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REMANDING AN IN-SERVICE CONSCIENTIOUS OBJECTOR CASE TO THE MILITARY: USE OR ABUSE OF THE POWER TO REMAND

JERRY G. DuTERROIL

Henry Weber was inducted into the United States Army after failing in his claim for conscientious objector (hereinafter referred to as CO) status before his local selective service board. He refused to carry a weapon when ordered at basic training and subsequently was court martialed and sentenced to six months at hard labor. Thereafter, he again refused to carry a weapon. This time he was tried and sentenced to death.[1] Some twenty-five years later, in the midst of our nation's longest and most unpopular war, another "Henry Weber" could possibly find himself honorably discharged from our armed forces, either by military approval or a federal court order. The path which the in-service CO has followed over the past twenty-five years was neither paved, nor charted, and is still far from its end. Nonetheless, one who finds military life inconsistent with his beliefs, today, can be discharged from our nation's armed forces. If one's discharge is denied, he may resort to the federal courts for relief by the issuance of a writ of habeas corpus.

Recently, the federal courts have remanded cases back to the Conscientious Objector Review Board for further proceedings. The problem dealt with herein concerns the proper instances where the courts should remand an in-service CO case to the military. In analyzing the problem, the focus of attention will be on three recent cases where the remanding procedure was employed.

BACKGROUND OF THE IN-SERVICE CO CLAIM

From the beginnings of our existence as a nation, special consideration was given to conscientious objectors:

> As there are some people who from Religious Principles cannot bear Arms in any case, this Congress intend no Violence to their Consciences, but earnestly recommend it to them to Contribute Liberally, in this time of universal calamity, to the relief of their distressed Brethern in the several Colonies, and to do all other services to their oppressed country, which they can consistently with their Religious Principals. Continental Congress, July 18, 1775.[2]

[1] M. WITTLES, ADVICE FOR CONSCIENTIOUS OBJECTORS IN THE ARMED FORCES 14 (1st ed. 1971); Weber's sentence was later reduced to life, then to 20 years, and finally five years and a dishonorable discharge.

[2] 2 JOURNALS OF THE CONTINENTAL CONGRESS 189 (1905).

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This early expression of our conscientious objection policy has been recognized from time to time throughout our history[3] and is presently recognized under section 456(j) of the Military Selective Service Act of 1967,[4] which provides exemption from service in the Armed Forces of the United States for conscientious objectors.[5] Section 456(j) applies to those who assert their claim of conscientious objection prior to entry into the service. Obviously, the question arose as to whether in-service conscientious objectors were denied "equal protection" of the laws, since their counterparts in civilian life could process their claim under the draft law. However, this issue was avoided by the issuance of Department of Defense Directive 1300.6 (1962).[6] The directive set forth the policies and procedures for the transfer of men who were found to be opposed to all military duty.[7] In accordance with DOD Directive 1300.6, each of the armed services and the Coast Guard adopted regulations[8] based essentially on the directive, thereby enabling in-service CO claimants to be discharged if they meet essentially the same criteria for CO exemption as their civilian brethren.[9] The military authorities still have the discretion to refuse the classification or to deny the

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3 For a history of conscientious objector provisions see Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH. L. REV. 409 (1952); Conklin, *Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins*, 51 GEO. L.J. 252 (1963).

4 50 U.S.C. § 456(j) (1970).

5 50 U.S.C. § 456(j) (1970) states: "Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service . . . who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

6 DOD Dir. 1300.6 issued August 21, 1961.

7 Non-combatant service is defined in DOD Dir. 1300.6, III, A, as

> . . . service in any unit of the Armed Forces which is unarmed at all times; 2. service in the medical department of any of the Armed Forces wherever performed; or 3. 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.

Non-combatant training is defined in the DOD Dir. 1300.6, III, B, as "Any training which is not concerned with the study, use or handling of arms or weapons." In some cases servicemen were granted a CO transfer to noncombatant status. United States v. Purvis, 403 F.2d 555 (2d Cir. 1969); United States *ex rel.* Tobias v. Laird, 413 F.2d 936 (4th Cir. 1969); United States v. Martin, 416 F.2d 44 (10th Cir. 1969); United States v. Nelson, 299 F.Supp. 300 (D. Minn. 1969).

8 The regulations pursuant to DOD Dir. 1300.6 in effect are:
Army: AR635-20 (August 15, 1970) (active personnel)
Ar 135-25 (August 1, 1970) (reservists)
Air Force: AFR 35-24 (May 1, 1970) (active and reserve)
Navy: BUPERSMANUAL Article 1860120 (August 21, 1970) (active and reserve)
Marine Corps: MCO 1306.16B (June 18, 1969) (active and reserve)
Coast Guard: COMDTINST 1900.2 (Oct. 7, 1968) (active and reserve).

9 DOD Dir. 1300.6, IV, B, 3b, reads: "Since it is in the national interest to judge all claims of conscientious objection by the same standards, . . . Selective Service System standards used in determining . . . classification of draft registrants prior to induction shall apply to servicemen who claim conscientious objection after entering military service."

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applicant's request.[10] It is the exercise of this discretion which has been challenged through habeas corpus proceedings.[11]

Federal Courts and the In-Service CO

Four years after the DOD Directive, the federal courts encountered petitions of habeas corpus[12] from servicemen whose applications for CO discharge had been denied by the military.[13] Initially, the courts adhered to the longstanding tradition of judicial nonintervention in military affairs by denying jurisdiction to review military CO claims by way of habeas corpus proceedings.[14] This tradition stemmed from the notion that a review of military administrative decisions created undue interference with the Executive Branch, and thus repugnant to the "separation of powers" concept.[15] Also, the judiciary feared that the morale and discipline of the armed forces would be undermined by judicial meddling. However, the landmark case of *Brown v. McNamara* (1967),[16] admitted that the federal courts have the power to review denials of CO discharge requests by the military, though the court ruled adversely to the petitioner on the merits. Then, in *Hammond v. Lenfest* (1968),[17] the first in-service objector was ordered released by the military because there had been "no basis in fact" for

[10] DOD Dir. 1300.6, IV, B, states ". . . bona fide conscientious objection . . . will be recognized to the extent practicable and equitable." DOD Dir. 1300.6, IV, B, 1, states "Administrative discharge prior to the completion of an obligated term of service is discretionary with the military service concerned . . . ."

[11] In light of the language in the DOD Dir. 1300.6, IV, B, 1, an intolerable situation would exist if military conscientious objection determinations were not reviewable by the courts. The armed services could conceivably make a farce out of the DOD Dir. by routinely denying discharge, even though one would meet the criteria established for a conscientious objector classification.

[12] The federal writ of habeas corpus, 28 U.S.C. § 2241 (1970), is the appropriate means to test the legality of military custody of a serviceman. Jones v. Cunningham, 371 U.S. 236, 83 S. Ct. 373, 9 L. Ed.2d 285 (1963); Green v. Sec. of Navy, 264 F.2d 63 (9th Cir. 1958); Reitemeyer v. McCrea, 302 F. Supp. 1210 (D. Md. 1969); Crane v. Hedrick, 284 F. Supp. 250 (N.D. Cal. 1968).

[13] *In re* Kanewske, 260 F. Supp. 521 (N.D. Cal. 1966), *appeal dismissed as moot sub nom*, Kanewske v. Nitze, 383 F.2d 388 (9th Cir. 1967). (The district court did agree to review but upheld the denial of discharge.)

[14] Noyd v. McNamara, 267 F. Supp. 701 (D. Colo.), *aff'd*, 378 F.2d 538 (10th Cir. 1967), *cert. denied*, 389 U.S. 1022, 88 S. Ct. 593. 19 L. Ed.2d 667 (1968); Chavez v. Fergusson, 266 F. Supp. 879 (N.D. Cal. 1967), *appeal dismissed as moot*, 395 F.2d 215 (9th Cir. 1968).

[15] The nonreviewability tradition was clearly pronounced by the Supreme Court in Orloff v. Willoughby, 345 U.S. 83, 73 S. Ct. 534, 97 L. Ed. 842 (1953), when, in refusing to review a military administrative decision, Justice Jackson wrote:

> [J]udges are not given the task of running the Army . . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Id. at 93, 73 S. Ct. at 540, 97 L. Ed. at 849.

[16] 387 F.2d 150 (3d Cir. 1967) (2-1 opinion), *cert. denied sub nom.*, Brown v. Clifford, 390 U.S. 1005, 88 S. Ct. 1244, 20 L. Ed.2d 105 (1968). The district court in this case had refused to accept jurisdiction—Brown v. McNamara, 263 F. Supp. 686 (D.N.J. 1967).

[17] 398 F.2d 705 (2d Cir. 1968).

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denying the CO discharge. It is now generally held that the federal courts can hear petitions of habeas corpus,[18] and according to the circumstances, grant the relief sought.[19]

In most instances of judicial review of administrative decisions, the courts employ the "substantial evidence" test, that is, the courts look to see if there is a substantial factual basis to support the administrative finding.[20] However, the "scope of review" of denials of in-service CO discharges is limited to a determination of whether the military had a "basis in fact" to support its refusal to discharge the applicant.[21] This "basis in fact" test was first applied to in-service cases in *Gilliam v. Reeves* (1966),[22] and thereafter, almost all courts have puportedly applied the test.[23] In this test, often considered the narrowest known to the law,[24] the administrative decision is upheld if there is the slightest factual evidence to support the determination of the administrative board.[25] Although the standard of review might seem harsh to the

18 Pitcher v. Laird, 421 F.2d 1272 (5th Cir. 1970), *application for stay of deployment denied as moot*, 399 U.S. 902, 90 S. Ct. 2190, 26 L. Ed.2d 557 (1970); Packard v. Rollins, 422 F.2d 525 (8th Cir. 1970); Quinn v. Laird, 421 F.2d 840 (9th Cir. 1970); United States *ex rel.* Sheldon v. O'Malley, 420 F.2d 1344 (D.C. Cir. 1969); Bates v. Commander, First Coast Guard District, 413 F.2d 475 (1st Cir. 1969); United States *ex rel.* Brooks v. Clifford, 409 F.2d 700 (4th Cir. 1969). *But see*, Noyd v. McNamara, 378 F.2d 538 (10th Cir. 1968), *cert. denied*, 389 U.S. 1022, 88 S. Ct. 593, 19 L. Ed.2d 667 (1967).

19 Helwick v. Laird, 438 F.2d 959 (5th Cir. 1971); Silberberg v. Willis, 420 F.2d 662 (1st Cir. 1970); Sertic v. Laird, 418 F.2d 915 (9th Cir. 1969); Emerson v. McKean, 322 F. Supp. 251 (N.D. Ala. 1971); Johnson v. Resor, 321 F. Supp. 563 (D. Mass. 1971); Aquilino v. Laird, 316 F. Supp. 1053 (W.D. Tex. 1970); Kepple v. Laird, 319 F. Supp. 1342 (D.D.C. 1970); United States *ex rel.* Armstrong v. Wheeler, 321 F. Supp. 471 (E.D. Pa. 1970); Benway v. Barnhill, 300 F. Supp. 483 (D.R.I. 1969); Koster v. Sharpe, 303 F. Supp. 837 (E.D. Pa. 1969); Goguen v. Clifford, 304 F. Supp. 958 (D.N.J. 1969); Cooper v. Barker, 291 F. Supp. 952 (D. Md. 1968); Gann v. Wilson, 289 F. Supp. 191 (N.D. Cal. 1968).

20 4 K. Davis, Administrative Law Treatise §§ 29.01, 29.02 (1958).

21 In Estep v. United States, 327 U.S. 114, 66 S. Ct. 423, 90 L. Ed. 567 (1946), the "basis in fact" test was first enunciated for selective service conscientious objector cases. The reasoning for employing this narrow scope of review is found in 327 U.S. at 122, 123 of the *Estep* opinion:

> The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant . . . .

Id. at 122, 66 S. Ct. at 427, 90 L. Ed. at 573.

22 263 F. Supp. 378, 384 (W.D. La. 1966). The court stated: "The scope for reviewing the action of a selective service board by habeas corpus is identical to that to be applied in reviewing the action of the Army." *Id.* at 384.

23 *See* Speer v. Hedrick, 419 F.2d 804, 806 (9th Cir. 1969); Cohen v. Laird, 315 F. Supp. 1265, 1271 (D.S.C. 1970); Rastin v. Laird, 320 F. Supp. 1047, 1050 (S.D. Cal. 1970); Ross v. McLaughlin, 308 F. Supp. 1019, 1023 (E.D. Va. 1970); Siebens v. Commanding General, 319 F. Supp. 992 (W.D. La. 1970); Laxer v. Cushman, 300 F. Supp. 920, 926 (E.D. Wisc. 1969); Owens v. Commanding General, 307 F. Supp. 285, 288 (N.D. Cal. 1969); United States *ex rel.* Scott v. Tillson, 304 F. Supp. 406, 410 (S.D. Ga. 1969). *But see* Silberberg v. Willis, 306 F. Supp. 1013, 1022 (D. Mass. 1969).

24 Blalock v. United States, 247 F.2d 615, 619 (4th Cir. 1957); *see* Witmer v. United States, 348 U.S. 375, 380, 75 S. Ct. 392, 395, 99 L. Ed. 428, 433 (1955).

25 It has been asserted that the "basis in fact" test is just as broad as the "substantial evidence" test. 4 K. Davis, Administrative Law Treatise § 29.07 (1958).

aspirations of the in-service CO applicant, it is so well established that to argue for the adoption of another standard seems fruitless.[26]

The Remand Procedure: A Review of Three Recent Cases

In determining the class of persons who are entitled to honorable discharge from the armed forces as conscientious objectors, the military must consider basically three issues:[27] (1) Is the applicant sincere[28] in his opposition to all war;[29] (2) Is his belief based upon religious training and belief, as the term has been construed by Supreme Court decisions;[30] and (3) Has this belief crystallized after entry into the military?[31] In reviewing the military findings as to these three issues, the courts must find a "basis in fact" to support a negative answer to any of the above questions. If such a negative finding by the military is supported by the record before the court, habeas corpus relief will be denied. A problem arises though, as to what action the court should take when the military has incorrectly processed one's application:[32]

[26] Cases have questioned the proper standard of review—Minasian v. Engle, 400 F.2d 137 n.1 (9th Cir. 1968); Craycroft v. Ferrall, 408 F.2d 587, 596 (9th Cir. 1970).

[27] The Supreme Court in Clay v. United States, 403 U.S. 698, 91 S. Ct. 2068, 29 L. Ed.2d 810 (1971), outlined the three basic tests one must satisfy in order to meet the burden of establishing a prima facie case. These three basic tests were pronounced in the cases cited in the three following footnotes.

[28] Witmer v. United States, 348 U.S. 375, 75 S. Ct. 392, 99 L. Ed. 428 (1955).

[29] Objection to a particular war will not be recognized—Gillette v. United States, 401 U.S. 437, 91 S. Ct. 828, 28 L. Ed.2d 168 (1971).

[30] United States v. Seeger, 380 U.S. 163, 85 S. Ct. 850, 13 L. Ed.2d 733 (1965). Under *Seeger*, religion includes "all sincere religious beliefs which are based on a power or being, or upon a faith to . . . which all else is ultimately dependent." *Id.* at 176, 85 S. Ct. at 859, 13 L. Ed.2d at 743.

Under Welsh v. United States, 398 U.S. 333, 340, 90 S. Ct. 1792, 1796, 26 L. Ed.2d 308, 319 (1970), the term "religious" was expanded to include "beliefs that are purely ethical and moral in source and content but that nevertheless impose upon . . . [the registrant] a duty of conscience to refrain from participating in any war . . . ." For a discussion of the religious criteria in conscientious objector cases see the following literature: Comment, *Selective Service System—Scope of the Conscientious Objector Exemption After Welsh v. United States*, 19 Kansas L. Rev. 231 (1971); Comment, *The Conscientious Objector Exemption After Welsh*, 9 Houston L. Rev. 358 (1970); Denno, *Welsh Reaffirms Seeger: From A Remarkable Feat of Judicial Surgery To A Labotomy*, 46 Indiana L. Rev. 37 (1970); Comment, *Conscientious Objector: Legal Definition of Religion and First Amendment Government Neutrality*, 2 St. Mary's L.J. 81 (1970).

[31] A request for discharge will not be entertained by the military if the claim is based on conscientious objection which existed prior to entry in the service and was not made within the Selective Service System or if the claim was made but denied within the Selective Service System prior to entry into the service. DOD Dir. 1300.6, IV, B, 2. However, the Army must consider a claim where it is shown that the applicant's beliefs have undergone change since they were rejected by the Selective Service System. United States *ex rel.* Barr v. Resor, 309 F. Supp. 917 (D.D.C. 1969). Claims based on conscientious objection growing out of experiences prior to entering military service, but which became crystallized after entry, will be entertained. DOD Dir. 1300.6, IV, B, 2.

[32] *Processing A CO's Request For Discharge:* Army Regulation 635-20 "sets forth the policy, criteria, and procedures for disposition of military personnel who, by reason of deeply held moral, ethical, or religious beliefs, claim conscientious objection to participation in war in any form." Under this regulation, every serviceman on active duty in the United States Army, may assert his legal right to make a request for discharge as a conscientious objector. Formal application is made by submitting DA Form 2496 (Disposition

(1) Should the court remand a case back to the military for reprocessing if the record does not reveal a basis in fact?
(2) Should the court remand a case for reprocessing when there is a basis in fact to support the military's decision to deny a request for conscientious objector discharge?

These questions were answered in the recent cases of *United States ex rel. Donham v. Resor, Rosengart v. Laird* and *Rothfuss v. Resor.*

United States ex rel. Donham v. Resor[33]

Cary Donham was a cadet at West Point, who sought a conscientious objector discharge after his third year. He was denied discharge from the military on the grounds that "his beliefs lacked the necessary depth of sincerity."[34] The Army based its decision apparently on the unfavorable recommendation of the hearing officer, although the chaplain and the psychiatrist expressed the view that Donham was sincere in his beliefs and a man of integrity. Petitioner Donham admitted during the officer interview that though his opposition to war crystallized several months prior to his request for discharge, he waited until the end of the academic year to insure credit for the courses he was pursuing. On petition for writ of habeas corpus, the district court found that the Army had a basis in fact, since "petitioner . . . continued to serve in an establishment and learn and teach things he then claimed to find intolerable as a matter of conscience . . . ."[35] On appeal, the Second Circuit, though agreeing with the lower court that a basis in fact was present, reversed and remanded the case to the Army because

Form) to one's immediate commanding officer. The serviceman must include in his application certain information as prescribed in the regulation. However, this language is a minimum and the serviceman may submit additional information to help substantiate his beliefs and sincerity. Upon submission of the application, the individual is held in his unit and assigned duties which involve the "minimum practicable conflict" with his beliefs, until a final determination is made on the application. Arrangements are then made for interviews conducted by a chaplain, a psychiatrist, and by a hearing officer, who has attained the grade, 0-3 (captain), or higher, and is "knowledgeable in policies and procedures relating to conscientious objector matters." This interview before the hearing officer allows the applicant to be heard in support of his request for discharge, and such hearing must be afforded the applicant unless he waives the "0-3 interview" in writing. After the interview, the hearing officer is required to enter his recommendation and the reasons therefor into the applicant's file and return the file to the applicant's immediate commanding officer. The commander then recommends approval or disapproval and the reasons therefor. Subsequently, after more form filling, the entire case file is forwarded to the Adjutant General, who will make the decision. If the application for CO discharge is denied, the applicant is furnished the reasons for denial.

This summary is substantially the procedure required in the Army's handling of a CO matter. However, as mentioned above, one who receives a negative decision from the Department of the Army may petition the appropriate federal court for a writ of habeas corpus, or even appeal to the Army's Board for Correction of Military Records.

[33] 436 F.2d 751 (2d Cir. 1971).

[34] Id. at 752.

[35] United States *ex rel.* Donham v. Resor, 318 F. Supp. 132 (S.D.N.Y. 1970), *rev'd*, 436 F.2d 751 (2d Cir. 1971).

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the Army's determination was not arrived at pursuant to its own regulations. One of the regulations which was not followed was the requirement that the hearing officer be "knowledgeable in policies and procedures relating to conscientious objector matters."[36] The hearing officer in the Donham case thought that one had to be a member of a church which advocated opposition to war in order to qualify as a conscientious objector.[37] Such a qualification is erroneous as a matter of law and consequently, the court decided that the officer was not "knowledgeable" as DOD Directive 1300.6 requires.[38]

The government contended that the hearing officer does not make the determination as to the petitioner's application and further, that those making the decision did not rely on the officer's findings as to the applicant's religious beliefs, therefore the violation of regulations did not prejudice petitioner's application. However, the court disposed of that argument by insisting on adherence by the Army to its own regulations.[39]

Whether or not petitioner's unit commander entered a recommendation as to approval or disapproval of the request as required by regulations was the other issue involved. Army regulations require the unit commander to submit a recommendation to department headquarters.[40] Petitioner argued successfully that his tactical officer was his unit commander as opposed to the commandant of the West Point cadets. Since his tactical officer did not make a recommendation, the Army violated the correct procedure required.

The purpose of this regulation is to make available to the Adjutant General an opinion from someone who knows the applicant personally. While the commandant is described by law as the immediate commander of the West Point cadets,[41] the personal contact between commander and cadet is absent. Realistically, the commissioned U.S. Army officer assigned to each company of cadets[42] would seem to

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36 AR 635-20, § 4, b(3).

37 This requirement, known as the "historic peace church" exemption, had not been the law since the end of World War I. Selective Service Act of 1917, ch. 15, § 4, 40 Stat. 76.

38 DOD Dir. 1300.6, VI, B, 4.

39 In Smith v. Resor, 406 F.2d 141 (2d Cir. 1969), the court spoke to this very point:

> Our reluctance, however, to review discretionary military orders does not imply that any action by the Army, even one violative of its own regulations, is beyond the reach of the courts. (Citation omitted.) Although the courts have declined to review the merits of decisions made within the area of discretion delegated to administrative agencies they have insisted that where the agencies have laid down their own procedures and regulations, those procedures and regulations cannot be ignored by the agencies themselves even where discretionary decisions are involved. *Id.* at 145.

The doctrine that an administrative agency must adhere to its own rules and regulations was announced by the Supreme Court in United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 74, S. Ct. 499, 98 L. Ed. 681 (1954). *See* Schatten v. United States, 419 F.2d 187, 191 (6th Cir. 1969); Hammond v. Lenfest, 398 F.2d 705, 710 (2d Cir. 1968).

40 AR 635-20, § 4, b(4)(b).

41 10 U.S.C. § 4334(c) (1970).

42 10 U.S.C. § 4349(a) (1970).

possess the personal relationship needed to make a recommendation on the CO request. Thus, the court remanded the case to the Army with instructions to reprocess the application in accordance with the above regulations.[43]

Rosengart v. Laird[44]

This second case illustrates how frequently the remand procedure could be used by a court before determining whether a "basis in fact" exists.

After petitioner, Rosengart, an officer in the U.S. Army Reserves, was denied discharge, he commenced habeas corpus proceedings. Following argument on the petition before the district court,[45] the case was remanded to the review board with instructions to answer four questions[46] concerning the prior determination of the discharge request. In response to Question 3, the board stated that petitioner "had to show that he had some religious training since joining the Army"[47] in order to be discharged from his military obligation. Subsequently, the district court found that regulations did not require in-service religious training, and that the review board performed contrary to regulations. Instead of issuing or denying the writ, the court remanded the proceedings to the Army, this time for a de novo hearing and a finding as to the merits. Once again discharge was denied on the basis that petitioner's application was grounded on philosophical views, sociological experiences and a personal moral code. The court stated that these views did not meet the standards for conscientious objection under *United States v. Seeger*.[48] However, the district court remanded the case for determination in view of the newly annunciated standards in *Welsh v. United States*.[49] After another negative decision by the board, the court found adversely against petitioner on the merits, and denied the writ. On appeal, petitioner contended that the multiple remands to the Army denied him "due process." These remands were defended by the Circuit Court of Appeals for the Second Circuit by

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43 *See* Hollingsworth v. Balcom, 441 F.2d 419 (6th Cir. 1971) (remanded to have military process application according to regulations).

44 No. 35684 (2d Cir., June 9, 1971).

45 *Id.* at 3301.

46 Question #3 of the four questions put to the Army by the district court:

> 3. Did the Conscientious Objector Review Board construe the regulations to require proof that not only had petitioner's opposition to war matured after entry into military service but that religious training had occurred after entering military service?

Rosengart v. Laird, No. 35684, at 3302 (2d Cir., June 9, 1971).

47 *Id.* at 3302.

48 380 U.S. 163, 85 S. Ct. 850, 13 L. Ed.2d 733 (1965).

49 398 U.S. 333, 90 S. Ct. 1792, 26 L. Ed.2d 308 (1970). In Daoust v. Laird, 434 F.2d 520 (D.C. Cir. 1970), the court remanded in order for the Army to consider applicant's request in light of *Welsh*. In Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968), on petition for rehearing, the court remanded because of new military CO regulations. *Id.* at 718.

reason that petitioner thereby was given "a fair opportunity to have the application considered and decided in compliance with established procedural requirements and existing and changing substantive law . . . ."[50] The circuit court further stated that to approve the contention advanced by petitioner would place the Army in such a position:

> . . . that the Army must in the first and only available instance act in the most punctilious fashion in the consideration and determination of a CO discharge application or face the prospect of losing the services of one of its officers on the smallest procedural technicality.[51]

Rothfuss v. Resor[52]

The Fifth Circuit, in a recent decision, remanded the proceedings though there was no "basis in fact" to support the Army's determination.

Petitioner Rothfuss' application was disapproved by the Army because his beliefs were not sincerely held. Rothfuss filed his conscientious objector claim after receiving orders for Viet Nam. The Army found that this factor cast doubt on the sincerity required to claim conscientious objector status. The denial was upheld by the district court which found the Army had acted with "basis in fact."[53] On appeal, the circuit court found nothing in the Army's regulations to support the review board's decision that a late conscientious objector application indicates insincerity, and therefore, concluded that a "basis in fact" was not present to support the denial. Such a finding by the circuit court did not result in the writ of habeas corpus being granted. Since the record before the court did not disclose whether timing of the application was the sole factor which cast doubt on the petitioner's sincerity, the case was remanded to the district court (or the Army as an alternative), to conduct evidentiary hearings for determining whether additional facts existed to provide a "basis in fact" for the denial.[54]

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[50] Rosengart v. Laird, No. 35684, at 3309 (2d Cir., June 9, 1971).

[51] *Id.* at 3309. If Army regulations are mere "procedural technicalities," is it then necessary for the Army to comply with regulations to decide if one qualifies for CO discharge? The district judge indicated at the outset of the case that affirmative evidence in the record blurred the petitioner's request, and the circuit court referred to all three remands as unnecessary to a decision on the merits. Accordingly, unless it was necessary to the court's decision, remanding the case became a procedural delay in deciding whether petitioner should be granted the relief sought. The Army incurred no legal detriment in its disregard of regulations, and yet, petitioner spent more time unsuccessfully adjudicating his claim than he will be required to serve on active duty. Seemingly, petitioner's claim that he was denied due process by the remanding procedures employed by the district court appears to have warranted more careful consideration by the circuit court.

[52] 443 F.2d 554 (5th Cir. 1971).

[53] *Id.* at 555.

[54] In Zemke v. Larsen, 434 F.2d 1281 (9th Cir. 1970), the court remanded to the Army because doubt existed as to whether an illegal classification standard was used. The court

If the timing of the application had been indicated by the record as the only factor to deny discharge, the writ would have issued. Obviously, this case grants the Army a second chance to develop a valid reason for the denial. It is the first case heretofore decided in military CO matters, where no "basis in fact" existed, and yet, the case was remanded.[55]

THE POWER TO REMAND: USE OR ABUSE OF DISCRETION

The judiciary has the discretion to determine whether an in-service CO case should be remanded or not. It is the exercise of this discretion which must be scrutinized to determine if due process has been denied the applicant.

Apparently, as illustrated by the *Donham* and *Rosengart* cases, remanding CO cases to the Army will occur if regulations have not been followed. However, what purpose will this procedure serve if a basis in fact existed for the denial? If regulations are followed in the reprocessing of an application, the applicant may prove his case to the detriment of the Army. New evidence might be obtained to clarify any contradictions appearing in the record which provided a basis in fact originally. As in the case of *Donham*, petitioner might be granted the writ after his application has been reprocessed. The two regulations involved in that case, if followed the second time, could result in the establishment of a prima facie case which cannot be refuted. Therefore, in *Donham*, it seems that the court was prompted to remand for the purpose of finding any new evidence which might be obtained by adherence to the regulations.

In *Rosengart* though, the circuit court referred to the multiple remands as unnecessary to the decision. In view of such language, what factor moved the district judge to remand three times? Surely the Army's compliance with the law and its own regulations should be sought, but if such reason alone predicates a decision to remand, such a procedure becomes merely a formality. If the court in *Rosengart* remanded to solicit more facts in order to make a determination, then the remands would be a proper exercise of discretion. However, the rationale for

could not determine, therefore, whether the applicant's CO request was properly denied by the military. Morrison v. Larsen, 446 F.2d 259 (9th Cir. 1971) presented a similar situation as in *Zemke*. In *Morrison*, doubt existed as to whether the Army erred in interpreting the "crystallization" requirements (*Id.* at 253 n.4) of AR 635-20. The court stated, "We view the proper form of relief in such circumstances is that stated by Zemke v. Larsen, . . . '[T]he district court [shall] allow the Department of the Army a reasonable time for reconsideration of appellant's application . . . failing which applicant is entitled to his release.'" Morrison v. Larsen, 446 F.2d 256 (1971). In neither *Zemke* nor *Morrison* was remanding employed to solicit additional valid grounds for a "basis in fact."

[55] In accordance with this decision in Rothfuss v. Resor, a very recent case was also remanded—Quamina v. Secretary of Defense, Civil No. SA 71-CA-155 (W.D. Tex. July 23, 1971).

remanding in *Rosengart* cannot be fairly ascertained from an examination of the court's opinion.

Judge Lumbard, the dissenting circuit judge, pointed out that the case was initially remanded "to determine, *inter alia*, whether . . . 'petitioner's opposition to war is not genuine or sincere on the basis of affirmative evidence.' "[56] Further, according to the dissent, the review board did not doubt the sincerity of petitioner's opposition to war, but disapproved the application because Rosengart's beliefs were based primarily on personal moral, philosophical and sociological reasons. Did the court then abuse its discretion in remanding the case to solicit a basis for denial not advocated by the review board? Fairness and justice dictate that the court should not supply the reason for denial when the board's reason is not substantiated by the record or erroneous as a matter of law. Further, it is submitted that where military regulations have been ignored but a basis in fact does exist, the courts should not deny the writ. Rather it should remand the case to the military for reprocessing in accordance with regulations, retaining jurisdiction, to insure compliance by the military authorities and to protect the serviceman from harmful military action.[57] When the application has been completely reprocessed according to regulation, the court should proceed to a determination based on the new record.[58]

A clear case of the court abusing its discretion by remanding is presented in the *Rothfuss* case. The effect of the remand will give the Army another opportunity to supply the "basis in fact" which was lacking when the court heard the case on appeal. Since a "basis in fact" was not present the writ should have been granted as a matter of law and the court's action appears to be an abuse of the discretionary power to remand.

An analogous situation to *Rothfuss* arose in *Bohnert v. Faulkner*,[59] where the court considered the possibility of remanding the proceedings. However, the court chose not to, stating:

> . . . since the question at issue on judicial review is whether the Board had a basis in fact for its determinations . . . and since that issue is basically one of law to be determined from the record that was before the Board, we decline to remand for an evidentiary hearing.[60]

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[56] Rosengart v. Laird, No. 35684, at 3317 (2d Cir. June 9, 1971).

[57] Such a procedure was submitted in Smith v. Resor, 406 F.2d 141 (2d Cir. 1968) where the court prohibited the military from activating a reservist whose request for an occupational waiver of the short hair requirement was being reprocessed.

[58] This procedure was suggested by Krieger v. Terry, 413 F.2d 73 (9th Cir. 1969) where the problem was what action the court should take where the in-service administrative remedies were not complete.

[59] 438 F.2d 747 (6th Cir. 1971).

[60] *Id.* at 756, n.4.

It is suggested, then, that where the military fails to follow its own regulations in the processing of a conscientious objector claim, the writ should be granted immediately, if no basis in fact is found in the record.

CONCLUSION

As long as Congress provides an exemption from our armed forces for those who as a matter of conscience are opposed to all war, and that privilege is extended to servicemen, every guarantee must be afforded the CO claimant that his claim will be processed and determined according to law.[61] It is hoped that the remanding procedure will only be employed to insure that objective.

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[61] Of 1,106 men in the Army who applied in 1970 for discharge as conscientious objectors, only 357 had the request approved. San Antonio News, Sept. 1, 1971, § A, at 2, col. 4.