OF PATRIOTISM AND CONSCIENCE

OCTOBER 21, 1968 MORSE JOHNSON

In recent months many automobile bumpers have blossomed out with stickers which decree "This is America, Love it or Leave it." Now it is obvious that the composer of this injunction, and the surprising number of car owners who are broadcasting it, have not been enlisted by the United States Chamber of Commerce. The America which they are commanding us to love or leave is not the America The Beautiful America with its purple mountains and amber waves of grain. Nor is this a call to join in singing our faith to the land of the free and the home of the brave. Nor would one of these car owners, I am certain, have chosen as a substitute sticker, had it been offered, Sir Walter Scott's romantic phrasing:

"Breathes there a man with soul
so dead,
Who never to himself hath said,
'This is my own, my native land'".

Contrary to the affirmations of all the familiar patriotic rituals, songs and pledges, this fiat to love or leave reflects rancor and malevolence. It is intended to and does carry the menacing implication that there are among us many whom the hawkers of the command have decided to label un-American. This is destructive not constructive for when patriotism is used by partisans it becomes divisive rather than unifying and when patriotism is used to besmirch rather than bestir it loses its aura of clean nobility.

Moreover, as with all others who wrap themselves in the American flag these advocates by bumper stickers also are proclaiming a certainty of the rectitude of their own Americanism while at the same time assailing the iniquity of those against whom they have opened fire. Such certainty can never stand the test of fair and objective inquiry. There is no one and only American way. No one person or group has been endowed with unerring omniscience. The pronouncements of the founding fathers and the provisions of the United

States Consitution do not provide self-executing guidelines. In fact, the very nature of a free society with its encouragement of diversity and its tolerance of dissent profoundly militates against both the wisdom and the validity of any self-asserted claim to a superior Americanism. So it would seem that all of us should at once reject, if not dondemn, any attempt to identify one side of an issue and its advocates with loyalty and the other side and its advocates with disloyalty.

But very few of us consistently do. We are most likely to forget this salutary principle when faced with outspoken protest in time of war. The supreme act of patriotism - the one glorified in song and legend - is to die on the battlefield while fighting for one's country. When their lives are gallantly being contributed by hundreds of Americans every day, and when the country resounds with the full panoply of patriotic regalia, any who question the cause are inevitably accused of disloyalty. The atmosphere at such times becomes increasingly stifling and the hostility toward dissenters increasingly bitter. Mark Twain described it as follows:

> "I can see a million years ahead, and this rule will never change in so many as half a dozen instances. The loved little handful - as usual - will shout for war. The pulpit will - warily and cautiously - object at first; the great, big, dull bulk of the nation will rub its sleepy eyes and try to make out why there should be war, and will say earnestly and indignantly, 'It is unjust and dishonorable, and there is no necessity for it.' Then the handful will shout louder. A few fair men on the other side will argue and reason against the war with speech and pen, and at first will have a hearing and be applauded; but it will not last long; those others will outshout them, and presently the anti-war audience will thin out and

> lose popularity. Before long you will see this curious thing; the speakers stoned from the platforms, and free speech strangled by hordes of furious men who in their secret hearts are still at one with the stoned speakers - as earlier - but do not dare to say so. And now the whole nation - pulpit and all - will take up the war cry, and shout itself hoarse, and mob any man who ventures to open his mouth, and presently such mouths will cease to open."

The best proof of the accuracy of Mr. Twain's apprehensions of the extent to which even the most responsible can become irresponsible in the climate of opinion generated by the pressures of war is the venon which Theodore Roosevelt spewed at the anti-imperlialists who denounced our participation in the Spanish-American War. "Traitors" and "perverse lunatics" and "malignant liars" were the names he applied to ex-Presidents Grover Cleveland and Benjamin Harrison, to former Secretary of State John Sherman, to Speaker of the House of Representatives Thomas Brackett Reed, to industrialists Andrew Carnegie and George P. Peabody, to college presidents Jacob Gould Schurman of Cornell and David Starr Jordan of Stanford and to reformers Charles Francis Adams, Jr., Carl Schurz and Jane Addams.

These distinguished Americans felt obligated not just to call on others to do or die but instead to reason why and having so reasoned, found the why wanting. They not only questioned but they questioned eloquently, effectively and dramatically. Representative Reed even resigned as Speaker of the House - the post he had for so long graced with so much vigor and skill. Such questioning of the justification of the purposes of a war and the killing which is part of it opens many vistas and presents many dangers. One of these was pointed out by Lord Ragland the blunderer who led the charge of the British Light Brigade in the Crimea. He advised:

"It will be a sad day when England
has her armies commanded by men
who know too well what they are
doing. It would smack of murder."

On the other hand the gentle and esteemed philosopher Justice Oliver Wendell Holmes endowed blind heroism with cosmic significance by confessing:

"I do not know what is true. I do
not know the meaning of the universe.
But in the midst of doubt, in the
collapse of creeds, there is one
thing I do not doubt . . . and that
is that the faith is true and
adorable which leads a soldier to
throw away his life in obedience to
a blindly accepted duty, in a cause
which he little understands, in a
plan of campaign which he has not
notion, under tactics of which he
does not see the use."

Messr.s Gilbert and Sullivan may have fully agreed with this tribute to the personal courage of the soldier on the battlefield but they also exposed the frequent senselessness of it. Although the Pirates of Penzance presented no threat whatsoever to the security of England, the Major General's daughters, enthralled with the joy and grandeur of heroic death, exhorted the frightened policemen as follows:

"Go, ye heroes, go to glory
Though ye die in combat gory
Ye shall live in song and story.
Go to immortality!
Go to death, and go to slaughter;
Die and every Cornish daughter
With her tears your graves shall water!
Go, ye heroes, go and die!
Go, ye heroes, go and die!

Go and do your best endeavor,
And before all links we sever,
We will say farewell forever.
Go to glory and the grave!

Go to glory and the grave!

On the other hand there have been throughout history many men who have girded their loins and taken up their muskets in full knowledge of the perils involved and certain of the reasons why. None spoke more movingly than the poet Rupert Brooke who, ashe marched off to death in World War I, inscribed the following testament:

"If I should die, think only this of me,
That there is some spot in some
foreign field
That is forever England."

Even though the inspiration of the Rupert Brookes of this world and the jingoistic thunderings of the Theodore Roosevelts when conjoined with the parades and songs, orations and editorials, create the kind of atmosphere and climate of opinion which Mark Twain was certain would always prevail when the bugle call sounded and the ramparts need be manned, and even though the men who serve in and seek elective office have sensitive, voter-attuned ears, the United States during World War I, World War II, the Korean War and now the war in Vietnam consistently provided by law a protected classification for any able-bodied man who asserted and could prove his sincere opposition to the use of force and arms as a method of settling disputes. Such a conscientious objector classification, moreover, was established by a law duly passed and never repealed by Congress in the face of a decision by the Supreme Court of the United States that it was not constitutionally required. In U. S. v McIntosh, the Court stated:

"The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because and only because, it has accorded with the policy of Congress thus to relieve him ... No other conclusion is compatible with the well-nigh limitless extent of the war powers . . . which include, by necessary implication, the power, in the last extremity, to compel

> the armed service of any citizen in the land, without regard to his objections or his views in respect to the justice or morality of the particular war or of war in general."

The original section of the Universal Military Training Act defined the classification thusly:

> "Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

The two phrases in this Section which I wish to explore in some depth and which have produced the most litigation and controversy are: - (l) "by reason of religious training and belief" and (2; "participation in war in any form." A Selective Service registrant named Berman was refused classification as a conscientious objector and was classified 1-A as available for military duty. He reported for induction as ordered but refused to be inducted. This procedure, by the way, became the best method by which an objecting registrant could successfully attack his classification in the courts. Failure to report for induction was deemed a failure to exhaust all administrative remedies - a prerequisite to any court action. Had he accepted induction and entered the Armed Forces and later attempted to upset his classification by habeas corpus the rules and procedures applicable to men in the Armed Forces would have controlled and these considerably reduce the scope of judicial inquiry.

But registrant Berman took the right steps to get his case substantively not just procedurally before the Court. The record in his case shows that all persons called upon to form an opinion of Berman as a person agreed unanimously and enthusiastically that he was a superior human

being - "courageous" according to the Hearing Officer of the Department of Justice; "devoted to worthy objects of human service" according to ministers, teachers and friends; and "pure, admirable and steadfast" according to all three judges of the U.S. Ninth Circuit Court of Appeals. Yet a majority of these same judges found that the local Draft Board had correctly classified him 1-A since his conscientious opposition to war was based entirely on philosophical, moral and sociological grounds without any relation to the concept of a deity and thus according to a majority of the Court were not by reason of religious training and belief as required by the statute. Thus, the case of Berman v. United States engrafted onto the Selective Service procedures the condition that a claimant for C.O. classification must, in addition to all other requirements, show that his opposition was grounded on the belief in a deity.

Since other Federal Circuit Courts had not been so explicit in their definitions of religious training and belief and in some instances had even rendered decisions which could be deemed in conflict with the Berman case, and since the Supreme Court of the U.S. had not resolved such inconsistencies in this area, the United States Congress decided to eliminate the resulting confusion and to bring about certainty. It, therefore, added to the critical section the following language:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

As a consequence of this amendment every local Draft Board and every court without exception thereafter required both on the forms supplied for such purposes and in personal interviews that each registrant claiming conscientious opposition to

war affirm and demonstrate a clear and necessary-dependency of his convictions on a literally and traditionally defined religious "Supreme Being". Thus, no matter how sincerely he held his beliefs and no matter how worthy his record and his character - and the Federal Reporter System has a great number of reported cases in which the defendant is consistently shown to have the very finest qualities - no matter all other consider-ations, unless the registrant could show or was willing to claim allegiance to an orthodox religious creed, he could not be classified 1-0 as a conscientious objector. The dilemna this created for the sincere 18 year old young man who was not a communicant in one of the traditional religions or whose beliefs were grounded on morality and bn love of man not love of a God is apparent. He could only avail himself of the 1-0 classification by falsely swearing that the basis of his beliefs, were in a relation to an orthodox Supreme Being. If he did not so swear falsely, he would of necessity be classified for combatant service against which he held profound and transcendent convictions. He further knew that if he did not accept induction for combatant service, he would be indicted, tried and found guilty of a crime. A number of reported decisions show that many young men wereforced into this position and ultimately served prison terms despite the first clause of the First Amendment to the United States Constitution which provides:

> "Congress shall make no law respecting the establishment of religion . . . "

The obvious violations of this constitu-tional mandate which the Supreme Being clause created and the injustices it too frequently perpetrated were destined to be terminated provided the dedication of a draftee and the skill of a lawyer and the creative intelligence of a court combined. They finally did and in Seeger v United States the Second Circuit Court of Appeals held that the then existing literal and traditional interpretation of the Supreme Being clause was un-const ilutional since it discriminated between religious beliefs by providing a C.O. classification

for some - the traditionalists - and not for others - the humanists. This, of course, forced the issue into the Supreme Court of the United States, which Court while ruling for Seeger and directing his Local Board to reclassify him from 1-A to 1-0 did not fully resolve the problem.

The Court did not hold the Supreme Being clause unconstitutional since it undoubtedly reasoned that to do so would have played havoc with the Selective Service System. Instead, it simply interpreted the Supreme Being clause into a surface constitutionality by holding:

> "Within that (clause) would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religions, exempting some and excluding others. . "

This is judicial craftsmanship pure and simple. The clause and the statute are saved by a contrived interpretation which eliminates much of its vulnerability. But the Court really did not rid the statute of another fatal flaw. As of this moment that statute operates unconstitutionally and unfairly since any man who professes a religion of whatever variety or sort will, if he meets all other tests, qualify for a C.O. classification. But any man who does not profess a religion and who bases his opposition on philosophical grounds or a set of moral principles cannot qualify even though he meets all other tests.

Stated more concretely but without distortion or exaggeration, the Quaker who is con-

scientiously opposed to the use of force may be classified 1-0 but the atheist who is no less sincere and as profoundly committed can never be. This result runs squarely afoul of the following unequivocal language of the Supreme Court in Torasco v. Watkins holding that Maryland could not require a declaration of a belief in God as a qualification for public office. It stated:

> "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or a disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."

This means that Congress cannot favor religions by providing a favored classification for all communicants while denying it to all non-communicants as it has done in the present C.O. situation. Beyond any doubt some day the Supreme Court will be forced to repair this gaping constitutional infirmity. When it does, however, it will have to use consummate judicial craftsmanship for it will be faced with the thorniest thicket in the C.O. terrain. The Court purposely avoided this thicket in Seeger when it stopped short after opening up the classification to all believers, no matter how unorthodox. For the Court well knew that to sanction the classification for those who reject a religious basis and put thier opposition on social or moral or philosophical grounds is to open a veritable Pandora's box of interpretation and regulatory problems.

Ponder a few examples. The registrant conclusively demonstrates his sincerity in opposing all wars but affirms that his religion has nothing whatsoever to do with his decision. Instead, he is a socialist and totally convinced that not only is private property the root of all evil but that

it is also the sole cause of all wars. Or more topically, the absolute sincere Republican who wholeheartedly believes that the corrupt Democrat Party has instituted all wars in this century and that it would be morally indefensible to fight in any. Such aberrations and many others of like ilk are not solely theoretical. They could easily occur. Certainly religious mavericks develop beliefs and reasons for such beliefs which seem to those of us who are more orthodox every bit as odd and bizarre as any thesis based on moral or social grounds. So the discrimination against non-believers cannot be justified on the grounds that by use of a religious test a line can be drawn separating the rational from the irrational. The discrimination can only be defended on the very practical and certainly non-constitutional argument that unless there is some place to start - like a religious test - there will never be any place to stop.

This is undoubtedly the same reason which prompted Congress to have required the applicant to demonstrate that he is conscientiously opposed to "participation to war in any form." This means that he must object to all use of force to settle any dispute and that there never has been and never will be a war which can be justified. Thus the registrant who refuses to fight in Vietnam but admits he would not hesitate to bear arms to repel a military invasion of the United States cannot be given a 1-0 classification even though his sincerity may be unquestioned and his religious credentials impeccable.

Today thousands of draft age men have found that they sincerely and conscientiously oppose the use of force in Vietnam and they can show that their opposition has the requisite religious motivation. But they cannot show and are unwilling to try to falsely show that they oppose all wars everywhere at any time. Their dilemna becomes as profound and as frustrating as that presented the humanist before the Supreme Being clause was liberalized. This dilemna is the root cause of much of the current protest and many of the acts of civil disobedience and of most of the

expatriations to Canada and Sweden.

I have had occasion to advise a number of these young men who are struggling to find a way to comply with both their consciences and the Selective Service laws, stay in the country and stay out of jail. All of them have been of the highest caliber.

One, for example, was sorely troubled by finding himself in the following position. He had vigorously proclaimed a willingness to goto jail rather than fight in Vietnam. He was admitted to a college and as a consequence immediately classified 2-S which would defer him from any service requirements until he left or graduated from college. He felt that quite possibly we would have resolved the Vietnam War by the time he graduated from college at which time he would be perfectly willing to enter the military service. But then, he reasoned, if that were the situation, he never would have tested his announced principles and he would be accused of having assumed a posture which was insincere. He came to me hoping I would find some way for him to be able to show that he did believe in what he said he believed in but that he would not have to abandon his college education in order to prove it. Unfortunately, I could not oblige. Another registrant indicated to me that if he were not classified 1-0 on the ground that he only had conscientious scruples against the Vietnam War, he would then be ready to abandon his principles and serve his country. I pointed out to him that were the Draft Board ever to hear this, of course they would classify him 1-A while if he remained silent on his course of action in the face of a 1-A classification, he might more likely be given a 1-0. This kind of paradox is not unusual where some men are called upon to determine what another man truly and sincerely believes what he claims to believe. A similar example resulting from the traditional appellate court doctrine that the lower court, having had the opportunity to see and judge the witness in person, is therefore much better able to make decisions about the sincerity of such witness. Since in the Selective Service structure

the local Draft Board occupies the same position as the lower court, Federal courts have applied this same consideration to the local Draft Boards, holding that its members were similarly in a better position to judge the sincerity of the witness. A registrant can avoid this result simply by not appearing before the local Board. When offered this possibility, which would preclude the Court from evading a decision, no registrant has taken it up as all are most genuine in their insistence on meeting the situation head on without resort to cute technicalities and without ever concealing their own beliefs.

By their actions and examples these young men are making all of us think more carefully and more thoroughly and thus are making a vital contribution to the ultimate betterment of our society. Surely the sacrifice of life or limb on the battlefield is not the only act worthy of being called patriotic. It is no answer to assert that unless we have physical security - obtained sometimes only by defeating the enemy in way - we will not have the opportunity to create a better country and world. Physical survival alone is not a broad enough basis on which to build. At all times a vigorous society must have not only those who obediently shoulder their weapons but also those whose consciences compel them to publicly question prevailing policies, particularly when such policies involve the infliction of death and destruction.

Edmund Burke once remarked:

"To make us love our country, our country ought to be lovely."

I am certain that Mr. Burke would have considered the United States at the present time worthy of such love. For even though the procedures established to safeguard the rights of the conscientious objector would not meet optimum standards, nevertheless the fact is that such procedures have been established and have been by and large fairly administered. And by the establishment and preservation of such procedures, the United States

has demonstrated that it values the protection of the conscience of one man as much as it honors the valor in battle of another.

Morse Johnson
