

## Enduring the Storm: Conscientious Objectors in the Persian Gulf War

Ronald L. Kuby

William M. Kunstler

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

---

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# CONSCIENTIOUS OBJECTORS

## ENDURING THE STORM: CONSCIENTIOUS OBJECTORS IN THE PERSIAN GULF WAR

RONALD L. KUBY AND WILLIAM M. KUNSTLER\*

### PROLOGUE

*It is early spring, 1991, at the U.S. Marine Corps base at Camp Lejeune, North Carolina and the hearing room is already hot and stifling. The clippity-clap of helicopters landing and taking off next to the "courthouse" makes it impossible to open the windows. Major Edward M. Healey, a fiftyish, balding, heavy-set Marine has been designated as the investigating officer for a conscientious objector hearing. He knows nothing about conscientious objection—he is neither cleric nor ethicist. His only two qualifications are that he teaches legal writing at a local community college and that he has no other duties at the present time.*

*Those of us who have been with Major Healey for the past few days sense that he is becoming, well, unglued. For over an hour, he has been cross-examining Lance Corporal Douglas DeBoer as to whether a minister, who provided a letter attesting to*

---

\* Civil Rights attorneys Ronald L. Kuby and William M. Kunstler are New York-based attorneys specializing in representation of political prisoners and prisoners of conscience. They are both affiliated with the Center for Constitutional Rights. Together with Steven Somerstein of the law firm of Somerstein & Pike, Hillary Richard of the law firm Rabino-witz, Boudin, Standard, Krinsky & Lieberman, Melissa Ennen of the counseling organization Hands Off!, and Michael Marsh of the War Resisters League, attorneys Kuby and Kunstler formed a legal team that provided pro bono legal and counseling services to over 1,000 members of the Armed Forces objecting to the Persian Gulf War. Counsel wish to thank Peter Graff, a second-year student at St. John's University School of Law, for his assistance in the preparation of this Article.

*DeBoer's sincere opposition to war, had come to the DeBoer home for "pizza events." DeBoer denies the minister's attendance at "pizza events." The minister had been over to the family home, for dinner, on many occasions, and they may have eaten pizza during some of those dinners, says DeBoer. After all, the minister has known the family for decades. DeBoer just won't admit "pizza events." He does not even know what a "pizza event" is. Neither do we. Nor do we understand what "pizza events" vel non have to do with whether DeBoer has a firm and sincere opposition to participation in war in any form. But Major Healey, the fact finder, feels he is on to something here. He insists that the minister described the meetings in question as "pizza events." DeBoer again proclaims his ignorance of the term. Major Healey is plainly displeased. He looks like Arlen Specter cross-examining Anita Hill. His lips pull tightly together, he shakes his head, frowns, and drums the table, uttering an occasional humph. He asks DeBoer whether he would object to adjourning the proceedings so that the minister can be recalled as a witness on this point. DeBoer, utterly baffled, agrees.*

*This is getting weird. Attorney Kuby, in a tone of voice and with a demeanor reserved for unstable clients who have snatched up writing implements and are fingering their sharp points, suggests that maybe the Major did hear "pizza events." "Maybe the minister said that he 'had been to the DeBoer home for dinner, to eat pizza, events of that type. . . .' and that is why the term 'pizza events' sticks in the Major's mind. There was a comma between 'pizza' and 'events,' but, of course, anyone would have heard it 'pizza events'. . . ." coos Kuby slowly and softly.*

We never do find out why Major Healey thinks the "pizza events" are significant. He adjourns the hearing. A few days later, without explanation, he writes a one-sentence application to his commanding officer asking to be relieved from the half-dozen cases to which he has been assigned. The request is granted. A few weeks later, Major Healey is quietly discharged from the Marine Corps on medical grounds. We never see him again.

No one is reassigned to hear DeBoer's case. It does not matter. The Marine Corps never had any intention of processing his claim. Instead, DeBoer is charged with the crime of desertion for being twenty-eight days late in reporting to his Florida drill site to commence active duty. Denied an adjournment of the court-martial to

finish the conscientious objector ("CO")<sup>1</sup> process, threatened with five years in prison if he goes to trial, and having glimpsed the system's workings, courtesy of Major Healey, DeBoer pleads guilty in exchange for fifteen months in the brig. He receives a Bad Conduct Discharge ("BCD").<sup>2</sup>

DeBoer does not renounce his conscientious objector beliefs. Now that he has been convicted, however, the Marine Corps will not finish processing his conscientious objector claim. According to the military's procedures, DeBoer cannot be a conscientious objector *because* he refused to fight. Only soldiers who obey orders can become conscientious objectors.<sup>3</sup>

DeBoer becomes one of thirty-three persons designated by Amnesty International ("AI") as "prisoners of conscience" in the

---

<sup>1</sup> See 32 C.F.R. pt. 75 (1991). A conscientious objector is one who has 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." *Id.* § 75.3(a).

<sup>2</sup> See *id.* § 41.6(b). The Secretary of Defense defines discharge as a "[c]omplete severance from all military status." *Id.*; see also *United States v. Scott*, 11 C.M.A. 646, 647 (1960) (requiring formal discharge certificate to terminate military status).

Various grades of discharge exist. See 32 C.F.R. pt. 41, app. A (1991). An honorable discharge is issued to members who have performed their required duties proficiently and conducted themselves within the bounds of satisfactory military decorum. *Id.* A general discharge under honorable conditions refers to an administrative discharge given to those whose records do not warrant an honorable discharge because their performance is tainted by some negative conduct. *Id.* Conversely, a discharge under other than honorable conditions or an undesirable discharge may be issued for behavior that fails to meet accepted military standards of conduct. *Id.*

The remaining two types of discharges, the BCD and the dishonorable discharge, are punitive in nature and result only from a conviction by a court-martial. See EDWARD M. BYRNE, *MILITARY LAW* 745, 748 (3d ed. 1982). A BCD has been defined as a type "of punitive discharge . . . [that] is designed as a punishment for bad conduct for an accused who has been convicted repeatedly of minor offenses and whose punitive separation from military service appears to be necessary." *Id.* at 745. A dishonorable discharge has been defined as "[t]he most severe punitive discharge . . . reserved for those who should be separated under conditions of dishonor, or of offenses of a military nature requiring severe punishment." *Id.* at 748.

<sup>3</sup> See Government's Brief at 5, *Lwin v. United States*, 33 M.J. 666 (N.-M.C.M.R. 1991) [hereinafter *Lwin* Brief] (citing Marine Corps Mobilization Management Plan, vol. 1, annex E, app. 8, ¶ 8(c) [hereinafter *MOBPLAN*]). According to *MOBPLAN*, "Marine reservists [sic] ordered to active duty must obey his orders unless his request for recognition as a conscientious objector was received prior to the mobilization order." *Id.* Once a member of the armed forces has been convicted of an offense and awarded either a Bad Conduct Discharge ("BCD") or a Dishonorable Discharge, the military ceases processing the conscientious objector claim. See Letter from Colonel J.R. Williams, U.S. Marine Corps, Deputy Inspector General, to Honorable Charles B. Rangel (July 3, 1991) (on file with author).

Motions by defense attorneys to hold up the court-martial so that the CO claim could be processed to completion were opposed by military prosecutors and denied by military courts.

United States—the highest number of such persons since the war in Vietnam.<sup>4</sup>

DeBoer's experience with the military's conscientious objector and justice systems may be charitably characterized as bizarre, but not atypical. During Operations Desert Shield/Desert Storm,<sup>5</sup> the military engaged in a pattern of mistreating and harassing conscientious objector claimants, ranging from verbal abuse to physical violence, from deploying them into the war zone to prosecuting them by courts-martial.<sup>6</sup> This was true despite the fact that under the military's own regulations, every member of the armed forces, whether conscripted or enlisted, has an absolute right to apply for discharge on the ground of conscientious objection.<sup>7</sup>

The campaign against the conscientious objectors reflected the military's deep concern about the potential for resistance from within the ranks. During Vietnam, such resistance had a corrosive effect on the morale of the armed forces and fueled anti-war senti-

---

<sup>4</sup> See Conscientious Objector Support Network, AIUSA, Table of U.S. Military Conscientious Objectors During the Persian Gulf War Adopted by Amnesty International As Prisoners of Conscience (1992) [hereinafter AI Table] (on file with author). According to Michael Marsh of the War Resisters League, at least 75 conscientious objectors in the U.S. Armed Forces were convicted of military offenses for refusing to participate in Desert Storm/Shield and were sentenced to imprisonment. See Kimberly J. McLarin, *For Resisters Gulf War Continues*, THE PHILADELPHIA INQUIRER, Jan. 16, 1992, at 1A. Amnesty International's smaller total reflects the fact that many resisters finished their incarceration before AI became aware of their cases.

<sup>5</sup> Operation "Desert Shield" commenced shortly after the August 2, 1990 Iraqi incursion into Kuwait. See Michael Drew & James Schwartz, *The Brewing Confrontation*, WASH. POST, Jan. 15, 1991, at A14 (timetable of events leading up to and following Iraqi invasion of Kuwait). The operation involved the deployment of about a half million members of the U.S. Armed Forces to the Persian Gulf. Operation "Desert Storm" refers to the commencement of hostilities by U.S., or "Allied," forces, on January 16, 1991. See David Evans & Terry Atlas, *U.S. Warplanes Attack Iraq*, CHI. TRIB., Jan. 17, 1991, at C1.

<sup>6</sup> See, e.g., Peter Applebome, *Epilogue to Gulf War: 25 Marines Face Prison*, N.Y. TIMES, May 3, 1991, at A14 (noting that Marine Corps was "harshest of all" in treatment of CO applicants) (quoting Ronald L. Kuby); Kevin Carter & Laura Wenzel, *Heroes Without Weapons*, THE PROGRESSIVE, Aug. 1991, at 16 ("Captain Francis Gaspar . . . told [CO] Lwin he hoped other Marines would 'beat the shit out of him' for not going to Saudi Arabia."); Michael Hovey, *A Matter of Conscience*, S.F. CHRON., June 14, 1991, at A27 (reporting refusal of armed services to process CO claims until after applicants deployed to Gulf); Dean E. Murphy, *Unwilling Warriors' New Battle*, L.A. TIMES, Apr. 24, 1991, at A1 (reporting that about 150 of 2500 CO applicants face court-martial proceeding and criminal prosecution); Bruce Shapiro, *The High Price of Conscience*, NATION, Jan. 20, 1992, at 50, 52 (Marine reservist CO George Ward was "repeatedly gouged . . . with a razor . . . while supposedly [receiving] a regulation haircut").

<sup>7</sup> See 32 C.F.R. § 75.5 (1991). However, persons who volunteered for military services must demonstrate that they were not conscientious objectors when they enlisted. *Id.* § 75.4(a)(1).

ment in the general population. Even in the early days of Desert Shield, GI resistance was providing the locus for anti-war groups around the country.<sup>8</sup> And a public relations campaign of "support our troops" could hardly be sustained if "our troops" were visibly opposing the war. Accordingly, the military engaged in a concerted effort to suppress and silence dissent within the ranks, while taking the public stance that such dissent was virtually nonexistent.

This campaign of suppression and denial was made possible primarily because the entire conscientious objector process is within the exclusive control of the military. The military defines "conscientious objection,"<sup>9</sup> places the burden of proof on the applicant,<sup>10</sup> appoints military officers to determine whether the applicant is "sincere,"<sup>11</sup> and grants itself sole authority to determine what will be done with the servicemember during the pendency of his or her application.<sup>12</sup>

With few exceptions, the experience of conscientious objectors during the Gulf War demonstrated that the military cannot be trusted to treat conscientious objector applicants in a fair and impartial manner. It belies human experience to expect that those who oppose a war will receive fair treatment at the hands of those who are fighting it. Due process of law and fundamental fairness to conscientious objectors became two more uncounted casualties of the Gulf War.

### I. NUMBERS GAMES: HOW MANY RESISTERS? WHAT TYPE OF RESISTANCE?

A close look at the statistics maintained by the military reveals a conscious effort to downplay the degree of opposition to the war within the ranks. Military figures released to the public

---

<sup>8</sup> Support committees quickly developed around individual refuseniks all over the United States. See, e.g., David Gonzalez, *Some in the Military are Now Resisting Combat*, N.Y. TIMES, Nov. 26, 1990, at A13 (discussing support groups helping COs). The most successful formed in New York City to defend Marine Corps resister Samuel Lwin, a student at the New School for Social Research. The campus-based group, originally called "Hands Off Sam!" provided legal and counselling services to hundreds of GIs around the country. See Carter & Wenzel, *supra* note 6, at 16.

<sup>9</sup> 32 C.F.R. § 75.3(a) (1991).

<sup>10</sup> *Id.* § 75.5(d).

<sup>11</sup> *Id.* §§ 75.5(e), 75.6(d). The officer is required, in a written report, to come to a "conclusion as to the underlying basis of the applicant's conscientious objection and the sincerity of the applicant's beliefs." *Id.* § 75(d)(3)(iv).

<sup>12</sup> *Id.* § 75.6(h).

show that of the more than half-million soldiers mobilized as part of Desert Shield/Storm between August 1, 1990 and July 31, 1991, only 473 applied for conscientious objector status.<sup>13</sup> Of these, the military hastens to add, 270 have been approved, yielding an approval rate of 57%.<sup>14</sup> These records have allowed the military to argue a dual message—the number of resisters was minuscule—(473 bad apples out of a barrel containing a half million) and even these were treated with the scrupulous fairness one expects from an institution whose mission is, after all, the protection of democracy.

On the other hand, civilian experts who provided legal assistance to GI's during the Gulf War claim that at least 2500 applications for conscientious objector discharge were actually submitted to the military, a discrepancy of over 500%.<sup>15</sup>

The difference is best explained by reviewing the military's ingenious method of record-keeping. Like estimating the number of Iraqi civilian dead, the military simply did not count the types of casualties it did not want added to the tally. For example, the Army, which contributed about 80% of the troops used in the Gulf War, pioneered a clever method for reducing conscientious objector applications—it prohibited soldiers from filing them. From August 1990, until January 2, 1991, Army regulations disallowed the filing of conscientious objector applications until the soldier arrived at his or her final duty station—Saudi Arabia.<sup>16</sup> The hundreds of soldiers who prepared and submitted their applications while this regulation was in effect were relegated to limbo and not counted in the military tally of conscientious objectors.<sup>17</sup>

---

<sup>13</sup> See Robert L. Larsen, Jr. & Theodore G. Hess, *Conscientious Objection in an All-Volunteer Military*, 66 ST. JOHN'S L. REV. 687 (1992); see also David Wood, *U.S. Army Throws Book at Conscientious Objectors*, OTTAWA CITIZEN, July 4, 1991, at H6 (reporting that 324 CO applications were adjudicated between October, 1990 and July, 1991).

<sup>14</sup> *Id.*

<sup>15</sup> See Murphy, *supra* note 6, at A1; Wood, *supra* note 13, at H6.

<sup>16</sup> See Memorandum from Army Headquarters, Washington, D.C., to all Army Reps and Activities (Jan. 1991) [hereinafter Army Memorandum] (on file with author). This memorandum amended ¶ 2-10C(1) of Army Regulation 600-43 to read as follows: "A soldier assigned or attached to a unit deploying to a new duty location . . . may submit an application for conscientious objector status[,] . . . [which] application will not preclude the soldier from deploying with his or her unit. The unit will process the application as operational and mission requirements permit." *Id.*; cf. Louis Sahagun, *Objectors' Sincerity Doubted*, L.A. TIMES, Feb. 24, 1991, at A11 (distinguishing procedure employed during Vietnam War pursuant to which soldiers seeking CO discharge remained in United States pending review of request).

<sup>17</sup> See Wood, *supra* note 13, at H6. Although the Pentagon required "soldiers activated

In addition, the Army's figures include only those applications received by the Army Headquarters in Washington, D.C., while the Marine Corps' figures count only those applications that have arrived at the headquarters of the various Marine divisions. But applications for discharge on the ground of conscientious objection are not submitted to headquarters—that is the last place they go.<sup>18</sup> Applicants must submit their claims to their unit commanders, and there are a multitude of such separate commands in the armed forces, located all over the planet. Once the commanders received the applications, they exercised enormous discretion in dealing with them—from throwing them into the trash can to recommending a discharge on some ground other than conscientious objection. It was the rare application that made it to Washington.

The estimate of 2500 conscientious objector applicants seriously *understates* the extent of anti-war sentiment within the military. The definition of "CO"<sup>19</sup> is so restrictive that few soldiers could realistically hope for such status, even if the decision-making process were a fair one. And the very filing of a conscientious objector application was a statement frequently viewed by the military as an act of cowardice.<sup>20</sup> Only the most dedicated young people chose such a route.<sup>21</sup>

Long after the war ended, the Pentagon admitted that more than 8,000 members of the Armed Forces were declared absent

for Persian Gulf duty to withhold their CO applications until they arrived in the war zone[,] . . . most officers understandably were too busy to process them." *Id.*

<sup>18</sup> See Sahagun, *supra* note 16, at A11.

Applicants are asked to provide written answers to 25 questions about training, personal and religious beliefs and then submit them to their commander, along with letters of support from friends and relatives. The applicant is scheduled for separate interviews with a psychiatrist, a chaplain and an investigating officer. Finally, all paperwork related to the case is sent to Washington for final approval or disapproval.

*Id.*; see also 32 C.F.R. § 75.6 (procedure for filing CO application).

<sup>19</sup> See *supra* note 1.

<sup>20</sup> See, e.g., Stipulation of Fact on Defense Motion for Unlawful Pretrial Punishment at 3, *United States v. Summers*, No. 593-26-6614 (Piedmont Jud. Cir. Court-Martial 1991) [hereinafter *Summers Stipulation*] (on file with author) ("members of Legal Platoon were referred to by troop handlers as conscientious objectors, deserters, [and] cowards . . . both privately . . . and in public"); Captain Ralph F. Miller, *How Should Commanders Handle Conscientious Objectors?*, MARINE CORPS GAZETTE, Feb. 1992, at 29 ("A Marine seeking relief from this contractual obligation by conscientious objection conjures images that are anything but sympathetic. Marines rightfully find this form of dissent distasteful.")

<sup>21</sup> See, e.g., Amy Wallace, "The Hell Months": *Conscientious Objector Recalls Marine Reaction*, L.A. TIMES, June 9, 1991, at B1. As one CO, Marine Corporal Ken Turner, put it, "[T]here were simpler ways to get [a discharge]." *Id.*



without leave from October, 1990 to March, 1991. And at least 7,300 were still missing as of March, 1991.<sup>22</sup> A desertion rate of over 1,000 soldiers per month bespeaks of a military in crisis.

These "AWOLS" were able to avoid both military service and the rigors of the conscientious objector process by simply taking propitious vacations before their notice to report for active duty arrived. These "refuseniks" were seldom prosecuted, as it was impossible for the military to show that they had actual notice of when and where they were supposed to report. Conscientious objectors, on the other hand, were required to report for active duty as a condition precedent to having their applications processed.<sup>23</sup> For those who were late in reporting, the applications themselves often contained statements sufficiently "incriminating" to permit the military prosecutors to make out a claim of notice.<sup>24</sup>

Still others were able to avoid Persian Gulf duty by claiming exceptions other than conscientious objector. During one weekend in December, the Fourth Marine Division, responsible for all 30,000 members of the Marine Corps Reserve, received approximately 300 applications for discharge or exemption from the call to active duty.<sup>25</sup> These applicants cited every reason from medical infirmity to their own prior unsatisfactory service records in support of these requests.<sup>26</sup> In other words, *on a single weekend*, about 1% of the entire Marine Select Reserve force sought to leave the military or avoid service in the Gulf.

As the war progressed and the Reserve call-up expanded to include members of the Individual Ready Reserve, each branch of the military installed fax lines to handle the volume of requests for exemption and discharge. The Air Force even went so far as to install a toll-free number for refuseniks.<sup>27</sup>

The number of active duty personnel who engaged in some

---

<sup>22</sup> See McLarin, *supra* note 4, at 1A.

<sup>23</sup> See *supra* note 16 and accompanying text.

<sup>24</sup> See Conscientious Objector Application of L. Cpl. John Henry Isaac III (Nov. 1990) ("Going U.A. [Unauthorized Absence] was the hardest thing that I have ever done.") (on file with author); Conscientious Objector Application of L. Cpl. James E. Summers, Jr. (Nov. 27, 1990) ("I view Camp Lejeune as a stepping-stone to Saudi Arabia.") (on file with author).

<sup>25</sup> Statement of Duty Sergeant, Fourth Marine Division, office of the Staff Judge Advocate, in response to telephone inquiry from author (Dec. 1990).

<sup>26</sup> *Id.*

<sup>27</sup> Conversation with David Stoler, Staff Military Counselor, Central Committee for Conscientious Objectors (April 29, 1992).

form of resistance to the war is impossible to estimate. Usually, these incidents were handled at the unit level by commanders whose intent was to resolve the problem quickly, without public notice, and without general recognition by other members of the unit. For example, one young African-American sailor who objected to fighting for the medieval Kuwaiti and Saudi monarchies was informed by his commander that he would be assigned to shore duties when his ship sailed—as long as he reported for duty immediately and terminated his absent without leave, or AWOL, status. The young man reported and remained in the United States, and the incident of resistance is not reflected in any military files.

## II. WHO WERE THE OBJECTORS? WHY DID THEY ENLIST AND WHY DID THEY RESIST?

The best profile of the Gulf War comes from examining the thirty-three prisoners of conscience listed by Amnesty International—the young people who, when faced with a choice between their military obligations and the demands of conscience, chose to follow their Gods even into a jail cell.<sup>28</sup> Of these thirty-three, almost all are from poor families. Nineteen are African-American, Latino, or Asian.<sup>29</sup> Thirty were low-ranking enlisted personnel; only three were commissioned officers.<sup>30</sup> Strikingly, twenty-six were reservists, rather than active-duty personnel.<sup>31</sup>

That the bulk of the resisters were members of the reserves was a predictable result of the military's use of the "poverty draft." Many reservists were recruited, at the age of seventeen or eighteen, for weekend duty by the promise of a stipend for college, some job training, and a tiny salary that meant the difference between welfare and self-sufficiency for many families.<sup>32</sup> The Reserve contract, an eight-year obligation, generally requires only one

---

<sup>28</sup> See AI Table, *supra* note 4.

<sup>29</sup> *Id.* at col. 1.

<sup>30</sup> *Id.* at col. 2.

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

<sup>32</sup> See Bruce Shapiro, *Hell for Those Who Won't Go: Military Resisters*, NATION, Feb. 18, 1991, at 194, 195 (for many recruits, "military represents the only ticket away from poverty or a career at McDonald's"). According to Lance Corporal John Isaac III, "his recruiter visited his drug-infested Harlem neighborhood offering a vision of hope, complete with money for college and a sterling entry on an otherwise paltry resume. The recruiter even treated the aspiring hospital administrator to a pizza after he agreed to an eight-year contract." Murphy, *supra* note 6, at A1.

weekend per month and two weeks of the year of drilling and training. Most young people who join the reserves do so in order to afford to be civilians.

For its part, the military is well aware of what motivates its young recruits and shamelessly misleads them as to the nature of their expected service.<sup>33</sup> Recruits are not told of the military's actual plans for them in case of war.<sup>34</sup> During the court-martial of Sergeant David Bobbitt, a Marine reservist, Major Bruce Warshawsky, a mobilization planner, acknowledged that recruiters seldom talk about the prospects of war in "selling" the Corps:

Q. [I]s it not a fact that what you promote at the beginning [are] virtues, rather abstract virtues in the telling, such as honor, integrity, valor and wills of iron; is that correct?

A. Yes, Sir.

Q. And isn't it a fact that when . . . the Marine Corps discusses a Marine Reserve experience, they refer to making people tougher, smarter, more confident and more determined; is that right?

A. Yes, sir.

Q. And they offer training at 200 technical schools and career fields; is that right?

A. Yes, sir.

<sup>33</sup> See, e.g., Wallace, *supra* note 21, at B1. Describing the seduction of CO Ken Turner, Amy Wallace writes,

When a friend who had joined the Army came home with a full wallet and a new wardrobe, Turner was intrigued. He went to the recruiting office to inquire about the Army. When the recruiter kept him waiting, Turner stepped into a hallway and was approached by a Marine.

"What do you want to get out of your life?" the Marine recruiter asked him, displaying a set of flash cards. Turner picked the cards labeled Travel, Money and Education, forgoing one that said Sense of Belonging to an Elite Group.

....

But, after the recruiter promised Turner filmmaking training in the Corps' audio-visual program, Turner signed on for six years in the Quality Enlistment Program. He completed boot camp in San Diego and was assigned to the School of Infantry. The training, he said, was geared toward learning military rules and technical skills.

*Id.*

<sup>34</sup> See Testimony of Major Bruce Warshawsky, U.S. Marine Corps Reserve at 7, United States v. Bobbitt, No. 100-64-9752 (Piedmont Jud. Cir. Court-Martial 1991) [hereinafter Warshawsky Testimony]. Major Warshawsky admitted on cross-examination that the Marine Corps' recruiting statements in promotional material do not mention "shooting people" or "the casualty figures for Vietnam." *Id.*; see also Murphy, *supra* note 6, at A1 (resisters claim misleading recruiters "lured them to boot camp with the prospect of educational and vocational benefits but skirted discussion about combat readiness and wartime obligations").

Q. And amongst the various things they show people is how to prepare dinner for a thousand; isn't that right?

A. Yes, sir.

Q. And even when discussing an assault vehicle, it's done in the context of learning skills like engineering and construction that translate easily into the right qualifications for top-notch occupations; isn't that correct?

A. Yes, sir.

Q. Nothing about killing people, is there?

A. No, sir, not that I can recall.<sup>35</sup>

Indeed, recruiters often told young reservists that they would not be called for active duty service unless there were an actual attack on the United States.<sup>36</sup>

Military recruiters also lied to young people about the meaning of conscientious objection.<sup>37</sup> During one court-martial, a Marine recruiter admitted that he spent five years misinforming people about the definition of CO.<sup>38</sup> He testified that he would tell young people that if they were slapped and hit back, they were not conscientious objectors.<sup>39</sup> His "example" was completely wrong and directly contradicted the military's own regulations:

Q. . . . When you read the Marine Corps order on conscientious objection, did you read, "[t]hat a willingness to use force to protect one's self, home or family is not considered inconsistent with a conscientious objection's [sic] participation in wars?"

A. Yes.

. . . .

---

<sup>35</sup> Warshawsky Testimony, *supra* note 34, at 8.

<sup>36</sup> Michael Marsh of the War Resisters League reports having heard this from at least ten reservists during the Persian Gulf war. Conversation with Michael Marsh in New York City (April 19, 1992). Under contract law, this type of recruiter fraud provided a basis to void the enlistment contract. See *United States v. Russo*, 1 M.J. 134, 137 (C.M.A. 1975) (holding fraudulent enlistment void under common law contract principles). In 1979, Congress amended the Uniform Code of Military Justice to provide that any member of the service who is mentally competent and of lawful age, and who accepts a paycheck and participates in some form of military activity has "constructively enlisted," irrespective of the fraudulent inducement. See 10 U.S.C. § 802(c) (1983); see also *United States v. Quintal*, 10 M.J. 532, 535 (A.C.M.R. 1980) (noting that Congress rejected *Russo* doctrine by adding subsection (c)). Obviously, this did little to discourage recruiter fraud.

<sup>37</sup> Prior to enlistment, every prospective member must swear that he or she is not a conscientious objector. See Testimony of First Sergeant Carl B. Smith at 144-45, U.S. Marine Corps, *United States v. Summers*, No. 593-26-6614 (Piedmont Jud. Cir. Court-Martial 1991).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 145.

Q. Okay. And did that tell you that in fact the test for conscientious objection is not whether you slap somebody and he slaps you back? That's not the test.

A. That's an example that I used.

Q. Okay. But that's an example that is specifically belied by what you read in Marine Corps orders; is that correct?

A. Correct.

Q. Okay. But, nonetheless, you used that example . . . anyway?

A. Correct.<sup>40</sup>

Of course, most young people, at the time of their enlistment, *a priori* believed that they would fight in whatever military venture the United States embarked upon. But a lot can change, and should change, between the teen years and young adulthood. Twenty-three-year-old Stephanie Atkinson, an Army private from Carbondale, Illinois, told 20,000 anti-war demonstrators in New York that she enlisted when she was seventeen in order to obtain money for college.<sup>41</sup> And she took the money and went to college. "I learned something in school," Atkinson said. "I learned . . . I won't fight in the Persian Gulf."<sup>42</sup> Responded Atkinson to her critics, "What do you want, that every 18-year old who joins up stay at exactly the same level of political and moral understanding for the rest of his or her life?"<sup>43</sup>

Indeed, in the civilian context, we would hail this maturation process. As a society, we hope that a young person of seventeen, who sees the world in black and white, accepts violence as a natural part of life, and believes that his or her point of view is the only correct one, will change into a thoughtful young adult, who realizes that no one holds a monopoly on right and wrong, and that shooting people is not an appropriate way to solve problems. But in the

---

<sup>40</sup> *Id.* at 150 (quoting Marine Corps Order 1306.16E, enc. 1, at 1 (Nov. 21, 1986), excluding such action from definition of "war in any form").

<sup>41</sup> Ronald L. Kuby & William M. Kunstler, *How to Conscientiously Object to the Gulf War*, L.A. DAILY J., Jan. 15, 1991, at 23.

<sup>42</sup> *Id.*

<sup>43</sup> Todd Ensign, *Military Resisters During Operation Desert Storm/Shield*, reprinted in CYNTHIA PETERS, *COLLATERAL DAMAGE* (1992). Atkinson failed to report for duty when ordered. See Sahagun, *supra* note 16, at A11. After 17 days AWOL, she was arrested at her home by a state trooper and spent a week in prison. See Dan Stets & Marie McCullough, *Jail Holds No Fears for U.S. "Refuseniks"*, TORONTO STAR, Feb. 3, 1991, at C7. Atkinson was reported to police by citizens of her home town in Illinois, who called her "a criminal, a traitor, [and] a coward." *Id.* Ultimately, the Army chose to give her an administrative—"other than honorable"—discharge in lieu of court-martial. *Id.*

military, such a transformation is viewed with suspicion.

As they matured, many resisters began to perceive contradictions between what they were training to do in civilian life and what they were training to do in the military. Typical in this regard was Lance Corporal John H. Isaac, III, an African-American Marine reservist from a poor family in Harlem. After waiting for a full day in a ghetto hospital emergency room to get help for his sick mother, Isaac went to school to study hospital administration. As he explained during his court-martial, while he kept studying ways in which to heal the sick, the Marine Corps was teaching him to kill more efficiently. When the time came, he chose jail over taking someone else's life.<sup>44</sup>

Another Marine reservist, Private Marquis Leacock, was an emergency rescue technician, with seven "saves" to his credit. He became a conscientious objector once the reality of his military "job" became clear to him. On weekends, Leacock loaded artillery for practice drills in the woods. One day, he loaded a defective round that exploded prematurely, seriously wounding his comrades. For the first time, Leacock witnessed what such ordnance actually did to human beings. According to the Navy Chaplain who was assigned to his case, "[a]fter this accident he was and is totally horrified at the thought of injuring any other human being, even by accident. . . . These thoughts are enveloped in his Christian religious training and belief."<sup>45</sup> The Chaplain went on to note that the Marine in question, "since entering the military, thoughtfully and diligently evolved a belief and ethical stance that precludes his participation in war of any kind."<sup>46</sup>

For another young resister, his developing Christian beliefs gradually became incompatible with his continued military service. Lance Corporal Demetrio Perez, the son of migrant workers, began a "fellowship" with members of the Mennonite community after the death of his mother. After years of study with the Mennonite brethren, Perez was ready to accept membership into the church, which required resigning from the military. Wrote Perez:

---

<sup>44</sup> See Murphy, *supra* note 6, at A1. Isaac was court-martialled for desertion and given a Bad Conduct discharge. He served six months at hard labor in the Marine Corps brig. He has been financially unable to return to college.

<sup>45</sup> REPORT OF CHAPLAIN J.S. LINEBACK, LCDR, CHJC, USN (Jan. 10, 1991).

<sup>46</sup> *Id.* Leacock was court-martialled for desertion and given a BCD. He served six months at hard labor in the Marine Corps brig and was subjected to sexual assault while in custody. He has since returned to college.

By the hand of the Lord I have been led to the Mennonite Church, a truly [G]od fearing, Christ loving brotherhood with whom I am seeking membership. After prayer and the development of convictions I feel truly it is God leading me . . . . The book of our heavenly [F]ather clearly states we cannot serve two masters. . . . I cannot bear arms, aid, or abet the use of violence in any kind of war. I do respect and love my country for the freedom and liberty we have under God.<sup>47</sup>

Perez's sincerity was attested to by two Mennonite bishops, every lay worker who had ever met him, a Navy Chaplain, and the Marine Corps Captain assigned to hear his case.<sup>48</sup>

These vignettes, illustrating the complex development from adolescence to adulthood, received predictably little understanding from the military. Lieutenant Colonel John B. Atkinson summed up the prevailing view among prosecutors that the "motivating factor for these individuals is not deep-seated religious or ethical conviction, but rather . . . cowardice."<sup>49</sup>

### III. THE MILITARY'S CONSCIENTIOUS OBJECTOR SYSTEM AND ITS PECULIAR WORKINGS DURING DESERT SHIELD/STORM

The right to claim conscientious objector status is a right exclusively of military creation. The military is free to define "conscientious objection" in any manner it chooses. Not surprisingly, the definition is so narrow as to exclude almost everyone, including Christ and most of the Apostles, from its ambit. Pursuant to 32 C.F.R. § 75.3(a), conscientious objection is defined 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>50</sup>

The most limiting aspect of this definition is that the objector must oppose all wars in all forms—those that have ever been

---

<sup>47</sup> Conscientious Objector Application of Lance Corporal Demetrio Perez, Jr. (Nov. 27, 1990).

<sup>48</sup> Perez was convicted of desertion, given a BCD, and served six months at hard labor in the brig. Upon his release, he was accepted into membership of the Mennonite Church. See generally Marla Donato, *Mennonites Thrust into Spotlight, War Leads to Calls About Conscientious Objector Status*, CHI. TRIB., Jan. 23, 1991, at 8 (indicating that Mennonite Church has long history of "pacifism and quiet resistance").

<sup>49</sup> Applebome, *supra* note 6, at A14.

<sup>50</sup> 32 C.F.R. § 75.3(a) (1991); see also *supra* note 1 (further breakdown of CO definition). Part 75 of volume 32 of the Code of Federal Regulations governs all military personnel and reservists. *Id.* § 75.2.

fought and those that might ever be fought.<sup>51</sup> This definition automatically excludes from consideration all those who follow the "just war" doctrines of Saint Augustine, Saint Thomas Aquinas, and the Catholic Church.<sup>52</sup> Indeed, the very invocation of the concept of "just war" as part of the applicant's belief system insured that the application would be denied.<sup>53</sup>

Ironically, some of the most patriotic young soldiers—those whose love of country would have led them to defend the nation in case of actual attack—were faced with the choice of either lying about their beliefs or admitting them and being denied conscientious objector status. A young person who refused to participate in a war undertaken for aggression, economic gain, or territorial expansion is denied conscientious objector status if he or she would pick up a gun to repel a Nazi invasion of his or her hometown.<sup>54</sup>

The military places the burden of proof on the applicant by clear and convincing evidence.<sup>55</sup> And the person who must be clearly convinced is, in first instance, a commissioned officer.<sup>56</sup>

---

<sup>51</sup> See *id.* § 75.5(b)(1); see also *Laxer v. Cushman*, 300 F. Supp. 920, 927 (D. Mass. 1969) (denying CO application because objection was not to "war in any form" but only to Vietnam War).

<sup>52</sup> See COMMONWEAL, June 14, 1991, at 387, 388.

Thus, in an April 25, 1991, letter to President George Bush—who had argued that the Gulf War was "just" by just-war standards—thirty-three Catholic bishops asked the president to provide legal recognition of selective conscientious objection based on the just-war teaching. Logic would hold that if the nations [sic] leaders accept the just-war theory as a standard for determining the legitimacy of particular wars—as the president did in this case—individuals who do not believe the war meets those standards should have the right to refuse a call to serve. In fact, morally, they would be obliged to do so.

*Id.* Compare William V. O'Brien, *Desert Storm: A Just War Analysis*, 66 ST. JOHN'S L. REV. 797 (1992) (applying just war criteria to Gulf War and finding them satisfied) with Gordon C. Zahn, *Ethics, Morality, and the Gulf War*, 66 ST. JOHN'S L. REV. 777 (1992) (reaching opposite conclusion).

<sup>53</sup> See Gordon C. Zahn, *Prisoners of Conscience*, U.S. STYLE, AMERICA, Nov. 16, 1991, at 360, 361 (noting that claims of many service personnel and reservists who based their objections on concept of "just war" "were rejected as 'selective' objection").

<sup>54</sup> Cf. *Rosenfeld v. Rumble*, 515 F.2d 498, 499 (1st Cir. 1975) (CO status denied after applicant admitted he would take up arms against foreign nation crossing territorial boundaries to kill Jews); see also *supra* note 51 and accompanying text (CO must be opposed to all war).

<sup>55</sup> See 32 C.F.R. § 75.5(d) (1991). The applicant "must establish by clear and convincing evidence: (1) That the nature or basis of his claim comes within the definition of and criteria prescribed herein for conscientious objection, and (2) that his belief in connection therewith is honest, sincere and deeply held." *Id.* But see H.R. 5060, 102d Cong., 2d Sess. (1992) (proposing to amend chapter 53 of United States Code title 10); *infra* notes 125-43 and accompanying text (in-depth look at H.R. 5060, *supra*).

<sup>56</sup> See 32 C.F.R. § 75.6(d) (1991). The conscientious objector process is a cumbersome



Commonly, Investigating Officers ("IOs") avoided any discussion of the Gulf War during the hearings, and instead focused upon hypothetical wars, asking the applicant to become a time-traveller or citizen of another nation. One young Marine Corps reservist of Lithuanian ancestry was asked whether it was immoral for the Lithuanians to resist, by force, the then-ongoing Soviet suppression of the Lithuanian independence movement. Applicants were frequently asked whether they would have fought Hitler, even if by so doing they could have saved the Jewish people from genocide. A naval medical officer, whose sister was in the Army, was presented with a detailed hypothetical in which she was asked to assume that the United States had been invaded, her sister wounded in combat and in need of medical care. Would she have provided medical care to her sister if it meant that her sister,

---

system, with layers of bureaucracy, that seldom can be navigated without the aid of an attorney or civilian counsellor. *See, e.g.,* Leonard v. Department of the Navy, 786 F. Supp. 82, 88-89 (D. Me. 1992) (detailing procedural aspects of CO application). The applicant first submits a detailed application, in a prescribed format, to his commanding officer. 32 C.F.R. § 75.6 (1991). The application must contain essay answers that explain, inter alia, (1) the applicant's belief system and why it is incompatible with military service; (2) how this belief system arose; (3) when it became incompatible with the military; and (4) when and under what circumstances the applicant believes the use of force is proper. *Id.* § 75.9(b). The applicant should supply letters of reference attesting to his or her sincerity. *Id.* § 75.9(d). The rest of the process is solely within the control of the military. *See id.* §§ 75.6, 75.7.

Each applicant is required to undergo an interview by a military psychiatrist, *id.* § 75.6(c), presumably to insure that this unwillingness to kill is not a product of treatable mental illness. Next, the applicant is interviewed by a military chaplain who is to engage in a critical examination of the applicant's views. *Id.* There is no requirement that the chaplain be of the same religious faith as the applicant. *Id.* The scheduling of these interviews is within the discretion of the unit commander.

The applicant's commanding officer is then required to appoint another officer, of the rank of Captain (in the Army and Marines) or Lieutenant (in the Navy and Coast Guard), or higher, to serve as an Investigating Officer ("IO"). *See, e.g.,* MCO 1306.16E(6)(d) (Nov. 21, 1986) (requiring Marines' IO to have rank of Captain or higher). The IO is to hold an informal "hearing" or interview with the applicant. 32 C.F.R. § 75.6(d)(2) (1991). The hearing is supposed to be nonadversarial. *Id.* The applicant is entitled to counsel only at his or her own expense—military lawyers are not provided. *Id.* § 75.6(d)(2)(i). The IO is required to prepare a report and recommend that the application be approved or denied. *Id.* § 75.6(d)(3). There are no time limitations on this process. The report is served on the applicant, who must submit a rebuttal "within the time prescribed by the military service concerned." *Id.* § 75.6(d)(3)(vi).

Following this initial phase, the application and report are submitted up the "chain of command," with officers of progressively higher rank adding their own opinions as to whether the application should be granted or denied. *See id.* § 75.6(e).

From there on, the individual branches of service have different requirements. As a general rule, however, the entire packet is supposed to end up on the desk of the Secretary of the Army, Navy, or Air Force, or the Commandant of the Marine Corps. *See id.* It is that individual who has final discharge authority. *See id.* § 75.6(f).

upon regaining health, would continue to participate in war?

These types of inquiries had a pervasive air of unreality. They were geared to ignoring the actual facts of the actual war that the objector was being called upon to fight, addressing hypothetical situations in which the striking of a single blow would result in unmitigated good and the staying of one's hand would create cataclysmic disaster. The purpose of such questions was not to engage in a neutral examination of the applicant's views, but rather, to try and get the resister to admit that under some conceivable circumstance, some act of war might be proper, so that the application could be denied.<sup>57</sup>

The applicant capable of surmounting the "war in any form" hurdle still had to demonstrate that his or her objection was grounded in religious training and belief.<sup>58</sup> The case law and the military's own regulations take an expansive view of the term "religious" in order to prevent the military reviewers from using their own private religious beliefs as a gauge.<sup>59</sup> "Ethical" and "moral" objections, not based upon a belief in God, have been held to be the functional equivalent of a "religious" objection.<sup>60</sup> Nonetheless, military authorities used their own, highly personal views of religion in making this assessment. For example, General J.E. Livingston, the Commanding General of the Fourth Marine Division, recommended disapproval of one conscientious objector application because the applicant, raised in a Catholic family, "did not cite examples from the lives of Jesus Christ or the saints of the Roman Catholic Church as examples of living in peace."<sup>61</sup> General Livingston ignored the fact that the young applicant repeatedly cited Dr. Martin Luther King, Jr. as the religious leader who most profoundly affected his views on war and peace.<sup>62</sup>

---

<sup>57</sup> See *supra* notes 50-52 and accompanying text (discussing denial of CO status unless applicant opposes war in any form).

<sup>58</sup> See 32 C.F.R. § 75.5(c) (1991).

<sup>59</sup> See, e.g., *Hager v. Secretary of the Air Force*, 938 F.2d 1449 (1st Cir. 1991); MCO 1306.16E(5)(c)(3) (Nov. 21, 1986) ("Particular care must be exercised by individuals processing applications not to deny the existence of bona fide beliefs that are incompatible with their own."); Naval Military Personnel Manual, § 1860120(2)(b) (Jan. 1986) ("Religious training and belief does not limit beliefs to traditional religious convictions . . . [D]eeply held moral or ethical beliefs . . . also qualify[.].").

<sup>60</sup> See *supra* note 59 and accompanying text.

<sup>61</sup> Commanding General J. E. Livingston, Second Endorsement, Private, First Class Carl C. Mirra, 064-64-2836/0351, United States Marine Corps Reserves, at 8 (Aug. 27, 1991) [hereinafter Livingston Recommendation].

<sup>62</sup> Conscientious Objector Application of Carl Christopher Mirra (Dec. 3, 1990) (on file

With respect to the same application, General Livingston noted that the reservist was a "belligerent Marine who missed drills, was disrespectful of superiors, and was not beyond lying to get out of his Marine Corps commitments. . . . [H]is belligerence was part of his deliberate strategy to disrupt an organization whose mission he believed was wrong."<sup>63</sup> He concluded that such "behavior belies the solid religious or moral foundation necessary to support a bona fide CO application."<sup>64</sup> General Livingston's determination that conscientious objection must be accompanied by pleasant obeisance to those at whom one's objection is directed surely would have disqualified everyone from Mahatma Gandhi to Jesus Christ from conscientious objector status.

The third hurdle facing the applicant was proving sincerity.<sup>65</sup> There was a certain poignancy in watching young people, just out of adolescence, attempting to convince career officers that they really believed it was wrong to kill somebody. And again, the military did no better in making these determinations. For example, one IO recommended that nine conscientious objector applicants be denied such status because they filed for discharge after "Iraq invaded Kuwait, the entry of the armed forces of the United States in that war, and the potential activation of his unit."<sup>66</sup> This recommendation was a wholly impermissible basis on which to deny a claim. Every court to consider the question has "universally" held that "late crystallization of conscientious objector convictions is not a sufficient basis in fact" for rejection.<sup>67</sup> In fact, courts have long recognized that the imminence of one's participation in war is often a *catalyst* for the crystallization of conscientious objector beliefs. Almost two decades ago, the Ninth Circuit summed up the

---

with author).

<sup>63</sup> Livingston Recommendation, *supra* note 61, at 8.

<sup>64</sup> *Id.*

<sup>65</sup> See 32 C.F.R. § 75.5(d) (1991); see also *Hager v. Secretary of the Air Force*, 938 F.2d 1449, 1454 (1st Cir. 1991) (citing *Armstrong v. Laird*, 456 F.2d 521, 522 (1st Cir. 1972)) (requiring that conscientious objection be sincere); *Lobis v. Secretary of the United States Air Force*, 519 F.2d 304, 306 (1st Cir. 1975) (same).

<sup>66</sup> Memorandum of Col. Frank A. Tauches, Jr., United States Marine Corps Reserve, to Commanding Officer, 2d Battalion, 25th Marines, Reviewing Conscientious Objector Applications of Sgt. David Bobbitt, Cpl. Keith Jones, L. Cpl. Maung Maung Lwin, L. Cpl. Waymon McWhite, L. Cpl. Robert Calabro, L. Cpl. Carl Christopher Mirra, L. Cpl. Kenneth Chin, L. Cpl. Joseph Lucas, and Pfc. Colin Bootman.

<sup>67</sup> *Hager*, 938 F.2d at 1455 (citing *Lobis*, 519 F.2d at 304); see also *Shaffer v. Schlesinger*, 531 F.2d 124, 130 (3d Cir. 1976) (adhering to assemblage of cases holding that timing of CO application is insufficient to support finding of insincerity).

lessons of both law and life by noting:

Each level of Army consideration was pinned to the timing of [the] application. Each officer inferred that a claim of crystallization based on receipt of orders could not be sincere. Yet, human experience repeatedly contradicts the inference: We again and again fail to decide what we think about a situation until we must confront it. Recognizing this reality, we have held that *crystallization of conscientious objector views upon receipt of orders to Viet Nam is not an indicium of insincerity*.<sup>68</sup>

But the military's exclusive control over the process made such holdings irrelevant.<sup>69</sup>

#### IV. THE COST OF CONSCIENCE: REPRISALS AGAINST CONSCIENTIOUS OBJECTORS

The popularity of the War, its short duration, and the nature of the military itself insured that Gulf War resisters would be the object of reprisals. Indeed, reprisals represented the universal experience of the Gulf War COs.<sup>70</sup>

##### A. *Deployment to the War Zone*

The general practice of the Army and the active-duty Marine divisions was to deploy the conscientious objector applicants to the Gulf,<sup>71</sup> where their applications were ignored until the war ended.

---

<sup>68</sup> *Richmond v. Larson*, 476 F.2d 1038, 1042 (9th Cir. 1973) (emphasis added).

<sup>69</sup> See 32 C.F.R. § 75.4(b) (1991) (providing that head of service will make final decision on individual basis); see also *supra* notes 49-55 and accompanying text. Judicial recourse is available for improper denials of applications through habeas corpus. See, e.g., *Leonard v. Department of the Navy*, 786 F. Supp. 82, 87-88 (D. Me. 1992) (habeas corpus relief granted when denial of CO application had no factual basis); *Hager*, 938 F.2d at 1451 (applicant petitioned for writ of habeas corpus after denial of CO application); *Shaffer*, 531 F.2d at 127 (same); *Lobis*, 519 F.2d at 305 (same). This was not a practical solution for Desert Shield/Storm COs because of the extraordinary length of time the military took to finally decide the CO claims. For example, a number of Marines who submitted their applications in November and December of 1990 are still awaiting final action by the Marine Corps at the time of this writing. Cf. *Murphy*, *supra* note 6, at A1 (Pentagon figures suggest 12 CO applications still pending, but anti-war groups claim number is higher). No case with which the authors are familiar took fewer than five months from the time the application was submitted.

<sup>70</sup> See, e.g., *Murphy*, *supra* note 6, at A1 (“[C]onscientious objectors complained that they have been treated with less regard than Iraqi prisoners of war.”); *Wallace*, *supra* note 21, at B1 (Marine and wife recount psychological harassment that made Marine feel “like a loser . . . totally disgraced . . . like he was nothing”).

<sup>71</sup> See *Hovey*, *supra* note 6, at A27 (many went AWOL to prepare their claims); *Wood*, *supra* note 13, at H6 (describing CO who was sent to Saudi Arabia in shackles).

This, too, was accomplished by a subversion of existing military regulations governing the treatment of conscientious objectors.<sup>72</sup>

In a kinder and gentler time, military planners had recognized that the COs were apt to be the target of improper treatment, and a regulatory mechanism was put in place to prevent commanders from forcing objectors into situations where they would have to choose between disobeying orders and following their conscience.<sup>73</sup>

Typical was Marine Corps Order 1306.16E, which provided that upon filing an application for conscientious objector status, "[u]ntil a final decision is made . . . every reasonable effort will be made to assign applicants to duties within the command that conflict as little as possible with their beliefs."<sup>74</sup>

The clear and salutary purpose of the Order was that all persons claiming CO status would be treated as such, until a decision was made as to their status.<sup>75</sup> Yet this Order was uniformly construed by military commanders to permit deployment of conscientious objector applicants—with their gear, weapons, and units—to Saudi Arabia.<sup>76</sup> The military saw no conflict between conscientious objection and sending an armed soldier into a combat zone.<sup>77</sup>

Indeed, as noted earlier, members of the Army were precluded, until January 2, 1991, from filing their conscientious objector applications until they arrived in Saudi Arabia.<sup>78</sup> Following months of protests by human rights organizations, the Army changed that regulation for one that sounded better, but had the same effect.<sup>79</sup> The amended regulation allowed the applicant to file

---

<sup>72</sup> See *supra* notes 16-17 and accompanying text (discussing Army tactic of mandating deployment while CO application pending).

<sup>73</sup> See 32 C.F.R. § 75.6(h) (1991) (instructing service to make every effort to assign applicants with pending CO claims to duties conflicting as little as possible with their asserted beliefs).

<sup>74</sup> MCO 1306.16E(6)(j) (Nov. 21, 1986). Each branch of the service had a similar provision.

<sup>75</sup> See *id.* The military had the option of processing the applications swiftly to prevent malingerers by persons falsely claiming CO status.

<sup>76</sup> See *supra* note 71; see also Wallace, *supra* note 21, at B1 (Marine's request for transfer to unit not being deployed while CO application pending was denied).

<sup>77</sup> The Army was particularly creative in deciding what duties presented a minimum conflict with the objector's views. One commander, leading a unit into ground combat in Kuwait, forced an objector to remain with the combat unit and to carry a rifle. The rifle, however, had the firing pin removed.

<sup>78</sup> See *supra* notes 16-17 and accompanying text.

<sup>79</sup> Army Memorandum, *supra* note 16 (amending Army Reg. 600-43, ¶ 2-10C(1)). If a soldier receives an order for *reassignment* to a unit that is about to be deployed, he or she may not submit a CO application "until he or she arrives at the new permanent duty sta-

for conscientious objector status at any time and anywhere, but the site at which the application would be processed would be within the discretion of the commander.<sup>80</sup> Nothing had changed—conscientious objectors were shipped to Saudi Arabia. Those unwilling to obey orders were forcibly chained and shackled and placed on military aircraft.<sup>81</sup> The Marine Corps' attempts to do likewise almost started a race riot in one case, where white Marines were ordered to attack a black Muslim conscientious objector and drag him to the troop bus.<sup>82</sup>

For those who had not yet completed their applications by the time of deployment, little work could be done upon them after arrival in Saudi Arabia.<sup>83</sup> Cut-off from their attorneys and civilian advisors, unable to contact colleagues to obtain needed letters of reference, and informed that no one was leaving until the "job" was done,<sup>84</sup> the Saudi desert proved to be a poor environment in which to apply for discharge.

Those who had submitted their applications before landing in Saudi Arabia fared no better. The exigencies of the war made it impossible to conduct the requisite psychiatric, chaplain, and IO hearings. Commanders were too busy to look for officers who could be relieved of their regular duties and act as IOs. No personnel were available to compile and process the reams of CO paperwork, then to ensure they were shipped back to the United States. Not surprisingly, the Army does not keep any statistics as to how many conscientious objector hearings were held in the Persian Gulf.

### B. Prosecution of Conscientious Objectors

The most pernicious reprisal against conscientious objector applicants was the decision that any breach of the Uniform Code

---

tion." *Id.* (amending Army Reg. 600-43, ¶ 2-10C(2)).

<sup>80</sup> See *id.* (CO application processed "as operational and mission requirements permit").

<sup>81</sup> Cf. Stets & McCullough, *supra* note 43, at C7 (U.S. medic stationed in Germany went AWOL, but Army "finally clapped him in hand irons and shipped him off to war against his will"); Wood, *supra* note 13, at H6 ("U.S. Army Private . . . went to war . . . with his wrists locked tightly together and his ankles shackled with 18 inches of steel chain.").

<sup>82</sup> The unit deployed without the conscientious objector. He was court-martialed, served nine months in the brig, and received a Dishonorable Discharge.

<sup>83</sup> See, e.g., Hovey, *supra* note 6, at A27 (reporting inability of CO applicants to process their applications once they arrived in war zone); Wood, *supra* note 13, at H6 (same).

<sup>84</sup> See *supra* note 83. Rotations of troops between the United States and Saudi Arabia did not occur until after the war ended.

of Military Justice ("UCMJ") would be treated as a major felony, prosecuted at general court-martial. This policy was created and most tenaciously pursued by the Fourth Marine Division, responsible for the reserves. Although Fourth Division Marines numbered only 30,000—about 6% of the troops mobilized for the war—70% of Amnesty International's prisoners of conscience were Marine reservists.<sup>85</sup>

Prosecuting these men and women achieved a number of goals for the Marine Corps. It had an obvious "chilling" effect on those who wished to apply for such a discharge. Second, obtaining criminal convictions against those who had already filed for conscientious objector discharge rendered the pending applications moot. In at least five cases, Marines who, against all odds, had received favorable recommendations by their IOs, had the entire process mooted when they were court-martialled.<sup>86</sup> And the Marine Corps does not count such dispositions as denied applications.<sup>87</sup> Of course, the Marine Corps refused to hold the court-martials in abeyance until after the conscientious objector claims had been processed.

Lastly, by criminalizing as many conscientious objectors as possible, the Marine Corps was able repeatedly to claim that such persons were being prosecuted for violating the law, not for their anti-war beliefs.<sup>88</sup> By refusing to recognize the overlap between a claim of conscientious objection and a refusal to perform duties that violated the soldier's conscience, the Marine Corps could maintain the legal fiction that no one was being prosecuted *for* being a conscientious objector.<sup>89</sup> This, of course, was entirely true.

---

<sup>85</sup> See AI Table, *supra* note 4 (24 of 32 "prisoners of conscience" were Marine reservists). Generally, the Army targeted only "high-profile" refuseniks for prosecution. The Navy and the Air Force, who contributed only tiny numbers of service members, similarly followed a policy of getting rid of the dissidents as quickly and quietly as possible.

<sup>86</sup> See, e.g., *United States v. Summers*, No. 593-26-6614 (Piedmont Jud. Cir. Court-Martial 1991).

<sup>87</sup> Telephone Conversation with Captain Robert L. Larsen, Jr., United States Marines Corp (Feb. 11, 1992).

<sup>88</sup> See Applebome, *supra* note 6, at A14. "A reservist who simply fails to report for duty falls into a disciplinary category beyond the realm of conscientious objection." Miller, *supra* note 20, at 30. "Officials say the men are not being prosecuted for applying for conscientious objector status." Applebome, *supra* note 6, at A14. "[S]ince claiming to be a CO or applying for CO status is not a violation of the Uniform Code of Military Justice, no Marine has been punished for requesting this status. Only those who violated the UCMJ by deserting or missing the movement of their units were punished." T.V. Draude, *Conscientious Objection*, WASH. POST, Dec. 14, 1991, at A25.

<sup>89</sup> See Miller, *supra* note 20, at 30. The media generally saw through this subterfuge,

They were prosecuted *because* they were conscientious objectors.

Such punitive action could only be undertaken if the conscientious objector applicant could be induced to commit a breach of military law. And before this could happen, the Marine Corps needed to abolish procedural protections for reservists.

A provision in Marine Corps Order 1306.16E provided that “[a] Marine reservist who applies for conscientious objector status will not normally be ordered to involuntary active duty until the application is resolved.”<sup>90</sup> The Marine Corps circumvented this Order by maintaining that it did not apply to activation of whole units, but rather, only to activation of individuals, despite the absence of such limiting language.<sup>91</sup> And, once activated, the Marine Corps took the position that no incompatibility existed between such claims and deployment to Saudi Arabia. Accordingly, conscientious objector applicants were involuntarily ordered to active duty and given orders to deploy.<sup>92</sup>

The results were disastrous. Young reservists confronted with an imminent call-up faced a terrible dilemma—report as ordered and be deployed to Saudi Arabia despite their claim of conscientious objection, or violate military law by failing to report on time.<sup>93</sup> In practice, young people were faced with only days or

---

prompting the Marine Corps to bemoan, in appropriately Orwellian fashion, the media's confusion. “Unfortunately, the media, largely unfamiliar with the administrative procedures and military justice, may lump the conscientious objector and the deserter into the same category. Understanding and endorsing disparate treatment is difficult. Proper dissemination of accurate information is, therefore, essential.” *Id.*

<sup>90</sup> MCO 1306.16E(6)(k) (Nov. 21, 1986).

<sup>91</sup> See *Lwin v. Cooper*, 33 M.J. 666, 667 (N.-M.C.M.R. 1991). The Naval Marine Court of Military Review ultimately rejected that rationale, but substituted another, finding that the use of the word “normally” permitted the Marine Corps to activate reservist COs during Desert Shield/Storm. *Id.*

<sup>92</sup> See Alan C. Miller & Ronald J. Ostrow, *Some Fear Civil Liberties May Be Added to Conflict's Toll*, L.A. TIMES, Feb. 14, 1991, at A9. Kathy Gilbert, co-chairwoman of the Military Law Task Force of the National Lawyers' Guild, claimed that the deployment of conscientious objectors to Saudi Arabia placed heavy burdens on COs who could not then “afford to have [their] attorney present or to call witnesses who can corroborate [their] change in beliefs.” *Id.* The Pentagon contended that it was “necessary to keep applicants with their units . . . because the hearings [were] before [their] unit commanders.” *Id.*

<sup>93</sup> Ironically and tragically, the Fourth Marine Division never had any intention of deploying COs to Saudi Arabia. In late November of 1990, a policy was made that such refuseniks would be kept either at their home base or at one of the Marine bases in the United States. Having made that sensible policy, the Fourth Marine Division then *decided to keep it a secret*, refusing to tell CO applicants what would happen to them. According to Marine Captain Peter Collins, one of the policy's authors, the purpose of secrecy was to prevent insincere applications.



sometimes hours to make such a decision.<sup>94</sup> Dozens of them missed their reporting dates and sought civilian legal counsel to aid in preparing their conscientious objector claims.<sup>95</sup> Almost without exception, these young people were absent for less than one month and voluntarily surrendered themselves before their units were sent to the Gulf.

Ordinarily, under the UCMJ, unauthorized absence for under thirty days is graded as the civilian equivalent of a low-level misdemeanor, with a maximum punishment of six months in jail, trial without a jury by Special Court-Martial, and no punitive discharge.<sup>96</sup> The general practice prior to Desert Shield/Storm had been to avoid *any* criminal prosecution for such offenses, and to sentence the offender to nonjudicial punishment involving extra duties or restricted liberty. That was particularly true when the soldier was a first-time offender and surrendered himself voluntarily.

This was not the policy followed with respect to conscientious objector applicants. Instead, members of the Marine Corps Judge Advocate General Corps "dusted off some law books,"<sup>97</sup> and charged each such objector with the crime of desertion with intent to avoid hazardous duty or shirk important service, a felony carrying up to five years in prison.<sup>98</sup> Ironically, the conclusive proof of the resister's intent to so "shirk" was the conscientious objection application itself. Thus did the military transubstantiate a petty offense, of its own creation, into a major felony.

Once the charges were brought, the Marine Corps adamantly refused to consider a plea to anything but desertion. Indeed, as time passed and the war was showing signs of great success for

---

<sup>94</sup> Cf. *Dix v. Resor*, 449 F.2d 317, 318 (2d Cir. 1971) (deciding Army properly considered fact that CO application was filed after applicant had been ordered to Vietnam); *Rothfuss v. Resor*, 443 F.2d 554, 558-59 (5th Cir. 1971) (although not conclusive, Army may consider that CO application was submitted on eve of deployment to combat zone).

<sup>95</sup> See *supra* note 71 (discussing soldiers going AWOL in order to properly complete claims).

<sup>96</sup> See 10 U.S.C. §§ 856, 886 (1983); UNITED STATES MANUAL FOR COURTS-MARTIAL pt. IV, ¶ 10(e)(2)(b) (1984) [hereinafter COURTS-MARTIAL MANUAL].

<sup>97</sup> Statement of Captain Russell Primeaux, U.S. Military Corps, to Attorney Ronald L. Kuby in Jacksonville, N.C. (June 1991). Captain Primeaux and his colleague, Captain Peter Collins, directed the prosecution of Marine Corps COs under orders from the Staff Judge Advocate, Colonel Glynn F. Voison, the attorney to Major General M.T. Cooper, former U.S. Marine Corps Commander, 4th Marine Division.

<sup>98</sup> See 10 U.S.C. §§ 856, 885(a)(2) (1983); COURTS-MARTIAL MANUAL, *supra* note 96, at pt. IV, ¶ 9(e)(1).

U.S. forces, the Marine Corps line hardened.<sup>99</sup> In December 1990, for example, the Marine Corps was willing to accept guilty pleas in exchange for sentences of nine months. By January 1991, the “going rate” was up to ten months. By April, it had jumped to an incredible fifteen months, with three extra months added on for conscientious objectors who had made public statements reported in the press.<sup>100</sup>

Faced with inflationary jail sentences, isolated at Camp Lejeune where they were subject to repeated harassment,<sup>101</sup> and awaiting a trial on a military base, in a military town, by a military court composed of Marines, most of the Camp Lejeune resisters pleaded guilty and received jail sentences ranging from eight to eighteen months. One young corporal who refused to plead guilty was convicted at trial and sentenced to thirty months,<sup>102</sup> the highest sentence imposed on the Gulf resisters.<sup>103</sup>

During Desert Shield/Storm, this “zero tolerance” for those late in reporting was employed exclusively against those who had applied for CO status.<sup>104</sup> Any excuse for missing a reporting date, other than conscientious objection, was treated with relative leniency. For example, court records at Camp Lejeune reveal that from

---

<sup>99</sup> See Applebome, *supra* note 6, at A14 (Marines have taken “harder line” with COs); Murphy, *supra* note 6, at A1 (Marine COs received harsher sentences compared with COs in other military branches).

<sup>100</sup> See Murphy, *supra* note 6, at A1 (“[C]onscientious objectors . . . presented a public relations problem for the Department of Defense.”).

<sup>101</sup> See *infra* notes 106-21 and accompanying text.

<sup>102</sup> See AI Table, *supra* note 4, at col. 4. Most of the Marine prisoners were released after serving six months in jail. *Id.* at col. 5.

<sup>103</sup> *Id.* at col. 4. Another resister, Army Captain Yolanda Huet-Vaughn, a medical doctor, received a 30-month sentence following court-martial for refusing orders to the Gulf. She was released after serving nine months in jail.

Two of the young men who reported late did so after January 16, 1991, after the formal commencement of hostilities. The Marine Corps declared its intention to prosecute them for desertion in time of war—an offense punishable by death. See Applebome, *supra* note 6, at A14. The Marine prosecutor did his bit for deterrence by refusing to rule out the possibility that the defendants would be executed. See *id.*

<sup>104</sup> See Shapiro, *supra* note 6, at 51.

Now, after dozens of courts-martial, it's clear that G.I.s who went temporarily AWOL during Desert Storm for purely private reasons—who went on lengthy drinking sprees, who covertly traveled home from bases in Germany, who simply vanished from their units without word or explanation—generally received minimal punishment and often were simply discharged. Prosecution and lengthy prison terms have most often been reserved for those who went AWOL after their C.O. claims were denied or discouraged, or who stood publicly against the war.

January 3, 1991 through May 25, 1991, fifty non-conscientious objector Marines were prosecuted for missing their reporting dates.<sup>106</sup> Of these, many were absent for months, rather than the few days typical for the conscientious objectors. Some had been apprehended; the conscientious objectors almost always surrendered themselves. Furthermore, of the fifty, not *one* was charged with desertion and not one was referred to a general court-martial. The average jail sentence imposed was approximately eleven *weeks*, as opposed to the twelve-month average for Marine conscientious objectors. Finally, of the fifty, twenty-eight received Bad Conduct Discharges, and not one was discharged dishonorably. Every Marine conscientious objector who was prosecuted received either a Bad Conduct Discharge or a Dishonorable Discharge.

*C. Retention on Active Duty for Those Who Refuse To Renounce Their Beliefs*

Even after the war ended, the Marine Corps placed one final hurdle in the paths of those who applied for CO status. The Commandant of the Marine Corps directed that all Marines who had outstanding conscientious objector applications would "be retained on active duty . . . until the application has reached the appropriate commanding general."<sup>106</sup> The stated purpose of this order was to "expedite" the determination as to whether these reservists would be available "in the event of future national emergency."<sup>107</sup> In other words, those who objected the most to military service would be kept in service the longest, in case of a future war.

However, the Marine Corps provided a loophole—an applicant who withdrew his CO application and repudiated his beliefs would be able to take his gear and go home. This transparent attempt to bribe sincere young people to withdraw their conscientious objector claims spoke volumes on how the Marine Corps viewed CO applicants and its own obligations to process applications. Fortunately, the young people affected by this order once again proved to be far more resolute in their beliefs than the Marine Corps anticipated. Not a single objector accepted the deal.

---

<sup>106</sup> In many, perhaps most cases, no prosecution was undertaken. Criminal charges were brought against only the most egregious offenders, and, of course, the COs.

<sup>106</sup> USMC, Administrative Message 0818082, Mar. 1991, at 2.

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

*D. Humiliation, Threats, and Beatings*

During the court-martial of Sergeant Bobbitt, Gunnery Sergeant Bret Alan Wurdinger testified that he identified the conscientious objectors at Camp Lejeune to the other Marines stationed there after ordering the COs to remain anonymous.

Q. When [the conscientious objectors] arrived on January 3, 1991, did you tell them . . . that they should not talk to anybody [at Camp Lejeune] about their conscientious objector status because they might be beaten up?

A. Yes, sir, for their own safety.

Q. During the first week of January, 1991, do you recall a time when you had a conversation with some Recon Marines in Recon barracks?

A. Yes sir.

Q. And in fact, [the conscientious objectors] were involved in a working party in that barracks?

A. Yes.

Q. And you had told the Recon Marines prior to the time they arrived for that working party that these were the conscientious objector/deserters?

A. Yes, sir.

Q. Do you think there may have been a physical safety problem with that?

A. Yes, sir.

Q. Did you see any discrepancy between telling [the conscientious objectors] not to tell anybody they were conscientious objectors . . . and you telling everybody that they were conscientious objectors/deserters? Did you see any possible discrepancy between those two situations?

A. No, sir.<sup>108</sup>

The testimony of Colonel J.D. Robinson provides further confusion regarding the Marine Corps' steps to preserve the safety of COs.

Q. So you had a [threatening] letter that was purportedly written . . . by two Marines, and you felt that [the conscientious objectors] would be safer here on the Marine base than they would be say, in Georgia, on leave?

A. That's correct.

Q. Or in surrounding states?

---

<sup>108</sup> Test. of Gunnery Sergeant Bret Alan Wurdinger, U.S. Marine Corps, United States v. Bobbitt, No. 100-64-9752 (Piedmont Jud. Cir. Court Martial 1991). In the argot of the Marine Corps, Reconnaissance Marines are reputed to be the toughest and most gung-ho.

A. Exactly.

Q. Where nobody knew who they were?

A. Well, the bottom line you have to realize is I am responsible for their safety . . . .<sup>109</sup>

The military legal system proved to be the most potent and useful tool to intimidate and punish conscientious objectors. On a day-to-day level, however, the individual resister faced pervasive, extra-judicial reprisals from colleagues, staff non-commissioned officers, and, occasionally, from commissioned officers. These extra-judicial reprisals comprised verbal abuse, name-calling, degrading and humiliating treatment, threats, and, occasionally, actual physical violence.

The most systematic harassment took place at Camp Lejeune.<sup>110</sup> In mid-December 1990, the Marine Corps decided to order all those objectors facing possible disciplinary charges to go to Camp Lejeune. This assignment effectively isolated them from their families, friends, supporters, attorneys, and the press. Upon their arrival at Camp LeJeune, they were placed in a special unit under the direct and daily control of officers who were openly hostile to the resisters.<sup>111</sup>

This harassment was documented in a series of evidentiary hearings held during court-martial proceedings.<sup>112</sup> The Marine Corps' own court found that "there were . . . repeated instances of intentional harassment and punishment of [the COs] by their Staff Noncommissioned Officer in Charge due solely to their status as conscientious objectors."<sup>113</sup> This included referring to the conscientious objectors as "deserters, cowards, and other derogatory term [sic], both individually and as a group," both publicly and privately; deliberately imperiling the physical safety of the COs by instigating confrontations between them and other marines; and harassing and punishing them by assigning extra duties, dumping trash into their barracks, "pre-failing" inspections, forcing them to "dress and undress repeatedly," and do push-ups "as punishment

---

<sup>109</sup> Test. of Colonel J.D. Robinson, U.S. Marine Corps, *Bobbitt*, No. 100-64-9752.

<sup>110</sup> See *supra* notes 6, 20 and accompanying text.

<sup>111</sup> The Marines denied the existence of any form of systematic or organized harassment, or that they were actively seeking harsher sentences for COs. See Applebome, *supra* note 6, at A14.

<sup>112</sup> See Summers Stipulation, *supra* note 20, at 1-4.

<sup>113</sup> *Id.* at 4.

for no apparent reason."<sup>114</sup> All of this mistreatment was done "to intentionally create a boot-camp atmosphere . . . solely [due] to their status as conscientious objectors."<sup>115</sup>

In addition, the Lejeune resisters were restricted to the base, whereas all other Marines were free to go into town in the evenings and to take weekend liberty outside the state.<sup>116</sup> Moreover, the resisters were given strict curfews that confined them to their barracks.<sup>117</sup> The stated basis for these restrictions was the fact that the *parents* of one resister had received a threat, purportedly authored by two Marines, calling them "traitors" and informing them that the authors knew where they were.<sup>118</sup> The "threat" was never investigated and eventually was determined to be groundless.<sup>119</sup> The court acknowledged that "[o]nce it was determined that a threat no longer existed, there was no rational basis for continuing any restrictions. The restrictions increased, if anything. The harassment and punishment continued."<sup>120</sup>

Despite these findings, not a single member of the Marine Corps was subject to any disciplinary action for mistreating the conscientious objectors. The failure of the Marine command to take any action against these malefactors sent the clearest possible signal that this illegal treatment and abuse were condoned at the highest level of command.

The only concern displayed by the Marine Corps with respect to its unlawful treatment of conscientious objectors was bad publicity. A recent award-winning essay in the Marine Corps Gazette warned that "[c]ommanders who seek to punish conscientious objectors court unnecessary and perhaps unfavorable media attention."<sup>121</sup> "Such attention may have a significant impact on the morale of their unit and . . . the commander."<sup>122</sup> The fact that such mistreatment is a crime under military law suggested a consequence so remote that to mention it simply would have cluttered up the page.

---

<sup>114</sup> *Id.* at 3.

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

<sup>116</sup> *Id.* at 1.

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

<sup>118</sup> *Id.* at 2.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 4.

<sup>121</sup> Miller, *supra* note 20, at 29.

<sup>122</sup> *Id.*

## V. RESTORING THE RULE OF LAW

One year after the war's end, it is hard to find anyone, civilian or military, who is satisfied with the functioning of the CO system during the war.<sup>123</sup> From Amnesty International to the General Accounting Office, reviews are under way to evaluate the treatment of conscientious objectors and make proposals for change.<sup>124</sup>

The most positive development is a bill, submitted to the House of Representatives on May 5, 1992, entitled the Military Conscientious Objector Act of 1992 (the "Act").<sup>125</sup> Drafted by the Honorable Ronald V. Dellums (D-Cal.), Chair of the House Subcommittee on the Armed Forces, the proposed legislation would amend title 10 of the United States Code to reflect the lessons of the Gulf War. The Bill represents a profound overhauling of the present system. In a clear and concise manner, it provides procedures for CO applicants and specific parameters for the military.

The Act would, for the first time, recognize "selective objection" as a basis for discharge.<sup>126</sup> The present draft provides CO status to one who objects to all war or "to participation in a particular conflict."<sup>127</sup> Thus would the "just war" doctrine be incorporated into modern law.<sup>128</sup>

Procedurally, the Act will revamp and streamline the entire CO process. Recognizing the military's superior access to information and investigative resources, the burden of proof has been reallocated to the military.<sup>129</sup> The burden must be carried by clear and

<sup>123</sup> See Applebome, *supra* note 6, at A14. Military officials and personnel were skeptical of the timing of the CO applications on the eve of combat. See *id.* Accordingly, members of the armed forces were unhappy with a system that permitted desertion in the name of religious or ethical convictions. See *id.* Particularly, the Marines, considering themselves "ready," "tough," and "strong," could not understand why someone would join the Corps other than to serve and fight. See Murphy, *supra* note 6, at A1.

<sup>124</sup> See AI Table, *supra* note 4. "[C]onscientious objectors made headlines when they were designated 'prisoners of conscience' by the human rights organization Amnesty International, which usually reserves such designations for captives of repressive regimes." Murphy, *supra* note 6, at A1; see also H.R. 5060, *supra* note 55 (proposing changes to procedures for processing CO applications). See generally Matthew Lippman, *The Recognition of Conscientious Objection to Military Service as an International Human Right*, 21 CAL. W. INT'L L.J. 31 (1990) (discussing conscientious objection as international human right).

<sup>125</sup> H.R. 5060, *supra* note 55.

<sup>126</sup> *Id.* § 2(a)(1) (proposing to amend title 10 with addition of § 1057(c)).

<sup>127</sup> *Id.*

<sup>128</sup> See *supra* notes 51-54 and accompanying text.

<sup>129</sup> H.R. 5060, *supra* note 55, § 2(a)(1) (proposing to amend title 10 with addition of § 1057(e)). Upon submission of a proper application for discharge, "the burden of proof that the applicant does not have a sincerely held conscientious objection shall lie with the armed

convincing evidence.<sup>130</sup>

The Act would retain the current system of psychiatric report, chaplain's interview, and Investigating Officer hearing. To expedite the process, however, a favorable recommendation by the IO constitutes approval, "and the applicant shall be discharged as rapidly as possible."<sup>131</sup> A time limit between hearing and decision is to be set forth.

If the IO recommends that the application be denied, the application is then forwarded to an Adjudication Panel, the decision of which shall be final.<sup>132</sup> To insure fairness in this appellate process, only one member of the three-person panel is to come from the military.<sup>133</sup> The other two members are to be a "civilian who is a member of the clergy or is trained in the disciplines of ethics or morality" and a "civilian attorney who is an administrative law judge" who acts as the Chair of the panel.<sup>134</sup> Furthermore, the Adjudication Panel also will have a specific time limit to render its decision.<sup>135</sup>

The Act will also provide badly-needed safeguards to prevent retribution against the applicant. Upon the filing of a Notice of Intent<sup>136</sup> to claim CO status, the applicant "shall be relieved from any duties involving the handling, training, and shipment of weapons and ammunition and shall be assigned duties that conflict as little as possible with the applicant's stated beliefs."<sup>137</sup> More importantly, filing a Notice of Intent prevents deployment of the applicant: (1) if the Notice is filed at the member's home site, the member must be retained there until the application is finally decided; (2) a member who files while away from his or her home site has an opportunity to be sent back home; (3) if the applicant is not on active duty when he or she files, the member may not be activated until the application is finally decided.<sup>138</sup> To prevent the ser-

---

forces." *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* (proposing to amend title 10 with addition of § 1057(g)(3)).

<sup>132</sup> *Id.* (proposing to amend title 10 by adding § 1057(g)(4), (h)(6)).

<sup>133</sup> *Id.* (proposing to amend title 10 with addition of § 1057(h)(2), (3)).

<sup>134</sup> *Id.* (proposing to amend title 10 with addition of § 1057(h)(2)(B)).

<sup>135</sup> *Id.* (proposing to amend title 10 by adding § 1057(h)(6)).

<sup>136</sup> *Id.* (proposing to amend title 10 with addition of § 1057(e)). A Notice of Intent is a simple statement by the putative applicant informing the military that he or she is a conscientious objector and requesting formal application materials. *Id.*

<sup>137</sup> *Id.* (proposing to amend title 10 with addition of § 1057(e)(2)).

<sup>138</sup> *Id.* (proposing to amend title 10 with addition of § 1057(e)(3)(A)-(B), (4)).



vicemember from blundering into breaches of military law—out of ignorance or fear—the military is required to provide legal counsel and assistance to the applicant from the preparation of the Notice of Intent until the application is finally decided.<sup>139</sup>

Lastly, the Bill protects the rights of those servicemembers who, because of conscientious objection, run afoul of military authorities. None of the information collected during the CO process can be used against the servicemember.<sup>140</sup> A member who faces a charge arising “out of the member’s objection to participation in war” has the right to have the court-martial proceedings held in abeyance until after the CO proceedings are decided.<sup>141</sup> If the application is granted, the charges must be dismissed.<sup>142</sup> If the application is denied, the military may then proceed with a court-martial.<sup>143</sup>

## VI. CONCLUSION

One year after the Gulf War, Kuwait remains ruled by a feudal monarchy composed of a single family. Hundreds of thousands of Iraqis are dead, including uncounted civilians. United States air power destroyed the infrastructure of an entire nation. Everyday, Iraqi children die as a consequence. Whether this destruction is the “fault” of Saddam Hussein, or of a dying empire flexing its last muscles in imperial conquest, is a conclusion to be drawn by historians yet unborn. Whether the war was “just” similarly awaits the verdict of future scholars and theologians. But surely the young people who refused to partake in the killing are entitled to more than drumhead tribunals headed by the same people who prosecuted the war. The military victory belongs to the U.S. Armed Forces, but the rule of law was lost in the winds of Desert Storm.

---

<sup>139</sup> *Id.* (proposing to amend title 10 with addition of § 1057(e)(7)).

<sup>140</sup> *Id.* (proposing to amend title 10 with addition of § 1057(h)(6)).

<sup>141</sup> *Id.* (proposing to amend title 10 with addition of § 1057(i)(1)).

<sup>142</sup> *Id.* (proposing to amend title 10 with addition of § 1057(i)(2)).

<sup>143</sup> *Id.* (proposing to amend title 10 with addition of § 1057(i)(3)). Such cases should be rare indeed, given the procedural guarantees elsewhere in the bill. In addition, the bill would guarantee all COs who comply with the Act an honorable discharge “with all rights, benefits, and privileges.” *Id.* (proposing to amend title 10 with addition of § 1057(k)). This change is significant because under current law, the government may forfeit a CO’s right to Servicemen’s Group Life Insurance. See 38 U.S.C. §§ 1910, 1972 (1988).