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Constitutional Law - In-Service Conscientious Objector - Goguen v. Clifford, 304 F. Supp. 958 (D.N.J. 1969)

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dom of speech in a company-owned town,¹⁵ prevention of Negro voting in a primary election,¹⁶ orders of a private park guard acting under the color of his authority as a deputy sheriff,¹⁷ and the statements of city officials that they would not permit negroes to seek desegregation,¹⁸ have all been held to constitute "state action."

In *Evans v. Abney*, the Court begins to delineate those acts of state agencies that are insufficient to constitute state involvement in racial discrimination. The decision enumerates two activities that lie beyond the uncertain line that defines the limits of "state action." A state court may enforce a neutral principle of trust law even if the result is to aid a private testator's scheme of discrimination. The existence of a state statute permitting racially restrictive trusts is not sufficient "state action" to invalidate a trust made under the authority of such a statute.¹⁹

To the extent that predictability in the law is desirable, the decision will benefit society. Those seeking to discriminate against racial groups may be encouraged, however, to push their activities to the limit of what is now a more clearly defined area of law.

FRED K. MORRISON

Constitutional Law—THE IN-SERVICE CONSCIENTIOUS OBJECTOR.
Goguen v. Clifford, 304 F. Supp. 958 (D. N.J. 1969).

After his induction into the United States Army, Private Philip W. Goguen applied for discharge on the basis that he had become a conscientious objector to all war.¹ Although his sincerity was unquestioned, Goguen's commanding officer denied the application on the grounds that his request was based on "essentially political, sociological or philosophical views, or a merely personal moral code" and not upon religious

15. *Marsh v. Alabama*, 326 U.S. 501 (1946).

16. *Smith v. Allwright*, 321 U.S. 649 (1944).

17. *Griffin v. Maryland*, 378 U.S. 130 (1964).

18. *Peterson v. Greenville*, 373 U.S. 244 (1963).

19. *But cf. Reitman v. Mulkey*, 387 U.S. 369 (1967) (article of state constitution prohibiting state from denying right of any person to decline to sell his real property to such person as he in his absolute discretion chooses would involve the state in unconstitutional racial discrimination).

1. ARMY REGULATION 635-20 (May 1, 1967) provides for a procedure whereby request for discharge may be made on grounds of conscientious objection to war which arose after admission to the military. The regulation was implemented in accordance with DEPARTMENT OF DEFENSE DIRECTIVE 1300.6 (revised May 1968).

grounds.² After he was denied discharge, Goguen petitioned the District Court of the District of New Jersey for a writ of habeas corpus.³

The Court held, *inter alia*,⁴ that the standard of "religious training or belief," set out in the Military Selective Service Act of 1967,⁵ is violative of constitutional proscription against the establishment of religion and due process.⁶ Accordingly the Court granted the petitioner a writ of habeas corpus.

Congress has historically required that for one to obtain conscientious objector status his opposition to war must be based on "religious train-

2. The regulation incorporates the same standards as those used by the Selective Service System in passing on pre-induction requests for conscientious objection status. See DEPARTMENT OF DEFENSE DIRECTIVE 1300.6, IV.B.3.b. This implements The Military Selective Service Act of 1967, § 7, 81 Stat. 104, *amending* 50 U.S.C. APP. § 456(j) (1964) (codified at 50 U.S.C. APP. § 456(j) (Supp. IV, 1969)):

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 subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code.

3. Goguen v. Clifford, 304 F. Supp. 958 (D. N.J. 1969). See also Koster v. Sharp, 303 F. Supp. 837 (E.D. Pa. 1969) which is an identical case.

4. The court also held that federal district courts have reviewing powers even in the absence of the petitioner exhausting his remedies through military channels. For the jurisdictional question see Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); Brown v. McNamara, 387 F.2d 150 (3rd Cir. 1967), *cert. denied sub nom.* Brown v. Clifford, 390 U.S. 1005 (1968); United States *ex rel.* Brooks v. Clifford, 409 F.2d 700 (4th Cir. 1969); Crane v. Hendrick, 284 F. Supp. 250 (N.D. Cal. 1968); Gann v. Wilson, 289 F. Supp. 191 (N.D. Cal. 1968); Cooper v. Barker, 291 F. Supp. 952 (D. Md. 1968); Benway v. Barnhill, 300 F. Supp. 483 (D. R.I. 1969). See also 43 N.Y.U. L. REV. 988 (1968); 37 GEO. WASH. L. REV. 589 (1969).

5. See note 3 *supra*.

6. 304 F. Supp. at 962:

For while one is free to practice his religion under the First Amendment, he who does not is equally free in the exercise of his election not to do so, and his Constitutional rights are not diminished thereby. It was declared in Epperson v. Arkansas, [393 U.S. 97, 103-107 (1968)], that the First Amendment mandates government neutrality between . . . religion and non-religion. The court observed at page 104, . . . quoting from Watson v. Jones, [13 Wall. 679, 728 (1872)], "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

U. S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"

U. S. CONST. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law"

ing and belief.”⁷ Due to the courts’ varying interpretations of the existing law,⁸ Congress incorporated a definition of “religious training and belief” in the Selective Service Act of 1948 by equating it with “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation.”⁹ Subsequently, however, in *United States v. Seeger*,¹⁰ the Court of Appeals for the Second Circuit held that this “Supreme Being” requirement violated the due process clause of the Fifth Amendment and accordingly reversed Seeger’s conviction for refusing to submit to induction into the armed services.¹¹ In affirming the Second Circuit,¹² the United States Supreme Court avoided the constitutional issue by holding that Seeger’s conscientious objection was “religious” within that definition in the 1948

7. See Selective Training and Service Act of 1940, ch. 720, § (g), 54 Stat. 889 (1940). The conscientious objector exemption stated that no person would be subject to combatant training or service “who, by reason of religious training and belief is conscientiously opposed to participation in war in any form.”

The Selective Draft Act of 1917, ch. 15, § 4, 40 Stat. 78 limited conscientious objector exemptions to members “of any well-recognized religious sect or organization . . . whose existing creed or principals forbid its members to participate in war in any form . . .” For an interpretation of the 1917 Act see *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 265 (1934) (Cardozo, J. concurring). He felt that military service had never been thought to constitute an interference with the free exercise of religion. *Id.* at 266.

[A] different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance . . . of any other end condemned by his conscience as irreligious or immoral. The right to private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government.

Id. at 268.

8. See *Phillips v. Downer*, 135 F.2d 521 (2d Cir. 1943) where the court granted conscientious objector status to one who objected to war on basic ethical and humanitarian grounds. *Accord*, *Brandon v. Downer*, 139 F.2d 761 (2d Cir. 1944); *Reel v. Badt*, 141 F.2d 845 (2d Cir. 1944); *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943) (dictum); *Clark v. United States*, 236 F.2d 13 (9th Cir.), *cert. denied*, 352 U.S. 882 (1956); *George v. United States*, 196 F.2d 445 (9th Cir.), *cert. denied*, 344 U.S. 843 (1952); *Cf. Berman v. United States*, 156 F.2d 377 (9th Cir. 1946).

9. Selective Service Act of 1948, ch. 625, § 6(j), 62 Stat. 612-13.

10. 326 F.2d 846 (2d Cir. 1964).

11. Seeger applied for a conscientious objector draft classification but was refused. Subsequently, he was drafted at which time he refused to be inducted into the Army. He was convicted of refusing to be inducted in *United States v. Seeger*, 216 F. Supp. 516 (S.D. N.Y. 1963). Seeger did not believe in a Supreme Being but the court found on appeal that he was sincere in his opposition to war from a “practical . . . [and] moral standpoint.” 326 F.2d at 848.

12. *United States v. Seeger*, 380 U.S. 163 (1965).

Act.¹³ In response to the *Seeger*¹⁴ decision, Congress deleted the "Supreme Being" clause from the 1948 Act.¹⁵ Lower Federal Courts, however, have consistently viewed the *Seeger* test as still applicable.¹⁶ It was not until *United States v. Sisson*,¹⁷ however, that a court ruled that the Military Selective Service Act of 1967 was unconstitutional when applied to inductees.

The District Court in *Goguen*¹⁸ relied upon *Sisson*¹⁹ in extending the constitutional test to those who sought discharge from military service. *Sisson* held, *inter alia*,²⁰ that to excuse from military service the

13. The court concluded that religious training and belief included 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.

Id. at 176.

For a critique of the test see: Brodie & Sutherland, *Conscience, the Constitution and the Supreme Court: The Riddle of United States v. Seeger*, 1966 Wis. L. Rev. 306, 319 (1966):

It is, of course, a sound principle that the court should avoid deciding constitutional issues if the case can be disposed of on a question of statutory interpretation. But the question remains whether constitutional issues should be avoided at the cost of an ambiguous and strained construction

14. *United States v. Seeger*, 380 U.S. 163 (1965).

15. Compare The Military Selective Service Act of 1967, § 7, 81 Stat. 104 (codified at 50 U.S.C. App. § 456(j) (Supp. IV, 1969)) with 50 U.S.C. App. § 456(j) (1964).

16. *Benway v. Barnhill*, 300 F. Supp. 483, 486 (D. R.I. 1969); *United States ex rel. Brooks v. Clifford*, 296 F. Supp. 716, 724-25 (D. S.C. 1969) (*dictum*); *United States v. Shacter*, 293 F. Supp. 1057, 1060-64 (D. Md. 1968); *United States v. St. Clair*, 293 F. Supp. 337, 442 (E.D. N.Y. 1968).

17. 297 F. Supp. 902 (D. Mass. 1969).

18. *Goguen v. Clifford*, 304 F. Supp. 958 (D. N.J. 1969).

19. *Goguen v. Clifford*, 304 F. Supp. 958, 962 (D. N.J. 1969) quoting from *Koster v. Sharp*, 303 F. Supp. 837, 845 (E.D. Pa. 1969) quoting from *United States v. Sisson*, 297 F. Supp. 902, 911 (1969):

Under the *Everson* test, [*Everson v. Board of Education*, 330 U.S. 1 (1947)] a regulation which makes exemption from military service dependent upon the applicant's religious belief is, on its face, defective. Further, a standard which exempts a religiously motivated conscientious objector from military service and denies the same relief to a person whose beliefs are just as sincere but which are not motivated by any relationship to any religion is constitutionally defective under the Fifth Amendment's guarantee of due process of law. We concur in Judge Wyzanski's assessment that '. . . it is difficult to imagine any ground for a statutory distinction except religious prejudice.'

20. It is not clear as to whether *Sisson* was a conscientious objector to a single war

"religious" conscientious objector while denying it to an individual who based his objection to war upon a personal moral code violated the first amendment to the United States Constitution.²¹ At least one court, however, has not followed the *Sisson* lead,²² and a number of courts, in deciding cases where the defendants' beliefs were comparable to Goguen's,²³ have avoided the constitutional question by classifying the defendants' objection as "religious."²⁴

If *Goguen* reaches the Supreme Court, it is probable that such a decision would be a delayed duplicate of *Seeger*, affirming the decision but avoiding the constitutional question by holding that Goguen's basis for conscientious objection to war is within the interpretation of "religious training and belief." Accordingly, the constitutionality of the Military Selective Service Act will remain in doubt until the Supreme Court is confronted with a petitioner whose conscientious objection can not, by *any* interpretation, be classified "religious."²⁵

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or to war in general. The court recognized that selective objection "might reflect a more discriminate study of the problem, a more sensitive conscience, and a deeper spiritual understanding . . ." than shown by those opposed to war "in any form." 297 F. Supp. at 908. Federal law exempts only those who are opposed to "war in any form." 50 U.S.C. APP. 456(j) (Supp. IV. 1969). See generally Magill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 VA. L. REV. 1355 (1968).

21. *United States v. Sisson*, 297 F. Supp. 902, 911 (D. Mass. 1969).

22. *United States v. Neamand*, 302 F. Supp. 1296, 1306 (M.D. Pa. 1969):

[I] decline the opportunity to follow the lead of *United States v. Sisson* . . . and hold that Section 6(j) does not violate either the First Amendment or the Fifth Amendment of the United States Constitution.

Accordingly, the defendant was found guilty of refusing to submit to induction.

23. Goguen was a Roman Catholic and his reasons for conscientious objection to war could have easily been included within the *Seeger* definition. See 304 F. Supp. at 959.

24. See *Fleming v. United States*, 344 F.2d 912 (10th Cir. 1965); *United States ex rel. Brooks v. Clifford*, 409 F.2d 700 (4th Cir. 1969); *United States v. St. Clair*, 293 F. Supp. 337 (E.D. N.Y. 1968); *United States v. Shacter*, 293 F. Supp. 1057 (D. Md. 1968) (Shacter was a professed atheist but was still granted conscientious objector status); *Benway v. Barnhill*, 300 F. Supp. 483 (D. R.I. 1969). In *United States ex rel. Healy v. Beatty*, 300 F. Supp. 843, 848 (1969) the court stated:

It is difficult to draw a line between religious beliefs and those merely philosophical or political. A person's own moral code may be that and nothing more but it may, at the same time, be derived from religious training and belief.

25. It has been argued that the court's construction in *Seeger* protected the conscientious objector exemption from a constitutional crossfire; Congress might decide to abolish the exemption if the Court held nonbelievers as well as believers entitled to exemption. *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56, 115 (1965).