

## **CONSCIENTIOUS OBJECTION: WILL THE UNITED STATES ACCOMMODATE THOSE WHO REJECT VIOLENCE AS A MEANS OF DISPUTE RESOLUTION?**

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The 1990s promise to be an era of increased regional conflicts. While many persons hoped that the end of the Cold War between the Soviet Union and the West would usher in a period of peace and stability, that hope has been shattered by recent events. Ethnic, religious and regional tensions threaten to tear apart many of the Republics that comprised what were formerly the Soviet Union and portions of Eastern Europe. The Gulf War demonstrated the fragile nature of the Middle East. The Tiananmen Square Massacre in China and the assassination of Rajiv Gandhi in India demonstrated the underlying violence lurking within those two nations. Developing industrial super-powers like Korea, Taiwan and Singapore face demands for more democratization and, if it is not realized, these countries may be the scenes of violent encounters. The Third World, which includes Africa, Latin America and parts of Southeast Asia, is constantly rocked by internecine warfare. First World Countries—the United States, Western Europe and Japan—have generally managed to solve their internal disputes in the political arena, but this could abruptly change. Consumer expectations continue to rise in these countries, but the gap between rich and poor, especially in the United States, is also widening. An economic collapse could reveal, in stark detail, the contradictions implicit in Western society and produce tensions not unlike those that led to some of the urban riots in the late 1960s. The disturbances following the Rodney King case in Los Angeles may signal a warning of what could happen on an even wider scale throughout the United States.

George Bush proclaimed that the Gulf War would usher in a “New World Order.” This call for a “New World Order” sig-

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naled that the United States would use military force to keep the lid on unstable conditions in the world, at least when it was in the United States's best interest to do so. Because of the nature of the world today, regional conflicts will continue to occur. The United States is likely to intervene in some of these conflicts either directly, as in Panama or Kuwait, or indirectly, as in Central America or Ethiopia.

This situation will produce new tensions for those who are conscientiously opposed to war. Young American men and women occasionally may be called upon to take part in military operations under circumstances that could cause them to periodically reexamine their views on war. Many young men and women from other countries torn by civil conflict will continue to seek asylum in the United States because of their conscientious opposition to participation in these conflicts.

Since the end of the Vietnam War and the end of the draft in the United States, most persons in the United States have given very little thought to the problems faced by conscientious objectors in American society. The treatment accorded young men and women in the United States military who conscientiously refused to participate in the Gulf War, and the large numbers of refugees, particularly from El Salvador, who have sought asylum in the United States because of their refusal to participate in regional conflicts, demonstrate that the United States must confront the problem and reexamine its commitment to respect the freedom of conscience of all persons.

The United States Supreme Court has aptly recognized that "[o]urs is a Nation of enormous heterogeneity in respect of political views, moral codes, and religious persuasions."<sup>1</sup> Our Nation, to the extent practicable, should and does accommodate this heterogeneity. The beliefs of conscientious objectors are entitled to respect not only because of our long tradition of recognizing the individual right to a free conscience, but also because conscientious objectors can and do contribute to the strength of the United States.

By speaking up against war in general and against specific wars in particular, conscientious objectors caution us against blindly following our leaders into military confrontations. Conscientious objectors also remind us that there may be alternatives to war and military action. Greater respect for conscientious ob-

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<sup>1</sup> *Gillette v. United States*, 401 U.S. 437, 457 (1971).

jection in our society may lead us to focus on civilian-based defense systems which could provide us with greater flexibility in dealing with "internal usurpers and international aggressors."<sup>2</sup>

Providing legal protection to conscientious objectors satisfies two values that our tradition respects. Our libertarian values respect individual differences, particularly differences based on religion and conscience, at least to the extent that they do not threaten the social order. Our democratic values require us to tolerate many ideas and opinions in the belief that the truth of any idea is best tested by competition in the market.<sup>3</sup>

Thus, as our Nation embarks upon a "New World Order," we can best ensure a new emphasis on non-violent solutions by giving due respect to those who conscientiously oppose the use of force and violence as the means of settling disputes. Some adjustments to our existing laws can help accomplish this goal.

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<sup>2</sup> SHARP, CIVILIAN-BASED DEFENSE - A POST-MILITARY WEAPONS SYSTEM 1 (1990). See also ROBERT L. HOLMES, ON WAR AND MORALITY 291 (1989), which provided that:

The aim should not be to end conflict. That would be utopian and might not even be desirable. The aim should be to develop nondestructive ways of dealing with conflict. Violence by its nature cannot do that. Nonviolence can.

*Id.* The U.S. National Conference of Catholic Bishops stated:

The Second Vatican Council praised "those who renounce the use of violence in the vindication of their rights and who resort to methods of defense which are otherwise available to weaker parties, provided that this can be done without injury to the rights and duties of others or of the community itself." To make such renunciation effective and still defend what must be defended, the arts of diplomacy, negotiation, and compromise must be developed and fully exercised. Nonviolent means of resistance to evil deserve much more study and consideration than they have thus far received. There have been sufficient instances in which people have successfully resisted oppression without recourse to arms. Nonviolence is not the way of the weak, the cowardly, or the impatient.

U.S. National Conference of Bishops, Pastoral Letter, *The Challenge of Peace* ¶ 222 (May 3, 1983). The effectiveness of massive nonviolent demonstrations against internal usurpers was manifested in the failure of the coup staged by the Soviet military in August 1991, due in large part because of the tens of thousands of demonstrators who rose to the defense of their elected president. See Serge Schmemmann, *Gorbachev Back as Coup Fails, But Yeltsin Gains New Power*, N.Y. TIMES, Aug. 22, 1991, at A1.

<sup>3</sup> Justice Holmes, in a famous dissent, once declared that "the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

## I. THE LEGAL STATUS OF CONSCIENTIOUS OBJECTORS WHO REFUSE TO SUPPORT AMERICAN MILITARY OPERATIONS

### A. *International Law*

The United Nations Universal Declaration of Human Rights protects freedom of conscience.<sup>4</sup> International law, however, has not traditionally been interpreted to require that nations respect the rights of conscientious objectors who refuse to participate in the military.<sup>5</sup>

An effort by the United Nations Commission on Human Rights to encourage member states to enact legislation and to take measures aimed at exempting conscientious objectors from military service has been underway for several years. In 1983, the Subcommission on Prevention of Discrimination and Protection of Minorities issued a report that urged states to recognize an exemption from military service for conscientious objectors and to grant asylum to those who are persecuted because of their conscientious objection.<sup>6</sup> In 1989, the Commission passed a resolution urging the Secretary General to transmit to member states its recommendations urging states to enact legislation recognizing exemptions for conscientious objectors.<sup>7</sup> The reports and resolutions passed by the Commission are not binding on the United States, but they do indicate that the international community is moving towards a greater consensus on the value of respecting the beliefs of conscientious objectors.

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<sup>4</sup> The United Nations Universal Declaration of Human Rights (1948), Article 18, provided:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

The United Nations Universal Declaration of Human Rights, 1948, art. 18, reprinted in JOSEPH MODESTE SWEENEY ET AL., CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM (2d ed. Doc. Supp. 1981).

<sup>5</sup> For example, the American Declaration of the Rights and Duties of Man (1948), Article XXXIV, declared: "It is the duty of every able-bodied person to render whatever civil and military service his country may require for its defense and preservation, and, in case of public disaster, to render such services as may be in his power." *Id.*

<sup>6</sup> *Question of Conscientious Objection to Military Service*, U.N. Doc. E/CN.4/Sub 2/1983/30 (June 27, 1983).

<sup>7</sup> *Conscientious Objection to Military Service*, Res. No. 1989/59 of the Commission on Human Rights (March 8, 1989). See also Matthew Lippman, *The Recognition of Conscientious Objection to Military Service as an International Human Right*, 21 CAL. W. INT'L L.J. 31 (1990).

B. *The United States Constitution*

Like the United Nations Universal Declaration of Human Rights, the First Amendment to the United States Constitution protects freedom of conscience.<sup>8</sup> United States courts, however, have refused to grant constitutional protection to many acts of those who are conscientiously opposed to war.

The United States Supreme Court has extended First Amendment protections to peaceful demonstrations and speech that is opposed to the draft and military operations. These protections have not always been present. For example, during World War I the Supreme Court held that the First Amendment did not protect those who spoke out against the draft and the war.<sup>9</sup> By 1966, the law had sufficiently developed to the point of enabling the Supreme Court to confidently declare that there could be "no question but that the First Amendment protects expressions in opposition to national foreign policy in Vietnam and to the Selective Service system."<sup>10</sup> Nonetheless, when anti-war demonstrations involve the destruction of or the trespass upon government property,<sup>11</sup> threaten violence or other unlawful action,<sup>12</sup> or disclose or threaten to disclose classified governmental information,<sup>13</sup> these activities may be curtailed independently of the speaker's message.

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<sup>8</sup> See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); see also *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977) (First Amendment principles "prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher.").

<sup>9</sup> Justice Holmes applied his formulation of the "clear and present danger" test to uphold the convictions of those who protested against the war and conscription into the military. See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

<sup>10</sup> *Bond v. Floyd*, 385 U.S. 116, 132 (1966).

<sup>11</sup> See *United States v. Albertini*, 472 U.S. 675 (1985) (rejecting the argument that a military base is a "public forum" for First Amendment activities); *Greer v. Spock*, 424 U.S. 828 (1976) (same); *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding a conviction for burning a draft card).

<sup>12</sup> Cf. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (holding that the First Amendment protects a nonviolent boycott); see also *Bond*, 385 U.S. at 134 (holding that Bond could not be refused his seat in the state legislature when he did not advocate that "people should break the law," but only stated that he admired "the courage of someone who could act on his convictions knowing that he faces pretty stiff consequences").

<sup>13</sup> Compare *New York Times Co. v. United States*, 403 U.S. 713 (1971) (holding that the government had not met its heavy burden to justify the enforcement of a

There is a long tradition in the United States of persons who refuse to pay taxes because of their opposition to military expenditures. This tradition dates back to at least 1846, when Henry Thoreau refused to pay a tax because of his opposition to the Mexican-American War. Congress, however, has refused to accommodate those persons who refuse to pay taxes because of their opposition to war,<sup>14</sup> and the courts continue to hold that the First Amendment is not infringed when the government penalizes these persons for failure to file tax returns.<sup>15</sup>

In 1929, the United States Supreme Court first tackled the question of whether conscientious objectors have a constitutional right to refrain from participating in the military in *United States v. Schwimmer*.<sup>16</sup> The Court held that the United States could refuse to naturalize a pacifist who refused to take an oath that she would support the United States by force of arms.<sup>17</sup> Similarly, in 1944, the Supreme Court held in *In re Summers*<sup>18</sup> that the Illinois Supreme Court could, notwithstanding the First and Fourteenth Amendments, refuse to allow a conscientious objector to be admitted to the practice of law.<sup>19</sup>

In 1946, the Supreme Court, in *Girouard v. United States*,<sup>20</sup> reinterpreted the Nationality Act of 1940 to allow conscientious objectors to be naturalized. Justice Douglas, in dicta, advanced a constitutional underpinning for the Court's interpretation of the Act:

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prior restraint on publication) *with* *Snepp v. United States*, 444 U.S. 507 (1980) (upholding prepublication clearance procedures for former CIA employees).

<sup>14</sup> Senator Mark Hatfield has periodically introduced legislation to create a special Peace Fund. Money from the Fund would be distributed by a board appointed by the President to support programs for non-military and nonviolent solutions to military conflict. See S. REP. NO. 689, 102d Cong., 1st Sess. (1991) (introduced by Senator Hatfield on March 19, 1991).

<sup>15</sup> See, e.g., *Nelson v. United States*, 796 F.2d 164 (6th Cir. 1986); *Randall v. Commissioner*, 733 F.2d 1565 (11th Cir. 1984).

<sup>16</sup> 279 U.S. 644 (1929).

<sup>17</sup> *Id.* at 652-53; *accord* *United States v. Macintosh*, 283 U.S. 605 (1931); *United States v. Bland*, 283 U.S. 636 (1931). These cases were overruled on statutory grounds in *Girouard v. United States*, 328 U.S. 61 (1946).

For background reading on the *Schwimmer* case, see Flowers & Lahutsky, *The Naturalization of Rosika Schwimmer*, 32 J. OF CHURCH & STATE 343 (1990).

<sup>18</sup> 325 U.S. 561 (1945).

<sup>19</sup> The United States Supreme Court has held that a university rule requiring all able-bodied male students under the age of 24, as a condition of their enrollment, to take a course in military science and tactics did not violate the constitutional rights of conscientious objectors. See *Hamilton v. Regents of the Univ. of Calif.*, 293 U.S. 245 (1934).

<sup>20</sup> 328 U.S. 61 (1946).

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>21</sup>

Any hope that the Court would hold that conscientious objection was protected by the Constitution was shattered, however, in *Gillette v. United States*,<sup>22</sup> wherein the Court held that Congress was not obliged to exempt persons who are opposed to participation in only a particular war. The Court rejected the argument that the Selective Service Act, by according special statutory status to those who opposed all war but not to those who opposed a particular war, worked a *de facto* discrimination among religions. In particular, those who believed in the "just" war theory argued that they were not allowed to follow the imperatives of their conscience.<sup>23</sup> The Court found that the Congressional exemption was tailored broadly enough to reflect valid secular purposes.<sup>24</sup>

The *Gillette* Court further determined that the conscription laws did not violate the Free Exercise Clause of the First Amendment. The Court articulated:

[T]he impact of conscription on objectors to particular wars is far from unjustified. The conscription laws, applied to such persons as to others, are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position. The incidental burdens felt by persons in petitioners' position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned. And more broadly, of course, there is the Government's interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of the power to Congress to raise and support armies.<sup>25</sup>

Recent cases demonstrate the unlikelihood that broad constitutional arguments appealing to freedom of religion or of conscience

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<sup>21</sup> *Id.* at 68.

<sup>22</sup> 401 U.S. 437 (1971).

<sup>23</sup> *Id.* at 452.

<sup>24</sup> *Id.* at 454.

<sup>25</sup> *Id.* at 462. In *Johnson v. Robison*, 415 U.S. 361 (1974), the Supreme Court upheld a statutory system of veterans' educational benefits that disqualified conscientious objectors who performed alternative civilian service. *Johnson v. Robison*, 415 U.S. 361 (1974). The Court held that the act did not create an arbitrary classification in violation of equal protection and did not abridge the Free Exercise Clause of the First Amendment. *Id.* at 383, 385.

will prevail before the courts in the immediate future. In *Employment Division, Dept. of Human Resources of Oregon v. Smith*,<sup>26</sup> the Supreme Court upheld an Oregon law that refused to grant an exemption to American Indians who ingested peyote for religious ceremonial purposes. In upholding the law, the Court noted that “[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.”<sup>27</sup> As examples, the Court cited the requirement that citizens pay general taxes<sup>28</sup> and participate in wars to which they are opposed on religious grounds.<sup>29</sup>

The Supreme Court’s decision in *Smith* was relied on by the Court of Appeals for the Seventh Circuit in *Ryan v. United States Dept. of Justice*.<sup>30</sup> Ryan was in charge of domestic security and terrorism investigations at the FBI’s office in Peoria, Illinois.<sup>31</sup> He was ordered to investigate a pacifist group called “Plowshares” that was linked to vandalism at a military recruiting facility in 1986.<sup>32</sup> Ryan declined to do so on the basis of his “personal, religious, and human beliefs” concerning the investigation of groups involved in acts which have been “consistently non-violent symbolic statements against violence.”<sup>33</sup> Ryan was terminated by the FBI only nine months before his fiftieth birthday when he would have been eligible to retire with immediate pension.<sup>34</sup> The Court of Appeals for the Seventh Circuit upheld the discharge on the ground that, “after *Employment Division v. Smith* . . . any argument that failure to accommodate Ryan’s religiously motivated acts violates the Free Exercise Clause of the First Amendment is untenable.”<sup>35</sup>

The refusal of the Supreme Court to recognize a constitutional right to exemption from military service in general, or from specific “unjust” wars in particular, should not be confused with the duty of those in the military not to enforce illegal orders — a principle now

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<sup>26</sup> 110 S. Ct. 1595 (1990).

<sup>27</sup> *Id.* at 1600 (quoting *Minersville School Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594-95 (1940)).

<sup>28</sup> *Id.* at 1599.

<sup>29</sup> *Id.* at 1600.

<sup>30</sup> 950 F.2d 458 (7th Cir. 1991).

<sup>31</sup> *Id.* at 459.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 459-60.

<sup>35</sup> *Id.* at 461. The court also rejected Ryan’s claim of discrimination under Title VII of the Civil Rights Act of 1964. *Id.*



firmly associated with the Nuremburg trials.<sup>36</sup> In *Little v. Barreme*,<sup>37</sup> Chief Justice John Marshall held that military officers could not rely upon the orders given them by their superiors, in this case the President, to perform illegal acts. The President had ordered an officer to seize a ship under circumstances not authorized by an act of Congress.<sup>38</sup> The Supreme Court held that the officer could be held answerable in damages to the owner of the vessel.<sup>39</sup>

The principle that members of the armed forces are not bound to obey unlawful orders is recognized in a number of other early federal cases<sup>40</sup> and by military law.<sup>41</sup> The defense is predicated on

<sup>36</sup> See TELFORD TAYLOR, *NUREMBURG AND VIETNAM: AN AMERICAN TRAGEDY* 78-94 (1971).

<sup>37</sup> 6 U.S. (2 Cranch) 170 (1804).

<sup>38</sup> *Id.* at 177-78.

<sup>39</sup> *Id.* at 179. Justice Marshall explained the difficulty he had in reaching that result:

I confess the first bias of my mind was very strong in favour of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.

*Id.* The Supreme Court later explained *Barreme*: "[T]he officers did not merely mistakenly conclude that the circumstances warranted a particular seizure, but failed to observe the limitations on their authority by making seizures not within the category or type of seizures they were authorized to make." *Butz v. Economou*, 438 U.S. 478, 491 (1978).

<sup>40</sup> See, e.g., *United States v. Bevens*, Cas. No. 14,589 (C.C.D. Mass. 1816), *rev'd on other grounds*, 16 U.S. (3 Wheat.) 336 (1818) (holding that an order by a naval officer directing a sentry to run through the body any man who abused the sentry by words alone was illegal and could not be used to justify a homicide committed by the sentry); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 137 (1851) (stating that "upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior.").

A military officer is not under a duty, however, to disobey an order which,

the objective illegality of the order and not on the subjective judgment of the officer.<sup>42</sup> Thus, it would not appear that conscientious objection to the command of a superior alone is a defense for failing to carry out the order.

This principle is demonstrated by the 1967 court martial of Dr.

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although illegal, appears to be regular on its face. In *Despan v. Olney*, 7 F. Cas. 534 (C.C.D. R.I. 1852) (No. 3,822), Circuit Justice Curtis held:

If [a military officer] receive an order from his superior, which, from its nature, is within the scope of his lawful authority, and nothing appears to show that that authority is not lawfully exerted in the particular case, he is bound to obey it; and if it turns out, that his superior had secretly abused or exceeded his power, the superior, who is thus guilty, must answer for it, and not the inferior, who reasonably supposed he was doing only his duty.

*Id.* at 535.

<sup>41</sup> The U.S. Army's THE LAW OF LAND WARFARE, provided:

The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful.

DEPARTMENT OF THE ARMY, THE LAW OF LAND WARFARE FM27-10, para. 509(a) (1956) [hereinafter THE LAW OF LAND WARFARE]. See also SHELDON M. COHEN, ARMS AND JUDGMENT 23-24 (1989).

<sup>42</sup> In *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827), the Supreme Court held that a citizen who refused to respond to an order of the President calling forth the militia could be tried by court martial. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30-31 (1827). The accused contended that the President's order lacked statutory authorization. The Court disagreed, however, and held that an officer cannot refuse to obey a lawful order because of his own personal doubts about its validity. *Id.* Justice Story noted:

If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defence must finally rest upon his ability to establish the facts by competent proofs. Such a course would be subversive of all discipline, and expose the best disposed officers to the chances of ruinous litigation.

*Id.* The U.S. Army's THE LAW OF LAND WARFARE provided:

In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal. At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders (*e.g.*, *UMCJ*, Art. 92).

THE LAW OF LAND WARFARE, *supra* note 41, para. 509(b).

Howard B. Levy, a captain in the army medical service.<sup>43</sup> Dr. Levy refused to give medical training to "aidmen" with the "Green Berets" on the ground that American troops were committing war crimes in Vietnam. A military judge allowed Levy to submit evidence of a criminal "pattern of practice" in Vietnam, but Dr. Levy's proof was insufficient and he was sentenced to prison. It is significant that Dr. Levy's defense did not rely upon his conscientious belief that training the aidmen would be illegal or immoral, but rather upon the objective illegality of American troops' actions in Vietnam. One can assume that Dr. Levy genuinely believed that the military action in Vietnam was illegal or immoral. Nonetheless, he did not prevail because he was unable to establish the objective illegality of the action.

### C. *The Selective Service Laws*

Congress has provided limited exemptions for conscientious objectors who are opposed to serving in the military.<sup>44</sup> The Selective Service Act exempts any person from "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>45</sup> The United States Supreme Court first construed the term "religious training and belief" in 1965 in *United States v. Seeger*.<sup>46</sup> Prior to 1965, the Selective Service Act had defined "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not in-

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<sup>43</sup> The court martial of Dr. Levy is summarized in TAYLOR, *supra* note 36, at 163-64.

<sup>44</sup> See 50 U.S.C.A. app. § 456 (West 1990); see generally Richard P. Fox, *Conscientious Objection to War: The Background and a Current Appraisal*, 31 CLEV. ST. L. REV. 77 (1982) (reviewing the past and current posture of conscientious objection). The Supreme Court has held that such exemption clauses do not violate the First Amendment's Establishment or Free Exercise Clauses; see *Selective Draft Law Cases*, 245 U.S. 366 (1918). The fact that there has been no formal declaration of war does not affect the Congressional power of conscription. See *United States v. Jacques*, 463 F.2d 653, 656 (1st Cir. 1972).

<sup>45</sup> 50 U.S.C.A. app. § 456(j) (West 1990). The Supreme Court has set forth the elements of a claim for conscientious-objector status:

In order to qualify for classification as a conscientious objector, a registrant must satisfy three basic tests. He must show that he is conscientiously opposed to war in any form. He must show that this opposition is based upon religious training and belief, as the term has been construed in our decisions. And he must show that his objection is sincere.

*Clay v. United States*, 403 U.S. 698, 700 (1971) (citations omitted).

<sup>46</sup> 380 U.S. 163 (1965).

cluding] essentially political, sociological, or philosophical views or a merely personal moral code."<sup>47</sup> The *Seeger* Court held, however, that "[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" fell within the statutory definition.<sup>48</sup>

Subsequently in *Welsh v. United States*,<sup>49</sup> the Court held that an applicant was entitled to conscientious-objector status even if the applicant's opposition to war was based on moral rather than "religious" grounds. The Court determined that § 456(j) exempted from military service "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."<sup>50</sup>

The *Welsh* holding was subsequently limited by *Gillette v. United States*,<sup>51</sup> however, in which the Supreme Court held that § 456(j) did not embrace a "just war" theory: "[C]onscientious scruples relating to war and military service must amount to conscientious opposition to participating personally in any war and all war."<sup>52</sup>

The *Gillette* Court did properly recognize that "[w]illingness to use force in self-defense, in defense of home and family, or in defense against immediate acts of aggressive violence toward other persons in the community, has not been regarded as inconsistent with a claim to conscientious objection to war as such."<sup>53</sup> The courts have also recognized that a conscientious objector classification depends not on the "religious tenets of an organization of which [the applicant] is a member," but rather on the

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<sup>47</sup> Congress, in 1967, eliminated "belief in a Supreme Being involving duties superior to those arising from any human relation" from the definition. Military Selective Service Act of 1967, Pub. L. No. 90-40 § 1.7 (codified at 50 U.S.C.A. § 460(b)(3) (1982)).

<sup>48</sup> *Seeger*, 380 U.S. at 176.

<sup>49</sup> 398 U.S. 333 (1970).

<sup>50</sup> *Id.* at 344.

<sup>51</sup> 401 U.S. 437 (1971).

<sup>52</sup> *Id.* at 443. The Court distinguished *Sicurella v. United States*, 348 U.S. 385 (1955), which held that a Jehovah's Witness could be a conscientious objector "although he was not opposed to participation in a 'theocratic war' commanded by Jehovah." *Id.* at 446 (citing *Sicurella v. United States*, 348 U.S. 385, 390-91 (1955)). The Court noted that the concept of a "theocratic war" was highly abstract because no such war had taken place since Biblical times and because Congress had "real shooting wars" in mind. *Id.* (quoting *Sicurella*, 348 U.S. at 391).

<sup>53</sup> *Id.* at 448.

“subjective religious beliefs of the particular individual.”<sup>54</sup>

The procedures for applying for conscientious-objector status must be strictly followed. Congress has specifically provided that there is to be no judicial review of the classification or processing of any registrant by a local draft board, an appeal board or the President, except as a defense to a criminal prosecution after the registrant has responded either affirmatively or negatively to an order to report for induction.<sup>55</sup>

Prior to the end of the draft in 1973, conscientious objectors were required to apply for an exemption prior to notice of induction.<sup>56</sup> After registration requirements were reimposed in 1980, however, the procedures were reversed so that a registrant can no longer apply for conscientious-objector status until after receiving an order to report for induction but prior to the day scheduled to report.<sup>57</sup> Because induction can occur as early as ten days after the order to report is issued, registrants have very little time to prepare and file the written claim and supporting documentation necessary for conscientious objection.<sup>58</sup>

A requirement that a citizen register for the draft has been held not to violate the First Amendment.<sup>59</sup> The Supreme Court

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<sup>54</sup> See also *Goodrich v. Marsh*, 659 F. Supp. 855 (W.D. Ky. 1987) (holding that a Jew can be a conscientious objector); *Bohnert v. Faulkner*, 438 F.2d 747, 754-55 (6th Cir. 1971) (holding that a Catholic could be a conscientious objector).

<sup>55</sup> 50 U.S.C.A. app. § 460(b)(3) (West 1990). The Court recognized a limited exception and allowed a registrant to bring a suit to enjoin his induction when the draft board clearly acted outside its proper jurisdiction. See *Oestereich v. Selective Service System*, 393 U.S. 233 (1968). In *Clark v. Gabriel*, 393 U.S. 256 (1968), the Court denied judicial review, however, where the registrant simply argued that he was wrongfully denied conscientious-objector status. The *Clark* Court cited the availability of raising misclassification as a defense in a criminal prosecution or by filing habeas corpus proceedings in the federal courts after induction. *Id.* at 259 (citing *Estep v. United States*, 327 U.S. 114 (1946)). State courts have no jurisdiction to interfere with military conscription even if it is alleged that the military has no basis for its actions. See *Tarble's Case*, 50 U.S. (13 Wall.) 397 (1871).

<sup>56</sup> See *Ehlert v. United States*, 402 U.S. 99, 103 (1971) (holding that those whose conscientious objection had not crystallized until after their induction notice would be required to present their claims, after induction, to the armed forces so long as the claimants were not subjected to combatant service or training until after their claim was acted upon).

<sup>57</sup> 32 C.F.R. § 1633.2(a) (1989). The rules specifically provide that no document relating to a registrant's claim as a conscientious objector will be retained nor a file established prior to the time the registrant is ordered to report for induction. 32 C.F.R. § 1633.3 (1989).

<sup>58</sup> 32 C.F.R. § 1624.5 (1989). The procedure for making a claim of conscientious objection is found in 32 C.F.R. § 1636 (1989).

<sup>59</sup> *United States v. Schmucker*, 815 F.2d 413, 417 (6th Cir. 1987); *United States v. Crocker*, 308 F. Supp. 998, 1001 (D. Minn. 1970), *aff'd in part*, 435 F.2d 601 (8th Cir. 1971). Professor Kellett has made an excellent argument that the present re-

has approved a Congressional measure that denies federal financial aid to male students who fail to register for the draft.<sup>60</sup> The Court found that the measure did not violate either the prohibition against bills of attainder or the Fifth Amendment privilege against self-incrimination.<sup>61</sup>

#### D. *Armed Forces Regulations*

In 1962, the Department of Defense began to allow members of the armed forces to apply for administrative discharge on the grounds of conscientious objection.<sup>62</sup> The standards are the same as for preinduction registrants,<sup>63</sup> and the Department of Defense has prescribed procedures to govern these discharges.<sup>64</sup> In addition, judicial review by means of habeas corpus relief may be available to those in active service whose discharge from the military has been disallowed.<sup>65</sup>

The regulations provide that persons whose conscientious-objection beliefs had crystallized prior to entering military service are ineligible for reclassification as conscientious objectors.<sup>66</sup> An applicant for a conscientious-objection discharge is entitled to a hearing and to counsel at his own expense.<sup>67</sup> Moreover, the applicant must establish the claim by "clear and convincing evidence."<sup>68</sup> The regulations also provided:

To the extent practicable under the circumstances, during the

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gistration system, the purpose of which is to provide only combat personnel and not support personnel, and which lacks any vehicle by which to claim conscientious-objector status either tentatively at the time of registration or permanently thereafter, violates the Constitution. Christine Hunter Kellett, *Draft Registration and the Conscientious Objector: A Proposal to Accommodate Constitutional Values*, 15 COLUM. HUM. RTS. L. REV. 167, 168-69 (1984). Congress has specifically linked registration to induction into the military, and the Supreme Court has declared that registration is the "first step in the induction process." *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981).

<sup>60</sup> *Selective Serv. Sys. v. Minnesota Public Int. Research*, 468 U.S. 841 (1984). The Supreme Court has held that Congress did not violate due process when it authorized the registration of men, and not women, under the Selective Service Act. *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981).

<sup>61</sup> *Selective Serv. Sys.*, 468 U.S. at 852-53, 856-58.

<sup>62</sup> D.O.D. Directive 1300.06 (Aug. 21, 1962).

<sup>63</sup> 50 U.S.C.A. app. § 456(j) (West 1990).

<sup>64</sup> See 32 C.F.R. § 75 (1989).

<sup>65</sup> *Parisi v. Davidson*, 405 U.S. 34 (1972). The Court found that the petitioner had fully exhausted his administrative remedies and held that the fact that a court-martial had been convened did not prevent the petitioner from seeking habeas corpus relief in the federal district courts. *Id.* at 37, 44-45.

<sup>66</sup> 32 C.F.R. § 75.4 (1989).

<sup>67</sup> 32 C.F.R. § 75.6(d)(2) (1989).

<sup>68</sup> 32 C.F.R. § 75.5(d) (1989).

period applications are being processed and until a decision is made by the headquarters of the service concerned, every effort will be made to assign applicants to duties within the command to which they are assigned which will conflict as little as possible with their asserted beliefs. However, members desiring to file application who are on orders for reassignment may be required by the military service concerned to submit applications at their next permanent duty station. During the period applications are being processed, applicants will be expected to conform to the normal requirements of military service and to perform satisfactorily such duties to which they are assigned. Applicants may be disciplined for violations of the Uniform Code of Military Justice while awaiting action on their applications.<sup>69</sup>

The military broadly read its regulations during the Gulf War. For example, conscientious objectors who received a notice of alert for deployment were required to report to Saudi Arabia before the military would let them file their petitions for discharge.<sup>70</sup> The military thus appeared to be stacking the deck against conscientious-objector applicants. Applicants complained that it was more difficult to assemble their documentation and to call witnesses when they were in Saudi Arabia, and that the action prevented them from

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<sup>69</sup> 32 C.F.R. § 75.6(h) (1989).

<sup>70</sup> The United States Navy-Marine Corps Court of Military Review found these regulations to be proper and stated:

We view the 23 August 1990 Secretary of Defense memorandum [that gave authority to order Selected Reserve units to active duty] as a clear mandate to the military departments to cease any screening activity of selected reservists re availability for active duty and to implement call-up procedures requiring selected reservists to report first and have their individual circumstances considered later, so as to ensure that their cases were considered uniformly with those of all others similarly called to active duty. Moreover, we see nothing illegal or ultra vires about such a requirement, which clearly and rationally serves the legitimate governmental objectives of achieving desired force levels without undue administrative interference and preserving the integrity of the call-up by eliminating opportunities for preferential treatment at the level of the individual selected reserve unit.

It follows that, even if lower-echelon regulations regarding conscientious objector status application processing were inconsistent with the 23 August 1990 Secretary of Defense memorandum, the latter would take precedence over the former. For the reasons enumerated by the military judge, however, we do not find such an inconsistency.

Lwin v. Cooper, 33 M.J. 666, 668 (1991). See Alan C. Miller & Ronald J. Ostrow, *Some Fear Civil Liberties May Be Added to Conflicts Toll*, THE LOS ANGELES TIMES, Feb. 14, 1991, at 9A; Rorie Sherman, *Challenge Brought Over Army Regulation*, NAT'L L.J., Aug. 5, 1991, at 22.

being represented by counsel of their choice.<sup>71</sup> Consequently, many young men and women who claimed exemption as conscientious objectors were charged with desertion or missing their troop movements and detained while the military proceeded against them through court-martial proceedings.<sup>72</sup>

## II. CLAIMS BY CONSCIENTIOUS OBJECTORS FOR ASYLUM IN THE UNITED STATES

### A. *The Refugee Act of 1980*

Congress provided in the Refugee Act of 1980 that aliens may be granted political asylum in the United States if they are unable or unwilling to return to their country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ."<sup>73</sup>

The legislative background for the 1980 Act was detailed by the United States Supreme Court in *INS v. Cardoza-Fonseca*.<sup>74</sup> In 1968, the United States agreed to comply with the substantive provisions of the United Nations Convention Relating to the Status of Refugees.<sup>75</sup> Article 33.1 of the Convention provided:

No contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>76</sup>

The *Cardoza-Fonseca* Court held that Congress intended to conform the definition of "refugee" and United States asylum law to that of the United Nations Protocol.<sup>77</sup> Accordingly, asylum applicants must show both a subjective fear that they will be persecuted

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<sup>71</sup> *Id.*

<sup>72</sup> Human rights groups estimate that more than 2,000 soldiers filed for conscientious-objector status during the Gulf War. See THE NAT'L CATHOLIC REPORTER, Nov. 8, 1991, at 7; NAT'L L.J., August 5, 1991, at 22. The military has proceeded with charges of desertion against large numbers of those who refused to serve. *Id.* In one of the most highly publicized cases, Army Reserve Captain Yolanda Huet-Vaughn's claim for a conscientious-objector exemption was denied and she was sentenced to two and a half years in a military prison after her conviction for desertion. THE NAT'L CATHOLIC REPORTER, August 30, 1991, at 3.

<sup>73</sup> 8 U.S.C.A. §§ 1101(a)(42)(A) and 1158(a) (West 1970 & Supp. 1992).

<sup>74</sup> 480 U.S. 421 (1987).

<sup>75</sup> 19 U.S.T. 6223, 6259-76, T.I.A.S. No. 6577 (1968).

<sup>76</sup> 189 U.N.T.S. 150, 176 (1954), 19 U.S.T. 6259, 6278, T.I.A.S. No. 6577 (1968).

<sup>77</sup> *Cardoza-Fonseca*, 480 U.S. at 432.



and an objective basis for their fear.<sup>78</sup> The Court defined a "well-founded fear" by reference to the United Nations High Commission for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Handbook),<sup>79</sup> which provided:

In general, the applicant's fear should be considered well founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.<sup>80</sup>

The Supreme Court interpreted this to mean that "so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility."<sup>81</sup>

In a later opinion, *INS v. Elias-Zacarias*,<sup>82</sup> the United States Supreme Court somewhat undercut its opinion in *Cardoza-Fonseca* by holding that applicants who seek asylum because of their political beliefs bear a heavy factual burden.<sup>83</sup> The Court denied asylum to a native of Guatemala who feared conscription by a guerrilla organization.<sup>84</sup> The Court of Appeals for the Ninth Circuit determined that the coercion practiced by the guerrilla organization necessarily constituted persecution on account of his political opinion.<sup>85</sup> The Court held that the petitioner had failed to show that his refusal to join the guerrillas was politically motivated, and that the guerrillas would "persecute him *because of* [his] political opinion, rather than because of his refusal to fight with them."<sup>86</sup>

<sup>78</sup> *Id.* at 431-32.

<sup>79</sup> *Id.* at 439 (citing UNITED NATIONS, OFFICE OF THE UNITED NATIONS HIGH COMMISSION FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS Ch. II, B(2)(a), § 42 (1979)) [hereinafter HANDBOOK].

<sup>80</sup> *Id.* at 439 (quoting HANDBOOK, *supra* note 79, Ch. II, B(2)(a), § 42).

<sup>81</sup> *Id.* at 440 (quoting *INS v. Stevic*, 467 U.S. 407, 424-25 (1984)).

<sup>82</sup> 112 S. Ct. 812 (1992).

<sup>83</sup> *Id.* at 817.

<sup>84</sup> *Id.* at 814-15.

<sup>85</sup> *Id.* at 815.

<sup>86</sup> *Id.* at 816. The Supreme Court stated:

Elias-Zacarias objects that he cannot be expected to provide direct proof of his persecutors' motives. We do not require that. But since the statute makes motive critical, he must provide *some* evidence of it, direct or circumstantial. And if he seeks to obtain judicial reversal of the BIA's determination, he must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution. That he has not done.

*Id.* at 816-17.

In *In re R—O—*, No. A-28779166, Interim Decision 3170 (Board of Immigration Appeals, April 22, 1992), the Board of Immigration Appeals strictly interpreted *Elias-Zacarias*. A citizen of El Salvador sought asylum in the United States on

*Elias-Zacarias* sets a strict standard for applicants seeking asylum because applicants must show a direct link between their beliefs and the persecution they fear. Also, unlike in *Cardoza-Fonseca*, the Supreme Court relied solely on the "ordinary meaning of the words used" in the statute<sup>87</sup> and did not examine international standards governing the granting of asylum. Moreover, the Court held that courts should reverse the discretion exercised by the Attorney General in denying asylum applications only if the petitioner presents evidence "so compelling that no reasonable factfinder could fail to find the requisite fear of persecution."<sup>88</sup> The Court's deference to the Attorney General and its almost summary rejection of *Elias-Zacarias*'s claim indicates that those who claim persecution because of their religion or politics bear a heavy burden if they seek judicial relief after the Attorney General has denied their request for asylum.

Despite the heavy burden placed upon applicants in *Elias-Zacarias*, federal law does provide support for refugees seeking asylum because of their conscientious objection to military service. The United Nations High Commission Handbook on Refugee Status recognizes that conscientious objectors may qualify as refugees so long as their belief is not based on a mere "dislike of military

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the ground that he feared persecution by a guerrilla organization with which he had been loosely associated when he was a student at the University of San Salvador. *In re R—O—*, No. A-28779166, Interim Decision 3170, at 2-3 (Board of Immigration Appeals, April 22, 1992). The immigration judge denied his application and the Appeals Board affirmed. *Id.* at 3-4. The Board stated:

[E]ven assuming the truthfulness of his claims regarding guerrilla threats, the respondent has not proven that the threat of harm was made by the guerrillas on account of a political opinion held by him underlying his refusal to continue to participate in guerrilla activities. He has only established that the threats were made solely on account of his refusal to continue his participation. In *INS v. Zacarias*, 112 S. Ct. 812 (1992), the Supreme Court held that a guerrilla organization's attempt to coerce a person into performing military service does not, without more, constitute persecution on account of political opinion . . . . In the respondent's case, he stated that he left the guerrillas because he did not want to be involved in more complex activities, particularly armed conflict, and because of his fear that he would be discovered by the Government. Neither reason is related to political opinion. The victim must show that he is being persecuted on account of his political opinion, and that his persecution is not solely the result of the guerrillas' aim in seeking to fill their ranks in order to carry out their war with the government and pursue their political goal, their political motive being irrelevant.

*Id.* at 6.

<sup>87</sup> *Id.* at 816.

<sup>88</sup> *Id.* at 817.

service or fear of combat.”<sup>89</sup> Religious convictions may provide the basis for conscientious objection if they are “genuine” and “are not taken into account by the authorities of [the applicant’s] country in requiring [the applicant] to perform military service.”<sup>90</sup> Unlike the Selective Service Act,<sup>91</sup> this definition appears to include those whose religious views prevent them from participating in an “unjust” war. Moreover, the Handbook requires that those persons who base their conscientious objection on political grounds must also demonstrate that the war is “condemned by the international community as contrary to basic rules of human conduct.”<sup>92</sup>

### B. Lower Court Decisions

Issues involving conscientious objectors seeking asylum in the United States have been addressed by the federal courts of appeals, and the Handbook definition of conscientious objection has been a crucial factor in these decisions. The Ninth Circuit Court of Appeals recognized that conscientious objection can be the basis for an asylum claim in *Canas-Segovia v. INS*,<sup>93</sup> an appeal by two brothers who claimed that their political and religious beliefs as Jehovah’s Witnesses prevented them from participating in military service in El Salvador.<sup>94</sup> El Salvador had a policy of mandatory military service for all males between the ages of 18 and 30 and did not exempt conscientious objectors or offer an

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<sup>89</sup> HANDBOOK, *supra* note 79, Ch. V, B, §§ 168-170. See Karen Musalo, *Conscientious Objection to Military Service Accepted as Valid Basis of Claim to Political Asylum for Salvadoran Men*, IMMIGRATION J., July/Sept. 1987, at 8; Karen Musalo, *Swords into Ploughshares: Why the United States Should Provide Refuge to Young Men who Refuse to Bear Arms for Reasons of Conscience*, 26 SAN DIEGO L. REV. 849 (1989).

In *Khalaf v. INS*, 909 F.2d 598 (1st Cir. 1990), the Court of Appeals for the First Circuit rejected an asylum claim by a man who did not want to comply with the compulsory conscription laws of Jordan. *Khalaf v. INS*, 909 F.2d 589, 592 (1st Cir. 1990). The court articulated that “Khalaf may disagree politically with the Jordanian government and may wish he had citizenship elsewhere, but he has taken advantage of Jordanian citizenship and for that Jordan can surely expect him to fulfill their citizenship requirements without interference from this court.” *Id.*

Similarly, in *Castillo v. INS*, 951 F.2d 1117 (9th Cir. 1991), the Court of Appeals for the Ninth Circuit rejected an asylum claim by a citizen of Nicaragua who believed that military service was “absurd,” on the ground that his objection was not based on one of the grounds enumerated in the Act. *Castillo v. INS*, 951 F.2d 1117, 1122 (9th Cir. 1991). The Court further found that his conscientious objection was not based on genuine religious convictions. *Id.*

<sup>90</sup> HANDBOOK, *supra* note 79, Ch. V, B, § 172.

<sup>91</sup> See *supra* note 45 (discussing the three-part test used to determine whether one qualifies for conscientious-objector status).

<sup>92</sup> HANDBOOK, *supra* note 79, Ch. V, B, § 171.

<sup>93</sup> 902 F.2d 717 (9th Cir. 1990), *vacated and remanded*, 112 S. Ct. 1152 (1992).

<sup>94</sup> *Id.* at 720.

alternative to military service.<sup>95</sup> The petitioners presented evidence that those who refused military service were tortured and killed.<sup>96</sup> An immigration judge held that Jehovah's Witnesses were not singled out for persecution in El Salvador, and that mandatory conscription applied equally to all Salvadorans without regard to religious belief.<sup>97</sup>

Relying upon the Handbook, the court of appeals reversed the immigration judge's decision and found that punishment of a conscientious objector could amount to persecution if "based upon genuine political, religious, or moral convictions, or other genuine reasons of conscience."<sup>98</sup> The court determined that the Canas brothers faced religious persecution because they had genuine religious convictions that prevented them from performing military service.<sup>99</sup> Moreover, the court opined that persecution would take place because Salvadoran law provided no exemption for the Canas brothers and imposed imprisonment as a penalty for refusing to do military service.<sup>100</sup> The court also found that the Canas brothers faced political persecution because their refusal to do military service would be construed as political opposition to the government and would expose them to severe dangers, including torture and death.<sup>101</sup>

The United States Supreme Court vacated the Ninth Circuit

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<sup>95</sup> *Id.*

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

<sup>97</sup> *Id.* at 721.

<sup>98</sup> *Id.* at 726.

<sup>99</sup> *Id.* at 727.

<sup>100</sup> *Id.* This decision differs from *Alonzo v. INS*, 915 F.2d 546 (9th Cir. 1990), where Alonzo, a citizen of Guatemala, sought asylum on the ground that, despite his exemption from the military under Guatemala law as the only son of a dependent widow, he was abducted three times into active military service by a local commander and the third time was brutally beaten. *Alonzo v. INS*, 915 F.2d 546, 547 (9th Cir. 1990). The Court noted that at no time had Alonzo asserted his religious or political beliefs to the military. *Id.* at 548.

<sup>101</sup> *Canas-Segona*, 902 F.2d at 728-29. In *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1984), the Court of Appeals for the Ninth Circuit recognized that political neutrality could constitute a "political opinion" within the meaning of the Refugee Act. *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286 (9th Cir. 1984). In *Rodriguez-Rivera v. INS*, 848 F.2d 998 (9th Cir. 1988), however, the petitioner, a politically neutral Catholic, felt that he could not take part in the violence that was a part of the civil war in El Salvador. *Rodriguez-Rivera v. INS*, 848 F.2d 998, 999 (9th Cir. 1988). The Court of Appeals for the Ninth Circuit upheld the finding of the immigration judge that the petitioner did not have a well-grounded fear of persecution. *Id.* at 1005. The petitioner offered no evidence concerning his religious beliefs, but instead relied on generalized evidence regarding his fears of persecution because of his membership in the social class of "poor urban workers" and his political neutrality. *Id.* at 999-1000.

judgment and remanded the case for further consideration in light of the Court's intervening decision in *INS v. Elias-Zacarias*.<sup>102</sup> On remand, the Court of Appeals for the Ninth Circuit held that the petitioner had presented no evidence that he faced persecution because of his religious beliefs under the standards set forth in *Elias-Zacarias*.<sup>103</sup> The court found persuasive, however, evidence that the Salvadoran government "imputed" political motives to those who refused to serve in the military and held that the petitioner had a genuine fear of persecution because of his "imputed" political motives.<sup>104</sup>

The Ninth Circuit has also found that persons who are conscientious objectors to particular acts of violence can qualify as refugees. In *Barraza-Rivera v. INS*,<sup>105</sup> Barraza was forcibly recruited into the El Salvador military.<sup>106</sup> Barraza's commander told him that he was to be sent on a mission to assassinate two men.<sup>107</sup> Barraza left the country because he did not want to participate in the killings and feared persecution on his return because he abandoned military service.<sup>108</sup> He also argued that, because of his association with the military, he was now a target of the guerrillas that were opposing the government.<sup>109</sup>

The Court of Appeals for the Ninth Circuit found that Barraza demonstrated a well-founded fear of persecution based on his refusal to participate in the murders.<sup>110</sup> The court held that conscientious-objector status was not limited to "those who refuse to be conscripted into the military because of dictates of conscience," but extends to "those who, after submitting to mandatory conscription, are placed in a position that requires them to betray their conscience by engaging in inhuman conduct and refuse to engage in such conduct."<sup>111</sup>

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<sup>102</sup> 112 S. Ct. 812 (1992).

<sup>103</sup> *Canas-Segovia v. INS*, No. 88-7444, 1992 WL 158253 (9th Cir., July 10, 1992). One of the brothers had since married an American citizen and thus qualified to stay in the United States on that ground. *Id.* at \*1.

<sup>104</sup> *Id.* at \*2.

<sup>105</sup> 913 F.2d 1443 (9th Cir. 1990).

<sup>106</sup> *Id.* at 1445.

<sup>107</sup> *Id.* at 1446.

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

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

<sup>110</sup> *Id.* at 1450.

<sup>111</sup> *Id.* at 1451. In an earlier case, the Ninth Circuit had rejected a more generalized claim based upon political opposition to the Iran-Iraq War. See *Kaveh-Haghigy v. INS*, 783 F.2d 1321 (9th Cir. 1986). In *Kaveh-Haghigy*, two brothers who were Iranian nationals were denied asylum by the Board of Immigration Appeals (B.I.A.). *Id.* at 1322. The brothers claimed that if they were returned to Iran, they

The Fourth Circuit Court of Appeals has taken a more restrictive view when conscientious objection is based on the political ground that the military action is "condemned by the international community as contrary to basic rules of human conduct."<sup>112</sup> In *M.A. A26851062 v. INS*,<sup>113</sup> the Fourth Circuit held that the Board of Immigration Appeals acted within its discretion in rejecting a petitioner's claim that the atrocities he wished to avoid were illegal and were perpetrated as a result of the policies of the Salvadoran military or government.<sup>114</sup> The court stated:

Misconduct by renegade military units is almost inevitable during times of war, especially revolutionary war, and a country as torn as El Salvador will predictably spawn more than its share of poignant incidents. Without a requirement that the violence be connected with official governmental policy, however, any male alien of draft age from just about any country experiencing civil strife could establish a well-founded fear of persecution. The Refugee Act does not reach this broadly.<sup>115</sup>

The petitioner introduced evidence gathered by private groups such as Amnesty International and America Watch to demonstrate that the military violence was a deliberate policy of the Salvadoran government.<sup>116</sup> The Fourth Circuit nonetheless held that the courts should not make immigration decisions based on their own "implicit approval or disapproval of U.S. foreign policy and the acts of other nations."<sup>117</sup> The Court articulated:

We thus reject petitioner's invitation to join the political branches in the articulation of foreign policy under the rubric of discerning a "well-founded fear of persecution." The Board's suggestion that the violence be condemned at a minimum by international governmental bodies renders inapplica-

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would be forced to serve in the war against Iraq, which they claimed was an illegal, revolutionary war that made military service tantamount to persecution of all young males. *Id.* at 1323. The Ninth Circuit rejected their argument and affirmed the decision of the B.I.A. on the ground that it was not the function of the judiciary "to evaluate the political justification for the actions of foreign government." *Id.* at 1323 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416-17 (1964)). The applicants did not strictly contend that the war was "condemned by the international community as contrary to basic rules of human conduct." See *supra* note 92 and accompanying text. The broader holding of the court, namely, that it would not evaluate the political justifications for an act of a foreign government, should thus be considered in the context of the arguments that were raised in that case.

<sup>112</sup> HANDBOOK, *supra* note 79, Ch. V, B, § 171.

<sup>113</sup> 899 F.2d 304 (4th Cir. 1990).

<sup>114</sup> *Id.* at 312.

<sup>115</sup> *Id.*

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

<sup>117</sup> *Id.* at 313.

ble the cases cited by *M.A.* which hold that a showing of persecution by the government is unnecessary if the government cannot control the group perpetrating the violence . . . . Unless the government's non-action has been condemned by a recognized public governmental body, the inquiry into the government's "control" over forces within its borders would place us in precisely the political posture that we have attempted to avoid.<sup>118</sup>

A dissent by Judge Winter properly interpreted the Handbook's requirement that military action be "condemned by the international *community* as contrary to the basic rules of human conduct" to mean only that the applicant "show that the military action wishing to be avoided 'violates international humanitarian law (the laws of war), or that the military forces in which [the alien] is resisting service violat[e] internationally recognized human rights.'"<sup>119</sup> Judge Winter likewise argued that government adherence to a formal policy of human rights violations was not required under the Refugee Act nor the Handbook, which "speaks only of the 'type of military action' . . . and makes no mention of governmental policy with respect to such action."<sup>120</sup>

The decisions of the Ninth Circuit Court of Appeals in *Canas-Segovia*,<sup>121</sup> accepting as a refugee one who is generally opposed to participating in war based on religious or "imputed" political grounds, and *Barranza-Rivera*,<sup>122</sup> accepting as a refugee one who refuses to participate in inhuman acts that betray his conscience, correctly interpret both the Handbook and the Refugee Act of 1980. Conversely, the concerns of the Fourth Circuit expressed in *M.A. A26851062*,<sup>123</sup> namely that courts should not evaluate the acts of foreign governments, is misplaced. Congress has directed the Attorney General to determine if persons are persecuted or have "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>124</sup> The federal courts are charged with reviewing the decisions of the Attorney General and reversing them if they are not

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<sup>118</sup> *Id.* at 314.

<sup>119</sup> *Id.* at 322 (Winter, J., dissenting) (quoting Letter From Joachim Henkel, Deputy Representative of the United Nations High Commissioner for Refugees, to Karen Musalo, Esq. (Jan. 30, 1986)).

<sup>120</sup> *Id.*

<sup>121</sup> See *supra* notes 93-101 and accompanying text.

<sup>122</sup> See *supra* notes 105-111 and accompanying text.

<sup>123</sup> See *supra* notes 113-120 and accompanying text.

<sup>124</sup> 8 U.S.C.A. §§ 1101(a)(42)(A) and 1158(a) (West 1970 & Supp. 1992); see *supra* text accompanying note 73.

supported by substantial evidence or if there has been an erroneous construction of the law.<sup>125</sup> These responsibilities necessarily require federal courts to determine whether the foreign country is persecuting persons on grounds that the Act forbids. While this determination may prove embarrassing to the foreign country,<sup>126</sup> Congress has directed that the decision be made objectively and without political considerations.<sup>127</sup>

Congress clearly did not intend that the decision to grant asylum be deferred until a political consensus is reached, either in the United States or internationally, regarding the propriety of a foreign country's actions. This result would inject politics into the process and result in those fleeing persecution in "unfriendly" countries being granted asylum, while those fleeing persecution in "friendly"

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<sup>125</sup> 8 U.S.C.A. § 1105a(a)(4) (West 1970 & Supp. 1992). See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987); but see *INS v. Elias-Zacarias*, 112 S. Ct. 812, 817 (1992) (holding that the Courts should defer to the factual determinations made by the Attorney General and should reverse the Attorney General's discretion only if the evidence is "so compelling that no reasonable factfinder could fail to find the requisite fear of persecution").

<sup>126</sup> The mere fact that the determination may "embarrass foreign governments" is not grounds for denying review on the basis of the "act of state" doctrine. See *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. Int'l*, 110 S. Ct. 701, 707 (1990) (federal courts are not precluded from deciding a case that requires imputing to foreign officials an unlawful motivation—the obtaining of bribes—in the performance of their official acts). The Supreme Court has recognized that "[t]he act of state doctrine is grounded on judicial concern that application of customary principles of law to judge the acts of a foreign sovereign might frustrate the conduct of foreign relations by the political branches of the government." *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767-68 (1972). The Court in *First National* held that the act of state doctrine did not apply because the executive branch had advised the Court that it did not feel that the nation's foreign policy would be compromised by a decision in that case. *Id.* at 768. The same is true under the Refugee Act, where Congress has directed the Attorney General to decide whether the applicant has stated a well-founded fear of persecution and where the courts are charged with reviewing that determination for its compliance with the statutory standards. See *supra* notes 73, 122-25 and accompanying text.

<sup>127</sup> See S. REP. No. 96-256 96th Cong., 2d Sess., reprinted in 1980 U.S.C.A.N. 144. The Act provided in relevant part:

The bill provides a new statutory definition of a refugee which will be added to the Immigration and Nationality Act. This definition eliminates the geographical and ideological restrictions now applicable to conditional entrant refugees under section 203(a)(7) of the Immigration and Nationality Act. Also, the new definition will bring United States law into conformity with our international treaty obligations under the United Nations Protocol Relating to the Status of Refugees which the United States ratified in November 1968, and the United Nations Convention Relating to the Status of Refugees which is incorporated by reference into United States law through the Protocol.

*Id.* See also *M.A. A26851062 v. INS*, 899 F.2d 304, 319 (4th Cir. 1990) (Winter, J., dissenting).



countries with more political clout not being granted asylum.<sup>128</sup>

The sole ground for granting asylum under § 208(a) of the Immigration and Nationality Act<sup>129</sup> (the Act) is if the Attorney General determines that an alien is a refugee as defined in § 1101(a)(42)(A).<sup>130</sup> That decision does not turn upon political considerations. Section 208(a) is thus distinguishable from § 207 of the Act, which allows the Attorney General to admit refugees who are outside the United States and are "determined to be of special humanitarian concern to the United States."<sup>131</sup> Congress did not include the "special concern" requirement, which necessarily involves political considerations, in the determination of who qualifies as a refugee under § 208. The Attorney General and the courts should likewise not be influenced by this concern when reviewing asylum applications under § 208.

As provided in the Handbook, a person may claim refugee status when he would be required to participate in "military action contrary to his genuine political, religious, or moral convictions, or to valid reasons of conscience."<sup>132</sup> The genuineness of an applicant's political, religious or moral convictions is not to be determined by political considerations — rather, it is "to be established by a thorough investigation of his personality and background."<sup>133</sup> The applicant has established a *prima facie* case of eligibility under the Act if his beliefs are genuine and if he has a subjective fear of persecution based on objective facts.<sup>134</sup>

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<sup>128</sup> Cf. *M.A. A26851062*, 899 F.2d at 320 (Winters, J., dissenting) (citations omitted). Judge Winters, dissenting, noted:

The congressional directive to apply the Refugee Act neutrally has not been respected, however. According to recent figures covering the first three quarters of 1987, the approval rate for asylum cases filed with INS district directors is as follows: Nicaragua, 83.9%, Iran, 67.4%, Romania, 59.7%, Afghanistan, 26.2%, Guatemala, 3.8%, and El Salvador, 3.6%. The overall approval rate for this period (covering all countries, 7,516 cases) was 54%. A further study reported that in 1984, 66% of the Iranian requests and 49% of the Polish requests for political asylum were granted as opposed to 2% from El Salvador. The study also found that among those aliens that had based their asylum applications on fear of torture, "only applicants from El Salvador had actually been deported."

*Id.*

<sup>129</sup> 8 U.S.C.A. § 1158(a) (West 1970 & Supp. 1992).

<sup>130</sup> 8 U.S.C.A. § 1101(a)(42)(A) (West 1970 & Supp. 1992).

<sup>131</sup> 8 U.S.C.A. § 1157(c) (West 1970 & Supp. 1992).

<sup>132</sup> HANDBOOK, *supra* note 79, Ch. V, B, § 170.

<sup>133</sup> *Id.* at § 174.

<sup>134</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

### III. RECOMMENDATIONS FOR REFORMING UNITED STATES LAWS

The wake of the Gulf War provides an excellent opportunity for the United States to review its standards on conscientious objection. The concern is fresh in everyone's mind and the bitterness that characterized the discussion of this subject during the Vietnam War era seems to have diminished.

Assuming that a constitutional amendment recognizing conscientious objection is not a priority, and that the present Supreme Court is unlikely to proclaim that the First Amendment fully protects the right to conscientious objection, the task of revising the law on conscientious objection must lie primarily with Congress. There are a number of reforms Congress can make regarding the Selective Service Act.

#### A. *Selective Conscientious Objection*

Congress should overrule *Gillette v. United States*<sup>135</sup> by amending the Selective Service Act<sup>136</sup> to include as conscientious objectors those who are opposed to particular wars. This amendment would protect those whose consciences are formed by the "just war" or similar theories but who are not opposed to all war. The amendment could be drafted to resemble the requirements contained in the Handbook.<sup>137</sup>

The Supreme Court in *Gillette* mentioned several reasons why Congress might not want to recognize selective conscientious objection, but none of these reasons is definitive today.

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<sup>135</sup> 401 U.S. 437 (1971).

<sup>136</sup> 50 U.S.C.A. app. § 456(j) (West 1990).

<sup>137</sup> See *Barraza-Rivera v. INS*, 913 F.2d 1443 (9th Cir. 1990).

The U.S. National Conference of Catholic Bishops advocated that selective conscientious objection be recognized:

At the same time, no state may demand blind obedience. Our 1980 statement urged the government to present convincing reasons for draft registration, and opposed reinstatement of conscription itself except in the case of a national defense emergency. Moreover, it reiterated our support for conscientious objection in general and for selective conscientious objection to participation in a particular war, either because of the ends being pursued or the means being used. We called selective conscientious objection a moral conclusion which can be validly derived from the classical teaching of just-war principles. We continue to insist upon respect for and legislative protection of the rights of both classes of conscientious objectors. We also approve requiring alternative service to the community—not related to military needs—by such persons.

U.S. National Conference of Catholic Bishops, Pastoral Letter, *The Challenge of Peace* ¶ 233 (May 3, 1981).

The government's need for manpower<sup>138</sup> probably would not be compromised by changing the law. The United States is operating under a volunteer army. Even if it becomes necessary to reinstate the draft, experience demonstrates that there is a sufficient pool of young men and women available to make groundless the fear that the United States would lack military personnel.<sup>139</sup> The present regulations, which do not allow draft registrars to declare their conscientious-objector status until after they receive a notice of induction,<sup>140</sup> clearly indicate that the government is sufficiently confident in its manpower supply, because it does not need to know in advance how many persons will apply for a conscientious-objector exemption when they are drafted.

Nor would the government's interest in maintaining a fair system for determining "who serves when not all serve"<sup>141</sup> be compromised. Conscientious objectors would still be required to perform alternative service.<sup>142</sup> The alleged difficulty of sorting out the claims of selective conscientious objectors<sup>143</sup> is not an insurmountable barrier to recognition of the right. The burden

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<sup>138</sup> *Gillette*, 401 U.S. at 455.

<sup>139</sup> Congress should remove gender discrimination from the Selective Service Act and require women, as well as men, to register. See *supra* note 60 and accompanying text. This would increase the pool available for service in the military. The Gulf War demonstrated that women can participate in combat equally with men.

<sup>140</sup> 32 C.F.R. § 1633.2(a) (1989).

<sup>141</sup> *Gillette*, 401 U.S. at 455.

<sup>142</sup> 50 U.S.C.A. app. § 456(j) (West 1990). That section provided in pertinent part:

Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], 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, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the Director may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [said sections]. The Director shall be responsible for finding civilian work for persons exempted from training and service under this subsection and for the placement of such persons in appropriate civilian work contributing to the maintenance of the national health, safety, or interest.

*Id.*

<sup>143</sup> *Gillette*, 401 U.S. at 455-56.

would still be upon the applicant to establish that he is conscientiously opposed to serving in the military and that his opposition is sincere.<sup>144</sup>

The concern that expansion of the right to conscientious objection would "open the doors to a general theory of selective disobedience"<sup>145</sup> is also unfounded. The Supreme Court in *Gillette* recognized that the history of the present exemption demonstrated that "it is not inconsistent with orderly democratic government for individuals to be exempted by law, on account of special characteristics, from general duties of a burdensome nature."<sup>146</sup> A broader exemption might well increase the respect of many persons for the law and legal process.

### B. Draft Registration

There is a serious question as to whether draft registration is really necessary today. Indeed, Congress should evaluate the possibility of eliminating draft registration. If Congress does decide to retain registration, however, it should provide that persons be allowed to give notice of their conscientious-objection views either at the time of registration or anytime up to the day they are ordered to report for induction. The present rules allow a claim for exemption to be filed only after the registrant has received an order to report for induction and prior to the day he is scheduled to report.<sup>147</sup>

Persons who have conscientious scruples about even being listed in the pool of those eligible for combatant service should be allowed to put the government on notice that they intend to apply for an exemption. The bureaucratic inconvenience to the government would be minimal, if any. The government could still require that registrants file a formal claim for exemption after they receive their notice of induction and process these claims as at present. This simple change would help to satisfy the consciences of many registrants and would pose little or no burden on the Selective Service System.

### C. Protecting Military Personnel

The regulations regarding exemptions for those who are already serving in the military should also be studied to determine

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<sup>144</sup> See *Clay v. United States*, 403 U.S. 698, 700 (1971).

<sup>145</sup> *Gillette*, 401 U.S. at 459 (citation omitted).

<sup>146</sup> *Id.* at 460.

<sup>147</sup> 32 C.F.R. § 1633.2(a) (1989).

if more protection can be afforded to conscientious-objectors without jeopardizing the military's legitimate needs.

First, present regulations allow those whose conscientious-objection beliefs have crystallized after joining the military to be reclassified.<sup>148</sup> The rules allow no exemption for selective conscientious objection.<sup>149</sup> There exist legitimate reasons why it would be disruptive to allow those in the military to refuse to participate in a specific action because they feel the action violates their personal, moral or religious beliefs. When specific orders are objectively illegal, both domestic law and international law support the right of a soldier to refuse to obey the order.<sup>150</sup> To extend this right to allow soldiers to consider their personal, moral or religious beliefs in carrying out orders, even when those beliefs are genuine, would undoubtedly disrupt military discipline.<sup>151</sup>

Nonetheless, it is conceivable that the military could adopt rules that would better accommodate those willing to serve in the military but who may be conscientiously opposed to participating in certain types of actions. Military personnel might be allowed to file a notice that they are adherents of the "just war" or similar theories either when they are inducted or when their beliefs have crystallized after induction. If a war is declared that conflicts with their beliefs, those military personnel could then file an exemption from being required to serve as a combatant in that war. Without further study, it is impossible to predict just how disruptive of military discipline or preparedness such an exemption would be.

At a minimum, regulations should be adopted that exempt persons from participating in actions that the person considers likely to result in apartheid or genocide.<sup>152</sup> These types of actions have been condemned by the United Nations,<sup>153</sup> and to rec-

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<sup>148</sup> 32 C.F.R. § 75.4 (1989).

<sup>149</sup> See 32 C.F.R. § 75 (1989).

<sup>150</sup> See *supra* notes 36-43 and accompanying text; see also *Barraza-Rivera v. INS*, 913 F.2d 1443 (9th Cir. 1990).

<sup>151</sup> See *supra* notes 30-35 and accompanying text.

<sup>152</sup> See Eide & Mubanga-Chipoya, *Report: Question of Conscientious Objection to Military Service*, U.N. Commission on Human Rights (1983), E/CN.4/Sub.2/1983/3 ¶ 156. On December 20, 1958, the United Nations General Assembly passed Resolution 33/165 recognizing the right of all persons to refuse service in military or police forces used to enforce apartheid and called upon all members to grant asylum to those compelled to flee their countries because of this conscientious objection to assisting in enforcing apartheid through service in military or police forces. *Id.*

<sup>153</sup> *Id.*; United Nations Convention on the Prevention and Punishment of the

ognize such an exception would demonstrate the United States's respect for international law. A special report prepared for the United Nations Commission on Human Rights, suggests that states also release persons from military service when the person considers the action "likely to be used for illegal occupation of foreign territory," or to be "engaged in, or likely to be engaged in gross violations of human rights," or when it is likely that resort will be made to "the use of weapons of mass destruction or weapons which have been specifically outlawed by international law or to use means and methods which cause unnecessary suffering."<sup>154</sup> While broader than an exemption for apartheid or genocide, these exemptions might also be incorporated into American law.

Second, the treatment accorded conscientious objectors in the military during the Gulf War was shameful. Requiring conscientious objectors to travel to Saudi Arabia for their exemptions to be processed does not seem to have been required by any military necessity and certainly gave the appearance of an attempt to frustrate the rights of those claiming exemption. The regulations should be amended so that this does not happen in the future.

Furthermore, military personnel from the top down should become more sensitive of the legitimate rights of those claiming conscientious exemption.<sup>155</sup> Conscientious objectors are not traitors; they are persons whose principles do not allow them to take up arms. The law realistically recognizes that these beliefs can crystallize at any time.<sup>156</sup> Military personnel claiming exemptions should be guaranteed a fair chance to demonstrate the genuineness of their beliefs. Presently, hearings involving those who claim exemption are conducted by military personnel; justice would be served by having the hearings conducted by persons outside the military.

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Crime of Genocide (1951); United Nations Declaration on the Elimination of all Forms of Racial Discrimination (1963).

<sup>154</sup> Eide & Mubanga-Chipoya, *supra* note 152, ¶¶ 157-60.

<sup>155</sup> One possible way of showing more respect to those who chose to exempt themselves from the military because of conscientious objection would be to remove the discrimination accepted by the Supreme Court in *Johnson v. Robinson*, 415 U.S. 361 (1974), which disqualified conscientious objectors who performed alternative civilian service from participating in a statutory system of veterans' educational benefits.

<sup>156</sup> *Cf. Ehlert v. United States*, 402 U.S. 99, 103-04 (1971).

*D. Tax Protesters*

The consciences of many persons could be eased if Congress passed legislation enabling those who are conscientiously opposed to having their tax moneys used to support the military pay their taxes into a special fund to support peace. Senator Mark Hatfield has regularly introduced legislation to create such a fund, but his bills have never been acted upon.<sup>157</sup> Such legislation would encourage respect for the law while respecting the rights of those who anguish over paying taxes to support military actions they conscientiously oppose. No good reason exists not to pass legislation respecting the legitimate views of conscientious objectors regarding the use of their tax money. The passage of such legislation would serve as an eloquent vindication of the stand taken by Thoreau almost 150 years ago.

*E. Refugees*

In making the determination as to whether a refugee should be granted asylum, existing legislation requires the Attorney General to adhere to the United Nation Handbook.<sup>158</sup> It is the duty of the courts to assure that this is done. When conscientious objection is based on any of the grounds specified in the U.N. Handbook, the courts should ensure that international standards are respected. Independent studies by human rights organizations can be helpful and should be used in making the assessment.

## VI. CONCLUSION

Conscientious objectors fulfill an important role in our democratic system. They provide a constant and living reminder that there may be alternatives to war. Our acceptance of refugees who are fleeing persecution because of their conscientious-objector beliefs expresses the United States's willingness to adhere to international standards concerning basic human rights. We signal to the world that heterogeneity is good and that governments can and should accommodate the religious and deep felt moral beliefs of all persons, if they do not seriously threaten the public peace. A few simple changes in our laws can remove the stigma of being a law-breaker that is placed upon persons who advocate peace as an alternative to war. Now is the time for Congress to

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<sup>157</sup> See *supra* note 14 and accompanying text.

<sup>158</sup> See *supra* notes 121-24 and accompanying text.

make these changes rather than to wait until the country is involved in another war, when it would be more difficult to be dispassionate and objective.