MILITARY LAW TASK FORCE
OF THE NATIONAL LAWYERS GUILD

FEDERAL HABEAS CORPUS FOR MILITARY CONSCIENTIOUS OBJECTORS: AN OUTLINE FOR ATTORNEYS AND COUNSELORS

318 Ortega Street
San Francisco, CA 94122
415-566-3732
Mlhiken@pacbell.net
Kathleengilberd@aol.com

This outline of cases and other sources relevant to habeas corpus petitions for military conscientious objectors ("COs") is a work in progress. The outline as it currently exists catalogues the cases we have collected over the years of filing habeas petitions for in-service COs. Because of that, it is strongest in the circuits we have filed cases, and weak in the other circuits. We hope to continue to update it -- both with old cases from other circuits as well as new cases as they come out. In the meantime, another source of cases from other circuits is the ALR Fed annotation from 1972, and updated since then, found at 10 ALR Fed. 15. With the assistance of MLTF member Kathleen Gilberd, we also hope to gather information on the many CO cases which do not end in litigation, in order to summarize trends and common problems.

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Jim Feldman and Peter Goldberger.

Regulations. Conscientious objectors in the military have no constitutional right to be discharged on that basis. See *Gillette v. United States,* 401 U.S. 437, 441 (1971). There have been efforts to enact legislation granting such a right, see, *e.g.*, The Military CO Act, HR 5060 (102d Congress), but to date, the following military regulations provide the only source for a right to discharge on the basis of conscientious objection. These regulations "recognize the historic respect in this Nation for valid conscientious objection to military service." *Parisi v. Davidson*, 405 U.S. 34, 45 (1972). "As the Defense Department itself has recognized, 'the Congress . . . has deemed it more essential to respect a man's religious beliefs than to force him to serve in the armed forces.' Depart-

ment of Defense Directive No. 1300.6 (May 10, 1968)." *Id.* The following regulations may be accessed through http://www.objector.org/helpingout/discharge-regulations.html#anchor241919.

- DoD Regulation: 32 CFR Part 75. The Code of Federal Regulations may be found in almost any library. They may also be found on the web at http://www.gpoaccess.gov/cfr/retrieve.html. This regulation, in the form of DoD Directive 1300.6, can be found at http://www.objector.org/helpingout/discharge-regulations.html#anchor241919.
- Army Regulation: AR 600-32.
- Navy Regulation: MILPERSMAN (NAVPERS 15560 D).
- Marine Corps Regulation: MCO 1306.16 E.
- Air Force Regulation: AFI 36-3204.
- Coast Guard Regulation: COMDTINST 1900.8.

Case law. Case law pertaining to conscientious objectors to military service generally falls into two categories: petitions for writs of habeas corpus and appeal decisions in criminal cases. A petition for writ of habeas corpus is a kind of lawsuit brought by someone who is being held in custody in violation of the constitution, laws, or treaties of the United States. Most habeas petitions are brought by prisoners. But courts have consistently held that members of the military are in a kind of custody and therefore may also bring habeas petitions when they are being held in the military in violation of law. Criminal cases generally involve appeals from convictions for failing to submit to induction under the Selective Service draft. These cases often involve COs, because if a draft board illegally denies a CO exemption and that person later refuses to submit to induction, the illegal denial is a defense. Most of the cases in this outline are habeas cases. Although no one is currently being drafted, and even though the current draft system is different from the one during the Vietnam War (which is where most of the cases date from), these old criminal cases are still pertinent, because their discussion of what constitutes a proper basis to deny a CO claim by a draft board also applies in the military CO discharge context. See *Ehlert v. United States,* 402 U.S. 99, 106-07 (1971) (discussing this principle).

Petitions for Writs of Habeas Corpus.

I. Procedural and jurisdictional issues that may arise in a habeas case.

A. The military's denial of a CO application may be challenged in federal court by filing a petition pursuant to 28 U.S.C. § 2241 for a writ of habeas corpus. *Parisi v. Davidson,* 405 U.S. 34, 35 (1972); *Jashinski v. Holcomb,* 2006 WL 1149156 *5 (W.D. Tex.

2006) (rejecting Army's argument that the petitioner's claim is non-judiciable).

B. Custody issues: For a court to have jurisdiction in a habeas case, the petitioner must be "in custody under the authority .. of the United States," 28 U.S.C. 2241(c)(1), or "in custody in violation of the Constitution or law or treaties of the United States." 28 U.S.C. § 2241(c)(3). Members of the military are generally considered to be "in custody" for purposes of habeas jurisdiction. *Parisi v. Davidson,* 405 U.S. 34 (1972); *Alhassan v. Hagee,* 424 F.3d 518 (7th Cir. 2005) (citing *Parisi*).

   1. AWOL or UA petitioner not in custody. AWOL or UA members of the military are not in custody. See *United States ex rel. Crane v. Laird,* 315 F.Supp. 837 (D.Ore. 1970); *Meek v. Commanding Officer, Valley Forge General Hospital,* 452 F.2d 758 (3d Cir. 1971). But see *McDonough v. United States,* 452 F.2d 1075 (1st Cir. 1971) (finding jurisdiction even though petitioner AWOL, because he went AWOL after being illegally disenrolled from ROTC and activated).

   2. Petitioner on leave when petition filed. *McDonough v. United States,* 452 F.2d 1075 (1st Cir. 1971) (petitioner satisfies custody requirement even though he is on leave); *United States ex rel. Lohmeyer v. Laird,* 318 F.Supp. 94 (D.Md. 1970) (same).

C. Issues related to the identity of the respondent. The proper respondent in a habeas petition is the petitioner's immediate "custodian." Normally, the "respondent" should be the petitioner's commanding officer – the officer who has control over the petitioner and could produce the petitioner's body before the Court. The respondent should not be some remote high level government official, such as the Secretary of the service branch concerned. See *Rumsfeld v. Padilla*, 542 U.S. 426, 124 S.Ct. 2711, 2718 (2004) (discussing this principle); *Blackmon v. England,* 323 F.Supp.2d 1 D.D.C. 2004) (dismissing petition where Secretary of the Navy, rather than active-duty petitioner's immediate commanding officer, named as respondent). There are two exceptions to this rule in the military context.

   1. Inactive Reserves. When a petitioner is in the inactive reserves, the proper respondent is of necessity going to be some remote official who has control over the petitioner. *Strait v. Laird,* 406 U.S. 341 (1972).

   2. Petitioner stationed overseas. In these cases, the Secretary of the pertinent armed service should be named as respondent. *Braden v. 30th Judicial Circuit Court of*

Kentucky, 410 U.S. 484, 498, 35 L.Ed.2d 443, 93 S.Ct. 1123 (1973) (discussing the exception); *United States ex rel. Toth v. Quarles,* 350 U.S. 11, 100 L.Ed. 8, 76 S.Ct. 1 (1955) (court-martial convict detained in Korea named Secretary of the Air Force as respondent); *Burns v. Wilson*, 346 U.S. 137, 97 L.Ed. 1508, 73 S.Ct. 1045 (1953)(court-martial convicts detained in Guam named Secretary of Defense as respondent).

D. Where a habeas petition should be filed: "venue-jurisdiction." A habeas petition should be filed in the United States District Court which has geographical jurisdiction over the properly-named respondent. Normally, this will be the district court having jurisdiction over the base where the petitioner is assigned. There are several exceptions to this rule:

1. Overseas petitioners. Although the offices of the respondents in these cases (the secretaries of the various military services) are generally in the Eastern District of Virginia (*i.e.,* the district in which the Pentagon is located), the proper venue for overseas cases is the United States District Court for the District of Columbia. *Gherebi v. Bush,* 338 F.Supp.2d 91 (D.D.C. 2004) (DDC is appropriate court to litigate Guantanamo Bay detainee habeas, despite fact that one of the respondents – the Secretary of Defense – has an office in Arlington, VA) See also *United States ex rel. Toth v. Quarles,* 350 U.S. 11, 100 L.Ed. 8, 76 S.Ct. 1 (1955) (court-martial convict detained in Korea named Secretary of the Air Force as respondent; case filed in DDC); *Burns v. Wilson*, 346 U.S. 137, 97 L.Ed. 1508, 73 S.Ct. 1045 (1953)(court-martial convicts detained in Guam named Secretary of Defense as respondent; case filed in DDC).

2. Inactive reservists. The habeas petition should be filed in the district having jurisdiction over the petitioner – not the district in which the respondent's office is located. Because the petitioners in these cases are not in actual custody (*i.e.,* they are not in active military service), the respondent is deemed to be in the petitioner's district through his or her subordinates. *Strait v. Laird,* 406 U.S. 341 (1972).

3. Petitioner under orders to report to new duty station or on leave when habeas petition filed. *Carney v. Laird,* 462 F.2d 606 (1st Cir. 1972) (when petitioner is on leave and under orders to report to a new duty station at time of filing of petition, petition should be filed in district of old duty station so long as it is filed before date petitioner is to report

to new duty station); *McDonough v. United States*, 452 F.2d 1075 (1st Cir. 1971) (where petitioner had been illegally disenrolled from ROTC New Hampshire and ordered to report to Ft. Knox, jurisdiction remained in NH despite fact that petitioner was AWOL).

4. Discharge or transfer of petitioner during pending habeas case – does not affect venue/jurisdiction of court. *Carafas v. LaVallee*, 391 U.S. 234 (1968); *McAliley v. Birdsong*, 451 F.2d 1244 (6th Cir. 1971); *Grubb v. Birdsong*, 452 F.2d 516 (6th Cir. 1971); *Leonard v. Hammond*, 804 F.2d 838, 842 (4th Cir. 1986); *Piland v.Eidson*, 477 F.2d 1148, 1150 (9th Cir. 1973) (stay of deployment pending appeal does not render case moot); *Jashinski v. Holcomb*, 2006 WL 1149156 (W.D. Tex. 2006) (involuntary transfer of petitioner outside court's territorial jurisdiction after petition filed does not affect court's jurisdiction).

E. Exhaustion of administrative remedies. The general rule in habeas cases is that a petitioner must first exhaust administrative remedies before seeking habeas relief.

1. Administrative remedies exhausted once Secretary of pertinent military service denies application. The general rule in CO cases is that a petitioner satisfies this requirement once the highest official of the military service branch has formally rejected his or her CO application. See *Parisi v. Davidson*, 405 U.S. 34, 38 n.3 (1972) (no need to appeal to the Board for the Correction of Military Records).

2. Effect of Court Martial. *Parisi v. Davidson*, 405 U.S. 34, 41-42 (1972) (when CO has been court-martialed following denial of CO application for offenses related to CO beliefs no need to exhaust military appeals); *Cf. Cole v. Commanding Officer, USS Spear*, 747 F.2d 217 (4th Cir. 1984) (en banc) (petitioner not excused from exhausting administrative remedies where Navy stopped processing application for CO discharge pending resolution of court martial charges).

3. Exceptions to exhaustion rule. *Von Hoffburg v. Alexander*, 615 F.2d 633 (5th Cir. 1980) (1. Only those remedies which provide genuine opportunity for adequate relief need be exhausted; 2. exhaustion is not required when petitioner may suffer irreparable injury if he is compelled to pursue his administrative remedies; 3. doctrine will not apply when administrative appeal would be futile, and 4. exhaustion may not be required if petitioner has raised substantial constitutional question).

II. Temporary restraining orders and preliminary injunctions. This section will include cases which rule on a CO habeas petitioner's request for a TRO or preliminary injunction to prevent his or her activation, transfer, or deployment, or otherwise to maintain the status quo pending litigation. See, e.g., *Lipton v. Sec. of the Air Force,* 1999 WL 33290664 (W.D.Tex. 1999) (stating standard of proof and then denying TRO and injunction, because petitioner did not demonstrate likelihood of success on the merits).

III. Substantive issues in a military habeas case.

A. Burden of proof. *Koh v. Secretary of the Air Force,* 719 F.2d 1384 (9th Cir. 1983) (once petitioner demonstrates prima facie claim, burden shifts to military to demonstrate basis in fact in the record to support the military's reason for denial); *Alhassan v. Hagee,* 424 F.3d 518 (7th Cir. 2005) (explaining government's burden); *Roby v. United States Department of the Navy,* 76 F.3d 1052, 1058 (9th Cir. 1996) (defining "basis in fact"); *Frey v. Larsen,* 448 F.2d 811, 813 (9th Cir. 1971) (same); *Taylor v. Claytor*, 601 F.2d 1102, 1103 (9th Cir. 1979) ("basis in fact" is "narrowest review known to law," quoting earlier case law); *Bonhert v. Faulkner,* 438 F.2d 747, 751 (6th Cir. 1971) (Court may conduct independent review of the record for a basis in fact); *United States v. Stetter,* 445 F.2d 472, 479 (5th Cir. 1971) (good discussion of basis in fact); *Lipton v. Peters*, 240 F.3d 1074 (Table), 2000 WL 1835310 (5th Cir. 2000) ("denial [of CO application] must be sustained if this court can discern any basis in fact for it"); *United States ex rel. Barr v. Resor,* 443 F.2d 707, 708 (D.C. Cir. 1971) (explaining government's burden).

B. Violation of Due Process. Courts have found it to be a violation of a CO applicant's Fifth Amendment Due Process rights for the military not to provide an applicant with access to recommendations or other documents in file or to fail to provide adequate notice and opportunity to rebut. See *Crotty v. Kelly,* 443 F.2d 214, 216-17 (1st Cir. 1971) (relying on *Gonzales v. United States*, 348 U.S. 407 (1955)); *Finley v. Drew,* 337 F.Supp. 76, 80-82 (E.D.Pa. 1972) (same).

C. Military fails to follow its own regulatory procedures.

1. In general. *Hollingsworth v. Balcom,* 441 F.2d 419, 421-22 (6th Cir. 1971) (military must follow its own procedures); *Silverthorne v. Laird,* 460 F.2d 1175, 1186 (5th Cir. 1972) (same).

2. Military violates own regulations by failing to provide applicant with access to recommendations or other documents in file or to fail to provide adequate notice

and opportunity to rebut. (No finding of Due Process violation.) *Sanger v. Seamans,* 507 F.2d 814, 819-20 (9th Cir. 1974).

3. Failure to inform applicant of purpose of hearing, contrary to regulation. *Hollingsworth v. Balcom,* 441 F.2d 419, 424-25 (6th Cir. 1971) (military to reopen case and correctly apply regulations).

4. Arbitrary application of regulations. *Silverthorne v. Laird,* 460 F.2d 1175, 1186 (5th Cir. 1972) ("it has been repeatedly recognized that the Army cannot apply its rules in an arbitrary manner and that when it does so the courts have power to review").

D. Military fails to give any reason for denial. *United States ex rel. Coates v. Laird,* 494 F.2d 709 (4th Cir. 1974) (case returned to the Marines to provide reason as required by regulation); *Sanger v. Seamans,* 507 F.2d 814, 818-20 (9th Cir. 1974) (Court should "neither speculate as to these reasons nor search the record for some other unstated reasons"; Court may grant conditional writ to allow military to provide reasons – but if reasons are trumped up or if insufficient basis in record to support them, discharge will be ordered; boilerplate reasons may suffice "where factual reasons for the denial were unambiguously demonstrated in the record.")); *Peckat v. Lutz,* 451 F.2d 366, 370 (4th Cir. 1971) (reason for denial "must be made manifest in the decision itself. It will not do to leave the point in a state of ambiguity" until government attorneys in the future devise some explanation for the denial). *Cf. Clay v. United States,* 403 U.S. 698, 703-05 (1971) (per curiam) (conviction for failing to submit to induction reversed where Selective Service Appeals Board failed to give reason for denial of CO exemption). *Chapin v. Webb,* 701 F.Supp. 970, 977 (D.Conn. 1988) (denial must be supported by a statement of reasons); *United States ex rel. Checkman v. Laird,* 469 F.2d 773, 780-81 (2d Cir.1972) (denial must be supported by a statement of reasons).

E. Military gives reason for denial. There are basically three reasons for which the military may deny a CO application: 1. The applicant does not claim to be conscientiously opposed to war in any form, 2. The applicant's opposition is not based on "religious training and belief," and 3. The applicant's stated opposition is not sincere. *Clay v. United States,* 403 U.S. 698, 700 (1971) (per curiam);*Hager v. Secretary of the Air Force,* 938 F.2d 1449 (1st Cir. 1991). At least one court has added a fourth reason: The applicant's opposition is not "deeply held." See *Roby v. United States Department of the Navy,* 76 F.3d 1052 (9th Cir. 1996). Even if an applicant can meet all of these criteria, his or her application

may still be disapproved if he or she held C.O.-qualifying beliefs before entering the military. 32 CFR § 75.4(a)(1). While the military must give a reason, it need not identify the supporting factual basis for the ultimate reason. The Court may search the record for supporting facts. Evidence need not be substantial, but it must be logical and objective. *Chapin v. Webb,* 701 F.Supp. 970, 977 (D.Conn. 1988). See also *United States ex rel. Checkman v. Laird,* 469 F.2d 773 (2d Cir.1972). Reasons given by an investigating officer which are not adopted by the military service as a reason to deny the application should not be considered by the court. *Chapin v. Webb,* 701 F.Supp. 970, 978 (D.Conn. 1988); *cf. United States ex rel. Barr v. Resor,* 443 F.2d 707 (D.C. Cir. 1971) (Court limits review to reasons provided by the military), *Bortree v. Resor,* 445 F.2d 776 (D.C. Cir. 1971) (same), and *United States ex rel. Sheldon v.O'Malley,* 420 F.2d 1344 (D.C. Cir. 1969) (same).

1. Religious training and belief. To qualify for CO discharge, applicant's beliefs must be "religious," as that term has been interpreted by the courts:

   "The term 'religious training and belief' does not include a belief which rests solely upon considerations of policy, pragmatism, expediency, or political views."

   32 C.F.R. § 75.3(b).

   a. Qualifying religious belief. *United States v. Seeger,* 380 U.S. 163 (1965) (belief in Supreme Being not necessary to qualify as "religious"; applicant's claim that belief is "religious" must be given great weight); *Welsh v. United States,* 398 U.S. 333 (1970) (broadly construing "religious training and belief" so as to include non-traditional expressions of religious belief, including non-deist religions and moral and ethical beliefs which take the place of religion in a person's life even where applicant does not describe own belief as "religious"); *United States ex rel. Holmes v. McNulty,* 432 F.2d 1182 (7th Cir. 1970) (following *Welsh*); *Bates v. Commander, First Coast Guard District,* 413 F.2d 475 (1st Cir. 1969) (belief not a disqualifying "personal moral code" because it affects political beliefs); *Helwick v. Laird,* 438 F.2d 964 (5th Cir. 1971) (no need to be member of established church); *Fleming v. United States,* 344 F.2d 912, 915-16 (8th Cir. 1965) (political beliefs do not disqualify unless they are sole basis for claim – COs may have religious as well as political and sociological beliefs); *Pitcher v. Laird,* 421 F.2d 1272 (5th Cir. 1970) (same); *United States ex rel. Brooks v.*

Clifford, 409 F.2d 700 (4th Cir. 1969) ("personal moral code" no basis to deny so long as views substantial motivated by religious training and belief

b. Non-qualifying belief. A belief that does not affect an applicant in any way other than to compel him or her to apply for discharge does not qualify as a religious belief. *Chapin v. Webb*, 701 F.Supp. 970, 980 (D.Conn. 1988).

c. Qualifying religious training. *United States v. Stetter,* 445 F.2d 472, 479 (5th Cir. 1971) (type or extent of religious training unimportant. "Sincerity of belief is the touchstone. The extent of training may, and often does, have no correlation with sincerity."); *Lobis v. Secretary of the Air Force,* 519 F.2d 304, 307 (1st Cir. 1975) (nature and quality of religious training unimportant – question is whether applicant "has provided a plausible explanation" for development of beliefs); *Reiser v. Stone,* 791 F.Supp. 1072, 1075-76 (E.D.Pa. 1992) (Army's finding of insincerity based on absence of "a development of convictions methodology that is comparable to the rigorous means by which traditional religious convictions are formulated" not supported by basis in fact where applicant provided logical explanation for development of beliefs).

d. Role of chaplain in determining religious character of belief. *United States ex rel. Greenwood v. Resor,* 439 F.2d 1249 (4th Cir. 1971) (chaplain, not commanding officer, is in best position to determine whether there is a religious core to an applicant's belief).

e. Political views. *Bates v. Commander, First Coast Guard District,* 413 F.2d 475 (1st Cir. 1969) (writing letters to express political opposition to a specific war does not disqualify applicant – political opposition to a specific war consistent with opposition to all wars); *United States v. Haughton,* 413 F.2d 736 (9th Cir. 1969) (opposition to war for religious as well as political reasons not disqualifying); *United States v. Hanson,* 460 F.2d 337, 343 (8th Cir. 1972) (same); Fleming v. *United States,* 344 F.2d 912, 195-16 (8th Cir. 1965) (same); *Chapin v. Webb,* 701 F.Supp. 970, 978 (D.Conn. 1988) (same – but where only political beliefs given, basis in fact to support denial).

f. Claims not based on religious training and belief – reason to deny. *Naill v. Alexander*, 631 F.2d 696 (10th Cir. 1980); *United States v. Coffey*, 429 F.2d 401 (9th Cir. 1970) (claims founded solely on policy considerations, pragmatism, or expedience may be denied); *Chapin v. Webb*, 701 F.Supp. 970, 980 (D.Conn. 1988) (claim based on political views); *Jashinski v. Holcomb*, 2006 WL 1149156 *7 (W.D. Tex. 2006) (belief that "war is not working" is "pragmatic in nature, rather than the sort of deeply held moral and ethical beliefs" that qualify for CO status).

2. Opposition to war in any form. To qualify, CO applicant must be opposed to "participation in war in any form" – that is, to participation in all real wars.

   a. Failure to state opposition to war in any form in application – reason to deny. *Keefer v. United States*, 313 F.2d 773 (9th Cir. 1963); *Jashinski v. Holcomb*, 2006 WL 1149156 *7 (W.D. Tex. 2006) (petitioner strongly opposes current war, but claim that she is opposed to all wars was less than clear and convincing).

   b. Willingness to participate in spiritual wars – not a reason to deny. *Sicurella v. United States*, 348 U.S. 385 (1955).

   c. Willingness to use force outside of war – not reason to deny claim. *Ferrand v. Seamans*, 488 F.2d 1386, 1390 (2d Cir. 1973) (willingness to restrain not selective objection); *United States v. Purvis*, 403 F.2d 555, 563 (2d Cir. 1968) (willingness to use force to restrain wrongdoing as a last resort); *Hinkle v. United States*, 216 F.2d 8 (9th Cir. 1954) (self-defense); *Taffs v. United States*, 208 F.2d 329 (8th Cir. 1954) (self-defense). *Cf. Clay v. United States*, 403 U.S. 698, 702-03(1971) (per curiam) (government concedes sincerity and religious nature of professional boxer's beliefs).

   d. Opposition to "modern warfare" qualifies as opposition to "war in any form." *Reynolds v. Widnall*, 1997 WL 258605 *6 (D.Mass. 1997).

   e. Selective objection (opposition to particular war only) – reason to deny claim. *Gillette v. United States*, 401 U.S. 437 (1971); *Frey v. Larsen*, 448 F.2d 811, 813 (9th Cir. 1971); *Rosenfeld v. Rumble*, 515 F.2d 498 (1st Cir. 1975) (Jewish petitioner willing to

take up arms outside a military context to repel Nazi invasion of the U.S.).

f. Opposition to a particular war – not a basis in fact, so long as applicant also opposed to all war. *Kessler v. United States,* 406 F.2d 151 (5th Cir. 1969); *Bates v. Commander, First Coast Guard District,* 413 F.2d 475 (1st Cir. 1969); *Aquilino v. Laird,* 316 F.Supp. 1053 (W.D.Tex. 1970).

g. Opposed to participation in war in any form, but insufficient evidence to support claim that applicant's beliefs preclude non-combatant status. *BenJudah v. Harvey,* 2005 WL 646073 *4 (N.D.Cal. March 21, 2005) (while applicant may have qualified for 1-A-O status had he applied for it, AR 600-43 ¶ 1-7(d) precluded granting 1-A-O as a "compromise" upon denial of 1-O claim).

h. Applicant unwilling to state that he would not change mind in hypothetical future war not a reason to deny. *Gillette v. United States,* 401 U.S. 437, 448 (1971) ("Unwillingness to deny the possibility of a change of mind, in some hypothetical future circumstances, may be no more than humble good sense, casting no doubt on the claimant's present sincerity of belief.)

i. Recognition that some wars are "justified" reason to deny. *Chapin v. Webb,* 701 F.Supp. 970, 981 (D.Conn. 1988).

3. Sincerity.

a. Unsupported disbelief in sincerity. *Witmer v. United States,* 348 U.S. 375 (1955) (sincerity is ultimate question; disbelief in sincerity must be supported by objective facts); *Shaffer v. Schlesinger,* 531 F.2d 124 (3d Cir. 1976); *Silverthorne v. Laird,* 460 F.2d 1175, 1186 (5th Cir. 1972) (disbelief in sincerity must be supported by objective facts "which substantially blurs the picture painted by the registrant"; simple disbelief of applicant not enough); *Howe v. Laird,* 456 F.2d 233 (5th Cir. 1972); *Frey v. Larsen,* 448 F.2d 811, 813 (9th Cir. 1971) (disbelief in sincerity "must be supported by objective facts in the record"); *United States v. Stetter,* 445 F.2d 472, 479 (5th Cir. 1971) (good discussion of sincerity); *Rothfuss v. Resor,* 443 F.2d 554, 559-60 (5th Cir. 1971) (conclusions of investigating officers

without more is not a basis in fact on which to deny claim); *Frisby v. Larsen*, 330 F.Supp. 545 (N.D.Cal. 1971) (no basis in fact for finding of insincerity based on demeanor, suddenness of decision to apply for CO, and rote-sounding answers during hearing); *Chapin v. Webb,* 701 F.Supp. 970, 977 (D.Conn. 1988) (negative recommendations standing alone are not bases in fact; discounting recommendation of commanding officer who never interviewed CO); *Masser v. Connolly,* 514 F.Supp. 734, 737 (E.D.Pa.1981) (negative recommendations standing alone are not bases in fact); *United States ex rel. Checkman v. Laird,* 469 F.2d 773, 784 (2d Cir. 1972) (discounting recommendation of officer who did not personally interview CO and gave no reason for disbelief).

b. Timing as an indicator of insincerity.

   i. Timing in general. *Rothfuss v. Resor*, 433 F.2d 554, 559-60 (5th Cir. 1971) (late crystallization relevant); *LaFranchi v. Seamans,* 536 F.2d 1259, 1260 (9th Cir. 1976) (timing alone never adequate reason to deny claim); *Rothfuss v. Resor,* 443 F.2d 554, 560 (5th Cir. 1971) (same); *Christensen v. Franklin,* 456 F.2d 1277 (9th Cir. 1972) (same); *Lobis v. United States Air Force,* 519 F.2d 304, 307 (1st Cir. 1975) (same); *Dietrich v. Tarleton*, 473 F.3d 177, 179 (D.C. Cir. 1972) (same); *Koh v. Secretary of the Air Force,* 719 F.2d 1384, 1386 (9th Cir. 1983) (timing alone not sufficient, but can lend doubt to application); *Cohen v. Laird,* 439 F.2d 866 (4th Cir. 1971) (military may consider timing); *United States v. Stetter,* 445 F.2d 472, 479 (5th Cir. 1971) (good discussion of timing);

   ii. Application filed after receiving deployment orders/prospect of combat duty. *Alhassan v. Hagee,* 424 F.3d 518 (7th Cir. 2005) (timing supported denial where petitioner had enlisted only six months before receiving orders to a combat zone and had not expressed any CO leanings to anyone until he filed application); *United States ex rel. Tobias v. Laird,* 413 F.2d 936 (4th Cir. 1969)(although prospect of combat duty acted as catalyst for submission request for discharge, it did not support denial of CO

discharge where sincerity clearly established by other means); *Richmond v. Larson*, 476 F.2d 1038, 1042 (9th Cir. 1973) (crystallization after combat orders not a basis in fact to deny CO status because "human experience repeatedly contradicts [that] inference: We again and again fail to decide what we think about a situation until we must confront it. Recognizing this reality, we have held that crystallization of conscientious objector views upon receipt of orders to Viet Nam is not an indicium of insincerity."); *Rothfuss v. Resor*, 443 F.2d 554, 558-59 (5th Cir. 1971) (fact that CO application not submitted until deployment to a combat zone imminent not, standing alone, basis in fact to supporting finding of insincerity); *United States ex rel. Lehman v. Laird*, 430 F.2d 96 (4th Cir. 1970) (same); *Christensen v. Franklin*, 456 F.2d 1277 (9th Cir. 1972) (same), *Rainey v. Garrett*, 989 F.2d 494 (table) 1993 WL 71656 (4th Cir. 1993) (reason to deny where applicant developed beliefs but withheld applying for discharge until he was ordered to report to war zone); *Jashinski v. Holcomb*, 2006 WL 1149156 (W.D. Tex. 2006) ("substantial doubt" as to applicant's sincerity where she did not begin to question her participation in the military until after she received activation orders).

iii. Delay in filing after crystallization. *Strait v. Laird*, 464 F.2d 205, 207-08 (9th Cir. 1972), *on remand from* 406 U.S. 341 (1972) (delay due to sincere attempt to reconcile new beliefs with military service not basis in fact to support finding of insincerity).

iv. Claim not filed until CO beliefs fully formed/lateness in crystallization – not a basis in fact. *Rastin v. Laird*, 445 F.2d 645 (9th Cir. 1971); *United States ex rel. Brooks v. Clifford*, 409 F.2d 700 (4th Cir. 1969); *Shaffer v. Schlesinger*, 531 F.2d 124 (3d Cir. 1976); *Reynolds v. Widnall*, 1997 WL 258605 *6 (D.Mass. 1997).

v. Where timing is adequately explained – no basis to find insincerity. *Tressan v. Laird*, 454 F.2d 761 (9th Cir. 1962).

c. Brevity of CO application. *Rastin v. Laird*, 445 F.2d 645 (9th Cir. 1971) (not basis to deny where everyone who interviewed applicant found him sincere).

d. Willingness to use force outside of war – not a basis in fact. *Warren v. Laird,* 353 F.Supp 730, 734 (S.D.N.Y. 1972).

e. Inconsistent acts prior to crystallization – not a basis to deny. *Bouthillette v. Commanding Officer, Newport Naval Base,* 318 F.Supp. 1143 (D.R.I. 1970).

f. Inconsistent beliefs prior to crystallization – not disqualifying. *Polsky v. Wetherill*, 455 F.2d 960 (10th Cir. 1972).

g. Inconsistent statements – reason to deny. *Thompson v. United States,* 474 F.2d 323 (9th Cir. 1973) (applicant for CO draft exemption asserted both late crystallization as well as life-long pacifism); *Perler-Tomboly v. Secretary of the Air Force*, 15 F.3d 1088 (Table), 1993 WL 484716 (9th Cir. 1993) (CO applicant expressed willingness to serve in the Air Force after date his beliefs crystallized).

h. Inconsistent acts in general – reason to deny. *Silverthorne v. Laird,* 460 F.2d 1175, 1186 (5th Cir. 1972); *Lewis v. Marsh*, 1988 WL 142633 *12 (E.D.Ky. 1988).

i. Failure to publicly protest war – not a basis to deny. *Frey v. Larsen,* 448 F.2d 811, 813 (9th Cir. 1971).

j. Willingness to participate in non-combatant activities pending disposition of application – not a reason to deny. *Silberberg v. Willis*, 420 F.2d 662 (1st Cir. 1970).

k. Applicant's attempt to find legal counsel – not a basis to deny. *Goldstein v. Mittendorf*, 535 F.2d 1339 (1st Cir. 1976).

l. Applicant already has a non-combatant job in the military. *LaFranchi v. Seamans*, 536 F.2d 1259, 1260-61 (9th Cir. 1976) (fact that as a physician applicant would never be required to be in combat

does not support military's conclusion that there is no conflict with military service and the applicant's professed views).

m. Presumption of insincerity when member applies for CO discharge only after military pays for medical education. *Lobis v. United States Air Force,* 519 F.2d 304, 309 (1st Cir. 1975) (not a proper basis to find applicant insincere, especially where investigating officer found him to be sincere).

n. Failure of applicant to offer to serve the United States in a non-military capacity. *Reynolds v. Widnall,* 1997 WL 258605 *4 (D.Mass. 1997) (not a reason to deny); *cf. Hager v. Secretary of the Air Force,* 938 F.2d 1449, 1462 (1st Cir.1991) (Breyer, J. concurring) (citing petitioner's offer to perform alternative civil service as evidence of sincerity).

o. Finding of insincerity based on misapprehension of fact – not a basis to deny. *Walshe v. Toole,* 663 F.2d 320 (1st Cir. 1981).

p. Finding of insincerity based on failure to comply with CO regulation – basis in fact. *Perler-Tomboly v. Secretary of the Air Force,* 15 F.3d 1088 (Table), 1993 WL 484716 (9th Cir. 1993) (CO applicant refused second interview with chaplain).

q. Finding of insincerity where applicant first wanted to be discharged when he failed to receive the educational benefits he expected. *Rainey v. Garrett,* 989 F.2d 494 (table) 1993 WL 71656 (4th Cir. 1993).

r. Failure to refuse induction – not a basis in fact. ., *Gruca v. Secretary of the Army,* 436 F.2d 239, 243 (D.C. Cir. 1970).

s. Willing participation in weapons training after crystallization, but before application for discharge. *Jashinski v. Holcomb,* 2006 WL 2149156 *6 (W.D. Tex. 2006) (basis in fact to deny).

t. Combination of insufficient reasons. *Woods v. Sheehan,* 987 F.2d 1454 (9th Cir. 1993) (supports denial of application). *BenJudah v. Harvey,* 2005 WL 646073 *4 (N.D.Cal. March 21, 2005).

4. Depth of belief. Compare *Alhassan v. Hagee,* 424 F.3d 518 (7th Cir. 2005) (chaplain's conclusion that CO beliefs were "immature at this point and not well developed" supported

denial for lack of depth), and *Roby v. United States Department of the Navy,* 76 F.3d 1052, 1057 (9th Cir. 1996) (depth of belief as well as sincerity must be proved; short time applicant held beliefs prior to application combined with fact that beliefs motivated no change in life other that applying for discharge supported lack of "depth" finding); with *Helwick v. Laird,* 438 F.2d 959 (5th Cir. 1971) (depth of belief need *not* be demonstrated – only sincerity); *Kemp v. Bradley,* 457 F.2d 627, 629 (8th Cir.1972) (applicant need not prove "depth of conviction," only sincerity); *Chapin v. Webb,* 701 F.Supp. 970, 978 (D.Conn. 1988) (applicant need not demonstrate that he would have no "rest or peace" if he were not discharged).

5. Beliefs not "firm" or "fixed." *Jashinski v. Holcomb,* 2006 WL 1149156 *7 (W.D. Tex. 2006) (beliefs neither "firm" nor "fixed" where applicant's CO belief were part of an intense period of changing beliefs).

6. Qualifying CO beliefs held prior to entering the military.

    a. Petitioner held CO beliefs prior to commissioning, but not prior to incurring a military service obligation – not a reason to deny. *Lewis v. Marsh,* 1988 WL 142633 *7 (E.D.Ky. 1988).

    b. Petitioner apprehensive about enlisting – not a reason to deny. *Polsky v. Wetherill,* 455 F.2d 460 (10th Cir. 1972); *Ward v. Volpe*, 484 F.2d 1230 (9th Cir. 1973).

    c. Religious belief on which CO is based was held prior to crystallization of CO beliefs – not a reason to deny. *United States ex rel. Healy v. Beatty,* 424 F.2d 299, 302 (5th Cir. 1970); *Helwick v. Laird,* 438 F.2d 959, 966 (5th Cir. 1971).

    d. Petitioner held qualifying CO beliefs prior to induction, but did not apply for a CO exemption – reason to deny. *Grubb v. Birdsong,* 452 F.2d 516 (6th Cir. 1971).

Jim Feldman is currently a member of the Board of the Washington DC-based Center on Conscience and War. From 1982 to 1989 he was staff attorney in Philadelphia for the Central Committee for Conscientious Objectors. He later served as chair of the CCCO board and, after that, along with Peter Goldberger, for a time as Co-General Counsel for CCCO. He has been a member of the Military Law Task Force since 1982.

Peter Goldberger is also a former co-chair of the CCCO Board and was formerly its co-General Counsel. He has counseled and represented conscientious objectors, first under the draft and then in military cases, since 1968. With Jim Feldman, Peter contributed to several chapters of CCCO's military counseling manual, "Helping Out." He is a long-time member and former co-chair of the MLTF, and has written several articles for "On Watch," the MLTF newsletter. Peter is also active in the ACLU of Pennsylvania and the National Association of Criminal Defense Lawyers.

Peter and Jim have practiced law together since 1989; their office is in Ardmore, Pennsylvania, near Philadelphia. Although their practice consists primarily of federal criminal appeals, sentencing, and post-conviction motions for prisoners, a small but important part has always been the representation of military COs. Since 1989 they have handled approximately eight military habeas cases. Jim and Peter are regularly consulted by attorneys and counselors throughout the country concerning the representation of conscientious objectors in the military.

Rai Sue Sussman is a third-year student at Lewis and Clark Law School, Portland, Oregon, where she is the coordinator of the student NLG chapter. She is a member of the MLTF and one of the founding members of the Military Law Counseling Project, a project of the Portland NLG run by Lewis and Clark students. Rai Sue worked on this memo as a MLTF intern.

ABOUT THE MILITARY LAW TASK FORCE

The NLG Military Law Task Force includes attorneys, legal workers, law students and "Barracks lawyers" interested in draft, military and veterans issues. The Task Force publishes *ON WATCH*, produces interim mailings on legal and political issues for Task Force members, sponsors seminars and workshops on draft, military and veterans law, produces educational materials on these issues, and provides support for members on particular cases or projects. It sponsors legal and educational work on military dissent, the rights of servicemembers, and challenges to oppressive military policies.

The Task Force encourages comments, criticisms, assistance and membership from Guild members and others interested in military law to write the Task Force or call us at 619-233-1701 or 415-566-3732.