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THE SUPREME COURT AND MILITARY DUTY

ON MAY 28, 1931, the Supreme Court of the United States decided the case number 504 on their term docket, the case of the United States v. MacIntosh,¹ which had been much discussed in the newspapers and of which the decision had been eagerly awaited.

The facts are doubtless familiar enough. Mr. Douglas Clyde MacIntosh, an ordained Baptist clergyman and professor of Theology at Yale University, a Canadian by birth, sought to be admitted to United States citizenship. He had fulfilled all the formal requirements and was ready to take the oath prescribed by the statute which governs the naturalization of foreigners. But in expressing his readiness to take the oath, he declared that he understood it in a special way, that is, that he understood it not to impose upon him the duty of bearing arms or indeed of "supporting" the country in war, unless he believed the war to be morally justified.

Citizenship was refused and he appealed to the courts, going as he was bound to do, first to the Federal District Court² of one Judge, then to the Circuit Court of Appeals³ of three and finally to the Supreme Court⁴ in which nine judges considered the case. All in all, therefore, thirteen federal judges have passed upon the matter. If we were merely to count them we should find that seven judges decided that Mr. MacIntosh was legally qualified to be an American citizen and that six judges decided that he was not. Nor would any one say that the seven in question, Justices Manton, Learned Hand, Swan, Hughes, Stone, Holmes and Brandeis, were all inferior in ability to the other six.

None the less, because of the way in which these thirteen judgments were distributed, Mr. MacIntosh was not admitted to citizenship. The majority of the Supreme Court, Justices Sutherland, McReynolds, Van DeVanter, Butler

¹ 283 U. S. 605, 51 Sup. Ct. 570 (1930).

² Not reported.

³ MacIntosh v. United States, 42 F. (2d) 845 (C. C. A., 2d, 1930).

⁴ *Supra* note 1.

and Roberts found that he was not "attached to the principles of the Constitution of the United States"⁵ and that the oath he was willing to take, as he interpreted it, was not the oath required of him by the Naturalization Act, Section 4, Chapter 3592.⁶

It would be very easy to declare roundly that the majority for whom Justice Sutherland spoke was quite wrong and that the minority who concurred in Justice Hughes' opinion was quite right. Certainly Justice Hughes' opinion has a nobler, finer ring than Justice Sutherland's. It will also be called less "technical"—to use a quite meaningless term of opprobrium—although, in fact, it is not in the least less technical. We may add that it is better written. Further, it cannot be gainsaid that Mr. MacIntosh is a man of exceptionally high quality, of higher quality, in Justice Hughes' words, than a "host far less worthy"⁷ who are annually admitted to citizenship. Perhaps, as was said in a much more ancient naturalization case, he is of the sort to be eagerly invited into our citizenship, if he had not voluntarily sought it.

Is it a love of "technicality" that makes a court, when it discovers that a man is of this description, look beyond that fact into statutes, decisions, reasons, rules, exceptions, basic principles and logical inferences? Doubtless many will think so, since there is no more fruitful course of nonsense than the term "technicality" in the mouths of persons who rarely take the trouble to think precisely or painstakingly. It may be said quite soberly that if there are weaknesses in either the majority or the minority opinion, it is not that either is too technical, but that neither is technical enough.

Evidently no one desires that naturalization shall at once take place when we come to the conclusion that the applicant is a fine fellow. Without constitutions and statutes, we should find that method a little vague, a little loose and perhaps even a little dangerous. At any rate, it is not open to us to use it. We have constitutions and statutes which require us to do differently. It is said that any Giaour

⁵ *Supra* note 1 at 613, 51 Sup. Ct. at 571.

⁶ U. S. C. A. Tit. 8 Sec. 372 *et seq.*

⁷ *Supra* note 1 at 629, 51 Sup. Ct. at 577.

may become a Moslem merely by reciting aloud: "There is no God but Allah" and so following, and doubtless that method works well enough. We make things somewhat harder, and, whether to our advantage or disadvantage, we ask many more things of men who deserve to be citizens of the United States.

Mr. Sutherland declares that Mr. MacIntosh may not become a citizen of the United States, because he will not agree to bear arms in any war that does not justify itself to his conscience, whereas he might legally be required to bear arms whether the war did so justify itself or not. Mr. Hughes retorts that the Naturalization Statute does not either directly or indirectly require him to bear arms in any war. Mr. Sutherland is sure that a man who declares that it must rest with his own private judgment whether he will or will not fight for his country, is not attached to the principles of the Constitution of the United States, as the Statute requires him to be. Mr. Hughes is of the opinion that the defence of the country against foes, domestic and foreign, which the statutory oath demands, can be carried on without fighting.

A debate between Judges of the Supreme Court is for the generality of Americans, legal or lay, a battle between giants, but, even if we allow for the diffidence that becomes all of us in the presence of such high argument, it may be questioned whether either of the contestants has really met the issue technically and, if the matter is not to be dealt with technically, it has no business before a court at all.

There is the statute before us. Parts of it are quoted verbatim and it is indicated that any one who wishes to read it all in detail can do so conveniently by looking up the volume called United States Code, Title 8, Section 372 and the following, or volume 34 of the Statutes at Large, page 596 and the following. It appears that besides many smaller details which are irrelevant, it is required that the applicant "be attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same," and it is further required that he will declare on oath that he "will support and defend the Con-

stitution and laws of the United States against all enemies, foreign and domestic.”

Now, although it is easy enough to find these words, it is not by any means easy to understand them. And the difficulty is just that the first requirement, instead of being expressed in technical and precise language, is expressed in sonorous, literary and rhetorical terms. Justice Sutherland asserts that Mr. MacIntosh does not meet this first requirement, but if he were talking technically and precisely, he would first tell us what the principles of the Constitution are and how he recognizes them; how he tests attachment or lack of attachment; and how he could answer those who find that the principles of the Constitution are complete individual liberty and the recognition of the individual conscience and who assert an undying attachment to these principles. No, Chief Justice Hughes is quite right in dealing with these words respectfully, but lightly. They are not much help to law or administration, being emotional or ornamental, rather than significant. They warm our hearts without illuminating our path. I suppose a person who intended to destroy the United States as a political unit, or to erect an absolute monarchy here could not honestly declare his attachment to the principles of the Constitution. But there is scarcely a shade of opinion short of these extremes whose defenders could not show themselves to be as attached to the principles of the Constitution as Justice Sutherland, and there is little indication in the majority opinion that Justice Sutherland would be able to refute them.

But the other requirement is more definite. Does defending the Constitution require the use of arms? Justice Hughes says “No,” and points out now many other ways there are in which the Constitution has been and may be defended. Doubtless Congress could declare war as it pleases, and doubtless it could try to compel American citizens to fight whether they liked the war or not. This is the burden of Justice Sutherland’s opinion. But no one doubts it and Justice Hughes concedes it at the beginning. Perhaps Congress could have required the duty to bear arms as a condition of naturalization. The question is whether Congress has in fact done so, and it is hard to meet the minority

contention that to ask the candidate for citizenship to defend the Constitution, does not necessarily imply that he must defend it by arms and not otherwise.

But, after all, that is not the only thing that the statute says. The applicant must "support" as well as "defend" the Constitution. Justice Hughes declares that every official is required to announce this support and it has never been supposed it implied the bearing of arms. But Justice Hughes does not note that in the Naturalization oath there is a phrase which does not occur in the official oath. The petitioner for naturalization must swear to support the statutes as well as the Constitution.

This, it seems to me, is the issue over which the opponents might properly have locked horns. If it were on the basis of disaffection to Constitutional principles or on the refusal to bear arms that Mr. MacIntosh is to be excluded, as Justice Sutherland asserts, few will deny that Justice Hughes succeeds in reducing these reasons to so fine a degree of tenuousness that they may be said to disappear. But supporting the laws of the United States must mean at least doing nothing to prevent their enforcement. May we reasonably infer that Mr. MacIntosh would in this sense support a statute of Congress, declaring a morally unjustified war?

Mr. MacIntosh is an extremely honest man. He has indicated it in his conduct, since by a very slight disingenuousness—the merest suspicion of it—he might have saved himself all this pother. I think we may assume that if Congress declared a morally unjustifiable war, he means us to understand that he would not fight in it, even if he were specifically by statute required to do so; and that he would not only disobey it, but refuse it any countenance whatsoever. Indeed, his disobedience and his example would actively hinder the war, and of this fact he could not but be conscious. Now, if a law requiring him to fight—that is, a law refusing persons like him an exemption based on their religious scruples—is a law of the United States, he has not fulfilled the obligation which the Naturalization Statute seeks to impose on him.

Two things are clear. Certainly there is no such statute at present in force in the United States; and equally cer-

tainly Congress could, if it chose, pass such a statute. Consequently, we are left with the question whether a law which Congress might in the future pass is now a law of the United States—within the sense which reasonable men will give to the statutory requirement.

It will evidently not do to say that an applicant for citizenship promises merely to support existing laws and not those that may be passed in the future. Does it follow then that he must support every conceivable law that Congress in the exercise of its Constitutional power may pass, no matter how unreasonable, whimsical or harmful the law is? Most citizens, if they search their consciences, will not go so far.

It is not a matter of obeying the laws. Every citizen must obey the laws, and his obligation to do so comes from his status as a citizen. It is neither enlarged nor strengthened, when, in addition, he specifically promises to obey. If he does not obey, he must accept the penalties imposed. It is for that reason that an officer of the United States swears to uphold the Constitution, but does not swear to obey the laws. It is taken as a matter of course that he will obey them or take the consequences.

But "supporting" the laws is more than obeying them; at any rate, it is a reasonable construction of the words to hold that it is. The really important thing is to be sure of the other element of our question. Does the Naturalization law demand of Mr. MacIntosh that he support a law which does not now exist, but which well may exist at some indefinite future time?

Surely, it is too much to ask his support of any conceivable law. It is not his obedience that is demanded—that is taken for granted—but something over and above obedience. Is there any American who will undertake to promise his encouragement to every law that Congress might possibly enact? Will Secretary Mellon support a dole, should Congress enact it? Will the economic bulwarks of our polity, the heads of our power companies and our banks, support widows' pensions, unemployment insurance, large increases in the income sur-tax or in the upper ranges of the inheritance tax schedules? And since the amending power is part

of the Constitution, will these same gentlemen, for whose legitimate interests judges—even Supreme Court Judges—are often and quite properly concerned, will they promise to support confiscatory statutes that may be passed if an amendment to this effect is made? Surely it is not impertinent to declare that it is more than doubtful.

We may go further. There are tax statutes actually in existence which propertied gentlemen have been heard unmeasuredly to denounce. There is a Prohibition statute, passed in accordance with a recent Amendment, which some millions of Americans, reputable and disreputable, actively disobey, or enable others to disobey. If Mr. MacIntosh had been asked: "Will you support and defend the Volstead Act from all enemies, foreign and domestic?" would he have been refused if he had said "No"?

The number of our Statutes at Large is vast. Some of them are picayune, foolish and bad. We cannot ask of any person that he support them all. Evidently, that is not what the Naturalization Act must mean. It must mean that he shall promise to support the important statutes—at any rate most of them—and we must ask ourselves whether a statute declaring war and requiring military service of Mr. MacIntosh in a war he deemed morally unjustifiable—is a statute of this sort.

That there is no such statute now, is, as has been said, not conclusive. But if it is true that it is highly unlikely that Congress will pass such a statute, then we may, as sensible persons, agree that anything which is highly unlikely to happen is not important.

Justice Hughes strongly asserts that no such statute is likely to be passed; and he bases his assertion on the fact that no such statute has ever been passed. On previous occasions, as happened most recently in 1917, when military service was generally required, there have always been exceptions, and in every case one of the exceptions has had something to do with conscientious religious scruples. Surely, it cannot be denied that what Congress has never done when it had a chance, Congress will not be likely to do in the future, if the chance should come again.

But Justice Hughes says too much when he declares that it is highly unlikely that persons who hold Mr. MacIntosh's views will fail to be exempted in any future Draft Act. Our most recent Draft Act, that of 1917, made special mention of men who had conscientious scruples against bearing arms. If we may credit report, our conscientious objectors had, in spite of the law, a rather bad time of it—and there are respectable and well-meaning citizens who are sorry it was not harder. But the Act certainly exempted them, just as previous Acts had exempted others with them.

But would Mr. MacIntosh have come within the exemption? Justice Hughes assumes that he would have. Yet the Act exempted only those who had conscientious scruples against military service of any sort. Suppose, in 1917, a conscript had declared that he had no objection to military service, but that he objected to serving in this particular war because he deemed it morally unjustifiable. Would he have been exempted? There is reason to believe that his induction into the service would have been somewhat accelerated.

Now, that is Mr. MacIntosh's position. He has no conscientious scruples against bearing arms, and he therefore does not clearly come within the exemption of our most recent and most elaborate Draft Act. If another Act is ever passed, it must be admitted that there is no reason to think it will extend the exemptions to any great extent; and certainly there is no reason to suppose that it will specifically cover Mr. MacIntosh's case.

I have left out all reference to the Schwimmer case⁸ which Justice Sutherland cites in support of his judgment. One reason is that as an American I am somewhat ashamed of it and I had hoped that no one would ever mention it again. In that astounding decision six Justices of the Supreme Court declared that a woman who would be past military age, even if she had been a man, could not become an American citizen, because she declared she would not do what it was almost inconceivable to believe any statute would ever ask her to do.

⁸ United States v. Schwimmer, 279 U. S. 644, 49 Sup. Ct. 448 (1929).

Justice Hughes noticed the Schwimmer case, only with the consecrated phrase with which courts administer euthanasia to their non-viable progeny: he said it stood on its own facts. That usually means that the case will not stand at all, in law, or in logic, or in common sense.

But a better, because more technical, reason for disregarding the Schwimmer case is that the Supreme Court, as no one knows better than the Supreme Court itself, is not bound by its previous decisions unless it chooses to be. If the Court cites a case, it cannot allege that the case of its own weight compels the Judges to do what they would not otherwise have done. The Court frequently and bluntly overrules itself, as it did quite recently in the *Farmers Loan & Trust Co. v. Minnesota*,⁹ even when, according to careful critics, the new decision did not logically require such an overruling. Therefore, if Justice Sutherland and the majority say they rely on the Schwimmer case,¹⁰ they can only mean that they hold the views there promulgated, or that they do not wish to go into the matter again. Either position is intelligible, and either would be a little more candid.

If "support," then, means what I have suggested it may mean, and if a Draft Act exempting only conscientious objectors to all wars is an important act, likely to be passed at some future time, Mr. MacIntosh was properly declared to be inadmissible under the Naturalization Act, as it is printed in Volume 34 of our Statutes at Large.

But—

It is at least equally reasonable to say that "support" does not mean more than "obey," and that when an applicant swears he will "support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic," he is, as far as the laws are concerned, merely asseverating solemnly what is a matter of course. He is only asserting that he is an honest man and wishes sincerely to become a citizen of this country. In that case, the phrase is merely a heart-stirring ritual, not without emotional value, but not useful for our purposes.

⁹ 280 U. S. 204, 50 Sup. Ct. 98 (1930).

¹⁰ *Supra* note 9.

Then all that the Naturalization Act demands—outside of the specific requirements which are concededly met in this instance—is that a candidate shall not wish to destroy this country as a political unit or to change it into something obviously and radically different from what it is. So much, I think, of specific content can be found in the statutory requirement. There may be a sacred right of revolution, but the statute requires a man to forego it when he seeks to become a citizen. Perhaps this should not be the case, but the statute seems unmistakably to insist upon it.

And if we are to understand the statute in this way, Justice Hughes' dissent becomes not merely the eloquent expression of a lofty and humane sentiment, but the assertion of a sound legal doctrine. The statute is then a broad and liberal one. It excludes anarchists and polygamists by name, but otherwise asks only warranted good character and an assurance that he who desires to become a member of this particular civic organization, does not do so in order to destroy it. And if that is the statutory demand, who has authorized commissioners and deputy commissioners, examiners and investigators, to draw up their puerile interrogatories and to limit and straighten with their mis-called discretion the operation of a national law? Whence do the mandarins of our Tape and Sealing-Wax Offices draw their power to be discreet at the expense of their betters? Justice Hughes asks these questions only by implication and with the judicial reserve that befits him, but they are important; and despite the fact that he speaks for a minority, one may hope that they will be heeded.

Mr. MacIntosh is not to be our fellow-citizen. It is unfortunate, and I, for one, regret it. I should have been glad to offer in exchange for him Mr. Capone who, I am sure, has no conscientious scruples against bearing arms in any quarrel, or the recently honorable Mr. William Hale Thompson, who is profoundly attached to the principles of the Constitution of the United States. I am not at all sure that Mr. MacIntosh was not legally excluded, in spite of the fact that nearly every reason for excluding him, presented by the majority, is a poor one. He is not likely to be troubled much by his exclusion, since he is a distinguished person and in

all probability will not be bullied too much by our custom officials and immigration inspectors.

And even if it was not strictly relevant, the debate between Justice Sutherland and Justice Hughes on the duty to bear arms serves an excellent purpose. The integrity and honesty of both are beyond question; but if any intelligent person can read both opinions and be unable to pick the intellectually finer, and the morally more satisfactory one, human judgments are more wantonly capricious than I like to believe.

What would happen if a very large number of citizens claim the right to refuse military service in a war they thought unjust? The answer is very simple. Congress should not declare war when a very large number of Americans believe it to be unjust.

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