

---

## Constitutional Law - Conscientious Objectors - The End of the Selective Conscientious Objector

James Michael Newton

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

### Recommended Citation

James M. Newton, *Constitutional Law - Conscientious Objectors - The End of the Selective Conscientious Objector*, 21 DePaul L. Rev. 1051 (1972)

Available at: <https://via.library.depaul.edu/law-review/vol21/iss4/7>

This Case Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

## CONSTITUTIONAL LAW—CONSCIENTIOUS OBJECTORS— THE END OF THE SELECTIVE CONSCIENTIOUS OBJECTOR

Guy Porter Gillette was convicted of willful refusal to report for induction into the armed forces. Gillette defended on the ground that he was entitled to an exemption from induction as a conscientious objector ("C.O.") to war. Gillette's claim to C.O. status was based solely upon his opposition to the war in Vietnam, rather than an opposition to all war. His claim was based upon a "humanistic" approach to religion that the war in Vietnam was an "unjust" war that was contrary to his conscience and his deeply held views concerning the purpose of human existence.<sup>1</sup> After the district court upheld the administrative denial of exemption, the court of appeals, in affirming the lower court, concluded that Gillette's conscientious beliefs "were specifically directed against the war in Vietnam," while the relevant exemption provision of the Military Selective Service Act of 1967, "requires opposition 'to participation in war in any form.'"<sup>2</sup>

In a companion case, Louis Negre, a Roman Catholic, sought discharge from the Army as a conscientious objector to war after receipt of orders for Vietnam duty. Negre based his claim to C.O. status on: (1) His belief that it was his duty as a Catholic to discriminate between "just" and "unjust" wars and to forswear participation in the latter, (2) that the war in Vietnam was "unjust", (3) participation in the Vietnam War would contravene his conscience and what he had been taught by his religious training.<sup>3</sup> Habeas relief was denied, and the denial was affirmed on appeal, because, in the language of the court of appeals, Negre "objects to the war in Vietnam, not to all wars," and therefore does "not qualify for separation [from the Army], as a conscientious objector."<sup>4</sup>

The issue, in these companion cases, is whether a selective conscientious objector, *i.e.*, an objector opposed to participation in a particular war rather than all war, is entitled to exemption from military service as a conscientious objector?

---

1. *Gillette v. United States*, 401 U.S. 437 (1971).

2. *Gillette v. United States*, 420 F.2d 298, 299-300 (2d Cir. 1970); *MILITARY SELECTIVE SERVICE ACT OF 1967*, 50 U.S.C. App. § 456(j) (1964 Supp. V).

3. *Supra* note 1, at 440-441.

4. *Negre v. Larsen*, 418 F.2d 908, 909-910 (9th Cir. 1969).

The Supreme Court of the United States, in deciding these cases jointly, held that neither Gillette nor Negre was entitled to exemption from military service as a conscientious objector under the Military Selective Service Act of 1967.<sup>5</sup>

The Court held that, although Gillette and Negre met the statutory requirement of sincerity of religious training and belief, they failed to meet the statutory requirement of opposition to all war. *Gillette v. United States*, 401 U.S. 437 (1971).

This decision is significant because it is the first time that the Supreme Court has ruled upon an individual's claim to C.O. exemption from military service by virtue of his opposition to a particular war. It represents a reversal of liberal construction of conscientious objector exemptions, and it poses constitutional problems with respect to the "free exercise" and "establishment" of religion clauses of the Constitution. The purpose of this note is to analyze the *Gillette* case within the historical context of conscientious objector legislation and case law and the "free exercise" and "establishment" of religion clauses of the Constitution.

Conscientious objector exemptions from military service have been recognized, in one form or another, by the legislative branch and enforced by the judicial branch since 1775 when the Continental Congress announced its resolve to respect the beliefs of people who because of religious principles could not bear arms.<sup>6</sup> This resolve was given statutory recognition in 1864 when Congress explicitly exempted from the federal draft persons who "are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith [of their] religious denominations. . . ."<sup>7</sup> These standards were further revised during World War I in the Draft Act of 1917 which exempted members of

any well-recognized religious sect or organization . . . whose existing creed or principles forbid its members to *participate in war in any form* and whose religious convictions are against war . . . .<sup>8</sup> (Emphasis added).

---

5. MILITARY SELECTIVE SERVICE ACT OF 1967, 50 U.S.C. App. §§ 456(j), 6(j) (1964 Supp. V) [hereinafter cited as "Act of 1967"]. The relevant provisions of this Act have not been changed by subsequent acts or the Draft Law of 1971.

"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.*" (Emphasis added).

6. Selective Service System Monograph No. 11, Conscientious Objection 29-38, at 33-34 (1950).

7. ACT OF FEBRUARY 24, 1864, ch. 13, § 17, 13 Stat. 9.

8. ACT OF MAY 18, 1917, ch. 15, § 4 at 78, 40 Stat. 76.

This Act, while following the 1864 statute with respect to membership in a religious sect, added the requirement of total pacifism by limiting C.O. exemptions to members of religious sects who were forbidden to "participate in war in any form."

Draft legislation in 1940 dropped the requirement of church membership or sectarian affiliation and provided for exemption to anyone "*who, by reason of religious training and belief, is conscientiously opposed to war in any form.*"<sup>9</sup> (Emphasis added).

A conflict developed over the breadth of the phrase "religious training and belief." In *United States v. Kauten*,<sup>10</sup> Judge Augustus Hand in *dictum* interpreted the clause to include an exemption to any individual whose conscientious scruple against war in any form was a response to an inward mentor, whether that mentor be conscience or God.<sup>11</sup> This *dictum* which allowed conscientious exemption regardless of church affiliation or belief in a Supreme Being became the law of the second circuit in *United States v. Badt*.<sup>12</sup>

The ninth circuit, on the other hand, construed the statute to require belief in a deity and implied adherence to a religious organization in *Berman v. United States*.<sup>13</sup> Since the Supreme Court refused to hear the *Berman* case,<sup>14</sup> the circuits remained in conflict until 1948 when Congress, in revising the selective service laws, defined "religious training and belief" as "an individual's belief in relation to a Supreme Being . . . ."<sup>15</sup>

This statutory requirement that an individual, although he need not be a member of a religious sect, must demonstrate an aversion to war, the source of which must stem from a belief in a Supreme Being, was never seriously challenged in the courts until 1965 in *United States v. Seeger*.<sup>16</sup> In this case the court at the circuit level declared the 1948

---

9. ACT OF SEPTEMBER 16, 1940, ch. 720, § 5(g), 54 Stat. 885, 889.

10. *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943).

11. *Id.* at 708. *Kauten* is also cited as the earliest decision to require opposition to all war, but Mr. Justice Hand's view that less than total opposition was a political rather than a religious belief is merely *dictum*.

12. 141 F.2d 845 (2d Cir. 1944); *see*, *Phillips v. Downer*, 135 F.2d 521 (2d Cir. 1943).

13. 156 F.2d 377 (9th Cir. 1946), *cert. denied*, 329 U.S. 795 (1946).

14. *Id.*

15. ACT OF JUNE 24, 1948, ch. 625, § 6(j), 62 Stat. 604 (1948).

16. *United States v. Seeger*, 326 F.2d 846 (2d Cir. 1964), *aff'd on other grounds*, 380 U.S. 163 (1965). By expanding the construction of the statute, the Court was able to keep it intact.

Act unconstitutional since the statutory requirement of a religious belief in a Supreme Being for C.O. exemption excluded non-theistic objectors and thereby provided for the establishment of pacifistic, theistic religions contrary to the first amendment's establishment clause and the fifth amendment's due process clause which require neutrality in dealing with religions.<sup>17</sup> The Supreme Court by providing a broad construction of the statute was able to bypass the constitutional issues presented by the circuit court and include Seeger, who held a sincere, non-theistic belief against the war, within the definition of religion contained in the statute. Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, 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 positions 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.<sup>18</sup>

This parallel test as established in *Seeger* to avoid constitutional problems expanded C.O. exemptions from religious beliefs derived from religion or a belief in a deity to individuals with non-theistic, but religious beliefs so long as these beliefs were derived from a parallel, ultimate source equivalent to a deity. The Court, however, failed to provide an adequate test for these parallel beliefs except to exclude those persons "who . . . decide on the basis of essentially political, sociological or economic considerations that war is wrong and that they will have no part of it."<sup>19</sup> The *Seeger* decision was incorporated into the Act of 1967 which deleted "Supreme Being" and excluded political, sociological or philosophical views from C.O. exemption.<sup>20</sup>

This liberalization of C.O. exemption, particularly with respect to the "religious training and belief" requirement, culminated with *Welsh v. United States*,<sup>21</sup> when the Supreme Court clarified the parallel test established in *Seeger*. In *Welsh*, the Court held that a non-theistic objector qualifies for exemption to the extent he holds sincere ethical or moral

---

17. *Supra* note 16, at 851-853. The theistic vs. non-theistic arguments of *Seeger* would seem to add impetus to Negre's claim based on just vs. unjust war principles since, as a Catholic, Negre's arguments encompass the same obstacles of free exercise and equal protection.

18. *Supra* note 16, at 165-166.

19. *Supra* note 16, at 173.

20. MILITARY SELECTIVE SERVICE ACT, 50 U.S.C. App. §§ 456(j), 6(j) (1964 Supp. V).

21. 398 U.S. 333 (1970).

beliefs in opposition to participation in war and these beliefs function as a religion in the registrant's life.<sup>22</sup>

The long term liberalization of the various "religious training and belief" clauses in conscientious objector legislation was not complemented with any compatible development of the "participation in war in any form" clause. Registrants failed to seriously or consistently challenge the constitutional validity of this clause until the Vietnam War, with the exception of theistic registrants who refused to fight in all war, except a theocratic war.<sup>23</sup> Although the clause first appeared in the Act of 1917<sup>24</sup> and has not varied in form through the Act of 1967,<sup>25</sup> it was not discussed by the courts until 1943 in *Kauten*<sup>26</sup> when Judge Hand stated in *dictum*:

There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act [Act of 1940]. The former is usually a political objection. . . .<sup>27</sup>

The only other instances of court decisions discussing or affecting the requirement of "opposition to participation in war in any form" prior to the Vietnam War have been the theocratic war cases following the Supreme Court's holding in *Sicurella v. United States*.<sup>28</sup> In that case the Court avoided discussion of constitutional implications of the clause and determined that Congress had in mind opposition to participation in "real shooting wars when it referred to participation in war in any form"<sup>29</sup> and not theocratic, biblical or holy wars.<sup>30</sup>

22. *Id.*, see also *United States v. Thaxter*, 437 F.2d 417 (9th Cir. 1971) which held that moral and ethical beliefs may be mixed with political or policy considerations and *Welsh* still applies.

23. *Sicurella v. United States*, 348 U.S. 385 (1955) which defined a theocratic war as an Armageddon or holy war waged on orders of Jehovah in defense of an individual's faith.

24. Act of May 18, 1917, ch. 15, § 4 at 78, 40 Stat. 76.

25. MILITARY SELECTIVE SERVICE ACT OF 1967, 50 U.S.C. App. §§ 456(j), 6(j) (1964 Supp. V). Nor was the wording changed in the current draft law, The Draft Act of 1971.

26. *Supra* note 10.

27. *Supra* note 10, at 708. Chief Justice Hughes in his famous dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), stated that an applicant should not be disqualified from C.O. status merely because his religious beliefs were based upon a just vs. unjust war theory.

28. *Supra* note 23; see also *United States v. Carroll*, 398 F.2d 651 (3rd Cir. 1968); *Kretchet v. United States*, 284 F.2d 561 (9th Cir. 1960); *Jessen v. United States*, 212 F.2d 897 (10th Cir. 1954).

29. *Supra* note 23, at 391. The Court stated that the test was not a registrant's opposition to all war, but rather his opposition, on religious grounds to *participation*

With the increasing dissatisfaction with United States' involvement in Vietnam, registrants seeking C.O. exemption began focusing their requests for exemption on the unjustness of the war in Vietnam rather than aversion to all war. As a result the courts were confronted with the selective conscientious objector who was opposed to "unjust" wars, but who would participate in "just" wars. This doctrine that an individual may determine which wars are "just" or "unjust" and, acting in accordance with his conscience, refrain from participation in the latter was first adopted and incorporated into the teachings of Catholicism.<sup>31</sup> The doctrine essentially provides that an individual must act according to his conscience and determine whether a particular war is unjust, and, if he finds it to be unjust, refrain from participation therein.<sup>32</sup> The majority of registrants who adopted this doctrine in pre-*Gillette* cases were denied C.O. status on grounds other than their failure to oppose all war. These denials of C.O. status ranged from procedural grounds<sup>33</sup> to the insincerity of registrants' beliefs<sup>34</sup> in accordance with the *Seeger-Welsh* guidelines.<sup>35</sup>

Two courts prior to *Gillette* confronted the "just-unjust" war doctrine and the constitutional issues raised by such a religious stance. They declared the "participation in war in any form" clause unconstitutional because it violated the free exercise, equal protection and establishment of religion clauses of the Constitution. In the first of these cases, *United States v. McFadden*,<sup>36</sup> defendant applied for C.O. status on the grounds

---

in war. Such a statement leads to the logical construction that a registrant need only be opposed to some war.

30. *Supra* note 23, at 390-391.

31. ST. AUGUSTINE, CITY OF GOD Bk. XIX ch. 7, Bk. IV chs. 14, 15 (Image Books ed. 1958); ST. THOMAS AQUINAS, TREATISE ON LAW 72 (Gateway Press Inc. ed. 1963). Although Catholicism was the initial proponent of the just vs. unjust war doctrine, the universal incorporation of this dogma into other religions is evidenced in the *amicus curiae* briefs filed in the *Gillette* case by the National Council of Churches of Christ in the U.S.A. (composed of eight religious sects with 42,000,000 members) and the American Jewish Congress.

32. *Supra* note 3, at 440-441; see Douglas' dissent in *Gillette v. United States*, 401 U.S. 437, 470-474 (1971); *United States v. McFadden*, 309 F. Supp. 502 (N.D. Cal. 1970); *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969).

33. See *United States v. Spiro*, 384 F.2d 159 (3rd Cir. 1967), cert. denied, 390 U.S. 956 (1968); *Noyd v. McNamara*, 378 F.2d 538 (10th Cir. 1967); *United States v. Kurki*, 384 F.2d 905 (7th Cir. 1967).

34. See *Davenport v. Laird*, 440 F.2d 380 (4th Cir. 1971); *Armstrong v. Laird*, 325 F. Supp. 1042 (D. Mass. 1971).

35. *Supra* note 16. See *Welsh v. United States*, *supra* note 21.

36. 309 F. Supp. 502 (N.D. Cal. 1970). The judgment was vacated and remanded in 401 U.S. 2 (1971) in light of the Supreme Court's decision in *Gillette*.

that he believed that the war in Vietnam was unjust, and to submit to induction would violate his conscience. His beliefs were based upon his training and belief in the Catholic religion and the sincerity of his belief was not at issue.<sup>37</sup> The essence of his claim was the role played by one's conscience in Catholic doctrine. Judge Alfonso J. Zirpoli capsulized that doctrine as follows:

There exists a divine law. This law is perceived by man through his conscience. When man detects this law of God which is written in his conscience he must obey its commands. If the laws of man are contrary to the law of God, as seen through one's conscience, the individual must obey God.<sup>38</sup>

Defendant argued that Section 6(j) of the Act of 1967, while allowing pacifist religious objectors an exemption, placed him, as a selective conscientious objector, in the unconstitutional position of violating a cardinal principle of his religion or suffering the consequences of jail.<sup>39</sup> As a result defendant claimed that the Act of 1967 violated the "free exercise" clause since it prevented him from exercising his religion; violated the "equal protection" clause since it favored one religion (peace religions) over others (Catholicism); and thereby "established" one religion at the expense of another.<sup>40</sup>

With respect to the "*free exercise*" issue the court stated that direct restrictions on the exercise of religion have been upheld in the past in cases dealing with the protection of society's health and morals by restraining *affirmative acts required by the religion*.<sup>41</sup> However, in McFadden's case, he was being *commanded to perform* an affirmative act—participation in a war which his conscience determined was unjust. The court compared McFadden to Sherbert in *Sherbert v. Verner*.<sup>42</sup> In that case, Sherbert's religion forbade her to work on Saturday, the Sabbath Day of her faith. Because of her adherence to this religious belief she was fired and subsequently denied unemployment compensation because jobs were available if she would forgo her religious belief. The Supreme Court held that underlying statute unconstitutional since:

---

37. *Id.* at 504.

38. *Supra* note 36, at 504-505.

39. *Supra* note 36, at 505.

40. *Id.* As to the impact of such a violation of the equal protection clause on Catholicism see the *amicus curiae* brief of the Executive Board of the National Federation of Priest's Council submitted in support of Negro.

41. *Supra* note 36, at 505. The Baltimore Catechism, the basic instructional document for young Catholics, provides that the *only* exception to the fifth commandment of "thou shall not kill" is "a soldier fighting a just war." BALTIMORE CATECHISM 147-48 (Official Revised Edition 1949).

42. 374 U.S. 398 (1963).

[It] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.<sup>43</sup>

Nor were her religious principles within the purview of the statute since they offered no threat to society's health or morals and there existed no compelling state interests.<sup>44</sup>

When compared to *Sherbert*, Judge Zirpoli found that:

[the] statute [Act of 1967] forces defendant McFadden to choose between following the precepts of his religion and going to jail or abandoning those precepts in order to avoid jail. Indeed, the case of defendant McFadden is stronger than *Sherbert's*, for not only is he faced with jail, but if he abandons his conscience he will be put in the position of possibly violating the fundamental precept of his religious belief—the killing of another human being in the cause of an unjust war.<sup>45</sup>

In dealing with "equal protection" issues,<sup>46</sup> a law which draws a distinction between classes with respect to primary rights must be supported by a compelling state interest,<sup>47</sup> or it denies equal protection and violates due process of law under the fifth amendment.<sup>48</sup> Judge Zirpoli found no compelling state interest in *McFadden*. With respect to the argument that striking the requirement of "war in any form" would result in a substantial loss of manpower, Zirpoli noted that the same argument was made after *Seeger* which struck the requirement of belief in a Supreme Being, but no reduction occurred.<sup>49</sup> At the same time, Zirpoli pointed out that when dealing in the area of primary freedoms the government is required to show that no alternate means exist to satisfy the same governmental interest.<sup>50</sup> In the case of selective objectors numerous alternatives are available such as the increasing numbers of individuals susceptible to the draft, the revocation of college deferments,

---

43. *Supra* note 42, at 404.

44. *Supra* note 42, at 403.

45. *Supra* note 36, at 506. See THE LIFE AND DEATH OF FRANZ JAGERSTATTER for an excellent example of a Catholic confronted with the choice of his conscience in opposition to Hitler's war, who was executed in World War II Germany for his religious belief in the final authority of the conscience.

46. Inherent in the free exercise clause is the concept that one religious group cannot be favored over another hence religions must be given equal protection under the law. *Fowler v. Rhode Island*, 345 U.S. 67 (1953); see also *Follett v. McCormick*, 321 U.S. 573 (1944).

47. See *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Sherbert v. Verner*, *supra* note 42, at 403, 406; *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

48. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

49. *Supra* note 36, at 507.

50. *Supra* note 36, at 507; see also *McGowan v. Maryland*, 366 U.S. 420, 450-452 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

activation of the reserves, or changes in the mental or physical requirements to meet the changing needs for manpower.<sup>51</sup> Nor would the extension of C.O. exemption to all selective objectors open the floodgates for spurious claims or problems in gauging sincerity since these rationales were rejected in *Seeger* and *Sherbert*.<sup>52</sup> As a result, Zirpoli reasoned, the Act of 1967 violated the "establishment of religion" clause of the first amendment in that, in failing to provide equal protection, it prefers pacifist religions over non-pacifist religions.<sup>53</sup>

In *United States v. Sisson*,<sup>54</sup> the second case involving the selective conscientious objector in the pre-*Gillette* era, the district court in granting Sisson's motion in arrest of judgment declared the Act of 1967 in violation of constitutional principles. While Sisson was unlike McFadden<sup>55</sup> in that Sisson's religious belief was based on high moral and ethical beliefs rather than an orthodox religion, the same issues of free exercise, equal protection and establishment of a religion were posed.

In treatment of these issues the court conceded that Congress has the constitutional power of conscription, but in the conscription of the conscientious objector the conflicting interests of common defense and individual freedom must be balanced<sup>56</sup> according to their magnitudes at any given time. In comparing the conflicting interests with respect to the Vietnam War the Court pointed out that:

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.<sup>57</sup>

---

51. *Supra* note 36, at 507.

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

53. *See* *Everson v. Board of Education*, 330 U.S. 1, 15 (1945) where the Court described the establishment clause: "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."

54. *Supra* note 52.

55. *See* note 36. The issues and arguments are identical in both McFadden and Sisson since, under *Seeger* and the incorporation of the *Seeger* doctrine in subsequent draft legislation, religion is no longer the test for a religious belief. However, a religious belief, such as McFadden's and Negre's, based upon the dogma of an orthodox religion provides a more concrete conflict with the first and fifth amendments.

56. *Supra* note 52, at 906-908.

57. *Supra* note 52, at 908.

Thus the court recognized the need to protect individual belief regardless of its selectivity.

With respect to the competing interest of the common defense, the Court pointed out that:

[a] campaign fought with limited forces for limited objects with no likelihood of a battlefield within this country and without a declaration of war is not a claim of comparable magnitude. Nor is there any suggestion that in present circumstances there is a national need for combat service from Sisson as distinguished from other forms of service by him. 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.<sup>58</sup>

Because the magnitude of Sisson's interest was greater, the Court held that the free exercise clause and the due process clause were violated by the Act of 1967.

The Court further held that because the Act of 1967 grants C.O. status to religious pacifists (*i.e.*, Quakers) at the expense of selective objectors (*i.e.*, Catholics or those opposed to particular wars on high ethical or moral grounds) it, in effect, established one religion over another and, hence, failed to provide equal protection under the law.<sup>59</sup> Since the Supreme Court determined that it lacked jurisdiction in *Sisson*,<sup>60</sup> its first opportunity to determine the application of C.O. exemption to selective conscientious objectors was in *Gillette*.

In view of the liberalization of the "religious training and belief" clause and the establishment of the parallel test doctrine<sup>61</sup> to expand the statutory requirements of C.O. exemption in an attempt to avoid the constitutional issues, the Supreme Court, in *Gillette*, had the opportunity to recognize selective conscientious objector exemptions either by way of a statutory construction of the "participation in war in any form" clause to include *Gillette* and *Negre* within its meaning as it did in *Seeger*<sup>62</sup> or to confront the constitutional issues in the manner of *McFadden* and *Sisson*.

The Court, however, took the opposite position with respect to both the statutory construction of the clause and the constitutional issues involved. *Negre* and *Gillette* attempted to provide the Court with a con-

---

58. *Supra* note 52, at 909.

59. *Supra* note 52, at 910-11.

60. *United States v. Sisson*, 399 U.S. 267 (1970).

61. *Supra* note 16.

62. *Id.* A statutory construction of the clause to mean participation in any form would have allowed the Court to bring *Gillette* and *Negre* within the meaning of the statute, but such a construction would have been without legal precedent except for the dictum in *Sicurella*.

struction of the clause to encompass selective objectors much like non-theistic objectors in *Seeger*. They contended that the clause was enacted from Chief Justice Hughes' dissent in *United States v. Macintosh*<sup>63</sup> and could be construed to require an opposition to any form of participation in war rather than an opposition to participation in all war (*i.e.*, war in *any form*). The Court rejected this statutory construction stating that it would strain good sense to construe the statute in such a manner, and furthermore:

[L]egislative materials simply do not support the view that Congress intended to recognize [just] any conscientious claim . . . as a basis for relieving the claimant from the general responsibility . . . of military service. The claim that is recognized by §6(j) is a claim of conscience running against war as such. [The] claim . . . involving opposition to a particular war only was plainly [not within] the focus of congressional concern.<sup>64</sup>

The Court then held:

Congress intended to exempt persons who oppose participation in all war—'participation in war in any form'—and that persons who object solely to participation in a particular war are not within the purview of the exempting section, even though the latter objection may have such roots in a claimant's conscience and personality that it is 'religious' in character.<sup>65</sup>

This construction of the statute determined that governmental interests outweighed the protections normally afforded individual religious belief.

Mr. Justice Marshall likewise dismissed petitioners' contention that the Court in *Sicurella v. United States*<sup>66</sup> had already interpreted the "participation in war in any form" clause consistent with their claims as selective conscientious objectors. Marshall determined that *Sicurella* was not on point since it involved a reservation with respect to an abstract theocratic war, and not "real shooting wars" which petitioners objected to and Congress had in mind when it enacted exemption legislation.<sup>67</sup> Although Marshall easily dismissed the construction arguments that were offered to salvage the statute, his dismissal of the constitutional arguments with respect to the "free exercise" and "establishment" clauses was less convincing.

Petitioners argued that the first amendment provides that Congress can make no laws respecting the establishment of religion or prohibiting

---

63. 283 U.S. 605 (1931); see *Gillette v. United States*, 401 U.S. 437 at 444, n.9 (1971).

64. *Supra* note 1, at 445-446.

65. *Supra* note 1, at 447.

66. *Supra* note 23.

67. *Supra* note 1, at 446-447.

its free exercise, and the provision of the statute that granted exemptions to religious objectors to all war, and not to selective objectors, interfered with these constitutional rights. While Marshall recognized the discrimination, he contended that the "establishment" and "free exercise" clauses were not contravened so long as the statute was fashioned for valid secular purposes and maintained neutrality.<sup>68</sup>

With respect to neutrality, Marshall argued that the liberalization of exemption requirements in *Welsh v. United States*<sup>69</sup> and *United States v. Seeger*<sup>70</sup> eliminated religion as a requirement of the statute and substituted an "individual belief [in] objection to all war. . . ."<sup>71</sup> As a result, the statute does not encourage or favor selected religions or membership in religious organizations, but merely limits the extent of the exemption within the purview of the valid secular and neutral reasons for enactment of the statute.<sup>72</sup>

These valid secular reasons are the needs of fairness in the administration of conscription laws to support the manpower requirements in defense of the country. Marshall contended that since the expansion of C.O. status to selective objectors would create difficulties in distinguishing the sincerity of conscientious objection from objections that were political and subjective in nature, an expansion to selective objectors would interject unfairness in the administration of conscription laws.<sup>73</sup> The Court therefore concluded:

That it is supportable for Congress to have decided that the objector to all war—to all killing in war—has a claim that is distinct enough and intense enough to justify special status, while the objector to a particular war does not.<sup>74</sup>

This conclusion not only dismissed future claims of C.O. status by selective objectors, but established opposition to all war as a *prima facie* element of C.O. exemption.

In its decision the Supreme Court slighted many of the salient arguments with respect to the constitutional issues posed by the Act of 1967. By interpreting the *Seeger* and *Welsh*<sup>75</sup> decisions to mean that the test

---

68. *Supra* note 1, at 449. See *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Abbington School District v. Schempp*, 374 U.S. 203 (1963).

69. *Supra* note 18.

70. See *United States v. Thaxter*, *supra* note 22.

71. *Supra* note 1, at 454.

72. *Supra* note 1, at 454, 460.

73. *Supra* note 1, at 459-462.

74. *Supra* note 1, at 460.

75. See *United States v. Seeger*, *supra* note 18; *Welsh v. United States*, *supra* note 22.

of C.O. status is exclusively whether an individual holds a sincere and highly ethical belief of opposition to all war, the Court in effect read out any religious overtones posed by the Act. This ignores the selective objectors who, like McFadden and Negre, base their claims upon the established doctrines of their religion; and to deny them C.O. status is to deny them a fundamental doctrine of their religion (*i.e.*, an individual's conscience is the ultimate determinant of the unjustness of a war and his participation therein). Such a denial is hardly compatible with the first and fifth amendments as expressed in *Sherbert v. Verner* which requires the statute rather than the individual to bear the burden of proof when there is a possible conflict with the free exercise of religion.<sup>76</sup> Since the *Gillette* decision, the Supreme Court has been confronted with the selective conscientious objector on four occasions.<sup>77</sup> In three of these, the Court summarily vacated the lower court judgments and remanded them for reconsideration in light of its decision in *Gillette*.<sup>78</sup> In the fourth, *United States v. Clay*,<sup>79</sup> the Court reversed the conviction of Clay on procedural grounds, but reaffirmed the C.O. exemption requirements of sincerity of belief,<sup>80</sup> orthodox religious or highly ethical or moral beliefs,<sup>81</sup> and opposition to all "real shooting wars" in any form.<sup>82</sup> At the same time the lower courts have rejected selective conscientious objector claims on the basis of *Gillette* without discussion or elaboration.<sup>83</sup> As a result the trend of liberalization of conscientious

---

76. *Supra* note 43. See Judge Zirpoli's arguments in *United States v. McFadden* at note 45.

77. *Clay v. United States*, 400 U.S. 990 (1971); *United States v. Shields*, 401 U.S. 1007 (1971); *Moore v. United States*, 401 U.S. 1013 (1971); *United States v. McFadden*, *supra* note 36.

78. *Id.*

79. *Supra* note 76.

80. *Supra* note 76. See *United States v. Seeger*, *supra* note 18.

81. *Supra* note 76. See *United States v. Seeger*, *supra* note 18; *Welsh v. United States*, *supra* note 22.

82. *Gillette v. United States* at note 72.

83. The lower courts have consistently applied "opposition to all war" as a part of the *prima facie* case of the conscientious objector since *Gillette*. See *United States v. Doran*, 438 F.2d 535 (4th Cir. 1971); *Kurtz v. Laird*, 449 F.2d 210 (5th Cir. 1971); *United States v. McKinley*, 447 F.2d 962 (9th Cir. 1971); *Davenport v. Laird* at note 34; *Armstrong v. Laird* at note 34; *United States v. Kaplan*, 327 F. Supp. 1086 (1971); *United States v. Quattrucci*, 329 F. Supp. 615 (1971). But for an important construction of the *Gillette* case see *Thomas v. Salatch*, 328 F. Supp. 18, 23 (1971). In that case the government claimed that letters and statements made by the petitioner which were directed against the Vietnam War showed his opposition to a particular war and thereby precluded C.O. status. The court rebutted this contention and stated that where the evidence shows an opposition to all war opposition to a particular war does not preclude C.O. status since

objector exemption has ceased, if not reversed.<sup>84</sup> More importantly, however, the Court has again sidestepped any confrontation between selective service legislation and the free exercise and equal protection clauses of the first and fifth amendments.<sup>85</sup>

*James Michael Newton*

---

it is logical and axiomatic that a person who opposes all war must also oppose a particular one.

84. See *Armstrong v. Laird* at note 34 where that court equated failure to object to all war with insincerity of belief.

85. See Douglas dissent in *Gillette v. United States* at note 1, 463-474.