

CONSTITUTIONAL RIGHTS AND CONSCIENTIOUS

OBJECTORS: THE STATUS OF NON-

RELIGIOUS OBJECTORS

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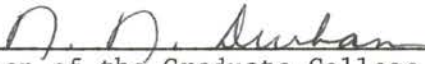
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## CHAPTER I

### INTRODUCTION

#### General Introduction

The Constitution and its First Amendment set forth guarantees for the protection of individual rights that provide a basis for civil liberties in the United States. In recent years, a central issue in the development of civil liberties has been the conscientious objector's struggle to establish safeguards for the exercise of personal freedom to conform to the dictates of conscience, that is, the rights of a conscientious objector to refuse to serve in the armed forces or to bear arms because it would be contrary to his moral or religious principles.

Congress has given some recognition to conscientious objectors' status by exempting them from military conscription under certain circumstances. The law protects freedom of conscience by applying the legal process to the classification of conscientious objectors and by allowing the conscientious objector to serve in ways other than combat or military service. Although the principle of freedom of conscience has been written into law, it has not always been consistently applied. That is, not all of those objectors who are genuinely conscientious

have been protected or treated equally.<sup>1</sup>

### The Problem

The validity of the conscientious objector's exemption is dependent upon a valid and reasonable classification. The purpose of this thesis is to investigate whether the conscientious objector provisions of the draft act which distinguish between religious beliefs and political, sociological, or personal moral beliefs, constitute a constitutionally valid basis for discriminating in the granting of exemption from military service.

As a result of the opposition to the war in Vietnam, an increasing number of selective conscientious objectors -- those who conscientiously oppose fighting in a specific war (i.e. Vietnam) but not all wars -- are attempting to achieve the legal status of conscientious objector. Currently, the law exempts anyone, "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."<sup>2</sup> Under the law, "the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code,"<sup>3</sup>

The statutory qualifications which limits conscientious objector status to those individuals "who, by reason of religious training and belief" not including "essentially political, sociological, or

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<sup>1</sup>Carl Cohen, "The Case for Selective Pacifism," The Nation, July 8, 1968, p. 14.

<sup>2</sup>Public Law 90-40, 90th Congress, S. 1432, June 30, 1967, Conscientious Objectors. 62 Stat. 612 (1967).

<sup>3</sup>Ibid

philosophical views or merely personal moral code" are opposed to compulsory military service, may constitute religious discrimination.<sup>4</sup> Statutory limitation of the qualification for legal protection because of the particular content of the individual's moral principles may be said to discriminate among different beliefs.

Thus, although certain conscientious objectors are protected by law, exemption from military service should be extended to all those who are conscientiously opposed to participation in war and not merely reserved for some because of their special beliefs. The law should provide equal protection of all objectors who are conscientiously opposed to participation in war. The law should also recognize those conscientious objectors who are opposed to a particular war or kind of war if it is to be logically consistent with the United States Constitution.

#### Review of Literature

A review of the literature concerning conscientious objectors indicates that the term and meaning of selective conscientious objector is a relatively new area under investigation. Harold Sherk<sup>5</sup> contends that the public is confused with regard to the state of the law dealing with conscientious objectors. "Much of the confusion is due to misinformation or ignorance as to the state of the law and current

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<sup>4</sup> Ibid

<sup>5</sup> Director, National Service Board for Religious Objectors, 550 Washington Bldg., Washington, D. C.

procedures."<sup>6</sup> Therefore, much of the literature dealing with conscientious objectors constitutes an investigation of the meaning and application of the Military Selective Service Act which states that:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code.

According to Peter Elbow,<sup>8</sup> the Military Selective Service Act, which classifies conscientious objectors, rests on three criteria: "religious training and belief", "conscientiously", and "opposed to participation in war in any form."<sup>9</sup>

Religious training and belief "does not include essentially political, sociological, or philosophical views, or a merely personal moral code" according to the law. Therefore, to obtain the status of a conscientious objector, a registrant must hold a religious position instead of a political, sociological, philosophical or personal moral code position. The Supreme Court in United States v Seeger,<sup>10</sup> however,

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<sup>6</sup>J. Harold Sherk, "The Position of the Conscientious Objector," Current History, July, 1968, p. 21.

<sup>7</sup>Public Law 90-40, 90th Congress, S. 1432, June 30, 1967. 62 Stat. 612 (1967).

<sup>8</sup>Mr. Elbow, a graduate student at Brandeis University, serves as a draft counselor for the American Service Committee in Cambridge, Massachusetts.

<sup>9</sup>Peter Elbow, "Who Is a Conscientious Objector?," The Christian Century, XVC (1968), pp. 989-991.

<sup>10</sup>380 U.S. 163 (1965).



stated the test in these words: "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within statutory definition."<sup>11</sup> In view of the Supreme Court's decision in Seeger, the District Court Judge, Alexander Harvey II, ruled that Michael H. Shacter, an atheist, was qualified for conscientious objector's status.<sup>12</sup>

While the statutory exemption requires "religious training and belief" as a basis for exempting conscientious objectors, John de J. Pemberton<sup>13</sup> states that "political judgments that enter into the conscientious conclusion do not necessarily make that conclusion less religious."<sup>14</sup> That is, a religious pacifist may believe a particular war is unjust and politically dangerous, as well as believe that his participation in war would be contrary to his moral or religious principles.

Elbow's second criteria, "conscientiously", implies sincerity. Elbow contends that "there is a tendency on the part of draft boards and even courts to judge a man's sincerity on the basis of his reply to the question on the use of force. [That is, unless a person is opposed to every form of force, he cannot be sincere in his objection to the

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<sup>11</sup> Ibid., p. 176.

<sup>12</sup> Time, December 20, 1968, p. 42.

<sup>13</sup> Executive Director, American Civil Liberties Union, New York, City.

<sup>14</sup> John de J. Pemberton, Jr., "The War Protestor," Current History, July, 1968, p. 27.

Vietnam war."<sup>15</sup> The courts recognize that sincerity may be expressed religiously as to theistic as well as non-theistic beliefs. The Court in the Seeger Case contends that any serious belief central to a person's life view should qualify him for a conscientious objector's classification as long as his belief is "religious". Furthermore, "local boards and courts . . . are not free to reject beliefs because they consider them 'incomprehensible'. Their task is to decide whether the beliefs professed by the registrant are sincerely held and whether they are, in his own scheme of things, religious."<sup>16</sup>

Finally, Congress contends that "opposed to participation in war in any form" is essentially a political objection. This implies the proposition that it is impossible for an individual to object to a particular war on religious grounds. For example, a religious person who objects to the war in Vietnam and not to all wars would not be classified as a religious objector. Furthermore, because opposition to participation in all wars is considered to be absolute, Elbow contends that "the question of how it applies to finite unpredictable reality is subject to dispute."<sup>17</sup>

#### The Hypothesis

It is the hypothesis of this study that there is a judicial trend towards enlargement of the area of legally acceptable conscientious objector status which presently includes "all sincere religious beliefs

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<sup>15</sup> Elbow, p. 991.

<sup>16</sup> United States v. Seeger, p. 185.

<sup>17</sup> Ibid.

which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."<sup>18</sup>

The Supreme Court in the Seeger Case stated the test in these words:

"A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within statutory definition."<sup>19</sup>

The Court's opinion indicates a trend towards accepting a wide range of "religious" beliefs extending from acceptance of the supernatural to doctrines of ethical humanism and beyond,<sup>20</sup> in order to provide equal protection of all objectors who are conscientiously opposed to participating in war. It is submitted that the present draft law appears to be in conflict with the First Amendment because it fails to grant exemptions to those who are conscientious objectors on non-religious grounds. [That is, the present law puts the government in support of specific religious beliefs and discriminates against atheists or those men who "whether they be religious or not are motivated in their objections to the draft by profound moral beliefs which constitute the central convictions of their beliefs."<sup>21</sup>] Therefore, the section exempting conscientious objectors in the 1967 draft act denies equal protection by preferring religious objectors over non-religious

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> In Boston, U. S. District Judge Charles E. Wyzanski, Jr. ruled that the Selective Service Act of 1967 was unconstitutional in violation of the First Amendment because it failed to grant draft exemptions to those who are conscientious objectors on non-religious grounds. Houston Chronicle, April 1, 1969, p. 1.

objectors. It also appears to violate the due process clause of the Fifth Amendment because it discriminates between different forms of religious beliefs.

The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment . . . . But the concepts of equal protection and due process . . . . But the concepts of equal protection and due process . . . are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so un-justifiable as to be violative of due process.<sup>22</sup>

Finally, in denying exemption to those pacifists who do not subscribe to the government's religious doctrine and qualifications, the draft law may also violate the provisions of the First Amendment that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . ." <sup>23</sup> For example, granting exemption to objectors on religious grounds but denying it to conscientious objectors whose grounds are humanitarian, moral, philosophical, or ethical should be held to violate the government's duty of neutrality in "its relation with . . . religious believers and non-believers."<sup>24</sup> The establishment clause permits accommodation of religion to avoid discrimination against religious beliefs and denial of religious freedom. What constitutes neutrality and how far the government can accommodate religion without over stepping constitutional bounds are highly debatable questions having no single solution.

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<sup>22</sup> Bolling v Sharp, 347 U.S. 497 (1954).

<sup>23</sup> Constitution of the United States, First Amendment.

<sup>24</sup> Everson v Board of Education, 330 U.S. 1, 18 (1947).

## Organization

Chapter Two defines and delineates a conscientious objector. The latter part of the chapter briefly traces the historical development of the draft laws with relation to conscientious objectors and provides the necessary background for an understanding of how legislation and courts have affected their status.

Chapter Three examines and analyzes the Court's opinion and reasoning in the Seeger Case and describes its effect on the status of the conscientious objector. It shows, among other things, the difficulty of distinguishing between a religious conscientious objector and a non-religious conscientious objector. The last part of the chapter discusses the 1967 draft law amendments to the previous statutory provision exempting conscientious objectors and its possible effects on the court's judicial interpretations of the draft law vis-a-vis conscientious objectors.

Chapter Four is devoted to discussing the advantages and disadvantages of legally recognizing the selective conscientious objector. The latter part of the chapter is concerned with proposed reform of the draft law in order to broaden the classification to include all sincere conscientious objectors who oppose military service.

Chapter Five is a summary and conclusion of the legal problems relating to conscientious objectors discussed in the body of the thesis. The conclusions will attempt to sustain the hypothesis that there is a judicial tendency to extend legal recognition to all conscientious objectors in order to insure equal treatment for those who are sincerely and conscientiously opposed to participation in war.

## CHAPTER II

### CONSCIENTIOUS OBJECTORS IN THE UNITED STATES

#### Conscientious Objectors Defined and Delineated

Generally, a conscientious objector is defined as an individual who refuses to serve in the military or who refuses to bear arms because it would be contrary to his religious or moral principles.<sup>1</sup> During World War II, there were a variety of conscientious objectors who were identified by their degree of participation in the military.<sup>2</sup> First, there was the absolute conscientious objector who is opposed to any kind of service to the United States in time of war. Second, there was the conscientious objector who is opposed to participating in anything connected with warlike services even in time of peace. In this second case, the conscientious objector was sent to perform work of public service under civilian direction. Third, there was the conscientious objector who refused to be involved in combatant activities, but was willing to serve in non-combatant activities in the military. Up to the present, the selective service law and the system's classification processes has recognized only the latter two types of

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<sup>1</sup>Webster's Seventh New Collegiate Dictionary (1961), p. 177.

<sup>2</sup>Selective Service System, Conscientious Objector, Special Monograph No. 11, Vol. I (Washington, 1950), p. 2.

conscientious objectors.<sup>3</sup>

Conscientious objectors have been further classified according to the basis of their beliefs. That is, conscientious objectors have been generally classified as a religious, ethical, or political objector. A religious objector is one who objects to bearing arms because of religious teaching and training. An ethical objector bases his objection on a personal moral code that is considered independent of any religious training or belief. The political objector is an individual who is not opposed to all wars, but only to particular "unjust" wars.<sup>4</sup>

A more detailed classification by a member of the Justice Department during World War II divided conscientious objectors into the twelve classes listed below.

1. The religious objector sincerely believes in a personal Creator whose immortal laws forbid the killing of human beings, particularly as set forth in the Commandment "Thou shalt not kill." He believes that war is contrary to the spirit and teachings of Christianity and in opposition to God's will, and he cannot participate, without subjecting his soul to eternal perdition.

2. The moral or ethical objector considers war inconsistent with his moral philosophy and humanitarianism which is independent of religious beliefs, except as it may be predicated upon a belief in a brotherhood of man. That concept is not based on a belief in the fatherhood of God. His conscience is bound by a moral law, which enjoins him from having to do with so destructive and futile a force as war, which evidences a breakdown of reason by substituting force. In fact, most of this type of objector denies a belief in a deity except insofar as there may be a moral force in the universe. It is his view that mankind is sufficient to itself, that it owes no obligation to any power except humankind, and that it may achieve perfection in and of itself without the interposition of any deity or supernatural power.

3. The economic objector, as a student of history, sees all wars

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<sup>4</sup>Mittlebeeler, "Laws and the Conscientious Objector," Oregon Law Review, XX (1941), p. 301.

<sup>3</sup>62 Stat. 612 (1967).

as based upon the inequitable distribution of natural resources, complicated and supported by tariff barriers, immigration restrictions and nationalistic control of colonial markets and sees no hope of this war effecting a more equitable distribution of economic opportunity.

4. The political objector sees war as a means of exploiting the masses for the few who are politically ambitious, or for the governments and deceiving the people.

5. The philosophical objector, generally a student of metaphysics, possesses a personal philosophy which dominates his ways of life.

6. The sociological objector whose objections are based upon a theory that war has no place in his own particular ordering of society.

7. The internationalist objector would destroy or abolish all international boundaries and sovereignty, racial and trade lines, and consider the world one big family of peoples devoid of war.

8. The personal objector, who objects to this particular war, because he believes it to be a war of imperialism or that the Allied Nations have brought it on, or that it is not the type of war in which he can participate.

9. The neurotic objector has a phobia of war's atrocities, a mental and physical fear and abhorrence of killing and maiming, and who therefore cannot participate in it.

10. The naturalistic objector's objection is physiological, and based upon an abhorrence of blood.

11. The "professional pacifist" objector would have "peace in our time at any cost." He would tolerate nothing which would inconvenience his mode of living, but would aggressively limit the liberties of others. He wants to enjoy all the protections of the government, but is unwilling to bear any of the responsibilities of citizenship in this respect.

12. The Jehova Witness objects to all man-made wars and Governments, but says he is not a conscientious objector to all wars, since he would fight and kill in defense of the Theocracy, his property and his brethren.<sup>5</sup>

Conscientious objectors hold in common a tendency to refuse to participate in a war regardless of personal consequences. Beyond this,

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<sup>5</sup> Unpublished report of the Assistant to the Attorney General, 1945, quoted in Selective Service System, 1 Conscientious Objection 3 (Special Monograph 11, 1950).



however, there are probably few convictions which they all share.<sup>6</sup> For example, some may oppose military service only in a particular war they consider unjust or otherwise morally or ethically unsupportable while others may oppose military service in any war in any form. Therefore, grounds of conscientious objection reflect a continuum of beliefs embodying religious, moral, ethical, philosophical, humanitarian, social, economic, and political considerations.

#### Historical Outline

A brief historical discussion of the role of the conscientious objector in the development of the federal draft legislation is appropriate in order to determine the effects legislation has had on the development and progress of the conscientious objector's status. Consequently this section is mainly directed toward a historical development of conscientious objector's legislation in general.

During the Civil War, the Union in 1864 and the Confederacy in 1862 recognized conscientious objectors to be members of religious groups who were opposed to bearing arms. Initially, however, the Union's Draft Act of 1863 did not specifically acknowledge the conscientious objector, but it did provide,

that any person drafted . . . may . . . furnish an acceptable substitute to take his place in the draft; or he may pay . . . not exceeding three hundred dollars . . . for the procurement of such substitute . . . and thereupon such person so furnish-  
the substitute, or paying the money, shall<sup>7</sup> be discharged from  
further liability under that draft . . . .<sup>7</sup>

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<sup>6</sup>See generally 1 U. S. Selective Service System, Conscientious Objection 2-4 (Special Monograph No. 11, 1950); Sibley and Jacob, Conscription of Conscience 18-43 (1952).

<sup>7</sup>12 Stat. 733 (1863).

In 1864, the Union Congress legally and formally recognized religious objectors. That is, assignment to non-combatant duty for those objectors whose religious faith prohibited them from bearing arms. Specifically, the amendment to the Draft Act of 1863 provided,

that members of religious denominations, who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations, shall, when drafted into the military service, be considered noncombatants, and shall be assigned by the Secretary of War to duty in the hospitals, or to the care of freedmen, or shall pay the sum of three hundred dollars . . . to be applied to the benefit of the sick and wounded soldiers . . . .<sup>8</sup>

The Confederate Congress initially passed a draft law in April, 1862 which did not specifically acknowledge the conscientious objector. Exemption was, however, provided for those who supplied a substitute. No special consideration was given to to the religious objector until October, 1862. The Act of 1862 contained the following draft exemption:

All persons who have been and are now members of the Society of Friends, and the Association of Dunkards, Nazarenes, Mennonists in regular membership in their respective denominations: Provided, Members of the Society of Friends, Nazarenes, Mennonists and Dunkards shall furnish substitutes or pay a tax of five hundred dollars each into the public treasury.<sup>9</sup>

At the onset of World War I, the United States Selective Draft Act of 1917 eliminated the provision for substitution or commutation fee and exempted from combatant duty those who were members of "any well-recognized religious sect" opposed to participating "in war in any

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<sup>8</sup> 13 Stat. 9 (1864).

<sup>9</sup> Confederate States of America, The Statutes at Large, (1861-1864), p. 78, quoted in Selective Service System, Conscientious Objector, Special Monograph No. 11, Vol. I (Washington, 1950), p. 45.

form."<sup>10</sup> Specifically, the 1917 Draft Act provided the following:

nothing in this Act shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be non-combatant; . . . .<sup>11</sup>

Because of the difficulty in determining which sect would qualify under the narrow term of the "religious sect" requirement of the 1917 Draft Act, President Wilson issued an executive order allowing conscientious objectors, who opposed combatant service either on religious or other grounds, to be assigned non-combatant duty.<sup>12</sup> No provisions, however, was made for those conscientious objectors who objected to both combatant and non-combatant military service. Congress, in March, 1918, passed a Farm Furlough Act which gave the Secretary of War the authority to furlough servicemen to agricultural services.<sup>13</sup> Furloughs were granted to those registrants recommended by the Board of Inquiry who proved to be sincere in their claim to be opposed to any service with the armed forces.<sup>14</sup>

The Supreme Court, in the Selective Draft Law Cases<sup>15</sup> of 1918,

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<sup>10</sup>40 Stat. 78 (1917).

<sup>11</sup>Ibid.

<sup>12</sup>Executive Order No. 2823 (March 20, 1918).

<sup>13</sup>40 Stat. 450 (1918).

<sup>14</sup>Mulford Q. Sibley and Phillip E. Jacobs, Conscription of Conscience (New York, 1952), pp. 11-12.

<sup>15</sup>245 U. S. 366 (1918).

upheld the power of Congress to compel military service by selective draft under the war powers without considering the rights of conscientious objectors. Between World War I and World War II, the Supreme Court generally decided in several cases that refusal to bear arms on conscientious grounds is not a constitutional right, but a congressional privilege. For example, although it was argued in United States v Macintosh<sup>16</sup> "that a citizen cannot be forced and need not bear arms in a war if he has conscientious religious scruples against doing so,"<sup>17</sup> the Court further stated that exemption from military service on religious grounds was based on congressional policy rather than of constitutional right.<sup>18</sup>

The Draft Act of 1940,<sup>19</sup> exempting conscientious objectors, contained many substantial changes from the Draft Act of 1917. For example, the statute eliminated the requirement that conscientious objectors must be members of a recognized pacifist sect. If an individual personally objected to participating in war in any form based on "religious training and belief," he would be exempt from combat duty under the act:

Nothing contained in this act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States

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<sup>16</sup>283 U. S. 605 (1931).

<sup>17</sup>Ibid., p. 623

<sup>18</sup>The Macintosh Case was overruled by Girouard v United States, 328 U. W. 61 (1946).

<sup>19</sup>54 Stat. 885 (1940).

who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.<sup>20</sup>

Furthermore, the statute provided that conscientious objectors could satisfy their obligation for service in one of two ways. First, those who were opposed to combat duty but not to service in the armed forces would be assigned noncombat duty prescribed by the President.<sup>21</sup> Second, those who were opposed to any service under the military were assigned to "work of national importance under civilian direction."<sup>22</sup> The objectors who were opposed to any type of compulsory military service, however, were not exempted, nor were any provisions made for the absolutist who refused to register. These objectors were violating the law and were subsequently penalized.

The last part of the statute provided for appeal boards and Department of Justice hearings for those conscientious objectors whose claims were not recognized by the local boards. Section 11 of the 1940 Draft Act provided that no person should be tried by a military or naval court martial in any case unless such person had actually been inducted into the armed forces.<sup>23</sup>

any person or persons who shall knowingly hinder or interfere in any way by force or by violence with the administration of this act or the rules or regulations made pursuant thereto, or conspire to do so, shall upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment

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<sup>20</sup>Selective Training and Service Act of 1940, Section 5 (g). (Pub. L. No. 783, 76th Congress, 2nd Session).

<sup>21</sup>Executive Order No. 8606 (December 6, 1940).

<sup>22</sup>Selective Training and Service Act of 1940, Section 5 (g). (Pub. L. No. 783, 76th Congress, 2nd Session).

<sup>23</sup>54 Stat. 894 (1940), 50 U. S. C. App 311 (1946).

for not more than 5 years or a fine of not more than \$10,000, or both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial in any case arising under this act unless such person has been actually inducted for the training and service prescribed under this act or unless he is subject to trial by court martial under laws in force prior to the enactment of this act. Precedence shall be given by courts to the trial cases arising under this act.<sup>24</sup>

Section 11 of the 1940 Draft Act represented a complete change from the procedure under the 1917 Draft Act which provided that the conscientious objector from the time of his orders to report for induction to the time of his discharge was a member of the military service and thus subject to military law.

There are certain qualifications under section 5 (g) of the Draft Act that a conscientious objector must meet in order to be exempted from the military service. One qualification for exemption specifies that a registrant must be opposed "to war in any form." A local board, whose primary responsibility is classifying registrants, may interpret this qualification in various ways. For example, some boards granted exemption to those registrants who were sincere in morally objecting to the current war, while others granted exemptions only to those registrants who opposed all wars.<sup>25</sup>

Similarly, another qualification for exemption specifying "religious training and belief" was also narrowly and broadly interpreted by local boards.<sup>26</sup> For example, some boards defined religion to mean

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<sup>24</sup> Ibid.

<sup>25</sup> Sibley, pp. 67-68.

<sup>26</sup> Ibid.

an outward expression of church attendance or church affiliation, while other boards interpreted religion to mean an inward expression based on philosophical, political, or humanitarian beliefs. In addition, local boards were also guided to some extent by directives from the National headquarters of Selective Service System. For example, General Hershey defined religion to be based on the recognition of some source of all existence which is divine because it is the source of all things."<sup>27</sup> Subsequently, local boards became less liberal and those objectors who were sincere in morally objecting to all wars although not believing in a Divine Creator could not under the Hershey ruling be classified as conscientious objectors.<sup>28</sup>

Soon afterwards, the courts in a number of decisions resolved the meaning of who "by religious training and belief, is conscientiously opposed to participation in war in any form . . . ." Beginning with United States v Kauten,<sup>29</sup> the Second Circuit Court of Appeals upheld the local board's denial of requested classification based on the ground that Kauten was a political objector and not a religious objector.

There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objector 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 justifiably be regarded as a response of the

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<sup>27</sup>Letter to Department of Justice, March 5, 1942, quoted in Julien Cornell, "Exemption from the Draft: A Study in Civil Liberties," Yale Law Journal, January, 1947, p. 269.

<sup>28</sup>Sibley, pp 67-68.

<sup>29</sup>133 F. (2d) 703, (C.C.A. 2d, 1943).

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.<sup>30</sup>

In addition, the court discussed the meaning of "religious training and belief" in the following paragraph:

It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-man and to his universe - a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets . . . .<sup>31</sup>

In United States ex rel Phillips v Downer,<sup>32</sup> however, the court based its decision on a different concept of what is meant by "religious training and belief" than that proposed in the Kauten Case. The court held that Phillips, who objected primarily on ethical and humanitarian grounds, was entitled to an exemption. The court advocated that "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 . . . ." <sup>33</sup> The view that sincere philosophical, moral, or humanitarian beliefs met the statutory requirements was maintained in

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<sup>30</sup> Ibid., p. 708

<sup>31</sup> Ibid.

<sup>32</sup> 135 F. 2d 521 (2d Cir. 1943).

<sup>33</sup> Ibid., p. 524.



several other similar cases that were dealt with by the Second Circuit Court of Appeals.<sup>34</sup> One is not surprised that the local boards were somewhat confused as to the precise definition of religious training and belief and to the qualification requirements of conscientious objectors.

A few years later, the Ninth Circuit Court of Appeals adopted a view regarding the meaning of "religious training and belief" contrary to that exhibited by the Second Circuit Court of Appeals. In Berman v United States,<sup>35</sup> the court held that conscientious exemption from military service must be based on a belief in a deity and not on a "person's philosophy of life or his devotion to human welfare . . . ."<sup>36</sup> Specifically, the court said:

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 high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one.<sup>37</sup>

Although the court affirmed Berman's conviction, the discrepancy between the Second and Ninth Circuit Courts was not resolved until 1948 when Congress incorporated the 1940 Draft Act standard for conscientious

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<sup>34</sup>United States ex rel Reel v Badt, 141 F. 2d 845 (2d cir. 1944); United States ex rel Brandon v Downer, 139 F. 2d 761 (2d Cir. 1944) dictum.

<sup>35</sup>156 F. 2d 377 (9th Cir. 1946), cert. denied, 329 U.S. 795 (1946).

<sup>36</sup>Ibid., p. 378.

<sup>37</sup>Ibid., p. 380.

objectors in the Selective Service Act of 1948:<sup>38</sup>

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form . . . .<sup>39</sup>

In addition to the above classification, Congress further included in the Draft Act of 1948 a definition of what is meant by "religious training and belief" that was to be used by the Selective Service System in considering claims for conscientious objector classification, That is,

Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person . . . whose claim is sustained . . . shall, if he is inducted into the armed forces . . . be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred . . . .<sup>40</sup>

Congress did not mention the discrepancy between the Second Circuit Court opinion and the Ninth Circuit Court opinion. Nevertheless, the Senate Armed Services Committee, paraphrasing the Berman Case and Chief Justice Hughes' definition in the Macintosh Case, observed that:

This section reenacts substantially the same provisions as were found in subsection 5 (g) of the 1940 Act. Exemption extends to anyone who, because of religious training and

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<sup>38</sup> Selective Service Act of 1948 (Universal Military Training and Service Act) Section 6 (j), 62 Stat. 612-13, as amended, 50 U.S.C. App 456 (j) (1964).

<sup>39</sup> Ibid.

<sup>40</sup> 62 Stat. 612 (1948) 50 U.S.C. App 456 (j) (Supp. 1950).

belief in his relationship to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service. (See United States v Berman, 156 F (2) 377, cert. denied, 329 U. S. 795)<sup>41</sup>

The Selective Service Act of 1948, on one hand, was an advancement because it provided a deferment to religious conscientious objectors. On the other hand, however, it narrowly defined religion which subsequently left little room for administrative interpretation, and allowed no recognition for the non-religious objector.

Congress appeared to be entering into an area forbidden by the Constitution. That is, Congress may have been violating the First Amendment's Establishment and Free Exercise Clause by defining religion and by preferring those religions that profess a belief in a Supreme Being.<sup>42</sup> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."<sup>43</sup> In addition, Congress may have been violating the guarantee of equal protection of law implicit within the due process clause of the Fifth Amendment by discriminating between different forms of religious expression.<sup>44</sup> "Discrimination may be so unjustifiable as to be a violative of due process."<sup>45</sup> Therefore, this provision of the Act of

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<sup>41</sup>S. Rep. No. 1268, 80th Congress 2d Session 14 (1948).

<sup>42</sup>United States v Seeger, 326 F. 2d 846 (2d Cir. 1964), 380 U. S. 163 (1965).

<sup>43</sup>United States Constitution, amendment I.

<sup>44</sup>United States v Seeger, 326 F. 2d 846 (2d Cir. 1964), 380 U. S. 163 (1965).

<sup>45</sup>Bolling v Sharp, 347 U. S. 497 (1954).

1948 dealing with "religious training and belief" later became the subject of several court cases and legal interpretations,<sup>46</sup>

The provision of the 1948 Draft Act dealing with complete deferment of objectors who objected to noncombatant duty was amended in the Draft Act of 1951.<sup>47</sup> The Draft Act of 1951 states that if a person "is found to be conscientiously opposed to participation in such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform . . . such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate . . . ."<sup>48</sup> Therefore, persons who object to combatant duty may be assigned to noncombatant duty in the armed service and those who object to noncombatant duty may be assigned two years of civilian work which is in the national interest.

Some of the most difficult administrative problems in the Selective Service Act of 1948 involve the local board's review and classification of each conscientious objector. That is, local boards have had to deal with each and every conscientious objector's case individually in order to determine if he qualifies for conscientious objector's status under the requirements of the draft. For those conscientious objectors whose claims were denied recognition by the local boards, a complex review procedure and a hearing before the Justice Department were provided.

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<sup>46</sup> Peter v United States, 324 F. 2d 173 (9th Cir. 1963), United States v Jacobson, 325 F. 2d 409 (2d Cir. 1963), United States v Seeger 326 F. 2d 846 (2d Cir. 1964).

<sup>47</sup> 65 Stat. 75 (1951), 50 U.S.C.A. App 45 et seq. (1951).

<sup>48</sup> 65 Stat. 86 (1951), 50 U.S.C.A. App 456 (j) (1951).

In United States v Seeger,<sup>49</sup> the Second Circuit reversed a denial of exemption to Seeger, holding that the due process clause of the Fifth Amendment requires equal treatment of all persons who have conscientious objections based on religious beliefs, including non-theistic beliefs.<sup>50</sup> Seeger, who did not believe in the existence of God, claimed conscientious objector's exemption on the basis of the "welfare of humanity and the preservation of democratic values . . . ."51 In a letter to his draft board, Seeger wrote:

My decision arises from what I believe to be considerations of validity from the standpoint of the welfare of humanity and the preservation of the democratic values which we in the United States are struggling to maintain. I have concluded that war, from the practical standpoint, is futile and self-defeating, and that from the more important moral standpoint, it is unethical.<sup>52</sup>

The Supreme Court in 1965 affirmed the Second Circuit Court's judgment, but not on constitutional grounds. Instead, the Court broadly interpreted the Statute's concept of "religious training and belief" to those conscientious objectors who hold "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."<sup>53</sup>

In summary, this review has shown that the Federal government

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<sup>49</sup>65 Stat. 75 (1951), 50 U.S.C.A. App 45 et seq. (1951).

<sup>50</sup>Ibid.

<sup>51</sup>Ibid., p. 848.

<sup>52</sup>Ibid.

<sup>53</sup>380 U. S. 176 (1965). This case will be more thoroughly discussed and analyzed in the next chapter.

through the years has expressed some recognition and consideration for religious beliefs, and has provided some kinds of exemptions to conscientious objectors from participating in the military service. In addition, there has been evidence of conflicting views between congressional intent and the court's opinions regarding the meaning and scope of "religious training and belief" affecting the status of conscientious objectors.

## CHAPTER III

### CONSCIENCE, THE CONSTITUTION, AND THE SUPREME COURT

This chapter describes, analyzes and examines the Court's opinion and reasoning in United States v Seeger. In addition, this chapter discusses the meanings of various terms enacted in the draft act of 1948 exempting conscientious objectors, and describes some of the justifications involved in exempting the conscientious objector. Finally, it discusses the constitutionality of the draft laws and the objector's provisions.

#### United States v Seeger

The question raised before the Supreme Court in United States v Seeger was whether or not the section providing for exemption of any person "who by religious training and belief", which is defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation", was constitutional in view of the religious clauses of the First Amendment and the due process clause of the Fifth Amendment.<sup>1</sup>

Seeger was convicted in the District Court of New York of having refused to submit to induction in the armed forces. He registered in 1953 and was classified 1-A. Four years later, he claimed exemption

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<sup>1</sup>380 U.S. 163 (1965).

as a conscientious objector. He refused to relate his convictions to a "belief in a Supreme Being" because of his skepticism in the existence of a God. Nevertheless, his beliefs were found to be sincere and based on his religious training and belief which included research into religious fields. The Justice Department, however, rejected Seeger's claim for exemption because his objections were not based on religious training and belief in relation to a Supreme Being. The defense, in the district court trial, argued that the classification in the Selective Service Act is unreasonable and arbitrary in violation of the Fifth and First Amendments. The district court contented that section 6 (j) was constitutional and Seeger was convicted. The Court of Appeals for the Second Circuit reversed his conviction on the basis that the Supreme Being requirement of the law created a classification that the due process clause of the Fifth Amendment makes impermissible. That is, "it distinguished between internally derived and externally compelled beliefs."<sup>2</sup>

Like Seeger, both Jakobson and Peter had been convicted in district courts for refusing to submit to induction. They both maintained that they were entitled to exemption under section 6 (j). Seeger, on the other hand, claimed that section 6 (j) was unconstitutional. While the Court of Appeals for the Ninth Circuit Court upheld the conviction of Peter, the Court of Appeals for the Second Circuit reversed Jakobson's conviction finding that his claim came within statutory requirements of section 6 (j) and reversed Seeger's conviction on broad

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<sup>2</sup>326 F. 2d 853 (2d Cir. 1964).



constitutional grounds declaring the section of the federal statute unconstitutional.<sup>3</sup>

In the Supreme Court, Seeger challenged section 6 (j) under the religious clauses of the First Amendment and the due process clause of the Fifth Amendment. First, Seeger contended that the section preferring certain kinds of religious based on the belief in a Supreme Being over other kinds of religious based on non-Supreme Being beliefs was contrary to the establishment clause of the First Amendment. Second, exempting certain kinds of conscientious objectors who profess belief in a Supreme Being while denying it to others who profess different kinds of religious beliefs was in violation of the free exercise clause of the First Amendment. Third, the section exempting conscientious objectors of the 1948 draft act is arbitrary because it discriminates among different forms of religious beliefs and expressions which violates the due process clause of the Fifth Amendment.

In this case the Supreme Court avoided deciding the constitutional questions posed by Seeger by adhering to the rules aimed at encouraging judicial self-restraint. That is, the court applied the rule that it would not "formulate a rule of constitutional law broader than is required by the precise facts to which it is applied," and the rule that when "the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a

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<sup>3</sup>Peter v United States, 324 F. 2d 173 (9th Cir. 1963);  
United States v Jakobson, 325 F. 2d 409 (2d Cir. 1963);  
United States v Seeger, 326 F. 2d 846 (2d Cir. 1964).

construction of the statute is fairly possible by which the question may be avoided."<sup>4</sup> Thus, the Court saved section 6 (j) of the 1948 Military Selective Service Act through statutory interpretation.

The Court contended that Congress was clarifying the meaning of "religious training and belief" by using "Supreme Being" in order to embrace all religion and to exclude essentially political, sociological, or philosophical views."<sup>5</sup> Further, the intention of the 1948 Act, requiring a conscientious objector's exemption to be based on religious beliefs, was essentially the same as the 1940 Act. Supporting this contention, the Court stated

The Senate Report on the bill specifically states that 6 (j) was intended to re-enact "substantially the same provisions as were found" in the 1940 Act. That statute, of course, refers to "religious training and belief" without more.<sup>6</sup>

In view of the reenactment of the 1940 Act in the 1948 Act, the Court stated that "religious training and belief" was the only requirement applicable to conscientious objector's exemption. This requirement was liberally interpreted, however, and Seeger was exempted because he met the criteria set forth by the statute.

Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God of those admittedly qualifying for the

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<sup>4</sup> Ashwander v T.V.A., 297 U.S. 288 (1936)

<sup>5</sup> Ibid., 165

<sup>6</sup> Ibid., 176

exemption comes within the statutory definition.<sup>7</sup>

According to the Court, "parallel to that filled by God" cannot be narrowly confined to traditional concepts of religion, but instead, must be broad enough to embrace "the beliefs of different individuals who will articulate them in a multitude of ways."<sup>8</sup>

The validity of what he believes cannot be questioned . . . . As Mr. Justice Douglas stated in *United States v Ballard*, 322 U.S. 78, 86 (1944): "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." Local boards and courts in this sense are not free to reject beliefs because they consider them "incomprehensible." Their task is to decide whether the beliefs professed by the registrant are sincerely held and whether they are in his own scheme of things, religious.<sup>9</sup>

The statute, however, excludes those beliefs based on a "merely personal code." "The use by Congress of the words 'merely personal' appears to restrict the exception to a moral code which is not only personal but which is the sole basis for the registrants beliefs and is in no way related to a Supreme Being. It follows, therefore, that if the claimed religious beliefs of the respective registrants in these cases meet the test that we lay down their objections cannot be based on a "merely personal" moral code."<sup>10</sup>

In summary, the Supreme Court directed that local boards and courts should first decide whether the objector's belief is sincere and honest. That is, does the objector truly hold the belief he professes

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid., p. 184.

<sup>9</sup> Ibid., pp. 184-185

<sup>10</sup> Ibid., p. 186

to hold. Second, the local board and courts should decide whether the objector's belief, in his own scheme of things, is religious within the meaning of the section 6 (j). That is, does the objector's belief occupy "a place in the life of its possessor parallel to that filled by the orthodox belief in God."<sup>11</sup> In this sense, the Supreme Court recognized that there is a "broad spectrum of religious beliefs" demonstrated in various ways that "embrace the modern religious community."<sup>12</sup> Therefore, local boards and courts should not "require proof" of religious beliefs nor "reject beliefs" because they find them "incomprehensible".<sup>13</sup> Finally, the Supreme Court stated that "exemption does not cover those who oppose war from a merely personal moral code, nor those who decide that war is wrong on the basis of essentially political, sociological or economic considerations rather than religious beliefs."<sup>14</sup>

#### Religious Objector and the Non-Religious Objector

The language of section 6 (j) relating to conscientious objectors provides little assistance in understanding the distinctions between conscientious objection and objections based on other grounds. Although the Supreme Court approved a broad definition of religion in the Seeger Case, does the Court's opinion imply any recognition of a conscientious objector whose objection to participation in war is not

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<sup>11</sup> Ibid., p. 166.

<sup>12</sup> Ibid., pp. 180-183

<sup>13</sup> Ibid., p. 163

<sup>14</sup> Ibid.

based on religious grounds? Is it possible to distinguish between a religious conscientious objector and a non-religious conscientious objector? Some of the language in the Seeger Case provides a distinction between religious and non-religious objectors, while other parts of the opinion leave little in the way of a clear distinction.

The Court considered Seeger to be a "religious" objector even though the government argued that because Seeger denied belief in a Supreme Being, his objection was based on "essentially political, sociological, or philosophical views or a merely personal moral code."<sup>15</sup>

In short, the government regarded Seeger to be a "non-religious" objector. The Court, however, stressed the point that there was no issue between theism and atheism involved in the case. "Nor do the parties claim the monotheistic 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 . . . ."<sup>16</sup>

The Second Circuit Court of Appeals considered Seeger to be "non-theistically religious" which is consistent with the earlier definition contained in the Kauten Case.<sup>17</sup> That is, the court in the Kauten Case states

The provisions of the present statute . . . .  
take into account the characteristics of a skeptical

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<sup>15</sup> Reply Brief for the United States as Petitioner (Seeger, No. 50), pp. 2-3, United States v Seeger, 380 U. S. 163 (1965).

<sup>16</sup> 380 U.S. p. 174

<sup>17</sup> United States v Seeger, 326 F. 2d 846, 853-54 (2d Cir. 1964).

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 exemption . . . . A compelling voice of conscience . . . we should regard as a religious impulse . . . 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.<sup>18</sup>

Therefore, the Second Circuit Court of Appeals in the Seegar Case held that

Kauten's broad definition embraced the recognition that "religion could not be confined to a belief in a supernatural power: That today, a pervading commitment to a moral idea is for many the equivalent of what historically considered the response to divine commands."<sup>19</sup>

But, as Dean Harlan Fiske Stone (later associate and Chief Justice of the Supreme Court) pointed out, conscience may be derived from a moral, ethical or philosophical source instead of a religious source. Thus, the Supreme Court chose to regard Stone's statement as the rationale underlying the conscientious objector's recognition. As quoted by the Court, Chief Justice Stone wrote:

Both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.<sup>20</sup>

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<sup>18</sup> United States v Kauten, 133F. (2d) 703,708 (C.C.A. 2d, 1943).

<sup>19</sup> Ibid.

<sup>20</sup> 380 U.S. at p. 170. Stone: The Conscientious Objector, 21 Columbia University Quarterly, 253, 269 (1919).

The Court placed Stone's liberal statement regarding the freedom of conscience side by side with Mr. Chief Justice Charles E. Hughes' narrowly confined statement of conscience.

Chief Justice Hughes . . . enunciated the rationale behind the long recognition of conscientious objection . . . accorded by Congress . . . when he declared that 'in the forum of conscience, duty to a moral power higher than the State has always been maintained.'<sup>21</sup>

This dissent by Chief Justice Hughes was concerned not only with the admission to citizenship of religious objectors, but it was also the source of the definition "belief in relation to a Supreme Being."

Another unclear passage in the Seeger Case is the test provided by the Court to be used to determine whether a belief meets the requirements of Section 6 (j). That is, "whether a given belief that is sincere and meaningful occupies a place in the life of the possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for an exemption."<sup>22</sup> Although the Court contends that this "test is simple of application" and is "essentially an objective one", it is difficult to understand clearly what is meant by the phrase "occupies a place in the life of the possessor." In what sense does a belief "occupy a place", since there are a variety of value systems or beliefs which could be considered equivalent in theory. Perhaps what the Court meant was that the religious character of a belief is determined not so much by the place it does occupy in the life of the possessor as by the place it ought to occupy in his life. For example,

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<sup>21</sup>380 U.S. at p. 169-70, quoting from United States v Macintosh, 283 U.S. 605, 633 (1931) Hughes, C. J., dissenting).

<sup>22</sup>Ibid., p. 166.

a man may hold what the Court describes as an orthodox belief in God, which clearly qualifies as a religious belief under section 6 (j) even though the man's belief may not have any marked effect on his conduct. The fact that a belief does occupy an important place in an objector's life may be some indication that it is a belief of a sufficiently fundamental character to warrant characterization as a religious belief.

It is the fundamental character of the truths asserted, and the fact they address themselves to basic questions about the nature of reality and the meaning of human existence, that is the primary reason for characterizing a belief in these truths as religious. The Court somewhat adhered to this type of reasoning when it described religious beliefs as that "based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."<sup>23</sup> Therefore, it seems the point of the Court's test is that if any given set of beliefs assumes sufficient importance in the individual's life to impose on him the duty of refraining from participation in any war, then these beliefs can be considered "religious" as used in the statute.

In conclusion, there seems to be little difference between a religious objector and a non-religious objector. Thus, the question arises: why is a conscientious objector, who by reason of the fact that his objection is founded on beliefs about the fundamental nature of reality and meaning of human existence, not necessarily a "religious" objector? Attempting to appraise the validity of arguments made on behalf of the religious and the non-religious conscientious objector,

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<sup>23</sup>Ibid., p. 176



one enters into an area in which judgments are subjective and the meaning of terms debatable, especially if administrative officials and courts incorporate their personal beliefs into the interpretation of statutory language. Consequently, it would be difficult to formulate a sound basis for a distinction between the two classes of objectors (the religious and the non-religious) and difficult to reconcile such judgments on the part of the government with respect to the religious clauses of the First Amendment.

#### Constitutional Issues

It was pointed out earlier in this chapter that the Supreme Court in Seeger avoided deciding constitutional issues and resolved the case on statutory interpretation. The Court avoided deciding the constitutional questions by adhering to the rules aimed at encouraging judicial self-restraint. That is, the Court applied the rule that it would not "formulate a rule of constitutional law broader than is required by the precise facts to which it is applied," and the rule that when "the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."<sup>24</sup> It is a sound principle that the Court should avoid deciding constitutional issues if the case can be disposed of by means of statutory interpretation. The Supreme Court realizes its power to construe the Constitution, particularly, its power to declare acts of Congress

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<sup>24</sup>Ashwander v T.V.A., 297 U.S. 288 (1936).

unconstitutional. This power, therefore, must be exercised with great restraint. Consequently, the Court approaches constitutional questions with reluctance, and decides cases on constitutional issues only if there seems to be no suitable alternative. The question remains, however, should constitutional issues be avoided at the cost of an ambiguous and strained construction of the statute even if the party chose to base "his position . . . not on factual but purely constitutional grounds."<sup>25</sup> If the statute had been interpreted differently, the Court may have found the statute to be discriminating against "those who embrace one religious faith rather than another", thus violating the free-exercise clause of the First Amendment and the due process clause of the Fifth Amendment.<sup>26</sup> Further, does the exemption from compulsory military service for reasons of conscientious objection afford any constitutional protection? In order to answer this question, one must first determine the government's power to compel military service, the constitutional power of Congress to refuse to exempt all conscientious objectors, and the constitutional right of Congress to grant exemption to one class of conscientious objectors and not others.

First, the United States Government has the power to compel military service. The authority to conscript men is based on the congressional power to "declare war", "raise and support armies", "make rules" for governing the land and naval forces supported by the "necessary and proper" clause of the Constitution.<sup>27</sup> The Court's decision in the

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<sup>25</sup>United States v Seegar, 380 U.S. 174

<sup>26</sup>Ibid., p. 188.

<sup>27</sup>Selective Draft Law Cases, 245 U.S. 366; 38 S. Ct. 159; 62 L Ed. 349 (1918).

Selective Draft Law Cases<sup>28</sup> of 1918 was unanimous. Chief Justice White, writing the opinion, ruled that compulsory military service is neither repugnant to a free government nor in conflict with the constitutional guarantee of individual liberty. Chief Justice White wrote

Finally, as 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 the 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 prohibition of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.<sup>29</sup>

The Court in *Jacobson v Massachusetts*<sup>30</sup> stated that:

[A person] may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country,<sup>31</sup> and risk the chance of being shot down in its defense.

Further, the assertion that conscientious objectors have a constitutional right to exemption from conscription was rejected by Mr. Justice George Sutherland in the Macintosh Case.

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 Congress thus relieve him . . . . The privilege of the native born conscientious objector to avoid bearing arms comes not from the Constitution, but from the exemption as in

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<sup>28</sup>245 U.S. 380.

<sup>29</sup>245 U.S. 380.

<sup>30</sup>197 U.S. 11 (1905). This case concerned the constitutionality of a compulsory vaccination law. The quotation concerning compelled military service was merely dictum, and was made simply as part of the supporting reasoning.

<sup>31</sup>Ibid., p. 29 (dictum).

its wisdom it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert the privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers . . . 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 of the justice or morality of the particular war or of war in general.<sup>32</sup>

This decision in the Macintosh Case, as well as the decision in the Selective Draft Law Cases, offer support for the contention that Congress is not constitutionally required to exempt conscientious objectors, and that conscientious objectors do not have a constitutional right to exemption. The Court, in 1934 pointed out that:

From the beginnings of our history . . . conscientious objectors have been exempted as an act of grace from military service . . . .<sup>33</sup>

Thus, between World War I and World War II, the Supreme Court decided several cases which generally established that refusal to bear arms on conscientious grounds is not a constitutional right, but only a privilege which Congress may grant or withhold.

The most frequent analogies used to justify the religious draft exemption are the cases dealing with naturalization. Two leading decisions in this field are United States v Macintosh<sup>34</sup> and United States v Schwimmer.<sup>35</sup> In these cases, pacifists were refused citizenship

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<sup>32</sup>United States v Macintosh, 283 U.S. 605, 623-24 (1931) (dictum).

<sup>33</sup>Hamilton v Regents of the University of California, 293 U.S. 245, 266 (1934). Even though their faith condemned war and training for war, students in a state university discovered that they could not demand exemption from a required course of military training.

<sup>34</sup>283 U.S. 605 (1931).

<sup>35</sup>279 U.S. 644 (1929).

because they would not be willing to bear arms in support of national security. Mr. Justice George Sutherland stated in the Macintosh Case: "Naturalization is a privilege, to be given qualified or withheld as Congress may determine."<sup>36</sup>

The Macintosh Case, however, was overruled by Girouard v United States.<sup>37</sup> The Court, relying on Chief Justice Charles E. Hughes dissent in the Macintosh Case, held that refusal to promise to take up arms did not indicate a lack of attachment to our institutions, nor render a person incapable of taking an oath of allegiance. Although the specific issue before the court in the Girouard Case concerned requirements of the naturalization oath in the Nationality Act of 1940, the Court, nevertheless, took the opportunity to declare:

The struggle for religious liberty has in the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.<sup>38</sup>

In estimating whether Congress may deny exemption altogether to

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<sup>35</sup>279 U.S. 644 (1929).

<sup>36</sup>283 U.S. 615. Both of these cases have been overruled by Girouard v United States, 328 U.S. 61 (1946). Subsequently, Congress inserted a conscientious objector exemption into the naturalization act. This statement, like its counter part in the Draft Act of 1948, contains the "religious training and belief" and the "Supreme Being" requirements.

<sup>37</sup>328 U.S. 61 (1946).

<sup>38</sup>Ibid., p. 68 (dictum).

conscientious objectors, one must take into account relevant decisions on related problems, since claims of religious conscientious objectors raise the "problem of governmental authority to compel behavior offensive to religious principles" and not the "issue of governmental power to regulate or prohibit conduct motivated by religious beliefs."<sup>39</sup>

The court's decision within the last few years has enlarged the scope of the free exercise clause of religious objectors. For example, Sherbert v Verner<sup>40</sup> involved a Seventh-Day Adventist who was denied unemployment compensation by South Carolina because she refused to work on Saturday, her faith's Sabbath being Saturday. The reason for her rejection of governmental authority was a personal one even though the state had a general rule of denying compensation to persons whose unavailability for work was due to merely personal reasons. The Court concluded that there was no "compelling state interest enforced in the eligibility provisions of the South Carolina statute [which] justifies the substantial infringement of an appellant's First Amendment right," and that a "showing merely of a rational relationship to some colorable state interest would [not] suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation . . . .'"<sup>41</sup> Therefore, only compelling considerations of public interest could warrant such a state action. For example, the freedom of worship may be restricted in

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<sup>39</sup> Abington School Dist. v Schempp, 374 U.S. 203, 205 (1963), (Brennan, J., Concurring).

<sup>40</sup> 374 U.S. 398 (1963).

<sup>41</sup> Ibid., p. 406, quoting from Thomas v Collins, 323 U.S. 516, 530 (1945).

order to protect important public interests. Safety may be a decisive factor, as in the case of laws directed against handling of snakes at a public meeting.<sup>42</sup> Individuals and churches in their religious activities may claim the benefit of the state's general laws for the protection of person and property. Public places may be used for religious services.<sup>43</sup> States may enact laws such as Sunday closing laws,<sup>44</sup> or provide transportation at public expense of children attending all schools,<sup>45</sup> where the purpose is to advance legitimate secular purposes. In those instances where legislative measures impinge in a substantial way on religious freedom, the state faces the burden of demonstrating that there are important, substantial, and compelling public interests that require subordination of individual liberty to the common good. According to the Sherbert Case, the government may even be constitutionally required to grant exemptions on religious grounds under certain types of statutes in order not to burden the free exercise of religion where important public interests are not prejudiced by granting the exemptions. If a state provides exemption in favor of free exercise of religion, why could not the national government similarly exempt, in favor of the free exercise of religion, those who are opposed to participation in war for religious reasons? On one hand, it can be argued that forbidding a state to deny unemployment benefits because

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<sup>42</sup>E. Harden v State, 188 Tennessee 17, 216 SW 2d 708 (1948).

<sup>43</sup>Saia v New York, 334 U.S. 558 (1948); Kunz v New York, 340 U.S. 290 (1951); Niemotko v Maryland, 340 U.S. 268 (1951).

<sup>44</sup>McGowan v Maryland, 366 U.S. 420 (1962).

<sup>45</sup>Everson v Bd of Ed., 330 U.S. 1 (1947).

of religious beliefs does not go as far in giving effect to the free exercise clause as prohibiting the national government, in the interests of religious freedom, from performing its military obligations. That is, the Federal government's interest in raising armies would exceed any interest a state may have in denying unemployment compensation to a particular class of persons. But on the other hand, granting to government a greater interest in military obligation, while compelling religious objectors to render military service in violation of their scruples, constitutes an incomparably greater interference with their religious freedom than that forbidden in the Sherbert Case. Therefore, it would seem that their religious beliefs should weigh more heavily in balance and should be within the protection of the free exercise clause, even against the greater interest of government.

Third, since the government provided an exemption recognizing conscientious objectors, the exemption should not discriminate among religions. For example, the essence of the equal protection clause is the prevention of unwarranted class differentiation. That is, the government cannot classify according to race because the Court, in Brown v Board of Education, held this to be an inherently arbitrary classification.<sup>46</sup> Therefore, why should types of religion or non-religion be a less irrational basis of differentiation especially in light of the establishment clause which forbids Congress or any other governmental unit from basing any distinction on religious grounds. The only basis for distinguishing between two types of conscientious objectors is that one is religious and the other is not. It follows

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<sup>46</sup> 347 U.S. 483 (1954). Shelley v Kramer, 334 U.S. 1 (1948).



then that the exemption benefits religion. Congress has enacted a policy through its Draft Act Section 6 (j) which prefers certain specified religious conscientious objectors over others. That is, preference for religious objectors as opposed to non-religious objectors who base their beliefs on secular ideology. The result of this arbitrary preference is an indirect recognition of only those religions which profess the existence of a Supreme Being. It would therefore follow that in matters of constitutional law Congress cannot do indirectly that which it is forbidden to do directly, and in our present context that would extend to establishing religion.<sup>47</sup>

A further complication is represented by the statement Mr. Justice Douglas made regarding the government's neutrality in religious matters.

The First Amendment commands government to have no interest in theology or ritual . . . [o]n matters of this kind government must be neutral. This freedom plainly includes freedom from religion. . . . The "establishment" clause protects citizens also against any law which . . . puts the force of government behind . . . [religious belief] and fines, imprisons, or otherwise penalizes a person for not observing . . . [religion].<sup>48</sup>

What constitutes neutrality and how far the government can accommodate religion without overstepping constitutional bounds are highly debatable questions having no single solution. The issue of neutrality comes into focus in the case of conscientious objection to military service, where commands or dictates of conscience, though not prompted by religion, are just as vital as those with religious sanctions. Can

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<sup>47</sup> Oyama v California, 332 U.S. 633, 636 (1948).

<sup>48</sup> McGowan v Maryland, 366 U.S. 420, 564 (1961) (dissenting opinion).

the state be "steadfastly neutral in all matters of faith"<sup>49</sup> when it grants conscientious objectors exemption to military service on religious grounds and rejects claims based on the compelling dictates of conscience. Perhaps the court's test in Seeger provides some answer: "Does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?"<sup>50</sup> It would therefore seem that conscientious scruples against participation in war, unallied with religious beliefs, but "equally paramount in the lives of their possessors,"<sup>51</sup> ought to command the same constitutional protection. The First Amendment, which protects the "free exercise of religion," protects freedom of belief as well, and prohibits aiding religion against non-believers.<sup>52</sup>

The Supreme Court stated in Cantwell v Connecticut<sup>53</sup> that, while the freedom of belief is absolute, the freedom to exercise one's religion is relative and may be limited in the public interest. For example, medical treatment such as vaccination may be necessary to prevent the spread of epidemic disease despite religious convictions,<sup>54</sup> or flouridation of the water supply may be a necessary health measure.<sup>55</sup>

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<sup>49</sup>Abington School District v Schempp, 374 U.S. 203, 299 (1963) (Brennan concurring opinion)

<sup>50</sup>United States v Seeger, 380 U.S. 163, 184 (1965).

<sup>51</sup>Ibid., p. 183

<sup>52</sup>Torcaso v Watkins, 367 U.S. 488, 496, 495 (1961).

<sup>53</sup>310 U.S. 296 (1940)

<sup>54</sup>Jacobson v Massachusetts, 197 U.S. 11 (1905).

<sup>55</sup>Baer v City of Ben, 206 Oregon 221, 292 P. 2d 134 (1956).

Likewise, the state may punish overt behavior which offends deeply rooted moral conceptions reflected in the laws of the state. For example, the Supreme Court held that the Federal government could prohibit the practice of polygamy by the Mormons in Utah Territory even though this practice was claimed to have religious sanction.<sup>56</sup>

Nevertheless, there are cases where the courts have not found the substantial and compelling public interests required to warrant the restriction on conscience. For example, a person may not be required to take an oath affirming religious belief as a condition of public office.<sup>57</sup> Such a "religious test for public office unconstitutionally invades . . . freedom of belief and religion and therefore cannot be enforced . . . ." <sup>58</sup> Similarly, a state cannot require a salute to the flag from one who is opposed on religious as well as on non-religious grounds.<sup>59</sup> Mr. Justice Robert H. Jackson states,

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.<sup>60</sup>

In the Torcaso Case, as well as the Barnette Case, there may be conscientious scruples, not derived from religious beliefs, which may have a force as strong as religious scruples and be entitled to the same

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<sup>56</sup> Reynolds v United States, 98 U.S. 145 (1879).

<sup>57</sup> Torcaso v Watkins, 367 U.S. 488 (1961).

<sup>58</sup> Ibid., p. 496.

<sup>59</sup> West Virginia State Board of Ed. v Barnette, 319 U.S. 624 (1943).

<sup>60</sup> Ibid., pp. 634-35.

treatment under the Constitution. Therefore, granting exemption to objectors on religious grounds but denying it to conscientious objectors whose grounds are humanitarian, moral, philosophical, or ethical should be held to violate the government's duty of neutrality "in its relation with . . . religious believers and non-believers."<sup>61</sup> This should be held whether or not religious objectors have an independent claim to exemption under the free exercise clause. Otherwise, the separation between religion and state would be broken, even though tolerant interpretation of the establishment clause permits accommodation of religion to avoid discrimination against religious belief and denial of religious freedom. The establishment clause "means at least this: Neither a state nor the Federal Government . . . can pass laws which . . . aid all religions . . . nor influence a person . . . or force him to profess a disbelief in any religion . . . [or penalize him] for entertaining or professing religious beliefs or disbeliefs. . . ."<sup>62</sup> "In short . . . the [First] Amendment 'requires the state to be a neutral in its relations with groups of religious believers and non-believers. . . .'"<sup>63</sup>

Consequently, the government may not act to discriminate against religion or grant it a preferred position. The concept of religion is construed in a broad enough way in the Seeger Case to include any sense of ethical force stemming from a creed, ideology, or philosophy which may or may not center on a supernatural being. A distinction,

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<sup>61</sup>Everson v Board of Education, 330 U.S. 1, 18 (1947).

<sup>62</sup>Ibid., pp. 15-16 (dictum).

<sup>63</sup>Abington School District v Schempp, 374 U.S. 203, 218 (1963), quoting from Everson v Board of Education at p. 18.

therefore, between a religious belief and a philosophical, moral, or ethical belief which cannot be rationally distinguished, is not a constitutionally valid ground for discriminating in the granting of exemption from military service.

If either [the purpose or the primary effect of the state's action] is the advancement or inhibition of religion then [it] . . . exceeds the scope of legislative power as circumscribed by the Constitution . . . [T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.<sup>64</sup>

In addition, the distinction between religious and non-religious objectors made by Congress violates the due process clause of the Fifth Amendment by denying equal protection.<sup>65</sup>

It would also result in a denial of equal protection by preferring some religions over other -- an invidious discrimination that would run afoul of the Due Process Clause of the Fifth Amendment.<sup>66</sup>

In Bolling v Sharpe,<sup>67</sup> the Court held that although the "Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states, . . . the concepts of equal protection and due process . . . are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases." The Court

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<sup>64</sup> 374 U.S. at p. 222.

<sup>65</sup> See Bolling v Sharpe, 347 U.S. 497 (1954).

<sup>66</sup> United States v Seeger, 380 U.S. 163, 188 (1955) (Douglas, J., concurring).

<sup>67</sup> 347 U.S. 497 (1954).

however, recognized that "discrimination may be so unjustifiable as to be violative of due process." Therefore, "a burden that constitutes an arbitrary deprivation of . . . liberty" is "in violation of the Due Process Clause."<sup>68</sup>

The Court in Seeger pointed out that the distinction between religious beliefs which the statute includes and the social, moral, or philosophical beliefs which it excludes are impossible to define. Further, it is not possible to formulate a definition of religion in such a way as to distinguish it from philosophical, social or moral views. Examples of this can be found among the wide range of "religious" beliefs to which the Court refers, extending from acceptance of the supernatural to doctrines of ethical humanism and beyond,<sup>69</sup> as well as the Court's view that "in such an intensely personal area . . . the claim of the registrant that his belief is an essential part of a religious faith must be given great weight."<sup>70</sup> Therefore, a distinction between a religious belief and a philosophical, moral, or ethical belief, being subjective, is not a constitutionally valid ground for discriminating in the granting of exemptions from military service.

In conclusion, although the Seeger decision approved a broad definition of religion, it continues to pose legal and constitutional problems for the conscientious objector:

- (1) Does the court still subscribe to the traditional view that the exemption of conscientious objectors is a

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<sup>68</sup> Ibid.

<sup>69</sup> 380 U.S. 163, pp. 174-75, 180-83 (1965).

<sup>70</sup> Ibid., p. 184

matter of legislative grace and not of constitutional right?

- (2) Must Congress, when it exempts religious objectors, exempt non-religious objectors as well?
- (3) May Congress, when it grants exemption to religious objectors, constitutionally limit that exemption to those professing belief in a deity?
- (4) May Congress, in granting exemption, distinguish between those who object to all war as against having equally sincere and compelling convictions against the morality of a particular war?
- (5) What recognition, if any, must be accorded the absolutist, the person who conscientiously objects to registration, as well as to all forms of prescribed service, however remote from military activity?<sup>71</sup>

#### Military Selective Service Act of 1967

The Selective Service Act of 1967 contains two significant amendments to the previous statutory provision regarding the status of conscientious objectors. The earlier provision exempted those conscientious objectors who based their opposition to war on "religious training and belief," which was defined as "belief in a Supreme Being involving duties superior to those arising from any human relation . . . ."<sup>72</sup> The first amendment<sup>73</sup> to section 6 (j) eliminated the reference to a Supreme Being, which was the statutory definition of "religious training and belief."

Nothing contained in this title shall be construed to require any person to be subject to combatant training

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<sup>71</sup>Clyde E. Jacobs and John F. Gallagher, The Selective Service Act: A Case Study of the Governmental Process (New York, 1967), p. 187.

<sup>72</sup>62 Stat. 612 (1948, as amended, 50 USC App 456 (j) (1964).

<sup>73</sup>81 Stat. 104, Pub L. No. 90-40 (June 30, 1967).

and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code.<sup>74</sup>

It seems that Congress disapproved of the liberal definition of "Supreme Being" provided by the Supreme Court in United States v Seeger.<sup>75</sup> The Conference Report states that it is the conferees' intent to "more narrowly construe the basis of classifying registrants as conscientious objectors."<sup>76</sup> The term religious training should not include "essentially political, sociological, or philosophical views, or merely personal moral code."

The Senate conferees also concurred in the desire of the House language to more narrowly construe the basis for classifying registrants as "conscientious objectors." The recommended House language required that the claim for conscientious objection must be based upon "religious training and belief" as had been the original intent<sup>77</sup> of Congress in drafting this provision of the law.

How congressional action will affect the courts, however, is questionable, since the liberal judicial interpretation of "religious training and belief" was probably the prime motivating factor in enacting the Supreme Being clause as a limiting device in 1948. So, Congress by removing the Supreme Being clause in attempting to limit the Seeger decision may have liberalized the section. Therefore, the

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<sup>74</sup>Ibid.

<sup>75</sup>380 U.S. 163 (1965). See Congressional Quarterly, XXV (1967), p. 1051, 1053.

<sup>76</sup>House of Representatives Conference Report No. 346. 90th Congress, p. 15.

<sup>77</sup>Ibid.



provision in the Draft Act of 1967 is no guarantee against broad judicial interpretation. Furthermore, it would seem that serious questions of unfair discrimination among religious beliefs may result from strict interpretation of the statute.

Finally, the second amendment to the exemption eliminates the special investigation conducted by the Justice Department in cases appealed by a registrant whose local draft board denied his conscientious objector's claim.<sup>78</sup>

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<sup>78</sup>81 Stat. 104, Pub L No. 90-40 (June 30, 1967).

## CHAPTER IV

### SELECTIVE CONSCIENTIOUS OBJECTORS

Conscientious objectors hold in common a tendency to refuse to participate in a war regardless of personal consequences. Beyond this, however, there are probably few convictions which they all share.<sup>1</sup> For example, some may oppose military service only in a particular war they consider unjust or otherwise morally or ethically unsupportable while others may oppose military service in any war in any form. The selective conscientious objector is one who opposes a particular war, but not all wars. He would examine the circumstances of a given war and measure them against the criteria for a just war. Briefly, the principal elements of the just war theory are:

- (1) The requirement that war be a last resort to be used only after all other means have been exhausted.
- (2) The requirement that war be clearly an act of defense against demands backed by the threat of force.
- (3) The requirement that war be openly and legally declared by properly constituted government.
- (4) The requirement that there be a reasonable prospect for victory.

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<sup>1</sup>See generally I U.S. Selective Service System, Conscientious Objection 2-4 (Special Monograph No. 11, 1950); Sibley and Jacob, Conscription of Conscience 18-43 (1952).

- (5) The requirement that the means be proportionate to the ends.
- (6) The requirement that a war be waged in such way as to distinguish between combatants and noncombatants.
- (7) The requirement that the victorious nation not require the utter humiliation of the vanquished.<sup>2</sup>

The just war theory provides a minimal set of criteria for judging a particular war. In addition, the theory is predicated upon the Aristotelian assumption that it is impossible to separate ethical-religious judgments from political judgments.

Should a registrant be granted an exemption because he is conscientiously opposed to military service on the grounds that he believes a particular war is unjust? It is difficult to draw the line of exemption for conscientious objectors. For example, if the exemption is broadly expanded, the Federal Government's defense and security may be endangered. On the other hand, if the exemption is narrowly confined to certain forms of conscientious objection, the draft law may be considered arbitrary and discriminatory.

The validity of the conscientious objector's exemption is dependent upon a valid and reasonable classification. The House Armed Services Committee eliminated the Supreme Being clause from the old draft law, which the Supreme Court used in the 1965 Seeger Case in order to broaden the definition of religious conscientious objectors. Now, the law exempts anyone "who by religious training and belief is conscientiously opposed to participation in war in any form." The term religious

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<sup>2</sup>Richard J. Niebanck, Conscience, War and The Selective Objector (Board of Social Ministry, 1968), pp. 19-21. See, Steward Meacham, "Resistance to the Draft," Liberation, March, 1966, p. 24.

training should not include "essentially political, sociological, or philosophical views, or merely personal moral code."<sup>3</sup> It is submitted that the present draft law is unconstitutional because it fails to grant exemptions to those who are conscientious objectors on non-religious grounds. As such, the present law puts the government in support of specific religious beliefs and discriminates against atheists or those men who "whether they be religious or not are motivated in their objection to the draft by profound moral beliefs which constitute the central convictions of their beliefs."<sup>4</sup> Denying exemption to those pacifists who do not subscribe to the government's religious doctrine and qualification violates the provision of the First Amendment that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . ."<sup>5</sup> Furthermore, the law does not recognize the selective conscientious objector. Is that limitation any more justifiable than a requirement that objection be based on a belief in a Supreme Being? Why should not a person who is conscientiously and religiously opposed to unjust wars allege that to deny him conscientious objector's status while granting it to an absolute pacifist is religious discrimination in violation of the First Amendment? That is, it discriminates between citizens with regard to their qualification for legal protection on the basis of the content of their moral beliefs.

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<sup>3</sup> 81 Stat. 104, Pub L. No. 90-40 (June 30, 1967).

<sup>4</sup> Houston Chronicle, April 1, 1969, p. 4.

<sup>5</sup> Constitution of the United States, First Amendment.

## Selective Objection and Public Policy

Since the President and Congress have not recognized the right of selective conscientious objectors, their reasoning will be examined. The most authoritative recent statement made by advocates of change in the selective service law favoring the selective conscientious objector is contained in the Report of the National Advisory Commission on Selective Service, otherwise known as the Marshall Commission (named after Burke Marshall, its chairman). Although the Marshall Commission did not endorse legal recognition of selective objection, the Commission did give fair representation of it in its final report.

The first proposal, made by the Marshall Commission, was that the statute should be amended to eliminate the requirement that conscientious objectors must be against war in all forms. The report asserted that although "the moral position of absolute pacifism . . . should continue to be honored, . . . it should not be accorded its present place of privilege as the legal doctrine which alone controls the issue of conscientious objection . . . ." <sup>6</sup> Furthermore, the Marshall Commission members recognized the responsibility of a citizen for his own personal moral judgments on matters of public safety.

In particular cases, therefore, it can happen that the conscientious moral judgment of the citizen is in conflict with the judgments made by government, either with regard to the justice of the nation's cause or with regard to the measure and mode in which military force is to be employed in the defense of the nation's vital

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<sup>6</sup>"In pursuit of Equity: Who Serves When Not All Serve?" Report of the National Advisory Committee on Selective Service, Washington, D. C.: Government Printing Office, 1967, pp. 48-49.

interests. In such cases the citizen should not be compelled by government to act against his conscience by being forced to bear arms.

The second proposal, made by the Marshall Commission, was that "public recognition should be given to the fact that there may be moral validity to the conscientious objection to particular wars," and that "measures should be taken to make an effective distinction between two groups presently existent within the student community."<sup>8</sup>

There are responsible students who feel themselves caught in a dilemma, namely, between their duty to their country and what they see as the exigencies of personal integrity and conscience. This group deserves serious consideration. There is also the handful of irresponsible individuals whose opposition to particular wars is simply part of a broader revolt against organized society. This group should be deprived of an issue which gives them an opportunity of seeming to represent all opposition.

Although serious consideration was given to the position of the selective objector, the majority of the Marshall Commission voted to retain the present requirement of the statute, that conscientious objection be based on moral opposition to war in all forms. Thus, in order to support their conclusion, the Commission advanced the following statements:

- (1) The question of "Classical Christian doctrine" on the subject of just and unjust wars is one which would be interpreted in different ways by different Christian denominations and therefore not a matter upon which the Commission could pass judgment.
- (2) The majority holds that so-called selective pacifism is essentially a political question of

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

support or nonsupport of a war and cannot be judged in terms of special moral imperatives. Political opposition to a particular war should be expressed through recognized democratic processes and should claim no special right of exemption from democratic decisions.

- (3) Legal recognition of selective pacifism could open the doors to a general theory of selective disobedience to law.
- (4) The majority of the Commission was unable to see the morality of a proposition which would permit the selective pacifist to avoid combat service by performing noncombatant service in support of a war which he had theoretically concluded to be unjust.
- (5) Legal recognition of selective pacifism could be disruptive to the morale and effectiveness of the Armed Forces. Forcing upon the individual the necessity of making that distinction -- which would be the practical effect of taking away the Government's obligation of making it for him -- could put a burden heretofore unknown on the man in uniform and even on the brink of combat, with results that could well be disastrous to him, to his unit and to the entire military tradition.<sup>10</sup>

The decision of the Marshall Commission, therefore, seems to have been based on the conviction that providing exemption only for ideological pacifists is neater from a legal standpoint, and that recognition of the selective objector could lead to a general civil disobedience. Nevertheless, these reasons for objecting to the recognition of the selective conscientious objector need to be analyzed since selective objection raises legal, political, ethical, and religious questions.

It seems apparent that the Marshall Commission refused to acknowledge any relevant moral or political support for the position of the selective conscientious objector. "The question of 'Classical Christine doctrine' on the subject of just and unjust wars is one which

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<sup>10</sup> Ibid., pp. 50-51

would be interpreted in different ways by different Christian denominations and therefore not a matter upon which the Commission could pass judgment."<sup>11</sup> No one can deny that moral principles of differing content and degree of generality and claims of absoluteness may be held and practiced by different persons with equal conscientiousness. Since the law aims to respect the conscientious objector, the requirement, therefore, that one must be opposed to war in every form is morally unjust. To exclude the just war doctrine which is a tenet of the Catholic Church amounts to religious preference. It discriminates between citizens regarding their qualifications for legal protection on the basis of the content of their moral principles. The law should apply equally to all who are conscientiously opposed to military service, and not reserved for some only because of their special beliefs.

The Marshall Commission held that selective pacifism could not be judged in terms of special moral imperatives because selective pacifism is essentially a political question of support or nonsupport of a war. "Political opposition to a particular war should be expressed through recognized democratic processes and should claim no special right of exemption from democratic decisions."<sup>12</sup> Would it be possible for a person to be a religious objector if he is sincere and conscientiously opposed to participating in the war in Vietnam based on his religious convictions? Obviously not, if Congress maintains the premise that selective pacifism is essentially a political question and rules out

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<sup>11</sup>Ibid., p. 50.

<sup>12</sup>Ibid.



its recognition. Furthermore, a selective pacifist opposed to a particular war may be just as sincere and authentically conscientious as an absolute pacifist.

The Marshall Commission further contended that "legal recognition of selective pacifism could open the doors to a general theory of selective disobedience to law, which could quickly tear down the fabric of government."<sup>13</sup> There is no evidence to support the view that if selective conscientious objectors are recognized, a large number of claims to exemption will be made, because it is not certain how many people will take this position. "As of 1966, conscientious objectors amounted to substantially less than one percent of all registrants in the Selective Service System."<sup>14</sup> Tables I and II in the appendix show the number and percentage of conscientious objectors classified as I-0 and I-W. It does not seem that the Federal Government's ability to carry on a war will be impaired by such a minority.

Whoever claims to be a conscientious objector must make specific application for that status and must undergo intense examination by the classification agency. He must show through his testimony and the testimony of his teachers and associates that the moral scruples he professes are part of his conscientiously held position. "Among the factors considered are such items as membership in a peace church, training in home and church, the general demeanor and pattern of conduct of the individual, his employment in defense-connected activities,

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<sup>13</sup> Ibid.

<sup>14</sup> Abe Fortas, Concerning Dissent and Civil Disobedience (New York, 1968), p. 50.

his participation in religious activities, and his credibility and the credibility of persons supporting his claim."<sup>15</sup> All of the same pressures to conformity would operate fully upon the registrant seeking selective conscientious objection as they do now upon the pacifist objector. The small proportion of those eligible and the proportion among them who will choose to enter the long road toward establishing exemption cannot be expected to be large (See Table II).

What is decided by the classifying agency is not the correctness of the moral beliefs held by the registrant, but his sincerity and the objective truth of his claims. Rules and procedures should be designed to insure the protection and equal treatment of all those who are genuinely conscientious. Thus, the line drawn at universal objection to war should be changed to include those who object to particular wars based on moral and religious grounds.

The Marshall Commission "was unable to see the morality of a proposition which would permit the selective pacifist to avoid combat service by performing noncombatant service in support of a war which he had theoretically concluded to be unjust."<sup>16</sup> In view of the Marshall Commission's first statement that the subject of the just war doctrine is beyond the competence of the Commission, there is no more inconsistency involved in permitting selective pacifists to perform noncombatant service in a war they have concluded to be unjust than there is in permitting absolute pacifists to perform noncombatant service.

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<sup>15</sup>"National Defense - Title 32," Federal Register, Vol. 33, No. 9 (January 13, 1968) p. 493.

<sup>16</sup>Report of the National Advisory Committee on Selective Service, p. 50.

Finally, the Marshall Commission majority held that "legal recognition of selective pacifism could be disruptive to the morale and effectiveness of the Armed Forces. Forcing upon the individual the necessity of making that distinction -- which would have the practical effect of taking away the Government's obligation of making it for him -- could put a burden . . . on the man in uniform . . . his unit and to the entire military tradition."<sup>17</sup> Here the Marshall Commission yielded completely to the military point of view. They seemed to assume that no judgment is possible with respect to a given war except that of the executive branch and of the military. It is agreed that citizens have an obligation to abide by the decisions of the body politic, especially in a democracy where they have a right to participate in making those decisions. However, does this obligation to abide by the lawful decisions of the community override all other obligations a citizen may have. For example, a citizen called to serve in the military may refuse on grounds of conscience. He may conclude that the decision of the majority calls for conduct which is to him morally intolerable. "It can happen that the conscientious moral judgment of the citizen is in conflict with the judgments made by government, either in regard to the justice of the nation's cause or with regard to the measure and mode in which military force is to be employed in defense of the nation's vital interests. In such cases the citizen should not be compelled by government to act against his conscience by being forced to bear arms."<sup>18</sup> In matters of deep moral principle,

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<sup>17</sup> Ibid., pp. 50-51.

<sup>18</sup> Ibid., p. 46

no one can relieve the individual of his duty to exercise his moral judgment; all the state can do is make it harder or easier for him to act in accordance with that judgment. Present provisions for conscientious objectors do make it easier for some conscientious objectors to exercise their moral judgment. Certain provisions, however, need to be changed in order to insure the protection and equal treatment of all objectors who are genuinely conscientious.

Other difficulties in the recognition of selective objection, in addition to those noted by the Marshall Commission, concern the practical problem of determining who are sincere objectors. This problem of judging who are sincere selective objectors should be no greater than that of judging who are sincere pacifists. Because selective objection is based upon a number of considerations, and is a more complex position, selective objectors might be expected to be less fraudulent in their presentation and testimony than pacifists. What has to be decided by the classifying agency is not the correctness of the moral convictions of the applicant, but the objective truth or falsity of his claim. The Court, in the Seeger Case pointed out that "local boards and courts are to decide whether the objector's beliefs are sincerely held . . . ." <sup>19</sup> In addition to the Seeger rule, there are other criteria which might be used to judge the sincerity of the selective conscientious objector. For example, Alan F. Geyer, Director for International Relations, Council for Christian Social Action, suggests the following:

- (1) The selective objector should present evidence

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<sup>19</sup> United States v Seeger, 380 U.S. 163.

of his careful study of the issues at stake in which he refuses to participate . . . .

- (2) The selective objector should demonstrate that he is capable of a serious effort at moral reasoning in the attempt to relate his convictions to the data which he possesses . . . .
- (3) The selective objector should be called upon to demonstrate that he has sought to give his convictions political expression . . . .
- (4) The selective objector should indicate his willingness to serve in some military capacity other than engagement in the particular conflict to which he objects . . . .
- (5) The selective objector should indicate his willingness to accept whatever legal penalties his position may impose upon him . . . .<sup>20</sup>

In conclusion, Congress has made it clear that exemption is available to those who object to "war in any form". Nevertheless, the exemption should be extended to those who object to a particular war in view of the free exercise of religion clause. That is, objection to serve in so-called unjust wars finds support in various religious traditions, and to deny exemption to these dissenters while granting it to those who object to all wars is preferential treatment for particular religious beliefs in violation of the First Amendment. The section of the Selective Service Act which defines conscientious objection should be designed to insure the protection and equal treatment of all objectors who are conscientiously opposed to military service, and not reserved for some only because of their special beliefs.

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<sup>20</sup> Alan F. Geyer, "The Just War and the Selective Objector," The Christian Century, February 16, 1966, reprinted in Social Action, April, 1966, pp. 17-18.

## REFORMS

It is suggested that Congress amend the Selective Service Act of 1967 to provide suitable alternatives of military and civilian service for those who object to participation in a particular war on grounds of conscience. For example, the following provisions for conscientious objectors were adopted by the General Board of Christian Social Concerns of the Methodist Church, April 12, 1967, and recommended to the House Armed Services Committee hearings:

- (1) Statutory recognition of moral, philosophical and humanitarian as well as religious motivation for conscientious objection.
- (2) Statutory provision for non-combatant military duty for those conscientiously opposed to combatant duty and alternative civilian service for those who conscientiously reject participation in any military training or duty.
- (3) Statutory recognition of conscientious objectors to particular war, declared or undeclared, or to the one confronted at the time of induction.
- (4) Statutory provision for those in the Armed Forces who become conscientious objectors to obtain non-combatant status or to be honorably discharged through an orderly and expeditious process subject to administrative review.<sup>21</sup>

Finally, the American Ethical Union recommended that Congress amend the Selective Service Act to provide legal recognition for conscientious objectors to particular wars.

Whereas the development and exercise of individual conscience is encouraged by the highest teachings of the world's greatest philosophies and religions, and

Whereas the American legal heritage has honored and protected the highest degree of liberty for the individual

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<sup>21</sup> Extension of the Universal Military Training and Service Act, No. 12 Hearings Before Armed Service Committee. House of Representatives. 90th Congress 1st Session, May 2-11, 1967, p. 2410.

conscience, and

Whereas the conscience of many men compel them to object to particular wars and military acts even though they do not claim to be absolute pacifists or to object to every war which could conceivably arise, and

Whereas the convictions of such men are often just as strong and sincere as the convictions of absolute pacifists and equally deserving of legal recognition.

Now therefore be it resolved that the American Ethical Union call upon Congress to amend the Selective Service Act to provide legal recognition for conscientious objection to particular wars.<sup>22</sup>

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<sup>22</sup>Ibid., p. 2419.

## CHAPTER V

### SUMMARY AND CONCLUSIONS

Our country has fairly consistently made provisions for exempting conscientious objectors from participating in war under certain circumstances. In 1863, the first Federal Conscription Law did not refer to conscientious objectors, but provided payment of three hundred dollars for procuring a substitute. The draft act of 1864 provided exemption to those who were conscientiously opposed to bearing arms by reason of their religious denomination. Those who were conscientiously opposed to bearing arms, however, had to pay three hundred dollars for the benefit of the sick and wounded or had to do hospital work instead of participating in the military service. The 1917 draft act exempted those members of well recognized religious sects whose creed forbade them to participate in war. Congress eliminated payment and instead required them to serve in noncombatant duty. It was the 1940 Selective Training and Service Act which exempted anyone who by reason of his religious training and belief was conscientiously opposed to participating in war and eliminated the requirement that conscientious objectors must be members of recognized pacifist sects. Congress, in the Selective Service Act of 1948, added the statutory definition of religious training and belief to mean an individual's belief in a Supreme Being. Although the committee reports suggest that the additional language was used to codify the old law as interpreted by the



courts, the reference to Supreme Being was widely viewed as confining the exemption to only those who profess a belief in a Supreme Being and orthodox religions. Furthermore, the law also excluded those conscientious objectors who did not refer to their beliefs as religious regardless of how sincerely the beliefs were held.

Thereafter, the Supreme Court in United States v Seeger<sup>1</sup> ruled that the statutory provisions exempting conscientious objectors could not be restricted to only those professing theistic religions and extended the statute to include those conscientious objectors whose belief is "sincere and meaningful" and which "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."<sup>2</sup>

The concept of religion was construed in a broad enough way in the Seeger Case to include any sense of ethical force stemming from a creed, ideology, or philosophy which may or may not center on a supernatural being. Moreover, the Court in Seeger pointed out that it is not possible to formulate a definition of religious belief in such a way as to distinguish it from philosophical, social, or moral beliefs. Examples of this can be found among the wide range of "religious" beliefs to which the Court refers, extending from acceptance of the supernatural to doctrines of ethical humanism and beyond,<sup>3</sup> as well as the Court's view that "in such an intensely personal area . . . the claim of the registrant that his belief is an essential part of a

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<sup>1</sup>380 U. S. 163 (1965).

<sup>2</sup>Ibid., p. 176.

<sup>3</sup>Ibid., pp. 174-75, 180-83.

religious faith must be given great weight."<sup>4</sup> Therefore, the hypothesis that there is a judicial trend toward enlargement of the area of legally acceptable conscientious objector status finds support in the broad way that the concept of religion was construed by the Court in the Seeger Case. Furthermore, the Court's opinion indicates a trend towards accepting a wide range of "religious" beliefs extending from acceptance of the supernatural to doctrines of ethical humanism and beyond,<sup>5</sup> in order to provide equal protection of all objectors who are conscientiously opposed to participating in war.

Recently, in the Military Selective Service Act of 1967, Congress eliminated the reference to a Supreme Being which was the statutory definition of "religious training and belief." It seems that Congress disapproved of the liberal definition of "Supreme Being" provided by the Supreme Court in the Seeger Case. In Congress' view, the term religious training and belief should not include "essentially political, sociological or philosophical views, or merely personal moral code." The language of the new provision is no guarantee against broad judicial interpretation since the liberal judicial interpretation of "religious training and belief" was probably the prime motivating factor in enacting the Supreme Being clause as a limiting device in 1948. Furthermore, strict interpretation of the 1967 draft act exempting conscientious objectors may raise serious questions of improper discrimination among religious beliefs.

The validity of the conscientious objector's exemption is

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<sup>4</sup>Ibid., p. 184

<sup>5</sup>Ibid., pp. 174-75, pp. 180-83.

dependent upon a valid and reasonable classification. A distinction between a religious belief and a philosophical, moral, or ethical belief which cannot be rationally distinguished is not a constitutionally valid ground for discriminating in the granting of exemption from military service. Therefore, it is submitted that the present draft law fails to grant exemptions to those who are conscientious objectors on non-religious grounds. As such the present law puts the government in support of specific religious beliefs and discriminates against atheists or those men who "whether they be religious or not are motivated in their objection to the draft by profound moral beliefs which constitute the central convictions of their beliefs."<sup>6</sup> Therefore, the section exempting conscientious objectors in the 1967 draft law appears to violate the concept of equal protection which the Court has read into the due process clause of the Fifth Amendment because it discriminates among different forms of religious beliefs. Furthermore, denying exemption to those pacifists who do not subscribe to the government's religious doctrine and qualification also appears to violate the provisions of the First Amendment that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . ."<sup>7</sup>

Finally, the 1967 draft law does not recognize the selective

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<sup>6</sup>In Boston, U. S. District Judge Charles E. Wyzanski, Jr. ruled that the Selective Service Act of 1967 was unconstitutional in violation of the First Amendment because it failed to grant exemptions to those who are conscientious objectors on non-religious grounds. Houston Chronicle, April 1, 1969, p. 1.

<sup>7</sup>Constitution of the United States, First Amendment.

conscientious objector, one who opposes a particular war. Congress has made it clear that exemption is available only those who object to "war in any form." Nevertheless, exemption from military service should be extended to those who object to a particular war. Objection to serve in so-called unjust wars finds support in various religious traditions, and to deny exemption to these dissenters while granting it to those who object to all wars is preferential treatment for particular religious beliefs. It is submitted that to deny conscientious objector's status to a person who is conscientiously opposed to unjust wars, while granting conscientious objector's status to an absolute pacifist, may violate the First Amendment. That is, it discriminates between citizens with regard to their qualification for legal protection on the basis of the content of their moral beliefs. The section exempting conscientious objectors should extend to all conscientious objectors in order to insure the protection and equal treatment of all objectors who are truly conscientiously opposed to participation in war.

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APPENDIX

TABLE I  
 CLASSIFICATION OF SELECTIVE SERVICE  
 registrants, 1965-1967

(In Thousands)

Classification Status of Registrants, 18½-26 years of age	1965		1966		1967	
	No.	Percent	No.	Percent	No.	Percent
Conscientious objec- tors available for civilian service I-0	11	0.1	9	0.1	11	*
Conscientious objec- tors working in civil- ian service I-W	3	*	6	*	6	*

\*Denotes less than 0.05 percent.

SOURCE: U. S. Bureau of Census, Statistical Abstract of the United States: 1968. (89th edition.) Washington, D. C., 1968 p 262.

TABLE II  
 CLASSIFICATION OF SELECTIVE SERVICE  
 REGISTRANTS, September 30, 1966

	Class I-0			Class I-W	
	Not examined	Examined and qualified	19-26 yrs of age	At Work	Released
Total	4,934*	3,253*	1,550*	4,933*	6,045*

\*Denotes less than 0.05 percent

SOURCE: "In Pursuit of Equity: Who Serves When Not All Serve?"  
Report of the National Advisory Committee on Selective Service,  
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