

Reclaiming the In-Service Conscientious Objection Program: Proposals for Creating a Meaningful Limitation to the Claim of Conscientious Objection

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Indeed, it seems that just as Voltaire could say that the Holy Roman Empire was neither holy, nor Roman, nor an empire, it could now be said that the [conscientious objection] exemption is available to those who are not religious in any orthodox sense, who have had no training whatever and whose assertion cannot be empirically tested.¹

I. Introduction

The conscientious objection exemption to involuntary military service is an important tradition in the United States, but the governing military regulations have resulted in judicial interpretation that has expanded it far beyond its original scope. This expansion adversely affects the U.S. military primarily in two ways. First, heightened judicial scrutiny of the government's decisions concerning in-service conscientious objection applications has the effect of severely limiting discretionary authority in this specific type of personnel action. This scrutiny results in the alienation of applicant servicemembers and commanders from the conscientious objection procedural process. Second, the expansion of the conscientious objection military regulations created an extremely vague standard that is difficult to apply. Although such an expansive exemption may be necessary for deciding claims of involuntarily drafted servicemembers, such an interpretation creates an indefinite standard that results in an unnecessary, disruptive distraction from mission readiness in a volunteer military. After a brief discussion of the historical roots of conscientious objection in America, this article defines the current state of the law of the in-service conscientious objection program. Finally, this article explores the problems created by the current in-service conscientious objection program procedures and recommends regulatory changes to address these problems.

A. Historical Background of Conscientious Objection

Conscientious objection to military service is deeply rooted in American history. From the time Europeans began forming North American settlements in the early 1600s, conscription has existed in America to assist in forming military units.² Colonial militias were formed primarily to defend against Native American attacks.³ As colonies formed militias, some colonists exercised their ideological objections to war. It was no surprise that the same people who left Europe for religious freedom⁴ would also be instrumental in the resistance against involuntary military service. Arguably the Quakers were the most influential group in the movement against military conscription.

The Quakers were among the first settlers to demonstrate their pacifist beliefs. One of the earliest recorded cases of anti-violence demonstrations in the United States occurred in the mid-1600s when a Native American war party decided not to attack a group of Quakers because the Quakers neither fought nor ran away.⁵ After the Quakers invited the Native Americans

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¹ *Armstrong v. Laird*, 456 F.2d 521, 523 (1st Cir. 1972) (Aldrich, J., dissenting) (rejecting the majority's conclusion that there was no basis in fact for the draft board's rejection of an inductee's conscientious objection claim).

² Harry A. Marmion, *Historical Background of Selective Service in the United States*, in *SELECTIVE SERVICE AND AMERICAN SOCIETY* 35, 36 (Roger W. Little ed., 1969).

³ Spencer P. Mead, *The Colonial Military: First American Soldiers*, J. AM. HIST. 120 (1907).

⁴ DAVID YOUNT, *HOW THE QUAKERS INVENTED AMERICA* 1 (2007).

⁵ In the mid-1600s during a time of exceptional hostilities with Native Americans tribes, the local authorities in western New York and Pennsylvania urged a local Quaker community to move inside the protective walls of a military fort. STEPHEN M. KOHN, *JAILED FOR PEACE: THE HISTORY OF AMERICAN DRAFT*

into their homes while they prayed, the Indian chief vowed not to harm the Quakers.⁶ The Quakers also heavily influenced the creation of the first conscientious objection exemptions to military conscription. In 1676 the Quakers bought West New Jersey and wrote into its charter a pacifist military policy.⁷ In 1703, however, West and East New Jersey merged and a new militia law required military service.⁸ But when a sympathetic jury refused to convict any of the Quakers who refused to enter military service, the militia law lost support and was not renewed.⁹ All subsequent New Jersey militia acts contained exemptions specifically for Quakers.¹⁰ When Virginia Quakers refused to participate in hostilities during the French and Indian War of 1756, Colonel George Washington was so impressed with the depth and sincerity of their beliefs that he released the Quakers from confinement and essentially relieved them of their service commitment.¹¹ As Quakers and other pacifists¹² continued to resist military conscription, colonial governments began to establish conscientious objection exemptions.¹³

In 1673, Rhode Island included a conscientious objection exemption in its militia law.¹⁴ Even though Rhode Island feared an attack from both the Native Americans and the Dutch, the legislature passed the exemption because it considered conscientious objection part of the fundamental ideal of liberty of conscience.¹⁵ In 1775, the Continental Congress passed a resolution exempting conscientious objectors from military service.¹⁶ In 1777, despite imminent British attacks on important American cities, George Washington believed conscientious objection to be so important that he called upon all persons except conscientious objectors to fight.¹⁷ Several other states also believed conscientious objection to be a right and included exemptions in their constitutions.¹⁸ However, an attempt to include a conscientious objection clause in the Bill of Rights failed.¹⁹ After passing through the House of Representatives, the bill failed in a Senate committee because of concerns over states' rights.²⁰ Nonetheless, the U.S. Congress began inserting military service exemptions in draft laws. The first such exemption was passed in 1863 by the Union during the Civil War.²¹ Not exclusive to conscientious objectors, the exemption to the Enrollment Act allowed individuals to avoid military service if they could either pay a commutation fee of \$300 or provide a suitable substitute to serve in their place.²² The first federal exemption to military service specifically for conscientious objectors was included in the 1864 Draft Act.²³ Since 1864, every draft law passed by the federal government has included an exemption for conscientious objectors.²⁴

LAW VIOLATORS, 1658–1985, at 5–6 (1986). The Quakers refused to do so and were approached by a Native American war party. Seeing that they were engaged in worship and were a peaceful people, the war party decided not to kill them. *Id.*

⁶ *Id.* at 6.

⁷ *Id.*

⁸ *Id.* at 7.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Other pacifist religious groups included the Mennonites and the Brethren. 1 SELECTIVE SERVICE SYSTEM, CONSCIENTIOUS OBJECTION 9–13 (1950) [hereinafter SELECTIVE SERVICE SYSTEM, CONSCIENTIOUS OBJECTION] (Special Monograph No. 11).

¹³ *Id.*

¹⁴ 2 SELECTIVE SERVICE SYSTEM, BACKGROUNDS OF SELECTIVE SERVICE, MILITARY OBLIGATION: THE AMERICAN TRADITION 16 (1947) [hereinafter SELECTIVE SERVICE SYSTEM, MILITARY OBLIGATION] (Special Monograph No. 1, Part 12 Rhode Island Enactments).

¹⁵ KOHN, *supra* note 5, at 8.

¹⁶ SELECTIVE SERVICE SYSTEM, BACKGROUNDS OF SELECTIVE SERVICE: A HISTORICAL REVIEW OF THE PRINCIPLE OF CITIZEN COMPULSION IN THE RAISING OF ARMIES 89 (1947) [hereinafter SELECTIVE SERVICE SYSTEM, CITIZEN COMPULSION] (Special Monograph No. 1).

¹⁷ KOHN, *supra* note 5, at 10.

¹⁸ These states were Del., Pa., N.Y., and N.H. *Id.*

¹⁹ SELECTIVE SERVICE SYSTEM, CONSCIENTIOUS OBJECTION, *supra* note 12, at 38.

²⁰ KOHN, *supra* note 5, at 11.

²¹ SELECTIVE SERVICE SYSTEM, CITIZEN COMPULSION, *supra* note 16, at 132.

²² *Id.*

²³ *Id.* at 141.

²⁴ Selective Service Act, Pub. L. No. 65-12, 40 Stat. 76 (1917); Selective Service and Training Act, 54 Stat. 885 (1940); Military Selective Service Act of 1948, 50 U.S.C.S. §§ 451–473 (LexisNexis 2008).

B. Modern Statutory Conscientious Objection Exemption

The current statutory conscientious objection exemption is short, consisting of only one paragraph in the Military Selective Service Act.²⁵ Although the statute exempts conscientious objectors from combat service, those granted conscientious objector status must still serve the U.S. government in some capacity.²⁶ After being granted conscientious objector status, the individual must then either serve in the military as a non-combatant or serve in a non-military civilian work program.²⁷ Because the statute is so brief, the procedures for the exemption are included within the Selective Service regulations.²⁸ The Selective Service regulations spell out the substantive standards used by local draft boards to decide conscientious objection claims. Due to a large number of legal challenges by inductees whose claims were denied, there exists extensive judicial interpretation of the Selective Service Act.

C. Judicial Interpretation of the Conscientious Objection Exemption

Arguably the most important decision concerning conscientious objection claims is the 1996 Supreme Court case *Estep v. United States*.²⁹ In *Estep*, the Court announced the “basis in fact” standard of review for habeas corpus petitions involving denied conscientious objection claims.³⁰ Upon reviewing the Selective Service Act’s language making local draft board’s decisions regarding classification of inductees final, the Court held that Congress intended judicial review to be limited rather than precluded.³¹ The Court held that judicial review of draft board classification decisions is limited to the question of whether there is a “basis in fact” for the decision.³² However, the Court made it clear that courts are not to reweigh the evidence to determine if the decision made by the local draft board was justified.³³ Rather, the courts were to determine whether the decisions were made in conformity with the regulations.³⁴ All courts continue to use this standard of review which has been described as “the narrowest known to the law.”³⁵ Thus, *Estep* set the firm precedent that classification of drafted military inductees is subject to judicial review, albeit a limited one.

However, the Supreme Court explored the shifting nature of the burden of persuasion in conscientious objection habeas corpus cases well before *Estep*.³⁶ In 1953, the Court explicitly stated that a claimant seeking conscientious objector status must first establish a prima facie case of entitlement to a conscientious objection exemption.³⁷ For a claimant to satisfy a

²⁵ Although the U.S. Armed Forces is currently an all-volunteer force, the Selective Service Act remains in force to effectuate any possible future draft. The heart of the exemption is the introductory sentence: “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.” 50 U.S.C.S. § 456(j).

²⁶ *See id.*

²⁷ *Id.*

²⁸ Selective Service System, 32 C.F.R. §§ 1602–1699 (2007).

²⁹ 327 U.S. 114 (1946). The Court was reviewing the two appellants’ convictions for refusing to submit to induction after the local draft board denied their request for exemption to service. *Id.* Although this case concerns an appellant who applied for the religious minister exemption of the Selective Service Act and not the conscientious objector exemption, all courts have followed the implicit holding in this case that denied conscientious objection claims may be appealed to federal court under habeas corpus proceedings. *See Aguayo v. Harvey*, 476 F.3d 971 (D.C. Cir. 2007); *Alhassan v. Hagee*, 424 F.3d 518 (7th Cir. 2005); *Roby v. United States Dep’t of the Navy*, 76 F.3d 1052 (9th Cir. 1996); *Rainey v. Garrett*, 1993 U.S. App. LEXIS 5404 (4th Cir. 1993); *Hager v. Sec’y of the Air Force*, 938 F.2d 1449 (1st Cir. 1991); *Naill v. Alexander*, 631 F.2d 696 (10th Cir. 1980); *United States ex rel. Checkman v. Laird*, 469 F.2d 773 (2nd Cir. 1972). The Court later confirmed that the writ of habeas corpus is also available to unconfined servicemembers who submitted to induction even though their requests for a conscientious objection exemption were denied. *Witmer v. United States*, 348 U.S. 375, 377 (1955).

³⁰ *Estep*, 327 U.S. at 122.

³¹ *Id.*

³² *Id.* The Court borrowed this standard of review from deportation cases in which Congress had similarly declared deportation orders to be final decisions.

³³ *Id.*

³⁴ *Id.*

³⁵ *Naill v. Alexander*, 631 F.2d 696, 698 (10th Cir. 1980); *Bishop v. United States*, 412 F.2d 1064, 1067 (9th Cir. 1969); *Blalock v. United States*, 247 F.2d 615, 619 (4th Cir. 1957).

³⁶ *See Dickinson v. United States*, 346 U.S. 389, 396 (1953).

³⁷ *Id.*

prima facie case, he or she merely has to show that he or she completed the proper paperwork.³⁸ Once the claimant establishes a prima facie case, the Government must show that there was a basis in fact for the denial.³⁹ The effective result of the *Estep* decision was to place the burden of persuasion on the Government to disprove a claim of conscientious objection. In his dissent, Justice Jackson argued that the majority's interpretation of the standard is directly at odds with congressional intent.⁴⁰ He instead asserted that the burden of persuasion should be placed squarely on the claimant to prove misapplication of law or arbitrary action by the board.⁴¹

Throughout the Vietnam War, courts continued to hear draft exemption denial cases, resulting in a significant change in the Selective Service Act's conscientious objection exemption. Although a statutory exemption is not constitutionally required,⁴² the courts have dramatically broadened the scope of the statutory conscientious objection exemption. This expansion began in *United States v. Seeger*, when the Supreme Court in 1965 interpreted the term "Supreme Being" in the Universal Military Training and Service Act's definition of "religious training and belief" to mean something other than a traditional view of God.⁴³ The Court broadly interpreted the statute to mean that belief in a "Supreme Being" is one that occupies "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."⁴⁴ In 1970 the Supreme Court took this one step further in *Welsh v. United States* when it held the appellant, who specifically characterized his belief as non-religious, qualified for conscientious objector status within the same statutory exemption of "religious training and belief."⁴⁵ Justice Harlan characterized the opinion as a "remarkable feat of judicial surgery to remove . . . the theistic requirement of [the conscientious objection exemption]."⁴⁶

After the cessation of the draft in 1972, case law interpreting the Selective Service Act's conscientious objection exemption dramatically decreased. Although the Selective Service Act continued to require all males reaching the age of eighteen to register for the Selective Service, a prospective inductee could not submit his claim until after an order to report for induction.⁴⁷ Because no one has been inducted since the draft terminated in 1972, there have been no conscientious objector packets considered by local draft boards for approximately thirty-five years. Consequently, the focus of conscientious objection to military service shifted from drafted individuals to those already in service.

D. The In-Service Conscientious Objection Program

The in-service conscientious objection program is a relatively recent phenomenon. Compared to the statutory conscientious objection exemption for involuntarily conscripted individuals, the need for a conscientious objection discharge provision for volunteers is not immediately obvious. But to dismiss the need for an in-service program for volunteers would be to under-appreciate the strong belief in individual freedom of thought and capacity for individuals to change their views over time. The in-service conscientious objection program recognizes that a person who volunteered for military service and

³⁸ *McGee v. United States*, 402 U.S. 479, 488 (1971).

³⁹ *Dickinson*, 346 U.S. at 396.

⁴⁰ *Id.* at 400 (Jackson, J., dissenting).

⁴¹ *Id.*

⁴² See *Johnson v. Robison*, 415 U.S. 361, 375 (1974). While holding that the denial of veterans benefits to discharged conscientious objectors was constitutional, the court noted that "Congress . . . is under no obligation to carve out the conscientious objector exemption for military training." *Id.* at 375 n.14 (quoting *Robison v. Johnson*, 352 F. Supp. 848 (D. Mass. 1973)).

⁴³ See *United States v. Seeger*, 380 U.S. 163 (1965). The Court interpreted the statutory definition of 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 including] essentially political, sociological, or philosophical views or a merely personal moral code." *Id.* at 164 (quoting Universal Military Training and Service Act, 50 U.S.C. § 456(j) (1958)).

⁴⁴ *Id.* at 184.

⁴⁵ 398 U.S. 333 (1970).

⁴⁶ *Id.* at 355 (Harlan, J., concurring) (accusing the Court of a perverse re-writing of the statute to avoid deciding the constitutional question of whether the statute violated the Establishment Clause). The *Gillette* Court addressed this issue, finding that the exemption as amended by the *Welsh* and *Seeger* definitions did not violate the Establishment Clause. *Gillette v. United States*, 401 U.S. 437, 448-53 (1971).

⁴⁷ See Selective Service System, 32 C.F.R. § 1636.2 (2007).

affirmatively denied⁴⁸ being a conscientious objector can subsequently have a fundamental change in core values and beliefs that are radically inconsistent with military service.

In 1951, one of the earliest written policies for the Department of Defense (DOD) conscientious objection program only briefly mentioned the handling of in-service claims.⁴⁹ This policy required that conscientious objection claims by those servicemembers not previously classified⁵⁰ were to be treated in the same manner as claims by those who stated that their records failed to reflect a previously granted conscientious objector status.⁵¹ The directive provided very little guidance and resulted in maximum discretion for military leaders to resolve conscientious objection claims. However, fifty-six years and four regulations later, the DOD has steadily lengthened its conscientious objection regulation and dramatically increased the administrative processing requirements.⁵²

The DOD details its current policies and procedures for the in-service conscientious objection program in DOD Instruction (DODI) 1300.06. Although this Instruction explicitly announces that a discharge based on conscientious objection is discretionary within each military department, the policy is that such a discharge will be approved to the extent “practicable and equitable.”⁵³ However, a servicemember who possessed conscientious objection beliefs and failed to assert those beliefs before entering service is not eligible to apply for a conscientious objection discharge.⁵⁴ The regulation also places the burden of proof on the applicant to show by clear and convincing evidence that he or she is entitled to conscientious objector status.⁵⁵ The DOD recognizes two different categories of conscientious objectors. A Class 1-O⁵⁶ objector is a person who sincerely objects to any form of military service and will be discharged from the service.⁵⁷ A Class 1-A-O objector, in contrast, is a person who sincerely objects to service as a combatant but who will remain in the service and perform non-combatant duties.⁵⁸ To earn conscientious objector status, the applicant must prove that (1) he is conscientiously opposed to war in any form, (2) his opposition is based on religious training and/or belief, and (3) his position is firm, fixed, sincere, and deeply held.⁵⁹ Once a claim is submitted, the applicant is interviewed by a chaplain and a psychiatrist.⁶⁰ An investigating officer is appointed to investigate the claim and holds an informal hearing.⁶¹ The applicant has the right to be present and be represented by private counsel at the hearing.⁶² Upon completion of the informal hearing, the investigating officer is required to complete a report and forward it through the chain of command.⁶³ Although service

⁴⁸ Military induction forms require an enlistee to affirmatively deny current or previous conscientious beliefs. See U.S. Dep’t of Defense, DD Form 1966, Record of Military Processing (Mar. 2007) [hereinafter DD Form 1966].

⁴⁹ See U.S. DEP’T OF DEFENSE, DIR. 1315.1, DISPOSITION OF CONSCIENTIOUS OBJECTORS (18 June 1951).

⁵⁰ The directive effectively created two categories of servicemembers who could apply for in-service conscientious objection. *Id.* para. II.D. The first category was volunteers. *Id.* The second category was a catch-all category of those servicemembers who had “not been classified previously” as conscientiously objectors. *Id.* This second category was broad enough to include people whose views were formed before or after entering military service. *Id.*

⁵¹ *Id.*

⁵² Subsequent conscientious objection regulations include: U.S. DEP’T OF DEFENSE, DIR. 1300.6, UTILIZATION OF CONSCIENTIOUS OBJECTORS AND PROCEDURES FOR PROCESSING REQUESTS FOR DISCHARGE BASED ON CONSCIENTIOUS OBJECTION (21 Aug. 1962); U.S. DEP’T OF DEFENSE, DIR. 1300.6, CONSCIENTIOUS OBJECTORS (10 May 1968) [hereinafter DODD 1300.6, 10 May 1968]; U.S. DEP’T OF DEFENSE, DIR. 1300.6, CONSCIENTIOUS OBJECTORS (20 Aug. 1971) [hereinafter DODD 1300.6, 20 Aug. 1971]; and U.S. DEP’T OF DEFENSE, INSTR. 1300.06, CONSCIENTIOUS OBJECTORS (5 May 2007) [hereinafter DODI 1300.06].

⁵³ DODI 1300.06, *supra* note 52, para. 4.1.

⁵⁴ *Id.* para. 4.1.1.

⁵⁵ *Id.* para. 5.3.

⁵⁶ Although the DOD uses the designation 1-O and 1-A-O for types of conscientious objectors, the U.S. Army, U.S. Air Force, U.S. Navy and U.S. Marine Corps all use the slightly different designations of 1-0 and 1-A-0.

⁵⁷ DODI 1300.06, *supra* note 52, para. 3.1. A servicemember granted 1-O status is discharged “at the convenience of the service.” *Id.* para. 8.1.

⁵⁸ *Id.* para. 3.1.

⁵⁹ *Id.* para. 5.1.

⁶⁰ The chaplain compiles a report evaluating the nature and basis of the claim and the applicant’s sincerity and depth of conviction. *Id.* para. 7.3. The psychiatrist compiles a report evaluating whether the applicant possesses a psychiatric disorder that would warrant treatment or disposition through medical channels. *Id.*

⁶¹ *Id.* para. 7.4.

⁶² *Id.*

⁶³ *Id.* paras. 7.4, 7.5.

Department Secretaries may delegate approval authority to general courts-martial convening authorities, only the Department Secretary concerned may disapprove an application.⁶⁴

The DOD requires all service Departments to create their own service regulations that implement DODI 1300.06.⁶⁵ The Army implements its conscientious objection program through Army Regulation (AR) 600-43.⁶⁶ All other services have also promulgated regulations implementing the in-service conscientious objection program and containing substantially similar procedures.⁶⁷ The Army's conscientious objection program implements all DOD requirements and adds detail primarily to give investigating officers guidance to assist with investigating claims. One notable provision of AR 600-43 not found in DODI 1300.6 is the requirement for discharged conscientious objectors to repay any unearned bonus, special pay, or expended educational program funds.⁶⁸ As noted above, all in-service conscientious objection applications denied at the unit level are forwarded to the service Secretary for final action. The Army created the Department of the Army Conscientious Objection Review Board (DACORB) at the department level to decide these cases for the Secretary.⁶⁹ The board consists of three officers from the Army departmental level: a chaplain from the Office of the Chief, Army Chaplains; a Judge Advocate from the Office of the Judge Advocate General; and a line officer from Army Special Review Board of the Army G-1.⁷⁰ There are no regulations governing how the board reviews applications, only that it must provide reasons to an applicant if his packet is disapproved.⁷¹ The board does not meet to review cases, but instead reviews them by staffing the action from office to office.⁷² Each member votes and cases are decided by a simple majority.⁷³ There is no right for an applicant to appear before the board and no new matters can be presented except those submitted in response to any comments about the application made by the government at the unit level.⁷⁴

E. Judicial Interpretation of the In-Service Conscientious Objection Program

In the 1972 case of *Parisi v. Davidson*, the Supreme Court opened the door for judicial review of denied in-service conscientious objection claims.⁷⁵ For the first time, the Court allowed a servicemember who was denied in-service conscientious objector status to petition for habeas corpus.⁷⁶ The Court disposed of this issue in one sentence by declaring that the writ has long been available for servicemembers who claim unlawful retention in the service.⁷⁷ Although it was settled law that habeas corpus was available for jailed draft dodgers and conscripted individuals whose conscientious objection claims were denied by draft boards,⁷⁸ it was not clear that servicemembers raising a conscientious objection for the

⁶⁴ *Id.* paras. 7.6, 7.1.

⁶⁵ *Id.* para. 6.2.1.

⁶⁶ U.S. DEP'T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION (21 Aug. 2006) [hereinafter AR 600-43].

⁶⁷ U.S. DEP'T OF NAVY, MANUAL 1900-020, CONVENIENCE OF THE GOVERNMENT SEPARATION BASED ON CONSCIENTIOUS OBJECTION (ENLISTED AND OFFICERS) (22 Aug. 2002); U.S. MARINE CORPS, ORDER 1306.13E, CONSCIENTIOUS OBJECTORS (21 Nov. 1986); U.S. DEP'T OF AIR FORCE, INSTR. 36-3204, PROCEDURES FOR APPLYING AS A CONSCIENTIOUS OBJECTOR (15 July 1994) [hereinafter AFI 36-3204]; U.S. DEP'T OF COAST GUARD, COMMANDANT INSTR. 1900.8, CONSCIENTIOUS OBJECTORS AND THE REQUIREMENT TO BEAR ARMS (30 Nov. 1990).

⁶⁸ AR 600-43, *supra* note 66, para. 3-1.a.(3). The DODI 1300.06 is silent concerning the repayment of bonuses, special pay, and educational benefits. DODI 1300.06, *supra* note 52.

⁶⁹ Other than requiring its existence, AR 600-43 provides no guidance on the structure or procedures of the DACORB. AR 600-43, *supra* note 66, para. 1-4.a.(2). Once the DACORB decides a conscientious objection case, the Deputy Assistant Secretary of the Army (Review Boards) makes the final determination for the case. ASAMRA—Army Review Boards Agency, http://www.asamra.army.mil/mission_arba.htm (last visited July 28, 2008).

⁷⁰ Interview with Major Eric Magnell, Administrative Law Attorney, Administrative Law Division, U.S. Army Office of the Judge Advocate General, in Arlington, Va. (Jan. 3, 2008) [hereinafter Magnell Interview].

⁷¹ AR 600-43, *supra* note 66, para. 2-8.d.(3).

⁷² Magnell Interview, *supra* note 70.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Although the opinion focuses almost entirely on the issue of exhaustion of administrative remedies, I focus on the brief portion concerning habeas corpus relief for servicemembers seeking a discharge for conscientious objection. 405 U.S. 34 (1972).

⁷⁶ *Parisi* applied for a conscientious objection discharge pursuant to AR 635-20, *Conscientious Objection*. *Id.* at 38.

⁷⁷ *Id.* at 39.

⁷⁸ *See, e.g., Gillette v. United States*, 401 U.S. 437 (1971).

first time after induction or voluntary enlistment could petition for habeas corpus. The Court completely skipped over any analysis of the custody requirement for a habeas corpus petition.⁷⁹ A possible explanation for this omission could be in the nature of Parisi's case. Parisi was actually drafted for military service and applied for conscientious objector status six months after entering the Army. Parisi was also incarcerated as a result of a court-martial conviction for refusing to deploy to Vietnam.⁸⁰ So, although Parisi's habeas corpus petition was based on a denied in-service conscientious objection claim, his circumstances looked a lot like all the previous cases decided under the Selective Service Act. The *Parisi* case proved to be the perfect bridge between the Selective Service Act induction cases and in-service conscientious objection cases. Thus, this decision established the precedent that courts could hear habeas corpus petitions concerning denied in-service conscientious objection claims.

The next major issue for the courts was to determine the standard of review applicable to denied in-service conscientious objection claims. With much assistance from the DOD, the Supreme Court once again disposed of this issue relatively easily. In the 1971 case *Gillette v. United States*, the Court held that in-service conscientious objection claims were to be measured using the same standards previously established by the Selective Service Act and interpreted by the courts.⁸¹ The Court cited DODD 1300.6 as conclusive proof of regulatory intent to adopt the same standards of evaluation for in-service conscientious objection claims as those for the Selective Service Act.⁸² Not only did the regulation contain much of the same language as the statute, but the regulation explicitly affirmed as policy that the standards should be consistent with the statute.⁸³

However, the DOD also gave conflicting signals that it intended to limit the scope of review for in-service conscientious objection claims. In the same directive cited by the *Gillette* Court, DODD 1300.6, the DOD apparently attempted to limit reviewability of requested discharges. The directive stated that no one, including conscientious objectors, has a vested right to a discharge and that any such discharge is discretionary.⁸⁴ In the very next update to the conscientious objection regulation published after the *Gillette* case was decided, the DOD removed the language that any declared in-service claims are to be reviewed under the same standards as the Selective Service Act.⁸⁵ This same update also included additional language that a conscientious objection discharge was at "the convenience of the government."⁸⁶ Finally, the update also clarified that the burden was on the applicant to prove his claim by clear and convincing evidence.⁸⁷ However, no court has interpreted any of these changes as DOD's intent to depart from the *Gillette* Court's interpretation that it intended for in-service claims to be reviewed under the same standards as Selective Service Act claims. Therefore, all denied in-service conscientious objection claims continue to be reviewed under the same standards as the Selective Service Act.

The current in-service conscientious objection standards are unclear as to what qualifies as a religious training or belief. As noted by the *Gillette* majority, the danger of erratic decision-making is enhanced when a conscientious objection

⁷⁹ *Parisi*, 405 U.S. at 39; see also *Habeas Corpus*, 28 U.S.C.S. § 2241 (LexisNexis 2008).

⁸⁰ However, the Court notes how the conscientious objection claim predated and was independent of the court-martial. *Parisi*, 405 U.S. at 41.

⁸¹ Although *Gillette*'s case was based on a denied claim before induction, the companion case of *Negre v. Larsen* decided in the same opinion involved a post-induction claim pursuant to DODD 1300.06. *Gillette*, 401 U.S. at 442.

⁸² *Id.*

⁸³ *Id.*

Since it is in the national interest to judge all claims of conscientious objection by the same standards, whether made before or after entering military service, Selective Service System standards used in determining 1-O or 1-A-O classification of draft registrants prior to induction shall apply to servicemen who claim conscientious objection after entering military service.

Id. (quoting DODD 1300.6, 10 May 1968, *supra* note 52, para. IV.B.3.b.). The same regulation also cites Selective Service Act case law as the origin of some of its procedures. *Id.* para. V.B.

⁸⁴ *Id.*

No vested right exists for any person to be discharged from military Service at his own request even for conscientious objection before expiration of his term of service, whether he is serving voluntarily or involuntarily. Administrative discharge prior to the completion of an obligated term of service is discretionary with the military Service concerned, based on judgment of the facts and circumstances in the case.

Id. para. IV.B.1.

⁸⁵ *Id.*

⁸⁶ *Id.* para. 7.1.

⁸⁷ *Id.* para. 5.4. Before this added language, there was no defined burden of proof on the applicant.

exemption of indeterminate scope is honored.⁸⁸ This nebulous standard is also criticized as one that favors educated and articulate applicants because they are able to craft a conscientious objection claim that best parrots case law.⁸⁹ As discussed further in the next section, the current judicial standard of review essentially forces the government to disprove a petitioner's conscientious objection claim once asserted. This places a near impossible standard on the government to produce evidence of the mental state of the petitioner. The remainder of this article explores the problems arising from the current conscientious objection program and proposes several remedial government actions to provide more meaningful standards and increase judicial deference to military personnel decisions concerning conscientious objection claims.

II. The Problem with the Current In-Service Conscientious Objection Program and Potential Solutions

A. The Problem: No Meaningful Standard Creates Confusion and Unfairness

The problem with the current in-service conscientious objection program is two-fold. First, the judicially-created standard adopted by the DOD is vague and easily met by an articulate applicant. The definition of "religious training or belief" has been expanded beyond its definition to incorporate almost any origin of belief.⁹⁰ Second, the currently configured regulatory framework of the in-service conscientious objection program arguably has resulted in the federal judiciary exercising the discretionary authority that rightfully belongs to the military. Previous military in-service conscientious objection regulations initially conveyed an intent to subject all in-service conscientious objection claims to judicial review using the same standards created for claims under the Selective Service System.⁹¹ The courts have fully embraced this intent and currently judge all conscientious objection cases according to substantially the same standards.⁹² Consequently, when the military denies a conscientious objection application, the applicant can appeal the decision up to the Supreme Court using rules designed for involuntarily drafted citizens. Even if the military concludes that an applicant has not met the regulatory conscientious objection standard, the current standard of judicial review creates a presumption of validity in favor of the applicant that is extremely difficult for the Government to overcome.

The difficulty with any conscientious objection program lies in the fact that the claim is inescapably subjective. By any definition, a claim of conscientious objection deals with the state of mind of the claimant. It is a matter of belief or, as aptly named, of conscience. As discussed earlier, the original conscientious objection exemption was available solely to applicants whose beliefs were based on religion. But the current regulatory definition expanded this exemption to specifically include non-religious beliefs that are held with the same intensity as a religious belief.⁹³ This expansion made an already difficult standard even more difficult to measure. Although any conscientious objection exemption cannot avoid the difficulty in reviewing subjective beliefs, the method used to analyze these beliefs can either amplify or reduce this difficulty.

⁸⁸ *Gillette v. United States*, 401 U.S. 437, 448 (1971).

⁸⁹ James L. Lacy, *Alternative Service*, in *SELECTIVE CONSCIENTIOUS OBJECTION: ACCOMMODATING CONSCIENCE AND SECURITY* 107, 112 (Michael F. Noone, Jr. ed., 1989); see also ROBERT A. SEELEY, *ADVICE FOR CONSCIENTIOUS OBJECTORS*, available at <http://www.objector.org/advice/contents.html> (last visited July 28, 2008) (citing case law while providing specific advice on how to apply for conscientious objector status).

⁹⁰ See *supra* notes 43–45 and accompanying text. The in-service conscientious objection program currently defines "religious training and/or belief" as follows:

Belief in an external power or "being" or deeply held moral or ethical belief, to which all else is subordinate or upon which all else is ultimately dependent, and which has the power or force to affect moral well-being. The external power or "being" need not be one that has found expression in either religious or societal traditions. However, it should sincerely occupy a place of equal or greater value in the life of its possessor. Deeply held moral or ethical beliefs should be valued with the strength and devotion of traditional religious conviction. The term "religious training and/or belief" may include solely moral or ethical beliefs even though the applicant may not characterize these beliefs as "religious" in the traditional sense, or may expressly characterize them as not religious. The term "religious training and/or belief" does not include a belief that rests solely upon considerations of policy, pragmatism, expediency, or political views.

DODI 1300.06, *supra* note 52, para 3.2.

⁹¹ DODD 1300.6, 10 May 1968, *supra* note 52, para. IV.B.3.b.

⁹² See, e.g., *Gillette*, 401 U.S. at 442. However, some courts interpret the in-service conscientious objection program standards differently. See *infra* note 141.

⁹³ See DODI 1300.06, 10 May 1968, *supra* note 52, para. 3.2.

The standard for judicial review of a denied conscientious objection application continues to be the “basis in fact” standard. That is, once an applicant establishes a prima facie case, the burden shifts to the government to show that there was a basis in fact for its decision.⁹⁴ An applicant establishes a prima facie case, when he “makes nonfrivolous allegations that, if true, would be sufficient under regulation or statute to warrant granting the requested reclassification.”⁹⁵ Although the military updated its regulations to require an applicant to prove his conscientious objection belief by clear and convincing evidence, the majority of courts have not changed their standard of review.⁹⁶ Most courts still only require applicants to establish a prima facie case to satisfy their burden under a habeas corpus petition.⁹⁷ The courts have made it clear that although this standard of review is the “narrowest review known to the law,”⁹⁸ “it is not toothless.”⁹⁹ Courts require the government to show “hard, reliable, provable facts” that form a basis for disbelieving the applicant’s sincerity, or to show something “concrete in the record which substantially blurs the picture painted by the applicant.”¹⁰⁰ In short, suspicion by the Government that a servicemember is not sincere is insufficient. So although by regulation applicants must prove their conscientious objection beliefs to their military service by clear and convincing evidence in order to shift the burden to the Government, on appeal in federal court they only need to assert a prima facie case to do the same. This goes beyond the euphemism of allowing two bites of the apple. It allows a small initial nibble followed by an extraordinarily large chomp.

Another problem with the current in-service conscientious objection exemption is that it appears to favor the privileged. The vague legal standards for conscientious objection created by the Supreme Court in the 1960s and 1970s created a condition where determining the beliefs necessary to qualify for the exemption was confusing, at best. After analyzing the statistics concerning conscientious objection discharges, military historian James L. Lacy concluded that these vague standards resulted in a disproportionate number of exemptions being granted to educated whites during the Vietnam War.¹⁰¹ Mr. Lacy noted a Selective Service survey from the 1970s concluding that of the Vietnam-era drafted individuals who were granted conscientious objection exemptions, 96% had graduated high school, 40% graduated college, and 70% had completed some college.¹⁰² He also noted that very few blacks were granted conscientious objector status.¹⁰³ Although these statistics were collected from draft board conscientious objection determinations, they are relevant to the current in-service regulatory framework because the regulations have largely adopted the judicially created standards.¹⁰⁴ Because of the complexity of navigating the legal system, servicemembers able to appeal their conscientious objection denials are the ones wealthy or lucky enough to retain the assistance of competent legal counsel. A look at the most recent conscientious objection cases decided in federal courts continues the trends noted by Mr. Lacy. Of these cases, approximately 61% of

⁹⁴ Most courts follow this burden-shifting analysis. *Rainey v. Garrett*, 1993 U.S. App. LEXIS 5404, at *8 (4th Cir. Mar. 16, 1993); *Shaffer v. Schlesinger*, 531 F.2d 124, 128 (3rd Cir. 1976); *Rosenfeld v. Rumble*, 515 F.2d 498, 499 (1st Cir. 1975); *Sanger v. Seamans*, 507 F.2d 814, 816 (9th Cir. 1974); *Chilgren v. Schlesinger*, 499 F.2d 204, 207 (8th Cir. 1974); *Smith v. Laird*, 486 F.2d 307, 310 (10th Cir. 1973); *see United States v. Bush*, 509 F.2d 776, 783 (7th Cir. 1975) (applying the basis in fact standard to a pre-induction prima facie case of conscientious objection from an inductee); *see also United States v. Fuller*, 497 F.2d 551, 554 (6th Cir. 1974) (holding that because the inductee failed to establish a prima facie case for conscientious objection, the draft board was not required to show reasons for the application’s denial). Some courts, however, appear to gloss over this burden shift and begin the analysis by searching the record for the government’s basis in fact for its denial of conscientious objection applications. *Alhassan v. Hagee*, 424 F.3d 518, 522 (7th Cir. 2005); *Hager v. Sec’y of the Air Force*, 938 F.2d 1449, 1454 (1st Cir. 1991) (failing to address the burden-shifting analysis it adopted earlier in *Rosenfeld*).

⁹⁵ *Woods v. Sheehan*, 987 F.2d 1454, 1456 (9th Cir. 1993) (quoting *Sanger*, 507 F.2d at 816).

⁹⁶ *See Harris v. Schlesinger*, 526 F.2d 467, 468 (9th Cir. 1975) (noting how the 12 June 1974 version of AR 600-43, *Conscientious Objection*, altered the burden of proof from the previous case law standard of prima facie case to clear and convincing evidence).

⁹⁷ Only a few courts have addressed the new standard, but these courts appear to alter their standard of review in language only and provide no new tools for reviewing conscientious objection claims. *See Rainey*, 1993 U.S. App. LEXIS 5404, at *4 (announcing the requirement for habeas corpus petitioners to prove a prima facie conscientious objection claim by clear and convincing evidence but providing no new analysis for reviewing claims); *see also Zabala v. Hagee*, 2007 U.S. Dist. LEXIS 27423, at *21 (N.D. Cal. Mar. 29, 2007) (quoting the new standard for applicants to prove a prima facie case by clear and convincing evidence but using exact same analysis from historical conscientious objection case law).

⁹⁸ *Woods*, 987 F.2d at 1456.

⁹⁹ *Hager*, 938 F.2d at 1454.

¹⁰⁰ *Id.*

¹⁰¹ *Lacy*, *supra* note 89, at 112.

¹⁰² *Id.* Mr. Lacy fails to cite the study and the author was unable to locate it or an equivalent study to confirm his results.

¹⁰³ *Id.*

¹⁰⁴ The author was unable to obtain current race or rank-specific data for in-service conscientious objection applications. The most recent U.S. Government Accountability Office report on Conscientious Objectors does not detail statistics based on rank or race. U.S. GOV’T ACCOUNTABILITY OFFICE, MILITARY PERSONNEL: NUMBER OF FORMALLY REPORTED APPLICATIONS FOR CONSCIENTIOUS OBJECTORS IS SMALL RELATIVE TO THE TOTAL SIZE OF THE ARMED FORCES 8 (2007) [hereinafter GAO CONSCIENTIOUS OBJECTOR REPORT 2007].

officers were granted writs of habeas corpus, while only about 33% of enlisted were granted the same.¹⁰⁵ Although these numbers are not conclusive, they suggest that education may still play a significant role in resolving in-service conscientious objection cases at the judicial level.

One argument against any change in the current regulatory scheme is that conscientious objectors have little impact on military operations because there are so few applicants. The latest U.S. Government Accountability Office report on conscientious objection in 2007 concluded that the number of applications for in-service conscientious objector status was small compared to the overall size of the military.¹⁰⁶ Although it reached a similar conclusion in its 1993 report, the U.S. General Accounting Office stopped short of concluding that there was no impact on military readiness.¹⁰⁷ Another prominent figure in the 2007 report is the average processing time for conscientious objection applications. On average, it takes the DOD about seven months to process a conscientious objection application.¹⁰⁸ This, of course, does not include the additional time that federal litigation can add to the processing time. Seven or more months is a significant amount of time to ask a commander to make special accommodations for conscientious objection applicants so their duties do not interfere with their alleged beliefs.¹⁰⁹ This is even more significant when combat units are continually training for and deploying in support of the Global War on Terror. Although the effect on military readiness is certainly nowhere near the effect felt by the military during the Vietnam War,¹¹⁰ the impact is still significant.

The vague in-service conscientious objection standards allow for various interpretations and creates uncertainty. These standards have a negative impact on military units and individual servicemembers. Commanders and their Soldiers need predictability in order to plan for the future. In order to train for missions, commanders need to be able to accurately predict whether their Soldiers will be granted conscientious objector status. Soldiers need this predictability just as much or more than commanders do because it profoundly affects their lifestyle. A vague conscientious objection standard that fails to provide such predictability results in wasted resources for the government and a sense of mystery or unfairness for the Soldier. Both of these results ultimately end in frustration for everyone involved because of lack of control and understanding of the process.

¹⁰⁵ The author compiled these rudimentary statistics by searching all federal courts for habeas corpus cases involving denied conscientious objection claims since 1980. From a total of twenty nine cases, the following numbers were compiled: Eight of the thirteen officers were granted the writ, while only four of twelve enlisted were granted the writ. Oddly, all eight of the victorious officers were physicians. This also supports the conclusion that better educated servicemembers have a greater chance at achieving conscientious objector status. The cut off date of 1980 was chosen at random. *Aguayo v. Harvey*, 476 F.3d 971 (D.C. Cir. 2007); *Alhassan v. Hagee*, 424 F.3d 518 (7th Cir. 2005); *Roby v. United States Dep't of the Navy*, 76 F.3d 1052 (9th Cir. 1996); *Woods v. Sheehan*, 987 F.2d 1454 (9th Cir. 1993); *Perler-Tomboly v. Sec'y of the Air Force*, 1993 U.S. App. LEXIS 31022 (9th Cir. Nov. 24, 1993); *Rainey v. Garrett*, 1993 U.S. App. LEXIS 5404 (4th Cir. Mar. 16, 1993); *Hager v. Sec'y of the Air Force*, 938 F.2d 1449 (1st Cir. 1991); *Walshe v. Toole*, 663 F.2d 320 (1st Cir. 1981); *Naill v. Alexander*, 631 F.2d 696 (10th Cir. 1980); *Rogowskyj v. Conway* 2007 U.S. Dist. LEXIS 17162 (D.D.C. Mar. 13, 2007); *Watson v. Geren*, 483 F. Supp. 2d 226 (D.N.Y. 2007); *Kwon v. Sec'y of the Army*, 2007 U.S. Dist. Lexis 26201 (E.D. Mich. Apr. 9, 2007); *Zabala v. Hagee*, 2007 U.S. Dist. LEXIS 27423 (D. Cal. Mar. 29, 2007); *Hanna v. Sec'y of the Army*, 2006 U.S. Dist. LEXIS 74326 (D. Mass. Oct. 6, 2006); *Jashinski v. Holcomb*, 482 F. Supp. 2d 785 (D. Tex. 2006); *Reynolds v. Widnall*, 1997 U.S. Dist. LEXIS 6976 (D. Mass. Mar. 26, 1997); *Leonard v. Dep't of Navy*, 786 F. Supp. 82 (D. Me. 1992); *Reiser v. Stone*, 791 F. Supp. 1072 (D. Pa. 1992); *Allison v. Stone*, 1992 U.S. Dist. LEXIS 12429 (D. Cal. Aug. 6, 1992); *Jones v. Mundy*, 792 F. Supp. 1009 (D.N.C. 1992); *United States ex rel. Brandon v. O'Malley*, 1991 U.S. Dist LEXIS 11492 (D. Ill. Aug. 19, 1991); *Chapin v. Webb*, 701 F. Supp. 970 (D. Conn. 1988); *Lewis v. Marsh*, 1988 U.S. Dist. LEXIS 13930 (D. Ky. Sep. 26, 1988); *Goodrich v. Marsh*, 659 F. Supp. 855 (D. Ky. 1987); *Bailey v. Sec'y of Army*, 1987 U.S. Dist. LEXIS 10804 (D. Ala. Nov. 18, 1987); *Koh v. Sec'y of Air Force*, 559 F. Supp. 852 (D. Cal. 1982); *Lawton v. Lehman*, 531 F. Supp. 139 (D. Va. 1982); *Cywinski v. Binney*, 488 F. Supp. 674 (D. Md. 1980).

¹⁰⁶ The report found that between 2002 and 2006 there were only 425 applications submitted from approximately 2.3 million servicemembers in the entire U.S. Armed Forces. GAO CONSCIENTIOUS OBJECTOR REPORT 2007.

¹⁰⁷ The General Accounting Office noted that although the number of overall applications more than doubled from any of the previous four years, the number of applicants probably had no measurable impact on readiness during the Persian Gulf War. See U.S. GEN. ACCOUNTING OFFICE, CONSCIENTIOUS OBJECTORS: NUMBER OF APPLICATIONS REMAINED SMALL DURING THE PERSIAN GULF WAR 4 (1993).

¹⁰⁸ The Navy had the shortest average processing time of about five months while the Air Force Reserve had the longest processing time of about one year. GAO CONSCIENTIOUS OBJECTOR REPORT 2007, *supra* note 104, at 15. The U.S. Army and Air Force do, however, impose application processing standards through their respective regulations. The Army requires an application be forwarded to Department of the Army within ninety days of submission. AR 600-43, *supra* note 66, para. 2-1.b. The U.S. Air Force imposes a guideline that each individual involved in the process forward the application to the next person within three working days. AFI 36-3204, *supra* note 67, para. 5.7.

¹⁰⁹ Although commanders are not absolutely required to assign applicants to duties that do not conflict with their beliefs, the regulation directs commanders to "make every effort" to do so. DODI 1300.06, *supra* note 52, para. 7.9.

¹¹⁰ Near the end of the Vietnam War in 1972, more people were being granted conscientious objector status than were being inducted into the military. See KOHN, *supra* note 5, at 93.

B. Potential Solutions

1. *The Nuclear Option: Abandoning the In-Service Conscientious Objection Program*

An extreme solution to the current in-service conscientious objection exemption problem is to eliminate the program entirely. Terminating the in-service conscientious objection exemption would eliminate not only the need for an administrative procedure to process in-service claims, but also any need for judicial review of those decisions. This option would bypass the difficult problem of how to revise the currently confusing process of handling in-service conscientious objector claims.

As tempting as it may be to simply eliminate the exemption, this is likely not the best option. As discussed earlier, conscientious objection exemption from military service has deep historical roots. Our nation has always valued freedom of individual belief and allowed for conscientious objection to service.¹¹¹ This holds true even in an all-volunteer military because people's beliefs can change.¹¹² Although history and national values weigh heavily against this option, it warrants some discussion because it undoubtedly has some advocates.

A conscientious objection exemption from military service is not constitutionally required and eliminating it would create no significant basis for a legal challenge based on the U.S. Constitution.¹¹³ Furthermore, because the current in-service exemption is not statutorily created, the DOD could unilaterally eliminate the exemption by merely publishing a new regulation. Congress has already granted the President and the Secretary of Defense the power to prescribe regulations for the military.¹¹⁴ The most persuasive argument for eliminating the in-service exemption is that a servicemember should not be allowed to claim conscientious objection after he has volunteered to serve. Potential servicemembers are required to affirmatively state that they are not conscientious objectors and have no beliefs that would prevent them from participating in war.¹¹⁵ The argument follows that a servicemember forfeits any right to claim conscientious objection at the time of enlistment. However, this argument dismisses the idea that a person can become a conscientious objector after previously disavowing any such belief. This argument also ignores the negative consequences of having sincere conscientious objectors serving in the military, such as degraded combat effectiveness during military operations and increased criminal and administrative procedures for servicemembers who refuse to train or fight.

Forcing sincere conscientious objectors to remain in the military compels them to choose either to follow their beliefs or to pick up a weapon and fight. But if sincere and deeply held, these beliefs prevent a conscientious objector from participating in military training and combat. This collision of military needs and personal beliefs results in either a refusal to train for combat or a refusal to fight during combat operations. Either way, forcing a conscientious objector to continue performing military service can have dire consequences not only for the individual, but for his entire military unit. Although some may think that requiring the servicemember to make such a decision is the perfect way to determine if he or she is a sincere conscientious objector, such a method would likely only create additional burdens for military units and leaders.¹¹⁶

¹¹¹ *Parisi v. Davidson*, 405 U.S. 34, 45 (1972) (noting the "historic respect in this Nation for valid conscientious objection to military service").

¹¹² Additionally, some servicemembers who volunteered can be forced to serve for longer than their original contractual commitment. See Dep't of Army Message No. 06-232, subject: Active Army Stop Loss/Stop Movement Program for Units Scheduled to Deploy OCONUS in Support of OIF and OEF (22 Aug. 2006); see also Michelle Tan, *Stop-Loss Likely to Last Into Fall 2009*, ARMY TIMES, May 5, 2008, available at http://www.armytimes.com/news/2008/05/army_stoploss_050308/.

¹¹³ See *Johnson v. Robison*, 415 U.S. 361, 375 (1974). While holding that the denial of veterans benefits to discharged conscientious objectors was constitutional, the court noted that "Congress . . . is under no obligation to carve out the conscientious objector exemption for military training." *Id.* (quoting *Robison v. Johnson*, 352 F. Supp. 848 (D. Mass. 1973)).

¹¹⁴ See 10 U.S.C.S. § 121 (LexisNexis 2008); see also *id.* § 113(b).

¹¹⁵ See DD Form 1966, *supra* note 48.

¹¹⁶ The case of Army Specialist (SPC) Katherine Jashinski provides a good example of problems that arise from requiring a servicemember to continue military service in spite of claimed conscientious objection beliefs. *Jashinski v. Holcomb*, 482 F. Supp. 2d 785 (D. Tex. 2006). Specialist Jashinski volunteered for the National Guard and applied for conscientious objector status after receiving activation orders to deploy to Afghanistan. *Id.* After her application was twice denied by the DACORB, she filed suit in federal district court. *Id.* She sought a temporary restraining order to prohibit the Army from deploying her to Afghanistan and a writ of habeas corpus to discharge her from the Army. *Id.* Although her unit deployed to Afghanistan shortly after she submitted her conscientious objection application, the Army allowed SPC Jashinski to remain in the United States until her application and court case were resolved. *Id.* One year after her unit had been deployed to Afghanistan, the court denied both the temporary restraining order and writ of habeas corpus. *Id.* After losing her case, SPC Jashinski refused to conduct weapons training and deploy to Afghanistan. Assoc. Press, *Soldier from Wis., Denied CO Status, Gets Bad Conduct Discharge*, LACROSS TRIB., May 26, 2006, <http://www.lacrosstribune.com/articles/2006/05/26/wi/soldier.txt>. She was tried by court-martial, convicted of disobeying a lawful order, and sentenced to 120 days confinement and a bad-conduct discharge. *Id.*

Another strong argument for eliminating the in-service conscientious objection program is that the current in-service conscientious objection regulatory scheme already results in the likelihood that sincere conscientious objectors will be forced to continue service in the military. Under the current program, a claimant who possessed conscientious objection beliefs prior to entering the military is barred from claiming the conscientious objection exemption after entry.¹¹⁷ So, applicants who fail to recognize and make known their pre-existing beliefs prior to enlistment forever waive the right to apply for conscientious objection and must continue military service in their assigned military occupation.¹¹⁸ The apparent reason for this waiver provision is to encourage people to voice their objections prior to enlisting. This provision demonstrates that our national policy of honoring conscientious objection beliefs is not without limit. It shows that Congress and DOD are willing to compromise the free expression of beliefs in order to set a meaningful limitation on the claim of conscientious objection. This is one of the few provisions currently in our system that helps provide an objective standard by which the conscientious objection program can be measured.

An in-service exemption is needed as a tool for military leaders to maintain morale and discipline. A deeply sincere conscientious objector who will not or cannot obey military orders can seriously and detrimentally affect mission accomplishment. Not only will conscientious objectors refuse to train or fight, but they can also affect morale and discipline in their units. This presents military leaders with two potential problems. First is the concern that other servicemembers will follow the lead of the conscientious objector and refuse to train or fight. A refusal to follow orders has the potential to spread throughout a unit like a disease. Second is the possibility that other servicemembers will harm the conscientious objector for refusing to train or fight. Violence against conscientious objectors was rampant in earlier conflicts¹¹⁹ and is certainly foreseeable in today's military as well. But apart from the concerns about the individual conscientious objector and the concerns of the military unit, deeper societal concerns argue against forcing sincere conscientious objectors to continue military service.

Although the military could unilaterally repeal the in-service conscientious objection exemption, such a move would go against our national values.¹²⁰ The United States was built on the foundation of religious freedom and independent thought. Since its inception, the United States has embraced these ideals by including a conscientious objection exemption in the earliest military conscription laws.¹²¹ Our nation also deeply believes in the ability of individuals to develop and change their own beliefs.¹²² It is not only a recognized and accepted principle of the United States, but an accepted principle of the international community as well. The United Nations High Commissioner for Human Rights has called on all nations to exempt conscientious objectors from military service.¹²³ This national and international support for conscientious objectors suggests that a repeal of the in-service program would, at best, result in social discontent. At worst, it could result in congressional action to codify an in-service conscientious objection exemption or judicial interference in the military personnel decision-making process. Regardless of any potential ramifications of eliminating the exemption, the in-service conscientious objection program appears to be permanently embedded in military planning. Although significantly narrowing the scope of the in-service program may be appropriate, a complete elimination would likely prove to be a mistake.

¹¹⁷ The DOD regulation actually limits this waiver to servicemembers who failed to file under the Selective Service System, rendering this limitation in an all-volunteer force meaningless. See DODI 1300.06, *supra* note 52, para. 4.1.1. This is essentially the same scheme as found in the Selective Service System where inductees are required to submit claims for service exemption before induction. Selective Service System, 32 C.F.R. § 1633.2 (2007). However, the service regulations make up for the DOD's failure by requiring that conscientious objection beliefs be claimed before any kind of entry into service, including voluntary enlistment. See AR 600-43, *supra* note 66; see also U.S. MARINE CORPS, ORDER 1306.13E, CONSCIENTIOUS OBJECTORS para. 4.c (21 Nov. 1986).

¹¹⁸ See *Grubb v. Birdsong*, 452 F.2d 516 (6th Cir. 1971) (holding that the applicant waived his right to conscientious objection because he failed to assert his fixed beliefs prior to induction); see also *Aguayo v. Harvey*, 476 F.3d 971 (D.C. Cir. 2007) (upholding the lower court's decision that the applicant forfeited his claim of conscientious objection by failing to assert his beliefs prior to enlistment).

¹¹⁹ See *KOHN*, *supra* note 5, at 29–33.

¹²⁰ "As the Defense Department itself has recognized, 'the Congress . . . has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces.'" *Parisi v. Davidson*, 405 U.S. 34, 45 (1972) (quoting DODD 1300.6, 10 May 1968, *supra* note 52).

¹²¹ See *supra* Part I.A.

¹²² Our criminal justice system's dependence on the sentencing philosophy of rehabilitation further demonstrates our society's fundamental belief that people can change. See *MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(g)* (2008).

¹²³ By using the language "[a]ware that persons performing military service may develop conscientious objections," the resolution implies that states should have an in-service conscientious objection exemption in addition to the exemption from conscription. U.N. CHR, 55th Sess., 58th mtg., U.N. Doc. E/CN.4/1998/77 (Apr. 22, 1998).

2. The Middle Ground: Eliminating the Class 1-O Exemption

Another possible change to the basic scheme of the in-service conscientious objection program would be to eliminate the discharge provision while retaining the non-combatant status provision. This option is essentially a compromise between total elimination of the program and preserving the existing program as is. Eliminating the Class 1-O exemption would produce the same benefits as would total elimination while continuing to provide accommodation to sincere conscientious objectors by allowing non-combatant service.¹²⁴ This option would produce many of the same benefits discussed above as a total elimination of the program. It would help provide a deterrent to insincere applicants by requiring continued service, minimize other servicemembers' feelings of unfairness by requiring continued service, and reduce risk of harm to applicants by moving them to a different unit. Another significant benefit for this option is that it would reduce processing times because applications would no longer need to go to the service headquarters for final approval.¹²⁵

The arguments against elimination of the Class 1-O option are similar to those against total elimination of the in-service conscientious objection program. The strongest argument against this option continues to be that the exemption is historically entrenched in our society and that forcing a servicemember to continue serving counters the basic American value of individual beliefs. This argument is strong, but is counterbalanced by the fact that all of our servicemembers currently volunteer and explicitly state they are not conscientious objectors when they enlist. It is important to recall that the historical roots of the conscientious objection exemption are grounded in the earliest conscription laws. Furthermore, our current program already requires that even the most sincere conscientious objectors compromise their beliefs to some degree.

In some regard, the current in-service conscientious objection program already produces a similar result. While a servicemember's application is pending, he is required to continue service and follow lawful orders until the event of application approval and subsequent discharge.¹²⁶ Because commanders are only required to make efforts to accommodate the applicant's beliefs during the application process, servicemembers are not only subject to service in contravention to their beliefs but also may have to perform actual combat duties.¹²⁷ Eliminating the Class 1-O exemption would merely be another step in the direction of requiring continued service that contravenes asserted beliefs.

In a larger sense, all U.S. citizens are already forced to provide support to the U.S. military by virtue of their citizenship. United States citizens are required to provide support to the military through the payment of federal taxes. Nearly a quarter of the federal budget is allocated to the DOD.¹²⁸ There is no tax exemption for conscientious objection to military operations, and courts have rejected all legal arguments for such an exemption.¹²⁹ So, although a conscientious objector may claim an absolute right to abstain from any support to the military, U.S. citizens are already required to provide some contribution to the military through government spending.

As already discussed, any change in the in-service conscientious objection program could be accomplished merely by changing the regulations. The current regulations would not have to be significantly revised to incorporate this change. The Class 1-O and Class 1-A-O conscientious objection categories are primarily distinguished by the definitions alone. Although both classes similarly object to participation in war, the Class 1-A-O conscientious objector's beliefs are "such as to permit

¹²⁴ Non-combatant service currently means

(1) service in any unit that is unarmed at all times, (2) any other assignment the primary function of which does not require the use of arms in combat provided that such other assignment is acceptable to the individual concerned and does not require him or her to bear arms or to be trained in their use, or (3) service aboard an armed ship or aircraft or in a combat zone . . . unless the individual concerned is personally and directly involved in the operation of weapons.

DODI 1300.06, 10 May 1968, *supra* note 52, para. 3.3.

¹²⁵ *See id.* para. 7.7.

¹²⁶ *Id.* para. 7.9.

¹²⁷ *See id.*

¹²⁸ In fiscal year 2007, the DOD accounted for 22.8% of federal spending. U.S. DEP'T OF TREASURY: 2007 FINANCIAL REPORT OF THE U.S. GOVERNMENT 41 (2007).

¹²⁹ A long line of cases in federal courts have concluded that such a self-authorized "war-tax deduction" is invalid. *See United States v. Lee*, 455 U.S. 252, 260 (1982); *see also Jenkins v. Comm'r*, 483 F.3d 90 (2d Cir. 2007); *Adams v. Comm'r*, 170 F.3d 173 (3d Cir. 1999); *Lull v. Comm'r*, 602 F.2d 1166 (4th Cir. 1979); *Nelson v. United States*, 796 F.2d 164 (6th Cir. 1986); *First v. Comm'r*, 547 F.2d 45 (7th Cir. 1976); *Autenrieth v. Cullen*, 418 F.2d 586 (9th Cir. 1969); *Randall v. Comm'r*, 733 F.2d 1565 (11th Cir. 1984).

military service in a non-combatant status.”¹³⁰ Thus, the regulatory revision to incorporate this change can be accomplished by literally deleting all mention of the Class 1-O conscientious objector.

3. Separate the In-Service Conscientious Objection Program Standard from the Selective Service Exemption Standard

Yet another option is to adopt completely separate standards for reviewing in-service conscientious objection applications from the standard that has been created by the courts. As already discussed, the military formatted its in-service conscientious objection program to mirror the standards created by federal courts for induction.¹³¹ Some of these definitions have severely restricted how an in-service conscientious objection application could be reviewed. When the military first adopted the judicially created standards for conscientious objection, the DOD concluded that it was in the national interest to judge all claims alike.¹³² This policy was more appropriate for a system in which people were involuntarily selected and forced to join the military. However, when every recruit must now affirmatively deny any conscientious objection beliefs before voluntarily entering the military, this policy is arguably outdated. From a practical standpoint, it makes sense to consider these factors when formulating standards for review of conscientious objection claims.

A good example of a judicially created standard adopted by the DOD concerns the timing of an application. According to this rule, application timing alone could not be the only factor in determining whether someone is a sincere conscientious objector. This standard was announced as early as 1971 by the Court of Appeals for the Fifth Circuit in *Rothfuss v. Resor*¹³³ and first showed up in military regulations several years later.¹³⁴ This rule quickly morphed from the initial proposition that a delay in applying cannot be a rationale for denial,¹³⁵ to the proposition that an application immediately following deployment orders cannot be a rationale for denial.¹³⁶ According to this rule, the fact that a servicemember raises the issue of conscientious objection for the first time literally on the eve of a combat deployment cannot be the only basis for denial. In its analysis, the *Rothfuss* court based its decision in adopting the timing rule partially on the fact that the applicable regulations did not announce that timing could be a factor.¹³⁷ A potential change in the regulation to separate the in-service program standards from the judicial standards for induction would be to simply state that application timing alone may be the only factor for determining applicant sincerity. Another means to accomplish this same end would be to simply bar claims of conscientious objection for a certain period before a deployment. There are positives and negatives to changing the weight given to the timing factor. While there is arguably merit to the idea that the gravity of facing an imminent combat deployment is sometimes the period when a servicemember searches deep enough to realize his sincerely held conscientious objection beliefs,¹³⁸ this argument becomes tenuous when the predeployment phase is abbreviated. However, the point is that the DOD is theoretically free to depart from the court-made standards for induction by simply revising the applicable regulations.

The military has the authority to depart from the judicially created Selective Service standards for conscientious objection. Courts have held that the military has in fact already done so. In 1996, in *Roby v. United States Department of Navy*, the Court of Appeals for the Ninth Circuit held that the military had in fact created a fourth element for the conscientious objector status by requiring that a belief be both sincere and deeply held.¹³⁹ Although the court found a basis for its decision both in Supreme Court precedent and military regulations, the court clearly based its decision on deference to

¹³⁰ DODI 1300.06, *supra* note 52, para. 3.1.

¹³¹ See *supra* Part II.A.

¹³² DODD 1300.6, 10 May 1968, *supra* note 52, para. IV.B.3.b.

¹³³ See 443 F.2d 554, 558–59 (5th Cir. 1971).

¹³⁴ This rule first appeared in the 1974 version of AR 600-43 but has yet to appear in any DOD regulations. See U.S. DEP'T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION para. 1-4(5) (12 June 1974).

¹³⁵ *United States v. Clifford*, 409 F.2d 700, 707 (4th Cir. 1969).

¹³⁶ See *Rothfuss*, 443 F.2d at 558–59.

¹³⁷ *Id.* at 559.

¹³⁸ See *Hager v. Sec'y of Air Force*, 938 F.2d 1449, 1456–57 (1st Cir. 1991) (providing a better discussion of this argument).

¹³⁹ 76 F.3d 1052, 1057 (9th Cir. 1996) (rejecting the First and Second Circuits' holdings that depth of conviction was an improper factor). The 1971 version of DODD 1300.6 in effect at the time of the case defined conscientious objector as someone “who is conscientiously opposed to participation in war in any form; whose opposition is found on religious training and belief; and whose position is sincere and deeply held.” DODD 1300.6, 20 Aug. 1971, *supra* note 52 para. 5.1.1.

military regulations.¹⁴⁰ The circuit courts are currently split on this issue,¹⁴¹ but there is clear precedent for the military to amend its regulatory standards for in-service conscientious objection. A solution to resolve this split would be for the DOD to clearly articulate an intent to depart from the judicially created Selective Service conscientious objection exemption standards. Absent a military regulation stating this intent, courts are forced to rely on the previously announced policy to measure such claims in accordance with the Selective Service exemption. The DOD could announce this intent in a new regulation by both explicitly denouncing the previous policy and altering its court-adopted standards for reviewing in-service conscientious objection claims. Then courts will be free to establish a new line of precedents distinct and separate from the Selective Service system cases.

4. *Alternative Service: Civilian Non-Military Work Requirement*

Another consequence of having vague and confusing standards for the in-service conscientious objection applications is that insincere applicants may be undeservingly granted a military discharge. One option to deter insincere claimants deals not with the standard of review, but with the consequences of a conscientious objection discharge. Requiring discharged conscientious objectors to perform alternative civilian work would provide a deterrent to those who are merely looking to avoid their service commitment. Currently, the primary deterrent to prevent insincere applicants from seeking a conscientious objection discharge is the requirement to repay any unearned bonuses, specialty, or education funds at the time of discharge.¹⁴² And although applicants are required to sign a form acknowledging potential loss of most veterans benefits,¹⁴³ this does not provide an effective deterrent because these benefits are determined independent of conscientious objector status.¹⁴⁴ The single determining factor for veterans benefits eligibility is the characterization of discharge.¹⁴⁵ Currently, most conscientious objectors receive honorable discharges,¹⁴⁶ which qualify them for full veterans benefits.¹⁴⁷ Although one argument against alternative service is that it may deter sincere servicemembers from applying for conscientious objection, this argument is tenuous because sincere applicants are presumably concerned with military service that counters their beliefs, not service altogether.¹⁴⁸ That said, requiring alternative service as a condition for discharge would provide a real disincentive for insincere conscientious objectors to seek the in-service conscientious objection exemption because it does not allow them to pursue immediate employment in the private sector.

Further, an alternative service program serves goals other than deterrence. It serves the goal of fairness by showing other servicemembers that a discharged conscientious objector is following through on his commitment to serve the United States. Just as important, an alternative service program benefits individual conscientious objectors by providing them the satisfaction of service to their country. Finally, an alternative service program has the ability to provide needy social programs with skilled employees. For example, a physician who still owes a service obligation and is granted a conscientious objection discharge could serve in an impoverished community that has trouble recruiting doctors. Although the number of discharged conscientious objectors remains low, an alternative service program can still make a significant difference by benefiting the public and individual conscientious objectors.

¹⁴⁰ See *Roby*, 76 F.3d at 1057.

¹⁴¹ See *Kemp v. Bradley*, 457 F.2d 627, 629 (8th Cir. 1972) (rejecting a separate depth of conviction test for conscientious objection); see also *Hager*, 938 F.2d at 1459 (joining the Eighth Circuit in rejecting a separate depth of conviction test for conscientious objection).

¹⁴² See 37 U.S.C.S. § 303a (LexisNexis 2008).

¹⁴³ DODI 1300.06, *supra* note 52, para. 7.2.2.

¹⁴⁴ See GAO CONSCIENTIOUS OBJECTOR REPORT 2007, *supra* note 104, at 17.

¹⁴⁵ *Id.*

¹⁴⁶ Out of 224 discharged conscientious objectors between 2002 and 2006, 207 received honorable discharges and 14 received general discharges. *Id.* The type of discharge for the remaining three is unknown. *Id.* at 23.

¹⁴⁷ Dep't of Veterans Affairs, 38 C.F.R. § 3.12 (2007).

¹⁴⁸ However, some conscientious objectors will still be opposed to fulfilling any service commitment. In *Smith v. Laird*, the applicant appealed the district court decision granting him a writ of habeas corpus on the condition that he serve the remainder of his commitment to the military in the Selective Service Alternative civilian work program. See *Smith v. Laird*, 486 F.2d 307 (10th Cir. 1973) (reversing the lower court's decision to require service in the alternative civilian work program as a condition on the granted writ of habeas corpus because neither Congress nor the regulations required such a condition on discharged conscientious objectors).

The key to this analysis is that the Selective Service Act already requires an alternative service program for conscientious objectors exempted from military conscription.¹⁴⁹ The purpose of the alternative service program is to allow exempted conscientious objectors to fulfill their service obligation by performing “appropriate civilian work contributing to the national health, safety, or interest.”¹⁵⁰ Under the statutory system, a person exempt from military service as a Class 1-O conscientious objector would be ordered to perform alternative service by his local draft board.¹⁵¹ Conscientious objectors then reports to the local Alternative Service Office where they are assigned “appropriate work” and monitored until their service obligation is complete.¹⁵² Appropriate types of employment include work in health care services, educational services, environmental programs, social services, community services, and agricultural services.¹⁵³ Alternative Service Program employers are limited to U.S. government offices and private entities primarily engaged in either charitable or public improvement activities.¹⁵⁴ Eligible employers are approved by the Alternative Service Office and are listed in the Alternative Service Employer Network.¹⁵⁵ In an apparent effort to prevent this program from being perceived as some form of punishment for conscientious objectors, the Selective Service System makes it clear that its policy is to “treat persons in the Alternative Service Program fairly and with dignity, and to assign them to positions which will make genuine contributions to the national health, safety, or interest.”¹⁵⁶

The Selective Service’s Alternative Service Program would be the perfect organization to assist the DOD with administering an alternative in-service program for discharged Class 1-O conscientious objectors. Although the current absence of a draft eliminates a need for the Selective Service System to continuously operate a large-scale program, the Alternative Service Program is establishing the programs necessary to accomplish this mission in the event of a return to the draft.¹⁵⁷ Administering an Alternative Service Program for discharged in-service conscientious objectors would help ensure that the Selective Service System has the proper systems in place in the event of a draft. Compared to full-scale operations during war time, the amount of resources necessary for administering a program for in-service conscientious objectors would be minimal.¹⁵⁸

Finally, alternative service is not a new concept, and it should be seriously considered for servicemembers seeking a voluntary discharge before their commitment has ended. The very first military conscription laws required that conscientious objectors somehow fill the void created by their absence.¹⁵⁹ An argument against alternative service, and perhaps against any limitation to a conscientious objection exemption, is that servicemembers who volunteer should be given much greater deference to follow a life path that takes them out of the military. But even though the U.S. military is an all-volunteer force, it still must maintain its numbers in a predictable manner so that it can accomplish its mission. This goal is the reason that the military requires volunteers to commit to specific terms of service. A practice of allowing servicemembers to essentially “un-volunteer” would undermine this goal of predictability. Requiring volunteers to fulfill this time commitment, even in an alternative civilian work program, deters insincere applicants who are merely looking to abdicate their responsibilities. At the same time, sincere conscientious objectors will likely be primarily concerned that they receive the significant benefit of service that does not conflict with their beliefs.

¹⁴⁹ Military Selective Service Act of 1948, 50 U.S.C.S. § 456(j) (LexisNexis 2008).

¹⁵⁰ *Id.*

¹⁵¹ Selective Service System, 32 C.F.R. § 1656.2 (2007).

¹⁵² *Id.* § 1656.4.

¹⁵³ *Id.* § 1656.5.

¹⁵⁴ *Id.*

¹⁵⁵ Selective Service System: Alternative Service Employer Network, <https://www.sss.gov/PDFs/PrinterFriendly/asen.pdf> (last visited July 29, 2008).

¹⁵⁶ Selective Service System: Alternative Service for Conscientious Objectors, <http://www.sss.gov/FactSheets/FSaltsvc.pdf> (last visited July 29, 2008).

¹⁵⁷ *See* U.S. SELECTIVE SERVICE SYSTEM, FISCAL YEAR 2006 ANNUAL REPORT TO THE CONGRESS OF THE UNITED STATES 23 (2006).

¹⁵⁸ There were a total of 224 Class 1-O conscientious objectors discharged from the DOD from 2002 to 2006 that could have performed alternative service. GAO CONSCIENTIOUS OBJECTOR REPORT 2007, *supra* note 104, at 10. Compare that to 11,950 conscientious objectors during World War II that were assigned alternative service. KOHN, *supra* note 5, at 46. During the Vietnam War, there were approximately 172,000 conscientious objectors that were required to perform alternative service (although nearly 50,000 of those simply “dropped out” due to lack of accountability). Lacy, *supra* note 89, at 112.

¹⁵⁹ The draft law of 1863 required a conscientious objector to do one of four things: (1) find a substitute, (2) pay a fee, (3) work in hospitals, or (4) care for freedman. Lacy, *supra* note 89, at 111.

5. Limiting the Conscientious Objection Exemption to Traditionally Religious Beliefs

Another option to improve the current in-service conscientious objection program is to limit the exemption to claims arising only from traditionally held religious beliefs. This change would effectively reverse the longstanding DOD policy of honoring conscientious objection claims originating from extra-religious beliefs as adopted from the *Seeger* and *Welsh* Supreme Court cases.¹⁶⁰ This could be done by merely amending the regulatory definition of “religious training and belief” to exclude any claims based on non-religious beliefs.

In a 1993 military law review article on the in-service conscientious objection program, Army Judge Advocate Major (MAJ) William Palmer similarly concluded that the program’s standard is “confusing and overbroad.”¹⁶¹ Accordingly, he proposed a new definition for the “religious training and belief” requirement to qualify for conscientious objection.¹⁶² The proposed standard limits in-service conscientious objection qualification to only those beliefs that society recognizes as traditionally religious.¹⁶³ Major Palmer proposed this new standard to correct the overbroad judicially-created standard.¹⁶⁴ Such a restriction in the definition would accomplish the goal of increasing predictability and fairness in the in-service program by judging conscientious objection claims against a relatively objective standard.

The most significant potential roadblock for instituting a purely religious conscientious objection is that it may violate the Constitution. The First Amendment states, in part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹⁶⁵ Although MAJ Palmer provides ample support to conclude that his proposed definition would not violate the Free Exercise Clause of the First Amendment, he fairly quickly brushes over the more problematic Establishment Clause when making the same conclusion.¹⁶⁶ The weaker constitutional argument against a religious only exemption is that it violates the Free Exercise Clause by prohibiting the practice of people’s religious, albeit non-traditional, beliefs.¹⁶⁷ Nonetheless, a long line of cases have clearly held that there is no constitutional requirement to provide a religious exemption from military service.¹⁶⁸

The stronger constitutional argument against a religious only exemption for conscientious objection is that it would violate the Establishment Clause. Because only people with religious pacifist beliefs would be exempted from military service, it could constitute a government endorsement of religion. Major Palmer relies primarily on the *Gillette* case for concluding that a religious only exemption would not violate the Establishment Clause.¹⁶⁹ However, the *Gillette* Court assessed the constitutionality of a definition that had an effect of discriminating between different religious beliefs, not between secular and religious beliefs.¹⁷⁰ The *Gillette* Court intentionally did not address this issue of entanglement or government overreaching in religious affairs.¹⁷¹ In *Lemon v. Kurtzman*, the Court laid out the three-pronged test to determine

¹⁶⁰ See *supra* notes 43–44 and accompanying text.

¹⁶¹ Major William D. Palmer, *Time to Exorcise Another Ghost from the Vietnam War: Restructuring the In-Service Conscientious Objector Program*, 140 MIL. L. REV. 179, 236 (1993).

¹⁶² Major Palmer’s proposed definition for religious training and belief:

Beliefs arising from recognition of a supernatural component to life. This supernatural component may be represented by belief in God, belief in an afterlife, or belief in the ability to reach a higher existence beyond the world as we understand it. These beliefs must provide an explanation for existence; must impose moral obligations; must encourage or demand specific behaviors or practices; and must be shared by a community of believers.

Id. at 223.

¹⁶³ See *id.*

¹⁶⁴ See *supra* Part II.A.

¹⁶⁵ U.S. CONST. amend. I. These clauses are commonly referred to as the Establishment Clause and Free Exercise Clause, respectively.

¹⁶⁶ See Palmer, *supra* note 161, at 225.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 234.

¹⁷⁰ It is also important to note that the *Gillette* court reviewed the religious exemption as modified by the *Welsh-Seeger* courts and not a religious-only definition as proposed by Major Palmer. See *Gillette v. United States*, 401 U.S. 437 (1971).

¹⁷¹ See *id.* at 450 (noting that the petitioners were actually asking for greater entanglement by asking the government to expand the conscientious objection to include religious objections to particular wars. The Court, however, superficially addressed the other *Lemon* factors and found no Establishment violation.).

if a government action violated the Establishment Clause.¹⁷² In order to survive an Establishment Clause challenge, a government action must have a secular legislative purpose, must have a principle or primary effect that neither advances nor inhibits religion, and must not foster excessive government entanglement with religion.¹⁷³ Although the Supreme Court refused to strictly apply the *Lemon* test to a recent Establishment Clause case,¹⁷⁴ it remains a commonly used test¹⁷⁵ and continues to provide a valid rationale for analysis. In this case, the first prong of the test is easily satisfied because the purpose of the religious only definition is to provide a fair and meaningful standard by which conscientious objection cases could be judged.¹⁷⁶ The second and third prongs, however, are more complicated and require extensive analysis that could easily be the subject of a separate article.¹⁷⁷ Undoubtedly, a religious only conscientious objection exemption would raise complicated First Amendment issues that may prove to be a significant challenge to implementation.

Although restricting the in-service conscientious objection program to a religious only belief would be a positive step toward the goal of fairness and predictability, many problems unrelated to constitutional concerns would remain. The problem of interpreting a subjective definition of the qualifying belief would be eliminated. Theoretically, this would restrict the number of people eligible for the exemption since the objection would have to be religious based. However, the difficulty in subjectively evaluating the sincerity of someone's innermost beliefs would still be present. The DOD and courts agree that an applicant's sincerity is the crux of the conscientious objection determination.¹⁷⁸ However, switching to a purely religion based definition raises the danger that the in-service conscientious objection program would receive more, not less judicial scrutiny. At least initially it is likely that the resulting heightened scrutiny would increase the chances of judicial interference in these cases.

6. *Make an In-Service Conscientious Objection Discharge a Discretionary Act*

Another approach to change the in-service conscientious objection program is to amend the program's procedures to make it a truly discretionary governmental act. The government apparently intended to make the in-service conscientious objection program completely discretionary within the government. Both explicit and implicit regulatory language of the program shows this intent to create a discretionary conscientious objection program.¹⁷⁹ Nevertheless, courts have interpreted the currently drafted program to mandate discharge of an applicant once he makes a claim for conscientious objection unless the government can produce a tangible basis in fact for the denial.¹⁸⁰ However, the courts have concluded that the program itself is discretionary.¹⁸¹ Because the military could arguably eliminate the program, it could also theoretically restructure the program to make each individual discharge discretionary by the military service concerned. The military currently operates such discretionary discharge programs for reasons other than conscientious objection, such as for mental disorders¹⁸² and

¹⁷² See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

¹⁷³ *Id.* at 612.

¹⁷⁴ See *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (refusing to strictly follow the *Lemon* test in deciding whether erection of a stone monument on the Texas state capital grounds violates the Establishment Clause).

¹⁷⁵ *McCreary County v. ACLU*, 545 U.S. 844, 859 (2005).

¹⁷⁶ Although *Gillette v. United States* was decided before *Lemon v. Kurtzman*, the *Gillette* court relied on the secular purpose test when deciding the Establishment Clause issue. See *Gillette*, 401 U.S. at 454.

¹⁷⁷ A starting point for this analysis would be Justice Harlan's dissent in *Welsh*, where he concludes that a religious-only conscientious objection exemption from the draft would violate the Establishment Clause. *Welsh v. United States*, 398 U.S. 333, 344-67 (1970) (Harlan, J., concurring) (accusing the Court of a perverse re-writing of the statute to avoid deciding the Establishment Clause question).

¹⁷⁸ See DODI 1300.06, *supra* note 52, para. 5.2.2; see also *Witmer v. United States*, 348 U.S. 375, 381 (1955).

¹⁷⁹ "Administrative discharge due to conscientious objection prior to the completion of an obligated term of service is *discretionary* with the Military Department concerned, based on a judgment of the facts and circumstances in the case." DODI 1300.06, *supra* note 52, para. 4.1 (emphasis added). "[A]n application for classification as a Conscientious Objector *may* be approved . . . for any individual [who satisfies the three elements of the exemption]." *Id.* para. 5.1 (emphasis added). "Applicants requesting discharge who are determined to be Class 1-O Conscientious Objectors will be discharged for the *convenience of the Government.*" *Id.* para. 8.1 (emphasis added).

¹⁸⁰ See *supra* Part II.A.

¹⁸¹ See *Johnson v. Robison*, 415 U.S. 361, 375 (1974).

¹⁸² U.S. DEP'T OF DEFENSE, DIR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS para. E3.A1.1.3.4.8. (21 Dec. 1993) (C1, 4 Mar. 1994) [hereinafter DODD 1332.14].

homosexual conduct.¹⁸³ These other programs could provide a basis of comparison for converting the non-discretionary in-service conscientious objection program to a discretionary one.

Although the government claims its conscientious objection program is discretionary, the courts interpret the current regulatory procedures as providing no such discretion. A government regulation must clearly state that its decision is committed to agency discretion. In *Chapin v. Webb*, the court highlighted the difference in the Navy's discharge programs for personality disorders and conscientious objection.¹⁸⁴ In that case, the applicant applied for both types of discharge.¹⁸⁵ The court's interpretation of the applicable regulations was that the personality disorder discharge was committed to agency discretion.¹⁸⁶ The court noted that the personality disorder discharge regulations merely established procedures for commanders to initiate and document discharges and did not include substantive standards for evaluation.¹⁸⁷ The court compared these procedures with language from the conscientious objection program regulation that stated "conscientious objector requests 'will be approved to the extent practicable and equitable' within limitations imposed by regulations."¹⁸⁸ The court also cited the language that personality disorders were to be made "at the convenience of the government" as further proof that the decision was committed to agency discretion.¹⁸⁹ Another critical difference noted by the court was the fact the decision to initiate the procedures for a personality disorder discharge belonged to the government, not the individual servicemember.¹⁹⁰ This case shows that differences in drafting discharge procedures have a significant impact on whether the discharge decision is committed to agency discretion.

The military homosexual conduct program provides another good comparison to the in-service conscientious objection program. This program, like the personality disorder discharge, was reviewed and found to be committed to agency discretion.¹⁹¹ Like the petitioner in *Chapin*, the petitioner in *Adkins v. United States* filed a habeas corpus petition to be discharged from the Navy.¹⁹² Adkins claimed that the Navy's regulations required it to process him for separation due to his homosexual conduct.¹⁹³ The court held that the decision not to process Adkins for separation was unreviewable and committed to agency discretion for several reasons.¹⁹⁴ First, the court noted that the Navy regulation clearly stated a policy to process for discharge any servicemember who solicited, attempted, or engaged in homosexual acts.¹⁹⁵ The first step in this process was for the commander to investigate the facts surrounding the claim of homosexual conduct.¹⁹⁶ The commander then either dismissed the claim or proceeded with the process, depending on whether the investigation supported the claim. The court found it important that although the policy required processing, there was no mechanism for review of a claim of homosexuality.¹⁹⁷ But perhaps the most important difference was highlighted by the court when Adkins cited the *Parisi* case and suggested that the homosexual conduct policy was on par with the conscientious objection program.¹⁹⁸ The court quickly

¹⁸³ *Id.* para. E3.A1.1.8.

¹⁸⁴ 701 F. Supp. 970 (D. Conn. 1988).

¹⁸⁵ *Id.*

¹⁸⁶ "Assuming petitioner does suffer from a personality disorder, the regulations he cites do not bind the Navy to discharge him. Indeed, automatic discharge is not mandated under any set of circumstances . . ." *See id.* at 974 (interpreting the U.S. NAVAL MILITARY PERSONNEL MANUAL para 3620200.1.f(3) (22 Aug. 2002) [hereinafter NAVAL MILITARY PERSONNEL MANUAL]).

¹⁸⁷ *Id.* The current personality disorder discharge procedures are included under the title "Other designated physical or mental condition." DODD 1332.14, *supra* note 182, para. E3.A1.1.3.4.8.

¹⁸⁸ *Chapin*, 701 F. Supp. at 974 (quoting NAVAL MILITARY PERSONNEL MANUAL, *supra* note 186, para. 1860120.1). The current in-service conscientious objection regulation continues to use this same language. DODI 1300.06, *supra* note 52, para. 4.1.

¹⁸⁹ *See Chapin*, 701 F. Supp. at 974 (quoting the NAVY MILITARY PERSONNEL MANUAL *supra* note 184, para. 3620200.1.f(3)). Oddly, this language is also found in the current conscientious objection program, but courts continue to hold that the discharge decisions are reviewable. DODI 1300.06, *supra* note 52, para. 8.1.

¹⁹⁰ *See Chapin*, 701 F. Supp. at 976.

¹⁹¹ *See Adkins v. United States Navy*, 507 F. Supp. 891 (D. Tex. 1981).

¹⁹² *See id.*

¹⁹³ *See id.*

¹⁹⁴ *Id.* at 898.

¹⁹⁵ *Id.* at 897.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 898.

¹⁹⁸ *Id.*

disposed of this argument by stating that the two programs had completely different purposes.¹⁹⁹ The difference was that the conscientious objection program was designed for the benefit of conscientious objectors and set out a precise method for servicemembers seeking a discharge.²⁰⁰ In comparison, the homosexual conduct policy was designed to benefit the Navy by providing a method for “discharging persons believed to be unsuitable for service.”²⁰¹ This case shows that the method of initiation and purpose of the program are driving factors in determining whether or not a discharge decision is committed to agency discretion.

Although the homosexual conduct and in-service conscientious objection programs differ with respect to the military’s discretionary authority, the procedural similarities of the two programs are worth highlighting. Both programs include detailed procedures and substantive standards for determining when a servicemember should be discharged. The presence of substantive standards was one of the primary factors the *Chapin* Court used in determining whether a government decision was reviewable.²⁰² Also present in both programs is the written policy that a servicemember will be separated upon satisfying the substantive standards.²⁰³ It is this language in the conscientious objection program policy that the *Chapin* Court found to obligate the military to mandatory action and made that action non-discretionary.²⁰⁴ These similarities make the two separation programs the most similar of all separation programs. The similarities also reinforce the conclusion that the primary difference in the two programs affecting reviewability is the method of initiation of separation. When the power to initiate separation is held by the servicemember, the separation decision becomes non-discretionary and is subject to judicial review. However, when the power to initiate separation is held by the military, the separation becomes discretionary and unreviewable.

Reversing the power of separation initiation is the fundamental change necessary to transform the in-service conscientious objection program into the intended discretionary governmental action. Making this change would require reformulating the basic initiating and processing procedures of the program to a scheme similar to those in the homosexual conduct policy. Like the homosexual conduct policy, there are other programs for separating servicemembers from the military for the convenience of the government.²⁰⁵ These other programs are designed to discharge a servicemember whose conduct is incompatible with military service. Although other programs exist for involuntarily separating servicemembers for the convenience of the military, the homosexual conduct policy most closely resembles the in-service conscientious objection program in depth of substantive and procedural requirements.²⁰⁶ Much like the current in-service conscientious objection policy, the homosexual conduct policy requires the command to conduct an initial investigation to determine a factual basis for separation.²⁰⁷ However, unlike the in-service conscientious objection program, the homosexual conduct policy allows local commanders to take no action if they find no factual basis for separation.²⁰⁸ Separation under the homosexual conduct policy uses administrative board procedures.²⁰⁹ This method affords the servicemember the most rights

¹⁹⁹ *Id.* at 899.

²⁰⁰ *Id.*

²⁰¹ *Id.* Another purpose of the conscientious objection program, however, is to benefit the military by discharging an individual rather than wasting resources on the “hopelessness of converting a sincere conscientious objector into an effective fighting man.” *Gillette v. United States*, 401 U.S. 437, 453 (1971).

²⁰² *See Chapin v. Webb*, 701 F. Supp. 970, 974 (D. Conn. 1988).

²⁰³ The U.S. government policy on homosexual conduct in the military is that “[a] member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations” 10 U.S.C.S. § 654 (LexisNexis 2008) (emphasis added). The DOD policy on the same, of course, mirrors that found in the U.S. Code. DODD 1332.14, *supra* note 182, para. E3.A1.1.8.1.2. Similarly, the DOD policy on conscientious objection is that “a request for classification as a conscientious objector and relief from or restriction of military duties in consequence thereof will be approved to the extent practicable and equitable” DODI 1300.06, *supra* note 52, para. 4.1.

²⁰⁴ *See Chapin*, 701 F. Supp. at 974.

²⁰⁵ For example, separation for parenthood or “other designated physical or mental conditions” (such as a personality disorder) are other involuntary separations for the convenience of the government not involving misconduct. *See* DODD 1332.14, *supra* note 182, para. E3.A1.1.3.

²⁰⁶ Comparing the homosexual conduct policy to the parenthood and the physical or mental condition discharge policy, the latter two offer very little substantive guidance. *See id.* para. E3.A1.1.3. The homosexual conduct policy also contains additional detailed procedural requirements to conduct investigations prior to initiation of separation proceedings. *Id.*

²⁰⁷ *Id.* para. E3.A4.

²⁰⁸ *Id.* para E3.A4.4.2; *see also id.* para. E3.A1.1.8.4.1.

²⁰⁹ *Id.* para. E3.A1.1.8.4.

under administrative separation procedures.²¹⁰ One important difference in the homosexual conduct separation procedures is that the local administrative board may retain a servicemember when it determines that he engaged in homosexual conduct for the purpose of terminating military service or when doing so is in the best interest of the military.²¹¹ The administrative separation procedures used for all other separations allows a board to factor in all of the servicemember's circumstances and cumulative performance when deciding whether or not to discharge the servicemember.²¹² Once the board has heard the evidence in the case, it makes a recommendation to the separation authority.²¹³ The separation authority then makes the final decision, but cannot discharge a servicemember if the board recommends retention.²¹⁴ Converting the current in-service conscientious objection program to a similar procedural scheme would eliminate the need for review at the service secretary level and give this power to commanders at the unit level.

A stark difference in the two programs is found in the opposite desires of the servicemembers subject to either one. The servicemember who holds conscientious objection beliefs usually desires to be discharged from the military while the servicemember who has engaged in homosexual conduct often desires to remain in the military. This raises the concern that reserving the right of separation initiation in the commander will preclude a servicemember from being able to assert conscientious objection beliefs in an attempt to seek a discharge. The procedures of the homosexual conduct policy account for this possibility by allowing the servicemember to essentially raise the issue of separation merely by making a statement.²¹⁵ Although the homosexual conduct policy does not require a commander to investigate homosexual conduct, the in-service conscientious objection program procedures could include such a requirement to initiate a fact-finding investigation for the sole purpose of determining whether a basis exists for separation.²¹⁶ Desires of servicemembers subject to the two programs concerning continued service may be different, but the basic inquiry is the same. The fundamental issue to be resolved is whether the individual servicemember is suitable for continued service in the armed forces.

Transitioning the in-service conscientious objection program to a commander-initiated separation action would provide the military with the discretion necessary in military personnel decisions. The only truly discretionary decisions are those which clearly place the decision for separation initiation on the government, not the individual. The benefits of a discretionary decision may be obvious, but are worth stating. The benefits of the homosexual conduct policy are a good indication of what to expect from making this program discretionary. Not only do commanders initiate the separation process, but the process itself contains thorough substantive and procedural requirements designed to provide detailed guidance on a very complicated subject. This detailed guidance clearly pushes commanders toward certain gates, but the latitude allowed in the regulations also provides them the discretion to decide when it is unnecessary to go through those gates. Certainly many may criticize such a scheme as creating a situation ripe for abuse by local commanders who may ignore policy and blindly retain all servicemembers who claim to be conscientious objectors, but this argument disregards the basic responsibility of commanders to safeguard the well-being of individual servicemembers and their military units as a whole. Commanders at the unit level have a vested interest in maintaining morale, discipline, and unit cohesion. This requires that legitimate conscientious objectors are separated from the military and insincere ones are retained. Further, because local commanders know their servicemembers and units better than a Department of the Army panel or a federal court, they are in a much better position to accurately make this determination.

III. Conclusion

Analyzing the military's in-service conscientious objection program reveals a program out of control. The program contains confusing, vague, standards that produce a high likelihood of inconsistent results. Not only are the outcomes

²¹⁰ Administrative board procedures afford the servicemember the right to formal notice of the proceedings, to a hearing in front of at least three experienced servicemembers, to present evidence and witnesses at the hearing, to question any government witnesses, to a summarized transcript of the hearing, and to have military legal representation (or civilian counsel at the servicemember's expense) at the hearing. *Id.* para. E3.A3.1.3.

²¹¹ *See id.* para. E3.A1.1.8.4.

²¹² *See id.* para. E3.A2.1.1.2.4.

²¹³ *See id.* paras. E3.A3.1.2.4, E3.A3.1.3.6.

²¹⁴ *See id.* para. E3.A3.1.3.6.4.2.

²¹⁵ *See id.* para. E3.A4.4.5.

²¹⁶ *See id.* para. E3.A4. Currently, the in-service conscientious objection program requires commanders to conduct an investigation, but commanders have no discretion to disregard a claim of conscientious objection due to lack of factual basis. DODI 1300.06, *supra* note 52, paras. 7.4, 7.5.

sometimes difficult to understand, the final decisions for in-service conscientious objection cases are often made far removed from the military units by civilian judges at the highest level of our federal judiciary. The current system results in a delayed decision-making process that leaves individual servicemembers and the military units to which they belong in a state of uncertainty while the application process drags on. The delayed system results in seemingly endless opinions by investigators, interviewers, commanders, and reviewers.²¹⁷ While a case navigates the extended procedures, applicants must defy their stated conscientious objection beliefs by performing military service that supposedly conflicts with these strongly held pacifist beliefs, or risk prosecution. This extended uncertainty leaves servicemembers and their commanders detached from the decision-making procedure, feeling confused and powerless.

This article discussed several potential methods of returning control of the in-service conscientious objection program to the DOD. The methods ranged in severity from complete termination of the in-service exemption to modification of the adopted Selective Service System standards. Except for a do-nothing alternative, the least disruptive alternative would be for the DOD to adopt the latter and explicitly declare its intent to break from the Selective Service System conscientious objection program standards. At the very least, the government should announce its intended departure from these rules in the very next DOD conscientious objection regulation. However, the foundation of such a system would have to rely on tangible standards evaluating demonstrated conduct by the servicemember. The clash between an inherently intangible claim of belief and the current all volunteer system of military manpower requires that the burden of proving a changed belief rests squarely on the servicemember. The current system allows a servicemember to shift the burden to the government by merely by asserting an unproven claim that, if true, would grant him conscientious objector status.²¹⁸ This system leaves the government with the task of proving a negative, which under the current system is nearly impossible, and at the very least, extraordinarily difficult, time consuming, and resource intensive.

Although a departure from the Selective Service Act's conscientious objection exemption review standards would dramatically improve the in-service program, an outright shift in the separation initiation authority to the government is the surest way to return discretion to military leaders. As the courts have held that the personality disorder and homosexual conduct separation provisions are completely discretionary, the in-service conscientious objection program could also be a truly discretionary military personnel decision. By converting the in-service conscientious objection program to one that resembles other involuntary separations for the convenience of the government, commanders would be placed in the driver's seat for controlling this program. Placing the authority for initiation of the separation on the local commanders empowers them to carry out their inherent responsibilities to do what is best for their servicemembers and the unit as a whole.

Of course, all of the proposed changes discussed in this article will have some effect of limiting the current in-service conscientious objection program. The historical underpinnings of the conscientious objection exemption to military service reflect its national value and strongly suggest that the conscientious objection program should be salvaged. But the current form of the program essentially removes this military personnel decision-making authority to not only the highest level of each military service, but ultimately to the highest level of the U.S. judiciary. While the numbers of conscientious objection applications remain low, there appears to be no widespread uproar from either the military or civilian community concerning the current state of the program. However, every unwarranted discharge can weaken our military's ability to fight and win wars. This is true for all ranks and specialties, but it can have an especially detrimental impact on our most highly specialized positions.²¹⁹ It is not difficult to anticipate a time when in-service conscientious objection applications increase as the military continues to face more deployments in support of the war on terror. Whether the applicant is in an enlisted infantryman or an officer physician, his chain of command should have the authority to review the application using a uniform and understandable standard that produces predictable results. Revising the in-service conscientious objection program can achieve this goal. Failing to revise the program will only continue to reinforce a broken system that produces flawed results for both servicemembers and the U.S. military.

²¹⁷ The whole process can result in up to thirteen different opinions in the U.S. Army's model if a denied application is appealed to the highest possible authority: (1) Psychiatrist, (2) Chaplain, (3) Investigating Officer, (4) Company Commander, (5) Battalion Commander, (6) Brigade Commander, (7) Staff Judge Advocate, (8) General Court-Martial Convening Authority, (9) DACORB, (10) Deputy Assistant Secretary of the Army (Army Review Boards), (11) U.S. District Court, (12) U.S. Circuit Court, and (13) the U.S. Supreme Court.

²¹⁸ See *supra* Part II.A.

²¹⁹ See *supra* note 105 and accompanying text (noting that since 1980, all of the successful federal habeas corpus petitions by officers for denied conscientious objection applications were filed by physicians).