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Naturalization and Willingness to Take Up Arms

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NATURALIZATION AND WILLINGNESS TO TAKE UP ARMS

"If necessary, are you willing to take up arms in defense of this country?"[1]

Is this a necessary and proper question to require an alien to answer on his application for naturalization? Apparently, under the decision of the Supreme Court of the United States in the *Girouard* case,[2] it is not.

The people of the United States, through the Constitution, have delegated to Congress the power to regulate naturalization.[3] In exercising this power, Congress has enacted several laws affecting naturalization,[4] in each of which it has required an alien, before admission to citizenship, to declare on oath in open court substantially as follows:

> "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God."[5]

Congress also required the court to be satisfied that the alien had "behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same"[6] during the five year period immediately preceding the date of his application for naturalization.

No doubt Congress intended that the answer to the question: "If necessary, are you willing to take up arms in defense of this country?", should give the court information of assistance in determining whether the applicant was "attached to the principles of the Constitution of the United States" and whether he could declare "without any mental reservation or purpose of evasion" that he would "support and defend the Constitution and laws" of the nation. But, did Congress intend that an unqualified affirmative willingness to bear arms in defense of this country should be a prerequisite to the granting of naturalization?

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[1] Question 22 of the Application for Naturalization.
[2] Girouard v. United States, 66 S.Ct. 826 (1946).
[3] U.S. Const., Art. I, Sec. 8: "The Congress shall have power * * * To establish an uniform Rule of Naturalization, * * *"
[4] For example: Naturalization Act of June 29, 1906, 34 Stat. 596; Selective Training and Service Act of 1940, 54 Stat. 889; Nationality Act of October 14, 1940, 54 Stat. 1137; Second War Powers Act of 1942, 56 Stat. 176; and Act of December 7, 1942, 56 Stat. 1041.
[5] 54 Stat. 1157, 8 U.S.C. Sec. 735(b), 8 U.S.C.A. Sec. 735(b).
[6] Naturalization Act of 1906, 34 Stat. 596, Sec. 4.

In the *Schwimmer* case,[7] the applicant for naturalization was a woman who was born in Hungary in 1877 and was a citizen of that country. She came to the United States to visit and lecture in 1921 and within a few months after her arrival declared her intention to become a citizen. She filed petition for naturalization in September, 1926. In her application she answered "I would not take up arms personally" to the question "If necessary, are you willing to take up arms in defense of this country?"

At the hearing, a statement made by her in private correspondence: "I am an uncompromising pacifist . . . I have no sense of nationalism, only a cosmic consciousness of belonging to the human family", was introduced in evidence. She testified "If . . . the United States can compel its women citizens to take up arms in the defense of the country — something that no other civilized government has ever attempted — I would not be able to comply with this requirement of American citizenship. In this case I would recognize the right of the Government to deal with me as it is dealing with its male citizens who for conscientious reasons refuse to take up arms." She further stated that she had occasionally glanced through Hungarian, French, German, Dutch, Scandinavian, and Italian publications, and said she could imagine finding in meetings and publications attacks on the American form of government and would conceive it her duty to uphold the Constitution against such attacks. And she testified further, "I am always ready to tell anyone who wants to know it that I am an uncompromising pacifist and will not fight."

The Supreme Court, on Writ of Certiorari, denied the petition for naturalization; Justices Holmes, Brandeis and Sanford dissenting. The court quoted from the *Manzi* case:[8] "Citizenship is a high privilege and when doubts exist concerning a grant of it, generally, at least, they should be resolved in favor of the United States and against the claimant." The court further stated:[9]

> "Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the Government. * * * The fact that, by reason of sex, age or other cause, they may be unfit to serve does not lessen their purpose or power to influence others."

In *Macintosh* case,[10] the applicant for naturalization was born in the Dominion of Canada, came to the United States in 1916, and

[7] United States v. Schwimmer, 279 U.S. 644, 49 S.Ct. 448, 73 L.Ed. 889 (1929). For comments on this case see Pugh, 3 U. Cin. L. R. 462 (1929), and Gray, 7 N.Y.U.L.Q. 723 (1930).
[8] United States v. Manzi, 276 U.S. 463 at p. 467, 48 S.Ct. 328, 72 L.Ed. 654 (1928).
[9] United States v. Schwimmer, *supra*, note 7, at p. 650.
[10] United States v. MacIntosh, 283 U.S. 605, 51 S.Ct. 570, 75 L.Ed. 1302 (1931).

in 1925 declared his intention to become a citizen. His answer to question 22 on the application; "If necessary, are you willing to take up arms in defense of this country?", was: "Yes, but I should want to be free to judge of the necessity." In a written memorandum subsequently filed, he amplified his answer by the following:

> "I am willing to do what I judge to be in the best interests of my country, but only in so far as I can believe that this is not going to be against the best interests of humanity in the long run. I do not undertake to support 'my country right or wrong' in any dispute which may arise, and I am not willing to promise beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not 'take up arms in defense of this country,' however 'necessary' the war may seem to be to the Government of the day."

On hearing before the District Court, Macintosh testified:

> "* * * that he would answer question 22 in the affirmative only on the understanding that he would have to believe that the war was morally justified before he would take up arms in it or give it his moral support. He was ready to give to the United States all the allegiance he ever had given or ever could give to any country, but he could not put allegiance to the government of any country before allegiance to the will of God."

Again, the Supreme Court denied naturalization. In this case Chief Justice Hughes dissented, and his dissent was concurred in by Justices Brandeis and Stone. The majority opinion went to some length in outlining the court's reasons for its decision, saying, in part:[11]

> "When he speaks of putting his allegiance to the will of God above his allegiance to the government, it is evident, in the light of his entire statement, that he means to make *his own interpretation* of the will of God the decisive test which shall conclude the government and stay its hand. * * *
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> "If the attitude of this claimant, as shown by his statements and the inferences properly to be deduced from them, be held immaterial to the question of fitness for admission to citizenship, where shall the line be drawn? Upon what ground of distinction may we hereafter reject another applicant who shall express his willingness to respect any particular principle of the Constitution or obey any future statute only upon the condition that he shall entertain the opinion that it is morally justified?"

The *Bland* case[12] was argued to the court immediately following the *Macintosh* case. Here the applicant refused to take the oath of allegiance to "* * * defend the Constitution and laws of the United States of America against all enemies, foreign and domestic;" except with the written interpolation of the words, "as far as my conscience

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[11] *Ibid.* at p. 625.
[12] United States v. Bland, 283 U.S. 636, 51 S.Ct. 569, 75 L.Ed. 1319 (1931).

as a Christian will allow." The Supreme Court said:[13] "The words of the statute do not admit of the qualification upon which applicant insists," and denied naturalization, saying that this case was governed by the *Macintosh* case.

Fifteen years after the *Macintosh* and *Bland* cases, the problem of whether or not to admit to citizenship one who refused to give an unqualified answer to the question: "If necessary are you willing to take up arms in defense of this country?", was again brought before the Supreme Court for decision in the case of *Girouard v. United States*.[14] The applicant's answer in this case was "No (Non-combatant) Seventh Day Adventist." He explained his answer by saying: "it is a purely religious matter with me, I have no political or personal reasons other than that." Before his Selective Service board, the applicant did not claim exemption from all military service, but only from combatant military duty. He was willing to serve in the army but would not bear arms. The court concluded that: "the Schwimmer, Macintosh and Bland cases do not state the correct rule of law",[15] and reversed the judgment of the Circuit Court of Appeals,[16] which had reversed an order admitting the applicant to citizenship. And again there were three justices who dissented, the dissenting opinion being given by Chief Justice Stone, in which Justices Reed and Frankfurter concurred.

In the opinion of the court, the fallacies underlying the general rule of the *Schwimmer, Macintosh* and *Bland* cases were demonstrated in the dissents of Justice Holmes in the *Schwimmer* case, and of Chief Justice Hughes in the *Macintosh* case. The fallacies pointed out are: (1) the oath required of aliens does not in terms require that they promise to bear arms, (2) the bearing of arms, important as it is, is not the only way in which our constitution may be supported and defended, even in times of great peril, and (3) "there is not the slightest suggestion that Congress set a stricter standard for aliens seeking admission to citizenship than it did for officials who make and enforce the laws of the nation and administer its affairs."

The words of the oath of allegiance: "* * * I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic", do not, of themselves, mean: "I am willing to take up arms." Nor do the words of the Naturalization Act of 1906[17] that no person shall be naturalized unless he has been for stated periods and still is; "a person of good moral character,

[13] *Ibid.* at p. 637.
[14] 66 S.Ct. 826 (1946).
[15] *Ibid.* at p. 830.
[16] 149 F. 2d 760 (1945).
[17] 34 Stat. 596, Sec. 4.

attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States", have such a meaning.

The court pointed out that nuclear physicists, lathe workers, seamen on cargo vessels, construction battalions, nurses, engineers, litter bearers, doctors and chaplains all made essential contributions to the great cooperative effort necessary for victory in a total war in its modern form. Devotion to one's country can be as real and as enduring among non-combatants as among combatants. One may adhere to what he deems to be his obligation to God and yet assume all military risks to secure victory.

In pointing up the third fallacy, the court said:[18] "While Article VI, Clause 3 of the Constitution provides that such officials (members of Congress or other public officers), both of the United States and the several States, 'shall be bound by Oath or Affirmation, to support this Constitution,' it significantly adds that 'no religious Test shall ever be required as a Qualification to any Office or Public Trust under the United States'." The court found that this oath differed in no material respect from that prescribed for aliens and that,[19] "There is not the slightest suggestion that Congress set a stricter standard for aliens seeking admission to citizenship than it did for officials who make and enforce the laws of the nation and administer its affairs."

The court then directed its attention to the Selective Training and Service Act of 1940[20] and to the Second War Powers Act,[21] and stated that the oath required of those inducted into the armed services includes the provision "that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and fairly against all their enemies whomsoever," and that Congress had provided the means whereby aliens serving as non-combatants in the armed services could gain citizenship by taking the same oath as required of any alien seeking naturalization, which contains the words "support and defend the Constitution." From these facts, the court argued that the oath could[22] "hardly be adequate for one who is unwilling to bear arms because of religious scruples and yet exact from another a promise to bear arms despite religious scruples."

In view of the decision of the *Girouard* case, should question 22 on the application be changed to read: "If necessary, do you object, for other than religious reasons, to taking up arms in defense of this country?" An affirmative answer to this question would indicate an

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[18] 66 S.Ct. 826, at p. 828.
[19] *Ibid.* at p. 828.
[20] 54 Stat. 889.
[21] 56 Stat. 176.
[22] 66 S.Ct. 826, at p. 829

unwillingness to take up arms, but, such unwillingness, being based upon reasons other than religious scruples, would not bar the Government under the Constitution from imposing the will of the many upon the one who so indicated his unwillingness to take up arms. Suppose, next, that the question be retained in its present form, and that further information be sought by adding: "If your answer to this question is other than 'Yes', give reasons." This would give the applicant the opportunity to state that his reasons for refusing to bear arms were based on religious scruples or on other grounds. A refusal to bear arms because of religious scruples would be no bar to the applicant's naturalization under the rule of the *Girouard* case, and a refusal to bear arms for other reasons would be no bar to his naturalization because the oath required of aliens does not in terms require that they promise to bear arms. It would appear then, that no answer to the question either in its present form, or as it might be amended, would act as a bar to the applicant being admitted to citizenship. Any answer given would be mere information. Why, then, retain the question: "If necessary, are you willing to take up arms in defense of this country?"

But, in adopting this line of reasoning are we not forgetting the meaning behind the words of Justice Butler in the opinion of the court in the *Schwimmer* case:[23] "Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the Government?" In the words of Justice Sutherland in the *Macintosh* case,[24] are we not allowing the applicant to make *"his own interpretation* of the will of God the decisive test which shall conclude the government and stay its hand," and are we not making "bargains with those who seek naturalization?" Are we to admit into citizenship an alien who "* * * is unwilling to rely, as every native born citizen is obliged to do, upon the probable continuance by Congress of the long established and approved practice of exempting the honest conscientious objector?"[25]

Are "We the People of the United States"[26] to welcome to our citizenship all those who seek justice, domestic tranquility, the common defense, the general welfare and the blessings of liberty with us; who are willing to be lathe workers, nuclear physicists, welders, or ship builders; but who are not willing to take up arms to defend those rights and privileges which they seek to enjoy?

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[23] United States v. Schwimmer, *supra,* note 7, at p. 650.
[24] United States v. McIntosh, *supra,* note 10, at p. 625.
[25] *Ibid.* at p. 625.
[26] Preamble to the Constitution of the United States of America.

Chief Justice Stone read the dissenting opinion in the *Girouard* case, of approximately the same length as the opinion of the court. It was the last opinion to be read by the Chief Justice in his long and honored career. In this very strong dissent, in which he was joined by Justices Reed and Frankfurter, the Chief Justice spoke for an affirmation of the judgment of the Circuit Court of Appeals,[27] which reversed an order admitting the applicant to citizenship, "For the reason that the court below, in applying the controlling provisions of the naturalization statutes, correctly applied them as earlier construed by this Court, whose construction Congress has adopted and confirmed."[28]

The Chief Justice pointed out that over a period of eleven years following the decisions in the *Macintosh* and *Bland* cases, six successive Congresses had made active, publicized legislative attacks upon the construction of the naturalization statutes as adopted by the court in its decisions in the *Schwimmer, Macintosh* and *Bland* cases. All of the measures proposed to Congress provided, in effect, that no person otherwise qualified "shall be debarred from citizenship by reason of his or her religious views or philosophical opinions with respect to the lawfulness of war as a means of settling international disputes, but every alien admitted to citizenship shall be subject to the same obligation as the native-born citizen".[29] Congress declined to adopt these proposals and, in the Act of 1940,[30] incorporated the very form of oath which had been administratively prescribed for the applicants in the *Schwimmer, Macintosh* and *Bland* cases.[31] The Chief Justice concluded:[32] "By thus adopting and confirming this Court's construction of what Congress had enacted in the Naturalization Act of 1906 Congress gave that construction the same legal significance as though it had written the very words into the Act of 1940."

Did Congress repeal this construction by enactment of the 1942 amendments of the Nationality Act? In 1942 Congress granted special favors to those seeking naturalization who had worn the uniform and rendered military service in time of war and could satisfy such naturalization requirements as had not been dispensed with by the amendments, and specifically provided that the amendment should not apply to "any conscientious objector who performed no military duty whatever or refused to wear the uniform."[33] The effect of these amendments was to exempt conscientious objectors who had rendered

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[27] 149 F. 2d 760 (1945).
[28] 66 S.Ct. 826, at p. 830.
[29] H.R. 297, 72d Cong., 1st Sess., introduced December 8, 1931.
[30] 54 Stat. 1137, Sec. 307(a), 8 U.S.C., Sec. 707(a), 8 U.S.C.A., Sec. 707(a).
[31] Naturalization Regulations of July 1, 1929, Rule 8(c).
[32] 66 S.Ct. 826, at p. 833.
[33] 8 U.S.C. Supp. IV, Sec. 1004, 8 U.S.C.A., Sec. 1004.

military service in uniform from the requirements of the oath to "support and defend the Constitution," which exemption was not extended to conscientious objectors who had not rendered such service nor worn the uniform. Thus *Girouard,* who had not rendered military service nor worn the uniform, should not be included under those exempt from the requirements of the oath by the 1942 amendments.

Chief Justice Stone concluded his dissent tersely,[34] "The amendments and their legislative history give no hint of any purpose of Congress to relax, at least for persons who had rendered no military service, the requirements of the oath of allegiance and proof of attachment to the Constitution as this Court had interpreted them and as the Nationality Act of 1940 plainly required them to be interpreted. It is not the function of this Court to disregard the will of Congress in the exercise of its constitutional power."

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[34] 66 S.Ct. 826, at p. 834.