

NATIONAL LAWYERS GUILD MILITARY LAW TASK FORCE

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LITIGATING FOR MILITARY CONSCIENTIOUS OBJECTORS

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1. **The habeas corpus process in U.S. District Court** (28 U.S.C. § 2241 *et seq.*) – Why habeas?: “in custody under the authority of the United States.” *Id.* § 2241(c)(1). See *Strait v. Laird*, 406 U.S. 341 (1972); *Schlanger v. Seamans*, 401 U.S. 487, 489 (1971) (habeas appropriate where member alleges s/he is “unlawfully detained, restrained, or confined” by military); *Jones v. Cunningham*, 371 U.S. 236, 240 (1963) (“Habeas corpus has also been consistently regarded ... as the appropriate procedural vehicle for questioning the legality of an induction or enlistment into the military service.”); *Kanai v. McHugh*, 638 F.3d 251, 255–56 (4th Cir. 2011).
2. **Substantive legal issues** –
 - a. **Sources of the “right”** to discharge as a conscientious objector:
 - (i) Constitutional basis? (decided adversely in *Gillette v. United States*, 401 U.S. 437 (1971))
 - (ii) Statutory basis (almost none, *but see* RFRA, 42 USC § 2000bb; *Little Sisters of the Poor v. Pennsylvania*, 591 U.S. 657, 680–83 (2020); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006)); see *Austin v. U.S. Navy Seals 1–26*, 142 S.Ct. 1301 (2022) (7–2, refusing to vacate stay of injunction under RFRA against Navy for considering vaccination status in determining eligibility for deployment). See also 50 U.S.C § 3806(j) (conscientious objector status under Selective Service System).
 - (iii) Administrative law (internal DOD and service branch regulations only)
 - b. Identifying and **testing reasons for denial** – must correlate to definitional criteria
 - (i) Conscientious opposition (sincerity, depth, “firm and fixed”)
 - (ii) ... to [one’s own] participation / in war / in any form – *cf.* *Clay v. United States*, 403 U.S. 698, 700 (1971) (per curiam); *Sicurella v. United States*, 348 U.S. 385, 388 (1955)
 - (iii) ... by reason of religious training and belief: *Welsh v. United States*, 398 U.S. 333 (1970) (broadly construing “religious training and belief” under Selective Service Act 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 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)
 - (iv) not existing at time of enlistment: Although regs don’t really say so, interpreted to mean that qualifying conscientious objector beliefs must have “crystallized” after military obligation incurred. *Cf.* erroneous enlistment/ fraudulent enlistment

c. **Narrow and deferential scope of civilian judicial review:** Is there any “basis in fact” for the military branch’s stated reason(s) for denial – review of “facts” recited by Secretary (if any) vs. searching the record for factual basis. *Witmer v. United States*, 348 U.S. 375 (1955); *Dickinson v. United States*, 346 U.S. 389, 396 (1953).

d. **Failure of military to follow its own procedural rules** – ground for relief in the form of habeas release (absolute writ) or “remand” (conditional writ)?

(i) DoD Instruction 1300.06 (eff. July 12, 2017), found at https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130006_dodi_2017.pdf or here: https://centeronconscience.org/wp-content/uploads/2009/10/DODI_2017.pdf

(ii) Service Branch regs (slight variations can sometime afford fertile grounds):

- Army Regulation: AR 600-43 (eff. March 22, 2023)
<https://centeronconscience.org/wp-content/uploads/2023/03/Army-CO-regulation-2023.pdf>
- Navy: MILPERSMAN 1900-020 (Dec. 29, 2020) (NAVPERS 15560 D)
<https://centeronconscience.org/wp-content/uploads/2021/03/Navy-CO-Milpersman-Dec-2020.pdf>
- Marine Corps: MCO 1306.16F (June 11, 2013)
<https://centeronconscience.org/wp-content/uploads/2020/01/marine-co-2013.pdf>
- Air Force: DAFI 36-3211, chapter 29 (June 24, 2022)
<https://centeronconscience.org/wp-content/uploads/2022/11/AF-CO-instruction-2022-pulled-from-DAF-Instruction-36-3211.pdf> .
- Coast Guard: COMDTINST 1900.8 (Nov. 30, 1990)
<https://centeronconscience.org/wp-content/uploads/2020/01/COMDTINST1900.8.pdf> .

3. Favorable **Relief** – 28 USC § 2243 (“grant such relief as law and justice require”):

a. **Honorable discharge with full veterans benefits**, unless CO “refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authorities” 38 U.S.C. § 5303(a). See also *Johnson v. Robison*, 415 U.S. 361 (1974) (permissible to deny veterans benefits to COs who performed civilian alternative service under the draft). Possible obligation to repay cost of educational benefits advanced by the military (service academy, medical or other graduate school, etc.).

b. **Vacating court-martial convictions** that are not unrelated – *Parisi v. Davidson*, 405 U.S. 34 (1972)

4. **Technical issues**

a. **Where to file** (quasi-jurisdictional, § 2241(a)) (when stateside, see *Strait v. Laird*, 406 U.S. 341 (1972) (locus of commanding officer); when deployed, D.D.C. – see *Padilla, infra*); *Kanai v. McHugh*, 638 F.3d 251, 256–58 (4th Cir. 2011)

b. **Whom to sue**/name as respondent – *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (immediate, not ultimate custodian must be named and sued)

c. **Application of Federal Rules**

- (i) Federal Rules Governing Section 2254 Cases, Rule 1(b): “The district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1(a) [*i.e.*, state prisoner § 2254 habeas proceedings].”
- (ii) Federal Rules of Civil Procedure 81(a)(4): “These rules apply to proceedings for habeas corpus ... to the extent that the practice in those proceedings: (A) is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and (B) has previously conformed to the practice in civil actions.” See *Mayle v. Felix*, 545 U.S. 644 (2005) (amendment of petition); *Browder v. Director, Dept. of Corrections*, 434 U.S. 257 (1978) (amend judgment or relief from judgment); *Harris v. Nelson*, 394 U.S. 286 (1969) (discovery).

d. **Exhaustion of administrative (in-military) remedies**

(i) **General requirement** (judge-made)

Final denial by service secretary after completion of CO application process. No requirement to seek relief from Board for Correction of Military Records. See *Parisi v. Davidson*, 405 U.S. at 38 n.3.

-- Steps in application process: written application – several questions requires a narrative answer; chaplain interview (may comment on sincerity), psych interview (not to comment), appt of Investigating Officer, IO hearing, IO’s report with recommendation, rebuttal, comments by the chain of command, supplemental rebuttal(s), decision – reasons for decision

(ii) **Exceptions** to exhaustion – futility (time, fixed legal policy)

e. **Getting paid** (other than by the client):

(i) Possible appointment of counsel or reimbursement of expenses under Criminal Justice Act, 18 USC § 3006A(a)(2)(B) (“Whenever ... the court determines that the interests of justice so require, representation may be provided to any financially eligible person [*i.e.*, ‘any person financially unable to obtain adequate representation’] who ... (B) is seeking relief under section 2241 ... of title 28.”)

(ii) Equal Access to Justice Act – if government’s position is not “substantially justified” – 28 U.S.C. § 2412(d).

5. **Preliminary Injunctions** – Fed.R.Civ.P. 65, 28 U.S.C. § 2243 (“grant relief as law and justice require”)

- a. Pros and Cons: Request for prelim. Injunction should get an evidentiary hearing at which the petitioner may testify concerning irreparable harm. This can be helpful if the petitioner makes a favorable impression on the court. However, if you don’t have time to adequately brief the case, the court is less likely to find that you have shown likelihood of success on the merits. It may be hard to overcome the court’s initial impression.

- b. Opportunity to negotiate a *status quo pendente lite* that the petitioner can live with. The military is sometimes willing to allow the petitioner to remain in a non-combatant status pending the outcome of the case, as if equivalent DoD procedure for status pending investigation of CO claim continued to apply.
- c. If you have no alternative but to move for a TRO or preliminary injunction, you must demonstrate:
 - (i) Irreparable harm.
 - (ii) Injunction will not unduly harm the military and is in the public interest.
 - (iii) Likelihood of success on the merits

6. Denials of relief, “remands” (conditional writ), and appeals:

- a. Second CO application permissible if new evidence or new grounds exist
- b. No “certificate of appealability” under AEDPA required for appeal in § 2241 case

Appellate decisions since 2005: *Kanai v. McHugh*, 638 F.3d 251 (4th Cir. 2011) (reversing grant of relief); *Watson v. Geren*, 569 F.3d 115 (2d Cir. 2009) (affirming grant of relief), 587 F.3d 156 (debating denial of rehearing en banc); *Hanna v. Sec’y of Army*, 513 F.3d 4 (1st Cir. 2008) (affirming grant of relief, 2-1 vote); *Aguayo v. Harvey*, 476 F.3d 971 (D.C.Cir. 2007) (affirming denial of relief); *Alhassan v. Hagee*, 424 F.3d 518 (7th Cir. 2005) (affirming denial of relief). Many more district court decisions, both reported and unreported, both favorable and unfavorable.