Michigan Law Review

Volume 52 | Issue 2

1953

Aliens - Naturalization - Netural Aliens Who Sought Relief from Military Service Barred from Becoming United States Citizens

John Houck S.Ed.
University of Michigan Law School

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Recommended Citation

John Houck S.Ed., *Aliens - Naturalization - Netural Aliens Who Sought Relief from Military Service Barred from Becoming United States Citizens*, 52 MICH. L. REV. 265 (1953).
Available at: https://repository.law.umich.edu/mlr/vol52/iss2/5

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COMMENTS

ALIENS — NATURALIZATION — NEUTRAL ALIENS WHO SOUGHT RELIEF FROM MILITARY SERVICE BARRED FROM BECOMING UNITED STATES CITIZENS—During World War II, an alien who was a citizen or a subject of a neutral country was allowed to escape service in the armed forces of the United States by signing Selective Service Form DSS 301. A release thus obtained carried with it a disability ever to become a citizen of the United States. A substantial number of neutral

aliens availed themselves of this relief from military service.[1] Today, the courts are faced with the problem of whether signing Form 301 shall in every case prevent the alien from becoming a citizen. It is the purpose of this comment to examine the cases that have arisen to date and to determine, against a background of United States policy in submitting aliens to military liability, the validity of the various defenses that have been interposed to the citizenship bar.

I. *History of Alien Liability to Military Service in the United States Through World War II*

Before the Civil War, aliens were excluded from the armed forces of the United States, and this nation insisted that its citizens be free of military service abroad.[2] This attitude found expression in a letter written by James Madison while he was secretary of state:

> "Citizens or subjects of one country residing in another, though bound by their temporary allegiance to many common duties, can never be rightfully forced into military service, particularly external service, nor be restrained from leaving their residence when they please. The law of nations protects them against both. . . ."[3]

In 1862, Secretary of State Seward was able to write with assurance: "I can hardly suppose that there exists, anywhere in the world, the erroneous belief that aliens are liable here to military duty."[4] A short time later, the Civil War Conscription Act[5] became law, and aliens for the first time became liable to serve in the armed forces of the United States. This act distinguished aliens who had declared their intention to become citizens of the United States from non-declarant aliens, imposing draft liability on the former class only. A short time later, because of protests from abroad, a presidential proclamation allowed declarant aliens to withdraw their declarations and escape service, provided they left the United States within sixty-five days and provided that they had not exercised political rights under

[1] Exact figures are not available, but the Selective Service System estimated that of the 4,000,000 aliens in the United States in 1940, 1,000,000 were liable to service, and of these four or five percent objected to entering the armed forces. See U.S. Government, Selective Service System, Special Monograph No. 16, 1 PROBLEMS OF SELECTIVE SERVICE 99 (1952).

[2] Id. at 100. See also Fitzhugh and Hyde, "The Drafting of Neutral Aliens by the United States," 36 AM. J. INT. L. 369 at 370 (1942).

[3] 4 MOORE, INTERNATIONAL LAW DIGEST 52 (1906).

[4] Ibid.

[5] 12 Stat. L. 731 (1863).

any state law.[6] The Spanish American War Act[7] also included military liability for declarant aliens, but the ranks were entirely filled by volunteers and no problems were raised concerning alien service.

The World War I Act of May 18, 1917,[8] fixed the pattern of requiring service of declarant aliens, and once again an amended act provided an escape:

> "Provided, that a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States."[9]

Thus, the price of freedom from military service was permanent disability to become a citizen, although there was no longer a requirement that the alien leave the country. Bills which attempted to bar from citizenship nondeclarant aliens who claimed exemption from service on grounds of alienage failed to pass Congress.[10]

The peacetime conscription law of 1940[11] followed the substance of these former acts closely. Registration was required of citizens and "every other male person residing in the United States," excepting diplomatic and consular officials. Only declarant aliens were liable for service. This act was amended by Public Law 360 after the United States entered World War II. Registration of aliens could be further limited by presidential declaration. Among the registrants, every male alien between specified ages residing in the United States was liable for service. Thus, the distinction between declarant and nondeclarant aliens was abandoned. Section 3(a) contained a proviso:

> " . . . that any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed

[6] 13 Stat. L. 732 (1863).
[7] 30 Stat. L. 361 (1898).
[8] 40 Stat. L. 77 (1917).
[9] 40 Stat. L. 885 (1918).
[10] Tutun v. United States, (1st Cir. 1926) 12 F. (2d) 763 at 764. Aliens who claim the exemptions from service that are also open to citizens do not disqualify themselves for citizenship. Petition of Kohl, (2d Cir. 1945) 146 F. (2d) 347.
[11] 54 Stat. L. 885 (1940).

by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."[12]

The Selective Service System adopted Form DSS 301 as the application under this section.

II. *Defenses to the Citizenship Bar*

While the right of the United States under international law to require military service of aliens has sometimes been questioned,[13] there is no doubt of the right of this country to impose conditions upon aspirants to citizenship, including military service while an alien is a resident.[14] Thus, the cases arising from use of Form 301 have not been generally concerned with the legality of the citizenship bar (with the exception of the cases involving treaty aliens, which will be noted later). Rather, conceding the validity of the provision, the alien typically argues that the special facts of his case avoid its effect as to him. Therefore, the cases will be grouped according to the defenses raised.

A. *Defense That Alien Was Not a Citizen of a "Neutral Country."* Section 3(a) provided relief from military service only for a "citizen or subject of a neutral country."[15] The Director of Selective Service defined a neutral country as one that was neither a co-belligerent nor an enemy.[16] It was the practice of the Director to give the local boards periodically a list of countries deemed neutral.[17] In *Petition of Ajlouny*,[18] the applicant maintained that signing Form 301 could be no bar to citizenship because his country, Palestine, was in fact non-neutral. The court agreed, refusing to be bound by the determination of the Director of Selective Service. Palestine was ruled

[12] 55 Stat. L. 844 (1941). In 1945, Congress amended 8 U.S.C. (1946) §224(c), defining those ineligible for citizenship, to include anyone barred under §3(a) of the Selective Service Act.

[13] The writers disagree whether the United States policy of drafting neutral aliens raises a problem in international law. For the view that the alien draft contravenes an established principle of the law of nations, see 28 VA. L. REV. 624 (1942). For the contrary view, see Fitzhugh and Hyde, "The Drafting of Neutral Aliens by the United States," 36 AM. J. INT. L. 369 (1942).

[14] In re Martinez, (D.C. Pa. 1947) 73 F. Supp. 101.

[15] 55 Stat. L. 844 at 845 (1941).

[16] Selective Service Regulations, §601.2(c). This, and other administrative material dealing with aliens, can be found in U.S. Government, Selective Service System, Special Monograph, 3 PROBLEMS OF SELECTIVE SERVICE (Appendix B) 33 (1952).

[17] U.S. Government, Selective Service System, Special Monograph, 3 PROBLEMS OF SELECTIVE SERVICE (Appendix B) collects all such lists issued during World War II.

[18] (D.C. Mich. 1948) 77 F. Supp. 327.

by Great Britain under a mandate. Great Britain was at war and Palestine was geared to those efforts. It had been bombed. No significant change had taken place between November 1942, when petitioner signed Form 301, and December 1943, when Palestine was taken off the Director's list of neutral countries. Since Palestine was not neutral, the application for relief from service was a nullity and petitioner was not disqualified from citizenship.[19] In *Petition of Dweck*,[20] the petitioner alleged that Syria was not a neutral country at the time the application was made. This contention emphasized less the non-neutrality idea than the belief that Syria, through invasion and occupation by Britain and France, had ceased to be a state. The court refused to find a parallel with *Ajlouny*. While Palestine was in "pupilage," and thus followed Great Britain, Syria had been set up as an independent republic before petitioner's application in 1943. Having found this status as an independent nation, the court did not concern itself with belligerency-in-fact. Thus, while not condemning either the *Ajlouny* method or result, this court in purporting to use the method failed to ask all the questions. The decision implies that *Ajlouny* permits an investigation into the facts of neutrality only when a state is not free to make an independent determination of status. Syria being independent, the court is bound by her formal declaration of war. If an inquiry into the facts of neutrality is a correct approach, it should be equally correct for independent states as for subject ones. The recent case of *In re Molo*[21] passes over *Dweck* and condemns the method of *Ajlouny*. While there are doubtless different degrees of neutrality, the court held that the Director's definition will be respected. A clear-cut test was needed by the Selective Service System for efficient operation. Congress was more concerned with getting men into uniform than in closely defining neutrality. Iran, the country in question here, was neutral until its declaration of war, despite treaties with Russia and Great Britain and a termination of diplomatic relations with the Axis before that time, and the presence of Allied troops and materiel.

The *Molo* argument of administrative necessity is compelling. By contrast, the alien's argument is unappealing; having enjoyed deferment as the national of a neutral country, he now seeks to escape the effect of that deferment. If he is successful in convincing the

[19] This decision closely follows that of the Board of Immigration Appeals in Matter of Mileikowsky, A-4443410 (1947), which also dealt with Palestine. See 5 IMM. & NAT. SERV. MO. REV. 56 at 58 (1947).

[20] (D.C. N.Y. 1950) 106 F. Supp. 169.

[21] (D.C. N.Y. 1952) 107 F. Supp. 137.

court of the non-neutrality of his homeland, he is admitting that he enjoyed, at least for a time, a deferment that he did not deserve.

B. *Defense of Exemption by Treaty.* Prior to the enactment of the Selective Service and Training Act of 1940, the United States had entered into treaties with some twenty countries, exempting their citizens from service in the armed forces of this country. These nations contended that the treaties remained superior to the draft law, and insisted that their nationals be released from military service in the United States without incurring the citizenship bar. Over the objection of Selective Service Headquarters, the State Department agreed to issue a revised Form 301 for use by treaty aliens, which deleted the clause disqualifying the applicant from citizenship. The State Department specified, however, that the final determination of the alien's right to United States citizenship should be left to the naturalization courts.[22]

A considerable amount of litigation has arisen concerning the use of these revised Forms 301, notably by Swiss nationals claiming under the Treaty of 1850.[23] In three cases before the various administrative boards of the Immigration and Naturalization Service during 1947 it was held that neither the treaty nor the use of the revised Form 301 served to absolve the alien from the citizenship disqualification. In *Matter of Kutil*[24] the lower reviewing board, the Central Office, held the treaty repealed to the extent that it was inconsistent with the Selective Service Act. To petitioner's claim that he would not have signed Form 301 had he appreciated its effect, the board replied that it was sufficient to deny citizenship that he had put his own interests before those of the United States. The Board of Immigration Appeals affirmed, while not agreeing that the draft law necessarily repealed the treaty provisions. In *Matter of Lowe,*[25] the Board reached the same result, holding itself not bound by the opinion of the Department of State, pointing out that that body had left the final determination of the question to the naturalization courts, and finding the intention of Congress "to penalize all nationals of neutral countries having treaties

[22] U.S. Government, Selective Service System, Special Monograph, 1 PROBLEMS OF SELECTIVE SERVICE 115 (1952). The treaties are discussed in some detail in Fitzhugh and Hyde, "The Drafting of Neutral Aliens by the United States." 36 AM. J. INT. L. 369 (1942). The content and use of the revised Form 301 is described in Moser v. United States, 341 U.S. 41, 71 S.Ct. 553 (1951).

[23] 11 Stat. L. 587 at 589 (1850): "The citizens of one of the two countries, residing or established in the other, shall be free from personal military service."

[24] A-4197506, A-4257898, 2, I. & N. Dec. 858 (1947).

[25] 5878178, 2, I. & N. 914 (1947).

with the United States similar to the Swiss treaty who claimed exemption from military service."[26] In *Matter of Weissman*[27] the Central Office again held the inconsistent treaty provisions repealed by the later act of Congress, and that contrary assurances to the petitioner from the State Department and the Swiss Legation were of no avail. The Board of Immigration Appeals affirmed. The Supreme Court in *Moser v. United States*[28] held that the bar to citizenship was not inconsistent with the treaty provisions, since the treaty did not guarantee unconditional exemption from service. However, the Court believed that a petitioner in good faith who had been misled by the State Department's revised DSS 301 should not be held to have waived any right he may have had to apply for United States citizenship. This decision should save from the citizenship bar those treaty aliens who signed the revised form, but apparently an alien from a treaty nation will not be allowed to make a similar plea where he signed the unrevised form, even if the consular officials representing his country advised him that he was protected under the treaty.[29] Thus, the treaty itself has never been made the basis of relief from the effect of Form 301.

C. *Defense of Mistake.* It is clear that the alien will not be permitted to complain that he was mistaken or misled into signing Form 301 unless he furnishes a substantial basis for this claim. The local board is presumed to have discharged its duty in acquainting the alien with the significance of his act in seeking relief from military service.[30] The applicant has a duty to ascertain the effect of this act.[31] If the court finds no fact basis for the claim of misunderstanding, or doubts the good faith of the applicant in making it, the defense fails.[32] As was stated above, the alien cannot rely upon the erroneous opinion of his country's consul that his rights to an unconditional release are guaranteed by treaty, unless this misunderstanding was compounded by the State Department in permitting the use of a revised Form 301 in which the citizenship bar is deleted, as in the *Moser* case.[33] Beyond

[26] Id. at 915.
[27] A-5113737, 2, I. & N. 899 (1947).
[28] 341 U.S. 41, 71 S.Ct. 553 (1951).
[29] Mannerfrid v. United States, (2d Cir. 1952) 200 F. (2d) 730; In re Martinez, (D.C. Pa. 1947) 73 F. Supp. 101.
[30] Barreiro v. McGrath, (D.C. Cal. 1952) 108 F. Supp. 685.
[31] In re Martinez, (D.C. Pa. 1947) 73 F. Supp. 101.
[32] Petition of Bartenbach, (D.C. Pa. 1949) 82 F. Supp. 649; In re Martinez, (D.C. Pa. 1947) 73 F. Supp. 101; Mannerfrid v. United States, (2d Cir. 1952) 200 F. (2d) 730; Barreiro v. McGrath, (D.C. Cal. 1952) 108 F. Supp. 685.
[33] Moser v. United States, 341 U.S. 41, 71 S.Ct. 553 (1951).

Moser, the only case in which credence was given the claim of mistake was *Machado v. McGrath*.[34] There, the petitioner set out his incomplete mastery of the English language, the fact that he was advised to sign Form 301 by a clerk of his local board, that he signed without the form having been explained to him, and did so in the belief that it would secure him an exemption on the grounds of nonresidence rather than neutral alienage. The court of appeals held that this stated a cause of action on mistake grounds, within the *Moser* rule. A right as important as citizenship should not be waived without there having been an opportunity for intelligent consideration of the alternatives. The Supreme Court denied certiorari.[35] Thus, the essential elements of a mistake defense seem to be the participation of the government or one of its officials in misleading the applicant,[36] coupled with a reasonable belief by the alien, considering his ability to understand the situation, that he does not waive his rights to apply for citizenship.

D. *Defense of Nonresidence.* Section 2 of the original 1940 draft law provided for registration of male citizens and "every male alien residing in the United States."[37] The attorney general was called upon to interpret this section, and defined residence very broadly to include ". . . every alien . . . who lives or has a place of residence or abode in the United States, temporary or otherwise, or for whatever purpose taken or established. . . ."[38] When amendment to the 1940 act permitted the drafting of nondeclarant aliens, the Director of Selective Service, under his delegated power to make exceptions, promulgated Regulation 611.13,[39] stating which nondeclarants would be held nonresidents of the United States. For present purposes, the important exceptions were (1) those aliens who did not remain in the United States for more than three months, and

[34] (D.C. Cir. 1951) 193 F. (2d) 706.

[35] 342 U.S. 948, 72 S.Ct. 557 (1952).

[36] In Mannerfrid v. United States, (2d Cir. 1952) 200 F. (2d) 730, the court characterized the mistake in the Moser case as caused by a third person, the consul. However, it would seem that the Supreme Court held the participation of the Department of State in the mistake an essential condition of relief: "In response to claims of petitioner and others, and in apparent acquiescence, our Department of State had arranged for a revised procedure in claiming exemption. The express waiver of citizenship had been deleted. Petitioner had sought information and guidance from the highest authority to which he could turn. . . . He was led to believe that he would not lose his rights to citizenship." Moser v. United States, 341 U.S. 41 at 46, 71 S.Ct. 553 (1951).

[37] 54 Stat. L. 885 (1940).

[38] 39 Op. Atty. Gen. 504 (1940).

[39] U.S. Government, Selective Service System, Special Monograph, 3 PROBLEMS OF SELECTIVE SERVICE 34 (1952).

(2) those who, upon proper application for determination of status, were determined to be nonresidents. Also, Regulation 611.21[40] required an alien who wished to be determined a nonresident to do so within three months. Later, this was supplanted by Regulation 611.21-1,[41] allowing determination of residence after the three-month period.

A number of aliens who signed Form 301 have argued that this act was a nullity because, being nonresidents, they were not liable for military service. These complaints have chiefly come from aliens who were in the United States on a temporary visa at the outbreak of war, and who were forced to apply for successive extensions because of inability to return home. In *Benzian v. Godwin*,[42] such an alien was denied the right to have his status as a nonresident determined because he did not apply within three months as was then required. To avoid military service he signed Form 301. When the regulation was changed to permit determination of residence after three months, petitioner applied again and was found to be a resident by his local board and the Director. In an action seeking a declaratory judgment of the alien's status as a nonresident, the court held that Congress had adopted the very broad definition of residence offered by the attorney general when it amended the draft law. Therefore, petitioner could escape service only if he came under one of the exceptions in Regulation 611.13 or if he signed Form 301. Since the Director had determined that the alien's case did not fall within a regulatory exception (a determination which the court was unwilling to find had no basis of fact), the alien was bound by Form 301 and subject to the citizenship bar. The Supreme Court in *McGrath v. Kristensen*[43] obviously disapproved of a definition of residence for the purposes of the Selective Service Act which included these temporary visitors. In this case the alien had signed Form 301 before May 16, 1942, after which time the regulations would have declared him a resident. Before this date, the Court held, the regulations either declared petitioner a nonresident or were nondeclarative of status. If they were nondeclarative, it was necessary to inquire into the breadth of the term "resident" in the act. The Court thought the act was not intended to include ". . . a sojourn within our borders made necessary by the conditions of the times. . . ."[44] Since the alien was a nonresident, his execution of

[40] Id. at 36.
[41] Id. at 37.
[42] (2d Cir. 1948) 168 F. (2d) 952.
[43] 340 U.S. 162, 71 S.Ct. 224 (1950).
[44] Id. at 176.

Form 301 did not result in disability for citizenship. Justice Jackson, the attorney general who had rendered the opinion which defined residence broadly, delivered a concurring opinion in which he completely renounced the view he had once held. This decision offers protection to aliens whose claim of nonresidence relates to a period not covered by the regulations, but the Court did not pretend to invalidate the more strict rules of residence found within the regulations. That the regulations where applicable will govern the case was made clear in *Mannerfrid v. United States*[45] and the *Machado* case.[46] The former action involved a determination of nonresidence under the regulations, while the latter illustrates the operation of the three-month rule.

Since an application by an alien under the regulations to have his status as a nonresident determined was undoubtedly considered in light of the attorney general's interpretation of the act, a court would be justified in holding that the tests used have been repudiated by *Kristensen*. However, the Second Circuit refused to so hold in the recent *Mannerfrid* decision. While there is understandable reluctance to reopen the Director's decisions on nonresidence, finding that one who remained involuntarily in the United States was resident here seems unduly harsh when the citizenship bar of Form 301 is considered.

E. *Miscellaneous Defenses.* Several of the defenses that have been offered can be dealt with in summary fashion. The fact that a country neutral when the alien signed Form 301 subsequently became belligerent, rendering the alien liable to military service, does not end the citizenship bar.[47] However, if the alien thereafter actually served in the armed forces, he may become a citizen despite the presence of Form 301 in his file.[48] Similarly, volunteering for military service after signing Form 301 does not wipe away the citizenship disability unless actual service follows.[49] The fact that the alien ultimately

[45] (2d Cir. 1952) 200 F. (2d) 730.

[46] Machado v. McGrath, (D.C. Cir. 1951) 193 F. (2d) 706.

[47] Petition of Fatoullah, (D.C. N.Y. 1948) 76 F. Supp. 499; Machado v. McGrath, (D.C. Cir. 1951) 193 F. (2d) 706; In re Molo, (D.C. N.Y. 1952) 107 F. Supp. 137. The Director of Selective Service held the opposite view. See Matter of Josefsson, A-4558054, 2, I. & N. 545 (1947).

[48] Matter of Weissman, A-5113737, 2, I. & N. 899 (1947). This follows the view of the courts under the similar provision of the World War I act. In re Gustavson, (D.C. Cal. 1924) 300 F. 251. See 5 IMM. & NAT. SERV. MO. REV. 56 at 59 (1947).

[49] In re Martinez, (D.C. Pa. 1947) 73 F. Supp. 101. There is some ambiguous language in Barreiro v. McGrath, (D.C. Cal. 1952) 108 F. Supp. 685, which could be read to say that the mere act of volunteering (by signing Form 165), would lift the citizenship bar, but it does not appear likely that the court intended anything less than actual service to suffice.

proves unacceptable to the armed forces because of age or physical condition will not help him if he claimed exemption as a neutral alien while potentially draft eligible.[50] Finally, it is obvious that the citizenship bar survived the expiration of the Selective Service Act.[51]

III. *Conclusions*

The United States is clearly within its rights in imposing a condition of military service upon those aliens who aspire to citizenship. Further, the use of willingness-to-serve as a screening process for would-be citizens expresses a sound policy; aliens who feel that they have an insufficient stake in the United States to join in its defense are free to avoid taking part, but in so doing they set themselves outside that group from which we wish to draw future citizens. Unfortunately, this generally desirable rule may work undue hardship in particular cases. It is doubtless true that individual rights were secondary to the necessities of the war effort, but at war's end a reconsideration of hastily made decisions was in order. Ordinarily, one would propose legislative relief for hardship cases, but with the termination of the alien draft in its World War II form, the legislative branch is likely to regard the problem as closed.[52] As a result, aliens with appealing cases find themselves cut off from legislative relief—a group whose status is determined by the actions of a critical period. As such, the relief which they may get seems almost wholly confined to the courts, which can mitigate only to a limited extent the effect of statutes and regulations. However, the best defenses available to an alien put him outside the operation of Form 301, because he was never subject to its terms or because he was misled, and in these areas the courts may act. Finally, let it be noted that the courts exhibit marked individual differences on the question of the seriousness of attempting to escape military duty. A court that believes in serving without objection when

[50] Petition of Perez, (D.C. N.Y. 1948) 81 F. Supp. 591. Ironically, most of the Form 301 cases involve aliens who were physically disqualified for service and thus could have escaped the draft without incurring the citizenship bar. Their healthier brothers entered the service when their countries subsequently became belligerent, as most did, and thus purged themselves of the Form 301 disability.

[51] Mannerfrid v. United States, (2d Cir. 1952) 200 F. (2d) 730; Benzian v. Godwin, (2d Cir. 1948) 168 F. (2d) 952; Machado v. McGrath, (D.C. Cir. 1951) 193 F. (2d) 706.

[52] A private bill seeking to avoid the effect of Form 301 in a single case was vetoed. See 5 IMM. & NAT. SERV. MO. REV. 31 (1947). The present draft law, the Universal Military Training and Service Act, 62 Stat. L. 604 (1948), 50 U.S.C. App. (Supp. V, 1952) §454, specifies military liability for every male alien admitted to permanent residence. Other aliens are liable if they reside in the United States for more than one year, but such aliens can ask to be relieved from service on penalty of being debarred from becoming citizens.

one is called as the *sine qua non* of loyalty to the principles of the United States is likely to overlook some of the possible defenses to the citizenship bar.[53]

John Houck, S.Ed.

[53] Compare In re Martinez, (D.C. Pa. 1947) 73 F. Supp. 101, with Moser v. United States, 341 U.S. 41, 71 S.Ct. 553 (1951).