

# CONSCIENTIOUS OBJECTION TO MILITARY SERVICE: A REPORT TO THE UNITED NATIONS DIVISION OF HUMAN RIGHTS

## I. INTRODUCTION

The principle of conscientious objection to military service has received limited recognition in international law and human rights documents,<sup>1</sup> although it is an issue that has been discussed and studied by the United Nations<sup>2</sup> and various religious organizations<sup>3</sup> for a considerable period of time. The United Nations Commission on Human Rights has refrained from declaring that conscientious objection should be considered a fundamental human right, despite the extensive consideration this issue has received. Consequently, the status of a conscientious objector depends upon the benevolence of one's nation and any constitutional, legislative or administrative provisions that may exist entitling an individual to exemption from military service.

In the United States, the exemption of conscientious objectors from military service is a privilege granted by act of Congress.<sup>4</sup> There exists no constitutional provision, express or implied, which confers a right of conscientious objection to military service.<sup>5</sup> Relief from the obligation to serve in the armed forces has been a concern to objecting United States citizens<sup>6</sup> as long as any form of

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<sup>1</sup> See Schaffer & Weissbrodt, *Conscientious Objection to Military Service as a Human Right*, 9 REV. INT'L COMM'N JURISTS 33, 37-40 (1972).

<sup>2</sup> The question of conscientious objection to military service was raised in the United Nations as early as 1950, and as recently as March, 1982. See U.N. Doc. E/CN.4/NGO/1 Add. 1 (1950) [hereinafter cited as Statement by Service Civil International]; 1982 U.N. ESCOR Supp. (No. 2) at 76, 154-55, U.N. Doc. E/1982/12; E/CN.4/1982/30 (1982).

<sup>3</sup> See Schaffer & Weissbrodt, *supra* note 1, at 35-37.

<sup>4</sup> 50 U.S.C. app. §456(j) (1976), which provides "Nothing contained in this title [sections 451 to 471a of this appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

<sup>5</sup> *United States v. Macintosh*, 283 U.S. 605, 623-24 (1930), *rev'd on other grounds*, *Girouard v. United States*, 328 U.S. 61 (1946). This statement is not affected by the subsequent decision in *Girouard*. See also Brief for Petitioner at 61-68, *Gillette v. United States*, 401 U.S. 437 (1971). According to that brief, James Madison initially proposed a clause that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person," be included in the Bill of Rights. That clause and subsequent proposals similar to it were not incorporated in the amendments to the U.S. Constitution because the states already protected that right and no need seemed to exist for blanket federal protection. *Id.* at 62, 64, 68.

<sup>6</sup> Under the present Selective Service Act, every male citizen of the U.S. and every other male resident between the ages of eighteen and twenty-six, is required to register

conscription has existed.<sup>7</sup> A study undertaken by the United Nations Division of Human Rights for the Sub-Commission on Prevention of Discrimination and Protection of Minorities,<sup>8</sup> and the recent revision of the United States Selective Service regulations with respect to the adjudication of claims for the deferment or exemption from military service,<sup>9</sup> have revived this question of conscientious objection.

This Note initially reviews the consideration by the United Nations of the question of conscientious objection. The Note then will examine the concept and various dimensions of conscientious objection to military service in the United States, and delineate both the recognized valid grounds for conscientious objection, and the procedures for obtaining the status of conscientious objector. The question of alternative service in lieu of induction is evaluated, as is the status of an individual who objects to military or alternative service in a manner not permitted by law. Asylum for persons who flee their country because their objection to military service is not recognized is considered as well. An attempt is made to provide some guidance in establishing international standards for conscientious objection, by comparing the provisions relating to conscientious objection in West Germany, Yugoslavia, and Brazil. Finally, this Note evaluates the probability and operative effect of a declaration by the United Nations that conscientious objection be considered a fundamental human right.

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with the Selective Service System. 50 U.S.C. app. § 453 (1976). Section 453 provides an exception to registration for aliens with lawful nonimmigrant status under section 101(a)(15) of the Immigration and Nationality Act, as amended (66 Stat. 163; 8 U.S.C. § 1101 (1976 & Supp. III 1979)). Aliens lawfully admitted for permanent residence in the United States (Immigration and Nationality Act § 101(a)(20), 8 U.S.C. § 1101 (1976 & Supp. III 1979)), are required to register. 50 U.S.C. app. § 456(a)(1) (1976).

<sup>7</sup> For a documentary history of conscientious objection in the United States from 1757 to 1967, see CONSCIENCE IN AMERICA (L. Schlissel ed. 1968) [hereinafter cited as CONSCIENCE IN AMERICA]. See also Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31, 35-47, for a concise historical summary of the law in the United States prior to *Gillette v. United States*, 401 U.S. 437 (1971).

<sup>8</sup> Letter from Theo C. van Boven to J. F. Green, Executive Director of the Commission to Study the Organization of Peace, forwarded to Louis B. Sohn, Chairman of the Commission (Dec. 4, 1981). This letter requested information examining the question of conscientious objection to military service and its inter-relationship with the promotion and protection of human rights. This information is to be used to make an analysis for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, as directed in Resolution 14 (XXXIV), Question of Conscientious Objection to Military Service, U.N. Doc. E/CN.4/1512; E/CN.4/Sub. 2/495 at 87-88 (1981), adopted on September 10, 1981 by that Sub-Commission (letter and resolution available in *Georgia Journal of International and Comparative Law Offices*).

<sup>9</sup> Deferment or Exemption From Military Service, 47 Fed. Reg. 4,640 (1982) (to be codified in scattered sections of 32 C.F.R.).

## II. UNITED NATIONS CONSIDERATION

In 1950, the Secretary-General of the United Nations circulated a statement prepared by the Service Civil International, which documented the legislative and administrative provisions of thirty-four countries regarding conscientious objection.<sup>10</sup> However, not until 1956 did the United Nations itself study the problem of conscientious objection to military service,<sup>11</sup> and then the issue was considered only within the context of a *Study of Discrimination in the Matter of Religious Rights and Practices*<sup>12</sup> (hereinafter 1960 Study). In connection with the 1960 Study, monographs of twenty-four countries were prepared, which included information on conscientious objection to military service.<sup>13</sup> The Study concluded that while there was no uniform solution to the problem of conscientious objection, exemptions should be granted to sincere objectors in a manner that would protect the objector from public disdain for the exercise of religious convictions.<sup>14</sup> The issue of the recognition of conscientious objection to military service as a human right arose again in 1971 within the context of the Commission on Human Rights' agenda item "Study of the Question of the Education of Young all over the World for the Development of its Personality and Strengthening of its Respect for the Rights of Man and Fundamental Freedoms."<sup>15</sup> This subject was viewed as an appropriate

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<sup>10</sup> Statement by Service Civil International, *supra* note 2. This statement distinguished between: (1) 12 countries with compulsory military service and with legal provisions for conscientious objectors (Australia, Canada, Denmark, Finland, Germany, Great Britain, Israel, the Netherlands, New Zealand, Norway, Sweden, and the United States of America); (2) 18 countries with compulsory military service but without legal provision for conscientious objectors (Belgium, Bolivia, Brazil, Colombia, El Salvador, France, Greece, Italy, Mexico, Persia, Peru, Philippines, Poland, Portugal, Switzerland, Turkey, Union of South Africa, and Venezuela); and (3) 4 countries without compulsory military service (Costa Rica, India, Lebanon, and Syria).

<sup>11</sup> The Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted Resolution C, in which the Sub-Commission decided to study discrimination in the matter of religious rights and practices. Mr. Arcot Krishnaswami was appointed as the Special Rapporteur of the study. U.N. Doc. E/CN.4/721; E/CN.4/Sub. 2/177 at 44-45 (1956).

<sup>12</sup> U.N. Doc. E/CN.4/Sub. 2/200 Rev. 1; U.N. Sales No. 60.XIV.2 (1960) [hereinafter cited as 1960 Study]. The 1960 Study devoted only two pages of text to the discussion of conscientious objection. *Id.* at 43-44.

<sup>13</sup> 1960 Study Monographs, *reprinted in* U.N. Doc. E/CN.4/1118 (1972) [hereinafter cited as 1972 Report]. Those countries included: Australia, Austria, Brazil, Canada, Chile, Colombia, Denmark, Finland, France, Federal Republic of Germany, Iceland, Israel, Liechtenstein, Luxembourg, Netherlands, Norway, Philippines, Portugal, Sweden, Switzerland, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, and Yugoslavia.

<sup>14</sup> 1960 Study, *supra* note 12, at 43-44.

<sup>15</sup> 50 U.N. ESCOR Supp. (No. 4) at 48-49, U.N. Doc. E/4949; E/CN.4/1068 (1971). Conscientious objection was included on the agenda of the Commission on Human Rights after an

context in which to consider conscientious objection because it is generally the young who are required to perform military service.<sup>16</sup> However, the discussion of conscientious objection before the Commission proved to be a matter of serious disagreement between representatives on the Commission. Three general opinions developed. One group advocated the recognition of conscientious objection and the provision of alternative forms of service.<sup>17</sup> A second group considered military service a universal duty for which no exceptions could be made. For those representatives, defense of one's country was not a matter of freedom of conscience. Instead, one who refused to bear arms could be considered only an unethical coward.<sup>18</sup> A third group of representatives from developing countries noted that their countries were in no position to allow such an exemption, given their vulnerable political status and inferior level of economic development.<sup>19</sup> Despite the differences of opinion, the Commission adopted Resolution 11B, which requested that the Secretary-General prepare updated information on national legislation relating to conscientious objection, and further resolved to study specifically the question of conscientious objection when the report became available.<sup>20</sup>

In 1972, the Secretary-General prepared a report on the *Role of Youth in the Promotion and Protection of Human Rights: The question of conscientious objection to military service*<sup>21</sup> (hereinafter

appeal was made by the Pax Romana requesting recognition of conscientious objection to military service as a human right. See U.N. Doc. E/CN.4/NGO/153 at 3 (1970).

<sup>16</sup> Schaffer & Weissbrodt, *supra* note 1, at 35. The authors point out that in some countries, including the German Democratic Republic, South Africa, and the Philippines, military training begins as early as 10 or 12 years of age.

<sup>17</sup> 50 U.N. ESCOR Supp. (No. 4) at 48, para. 203, U.N. Doc. E/4949/E/CN.4/1068 (1971).

<sup>18</sup> *Id.* at 48, para. 204. The prevailing opinion of this group was that "the entire question should be left to national governments rather than made a subject for international consideration. . . ." *Id.*

<sup>19</sup> *Id.* at 48, para. 205.

<sup>20</sup> *Id.* at 88. Resolution 11B (XXVII) was adopted by 18 votes to 3, with 7 abstentions. *Id.* at 49, para. 211.

<sup>21</sup> 1972 Report, *supra* note 13, at 12-72. This portion of the report distinguished between member nations that had no compulsory military service (Bahrain, Barbados, Bhutan, Botswana, Canada, Democratic Yemen, Fiji, Iceland, Jamaica, Japan, Kuwait, Lesotho, Luxembourg, Malawi, Malta, Mauritius, Nicaragua, Pakistan, Saudi Arabia, Sierra Leone, Somalia, Trinidad and Tobago, and the United Kingdom of Great Britain and Northern Ireland); those which had compulsory military service and provisions relating to conscientious objection and/or alternative service (Australia, Austria, Belgium, Brazil, Denmark, Finland, France, Madagascar, Netherlands, New Zealand, Norway, Sweden, and United States of America); and those which had compulsory military service but made no provision for conscientious objectors (Argentina, Chile, Czechoslovakia, Cyprus, Greece, Guatemala, Hungary, Iran, Italy, Ivory Coast, Laos, Malaysia, Mexico, Morocco, Niger, Philippines, Portugal, Singapore, Syrian Arab Republic, Thailand, Tunisia).

The 57 countries that responded in 1972 included 17 responses from countries that also

1972 Report), for submission to the Commission on Human Rights. The 1972 Report was only a compilation of national legislation from member nations on conscientious objection, and did not purport to address the issue of conscientious objection to war and military service as a human right. For example, the United States reported at that time<sup>22</sup> that conscientious objection to military service and alternative service were provided for legislatively in section 6(j) of the Military Selective Service Act.<sup>23</sup> By 1980, many of the legislative provisions had been amended, repealed, or allowed to expire, and the 1972 Report was representative of only one-third of the membership of the United Nations.<sup>24</sup> In the interim a significant development had occurred: the United Nations General Assembly adopted Resolution 33/165, which recognized for the first time, "the right of all persons to refuse service in military or police forces which are used to enforce *apartheid*."<sup>25</sup> The significance of such a measure must not be underestimated. The objection to compulsory enforcement of apartheid strikes at the conscience of all who purport to adhere to the Universal Declaration of Human Rights.<sup>26</sup> This qualified recognition of conscientious objection by the General Assembly, coupled with additional factors including: (1) the failure of the 1972 Report to address conscientious objection as a basic human right, (2) the recognition that many of the legislative provisions were inapplicable by 1980, and (3) the acknowledgment that the 1972 Report was inadequately representative of the United Nations membership, resulted in proposals by non-governmental organizations and governments that led the Commission on Human Rights to request an update of the 1972 Report.<sup>27</sup> In 1980, the

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contributed to the 1960 Study, and 40 additional responses from countries that did not participate earlier. Seven countries, which had previously contributed to the 1960 Study, failed to respond in 1972. See 1960 Study Monographs, *supra* note 13, at 4-11.

<sup>22</sup> 1972 Report, *supra* note 13, at 65.

<sup>23</sup> See *supra* note 4. Section 456(j) also provides that, "[a]ny person claiming exemption from combatant training and service because of such conscientious objections . . . shall . . . be assigned to noncombatant service . . . or shall, if he is found to be conscientiously opposed to participation in such non-combatant service, in lieu of induction, be ordered . . . to perform . . . such civilian work contributing to the maintenance of the national health, safety, or interest as the Director may deem appropriate." 50 U.S.C. app. § 456(j) (1976). *But see infra* note 46 and accompanying text.

<sup>24</sup> U.N. Doc. E/CN.4/NGO/289 (1980) [hereinafter cited as 1980 Statement by International League for Human Rights].

<sup>25</sup> G.A. Res. 33/165, 33 U.N. GAOR Supp. (No. 45) at 154, U.N. Doc. A/33/45 (1979).

<sup>26</sup> Universal Declaration of Human Rights, art 2, U.N. Doc. A/811 (1948).

<sup>27</sup> See 1980 Statement by International League for Human Rights, *supra* note 24; U.N. Doc. E/CN.4/NGO/286 (1980) [hereinafter cited as 1980 Statement by Friends World Committee for Consultation]; U.N. Doc. E/CN.4/L.1528 (1980) [hereinafter cited as 1980 Draft Resolution]. Canada, Costa Rica, Denmark, and the Netherlands submitted the 1980 Draft Resolution that was adopted by the Commission on Human Rights by a vote of 23 to 2,

Secretary-General responded to the Commission's request by presenting a report<sup>28</sup> that also was limited to compiling information on national legislation received from thirty-six member nations.<sup>29</sup>

The United Nations has continued to serve as a forum on the issue of conscientious objection to military service. Nongovernmental organizations persist in their efforts to secure the express acknowledgment of conscientious objection as a basic human right under international law.<sup>30</sup> However, these efforts have produced varied results recently. During its thirty-seventh session in 1981, the Commission on Human Rights adopted two divergent resolutions on the question of conscientious objection.<sup>31</sup> Resolution 39 was introduced by the representatives of the Byelorussian Soviet Socialist Republic and was adopted without a vote.<sup>32</sup> Yet the words "conscientious objection" are not to be found in the text of Resolution 39. Instead, the emphasis is placed upon the right of a country to overcome threats to national sovereignty and territorial integrity and to ensure the implementation of youth programs for the economic and social development of the country.<sup>33</sup> In marked contrast to this retrenchment on conscientious objection was the

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with 15 abstentions. 1980 U.N. ESCOR Supp. (No. 3) at 106-07, 198-99, U.N. Doc. E/1980/13 (1980).

<sup>28</sup> U.N. Doc. E/CN.4/1419, Add. 1-5 (1980); U.N. Doc. E/CN.4/1509 (1981) [hereinafter cited together as 1980 Report]. Member nations that had no compulsory military service in 1980 include: Bahamas, Barbados, Costa Rica, Ghana, Grenada, Iceland, Lebanon, Mauritius, Oman, Pakistan, Senegal, Sri Lanka, Togo, United Kingdom, and United States. Countries reporting that compulsory military service did exist and that provisions relating to conscientious objection were in effect include: Belgium, Brazil, Denmark, Federal Republic of Germany, Finland, Italy, Netherlands, Portugal, Spain, Suriname, and Sweden. Member nations that had compulsory military service but made no provision for conscientious objection include: Equatorial Guinea, Iran, Kuwait, Madagascar, Malawi, Mexico, Panama, Tonga, and Yugoslavia.

<sup>29</sup> *Id.* The level of response from member nations dropped from 57 nations in 1972 to 36 nations in 1980. These figures reflect the following: nineteen of the 36 countries responded in both reports; seventeen other countries responded only in 1980 (two of these had participated in the 1960 Study, however); a total of 38 countries, which had previously contributed to the 1972 Report, failed to respond in 1980. See 1972 Report, *supra* note 13, at 12-72; 1960 Study Monographs, *supra* note 13, at 4-11.

Whether this decline reflects a corresponding lack of concern by the member nations on the issue of conscientious objection, is a conjectural matter. It may be a significant indicium in the event conscientious objection as a basic human right is presented for consideration by the Commission on Human Rights and subsequently by the General Assembly.

<sup>30</sup> U.N. Doc. E/CN.4/NGO/292 (1981) [hereinafter cited as 1981 Statement by Friends World Committee for Consultation]; U.N. Doc. E/CN.4/NGO/308 (1981) [hereinafter cited as 1981 Statement by International League for Human Rights].

<sup>31</sup> 1981 U.N. ESCOR Supp. (No. 5) at 137, 242-44, U.N. Doc. E/1981/25//E/CN.4/1475 (1981).

<sup>32</sup> *Id.* at 242-43.

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

resolution presented by the representative of the Netherlands.<sup>34</sup> Resolution 40 failed to receive the popular support shown its counterpart,<sup>35</sup> but did lead to a request that the Sub-Commission on Prevention of Discrimination and Protection of Minorities prepare a study on conscientious objection to be presented to the Commission on Human Rights.<sup>36</sup> It is this study that prompts the present consideration of conscientious objection in this Note.<sup>37</sup>

The concept of conscientious objection as a specific human right was recognized on the international level first by a Resolution of the Council of Europe's Consultative Assembly<sup>38</sup> (hereinafter Resolution 337), which was based upon the Report on the Right of Conscientious Objection presented to the Assembly by the Legal Committee<sup>39</sup> (hereinafter Council of Europe Report). The Consultative Assembly declared that: "Persons liable to conscription for military service who, for reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian, philosophical or similar motives, refuse to perform armed service shall enjoy a personal right to be released from the obligation to perform such service."<sup>40</sup>

Conspicuously absent from this declaration is any political motive upon which an objector might base a conviction. It appears that selective conscientious objection<sup>41</sup> based merely on political motives would be an impermissible ground of objection. The Council of

<sup>34</sup> *Id.* at 243-44.

<sup>35</sup> Resolution 40 was adopted by a vote of 25 to 3, with 12 abstentions. *Id.* at 137.

<sup>36</sup> *Id.* at 244.

<sup>37</sup> U.N. Doc. E/CN.4/1512; E/CN.4/Sub. 2/495 at 67-68, 87-88 (1981).

<sup>38</sup> Resolution of the Eur. Consult. Ass., 18th Sess., Res. No. 337 (1967).

<sup>39</sup> Report of the Legal Committee, Eur. Consult. Ass., 18th Sess., Doc. No. 2170 (1967) [hereinafter cited as Council of Europe Report].

<sup>40</sup> Resolution 337, *supra* note 38, at 1.

<sup>41</sup> Greenawalt defines the selective conscientious objector as one who objects to a particular war as unjust, based upon a variety of moral principles. For a war to be just, the following conditions must be satisfied:

- (1) The cause must be just; (2) war must be the last resort to secure justice;
- (3) war must be declared by constituted public authority; (4) there must be a reasonable prospect of victory; (5) the means used must be proportionate to the good likely to be achieved; (6) the government's intention must be just, free of vindictive hatred; (7) if victorious, the victor should treat the vanquished with mercy; (8) the war must be waged by just means, rather than such prohibited means as direct attack on noncombatants, excessive violence to combatants, and harsh treatment of prisoners.

Greenawalt, *supra* note 7, at 51.

Whether the threat of nuclear warfare would apply to the last condition is a disputed question. More importantly, it is unclear whether the failure to satisfy only one of the conditions will give rise to a valid selective conscientious objection. It is difficult to imagine a "just war" in which all of these conditions would be satisfied.

Europe Report indicated that an individual must be prevented from obtaining conscientious objector status in the event his conviction is insincere or based upon an objection to certain wars or forms of warfare.<sup>42</sup> Thus, if conscientious objection, as recognized by the Council of Europe, is to be considered a basic human right, it must be viewed as a qualified human right, at best.

It also has been argued that conscientious objection to military service is a right implicit in article 18 of the Universal Declaration of Human Rights,<sup>43</sup> which states that: "Everyone has the right to freedom of thought, conscience and religion . . ."<sup>44</sup> Neither position has gained approval from the General Assembly, yet the need exists for an elaboration of the standards for the treatment of conscientious objectors. A review of the United States approach, which follows, may assist in the development of international standards for the treatment of conscientious objection to military service.<sup>45</sup>

### III. UNITED STATES APPROACH

#### A. Overview

The authority of the Selective Service System to induct persons for training and service in the Armed Forces expired on July 1, 1973.<sup>46</sup> As the Armed Forces of the United States now are based upon an all-volunteer program, the questions of conscientious objection and alternative service for inductees no longer arises.<sup>47</sup> It is important to note, however, that the Military Selective Service Act was not repealed, so it remains an accurate statement of United States law.

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<sup>42</sup> Council of Europe Report, *supra* note 39, at 7. Examples of such objections to specific warfare included: objection to active service on foreign soil or in a colonialist venture; objection to a war in which the threat of the use of nuclear weapons exists; and objection to military service while an involved country is divided. *Id.*

<sup>43</sup> Universal Declaration of Human Rights, art. 18, U.N. Doc. A/811 (1948). See 1980 Statement by International League for Human Rights, *supra* note 24, at 3; 1980 Statement by Friends World Committee for Consultation, *supra* note 27, at 1.

<sup>44</sup> Universal Declaration of Human Rights, art. 18, U.N. Doc. A/811 (1948). Compare art. 18 with U.S. CONST. amend. I (the first amendment does not recognize the right to freedom of thought or conscience explicitly; it does provide for the right to freedom of speech and press).

<sup>45</sup> See also 1980 Statement by Friends World Committee for Consultation, *supra* note 27, at 1. This nongovernmental organization requested that the Commission on Human Rights particularly consider the organization of alternative service and measures to prevent the abusive practice of imposing prison sentences on the conscientious objector who refuses military service and/or alternative service.

<sup>46</sup> 50 U.S.C. app. § 467(c) (1976). "[N]o person shall be inducted for training and service in the Armed Forces after July 1, 1973. . . ." *Id.*

<sup>47</sup> 1980 Report, *supra* note 28, at 10.

For those persons who already have entered the military service, Defense Department regulations allow administrative discharge or an assignment to noncombatant training and service based upon conscientious objection.<sup>48</sup> Section 75.3 defines conscientious objection as "[a] firm, fixed and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and belief."<sup>49</sup> However, the privilege of conscientious objection is waived by military personnel who possessed valid conscientious objection beliefs before entering military service but failed to request classification as a conscientious objector.<sup>50</sup>

Exemption from military service has existed in one form or another in the United States beginning with exemption from colonial militias of those required to serve during the Revolutionary War.<sup>51</sup> More recently, the exemption for conscientious objection during World War II was extended to one who "by reason of religious training and belief"<sup>52</sup> was opposed to participation in war in any form. The rationale of Congress underlying this provision was that conscience is a matter of individual belief and does not result merely from membership in a pacifist sect.<sup>53</sup> However, Jehovah's Witnesses could not claim individually to be opposed to participation in war in any form, because their religion required them to fight on Judgment Day. Instead, their claim was based upon the exemption allowed for ministers, as each member of their sect is considered to be a minister. This claim was denied routinely,

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<sup>48</sup> Conscientious Objectors, 32 C.F.R. §§ 75.1-.11 (1981).

<sup>49</sup> *Id.* at § 75.3.

<sup>50</sup> *Id.* at § 75.4. If a member of the Armed Forces requested classification before entering military service and such a request was denied, any subsequent request based upon essentially the same grounds is barred. There exists one exception to this rule of waiver. Review for classification as a conscientious objector will be granted to a member of the Armed Forces who possessed conscientious objector beliefs before entering military service upon two conditions: first, if such beliefs crystallized after receipt of an induction notice, and second, if Selective Service System regulations prohibited the submission of requests for conscientious objection classification after receipt of induction notice. *Id.* See also 32 C.F.R. §§ 739, 888.1(e) (1981) (implementing uniform procedures for the discharge of conscientious objectors from the Navy, Marine Corps, and Air Force).

<sup>51</sup> Greenawalt, *supra* note 7, at 35. The exemption may have been limited to those who were members of a particular religious sect, those who could pay the prescribed fee, or those who could hire a substitute. For the U.S. approach to conscientious objection during the Civil War and World War I, see *id.* at 35-36 and CONSCIENCE IN AMERICA, *supra* note 7, at 88-186. Of particular interest is the Draft Act of 1917 provision, which restricted the exemption to those persons belonging to a "well-recognized sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in wars in any form." Draft Act of 1917, ch. 15, 40 Stat. 76, 78 (1917).

<sup>52</sup> Selective Training and Service Act of 1940, ch. 720, § 5(g), 54 Stat. 885, 889 (1940).

<sup>53</sup> Comment, *Conscientious Objection and the First Amendment*, 14 AKRON L. REV. 71, 73 (1980).

and consequently many Jehovah's Witnesses were sentenced to prison.<sup>54</sup>

The "greatest single innovation"<sup>55</sup> of the World War II draft legislation was the provision for Civilian Public Service camps, which enabled conscientious objectors to perform nonmilitary alternative service.<sup>56</sup> The major defect in the administration of the Civilian Public Service camp program was the refusal to pay the conscientious objector wages for the work he performed. The conscientious objector may have received a stipend for maintenance (not exceeding \$15.00 per month), but the balance of the earnings was paid by the employer to the United States Treasury.<sup>57</sup> The conscientious objector was denied comparable military pay, life and health insurance benefits and the family was refused dependency allowances.<sup>58</sup> Obviously, the families of imprisoned conscientious objectors suffered similar hardships.

In 1948, Congress responded to a conflict between the Second and Ninth Circuits<sup>59</sup> over the interpretation of "religious training and belief" in section 5(g) of the 1940 Draft Act by enacting section 6(j) of the Military Service Act (hereinafter 1948 Draft Act).<sup>60</sup>

<sup>54</sup> See CONSCIENCE IN AMERICA, *supra* note 7, at 180; J. CORNELL, THE CONSCIENTIOUS OBJECTOR AND THE LAW 67-68 (1943) [hereinafter cited as J. CORNELL, THE CONSCIENTIOUS OBJECTOR]. By July 1, 1943, 2071 conscientious objectors were convicted of Selective Service Law violations. Of this number, more than one-fourth were Jehovah's Witnesses. *Id.* at 67. By the end of the war, 5,300 conscientious objectors were prosecuted, 4,300 of whom were Jehovah's Witnesses. CONSCIENCE IN AMERICA, *supra* note 7, at 216. The average prison sentence served by the conscientious objector was 30.6 months, although at the same time the overall average for federal prisoners was 22.1 months. J. CORNELL, CONSCIENCE AND THE STATE 15 (1944) [hereinafter cited as J. CORNELL, CONSCIENCE AND THE STATE].

<sup>55</sup> CONSCIENCE IN AMERICA, *supra* note 7, at 215.

<sup>56</sup> Selective Training and Service Act of 1940, Ch. 720, § 5(g), 54 Stat. 885, 889 (1940). Section 5(g) provided that "[a]ny such person claiming such exemption from combatant training and service because of such conscientious objection . . . shall . . . be assigned to noncombatant service . . . or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of induction, be assigned to work of national importance under civilian direction." *Id.*

<sup>57</sup> J. CORNELL, CONSCIENCE AND THE STATE, *supra* note 54, at 40-41.

<sup>58</sup> See CONSCIENCE IN AMERICA, *supra* note 7, at 215-16. The congressional and military position was that the conscientious objector was not exposed to the same risks as the soldier and therefore he did not deserve to be paid. Congress refused to provide assistance to the dependent families, even though it could have decided to appropriate the funds out of the earnings deposited with the U.S. Treasury. "The very fact that a man does not get paid is one means of sorting the conscientious objector from the slacker." *Id.* at 216 (statement of Lewis F. Koch before the Senate Military Affairs Committee in 1942).

<sup>59</sup> Compare *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943) (expansive interpretation of language to include conscientious social belief), with *Berman v. United States*, 156 F.2d 377 (9th Cir. 1946) (strict construction of language limited to an individual's belief in a higher authority).

<sup>60</sup> Selective Service Act of 1948, ch. 625, title I, § 6(j), 62 Stat. 604, 612-13 (1948).

Congress adopted the Ninth Circuit construction and specified that "religious training and belief" was to be interpreted as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."<sup>61</sup> While it would appear that this amendment had little direct impact upon conscientious objectors during the Korean conflict, the question of conscientious objection during that conflict was not as volatile an issue as it had been during World War II.<sup>62</sup>

The amendment of the conscientious objection exemption in the 1948 Draft Act gave rise to two distinct issues during the Vietnam conflict. The first challenge involved those who objected to war for deeply held ethical, but not religious, reasons.<sup>63</sup> The second concerned the ability to object to a *particular* war as unjust.<sup>64</sup> Both of these challenges reflected the then prevailing opposition to United States military involvement in Vietnam, an opposition held in various United States quarters for a variety of reasons.<sup>65</sup> The extent of the opposition may be gauged by the reaction of the registrants who burned their draft cards in protest.<sup>66</sup> Congress responded to these symbolic acts by making it a felony to destroy and/or mutilate a draft card.<sup>67</sup>

<sup>61</sup> *Id.* at 613. For a summary of the legislative history of § 6(j) see *Welsh v. United States*, 398 U.S. 333, 348-50 (1969) (Harlan, J., concurring).

<sup>62</sup> According to one author, slightly more than 50 prosecutions involving conscientious objectors were reported during the Korean conflict. See *CONSCIENCE IN AMERICA*, *supra* note 7, at 217.

<sup>63</sup> See *infra* notes 86-93 and accompanying text; *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970).

<sup>64</sup> See *infra* notes 94-101 and accompanying text; *Gillette v. United States*, 401 U.S. 437 (1971). See *supra* note 41. The resolution of these issues contributed to the present concept of conscientious objection and its dimensions. These cases will be analyzed later in this Note in that context.

<sup>65</sup> For a discussion of the justiciability of challenges to the use of U.S. military forces in Vietnam, see J. MOORE, *LAW AND THE INDO-CHINA WAR* 570-98 (1972). That author points out that the Supreme Court refused to grant *certiorari* to review certain claims that it treated as nonjusticiable political issues. Specifically, the four major claims considered were that: "American involvement has not been constitutionally authorized; . . . American participation is in violation of international law; . . . the method of conducting hostilities violates international law; and . . . participation in the war will entail personal responsibility under the Nuremberg principles. . . ." *Id.* at 571-72. See also R. HULL & J. NOVOGROD, *LAW AND VIETNAM* 169-87 (1968) (addressing the constitutional aspects of the United States involvement in Vietnam). See generally 1-4 *THE VIETNAM WAR AND INTERNATIONAL LAW* (R. Falk ed. 1976) (a four volume classic containing essays on the international ramifications of the Vietnam war).

<sup>66</sup> *CONSCIENCE IN AMERICA*, *supra* note 7, at 256.

<sup>67</sup> Pub. L. No. 89-152, 79 Stat. 586 (1965) (codified as amended at 50 U.S.C. app. § 462(b)(3) (1976)). A person who "knowingly destroys, knowingly mutilates, or in any manner changes

The question of conscientious objection to military service is raised once again due to the reinstatement of registration procedures by former President Jimmy Carter on July 8, 1980.<sup>68</sup> President Ronald Reagan has decided to continue the process of peacetime registration.<sup>69</sup> President Reagan emphasized that continued registration was not an indication that conscription also would be reinstated. "Make no mistake: The continuation of peace time registration does not foreshadow a return to the draft . . . Only in the most severe national emergency does the Government have a claim to the mandatory service of its young people."<sup>70</sup>

## B. *Analysis of United States Law*

### 1. *Valid Grounds for Conscientious Objection*

The Constitution of the United States does not recognize explicitly a right to conscientious objection to military service. Instead, Congress has elected to grant a privilege of exemption to "any person . . . who by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal code."<sup>71</sup> This provision is limited in its ap-

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any such [registration] certificate" was subject to be fined not in excess of \$10,000, or imprisoned for not more than five years, or both. *Id.*

<sup>68</sup> Proclamation No. 4771, 45 Fed. Reg. 45,247 (1980), *reprinted in* 50 U.S.C.A. app. at 16 (West 1981). After the Vietnam conflict had ended, President Gerald R. Ford terminated the procedures established for registration under 50 U.S.C. app. § 453. *See* Proclamation No. 4360, 40 Fed. Reg. 14,567 (1975), *reprinted in* 50 U.S.C.A. app. at 15 (West 1981).

<sup>69</sup> President's Statement on Continuation of the Registration Program, 18 WEEKLY COMP. PRES. DOC. 8 (January 11, 1982).

<sup>70</sup> *Id.* Male citizens born in calendar year 1960 and thereafter are required to register upon attaining their eighteenth birthday. *See* Proclamation No. 4771, *supra* note 68. Mr. Reagan provided a grace period for those who have failed to register under Proclamation No. 4771. President's Statement on Continuation of the Registration Program, *supra* note 69, at 8. Beginning March 1, 1982 the Selective Service System requires "full compliance" with 50 U.S.C. app. § 453 and "any person . . . who otherwise evades or refuses registration . . . shall . . . be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment." 50 U.S.C. app. § 462(a) (1976). *See* Notes of telephone interview with Paul Knapp, Attorney with the Policy Development Department of the Selective Service Administration (Feb. 24, 1982) (available in *Georgia Journal of International and Comparative Law Offices*). *But see* *Rostker v. Goldberg*, 453 U.S. 57 (1981). Although the issue in that case dealt with the constitutionality of Selective Service registration limited to males, Justice Rehnquist stated that the purpose of registration is to prepare for a draft of combat troops. *Id.* at 77.

To date, prosecutions for failure to register have totalled five in number. Each of these defendants refused based upon conscientious objection to military service. *See Selective Prosecution Argued in Draft Cases*, 68 AM. BAR ASSOC. J. 1554 (1982).

<sup>71</sup> 50 U.S.C. app. § 456(j) (1976). *But see infra* notes 187, 204-05, 217-18 and accompanying text for alternative approaches to conscientious objection.

plication to persons prior to their induction into the Armed Forces. Induction is effective upon the administration of an oath of allegiance and the act of a registrant who steps forward upon command.<sup>72</sup> Once inducted, a member of the Armed Forces may be discharged or assigned to noncombatant duties only because of a privilege granted by the executive branch of the federal government, and not as a constitutional right nor under any statutory provision.<sup>73</sup>

The Department of Defense procedures delineate the recognized grounds for military discharge as a conscientious objector quite specifically. There exist two categories of conscientious objector: first, a person with a firm, fixed and sincere objection to participation of any kind in war in any form by reason of religious training and belief;<sup>74</sup> and second, a person with a firm, fixed and sincere objection to participation as a combatant in war in any form, by reason of religious training and belief, but whose convictions are such as to permit military service in a noncombatant status.<sup>75</sup> Religious training and belief is interpreted as a belief in an external power or being, or it may be a deeply held moral or ethical belief.<sup>76</sup> Either kind of belief must be the ultimate controlling force in the individual's life, and may not be based solely upon political views.<sup>77</sup>

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<sup>72</sup> 2 SEL. SERV. L. REP. (PUB. L. EDUC. INST.) 1083 (1968). The action of "stepping forward" is considered conclusive evidence of one's intent to be inducted into the Armed Forces.

<sup>73</sup> See *Hopkins v. Schlesinger*, 515 F.2d 1224 (5th Cir. 1975). That case made it explicit that the "Army is under neither a statutory nor a constitutional obligation to provide for the discharge of a conscientious objector. However, once the Army promulgates a policy of allowing discharge on grounds of conscientious objection, it must apply that policy with an even hand." *Id.* at 1227.

<sup>74</sup> Conscientious Objectors, 32 C.F.R. § 75.3 (1981).

<sup>75</sup> *Id.* These two categories also apply to a registrant who seeks conscientious objection classification. Under the first category, a registrant is classified, "1-0: Conscientious objector available for alternative service." The second classification is "1-A-0." Such an objector is available for noncombatant military service.

<sup>76</sup> (b) *Religious training and belief.* 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 of an orthodox deity, but may be a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of another, or, in the case of deeply held moral or ethical beliefs, a belief held with the strength and devotion of traditional religious conviction. The term 'religious training and belief' may include solely moral or ethical beliefs even though the applicant himself may not characterize these beliefs as 'religious' in the traditional sense, or may expressly characterize them as not religious. The term 'religious training and belief' does not include a belief which rests solely upon considerations of policy, pragmatism, expediency, or political views.

*Id.* at § 75.3(b).

<sup>77</sup>*Id.*

If Congress decides to reinstate the draft, present registrants will need to follow the procedures in part 3 of this section to claim conscientious objection status.<sup>78</sup> The recent regulations with respect to deferment and exemption from military service outline the specific grounds for claiming conscientious objection.<sup>79</sup> There exist three grounds for conscientious objection classification. First, a registrant's objection may be founded upon religious training and belief.<sup>80</sup> Second, the objection may be based upon strictly religious beliefs.<sup>81</sup> Finally, the objection may be based upon personal beliefs that are purely ethical or moral in source or content,<sup>82</sup> provided that, they occupy in the objector's life a place parallel to that filled by belief in a Supreme Being for those holding more traditional religious views. The decision of the board in each of these instances is based upon the consistency of the objector's statements and the sincerity of his objection.<sup>83</sup>

## 2. *Concept and Dimensions of Conscientious Objection*

The concept of conscientious objection in the United States is reflected accurately in the aforementioned grounds for valid classification. The evolution and dimensions of the concept of conscientious objection initially depended upon the construction Congress mandated in the legislative provisions permitting such an

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<sup>78</sup> Registrants under 50 U.S.C. app. § 453 are classified administratively in Class 1-H. See Amendments to Regulations with Respect to Deferment of Exemption from Military Service, 47 Fed. Reg. 4,640, 4,652 (1982) (to be codified at scattered sections of 32 C.F.R. §§ 1602-53). This class contains those registrants not subject to processing for induction and thus not available for unrestricted military service.

No consideration of conscientious objection is made until: (1) the registrant has received an order to report for induction, or (2) the Director of the Selective Service System has made a specific request for submission of claims and documents in support of claims. *Id.* at 4,656 (to be codified at 32 C.F.R. § 1636.2). Neither condition is presently in effect.

<sup>79</sup> The new regulations provide a much more detailed definition of the basis for classification as a conscientious objector than the grounds provided in 50 U.S.C. app. § 456(j). Compare 47 Fed. Reg. 4,640, 4,655-57 (1982) (to be codified at 32 C.F.R. §§ 1636.1-10) with 50 U.S.C. app. § 456(j) (1976).

<sup>80</sup> 47 Fed. Reg. 4,640, 4,656 (1982) (to be codified at 32 C.F.R. §§ 1636.3-4).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* See also *id.* (to be codified at § 1636.6). That regulation provides additional extensive guidelines to assist the board in analyzing the religious training and belief requirement; e.g., Board members may not reject as invalid the beliefs of the conscientious objector because they find them incomprehensible or inconsistent with their own beliefs.

<sup>83</sup> *Id.* at 4,657 (to be codified at 32 C.F.R. § 1636.10). Additional considerations relevant to a determination of the registrant's sincerity include: documentary evidence, oral statements of the registrant or his witnesses, his general demeanor, the timing of the crystallization of his conscientious objection, consistency of actions with stated beliefs, and supplemental letter of reference. *Id.* at 4,657-58 (to be codified at 32 C.F.R. § 1636.8).

exemption. With the exception of one amendment in 1967,<sup>84</sup> the legislative grant of a conscientious objection exemption has remained unaltered since the 1948 Draft Act.<sup>85</sup> Since that Act, the dimensions of conscientious objection have been circumscribed by the United States Supreme Court in three landmark decisions rendered in the wake of the Vietnam conflict.<sup>86</sup>

In *United States v. Seeger*<sup>87</sup> the Supreme Court considered the conscientious objector exemption claims of three individuals who did not adhere to any traditional religious belief or being. At that time, 1965, section 456(j) required that one's religious training and belief be in relation to a Supreme Being. Seeger challenged the constitutionality of this provision claiming that: (1) the refusal to exempt nonreligious conscientious objectors under section 456(j) was a violation of the first amendment protection of the establishment and free exercise of religion; and (2) the discrimination between different forms of religious expression violated the fifth amendment due process clause.<sup>88</sup> However, the Court did not rule on the constitutional issues in *Seeger*. Instead, the religious training and belief requirement was interpreted as "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption . . . ."<sup>89</sup> The effect of this construction was to avoid the constitutional challenges that would have required the invalidation of the statute.<sup>90</sup> The benefit of this approach was that

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<sup>84</sup> Pub. L. No. 90-94, § 1(7), 81 Stat. 100, 104 (1967) (codified as amended at 50 U.S.C. app. § 456(j) (1976)). This amendment struck the provision that required that religious training and belief stem from an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation. Congress was responding to the United States Supreme Court decision in *United States v. Seeger*, which interpreted "in a relation to a Supreme Being" to mean "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." 380 U.S. 163, 165-66 (1964).

<sup>85</sup> See *supra* note 60 and accompanying text.

<sup>86</sup> See *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970); *Gillette v. United States*, 401 U.S. 437 (1971).

<sup>87</sup> 380 U.S. 163 (1965).

<sup>88</sup> *Id.* at 165. The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. The fifth amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

<sup>89</sup> 380 U.S. 163, 176.

<sup>90</sup> By reviewing the legislative history of the 1948 Draft Act and interpreting section 456(j), the Court avoided "imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets." *Id.*

The Court gave specific directions to local boards and lower courts for their determina-

it provided the lower courts with a somewhat objective test for reviewing conscientious objection claims, and indicated to Congress that the "Supreme Being" terminology no longer would be acceptable. Religion could not be preferred over non-religion.

The approach by the Court in *Seeger* was directed at the position the belief occupies in one's life, not at the question of the existence of some Supreme Being. In a subsequent case, *Welsh v. United States*,<sup>91</sup> the Court applied the *Seeger* parallel belief test and held that the conscientious objection exemption requires that "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war,"<sup>92</sup> be exempted from military service. The combined result of *Seeger* and *Welsh* is to expand the scope of the conscientious objection exemption by effectively eliminating the religious training and belief requirement of the statute. At the same time, the *Welsh* decision excludes two groups of registrants from the conscientious objection exemption: (1) those whose beliefs are not deeply held, and (2) those whose objection to war rests solely upon considerations of policy, pragmatism, or expediency, rather than moral, ethical, or religious principle.<sup>93</sup>

That the Supreme Court has been unwilling to develop a limitless exemption for conscientious objection is shown also by *Gillette v. United States*,<sup>94</sup> wherein the Supreme Court rejected two claims of conscientious objection to participation in a particular war. The claimant's objections were found to have been sincere, but they focused only upon participation in the Vietnam conflict, which they considered an unjust war.<sup>95</sup> In reviewing these claims, the Supreme Court concluded that the congressional exemption for conscientious opposition to "participation in war in any form" was intended to extend only to those who oppose participation in *all* war.<sup>96</sup> The

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tion of the validity of a registrant's claim. They are "not free to reject beliefs because they consider them 'incomprehensible.' Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious." *Id.* at 185.

<sup>91</sup> 398 U.S. 333 (1970). As the Court in *Welsh* noted, Congress deleted the "Supreme Being" terminology from section 456(j) in 1967. *Id.* at 336 n. 2. See *supra* note 84.

<sup>92</sup> 398 U.S. at 344.

<sup>93</sup> *Id.* at 342-43.

<sup>94</sup> 401 U.S. 437 (1971).

<sup>95</sup> *Id.* at 439-41. Gillette was opposed to participation in the Vietnam conflict, but was willing to participate in a war of national defense or a United Nations peace-keeping task force. *Id.* at 439.

<sup>96</sup> *Id.* at 447. The Court emphasized that this would be true regardless of the sincerity of the claimant or religious character of his objection.

Court also held that there was no violation of the establishment or exercise clauses of the first amendment, generally because section 456(j) does not discriminate, on its face, on the basis of religious belief or affiliation.<sup>97</sup> While the Court in *Gillette* finally addressed the constitutional issues directly, it failed to enunciate the proper test to be applied in selective objection cases, and did not explain how the government had met its burden of proof.<sup>98</sup>

For Justice Douglas, dissenting in *Gillette*, the question the majority failed to address was whether a man can be compelled against his conscience to kill.<sup>99</sup> He was the only member of the Court to argue that a right of free exercise of conscience or belief is implied in the first amendment.<sup>100</sup> Justice Douglas reminded the ma-

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<sup>97</sup> *Id.* at 450. Justice Marshall found that neutral considerations, e.g., the incorporation of a conscientious objector into military life, supported the existence of the exemption that was not designed to favor any religion. Additionally, the government's interest in maintaining a fair system for military conscription was sufficiently neutral to justify limiting the exemption to objectors to all war. Therefore, section 456(j) could not have been said to reflect a religious preference. *Id.* at 452, 454-55. Justice Marshall's concern appears to have been centered on the impact upon military capacity if selective objection were recognized as a right implicit in the Constitution.

<sup>98</sup> See Sheffer, *The Free Exercise of Religion and Selective Conscientious Objection: A Judicial Response to a Moral Problem*, 9 CAP. U. L. REV. 7, 24 (1979). That article analyzes three lower federal court decisions that recognized selective conscientious objection. See *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969) (ruling that in balancing individual rights against government need to conscript men to fight in Vietnam, the demand of conscience outweighed the need to fight), *appeal dismissed*, 399 U.S. 267 (1970); *Koster v. Sharp*, 303 F. Supp. 837 (E.D. Pa. 1969) (conscience, not religion, was the standard to be applied); *United States v. McFadden*, 309 F. Supp. 502 (N.D. Cal. 1970), *aff'd*, 423 F.2d 1291 (9th Cir. 1970), *vacated and remanded*, 401 U.S. 1006 (1971), *rev'd*, 462 F.2d 484 (9th Cir. 1972) (district court on remand was ordered to dismiss the indictment). It is noteworthy that the court in *McFadden* held that to require that the objection be directed at participation in all wars violated the free exercise of religion clause; efficiency, troop morale, and manpower quotas were not sufficiently compelling to justify such invidious discrimination and therefore equal protection and due process of law were violated. 309 F. Supp. at 508. Although the Supreme Court vacated and remanded *McFadden* for consideration in light of its decision in *Gillette*, the Ninth Circuit sustained *McFadden's* defense of former jeopardy and refused to consider the contentions of the government, 462 F.2d at 486. No direct evidence of the reason for the government's failure to appeal the decision was available, but the date of the decision coincides with the reduced U.S. military involvement in Vietnam and it is conceivable that the government may have considered it no longer necessary to pursue the matter.

For a discussion of the consistency of the Supreme Court holdings and rationale in *Welsh* and *Gillette*, compare Greenawalt, *supra* note 7, at 41-67 (the decision in *Gillette* extended to Congress the requisite degree of legislative deference), with Meiklejohn, *Conscientious Objection in the Supreme Court: Welsh and Gillette*, 8 CUM. L. REV. 1 (1977) (the Court's opinion in *Welsh* compels acceptance of selective conscientious objection; the holding in *Gillette* is inconsistent).

<sup>99</sup> *Gillette v. United States*, 401 U.S. at 464.

<sup>100</sup> *Id.* at 465-66. "Yet conscience and belief are the main ingredients of First Amendment rights. They are the bedrock of free speech as well as religion." *Id.*

jority that the establishment clause prohibits invidious discrimination; therefore specific objectors must receive equal treatment with general objectors if their objection is based on similar grounds of religion and conscience.<sup>101</sup> The validity of this argument is questionable for the present time, in light of the eight to one decision in *Gillette*.

The direct application of the decision in *Gillette* subsided after the induction authority expired in 1973.<sup>102</sup> However, when the decision was made in 1980 to reinstitute registration procedures,<sup>103</sup> Congress and the Selective Service System were provided an opportunity to review the concept and parameters of the conscientious objection exemption. It was recommended in a 1979 Selective Service System report on conscientious objection, that there be a:

[c]omplete rescission of the conscientious objector exemption . . . ; and as an alternative, restriction of the conscientious objector exemption to practicing members of religious sects that specifically prohibit participation in military service, elimination of the requirement that reason be given for the denial of a claim . . . , and a specification that Selective Service determination on claims shall not be subject to review by another agency, official, or court of the United States . . . .<sup>104</sup>

President Carter proposed a program of compulsory lottery-based national service that would have consisted of a military draft with a civilian compulsory service attached.<sup>105</sup> A lottery would have been used to determine who would serve, and those selected would have been required to choose military or civilian service.<sup>106</sup> This pro-

<sup>101</sup> *Id.* at 469. See also Sheffer, *supra* note 98, at 23. At no time has the Supreme Court held that a right of free exercise of conscience emanates from the penumbra of the Bill of Rights, nor have classifications of conscience been found invidious. One of these findings would be required to find a violation of the fifth amendment's due process clause.

<sup>102</sup> See *supra* note 46.

<sup>103</sup> See *supra* note 68.

<sup>104</sup> *Judiciary Implications of Draft Registration, 1980: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess. 53 (1980)* (statement of Joseph W. Elder, Professor, Univ. of Wisconsin-Madison, which includes a quotation from the Selective Service System's report on conscientious objectors, by Major Donald A. Gurwitz, prepared for Colonel Walter Thompson in the summer of 1979).

<sup>105</sup> PRESIDENTIAL RECOMMENDATIONS FOR SELECTIVE SERVICE REFORM OF FEBRUARY 11, 1980, H. R. DOC. NO. 265, 96th Cong., 2d Sess. 56-59 (1980).

<sup>106</sup> *Id.* at 57-58. Constitutional challenges have been suggested to be inherent in these types of proposals. See Comment, *supra* note 53, at 72. If Congress narrowed the exemption, resulting in one religion being favored over another religion or even non-religion, the first amendment establishment clause might be violated. Abolition of the exemption might violate the first amendment free exercise clause. Proposals of compulsory civilian

gram would have eliminated the conscientious objector exemption. The recent release of regulations with respect to deferment or exemption from military service indicates that the Selective Service has decided to maintain the concept of conscientious objection as applied in section 456(j) and under the interpretations of the Supreme Court in *Seeger*, *Welsh*, and *Gillette*.

### 3. *The Procedures for Obtaining the Status of Conscientious Objector*

Registrants are presently unable to submit claims or other documents to be classified as conscientious objectors available for either alternative service or for noncombatant military service. In the event that the Director of the Selective Service Administration requests submission of such claims, or induction orders are issued, only then may the classification proceedings begin.<sup>107</sup>

The local boards, generally in each county, shall have the authority to consider and determine all claims by registrants.<sup>108</sup> Each registrant first must submit in writing his claim for exemption and any documents in support of claims.<sup>109</sup> After his claim is filed with the local board, a personal appearance is scheduled for the presentation of witnesses and other evidence.<sup>110</sup> The failure to appear does not bar the conscientious objection claim automatically. A second personal appearance is scheduled, but failure to appear on that occasion will be excused only by the filing of a timely written explanation and the determination of the board that the failure to appear was for good cause.<sup>111</sup> The registrant who cannot show good cause is considered to have waived his opportunity to claim exemption as a conscientious objector.

At the personal appearance the registrant presents all relevant information available to him. Oral testimony must be summarized

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service, such as President Carter's, might violate the thirteenth amendment prohibition against involuntary servitude, especially in the absence of induction. There also would be various statutory challenges involved.

<sup>107</sup> Deferment or Exemption From Military Service, 47 Fed. Reg. 4,640, 4,656 (1982) (to be codified at 32 C.F.R. §§ 1636.2-3). *But see infra* notes 188-95, 226 and accompanying text for the German and Brazilian procedural regulations.

<sup>108</sup> *Id.* at 4,661 (to be codified at 32 C.F.R. § 1648.1).

<sup>109</sup> *Id.* at 4,656 (to be codified at 32 C.F.R. §§ 1636.2-3).

<sup>110</sup> *Id.* at 4,661 (to be codified at 32 C.F.R. § 1648.4(a)). A registrant generally is restricted to presenting the testimony of three witnesses. The registrant may request that these proceedings be open to the public. *Id.* at 4,661-62 (to be codified at 32 C.F.R. §§ 1648.5(c), 1648.5(i)).

<sup>111</sup> *Id.* at 4,661 (to be codified at 32 C.F.R. § 1648.4(b)).

in writing and placed in the registrant's file.<sup>112</sup> He may be accompanied by counsel, but only the registrant and witnesses are allowed to testify.<sup>113</sup> The board then considers the merits of the claim utilizing the guidelines to analyze his religious training and belief, and additional factors relevant to a determination of the registrant's sincerity.<sup>114</sup> The changes in the new regulations reflect an attempt to streamline the classification process by reducing the amount of paperwork required. The effect, however, is to shift the burden of providing information completely to the claimant. The sufficiency of his claim under the revised system depends not only upon the answers he may provide, but more importantly it assumes that he will know all the necessary questions.

Appeal to a district appeal board may be made by the registrant upon a denial of his claim for classification.<sup>115</sup> The registrant must file a written notice of appeal and may request a personal appearance.<sup>116</sup> He also may submit a written statement specifying the reasons for taking such an appeal.<sup>117</sup> If the district board renders an adverse classification, the claimant may petition the President

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<sup>112</sup> *Id.* at 4,661-62 (to be codified at 32 C.F.R. § 1648.5(d)). The use of cameras or recording devices and the transcription of verbatim testimony is prohibited. *See id.* at 4,662 (to be codified at 32 C.F.R. § 1648.5(h)).

<sup>113</sup> *Id.* at 4,662 (to be codified at 32 C.F.R. § 1648.5(f)).

<sup>114</sup> *Id.* at 4,656-57 (to be codified at 32 C.F.R. §§ 1636.5-8). Two provisions are conspicuously absent in the revised regulations. First, no longer may the Board determine that a prima facie claim has been established. *See* 32 C.F.R. § 1661.8 (1981), *amended by* 47 Fed. Reg. 4,640 (1982). Furthermore, no provision has been made for the submission of standardized forms for conscientious objection claims. This is consistent with the trend of the Selective Service System to reduce the amount of information required in filing claims. Originally, after registration a person had to file an eight-page Classification Questionnaire [SSS Form 100] (*see* A. TATUM & J. TUCHINSKY, GUIDE TO THE DRAFT 30-45 (1969) for a reproduction of Form 100). Form 100 was revised in March, 1972, 37 Fed. Reg. 5,121 (1972), but that shorter Registration Questionnaire was revoked in December, 1972, 37 Fed. Reg. 25,715 (1972). After the revocation of Form 100, a conscientious objector would file a two-page Current Information Questionnaire [SSS Form 127]. On this form he would indicate that he claimed to be a conscientious objector and the Selective Service System then would send the registrant a Special Form for Conscientious Objector [SSS Form 150]. Form 150 was revised at least three times, and on each occasion the amount of information to be submitted was reduced substantially. (Copies of Forms 127 and 150 are reproduced in 2 SEL. SERV. L. REP. (PUB. L. EDUC. INST.) 2156:11-12, 2156:13-14.3 (1973)).

<sup>115</sup> Deferment or Exemption From Military Service, 47 Fed. Reg. 4,640, 4,662 (1982) (to be codified at 32 C.F.R. § 1651.1). The Director of the Selective Service also may appeal from any determination of a local board.

<sup>116</sup> *Id.* at 4,662 (to be codified at 32 C.F.R. § 1651.3). The personal appearance is not mandatory at this stage and the scope of review is limited. Only the registrant may appear (accompanied by counsel), and only the information in his file and written evidence submitted to the local board is considered on appeal.

<sup>117</sup> *Id.* at 4,662 (to be codified at 32 C.F.R. § 1651.4). Procedural errors will be returned to the local board for correction. Failure to appear before the district appeal board does not bar the appellant's claim. Classification will be based upon the material in his file.

of the United States and request a personal appearance before the National Selective Service Appeal Board.<sup>118</sup> A written notice of appeal is filed with the local board. The restrictions and considerations upon review by the national board correspond with those of the district appeal board.<sup>119</sup> The decision of the President appears to be final. There is no provision for subsequent judicial review unless the registrant refuses to submit to induction and is charged with a violation of the Military Selective Service Act.<sup>120</sup>

#### 4. *Alternative Service*

The regulations for alternative service in lieu of induction are administered by the Selective Service System.<sup>121</sup> Only those individuals who have been classified as conscientious objectors available for alternative service may "volunteer" for alternative service. This provision allows the conscientious objector to suggest suitable jobs in which he may be skilled.<sup>122</sup> The failure to volunteer or the disapproval of the proposed jobs results in an assignment of a specific job by the State Director.<sup>123</sup>

Only those positions in which the employer is either the federal or state government or a nonprofit organization may be considered appropriate for alternative service. Also, the nonprofit organization must serve the general public in some charitable activity or contribute to the improvement of the public health or welfare through its programs.<sup>124</sup> The Selective Service System identifies five elements that a State Director will be required to consider

<sup>118</sup> *Id.* at 4,663 (to be codified at 32 C.F.R. § 1653.1).

<sup>119</sup> *Id.* at 4,663-64 (to be codified at 32 C.F.R. § 1653.3). Proceedings before the national appeal board are closed to the public.

*See also* Conscientious Objectors, 32 C.F.R. §§ 75, 730, 888e (1981) (procedures for disposition of conscientious objectors from the specific branches of the Armed Forces).

<sup>120</sup> 50 U.S.C. app. §§ 451-471a (1976 & Supp. III 1979).

<sup>121</sup> Alternate Service, 32 C.F.R. § 1660 (1981). *But see infra* notes 196-201, 227 and accompanying text for the German and Brazilian treatment of alternative service.

<sup>122</sup> Alternate Service, 32 C.F.R. at § 1660.3 The use of the term "volunteer" in this section is misleading in as much as the conscientious objector is being compelled to serve in lieu of induction. However, this approach would utilize the skills and training of each objector, and would maximize the benefits available to the nation under such a system.

*See also* 1981 Statement by Friends World Committee for Consultation, *supra* note 30. That statement submitted by the Friends World Committee for Consultation (Quakers) suggested various forms of alternate service: ambulance units in war zones; social services in areas of need; hospital service in regions with a shortage of para-medical personnel; educational service; and international service for peace and development. *Id.* at 2.

<sup>123</sup> Alternate Service, 32 C.F.R. at § 1660.4. The registrant still is allowed to amend the order to report to alternate service, by submitting an alternative proposal for employment.

<sup>124</sup> *Id.* at § 1660.5. These programs may include educational and scientific activities in support of the public health or welfare.

in ruling upon job proposals. The job must serve the nation's health, safety or welfare.<sup>125</sup> The competitive labor market cannot be interfered with by assigning conscientious objectors to positions already filled by qualified applicants.<sup>126</sup> Compensation may not exceed the standard of living that would have been received in military service.<sup>127</sup> The proposed job should utilize a registrant's special skills.<sup>128</sup> Finally, only in extreme circumstances will a registrant be allowed to work within his community.<sup>129</sup> These provisions are designed to insure that there is equitable treatment between military personnel and alternative servicemen.

A conscientious objector is required to complete twenty-four months of alternative service before his release can be secured.<sup>130</sup> This period is identical to the length of service required of an inductee in the Armed Forces.<sup>131</sup> Under the alternative service regulations, failure to perform alternative service to the satisfaction of one's employer is sufficient to find an intentional violation of the Selective Service Act.<sup>132</sup> The flexible nature of these regulations assumes that in a time of induction there will exist an increasing demand for employees as men are compelled to serve in the military. While this may be a valid assumption, the regulations do not specify the manner in which the Selective Service is to identify that demand. This deficiency is addressed in a proposal to revise the Selective Service alternative service program.<sup>133</sup>

The Alternative Service Concept Paper proposes that the Selective Service System cooperate with other federal agencies, for example, the Federal Emergency Management Agency, Department of Labor, Office of Personnel Management, and state and local government agencies, to identify and fill work force shortages in civilian areas.<sup>134</sup> Not only would specific job openings be iden-

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<sup>125</sup> *Id.* at § 1660.6(a)(1).

<sup>126</sup> *Id.* at § 1660.6(a)(2).

<sup>127</sup> *Id.* at § 1660.6(a)(3).

<sup>128</sup> *Id.* at § 1660.6(a)(4).

<sup>129</sup> *Id.* at § 1660.6(a)(5). These last three elements can be waived at the discretion of the State Director.

<sup>130</sup> *Id.* at § 1660.10.

<sup>131</sup> 50 U.S.C. app. § 454(b) (1976).

<sup>132</sup> 32 C.F.R. § 1660.8 (1981).

<sup>133</sup> Proposed Concept of Alternative Service, 46 Fed. Reg. 6,998 (1981) (to be codified at 32 C.F.R. pt. 1660) (proposed Jan. 22, 1981). A final set of regulations is expected to be released no later than May 24, 1982. See Notes of telephone interview with Paul Knapp, Attorney with the Policy Development Department of the Selective Service Administration (Feb. 24, 1982) (available in *Georgia Journal of International and Comparative Law Offices*).

<sup>134</sup> *Id.* at 6,999.

tified, but a system of priorities would be established for placement purposes. Maximization of the program would be attempted by placement of conscientious objectors according to their abilities.<sup>135</sup> A data bank would be established containing individual aptitude and skill profiles and available alternative service positions.<sup>136</sup>

The success of this proposal is enhanced by its approach from a national perspective. The present systems operates, in effect, as fifty separate units. The proposed system would coordinate resources available from various governmental agencies, and would be open to suggestions from nongovernmental organizations interested in conscientious objection and alternative service as well as input from employers who would participate in the program.<sup>137</sup> The Selective Service Administration recognizes that there must be some incentives for employers to participate, and suggests that the federal government subsidize the program through a system of tax incentives or employee stipends.<sup>138</sup>

##### 5. *Status of the Conscientious Objector*

The decision of the conscientious objector to claim exemption from military service carries unforeseen costs apart from the expenditures incurred in pursuing the claim. For purposes of Veteran's Administration (V.A.) benefits, the conscientious objector is barred specifically from any entitlement under a V.A. program.<sup>139</sup> The conscientious objector, by reason of his belief, forfeits all rights to both the National Service Life Insurance<sup>140</sup> and the Serviceman's Group Life Insurance programs.<sup>141</sup> Under those forfeiture provisions, the objector is placed in the same category as persons guilty of mutiny, treason, spying, or desertion. The only exception to this penalization of conscientious objection exists for those objectors who served the military in noncombatant roles.

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<sup>135</sup> *Id.* at 7,000.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 7,002.

<sup>138</sup> *Id.* at 6,999.

<sup>139</sup> 38 U.S.C. § 3103(a) (1976). "[T]he discharge of any such person on the ground that he was a conscientious objector . . . shall bar all rights of such person under laws administered by the Veteran's Administration." *Id.* But see *infra* notes 218-25 and accompanying text for the deprivation of benefits and political rights imposed upon Brazilian citizens.

<sup>140</sup> 38 U.S.C. § 711 (1976). "Any person found guilty of mutiny, treason, spying or desertion, or who, because of conscientious objections, refuses to perform service in the Armed Forces . . . shall forfeit all rights to National Service Life Insurance." *Id.*

<sup>141</sup> 38 U.S.C. § 773 (1976).

The Veteran's Readjustment Act of 1966<sup>142</sup> allows that category of conscientious objectors to be eligible for educational benefits; those who performed alternative service in the civilian community are not eligible. The justification for this discrimination has been that "[s]ince Congress is not Constitutionally required to carve out an exception for conscientious objectors . . . Congress 'owed' CO alternative servers nothing in the way of extra benefits."<sup>143</sup>

It is argued that alternative service is more disruptive than military service, and therefore the conscientious objector should be able to participate in these programs.<sup>144</sup> For example, dependents of alternative servicemen are not entitled to receive benefits that are otherwise available to families of military personnel. Unlike military service veterans, alternative servicemen receive no re-employment guarantees. Moreover, the level of training received by alternative servicemen generally is not comparable to the skills developed by military personnel.<sup>145</sup> The ability of the veteran to find employment upon completion of his tour of duty, military or civilian, depends in large part upon the skills he developed while serving. This differential treatment perpetuates the hardships the conscientious objector and his family must endure, beyond his required period of alternative service.

An objector is faced with two options when he either fails to comply with the proper procedures for obtaining the conscientious objector exemption or is denied such status by the local board or military review board. He may decide to violate the Selective Ser-

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<sup>142</sup> 38 U.S.C. § 1651-86 (1976).

<sup>143</sup> Zweig, *Military Law: Educational Benefits for Conscientious Objectors Performing Alternative Service*, 1976 ANN. SURV. AM. L. 698, 703 (1976). See also *Johnson v. Robison*, 415 U.S. 361 (1974), *rev'g*, 352 F. Supp. 848 (D. Mass. 1973). The Supreme Court held that the Veteran's Readjustment Act denial of educational benefits to conscientious objectors who performed alternative service was not unconstitutional. The respondent's claim that the statute violated the free exercise of religion clause in the first amendment was rejected. 415 U.S. at 366, 383.

An alien or noncitizen national of the United States who is exempted from military service by reason of conscientious objection also is penalized for his beliefs. Such an individual is not entitled to forego the general residency requirement of five years for naturalization purposes. See 8 U.S.C. § 1427(a) (1976). On the other hand, those who served honorably on active duty status may be naturalized regardless of their period of residence. 8 U.S.C. § 1440(a) (1976).

This is not to intimate that an alien or noncitizen national who is a conscientious objector will be barred from becoming a naturalized U.S. citizen. Such an individual is allowed to refuse to bear arms on behalf of the United States provided that he agrees to perform noncombatant military service or work of national importance under civilian direction. The opposition to bear arms must be by reason of religious training and belief. 8 U.S.C. § 1448(a) (1976).

<sup>144</sup> Zweig, *supra* note 143, at 701.

<sup>145</sup> *Id.*

vice Act by failing to register, by refusing to submit to induction, or by refusing to comply with an assignment of alternative service.<sup>146</sup> However, the objector who submits to induction is subject to the jurisdiction of the courts-martial.<sup>147</sup> A decision to violate the Code of Military Justice<sup>148</sup> may expose the unrecognized conscientious objector to dishonorable discharge, imprisonment, death, or any other punishment directed by a court-martial.<sup>149</sup> It was the threat of this type of prosecution that caused draft evaders and deserters to seek asylum in foreign countries as a last resort.<sup>150</sup>

#### 6. *The Questions of Asylum and Extradition for Unrecognized Conscientious Objectors*

The question of asylum under international law is governed by national legislation and regulations that implement specific obligations imposed by international treaties and agreements. At the very least, the so-called right of asylum is nothing but the right of a State to grant asylum to an alien, that is, "to allow a prosecuted alien to enter, and to remain on, its territory under its protection. . . ."<sup>151</sup> Implicit in this qualified right is the discretionary latitude with which a nation might grant territorial asylum, taking into account various foreign policy considerations. Under the United Nations Universal Declaration of Human Rights, the right to asylum is qualified similarly: "Everyone has the right to *seek* and to enjoy in other countries asylum from persecution." (emphasis added).<sup>152</sup> Article 14 does not confer a right to receive asylum,

<sup>146</sup> 50 U.S.C. app. § 462 (1976).

<sup>147</sup> *Id.*

<sup>148</sup> 10 U.S.C. §§ 801-950 (1976 & Supp. III 1979).

<sup>149</sup> Only the offenses of desertion or attempt to desert and willful disobedience of an order of a superior officer, during a time of war, are punishable by death. A court-martial may direct any other punishment for offenses including desertion and disobedience of an order of an officer not in time of war, absence without leave, missing movement of one's unit, and failure to obey any other order or regulation. See 10 U.S.C. §§ 885-92 (1976). Any person who advises or urges a refusal of duty by any member of the Armed Forces shall be fined not more than \$10,000 or imprisoned not more than 10 years, or both. (During time of war the penalty is increased to 20 years imprisonment.) One who harbors a person who committed this offense also is subject to the \$10,000 fine and 10 year imprisonment penalty. 18 U.S.C. §§ 2387, 2388 (1976).

<sup>150</sup> The treatment of amnesty for draft evaders, veterans with less than honorable or dishonorable discharges, and deserters is beyond the scope of this Note. The exercise of the President's power to pardon after the Vietnam conflict is analyzed in Hansell, *Amnesty, Discharge Status Upgrading and Military Deserters Under the Carter Administration: Selective Redemption*, 11 CLEARINGHOUSE REV. 344 (1977). See also Greenawalt, *Vietnam Amnesty: Problems of Justice and Line Drawing*, 11 GA. L. REV. 1 (1976).

<sup>151</sup> 1 L. OPPENHEIM, INTERNATIONAL LAW § 316, at 678 (H. Lauterpacht 8th ed. 1955).

<sup>152</sup> Universal Declaration of Human Rights, art. 14, U.N. Doc. A/811 (1948). Article 14,

however,<sup>153</sup> and there is no obligation imposed upon a petitioned nation to grant such a request.

An obligation is imposed under the more expansive, yet not absolute, provisions of the Protocol Relating to the Status of Refugees.<sup>154</sup> Article 33 of the Protocol prohibits the expulsion or return of a refugee seeking asylum. It requires that: "No contracting State shall expell or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."<sup>155</sup> As one author has noted, article 33 established a right not to be returned, rather than any affirmative right to remain under the protection of the petitioned country. Only when a refugee is able to secure the protection of a third country against his return to a persecuting country may the petitioned country refuse to grant asylum.<sup>156</sup>

The General Assembly also has adopted a *Declaration on Territorial Asylum*, which expounds certain general principles to be adopted by member nations that are consistent with the right to seek asylum under article 14 of the Universal Declaration of Human Rights.<sup>157</sup> The recommendations of the General Assembly were intended to achieve mutual recognition and support of nations that granted asylum. In an attempt to further this goal of cooperation, the United Nations convened a conference on territorial asylum in 1977, which was not able to complete a final draft convention.<sup>158</sup>

§ 2 provides that: "This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations." This section identifies the scope of the right to seek asylum and essentially limits it to political persecution.

<sup>153</sup> L. OPPENHEIM, *supra* note 151, at 677-78.

<sup>154</sup> *Opened for signature* Jan. 31, 1967, 19 U.S.T. 6260, T.I.A.S. No. 6577, 606 U.N.T.S. 268 [hereinafter cited as Protocol].

<sup>155</sup> *Id.* at art. 33, § 1. Section 2 protects the requested country by denying the benefits under § 1 when there are reasonable grounds for regarding a refugee as a danger to the security of the requested country or when the refugee has been convicted of a particularly serious crime. *Id.* at § 2.

For the purposes of the Protocol the term "refugee" applies to any person who: "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . ." *Id.* at art. 1 A(2).

<sup>156</sup> Note, *The Right of Asylum under United States Law*, 80 COLUM. L. REV. 1125, 1126 (1980).

<sup>157</sup> G.A. Res. 2312, 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967).

<sup>158</sup> U.N. Doc. A/CONF. 78/12 (1977). The Conference failed to complete its work in drafting a final convention. The General Assembly since has ignored the request in the Conference Report that a further session be convened to complete the work of the Conference.

It was within this context of international asylum that United States draft evaders and deserters of the Vietnam conflict sought refuge overseas. Estimates of the number of Vietnam era draft evaders in Canada ranged from Selective Service statistics of 1,500 to media reports as high as 70,000.<sup>159</sup> The number of deserters under some political motivation was much more conservative: 749 were absent from military duty without authorization in foreign countries.<sup>160</sup> This number is especially deceptive when compared to the total number of desertions in the United States Armed Forces during 1967 and 1968. The Department of Defense reported that there were 93,584 unauthorized military absences that exceeded 30 days in length.<sup>161</sup> On the other hand, there were only 693 total convictions for desertion from the Armed Forces between 1964 and December of 1967.<sup>162</sup> Instead, many of the deserters were punished for the lesser offense of Absent Without Leave (AWOL).<sup>163</sup>

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<sup>159</sup> Jones & Raish, *American Deserters and Draft Evaders: Exile, Punishment or Amnesty?* 13 HARV. INT'L L. J. 88, 88 n. 2 (1972). As of December 31, 1968 the Selective Service reported that 2,101 individuals remained under indictment for violations of the Selective Service Act; of this number, one-third were estimated as fugitives from the country. See SUBCOMM. ON TREATMENT OF DESERTERS FROM MILITARY SERVICE OF THE SENATE COMM. ON ARMED SERVICES, TREATMENT OF DESERTERS FROM MILITARY SERVICE, S. REP. NO. 93, 91st Cong., 1st Sess. 27-29 (1969) [hereinafter cited as S. REP. NO. 93]. It was not noted whether this number represented violations including failure to register, or only violations for refusal to submit to induction after registration. Conceivably, the number of draft evaders was much higher when those who fled the country before registration are counted.

<sup>160</sup> This number covered the time period from July 1, 1966 through January 21, 1969. Of the 749, 170 had been returned to U.S. jurisdiction. Sweden alone accounted for at least 174 known deserters. S. REP. NO. 93, *supra* note 159, at 7, 10.

Another account reported that as many as one-third of the deserters in foreign countries were aliens returning to their original countries. In May, 1968, the greatest number of U.S. citizens known to have deserted was in Canada. Sweden ranked second in deserters, followed by France. *Military Deserters: Hearings Before a Subcomm. of the Senate Comm. on Armed Services*, 90th Cong., 2d Sess. 3, 6 (1968) (statement of Alfred Fitt, Asst. Sec. of Defense (Manpower and Reserve Affairs)) [hereinafter cited as *Hearings*].

<sup>161</sup> S. REP. NO. 93, *supra* note 159, at 24. This was in spite of extensive programs that were designed to deter desertion by holding frequent indoctrination sessions. See *Hearings*, *supra* note 160, at 7-8.

<sup>162</sup> *Hearings*, *supra* note 160, at 11. This approach was consistent with a general trend of leniency that developed after World War II. The number of absentees tried and convicted of desertion actually decreased after World War II and Korea. *Id.* at 66.

This finding of lenient treatment led the Subcommittee on the Treatment of Deserters from Military Service to recommend the abandonment of the overemphasis on leniency extended to deserters. It was the position of the Subcommittee that the seriousness of the problem of desertion was directly related to this lenient treatment. Such leniency was characterized as a "miscarriage of justice." S. REP. NO. 93, *supra* note 159, at 31-33.

<sup>163</sup> S. REP. NO. 93, *supra* note 159, at 31. Absence without leave for more than 30 days is punishable by dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor not to exceed one year. *Id.* at 6. The punishment for desertion (under which an intent to remain away permanently must be proven) is dishonorable discharge, forfeiture, and confinement not to exceed five years. *Id.* at 5.

These serious rates of desertion and draft evasion may be attributed in part to the problems of leniency, failure to prevent the exodus of objectors, and inadequate personnel accounting. However, it would have been nearly impossible for deserters and evaders to abandon their obligation of military service without the receptive asylum policies of Canada, Sweden, and France.<sup>164</sup>

Although Canada did not offer formal asylum to United States draft evaders and deserters, emigration across the northern border was attractive because Canadian laws did not exclude a noncitizen due to draft evasion or desertion. Canada had no draft, and the United States-Canadian extradition treaties did not include draft evasion or desertion as extraditable offenses.<sup>165</sup>

During the Vietnam conflict, Swedish governmental authorities refused requests of the United States Government for information that would have led to the return of deserters<sup>166</sup> to United States control.

The Swedish authorities made it quite clear that in their eyes and in accordance with their traditions as a neutral country and a place of asylum for people from various countries, there was no point in discussing the matter of returning these people to the United States or to U.S. control, and indeed as a general matter their position was that this is a matter entirely for decision and determination by Swedish authorities.<sup>167</sup>

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This disparate treatment led the Chairman of the Subcommittee, Sen. Inouye to remark that "instead of burning draft cards [5 year sentence imposed], the easiest way to get out of service would be to volunteer, desert, make a few statements, then arrange through some third party to return and get 4 months' hard labor and go free, and never be drafted again." *Hearings, supra* note 160, at 26.

<sup>164</sup> The continued presence of U.S. deserters in Canada, Sweden and France during the Vietnam conflict depended upon the internal laws and foreign policy positions of the respective country. *See Hearings, supra* note 160, at 49.

<sup>165</sup> *See* A. TATUM & J. TUCHINSKY, *supra* note 114, at 237-45. "It [was] the announced policy of Canada not to discriminate against deserters or evaders seeking refuge in Canada." Jones & Raish, *supra* note 159, at 90-91.

The deserter or draft evader normally would seek "landed immigrant status" under the Canadian Immigration Act, Can. Rev. Stat. ch. I-2 § 32(4) (1970), and the Immigration Regulations, Part I, *as amended*, Can. Stat. O. & Regs. No. 67-434 (1967). While these provisions have been repealed subsequently, the provisions replacing them are essentially identical with respect to qualifications for landed immigrant status. *See* Immigration Act, 1976, Can. Stat. ch. 52, § 128 (1976-77); Immigration Regulations, 9 Consol. Regs. Can. ch. 940, § 42, ch. 940 sch. I (1978). *See also* Jones & Raish, *supra* note 159, at 90-96 (containing a detailed recital of Canadian and Swedish immigration laws as they applied to U.S. draft evaders and deserters).

<sup>166</sup> Generally, deserters entered Sweden after leaving their posts in Europe. On the other hand, the number of draft evaders in Sweden was probably small, due to the distance of that country from the United States. *See* Jones & Raish, *supra* note 159, at 94.

<sup>167</sup> *Hearings, supra* note 160, at 42 (testimony of Frederick Smith, Deputy Adm'r, Bureau of Security and Consular Affairs, Dep't of State).

The Swedish authorities were criticized for their policy of providing asylum and financial assistance to deserters from the United States Armed Forces. The financial assistance, amounting to nearly \$120 per month for subsistence, food, and pocket money, was regarded as an inducement for United States military personnel to desert.<sup>168</sup> On the other hand, the United States government was criticized for its failure to make any adequate effort to secure the return from foreign countries of deserters, and for its inconsistent treatment of alien deserters with regard to the question of their admissibility to the United States.<sup>169</sup>

The most immediate consequence of the decision to depart from the United States to avoid military service is that the deserter or draft evader is subject to arrest and almost certain conviction under the selective service laws, should he attempt to return to the United States.<sup>170</sup> At one time, desertion and draft evasion were sufficient grounds to result in a loss of nationality for the United States citizen,<sup>171</sup> but in 1958 the Supreme Court ruled that avoidance of the burdens of citizenship was an insufficient ground to expatriate a United States citizen and that the provisions of the Immigration and Nationality Act that attempted to expatriate the deserter or draft evader were unconstitutional.<sup>172</sup> Congress subsequently repealed those provisions.<sup>173</sup> On the other hand, if the military deserter or draft evader voluntarily renounces his United States citizenship, he is categorized with other undesirable aliens and is precluded from re-entering the United States.<sup>174</sup>

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<sup>168</sup> S. REP. NO. 93, *supra* note 159, at 11-12. Under 18 U.S.C. §§ 2387, 2388 (1976), such inducement, if committed with the intent to interfere with U.S. military forces, would subject a person to criminal liability of a maximum \$10,000 fine and/or 20 years imprisonment.

<sup>169</sup> The Subcommittee called for a renegotiation of U.S. extradition agreements to provide for the return of deserters and draft evaders. It specifically criticized the Immigration and Naturalization Service position that "desertion from the military forces of another country, including conviction for desertion, would not be relevant to the question of an alien's admissibility to the United States." S. REP. NO. 93, *supra* note 159, at 12-13.

<sup>170</sup> Note, *Draft Resisters in Exile: Prospects and Risks of Return*, 7 COLUM. J. L. & SOC. PROBS. 1, 3 (1971). In 1969, the conviction rate for Selective Service prosecutions was 98.9%.

<sup>171</sup> Immigration and Nationality Act §§ 349(a)(8), 349(a)(10), 8 U.S.C. § 1481 (1976) (repealed 1978 and 1976 respectively). Expatriation resulted from acts of: (8) desertion from military service in time of war, and (10) departing or remaining outside the United States for the purpose of avoiding military service in time of war or national emergency.

<sup>172</sup> See *Trop v. Dulles*, 356 U.S. 86 (1958) (expatriation of deserter constituted cruel and unusual punishment); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (expatriation of one who avoided military service constituted unconstitutional punishment because it was not imposed subject to the protections of the fifth and sixth amendments).

<sup>173</sup> Paragraph (8) of section 349(a) was repealed by Pub. L. No. 95-432, § 2, 92 Stat. 1046 (1978). Paragraph (10) was repealed by Pub. L. No. 94-412, § 501, 90 Stat. 1258 (1976).

<sup>174</sup> Immigration and Nationality Act § 212(a)(22), 8 U.S.C. § 1182(a)(22) (1976). It is essential that the resister renounce his citizenship prior to mailing his induction notice. Other-

A citizen of the United States may lose his nationality by obtaining naturalization in a foreign country upon his own application;<sup>175</sup> or, he may take an oath or make an affirmative declaration of allegiance to a foreign state,<sup>176</sup> for example, for purposes of employment or to complete the naturalization process. Implied by these acts is an intention to renounce one's citizenship voluntarily. Absent these circumstances, a United States citizen has the constitutional right to remain a citizen unless he voluntarily relinquishes that citizenship.<sup>177</sup> It is argued that the Vietnam draft evader who became a Canadian citizen may have been a dual national, because Canadian naturalization does not require renunciation of other citizenship in its oaths of allegiance.<sup>178</sup> For draft evaders after *Afroyim v. Rusk*, the question of expatriation depended upon a clear demonstration of an intent to expatriate oneself when one accepted the burdens and benefits of foreign citizenship.<sup>179</sup>

The citizenship status of a deserter may be critical to the question of extradition of draft evaders by or to the United States. Extradition exists in the United States only by the authority of an enforceable extradition treaty between the United States and a foreign country.<sup>180</sup> In the absence of a treaty, the United States may not extradite, or seek the extradition of, a draft evader. Extradition of individuals is limited to those persons charged with extraditable offenses, as designated specifically by a treaty to which the United States is a party.<sup>181</sup> The conscientious objector who deserts or evades the draft may not be extraditable simply because

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wise, the resister will be unable to obtain reclassification as a nonresident alien; the combined effect of the untimely renunciation will be to render the resister subject to arrest upon any attempted return, and to leave him stateless.

<sup>175</sup> Immigration and Nationality Act § 349(a)(1), 8 U.S.C. § 1481(a)(1) (1976).

<sup>176</sup> *Id.* at § 349(a)(2).

<sup>177</sup> *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967). It was Attorney General Ramsey Clark's position that *Afroyim* decided only that the United States cannot revoke one's citizenship when a U.S. citizen votes in a foreign political election. As *Afroyim* failed to define the conduct that may be regarded as a voluntary relinquishment of citizenship, the Attorney General appeared to adopt the view that the government is giving formal recognition (rather than terminating citizenship) to the consequence of a citizen's voluntary relinquishment of his citizenship. That relinquishment may be implied by his actions in taking an oath of allegiance or securing citizenship in another country. See *Expatriation: Effect of Afroyim v. Rusk*, 387 U.S. 253, 42 Op. Att'y Gen. 397 (1969) [hereinafter cited as 42 Op. Att'y Gen.].

<sup>178</sup> Dellapenna, *The Citizenship of Draft Evaders after the Pardon*, 22 VILL. L. REV. 531, 548 (1977). This position is at odds with the Attorney General's opinion, *supra* note 177, at 399-400.

<sup>179</sup> 42 Op. Att'y Gen., *supra* note 177, at 400.

<sup>180</sup> 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 734 (1968).

<sup>181</sup> *Id.* at 772.

desertion or draft evasion is not enumerated in the particular treaty. Many extradition treaties prohibit extradition when the offense is a military crime.<sup>182</sup>

The deserter or draft evader also may be exempt from extradition if he has become a national of the requested state.<sup>183</sup> A request by the United States for the extradition of a dual national has been denied, and absent a specific provision in an extradition treaty, extradition is prohibited when an individual has acquired the nationality of the country granting asylum after the commission of the offense.<sup>184</sup> Even if the deserter or draft evader chooses not to become naturalized, the requested state may grant political asylum to the conscientious objector and refuse the United States request to extradite.<sup>185</sup>

#### IV. COMPARATIVE ANALYSIS

##### A. *A Comparison Involving the West German, Yugoslav, and Brazilian Approaches to Conscientious Objection*

The development of international standards for conscientious objection to military service requires more than an extensive analysis of United States law on the subject. The recent revision of the Selective Service Regulations is one indication that the system for processing exemptions to military service is still imperfect in the United States. A brief survey of three divergent approaches to the recognition of conscientious objection follows. The purpose

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<sup>182</sup> *Id.* at 858. See Convention on Extradition, Oct. 24, 1961, United States—Sweden, art. V, para. 4, 14 U.S.T. 1845, T.I.A.S. No. 5496. Article V provides that extradition shall not be granted for a purely military offense. *Id.* at 1849.

<sup>183</sup> 6 M. WHITEMAN, *supra* note 180, at 865. See Convention on Extradition, Oct. 24, 1961, United States—Sweden, art. VII, 14 U.S.T. 1845, T.I.A.S. No. 5496. Article VII states that "[t]here is no obligation upon the requested State to grant the extradition of a person who is a national of the requested State," but also provides that the executive has the discretionary authority to do so. *Id.* at 1849.

<sup>184</sup> 6 M. WHITEMAN, *supra* note 180, at 867-69. In 1959, the U.S. refused to extradite an individual who recently had become a U.S. citizen, even though extradition had been sought four years prior to the acquisition of his new citizenship. *Id.* at 869.

However, there may be an exception to this general rule of law. As between the United States, Great Britain, and Canada, if a treaty refers only to persons and makes no mention of nationality, the presumption is that nationals of the requested country may be extradited. *Id.* at 871.

<sup>185</sup> There are numerous reasons for the foreign country to refuse the U.S. request of extradition. One primary motivating factor may be the need for highly educated and/or skilled people in the foreign country. For example, the Canadian government during the Vietnam conflict readily granted landed immigrant status to the college educated or highly trained individual. (The "landed immigrant" status is analagous to the U.S. "lawfully admitted alien" status.) See A. TATUM & J. TUCHINSKY, *supra* note 114, at 237-45.

of this comparative analysis is to present an overview of the various potential facets of an exemption based upon conscience, and to create a continuum along which a model approach to the treatment of conscientious objection may be placed.

### 1. *Federal Republic of Germany*

In West Germany, conscientious objection is an explicit constitutional right guaranteed under the Basic Law of the Federal Republic of Germany.<sup>186</sup> Article 4(3) provides that: "No one may be compelled against his conscience to render war service involving the use of arms. Details shall be regulated by a federal law."<sup>187</sup> The right of conscientious objection is regulated by the procedures prescribed in the Conscription Act,<sup>188</sup> which permits any person subject to military service to apply at any time for formal recognition as a conscientious objector.<sup>189</sup> This application process is more liberal than the United States procedures, which generally restrict the ability of military personnel to claim post-induction conscientious objector status. The decision on the West German objector's application is made by a special examination committee for conscientious objection (Pruefungsausschuss fuer Kriegsdienstverweigerer),<sup>190</sup> and the committee is required to take into account

<sup>186</sup> GRUNDGESETZ FUER DIE BUNDESREPUBLIK DEUTSCHLAND [GG] art. 4(3) (W. Ger. 1949) (G. Flanz trans. 1974).

Other countries that recognize conscientious objection as a constitutional right include: Portugal, the Netherlands (proposed), and Suriname. 1980 Report, *supra* note 28, at 8, Add. 2 at 4, Add. 6 at 3.

<sup>187</sup> GG art. 4(3). The Basic Law may require that all other men at least eighteen years of age serve in the Armed Forces, in the Federal Border Guard, or in a Civil Defense organization. *Id.* at art. 12a(1). (The conditional tense of this subsection is interpreted as allowing for the possibility of enactment of national legislation requiring conscription.)

<sup>188</sup> Wehrpflichtgesetz, 1962 Bundesgesetzblatt [BGBl] I 349 (W. Ger.). The Conscription Act was amended by an act allowing for simple written notification to an Examination Committee that an individual claimed conscientious objector recognition. 1977 BGBl I 2021. That amendment was repealed (1977 BGBl I 1229), after the amendment was found unconstitutional by the highest constitutional court. Bundesverfassungsgericht [BVerfG] 1977 BGBl I 2623 (W. Ger.)

<sup>189</sup> *But see* 1962 BGBl I 349 § 26(3). In order to receive an exemption from military service, the conscientious objector must submit his application two weeks before his induction examination. The application itself does not do away with the duty to report for registration purposes nor to appear at the induction examination. However, an applicant cannot be required to report for military service before the matter has been resolved completely. Only if the Examination Board or the Administrative Court has rejected the application, may the individual be compelled to perform military service. *See* 1980 Report, Add. 1, *supra* note 28, at 7. Note however, that § 26(3) does not prohibit an individual from seeking recognition of conscientious objector status after his induction.

<sup>190</sup> 1962 BGBl I 349 § 26(3). This committee is analogous to the U.S. Selective Service System's local draft board.

the complete personality of the applicant as well as his moral conduct when making its decision.<sup>191</sup> It is important to note that members of the committee have extensive discretion, and are not subject to any directions or regulations in reviewing an application. This lack of regulatory guidelines is in direct contrast to the extensive provisions that bind the local draft boards in the United States.<sup>192</sup> At the same time, a West German applicant's legal rights are protected under the Conscription Act, which provides that he may receive the benefit of counsel<sup>193</sup> and requires that the applicant be advised of the proper process for the appeal of an adverse decision.<sup>194</sup> Generally, the United States and West German appellate practices are quite similar. The rejection of a West German's application for conscientious objector recognition is challenged initially before an examination board. Legal action then may be instituted before an Administrative Court and subsequently appealed to a Federal Administrative Court. If the application is rejected still, a conscientious objector may file a complaint with the Federal Constitutional Court claiming that his fundamental right of conscientious objection to military service has been denied.<sup>195</sup>

A person who receives formal recognition as a conscientious objector may not, under any circumstances, be compelled to render military service, even in a time of peace.<sup>196</sup> The conscientious objector may be drafted, however, into non-combatant military ser-

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<sup>191</sup> 1962 BGBI I 349 § 26(4). The applicant does not have to prove any specific conditions to receive recognition as a conscientious objector.

<sup>192</sup> 1962 BGBI I 349 § 26(8). Such persons are designated by churches, religious communities (32 C.F.R.). The only exception to this exercise of discretion is that the examination committee for conscientious objection will be bound by the decisions of the administrative and constitutional courts on matters of conscientious objection, and will be required to determine the validity of an application in accordance with those decisions.

<sup>193</sup> 1962 BGBI I 349 § 26(8). Such persons are designated by churches, religious communities, and corporate bodies of public law, and they receive no compensation for their services.

<sup>194</sup> *Id.* at § 26(6).

<sup>195</sup> 1980 Report, Add. 1, *supra* note 28, at 7. The extent of this fundamental constitutional right has not been tested in the context of selective conscientious objection to a particular war, as it has been tested in the U.S. See *supra* notes 94-101 and accompanying text; *Gillette v. United States*, 401 U.S. 437 (1971). The reason selective conscientious objection remains unchallenged in West Germany is that West Germany has not found itself at war with any country since its constitution was adopted in 1949. The question of selective conscientious objection is quite viable in that country, given the present division of Germany into East and West. In the event of a conflict in which East may be pitted against West, the refusal of many Germans to fight against "fellow" Germans is foreseeable. See Council of Europe Report, *supra* note 39, at 7.

<sup>196</sup> 1980 Report, Add. 1, *supra* note 28, at 7.

In Finland, conscientious objectors are required to bear arms in time of war. *Id.* at 6.

vice, provided that he applies for such service.<sup>197</sup> If not, a conscientious objector will be required constitutionally to complete a period of alternative civilian service,<sup>198</sup> as regulated by the Civilian Service Act for Conscientious Objectors.<sup>199</sup> Generally, the alternative service must be completed with a civilian agency and it must be for the general public welfare.<sup>200</sup> The period of alternative service in West Germany is equal to the length of compulsory military service.<sup>201</sup>

## 2. *Socialist Federal Republic of Yugoslavia*

In the Socialist Federal Republic of Yugoslavia conscientious objection to military service is not recognized as a constitutional right as it is in West Germany, nor as a privilege granted by the legislature or executive as it is in the United States. Consistent with the ideology of a socialist political system, the Yugoslav Constitution<sup>202</sup> establishes the "inviolable and inalienable right and duty"<sup>203</sup> of its citizens to protect and defend the independence and

<sup>197</sup> 1962 BGBl I 349 § 25. Non-combatant military service exempts a conscientious objector from the duty of armed combat and the requirement that he participate in a training program that prepares an inductee for armed military service. *Id.* at § 27.

In Italy, a conscientious objector may elect to serve the military in an unarmed capacity. Only one person has made this election. 1980 Report, Add. 3, *supra* note 28, at 3.

<sup>198</sup> GG art. 12a (2-6), amended by 1968 BGBl I 710.

A person who refuses, on grounds of conscience, to render war service involving the use of arms may be required to render a substitute service. The duration of such substitute service shall not exceed the duration of military service. Details shall be regulated by a law which shall not interfere with the freedom of conscience and must also provide for the possibility of a substitute service not connected with units of the Armed Forces or of the Federal Border Guard.

*Id.* at art. 12a(2).

<sup>199</sup> Gesetz ueber den Zivildienst der Kriegsdienstverweigerer, 1960 BGBl I 10; amended by 1977 BGBl I 1229; declared unconstitutional by BVerfG, 1977 BGBl I 2623 (the effect of his holding was to repeal the 1977 Amendment and revive the 1960 Act as originally enacted).

<sup>200</sup> 1980 Report, Add. 1, *supra* note 28, at 7. Social work has priority over other forms of civilian service.

<sup>201</sup> *Id.* At the time the 1980 Report was compiled, the average length of compulsory military service or alternative civilian service in West Germany was 16 months.

A unique approach to civilian service during a state of military defense exists in West Germany. Under the Constitution, if "civilian service requirements in the civilian public health and medical system or in the stationary military hospital organization cannot be met on a voluntary basis, women between eighteen and fifty-five years of age may be assigned to such services by or pursuant to a law." GG art. 12a(4).

In Denmark, the Netherlands, and Italy, the length of alternative service exceeds the length of military service. 1980 Report, *supra* note 28, Add. 1 at 6, Add. 2 at 3, Add. 3 at 3.

<sup>202</sup> USTAV SOCIJALISTICKE FEDERATIVNE REPUBLIKE JUGOSLAVIJE [hereinafter cited as USTAV JUGOSLAVIJE] (Constitution) (Yugo. 1974) (G. Flanz trans. 1979).

<sup>203</sup> *Id.* at art. 237. "It shall be the inviolable and inalienable right and duty of the nations and nationalities of Yugoslavia, working people and citizens to protect and defend the in-

social system of Yugoslavia. Compulsory military service is the duty of all citizens,<sup>204</sup> and is regulated by the Compulsory Military Service Act.<sup>205</sup> That Act is effective in peacetime as well as in war, and provides for the training and organization of all Yugoslav citizens who are able to work.<sup>206</sup>

The Constitution also guarantees the equality of all citizens' rights and duties regardless of nationality, race, sex, language, religion, education or social status.<sup>207</sup> This guarantee precludes the utilization of one's religious beliefs to an advantage over a fellow citizen; the logical inference of such position being that the obligation of military service cannot be avoided, regardless of an individual's religious or conscientious convictions. Furthermore, the refusal to fulfill any aspect of one's military service obligation is considered a violation of the Yugoslav Criminal Code,<sup>208</sup> and the assertion of religious or conscientious objection as a defense is not recognized. For example, draft evasion,<sup>209</sup> desertion,<sup>210</sup> and the refusal

dependence, sovereignty, territorial integrity and the social system of the Socialist Federal Republic of Yugoslavia [S.F.R.Y.] established by the S.F.R.Y. Constitution." *Id.*

The same approach to the duty of the citizenry is adopted in Panama, Syrian Arab Republic, Equatorial Guinea, and Iran. In fact, in Iran it is a religious duty, and theoretically an objection based upon religious belief is impossible in that country. 1980 Report, *supra* note 28, at 7, 8, Add. 2 at 2, Add. 3 at 2.

<sup>204</sup> USTAV JUGOSLAVIJE art. 241. In fact, the act of a person attempting to prevent citizens of the S.F.R.Y. from repelling enemy attack is unconstitutional and punishable as high treason. *Id.* at art. 238.

<sup>205</sup> Obavezne Vojne Sluzbe Odluke, Yugoslavia, OFFICIAL GAZETTE (Slubveni List), 1980, no. 36.

<sup>206</sup> 1980 Report, Add. 2, *supra* note 28, at 5. This system is quite similar in theory to the proposal made by U.S. President Carter in 1980. See *supra* note 105 and accompanying text.

The organization of the Yugoslav armed forces is uniquely decentralized, due to the autonomous nature of the several nationalities in Yugoslavia. Each commune, autonomous province, socio-political community, and Republic is required to organize a system of territorial and civil defense in addition to the coordination of a system of national defense. The responsibility for providing military equipment and supplies rests with the self-managing organizations, local communities and labor organizations. See USTAV JUGOSLAVIJE art. 239; THE YUGOSLAV CONCEPT OF GENERAL PEOPLE'S DEFENSE 318-21 (O. Mladenovic ed. 1970).

<sup>207</sup> USTAV JUGOSLAVIJE art. 154.

<sup>208</sup> KRIVICNI YAKONIK (Criminal Code) (Yugo.) (B. Blagojevic trans. 1964).

<sup>209</sup> Evasion of a summons to military service, KRIVICNI YAKONIK art. 339. This article lists three degrees of the offense of draft evasion. The first category includes failure to "report for military conscription, doing of the compulsory military service, military training or any other military duty," which is punishable by fine or imprisonment not to exceed one year. The second category applies to one who hides in order to evade a military obligation, and this offense is punishable by imprisonment of not less than three months nor more than five years. The most severe category of draft evasion applies to one who leaves the country with the intent to avoid his military obligation; this violation carries a ten year maximum prison sentence.

<sup>210</sup> Arbitrary abandonment and desertion of the army, KRIVICNI YAKONIK art. 342. This article enumerates four categories of desertion: absent without leave; abandonment and

to bear arms<sup>211</sup> are specifically enumerated criminal offenses against the Armed Forces.<sup>212</sup> Finally, although the Compulsory Military Service Act requires that a system of civil defense be organized, apparently no provision exists to allow the election of alternative civilian service.

### 3. *Federal Republic of Brazil*

An alternative and distinct approach to the question of conscientious objection is reflected in Brazilian legislation. Under the Constitution of the Federal Republic of Brazil,<sup>213</sup> the freedom of conscience is guaranteed specifically,<sup>214</sup> and an individual's rights are protected from deprivation regardless of expression or exercise of religious, political or philosophical beliefs and convictions.<sup>215</sup> Although this appears consistent with both the West German and United States approaches, one factor separates Brazil from other nations that recognize the right or privilege of conscientious objection. The distinguishing characteristic of the Brazilian constitutional guarantee of conscientious expression is contained in its disclaimer or disqualification clause. An individual's rights shall not be denied, "unless he invokes it [religious, political or philosophical conviction] to exempt himself from a legal obligation required of all, for which case the law may establish loss of the rights incompatible with conscientious excusal [refusal]."<sup>216</sup> This single clause opens a Pandora's box for the Brazilian citizen who is compelled to object to military service.

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seclusion (concealment) with the intent to avoid military service; desertion and escape abroad; and inducement of desertion. The respective penalties for these offenses are imprisonment for: not more than one year; not more than eight years; not more than twelve years; and a period equal to the punishment for the nature of the desertion induced.

<sup>211</sup> Refusal to receive or use arms, KRIVICNI YAKONIK art. 327a. This offense is punishable by imprisonment not to exceed ten years.

<sup>212</sup> Criminal Offenses Against the Armed Forces, KRIVICNI YAKONIK ch. 25, arts. 327-62. There are 39 separate offenses specified in this chapter. Note that if an individual commits an offense of draft evasion, desertion, or the refusal to bear arms (plus other offenses), *in a time of war*, the penalty is increased to imprisonment of not less than five years, or the death penalty may be imposed. *Id.* at 360a.

<sup>213</sup> CONSTITUICAO DA REPUBLICA FEDERATIVA DO BRASIL [hereinafter cited as CONST. DO BRASIL] (Braz. 1967, amended 1969) (Organization of American States trans. 1975).

<sup>214</sup> CONST. DO BRASIL art. 153, para. 5.

<sup>215</sup> CONST. DO BRASIL art. 153, para. 6.

<sup>216</sup> *Id.* It is interesting to note that the Brazilian authorities do not consider conscientious objection to military service a crime. However, the exercise of the "right" of conscientious objection penalizes an objector by revoking no less than twelve critical rights and privileges available to all other Brazilian citizens. Although it may not be an offense under the Brazilian Criminal Code, the exercise of conscientious objection results in severe punishment otherwise reserved for criminal acts. See 1972 Report, *supra* note 13, at 41.

The disqualification clause applies to the conscientious objector, because military service is compulsory for all Brazilian citizens.<sup>217</sup> The constitutional effect of the clause is the loss to the conscientious objector of all political rights for a religiously motivated refusal to perform military service.<sup>218</sup> The conscientious objector is not eligible to register to vote<sup>219</sup> or be elected to political office.<sup>220</sup> As long as the suspension of political rights continues, the objector also is ineligible for any public or trade union office.<sup>221</sup> Although the Brazilian conscientious objector may not be imprisoned for the refusal to bear arms, a fine may be imposed in the form of a military tax under the Military Service Act.<sup>222</sup> The penalties imposed upon the conscientious objector do not end here. Within the Regulations to the Military Service Act<sup>223</sup> there exists a disabling provision, which applies to all citizens who are unable to produce proof of the satisfaction of one's military obligation.<sup>224</sup> Under that disabling provision, a Brazilian conscientious objector is prohibited from: (1) obtaining or renewing a passport; (2) becoming an employee in a governmental organization, or one subsidized with government funds; (3) signing a contract with the government (this applies to all federal, state, territorial and municipal governments); (4) study-

<sup>217</sup> CONST. DO BRASIL art. 92, which provides that: "All Brazilians are obligated to military service or other duties necessary to the national security, under the terms and penalties of the law."

<sup>218</sup> CONST. DO BRASIL art. 149, para. 1(b).

In both Sweden and Belgium, conscientious objectors receive benefits equal to those granted servicemen. 1980 Report, *supra* note 28, Add. 1 at 11, Add. 3 at 2.

<sup>219</sup> CONST. DO BRASIL art. 147, para. 3(c).

<sup>220</sup> CONST. DO BRASIL art. 150.

<sup>221</sup> CONST. DO BRASIL art. 185, *reprinted in* 1980 Report, Add. 1, *supra* note 28, at 2 (The 1980 Report is cited here because there is a difference in translation between the text of article 185 in the Organization of American States' version, *supra* note 213, and the 1980 Report's reference. The most recent translation is used here to account for any unknown changes in interpretation or amendment.)

<sup>222</sup> Ato de Servico Militar art. 69, Ley. no. 4,375 of Aug. 17, 1964, *reprinted in* 1980 Report, Add. 1, *supra* note 28, at 3. "Military tax equivalent to the minimum fine shall be levied on persons . . . who are granted a certificate of exemption from service." *Id.*

<sup>223</sup> Regulamentos a Ato de Servico Militar, Decreto no. 57,654, of Jan. 20, 1966, *reprinted in* 1980 Report, Add. 1, *supra* note 28, at 3-4.

<sup>224</sup> *Id.* at art. 210, *reprinted in* 1980 Report, Add. 1, *supra* note 28, at 4. Article 210 is restricted to those citizens who remain eligible for induction, i.e., men between the ages of 19 and 45.

Fulfillment of military obligations is defined under article 3(17) of the Regulations, and it requires documentary proof attesting to one's military status. A conscientious objector receives none of the nine valid documents. *Nota bene*; do not confuse the certificate of exemption for moral disqualification (article 3(17)(c) of the Regulations), which applies to women and clergymen under article 92 of the constitution, with the exemption allowed to conscientious objectors for reasons of religious, political or philosophical beliefs. The conscientious objector receives no such certificate for the purposes of article 210 of the Regulations.

ing in an educational institution; (5) obtaining work permits, diplomas or occupational certification; (6) being appointed to a public position; (7) holding any elected or appointed public office; and (8) receiving any prize or privilege from any of the four categories of governments.<sup>225</sup> It is difficult to imagine any deprivation of individual rights and privileges that would be more extensive than these which act to deprive one of a livelihood.

The process of claiming conscientious objector status in Brazil is relatively simple. The individual must submit a legal deposition containing the grounds for objection. The deposition must indicate that the objector is familiar with the legislation applicable to conscientious objection, and furthermore, that he is cognizant of the consequences of his decision.<sup>226</sup> Once an exemption is granted, there is no subsequent provision for alternative service.<sup>227</sup> However, should an objector experience a change in conscience or religious beliefs, his political rights may be restored only if he is drafted into active military service.<sup>228</sup>

#### B. *Potential United Nations Treatment*

Two questions remain to be addressed: What is the probability that conscientious objection to military service will be recognized in the near future as a fundamental human right under international law, and what would be the operative effect of such action? The mechanics of such a decision are relatively straight-forward. The right of conscientious objection might be incorporated into an international document, such as the Declaration of Human Rights or the International Covenant on Civil and Political Rights. As a compromise solution, an alternative would be to appoint a special rapporteur, followed by the adoption of a resolution by the General Assembly recognizing conscientious objection as a fundamental human right.<sup>229</sup> The operative effect of such action, on the other hand, is more complicated than its mechanics.

One mode of analysis argues that the recognition of conscientious

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<sup>225</sup> *Id.* at art. 210(1-8), *reprinted in* 1980 Report, Add. 1, *supra* note 28, at 4.

<sup>226</sup> 1972 Report, *supra* note 3, at 41.

<sup>227</sup> *Id.* In the Netherlands, not only is there provision for alternative service, but that country allows several grounds for exemption from alternative service, e.g., being a breadwinner. 1980 Report, Add. 2, *supra* note 28, at 3.

<sup>228</sup> Regulamentos a Ato de Servico Militar, *supra* note 223, at art. 244, *reprinted in* 1980 Report, Add. 1, *supra* note 28, at 3-4.

<sup>229</sup> See 1981 Statement by International League for Human Rights, *supra* note 30. Either alternative would require considerable effort and expense by the 3rd Committee and the General Assembly.

objection would involve few if any administrative or constitutional barriers. Countries that already have civilian directed development programs could accommodate conscientious objectors readily.<sup>230</sup> Furthermore, constitutional provisions mandating compulsory military service for all citizens would not prevent the recognition of conscientious objection, given the fact that women and children are exempt already under such provisions.<sup>231</sup>

Under the opposing point of view, it is argued that the question of military service falls within the domestic jurisdiction of the States.<sup>232</sup> It also should be noted that the proposed inclusion of conscientious objection in article 18 of the International Covenant on Civil and Political Rights was rejected flatly.<sup>233</sup>

Despite this difference of opinion, there may exist one solution that would recognize the national sovereignty of a country, and at the same time incorporate the right of conscientious objection into an international human rights document. Article 8(3)(c)(ii) of the International Covenant on Civil and Political Rights provides that the guarantee of freedom from forced labor does not extend to military service or to alternative service required of conscientious objectors.<sup>234</sup> That clause has been construed to mean that the recognition of conscientious objection is a matter within the discretion of a given country.<sup>235</sup> However, the mention of conscientious objection in article 8(3)(c)(ii) neither requires nor precludes its recognition. Furthermore, it serves as the only reference to conscientious objection in a major international human rights instrument. This reference provides the source into which international procedures applicable to the treatment of conscientious objectors might be injected. Such a compromise solution still would be difficult to obtain, however. The step from the qualified recognition of conscientious objection in the enforcement of apartheid, to a general acknowledgement for all military service is probably too

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<sup>230</sup> Schaffer & Weissbrodt, *supra* note 1, at 41.

<sup>231</sup> *Id.* at 47. These authors make a significant observation: the use of military personnel to decide the propriety of a claim should be eliminated, because the military has a vested interest in the decision. *Id.* at 45.

<sup>232</sup> The authority for such a position stems from the U.N. CHARTER art. 2, para. 7.

<sup>233</sup> U.N. Doc. E/CN.4/353/Add. 3 at 7 (1950). The Republic of the Philippines recommended in its Comment on the Draft International Covenant on Human Rights that, "[p]ersons who conscientiously object to war as being contrary to their religion shall be exempt from military service." That recommendation was never adopted. *Id.*

<sup>234</sup> International Covenant on Civil and Political Rights, art. 8(3)(c)(ii), *reprinted in* THE INTERNATIONAL BILL OF RIGHTS 381 (L. Henkin ed. 1981).

<sup>235</sup> Partsch, *Freedom of Conscience and Expression, Political Freedoms*, in THE INTERNATIONAL BILL OF RIGHTS, *supra* note 234, at 212.

great at this time. For the first time since the question of conscientious objection was raised before the Commission on Human Rights, a resolution has been adopted that ignores conscientious objection, and no counterpart was presented to rebut such a position.<sup>236</sup> It would be premature, however, to dismiss the possibility of the recognition of conscientious objection before the current study is completed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

## V. CONCLUSION

The privilege to object conscientiously to participation in military service has been reaffirmed in the United States with the revision of the Selective Service deferment and exemption regulations. The privilege to claim exemption is by no means absolute; the selective conscientious objector is denied the exemption regardless of the sincerity or religious basis of his beliefs. While the revised regulations attempt to improve the administrative efficiency of the exemption process, it appears that this is accomplished at the expense of the conscientious objector. The validity of a claim is now dependent upon the sufficiency of the information the conscientious objector is able to provide.

The Selective Service presently is revising its alternative service program, which establishes a system to coordinate resources from governmental agencies. This system seeks to maximize the placement of conscientious objectors according to their abilities in areas of critical employment shortage.

From a comparative perspective, the question of conscientious objection has been analyzed in this Note in the context of the West German, Yugoslav and Brazilian provisions for the exemption.<sup>237</sup> This approach has been utilized to establish a continuum along which a specific nation's treatment of conscientious objection may be placed. The most extensive recognition of conscientious objection exists in West Germany as a constitutional right, under which

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<sup>236</sup> 1982 U.N. ESCOR Supp. (No. 2) at 76, 154-55, U.N. Doc. E/1981/12; E/CN.4/1982/30 (1982). Resolution 1982/36 was adopted without a vote. Unfortunately, the summary records of the 60th meeting on March 11, 1982, were not available at the time of publication to provide further explanation of the vote.

<sup>237</sup> No attempt has been made in this Note to suggest a model legislative or constitutional provision for conscientious objection to military service. Two organizations, the Legal Committee of the Council of Europe and the International Peace Bureau in Geneva, have attempted this task already. See Council of Europe Report, *supra* note 39; International Peace Bureau, *Draft Universal Charter of Conscientious Objection to Military Service or Training*, reprinted in 3 J. JOYCE, HUMAN RIGHTS: INTERNATIONAL DOCUMENTS 1684-87 (1978).

the procedures for claiming the exemption are more liberal and discretionary than those found in the United States. Also, the legal rights of a West German objector are protected fully and provisions are made for the completion of alternative civilian service. Yugoslavia, on the other hand, lies at the other end of the continuum, as that nation compels military service of all its citizens with absolutely no corresponding provision for conscientious objection. Rather than recognize conscientious objection as a privilege or constitutional right, Yugoslavia has chosen to make it a criminal offense. The Brazilian practice is the most deceptive of all, and falls somewhere between Yugoslavia and the United States along the continuum. Brazil recognizes the right to freedom of conscience, but at the same time denies the conscientious objector several significant political and individual rights. Brazil, like Yugoslavia, makes no provision for alternative service.

Although the United States recognition of conscientious objection falls closest to the West German approach, many of the costs borne by one claiming conscientious objector status in the United States are not readily apparent. There are burdens that the conscientious objector and his family will have to endure due to the deprivation of benefits otherwise available to persons serving their country. There are difficult choices to be made, as well, in the event one's conscientious objection claim is not recognized. However, these various difficulties with regard to conscientious objection should not obscure a significant factor: the United States continues to recognize that an individual's responsibility to his conscience precludes a duty to military service.

The potential for the recognition of conscientious objection in an international human rights instrument presently exists. It remains to be seen whether the Commission on Human Rights will realize that potential by the declaration of conscientious objection as a fundamental human right.

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