

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

MICHAEL D. BARNES,

Petitioner,  
vs.

PETE GREEN, Secretary of the United  
States Army, MICHAEL X.  
GARRETT, Colonel of the United  
States Army, and DOES 1-50  
inclusive,

Defendants.

3:08-cv-00015-JWS-JDR

**RECOMMENDATION**  
**REGARDING PETITION FOR**  
**WRIT OF HABEAS CORPUS**  
**AND MANDAMUS**

(Docket No. 1)

The court has now before it Mr. Michael D. Barnes petition pursuant to 28 U.S.C. § 2251 for writ of *habeas corpus* and *mandamus*. (Docket No. 1; opening brief at docket No.17). Said petition is made on the grounds that Barnes is a conscientious objector (CO), and should therefore be discharged from the United States Army. The petition is opposed by the defendants Peter Geren, Secretary of the United States Army, Michael X. Garrett, Colonel of the United States Army, and DOES 1-50 inclusive (hereinafter “the Army”). (Docket No. 25). Barnes filed a reply brief at docket No. 29. The parties have requested oral argument. (Docket Nos. 31 and 32). Oral argument was heard on May 12, 2008. An initial recommendation was issued at docket No. 38 and subsequently withdrawn for further review. (Docket No. 40). For the reasons that follow, Barnes’ petition for writ of *habeas corpus* and *mandamus* should be granted.

## THE LEGAL STANDARD

A serviceman has no constitutional right to CO status. *Roby v. Dep't of Navy*, 76 F.3d 1052, 1055 (9<sup>th</sup> Cir. 1996).<sup>1</sup> Rather, the military's provision allowing for CO status is voluntary, and the court is therefore instructed that its review of a decision to deny CO status is as deferential as its constitutional responsibilities permit. *Id.* at 1056. The court must bear in mind that when a person enters into a contractual commitment with the government to serve his country, it is anticipated he will fulfill his promise. *Id.* The military's considered professional judgment is not lightly overruled by the judiciary. *Id.* The Ninth Circuit, borrowing from Supreme Court language, applies all the elements of the military branch's CO test and uses a "depth of conviction" test to determine the petitioner's case. The depth of an applicant's conviction is measured by the applicant's objection to participating in war in any form due to a sincere and meaningful belief which occupies in the life of the possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption. *Id.* At 1057. Excluded from CO status are those servicemen whose beliefs are not deeply held and those whose objection to war does not rest upon moral, ethical, or religious principle. *Id.* at 1058.

The army regulations for determining CO status, over which the court's review takes place, and which in this case are specific to a soldier requesting discharge as opposed to an induction case, provide that the soldier show: (1) a firm, fixed and sincere objection to participation in war in any form or the bearing of arms, because of religious training and belief; and (2) a sincere objection to war in any form. This standard must be established by the soldier by clear and convincing evidence. The military's decision will be upheld if there is a basis in fact for the decision. *Witmer v. United States*, 348 U.S. 375, 380-381 (1955). The court is not to substitute its judgment

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<sup>1</sup> Notably, the Army's opposition cites to some pages that do not exist in *Roby*.

for the Army's by weighing the evidence. The court is not to search the record for substantial evidence to support the Army's determination. *Roby* 76 F.3d at 1058. However, the Army must show some hard, reliable, provable facts, and its reasons must be grounded in logic, and mere suspicion of insincerity is inadequate. *Hager v. Secretary of the Air Force*, 938 F.2d 1449, 1454 (1<sup>st</sup> Cir. 1991); *Smith v. Laird*, 486 F.2d 307, 310 (10<sup>th</sup> Cir. 1973).

### **BACKGROUND**

This is a record review case. That record is composed of the evidence presented by the petitioner in his CO applications and hearing before the Army, and upon other evidence from the Army's investigative and hearing procedures. The Army does not take issue with the statement of facts presented by Barnes, and it appears to be supported by the record. That record is found at Barnes' appendix of exhibits Vols. One, Two, and Three. (Docket Nos. 9, 10 and 11). Therefore, the following statement of facts is taken mostly, but not exclusively, from Barnes' opening brief. Notably, his personal history – which comprise a good deal of the statement of facts – were presented to the Army. Thus, when beliefs or assertions of Barnes' are set forth herein, they are statements of what he communicated to the Army. The court has deleted from the "facts" presented by Barnes those parts which were patently argument.

Barnes is a non-denominational Christian, who voluntarily enlisted in the Army in February 2005 – after military operations had commenced in Afghanistan and Iraq – and specifically pursued assignment with Army Special Forces. After troubled teenage years, Barnes, who grew up in the Christian faith, was baptized at the New Hope Community Church in Portland, Oregon in September of 2001. This made for a major transition in his life. Beginning shortly before his baptism (in 2000) he translated his Christian belief in doing good works into volunteering for organizations with humanitarian missions. As a volunteer for habitat for humanity he helped build a home

and did landscaping for a family that could not afford a house. In 2003 he performed house remodeling and landscaping for a group home for youth in the juvenile justice system. Additionally, he volunteered at a church affiliated after-school program in August 2003, as a mentor to youth in sports and Bible study. From November 2003 through January 2005 Barnes was a residential guidance counselor at a Christian youth home. From April through September 2004 he collected clothes for “World Concern”, a Christian organization that sends clothes overseas to countries in need.

In March 2005, Barnes enlisted in the Army for a five-year contract as Special Forces candidate. He claimed that he believed that by defending freedom and helping people in other countries he could serve the Lord. Since childhood, he had wanted to be a soldier. As a little boy he played with GI Joe toys and toy tanks, and later put a chin-up bar and rope in his back yard to physically prepare himself to serve. After boot camp he was assigned to the 501<sup>st</sup> Line Battalion, 4<sup>th</sup> Brigade, 25<sup>th</sup> infantry division at Fort Richardson, Alaska. There, he claimed, he began to question his beliefs about service in the military. This was due to hearing other soldiers talk not about helping people, but rather about killing them, and doing so as if it were fun. This included stories from soldiers who had served in Iraq and Afghanistan. These included laughing at them and degrading them. Yet, he told himself that these were the perceptions of just a few soldiers, and that war was not really as they described it.

In February of 2006, at Fort Richardson, Barnes, accepted an assignment as a driver for the Executive Officer for the Brigade Personal Security Detachment. He thought this would be a prestigious job to be served with a selected group of soldiers. Instead, he spent most of his time just sitting around. This caused him to believe he was wasting his life and not helping people pro-actively.

He thought back to how much he loved his job and life before he joined the Army, and how good it felt to serve the Lord by helping youth. He believed that by

helping troubled youth while they were young, he could help them avoid making bad decisions. He began to realize that he had made the wrong decision to enlist. He became unhappy, depressed, and stressed. He was short tempered with his wife. He complained to her about how much he disliked his job in the military. He became full of anger and did not like it. *Id.*

On leave for July 4, 2006, Barnes went home to Oregon and spent time with his family. He was unable to relax, find peace, or be happy. He was distressed about returning to Fort Richardson. He was short-tempered, angry, and even punched a wall out of anger. He discussed his mental state with his family and decided to see an Army mental health counselor when he returned to base. *Id.*

Upon returning to Fort Richardson, Barnes met with Captain Gilboy, the Brigade psychiatrist. Captain Gilboy diagnosed Barnes with depression and prescribed an anti-depressant. Barnes saw a civilian psychologist, who also diagnosed depression and recommended a stronger anti-depressant. However, before he could start further treatment, Barnes and his unit were sent in August to the Joint Readiness Training Center at Fort Polk, Louisiana, for pre-deployment training. Barnes' depression deepened. *Id.*

In the end of September, Barnes and his unit were deployed to the Middle East. He had a bad feeling in his gut that what he was about to do was morally and ethically wrong, but convinced himself that it was the fear of combat and anticipation of having to take another person's life that caused his apprehension, something that all soldiers experience. While in Kuwait, he tried to prepare himself mentally for combat, but he still struggled with depression and a feeling that what he was doing was not right. He studied the Bible daily and prayed looking for answers. He also spoke with his family about his internal conflict. A month later he was sent to Iraq. He was reassigned to the Tactical Operations Center as a radio operator at the Kalsu Forward Operations Base, Iraq. At first Barnes was upset about this reassignment and requested to be assigned to

the 501<sup>st</sup> Line battalion as an infantryman. He felt conflicted between his wish to serve and a gut feeling that killing may be wrong. His request was denied. *Id.*

In November and December 2006 petitioner studied the Bible intensely in an attempt to calm his troubled spirit. He realized that his spirit was troubled because his participation in war was against the Lord's will. As he stated in his Application for Discharge:

The more I read the Bible and related it to my life and how I should be living, the more I saw that what I am part of is wrong. All of the depression and misery I have been dealing with has been an inner conflict with being a soldier and serving the Lord. I have been trying to justify being a soldier and finding a way to do so while still being a Christian, because that is what I wanted to be since I was a kid, but I can no longer justify spending my short time in this world participating in or supporting war. *Id.*

Upon arrival in Iraq in September 2006, Barnes was assigned to be radio operator. His assignment gave him time to read the Bible. Once in Iraq Barnes realized that the war stories he heard at Fort Richardson that saddened and offended him were accurate. Soldiers harmed Iraqis to get a laugh at their expense. They gave Iraqis chewing tobacco to make them sick, put urine in their drinks, and made them say and do degrading things. Soldiers abused Iraqi children. Once while Barnes was on patrol, his Humvee stopped and some Iraqi children approached them waving and smiling. Barnes took their picture on his camera and shared it with them, which the children enjoyed. The other soldiers in his Humvee were mad and said hateful things about the children. One soldier told another to "go and slap the crap out of one of those kids and watch the others flee." Barnes heard from soldiers and saw reports of detainees beaten regularly while being transferred. This abuse was covered up or later justified. Barnes stated in his Application for Discharge:

From what soldiers have told me, they don't shoot only if they have to; they shoot whenever they can. One example given was, "when I was told my soldiers didn't shoot (those later detained) because they dropped their weapons, I instructed them to shoot those who have weapons regardless of whether or not they drop their weapons." Soldiers are becoming full of hate from war and U.S. troops dying, and that hate is deluding their morals and making their focus "payback." I have also heard from a SGT that just lost his Squad leader, that "for every American they kill, we should go into the village and kill 10 of them whether they are bad or not; those who are not bad still know what's going on and cover for them."

This and other incidents were examples of "what war does to people's morals and how it ruins their souls." *Id.*

Barnes' assignment as a radio operator put him in contact with information for the entire Babil Province in Iraq. He saw and heard of the damage caused by war, a country torn apart, civilians killed. He lost soldiers that were friends:

I ask myself what they died for and how they will explain to the Lord what they spent their life doing that served him. This troubles me. How would I justify to the Lord that participating in war is serving him? I cannot. War is evil and nothing but evil comes from it. Many of those who participate in it lose their souls along the way. People say combat veterans are never the same after returning from war. I believe this is because they lose their souls along the way. *Id.*

Barnes' conflict between his religious beliefs and his military service affected his mental health. He sought psychiatric care at the Kalsu mental health clinic from November 1, 2006 through to the end of December 2006. He was diagnosed with Adjustment Disorder with Depressed Mood (DSM-IV 309.0). His psychiatrist, Scott Moran MD, opined that Barnes' emotional distress "was related to his service in the Army and to his religious concerns about being in the Army." His symptoms included "depressed mood, decreased sleep, anxiety and worry, difficulty concentrating, low energy and low motivation to continue to serve." Dr. Moran recommended, and Barnes was compliant with, antidepressant medication and psychotherapy. However, Dr. Moran stated that his symptoms did not improve much before the end of December. He also opined: "It is my opinion that PFC Barnes' symptoms will not improve until the psychosocial and spiritual stressors that are causing his symptoms are eliminated. (January 31, 2007 Letter of Dr. Moran; PA, Exhibit C.)

Barnes' spiritual growth process led him to the clear understanding in late November and early December that he could not participate in war. Barnes described the moment that his conscientious objection crystallized:

I was reading in the New Testament and the scriptures kept telling me I was not living right and that I had to put the Lord first in my life. I struggled with this, because what was I going to do, quit the military? I can't go to jail; I have a wife and two kids to support. I can't get a dishonorable discharge, because then I will struggle to support my family and won't be able to get a job helping juveniles like I want to. What will my peers, friends, and family think? I was asking myself these questions and then read Matthew 16:25 "For whoever wants to save his life will lose it, but whoever loses his life for me will find it. What good will it be for a

man if he gains the whole world, yet forfeits his soul?" That was the defining moment for me. No turning back from there. I could not participate in what I knew was wrong and if I was punished for standing up for my faith, I would take that punishment with honor, knowing I am serving the Lord. I must follow my faith and worry about my soul, not worry about what could happen to me in this world. *Id.*

In early December 2006, Barnes contacted the GI Rights Hotline in an attempt to address his conflict about being in the Army. He spoke to Alison Carter, a volunteer counselor, and spoke with her about how to reconcile his Christian faith with continued service in the Army. On December 13, 2006, Ms. Carter emailed Barnes the form Application for Discharge based upon conscientious objection, Army Regulation ("AR") 600-43, Appendix B. (January 31, 2007 Letter from Alison Carter; PA, Exhibit C.)

Barnes began drafting his application. However, on December 20 Barnes' squad leader in his unit was killed in combat, and a gunner, Specialist Swackerd, was wounded. The next day Barnes was ordered to replace gunner Swackerd. On December 22, Barnes orally told his Platoon Sergeant that he was a conscientious objector and could not participate in war. He then had to restate his objection up the chain of command, to Sergeant Major Maggard and Command Sergeant Major Turnbull. He also discussed the objection with the Non Commissioned Officer in Charge of the Personal Security Detachment, Sergeant 1st Class Self, and again with Sergeant Major Maggard, who spent 30-45 minutes interrogating him. Barnes nevertheless told him that he was firm in his beliefs and his decision was final. Two days later Sergeant Major Maggard ordered Barnes to D Company of the 501<sup>st</sup> Infantry, Iskan Forward Operations Base, to deploy in combat. He spoke to Sergeant Major Knight and again stated his objection that participating in war went against his faith and morals. Knight told petitioner that

he would be assigned to conduct combat operations, and told petitioner to consult with the chaplain. The chaplain tried to convince petitioner that he was not a conscientious objector. In Barnes' eyes, the chaplain's focus was on serving the military and not serving God. Nevertheless, Barnes was firm in his belief. After reporting back to Sergeant Major Knight and reasserting his objection to war, he was sent back to Kalsu.(PA,ExhibitA.)

When he returned to Kalsu, Command Sergeant Major Turnbull was very angry and stated that he was not a conscientious objector until he turned in his application. Barnes indicated that he had been working on it. First Sergeant Bowen then sent him to Major Cell, the base housing control. He was questioned again and then sent to the flight line. Barnes summarized his experience as follows:

Telling all of those high-ranking NCOs [non-commissioned officers] that participating in war was against my beliefs and morals was one of the hardest things I have had to do in my life. I could think of no one worse to have to explain my objection to war to than a CSM [Command Sergeant Major],who has been in the military his whole life, eats, breaths, and sleeps combat, and is known for his intimidation and temper. I not only had to face 1 CSM, I had to face 3 and 2 ISGTs [first sergeants]. I was very intimidated and it took great courage, but I did because I knew I had to follow my conscience and listening to God is more important than fearing the wrath of high-ranking NCOs and Officers while in a war zone. I felt very confident I was doing the right thing and my soul was at ease when doing so. I felt like God was with me. *Id.*

Although Barnes stated that after declaring his beliefs “my soul was at ease”, he admitted “[m]y daily life has not changed in my actions, so much as it has in my thoughts.”

On January 1, 2007, Barnes submitted his written application for discharge from the Army on the Basis of Conscientious Objection in the form required by AR 600-43 to his company commander, Captain Hopkins. The applications stated that his participation in the war or the military “goes against [his] faith in God, [his] Morals, and [his] Ethics.” That his spirit was tormented by involvement in the support of the war and it was severely affecting him. He described how he was “saved” in 2001, and how he spent significant time in the two years prior to his enlistment working in Christian-based youth programs. He stated that he enlisted because he always wanted to be a soldier and so he “could serve the Lord through service by defending freedom and helping other people in countries no one else would help.” He further stated that he had come to believe that some of his peers were “amoral, lacking faith, and enjoyed killing the enemy.” His prepared statement also included the statement: “When evil is all around me, I stand firm in my beliefs and encourage others to do the same. He stated that it was very intimidating for him to inform several Command Sergeants Majors within his unit that he was a CO. During his so informing them Barnes did not mention any alleged atrocities he had witness or heard about. The application contained supporting letters from family, a friend and a former employer.

Captain Hopkins began his own inquiry. Hopkins obtained statements from individuals that he thought would shed a negative light on the application. Hopkins also questioned a soldier who had submitted a statement on behalf of Barnes.

On January 4, 2007, Chaplain Andrew Lawrence interviewed Barnes per AR 600-43. Chaplain Lawrence stated in his report that Barnes’ “convictions arise out of what he describes as his non-denominational Christian faith, morals and beliefs - his core values - which have developed over the last six months of daily prayer and scripture

reading." Chaplain Lawrence stated: "while CO is not a requirement of Christian practice, it is consistent with both Christian Scripture and lived tradition." He also stated that Barnes "gives the appearance of genuine sincerity in his Christian beliefs. The consistency of his demeanor and general lifestyle indicate sincerity." Barnes "spoke with a passion when questioned on his personal conviction and individual beliefs." As required by AR 600-43-2-3(a)(2)(h), Chaplain Lawrence did not make a recommendation on whether the application should be approved. (Lawrence Letter; PA, Exhibit B.)

On January 13, Barnes was given a mental health examination by Major Overstreet pursuant to AR-600-43. Overstreet concluded that Barnes had no diagnosis or condition under any Axis of the DSM-IV. (January 13,2007, Behavioral Health Evaluation; PA, Exhibit B.)

On January 15,2007, Barnes submitted a Request for Redress under Article 138 of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. §938. The Request for Redress was a result of Captain Hopkins' interference with and directing of the investigation of Barnes' claim, including interviewing witnesses under his command, suggesting changes to their statements, and soliciting and placing witness statements in Barnes' application packet. (January 15,2007 Request for Redress Under Art. 138; PA, Exhibit B.)

On January 14,2007, Respondent Colonel Garrett appointed Major James D. Clay as the Investigating Officer for Barnes' application, pursuant to AR 600-43-2-4. On January 23, Major Clay held a hearing wherein he interviewed Barnes. At the interview, Major Clay received a number of unsolicited letters from other members of Barnes' unit. Most of the witnesses who testified orally were previously contacted by Captain Hopkins in his effort to show Petitioner to be insincere. Major Clay relied on the testimony of those witnesses and disregarded Barnes' oral testimony, personal statement, and supporting letters. (PA, Exhibit B.)

After the hearing on January 23, Major Clay prepared a report of his investigation. Major Clay determined that Barnes' religious or moral stance against war was not sincere and fact based, and recommended that he not be granted a discharge on the basis of conscientious objection. (PA, Exhibit B.)

On February 1, 2007, Barnes submitted a rebuttal to Major Clay's report, pointing out the legal and factual errors in the report. The report and supporting documents were then sent up the chain of command for recommendation. On February 3, Captain Hopkins and Colonel Garrett recommended disapproval. On February 18, Staff Judge Advocate Grady, the attorney for the command, sent the application packet back to Major Clay due to his failure to follow the procedural requirements of AR 600-43. (PA, Exhibit C.)

Judge Advocate Grady determined that it was not clear whether the transcripts accurately summarized the testimony of the witnesses. She also found that the report did not state the underlying basis of Barnes' objection to war, and that the Investigating Officer's "broad conclusions do not appear to be based on the facts contained in the entire record." Judge Advocate Grady referenced specific examples in her memo sending the case back for further action. *Id.*

On February 22, 2007, Major Clay issued a response to Judge Advocate Grady's memo. Major Clay's response purported to address Grady's concerns but nevertheless recommended against a conscientious objection discharge. Clay stated that Barnes' objection to war was "personal in nature," that he is insincere because his packet was submitted 3-4 weeks after he came to the realization that he was a conscientious objector, and not earlier, and that the packet was "fabricated" because his beliefs were not formed or mature at the time he submitted his packet. He opined that if he was a "true conscientious objector, he would have informed the command as soon as he felt he could not support the war because of his Christian beliefs." Major Clay ignored

evidence in the record that Barnes had expressed conflicts with his religious beliefs in November and December of 2006 to a mental health counselor. *Id.*

Barnes' counsel filed a second rebuttal requesting a new hearing. That request was not granted.

On February 23, Commanding General Fils recommended disapproval of the application. *Id.* On September 5, 2007, the Department of the Army Conscientious Objector Review Board (DACORB) recommended disapproval of the application. The vote of the panel was 2-1, with the Chaplain on the Board recommending approval. (PA, Exhibit D.)

The decision by DACORB denying the application is the final administrative decision by the Army, AR 600-43, '2-8, and therefore Barnes has exhausted his administrative remedies.

The two members of DACORB who voted to deny the application stated their reasons in their decision, which is summarized herein. (1) Staff Judge Advocate: Barnes' sincere Christian beliefs are not the equivalent of an objection to war, and "nothing in the application" establishes clear and convincing evidence of an objection to war. Barnes' supporting letters from friends and family suggest a sincere opposition to war in all forms, but they are not credible based on Barnes' previous attitudes towards the infantry, the timing of the application, and the statements of his chain of command. (2) Assistant President: The timing of application and reasoning suggests convenience rather than in-depth conviction, e.g. his late submission of an official application on January 11, 2007. Other than reading the Bible and quoting biblical phrases, and second guessing his decision to join the army, the applicant expressed little evidence of a sincere and rooted objection to war. He was diagnosed as depressive. His explanation of his beliefs and lifestyle changes are weak and general, are not supported by actions, and are more as afterthoughts than lifestyle changes. Furthermore, he did not receive an endorsement (for CO status) from his chain of command. *Id.*

The Staff Chaplain voted to approve the application and the President of the Board apparently abstained. The Staff Chaplain stated:

The statements of those who know him best validate the internal conflict between his faith beliefs and his service in the Army. The statement by Dr. Moran further validates the internal conflict and concludes that his struggle with depression will not get better until his spiritual-social struggle is resolved. Though I do not perceive PFC Barnes faith to be mature in its thought process, it does seem to be the driving force behind his decision. His resolve not to participate in engaging the enemy is based on his religious convictions. *Id.*

#### **DISCUSSION**

For purposes of 28 U.S.C. §2241, servicemen are in "custody" – that is suffer a restraint of liberty – and may seek a writ of *habeas corpus* after exhausting all available administrative remedies. *Parisi v. Davidson*, 405 U.S. 34, 35 (1972); *Schlanger v. Seamans*, 401 U.S. 487, 489 (1971); *Oestereich v. Selective Servo Sys. Local Bd.*, 393 U.S. 233, 235 n. 5 (1968). Barnes' unit is based in Anchorage, Alaska, which is within the territorial jurisdiction of this court.

First, the court readily dispenses with the question of whether Barnes' made a *prima facie* case of conscientious objection. A CO applicant makes a *prima facie* case by making nonfrivolous allegations of facts that have not been previously considered and if true would be sufficient under regulation or statute to warrant granting the requested classification. *Mulloy v. United States*, 398 U.S. 410, 416 (1970). Barnes reply brief deftly points out that the Army simply mis-characterizes his application as being on political grounds. While there is evidence that Barnes' had political views on

the war in Iraq, something he freely admitted at the hearing, his application plainly states: "I do not believe in any war or the military lifestyle that prepares for and supports war. My participation in such goes against my faith in God, my Morals and my Ethics". He continues: "I am a Christian and being part of the military, which supports and wages war goes against my faith, morals, and beliefs." It is hard to imagine a plainer statement in making a *prima facie* case. At the hearing he testified: "My religious views do not support any war." Moreover, the letters of support he provided strongly support the notion that he is sincere in his religious beliefs, and not someone who suddenly and conveniently found God. Barnes made a *prima facie* case for CO status. Ergo, the burden shifted to the Army to provide a rational basis for denying Barnes's application. *Dickinson v. United States*, 346 U.S. at 389, 396-397 (1953). Once Barnes made a *prima facie* showing that he is opposed to all wars, that his opposition is based on religious or moral training and belief, and that he is sincere in his beliefs, the military bears the burden of demonstrating a "basis in fact" for denying the application. *Estep v. United States*, 327 U.S. 114, 122 (1946)

Because Barnes made his *prima facie* showing by clear and convincing evidence, and bearing in mind the legal standard set forth *supra*, the court's focus in this case is on whether there is substantial evidence in the record to support the Army's determination, or, as Barnes urges, whether there was plenty of substantial evidence to support his CO application but only superficial evidence from a likely tainted process supporting the Army. The court concludes that in his rebuttal statements, Barnes' then counsel, Mr. David C. Miner, correctly assessed the problems with the Army's processing and decision of Barnes' application, and the deficits in the process coupled with the Captain Hopkins' investigative actions, demand a decision in Barnes' favor.

Using the rebuttals as a roadmap, the court begins with Barnes' Company Commander – Captain Hopkins – activities. After Barnes' expressed his concerns over Captain Hopkins' in a request for redress, Hopkins acknowledged misinterpretation of

AR 600 - 43 and that his independent investigation was a mistake. He also responded that Barnes' CO application packet was presented to an independent investigating officer who would determine which statements would remain in his packet. The witnesses called by Major Clay at the hearing included several who had provided Hopkins with written statements, and their's and the other written statements were taken into evidence by Clay. There is nothing in the record to suggest that Clay made any effort to ensure that Hopkins' activities were probed so as to ferret out the obvious risk of bias and prejudice they might have had on the evidence presented. Taken in a vacuum, there is nothing in this observation which meets the above discussed legal standard for deciding against the Army. But it takes little imagination to see that this evidence was quite possibly tainted, and the fact that it was not sufficiently probed for taint serves to permeate the reliability of both the evidentiary process and the decision against Barnes' application. Thus, while the court is not in a position to pass on Barnes' broader allegations of witness tampering and the soliciting of evidence against Barnes, the inappropriate investigation weighs against the Army.

The evidence taken by Major Clay at the hearing itself consisted of soldiers whom he asked a series of very sweeping, shallow, and compound questions, to which he received replies given in the short clipped responses typical of military discourse. These were made part of summary transcription which was considered with the documentary evidence. An example of the question and answer taking of testimony is as follows exactly as recorded in the summary transcription:

Testimony of Lieutenant Colonel Warren:

Q. How long have you been in the military, how long have you known PFC Barnes and in what role?

A. Since APR 06, my driver...

Q. Please discuss PFC Barnes performance and motivation towards being an infantry paratrooper.

A. Soldier was a motivated infantryman and wanted back on the line.

Q. Did you see any indicators of an internal struggle or a maturing process of his moral, ethical, or religious views that would cause him to make a stance against war?

A. None.

Q. Did this soldier goto (sic) church or other religious activities?

A. No.

Q. Was his Conscientious Objector stance a gradual maturing or a sudden change?

A. Sudden, first heard of 22 Dec...

Q. Do you feel he is sincere in his request to being a conscientious objector?

A. No.

The court will not regurgitate the other testimony. Suffice it to say that it all shares a sameness for its profound lack of probing questions by Major Clay. Lieutenant Colonel Warren's testimony epitomizes the absence of meaningful probative evidence that the questions and answers provided. Leaving aside the absence of foundational questions to show that the witnesses would likely have personal knowledge of what they testified to, the answers prove nothing. Lieutenant Colonel Warren's point-blank opinion that Barnes' request was not sincere is so conclusory that it is matched only by his answer to the question of whether Barnes' showed any internal struggles regarding his decision. Other than showing that Warren has an opinion based on virtually nothing at all, what does it matter that he was not aware of the Barnes' inner feelings? He also did not testify that he was aware that Barnes concocted his story. Does that mean it was not concocted? Of course not, and the Army would be quick to point that out. That means that the evidence raises a suspicion, but cannot form the foundation of a rational basis finding. As for his having been a motivated infantryman, a theme that shows up throughout the testimony, one would be left convinced that the

Army has concluded that a good soldier cannot also become a conscientious objector. Surely that is not the case, making this evidence equally without substance. In short, all of the testimony the Army relies upon equates to little more than thin air.

The Army "must show some hard, reliable, provable, facts which would provide a basis for disbelieving the applicant's sincerity, or it must show something concrete in the record which substantially blurs the picture painted by the applicant." *Smith v. Laird*, 486 F.2d 307, 310 (10th Cir. 1973); *Shaffer v. Schlesinger*, 531 F.2d 124, 128 (3rd Cir. 1976). Much is made of the fact that Barnes did not attend church services in Iraq. While attendance or non-attendance of church services might hold sway if there were other facts showing a sudden and convenient getting of religion, surely the Army agrees that it is not its province to suggest there is a proper way to be a Christian, or for that matter, to lay claim to or practice any other form of religion. That being the case, the evidence of not attending church here is too thin to provide the requisite basis in fact for the denying Barnes' application. Again, the Army's evidence is mere suspicion/speculation, and uncontroverted evidence supporting a *prima facie* case for CO status cannot support a denial on the basis of suspicion of or speculation. *Id.* And there is evidence aplenty in support of Barnes' application. His own statements, his supporting letters, and perhaps most importantly the Chaplain's conclusions:

The statements of those who know him best validate the internal conflict between his faith beliefs and his service in the Army. The statement by Dr. Moran further validates the internal conflict and concludes that his struggle with depression will not get better until his spiritual-social struggle is resolved. Though I do not perceive PFC Barnes faith to be mature in its thought process, it does seem to be the driving force behind his decision. His resolve not to

participate in engaging the enemy is based on his religious convictions.

The fact that Barnes' thought processes may not have been "mature" is of no moment. One need not be a St. Augustine or a St. Thomas Aquinas to qualify as CO, indeed conscientious objection has no necessary relation to intellectual sophistication. *Helwick v. Laird*, 438 U.S. 959, 964 (5th Cir. 1971); *U.S. v. Setter*, 445 F.2d 472, 478 (5<sup>th</sup> Cir. 1971). In point of fact, the Army regulations provide:

Beliefs can be deeply held even though they lack sophistication. Care must be taken to avoid the inference that an applicant who lacks sufficient insight or knowledge to express his or her beliefs clearly does not hold the beliefs, or that they are not "religious" in origin or held with the strength of traditional religious convictions.

AR 600-43, Glossary, Section II, "religious training and belief".

The evidence is overwhelming that Barnes – once a motivated infantryman – is a person who takes his religious beliefs seriously, and there is strong evidence that his decision was motivated by those beliefs. The Army's contention that the timing of his decision makes it suspect is sound. But taken in context it is only a sound suspicion, not the stuff of a decision grounded in a rational basis in fact. True, the timing of Barnes' decision is suspect. But that alone cannot be the basis for denying his application. *Christensen v. Franklin*, 456 F.2d (9<sup>th</sup> Cir. 1972). Quite simply, the Army hung its hat on facts of little consequence and was swayed by conclusions based on speculation and suspicion. This was in no small measure due to an obvious ignoring of the facts Barnes presented which showed him to frequently read the Bible and to have a long history of change based upon an evolving and often intense engagement with his Christian faith. Pivotal to this analysis is the concept of "crystallization" of one's beliefs. The timing of crystallization might cast doubt upon the genuineness of some

claims, but there is no reason to suppose that such claims could not be every bit as bona fide and substantial as those whose conscientious objection ripens sooner. *Ehlert v. United States*, 402 U.S. 99, 103-104 (1971). Such is the evidence of Barnes' crystallization, and the Army has shown no hard factual evidence to the contrary. Instead, its briefs and its oral argument rely almost exclusively on the timing of his crystallization. At oral argument, the Army makes much of the fact that Barnes did not mention his reading of Matthew 16:25 and his realization that his religious belief made him opposed to participation in any form of war, was not made known until December after he was told that he would replace a wounded gunner. But this ignores evidence that for months previous to December he was seen by Specialist Flinner to become less motivated as a soldier and more concerned about his Christianity. Likewise, Specialist Schreiber wrote that Barnes was always reading the Bible or a training book, and that he began to see changes in Barnes after he was switched to the RTO. According to Schreiber, those changes were such that he had more time to read that Bible and that he learned that his life was more valuable helping others rather than hurting them. Schreiber also wrote that Barnes went on to seem the exact opposite of how Schreiber previously viewed him. This, and other evidence about Barnes reading the Bible (Sergeant Blough), was given short shrift by Major Clay. Rather, DACORB was presented with a summarized transcript that emphasized snapshots of evidence which provided only opinions about Barnes' sincerity, but did not include hard factual bases for those opinions. Furthermore, the Army makes much of Barnes not exhibiting lifestyle changes during this period. This is of no moment. Again, his choice not to attend church services is not determinative, and lifestyle changes in a combat zone are obviously limited. As was suggested at oral argument, feeding the homeless of Baghdad was not a plausible option. Likewise, Barnes' failure to speak out regarding misconduct he understood other soldiers to have engaged in (some of which he claimed to have

witnessed) is not – as the Army would have it – sound evidence that he was not distressed by such alleged conduct.

The Army is correct that the sincerity of CO applicant is measured by facts, and the Army’s judgment of sincerity is given great deference. *See* The Legal Standard *supra*. Here, the question of sincerity is in sharp contrast to a case upon which the Army relies heavily in its opposition. *See Boyd v. Hagee*, 2008 U.S. Dist. Lexis 12337, 9-10 (S.D.Cal. 2008).<sup>2</sup> There, as the Army summarizes the decision, the court found “several facts in the record which cumulatively support a finding of insincerity.”

- (1) the interviewing chaplain’s determination that “while petitioner believed killing was wrong,” petitioner is using the CO process to expeditiously leave the military.
- (2) “the petitioner never discussed his opposition to war with anyone in the military, either on deployment in Iraq nor while stationed at Camp Pendleton.
- (3) “a non-commissioned officer from petitioner’s unit stated that [petitioner] seemed to be a motivated Marine . . . who exhibited a tendency to manipulate situations to get what he wanted;”
- (4) the IO’s recommendation noted that “expediency and avoidance of further military service was primary . . . factor in his submission of this application;” and
- (5) a fellow Marine from petitioner’s unit advised the IO that petitioner “intended to get out of the Marine Corps with an honorable discharge anyway possible.”

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<sup>2</sup> *Boyd v. Hagee*, 2008 WL 481974, S.D.Cal., February 19, 2008 (NO 06CV025 (RRB))

The “*cumulative*” evidence in the instant case makes for a very different picture. There is no evidence that Barnes was manipulative or acting in an expedient fashion to do whatever it took to get out of the Army with an honorable discharge. The *Boyd* case actually supports Barnes, not the Army.

Major Clay’s and the DACORB’s reliance on Barnes’ mental health history is of no avail to the Army’s case. There is no factual basis from that history that is necessarily inconsistent with his application for CO status. Again, the Army – as did Major Clay in his recommendation – relies on speculation that his medical and personal problems only are at the root of his decision to apply for CO status. But this is speculation, and, as the Staff Chaplain who voted in favor of approving Barnes’ application concluded: “The statement by Dr. Moran further validates the internal conflict and concludes that his struggle with depression will not get better until his spiritual-social struggle is resolved.”<sup>3</sup> At oral argument the Army made a confusing statement regarding the presentation of some of the mental health records presented to the court by the petitioner, and seemed to be saying those records were not seen by DACORB. On the other hand the Army seems to acknowledge that consideration of them is proper, although the Army maintains they actually support its position since they support their theory that the timing of Barne’s crystallization was convenient rather than sincere. The Army’s opposition brief is silent on this matter, and reference to Major

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<sup>3</sup>The court is not persuaded by the Army’s argument that the letter from Dr. Moran dated January 31, 2007, which the Chaplain relied upon is not credible because in that letter Dr. Moran states that he saw Barnes from the “first of November to the end of December”. The Army posits that: “Prior to November 28<sup>th</sup> [2006] there’s no record of him visiting with Dr. Moran until the December 22<sup>nd</sup> [2006] mention of conscientious objector status ..... the objective facts show that Dr. Moran only saw him twice and only at the same or (indiscernible - telephonics) instantaneously at the time that he was filing his conscientious objector packet did he reveal to mental health professionals that he had religious-based difficulties with his job performance.” This is a return to the Army’s theme that the timing of Barne’s crystallization is suspect. While the timing was understandably suspect, the only hard evidence in the record is in support of Barnes’ claim that he was in the throws of a struggle over his religion and his participation in war.

Clay's recommendation leaves one with the impression that some of Barnes' mental health records were attached thereto. They left Major Clay to conclude that his previous treatments for depression were found to be due to non-religious stressors. Perhaps if the Army files objections to this recommendation it can clarify its position therein. Suffice it to say that while this is a "record review" case: (1) Where the petitioner is claiming that the Army failed to thoroughly consider his case and essentially "cherry picked" facts against him, facts not considered constitute an important part of the record when considering the "cumulative evidence"; and (2) DACORB – certainly the DACORB Staff Chaplain – obviously considered Dr. Moran's letter. Barnes' oral argument was equally uninformative regarding the mental health records. Perhaps any objections he files to this recommendation, or responses to objections by the Army, will help to clarify this point.

Furthermore, Barnes is correct that the Board's reliance on the fact that his chain of command did not endorse his application does not amount to "a basis in fact". Rather, the chain of command's conclusions would only be important if they supplied the reliable and substantial evidence needed to form a basis in fact. The fact that he had not previously informed superiors about his evolving feelings is not hard evidence that he did not sincerely have those feelings. Again, the Army's findings regarding Barnes' beliefs are not supported by the requisite factual basis.

In short, Major Clay's encapsulation of the evidence through his limited questioning and muted summary of the record (including his recommendation and rebuttal responses) – (whether or not viewed in light of Captain Hopkins' investigative activities) – makes it impossible to conclude that DACORB had a basis in fact for its decision. Indeed, a review of the broader record does not fill in these gaps, but only serves to punctuate the absence of facts in the Army's favor. At oral argument the Army urged that a DACORB decision need only state its reasons, and is not required to state the factual basis for those reasons. The Army is correct, but that does not subtract from

the need for such a factual basis to exist in the record. Again, however, the facts that the Army relies on fall far short of hard evidence. In light of the sound *prima facie* case presented by Barnes, the record is rife with evidence that only supports the sort of suspicion and speculation that is “foreign to our concepts of justice”. *Dickinson*, 346 U.S. at 397. True, Barnes counsel had the opportunity to question the witnesses at the hearing. But this is of no avail to the Army since he had already made his *prima facie* case and the burden had shifted to the Army. The Army failed to satisfy that burden. Instead, it does not dispute that Barnes is a sincere Christian, but finds his application for CO status to be insincere without providing hard evidence for that conclusion.

This leaves the court to decide whether this case should be remanded to DACORB or whether the writ should be granted outright and mandamus issue directing the Army to discharge Barnes. *Hanna v. Secretary Of The Army*, 513 F.3d 4, 16-17 (2008) is squarely in Barnes’ camp. As discussed therein, including citation/discussion by the Ninth Circuit, remand is not appropriate here because the record below does not reflect flaw in any aspect of the proceedings, evidence, or decision, except that the decision does not have a hard factual basis.

The DACORB’s denial of Hanna’s application is not flawed “by mistaken legal premises, unsustainable subsidiary findings, or doubtful reasoning.” See *Castaneda- Castillo v. Gonzales*, 488 F.3d 17, 25 (1<sup>st</sup> Cir. 2007). Nor is this a case of procedural defect as reflected in the cases cited in the Army’s reply brief. See *Friedberg v. Resor*, 453 F.2d 935, 938 (2d Cir. 1971) (remanding without reaching merits where Board failed to observe military regulations in reviewing application); *Coates v. Laird*, 494 F.2d 709, 712 (4<sup>th</sup> Cir. 1974) (remanding where military failed to state reasons for its decision, as required

by regulations); *Sanger v. Seamans*, 507 F.2d 814, 819 (9<sup>th</sup> Cir. 1974) (remanding where document on which Secretary relied in reaching decision was missing from record). Remand is improper where, as here, there are no procedural defects, “[a hearing] has already taken place with a finding favorable to [the applicant] and the record reveals no other possible basis for a finding of insincerity.’ *Goldstein v. Middendorf*, 535 F.2d 1339, 1345 (1<sup>st</sup> Cir. 1976). *See also Coates*, 494 F.2d at 712 (stating that remand is not appropriate where “the record shows that there is ‘no basis in fact’ for denial on any valid ground.

Barnes’ case is one which is without defects other than “no basis in fact” for denial on any valid ground.

#### CONCLUSION

Because there no basis in fact for rejecting Barnes’ *prima facie* showing that he was a conscientious objector, his petition for writ of *habeas corpus* and *mandamus* should be **GRANTED**. Accordingly, the Army should be ordered to grant Barnes an honorable discharge consonant with his service record and his status as a conscientious objector.

DATED this 15<sup>th</sup> day of May, 2008, at Anchorage, Alaska.

/s/ John D. Roberts

JOHN D. ROBERTS

United States Magistrate Judge

Pursuant to Federal Rule of Civil Procedure 72(b), a party seeking to object to this proposed finding and recommendation shall file written objections with the Clerk of Court no later than **the close of business on May 21, 2008**. The failure to object to a magistrate judge's findings of fact may be treated as a procedural default and waiver of the right to contest those findings on appeal. McCall v. Andrus, 628 F.2d 1185, 1187-1189 (9th Cir.), cert. denied, 450 U.S. 996 (1981). The Ninth Circuit concludes that a district court is not required to consider evidence introduced for the first time in a party's objection to a magistrate judge's recommendation United States v. Howell, 231 F.3d 615 (9<sup>th</sup> Cir. 2000). Objections and responses shall not exceed **five (5) pages** in length, and shall not merely reargue positions presented in motion papers. Rather, objections and responses shall specifically designate the findings or recommendations objected to, the basis of the objection, and the points and authorities in support. Response(s) to the objections shall be filed **no later than the close of business on May 23, 2008**.

Reports and recommendations are not appealable orders. Any notice of appeal pursuant to Fed.R.App.P. 4(a)(1) should not be filed until entry of the district court's judgment. See Hilliard v. Kincheloe, 796 F.2d 308 (9th Cir. 1986).