# Selective conscientious objection: the court martial of Flight Lieutenant Malcolm Kendall-Smith, RAF

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## Abstract

- Flight Lieutenant Malcolm Kendall-Smith refused to serve in Iraq, believing it to be an illegal war. This raises the issue of selective conscientious objection.
- In the United States, conscientious objection is accepted for moral, ethical, or religious belief. However, the Supreme Court has refused to allow objection to a particular war — selective conscientious objection is not recognised.
- In the United Kingdom, general conscientious objection is accepted, but selective conscientious objection is not.
- In Israel, courts have accepted that selective conscientious objection would damage the framework of the military.
- In Australia, selective conscientious objection was accommodated in the *Defence Legislation Amendment Act 1992* (Cwlth), but is only available to conscripts.


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ON 13 APRIL 2006, Flight Lieutenant Malcolm Kendall-Smith, a 28-year-old Medical Officer with the Royal Air Force (RAF), was court-martialled and sentenced to 8 months in prison for a series of offences that resulted from his refusal to serve in Iraq. He was also ordered to pay £20 000 from his personal savings towards the defence costs, and dismissed from the service.

In this article, we examine the court martial of Kendall-Smith, as well as the concept of conscientious objection. Although the case of Kendall-Smith did not directly raise the issue of conscientious objection in the traditional sense, it nonetheless brings the issue into consideration.

## The military charges

The charges faced by Kendall-Smith were that:

- on 1 June 2005, he failed to comply with a lawful order to attend RAF Kinloss for pistol and rifle training;
- on 6 June 2005, he failed to attend a helmet fitting;
- between 12 and 24 June 2005, he failed to attend training;
- on 30 June 2005, he failed to comply with an order to attend a deployment briefing at RAF Lyneham; and
- on 12 July 2005, he failed to comply with an order to replace a Squadron Leader for Operation Telic in Basra, Iraq.[1]

## Kendall-Smith's background

Malcolm Kendall-Smith was born in Brisbane, and obtained his medical degree at Otago University, Dunedin, New Zealand.[2] He worked in a number of hospitals in Australia, before returning to New Zealand to study philosophy. Kendall-Smith's thesis was on the secular and rational morality of Immanuel Kant. Kant argued that the source of good lies only in a good will. A good will is one that acts in accordance with universal moral laws that the autonomous human being freely gives itself. These laws obligate people to treat other human beings as ends rather than as (merely) means to an end.[3] Kendall-Smith then took up a post as a tutor in the subject of Kant's ethics and morality at Otago University.

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In August 2000, Kendall-Smith began his RAF career, on a 6-year short-service commission. In 2002, he was based at RAF Lyneham, Wiltshire, before becoming a senior house officer in psychiatry based at RAF Brize Norton, Oxfordshire. On 1 July 2002, he was deployed as a general practitioner registrar at RAF Thumrait, Oman, and on 1 February 2003, he was posted to RAF Ali Al Salem in Kuwait for the Iraq invasion. From September 2003, he was based at RAF Kinloss in Scotland, and on 27 October 2003, he was deployed to RAF Al Udeid in Qatar.[2]

Following his refusal to serve in Iraq in July 2005, he was charged, and he faced court martial on 11 April 2006. His defence counsel, Philip Sapsford QC, argued that the defendant believed there was no lawful reason for UK forces to enter Iraq, as Iraq had not attacked the United Kingdom.[4] Bayliss JA at the committal hearing found that, at the time of the alleged crimes, UK troops were fully covered by United Nations resolutions authorising their presence in Iraq.[4]

## The court martial

Kendall-Smith argued that the ongoing presence of US-led forces in Iraq was illegal, in that the invasion of Iraq had not complied with the legal obligations to protect UK citizens or allies.[5] He had refused to serve in Basra in July 2005 because he did not want to be complicit in an "act of aggression" contrary to international law. In his view, the ongoing acts of aggression and systematically applied war crimes in Iraq provide a moral equivalent between the United States and Nazi Germany. Kendall-Smith argued that he had refused to take part in training and equipment-fitting before the deployment because he believed preparatory acts are equally as criminal as the primary act itself. He refused to follow the order out of his duty to international law, the Nuremberg principles, and the law of armed conflict.[6]

At one point, defence counsel for Kendall-Smith had floated the idea of calling SAS soldier Ben Griffin. Griffin refused to serve in Iraq, was expected to be court-martialled, but instead was permitted to quit the army with a glowing testimonial from his Commanding Officer, "describing him as a 'balanced, honest, loyal and determined individual who possesses the strength of character to have the courage of his convictions'".[7] Griffin had served 3 months in Iraq, and had formed the opinion that illegal tactics were being used by US troops, namely, being "trigger happy".[8]

The prosecution contended that Kendall-Smith did not have the "responsibility" to question the legality of orders given to him. It was argued that the presence of UK forces in Iraq was not unlawful. As a regular serviceman, he could not pick and choose those orders he did or did not wish to obey, and no question of any unlawful order being given to him arises in this case.[6] The prosecution stated that Kendall-Smith had applied for early release from the RAF in May 2005, but was informed he was expected to serve about another 12 months. The prosecution stated that the "background to this case appears to be a sense of grievance felt by the defendant, firstly that he could not immediately resign from the RAF, and secondly that he remained eligible for deployment overseas".[6]

The Judge Advocate of the Court Martial Panel informed Kendall-Smith that, while the panel believed he had acted on moral grounds, he was still accused of an "amazing arrogance" and the sentence was intended to make an example of him.[1] The Judge Advocate stated that:

> Obedience of orders is at the heart of any disciplined force . . . Refusal to obey orders means that the force is not a disciplined force but a disorganised rabble. Those who wear the Queen's uniform cannot pick and choose which orders they will obey. Those who seek to do so must face the serious consequences.[1]

## Other recent cases involving the prosecution of military medical personnel

Other significant cases that are similar to Kendall-Smith's situation concerned Captain John Buck, a United States Air Force (USAF) Medical Officer, and Lieutenant Dennis J Lipton, also from the USAF. Buck was a 32-year-old Emergency Room Physician who disobeyed a direct order to take the anthrax vaccine, in preparation for a potential deployment to Bahrain during 2001.[9] Buck stated that he had come to an "ethical crossroads" in his life, and that his refusal to take the controversial vaccine was a matter of conscience. Buck stated that, because the vaccine was being used off-label, it violated the US Food and Drug Administration guidelines. Buck argued that the anthrax inoculation program should have been made voluntary or got "rid of… altogether".[10]

The trial for Buck occurred in May 2001, during which he asked to resign under a general discharge, but this was rejected. Subsequently, Buck declined to present a defence and was found guilty of disobeying the order of a superior commissioned officer under the US Military Code. He was sentenced to 60 days of restriction to the air force base, forfeiture of US$1500 of pay a month for 14 months, and an official reprimand.[11]

Lipton joined the USAF during April 1993 as a way of funding his medical school fees.[12] While attending medical school in Houston, Texas, he became a conscientious objector because of experiences treating victims of violence and war. Lipton questioned whether he could participate in and sanction war when, as a physician, his mission is to protect and preserve life. Lipton argued that in war, the mission of the military is to take life, which is contrary to the Hippocratic oath, to which he was bound. He submitted an application for discharge as a conscientious objector, and offered to repay the money that the USAF had spent on his education, or to work in an unarmed branch of the government, such as public health.[12]

Lipton's application was refused, and he was subsequently charged under the US Military Code in 1999. The charges were one offence of arriving late for training, two offences of specific instances of failure to obey a direct order (one to wear a military uniform, and another to participate in active training), and an offence of dereliction of duty with regard to his failure to attend a training course.[12] Lipton pleaded guilty to the first two sets of charges, and not guilty to the third. The third charge was not proceeded with, and Lipton was found guilty of the first two sets of charges. The military judge handed down the punishments of a US$30 000 fine, 6 months' imprisonment, and dismissal from the USAF. However, because of a pre-trial agreement, the actual sentence imposed was a US$30 000 fine, 5 days in jail, and dismissal.[12]

## International approaches to conscientious objection

### *United Nations Commission on Human Rights*

In 1989, the UN Commission on Human Rights adopted Resolution 1989/59, which recognises the right of everyone to have conscientious objections to military service. This was further developed in 1995 under Article 1995/83, which recognises that people performing military service may develop conscientious objections. Under Article 18 of the International Covenant on Civil and Political Rights,[13] this is deemed a legitimate exercise of freedom of thought, and people performing military service should not be excluded from the right to conscientious objection.[14]

### *United States*

In the US, religious belief or training is a valid reason enshrined by statute[15] for conscientious objection to participation in any war. The US Supreme Court has extended this to include moral and ethical reasons.[16] However, selective conscientious objections are not accepted. A member of the US armed forces can seek administrative discharge,[17] but this is discretionary and may be determined by considerations of national security.

Historically in the US, policy was unusually liberal with respect to conscientious objectors as a result of the Quaker majority in Pennsylvania state parliament until 1756. In World War II, non-combatant service alternatives were available to conscripts who belonged to a pacifist religious sect.

In the US military, conscientious objection is a privilege, not a legal right.[18] The Military Selective Service Act and government regulations recognise two types of conscientious objectors:

- Conscientious objector to all forms of military service (Class 1-0)
- Non-combatant conscientious objector (Class 1-A-O).

In World War II, an estimated 25 000 non-combatant soldiers (1-A-O) were accepted into the US armed forces; most served in the medical corps, where they often performed extremely hazardous work. Some were killed in combat areas, and one received the Congressional Medal of Honor.[19]

The absolutists (1-0) went to jail. All told, some 6000 men were sentenced to prison terms for as long as 5 years. About three-quarters of these were Jehovah's Witnesses (whose claims for blanket exemption as ministers have never been recognised by the government). The remainder consisted of hardcore religious objectors and some black Muslims protesting the racism of US society in general and its military in particular.[19]

The post-War Selective Service Act, passed in 1948 and amended in 1951, required that conscientious objection be based on religious belief and training that included belief in a Supreme Being. In 1970, the Supreme Court removed the religious requirement. In *Welsh v United States*, the Supreme Court characterised those who qualify as conscientious objectors as people "whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war".[20]

In 1971, the Supreme Court refused to allow objection to a particular war. This decision affected thousands of objectors to the Vietnam War. Some 50 000 to 100 000 men are estimated to have left the US to avoid being drafted to serve in that war. Of importance was *Gillette v United States* (1971), where Marshall J observed:

> Moreover, the belief that a particular war at a particular time is unjust is by its nature changeable and subject to nullification by changing events. Since objection may fasten on any of an enormous number of variables, the claim is ultimately subjective... In short, it is not at all obvious in theory what sorts of objections should be deemed sufficient to excuse an objector, and there is considerable force in the Government's contention that a program of excusing objectors to particular wars may be "impossible to conduct with any hope of reaching fair and consistent results".[21]

The US military still does not recognise selective conscientious objection.[18]

### *United Kingdom and Canada*

In the UK, a non-combatant corps was established in World War I for conscientious objectors. From 1968 onwards, recruits were permitted to discharge as conscientious objectors within 6 months of entering the armed forces.[22] Article 9 of the European Convention on Human Rights and Fundamental Freedoms, which guarantees the right to freedom of thought, conscience and religion, finds its expression in the Human Rights Act 1998 (UK). Where the armed services do not accept claims of conscientious objection, an Advisory Committee on Conscientious Objectors can intervene. In 1996, the House of Lords moved an

amendment to the Reserve Forces Bill 1996 to include "discharge on the grounds of conscience".

In Canada, the National Defence Act does not recognise conscientious objection, but nor is conscription operating. During World War II, when the National War Service Regulations 1940 were proclaimed, more than 10 000 men successfully claimed conscientious objection to war for pacifist reasons. In the mid 1990s, the Defence Department allowed people with a genuine change of heart to leave the military before the end of their 5-year commitment.[23]

### Israel

In recent times, conscientious objection by members of the Israel Defense Forces (IDF) has emanated from concerns about the forcible clearance of fellow countrymen who settled on the West Bank in the so-called Occupied Territories. The current policy of the IDF is to grant exemptions to Ultra-Orthodox Jews and to Arabs, while denying exemptions to those whose reasons for refusal to serve are based on philosophical opposition to the IDF's activities in the Occupied Territories. In the case of *Zonshein*,[24] the Minister of Defense argued successfully that selective conscientious objection was not a protected expression of freedom of conscience and that recognising selective conscientious objection would damage the framework of the military. In his judgement, Barak J referred to Bejski and Levin JJ, who in a previous Israeli case[25] noted:

> No military system can accept the existence of a general principle which allows soldiers to dictate where they will serve, whether for economic, social or conscientious reasons.[25]

Barak J reasoned that approval of selective conscientious objection in the IDF would "loosen national ties and create an army of different groups comprised of various units to each of which it would be conscientiously acceptable to serve in certain areas … [but] unacceptable to serve in others".[24]

### Australia

"Conscientious belief" was defined in the Commonwealth *Defence Act 1903* as requiring a fundamental conviction of what is morally right and wrong, which is so compelling that the person is duty-bound to follow that belief.[16] The Defence Act recognised the validity of conscientious belief for "those who could prove that the doctrines of their religion forbade them to bear arms or perform military service" (section 60), but it was not applicable to either volunteers or conscripts, such as those affected by compulsory military training for males aged 12 to 26 years of age[26] between 1911 and 1929.

No conscription occurred during World War II, but in the Vietnam War, 733 men were granted total exemption[16] under the *National Service Act 1951* (Cwlth), but such cases generally required evidence of "deep seated and compelling" conscientious objection.[27,28] During the Vietnam War, the concept of selective conscientious objection was introduced in a number of successful claims.[16]

With the advent of the Gulf War in 1990, selective conscientious objection was accommodated in the *Defence Legislation Amendment Act 1992* (Cwlth), but again it was not made available to volunteers.[29] Conscripts may apply for exemption from combatant duties in time of war under sections 61A(1)(h) and (j), or they can apply for complete exemption where their conscientious beliefs do not allow them to participate in wars in general or specific conflicts. If wartime conscription were to be reintroduced, claims would be assessed by conscientious objection tribunals established by the Minister for Defence, and appeals against such decisions could be brought to the Administrative Appeals Tribunal.

On 23 August 1990, while HMAS *Adelaide* was about to depart Perth for the Gulf in response to the invasion of Kuwait by Iraq, Leading Seaman (LS) Terry Jones left his ship without lawful excuse.[29] While being absent without leave, LS Jones stated:

> I am not a coward and I would be prepared to fight for my country, but I am taking a political stand because this is not our war, we are just following the Americans. I am prepared to die to defend my country but not to protect United States oil lines.[29]

On 13 October 1990, LS Jones was court-martialled and convicted of absenting himself without leave. He was reduced in rank, forfeited 4 days' pay, and received a 21-day suspended sentence. He was discharged at his own request thereafter.[29]

Although the Conscientious Objection Tribunal exists, it is only open to those who are conscripts.[30] This means Permanent members of the Navy, Army and Air Force may find themselves having to fight against their conscientious beliefs.

## Conclusion

The US, UK and Israel have adopted a strong opposition to selective conscientious objection, especially for volunteers for military service. Unlike the US and Israel, Australia does not currently have a system of national conscription — a process which inevitably leads to far greater claims for both selective and non-selective conscientious objection to military service.

Speaking about selective conscientious objection, Marshall J in the US Supreme Court expressed the public policy as:

> [R]eal dangers … might arise if an exemption were made available that in its nature could not be administered fairly and uniformly… Should it be thought that those who go to war are chosen unfairly or capriciously, then a mood of bitterness and cynicism might corrode the spirit of public service and the values of

willing performance of a citizen's duties that are the very heart of free government.[21]

Kendall-Smith stated at his trial that he had "[T]wo great loves in life, medicine and the Royal Air Force".[31] The Court took the view that the national interest prevailed over the views of the individual.


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## Competing interests

None identified. These are our own views, and do not represent those of the Australian Defence Force or the Commonwealth of Australia.

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