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SELECTIVE PACIFISM, RETROACTIVITY AND H. R. 832

INTRODUCTION

Interest in and claims for conscientious objector classification have risen in proportion to opposition to American involvement in Southeast Asia. Congress has traditionally recognized a privilege of conscientious objection by requiring that an applicant be sincerely opposed to participating in war in any form because of religious training and belief.\(^1\) In *Welsh v. United States*,\(^2\) the Supreme Court redefined "religious training and belief" and held that

[w]hat is necessary . . . for a registrant's conscientious objection to all war to be "religious" . . . is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions. . . . If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but

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1. Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 9. The Conscript Act of 1864 granted C.O. status to members of religious denominations "who . . . declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of said religious denominations . . . ." *Id.*

Act of May 18, 1917, ch. 15, 40 Stat. 76 exempted the members of "any well-organized religious sect or organization . . . whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war . . . ." *Id.*

Act of Sept. 16, 1940, ch. 720, § 5(g), 54 Stat. 885 deleted the 1917 statute's requirement of church membership and inserted the requirement of "religious training and belief" from those "conscientiously opposed to war in any form."

Act of June 24, 1948, ch. 625, § 6(j), 62 Stat. 604 resolved a conflict between *United States ex rel. Reel v. Bade*, 141 F.2d 845 (2d Cir. 1944), which allowed C.O. status to an atheist and *Berman v. United States*, 156 F.2d 377 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946), which held that conscientious objection must be related to belief in a deity. The Act of 1948 required that

religious training and belief means an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation but does not include essentially political, sociological, or philosophical views or a merely personal code.


Produced by The Berkeley Electronic Press, 1971
that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" . . . . [S]uch an individual is as much entitled to a "religious" conscientious objector exemption . . . as is someone who derives his conscientious opposition to war from traditional religious convictions.

With such an anomalous definition of religion, the Court was able to save the statute from first amendment difficulties and reduce the conscientious objection criteria to sincerity and opposition to participation in war in any form. The purpose of this note is to examine the "in any form" requirement and to explore the possibility of and benefit from its deletion from selective service law.

SELECTIVE CONSCIENTIOUS OBJECTOR STATUS IN THE COURTS

Claims for selective conscientious objection seem to fall into three categories: those based on religious objections, e.g., the "just war" doctrine; those based on moral, ethical or humanistic grounds; and those based on legal grounds, e.g., that the war in Vietnam is illegal under domestic or international law.

Selective Pacifism Based on Religion

Under the Welsh definition of religion, it no longer seems viable to characterize the draft law as unconstitutional merely because it favors religious belief over secular belief. Although Welsh affords exemption on religious, moral or ethical grounds, the draft still favors "religious" conscientious objection to all war over "religious" conscientious objection to particular wars. This raises the question whether the conscription law violates the establishment and free exercise clauses of the first amendment, or the equal protection doctrine inherent in the fifth amendment. These issues were presented to the Supreme Court in Negre v. Larsen and Gillette v. United States. Gillette believed he had a duty based on

3. Id. at 339-40 (emphasis added).
4. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.
5. The equal protection clause of the fourteenth amendment does not apply to the federal government, but in Bolling v. Sharpe, 347 U.S. 497 (1954), the Supreme Court held that to deny equal protection was a violation of the due process clause of the fifth amendment.
Humanism to abstain from involvement in unjust wars. Gillette expressed willingness to fight in some wars, but because Gillette's pacifism was selective, his claim for exemption was denied. He was ordered to report for induction and refused induction. The second petitioner, Negre, had been inducted and ordered to Vietnam. Negre, describing himself as a devout Roman Catholic, believed he had a duty to discriminate between just and unjust wars. Negre, like Gillette, objected to the Vietnam war, but did not believe all wars were unjust. Neither petitioner's sincerity was questioned.

The initial contention raised by the petitioners was that "participation in war in any form" meant participating in any form in a particular war. The Court, speaking through Justice Marshall with Justice Douglas dissenting, rejected this on the basis of legislative history and syntax. The petitioners further contended that favoring the traditional pacifist sects over those faiths which distinguish between just and unjust wars violated the establishment clause of the first amendment. The Court held that this, if true, is allowable if the reasons for the alleged favoritism are neutral and secular. Justice Marshall cited, as reasons for allowing an exemption to C.O.'s, congressional recognition of the hopelessness of converting a sincere conscientious objector into an effective fighting man, duty to a moral power higher than the state, concern over the imposition of conscription on conscientious objectors to war and respect for the principle of supremacy of conscience. Though the Court conceded that these were affirmative reasons which merely support the grant of an exemption rather than demonstrate why exemption should be restricted to total pacifists, it maintained that they are neutral with respect to

8. Gillette stated his views as follows:
   I object to any assignment in the United States Armed Forces while this unnecessary and unjust war is being waged, on the grounds of religious belief, specifically "Humanism." This essentially means respect and love for man, faith in his inherent goodness and perfectability, and confidence in his capability to improve some of the human condition.

Id. at 463 (dissenting opinion).

9. The theological basis for this belief is explained by Pope John XXIII in Part II of PACEM IN TERRIS (1961).

   Since the right to command is required by the moral order and has its source in God, it follows that if civil authorities pass laws or command anything opposed to the moral order and consequently contrary to the will of God, neither the laws made nor the authority granted can be binding on the consciences of citizens, since God has more right to be obeyed than men.

Id. at § 31.


11. 401 U.S. 437, 443-45 (1971). The Court held that Congress has never intended to allow selective C.O. status and that a straight forward grammatical reading of the law can lead to only one conclusion: "in any form" modifies "war" and not "participation."
the establishment clause. It is submitted that under Welsh "duty to a moral power higher than the state" is not secular and neutral as the majority in Gillette contends. The same Court in Welsh held religious training and belief to encompass moral beliefs. Welsh's conscientious objector application reveals that the basis for his claim was a duty to a moral power greater than the state:

I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. This belief (and corresponding "duty" to abstain from violence toward another person) ... is essential to every human relation. I cannot ... assume duties which I feel are immoral and totally repugnant.12

Apparently the Supreme Court believes "moral duty" to be religious with respect to the first amendment when a total pacifist like Welsh claims exemption, but secular when selective pacifists such as Gillette and Negre are involved. A more confusing inconsistency is difficult to imagine.

The Court conceded that the establishment clause prohibits subtle departures from neutrality, but then contended that the exempting provisions focus on individual conscientious belief, not on sectarian affiliation. It is submitted that this itself is a subtle departure from neutrality. Certain sects such as the Quakers espouse a total pacifist position,13 and the Jehovah's Witnesses consider their men workers "ordained" and rightfully exempt from military service.14 Catholicism includes the "just war" doctrine in its teachings, and reasons that to participate in what is conscientiously considered to be an unjust war is sinful.15 In these three faiths, individual conscientious belief is a product of sectarian affiliation. When a question is asked concerning a person's beliefs, he does not reply by stating the length and breadth of his beliefs; it is sufficient to identify beliefs by divulging his sectarian affiliation. If it is true that individual conscientious belief connotes sectarian affiliation, to allow exemption to only those who object to all war would seem to be a subtle departure from neutrality and violative of the establishment clause of the first amendment because exemption would indeed be based on sectarian affiliation.

To demonstrate why conscientious objection should be limited to

total pacifists, the Court professed the government's need for manpower and its interest in maintaining a fair system for determining who serves when not all serve.\textsuperscript{16} The manpower reason is given no documentation by the Court.\textsuperscript{17} The Court supports the "fairness" reason by arguing that a limitless variety of beliefs are subsumable under the rubric "objection to a particular war." . . . [They] may more likely be political and nonconscientious than otherwise. The difficulties of sorting the two with a sure hand are considerable. . . . In short, it is not at all obvious in theory what sorts of objections should be deemed sufficient to excuse an objector . . . .\textsuperscript{18}

But in reality, it seems that the basis for conscientious exemption would be the same although the factual bases will be more particularized and contemporary because they relate to the war at hand. In light of the directive from the Selective Service System to all local draft boards following \textit{Welsh}, it would seem that the same test used for all-war conscientious objectors would be also applicable to selective conscientious objectors. Local Board Memorandum \#107\textsuperscript{19} states that the "primary test" should be the "sincerity with which the beliefs are held; the beliefs need not be based on religion but must be held with the strength of traditional religious convictions." But, as Justice Marshall suggests, a selective objector's factual basis for objection to a particular war could be one which most regard as mistaken.\textsuperscript{20} Under \textit{United States v. Seeger},\textsuperscript{21} the truth of these beliefs would not be open to question, the only issue being whether the beliefs are truly held. This could be changed for selective C.O.'s to require that there be a substantial basis in fact that the belief is true. This test, coupled with the inherent skepticism of draft boards when faced with a claim for conscientious objection, should allow

\begin{itemize}
  \item 17. It is quite probable that there would be a marked increase in the number of draft registrants enjoying conscientious objector status if it were allowed, but this deficit could be remedied by implementing the measures proposed to attract an all-volunteer army. Hochstadt, \textit{The Right to Exemption from Military Service of a Conscientious Objector to a Particular War}, 3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 42-45 (1967).
  \item 19. Selective Service System Local Board Memorandum \# 107, July 6, 1970.
  \item 21. 380 U.S. 163 (1965).
\end{itemize}
the present administrative apparatus to screen out the spurious from the sincere claimant under the present guidelines enunciated in selective service directives.

In order for the local board to find that a registrant's moral and ethical beliefs are . . . held with the strength of traditional religious conviction, the local board should consider the nature and history of the process by which he acquired such beliefs. The registrant must demonstrate that his moral or ethical convictions were gained through training, study, contemplation, or other activity, comparable in rigor and dedication to the processes by which traditional religious convictions are formulated. The registrant must show that these moral and ethical convictions, once acquired, have directed his life in the way traditional religious convictions of equal strength, depth and duration have directed the lives of those whose beliefs are clearly founded in traditional religious conviction.22

The Court concluded its establishment clause holding by explaining that its decision did not mean that Congress could not exempt conscientious objectors to a particular war if it chose to do so, but only that there was a neutral secular justification to not do so. It is ironic that in the paragraph immediately preceeding the acknowledgment that the availability of selective C.O. status is subject to Congress' whim, the Court counsels that

[s]hould it be thought that those who go to war are chosen unfairly or capriciously, then a mood of bitterness and cynicism might corrode the spirit of public service and the values of willing performance of a citizen’s duties . . . .23

In its free exercise discussion, the Court admits that the disallowance of an exemption for selective conscientious objectors has an impact upon the free exercise of religions which embrace the doctrine of a "just war," but the Court found that

our analysis . . . shows that the impact of conscription on objectors to a particular war is far from unjustified. The conscription laws, applied to such persons . . . are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position.24

22. Selective Service System Local Board Memorandum # 107, July 6, 1970.
24. Id. at 462.
It seems that the majority failed to recognize the difference between the intent and the effect of the law. The effect of the selective service act is to discriminate against those who believe in the "just war" doctrine. To say that the denial of selective conscientious objection does not work a penalty is to ignore the thousands of young draft registrants whose consciences have forced them to choose federal prison over service in the military. In the words of Justice Douglas, "the welfare of the single human soul was the ultimate test of the vitality of the First Amendment."

The petitioners in Gillette finally claimed that the due process clause of the fifth amendment makes denial of a selective C.O. exemption unconstitutional because the distinction drawn between objectors to all war and objectors to a particular war is arbitrary and invidious and discriminates in contravention of the equal protection doctrine inherent in the fifth amendment. The majority denied this claim for the same reasons it denied the claim that selective conscientious objection violated the establishment clause—the neutral secular reasons which the Court held to justify Congress' distinguishing between religious C.O.'s and religious selective C.O.'s.

Welsh and Gillette seem to foreclose any religious, moral or ethical approach to selective conscientious objection. The only available alternative in the courts, therefore, seems to be the challenge that the war is illegal under domestic or international law.

Selective Pacifism Based on Legal Grounds

The grounds for claiming a war is illegal are very similar to the reasons a religious objector believes a war is unjust. The Charter of the International Military Tribunal specifies three types of war crimes:

(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of

25. For a sensitive and articulate treatment of the moral dilemma which faces the selective C.O., see W. Gaylin, In the Service of Their Country—War Resisters in Prison (1970).
any of the foregoing;

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, villages, or devastation not justified by military necessity;

(c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.29

The Charter also provides that there shall be no immunity for heads of state, nor will a person be excused if he was following orders.30

The so-called Nuremberg selective objector usually argues that the crimes specified in the Charter are binding on the United States because article VI of the Constitution holds international treaties to be the supreme law of the land.31 These Nuremberg principles are accepted as binding norms of international law.32 The U.S. Army's ostensible adherence to the Nuremberg principles is evidenced in the Army Field Manual 27-10, The Law of Land Warfare.33 The Nuremberg objector contends

29. 59 Stat. 1546, 1547, art. 6 (1945).
30. 59 Stat. 1546, 1548, art. 7-8 (1945).
31. Article VI of the Constitution provides that:
This Constitution, and the Laws of the United States made in Pursuance there-of; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution notwithstanding.
U.S. CONST. art. VI.
32. See The Paquette Habana, 175 U.S. 677, 700 (1900). The Supreme Court held that:
International law is a part of our law and must be ascertained and administered by the courts of justice ... as often as questions of right depending upon it are duly presented for ... determination. For this purpose, if there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations ....
Id. at 700. See also Cook v. United States, 288 U.S. 102 (1933); Whitney v. Robertson, 124 U.S. 190 (1888).
that these laws are being violated in Vietnam "as a matter of policy," and that by becoming a member of the armed forces, he could be ordered to participate in these violations. Therefore, to keep from becoming a war criminal, he must refuse induction into the armed forces. In effect, the argument is that moral considerations which are completely divorced from religion compel disloyalty to certain policies of the state.

Only one case can be found where a court allowed the defendant to raise the illegality of the Vietnam war as a defense. In May of 1967, Capt. Howard B. Levy was court-martialed at Fort Jackson, South Carolina for willfully disobeying an order to train Special Forces medical aides. Capt. Levy contended this order was unlawful because the knowledge gained by the "Green Beret" medics would be utilized in an unlawful war for unlawful purposes. The trial officer, Col. Edward V. Brown, ruled that the Army would acquit Capt. Levy if he could prove that the United States was committing war crimes in Vietnam as a matter of policy. The defense proffered testimony in private session that "Green Beret" medics were engaging in criminal activities, but at the close of the trial, Col. Brown ruled that while the defense had evidenced specific instances of needless brutality, it had not shown this to be military policy. There was no evidence that the medical aides would render the order illegal by engaging in war crimes or in some way prostituting their medical training by employing it in crimes against humanity. Ironically, while the Army permitted Capt. Levy to attempt to show war crimes to be a matter of policy, the civilian courts have uniformly declined to consider as a defense to a prosecution for refusing military induction whether military actions in a particular war violate international or domestic law. They have held that it is a political question, that the

34. In the court-martial proceedings against Capt. Howard B. Levy at Fort Jackson, South Carolina, for Capt. Levy's refusal to instruct "Green Beret" medics, Judge Col. Edward V. Brown ruled that he would acquit Capt. Levy if the defense could prove that the United States was committing war crimes in South Vietnam as a matter of policy. Washington Post, May 18, 1967, § A, at 1, col. 6.


SELECTIVE PACIFISM

81

suit was an uncontested suit against the sovereign United States and therefore unmaintainable or that the particular plaintiff presenting the question had no standing to raise it. Recently, however, two cases have bypassed these three procedural defenses. In Orlando v. Laird, it was recognized that a serviceman under orders to report for shipment to Vietnam had standing to challenge the constitutionality of an undeclared war. The court then distinguished questioning the wisdom of, or seeking to arrest, combat action as purely political from the justiciable issue of determining whether a political decision has been made by the agency properly authorized to make it. The court ruled that Congress had impliedly declared war by amending the Selective Service Act, providing veteran’s benefits for soldiers of the Vietnam era and voting huge appropriations to sustain and extend combat activity.

In Mottola v. Nixon, the question of whether the Vietnam war was being waged by and under the authority of the branch of government in which the power is constitutionally vested received its most extensive treatment. Three military reservists sued to enjoin the President from ordering United States military personnel into Cambodia, and sued to obtain a judgment declaring that the plaintiffs had a right to refuse to participate in an illegal and unconstitutional war. The Government moved to dismiss for lack of jurisdiction over the subject matter because 1) it was a non-justiciable political question, 2) the plaintiffs lacked standing to raise the question and 3) the sovereign had not consented to be sued. The court ruled the reservists had standing to raise the question, holding that although the alleged illegality of the Vietnam war cannot be raised as a defense to prosecution for refusal to submit to induction, it may be raised by someone who, although not yet called up to go to Vietnam, is ever vulnerable and subject to such orders. The court then ruled that sovereign immunity is no bar to an action challenging the Vietnam war power of the President because the plaintiffs alleged that the President, although purporting to act in


the name of the sovereign, had exceeded his constitutional authority. In such a case, the relief plaintiffs request does not require any affirmative action but merely requires the President cease his unauthorized continuance of the war.

The "political question" issue was settled by distinguishing, as political, a challenge to a constitutionally authorized administrative decision from the justiciable issue of whether an agency was constitutionally authorized to make the decision itself. The plaintiffs could not challenge the wisdom of the Vietnam war, but could question the President's power to wage it without a declaration from Congress.

The court reached no decision on the main issue since the Government had not filed responsive pleadings directed to the constitutional question. The court acknowledged the "implied congressional declaration" decision in Orlando, but noted that

a strong case can be made for the proposition that compliance with the Constitution of the United States and its plain provision that the power to declare war lies, not in the President, but in Congress . . . that compliance calls for nothing less than what the Constitution plainly says—a declaration of war by the Congress or at least an equally explicit congressional expression . . . that unless the President receives, upon his request or otherwise, such a declaratory consent, either general or limited, as soon as reasonably possible, any undeclared war becomes a usurpation by the President or an abdication by Congress—or, perhaps both.43

The court denied the Government's motion to dismiss and directed that it file responsive pleadings.

It seems certain from Gillette that selective conscientious objection will not be allowed on moral, ethical or religious grounds; however, it would appear that there is a possibility that the President is not constitutionally authorized to wage this war without a declaration from Congress. If it were decided that the Vietnam war is unconstitutional or even that selective pacifism should be allowed, this would be of benefit to those presently eligible for the draft, although it would seem to be of little or no importance to those who have already been forced either to compromise their consciences in the military, to submit to federal prosecution and prison for refusing induction or to flee the country to avoid the military and federal prisons. If the allowance of selective

43. Id. at 553.
conscientious objection or a declaration that the war in Vietnam is domestically or internationally illegal is to be meaningful, it must be retroactive to those in the military, those in prison and those in exile whose present station is the result of conscientiously holding these beliefs before they were recognized legally. Anything less would seem to be an empty gesture.

SELECTIVE CONSCIENTIOUS OBJECTION AND RETROACTIVITY

Prior to 1965, the Supreme Court's views on whether declaring a statute to be unconstitutional should be retroactive were unclear. In *Ex parte Siebold*, the Supreme Court held that if a statute is declared unconstitutional, a prior conviction under that statute would be void. But in *Chicot County Drainage District v. Baxter State Bank*, the Supreme Court reversed a circuit court decision which had declared void a judgment rendered under an unconstitutional statute. The Court held that

[t]he actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration.

Since the *Chicot County* decision concerned a civil statute and is distinguishable from the *Siebold* dictum which involved a criminal statute, there has been no direct holding by the Supreme Court whether those who are convicted under a criminal statute subsequently declared unconstitutional are entitled to have their convictions voided. The Supreme Court has, however, spoken extensively on whether the subsequent unconstitutionality of a statute regulating criminal procedure should result in retroactive application. The holdings indicate that the Supreme Court will not apply a new decision retroactively unless it would remedy a criminal procedure which had compromised the reliability of the fact finding process. When a constitutional guarantee has been heightened or added to in a manner which improves the reliability of the finding of guilt, the new interpretation essentially establishes a new required level

44. 100 U.S. 371, 376-77 (1880) (dictum).
45. 308 U.S. 371 (1940).
46. *Id.* at 373.
of confidence that a man has committed a crime. By raising the degree of confidence in guilt required to constitutionally convict a man, it may be that a person convicted in the past would not be guilty beyond a reasonable doubt under the present standards and should not be kept in prison.\(^49\)

A number of lower federal courts, however, have extended the situations in which retroactivity is allowed, and have held that *Marchetti v. United States*,\(^50\) *Grosso v. United States*,\(^51\) *Haynes v. United States*\(^52\) and *Leary v. United States*\(^53\) should be applied retroactively.\(^54\) The rationale of these cases seems to be that although the fifth amendment privilege of self-incrimination does not sharpen the fact finding process, it would bar any conviction under the unconstitutional statutes if those previously convicted were tried today, because they stand convicted of actions the government can no longer constitutionally punish.

A similar doctrine of retroactivity is apparent in some lower federal court selective service cases. The Supreme Court decided in *Gutknecht v. United States*\(^55\) and *Breen v. Selective Service Board No. 16*\(^56\) that draft boards may not accelerate a registrant's induction date for failure to comply with selective service laws. The Court stated that such power exercised at the discretion of the local board and not by the courts is "not congenial to our lawmaking traditions."\(^57\)

In *Andre v. Resor*\(^58\) and *United States v. Kelly*,\(^59\) *Gutknecht* and

\(^{49}\) Id. at 79-83.

\(^{50}\) 390 U.S. 39 (1968) (holding that to require payment of a wagering tax where there was likelihood that such payment would result in prosecution for violation of gambling statutes was a denial of the privilege not to incriminate oneself).

\(^{51}\) 390 U.S. 62 (1968) (holding that to require payment of a wagering excise tax where there was likelihood that such payment would result in prosecution for violation of gambling statutes was a denial of the privilege not to incriminate oneself).

\(^{52}\) 390 U.S. 85 (1968) (holding that to require payment of a tax on certain classes of firearms used principally by persons engaged in unlawful activities denies the privilege to be free from self-incrimination).

\(^{53}\) 395 U.S. 6 (1969) (holding that requiring the payment of a marihuana tax before marihuana can be purchased violates the fifth amendment).


\(^{59}\) 314 F. Supp. 500 (E.D.N.Y. 1970). See also Swartz v. United States, 3 S.S.
Breen were applied retroactively. In Andre, the petitioner's induction
date was accelerated for his failure to keep his draft board informed of
his current address, and he was subsequently inducted. One year after
his induction and one month after the Gutknecht decision, Andre filed
a petition for habeas corpus.60 The court decided that Andre had not
waived his right to raise Gutknecht by submitting to induction because
"one cannot waive a right of which he has no knowledge."61 The court
further held that Gutknecht should be given retroactive effect, reasoning
that if a new rule of law will prevent the conviction of innocent persons,
as Gutknecht does, it should be given full retroactivity. As a result,
Andre was given a full discharge from the military.

In United States v. Kelly,62 the petitioner's induction was accelerated
for failure to possess his selective service registration card. He was
notified to report for induction, refused induction, was indicted and
was sentenced upon his guilty plea to three years imprisonment. This
was more than one and one-half years before the Gutknecht decision.
Kelly moved to vacate the sentence and judgment of conviction63 and
the motion was granted. The court held that

[t]he purpose of the Breen and Gutknecht decision, viewed
broadly, is immaterial to the reliability of the fact finding pro-
cedures leading to a conviction. The concern is not with the
facts on which the conviction was based, but, rather, the
principle that the trial should never have taken place. The
principle goes beyond and is paramount to any question of
fairness of a trial and the presence of "other safeguards." It
is difficult to conceive of any valid reason why Breen and
Gutknecht should not be applied retroactively.64

Retroactivity of selective services cases was carried further in Ramos
v. United States.65 Ramos applied for conscientious objector classification
based on ethical and moral convictions. He was denied the exemption
and consequently refused induction. Ramos was convicted for refusing
induction and was sentenced to two and one-half years' imprisonment in

304 U.S. 458 (1938).
October of 1968. In 1970, Ramos maintained that the criteria for C.O. exemption had been changed in Welsh, entitling Ramos to have his conviction and sentence vacated. The court decided that Ramos' beliefs were consistent with those endorsed in Welsh and held that Welsh should be applied retroactively to Ramos because it would be senseless to deny the petitioner relief merely because he happened to be prosecuted before the decision in Welsh, when his conviction was based upon a statutory interpretation which the Supreme Court had since determined to be incorrect. In short, the local board simply applied the wrong standard. The court found the petitioner was not foreclosed from pressing a collateral attack upon his conviction. Furthermore, the court found compelling reasons to retroactively apply the holding in Welsh which, if it did not eliminate the statutorily required religious content for conscientious objector classification, at least interpreted the criterion so expansively that there would be no basis in fact for the local board's action if the petitioner's case were to be decided for the first time today.

The trend of these lower federal courts to broaden the grounds for holding a Supreme Court decision retroactive is an unexpected but deserved benefit to inductees and federal prisoners, including those whose inductions were punitively accelerated and those whose claims for conscientious objector exemption were denied because their grounds were not religious but merely ethical or moral. If, as these federal courts have held, relief should not be denied merely because a petitioner happened to be inducted or convicted before the statute convicting him was re-interpreted or declared unconstitutional by the Supreme Court, it would seem that permitting selective objection on religious, secular or legal grounds could result in exemption for not only those selective C.O.'s eligible for the draft but also possible release through collateral attack for those in the military or in prison. Gillette, however, denies selective conscientious objection based on religion. Welsh's definition of religion seems to preclude any claims on secular grounds. In addition, it is difficult to be optimistic about relief for those who conscientiously object to the war in Vietnam on ethical, moral, religious or legal grounds until the extension of retroactivity becomes more general and the illegality of an undeclared war question is answered. If, as many suggest, even those who have deserted the military or fled federal jurisdiction deserve a before-the-fact opportunity to claim selective C.O. status, it would not be available under the collateral attack approach presented by the lower

federal courts.

It appears that if selective conscientious objection is to become a reality for those eligible for the draft, those who have been inducted, those who are in federal prison for refusing induction and those in exile in foreign countries, it must come from the legislature or the executive.

SELECTIVE CONSCIENTIOUS OBJECTION AND H.R. 832

If Congress were to permit selective conscientious objection under the conditions now required for conscientious objection, there should be no opposition on constitutional grounds. The Supreme Court has held that

[t]he conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him . . . . The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution but from the acts of Congress . . . . [t]hat body may grant or withhold the exemption as . . . it sees fit . . . .

Clearly, the exemption for conscientious objectors is a “creature of Congress” and judging by Justice Marshall’s dictum in Gillette, that the Court did not suggest that Congress would be acting irrationally or unreasonably if it exempted those who object to a particular war, the Supreme Court seems to suggest it would approve such legislation. Legislation of this type has been introduced in the House of Representatives. Section 1 of H.R. 832 would amend section 6(j) of the Military Selective Service Act of 1967 by deleting the phrase “war in any form” and inserting “in any form in all wars or a particular war.” Persons granted this selective C.O. exemption could request assignment either to noncombatant military service or civilian service in the national interest as is done under the current law.

The valid secular purposes for permitting conscientious objection to all wars mentioned in Gillette apply equally to permitting selective conscientious objection. Justice Marshall admits that all but two of his

69. But the legislative power to grant or deny a privilege does not imply a fortiori an equivalent power to grant or deny such a privilege on unconstitutional grounds. See Speiser v. Randall, 357 U.S. 513 (1958).
70. H.R. 832, 92d Cong., 1st Sess. (1971). The bill was referred to the House Committee on Armed Services, January 22, 1971.
neutral reasons for granting exemption to total C.O.'s apply also to selec-
tive C.O.'s. The reasons the Court gives for not allowing selective C.O. status seem unconvincing at least. To say that the Government's need for manpower is a reason to deny selective C.O. exemption is to admit that it is a possible $10,000 fine and 5 years' imprisonment\(^2\) and not popular support which has enabled the government to pursue its military course in Vietnam. The interest in maintaining a fair system for determining who serves when not all serve seems to imply that the draft boards are having a very difficult time as it is with the loopholes in the draft law. Consequently, the government must deny what the selective C.O. believes is his right to obey what he conscientiously feels is his duty to a power higher than the state for no other reason than administrative expedience—apparently draft boards cannot be both fair and efficient. To allow selective conscientious objection through H.R. 832 would be to give legislative acknowledgment to what Vietnam has made painfully apparent. One can believe that he must never under any circumstances do a certain thing while another may believe that he must not do it except under certain rare and compelling circumstances. In both cases, the belief can be completely conscientious, and theoretically it is conscientious objection that the law seeks to protect. To require that conscientious objection extend to all war discriminates, therefore, among conscientious objectors by the content of their beliefs and denies freedom of belief to those who conscientiously object to certain wars. As Justice Jackson stated: \(^3\)

> If there is any fixed star in our Constitutional constellation, it is that no official high or petty can prescribe what shall be orthodox in religion . . . or force citizens to confess by word or deed their faith therein. \(^4\)

In addition to the legal implications, it may well be argued that an important social benefit will be realized from permitting selective conscientious objection. This could serve as a type of safety-valve veto for the nation as a whole. If it is possible for citizens in their private capacities to refuse participation in what honestly appears to them as an immoral, unethical or irreligious course of action on the part of their government, the impetuosity of political leaders who espouse force instead of negotiation could be somewhat restrained. In effect, it would seem that America would not demur at a time of crisis, but if large masses of citizens cannot conscientiously engage in a war, that, logically, would seem a valid

\(^2\) Id.
\(^4\) Id. at 642.
reason for the nation not to engage in that war.\textsuperscript{78}

**H.R. 832 and Retroactivity**

Section two of H.R. 832 provides for an addition to section 12(a) of the Military Selective Service Act of 1967\textsuperscript{76} to make the selective C.O. status granted in section one of H.R. 832 completely retroactive. To be eligible for this retroactive application the applicant must have been a selective C.O. either when he received his induction notice or when he left federal jurisdiction to avoid induction or prosecution. Those who left federal jurisdiction to avoid prosecution for refusing or evading military service and return to claim a selective C.O. exemption could not be arrested or prosecuted until the final administrative authority denies the claim, but at that time they would be subject to immediate arrest by the Federal Bureau of Investigation. Should a prisoner's claim be denied, he would be returned to prison, and should an inductee's claim be denied, he would be returned to the military.\textsuperscript{77}

This bill, combined with *Welsh*, would exempt anyone who conscientiously objected to the Vietnam war on ethical, religious or moral grounds. It would also mean that the enlarged scope of retroactivity applied in the lower federal courts\textsuperscript{78} would be granted to selective C.O. applicants. But by far the most prominent feature of H.R. 832 is the relief it would extend to those who left the United States to escape prosecution for refusing or evading military service\textsuperscript{79} and those who deserted the military.\textsuperscript{80} It is possible that those in prison and those inducted into the military could have secured their release if selective C.O. status were allowed under the retroactive grounds enunciated in *Kelly* and *Ramos*, but to extend retroactivity to young men who have violated federal law and never been tried or convicted is novel. No amnesty grant by the federal government has ever gone this far. The amnesty proclamations following the Civil War denied amnesty to "[a]ll who resigned or tendered resignations of their commissions in the army or navy of the United States to evade duty in resisting the rebellion."\textsuperscript{81} President Coolidge's amnesty proclamation following World War I granted amnesty and pardon to

\textsuperscript{75} 207 NATION 11, 12-15 (1968).
\textsuperscript{76} 50 U.S.C. App. § 462(a) (Supp. IV, 1968).
\textsuperscript{78} See notes 44-67 supra and accompanying text.
\textsuperscript{79} This relief is available only if they were selective conscientious objectors when they left the country.
\textsuperscript{80} This relief is available only if they were selective conscientious objectors at the time of their induction.
\textsuperscript{81} Presidential Proclamation of May 29, 1865, no. 37, § 5, 13 Stat. 758.
only those who had deserted the military after the armistice was signed. President Truman's Amnesty Board was restricted to granting amnesty to those who had been convicted for violating the Selective Training and Service Act of 1940. H.R. 832 goes farther than mere forgiveness; it enables the federal government to admit that not allowing selective conscientious objection was unjust. As one writer has suggested:

[E]veryone who has opposed the war—and this includes a clear majority of Americans according to polls since September 1968—should sense some common cause with the resisters and deserters. These young men are guilty of no crime other than that of sharing the opinion held by a majority of Americans, although they arrived at the opinion ahead of the majority. The crucial difference is that these men were 18 to 26 years old. They could not oppose the war in theoretical comfort, nor could they feel that they had done their duty simply by showing up for a few anti-war demonstrations. The brute fact is that these young men took a position which most . . . shared, but are in a situation where faithfulness to that position makes them subject to legal reprisal.

H.R. 832 would rectify this situation and allow the selective conscientious objector to be treated by the law as it should have been, not as it was.

However, to expect the exiled selective conscientious objector to risk a prison sentence and fine on the possibility of receiving just treatment from his draft board is fatuous. Those in prison and in the military will have nothing to lose and everything to gain by applying for release under H.R. 832, but not so the exile. Realistically, it seems that the distaste of some local draft boards for conscientious objectors must be remedied before any of the beneficiaries of H.R. 832 will have any more than a theoretical hope for a fair hearing. Therefore, those who would have

82. Presidential Proclamation of March 5, 1924, 43 Stat. 1940.
87. This ill-feeling and, in some cases, hostility toward C.O.'s has been acknowledged in Rabin, Do You Believe in a Supreme Being—The Administration of Conscientious Objector Exemption, 1967 WIS. L. REV. 642; Macgill, Selective Conscientious Objection: Divine Will and Legislative Grace, 54 VA. L. REV. 1355, 1380 (1968). It has been statistically documented in J. Davis & K. Dolbear, Little Groups of Neighbors: The Selective Service System 93 (1968).
the best chance for relief under H.R. 832 would seem to be those who had previously requested and been denied C.O. exemption by their local boards on the grounds made valid by this bill. They would probably have little trouble convincing the board that they have remained believers in selective conscientious objection. But the applicant who was aware that selective conscientious objectors did not qualify for exemption and thought it futile to apply may have difficulty in convincing his local board that he was a selective C.O. when he received his induction notice or when he left the country. As well as having to prove himself to have been a sincere selective C.O. before the bill, he must convince the local board that he is a sincere selective C.O. now. The applicant bears the burden of establishing prima facie compliance with the sincerity requirement. 88 Once such a case has been made, the Selective Service System has the burden of showing something in the record to support a denial, 89 but the process itself seems less than fair. The C.O. exemption is determined chiefly upon the sincerity of the registrant's beliefs. 90 This requirement poses the greatest difficulty for local boards and registrants and many different facts may cast doubt on an applicant's truthfulness and be the basis of a denial of exemption. As one court has stated, "[t]he best evidence [of a registrant's sincerity] may well be, not [his] statements or those of other witnesses but his credibility and demeanor in a personal appearance." 91 A board can base a finding of insincerity upon nothing more than the applicant's nervous appearance or unreliable demeanor as long as the disbelief is honest and rational. 92 When one considers that this applicant is faced with returning to prison, or to the military, or with immediate arrest by the F.B.I., it can be seen that the applicant may be nervous and inarticulate. Nervousness and inarticulatness could easily and honestly be mistaken for an evasive demeanor by the local board, and consequently the applicant's claim may be mistakenly denied. In the applicant's appeal to the state board, the applicant may rebut in writing allegedly incorrect conclusions. 94 However, the appeals board is quite justified in believing the local board and denying the C.O. exemption. Until 1967, the Department of Justice and the F.B.I. conducted an independent investigation for the

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90. Shapiro & Striker, Mastering the Draft § 12.3.3 (1970).
91. United States v. Simmons, 213 F. Supp. 901, 904 (7th Cir. 1954), rev'd on other
(E.D.N.Y. 1968).
92. United States v. Corliss, 280 F.2d 808 (2d Cir.), cert. denied, 364 U.S. 884
(1960).

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appeals board and substantially mitigated the harshness of the system.\textsuperscript{95} This provided a de novo hearing on the merits of the claim. But this was discontinued under the present law;\textsuperscript{96} now the question of an applicant’s sincerity is not subject to judicial review or federal investigation.\textsuperscript{97}

With the issue of an applicant’s sincerity wholly within the local board’s discretion and not subject to judicial review, it is apparent that local boards are given the final say under H.R. 832 to decide who shall receive the benefit of the retroactivity section. But this puts the applicant at the mercy of the very agency which precipitated the applicant’s exile, imprisonment or military confinement.

The local boards, by the Selective Service System’s own admission, “bring little sympathy into the consideration of these cases,”\textsuperscript{98} so it would seem that any skepticism is justified.

Those who have a past record of selective conscientious objection with their draft boards will probably fare well under H.R. 832, but those whose selective C.O. beliefs were not made known to their draft boards at the time they fled the United States or received their induction notices are at an extreme disadvantage. It is suggested that unless an investigation or inquiry is permitted to ascertain an applicant’s sincerity as was done prior to 1967, H.R. 832 offers little to those without a documented history of selective conscientious objection.

Perhaps it would be better to follow the idea of President Truman’s Amnesty Board\textsuperscript{99} and appoint a board to investigate the case of each applicant in conjunction with the Department of Justice and then recommend or deny exemption on this basis.

CONCLUSION

It is difficult to deny that for America to enjoy domestic peace, not only must the United States involvement in Indo-China cease, but all the boys must be brought home. If it is possible that any good can be derived from this war, it is that the conscientious belief that a certain war is immoral, unethical or in contravention of religion must be above and beyond the power of the government to raise and support armies. As was stated by Judge Wyzanski in \textit{United States v. Sisson}.\textsuperscript{100}

\textsuperscript{96} Id.
\textsuperscript{98} Id. at 674 n.86.
SELECTIVE PACIFISM

When the state through its laws tries to override reasonable moral commitments it makes a dangerously uncharacteristic choice . . . . When the law treats a reasonable, conscientious act as a crime it . . . invites civil disobedience. It impairs the very habits which nourish and preserve the law. 101

Only if the government admits its mistake in denying selective conscientious objection and extends it without prejudice to those who deserved it before or are entitled to it now, can America gain anything from all that has been lost in Southeast Asia.

APPENDIX

H.R. 832

(i) Any person who received a notice to report for induction into the Armed Forces prior to the date of enactment of this Act shall be entitled to offer information to his local board in substantiation of his claim to exemption—

(A) from combatant training and service in the Armed Forces provided he was conscientiously opposed to participation in a particular war at the time he received such notice; or
(B) from both combatant and noncombatant training and service in the Armed Forces provided he was conscientiously opposed to participating in any form in a particular war at the time he received such notice.

He shall be entitled to make his claim to exemption whether or not he has previously offered any information in substantiation of a claim to be a conscientious objector. The grant or improper denial of his claim shall be a defense to any prosecution for refusing or evading service in the Armed Forces.

(ii) Any person who left a jurisdiction prior to the date of enactment of this Act with intent to avoid prosecution for refusing or evading service in the Armed Forces and who returns to such jurisdiction shall be entitled to offer information to his local board in substantiation of his claim of exemption—

(A) from combatant training and service in the Armed Forces provided he was conscientiously opposed to participation in a particular war at the time he left such jurisdiction; or
(B) from both combatant and noncombatant training and

101. Id. at 910-11.
service in the Armed Forces provided he was conscientiously opposed to participating in any form in a particular war at the time he left such jurisdiction.

He shall not be prosecuted for the violation of any Federal law arising out of the act of having left such jurisdiction with intent to avoid prosecution for refusing or evading service in the Armed Forces unless he is finally convicted for refusing or evading service in the Armed Forces.

(iii) Any prosecution for refusing or evading service in the Armed Forces of a person who has offered information in substantiation of his claim to exemption under subparagraph (i) or (ii) of this paragraph shall be suspended until his claim to exemption has been granted or denied, including the final disposition of all administrative appeals taken with respect to such claim. The grant or improper denial of his claim for exemption shall be a defense to such prosecution.

(iv) Any person convicted prior to the date of enactment of this Act for refusing or evading service in the Armed Forces shall be entitled to make a motion\(^{102}\) . . . for temporary release on the ground that he has offered information in substantiation of his claim to exemption under subparagraph (i) or (ii) of this paragraph. . . . He shall be entitled to make a motion\(^{103}\) . . . for permanent release on the ground his claim has been granted or improperly denied.

(v) Any person inducted into the Armed Forces prior to the date of enactment of this Act shall be entitled to offer information to his local board in substantiation of his claim to exemption under subparagraph (i) of this paragraph . . .\(^{104}\)

(vi) Any prosecution commenced prior to the date of enactment of this Act for acts arising out of a nonviolent refusal or evasion of continued service in the Armed Forces\(^{105}\) . . . of a person who has offered information in substantiation of his claim to exemption under subparagraph (i) . . . shall be suspended until his claim . . . has been granted or denied including the final disposition of all administrative appeals. . . .
The grant or improper denial of his claim to exemption shall be a defense to such prosecution.

(vii) Any person convicted prior to the date of enactment of this Act for acts arising out of a nonviolent refusal or evasion of continued service in the Armed Forces . . .\textsuperscript{106} shall be entitled to apply for temporary release . . .\textsuperscript{107} on the ground that he has offered information in substantiation of his claim to exemption under subparagraph (i) . . . . He shall be temporarily released for noncombatant duties until his claim to exemption has been granted or denied, including . . . administrative appeals taken . . . . He shall be entitled to apply for permanent release . . .\textsuperscript{108} on the ground that his claim to exemption has been granted or improperly denied.

\textsuperscript{108} Id.