of noncombat service again does not settle for either side. Court rulings however have been less hesitant in affirming that exemption from bearing arms because of conscientious scruples is dependent upon the grace of benevolence of the legislature. A chronological study of the Supreme Court and lower court rulings on issues which indirectly or directly bear upon the conscientious objector will disclose that the predominating and still prevailing judicial doctrine is the emphasis upon the general duty to defend the fatherland as against the protest of the dissenting conscience and the gradual elevation of the dissenting conscience to greater significant notice and inviolability but within the context of a congressional grace.

United States v. Schwimmer, 279 U.S. 644 (1929)

In 1929 the Supreme Court ruled that an applicant for naturalization could be denied her request because of her paci-

first confession,³⁵ according to the provisions of the Naturalization Act of 1906.³⁶

That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution. (ibid. at 650)

Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the Government. And their opinions and beliefs as well as their behavior indicating a disposition to hinder in the performance of that duty are subjects of inquiry under the statutory provisions governing naturalization and are of vital importance, for if all or a large number of citizens oppose such defense the "good order and happiness" of the United States can not long endure. (ibid. at 650, 651.)

The fact that she is an uncompromising pacifist with no sense of nationalism but only a cosmic sense of belonging to the human family justifies belief that she may be opposed to the use of military force as contemplated by our Constitution and laws. And her testimony clearly suggests that she is disposed to exert her power to influence others to such opposition.

A pacifist in the general sense of the word is one who seeks to maintain peace and to abolish war. Such purposes are in harmony with the Constitution and policy of our Government. But the word is also used and understood to mean one who refuses or is unwilling for any purpose to bear arms because of conscientious considerations and who is disposed to encourage others in such refusal. And one who is without any sense of nationalism is not well bound or held by the ties of affection to any nation or government. Such persons are liable to be incapable of the attachment for and devotion to the principles of our Constitution that is required of aliens seeking naturalization. (ibid. at 651, 652)

35. *United States v. Schwimmer*, 279 U.S. 644 (1929).

36. U.S.C. Title 8, § 381.

"He (the applicant for naturalization) shall, before he is admitted to citizenship, declare on oath in open court . . . that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same."

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Apart from the fact that the applicant for naturalization was a woman forty-nine years of age, a most improbable subject to be called upon to bear arms in defense of the United States, the reasoning of the Court discloses an undefined but none the less overly alarming fear of the corrosive effect of pacifism upon devotion to the Constitution and upon fellow citizens. Though free speech was not the issue before the Court, the Court's premonitions that the applicant "is disposed to exert her power to influence others to such opposition (to war)" discloses the Court's mind on the efficacy of speech to be in accord with its earlier rulings under the Espionage Act of 1917 and the state criminal anarchy statutes.³⁷

United States v. Macintosh, 283 U.S. 605 (1931)

Two years later, the Supreme Court, on a five to four split, ruled that Douglas Macintosh, a Canadian by birth and a professor of theology at Yale, whose application for naturalization had been declined by the lower courts, could not be admitted because, though not a pacifist, he would not give a definite pledge in advance to fight in any war in which the country should engage.³⁸ In response to the query of the Naturalization Act of 1906, "Are you willing to bear arms in defense of the United States?", he wrote: "Yes, but I should want to be free to judge of the necessity." *Macintosh* clearly sets forth the apparent antimony between a claim of inviolability of conscience on the bearing of arms and the general patriotic duty to come to the defense of the fatherland. The question is with whom does the ultimate decision on the righteousness of war rest?³⁹

37. Notably the *Schenck* (1919), *Frohwerk* (1919), *Debs* (1919), *Abrams* (1919), *Gilow* (1925), *Whitney* (1927) Cases.

The dissenting opinion, written by Justice Holmes and concurred in by Justice Brandeis, was quick to distinguish such fears of influence in wartime from those that the Court and shared in *Schenck*. Cf. *id.* at 654, 655.

38. The Naturalization Act #4, 34 Stat. 596 (1906).

39. In a memorandum, Macintosh stated:

I am willing to do what I judge to be in the best interests of my country, but only in so far as I can believe that this is not going to be against the best interests of humanity in the long run. I do not undertake to support "my country, right or wrong" in any dispute which may arise, and I am not willing to promise beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not "take up arms in defense of this country", however, "necessary" the war may seem to be to the Gov-

The *Macintosh* case is clearly distinguishable from the earlier *Schwimmer* case. In the latter case, there was an apparent contrariety between an uncompromising pacifism and the duty implied in the manifold benefits that a citizen enjoyed under the Constitution to fight if necessary for its survival. Actually, the Court in *Schwimmer* veered more to the bad tendency latent in a free speech advocacy of pacifism. In *Macintosh* the Court was confronted with the age-old problem of ultimate and absolute allegiances, to God and to country, and in this instance, it was not an abstract question, but concretely, the United States of America with high credentials as a democratic and generally speaking, a beneficent governance. We must note that though *Macintosh* is a conscientious objector case, it is not the customary one. To begin with, he is not a citizen of the United States but seeks citizenship. Further, he is not objecting to all wars—he had served as a chaplain of the Canadian Expeditionary Force in World War I—but more precisely, he refuses to commit himself *a priori* to underwrite the moral righteousness of any war in which America may be a participant and to bear arms at her calling. In a word, he claims the right of conscience to be a selective conscientious objector as a citizen of the United States. While he was anticipating the more common issue of today, that of the selective conscientious objector, he was at the same time proceeding from a less firm position, that of an applicant to citizenship, a privilege which the American government need not “bargain” about with any alien.

Justice Sutherland gave the majority opinion denying the right to citizenship:

In effect, he offers to take the oath of allegiance only with the qualification that the question whether the war is necessary or morally justified must, so far as his support is concerned, be conclusively determined by reference to his opinion.

When he speaks of putting his allegiance to the will of God above his allegiance to the government, it is evident, in the light of his entire statement, that he means to make his own interpretation of the will of

ernment of the day. Cf. *United States v. Macintosh*, 283 U.S. 605, 618 (1931). Professor Macintosh had served as a chaplain in the Canadian Expeditionary Force during World War I.

God the decisive test which shall conclude the government and stay its hand. We are a Christian people according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God.

But, also, we are a nation with the duty to survive; a nation whose constitution contemplates war as well as peace; whose government must go forward upon the assumption, and safely can proceed upon no other, that unqualified allegiance to the nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God.

The applicant here rejects that view. He is unwilling to rely, as every native-born citizen is obliged to do, upon the probable continuance of Congress of the long established and approved practice of exempting the honestly conscientious objector, while at the same time asserting his willingness to conform to whatever the future law constitutionally shall require of him; but discloses a present and fixed purpose to refuse to give his moral or armed support to any future war in which the country may be actually engaged, if, in his opinion, the war is not morally justified, the opinion of the nation as expressed by Congress to the contrary notwithstanding. . . .

It is not within the province of the courts to make bargains with those who seek naturalization. They must accept the grant and take the oath in accordance with the terms fixed by law, or forego the privilege of citizenship. There is no middle choice. If one qualification of the oath be allowed, the door is open for others, with utter confusion as the probable final result.

There is no intimation of any probability of an unjust war by the United States, but rather, on the contrary, the unquestioned deference to be shown to the morally unfailing democratic process by which a nation is committed through congressional declaration of war. It may be that America is viewed as the light of the world. Communism and Facism had already emerged on the Continent as a threat to the European democracies and the awesome lesson of the Nuremburg was still in the future. But as far as the constitutional issue

was concerned—could *Macintosh* invoke a constitutional right under the first amendment to refuse to bear arms because of religious conscientious objections? *Macintosh* states unequivocally for the first time the doctrine which to this date has persisted and seems likely to endure unchanged that exemption from military service because of religious scruples is not a constitutional right but a matter of congressional grace.

This, if it means what it seems to say, is an astonishing statement. Of course, there is no such principle of the Constitution, fixed or otherwise. The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied, but because, and only because, it has accorded with the policy of the Congress thus to relieve him. The alien, when he becomes a naturalized citizen, acquires, with one exception, every right possessed under the Constitution by those citizens who are native born. . . . The privilege of the native-born conscientious objector, to avoid bearing arms comes not from the Constitution but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert that privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers as above illustrated, which include, by necessary implication, the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect to the justice or morality of the particular war in general.⁴⁰

The startling fact of the majority opinion in *Macintosh* is its affirmation about the “well-nigh limitless extent of the war powers.”

From its very nature, the war power, when necessity calls for its exercise, tolerates no qualifications of limitations, unless found in the Constitution or in applicable principles of international law.⁴¹

Chief Justice Evans Hughes gave the celebrated minority opinion concurred in by Justice Holmes, Brandeis, and Stone. The majority opinion upheld the constitutionality of the

40. 283 U.S. at 623-24.

41. *Id.* at 622.

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Naturalization Act even while understanding its requirement of a promise to bear arms to be unconditional and absolute. The dissenting opinion, on the contrary, would not call into question the constitutionality of the Naturalization Act because it read its commitment to bear arms not to be absolute, but rather a requirement subject to higher moral imperatives, a supposition demanded by the constitutional guarantee of religious liberty of conscience.

While it has always been recognized that the supreme power of the government may be exerted and disobedience to its commands may be punished, we know that with many of our worthy citizens it would be a most heartsearching question if they were asked whether they would promise to obey a law believed to be in conflict with religious duty. Many of their most honored exemplars in the past have been willing to suffer imprisonment or even death rather than make such a promise. And we also know, in particular, that a promise to engage in war by bearing arms, or thus to engage in a war believed to be unjust would be contrary to the tenets of religious groups among our citizens who are of patriotic purpose and exemplary conduct. . . . Much has been said of the paramount duty to the state, a duty to be recognized, it is urged, even though it conflicts with convictions of duty to God. Undoubtedly that duty to the state exists within the domains of power, for government may enforce obedience to laws regardless of scruples. When one's beliefs collides with the power of the state, the latter is supreme within its sphere and submission or punishment follows. But, in the forum of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens.

The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. . . . One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God.

Professor Macintosh, when pressed by the inquiries put to him, stated what is axiomatic in a religious doc-

trine. And, putting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government, presents in part a question of constitutional law and also, in part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience. *There is abundant room* for enforcing the requisite authority of the law as it is enacted and requiring obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power.⁴² (emphasis supplied.)

At this point, it is well to bring into focus and note how much that is said in opposition is not disowned but rather resolves into a coherent, complementary proposition. Morally, the conflict between patriotic duty to defend the country and, on the other, to be true to the dictates of conscience in obedience to God, is complicated by the fact that in either claim of duty there is a presumption of moral correctness, a supposition of course that is rebuttable. We shall have to return to this moral problematic in the concluding part of our discourse which will inquire into the polarity of claims of conscience and of the moral-legal claims of a political community upon its citizens. For the present, we make these observations: exemption from military service for scruples of conscience is by congressional grace. Since *Macintosh* this proposition has not been brought into doubt by the Supreme Court nor by any lower court. However startling it is to read of the limitless extent of the war powers, *salus populi, suprema lex*, remains broadly an uncontested affirmation. It is within these two positions that in fact the courts have worked out to the present decisional law on conscientious objectors. Granting the congressional provisions for conscientious objectors, the prefer-

42. *Id.* at 633-634.

ential status formerly given to theistic believers, has by now since the construction of no-establishment in *Everson* and of novel latitudinarian meaning of religion to adumbrate non-theistic beliefs since *Torcaso* and *Seegar*, the right of government to compel every able bodied person to participate in a war effort *somehow*—either by assignment to noncombatant service in the military or to civilian service outside the military—remains undiminished. And we may well conjecture whether with all the moralizing and legal thinking, it has been the realism of the situation that makes possible the course of moral and legal development on the conscientious objector. Namely, *there is abundant room* (in the words of the dissenting opinion)—there is the pragmatic experience that in time of war, a government can rely upon the patriotism of its people for a sufficiency of military manpower both from voluntary and coercive enlistment with all the numerical allowances made for the exempted conscientious objector. The only alternate is a morally justifiable resistance and insurrection against a government committed to war.

Though the 6 to 3 majority of *Schwimmer* dwindled in two years to a 5 to 4 in *Macintosh* (and *Bland*), it was not until fifteen years later that the dissenting opinions would emerge for the majority in *Girouard v. United States*.⁴³ The Court, in effect, reversed the three earlier⁴⁴ cases, by holding that Girouard may be admitted to citizenship because he was willing to take the oath of allegiance and to serve in the army as a non-combatant, but who, because of his religious scruples—he was a Seventh Day Adventist—was unwilling to bear arms. The Court reasoned *a maiore ad minorem* by noting

43. 328 U.S. 61 (1946).

44. There are slight discrepancies between *Schwimmer*, *Macintosh*, and *Girouard* which do not affect the substantial basic issue. *Schwimmer* was a woman, who is not traditionally inducted into military service in the United States. Besides, the naturalization act of 1906 had not specifically required willingness to bear arms in the defense of the country but literally, an oath of allegiance and support, a provision, however, which the Supreme Court construed to an equivalence to the bearing of arms, and equivalence further debilitated by the Court's fear that the Hungarian pacifist's use of free speech against war might influence the duty of patriotism of others. *Macintosh* was willing to take the oath to "support and defend the Constitutional laws of the United States against all enemies, foreign and domestic", provided he reserved to himself to judge of its necessity and morality. *Girouard* prescinded from the issue raised by *Macintosh* and was content to limit his duty to defense to noncombatant service in the army. The *Girouard* ruling simply reversed the narrow statutory construction of the Naturalization Act. In *Macintosh* with a non-absolutist interpretation which allowed alternate service.

that similar religious scruples would not bar a citizen from public office, that of congressman not excluded, and surely, the national legislature could not have intended stricter requirements for aliens requesting citizenship than for public officials who legislate and administer law. In 1950 the Court went further and would admit to citizenship a man who would not serve in the Army in any capacity.⁴⁵ Strictly speaking, the *Girouard* ruling does not of course deny that Congress has the right to require military service as a prerequisite for naturalization but rather conditions it with alternate equivalents with due regard for the immunity of conscience guaranteed by the religious clauses of the first amendment.

Intervening Lower Federal Court Reasonings Conducive to the Seeger decision of 1965

Deference to rights of conscience is a sensitivity which American law has gradually and in increasing extensions reached to a variety of claims. But in almost all such protests of conscientious scruples a limit is set that somehow subordinates an absolute immunity to the interests of national security or in a weighing of interests a superior claim of general welfare. This is noted for example in the concurring opinion of Mr. Justice Cardozo in *Hamilton v. Regents of the University of California*,⁴⁶ who notes that the exercise of private judg-

45. *Cohnstaedt v. Immigration and Naturalization Service*, 339 U.S. 901 (1950). By the Immigration and Naturalization Act of June 27, 1952 (66 Stat. 163), which codified much previous legislation, terminated the policy of denying the privilege of naturalization to conscientious objectors. The present controlling law on conscientious objectors *cf.* 8 U.S.C. 1451 (c): "(5) (A) to bear arms on behalf of the United States when required by law, or (B) to perform noncombatant service in the Armed Forces of the United States when required by law, or (C) to perform of national importance under civilian direction when required by law."

Hamilton v. Regents of the University of California, 293 U.S. 245 (1934) is interesting for the conditions and limitations that may be set to a conscientious objector short of the requirements of war. It distinguishes a circumstance of grace, the benevolence of free higher education provided for under the Morrill Act of 1862 in Federal land-grant colleges, to which no one is obliged by law, with the requirement of compulsory instruction in military science unaccompanied by any pledge of military service from military service.

Even so, the Federal government leaves it up to each state how to comply with the Morrill Act requirement of military training. States may require it absolutely as a condition for admission in these Federal land-grant colleges or allow an alternate course, v.g. in physical exercise, for those opposed to any instruction in arms, and provide some other training that would prepare the student for noncombatant service in time of war.

46. In controversies of this order courts do not concern themselves with matters of legislative policy, unrelated to privileges or liberties secured by the organic law. . . . Instruction in military science is not instruction

ment is not beyond all restriction. Similarly, the exercise of free speech and press in times of war will undoubtedly be subordinated to national security and defense whatever the reappraisal in retrospect of the reality of the dangers to the national war effort and of the appropriate canon of constitutional construction of "danger" in the first World War cases.⁴⁷ Be that as it may, the duty to participate in the defense of the nation *in some way*, provided for by the national compulsory military training and service, is evident in the very provisions on conscientious objectors—there is to be some form of authoritatively stipulated and assignable service. There is no constitutional right to exemption⁴⁸ and the mandatory alternates to actual combat service underscore what *Macintosh* and succeeding court rulings have established as a principle beyond doubt. But there has been a gradual enlargement of the category of the conscientious objector from the first World War Draft Act of 1917, which provided for conscientious objectors who were members of "any well-recog-

in the practice or tenets of a religion. Neither directly or indirectly is government establishing a state religion when it insists upon any such training. Instruction in military science, unaccompanied here by any pledge of military service, is not an interference by the state with the free exercise of religion when the liberties of the constitution are read in the light of a century and a half of history during the days of peace and war.

Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other and condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.

293 U.S. 245, at 268 (1934). Justices Brandeis and Stone concurred in this opinion.

47. Notably, *Schenck v. United States*, 249 U.S. 47 (1919), *Frohwerk v. United States*, 249 U.S. 204 (1919), *Debs v. United States*, 249 U.S. 211 (1919), *Abrams v. United States*, 250 U.S. 616 (1919), *Schaefer v. United States*, 251 U.S. 466 (1920), *Pierce v. United States*, 252 U.S. 239 (1920), *Gitlow v. New York*, 268 U.S. 652 (1925), *Whitney v. California*, 274 U.S. 357 (1927).
48. Cf. *In re Summers*, 325 U.S. 561 (1945) State of Illinois Bar Committee on character and fitness recommended that Summers not be allowed to practice law in Illinois because Summers would not swear to support and defend the constitution of Illinois by arms. Summers based his refusal on grounds of religious conscience but the United States Supreme Court upheld the decision of Supreme Court of Illinois on the basis of the *Macintosh* and *Hamilton* rationale and in effect rejecting the plea that the refusal to bear arms because of religious scruples was protected by the religious clauses of the First Amendment. The dissenting opinion of Justice Black concurred in by Justices Murphy, Douglas, and Rutledge, would have allowed Summers' plea a consideration under the First Amendment religious liberty clause. That the dissenting opinion of Justice Black may have disposed the Court the following year to the Girouard construction of the Naturalization Act may be indicated by the narrow margin of 5 to 4 *re Summers*.

nied sect or organization . . . whose creed or principles forbid its members to participate in war in any form", to a consideration of the religious scruples of one not a member in a recognized pacifist sect by the broader terms of an Executive Order.⁴⁹ Durin gthe congressional committee hearings on the Burke-Wadsworth Conscription Bill in 1940⁵⁰ witnesses urged exemption for non-theistic conscientious scruples against the bearing of arms of those who were affiliated with organizations committed to pacifist profession and on such non-religious grounds. It seems that the affiliation with a publicly noted organization as a test or ostensible sign of sincerity of conscientious protest was undoubted on both sides, the theist and non-theist rule of conscience. Though the argument for members of non-theist pacifist organizations did not then prevail, the outcome of the *Seeger* case fifteen years later was to allow for the non-theist without any such membership the same identical protection given to the theist-grounded scruples under the religious clause of the first amendment by an apparently arbitrary enlargements of the conventional meaning of religion. To this end-result, lower federal court opinions contributed by setting in opposition contrary constructions of religious scruples, an opposition which the Supreme Court in *Seeger* would resolve by affirming that there may be no opposition before the law between the ultimate determinants of different individual consciences.

Lower Federal Court Construction of "Religion"

The Burke-Wadsworth Conscription Bill was enacted prior to the American entry into World War II and is known as the Selective Training and Service Act of 1940.⁵¹ The religious scruples against the bearing of arms obviously would rest on the religious liberty clause of the first amendment. But the objector whose conscientious scruples were not rooted in theistic belief could only hope to gain equal consideration

49. Executive Order No. 2823, March 20, 1918, which, while stipulating the non-combatant services to which objectors could be assigned, extended the exemption to include those who, although they were not members of "any well recognized sect or organization" opposed to the bearing of arms, were motivated by personal religious dictates against service in the armed forces.

50. Cf. Hearings on S. 4164 before the Senate Committee on Military Affairs, 76th Congress, 3d Sess. 1 (1940): Hearings on H. R. 10132 before the House Committee on Military Affairs, 76th Congress 3d Sess. 1, (1940).

51. 54 Stat. 885.

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before the law by charging preferential treatment of the theistic protestor in violation of the no establishment clause. Nonetheless, despite the basic reasonableness of their rationale, the Act of 1940 only broadened its allowance for exemption from combat training those whose objections were related to religious training and belief.⁵² The Act did not limit exemption to members of recognized pacifist sects, but rather extended it to any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." It in effect legislated what had been permissible during World War I by virtue of the broad terminology of the Executive Order that implemented the 1917 Draft Act. It was, however, an improvement upon the precedent in another regard,—surrogate civilian service was now placed under civilian direction and as a corollary removed the conscientious objector assigned to these civilian tasks from military supervision and from military court martial proceedings. The disengagement of religious scruples from a required affiliation to a historic pacifist sect would of course remove the presumption of an objective test of sincerity. What was now required in order to allow the same claim of subjective conscience for the non-theist was either to reverse the *Macintosh* ruling that exemption was by congressional grace and affirm it to be a constitutional right under the first amendment or, somehow adumbrate under "religion" the nontheistic claim of conscience in order to avoid the challenge to establishment of religion in diminution of the religious liberty clause. These prima facie antinomies were to emerge in fact in lower federal court reasonings and rulings in a polarization between the narrow and broad construction of the meaning of "religion" and so force eventually the Supreme Court to resolve this crucial problem. And so in fact it came about.

The first breach in the traditional meaning of religion which the Congress and the courts⁵³ had consistently adhered

52. The Act of 1940 was the first peacetime selective service law with emphasis on training. Its provision for exemption read: "Nothing contained in this act shall be construed to require any person to subject to combatant training who, by reason of religious training and belief, is conscientiously opposed to participating in any form." Ch. 720, #5(g), 54 Stat. 889.

53. In addition to the state and federal statutes (to which we have already referred) that consistently understand religion to be as Jefferson had expressed it "the relations which exist between man and his Maker, and the duties resulting from those relations". Cf. Costanzo, *THIS NATION*

to even against mounting pressures against the narrow construction of the definition of "religion" occurred in 1943, in *United States v. Kauten*,⁵⁴ when Justice Augustus Hand set forth one of those *dicta* that eventually courses its way into constitutionality.⁵⁵ Kauten had refused to report for induction as required by the Selective Service Act of 1940. His objections to military conscription were not based on religious grounds nor for that matter on moral claims of conscience as he might have done so even as an atheist. Rather, he charged that the American involvement in the war was President Roosevelt's way of coping with the rising rate of unemployment. Obviously, since his protest was political, he could not claim exemption under the religious conscientious objector provisions of the Selective Service Act, and in fact, the circuit court ruled against him. Nonetheless, Judge Augustus Hand in the course of his opinion proceeded without any necessity for the disposition of the case and, contrary to the clear intent of Congress,⁵⁶ to reconstruct the federal statute broadly so that "religious" "take into account the characteristics of a skeptical generation and make the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed, the basis of the exemption."⁵⁷ It is interesting to note that Judge Augustus Hand would uphold the legitimacy of a nontheistic moral claim against all wars but does not allow that a selective conscientious objection—to a particular war—is deserving of equal consideration. Rather, he strongly intimates that generally speaking objection to a particular war is more likely than not political. He concludes with the proposition that is later adopted in the *Seeger* ruling of 1965 which equates the ultimate non-theistic

UNDER GOD, CHURCH, STATE, AND SCHOOLS IN AMERICA, (Herder and Herder 1964); the Supreme Court rulings which understood "religion" in this man-God relationship are *Davis v. Beason*, 133 U.S. 333, 342, (1890), *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), *Macintosh v. United States*, 283 U.S. 605, (1931), dissenting opinion of Chief Justice Hughes at 633-34.

54. 133 F.2d 703 (2d. Cir. 1943).

55. Such for example as the dictum in *Everson* denying any financial aid in any form, in any amount to religion which the Court subsequently refused to consider merely a dictum.

56. Cf. *supra* note 50.

57. Cf. *supra* note 54, at 708. The relevant statutory provision reads:

"Nothing contained in this act shall be construed to require any person to be subject to combatant training who, by reason of religious training and belief, is conscientiously opposed to participating in war in any form."

Selective Training and Service Act of 1940, ch. 720 #5(g), 54 Stat. 889.

conscientious persuasion to conscientious scruples related to theistic dogmas.⁵⁸

Judge Hand's *dictum* in *Kauten* must have impressed his associate justices because that same year, the same court of appeals ruled in *United States ex rel. Phillips v. Downer*⁵⁹ that a stricter view than that expressed by Judge Hand, namely, that which demanded a belief sanctioned by one of the historic peace churches, would restore in essence the requirement of the Act of 1917 which the 1940 Act deliberately set out to amend. An analysis of the circuit court's reasoning will disclose that it was more distinguished for its enlightening and expansive mood than for its accuracy. A reading of the Hearings on the proposed Selective Service Act of 1940⁶⁰ reveals that the congressional committees pointedly rejected to allow nonreligious protests against war, couched in philosophical and humanitarian terms, to be eligible for exemption from combat service. But the Circuit Court nonetheless was ready to denote philosophical and humanitarian conscientious objections as "religious"—contrary to a consistent traditional use by the courts themselves up to that time of "religious" as connoting theism; further, to identify arbitrarily the "religious" with church membership, and thirdly, by this unjustifiable device, read into the 76th Congress, an intent contrary to their very explicit distinction between the religious scruples against the bearing of arms unrelated to membership (which the Congress now wished to include among the exempted) and the religious protestor who was a member of a historic pacifist sect to whom alone the 1917 Act restricted the exemption.⁶¹

58. There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.

Cf. supra note 54 at 709.

59. 135 F.2d 521 (2d Cir. 1943). *See too*, *United States ex rel. Reel v. Badt*, 141 F.2d 845 (2d Cir. 1944).

60. *Cf. supra*, note 50.

61. 135 F.2d 521 (2d Cir. 1943) at 524:

But if a stricter rule than was announced in the *Kauten* case is called for, one demanding a belief which cannot be found among the philosophers but only among religious teachers of recognized organizations, then we are substantially, or nearly back to the requirement of the Act of 1917 of membership in a well-recognized religious sect or organi-

So it was that the second circuit of appeals reasoned by an intellectually uncomfortable amalgam of an innovation in lexicography, by a contrary to fact reconstruction of congressional intent, and by an unreflecting identity of the "religious" with a church-member.

Three years later, the court of appeals of the Ninth Circuit was confronted with same problem in *Berman v. United States*⁶² and after deliberating at length on the *dictum* of *Kauten* refused to adopt it. Judge Stephens noted the similarity, at least in principle, between the situations in the Second Circuit cases and in *Berman* and immediately stated that the court took "divergent views from those expressed in those cases." The court correctly read the congressional intent in the provision "of religious training and belief" to mean training in theistic beliefs and related this meaning to the double purpose that the 76th Congress embodied in the statute, namely, to distinguish between the nontheistic moralist objection to war and the religious, that is, a dictate of conscience related "to an authority higher and beyond any worldly one."⁶³ These latter the Congress of 1940 wished now to include within the coverage of exemption whether or not they were affiliated with a pacific church or not. In a word, the Ninth Circuit court noted the obvious that had unaccountably escaped the Second Circuit court, namely, the statute of 1940 was drawing a distinction precisely to provide exemption for the religious, i.e. theistic, scruples of one not a member of a historic pacifist church, and to distinguish such a one from the objector on merely philosophical, sociological or moral grounds, whose belief did not relate to a deity, and not to include the latter within the exemption because he was not

zation whose existing creed or principles forbid its members to participate in war in any form.

62. 156 F.2d 377 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946).

63. It is our opinion that the expression "by reason of religious training and belief" is plain language, and was written into the statute, for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one. . . . There are those who have a philosophy of life, and who live up to it. There is evidence that this is so in regard to appellant. However, no matter how pure and admirable this standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion.

Id. at 380-81.

a "religious" objector within the meaning of the statute. The Supreme Court refused *certiorari*⁶⁴ and left the antinomy between the Second and Ninth Circuit Courts of Appeal to Congress to settle.

The 80th Congress responded to the Court's inaction on the *Kauten-Berman* antinomy by unequivocally agreeing that *Berman* had indeed correctly understood its "plain language" and "specific purpose" of the 1940 statute. In order to dispel any further ingenious reconstruction of its intent such as the Second Circuit Court of Appeals had forged in *Kauten* and *Downer*, it specifically defined the meaning of "religious training and belief," something the Congress had not bothered to do⁶⁵ because supposedly it was intelligible in the traditional context of religion as related to Deity, as the Courts themselves had until then so understood.

Religious training and belief in this connection mean an individual's belief in 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.⁶⁶

But if the Selective Service Act of 1948 determined to abide by the traditional meaning of religion, those whose moral convictions were not theistically grounded and were accordingly excluded from the congressional grace extended to the religious scruples of theists, now shifted their tact and challenged the constitutionality of the statutory provision by raising claims under the guarantees of the First Amendment,

64. Cf. *supra* at 62.

65. Cf. *supra* note 57.

66. Section 6(j), 62 Stat. 612 (1948), 50 U.S.C. App. #456(j), 1958. We may note here that while both the 1940 and 1948 statutes speak of both "religious training and belief" both the courts and Congress have not followed the lead of Justice Stephens who stressed the requirement of "religious training" no less than "belief" in *Berman*. Cf. Universal Military Training and Service Act, 62 Stat. 609 (1948), 50 U.S.C. App. ##451-73 (1958). In fact, the congressional explanation of "religious training and belief" really only defines what Congress understands "belief" to be while actually being entirely mute on the meaning of "religious training". In 1948 one might reasonably find corroborating evidence of congressional meaning of "religious" from the 1940 and 1948 provisions for ministerial exemption which patently favored theistic believers as against non-believers. But in the light of the *Seeger* ruling in 1965, such an interrelated rationale ceases to be meaningful. The statutory ministerial exemption is surely by now, consequent to *Torcaso* and *Seeger*—constitutionally *sui generis* and must be upheld by a reasoning unique to itself.

issues which until then, had emerged before the court only indirectly⁶⁷ and were either summarily dismissed or met by collateral considerations other than those of the religious clauses of the First Amendment.

During the decade and a half following the 1948 Draft Act, the Second, Third⁶⁸ and Ninth Circuits construed the statute in keeping with the criteria set down in *Berman* and adopted by Congress in the Draft Act of 1948. Both the Second and Ninth Circuits upheld the constitutionality of the 1948 amendments against First Amendment challenges. In 1952, the Ninth Circuit court was confronted with the charge that the exemption provision of the 1948 Draft Act was an interference with the religious liberty clause or a violation of the no-establishment prohibition of the First Amendment. Here surely would have arisen the opportunity to challenge the Supreme Being clause by pointing to the statutory preference of theistic believing conscientious objectors over non theistic protestors. But the fact that the defendant was a believer in God denied him the personal claim to make such an assault upon the constitutionality of the exemption provision.⁶⁹ Nonetheless, the court chose to discourse about the constitutionality of the exemption as restricted to theistic believers and argued

67. For example, in *Kramer v. United States*, 245 U.S. 478 (1918) the defendant's conscientious objection to the 1917 Draft Act was not based on religious grounds but on philosophical, social, or humanitarian persuasions. Consequently the first amendment religious guarantees were not apparently directly before the Court. But when earlier, in *Arver v. United States* (Selective Draft Law Cases), 245 U.S. 366 (1918), the challenge was made that the 1917 Act was in violation of the First Amendment because by its ministerial exemptions the conscription act was establishing or interfering with religion, the Court summarily rejected it out of hand as not deserving serious consideration. "We think its unsoundness is too apparent to require us to do more." *Id.* at 390. In *Macintosh*, the Court could do no better with the defendant's claim of conscience than to point to the "limitless extent of the war powers" . . . which include, by necessary implication, the power, in the last extremity, to compel the armed services of any citizen in the land, without regard to his objections or his views in respect to the justice or morality of the particular war in general." *United States v. Macintosh*, 283 U.S. 605, at 624 (1931). In *Schwimmer* (1929) the claim of conscience was swallowed up in the bad tendency of the exercise of free speech upon the wartime obligations. In *Hamilton* (1934) the conscientious protest was engulfed in the bad tendency of an unabridged exercise of private judgment. In *Girouard* (1946) and *Cohnstaedt* (1950), the claim of conscience was met by a broadened statutory construction of the Immigration and Naturalization Service laws, in a reversal of *Macintosh*, *Bland*, and *Schwimmer* rulings.

68. In *United States v. De Lime*, 233 F.2d 96 3d Cir. 1955) the defendant, by his own avowal, an agnostic, could hardly sustain his claim in accordance with the congressional statutory explanation of "religious training and belief" as related to the individual's belief to a Supreme Being.

69. *George v. United States*, 196 F.2d 445, 452 (9th Cir.). *Cert. denied*, 334 U.S. 843 (1952).

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that since the exemption was a matter of legislative benevolence and not of constitutional right, the Congress could set conditions to the exemption at will. Since arbitrary determination might import unreasonableness, as the court itself allowed,⁷⁰ such a view would be of doubtful validity in the light of the *Speiser* ruling of 1958.⁷¹

Though the Court had disposed of the challenge to the constitutionality of the discriminatory exemption of the act of 1948, on the *Macintosh* doctrine of legislative grace and discretionary selectivity, it did nonetheless, take cognizance of the defendant's charge that the exemption provisions did violence to the religious clauses of the First Amendment. The Court pointed to the fact that Congress had formally adopted in 1948 the traditional meaning of "religion" as generally understood "in American society" "and the manner in which it has been defined by courts," namely, "in terms of the relationship of the individual to a Supreme Being." Such a clear understanding underlying "religious training and belief" was easily distinguishable from "political, sociological, philosophical and ethical grounds for opposing the war," and the Congress, even prescinding from the plenary power to provide for the defense of the country, to which the Supreme Court had referred in *Macintosh*, could make a discriminatory classification based upon that distinction without offending the due process clause.⁷²

Four years later, the Ninth Circuit court was directly confronted with the constitutional issue posed by the First Amendment in *Clark v. United States*.⁷³ The defendant had

70. "It is established constitutional doctrine of long standing that exemptions of this character do not spring from the constitution but from the Congress. . . . This being so, there is brought into play the familiar principle that whatever the Government, State or Federal, may take away altogether, it may grant only on certain conditions. Otherwise put, whatever the Government may forbid altogether, it may condition even unreasonable." *Id.* at 449-50.

71. *Speiser v. Randall*, 357 U.S. 513 (1958). Supreme Court would not allow a veteran's property tax exemption to be conditioned by a loyalty oath as required by Articles XIII and XX of the California Constitution. See too the companion cases, *First Unitarian Church v. Los Angeles, Valley Unitarian-Universalist Church, Inc. v. Los Angeles*, 357 U.S. 545 (1958), disposed of on the same grounds as *Speiser*. The churches had contended that to condition property tax exemption accorded to churches upon the required disclaimer of forbidden advocacy was a denial of due process.

72. *Cf. supra* note 69 at 451-452.

73. *Clark v. United States*, 236 F.2d 13 (9th Cir.), *cert. denied*, 352 U.S. 882 (1956).

been denied exemption from military service because he had not based his scruples upon belief in God. He buttressed his argument by adding to the guarantees of the religious clauses of the First Amendment, the proscription of a "religious test" provision of Article VI of the Constitution. The circuit court dispensed with the appeal to the First Amendment by referring to its own ruling in *George* and discounted the invocation of Article VI as "specious reasoning."⁷⁴ Both in *George* and *Clark* the Supreme Court denied *certiorari*.⁷⁵

We have so far observed that the provision of the 1917 Draft Act for religious conscientious objectors related religious scruples to the bearing of arms to membership in a historic pacifist church or sect, a provision that was broadly construed by an executive order in implementation of the statute. The Selective Draft Law Cases of 1918 upheld the constitutionality of the act. The 1940 Draft Law extended the exemption to religious objectors whose scruples were not conditioned by affiliation with a well-known pacifist church or sect. Though the two draft acts provided exemption to scruples based on "religious beliefs" (1917) and on "religious beliefs and training" (1940), neither statute explicitly and formally mentioned that the religious belief be in God. It is safe to surmise that the traditional meaning of religious belief in a Supreme Being was too obvious to spell out and besides the courts themselves had explicitly or implicitly so understood the term "religion."⁷⁶ Having disengaged religious scruples from church-affiliation or confession to any congregational creed, the conscientious objectors, then proceeded to attack the constitutionality of the exemption provision for restricting it to scruples which were prompted by religious, that is, theistic belief. When the United States Supreme Court refused to resolve the antinomy between the construction of religion by

74. *Id.* at 23-24.

75. *Cf. supra* notes 69 and 73.

76. *Cf. Davis v. Beason*, 133 U.S. 333, 343 (1890): "the term religion had reference to one's views of his relations to his Creator, and to obligations they impose of reverence for his being and character, and of obedience to his will." *See too, Church of the Holy Trinity v. United States*, 143 U.S. 457, 470-471 (1892), *Macintosh v. United States*, 283 U.S. 605, 627 (1931) dissenting opinion of Chief Justice Hughes: "The essence of religion is belief in a relation to God involving duties superior to those rising from and human relation". "Allegiance to God is superior to allegiance to civil power, *passim . . . passim*. Holmes, Brandeis, Stone concur in the Chief Justice's dissent.

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the Second and Ninth Circuit courts, Congress, in 1948, formally and explicitly adopted the traditional meaning of religion as a relation to theistic doctrine and refused to include within the exemption provision conscientious scruples against arms not based on a belief in God as is abundantly clear from the congressional committee Hearings on the matter.

Whereas the first two challenges were directed against the preferential status conferred by the 1917 and 1940 draft laws upon theistic believers and church affiliation, the third assault was ingeniously construed—once the disengagement from church-affiliation had paved the way—*under* the protective coverage of “religious beliefs” and by entering *within* the meaning of religion. To this ultimate successful challenge, in *Seeger* (1965), propositions originally set forth as dicta in *Everson* and *Torcaso* were to contribute the ideas of “non-preference,” “impartiality” and “equivalence” for the latitudinarian mutation of the lexicographical meaning of “religion.”

With the dislodgment of the church-membership requirement and the reaffirmation of theism as the core meaning of “religious beliefs” in the statute of 1948, the only course left against congressional intransigence on religious, that is, theistically, motivated scruples against the bearing of arms, was to induce the Supreme Court to subsume non-theistic conscientious protests under the same literary connotation of “religion” as the theistically rooted scruple. The Court could be induced to this purpose by facing it with a dilemma for which the Court itself had paved the way in the last twenty years. The restriction of exemption to pacifist theists was a frankly preferential benevolence denied to non-theist pacifists. But prior to 1947, in spite of the almost general proscription of state financial aid to religious institutions, not only the federal government but even state governments under one form or another, by one justifying rationale or another, provided fiscal benefits to religious institutions and agencies in a large variety of ways. Why is 1947 the origination of that course of dialectical gymnastics that conduced with reasonable expectation the outcome of *Seeger* in 1965?

The First Amendment to the Constitution, of itself, binds only the Federal government. "Congress," says the Amendment, "shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The States were left free by the Amendment to regulate the regulation between government and religion as they chose. But most of the areas in which religion comes into contact with government lie within the jurisdiction of the States rather than of the Federal government. Such are marriage and the family, public morals, the protection of life and health, some parts of criminal and civil law and, supremely, education. In 1925, however, the Supreme Court began to interpret the Fourteenth Amendment as meaning that the First Amendment was binding on the States as well as on the Federal government. It was not until 1947 that the Court for the first time undertook to apply the establishment of religion clause of the First Amendment to the States and their administrative subdivisions, such as counties, municipalities and school districts. Prior to 1947, the Court had decided only three cases under the establishment clause. All three had involved the Federal government, and in each of these cases the Court upheld the government against the charge that it acted in such a way as to establish religion.

The clause in the First Amendment that "Congress shall make no law respecting an establishment of religion" was first invoked in *Bradfield v. Roberts*, 175 U.S. 291 (1899), where the Supreme Court sustained a federal appropriation for the construction of a public ward to be administered as part of a hospital under the control of Sisters of the Roman Catholic Church. The Court found no prohibited aid to religion but rather a valid appropriation in aid of a group of privately incorporated individuals whose religious affiliations and beliefs were beyond the scope of judicial inquiry. Federal appropriations were again challenged in *Quick Bear v. Leupp*, 210 U.S. 50 (1908), where the Supreme Court distinguished between federal funds held in trust for the beneficial use of Indian wards, at whose request such funds could be used to reimburse the religious schools which they attended, and funds from the public treasury which could not be paid to any sectarian group for educational purposes. The Court, though

holding that such use of trust funds in no way violated the First Amendment (citing *Bradfield v. Roberts*, supra), declined to comment on the extent to which the Amendment might forbid a similar expenditure from public funds. In *Selective Draft Law* cases, 245 U.S. 366 (1918), the Supreme Court upheld the Selective Service Act of 1917 over the objection, inter alia, that the clause, exempting ministers and members of religious sects whose tenets deny the moral right to engage in war, constituted an establishment of religion. D.6th ('59)

In 1947 the Court upheld the constitutionality of a New Jersey statute which provided at public expense bus transportation to all school children whether they attended governmental schools or nongovernmental schools, as a legitimate exercise of state police power.⁷⁷ Not content with satisfying the requirements of law, the Court, in acknowledgment of the appellant's contention, also considered whether public aid to religion was constructively a violation of the First Amendment. It pronounced:

The establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.⁷⁸

What apparently at its face seemed to many jurists at most a *dictum* as far as the precise issue before the Court was in time officially adopted as a constitutional law proposition,⁷⁹ and in its light the meaning of the establishment clause has changed considerably from what had been understood by such leading authorities of constitutional law as Storey, Cooley and

77. *Everson v. Board of Education*, 330 U.S. 1 (1947).

78. *Id.* at 15. For a personal study of the issues involved, particularly as related to education under religious auspices or religious practices in public schools confer, Costanzo, *THIS NATION UNDER GOD, CHURCH, STATE AND SCHOOLS IN AMERICA* (Herder and Herder 1964).

79. *Cf. McCollum v. Board of Education*, 33 U.S. 203 (1948) where the dictum is repeated, and *Torcaso v. Watkins*, 367 U.S. 488 (1961) where it is affirmed as a proposition of constitutional construction.

Corwin.⁸⁰ What matters for our discourse is that the Court was putting forth a proposition that has been variously described as one of absolute separation of church and state, of governmental neutrality, of governmental impartiality between believers, and between believers and non-believers. Apart from its implications on governmental fiscal aids to religious institutions, it set down a proposition which advocates of the "rights" of non-believers, whether for themselves or in denial of governmental action toward others, could use as a premise for the evolution of the notion that the non-believer should have equal status with the believer within the protective coverage of the religious clauses of the First Amendment. Encouraged then by the *Everson dictum* and undeterred by the reaffirmation of the traditional meaning of religion by the Draft Act of 1948, they succeeded in inducing the Court to make such an admission 14 years later in *Torcaso v. Watkins* (1961) again by a dictum, though not as prominently incorporated within the text of the opinion as in *Everson*, at least appended as a footnote.

In *Torcaso*⁸¹ the right of a citizen to become a notary public without being required by law to make a public declaration of belief in God was upheld. It would have been more felicitous had the court not subsumed in a footnote,⁸² by an exercise

80. The study on the historical-legal meaning of the no-establishment clause is one of the most agitated and prolific in the last two decades in publications on constitutional law and outside the scope of our paper.

81. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

82. "Among religions in this country which do not teach a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." *Id.* at 495 n. 11. Two reflections on this proposition may provide pause on the soundness of the statement as a correct proposition theologically speaking and secondly suggest serious doubts as to its viability as a constitutional principle. First, though the oriental beliefs differ in their concept of theism from the western creeds—the personality of the divine being, its trinitarian nature, its eternal immutability, its transcendence as well as its immanence, the order of creation, the eternal distinctiveness of the personal immortality of humanism the afterlife—still the far eastern oriental faiths—whatever the concept of absorption of human realities into the absolute, or the belief on reincarnation, or the eternal procession of absolute being in time and space in manifold phenomenal manifestations, or the unreality of temporal-spatial realities—none of these faiths denied the objectivity the Absolute, of the Permanent Reality and its distinctiveness from the subjectivity of worshippers or non-worshippers—and would scarcely merit being linked with atheism or the nontheism of Ethical Culture and Secular Humanism. Eastern religious confess to, not deny, a Supreme Being.

Secondly, if the Court intended neutrality between believers and non-believers, between theists and non-theistic believers, as it purported to do in the opinion to which the footnote is appended, then it has placed itself in a truly uncomfortable posture if such a neutrality were to be applied

of logical positivism, nontheistic beliefs into the meaning of religion in the First Amendment. To have preserved even in legal interpretation the traditional meaning of religion as the relation of man to a transcendental being, God, would not have precluded the right of a non-theistic (non-religious) conscience from the protective mantle of the First Amendment religious clauses. *Torcaso* could have adequately rested its ruling on the Anglo-American tradition of law that the right of belief is a right to an internal area of absolute inviolability into which inner sanctum neither the law may inquire nor the coercive power of government force its disclosures.⁸³ The prolongation of the propositions of *Everson*—originally a dictum—become apparent in the passage in *Torcaso* to which the footnote-dictum is appended.

Neither (a State nor the Federal government) can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.⁸⁴

to the area of education, that area on which these presuppositions may not be taught—in public schools to underly those—the inculcation of moral and civic values which the state expects the public school children to learn—then in effect the Court is underwriting the teaching of Ethical Culture and Secular Humanism in these tax-supported schools and conferring upon these non-theistic “beliefs” a preferred status in contravention of the no-establishment clause of the First Amendment. It would seem at this time that the Court in order to avoid conferring a preferential status upon Secular Humanism in its consideration of the question of tax aid to church-affiliated institutions of learning, infra-collegiate and collegiate, may have to fix upon the secular achievements in these religious schools without prejudice to its religious affiliation and its religious teachings. Only in this way can neutrality and impartiality be hyphenated to comport with both religious clauses of the First Amendment.

83. Cf. Costanzo, *Wholesome Neutrality: Law and Education*, 43 N.D. LAW REV. 605, 633-34 (1967).

84. Cf. *supra*, note 81 at 495.

On writs of Certiorari to the United States Court of Appeals for the Second Circuit. *United States v. Jakobson*, 325 F.2d 409 (2d Cir. 1963), *United States v. Seeger*, 326 F.2d 846 (2d Cir. 1964). In *Jakobson*, the Second Circuit espoused the view that the Supreme Being clause must be liberally interpreted to prevent constitutional difficulties which might arise from protecting the “free exercise” of only a few favored religions. *Id.* at 415. *Jakobson*, while recognizing an Ultimate Cause or Creator of all existence, contended there were two basic views of man's relationship to his Creator: the conventional “vertical” image which conceived of God as being on a higher plane than man, and the “horizontal” view which pictured the Creator as man's partner, allowing mortals to share in the grandeur and joy of the universe. He maintained that *only* the horizontal perspective led to the love for one's brethren which made war abhorrent and unallowable. *Id.* at 413. Inable to believe that Congress meant to exclude views of this character, or to require draft boards to distinguish between “vertical and horizontal transcendence”, the court concluded that the statute must be broad enough to embrace *Jakobson's* views. *Id.* at 416. By refusing to

Just as it was the antinomy to legal interpretation between the broad construction of "religion" in the Draft Law of 1940 by the Second Circuit court opinions in *Kauten v. United States* (1943) and *United States ex rel. Phillips v. Downer* (1943) and the traditional meaning of religion by the Ninth Circuit court opinion in *Berman v. United States* (1946) that forced Congress to specifically include the Supreme Being requirement in its definition of religious belief in the Selec-

perpetuate unduly restrictive concepts of a Supreme Being, the Second Circuit in *Jakobson* set the stage for *Seeger*, which squarely posed the issue of whether the requirement of belief in a Supreme Being could validly be employed at all. To arrive at its conclusion, the *Seeger* court, assuming arguendo that Congress could constitutionally withdraw the conscientious objector provision (of *Macintosh* and *Hamilton* cases), reasoned that the conditions which it could place upon exercise of the privilege were subject to constitutional limitations. Having established the proposition that Congress could not unconstitutionally condition a privilege which it could constitutionally withdraw, the court proceeded to find the Supreme Being requirement an unconstitutional limitation. 326 F.2d at 854. For support the court relied on *Speiser v. Randall*, 357 U.S. 513 (1958), which held that while a state legislature was not required to give a property tax rebates to veterans, it could not condition such a grant on a procedure which amounted to less than due process, i.e., the signing of loyalty oaths. The application of the *Speiser* principle to *Seeger* necessitated an extension of the former, since in *Speiser* an error on the part of the state could have resulted in denial of a constitutional right, whereas a similar mistake in the *Seeger* situation could not abridge the nonexistent right to a draft exemption. Neither the deistic nor the nondeistic conscientious objector is entitled under the Constitution to a draft exemption. (cf. *Macintosh* and *Hamilton* and to federal circuit court of appeals which relied on the *Macintosh* and *Hamilton* rationale on congressional grace).

However, the extension was not unwarranted, given the traditional definition of religion of section 456 (j) of the Universal Military Training and Service Act of 1948: "While the problem of discrimination falls historically within the proscription of the Fourteenth Amendment, it is settled that most, if not all, aspects of equal protection are embodied in the due process requirement of the Fifth Amendment. Therefore, in the words of the *Seeger* circuit court, "a line such as is drawn by the 'Supreme Being' requirement between different forms of religious expression cannot be permitted to stand consistently with the due process clause of the Fifth Amendment." 326 F.2d at 854. Whether or not the line drawn by the statute is violative of the Fifth Amendment depends on its reasonableness, in the light of the purpose sought to be attained. Arguably, down to the Supreme Court ruling in *Seeger* (1965), the Supreme Being requirement was a reasonable implementation of a valid legislative purpose because confession to Supreme Being, to theistic transcendence, provided an objective norm, however dubious, that pragmatically at least served as an external shield of defense against arbitrary objections, whether sincerely or insincerely professed, based on allegedly political, sociological, and other nonreligious grounds. Even Mr. Justice Augustus Hand had distinguished his broad concept of religion in *Kauten* from political objections. If however, as it not appears in the light of the *Seeger* ruling of 1965, the subjective test of sincerity proceeding from an avowal of broadly religious conscientious scruples can be as reliable or suspect as the formerly objective tests of membership in a historic pacifist church or profession of religious pacifism, the way has undoubtedly been paved that cannot be marked off by a line, the distinction between religious scruples however God, now understood from purely moral conscientious scruples which openly affirms atheism or formally denies God even in the broad understanding of *Seeger*. What undoubtedly encouraged the Second Circuit court to its *Seeger* rationale were the neutrality and impartiality affirmations in *Everson* and, more pertinently in *Torcaso*, in order to avoid the charge of favoritisms among religions, however religion and theism is now legally to be understood.

tive Service Act of 1948—in default of judicial review by the United States Supreme Court, so too, it is the antinomy between the opinions of the Second Circuit court—a route understandably favored by the litigants and their lawyers—and the Ninth Circuit court, that would confront the Supreme Court to decide whether the Supreme Being requirement may adumbrate under its dictionary meaning non-theistic believers, as *Torcaso* seemed to augur, or whether it may abide by the traditional meaning of Supreme Being, as the Ninth Circuit court had consistently adhered to. The contest between the *Kauten*⁸⁵ (all moral conscientious objectors) and the *Berman*⁸⁶ line (theistic religious scruples) was to be resolved not by opposing one against the other with the weight of congressional specification on the *Berman* side, but by gaining entrance into a more expansive (even if uncomfortable) meaning of theism and religion by relating (or equating) Supremacy of Being to Supremacy of conscientious reference.

In collating the trilogy of *Seeger*, *Jakobson*, and *Peter*⁸⁵ for final review the United States Supreme Court was faced with an impasse from which it was able to extricate itself only by rising above the constitutional challenges. For such an effort the Court has had a persevering tradition of guidelines to exert every ingenuity to safeguard the constitutionality of a legislation short of a judicial denial of a clear constitutional right.⁸⁶ Mr. Justice Douglas' concurring opinion is remarkable for its frankness on this point.

The legislative history of this Act leaves much in the dark. But it is, in my opinion, not a *tour de force* if we construe the words "Supreme Being" to include the cosmos as well as an anthropomorphic entity. If it is a *tour de force* so to hold, it is no more so than other instances where we have gone to extremes to construe an Act of Congress to save it from demise on constitutional grounds. In a more extreme case than the present one we said that the words of the statute may be strained "in the candid service of avoiding a

85. *United States v. Seeger*, 380 U.S. 164 (1965); *United States v. Jakobson*, 380 U.S. 164 (1965); *Peter v. United States*, 380 U.S. 164 (1965); Nos. 50, 51, and 29 October Term, 1964. Ruling rendered on March 8, 1965.

86. *Cf. Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) concurring opinion of Mr. Justice Brandeis at 346-348. For a remarkably similar set of rules set down ten years previously cf. the eminent constitutional jurist, Ed Ward S. Corwin, *Judicial Review in Action*, U. of PA. L. R. 639 (1926).

serious constitutional doubt." *United States v. Rumely*, 345 U.S. 41, 47⁸⁷

The majority opinion of Court delivered by Mr. Justice Clark, on the other hand, is more confident about the propriety of its construction and in fact, proceeds to relate its ingenious interpretation to congressional intent and even to the implications of the *Berman* ruling. And as if to render its interpretation theologically respectable, it even quotes knowledgeably from Tillich and other "modern" theologians and the Ecumenical Council no less.⁸⁸ Much is made of the disparity between the explicit use of the appellation "God" in *Macintosh* and *Berman* and on the other hand the employment rather of "Supreme Being" in the Act of Congress of 1948 to reason that Congress intended by this substitution to refrain from the narrow connotation and to deliberately intend a broadened meaning by "Supreme Being." And all this is done, it seems, with the blessing of Chief Justice Hughes whose definition of religion as "a relation to God involving duties superior to those arising from any human relation" had been relied upon in part by the *Berman* ruling. But the passage⁸⁹ which the Court quotes from the dissenting opinion of Chief Justice Hughes in *Macintosh* can lend support to *Seeger* only by considering it in itself, severing it from the rest of the succeeding passages even though Justice Clark reads it as an interpretative commentary upon the later statement with the appellation "God." Generally a commentary follows upon a passage to be so interpreted, or if it precedes it—contrary to the usual usage it would pointedly forewarn that the succeeding passage is to be understood by the preceding propositions.

87. Cf. *supra* note 85, Mr. Justice Douglas concurring opinion, at 1. (refers to 85 of this page).

88. Cf. *supra* note 85 at 14-20.

89. Cf. *supra* note 85 (of this page) at 12.

(P)utting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field.

Macintosh v. United States, 283 U.S. 605, 632 (1931). Mr. Justice Clark might have considered that in "putting aside dogmas with their particular conceptions of deity" Chief Justice Hughes was not putting aside the deity but particularity of differing conceptions of the deity and further that the "supremacy of conception" that Chief Justice Hughes here speaks of is a "supremacy" that is related to those "duties superior to those arising from any human relation" because of the relation of these duties to "God" which is apparently what Chief Justice Hughes meant in the succeeding passage. *Id.* at 633-634.

Be that as it may, the Court had a purpose in radically redefining the term "religion," for, in this way, it could avoid the issues raised by the First Amendment cases of *School District of Abington v. Schempp*, 374 U.S. 203 (1963), the ruling on the Bible and the Lord's Prayer, and *Engel v. Vitale*, 370 U.S. 421 (1962) on a voluntary school prayer, and more especially, by *Torcaso v. Watkins*, 367 U.S. 488 (1961), the Maryland notary public oath case, where, after stating that "neither a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion," (at 495) the Court noted that there are religions which are not predicated upon a conventional belief in God. (at 495 n. 11) In addition to the First Amendment problems which would arise under the *Berman* view of the test, a problem would present itself as to the denial of due process which is guaranteed by the Fifth Amendment. In fact, the court of appeals in *Seeger* held that the exemption clause was violative of the due process guarantee in that it established an impermissible classification.⁹⁰ As we have already noted, it is a fundamental rule of the judicial process that a statute should be construed so as not to draw its constitutionality into question, but in *Seeger* the Court's intellectual maneuvering was patently a failure to confront the real, hard issue, that has only been delayed and only time can bring about another unavoidable confrontation—the question whether the free exercise or establishment clause of the First Amendment or the due process guarantee of the Fifth Amendment was possibly violated. The Court was careful to note—as it skirted the constitutional issue—that none of the individuals involved were atheists and that it was not deciding that question.⁹¹ The Court avoided the problem presented by the *Berman* ruling

90. *United States v. Seeger*, 326 F.2d 846, 854 (2d. Cir. 1964).

91. *Cf. supra* note 85 (I) at 10: "No party claims to be an atheist or attacks the statute on this ground. The question is not, therefore, one between theistic and atheistic beliefs. We do not deal with or intimate any decision on that situation in this case. Nor do the parties claim the montheistic belief that there is but one God; what they claim (with the possible exception of *Seeger* who bases his position here not on factual but on purely constitutional grounds) is that they adhere to theism, as opposed to atheism, which is "the belief in the existence of a god or gods: belief in the superhuman powers or spiritual agencies in one or many gods." *Our question here, therefore, is the narrow one: Does the term "Supreme Being" as used in #6(j) mean the orthodox God or the broader concept of a power or being, or a faith," to which all else is subordinate or upon which all else is ultimately dependent"?*

by interpreting the Senate Report⁹² on the 1948 Act in such a way as to conclude that, "rather than citing *Berman* for what it said 'religious belief' was, Congress cited it for what 'religious belief' was not."⁹³ This sort of interpretation is not likely to offer the most assuring prospects of ascertaining legislative intent. Much less persuasive was Mr. Justice Clark's notice that the Senate Report "was intended to re-enact" substantially the same provisions as were found "in the 1940 Act."⁹⁴ To have pointed out, as he does, that statute, of course, refers to "religious training and belief *without more*,"⁹⁵ is not to eliminate effectively the significance of the Senate's specific citation of *Berman* (with its appellation "God") as the Senate's construction of the 1940 Act's "religious training and belief" phrase. The "substantial re-enactment" in 1948 of the 1940 provisions could more reasonably mean that the original reference contained that traditional meaning (if not word) of God-man religious belief which the 1948 points to by its citation of *Berman*. Perhaps the expediency of weakening an obvious historical legislative record prompted the less likely construction.

Under the *Seeger* test, the only statutorily excluded claims are those based upon (1) scruples which are essentially political, sociological or philosophical *and* are accompanied by a disavowal of religious belief as it is defined by the Court, and (2) a personal moral code which is the only basis for objection and has no relation whatsoever to a Supreme Being.

The dubiety of the new test is not centered in the Court's positing of those who are explicitly excluded from exemption, but rather in the novel understanding of what constitutes religion. It would now seem that any conscientious objector may benefit from the exemption from service clause provided he is evidently sincere in his avowed scruples and does not explicitly disavow theism—however they may be understood. Besides, the objector need not disown political, sociological, or philosophical rationales provided these are not the sole basis of his claim for the classification. One might cynically observe that

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

93. Cf. *supra* note 85 (I) at 12-13.

94. *Id.*

95. *Id.*

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a person clever enough to simulate sincerity and intelligent enough to formulate his objection to military service in language as to fit with the legal requirements as interpreted by *Seeger* would have an advantage over the avowed atheist who is sincerely convinced of the uselessness or wrongfulness of modern war. But then too the same cynic ought to allow that even with the benefit of external norms of sincerity, which formerly prevailed in 1917 as membership in a historic pacifist church and in 1940 religious scruples without any such affiliation, that even such a claim could be made expediently without inner profound commitment. These reflections are made to suggest that the practical effect of the *Seeger* ruling is to compound the difficulties with which a Local Draft Board must cope in deciding whether a protestor is truly eligible for the exemption.⁹⁶

IN SUMMATION

Now, to purse together what is allowable under statutory and decisional law. Exemption to the "bearing of arms" based on religious scruples is dependent upon an act of congressional grace and not upon a claim of constitutional right. Once the categories of exemption are established by the supreme legislature, its terms must not be violative of constitutionally guaranteed rights or the due process clause of the Fifth Amendment by a show of discriminatory preference. The direct challenge to a claim of a preferential status of a definition of religion in disregard of the no-establishment and free exercise of religion was avoided by enlarging upon the traditional meaning of religion to include what is equivalently ultimate in every man's conscience, provided that such a profession is not accompanied by an explicit formal affirmation of atheism or is exclusively identical in its rationale with philosophical, political, economic or sociological considerations concerning the justice or utility of war. The line between religious scruples

96. The enlargement of the difficulties are not eased by Mr. Justice Clark's confidence in the provision of the Act for "a comprehensive scheme for assisting the Appeals Board in making this determination (of whether a belief is truly held)—placing at their service the Federal Bureau of Investigation, hearing examiners and other facilities of the Department of Justice." Cf. *supra* note 85(I) at 21-22. The rulings of the civilian boards are not subject to judicial review except as a defense against criminal prosecution, is a relevant question but one which is not directly pertinent to our discourse and so need not detain us here.

which stop short of denying human relations to a "Supreme Being" and whose belief is sincere and meaningful in the sense that it "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God" and accordingly "qualifies for the exemption" is but for that denial or restraint from denial, scarcely discernible from a philosophical moral objector who openly avows atheism. Be that as it may, a conscientious objector whose dissent is honored as sincere and meaningful by the civilian draft boards may choose to serve in the armed forces in a noncombat function or serve his country in civilian work outside the military, contributing to the maintenance of the national health, safety and interest. Obviously, test for a ministerial exemption differs from that of a lay conscientious objector. A claim of ministerial exemption is a factual question susceptible of exact proof by evidence of membership in a pacifist church or sect.⁹⁷ The validity of a "belief" cannot be questioned.⁹⁸ Local Boards, and for that matter the courts, may not pry into the "truth" of a belief or reject it as being incomprehensible. But it is their responsibility to ascertain where the "belief" is "truly held." In every case then, as the Court admits, the question that must be resolved is the one of sincerity. The burden of proof is clearly upon the conscientious objector above all of the *Seeger* type and there are more demands made upon such a one than say upon the dissenter who is a member of a historic pacifist church or even of one whose religious scruples are premised upon theism.

Since the ultimate question is sincerity, the registrant cannot, like the minister-registrant, rely solely on objective facts, but in his case objective facts are relevant only in so far as they help determine the sincerity of the registrant in his claimed belief. The registrant has the burden to show clearly that he is entitled to classification as a conscientious objector, and the burden is not shifted by his statement as to his belief. In a word, he must establish credibility of

97. What constitutes a church or who is an "ordained" minister is a relevant question. Cf. Legal Aspects of Selective Service. Revised January 1, 1963. pp. 19-24. Ministerial Classification in General.

98. "Some theologians, and indeed some examiners might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government." Cf. *supra* note 85(I) p. 21.

his claim of conscience apart from testimonies by witnesses or his own statements as to his beliefs. In this writer's judgment, if this was a difficulty with religious scruples related to theistic premises but with no relation to a pacifist church or sect, the difficulty of proof would seem to be even greater for the dissenter who relates his conscience to a "Supreme Being" without committing himself to belief in a personal God.

The rulings of the civilian boards are not subject to judicial review except as a defense against criminal prosecution. Their determinations are final and may not be reversed by the courts.⁹⁹

Recourse to the courts by defendants is generally predicated on a claim—as in the past—of the unconstitutionality of the statutory exemption or—as in our times—the unconstitutionality of our combative involvement in Vietnam. On the latter question the Supreme Court has at least in two cases refused to grant certiorari¹⁰⁰ by civilian complainants and by

99. "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards are made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." *Estep v. United States*, 327 U.S. 114 (1946) quoted in *Seeger* at 21-22.

100. *Cf. United States v. Johnson*, United States Court of Military Appeals, September 26, 1967, *per curiam*, 18 N.S.C.M.A. 246. Case No. 401 on the appellate docket for the 1967 term of the United States Supreme Court. *Mora v. McNamara*. Lower Federal Courts have traditionally waived this challenge aside since the conduct of war, whether by congressional declaration of war or by presidential powers is considered as purely a political and military act and therefore outside the judicial determination. Strictly speaking, the Supreme Court can legally review the acts of the Commander in Chief. Technically, its power of judicial review extends to all Federal constitutional questions. Its refusal to grant certiorari stems from a longstanding judicial reluctance to challenge the President in wartime over the legality of his wartime actions. Historically, the Supreme Court has a record reaching as far back as the Civil War, of permitting highly questionable acts by the Executive during wartime. Occasionally, it has declared those or similar acts, illegal—but only after the war has ended. Not until after the Civil War was over, did the Court declare that President Lincoln had overstepped his authority in suspending habeas corpus by trying civilians in military courts. It similarly waited until peace came before declaring unconstitutional the martial law imposed on Hawaii during World War II (and the confinement of American born Japanese citizens in segregated camps during the war on the west coast). The sole notable exception (to judicial refrain without effective consequence) occurred at the very beginning of the Civil War, after the right of habeas corpus had been suspended in Maryland under authority granted by President Lincoln to his generals. Chief Justice Taney, act *in camera* for the Supreme Court in *Ex parte Merryman* granted a writ of habeas corpus to a lieutenant of

complainants in military service. It is well to stress that any deferment, whether for occupational reasons or for religious scruples, are given only when they serve the national interest. This is patently obvious in regard to the former. The exemption that covers conscientious objectors is intended to fulfill a double purpose,—the claim of conscience and a civilian service “in the National health, safety, of interest.”

SUMMATION AND ADDENDA

Successive steps at which a justiciable action may arise for conduct in violation of the requirements of the Military Service Act of 1967 and the Uniform Code of Military Justice Act of 1968 may be set down as follows:

- a) those eligible refuse to submit to registration with their local draft board.
- b) registrant refuses to report for induction.
- c) registrant reports for induction but refuses to be sworn in.
- d) serviceman in noncombat military camp refuses to perform normal military assignments that are unrelated to combatant engagement.
- e) serviceman in noncombat military post refuses to fulfill an assignment that is related to combat services of others, e.g., train pilots.
- f) serviceman refuses to go to combat area.
- g) serviceman deserts upon receipt of orders assigning him to combat area.

a secessionist drill company who had been imprisoned by the military in Fort McHenry. When General Cadwallader, commanding the fort, refused to release Merryman, the Chief Justice issued a writ of attachment for contempt against the general. When the Federal Marshall attempting to serve the writ was refused to admittance to the fort, Taney had to content himself with filing his option. In it he argued that only Congress could suspend the right of habeas corpus, that even it could not do so if the civil courts in the area were open, and that the suspension had therefore been an act of military usurpation. It may well be that since the conduct of a war is an exercise of war that as much, once it is initiated, it cannot be as easily constrained by the rule of law and is therefore not deemed justiciable—susceptible to resolution in the courts. This note is, however, not revelatory of whether this writer does in fact personally question the legal basis for the American involvement in Vietnam, but is descriptive of Supreme Court conduct.

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h) serviceman in combat area refuses to perform combat duties.

i) serviceman in combat area deserts in order not to participate in combat operations.

j) serviceman in combat area refuses to carry out a specific combat assignment.

We will limit our concluding considerations to those litigations upon which the United States Supreme Court has ruled as a valid claim of conscience and discourse in part about the regulations on protest and dissent activities of servicemen as these activities may be subsumed under the freedom of expression rights of the first amendment. Apart from the Captain Levy case, consideration of the legitimate invocation of the Nuremburg doctrine on Crimes Against Humanity, Crimes Against Peace, War Crimes, and Conspiracy to commit any of the foregoing crimes, cannot possibly be contained within narrow bounds and deserves for the complexities of the issues involved and the controversies about them a comprehensive and independent study.

Absolute (universal) Conscientious Objectors

Our historical survey of the origins of conscription have been related to the American constitutional history of the conscientious objector to military service and combat. The constitutional premise is still in the construction of the Court an exercise of congressional grace; its statutory provisions until the *Seeger* ruling, membership in a historic pacifist church or sect. The *Seeger* ruling expanded from within the meaning of "religion" to include nontheistic ultimate referrals that in effect stop short of openly avowed atheism. We have noted elsewhere that the high tribunal could have avoided this judicial interpolation in lexicography which has its original inspiration in footnote 10 of *Torcaso*.

It would have been more felicitous had the Court not subsumed in a footnote, nontheistic beliefs into the meaning of religion in the First Amendment. The Court could have adequately rested its ruling on the Anglo-American tradition of law that the right to

belief is a right to an internal domain of absolute inviolability, into which inner sanctum neither the law nor the coercive power of government force its disclosure.¹⁰¹

The national judiciary had steadfastly with but one exception held to the meaning of religion as an orthodox belief in God in accord with the highest tribunals understanding of the term in *Davis v. Beason* (1889), *Church of the Holy Trinity v. United States* (1892), *United States v. Macintosh* (1930), *Hamilton v. Regents of California* (1934). The one exception occurred in a lower federal court *dictum* of Justice Augustus Hand who in *United States v. Kauten* (1943) undertook to redefine "religion" in the Selective Service Act of 1940 in a manner that strongly suggests the latitudinarian construction of *Seeger* even though the Supreme Court makes no such acknowledgment of indebtedness. This *dictum*, which we may note was not actually necessary for the disposition of the litigation in *Kauten* was, however, adopted by the same Second Circuit Court of Appeals that same year in *United States ex rel. Phillips v. Downer*. The Ninth Circuit Court of Appeals, in contrast, clung to the traditional and prevailing meaning of religion in its *Berman* ruling.

The Supreme Court's abiding intention to preserve whenever possible the constitutionality of congressional law would have served in the long run a more positive purpose in constitutional interpretation had this paramount intent been subordinated to the necessity and advantages of preserving the identity of meanings of words even at the hazard of striking down the constitutionality of §6(j) of the Universal Military

101. The question of the legality of selective conscientious objector to a particular war is before the United States Supreme Court now in the case of John H. Sisson, Jr., whose conviction for refusing induction was overturned in April, 1969, by Chief Judge Charles E. Wydzanski of the United States District Court for Massachusetts. *U.S. v. Sisson*, 297 F. Supp. 902, 1969 found the 1967 Selective Service Act unconstitutional on the ground that it discriminates against non-theists, religious or not, with profound moral convictions.

The sincerely conscientious man, whose principles flow from reflection, education, practice, sensitivity to competing claims, and a search for a meaningful life, always brings impressive credentials. When he honestly believes that he will act wrongly if he kills, his claim obviously has great magnitude. That magnitude is not appreciably lessened if his belief relates not to war in general, but to a particular war or to a particular type of war. Indeed a sensitive conscientious objector might reflect a more discriminating conscience, and a deeper spiritual understanding.

Training and Service Act by submitting it to the tests of the twin religious clauses of the First Amendment, the nondiscriminatory requirements of the equal protection of laws, and the due process clause of the Fifth Amendment. In such an eventuality, the problem would have been referred back to the Congress on how to relate the moral prerogative of immunity of conscience to a legal status without endangering on the one hand national security and on the other, without exposing a legal favor to abuse. For not every claim of conscience is a conscientious claim. Mr. Justice Clark's latitudinarian interpolation of "Supreme Being" expression in the Universal Military Training and Service Act is made to rest on a supposed motivation when the Congress did not use the designation "God,"—despite the explicit reference to *Berman* in the Senate Report on the 1948 Act. This was an ingenious exercise of professing to understand and follow the authentic legislative intent contrary, we respectfully submit, to its patent purpose.

The *Seeger* ruling, despite its explicit intent to hold the line against "essentially political, sociological, or philosophical views" and from "merely personal moral code", in fact weakens the distinction by which the cut-off of exemption from military duty may be maintained. First, the restraint from an open avowal of atheism is too tenuous to have any great practical significance. Atheists and secular humanists need not find it conscientiously intolerable to phrase their conscientious objection to war as did the defendants in *Seeger*. Secondly, a "merely personal moral code," sincerely avowed, is scarcely distinguishable from *Seeger's* "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." (*Jakobson* held to the "belief in a Supreme Reality" and *Peter* in the existence of a universal power beyond that of man.) Thirdly, why should a moral philosophical conviction on the immorality of war be distinguishable from a sincere and meaningful belief whose saving grace seems to be that it does not formally avow atheism, as *Seeger* chose not to commit himself one way or the other. Fourthly, does not a moral imperative presuppose a conscientious evaluatory judgment of human realities—not excluding the political, sociological, and economic? Men do not act on

principle but on motivations (practical judgments) in the light of a principle. There are general principles of morality but not general morality. Morality inheres in each particular concrete human act. It seems to this writer that once the conscientious objection is disengaged from its theistic referral, both practically and rationally, for better or for worse the line cannot be logically held.

In *Oesterreich v. Selective Service System Local Board*, 393 U.S. 233 (1938), the Court ruled that the grant of draft-exempt status to a divinity student was not revocable under the delinquency regulations and unconditioned by activities that are unrelated to the original grant of exemption. "When Congress has granted an exemption and a registrant meets its terms and conditions, a Board (cannot) . . . withhold it from him for activities or conduct not material to the grant or withdrawal of the exemption." The draft board had declared Oesterreich delinquent because he protested United States participation in the Vietnam war by returning his draft card to the Government. The delinquency procedure, the Court ruled, was "without statutory basis and in conflict with" Oesterreich's explicit statutory right to an exemption.

Selective Conscientious Objector

One would suppose that if the "religious" conscience of the absolute pacifist can lay claim to draft-exemption, the claim of conscience based on a discriminating evaluatory judgment on the justice or injustice of a particular war would commend itself with greater reasonableness to the legislature. It is safe to say that the generality of mankind does distinguish between just and unjust wars and whatever the merits of the sincere subjective conscience of the absolute pacifist, a free and independent political community would not long survive against an aggressor without the ultimate recourse to arms. But the absolute pacifist has the legal advantage of not subjecting his religious scruples and the validity of his beliefs to inquiry by the government whereas the selective objector, precisely because his moral evaluatory judgment is related to a factual situation, would have to demonstrate the correctness of his moral stance. Besides, this pragmatic difficulty

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is doubly compounded by the danger of converting draft boards into Inquisitions—unless both statutory and decisional law would hold the SCO equally with the ACO to the test of sincerity and not to the demonstrative force of the evaluatory judgment as SCO are in some continental countries, where draft exempt provision is extended to them.

Selective Conscientious Objector—Classified
but not yet inducted

Draftees who have registered and been classified by the local draft board have expressed their selective protest against the American involvement in the Vietnam war by burning their draft card or turning it in to the draft board.

In *United States v. O'Brien*, 391 U.S. 367 (1968), the defendant publicly burned his Selective Service Registration certificate in order to influence others to adopt his antiwar protest. The defendant was convicted under the provisions of the 1965 Amendment to the Universal Military Training and Service Act of 1948, (Section 462(b) (3) of Title 50 App. of the United States Code), whereby Congress subjected to criminal liability not only one who “forges, alters, or in any manner changes” but also one who “knowingly destroys, (or) knowingly mutilates, or in any manner changes any such certificate”. Chief Justice Warren, in the opinion of the Court, upheld the constitutionality of the 1965 Amendment. To the defendant’s claim that his act was ‘symbolic speech’ under the protective coverage of the First Amendment, the Chief Justice responded:

We cannot accept the view that an apparently limitless variety of conduct can be labelled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea. However even on the assumption that the alleged communicative element in O’Brien’s conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the

nonspeech element can justify the incidental limitations on First Amendment freedoms. To characterize the quality of the government interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the governmental restriction is unrelated to the suppression of free speech; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. We find that the 195 Amendment to §462(b) (3) of the Universal Military Training and Service Act meets all these requirements.

Distinguishing the present ruling from that in *Stromberg v. California*, 283 U.S. 359 (1931), the Court stressed that "both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunitative aspect of the defendant's conduct and that the governmental interest and scope of the 1965 Amendment are limited to preventing a harm to the smooth and efficient functioning of the Selective Service Act.

In response to a memorandum circulated to the local draft boards by the then Selective Service Director Lieut. General Lewis B. Hershey, counselling the draft boards to apply the delinquency regulation of the Selective Service Act against draftees who engaged in "illegal" forms of protest—v.g. sit-ins in local draft board offices, turning in registrant's certificates,—the Supreme Court ruled on the validity of these delinquency regulations under which, in one case, the defendant's induction was accelerated and in the other, the defendant incurred loss of deferment.

In *Gutknecht v. United States* decided January 19, 1970, the Court stated through Mr. Justice William Douglas that:

There is nothing to indicate that Congress authorized the Selective Service System to reclassify exempt and deferred registrants for punitive purposes and to provide for accelerated induction of delinquents. . . .

If federal and state laws are violated by registrants they can be prosecuted. If induction is to be substituted for these precautions, a vast rewriting of the draft act is needed.

David Earl Gutknecht had been classified 1-A and was appealing his draft board's refusal to classify him as a conscientious objector. During a protest demonstration he threw his draft credentials at the feet of a United States marshal at the Federal Building in Minneapolis. He was declared delinquent and was ordered to report for induction in five days. When he refused to be inducted he was convicted of refusing to perform a duty required of him by the Selective Service laws and was sentenced to four years imprisonment. In overturning his conviction, the Court stressed that Congress had not set down statutory standards for the acceleration of induction and that the asserted discretion of draft boards to do so constitute a "broad, roving authority, a type of administrative absolutism not congenial to our lawmaking traditions."

In response to complaints in Congress that the Federal courts were interfering with the Selective Service System's efforts to discourage illegal activities which physically obstructed recruitment, sit-ins at local draft boards, draft card burning, turning in registrant's certificate,—by reclassifying the protestors, Congress passed a law in 1967 which permitted draft registrants to challenge their reclassifications in court in one of two ways. One was to submit to induction and then obtain release through habeas corpus proceedings. The other was to refuse to serve and then raise the objection to the reclassification as a defense to the Government's criminal prosecution. On January 26, 1970, the Court ruled in *Breen v. United States* that this provision does not apply in the revocation of a student deferment. In *Oesterreich*, the preceding year, the Court had declared that Congress could not have intended to bar those with draft exemptions specifically granted by Congress—such as men studying for the ministry—from going to court promptly in a civil suit to challenge a draft board's attempt to take the exemption away. In *Breen* the Court said it was "unable to distinguish" any legal difference between an exemption and deferment. Until 1967, exemptions were different from deferments in that they were absolute

declarations by Congress that men in certain categories could not be drafted. Student deferments were subject to the discretion of individual draft boards. But when Congress amended the law in 1967 it also wrote into the statute specific standards for student deferments making them similar to statutory exemptions. The Court reasoned in *Breen* that Congress could not have intended at the same time to give local draft boards broad power to cancel these student deferments free of judicial interference. The defendant, Timothy J. Breen, an undergraduate at the Berkeley School of Music in Boston lost his 2-S deferment and was reclassified 1-A after he gave his draft card to a clergyman as an act of protest. On the second issue, the Court ruled that the Selective Service System lacks legal authority to declare students delinquent and to reclassify them 1-A as punishment for turning in their draft credentials. On this point, the *Breen* ruling is but a prolongation of the ruling in *Gutknecht* which denied statutory basis for accelerating induction.

Protest, Dissent, and Conscientious Objectors in Military Service

Protest and Dissent by Military Personnel

On May 28, 1969, the Department of the Army set forth through the Office of the Adjutant General, *Guidance on Dissent*. Acknowledging that the right to express opinions on matters of public and personal concern is "secured to soldier and civilian alike by the Constitution and the laws of the United States," it noted that the exercise of these rights is not absolute but subject to constitutional, statutory, and regulatory provisions relevant to the status of the subjects.

The constitutional coverage is in the First Amendment guarantee of freedom of speech, press, assembly, and right of petition. Restrictive statutory provisions applicable to all persons, military and civilian relate to activities subversive of military service and the performance of military duties: (1) Enticing desertion, 18 U.S.C. Sec. 1381; (2) Counselling insubordination, disloyalty, mutiny, or refusal to carry out duties, 18 U.S.C. Sec. 2387; (3) Causing or attempting to

cause insubordination, 18 U.S.C. Sec. 2388; (4) Counselling evasion of the draft, 50 U.S.C. App. Sec. 462. Statutory restrictions which are specifically applicable to members of the Army are: (1) 10 U.S.C. Sec. 917 (Article 117, UCMJ)—Provoking speech or gestures; (2) 10 U.S.C. Sec. 882 (Article 82, UCMJ)—Soliciting desertion, mutiny, sedition or misbehavior before the enemy; (3) 10 U.S.C. Sec. 904 (Article 104, UCMJ)—Communication or corresponding with the enemy; (4) 10 U.S.C. Sec. 901 (Article 101, UCMJ)—Betraying a countersign; (5) 10 U.S.C. Sec. 888 (Article 88, UCMJ)—Contemptuous words by commissioned officers against certain officials; (6) 10 U.S.C. Sec. 889 (Article 89, UCMJ)—Disrespect toward his superior commissioned officer; (7) 10 U.S.C. Sec. 891 (Article 91, UCMJ)—Disrespect toward a warrant officer or noncommissioned officer in the execution of his office; (8) 10 U.S.C. Sec. 892 (Article 92, UCMJ)—Failure to obey a lawful order or regulation; (9) 10 U.S.C. Sec. 934 (Article 134, UCMJ)—Uttering disloyal statements.

In addition to constitutional and statutory provisions, there are Army regulations that may relate to "soldier dissent". These are (1) AR 210-10, par. 5-5 Dissemination of publications; (2) AR 360-5, par. 9b Submission for review of unofficial writings or speeches; (3) AR 380-5 Divulgence of National Security Information; (4) AR 600-20 Political Activities (par. 42) and participation in demonstrations (par. 46); (5) AR 600-20, par. 31 Appearance and conduct; (6) AR 604-10 Discharge of personnel who are active members of subversive organizations; (7) AR 670-5 Wearing of unauthorized items on the uniform.

Within the context, then, of the constitutional, statutory, and specifically Army regulatory provisions, *Guidance* delineates the following norms of conduct:

Concerning the possession and distribution of political materials, a commander may delay distribution of a specific issue of a publication which reaches servicemen through official facilities (Post Exchanges and Post Libraries) only if he determines that the specific publication presents a clear danger to loyalty, discipline, or morale of the troops and concurrently with the delay submits a report to the Department

of the Army. A commander may require prior approval be obtained for the distribution on the post of publications which reach servicemen through other than official transits. Denial of permission for distribution must be related to illegal content (counselling disloyalty, mutiny, etc.,) or to the manner of its circulation which impedes training or troop formation. Mere possession of a publication may not be prohibited unless in direct violation of post regulations governing unauthorization and distribution.

Attendance by members of the Army at Coffee Houses should not be barred because of the First Amendment guarantee of freedom of association and expression. If, however, it can be demonstrated that activities therein include illegal acts calculated to have an adverse effect on soldier health, morale or welfare, e.g., counselling soldiers to refuse to perform duty or to desert,—commanders may declare such places “off-limits.”

Mere membership in “Servicemen’s Union” could not constitutionally be prohibited. But commanders are not authorized to acknowledge or to bargain with them. Specific acts by individual members of a “servicemen’s union”, which constitute offences under UCMJ or AR, e.g., refusal to obey orders,—may be dealt with appropriately.

“Underground Newspapers” may not be published on post, with Army facilities, and during duty hours. On the other hand, such publications off post during off duty hours and with private resources comes under the protective coverage of the free press and speech clauses of the First Amendment, subject only to such restrictions of federal law which make certain utterances punishable (e.g., 10 U.S.C. Sec. 2387 or the UCMJ). On post distribution requires the prior approval of the commander according to AR 210-10.

On post demonstrations by soldiers is presently prohibited by AR 600-20 and 600-21. These same regulations prohibit members of the Army to participate in off-post demonstrations if they are in uniform or during duty time, or in a foreign country,—if the activity constitutes a breach of law and

order, or if there is reasonable expectation of violence as a consequent.

Refusal to Obey Orders (to teach)
Captain Levy

The court martial of Captain Howard Brett Levy on charges of wilful disobedience of orders and seeking to promote disloyalty and culpable negligence, ended on June 3, 1967 when he was sentenced to three years of hard labor and dismissal from the service. His court-martial is particularly significant. It was the first time that the war crimes doctrine of Nuremburg was raised as a defense for wilful disobedience of an order to train aidsmen of the Green Beret in the treatment of skin diseases in Vietnam. It marked too the first attempt to cite medical ethics as a defense for wilful disobedience. After chief defense counsel, Charles Morgan, Jr., cited the Nuremburg War Crimes trials and ruling there that any soldier must disobey an order he knows will result in war crimes or crimes against humanity, Colonel Brown, the Army's senior trial judge, rules that the defense could present evidence attempting to prove that the Special Forces (Green Berets), an elite counter-insurgency unit, were guilty of war crimes and crimes against humanity. The original publicly avowed intent of the defense was to plead the defense of truth by proving that since the Green Beret medics were cross-trained in combat, they were killers first and healers second. Despite wide advertisement through the communication media, the defense was unable to produce a live witness with first-hand knowledge of an atrocity committed by a Green Beret medic. In an out of court hearing, Colonel Brown ruled that the evidence proffered was insufficient:

While there have been, perhaps, instances of needless brutality in this struggle in Vietnam, about which the accused may have learned through conversations or publications, my conclusion is that there is no evidence that would render the order to train men illegal on the ground that eventually these men would become engaged in war crimes or in some way prostitute their medical training by employing it in crimes against humanity. Consequently on this issue, the

accused's subjective beliefs may be heard only in mitigation of punishment if the trial reaches that stage. (New York Times. May 26, 1967).

The defense counsel then invoked medical ethics as a defense. He noted that Captain Levy's remark that medicine was being "prostituted" because Green Beret medics used it as a "handmaiden of politics" to convert Vietnamese peasants to loyalty to the Saigon regime. The supposition that a humanitarian act becomes somehow vitiated morally and suspect because by its advantages and goodness it engenders friendliness and invites loyalty in the recipients left the ten career officers who sat in judgment unmoved—and for obvious reasons of basic sanity and common sense.

On the issue of freedom of speech, Col. Brown stated that any member of the armed services had the right to express opinions, privately and informally "on all political subjects and candidates—and in strong and provocative words." An officer can disagree with foreign policy, especially the Vietnam war, as strongly as he wants, so long as his words do not have the clear intent of creating insubordination and mutiny. The defense counsel's argument that "If he's a subversive, he's pretty ineffective subversive" was in this writer's opinion a misconstruction of casual intent with efficacy, since the inefficacy of a deliberate calculated intent to subvert may well be a testimonial to the patriotism and firm convictions of the auditors.

On June 1, 1967, Captain Howard Levy was found guilty by a general court-martial of disobedience, seeking to promote disloyalty and of culpable negligence. On November 13, 1967, the United States Supreme Court denied petition for review filed by the American Civil Liberties Union for Captain Levy.

Captain Dale E. Noyd

The court-martial of Captain Dale E. Noyd is similar to that of Captain Levy in that both were officers who refused to teach as ordered but the two cases are marked off more by their disparities. Capt. Levy of the United States Army, refused to teach medic aidemen whose military assignment would be functionally noncombatant while Capt. Noyd of the United

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States Air Force refused to train fighter pilots whose service would clearly be combatant. Capt. Levy charged that the war in Vietnam was immoral because of alleged atrocities and he therefore pleaded defense under the Nuremburg doctrine on war crimes and wars against humanity. Under this major premise—moral (international)) legal doctrine, he justified his exercise of free expression under the protective coverage of the first amendment guarantees when he urged servicemen not to fulfill their military duties. Capt. Noyd made no such charges nor was he charged similarly. Rather, his protest was that of the selective conscientious objector to American participation in a war of aggression in Vietnam. While avowing his readiness to fight for his country in a defensive war. He asked the Air Force either to accept his resignation or to assign him to noncombat service. His recourse to the civil courts for an injunction to compel the Air Force to accept either alternative was unsuccessful. The Federal District Court (Denver) ruled that civil courts must refrain from interfering with the military and had no jurisdiction until all the available administrative remedies of the military had been exhausted. Judge William E. Doyle said:

It is not unreasonable to require him to exhaust his remedies within the (military) establishment before coming to court. He has enjoyed its benefits and it is not unreasonable to require him to face its burdens. (New York Times, April 26, 1967)

The United States Court of Appeals for the Tenth Circuit affirmed. With the refusal of the United States Supreme Court to act, Capt. Noyd faced court martial proceedings.

The Defense Department has procedures for releasing servicemen who become conscientious objectors after entering service, but the Air Force turned down Capt. Noyd's selective conscientious objection for release to noncombatant duty. While the courts have recognized a serviceman's right to alter his beliefs after his enlistment, they have not ruled that he has a right to object to a particular war.

A nine-member general court-martial found Capt. Noyd guilty of wilful disobedience of a lawful order in refusing to train a student pilot to fly in Vietnam.

Col. Harold R. Vague, who presided as law officer of the court, had ruled that religious convictions would constitute a defense only if they caused a "mental compulsion" that affected Capt. Noyd's capacity "for specific intent" to disobey the order. But both the attorneys for the defendant and Capt. Noyd himself explicitly refused to use any defense that might imply a plea of insanity. The exchange between the presiding officer and the defendant discloses only moral compulsion:

Col. Vague: During that time, were you suffering from any mental disease, defect or derangement that would prevent you from knowing the difference between right and wrong and adhering to the right?

Capt. Noyd: When I was up against that order and that was the ultimate confrontation of what had been going on for a year and a half, I could not obey that order. It was conscious and voluntary, but in a sense I would say I had no choice because I knew it was what I must do.

In response to Col. Vague's question if the captain was at that time "mentally capable," of obeying the order, the defendant said: "Yes sir. If I could have brushed aside everything I believed, I could have obeyed the order." (New York Times, March 9, 1968. Captain Is Convicted for Refusal To Train Pilot for Vietnam War.)

Both the Levy and Noyd cases raise a moral-legal consideration which neither the civil nor military courts have attended to because the military law itself does not give basis for that consideration. But extra-judicial reflections might raise the issue of an argument of greater presumption for obedience in career officers and professional soldiers than in enlisted men, and even to a lesser degree in draftees. This question must be weighed not in the abstract but in the concrete circumstances of an open society dedicated to public challenge and debate, and to disclosure, not only by private individuals but also by members of the government in unofficial capacities as well as in official hearings of congressional committees. Military obedience and discipline cannot reasonably be restricted only to duties with which military personnel agree. Surely these officers are aware of the forty or more mutual defense pacts of their government with other govern-

ments and that the final determination rests with the highest officials of the national government. I am not now ready to resolve this question satisfactorily. But may the mutuality of private judgment on the morality of a war invite less and less credence in professional soldiers and career officers who, apart from enjoying certain privileges for years in military life, are in a sense expected to defer with greater expectation to the orders of higher officials?

Refusal to Obey Combat Orders.

Under the Uniform Code of Military Justice as most recently amended by the Military Justice Act of 1968, military personnel who refuse to obey the order of a superior officer, v.g., to board a troop ship or having reached the area of military operations, refuse to move out to a combat area with a unit,—are subject to the provisions of Article 90. Article 99 details nine specific categories of grave offenses in the presence of the enemy in wartime. A formal declaration of war is not essential because the courts have held since Korea that combat operations in the presence of the enemy are legally equivalent. The maximum penalty is death. Such an extreme punishment is rare and most unlikely. In World War II only one man out of approximately 13 million men under arms was executed for military dereliction of duty. A sentence of death would have to pass through six legal stages of investigation and review, culminating automatically in a personal review by the President. Before a death penalty can be handed down, however, there must be a full investigation under the provisions of the 32d Article of War with rights for “representation, cross-examination and presentation” (Art. 32, Sec. 832, a,b,c.) If that investigation ascertains that a lawful order by a superior officer has been refused, the offender is liable to trial by a locally convened general court-martial. The court’s judgment is next reviewed in the field by officers of the Judge Advocates Office. It then passes to Washington for further review by the Judge Advocate General of the military service concerned, and from there to the Court of Military Appeals,—the military equivalent of the United States Supreme Court, and finally, before sentence can be carried out, to the President. (cf. Articles 59-76)

The above discourse is clearly unrelayed to the serviceman who is in the area of military operations but prior to commitment to actual combat makes a plea of becoming a general conscientious objector before proper authorities and asks for assignment to noncombat service—even if need be in combat area.

CONCLUSION

Not every moral right and obligation is translated into legal rights and obligations nor, even when desirable, is any moral right and obligation easily translatable into a legal guarantee. We see no rational difficulty in affirming the moral right of a subjective conscience to protest a discriminating, selective conscientious objection. We do not thereby affirm with equal title that such moral right must be a legal right. We do approach the vexing problem in terms of tolerable, pragmatic considerations. To date, the actual expectancy of selective conscientious objectors in countries which allow military service-exemption to them, has not been of such high incidence as to pose a threat to the requirements of self-defense. Secondly, every war cannot be supported by a nation under arms without necessary services of civilians and to such capacities and functions the selective conscientious objector may be assigned. Thirdly, even in combat areas a significantly high proportion of the men under arms never participate in combat duties. The selective conscientious objector in the military may be assigned to these necessary services,—caring for the wounded, transportation, maintenance, food distribution, postal service, etc. One need not be committed to the desirability or even the necessity for granting exemption status to the selective conscientious objector in holding, as does this writer, that the prolongation of the rationale of *Seeger* logically leads to this consideration.¹⁰¹