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Edward F. Waite

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SECTION 5(g) OF THE SELECTIVE SERVICE ACT, AS AMENDED BY THE COURT

By Edward F. Waite*

This article assumes four postulates:

(1) In construing a statute the court's aim should be to declare the law as it *is*, rather than as it ought to be.

(2) Within constitutional limitations the statute law *is* what the legislature intended, if this can be ascertained.

(3) "Words used in a statute are to be read in the natural and ordinary sense given them by those who use the language with propriety; the approved popular meaning being given to words of common speech unless there is reason to believe, from the face of the statute, that the words were intended to bear some other meaning."[1]

(4) Departure from the foregoing principles by a court so high in our judicial system as a United States Circuit Court of Appeals is a matter of general and grave concern.

The Selective Training and Service Act of 1940 contains the following language—Sec. 5(g):

"Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained . . . shall, if he is inducted into the land or naval forces under this Act, 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 assigned to work of national importance under civilian direction."

The proper administrative authorities divided registrants into classes according to the various provisions of the Act. Class I-A covers those who are subject to no exemption. Class I-A-O includes each registrant "who would have been classified in Class

*Judge of the District Court for the Fourth District, Minnesota, 1911-1941 (Retired); Special Assistant to the Attorney General, designated as Hearing Officer under Section 5(g) of the Selective Training and Service Act of 1940. The views expressed in this article are those of the author, and do not necessarily represent those of the Department of Justice.

[1]Black, Interpretation of Laws (2d Ed.), 141.

I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to combatant military service in which he might be ordered to take human life, but not conscientiously opposed to noncombatant military service in which he could contribute to the health, comfort and preservation of others." Class IV-E covers those who have been found "by reason of religious training and belief to be conscientiously opposed to both combatant and non-combatant military service."

In March, 1941, Mathias Kauten was placed by his local draft board in I-A. The local appeal board confirmed this classification, and he was duly ordered to report for induction. This he refused to do. He was prosecuted and convicted under Sec. 11 of the Act for failing to perform a required duty. The case went to the Circuit Court of Appeals, 2nd Circuit, and was decided Feb. 8, 1943.[2] The opinion was by Judge A. N. Hand, sitting with Judges Clark and Frank. It appeared in the record that the appeal board had adopted the report and recommendation of the hearing officer who had heard the case in accordance with the administrative machinery set up in the Act, and had recommended "that the appeal of the registrant based upon grounds of conscientious objections be not sustained." According to this report the registrant admitted that he was an atheist, or at least an agnostic. In his questionnaire he circled the word "religious" with a notation on the side: "This is not my case." "The registrant makes it quite clear," says the hearing officer, "that his religious training and belief is not the basis of his present opposition to war. There is no doubt that the registrant is sincerely opposed to war but this belief emanates from personal philosophical conceptions arising out of his nature and temperament, and which is to some extent political. . . . It is quite obvious that the registrant's opposition to the present war is greatly influenced by his dislike of our present administration." The appeal was specifically based upon an error of law of the appeal board in construing too narrowly the word "religious" as used in the statute.

After holding that the court could not review the decision of the local draft board, but that the remedy lay through habeas corpus after compliance with the order for induction, thus disposing of the case, the court went on to say:

"It seems proper, however, to say that we find no error of law on the part of the appeal board. The only error suggested . . . is

[2]United States v. Kauten, (C.C.A. 2nd Cir.) 133 F. (2d) 703.

whether the statute was properly construed in excluding from the exemption of Section 5(g) a person having such beliefs as the defendant expressed. . . . In order to avail himself of his privilege a registrant must establish that his objection to participation in war is due to 'religious training and belief.' It must ex vi termini be a general scruple against participation in war in any form, and not merely an objection to participation in this particular war. . . . Though the registrant may have been entirely sincere in the ideas he expressed, his objections to reporting for induction were based on philosophical and political considerations applicable to this war rather than on 'religious training and belief.' They, therefore, were properly overruled, but not because he lacked membership in any sect or organization whose religious convictions were against war. . . . We are not convinced by anything in the record that the registrant did not report for induction because of a compelling voice of conscience, which we should regard as a religious impulse, but his declarations and reasoning seem to indicate that he was moved by convictions, however sincere, of quite a different character. . . . *It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious beliefs arise from a sense of the inadequacy of reason as a means of relating the individual to his fellowmen and to his universe—a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.* [Italics supplied.] . . . 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 participating in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act."

This of course was a clear declaration that even if the court should regard the case as properly in court—a point which had been decided in the negative—it would hold that no error of law had been committed. But the court said further—

"The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought religious impulse." [Italics supplied.]

Although the italicized language was responsive to an extensive and ingenious argument in appellant's brief, if it is to be regarded as a general interpretation of the words "by reason of religious training and belief" in the Act as adding nothing to "conscientiously," certainly no lawyer reading the whole case can fail to

raise the question whether it was not merely a dictum. Nothing was argued in the Government's brief excepting what it insisted was the only point involved—whether the trial court erred in refusing to accept evidence to show error of law on the part of the local board or the appeal board. The opinion was hailed by proponents of appellant's view as "significant judicial recognition of religious belief as a matter of personal conscience, not necessarily related to theological or ecclesiastical concepts;" but the sympathetic writer added that "Judge Hand, in elaborating his views on religion, went beyond the legal issues before the court."[3] It is referred to, however, by the same court in the case of *United States ex rel. Phillips v. Downer,*[4] decided May 7, 1943, as an "authoritative interpretation of the Act." The court quotes the italicized language, and holds that the registrant Phillips, who was before the court on a writ of habeas corpus, was entitled to exemption. It accepts his statement that, while he admits he is an agnostic, his opposition to war is "deep-rooted, based not on political considerations but on a general humanitarian concept which is essentially religious in character," and the court distinguishes the case from *Kauten* as follows: "Here the opposition to war was a deep-rooted one applying to war in general and was not based upon political objections to this particular war." "The government does make a claim that a registrant's opposition to war must be definitely traceable to some religious belief or training. But if a stricter rule than that announced in the *Kauten Case* is called for, one demanding a belief which cannot be found among the philosophers, but only among religious teachers of recognized organizations, then we are substantially or nearly back to the requirement of the Act of 1917, of membership in a well-recognized religious sect or organization whose existing creed or principles forbid its members to participate in war in any form." The opinion was by Judge Clark, sitting with Judges A. N. Hand and Chase. Judge Chase dissented on grounds which are not relevant to this inquiry.

The same question was again considered in the 2nd Circuit in *United States ex rel. Brandon v. Downer,*[5] decided Jan. 7, 1944. The appeal was from the District Court which had quashed a writ of habeas corpus. The recital of facts shows that the registrant Brandon "does not believe in God or in any divine power, but he is opposed to war and military service because he believes that war

[3]The Conscientious Objector, March, 1943.
[4](C.C.A. 2nd Cir. 1943) 135 F. (2d) 521.
[5](C.C.A. 2nd Cir. 1944) 139 F. (2d) 761.

is morally wrong and 'a denial of the brotherhood of man.'" The chairman of the local appeal board testified at the trial that one of the reasons for the rejection of the registrant's claim to exemption was that the board considered that he did not have "a compelling moral conviction against which he cannot act contrary." The court, while it did not agree with this conclusion, held that it could not find that the board's decision was arbitrary and capricious, and affirmed the court below. The opinion was by Judge L. Hand, sitting with Judges Chase and Frank. The court said: "Were it not for the eye examination incident," (the occurrence on which the local appeal board based its conclusion above quoted) "we would be obliged to reverse, for in that event appellant would unquestionably have been a conscientious objector within the statute as we recently construed it in *United States v. Kauten*."

Again the same question was before the same court in *United States ex rel. Reel v. Badt*,[6] decided April 13, 1944, opinion by Judge A. N. Hand, sitting with Judges L. Hand and Swan. The hearing officer, in recommending against the claim for exemption, reported that the registrant denied any belief in a deity, "except so far as there may be a moral force in the universe," and was "a philosophical humanitarian." The court said: "It is evident that the hearing officer . . . placed his decision upon the ground that the relator was not a conscientious objector because his opposition to war was based on humanitarian considerations, and not on any obligation to a deity or supernatural power. In other words, he reached a conclusion as a matter of law which was directly opposed to our decision in *United States v. Kauten*. There we said that 'a conscientious objection to participation in any war under any circumstances . . . may be the basis of exemption under the Act.'" The court ordered a further hearing before the District Court, to ascertain whether "the Director of Selective Service . . . adopted the findings of fact of the hearing officer." "If," the court said, "the District Court shall find that the Director of Selective Service adopted the findings of fact of the hearing officer or determined that the relator did object to participation in any war under any circumstances because of the compelling voice of his conscience, the writ should be sustained."

It seems plain that in the cases cited the court declared that as applied to a sincere objector to participation in any and all wars the words "by reason of religious training and belief" add nothing to what is connoted by the word "conscientiously;" that a

[6](C.C.A. 2nd Cir. 1944) 141 F. (2d) 845.

scruple properly termed "conscientious" is a "religious" scruple within the meaning of the Act. That the conscription statute ought thus to provide, many thoughtful persons agree. They can see no good reason why a sincere objector on professed philosophical or humanitarian grounds should be on a different footing from a sincere objector on grounds professed to arise out of a sense of obligation to a divine being, when both are backed by willingness to pay the same price for loyalty to principle. Some of us who wish this were the law are convinced—regretfully—that it is not. The writer thinks it will be serviceable to offer some of the reasons for this conviction.

I. Applying the familar rule for the construction of statutes let us see whether there is any internal evidence in the Selective Service Act that the words "religious" and "conscientiously" are used in other than "their approved popular meaning." In Sec. 5(d) exemption is extended to "regular or duly ordained ministers of religion." Neither the word "religion" nor any of its derivatives appears elsewhere. Neither "conscience" nor any derivative is found elsewhere than in Sec. 5(g); and surely it will not be claimed that anything there modifies the popular meaning of the word. Where the term "conscientious objection" is used by itself, without qualifying words, there can be no doubt that it refers to the full definition appearing in the first portion of the sub-section.

II. Perhaps the daily experience of those of us who do not commonly speak the language of the intelligentsia is a sufficient guide to the "natural and ordinary sense" of the words in question; but let us consult the lexicographers. In Webster's New International Dictionary, 1940, we find: "Religion. 1. The service and adoration of God or a god as expressed in forms of worship, in obedience to divine commands . . . and in the pursuit of a way of life regarded as incumbent on true believers;" and I have examined a sufficient number of authorities to warrant the assertion that every one in common use gives a primary definition of like import. "Conscience" is primarily defined as "sense or consciousness of right and wrong," and I have found no definition which relates it to belief in a divine or supernatural being. I submit that in common use "conscientious" connotes nothing beyond a fixed and thoughtful sincerity concerning the moral character of personal conduct.

No one can read the well known *Mackintosh Case*,[7] wherein

[7]United States v. Macintosh, (1931) 283 U. S. 605, 51 S. Ct. 570, 75 L. Ed. 1302, reversing (C.C.A. 2nd Cir. 1930) 42 F. (2d) 845.

both opinions involved discussion of the American attitude toward religion, and specifically as evidenced by exemptions in draft laws, without seeing plainly that each group of justices used the term "conscientious objector" as covering only those who objected to military service on grounds of religion as defined by the Chief Justice in his dissenting opinion (in which Justices Holmes, Brandeis and Stone concurred), namely that "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relationship." The dissent quoted the following from the opinion of Justice Field in *Davis v. Beason*.[8] "The essence of religion has reference to one's view of his relations to the Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." In the majority opinion by Justice Sutherland it is said: "We are a Christian people (*Church of the Holy Trinity v. United States*, 143 U. S. 457, 470, 471, 36 L. Ed. 227, 231, 232, 12 S. Ct. 511) . . . acknowledging with reverence the duty of obedience to the will of God." In the parallel case of *Bland v. United States*,[9] decided the same day as the *Mackintosh Case* in the court below and by the same judges, the case was distinguished from *United States v. Schwimmer*[10] as follows: "The question of whether religious conviction would be an acceptable excuse from aliens refusing to agree to bear arms in defense of the United States did not arise. Counsel for the Government stated expressly that . . . 'the respondent has no religion.' In that case the applicant had a conscientious objection, possessed of pacifistic ideas with propagandist proclivities and of cosmic anti-nationalistic desires and purposes." In *Reynolds v. United States*,[11] discussing the constitutional questions involved in the conviction of a Mormon under an indictment for bigamy, the court said: "The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere, we think, more appropriately than to the history of the times in the midst of which the provision was adopted." And in the historical review which follows, Thomas Jefferson is quoted thus: "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship," etc., . . . "Coming as this does," the court continues, "from an acknowledged

[8](1890) 133 U. S. 333, 10 S. Ct. 299, 33 L. Ed. 637.

[9](C.C.A. 2nd Cir. 1930) 42 F. (2d) 842.

[10](1929) 279 U. S. 644, 49 S. Ct. 448, 73 L. Ed. 889.

[11](1879) 98 U. S. 145, 25 L. Ed. 244.

leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured."

These quotations from the courts are not presented, of course, as direct authority for any particular interpretation of the Selective Service Act, since the distinctions here involved were not in any instance before the court; but they are useful as showing what the words we are considering meant to these courts when the opinions were written.

III. The "C. O." is no new phenomenon in American life. He was known before the adoption of the Constitution. The Circuit Court in the *Mackintosh Case* refers to numerous colonial statutes, ranging from 1777 to 1782, and to the constitutions of 22 states, 1819 to 1898, in which there has been "a recognition of the right of a citizen to be excused from military service based on conscientious religious scruples."[12] Justice Cardozo, in *Hamilton v. University of California,*[13] adds to this list the Constitution of Idaho and a Colonial law of New York in 1755. I have not thought it necessary to verify these references nor to pursue the inquiry with a view to extending the lists. Some of the constitutions and many of the statutes cited have been amended, often in the direction of increased liberality.

Turning to national legislation, we find that the Act of May 8, 1792, providing for a national militia, exempted those who were exempted by the laws of the respective states.[14] There were several such state exemptions, all on definite religious grounds.[15] I find no

[12]On July 18, 1775, the Continental Congress passed the following resolution: "As there are some people who, from religious principles, cannot bear arms in any case, this Congress intends no violence to their consciences, but earnestly recommend to them to contribute liberally in this time of universal calamity to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed country which they can consistently with their religious principles." Journals of Congress (1774-1788) Vol. I, p. 119.

[13](1934) 293 U. S. 245, 55 S. Ct. 197, 79 L. Ed. 343.

[14]1 U. S. Stats. at Large, 1st Sess., 2nd Congress, Chapter 33, Sec. 2.

[15]On June 8, 1798, James Madison proposed in the House of Representatives some additional clauses for insertion in Sec. 9, Art. I of the New Constitution. Among them was the following: "The right of the People to keep and bear arms shall not be infringed, a well armed and well regulated militia being the best security for a free country; but no person religiously scrupulous of bearing arms shall be compelled to render service in the militia." Gales' Annals of Congress, Vol. 1, 434. In the debate which followed (Ib., 749-751, 766-776, 1818, 1821-1828) it appears plainly that the exemption was proposed and understood merely as recognizing the scruples of certain religious sects, especially the Quakers. It was finally decided (Ib. 1827) to leave the matter of exemptions to the states, and only Art. II of the Bill of Rights survived the discussion.

later exemptions based on scruples of any sort, in any one of the compulsory service acts prior to 1864. In that year it was enacted[16] that "members of religious denominations, who shall on oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations, shall, when drafted into military service, be considered noncombatants," and shall be assigned to special duty or pay a fine.[17] The Act of January 2, 1903, to promote the efficiency of the militia, provided[18] that "Nothing in this Act shall be construed to require or compel any member of any well recognized religious sect or organization at present organized and existing whose creed forbids its members to participate in war in any form, and whose religious convictions are against war or participation therein in accordance with the creed of said religious organization, to serve in the militia or any other armed or volunteer force under the jurisdiction and authority of the United States." In Ch. 134, Sec. 59 of the Act of June 3, 1916,[19] providing for compulsory service in the National Guard, Naval Militia and Unorganized Militia, we find the following: "All persons who because of religious belief shall claim exemption from military service, if the conscientious holding of such belief shall be established under such regulations as the President shall prescribe, shall be exempted from militia service in a combatant capacity; but no person so exempted shall be exempt from militia service in any capacity that the President shall declare to be noncombatant." The Act of May 18, 1917,[20] in force during the First World war, provides that "Nothing contained in this Act shall be construed to require or compel any person to be subject to training or service in a combatant capacity in the land and naval forces of the United States who is found to be a member of any well recognized religious sect whose creed or principles forbid its members to participate in war in any form, if the conscientious holding of such belief by such person shall be established under such regulations as the President may prescribe; but no such person shall be re-

[16]13 U. S. Stats. at Large, 28th Congress, Chapter 13, Sec. 17.

[17]In 1862 the Confederate Congress specifically exempted (on the furnishing of a substitute or payment of fine) Friends, Dunkards, Nazarenes, and Mennonites. (Wright, Conscientious Objectors in the Civil War, p. 104).

[18]32 U. S. Stats. at Large, 2nd Session, 57th Congress, Chapter 196, sec. 2.

[19]39 U. S. Stats. at Large, 1st Session, 64th Congress.

[20]40 U. S. Stats. at Large, 1st Session, 65th Congress, Chapter 15, Sec. 4.

lieved from training or service in such capacity as the President may declare to be noncombatant."

IV. From the foregoing review it seems clear that in colonial and federal draft laws, and in some state constitutions and statutes, prior to 1940, exemptions on the ground of conscientious scruples were granted only to those who claimed them to be religious in the ordinary use of that word. Did Congress intend to change this long established policy by Sec. 5(g) of the Selective Service Act of Sept. 16, 1940?[21]

The original Burke-Wadsworth bill[22] had its exemption clause, Par. 7 (d), in the precise words of the Act of May 18, 1917, including only members of the so-called pacifist sects,[23] and excusing no objectors from noncombatant service. The bill became the subject of vigorous attack, and both it and its successor, the present law, were discussed at numerous public hearings before the House and Senate Committees on Military Affairs. The official reports of these hearings cover nearly 1000 pages.[24] The writer will not pretend to have read them all, but he has examined them with sufficient care to be quite sure that the following statements are correct.

Many persons representing pacifist organizations, religious groups, and the army and the navy, appeared with criticisms and suggestions for amendments. While the principle and present necessity of compulsory military service were the chief points of attack, various details, including the restricted terms of exemption in the original House bill, and retention for noncombatant service were criticized. Throughout the discussion there was no suggestion, either by members of the respective committees or by those who appeared for hearing, that the language of the bill as amended and passed included such persons as were declared in the *Kauten Case* to be conscientious objectors "by reason of religious training and belief." Repeated appeals were made for still broader terms, but without avail.

The history of the original Sec. 7 (d), later 5(g), seems of sufficient importance to examine it somewhat in detail. The first positive suggestion made at the hearings for enlargement of the

[21] 54 U. S. Stats. at Large, p. 889.

[22] H.R. 10132; S. 4164.

[23] In the First World War 13 such sects were recognized, of which the chief were the Society of Friends, Church of the Brethren, and Mennonites. (First Report of the Director of Selective Service, pp. 188, 189.

[24] Hearings before the Committee on Military Affairs, H.R. 76th Congress, 3rd Session, on H.R. 10132, and before the Senate Committee on Military Affairs on S. 4164.

exemption was to cover an objector "who individually has religious scruples against the bearing of arms."[25] The present Sec. 5(g), with variations as to administrative details, was suggested July 25 by two representatives of the Society of Friends after conferring with a representative of the Army, and was evidently a compromise. The objectives were said to be to remedy "three difficulties and limitations in the present wording of the Burke-Wadsworth bill. . . . In the first place, consideration there is on the basis of membership in a well-organized religious sect. Well, that would benefit the Quakers, but we do not believe they have any right of preferential treatment. We want the consideration on the basis of conscience rather than on the basis of membership. Second, there is no provision for exemption from noncombatant service in the present Burke-Wadsworth bill. That is the main objection to it as it is worded in 7 (d)."[26] (The third point had to do with administration and is not relevant here.) The suggestion evidently met with favor, for it was incorporated in a substitute bill submitted to the Senate Aug. 5 by the Committee on Military Affairs.[27] This bill was accompanied with majority and minority reports. The minority report contained no reference to conscientious objectors; the majority report only the following: "The measure is fair to the person holding conscientious scruples against war and to the Nation of which he is a part. It provides for inquiry and hearing by the Department of Justice to make recommendations as to whether a person claiming deferment because of conscientious objections to war is or is not a bona fide conscientious objector. If his contention is made in good faith he may not be selected for combat service, but may be selected either for noncombatant service or for national work under civilian direction."[28]

It was objected at the hearings that the bill "made no provision for other than religious objectors," and argued that there ought to be exemption for those who are "nonreligious," in line with the British law.[29] A representative of the American Civil Liberties Union proposed an amendment which omitted the word "religious" and extended exemption to all persons "conscientiously

[25]House Hearings, p. 152.

[26]House Hearings, p. 208.

[27]Cong. Record, Vol. 86, p. 9824.

[28]Senate Report, No. 202, 76th Congress, 3rd Session, IV Sen. Miscellaneous Reports, Cal. No. 2110.

[29]House Hearings, pp. 185, 186, 189.

opposed to war in any form."[30] This was supported by a representative of the Mennonite Church.[31] A representative of the War Resisters League, commenting on the Senate bill, said: "Despite the relative liberality of the Senate conscription bill, in respect to conscientious objectors, it is not as broad in its exemptions as the British National Service Act of 1939. The latter includes all conscientious objectors, regardless of whether their scruples are based on religious belief or simply on humanitarian considerations. . . . The British have set us a good example by recognizing the fact that conscientious objections to war do not invariably spring from religious beliefs."[32] On the same day the precise point now under consideration was presented by a representative of the Committee on World Peace of the Methodist Episcopal Church, Baltimore Conference, as follows: "The bill should make adequate provision for all genuinely conscientious objectors to military training and service, whether their objection springs from religious, ethical or philosophical grounds. To this end we recommend amending Sec. 7, paragraph (d), by deleting the words 'by reason of religious training and belief' so that exemption would be extended to 'any person . . . who . . . is conscientiously opposed to participation in war in any form,' and is found under the terms of the bill to be a bona fide objector."[33] Neither this nor any like change was recommended by either Committee. Can it be doubted that the omission was deliberate?

In the prolonged discussion of the substitute bill in both houses there was only a single reference to conscientious objectors, and that was brief and inconsequential.[34]

V. It seems appropriate to note how the Act has been construed by friends of a more liberal law. A contributor to The Christian Century of July 15, 1942 said: "Assuming, however, that the mature conscience is rational, why should not the state grant a fuller recognition of conscience? . . . The Selective Service Act of 1940 offers exemption to any person who 'by reason of religious training and belief is conscientiously opposed to par-

[30]House Hearings, p. 191.

[31]House Hearings, p. 197.

Since the preparation of this article there has come to the attention of the writer Exhibit B of a reply of the Secretary of War and the Director of Selective Service to a Memorandum submitted to the President in March, 1944, by a committee organized by the American Civil Liberties Union. The Exhibit presents a full and illuminating series of quotations from both Senate and House Hearings, all in line with those cited herein.

[32]House Hearings, p. 457.

[33]House Hearings, p. 463.

[34]Cong. Record, Vol. 86, p. 10106.

ticipation in war in any form.' This implies that only religious persons have consciences and that their consciences operate on the principle of 'all or none.' Non-absolutists who would want to distinguish between a just and an unjust war would have no recognition under the present law, and neither would one whose objections come from moral, humanitarian or political grounds." In September 1943, a group of citizens, many of whom are of such national distinction that their names carry weight,[35] issued "A Report on the Treatment of Conscientious Objectors in World War II." After commenting on the conservative attitude of Congress in its reception of proposals to liberalize the original bill, they say:

"Thus the category of conscientious objectors, while not requiring membership in a religious sect opposed to war, was reserved to those whose religious training and beliefs led them to oppose participation in all wars, and excluded by interpretation in practice those equally conscientious whose objections to participation in all wars were based on humanitarian, philosophical, and —in its widest sense—political grounds. The religious agencies from the first understood that no such distinction could be fairly made, when they urged the broad ground of conscience. The justice of their position has been abundantly proved by the hundreds of cases of men of conscience, denied recognition under illiberal interpretations of the narrow terms of the law, who have inevitably chosen prison rather than yield their principles."

Where shall we find, in any authoritative quarter, a more liberal statement of the province of the court in the interpretation of a statute than the following:

"It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had none the less a real and ascertainable pre-existence in the legislator's mind. The process is, indeed, that at times, but it is often something more. The ascertainment of intention may be the least of a judge's troubles in ascribing meaning to a statute. 'The fact is,' says Gray in his lecture on the *Nature and Sources of the Law,* Sec. 370, p. 175, 'that the difficulties of so called interpretation arise when the legislature has had no meaning at

[35]Ernest Angell, Cyrus Leroy Baldridge, Robbins Wolcott Barstow, George S. Counts, Sherwood Eddy, Frederick May Eliot, Dorothy Canfield Fisher, Christian Gauss, Arthur Garfield Hays, Max Lerner, William Draper Lewis, Felix Morley, William Allen Neilson, W. W. Norton, G. Bromley Oxnam, Edward L. Parsons, Edward A. Ross, Mary E. Woolley.

all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present in its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.' "[36]

In the light of the foregoing historical and contemporary facts, can it be claimed that the interpretation of Sec. 5(g) in the 2nd Circuit is warranted by any sound criterion? Surely "religion" in the Selective Service Act of 1940 means what it meant in the Constitution, and what it has meant in common speech and in colonial, state and federal laws for more than 150 years.

But someone may say—"Even if a Senator or Representative who voted for the Selective Service Act of 1940 wouldn't recognize it as it has come from the court room of the 2nd Circuit, what of it? The Act will expire in a few months, and in the mean time the draft law can be more easily administered so as to avoid unjust discriminations. Why not?" Well, answers will differ, perhaps according to one's convictions as to the function and limitations of the judicial office.

[36]Cardozo, The Nature of the Judicial Process, pp. 14, 15.