RECENT CASES

CONSTITUTIONAL LAW—CONSCIENTIOUS OBJECTORS—FIRST AMENDMENT RELIGION CLAUSES REQUIRE GRANT OF EXEMPTION FROM DRAFT BASED ON PERSONAL MORAL OBJECTION TO SERVICE IN VIETNAM. *United States v. Sisson* (D. Mass. 1969).

After two unsuccessful attempts to have the indictment dismissed,[1] John Sisson, Jr., was found guilty of failing to comply with the order of his local Selective Service Board to submit to induction in the armed forces in violation of the Military Selective Service Act of 1967.[2] Sisson claimed that he was a conscientious objector.[3] However, that claim was not based upon "religious training and belief" and was limited to objection to combat service in Vietnam. On motion in arrest of judgment, Chief Judge Wyzanski of the United States District Court, District of Massachusetts, *held*, granted: (1) The statute invalidly discriminated against Sisson by favoring religious objectors, and tended to establish religion in contravention of the first and fifth amendments; and, (2) The statute as written violated the first amendment free exercise of religion clause and the fifth amendment due process clause.[4] *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969).

---

1. United States v. Sisson, 294 F. Supp. 511 (D. Mass. 1968). Motion to dismiss indictment denied—the court held that Sisson's contention that there was no constitutional authority to conscript him to serve in an undeclared war presented a political question. United States v. Sisson, 294 F. Supp. 515 (D. Mass. 1968). Motion to dismiss indictment denied—the court held that Sisson's contention that he was being ordered to fight in genocidal war presented a political question.

2. 50 U.S.C., App. § 462(a) (1964), *as amended*. (Supp. III, 1968). Any person who "evades or refuses registration or service in the armed forces . . . shall upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . ."

3. Military Selective Service Act, 50 U.S.C., App. § 456(j) (1964), *as amended*. (Supp. III, 1968). "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who by reason of religious training and belief is conscientiously opposed to participation in war in any form."

4. The United States Supreme Court has consented to hear the case. 38 U.S.L.W. 3113.

I. ". . . by reason of religious training and belief. . . ."

The foundation of the present conflict can be traced to the Universal Military Training and Service Act of 1947.[5] The 1965 case of *United States v. Seeger*[6] brought about a major change in this Act. Seeger questioned the constitutionality of that Act insofar as it defined "religious training and belief," as:

> 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.[7]

In applying for his conscientious objector exemption, Seeger asserted a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed," but admitted his "skepticism or disbelief in the existence of God . . . ."[8] In granting Seeger's exemption the Supreme Court broadened the interpretation of "Supreme Being" and "religious training and belief." The Court stated that the test of religious belief within the meaning of 50 U.S.C., App. section 6(j) is whether it is "[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 qualifiying for the exemption . . . ."[9] However, the Court reaffirmed the limitations on the exemption contained in the Act,[10] by excluding those whose beliefs were based essentially on political, sociological or economic considerations that war is wrong, disavowing religious considerations. The Court further approved the 1947 Act exclusion of those whose opposition to war stems from "a merely personal moral code."[11] As a result of *Seeger,* the Selective Service Act of 1967 deleted the concept of belief in a Supreme Being.[12]

5. Universal Military Training and Service Act, 50 U.S.C., App. § 456, 6(j) (1947), 65 Stat. 80, repealed by act Sept. 6, 1966, P.L. 80 Stat. 656.

6. United States v. Seeger, 380 U.S. 163 (1965).

7. Universal Military Training and Service Act, 50 U.S.C., App. § 456, 6(j) (1947), 65 Stat. 80, repealed by act Sept. 6, 1966, P.L. 80 Stat. 656.

8. 380 U.S. at 166.

9. *Id.* at 176.

10. 50 U.S.C., App. § 456(j) (1964). 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."

11. See note 10 *supra.*

12. Military Selective Service Act, 50 U.S.C., App. § 456(j) (1964), *as amended,*

In its emphasis upon the sincerity and meaningfulness of the objector's belief, the *Seeger* definition appears broad enough to include the convictions of persons whose beliefs are not religiously oriented. It was Sisson's contention that he met the breadth of the definition, in that his belief was held with as much conviction as the belief of a religious objector. But insofar as *Seeger* and the statute required a formal religious basis and did not allow an objection based upon a personal moral code, Sisson did not qualify and therefore argued that the requirement invalidly discriminated against him. Sisson's objection was further qualified in that he was opposed to training and service in Vietnam and not to "war in any form" as required by the Act.[13] In this latter respect, the 1967 Act would apply equally to Sisson and the orthodox objector, who distinguished his religious opposition in regard to a particular war. Therefore, Sisson's contentions of unconstitutional discrimination on religious grounds and the limitations upon his objection will be considered separately.

The *Seeger* Court avoided a confrontation of the constitutionality of the Universal Military Training Act of 1947. Rather than test the constitutionality of the Act by the first amendment as Seeger had suggested, the Court found that the Act was not applied as Congress had intended. The Court was able to bring Seeger's views within the purview of the statute by expanding the scope of the definition of religious training and belief. Thus, the Court was able to avoid the constitutional question. However, as Sisson made no claim to any religiously based belief, the question was unavoidable.

The first amendment of the Constitution provides that: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ."[14] These

(Supp. III, 1968). Note that the sentence:

> 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 code . . . ,

as found in the 1947 act has been replaced by the following sentence in the 1967 Act: "As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code." The effect of the *Seeger* decision was the deletion from the 1967 Act the words "Supreme Being."

13. See note 3 *supra.*

14. U.S. CONST. amend. I.

two clauses forbid two quite different kinds of governmental encroachment upon religious freedom. The establishment clause prohibits the enactment of laws which favor one religion over others or the religious over the non-believer.[15] The free exercise clause prohibits enactment of laws which discriminate against individuals because of their faith or lack of it.[16] Although these prohibitions appear quite distinct, the decided cases often interchange the two clauses with the result that cases having divergent fact situations frequently reach their solution through the application of the same doctrine.

Thus, in *Everson v. Board of Education,*[17] the Supreme Court upheld a New Jersey statute which authorized district boards of education to make rules and contracts for the transportation of children to and from school where, by resolution, a board of education had authorized the reimbursement of parents for fares paid for transportation by public carriers of children attending public and parochial schools. The Court held that the statute was not in violation of the first amendment prohibiting any "law respecting an establishment of religion." On the contrary, applying the free exercise clause the Court stated that: "[The state] cannot exclude individual [religious groups], Non-beliebers, . . . or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."[18] The *Everson* Court, however, laid no basis for their determination of the first amendment argument.

The question again arose in the 1960 Supreme Court case of *Torcaso v. Watkins.*[19] This decision, unlike *Everson,* involved the rights of a non-believer. In *Torcaso,* the appellant was refused a commission as a notary public because he would not declare a belief in God as required by a Maryland statute. In holding the statute unconstitutional, the Court declared that "neither State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion. Neither can

15. Engel v. Vitale, 370 U.S. 421 (1962).

16. Torcaso v. Watkins, 367 U.S. 488 (1960); *cf.* Everson v. Board of Education, 330 U.S. 1 (1947).

17. Everson v. Board of Education, 330 U.S.1 (1947).

18. *Id.* at 17.

19. 367 U.S. 488 (1960).

constitutionally pass laws or impose requirements which aid all religions as against non-believers . . . ."[20]

The requirement of the 1967 Act that the objection to military service be religiously based denies to non-believers the benefit of exemption. This requirement, found in the law enacted for the common defense, appears to contradict the teaching of *Everson.* Moreover, contrary to *Torcaso,* that requirement forces Sisson to "profess a belief" in order to qualify for the exemption. By either approach the statute appears to create an unconstitutionally discriminatory standard.

The elimination of this discriminatory standard would seem to effectively rewrite the Constitution to create a "free exercise of conscience clause." As revolutionary as this step may appear, it seems already to have been taken as found in the contradictions inherent in the *Seeger* decision. At the date of decision Seeger disavowed any belief in a Supreme Being. The conclusion is inescapable that his objection to military service was moral in character and had become entirely personal. The contradiction appears in the *Seeger* Court's approval of exclusion of a personal moral code as grounds for exemption. Furthermore, when comparing Seeger to Sisson at the date of their respective trials, it is impossible to discern any relevance in the historic source of their beliefs. In *Sisson,* Chief Judge Wyzanski stated the same conclusion positively when he wrote: "It is not the ancestry but the authenticity of the sense of duty which creates constitutional legitimacy."[21] Thus it would seem that Sisson was unconstitutionally discriminated against if he could demonstrate that his moral code represents 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 . . . ."[22]

Two questions must be asked: Can a "merely moral belief" occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption? Can one order his life by placing his primary value

20. *Id.* at 495. "Everson and Torcaso are reasoned from a principle which forbids preference among religions or between religious and non-religious." 34 U. CHI. L. REV. 79, 88 (1966).

21. United States v. Sisson, 297 F. Supp. 902, 909 (D. Mass. 1969).

22. 380 U.S. at 176.

system on an essentially "sociological or philosophical" view? To answer these questions one must look at the strength and priority of the particular values. Milton Rokeach, in a study of attitudes and values, stated: "[A] grown person probably has tens of thousands of beliefs, hundreds of attitudes, but only dozens of values. A value system is an hierarchical organization—a rank ordering—of ideals or values in terms of importance."[23] Another social psychologist added that "[b]oth attitudes and values reside in the psychological field and define what is expected and desired. Both can be conceived of as motivational-perceptual states which direct behavior."[24]

It is apparent that the strength of the value which is held is not determined by whether it is based on "religious training" or some other mode of learning. The determining characteristic is the particular "rank ordering" in the value hierarchy. The important factor is the priority of the belief held and not the basis upon which the belief is held. A "merely moral belief" can and often does occupy the same place in the life of one person as an orthodox belief in God holds in the life of another. This argument has been supported in the writings of social psychologists regarding value formation and belief structures. Thus, John Gardner stated:

> There are those who think of the meaning of life as resembling the answer to a riddle. It is a profoundly misleading notion. The meanings in any life are multiple and varied. Some are grasped very early, some late; some have a heavy emotional component, some are strictly intellectual; some merit the label religious, some are better described as social. But each kind of meaning implies a relationship between the person and some larger system of ideas or values, a relationship involving obligation as well as rewards.[25]

That Sisson qualified, based upon these criteria and the particular facts of his case, was stated by Chief Judge Wyzanski:

> Sisson's table of ultimate values is moral and ethical. It reflects quite as real, pervasive, durable, and commendable a

23. ROKEACH, M., THE NATURE OF ATTITUDES (1966), p.10.

24. HOLLANDER, E.P., PRINCIPLES AND METHODS OF SOCIAL PSYCHOLOGY (1967), p.137.

25. Gardner, John W., *Individuality. Commitments and Meaning.* in CURRENT PERSPECTIVES IN SOCIAL PSYCHOLOGY (1967), p.89.

> marshalling of priorities as a formal religion. It is just as much a residue of culture, early training, and beliefs shared by companions and family. What another derives from the discipline of a church, Sisson derives from the discipline of conscience.[26]

Since *Sisson*, other courts have reached varying results. In *Welsh v. United States*,[27] the appellant was denied the status of conscientious objector, because his beliefs were based not on religious but on moral grounds. In another case, *Koster v. Sharp*,[28] the court granted a writ of habeas corpus for release from the military. The petitioner presented arguments similar to those raised by Sisson; the Court granted the status of conscientious objector on the basis of Koster's moral belief. It seems possible to extend the exemption to non-religious objectors insofar as their belief holds the same place in their life as does an orthodox belief in the life of one clearly qualified for exemption as a religious objector. This would limit the exemption to those who were opposed to *war in any form*. By limiting the exemption to this situation, one of the first amendment objections is obviated; non-religious objectors would no longer be the subjects of discrimination. The local draft boards would not require that the belief be based on religious training; they would require only that such belief is held with equal conviction and sincerity. This would place no greater burden on the draft board in regard to fact finding problems than does the determination of the sincerity of a religious believer.

II. ". . . opposed to participation in war in any form . . ."

If this is the final determination, however, Sisson has won only half the battle. In addition to the requirement of a belief based upon "religious training" which both the *Sisson* and *Koster* courts[29] have agreed can only be grounded upon religious

26. 297 F. Supp. at 905.

27. 404 F.2d 1078 (9th Cir. 1968), *appeal granted* 38 U.S.L.W. 3113 (1969).

28. Civil No. 69-1242 (E.D. Pa. Aug. 29, 1969). Koster's beliefs were based on non-religious grounds according to the army's definition of religious training and belief. It should be noted that the military uses the same test as the local board as set out in *Seeger*.

> [T]he regulations [Department of Defense Directive 1300.6, IV. 3(b)] incorporate by reference statutory standards which govern the determination of whether a conscientious objector discharge should be granted. These standards are the same as those used by the Selective Service System in passing on pre-induction requests for conscientious objector classification.

29. Koster v. Sharp, Civil No. 69-1242 (E.D. Pa. Aug. 29, 1969).

prejudice, Sisson's objection was to service in Vietnam. In this respect Sisson and other conscientious objectors are on equal footing, for the Act required that the objection must be to "war in any form." The court in *Sisson* assumed that Congress has the general power to conscript even in the time of peace; however, Chief Judge Wyzanski found that this power is not absolute but is subject to some "exception or immunity" in favor of individual liberty.[30] On the contrary, it has been suggested that exemption from conscription is entirely dependent upon legislative grace,[31] and that a selective conscientious objector, like Sisson, has no right to refuse induction because Congress has not seen fit to provide for him. However, it cannot be doubted that the religious liberty of a person, who objects to a particular war because of his faith, would be infringed upon by conscription for service in that war. It should follow on the same first and fifth amendment grounds considered in the earlier section that the test of whether such infringement is justified must also be the same for the non-religious selective objector.

The Supreme Court has recognized that there may be situations in which the right to free exercise of religion may necessarily be infringed. But the Court has stated, in *Sherbert v. Verner*,[32] that "in this highly sensitive constitutional area, [o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitations."[33] In *Sherbert*, the appellant, a member of the Seventh Day Adventist Church, was denied state unemployment compensation benefits because she refused to accept otherwise suitable employment which would have required her to work on her religion's Sabbath. The Court held that the state must adopt an alternative form of regulation which eliminates this infringement, unless it can demonstrate that no

30. 297 F. Supp. at 907.

31. The Court of Military Appeals concluded that "the constitution neither confers upon, nor preserves to the individual a right to avoid military service because of compulsions of his conscience." United States v. Noyd, 18 U.S.C.M.A. 483, 490, 40 C.M.R. 195 (1969). In a concurring opinion Judge Ferguson stated that: "It is well settled that no claim of conscientious objection may be founded on constitutional principles." *Id.* at 498. In this case the petitioner was an in-service conscientious objector who, like Sisson, because of moral beliefs was opposed to involvement in Vietnam.

32. 374 U.S. 398.

33. *Id.* at 406. "[A]ny attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." Thomas v. Collins, 323 U.S. 516, 530 (1945).

alternative form of regulation can accomplish its legislative purpose without entailing unreasonable cost.[34] This holding of the Supreme Court appears to set forth a viable test of whether the infringement of first amendment freedom of religion rights is justified.

Clearly the defense of the nation is an essential and a paramount interest of Congress and of the people of the United States. As the *Sisson* court assumed, without deciding, it seems indisputable that Congress could "compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general," *if* the conflict were one which would place the nation in danger of destruction.[35] As the balance of danger moves away from that point, individual rights may have to be given consideration.

Alexander Hamilton urged that "[the war] powers ought to exist without limitations . . . . [N]o constitutional shackles can wisely be imposed . . ."[36] upon the Congress in carrying out those powers. Furthermore, the determination of a selective objector is based upon the factual deliberation resulting in agreement or disagreement with our government's foreign policy. To grant this right would "be tantamount to the substitution of private judgment for the judgment of public officers entrusted with carrying out the powers of Government."[37] If such a right is granted here, by logical extension it would seem that the individual should have the right to review every act of Congress to determine, upon his moral belief, whether he will follow that act or disregard it. However, that right has already been exercised in cases like *Torcaso, Everson* and *Sherbert,* without disastrous results. More importantly, contrary to Hamilton's urging, it appears that the first amendment, wisely or not, has imposed some shackles upon congressional power to conscript civilians for service in the military.[38] It seems necessary then, to determine whether the present military situation and the corresponding

34. 374 U.S. at 407.

35. 297 F. Supp. at 908.

36. THE FEDERALIST No. 23 (Hamilton).

37. United States v. Noyd, 18 U.S.C.M.A., 483, 493, C.M.R. 195 (1969).

38. Other war powers have been limited by individual rights under the Constitution. *Cf.* O'Callahan v. Parker 89 S. Ct. 1683 (1969). Noted in 7 SAN DIEGO L. REV. 55 (1970).

"gravity of abuse" by refusal to serve are sufficient to override individual rights.

Judge Wyzanski took a pragmatic approach and found that under present circumstances there does not appear to be a national need for combat service from Sisson. "The want of magnitude in the national demand for combat service is reflected in the nation's lack of calls for sacrifice in any serious way by civilians."[39] He also cited the lack of a declaration of war or congressional proclamation of the existence of a national emergency. In addition, Chief Judge Wyzanski pointed out that "a selective conscientious objector might reflect a more discriminating study of the problem, a more sensitive conscience and a deeper spiritual understanding."[40] These considerations were controlling in the court's determination that the present situation falls short of the "last extremity," which would permit Congress to "compel the armed service of any citizen in the land."[41] It seems, however, that consideration by the *Sisson* court of state and military need for Sisson and those like him, other than the judicial notice of the lack of a declaration of war, is an unjustified invasion of other governmental powers. Although there are presently no established criteria for determining when there may be a need for Sisson to serve, there are some possible indicators. As previously indicated, there has been no formal declaration of war. Moreover, the Selective Service Act provides for a special classification which conditionally exempts those persons who because of physical, mental or moral standards do not qualify for service now, but would qualify "for such service in time of war or national emergency declared by the Congress."[42] The fact that this classification is presently being utilized is an indicator that no national emergency exists. Since Congress has not faced the problem immediately at hand and criteria are needed, these could justifiably be used, and reach the same result as the *Sisson* court.

It appears, therefore, that the government must demonstrate that no alternative form of regulation can accomplish its

39. 297 F. Supp. at 909. "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." *Id.* at 910.

40. *Id.* at 908.

41. *Id.* at 907.

42. 32 C.F.R. § 1622.17 (1969).

legislative purpose without entailing unreasonable cost.[43] A possible alternative seems available in section 456(j) which provides for substitute service in a capacity which contributes to the national health, safety and interest.[44] One possible effect of extending the exemption is that the number of conscientious objectors during an unpopular war might increase to such a point that the military would suffer from a manpower loss to the advantage of projects of national health and safety; eventually there may be a saturation point at which civilian jobs of the applicable nature will not be available. However, this is inherently possible even limited to the present conscientious objector classification, and this possibility alone should not control; when the saturation point is reached, that in itself may be sufficient justification for revocation of exemption. Furthermore, it is better to have these people working for the national interest in a civilian capacity than in jail.[45]

Two other arguments appear more valid. If exemption from military service were allowed on a selective basis, it would become necessary to make a redetermination of the objector's classification upon each change in the world situation. Furthermore, it may be that the selective objector's complaint is premature. Pearl Harbor taught this nation the necessity of having trained forces available on short notice. The selective objector does not resist being trained to fight and serve in the military generally. A more timely remedy may be a habeas corpus action in the event of receipt of orders to participate in the furtherance of the war effort to which he is conscientiously opposed.

---

43. See note 34 *supra.*

44. That section states:

> Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title . . . be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform a period equal to the period prescribed in section 4(b) . . . such civilian work contributing to the maintenance of the national health, safety, or interest . . . .

45. In addition, there appears to be no strong moral basis for not serving in an alternate capacity. Selective objectors could, therefore, be placed in such positions subject to induction in the event of a national emergency.

Whatever the outcome:

> The statute as here applied creates a clash between law and morality for which no exigency exists . . . . The law cannot be adequately enforced by the courts alone, or by courts supported merely by the police and the military. The true secret of legal might lies in the habits of conscientious men disciplining themselves to obey the law they respect without the necessity of judicial and administrative orders. When the law treats a reasonable, conscientious act as a crime it subverts its own power. It invites civil disobedience. It impairs the very habits which nourish and preserve the law.[46]

SANDOR W. SHAPERY

CONSTITUTIONAL LAW—FIRST AMENDMENT—STATES MAY NOT PROHIBIT MERE PRIVATE POSSESSION OF OBSCENE MATRIAL. *Stanley v. Georgia* (U.S. 1969).

An investigation into the suspected bookmaking activities of Robert Eli Stanley led to the issuance of a search warrant by a United States Commissioner. Under the authority of this warrant, Stanley's residence was searched. Little evidence of illegal wagering was discovered, but three reels of motion picture film were found in a desk drawer in Stanley's bedroom. After the investigators viewed the films on Stanley's projector, the reels were seized as contraband obscene matter.[1] Stanley was arrested, indicted for possession of obscene matter in violation of Georgia law,[2] tried and convicted in the Superior Court of Fulton County.

The Supreme Court of Georgia[3] affirmed the conviction reasoning that obscenity is not entitled to the protection of the first amendment under the rule of *Roth v. United States*[4] and that

46. 297 F. Supp. at 910-11.

1. Appellant did not argue that the materials seized were not obscene. Therefore, the Court assumed, for purposes of decision, that the films would be classified as obscene matter under any presently accepted test. 394 U.S. at 557 n.2.

2. GA. CODE ANN. § 26-6301 (Supp. 1968), which reads in pertinent part, "Any person . . . who shall knowingly have possession of . . . any obscene matter . . . shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony . . . ."

3. *Cf.* Stanley v. State, 224 Ga. 259, 161 S.E.2d 309, 312 (1968). The exact ground was not urged until argument before the United States Supreme Court. Stanley v. Georgia, 394 U.S. 557, 560 (1969).

4. Roth v. United States, Alberts v. California, 354 U.S. 476 (1957).