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Conscientious Objection

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NOTES

CONSCIENTIOUS OBJECTION

Conscientious objection to war has been brought sharply into focus by the publicity afforded the Vietnam war. Conscientious objection to war is nothing new nor even a product of the recent past. It has been a recognized fact in the United States since pre-Revolutionary War days. In 1757 Quakers refused to pay taxes that would be used to support the French and Indian War,[1] and they would not take part in the American Revolution.[2] In 1789 James Madison proposed a Bill of Rights which would include exemption from the military for conscientious objectors, but the First Congress of the United States did not adopt the proposal[3] despite the fact that in 1775 the First Continental Congress had resolved to protect the right of conscientious objection.[4] The matter of conscientious objection was left largely to the individual states until the Civil War,[5] when Congressional Legislation provided that conscientious objectors be considered non-combatants only.[6]

The Selective Service Act of 1917[7] provided an exemption for conscientious objectors[8] which required membership in

> . . . [A]ny well recognized religious sect or organization at present organized and existing . . . and whose *existing* creed or principles *forbid* its members to participate in war in any form. . . .[9] (emphasis added.)

The scope of the exemption, as can be readily seen, was intended to be very narrow.

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1. CONSCIENCE IN AMERICA 34 (L. Schlissel ed. 1968).
2. *Id.* at 41.
3. *Id.* at 45.
4. Maddocks, *Legal and Constitutional Issues Regarding Conscientious Objectors*, DIALOGUE ON THE DRAFT, REPORT OF THE NATIONAL CONFERENCE ON THE DRAFT 39 (1966).
5. *Id.*
6. Act of Feb. 24, 1864, ch. 13 § 17, 13 Stat. 6 at 9.
7. Act of May 18, 1917, ch. 15 § 4, 40 Stat. 76 at 78.
8. *Id.*
9. *Id.*

The Selective Service Act of 1940[10] contained less-confining words. It no longer required membership in a well-recognized "peace" church. The exemption now applied to one ". . . who, by reason of *religious training and belief*,[11] is conscientiously opposed to participation in war in any form."[12] (emphasis added).

The Circuit Court of Appeals for the Third Circuit stated in *United States v. Bowles*[13]:

> The 1917 Draft Act required membership on the part of a conscientious objector in a well-recognized religious sect whose existing creed or principles forbade its members to participate in war in any form if he was to obtain exemption from combatant service. The present act, however, does not require such membership on the part of a conscientious objector seeking classification as such.[14]

The Selective Service Act of 1948, section 6(j)[15] dealt with conscientious objection and was worded the same as the 1940 Act, but added the following clarifying words:

> 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 philosphical views or a merely personal moral code.[16]

The Selective Service Act of 1967[17] is worded virtually the same as the 1948 Act. Although the words have changed to some degree in each succeeding Act, and although it *seems* that Congress has broadened the scope, in fact, the result of the change in wording had little effect on those applying for conscientious objector status, until the case of *United States v. Seeger*,[18] discussed below.

The duty to bear arms in *defense* of country has, evidently, a necessary importance in the world in which we live. The right to be able to live within one's conscience also should have a necessary importance. Occasionally, a conflict of the two arises together in the same individual, and the duty and the right naturally oppose each other. For many, this opposition can be overcome in favor of duty; for others, it cannot.

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10. Act of Sept. 16, 1940, ch. 720 § 5(g), 54 Stat. 885 at 889.
11. *Id. See also*, George vs. United States, 196 F.2d 445 (9th Cir. 1952) for discussion of problems of defining "religious training or belief".
12. Act of Sept. 16, 1940, ch. 720 § 5(g), 54 Stat. 885 at 889.
13. United States v. Bowles, 131 F.2d 818 (3d Cir. 1942).
14. 131 F.2d 818, (3d Cir. 1942). *See also* United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943); United States v. Downer, 135 F.2d 521 (2d Cir. 1943).
15. Act of June 24, 1948, ch. 625 § 6(j), 62 Stat. 604 at 612.
16. *Id.*
17. 81 Stat. 100 § 6(j) (1967).
18. United States v. Seeger, 380 U.S. 163 (1965).

This country, through Congress, has recognized that many people cannot compromise their conscience, and has chosen to respect this obedience to conscience, by an exemption in its draft laws, called "conscientious objection." Although few people have come within the scope of this classification throughout the greater part of our country's history, the recent past has brought a gradual expansion of the scope of the classification.

Can one be a loyal citizen and yet refuse to bear arms in a war? The answer seems to be "yes." While the following three cases do not deal directly with conscientious objector classifications, they involve people and principles and reasonings that run closely parallel with cases concerning conscientious objector status, and point out the change in the Supreme Court's interpretation of the duty to bear arms in relation to loyalty, citizenship, and freedom.

In 1929 the Supreme Court upheld the denial of a petition for citizenship made by a Hungarian diplomat-pacifist because she refused to swear that she would bear arms in defense of this country.[19] Similarly, in 1931 a petition for citizenship was denied a Canadian minister who made the qualifying statement that he would not bear arms in defense of this country unless he believed the war to be morally justified.[20] In 1946 the Supreme Court heard the case of *Girouard v. United States*.[21] A Canadian Seventh-Day Adventist applied for citizenship, stating he would enter the Army as a non-combatant but would not bear arms. The lower courts had denied his petition. The Supreme Court overruled *Schwimmer* and *Macintosh*, and granted citizenship saying that the oath of allegience aliens are required to take does not contain a promise to bear arms[22] and to so find is to read the promise in by implication.[23] The Court pointed out that citizens could get conscientious objector status and still be loyal to their country,[24] that one with similar religious convictions would not be barred from becoming a member of Congress or from holding public office,[25] and that Congress could not have intended that one must give up his religious convictions to become a citizen, but need not do so to hold public office.[26]

Possibly the change in thought evidenced by the holding in the *Girouard* case led to the Supreme Court's expansion of the scope of qualification for conscientious objector status as it interpreted the various clauses of the Draft Acts dealing with conscientious objector exemptions.

19. United States v. Schwimmer, 279 U.S. 644 (1929).
20. United States v. Macintosh, 283 U.S. 605 (1931).
21. Girouard v. United States, 328 U.S. 61 (1946).
22. *Id.* at 64.
23. *Id.*
24. *Id.*
25. *Id.* at 65.
26. *Id.* at 66.

Although the meanings of other clauses have been expanded, the courts do consistently require good evidence that the petitioner is *sincere*. For example, in *United States v. Witmer*[27] the Supreme Court upheld denial of conscientious objector classification to Witmer because of lack of sincerity on his part. The Court felt that there was sufficient evidence of this lack of sincerity in that Witmer had first tried to be exempted as a farmer, and then as a minister. After failing in these two attempts, Witmer then applied for a conscientious objector exemption.

As noted previously, conscientious objector status was, at first, granted only to members of a few recognized "peace" churches.[28] Congress eliminated this requirement in the 1940 Draft Act. The courts then operated under the words "religious training and belief"[29] as used in the 1940, 1948, and 1967 Acts. Congress attempted to define this phrase in the 1948 Act,[30] but the Courts have had to struggle with this phrase ever since.

In *United States v. Downer*[31] the Second Circuit Court of Appeals sustained conscientious objector status for the defendant saying his humanitarian opposition to war, though not based on any church membership, was essentially religious in character. Three years later the Ninth Circuit Court of Appeals strictly interpreted "religion" in *United States v. Berman*,[32] denying conscientious objector status to a humanitarian whose lack of belief in a deity did not, the court felt, meet the requirements for such classification. This problem will be returned to later.

Chronologically, the next phrase to deal with is "war in any form." In *United States v. Hartman*[33] petitioner was appealing denial of conscientious objector classification. The reason for the denial was the lower court's strict interpretation of the "war in any form" clause. Petitioner had stated he would fight to defend his life, or his family, or in a theocratic war. Petitioner pointed out that a theocratic war did not involve the use of carnal weapons and would only be fought on a command from Jehovah. The Court held that it was not Congressional intent to include theocratic wars within the meaning of "war in any form," and reversed the lower court decision. It has been similarly held that a conscientious objector classification cannot be denied simply because petitioner would fight to defend his home,[34] and kill if necessary.[35]

27. United States v. Witmer, 348 U.S. 375 (1955).
28. These churchs include Quakers and Seventh-Day Adventists.
29. George v. United States, 196 F.2d 445 (9th Cir. 1952).
30. Act of June 24, 1948, ch. 625 § 6(j), 62 Stat. 604 at 612.
31. United States v. Downer, 135 F.2d 521 (2d Cir. 1943).
32. United States v. Berman, 156 F.2d 377 (9th Cir. 1946).
33. United States v. Hartman, 209 F.2d 366, 370 (2d Cir. 1954). *See also*, Taffs v. United States, 208 F.2d 329, 330 (8th Cir. 1953); Sicurrella v. United States, 348 U.S. 385 (1955).
34. Shepherd v. United States, 217 F.2d 942 (9th Cir. 1954).

In 1965 the Supreme Court delivered a landmark decision on the meaning of "religious training or belief" in *United States v. Seeger*.[36] Prior to this case a belief in a Supreme Being was generally required as the motivation for conscientious opposition to participation in war. Without this belief, no conscientious objector status was to be granted. In *Seeger* the Supreme Court stated that the words "religious training or belief" were used by Congress to distinguish and exclude essentially sociological, political, or philosophical views. The Court stated this test:

> . . . the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel position in the lives of their respective holders we cannot say that one is "in a relation to a Supreme Being" and the other is not.[37]

Seeger had not stated a belief in a Supreme Being as the basis of his conscientious objection, and for basically this reason the classification had been denied.

On the basis of this "parallel position" and the fact that Seeger had not, disavowed any belief "in a relation to a Supreme Being,"[38] the Court found for Seeger, giving this guideline:

> Local boards and courts in this sense are not free to reject beliefs because they consider them "incomprehensible." Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.[39]

It is interesting to note that the Second Circuit Court of Appeals in 1943 had held for a conscientious objector on basically the same reasons in *United States v. Downer*.[40] Also, in 1945 the same court in *United States v. Badt*[41] held that a conscientious objector classification could be granted if a registrant's opposition to war was based on humanitarian considerations, rather than an obligation to a deity or supreme power.

After *Seeger* the courts began to use the "parallel position" in the life of the registrant as the basis for granting a conscientious

35. United States v. Lauing, 221 F.2d 425 (7th Cir. 1955).
36. 380 U.S. 163 (1965).
37. *Id.* at 165, 166.
38. *Id.* at 187.
39. *Id.* at 184, 185.
40. 135 F.2d 521 (2d Cir. 1943).
41. United States v. Badt, 152 F.2d 627 (2d Cir. 1945).

objector classification.[42] In *United States v. Prince*[43] the District Court for Maine held that a registrant could not be denied the classification because he did not believe in a "traditional God" or was not a member of an organized church or religious sect. In *United States v. Vlasits*[44] the Fourth Circuit Court of Appeals held that a draft registrant who did not currently consider himself a member of a formal religious organization, but asserted that his religious training contributed to his humanistic philosophy and beliefs, and that any participation by him in war would violate such principles, was entitled to classification as a conscientious objector. The Fourth Circuit Court of Appeals in *United States v. Broyles*[45] found a prima facie entitlement to conscientious objector classification was established by defendant's claim that he saw a "life force" as a supreme force and human life as sacred, and also by a showing of a practice of this belief by his work in certain organizations. Once this prima facie case was established the local board had stated no good reason for denial of the classification.

Seeger was a big breakthrough for those who did not believe in a Supreme Being, yet were conscientiously opposed to war. But, there was still another expansion to come. In *Seeger* the Court had stated that the words "religious training and belief" were used by Congress ". . . to exclude essentially political, sociological, or philosophical views."[46] This is no doubt in reference to the words of the Selective Service Act of 1948 section 6 (j), ". . . but does not include essentially political, sociological, or philosophical views or a merely personal moral code."[47] An indication that courts have adhered to these words is found in *United States v. Berman*[48] where the Ninth Circuit Court of Appeals said that the use of the word "religion" was not intended by Congress to include morals, or devotion to human welfare or to a policy of government.[49] The Second Circuit Court of Appeals in *United States v. Kauten*[50] which had in the same year held for the petitioner in *United States v. Downer*[51] stated that a conviction that war was inexpedient or disastrous was not a sufficient basis for a conscientious objector classification,[52] and found against Kauten. In *United States v. Lewis*[53] a Negro had been convicted for refusing induction into the Armed Forces. He

42. *See* United States v. White, 421 F.2d 487 (5th Cir. 1969); Pitcher v. Laird, 421 F.2d 1272 (5th Cir. 1970).
43. United States v. Prince, 310 F.Supp. 1161 (S.D.Me. 1970).
44. United States v. Vlasits, 422 F.2d 1267 (4th Cir. 1970).
45. United States v. Broyles, 423 F.2d 1299 (4th Cir. 1970).
46. 380 U.S at 165.
47. Act of June 24, 1948, ch. 625 § 6(j), 62 Stat. 604 at 613.
48. Berman v. U.S., 156 F.2d 377, 380 (9th Cir. 1946).
49. 156 F.2d 377 at 380 (9th Cir. 1946); *See also*, Sorenson v. Williams, 207 F.Supp. 184 (E. D. Pa. 1962); United States v. Delime, 223 F.2d 96 (3d Cir. 1955).
50. United States v. Kauten, 133 F.2d 703 (2d Cir. 1943).
51. 135 F.2d 521 (2d Cir. 1943).
52. 133 F.2d at 708.
53. United States v. Lewis, 275 F.Supp. 1013 (E.D. Wis. 1967).

said that he could not conscientiously serve in the Armed Forces of a nation whose laws and customs did not afford him the same opportunities that whites were given. The U. S. District Court for the Eastern District of Wisconsin felt that defendant was making a frivolous claim and therefore was not acting in good faith. The conviction was affirmed. The Tenth Circuit Court of Appeals in *Fleming v. United States*[54] reversed a conviction of defendant for refusing induction. The court said defendant had made a prima facie case of qualification for a conscientious objector classification and could not be denied it even though defendant's reasons were based primarily on political, sociological convictions, or a merely personal moral code. These must be the *sole* reasons[55] before a denial can be made. Here there was also evidence that defendant had been influenced by religious training and belief in a Supreme Being.[56] Similarly in *United States v. Levy*,[57] the Eighth Circuit Court of Appeals said that a personal moral code was not the sole basis for defendant's conscientious objection, even though it was the primary reason. Defendant's conscientious objection was also based on at least one belief that came from a force or Supreme Being, that belief being that he must act according to what he believes is right and this obligation is greater than an obligation to secular authorities.[58]

In *Welsh v. United States*[59] the Supreme Court had occasion to interpret the words "sociological, political, or philolsophical or a merely personal moral code." Defendant was convicted of refusing induction into the Armed Forces. He claimed a conscientious objection exemption. The lower courts found no religious basis for the classification and also that defendant had denied that his views were religious. The Government claimed defendant's views were sociological, political, philosophical or a merely personal code. The Court discussed the exemption in the Selective Service Act of 1967 section 6(j) and said that those intended to be excluded from the exemption were:

> The two groups of registrants that obviously do fall within these exclusions from the exemption are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency.[60]

54. Fleming v. United States, 344 F.2d 912 (10th Cir. 1965).
55. *Id.* at 915.
56. *Id.* at 916.
57. U.S. v. Levy, 419 F.2d 360 (8th Cir. 1969).
58. 419 F.2d at 367. *See also*, United States v. White, 421 F.2d 487 (5th Cir. 1969); Pitcher v. Laird, 421 F.2d 1272 (5th Cir. 1970).
59. Welsh v. United States, 938 U.S. 333 (1970).
60. *Id.* at 342, 343.

Thus the Supreme Court has now held, it seems, that along with insincerity, the only other objections to war which are not a basis for conscientious objector classification are considerations of inconvenience. These seem to be the only reasons left that are not at least "parallel" to religion. If it seems from the foregoing that the field of conscientious objection has been opened to its widest, it should be pointed out that there is yet another expansion of the qualifications for the classification.

In *United States v. Sisson*[61] the U. S. District Court for Massachusetts reversed a conviction of refusal to submit to induction in the Armed Forces. Defendant did not come within any definition of a religious conscientious objector yet claimed he was conscientiously opposed to the war in Vietman, and morally opposed to killing in that war. The Court found that the 1967 Draft Act discriminated between the draft status of Sisson as a conscientious objector and the draft status of conscientious objectors who were adherents to certain types of religions.

Basing this discrimination on the "free exercise of religion" clause of the First Amendment of the U. S. Constitution, the court said:

> Sisson's case being limited to a claim of conscientious objection to combat service in a foreign campaign, this court holds that the free exercise of religion clause in the First Amendment and the due process clause of the Fifth Amendment prohibit the application of the 1967 draft act to Sisson to require him to render combat service in Vietnam.
>
> The chief reason for reaching this conclusion after examining the competing interests is the magnitude of Sisson's interest in not killing in the Vietnam conflict as against the want of magnitude in the country's present need for him to be so employed.[62]

Quoting further from the case:

> . . . Congress has not provided a conscientious objector status for a person whose claim is admittedly not formally religious.
>
> In this situation Sisson claims . . . the Constitution does preclude Congress from drafting him under the 1967 Act. The reason is that this Act grants conscientious objector status solely to religious conscientious objectors but not to non-religious objectors.
>
> . . . .
>
> This Court, therefore, concludes that in granting to the religious conscientious objector but not to Sisson a special Conscientious objector status, the Act, as applied to Sisson,

61. United States v. Sisson, 297 F.Supp. 902 (D. Mass. 1969).
62. *Id.* at 910.

> violates the provision of the First Amendment that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[63]
>
> . . . .
>
> . . . [T]his Court decides . . . that as a sincere conscientious objector Sisson cannot constitutionally be subjected to military orders . . . which may require him to kill in the Vietnam conflict.[64]

And elsewhere in the case the Court said:

> The sincerely conscientious man, whose principles flow from reflection, education, practice, sensitivity to competing claims, and a search for a meaningful life, always brings impressive credentials. When he honestly believes that he will act wrongly if he kills, his claim obviously has great magnitude. That magnitude is not appreciably lessened if his belief relates not to war in general, but to a particular war or to a particular type of war. Indeed a selective conscientious objector might reflect a more discriminating study of the problem, a more sensitive conscience, and a deeper spiritual understanding.[65]

This reference to "selective" conscientious objection is further expanded in *United States v. McFadden*.[66] The U. S. District Court for the Northern District of California held that a statute exempting from military service only those persons whose religious beliefs forbid them to participate in war in any form placed such a burden upon religious beliefs of a Catholic selective objector, who believed the war in Vietnam was an unjust war, as to violate the free exercise clause of the First Amendment.[67] Since no compelling state interest exists justifying invidious discrimination against Catholic selective objectors who believe the Vietnam war is an unjust war, the statute requiring opposition to "war in any form" violates equal protection and due process of law,[68] and also violates the First Amendment's mandate against establishment of religion.[69] In *United States v. Berg*[70] the U. S. District Court for the Southern District of Maine held for the defendant, a Catholic, who distinguished between a "just" war and an "unjust" war. The defendant said that the conditions for a "just" war cannot be met under the conditions of contemporary warfare. The Court held that on the basis of this reasoning, defendant's belief that all wars are now

63. *Id.*
64. *Id.* at 912.
65. *Id.* at 908.
66. United States v. McFadden, 309 F.Supp. 502 (N.D. Cal. 1970).
67. *Id.* at 506.
68. *Id.* at 508.
69. *Id.*
70. United States v. Berg, 310 F.Supp. 1157 (S.D. Me. 1970).
71. *Id.*

"unjust" was sufficient basis for granting a conscientious objector classification.[71]

Once upon a time one had to be a member of an established religion that forbade killing and participation in war, and believe in an orthodox God, and be opposed to war in any form, in order to be classified a conscientious objector. Now one can be granted that classification even though he does not believe in God or a Supreme Being, is not a member of any religious organization, is opposed to war on personal moral grounds, or is only opposed to a particular war, as long as that opposition is not based on reasons of inconvenience or grounds of expediency, policy, or pragmatism.

The author welcomes this trend of expanding the scope of the conscientious objector classification. Like the expansions in other areas of the criminal law, this one further protects the rights of the individual. These individual rights have been steadily shrinking in our society, and could evaporate completely. Such a situation would be sorely felt by all of us, no matter what our political views are at present. Therefore, any step that restores individual rights to any degree, is a step in the right direction.

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