Michigan Law Review

Volume 40 | Issue 3

1942

ALIENS - NATURALIZATION - REFUSAL TO BEAR ARMS

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ALIENS — NATURALIZATION — REFUSAL TO BEAR ARMS — In applying for citizenship, petitioner, a licensed missionary in the denomination of Seventh Day Adventists, was unwilling to promise to bear arms, on the ground that she was a noncombatant. Petitioner was not a pacifist or conscientious objector and would gladly do any war work in an army camp except that involving the use of a weapon. *Held*, that application for naturalization must be denied for failure to take the oath of allegiance in the form prescribed by law. The court expressed its desire to grant citizenship, but declared itself bound by stare decisis.[1] *In re Losey*, (D. C. Wash. 1941) 39 F. Supp. 37.

It is well settled that Congress may constitutionally require citizens to bear arms for their country, regardless of any religious scruples of such citizens.[2] Similarly it may deny citizenship to aliens who are unwilling to promise to bear weapons for the United States.[3] The crucial problem in this case is whether the terms of the naturalization oath [4] are to be interpreted as requiring a promise

[1] In the following cases citizenship was denied an applicant who would not promise to bear arms: because she was an uncompromising pacifist with no sense of nationality other than a "cosmic consciousness of belonging to the human family," United States v. Schwimmer, 279 U. S. 644, 49 S. Ct. 448 (1928); because he wished to determine for himself the justice of the cause for which the nation was fighting, United States v. Macintosh, 283 U. S. 605, 51 S. Ct. 570 (1931); and because she wished to amend the oath by adding "as far as my conscience as a Christian will allow," United States v. Bland, 283 U. S. 636, 51 S. Ct. 569 (1931). Justices Holmes, Brandeis and Sanford dissented in the first of these cases, as did Justices Hughes, Stone, Brandeis and Cardozo in the latter two.

[2] Selective Draft Law Cases, 245 U. S. 366, 38 S. Ct. 159 (1918).

[3] United States v. Schwimmer, 279 U. S. 644, 49 S. Ct. 448 (1928); United States v. Macintosh, 283 U. S. 605, 51 S. Ct. 570 (1931); United States v. Bland, 283 U. S. 636, 51 S. Ct. 569 (1931). Even the dissenting opinions in these cases grant that Congress possesses this power.

[4] 34 Stat. L. 597 (1906), 8 U. S. C. (1934), §§ 381, 382.

to bear arms.[5] This oath, to "support and defend the Constitution and laws of the United States against all enemies . . . and bear true faith and allegiance to the same," [6] is substantially the same as the oath required to be taken by civil officers generally,[7] which has never been administered as a positive promise to bear arms.[8] But even if the office holder's oath requires no such promise, it does not follow that an alien's oath should be similarly interpreted, particularly since there is greater need for such a promise by an alien in order to make certain that he will support the United States unequivocally even against the nation of his former allegiance.[9] Further, the oath of office, unlike the alien's oath, relates only to the proper discharge of duties of the office, not to all the officer's duties as a citizen of the United States. Finally, the Naturalization Act contains an added requirement that the oath-taker must have "behaved as a man . . . attached to the principles of the Constitution . . . and well disposed to the good

[5] It is surprising that while Justices Holmes and Hughes, dissenting in the Schwimmer and Macintosh cases and admitting the problem to be one of mere statutory construction, deal almost wholly in their arguments with the merits of legislation which excludes aliens "because they believe more than some of us do in the teachings of the Sermon on the Mount." United States v. Schwimmer, 279 U. S. 644 at 655, 49 S. Ct. 448 (1928). Justice Holmes, in praising Mrs. Schwimmer's desire to make the world more perfect and change existing laws, neglects to point out that what she was doing was not merely opposing draft legislation but rather refusing in advance to obey such a law when enacted. Congress has expressly exempted conscientious objectors from combatant service in the Selective Service Act of 1940, 54 Stat. L. 889 (1940), 50 U. S. C. A. (Supp. 1941), Appendix 5, § 5 (g), as in all past draft legislation. 1 Stat. L. 271 (1792); 3 Stat. L. 134 (1814); 12 Stat. L. 597 (1862); 12 Stat. L. 731 (1863); 40 Stat. L. 76 (1917). Twenty-two state constitutions provide similar exemptions. See Macintosh v. United States, (C. C. A. 2d, 1930) 42 F. (2d) 845. But since only those opposed to war "in any form"—i.e., to all war—are excused, Professor Macintosh and Miss Bland would not be classified as conscientious objectors. Since, also, the 1917 Selective Service Act does not exempt all conscientious objectors but only those who are members of a well-recognized religious sect which opposes war, neither Mrs. Schwimmer, Professor Macintosh nor Miss Bland would be exempted from combatant service. But the 1941 Selective Service Act does not make any such distinction. See Wigmore, Sears, Freund, and Green, "United States v. Macintosh—A Symposium," 26 ILL. L. REV. 375 (1931).

[6] It would seem that a promise to "support and defend the laws" would imply a promise to do whatever was reasonably necessary and whatever Congress could constitutionally compel her to do to defend the same, i.e., to bear arms. See In re Shanin, (D. C. Mass. 1922) 278 F. 739.

[7] Rev. Stat. (1875), § 1757, 5 U. S. C. (1934), § 16.

[8] The fact that civil servants are not asked whether they will bear arms does not mean that the oath does not require arms-bearing, but only that those who administer the oath, rightfully or wrongfully, do not make a custom of informing the oath-taker that he is making such an implied promise when he takes his oath. No court has held that an office-holder may take the oath if he is unwilling to promise to bear arms.

[9] In naturalization cases all doubts are resolved against the petitioner, who has the burden of showing that he possesses all the required qualifications. In re De Mayo, (D. C. Mo. 1938) 26 F. Supp. 996; United States v. Schwimmer, 279 U. S. 644, 49 S. Ct. 448 (1928).

order and happiness of the same." [10] The rule that, except for their disqualification for the presidency, naturalized persons have all the privileges of native-born citizens [11] is not violated by requiring a promise to bear arms, for the oath has been interpreted as an oath not to volunteer but only to serve, as the native-born must, if the law so requires.[12] Further, the promise is made before naturalization, i.e., before the alien is entitled to the privileges of citizens. Any attempt to distinguish the principal case from the *Schwimmer*, *Macintosh* and *Bland* cases [13] denying citizenship on the basis of the different grounds assigned for refusal to take the oath [14] would seem hopeless in view of the fact that the issue involved is merely one of whether the statute requires such an oath to be taken. However, the principal case is, if anything, a weaker case for the applicant than the earlier cases, since here petitioner is not a religious objector [15] whose conscience will not allow her to fight for any cause or for a cause she does not deem to be just, but a woman to whom arms-bearing is so distasteful as compared to other war work that she seeks to induce the court to amend the conditions of naturalization. Whether the Supreme Court will reverse itself when the instant case is appealed is questionable, since the Court has from the beginning of the present emergency already demonstrated its willingness in the interest of national unity and defense to withdraw some of the protection it has traditionally given to freedom of conscience.[16] Further, the Supreme Court

[10] 34 Stat. L. 598 (1906), 8 U. S. C. (1934), § 382. Emphasizing the word "behaved," the circuit court of appeals in Schwimmer v. United States, (C. C. A. 7th, 1928) 27 F. (2d) 742, said that only the "conduct" and not the "views" of the applicant should be considered. But it was suggested in Macintosh v. United States, (C. C. A. 2d, 1930) 42 F. (2d) 845, that the words "well disposed" referred to the "views" of the applicant, and that if he opposed arms-bearing, he would not be "well disposed to the good order of the same."

[11] Luria v. United States, 231 U. S. 9, 34 S. Ct. 10 (1913).

[12] See the symposium in 26 ILL. L. REV. 375 (1931). Both the naturalized person and the native-born citizen may claim any exemption from bearing arms that the law permits.

[13] See note 1, supra. In pointing out that an oath is an unreliable way of testing the likelihood of good citizenship, Professor Sears in the symposium in 26 ILL. L. REV. 375 at 383, 384 (1931), observes that "only very cautious individuals with New England consciences" are thus denied citizenship, though their sensitive consciences are the very quality that should make them desirable citizens. For "If [they] had crossed their fingers and had taken the oath without explaining their ideas," and regarded the oath, as most do, as mere rigamarole, their applications would be accepted.

[15] While the objections of Mrs. Schwimmer, an avowed atheist, were not religious—unless the moral beliefs of an atheist can be said to constitute a religion—her objections were nonetheless "conscientious." See Justice Holmes' dissenting opinion in United States v. Schwimmer, 279 U. S. 644 at 653, 49 S. Ct. 448 (1928). The Selective Service Act of 1940 exempts only if the objections to fighting are the result of "religious training and belief." 54 Stat. L. 889 (1940), 50 U. S. C. A. (Supp. 1941), Appendix, 5, § 5 (g).

[16] See Minersville School District v. Gobitis, 309 U. S. 645, 60 S. Ct. 609 (1940); 39 MICH. L. REV. 149 (1940); 26 CORN. L. Q. 127 (1940); 35 TIME, No. 24, p. 22 (June 10, 1940). It would seem difficult to predict a reversal of the

as recently as 1938 denied certiorari of a decision denying citizenship to a Mennonite whose religious faith forbade him from fighting under any circumstances.[17] Finally, in the ten years that have elapsed since the decision of the *Macintosh* case Congress has not seen fit to amend the Naturalization Act; this indicates Congressional approval of the interpretation given to the act in that case which the Court cannot easily ignore.[18]

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principal case in view of the fact that even Justice Stone, who, as the lone dissenter in the Gobitis case, thus showed himself to be the most reluctant of all the justices to let freedom of conscience be impaired in the interests of patriotism and unity, concurred in the majority opinion in the Schwimmer case.

[17] Warkentin v. Schlotfeldt, (C. C. A. 7th, 1937) 93 F. (2d) 42, cert. den. 304 U. S. 563, 58 S. Ct. 943 (1938).

[18] See Beale v. United States, (C. C. A. 8th, 1934) 71 F. (2d) 737.