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Conscientious Objectors

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NOTES

CONSCIENTIOUS OBJECTORS

Congress has established a universal military training program,¹ thereby departing from a traditional policy of resorting to conscription only in times of war or periods of national emergency. As a consequence, if the litigious experience of World War II is any indication, the problem of the conscientious objector to military service will continue to confront the courts and lawyers. Presently, no conscientious objector is subject to combatant military service.² But before such status is attained, the individual claiming to be a conscientious objector must run the gamut of the administrative procedure set up to determine his good faith.³ Since the 1948 Act,

1. Universal Military Training and Service Act of 1951, Pub. L. No. 51, 82d Cong., 1st Sess. (June 19, 1951).

2. 62 Stat. 612 (1948), 50 U. S. C. A. App. § 456(j) (Supp. 1951).

3. 62 Stat. 613 (1948), 50 U. S. C. A. App. § 456(j) (Supp. 1951); 32 Code Fed. Regs. §§ 1624-1627 (1949), as amended by Exec. Order No. 10292, 16 Fed. Reg. 9853 (1951). The Administrative Procedure Act is not applicable, 62 Stat. 623 (1948), 50 U. S. C. A. App. § 463(b) (Supp. 1951). Because of its inherent nature, the issue of good faith will not be covered in this Note.

the individual must satisfy a stricter religious test than formerly to be classified a conscientious objector.⁴ It is the purpose of this Note to survey the problem of religious requirements, after a description of the administrative procedure involved.

I. ADMINISTRATIVE PROCEDURE

At the time directed by the president, the individual claiming to be a conscientious objector is under a legal duty to present himself at his local draft board for registration.⁵ The local board is the first to consider the objector's claim, and it may⁶ make the classification of conscientious objector (I-O) or of conscientious objector available for non-combatant service (I-A-O).⁷ The latter classification will subject the objector to perform military service, but not combat duties.⁸ The former classification entitled the objector to complete exemption from any service under the 1948 Act⁹ but now compels him to perform service of national importance in civilian work camps operated by Selective Service,¹⁰ as during World War II.¹¹ If the objector's claim is not sustained by the local board and he is classified either as available for military service (I-A) or as a

4. 62 Stat. 612 (1948), 50 U. S. C. A. App. § 456(j) (Supp. 1951). See Resolution of the National Student Association (a national association of university student councils) in their 4th Annual Congress at Minneapolis, Minnesota, August 29, 1951: "The Congress urges recognition of conscientious objectors on religious and humanitarian grounds as opposed to the draft law of 1951." See notes 54-57 *infra*, for discussion of the former test.

5. 62 Stat. 605 (1948), 50 U. S. C. A. App. § 453 (Supp. 1951).

6. 32 Code Fed. Regs. § 1622.1(c), as amended by Exec. Order No. 10292, 16 Fed. Reg. 9848 (1951).

7. 32 Code Fed. Regs. § 1622.11, as amended by Exec. Order No. 10292, 16 Fed. Reg. 9848 (1951) (Class I-A-O); 32 Code Fed. Regs. § 1622.14, as amended by Exec. Order No. 10292, 16 Fed. Reg. 9849 (1951) (Class I-O).

8. 62 Stat. 612 (1948), 50 U. S. C. A. App. § 456(j) (Supp. 1951); 32 Code Fed. Regs. § 1622.11, as amended by Exec. Order No. 10292, 16 Fed. Reg. 9848 (1951). Exec. Order No. 10028, 14 Fed. Reg. 211 (1949) defines non-combatant duty: ". . . The term 'non-combatant service' shall mean (a) service in any unit of the armed forces which is unarmed at all times; (b) service in the medical department of any of the armed forces, wherever performed; or (c) any other assignment the primary function of which does not require the use of arms in combat; provided that such other assignment is acceptable to the individual concerned and does not require him to bear arms or to be trained in their use."

9. 62 Stat. 612 (1948), 50 U. S. C. A. App. § 456(j) (Supp. 1951); 32 Code Fed. Regs. § 1622.20 (1949).

10. Pub. L. No. 51, 82d Cong., 1st Sess. § 1(q) (June 19, 1951). While serving in civilian work of national importance, the objector is classified I-W. After 24 months of service, the objector will be released and classified I-W Rel. See 32 Code Fed. Regs. § 1622.16, as amended by Exec. Order No. 10292, 16 Fed. Reg. 9850 (1951).

11. 54 Stat. 889 (1940), 50 U. S. C. § 305(g) (1946).

conscientious objector available for non-combatant service, he has ten days to appeal to the state selective service board to request the I-O classification.¹² On this appeal, the objector's claim is referred to a hearing officer appointed by the Justice Department,¹³ who has available to him a secret investigatory report made by the F.B.I.¹⁴ The state appeal board may accept or reject the decision of the hearing officer.¹⁵ If there is a dissenting vote in the state board's decision¹⁶ or if the board will certify an appeal,¹⁷ the objector may appeal an adverse decision to the president. The president may delegate the power of review to the Director of Selective Service.¹⁸ After this appeal, or if no appeal to the president is allowed, the administrative process is complete except for the physical examination. During World War II the administrative process was not completed until the objector had passed a physical examination which was given in conjunction with induction ceremony.¹⁹ Now the physical examination is given before the selectee receives his order to report for induction.²⁰ If the selectee is physically acceptable to the Army, he is under a duty to report for induction.²¹

At this point an objector wishing to contest the administrative decision has two possible avenues of procedure in the courts. First he may bring habeas corpus against the military authorities after induction,²² and second he may refuse to report for induction and stand trial for the crime of failure to comply with the order to report for induction.²³ Either course would give the federal district court power to decide the constitutionality of the conscription act and to

12. 32 Code Fed. Regs. § 1626.2(c) (1) (1949).

13. 62 Stat. 613 (1948), 50 U. S. C. A. App. § 456(j) (Supp. 1951); 32 Code Fed. Regs. § 1626.25 (1949).

14. See *United States v. Downer*, 135 F. 2d 521, 523 (2d Cir. 1943).

15. 62 Stat. 613 (1948), 50 U. S. C. A. App. § 456(j) (Supp. 1951); 32 Code Fed. Regs. § 1626.25(d) (1949). See *Bowles v. United States*, 319 U. S. 33 (1943).

16. 32 Code Fed. Regs. § 1627.3 (1949).

17. 32 Code Fed. Regs. § 1627.1 (1949).

18. 62 Stat. 621 (1948), 50 U. S. C. A. App. § 460(c) (Supp. 1951). Such was in fact done during World War II: Exec. Order No. 9410, 8 Fed. Reg. 17319 (1943). But see *Giese v. United States*, 143 F. 2d 633, 636 (D.C. Cir. 1944) (dissenting opinion), *aff'd per curiam* by an equally divided court, 323 U. S. 682 (1945).

19. *Falbo v. United States*, 320 U. S. 549 (1944). Cf. *Billings v. Truesdell*, 321 U. S. 542 (1944), 28 Minn. L. Rev. 334.

20. 32 Code Fed. Regs. § 1628.10 (1949). Cf. 32 Code Fed. Regs. § 1632.5(2) (1949).

21. 32 Code Fed. Regs. § 1632.14 (1949).

22. *United States v. Downer*, 135 F. 2d 521 (2d Cir. 1943).

23. *Gibson v. United States*, 329 U. S. 338 (1946); *Estep v. United States*, 327 U. S. 114 (1946), 31 Minn. L. Rev. 286 (1947).

review the question of whether there was any basis in fact for the administrative decision.²⁴

Resort to habeas corpus has been the historical method to secure review of the inductee's grievances.²⁵ During World War I, when all selectees were under military jurisdiction as of receipt of notice to report for induction,²⁶ and the conscientious objector had no alternative to non-combatant military service,²⁷ the objector could not secure review of his classification or test the constitutionality of the act except by habeas corpus. If the objector was sincere in his protestations he usually refused to accept military discipline after induction,²⁸ thereby subjecting himself to the harsh provisions of martial law.²⁹ To escape military punishment, the objector sought to secure review by the courts before induction.³⁰ During World War II, all breaches of duties created under the Selective Service Act were made non-military crimes³¹ to be tried in the district courts prior to induction, the maximum penalty being five years in prison and/or a \$10,000 fine.³² However, review of the selective service classification could not be obtained in criminal proceedings for failure to obey pre-induction orders.³³ The sole remedy was

24. See *Gibson v. United States*, 329 U. S. 338 (1946) (refusal to report for induction); *United States v. Cain*, 144 F. 2d 944 (2d Cir.), *cert. denied*, 323 U. S. 795 (1944) (habeas corpus—any evidence to support the board's finding). See *United States v. Estep*, 327 U. S. 114, 122 (1946) (no basis in fact); *United States v. Mansavage*, 178 F. 2d 812, 818 (7th Cir. 1949), *cert. denied*, 339 U. S. 931 (1950) (if no basis in fact).

25. See *Arbitman v. Woodside*, 258 Fed. 441 (4th Cir. 1919); *McCall's Case*, 15 Fed. Cas. 1225, No. 8,669 (E.D. Pa. 1863); *State in re Emerson*, 39 Ala. 437 (1864); *Lanahan v. Birge*, 30 Conn. 438 (1862); *Camfield v. Patterson*, 33 Ga. 561 (1863); *Ex parte Turman*, 26 Tex. 708 (1863). But see *Kneedler v. Lane*, 45 Pa. 238 (1863) (injunction).

26. *United States v. Drum*, 107 F. 2d 897 (2d Cir. 1939), *cert. denied*, 310 U. S. 648 (1940); *Franke v. Murray*, 248 Fed. 865 (8th Cir. 1918). But *cf.* *Patterson v. Lamb*, 329 U. S. 539 (1947).

27. 40 Stat. 78 (1917).

28. See examples of such conduct discussed in Thomas, *The Conscientious Objector in America* cc. VIII & IX (1923); Hayes, *Challenge of Conscience* c. 8 (1949) (English conscientious objector problems).

29. See Keefe and Moskin, *Codified Military Injustice*, 35 *Cornell L. Q.* 151 (1949).

30. See *Angelus v. Sullivan*, 246 Fed. 54 (2d Cir. 1917) (injunction); *United States v. Kinkead*, 250 Fed. 692 (3d Cir. 1918) (habeas corpus against the draft board).

31. 54 Stat. 895 (1940), 50 U. S. C. § 311 (1946).

32. *Ibid.*

33. *Falbo v. United States*, 320 U. S. 549 (1944); *Goodrich v. United States*, 146 F. 2d 265 (5th Cir. 1944); *United States v. Nelson*, 143 F. 2d 584 (2d Cir.), *cert. denied*, 323 U. S. 750 (1944); *Bronemann v. United States*, 138 F. 2d 333 (8th Cir. 1943); *United States v. Mroz*, 136 F. 2d 221 (7th Cir.), *cert. dismissed*, 320 U. S. 805 (1943); *United States v. Kauten*, 133 F. 2d 703 (2d Cir. 1943), discussed in Waite, *Section 5(g) of the Selective Service Act, as Amended by the Court*, 29 *Minn. L. Rev.* 22-25

habeas corpus after induction.³⁴ This remedy afforded the objector an almost impossible choice, for submission to military authority would foreclose review by habeas corpus³⁵ and unsuccessful review would leave him confronted with a court-martial for not submitting to military authority. Faced with the choice of five years in a civilian prison without opportunity for a review of his classification, as opposed to military detention barracks if his review were unsuccessful, most objectors so situated chose civilian prisons or followed advice³⁶ to attempt to get judicial review without being inducted.

The rule that the objector may have review of his classification at his trial for refusal to report for induction was not evolved by the Supreme Court until the latter part of World War II. In *Falbo v. United States*,³⁷ a prosecution for failure to report for physical examination and induction, the Court refused to allow any review of the administrative decision, declining to interfere with the orderly process of men into the armed forces, the administrative process remaining incomplete. Mr. Justice Murphy dissented,³⁸ pointing out that the orderly process was already seriously interrupted when the selectee had refused to report for induction, so there was no practical reason why judicial review should not be given at that juncture.³⁹ The *Falbo* case was universally construed as denying any review of classification in a criminal trial.⁴⁰ The case of *Billings*

(1944); *United States v. Grieme*, 128 F. 2d 811 (3d Cir. 1942). The classification could not be tested by a declaratory judgment, *Meredith v. Carter*, 49 F. Supp. 899 (N.D. Ind. 1943); nor by habeas corpus against a United States Marshal while awaiting trial for refusal to report for induction, *United States v. McGinnis*, 146 F. 2d 851 (4th Cir. 1944); *Albert v. Goguen*, 141 F. 2d 302 (1st Cir. 1944); nor by habeas corpus against the draft board, *Biron v. Collins*, 145 F. 2d 758 (5th Cir. 1944); nor by writ of certiorari or injunction against the draft board, *Drumheller v. Berks County Local Bd.*, 130 F. 2d 610 (3d Cir. 1942). See H. R. Rep. No. 36, 79th Cong., 1st Sess. 4-5 (1945). *But see* *United States v. Messersmith*, 138 F. 2d 599, 602 (7th Cir. 1943).

34. *United States v. Downer*, 135 F. 2d 521 (2d Cir. 1943).

35. See *Estep v. United States*, 327 U. S. 114, 130 (1946) (dilemma posed by Murphy, J., concurring). See *United States v. Mellis*, 59 F. Supp. 682 (M.D. N.C. 1945).

36. See Cornell, *Conscience and the State* 61-71 (1944).

37. 320 U. S. 549 (1944).

38. *Id.* at 555.

39. See *Baxley v. United States*, 134 F. 2d 998, 999 (4th Cir. 1943). See Bell, *Selective Service and the Courts*, 28 A. B. A. J. 164, 167 (1942).

40. See *Estep v. United States*, 327 U. S. 114, 138 (1946) (concurring opinion of Frankfurter, J.) and cases cited at 139. See *Cox v. United States*, 332 U. S. 442, 445 (1947) ("At that time the lower federal courts interpreted *Falbo* . . . as meaning that no judicial review of any sort could be had of a selective service order."). See 57 Harv. L. Rev. 577 (1944).

*v. Truesdell*⁴¹ distinguished the *Falbo* rule, holding that submitting to the pre-induction physical did not place the objector under military jurisdiction. In *Estep v. United States*,⁴² the Court approached the views of Mr. Justice Murphy and completed the evolution, allowing review of the classification in a criminal trial, where the objector had submitted to the physical examination but not induction. After World War II, alteration of the selective service regulations⁴³ averted the possibility of the *Falbo* situation recurring, and the case of the *Gibson v. United States*⁴⁴ reaffirmed the holding that judicial review is available upon refusal to report for induction.

The *Gibson* and *Estep* cases found limited judicial review of the administrative decision possible despite the provision in the Selective Service Act of 1940 that such a decision should be *final*.⁴⁵ The word "final" has indefinite meaning, depending upon the administrative body involved, although the use of that word has cut off judicial review of the decisions of some administrative bodies.⁴⁶ However, since the 1948 Act retains the same terminology,⁴⁷ it would seem that Congress did not intend to curtail the review of selective service classifications.

II. THE "SUPREME BEING" CLAUSE

The devices used to determine who should qualify as a conscientious objector have a disgraceful history, but have gradually been improved by Congress in each succeeding war. Before the problem became a federal one in the Civil War,⁴⁸ the states had encountered the problem of the conscientious objector. Early state constitutions and laws made exemptions for conscientious objectors who belonged to some well-recognized sects and who paid a small fine or tax for the privilege.⁴⁹ The Civil War act had indirect provisions for the conscientious objector, who could qualify under a general provision exempting all those from service who could procure a substitute or pay a \$300 penalty.⁵⁰ The Confederate counter-

41. 321 U. S. 542 (1944), 28 Minn. L. Rev. 334.

42. 327 U. S. 114 (1946), 31 Minn. L. Rev. 286 (1947).

43. 9 Fed. Reg. 1415 (1944) (providing for physical examination prior to induction).

44. 329 U. S. 338 (1946).

45. 54 Stat. 893 (1940).

46. See Davis, *Administrative Law* 832-838 (1951).

47. 62 Stat. 620 (1948), 50 U. S. C. A. App. § 460(b)(3) (Supp. 1951).

48. For a general discussion of conscientious objectors in the Civil War, see Wright, *Conscientious Objectors in the Civil War* (1931).

49. See Note, 27 Wash. U. L. Q. 565, 567 (1942).

50. 12 Stat. 733 (1863).

part allowed for substitution only,⁵¹ but was retracted when the fortunes of war turned against the South.⁵² The substitution device was not used in the World War I conscription act,⁵³ which required service of all able men on an equal basis. The conscientious objector was allowed non-combatant service if he could establish his membership in a "well-recognized religious sect" which was opposed to war as well as proving his individual opposition to war. Under this test, the individual's associations were probably given more weight, while sincere objectors from some of the larger denominations were excluded.

The Selective Service Act of World War II dropped the test by association, and based the test on the individual's religious training and belief.⁵⁴ Contributing to this liberalization were the protestations of the imprisoned objectors of World War I,⁵⁵ the outcry against the hysterical treatment given civil liberties during that war,⁵⁶ the attempts to have the courts liberalize the naturalization laws to allow alien conscientious objectors to become citizens,⁵⁷ the pacifist upsurge of the 1930's, and finally the fact that the Selective Service Act was passed in time of peace rather than under the urgency of war already declared. However, the "religious training and belief" test met with varied application by the courts. The Ninth Circuit Court of Appeals in *Berman v. United States*⁵⁸ held that the test did not encompass broad philosophical or sociological beliefs, relying on a dictum from the dissent of Mr. Chief Justice Hughes in *United States v. Macintosh*.⁵⁹ The *Berman* case placed more emphasis upon the orthodox idea of what should constitute

51. Stats. of Confederate States, 1st Cong., Sess. I c. 31 (1862).

52. Stats. of Confederate States, 1st Cong., Sess. IV c. 4 (1864); *Daly and Fitzgerald v. Harris*, 33 Ga. 38 (Supp. 1864); *Burroughs v. Peyton*, 16 Gratt. 470 (Va. 1864).

53. 40 Stat. 78 (1917).

54. 54 Stat. 889 (1940), 50 U. S. C. A. App. § 305(g) (1950).

55. See Thomas, *op. cit. supra* note 28, at 183, 197.

56. See Chafee, *Freedom of Speech in War Time*, 32 Harv. L. Rev. 932-936 (1919).

57. See *United States v. Macintosh*, 283 U. S. 605 (1931); *Beale v. United States*, 71 F. 2d 737 (8th Cir. 1934); *Bland v. United States*, 42 F. 2d 842 (2d Cir.), *rev'd*, 283 U. S. 636 (1930). After World War II, one attempt was finally successful, *Girouard v. United States*, 328 U. S. 61 (1946) (holding that alien conscientious objectors could become citizens as long as that privilege was granted to naturalized citizens). The statutes have since been amended, see Pub. L. No. 831, Tit. I § 29, 81st Cong., 2d Sess. (Sept. 23, 1951).

58. 156 F. 2d 377 (9th Cir.), *cert. denied*, 329 U. S. 795 (1946).

59. See 283 U. S. 605, 633 (1931): "The essence of religion is belief in relation to God involving duties superior to those arising from any human relation."

"religious training and belief" than did the Second Circuit, which applied a broad philosophical test.⁶⁰

The 1948 Act for the first time defined religious training and belief as "an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but . . . [as not including] . . . essentially political, sociological or philosophical views. . . ."⁶¹ This clause, which is essentially the dictum of Mr. Chief Justice Hughes,⁶² is set forth along with an immediate reference to the *Berman* case in the Senate report⁶³ that accompanied the Selective Service and Training Act of 1948. Thus it is certain that Congress intended a more restricted test for conscientious objectors than under the World War II Act.

The *Selective Draft Law Cases* decided, in a single cursory sentence,⁶⁴ that the "well-recognized sect" provision of the World War I Act was not an establishment of religion. A clause that is broader than the test so summarily upheld would merit little analysis now unless cases since 1917 have added new meaning to the phrase "establishment of religion."⁶⁵ *McColum v. Board of Education*⁶⁶ and *Everson v. Board of Education*,⁶⁷ the leading cases in the field of separation of religion and education, have set such a standard that "establishment of religion" now means an incidental preferment of one religious body over another,⁶⁸ a fact

60. *United States v. Badt*, 141 F. 2d 845 (2d Cir. 1944), *cert. dismissed*, 328 U. S. 817 (1946); *United States v. Downer*, 135 F. 2d 521 (2d Cir. 1943). See *United States v. Kauten*, 133 F. 2d 703, 708 (2d Cir. 1943), A. Hand, J.: ". . . the content of the term [religion] is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe—a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgression of its tenets."

61. 62 Stat. 612 (1948), 50 U. S. C. A. App. § 456(j) (Supp. 1951).

62. See note 59 *supra*.

63. Sen. Rep. No. 1268, 80th Cong., 2d Sess. 14 (1948).

64. 245 U. S. 366, 389 (1917): "And we pass without anything but statement the proposition that an establishment of religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more."

65. U. S. Const. Amend. I: "Congress shall make no law respecting an establishment of religion. . . ."

66. 333 U. S. 203 (1948).

67. 330 U. S. 1 (1947).

68. The current controversy rages over whether the establishment of religion clause in the First Amendment means that the state may not aid religious bodies in any form after the *McColum-Everson* cases. See *Everson v. Board of Education*, 330 U. S. 1, 15 (1947): "The 'establishment of reli-

conceded by the most vigorous critics of the *McCollum* case.⁶⁹ Since some religious bodies which constitute a great proportion of the world's population,⁷⁰ as well as some organized churches which must be included in the Christian cultural group,⁷¹ do not ascribe to belief in a Supreme Being,⁷² the Supreme Being clause necessarily confers a privileged status upon those religious bodies which do profess to belief in a Supreme Being—if the clause is given a strict interpretation.

While the term "Supreme Being" might seem to denote a personage, it could fairly connote an omnipotent intelligence or authority.⁷³ If the term is given a strict interpretation—as the *Berman* case calls for—an establishment of religion in the 1948 Act is certain under the *McCollum-Everson* rule. This constitutional argument, i.e., establishment of religion, may encounter serious problems. One, the doubtful standing of the plaintiff to bring the suit in the *McCollum* and similar cases on establishment of religion,⁷⁴ would not seem to apply to a less orthodox objector

gion' clause . . . means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." Opponents of the *McCollum* case contend that Madison's *Memorial and Remonstrance against Religious Assessments*, set out in full in the *Everson* case, 330 U. S. at 63, has been substituted for the First Amendment. See 14 Law & Contemp. Prob. 1-169 (1949); Waite, *Jefferson's "Wall of Separation": What and Where?*, 33 Minn. L. Rev. 494 (1949).

69. See Corwin, *The Supreme Court as National School Board*, 14 Law & Contemp. Prob. 3 (1949); Brief for Appellees, p. 20, *McCollum v. Board of Education*, 333 U. S. 203 (1948).

70. The following bodies exclude any idea of a Supreme Being in their dogma: Buddhists, estimated numbers—150,300,000, Information Please Almanac 631 (1951); see 2 Encyclopaedia of Religion and Ethics 183 (1910) (discussion of doctrine). Taoists, estimated numbers—50,053,200, Information Please Almanac 631 (1951); see 12 Encyclopaedia of Religion and Ethics 197-198 (1922) (discussion of doctrine). Jainists (India), estimated numbers—1,250,000, 12 Encyclopaedia Britannica 868 (1951); see 2 Encyclopaedia of Religion and Ethics 186 (1910) (discussion of doctrine).

71. Unitarians, 59,228 members in 1936, U. S. Dep't of Commerce, Bureau of Census, 2 Religious Bodies 1616 (1936); Society for Ethical Culture, 2000 members in 1936, U. S. Dep't of Commerce, Bureau of Census, 2 Religious Bodies 53 (1936).

72. Unitarian: see 22 Encyclopaedia Britannica 709 (1951). The Unitarian Church has no official creed or dogma, leaving that aspect of religion to the individual member. Therefore "theists" could properly be members of the church, as well as humanists. See Reese, *The Meaning of Humanism* (1945). Ethical Culture Society, 8 Encyclopaedia Britannica 756 (1951); 10 Encyclopaedia Americana 537, 539 (1947).

73. Webster's New International Dictionary (2d Ed., Unabridged 1947).

74. See *McCollum v. Board of Education*, 333 U. S. 203, 233-234 (1948) (concurring opinion of Jackson, J.). Cf. *Pierce v. Society of Sisters*, 268 U. S. 510 (1925). See Corwin, *The Supreme Court as National School Board*, 14 Law & Contemp. Prob. 3, 5-9 (1949).

facing a prison term. Secondly, however, conscription acts have come before the courts when the nation was engaged in war or going through periods of national emergency, when even a compelling individual interest could not convince a court to find a conscription act unconstitutional in the face of the nation's greatest interest—self-preservation. However, since universal military training is a reality, the decision might come when the nation is at peace. A possible establishment of religion in the selective service act might be subject to a more serious treatment than it once was given.⁷⁵

III. THE PHILOSOPHICAL-SOCIOLOGICAL OBJECTOR

Although the present test excludes him,⁷⁶ the philosophical-sociological objector who would be willing to accept a conscientious objector classification can for practical purposes be treated like the recognized religious objector.⁷⁷ The reason recognition is granted at all is curtly stated by the military: conscientious objectors are a troublesome lot that cannot be bothered with as long as the number is so small.⁷⁸ Another similar historical instance would seem to substantiate this, for it shows that the privilege was given only when the luxury could be afforded.⁷⁹ Presumably philosophical and sociological objectors could make themselves as much a nuisance as their more devout brethren. Probably a better reason is that since the government must allow the free dissemination of religious views which outwardly condemn war, it should make some provision for those who recently accept those views. When such views are encouraged, indirectly, by exempting religious bodies from taxation, there is more reason for making the provision. Granting exemption to the religious objector because his conscience is subject to a greater compulsion than the philosophical-sociological objector approaches discrimination between religious ideas. This discrimination proposes the question: where is the

75. See *Selective Draft Law Cases*, 245 U. S. 366, 389 (1917).

76. See *Berman v. United States*, 156 F. 2d 377 (9th Cir.), *cert. denied*, 329 U. S. 795 (1946), and notes 58-63 *supra*.

77. Such appears to be the case in England: See Hayes, *op. cit. supra* note 28, at 58-64; Pollard, *Conscientious Objectors in Great Britain and the Dominions*, 28 J. Soc'y Comp. Leg., 3rd Ser., parts III & IV, 72, 74 (1946).

78. 1 *Hearings before Senate Military Affairs Committee on Sen. 315*, 78th Cong., 1st Sess. 22-24 (1943).

79. See note 52 *supra*.

dividing line between religion and philosophy, even philosophy and politics? Unless the question can be answered, intellectual honesty requires a liberalization of the present test.

IV. THE POLITICAL OBJECTOR

The political objector must be carefully distinguished from the conscientious objector, whose status is established by Congress as exempt from military service. The political objector is of two types: one consists of participants in an unorganized political movement seeking to outlaw conscription through their martyrdom; the other includes members of an organized group opposed to the interests of the government. The latter group might best be described by citing its current example, the American Communist Party. Because of the elements of sincerity and sedition, the problems of the latter type are outside the scope of this Note.

The current examples of the objector to war who is a participant in an unorganized movement consists of those who base their objection to war on religious grounds. It is abundantly clear that one may be a political objector and still base his objection on religious grounds. The "absolutist" objector,⁸⁰ who refuses to register for the conscription process and refuses to recognize any power in the government to conscript, is such a religious objector seeking to effect political change. If such an objector writes his draft board of his intention not to register, inclosing all pertinent data necessary for registration, he has not fulfilled his duty and is liable to prosecution,⁸¹ though had he registered the conscientious objector classification would have been easily secured.⁸² In England the absolutist objector who informs the authorities of his refusal to register will be registered without his consent.⁸³ The American absolutist may be registered if he appears at the draft board stating his intention not to register,⁸⁴ but if he persists in his position,

80. The term is used in Hayes, *op. cit. supra* note 28, at 242; also in 1 Conscientious Objection 2 (Selective Service System, Special Monograph No. 11, 1950). 1,624 such persons went to prison in World War II, *id.* at 117.

81. Cannon v. United States, 181 F. 2d 354 (9th Cir.), *cert. denied*, 340 U. S. 892 (1950).

82. See Richter v. United States, 181 F. 2d 591, 594 (9th Cir.), *cert. denied*, 340 U. S. 892 (1950). Cf. Cannon v. United States, 181 F. 2d 354 (9th Cir.), *cert. denied*, 340 U. S. 892 (1950).

83. National Service (Armed Forces) Act, 1939, 2 & 3 Geo. 6, c. 81 § 5 (7).

84. United States v. Norton, 179 F. 2d 527 (2d Cir. 1950) interpreting 32 Code Fed. Regs. § 1613.16 (1949).

he will be convicted under some other provision of the Act.⁸⁵ The legal argument given by the absolutist, that temporal laws cannot contravene the law of God, or the natural law, to which the constitution must conform, has been rejected by the courts.⁸⁶ Though the natural law theory has found some application in other instances in the past,⁸⁷ recent decisions indicate that the Court is not likely to accept it in the near future.⁸⁸

The Jehovah's Witness seeks political recognition of a different sort. Every Jehovah's Witness must pledge to proselytize the teachings of the sect,⁸⁹ and all members are termed ministers. Though Selective Service would certainly grant them the conscientious objector classification (I-O),⁹⁰ which would require their attendance at civilian work camps, the Jehovah's Witnesses insist upon the minister of religion classification (IV-D),⁹¹ which entitles the classificant to complete exemption from military or civilian service.⁹² By a clear misinterpretation of words,⁹³ the Jehovah's Witnesses attempt to secure exemption for the propagation of their doctrines, or perhaps for merely selfish reasons.⁹⁴

Since in our time and in the foreseeable future, any government must have the power to wage war to defend itself, those who fight the political battle to outlaw war must be content with martyrdom. Those who seek special advantage for themselves will probably not be able to call themselves martyrs.

85. *United States v. Kime*, 188 F. 2d 677 (7th Cir.), *cert. denied*, 20 U. S. L. Week 3089 (U.S. Oct. 3, 1951) (failure to have registration certificate in possession).

86. *See Gara v. United States*, 178 F. 2d 38, 40 (6th Cir. 1949), *aff'd per curiam* by an equally divided court, 340 U. S. 857 (1950); *United States v. Henderson*, 180 F. 2d 711, 713-715 (7th Cir.), *cert. denied*, 339 U. S. 963 (1950).

87. *See Lochner v. New York*, 198 U. S. 45 (1905).

88. *See Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U. S. 525, 535 (1949); *Guaranty Trust Co. v. York*, 326 U. S. 99, 101-103 (1945), 30 Minn. L. Rev. 643 (1946). *But see Williams v. Kaiser*, 323 U. S. 471, 476 (1945).

89. *See Waite, The Debt of Constitutional Law to Jehovah's Witnesses*, 28 Minn. L. Rev. 209, 213 (1944).

90. *See Klopp v. United States*, 148 F. 2d 659 (6th Cir. 1945); *United States v. Messersmith*, 138 F. 2d 599 (7th Cir. 1943); *Goodwin v. Rowe*, 49 F. Supp. 703 (N.D. W. Va. 1943).

91. 32 Code Fed. Regs. § 1622.19 (1949).

92. 62 Stat. 611 (1948), 50 U. S. C. A. App. § 456(g) (Supp. 1951).

93. *See Martin v. United States*, 190 F. 2d 775 (4th Cir. 1951). Sen. Rep. No. 1268, 80th Cong., 2d Sess. 13 (1948) clearly points out that the "minister of religion" classification was not intended to apply to all members of the Jehovah's Witnesses.

94. *United States v. Pitt*, 144 F. 2d 169 (3rd Cir. 1944) (bad faith); *Honaker v. United States*, 135 F. 2d 613 (4th Cir. 1943) (work in war plant).