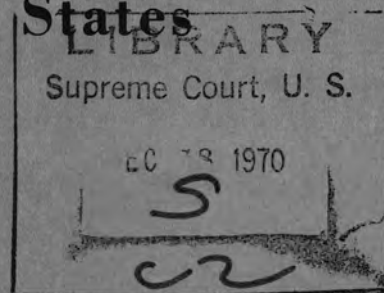


Supreme Court of the United States

OCTOBER TERM, 1970



In the Matter of:

Docket No. 325

LOUIS A. NEGRE,

Petitioner,

vs.

STANLEY R. LARSEN, ET AL.

Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM -1970

LOUIS A. NEGRE,

Petitioner

vs

STANLEY R. LARSEN, ET AL.,

Respondent

No. 325

The above-entitled matter came on for argument at
11:00 o'clock a.m., on Wednesday, December 9, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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Washington, D. C.
On behalf of the United States

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Number 325: Negre against Larson.

ORAL ARGUMENT BY RICHARD HARRINGTON, ESQ.

ON BEHALF OF PETITIONER

MR. CHIEF JUSTICE BURGER: You may proceed whenever you are ready, Mr. Harrington.

MR. HARRINGTON: Mr. Chief Justice and may it please the Court: This is a petition for certiorari to the 9th Circuit Court of Appeals by Louis Negre.

Louis Negre is a young man who is a Catholic conscientious objector. He got discharged from the United States Armed Forces when he was assigned to serve in Vietnam. And his application for conscientious objection discharge having been denied by the Army on the grounds that it was based on a personal moral code. He was assigned to go to Vietnam.

So, in this case, there is no question that the war in which he was asked to serve was the war to which he objects. He had standing to object to serving in that particular war to which he was assigned. He sought a writ of habeus corpus, before Judge Zirpoli in San Francisco, to restrain the Army from shipping him to Vietnam to take part in that war and to be discharged as a religious objector.

Judge Zirpoli denied his application for habeus corpus on grounds set out in his opinion and in the course of

1 argument, he made the observation that even if my client,
2 Louis Negre, were willing to serve in the United States, that
3 under the common law concept he would be aiding and abetting
4 the war.

5 My client relied, however, on the concept that was
6 traditional in the law and also in logic between proximate and
7 remote participation. He indicated that he drew a practical
8 distinction, that he would not participate in any form in the
9 war, but like the man in Kansas, who was against World War II
10 and he was a railroad switchman. He did not decline to flip
11 the switches when the railroad troop trains came through. And
12 now it is charged against him that he isn't willing to par-
13 ticipate in war.

14 And of course it would be nonsense to say that a man
15 has to close his eyes when a troop train goes by or else he is
16 participating in war. There is a distinction between the non-
17 participation and participation and my client refused to par-
18 ticipate and refused to participate in Vietnam.

19 Q How long had he been in the service at the
20 time he made his first claim?

21 A He made his first claim, Your Honor, approxi-
22 mately four months after induction into the service and after
23 he had been assigned to serve in Vietnam.

24 Q Does he claim that this belief had come to
25 fruition in that four-month period, or was it the assignment to

1 Vietnam that merely triggered a preexisting belief?

2 A I think the latter, Your Honor; he was a
3 Roman Catholic and as I have been at pains to set out in my
4 brief, and this is set out by the Army hearing officer --

5 Q Well, then my questions were preliminary then
6 to asking if that's the case why wouldn't just a cancellation
7 of his assignment to Vietnam satisfy his objections?

8 A If that were the case, the Army's answer to
9 that in Judge Zirpoli's court was that they had no provision
10 for cancelling his assignment to Vietnam.

11 On the pragmatic side the Army puts the practicali-
12 ties substantially as the Solicitor General does, and says "We
13 don't have any form of duty where a man can say 'I'll serve
14 here, but I won't serve there.'"

15 Q Then his position was taken only because of the
16 Army limitations and not for any other reasons?

17 A His position was taken only because the Army
18 said it had no assignments for him except to compel him to
19 participate in the War in Vietnam. And that's where, indeed,
20 they carried him. They assigned four sergeants, put him on an
21 airplane and carried him to Vietnam, after this Court refused
22 to entertain a stay.

23 Q He is now back in this country and remains in
24 the Army Reserves?

25 A He has a four-year Army Reserve obligation and

1 I presume the next time, Your Honors, that they want him to
2 serve, they will pick him up again and take him again, as they
3 have done on prior occasions.

4 Q Well, as I read your brief, he was ordered to
5 Vietnam; he refused. He was then court-martialed for refusal
6 to obey a lawful order and he was acquitted. Is that correct?

7 A He was acquitted because the Army didn't
8 follow its own procedures in processing his application.

9 Q What do you mean?

10 A Well, he filed the first application which was
11 summary because hastily prepared. That was denied. He filed
12 a second application supported with a citation of religious
13 authority and letters from friends. The Army said, "That's
14 just same," but the Army could not persuade the court martial
15 it was same. The seven combat veterans in the court martial
16 said that's entirely different; please process the second
17 application.

18 The second application was then denied; he then
19 declined to go to Vietnam. I suggested they court martial him;
20 he was ready to stand court martial, but they carried him off
21 instead.

22 Q How long did he stay there?

23 A Four months.

24 Q And then came home --

25 A Came home --

1 Q By military transportation as a result --

2 A That's not on the record, Your Honor, but
3 he did and --

4 Q Under his own power he came home.

5 A Yes.

6 Q And is now in the Ready Reserve, or the --

7 A Now in the Ready Reserve with a four-year
8 obligation; will be called on the order of the President or
9 for failing to meet his Ready Reserve obligations at any time.

10 Q Could I ask you a question that's a little
11 off what you are arguing?

12 A Yes, Your Honor.

13 Q Is there any dispute that the Catholic
14 doctrine as a doctrine, of Catholicism, recognizes selective
15 objection to war?

16 A There is -- the Solicitor General takes the
17 view that that puts him in the realm of politics. But if you
18 look at the Catholic religion --

19 Q Leaving out the legal argument; I'm asking
20 about the religious tenets. In other words, is this not,
21 unlike the other case, a religiously-based objection?

22 A Yes, it is, Your Honor.

23 Q That's what I'm getting at.

24 A The --

25 Q And there is no dispute on that between you

1 and the Solicitor General. It doesn't answer the case, of
2 course.

3 A Well, he hasn't addressed himself to it, but
4 I can answer that as follows:

5 Aquinas in his treatise, Part II, Section 2,
6 Question 40, put that very question, and he said -- the
7 question is: "Is it always sinful to participate in war?" The
8 answer was "no." That was 1272, Teachings of Aquinas, by
9 Canon 1366, of Canon Law in the Roman Catholic Church is
10 binding teaching in all Catholics. And that doctrine was
11 reaffirmed, however, by Aquinas, but I discounted him in the
12 brief by St. Augustine, by Victoria Salamanaca, 1520; St.
13 Alphone Legori(?) 1787; the Baltimore Catechism, 1949; Vatican
14 II, 1965, and the American Bishops.

15 Q Well, I didn't suppose, at least as I read
16 the briefs, that there was any dispute about that. My only
17 point is: this is not a Seeger type or a Welsh-type conscien-
18 tious objector?

19 A I think Your Honor is absolutely correct.
20 Whatever the differences of the Court were --

21 Q It's based on a later religion -- on an older
22 religion.

23 A It's based on an older religion and I am
24 astonished by the suggestion by the Government that it is not a
25 religious belief, because --

1 Q The Catholic doctrine is that it's sinful
2 to --

3 A That's true, Your Honor --

4 Q -- and leaves it to the particular conscience
5 of its members?

6 A Not only leaves it; it mandates the individual
7 to exercise his conscience because it's the individual who is
8 judged. As Mr. Negri pointed out in his application: the
9 church isn't judged.

10 Q Yes, but it leaves the individual free to
11 exercise his conscience based on any matters that he wants to
12 claim are related to conscience.

13 A No, Your Honor; the church has specific
14 definitions of the --

15 Q But the church hasn't taken a position on the
16 Vietnam War.

17 A The church has not taken a position on any
18 factual position --

19 Q So, the answer is: no; it hasn't.

20 A That's correct, Your Honor.

21 Q Now, what about the church's instructions
22 about how you go about figuring what is -- how you decide
23 whether you conscientiously opposed --

24 A Well, Your Honor, it's called the examination
25 and formation of conscience and you have a duty to properly

1 form your conscience, and as Aquinas points out, to commit a
2 mistake, which is objectively a mistake; you are not guilty of
3 moral fault for the mistake, but you may be guilty of moral
4 fault if you haven't properly formed a conscience by purposely
5 inquiring prayer and investigation as far as you may into the
6 matter.

7 Q But it gives no instructions about the factors
8 that go into it --

9 A Yes, it does, Your Honor.

10 Q -- it just says "be careful?"

11 A No, Your Honor. It says the factors -- by
12 starting from Aquinas, as I say in 1272, they are often broken
13 down into lists: whether the war was declared by the properly
14 constituted government, is one factor; whether it's conducted
15 in defense as opposed to a war of aggression, is another fac-
16 tor. When the means used are proper means and do not injure
17 the civilian populations who are not combatants is the third
18 factor.

19 Accordingly, there are factors which have different
20 numbers on different lists, but they go to the justice of the
21 war in the broad sense. Now, one of the tests is whether the
22 harm done exceeds the gain that may be expected from the war.

23 In other words, this troubled John XXIII greatly --

24 Q Yes, but that's based on -- in each case it's
25 the individual's judgment that can be exercised?

1 A Always, and that's also true of the Quakers.

2 Q Who can examine or review whether proper
3 standards that you have described to Justice White, have been
4 applied?

5 A Well, I think the function as outlined cor-
6 rectly in the Seeger opinion, that what the government draft
7 board or hearing officer has to do is to determine are the
8 beliefs religious; and are they, second, sincerely held? Once
9 they are found to be religious and sincerely held it's no part
10 of government to put on a theological hat and say, "Well, my
11 wfriend, you say it's religious and you have support of the
12 others that it is religious, but we have the government theo-
13 logian sitting here and he wants to engage in a theological
14 imposition -- to say you are an orthodox Catholic:

15 Did you go to church four times last month? Have
16 you taken confession? That's no part of government. What is
17 the government's function as announced in Seeger is to deter-
18 mine (1) is the belief religious, however that doctrine may be
19 interpreted under the constitution --

20 Q I didn't think it was an issue here any more
21 than it was in the last case.

22 A Well, Your Honor --

23 Q Am I mistaken?

24 A I think the Solicitor General contends that my
25 client's objection is illegal. The brief says that despite the

1 fact that he's resting it on the teaching of the Roman
2 Catholic Church which has been uniform for 2,000 years and
3 despite the fact that the only hearing officer in his findings,
4 set out in the Appendix A-37, said the following: "His religious
5 training has been extensive and he is extremely devout. His
6 sincerity is shown by his willingness to be incarcerated for
7 his beliefs. The roots of his beliefs are religious.

8 The real question in this case is what are those
9 beliefs? It is not -- beliefs are not based on religious
10 grounds. He continues -- Appellant sincerely believes that
11 the War in Vietnam is wrong and his failure to object to serving
12 in Vietnam is in violation of his religious beliefs.

13 Q Well, I say, I don't think there is an issue
14 about that in this case. Am I mistaken?

15 A I'm puzzled, then, Your Honor. Why is the
16 Solicitor General asserting that his objection is political
17 when it was found by the fact-finder in the case to be religious?

18 Q Well, perhaps you don't understand my question.
19 I didn't understand that the Solicitor General was making any
20 such contention. You say you do and where is that in his
21 brief?

22 A Well, in his brief, Your Honor, it says that
23 anyone who objects, not to all wars, but only to wars defined
24 in his religion as objectionable in some fashion, is of neces-
25 sity, a political objector.

1 Q Well, that's simply the argument that he uses,
2 is it not, that the consequence of acceptance, as he sees it,
3 of the selective conscientious objection.

4 Q The practical difficulty in future cases is
5 what he's talking about.

6 Q He's not contesting either the religious
7 based source of your client's objections or his sincerity.

8 A Well, I think that's correct, Your Honor.

9 Q Well, Mr. Harrington, suppose (1) we give you
10 all the relief you want; and (2) in very short order this
11 country gets involved in the War in the Middle East. Will we
12 then have a choice of whether or not: "Even though I fought in
13 Vietnam, I don't want to fight in the --

14 A Well, he didn't fight in Vietnam, Your Honor.

15 Q No, but this hypothetical man did.

16 A If the man would have that choice, I would say
17 and the Catholic Church said he has a religious duty to make
18 that choice. Yes; he must definitely decide.

19 Q And so the religious choice is now going to
20 control the ability of the Army to assign its men already in
21 battle.

22 A And that certainly is true of the Quaker,
23 Your Honor. Holder wrote a book: "The Quakers in England and
24 America. Many Quakers fought in the REvolutionary war.

25 Q I don't know of any case before this one where

1 a man in the Army has had a right to decide where he was going
2 to go.

3 A Well, Your Honor, that's why he sought dis-
4 charge from the Army, because the Army makes no provision for
5 him to decide where he's going to go. They say, "We have no
6 provision.

7 Q And so if we rule with you, then the Army has
8 to give a guy a choice as to where he's going to fight?

9 A No, Your Honor; he should be discharged. The
10 Army has no provision to --

11 Q But they seemed to finally work out a pro-
12 vision alternative; didn't they?

13 A Well, Your Honor, no; what the Army did is
14 what they did to Cyrus Pringle. Now, Justice Harlan inquired:
15 did Congress always have exemptions? The answer to that ques-
16 tion is: "No." In the Civil War there was no exemption for
17 religious objectors. It took Cyrus Pringle from Vermont and he
18 strapped a rifle on his back and marched to Virginia -- and
19 staked him to -- and he wouldn't serve; he didn't serve and
20 that's the pragmatic of the question.

21 Congressman Faddis in 1940, the time of great
22 national peril, outlined what the real pragmatic problem here
23 is, which is quite different from the speculative problem. He
24 said, "If I were to go out and command the troops, and I may;
25 I don't want any conscientious objectors in my regiment at all.

1 I rather they would be someplace else. They would be more
2 bother than they are worth, and a bad example to the other men.
3 You cannot do anything with them in the way of training them to
4 be soldiers. I am sure no man who would command the troops
5 would want them."

6 Now, the Army's representative who testified,
7 agreed; the Army didn't want these men and you can see why.
8 Who would want a man out in the perimeter and one thing you
9 know about him is he won't use his weapon?

10 Q That's what I come back to. The Army -- the
11 Government, collectively, did find an alternative with respect
12 to this man, the result of which is he is not now serving in
13 any active capacity, but you said he may be.

14 A The alternative, Your Honor, was to overpower
15 him with four strong sergeants: two at each hand and two at
16 each feet. They carried him off.

17 Q I know, but they aren't overpowering him
18 today; are they? They keep him in the Ready Reserve?

19 A Well, he's not attending Ready Reserve meet-
20 ings. They haven't come out yet; I don't know when they will
21 come out, Your Honor.

22 Q Well, do I gather that if the Army had a
23 provision for recognized selective conscientious objectors and
24 said, "We will not send you to Vietnam; we will send you some-
25 where else." I take it, or am I wrong in suggesting that that

1 would satisfy your position?

2 A You're correct, Your Honor, because Negre
3 thought: if I work in the Fort Ord Hospital, which I do not
4 regard as proximate participation in war, I'm helping sick
5 people down there. He said, "I would be prepared to do that."

6 Q But does your client object to just going to
7 Vietnam?

8 A He objected to going to Vietnam because he
9 said that would be proximately participating in the war which
10 he --

11 Q How about being assigned to duty with the
12 occupational forces in Europe?

13 A No one suggested he be assigned --

14 Q Well, what if he were?

15 A I don't know what he would do if he were,
16 Your Honor. It's not in the record. The record was that he
17 was assigned to Vietnam and that he refused to do.

18 Q Well, I'm just trying to find out what the
19 scope of his objection is.

20 A It was to proximate participation in the war
21 which violated the tenets of --

22 Q And he might object to a lot of other kinds of
23 military service, but at least we know he's objecting to this
24 one?

25 A That's correct, Your Honor. Now, this does

1 pragmatic problems for the Army, as their counsel asserted in
2 the lower court.

3 Q Well, following through on what Mr. Justice
4 White stated, did I understand you to say he is not attending
5 Ready Reserve meetings?

6 A That's right -- yes, Your Honor; he's not
7 attending Ready Reserve meetings.

8 Q I assume this is not in the record, but this
9 would be indicative, then, that he doesn't want to participate
10 any way.

11 A Well, he's kind of been soured by his ex-
12 perience with the Army, Your Honor, but that's not on the
13 record. The record we have here, he declined to participate in
14 the War in Vietnam. And he did cite that he was willing to
15 serve in a capacity that was not participation in the war.

16 Q Is it in the record that he is in the Ready
17 Reserve now or as distinguished from whether he is attending or
18 not attending the meetings?

19 A No, it's not, Your Honor. The Solicitor
20 General, in a footnote, concedes that the case is not moot;
21 that under *Carafas v. LaVallee* he has this obligation which is
22 a substantial burden on him and I think that's clear from his
23 four-year reserve obligation fixed by 10USC 270. And he can be
24 called into active duty at any time, in the Ready Reserve.

25 Q But why is his posture any different now,

1 today, from what it was on the day before he was assigned to
2 Vietnam and had then served and acquiesced in serving for four
3 months you indicated?

4 A Well, Your Honor, in the -- doctrine he had
5 not been called upon to form his conscience about participation
6 in that war until he was assigned to serve in the war or some-
7 time before he could anticipate that that would occur. And
8 that caused him then to make a moral judgment; did this comply
9 -- or a religious judgment: did it comply with religion? And
10 that's when he made the judgment.

11 And, having made the judgment he then was bound by
12 his religion to refuse to serve. Accordingly, that's what he
13 did do; he did refuse, but he was, as I say, carried off,
14 nevertheless.

15 Now, I assert, Your Honor, our position is quite
16 simple; it's an equal protection position that if the Quaker
17 on my right hand says, "I'm not going to fight in the Vietnam
18 War." You say "Why not?" "Because of my religion." If you
19 compel the man, the Quaker would be violating the statute,
20 certainly.

21 Now, my Catholic on my left hand is not going to go.
22 You say, "Why not?" He says, "Because of my religion," but
23 they are both acting under the command in the Bible: "It's
24 better to obey God than man." They're both acting as taught
25 by their religion. But you say, "Well, you're a felon and you

1 have to go because you are Catholic and to the Quaker they say,
2 "Well, you may stay home." And the only difference is the
3 theological imposition you find out as the hearing officer
4 said, "My client subscribes his beliefs to the Pope and to the
5 Church and the Church doesn't teach total pacifism." And they
6 say therefore, you are not exempt. You aren't a total paci-
7 fist."

8 We think this is a manifest denial of equal protec-
9 tion. That Congress could abolish all exemptions, I don't
10 purport to say, but I do say that if they can't grant an exemp-
11 tion to members of one religion and deny it to another by
12 picking out of this other man's religion a doctrine of his
13 church. The price is for doctrine; not even for conduct.

14 Q Would that doctrine prohibit him or does it
15 affirmatively permit him to form the same position of con-
16 science that you have described and attributed to the Quaker?

17 A Will permit him? Not without denying the
18 authority of Aquinas, who answered, as I mentioned to Your Honor,
19 it's not unlawful to participate in war. You must do so, where
20 commanded by the state and I --

21 Q As a matter of his individual application of
22 conscience, could he form the same position of total pacifism
23 of that of the Quaker?

24 A Your Honor, he could not form that position
25 without denying the authoritative teaching of the church that

1 there are just wars in which he must participate. So the
2 church might find him to be in ignorance, but he wouldn't be an
3 orthodox Catholic; he would then have denied the authoritative
4 teachings of his church, which is that there are just wars and
5 if he is assigned to serve in one he should serve in it.

6 So, he can deny it, but then he's not a Catholic.

7 Q Has the Catholic church decided that this is
8 not a just war?

9 A The Catholic church doesn't make the decision
10 in any particular case, Your Honor, whether it's an act -- if
11 I kill somebody the church doesn't tell me it's self-defense or
12 murder. The church sets a moral standard. I must decide
13 whether I've committed murder or self-defense and I'm judged
14 by God in the Catholic church, whether I'm correct in my
15 decision.

16 But the Pope doesn't issue letters saying, "That
17 was murder and that was self-defense."

18 Q Does your argument not come down to the fact
19 that you say, because a man can, under the Catholic church, but
20 need not, object to a particular war. It's left up to him
21 entirely?

22 A He must decide in each case whether it meets
23 the standards fixed by his church. It's not up to him what the
24 standards are. He's bound by the church standards and the
25 church teaching, Your Honor. He must apply the church

1 standards. He can't apply his own, but it's he who has to
2 apply them. And that's true of the Quakers; it's the Quaker
3 who decides that he's a Quaker.

4 Q You don't rely either on the prevailing, the
5 four-man opinion in Welsh or Seeger, to support that viewpoint;
6 do you?

7 A No, I rely on Welsh and Seeger, particularly
8 Welsh. The Court conceded at least what Congress had in mind
9 was to exempt religious objectors.

10 Q That's right: religious.

11 A And if my client isn't religious, I don't know
12 what religion is. All the Justices agree that religious objec-
13 tors were intended by Congress to be exempted.

14 Q The church's religious objection, but you say
15 yours gets down to the individual's.

16 A Conscience is always individual. The voice
17 of God is an expression of conscience.

18 Q Well, then that means that any man has the
19 right in the United States to determine whether he will go to
20 any war at all; wouldn't it?

21 A That's true. If the Quakers could convert
22 every man in the country to be Quakers, then none would go.
23 That's true today.

24 Q The Quakers have it as a church doctrine.

25 A To the contrary, Your Honor; the Quakers teach

1 there is no church doctrine.

2 Q Well, I don't know what they call it, but --

3 A George Fox --

4 Q I have always understood that they thought
5 that you didn't engage in any war at all.

6 A Your Honor, and to the contrary, George Fox
7 was put in jail for asserting that he got messages directly
8 from the dead. That was regarded as blasphemy. He says, "I
9 don't get guidance from the church. Each man has rights."
10 That's conscience.

11 Q Well, that would leave -- I'm not saying they
12 are right or wrong, but would that not leave every individual
13 in the nation to decide whether he would serve in a war or not;
14 wouldn't it invalidate our entire draft system?

15 A No; it does not invalidate the draft system,
16 Your Honor, because with that existing right of everyone to
17 become a Quaker, if he so desires --

18 Q And not Quaker, I'm talking about any
19 religion, if they all relieve the man free to go to a war or
20 not, has he sees fit, how could there be any draft system even
21 if the Congress wanted it?

22 A Because most men don't judge the war to be
23 unjust --

24 Q Most of them might not, but suppose more and
25 more until 98 percent of them did.

1 A If 98 percent of the country turned Quaker
2 we wouldn't have a big army, but only 11 tenths of one percent
3 of the draft-eligible men --

4 Q I suppose Congress could change that statute
5 -- then --

6 A I think Congress can abolish the whole exemp-
7 tion. Then they wouldn't discriminate against Catholics; that
8 would be one solution: abolish it all; make them all -- But
9 then I can imagine what a pleasure it would be to have a
10 division of conscientious objectors; instead of having one
11 like poor old Negre, you would have 25,000, 30,000 of these
12 guys in the Army. I don't think Congress felt that was
13 practical.

14 Q I presume you are right, because I don't
15 know anything about the doctrine, but I have never before
16 thought that it was a part of the Catholic doctrine that every
17 member of that church was left free to obey a law or not obey
18 it as he saw fit.

19 A Well, Your Honor, the church isn't an anar-
20 chaic institution; it teaches obedience to the faith and morals,
21 and it teaches obedience to the state except in the rare and
22 exceptional case where the commands of the state violate God's
23 commands. And in that case --

24 Q Well, you as an individual --

25 A As taught by the church; as instructed by the

1 church and its doctrine.

2 Q But the church hasn't taken any position on
3 this, I understand.

4 A The church has announced the doctrines that a
5 Catholic must apply in deciding whether or not to serve.

6 Q But under those doctrines, some Catholics, if
7 they follow the doctrine, will be conscientiously obligated to
8 go to Vietnam?

9 A Yes.

10 Q And the other-- and another group will be
11 conscientiously obligated not to go to Vietnam?

12 A Absolutely, Your Honor. That's absolutely
13 correct. And each must follow the commands of his conscience
14 as the voice of God.

15 Q Well, both are acting, on your analysis,
16 religiously?

17 A Yes; the prime teaching of the Catholic
18 church. Now, if a man is just a political objector, and there
19 are some -- those officers concerned from West Point -- they
20 say this is a terrible political mistake. If I'm assigned I'll
21 go, they say. That's a political objection. As Talleyrand
22 said, it's worse than the crime; it's a mistake.

23 These are men whose objections are solely political;
24 they say, "I'm willing to serve in Vietnam, but I say it's a
25 mistake to go, politically." They are not exempt from the Army,

1 Your Honor. That's what Congress excluded. That's a political
2 objection.

3 Q What happened to the two men in the same
4 position as this man and both of them are against the War in
5 Vietnam and one is a Catholic and one is some other religion.
6 The Catholic wins and the other man loses?

7 A No; if the other man's a Quaker he wins too.

8 Q But, he's not a Quaker.

9 A He's a Presbyterian? If the Court finds it's
10 a religious belief, Your Honor, I say it's an ---to the
11 Presbyterians, just as to the Quakers. You shouldn't discrim-
12 inate against Presbyterians, either.

13 Q Well, is there anything in the Presbyterian
14 religion that says that?

15 A I'm not prepared to say, Your Honor.

16 Q Well, assuming it doesn't and just on his own
17 mind he feels the same way as your Petitioner does: he believes
18 in God and he believes that God gives him the right to decide
19 which war he's going to fight in. If he can't show that in his
20 Presbyterian religion he's a dead pigeon.

21 A Your Honor, I don't think that the constitution
22 in the First Amendment will permit any man to be crammed into
23 an orthodox box. If this is a man's sincerely personal
24 religious belief, even though he's a heretic to the Presbyter-
25 ians, the Courts and the Government must recognize --

1 Q If that's your position why are you spending
2 two-thirds of your time on the Catholic religion?

3 A I explained --

4 Q I am back with my Brother Stewart; I don't
5 get it.

6 A I'm explaining because the Solicitor General
7 says my client's objections are political in and of themselves
8 and that's wholly untenable. And I have set that out; I think
9 it's untenable,

10 Q And you say Congress has no constitutional
11 power to discriminate between your client and Quakers?

12 A That's my assertion: not on grounds of
13 religious doctrine, Your Honor. Now, for conduct, yes. If
14 they want to discriminate on conduct, such as they can't be
15 bigamists. Then that's a different war, but here the conduct's
16 the same. The Catholic declines to go and the Quaker declines
17 to go.

18 Q You don't just limit yourself to an equal
19 protection argument, do you? You are -- on a First Amendment
20 claim, I take it?

21 A Yes; certainly. The First Amendment is in-
22 corporated -- the 5th Amendment incorporates equal protection
23 from the 14th and that goes into the First Amendment.

24 I also have a statutory construction argument.

25 Thank you, Your Honor.

1 MR. CHIEF JUSTICE BURGER: Thank you, Mr.
2 Harrington.

3 Mr. Solicitor General.

4 ORAL ARGUMENT BY ERWIN R. GRISWOLD, SOLICITOR
5 GENERAL, ON BEHALF OF THE UNITED STATES

6 MR. GRISWOLD: May it please the Court: before
7 opening my argument in this case, I would like to clarify two
8 things which came up in the previous argument and which are
9 relevant here.

10 Mr. Justice Harlan referred to a, the fact that
11 there is in the statute a reference to a purely personal moral
12 code. I was a little vague in my answer. I have now had a
13 chance to find the statutory language. It is in the appendix
14 to the Petitioner's brief in this case: the Negre case on page
15 1-A at the back. "Nothing contained in this title shall be
16 construed to require any person to be subject to combatant
17 training and service in the Armed Forces of the United States
18 who, by reason of religious training and belief is conscien-
19 tiously opposed to participating in war in any form."

20 And then comes this sentence which was unfortunately
21 omitted in the printing of our brief:

22 "As used in this subsection the term 'religious
23 training and belief' does not include essentially political,
24 sociological or philosophical views or a merely personal moral
25 code." It was because of the way the statute has put it as a

1 definition of religious training and belief which we are not
2 questioning here, rather than as having something to do with
3 participation in war in any form that I omitted it before.
4 Formally, verbally that is the way that it is limited. Prac-
5 tically, it seems to me to give some indication of what
6 Congress is trying to get at in formulating the provision
7 itself.

8 And then there was a question to me as to whether
9 Congress had ever refused to allow conscientious objection.
10 This is covered on pages 34 to 36 of the supplement to the
11 brief which we filed in the Welsh case, which we printed the
12 brief in the Seeger case which gave a detailed treatment of the
13 history.

14 The fact is that at the beginning of the Civil War
15 military service was a state matter. And you will remember it
16 was always the "7th of Massachusetts," and the "3rd of Ohio,"
17 and so on. Thereafter Congress said -- and some states had
18 conscientious objector provisions and others had different
19 ones -- and thereafter Congress provided for a draft, but at
20 the beginning it provided that you could provide substitutes
21 and a great many of the conscientious objectors apparently
22 provided a substitute.

23 Finally, thereafter, during the Civil War, Congress
24 enacted the statute which was typical of the form right down
25 through the World War II, that "Members of religious

1 denominations who shall by oath or affirmation, declare that
2 they are conscientiously opposed to the bearing of arms and who
3 are prohibited from doing so by the rules and articles of faith
4 and practice of said religious denomination, shall, when
5 drafted into the military service, be considered noncombatant
6 and shall be assigned by the Secretary of War to duty in the
7 hospitals or to the care of Freedmen or shall pay the sum of
8 \$200 to such person as the Secretary of War shall designate to
9 receive it to be applied to the benefits of the sick and wounded
10 soldiers.

11 "Provided no person shall be entitled to the bene-
12 fits of the provisions of this statute, unless his declaration
13 of conscientious scruples against bearing arms shall be sup-
14 ported by satisfactory evidence that his deportment has been
15 uniformly consistent with such declaration."

16 Now, turning to this case, I think, though it is
17 in some ways, more complicated, it presents essentially the
18 same legal issue as the preceding case --

19 Q Is it your contention, Mr. Solicitor General,
20 at all, that in this case that sentence that you read to us
21 about "essentially political, sociological, or philosophical
22 views, or merely personal moral code;" is it any part of your
23 contention in this case that the Petitioner here comes within
24 that sentence, that his beliefs come within that sentence?

25 A Within what sentence?

1 Q The one you just read to us --

2 A It is, I think, the essence of our case.

3 Q Well, I have not understood that at all.

4 A That the -- I hate to get into what is the
5 doctrine of the Catholic Church. I don't think it is relevant.

6 Q Well, I thought it was --

7 A I'm not an expert on it. But it is, insofar
8 as I understand it, it is the doctrine of the Catholic Church
9 that there is a distinction between just and unjust wars which
10 has theological significance.

11 However, the church, as I understand it, does not
12 make that choice for the individual. And that choice, I
13 suggest, is on a different level than the determination of the
14 church between just and unjust wars. That choice is a personal
15 choice and if the individual choice is a selective conscientious
16 objection he is not covered by the statute any more than is a
17 Quaker who might make the same choice.

18 A Quaker -- the Quaker religion, insofar as it is
19 formalized, is opposed to war in any form, but there are many
20 good Quakers who have served in wars: Paul Douglas served
21 actively in World War II; Herbert Hoover was Commander-in-Chief
22 of the Army and Navy and if a Quaker says, "Yes, I understand
23 that's the teaching of my church, but as far as I am concerned
24 it's a selective matter; I will serve in some wars and not in
25 other wars, then he would not be covered by this statute,

1 either.

2 Q Well, what you're saying, I take it, Mr.
3 Solicitor General, is that no member of any religious group on
4 that ground may claim selective conscientious objection.

5 A That is precisely our position. That is what
6 Congress has said. Congress has said "is opposed to partici-
7 pating in war in any form." And the issue is whether he is
8 opposed to all participation in all wars and he may evidence
9 religion as a reason for supporting the sincerity of his view
10 that he is opposed to all wars; but if he asserts, as Mr. Negre
11 does, that he is not opposed to all wars, but is opposed to
12 this war, then he does not come within the statute, whether he
13 is religiously motivated or not.

14 Q Well, that's what I thought the issue was,
15 rather than the issue being whether or not he was religiously
16 motivated.

17 A There is no doubt whatever in my mind that Mr.
18 Negre is religiously motivated.

19 Q Well, that's -- then I misunderstood. I
20 wholly misunderstood your answer to my question.

21 A But --

22 Q Well, you still say it's a personal moral
23 code?

24 A I say it is in the last analysis, his choice;
25 not his church's choice.

1 Q Well, do you say that his refusal to parti-
2 cipate in the Vietnam War, you concede is religious -- is based
3 on a religious belief?

4 A Yes, Mr. Justice, but it is not a religious
5 belief which leads him to say "I will not participate in war
6 in any form."

7 Q Well, that's true; that may be good
8 statutory construction, but how about the constitutional
9 argument of discriminating between one religion and another one?

10 A I don't think it does, Mr. Justice. I think
11 it --

12 Q Well, between one religious belief and another.

13 A I don't think it does, Mr. Justice. I think
14 it discriminates between a person who is conscientiously opposed
15 to participation in war in any form and one who is conscientiously
16 opposed to participation in this particular form.

17 Q Well, now, in both of those beliefs you just
18 described you conceded are religious? You concede that --

19 A In the broad sense, which is the result of --
20 I won't say decided by -- but is the result of this Court's
21 decision in the Welsh case --

22 Q Yes, but let's assume two men both refuse to go
23 to Vietnam and they say -- one of them says the reason is "I
24 am religiously opposed to war in any form," and the other one
25 says, "Based on my religious beliefs I object to the Vietnam

1 War, and will not go to the Vietnam War."

2 You apparently concede that both beliefs motivating
3 the refusal are religious beliefs; that the one you would say
4 is entitled to recognition and the other is not?

5 A Yes, Mr. Justice and I would equally say that
6 the belief which asserted that I do not believe in any supreme
7 being; I abhor all organized religion; however, by reason of
8 deep conscientious feeling I have concluded that I will not
9 participate in war in any form, would likewise be protected.

10 Whether it is religion in the conventional sense or
11 not, makes no difference; the question is the depth of the
12 view and the nature of the view.

13 Q Still, how do you justify the -- discriminating
14 between those two religious beliefs motivating refusals to go to
15 Vietnam?

16 A Because one is a view which within the
17 statutory language as it has come to be meant by reason of
18 religious training and belief, is opposed to war in any --
19 opposed to participation in war in any form and the other is,
20 by reason of religious training and belief, however construed,
21 is not opposed to participation to war in any form.

22 Q Well, I agree that's the right under the
23 statute, but when you ask why the statute, so construed and
24 applied is constitutional; why is it constitutional to discrim-
25 inate between one religious belief and another?

1 A I don't think we are discriminating between
2 one religious belief and another, Mr. Justice. I think we are
3 discriminating between one belief which is opposed to parti-
4 cipation in war in any form, whether it is supported by con-
5 ventional religion or not, and on the other hand, an opposition
6 to participation in this particular war, whether it is suppor-
7 ted by conventional religion or not.

8 Q Would it be correct to say -- that another way
9 to put your position, Mr. Solicitor General, is that when it's
10 a selective choice, subjective on the basis of what wars then
11 the reason for it becomes irrelevant.

12 A Yes, Mr. Justice; I think that's what I've
13 been trying to say: whether it is religious or not, if it is
14 selective that (a) it does not come within the statute, and (b)
15 there is nothing in the constitution which requires Congress
16 to recognize it, or putting it another way: it does not amount
17 to an establishment of religion or a denial of the free exer-
18 cise of a religion which is all that the First Amendment covers;
19 nor is it an invidious discrimination insofar as there is an
20 equal protection concept in the Fifth Amendment.

21 Now, it's already been pointed out that this case is
22 different from the Gillette case, since it arises in habeus
23 corpus and is not a criminal case. This, I don't think, makes
24 any significant difference; it is based on a directive of the
25 Department of Defense and Army regulations which provide for

1 release of people on the basis of conscientious objection and
2 they should be judged according to the regulations, by the same
3 standards, whether made before or after entering military ser-
4 vice and these shall be the selective service system standards.

5 Thus, Section 6J is incorporated into the relevant
6 military regulations. I do think it is pertinent to point out
7 again, as has been asserted, as has been stated here by Mr.
8 Harrington, that the Petitioner is no longer on active duty in
9 the Army. He has been transferred to the Ready Reserve. He
10 can quite readily within the conscientious scruples which he
11 showed during the four months that he was in the Army where he
12 was willing to serve in uniform on this side, he can quite
13 readily comply with the military requirement which, it seems to
14 me if he doesn't, it would be completely a clear case of
15 military disobedience which ought to be treated as such.

16 If he does feel that his views have now changed so
17 that he is opposed to participation in war in any form, he is
18 still entitled to file a claim based upon that. I do not
19 understand that he has ever made any such claim.

20 Now, the other difference between this case and the
21 Gillette case as already pointed out, is that the objection in
22 the present case has a clear religious basis within the conven-
23 tional sense of that term. The Petitioner is a Catholic; he
24 based his application on well-known writings of traditional
25 Catholic authors, including the present Pope and his predecessor

1 Pope John XXIII.

2 And on the basis of these writings, he says that
3 each Catholic must find his own conscience with respect to
4 military service and that there is a distinction between just
5 and unjust wars. On this basis he concludes that he cannot
6 conscientiously participate in the war in Vietnam, although he
7 would be prepared to perform noncombatant hospital service in
8 the United States because such service is not directly in aid
9 to the Army in Vietnam.

10 The hearing officer found that he was a devout
11 Catholic who sincerely believed that the War in Vietnam was
12 wrong and he concluded, however, that the application for dis-
13 charge should be rejected because, in his opinion, the appli-
14 cant objected to a particular war and not to war in any form,
15 and this was supported by the Department of the Army.

16 The District Court, in the habeus corpus proceeding,
17 pages 47 and 48 of the appendix, read the -- recited the
18 opinion of the hearing officer and concluded that it is a fact
19 when considered together with other facts disclosed in the
20 record, including the timing of the application and Petitioner's
21 request for noncombatant status with the restriction that he
22 be assigned to duties in the United States; that these could
23 sustain the opinion of the hearing officer and the decision of
24 the Army.

25 It, therefore, cannot be said that the decision of

1 the Army is without a basis in fact thereof. And the Court
2 of Appeals affirmed, holding on page 51 of the appendix that
3 beyond question there was a basis in fact, for the conclusions
4 of the Department of the Army. It fully pointed out that the
5 Petitioner objects to the War in Vietnam, not to all wars.
6 Clearly his views are completely inconsistent with the objection
7 to war in any form.

8 Q Mr. Solicitor General, are there any figures
9 as to the number of selective conscientious objector claims
10 that have been made since Judge Rozanski in the Sisson case --

11 A No, Mr. Justice, I know of no such figures.

12 Q Do you know what the Army has been doing with
13 these selective claims?

14 A No, Mr. Justice, I do not. Of course, we have
15 two groups: we have those before the selective service system,
16 which we file in one procedure. We have those seeking release
17 from the Army, which would follow another procedure. Those
18 come in at least four, maybe five different services and I do
19 not know of any effort to tabulate the expressly selective
20 claims which have been made since Judge Rozanski's decision.

21 Q May I ask you a question, Mr. Solicitor
22 General. No one would know better than the Solicitor General,
23 even the Members of the Court, the difficulty of these cases.
24 I do not understand why, if this man has gotten what he wants,
25 and is not being compelled to fight, this wouldn't be moot?

1 A Well, Mr. Justice, I share that feeling to a
2 very considerable extent. This man is in the Ready Reserve.
3 There is a suggestion here by Mr. Harrington, not supported in
4 the record,-- I mean I'm not denying it -- I just don't know,
5 that he isn't attending his drills, and may be subject to an
6 order of call-up. As I have said, that seems to me to be a
7 pure case of military disobedience. He has never made a claim
8 of total conscientious objection. This has never been passed
9 on by anyone. His claim is one of selective conscientious
10 objection and it seems to me that the effect of the Department
11 of the Army was that he would be classified as 1-A-O; that is,
12 as a noncombatant in the military services which was the ser-
13 vice which he did perform.

14 Frankly, I don't myself, understand why the case
15 isn't moot, that I suppose that --

16 Q If you lose this case --

17 A The case is cited in the footnotes as having
18 a chilling effect on me and I didn't quite feel that I could
19 assert that the case was moot. Or, let me put it another way:
20 if I had moved to dismiss the case on the grounds that it was
21 moot, I would have thought that maybe I would have not been
22 successful.

23 Q I would think you are quite right.

24 A But, it would not --

25 (Laughter)

1 A It would not distress me if the Court should
2 conclude that the case was moot. It seems to me that this is
3 a case where the Court is being called on to decide the
4 ultimate question of principle in a factual situation where it
5 is not really presented.

6 Q As I understand it, the man is where he wants
7 to be. He's objected to going into the war and the Army has
8 kept him here. I don't see where he has any controversy at the
9 present time.

10 A Because he is --

11 Q I don't see why we --

12 A Mr. Justice, he is trying very hard to get a
13 decision out of this Court and he is apparently now not com-
14 plying with his reserve obligation in order that he may be
15 called back into active service in order that he may get another
16 order to go to Vietnam, the order that he may be sure that the
17 issue will be presented.

18 Whether that possibility which turns considerably on
19 his own determination to get a decision on this issue, is
20 sufficient to keep the case from being moot, is something which
21 the Court ought to consider; will consider, of course. And it
22 seems to me there is much reason to think that this is a case
23 which is essentially moot.

24 Q We've still got the issue in the other case?

25 A We still have -- we don't have the Catholic

1 doctrine --

2 Q Not the religious --

3 A -- we have the selective conscientious --

4 but I think the Catholic doctrine argument can be highlighted
5 by the reply brief which was filed in this case. Incidentally,
6 it is full of learned excerpts from Catholic authors through
7 the years. It did occur to me how far the Court can take
8 judicial notice of such material, if it is relevant, which I
9 don't think it is, because I don't think the Court can go into
10 the church doctrine of any kind.

11 If it is relevant, it seems to me it ought to be
12 put in by evidence; it ought to be subject to examination and
13 cross-examination and there ought to have been an opportunity
14 to put in other teachings of other prominent Catholic theolo-
15 gians and I have no doubt that a very confusing mass of
16 material altogether can be found rather than the selected
17 materials which are here.

18 But, the point which I want to make is -- can be
19 seen in two places in this brief: page 3, the heading. This
20 is the blue-covered reply brief for the Petitioner in this
21 case.

22 "The Catholic Church teaches that its members have a
23 religious duty to participate in just wars." Now, if there is
24 that; if that were true, there would be a problem. Among other
25 things, they couldn't ever be a Catholic conscientious objector

1 within the statute. He would always say, well I will
2 participate in just wars and I would call your attention to the
3 fact that the Mulloy case which was decided by this Court last
4 year, involved a Catholic and had substantial material in the
5 record about Catholic doctrine and he claimed to be a total
6 conscientious objector.

7 We have filed a petition for certiorari in another
8 case which is now pending, raising an issue like this: Laird
9 against Caprobiano(ph) No. 611, which also involves this
10 Catholic who claims to be a total conscientious objector and I
11 think that the light comes on page 7 of the reply brief.

12 This is the place where there was an error in the
13 printing of the brief and the material -- my copy at least,
14 and I hope in yours -- has been written in in longhand. This
15 is the language just below the middle of page 7:

16 "Captain Van Wert, was correct in capturing the
17 theological gist of the teaching of Paul VI in the Pastoral
18 Constitution that a Catholic has a religious duty to distin-
19 guish between just wars in which he may participate and unjust
20 wars in which he has a religious duty to refuse to participate.

21 Q The brief I have does not read that way. It
22 reads: "to discriminate between just wars in which he has a
23 religious duty to --

24 A Well, I'm sorry; in the language that I have
25 it says "distinguish," and the one that Mr. Harrington has it

1 says "discriminate," and I don't know whether they couldn't
2 make up their minds or whether --

3 (Laughter)

4 A -- or whether it was an error.

5 Q Mr. Solicitor General, there is a very
6 significant distinction beyond the use of that term. The term
7 "may" and "must" is very, very different.

8 A In which you may participate -- I believe that
9 is in --

10 Q I'm not in favor of any --

11 Q I'm not either.

12 A No; I'm sorry. In Mr. Harrington's copy --
13 this is interesting, because apparently there was a change of
14 view --

15 Q Mr. Solicitor General will you read it --
16 I have nothing on it.

17 Q I haven't either.

18 (Laughter)

19 A Well, I'm sorry, Mr. Justice. The copy that
20 was furnished me has the language on which I have based my
21 argument and which I will stand on, "to distinguish between
22 just wars in which he may participate and unjust wars in which
23 he has a religious duty to refuse to participate --

24 Q Where are the alternative briefs?

25 A And I will venture the suggestion that the

1 sound theological doctrine is that a Catholic may participate
2 in all wars; that a Catholic may decline to participate in all
3 wars, and that he is not within a religious duty to participate
4 in just wars; that he does have a considerable freedom of
5 conscience and I haven't the slightest doubt that that is the
6 practical construction which has been given, not only by many
7 individual Catholics but by their religious advisors.

8 Q Mr. Solicitor General, in the other case, in
9 the Gillette case, there was no finding in either of the courts
10 below as to whether or not a religious belief was involved.
11 But you don't challenge it, but if that were determined that
12 there wasn't a religious belief involved, why, we wouldn't be
13 reaching some of these questions in that case, either.

14 A Well, that depends on what the decision in the
15 Welsh case means and all I can say is that five members of the
16 Court, on one ground or another, have determined that the words
17 "religious training and belief" in the statute do not have
18 much significance. Four, because they don't think it should
19 have and one because he thinks that constitutionally they can't
20 have.

21 And, all that we on this side of the bar can do is
22 to undertake to proceed on the basis of the decision which we
23 have reached for varying reasons by five members of the Court
24 which did, in effect, write out from the statute, the words
25 "religious training and belief."

1 MR. CHIEF JUSTICE BURGER: Mr. Solicitor General,
2 we will recess now, but we will enlarge your time --

3 A No; I have no more.

4 Q Well, then we will allow Mr. Harrington,
5 although he is out of time, to have a few minutes to respond
6 after lunch.

7 But in the meantime, it would be helpful to the
8 Court if you would arrange to say what version you wish on this
9 page and the Clerk in the interim will arrange to have at
10 least nine copies made so that we will know precisely what
11 position we are to act on.

12 MR. HARRINGTON: I filed 50 errata sheets,
13 yesterday, Your Honor.

14 MR. CHIEF JUSTICE BURGER: Oh, well, they have not
15 reached us yet. That's quite late to have --

16 MR. HARRINGTON: We apologize, Your Honor.

17 MR. CHIEF JUSTICE BURGER: Very well. We will see
18 if we have it later.

19 (Whereupon, the argument in the above-entitled
20 matter was recessed at 12:00 o'clock p.m. to resume at 1:00
21 o'clock p.m. this day)

1 1:00 o'clock p.m.

2 MR. CHIEF JUSTICE BURGER: Mr. Harrington, we will
3 give you another two minutes.

4 FURTHER ARGUMENT BY RICHARD HARRINGTON, ESQ.

5 ON BEHALF OF PETITIONER

6 MR. HARRINGTON: Mr. Chief Justice and may it
7 please the Court: The Clerk did a marvelous job printing my
8 brief on very short notice. The printed text is set out in
9 the errata sheet filed yesterday with the Clerk is before the
10 Court, and the proper correction appears at page 7 after
11 line 23: "Discriminates between just wars in which he has a
12 religious duty to participate and unjust wars in which he has
13 an unjust duty to refuse to participate."

14 Now, my two minutes remaining I will make two
15 points; which will be a record for brevity, I hope. First,

16 First, the Solicitor General, I think, never
17 answered Mr. Justice White's inquiry how the constitution
18 permits discrimination between religions on the grounds of
19 belief in this case.

20 Q We will have to start with the premise that it
21 is discrimination.

22 A I think his premise is that --

23 Q If you go from that premise you don't have
24 any difficulty with the conclusion.

25 A If Your Honor please, that's correct. And if

1 you accept the religious beliefs of Negre here to be that he
2 must fight in just wars; he must refuse to fight in unjust
3 wars, then that is a discrimination on that basis and that
4 belief.

5 Q Is there anything to prevent a Presbyterian
6 or a Methodist or a Baptist, or anyone else from applying the
7 Pope's doctrine, not the doctrine, but the historic doctrine
8 of the church --

9 A No, Your Honor and I think that's exactly the
10 point Justice Marshall made, that it's the individual's
11 religion. It's not the place of government to say you are an
12 orthodox believer or unorthodox.

13 And so if a Baptist would come with the belief,
14 based on his religion that like the Catholic, he must fight in
15 just wars and must refuse to fight the unjust wars and he can
16 get equal protection too. In that case --

17 Q Which church was that? You were speaking
18 about another church then; what was that?

19 A Justice Marshall's question about --

20 Q What about the Baptist church?

21 A Well, if the Baptist church had such a
22 teaching --

23 Q I thought you said it; that's all. I don't --

24 A Your Honor, I think that any religion -- what
25 I'm really saying -- I'm not speaking as a theologian, but what

1 I think our constitution does is to permit each of us to have
2 some religious beliefs. --

3 Q Why wouldn't that permit -- why wouldn't that
4 absolutely prevent the government -- and I'm not saying whether
5 it shouldn't be prevented or should -- why wouldn't that
6 absolutely make it impossible for the government to have a law
7 drafting an army?

8 A Because most of the persons of the country
9 think that any war that the government starts is a just war
10 and they go willingly and happily and are pleased to serve.

11 Q Well, some of them keep that opinion until
12 they are drafted.

13 A Some after they are drafted lose some
14 enthusiasm, but they are nevertheless loyal soldiers, and the
15 number of objectors is small. There are 2 million college
16 students with only 25,000 objectors.

17 Q Does your case depend in any degree on how
18 many of them there are?

19 A No, Your Honor, because --

20 Q Suppose 98 percent of the people decided
21 to do that; you wouldn't --

22 A I agree entirely, and if 98 percent of the
23 people adopted a religion and followed it the country would be
24 much better.

25 But in the field of the armed services, if they all

1 became pacifists we wouldn't have any army.

2 Q Or the war.

3 A Or a war. And I devoutly would hope that the
4 world would come to that condition.

5 Mr. Justice Black, I think the case is not moot.
6 It's not moot --

7 Q Why?

8 A It's not moot, Your Honor, for three different
9 reasons: Number one, if the application had been granted when it
10 should, my client would have been discharged and would have
11 had no reserve obligation whatever.

12 Number two: there is --

13 Q I don't see why not. I thought they just
14 objected to getting mixed up in this war.

15 A Well, Your Honor, departing from the record,
16 on the grounds of mootness, I should lay the full record before
17 the Court. The fact of the matter is before this young man
18 went to Vietnam he amended his application solely in this par-
19 ticular. He said, "After what's happened to me I'm unwilling
20 to serve in the United States Army anywhere because it now all
21 appears to me to constitute aiding and abetting this immoral
22 war, which violates my religion.

23 Now, the Solicitor General never that this --

24 Q That must have been a newly-developed idea,
25 from what you say.

1 A It was. Judge Zirpoli pointed out to him at
2 trial that he was aiding and abetting the war by releasing
3 another man to go and after he got that admonition from Judge
4 Zirpoli and after this Court had denied certiorari, he then
5 gave that consideration and he did amend his application in
6 that particular alone.

7 Now, therefore, the case is not moot. The young
8 man feels that he should not participate in this war, even by
9 aiding and abetting it.

10 And, thirdly, as I point out to you, Your Honors:
11 we did seek a stand before he went to Vietnam.

12 Q Has he filled out a writ of habeus corpus to
13 get out?

14 A Yes he has.

15 Q On the ground that they might sometime send
16 him to Vietnam?

17 A That's this case, Your Honor. Before he went
18 -- we filled out that writ and---

19 Q But it was not a new writ since he went into
20 the reserves?

21 A No; no, he didn't serve a new writ, Your Honor.
22 But I simply say that if an issue is the law, then he can't
23 raise it before he's in the Army. And this Court will not
24 stay the -- in the Army. And when we get to this Court we have
25 exhausted our remedies; we are too late. There won't be many

1 cases where we will ever be able to present our position be-
2 cause there will never be any right time.

3 We respectfully submit we have exhausted our -- we
4 tried to be diligent; we moved as quickly as we could; this is
5 under a writ of this Court; he's entitled to be discharged under
6 the constitutional protection and we ask that he be discharged.

7 Thank you.

8 MR. CHIEF JUSTICE BURGER: Thank you, Mr.
9 Harrington. Thank you, Mr. Solicitor General. The case is
10 submitted.

11 (Whereupon, at 1:05 o'clock p.m. the hearing in the
12 above-entitled matter was concluded)