Buffalo Law Review

Volume 19 | Number 2 Article 29

1-1-1970

Selective Service Law—In Providing for Conscientious Objector Exemption, Free Exercise of Religion Clause of First Amendment Precludes Discrimination in Favor of Those With Formal Religious Beliefs

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full effect as an agreement for "general peace."[23] Applying the test of "fairness" and "knowledge" to the present case the court denied summary judgment. In essence the court's holding insures that the plaintiff, in this type of case, will have access to the jury on the issue of the parties' intent.

The court's approach to the problem of inequitable release agreements in the personal injury field seems deficient. If a plaintiff is mistaken as to the extent of injuries a release is a bar.[24] However, the plaintiff may be just as mistaken about what he bargained for as in the "unknown injury" situation. More importantly, the result may be just as inequitable where there is only a mistake about the extent of injury. In the present case the court was directly confronted with the possibility of an unjust decision based merely upon classification of the plaintiff's injuries. Therefore, it is suggested that the court's "known-unknown" dichotomy is not conducive to just decisions in the personal injury field. The court must have been aware of the possibility that a contrary decision would have left the minor plaintiff without adequate compensation for her injuries. Fortunately, an equitable decision was reached but at the price of an intensive struggle by the court to refine an inappropriate classification scheme of types of injuries. There is no imperative need to adhere to it. Personal injury settlements are based upon an assumption of the existence of a state of facts, namely the condition of the plaintiff. If the parties' views of these essential facts are incorrect, then they are mistaken as to what they have bargained about. Under this simplified contract approach general releases should be rescinded whenever an injured party experiences further complications which are discovered after settlement that if not compensated for, would result in a grossly inequitable situation. This would enable the courts to deal directly and openly with this problem and to abandon a classification scheme which may lead to inequitable decisions.

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SELECTIVE SERVICE LAW—IN PROVIDING FOR CONSCIENTIOUS OBJECTOR EXEMPTION, FREE EXERCISE OF RELIGION CLAUSE OF FIRST AMENDMENT PRECLUDES DISCRIMINATION IN FAVOR OF THOSE WITH FORMAL RELIGIOUS BELIEFS

On April 17, 1968, John Sisson, Jr., in obedience to an order from his local Board, reported to the Boston, Massachusetts induction center for induction into the armed forces. After being warned of the consequences by the officer-in-charge, Sisson deliberately refused to be inducted. Since his objections were based upon convictions of general morality and conscience, Sisson did not claim in any formal sense to be a religious conscientious objector. Additionally, Sisson

23. 280 N.Y. 1 (1939).
24. Moyer v. Scholz, 22 A.D. 50, 253 N.Y.S.2d 483 (3d Dep't 1964).

did not claim to be opposed to participation in war in any form, but was specifically opposed to American involvement in Vietnam. At trial, a jury sitting in the United States District Court for the District of Massachusetts found Sisson guilty of a violation of section 12 of the Military Selective Service Act of 1967[1] for unlawfully, knowingly, and wilfully having refused to comply with the order of his draft board to submit to induction into the armed forces. During subsequent proceedings on a motion in arrest of judgment, pursuant to Rule 34 of the Federal Rules of Criminal Procedure, the trial court focused on two issues: whether conscientious objectors may be compelled to perform combat service, and whether the 1967 Selective Service Act unconstitutionally discriminated in favor of religious conscientious objectors to the prejudice of Sisson. The court *held*, first, because of a lack of national need for combat service from Sisson, the free exercise of religion clause of the first amendment and the due process clause of the fifth amendment prohibit the application of the 1967 Selective Service Act to require Sisson to render combat service in Vietnam, and second, the statute is invalid because Congress, in providing draft exemption for religious conscientious objectors only, unconstitutionally discriminated against those who are motivated against war by profound nonreligious beliefs. *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969), *prob. juris. noted*, — U.S. —, 90 S. Ct. 92 (1969).

"The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."[2] As such, "the power of Congress to classify and conscript manpower for military service is beyond question."[3] Contentions that this power may be utilized only in time of national emergency have been rejected by the courts under the rationale that "the Congressional power to provide for the draft does not depend upon the existence of a war or national emergency, but stems also from the Constitutional power to raise and support armies and to provide and maintain a navy."[4] By this reasoning, the power of Congress to conscript for peace time, as well as for war time, service has been upheld.[5] Furthermore, Congress may delegate its power to conscript individuals for limited service during peace time

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1. 50 U.S.C. § 451, *et seq.* (1964). Section 12 (Title 50 U.S.C.A. § 462) provides in pertinent part:

> Any . . . person . . . who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or both such fine and imprisonment.

2. United States v. O'Brien, 391 U.S. 367, 377 (1968). *See also* Lichter v. United States, 334 U.S. 742, 755-58 (1948).

3. United States v. O'Brien, 391 U.S. 367, 377 (1968).

4. United States v. Hogans, 369 F.2d 359, 360 (2d Cir. 1966).

5. Bertelsen v. Cooney, 213 F.2d 275 (5th Cir. 1954), *cert. denied*, 348 U.S. 856. *See also* Etchevery v. United States, 320 F.2d 873 (9th Cir. 1963), *cert. denied*, 375 U.S. 930 (1963). *Accord*, Memorandum Opinion of Mr. Justice Stewart in Holmes v. United States, 391 U.S. 936 (1968).

to the President.[6] Nonetheless, there may be some limitation upon the application of this power during peace time conditions. Whether or not an individual may be compelled in the absence of a declaration of war to render military service in armed international conflict overseas is thought by some to be an open constitutional question.[7]

It is believed by many that the power to conscript also includes the power to exempt from conscription, and Congress has exempted conscientious objectors from service in the armed forces since the enactment of the first conscription legislation.[8] Although some have argued that the exemption has been provided in response to a constitutional requirement,[9] the courts have consistently maintained the position that the conscientious objector exemption derives from Congress and not from any constitutional mandate. Speaking on this issue, the Supreme Court has clearly indicated that the privilege to avoid combatant service comes from Congress, and that "that body may grant or withhold the exemption as in its wisdom it sees fit."[10]

The present conscientious objector exemption provisions are to be found in section 6(j) of the Military Selective Service Act of 1967.[11] This section exempts from combat training and service in the Armed Forces individuals

6. Section 4(a) of the Military Selective Service Act of 1967, 50 U.S.C. § 454(a) (1964), provides in pertinent part:

> [T]he President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title . . . such number of persons as may be required to provide and maintain the strength of the Armed Forces.

7. Holmes v. United States, 391 U.S. 936 (1968); Hart v. United States, 391 U.S. 956 (1968); McArthur v. United States, 393 U.S. 1002 (1968).

8. United States v. Seeger, 380 U.S. 163, 169-73 (1965).

9. Note, *The Conscientious Objector and the First Amendment: There But For the Grace of God . . .*, 34 U. CHI. L. REV. 79 (1966); Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 VA. L. REV. 1355 (1968).

10. United States v. Macintosh, 283 U.S. 605, 623 (1931). *See also* Korte v. United States, 260 F.2d 633, 635 (9th Cir. 1958), *cert. denied*, 358 U.S. 928 (1958); George v. United States, 196 F.2d 445, 451 (9th Cir. 1952); Local Draft Board No. 1 v. Connors, 124 F.2d 388 (9th Cir. 1941).

11. 50 U.S.C. App. § 456(j) (1964). This section provides:

> 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. As used in this section, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objection, whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, . . . be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) (section 454(b) of this Appendix) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board pursuant to Presidential regulations may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title (section 462 of this Appendix) to have knowingly failed or neglected to perform a duty required of him under this title . . . .

who are opposed to participation in war in any form by reason of their religious training and belief. These provisions evolved from similar provisions provided by Congress in the 1940[12] and 1948[13] series of draft acts. To gain conscientious objector exemption under the 1940 draft act, it was required that the registrant's anti-war convictions be strictly based upon religious training and belief.[14] Subsequent court decisions excluded conscientious objection based upon philosophical, social or political policy from the exemption provisions of this act.[15] In order to effectuate the spirit and intent of the provisions of section 6(j), the President has promulgated regulations establishing individual classifications for conscientious objection to combatant and non-combatant service.[16]

The constitutionality of the exemption provisions has come under varied and continuous attack. The Act of 1917[17] allowed conscientious objector status only to members of pacifist religious sects, and the Supreme Court upheld this classification despite the argument that it violated the "free exercise of religion" provision of the first amendment.[18] Nevertheless, "in adopting the 1940 Selective Training and Service Act Congress broadened the exemption afforded in the 1917 Act by making it unnecessary to belong to a pacifist religious sect . . . ."[19] Section 5(g) of the 1940 Act and the similar provisions found in section 6(j) of the 1948 and 1967 Acts have consistently been held to be constitutional in the same manner as were the corresponding provisions of the 1917 Act.[20] The courts have rejected contentions that the provisions impose a religious test for a public office,[21] that the law shows a preference of one religion over another,[22] and that the Act is a law respecting an establishment of religion.[23]

The courts have shown a marked unwillingness to defy the will of Congress in this area. In *United States v. Kurki*,[24] for example, the Court refused to provide a conscientious objection exemption to a selective conscientious objector

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12. Act of September 16, 1940, 54 Stat. 885, 889, § 5(g).
13. Act of June 24, 1948, 62 Stat. 604, 612-13, § 6(j).
14. United States v. Seeger, 380 U.S. 163, 176 (1965).
15. Berman v. United States, 156 F.2d 377 (3d Cir. 1946); United States v. Kauten, 133 F.2d 703 (2d Cir. 1943).
16. 32 C.F.R. §§ 1622.10, 1622.11, and 1622.14.
17. Act of May 18, 1917, 40 Stat. 76, 78, § 4.
18. In Arver v. United States, 245 U.S. 366, 389-90 (1918) the Supreme Court stated:
> And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more.
19. United States v. Seeger, 380 U.S. 163, 171 (1965).
20. *See supra* note 17.
21. Clark v. United States, 236 F.2d 13, 23-24 (9th Cir. 1956), *cert. denied*, 352 U.S. 882 (1956).
22. George v. United States, 196 F.2d 445, 448 (9th Cir. 1952), *cert. denied*, 344 U.S. 843 (1952).
23. *Id.* at 449. *See generally*, In re Summers, 325 U.S. 561 (1945).
24. 255 F. Supp. 161 (E.D. Wis. 1966), *aff'd*, 384 F.2d 905 (7th Cir. 1967), *cert. denied*, 390 U.S. 926 (1967).

(i.e., an individual who objects to participation in a particular war, rather than to war in any form); Congress had provided that, in order to be entitled to exemption, conscientious objectors must be opposed to participation in war in any form. It should be noted that the provisions under consideration in that case respecting opposition to participation in any war are identical to the provisions found in section 6(j) of the Military Selective Service Act of 1967.

To be entitled to exemption as a conscientious objector, the registrant must demonstrate, first, that he is opposed to participation in war in any form, and second, that such opposition is a result of his religious training and belief.[25] Definitionally, "training" signifies "no more than individual experience supporting belief; a mere background against which sincerity could be tested,"[26] and "religious training and belief" has been broadly construed by the Supreme Court to include "all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."[27] The statutory exemption does not recognize all forms of conscientious objection since the congressional definition of "religious training and belief" specifically excludes "essentially political, sociological, or philosophical views, or a merely personal moral code."[28] Nevertheless, it is thought that these categories of conscientious objection should have narrow application. For example, in *United States v. Seeger*,[29] the Court broadly construed the congressional definition of religious training and belief to embrace all religions, and to exclude political, sociological or philosophical views and personal moral codes having no religious attributes. As indicated by the Supreme Court, "the use by Congress of the words 'merely personal' seems to us to restrict the exception to a moral code which is not only personal but which is the sole basis for the registrant's belief and is in no way related to a Supreme Being."[30] Association with a particular religious sect, however, is irrelevant to the question of eligibility for the exemption. "The ultimate question . . . is the sincerity of the registrant in objection, on religious grounds, to participation in war in any form."[31] Just as irregular church attendance does not automatically

25. 50 U.S.C. App. § 456(j) (1964).
26. *In re* Nissen, 146 F. Supp. 361 (D. Mass. 1956).
27. In United States v. Seeger, 380 U.S. 163, 176 (1965) the Court stated:
[U]nder the 1940 Act it was necessary only to have a conviction based upon religious training and belief; we believe that is all that is required here. Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.
28. 50 U.S.C. App. § 456(j) (1964).
29. 380 U.S. 163 (1965).
30. *Id.* at 186.
31. Witmer v. United States, 348 U.S. 375, 381 (1955).

disqualify a registrant from entitlement to the exemption,[32] mere affiliation with a particular religious sect does not *per se* entitle a registrant to conscientious objector status.[33]

The registrant must also be opposed to participation in any war, and it is not sufficient to espouse opposition to a particular war only.[34] "War," within section 6(j) of the Act,[35] has been defined as "actual military conflicts between nations of the earth in our time—wars with bombs and bullets, tanks, planes and rockets."[36] Theocratic wars, therefore, are not considered to be within the phrase "war in any form," and a person who states that he would participate in a theocratic war should not, on that basis alone, be denied conscientious objector status.[37] Moreover, although the willingness of the registrant to use force in various situations may be considered by a local Board to be some evidence of a lack of conscientious objector scruples, the willingness of a registrant to use force to protect the property of his religion or the lives or property of his brethren,[38] or to employ self-defense,[39] or to kill in self-defense[40] is not, by itself, sufficient evidence on which to predicate a denial of the exemption.

Although it may be determined that because of religious training and belief a registrant is opposed to participation in war in any form, the breadth of a registrant's exemption from service in the armed forces depends upon the extent of his opposition to service therein. Even though the registrant is granted an exemption from combat service as a conscientious objector, he may still be drafted into the armed forces as a non-combatant if it is determined that he is not opposed to such service.[41] The non-combatant exemption is provided to those individuals "who are found to be conscientiously opposed to taking life or active participation in mortal combat, but not to service in support of others who do engage in combat."[42] Therefore, a registrant who is classified as

32. Imboden v. United States, 194 F.2d 508, 513 (6th Cir. 1952), *cert. denied*, 343 U.S. 957 (1951).

33. United States v. Corliss, 280 F.2d 808, 813 (2d Cir. 1960), *cert. denied*, 364 U.S. 884 (1960); United States v. Simmons, 213 F.2d 901, 904-05 (7th Cir. 1954), *rev'd on other grounds*, 348 U.S. 397 (1954); Schuman v. United States, 208 F.2d 801 (9th Cir. 1954).

34. United States v. Kurki, 384 F.2d 905 (7th Cir. 1967); United States v. Kauten, 133 F.2d 703 (2d Cir. 1943).

35. 50 U.S.C. App. § 456(j) (1964).

36. Sicurella v. United States, 348 U.S. 385, 391 (1955); Riles v. United States, 223 F.2d 786 (5th Cir. 1955).

37. Sicurella v. United States, 348 U.S. 385 (1955); Rempel v. United States, 220 F.2d 949 (10th Cir. 1955); United States v. Wilson, 215 F.2d 443 (7th Cir. 1954); United States v. Hertzog, 122 F. Supp. 632 (M.D. Pa. 1954).

38. Sicurella v. United States, 348 U.S. 385 (1955).

39. United States v. Gearey, 379 F.2d 915 (2d Cir. 1967), *cert. denied* 389 U.S. 959 (1967).

40. Pitts v. United States, 217 F.2d 590 (9th Cir. 1954).

41. 50 U.S.C. App. § 456(j) (1964); Instant case at 910.

42. United States v. Moore, 217 F.2d 428, 433 (7th Cir. 1954), *rev'd on other grounds*, 348 U.S. 966 (1954).

a non-combatant may be considered for non-combatant service in a combat zone or elsewhere.[43]

It should be noted that the registrant carries the singular burden of demonstrating to his local Board that he is eligible for and entitled to the exemption. The Selective Service System regulations make it abundantly clear that a "registrant who has failed to establish to the satisfaction of the local board . . . that he is eligible for classification in another class" shall be classified I-A.[44] In *Dickinson v. United States*,[45] the Supreme Court indicated that "each registrant must satisfy the Act's rigid criteria for exemption . . . and since the . . . exemption is a matter of legislative grace, the selective service registrant bears the burden of clearly establishing a right to the exemption."

Initially, the court in *Sisson* assumed for purposes of the opinion that in time of war Congress has the power to draft the generality of men for combat service, that this power also includes conscription of a conscientious objector for some kinds of service in peace or war, and that when the nation must defend itself against invasion, all persons may be conscripted for combat service. Against the background of these assumptions, the court considers the question of whether Congress can compel the combat service of a conscientious objector in armed international conflict overseas, in the absence of a declaration of war, when the internal safety and security of the nation is not at stake.[46] The Court determined that Sisson had waited until the administrative process was over to raise the constitutional challenge to the statute, and noted that Sisson was not a religious conscientious objector within the congressional definition,[47] that Sisson never made a claim to such status,[48] that the opposition voiced by Sisson was directed solely toward United States operations in Vietnam.[49] With these facts in mind, the court nevertheless found that Sisson was sincere in his beliefs,[50] that his beliefs were reasonable,[51] that society has an interest in protecting the liberty of the conscientious objector, religious or otherwise,[52] and that the sense of duty, if authentic, is constitutionally legitimate[53] and therefore subject to the same protections afforded to other recognized interests.[54] Noting that the Supreme Court considers the war powers broad enough to

43. *Supra* note 41.
44. 32 C.F.R. § 1622.10 (1969). *See generally*, 32 C.F.R. § 1622.1(c) (1969).
45. 346 U.S. 389, 395 (1953).
46. This appears to be nearly akin to the question posed by Justices Douglas and Stewart in Holmes v. United States, 391 U.S. 936 (1968).
47. Instant case at 909.
48. *Id.* at 904.
49. *Id.* at 905, 908, 910, 912. This case concerns opposition to a particular war and not to war in any form. Any other consideration would force the portions of the opinion directed toward recognition of the legitimacy of selective conscientious objection into pure *obiter dictum*. *See also* United States v. Sisson, 294 F. Supp. 511, 515, 520 (D. Mass. 1968).
50. Instant case at 905.
51. *Id.*
52. *Id.* at 908.
53. *Id.* at 909.
54. *Id.* at 910.

compel all citizens to render combat service *in the last extremity*,[55] the court decided that the last extremity is reached when the country is fighting for its very existence, and that the conscientious objector, therefore, is protected from combat service until the last extremity or something equivalent thereto is reached. When the public and private interest in the common defense reach the level[56] of the last extremity, the public and private interests in individual liberty should be subordinate. As the Vietnam type conflict does not approach anything near the "last extremity,"[57] and since the national need for combat service is slight in relation to the public interest in individual liberty,[58] the court reasoned that the free exercise of religion clause of the first amendment and the due process clause of the fifth amendment prohibit compelled combat service from Sisson in the Vietnam conflict. Acknowledging that on appeal the Supreme Court might deal only with the issue of the constitutionality of the draft provisions regarding the religious conscientious objector exemption,[59] the court explicitly found that the exemption is unconstitutional due to its discrimination in favor of religious conscientious objectors. Since, by a prior finding,[60] a non-religious conscientious objector should be accorded the same recognition by Congress as a religious conscientious objector, the recognition by Congress of conscientious objection on religious basis only is an unconstitutional discrimination in violation of the "free exercise of religion" clause of the first amendment.[61]

Sisson establishes three important new points of law, each of which is contrary to a long history of judicial precedent:[62] that there is a constitutional restriction prohibiting compelled combat service from conscientious objectors under certain circumstances; that there is an equality between religious and non-religious conscientious objectors; and that selective conscientious objection is legitimate. Should the Supreme Court adopt these new points of law, the war powers of Congress will not be as broad as they have previously been construed to be. Nevertheless, it should be noted that the Supreme Court may not reach the conclusions of law advanced by *Sisson*, but may choose to fashion its

55. United States v. Macintosh, 283 U.S. 605, 623-24 (1931), per Mr. Justice Sutherland. The Court stated therein:

> The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. . . . [T]he war powers . . . include . . . the power, *in the last extremity*, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general. (Emphasis added.)

56. Instant case at 908. The Court states therein: "Those rival categories of claims cannot be mathematically graded. There is no table of weights and measures. Yet there is no insuperable difficulty in distinguishing orders of magnitude."

57. *Id.* at 909.

58. *Id.*

59. 50 U.S.C. App. § 456(j) (1964).

60. *See supra* notes 50-54 and accompanying text.

61. Instant case at 911.

62. *See supra* notes 2, 3, 10, 15, 17-24 and accompanying text.

remedy so as to avoid the issue of constitutionality, a course the *Sisson* court might have followed.

It may be questionable whether the court in *Sisson* should have proceeded as far as it did in arriving at its decision, since, contrary to the statement of the court, it appears that Sisson failed to exhaust his administrative remedies. Although the court referred to exhaustion of administrative remedies, this reference was in relation only to the fact that Sisson waited until the administrative process was over to raise the contention that the statute was unconstitutionally discriminatory.[63] In selective service cases, only exhaustion of administrative remedies is usually held to be acceptable.

Generally speaking, a registrant is required to exhaust his administrative remedies before raising, in court, the contention that his classification is invalid. The exhaustion doctrine provides that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[64] The primary purpose of this doctrine is to allow for the smooth and orderly operation of the administrative agency. The Supreme Court has indicated that

> the agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise.[65]

This discretion or expertise has limitations, however, and an administrative agency is usually thought to be incapable of deciding the constitutionality of the statute from which it derives its authority to act.[66] Additionally, a number of courts have been unwilling to require exhaustion where the local Board denied a registrant procedural rights,[67] or where there was no pressing national emergency compelling limited judicial review of a registrant's classification.[68] The reluctance to compel strict exhaustion of administrative remedies in all instances has been announced by the courts[69] and noted by legal scholars.[70]

There are, however, several areas of the law in which the Supreme Court is

63. Instant case at 906.
64. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938).
65. McKart v. United States, 395 U.S. 185 at 193-94 (1969). The *McKart* case was decided after the *Sisson* decision was handed down, and may provide some indication of the Supreme Court's present disposition toward exhaustion of administrative remedies.
66. Public Utilities Comm'n of State of California v. United States, 355 U.S. 534, 539 (1958). *Cf.* Mr. Justice Douglas' dissenting opinion in Hart v. United States, 391 U.S. 956, 960 (1968).
67. Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956).
68. Ex Parte Fabiani, 105 F. Supp. 139 (E.D. Pa. 1952).
69. McKart v. United States, 395 U.S. 185 (1969).
70. 3 K. DAVIS, ADMINISTRATIVE LAW §§ 20.01, 20.06 (1958 with 1965 Supp.); Layton and Fine, *The Draft and Exhaustion of Administrative Remedies*, 56 GEO. L.J. 315, 320-31 (1967).

willing to apply the exhaustion doctrine much more strictly. Within the Selective Service law, the Court has indicated that claims for deferments for those engaged in activities deemed necessary to the maintenance of the national health, safety, or interest, and claims for *conscientious objection exemption* "would appear to be examples of questions requiring the application of expertise or the exercise of discretion,"[71] and therefore requiring exhaustion of available administrative remedies. To assist a registrant in exhausting the available administrative remedies, provision is made within the framework of the Selective Service System for appeals[72] by a registrant from a particular classification, and, while appeal from a classification is being taken, induction is suspended.[73]

Against this apparent requirement for exhaustion and the provision of means to effect exhaustion, *Sisson* presents one fact distinguishing it from all other important cases in this area, namely, an apparent failure to utilize any of the available administrative remedies to obtain a change in classification. In *Falbo v. United States*,[74] *Estep v. United States*,[75] *Seeger*,[76] and *McKart v. United States*,[77] each petitioner had utilized the administrative machinery in a positive attempt to alter his classification. In *Sisson*, however, except for a letter to his local board,[78] Sisson failed to make use of any of the administrative remedies available to him. The contention raised by Sisson was that the Act, *as applied to him*, violated "the provision of the First Amendment that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.' "[79] However, the *Sisson* opinion is completely devoid of any indication of the manner in which the section, later held to be unconstitutionally discriminatory, was applied to Sisson. It appears that what Sisson asked the court to do was to declare unconstitutional that which *may* have denied him conscientious objector exemption, not that which in fact did. This request seems to lack rationality, for before there can be a denial of equal treatment under the law, one would logically expect that there has first been some form of denial. Because a statute may be applied in various ways, to declare an Act of Congress unconstitutional *as written* would be to render an opinion advisory in nature. In other words, the complaint "is merely that officials of the executive department of the government are executing and will

71. McKart v. United States, 395 U.S. 185, 198 (1969) (esp. notes 15 and 16 therein).
72. 32 C.F.R. parts 1626 and 1627 (1969).
73. *See* 32 C.F.R. §§ 1624.3, 1625.14, 1626.41, and 1627.8 (1969).
74. 320 U.S. 549 (1944).
75. 327 U.S. 114 (1946).
76. United States v. Seeger, 380 U.S. 163 (1965).
77. 395 U.S. 185 (1969).
78. Instant case at 904-05. Presumably, Sisson also informed his local Board of his change of address, pursuant to 32 C.F.R. § 1641.3. This act would no more change Sisson's classification in any *formal* sense than would requesting a form "so that I might make my claim as a conscientious objector." Neither act has any relation to exhaustion of administrative remedies.
79. Instant case at 911.

execute an act of Congress asserted to be unconstitutional; and [the court was] asked to prevent [this]. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly [the courts] do not possess."[80] It appears, therefore, that the court should have developed the factual basis of exhaustion of administrative remedies more fully, or it should have remanded the case to Sisson's local Board for a determination of Sisson's eligibility for conscientious objector exemption.

Even absent a consideration of exhaustion of administrative remedies, the court in *Sisson* should have attempted to construe section 6(j) of the Military Selective Service Act of 1967[81] so as to maintain its constitutionality.[82] By so doing, the court may have been able to afford a remedy similar to that which was provided, and still maintain a close relationship with past judicial precedent. In *United States v. Seeger*,[83] the Supreme Court utilized this technique to exempt several registrants from the draft and avoid the contention that the conscientious objector provisions of the draft act then in force were invalid. At the time of that case "religious training and belief" was defined to mean "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [did] not include essentially political, sociological, or philosophical views or a merely personal moral code."[84] Although the petitioners in *Seeger* believed in a "Supreme Reality" or a "universal power" rather than in a "Supreme Being" as required by the provisions of the act, the Court construed Supreme Being broadly enough to embrace the petitioners' beliefs.[85] And in so doing, the Court construed political, sociological or philosophical views or merely personal moral codes, excluded by Congress from the definition of religious training and belief, to be those views and personal moral codes having no relation to a Supreme Being.[86] By broadly construing the phrase "Supreme Being" and narrowly construing those views specifically excluded from the definition of religious training and belief the Court was able to provide exemption from the draft without declaring the conscientious objector provisions to be invalid. In *Sisson*, however, it appears that the court completely disregarded this technique in making its determination of the validity of section 6(j) of the present act. Nevertheless, the court in *Sisson* may have been able to uphold section 6(j) by broadly construing the phrase "religious training and belief" in much the same manner that the Supreme Court in *Seeger* construed "Supreme Being," and by narrowly constru-

80. Frothingham v. Mellon, 262 U.S. 447, 488-89 (1923).
81. 50 U.S.C. App. § 456(j) (1964).
82. *See* Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); F. FRANKFURTER, LAW AND POLITICS 25 (paperback ed. 1962); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1936) (concurring opinion of Mr. Justice Brandeis).
83. 380 U.S. 163 (1965).
84. Act of June 24, 1948, ch. 625, 62 Stat. 604, 612-13, § 6(j).
85. 380 U.S. at 176. *See also* concurring opinion of Mr. Justice Douglas at 188.
86. *See supra* note 30 and accompanying text.

ing the specifically excluded views as having no relation to religion. Had the court thereafter determined that Sisson's belief had some relation to religion, even though minor, Sisson's belief would be within the congressional definition of religion, Sisson could have been afforded exemption from the draft, and the exemption's constitutionality would have been upheld. By utilizing such a procedure, the court may have been able to avoid "imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and [would have been] in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets."[87]

Because the Supreme Court may choose, on appeal, not to adopt the new points of law developed in *Sisson*, the method the court chose to exempt Sisson from the draft may have provided relief of a temporary nature only, and a remedy which is tenuous at best. It is apparent, therefore, that the court should have made an overt attempt to construe the provisions of section 6(j) of the Act so as to include Sisson within the section's coverage. While it is true that the court may have found that Sisson's convictions had no basis whatsoever in religion, in making that determination alone the court would have made an attempt to uphold the validity of the statute, and would have explored every route available in fashioning its remedy.

DAVID A. HIGLEY

TAXATION—STIPENDS GIVEN IN CONJUNCTION WITH EMPLOYER DOCTORAL PROGRAMS ARE TAXABLE AS COMPENSATION FOR EMPLOYMENT

Respondents, Johnson, et. al.,[1] received stipends (which were originally included in their gross income for the years 1961-1962) from their employer, Westinghouse, while they were completing dissertations for doctoral degrees. Such stipends constituted the second phase of a two-part program known as the Westinghouse Bettis Fellowship and Doctoral Program.[2] The payments from Westinghouse were based on a specified percentage of respondents'

87. United States v. Seeger, 380 U.S. 163, 176 (1965).

1. Respondents were Richard E. Johnson, Richard A. Wolfe, and Martin L. Pomerantz, all engineers at the Bettis Atomic Power Laboratory and employed by Westinghouse. Their wives were parties to the action merely because joint tax returns were filed for the years in question.

2. This program was a two-phase schedule of subsidized post-graduate study in engineering, physics, or mathematics. The first phase was a "work-study" concept with the employee being paid for a forty-hour week and receiving up to eight hours off for the purpose of attending classes. When an employee completed all preliminary requirements for his doctorate he could apply for an educational leave of absence, which constituted the second phase, to complete work on his doctoral dissertation. The employee was required to submit a proposed dissertation topic for approval by Westinghouse and the Atomic Energy Commission. Approval was based, *inter alia*, on a determination that the topic had at least some general relevance to the work done at Bettis.