NOTES

CONSTITUTIONAL LAW—CONSCIENTIOUS OBJECTOR—OBJECTION TO A PARTICULAR WAR—*United States v. Bowen,* Cr. No. 42499 (N.D. Cal., Dec. 24, 1969).

Defendant, a draft eligible male, sought classification as a conscientious objector. A member of the Roman Catholic Church and an advocate of its beliefs, he was raised as a Catholic and obtained most of his education at Catholic schools. According to his understanding and belief, Catholic doctrine[1] recognizes wars as being just or unjust. He concluded that the present conflict in Vietnam was unjust and that it would violate his religion and his conscience to participate in it.

In order to obtain classification as a conscientious objector, defendant complied[2] with all the requirements and regulations of the Military Selective Service Act of 1967.[3] When his application was denied on the ground that he did not meet the requirements of Section 6(j)[4] of the Act, he made a personal appeal before his local board, which two days later affirmed its prior denial of his application. Subsequently, defendant appealed to the Michigan Appeal Board, which also decided against him. He was then ordered by his local draft board to report

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1 United States v. Bowen, Cr. No. 42499 (N.D. Cal., Dec. 24, 1969). In a footnote to its opinion the court concluded,

> from the ample testimonial and doctrinal evidence introduced at trial[,] that at least a substantial number of knowledgeable Catholic leaders count the doctrine of just wars as a basic element of church dogma, that Bowen reasonably believed Catholic doctrine to require that he make his own determination as to whether the war was or was not just and, that having decided that it was unjust, conscientiously believed his religious faith made it imperative that he refuse to serve.
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> [The court also noted that] [w]hile not of direct pertinence, it is to be noted that *amicus curiae* briefs were brought to the court's attention which documented the view that communicants of other faiths—Protestant and Jewish—have ample doctrine in their religions to support similar religious conscientious objection.

Id. at 2 n.1.

2 In Nov. of 1967 defendant filed Selective Service System No. 150—Special Form for Conscientious Objectors. (It is a questionnaire type form on which the applicant gives his reasons in support of his desire for the exemption.) In it he set out in detail the reasons why his religious beliefs required that he not participate in the Vietnam War.

3 Military Selective Service Act of 1967, 81 Stat. 100, 50 U.S.C. app. §§ 451-473 (Supp. IV 1969).

4 50 U.S.C. app. § 456(j). This section provides in part:

> 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.

for induction at the Oakland Induction Center on June 23, 1968. He reported as ordered but refused to submit to induction. Defendant was indicted and brought to trial on the charge of refusal to submit to induction. The United States District Court for the Northern District of California granted defendant's motion for judgment of acquittal, declaring Section 6(j) unconstitutional because it violates the first and fifth amendments to the Federal Constitution.[5]

The first amendment to the Constitution states: "Congress shall make no law respecting an establishment of religion. . . ." In a recent decision,[6] the Supreme Court interpreted this amendment to mean that government must be neutral in matters of religious theory, and that the amendment mandates governmental neutrality among religions, and between religion and non-religion. This interpretation was applied by the *Bowen* court to determine that there was a violation of the first amendment. The Government argued, that because the statute makes no mention of specific religious sects and because it inquires into the subjective beliefs of the individual applicant rather than into the tenets of one's religion, there is no discrimination among religions. The court refused to accept this argument and stated that its inquiry must go beyond the statute's words to its practical effects. On the authority of *Terry v. Adams*,[7] the court concluded that the statute, although not overtly stating discrimination against any particular religious sect, had in effect resulted in discrimination against those that did not preach total pacifism,[8] and therefore constituted a breach of the establishment clause of the first amendment.

Prior to this case, most of the controversy concerning the first amendment in relation to conscientious objector status centered on the question of whether or not the opposition to participation in war actually had to be by reason of religious training and belief. Although it was apparent that if religious belief was required, the statute would discriminate against those who may have been sincere but did not base their beliefs on religious grounds, the bulk of the courts, until recently, found such belief to be necessary.[9] In *United States v. Seeger*,[10] the

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5 United States v. Bowen, Cr. No. 42499 (N.D. Cal., Dec. 24 1969).

6 Epperson v. Arkansas, 393 U.S. 97 (1968).

7 345 U.S. 461 (1953).

8 Cr. No. 42499 at 6. The court noted that applicants, for conscientious objector status, of certain religions are generally exempted from military service while members of other religions are not so exempted.

9 Peter v. United States, 324 F.2d 173 (9th Cir. 1963) (did not clearly manifest a belief in a Supreme Being to Whom he owed obedience); Clark v. United States, 236 F.2d 13 (9th Cir. 1956), *cert. denied*, 352 U.S. 882 (1956) (did not believe in a Supreme Being); United States v. Bendik, 220 F.2d 249 (2d Cir. 1955) (not founded on a belief in a Supreme

Supreme Court ruled that the requirement that the objector's beliefs had to be based on religion was unconstitutional. *Seeger* is in sharp contrast with the Court's previous ruling on this question in *Sicurella v. United States*.[11] In that case, the Court stated that "[t]he test is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to *participation* in war."[12] To present, there have been no cases decided since *Seeger* which require any kind of formal religious beliefs in order to qualify for the exemption.

Since *Seeger* removed the necessity for a religious basis of opposition, the real substance of the holding of the instant case lies within the realm of the fifth amendment. In its holding, the court stated that "the first amendment specifically applies to religion whereas the equal protection clause has a much broader sweep. . . ."[13] Although the equal protection clause is embodied in the fourteenth amendment, and therefore applies only to the States, the Supreme Court has held that the due process and equal protection clauses are not mutually exclusive and that discrimination may be so unjustifiable as to be violative of due process.[14] Evidently, the *Bowen* court found this theory applicable. In holding that Section 6(j) is violative of the equal protection clause, the court disregarded the fact that Congress apparently intended to employ a classification which would be reasonable in the light of the purpose of the Act. The court justified this by reference to *Shapiro v. Thompson*[15] which held that "any classification which serves to penalize the exercise of that right [any constitutional right], unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." This court found that such classification did not promote any compelling governmental interest.[16]

Being); Berman v. United States, 156 F.2d 377 (9th Cir. 1946) (must be based on an individual's belief in his responsibility to an authority higher and beyond any worldly one).

10 380 U.S. 163 (1965). The court stated that

> [t]he 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.

Id. at 176.

11 348 U.S. 385 (1955).

12 *Id.* at 390.

13 Cr. No. 42499 at 7.

14 Bolling v. Sharpe, 347 U.S. 497 (1954).

15 394 U.S. 618, 634 (1969).

16 Cr. No. 42499. The court stated—

> applying the *Shapiro v. Thompson* test, it is clear that there is no compelling governmental interest for distinguishing the defendant, who is opposed to participation in the Vietnam War on religious grounds, from others who are religiously opposed to all wars.

Id. at 8.

There have been many cases holding that one will not be exempt where his objection is to a particular war.[17] However, there has been one exception—*United States v. Sisson*.[18] In this extraordinary case, the court made its decision by balancing the defendant's objection to the Vietnam conflict with the country's present need for his participation.

There is, however, a very important distinction between *Sisson* and *Bowen*. *Sisson* did not hold that defendant could not be drafted, but only that he could not be subjected to military orders that required him to kill in the Vietnam conflict. The indication of *Bowen* is that defendant could not be drafted while the United States is involved in Vietnam. There is, however, no indication whether he could later be drafted for combatant training and service in places other than Vietnam.[19] Also, *Sisson*, in accord with *Hamilton v. Regents of the Univ. of California*,[20] explicitly assumed, *"that in time of declared war or in the defense of the homeland against invasion, all persons may be conscripted even for combat service."*[21] Because *Bowen* would grant to selective objectors the same standing as absolute objectors, it can be assumed, although not stated in the decision, that selective objectors like total objectors can be conscripted in time of declared war or in defense of the homeland.

Since the courts have long recognized that the statutory exemption from military service offered to conscientious objectors pursuant to Section 6(j) is a matter of legislative grace rather than constitutional right,[22] *Bowen* may not find universal approval. However, *Bowen* met

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After noting that Section 6(j) may serve administrative efficiency by limiting the class of persons eligible for conscientious objector status, the court stated "administrative convenience is not a sufficiently compelling consideration to justify disregard of the first and fifth amendments." *Id.* at 9 n.6.

17 United States v. Kauten, 133 F.2d 703 (2d Cir. 1943) (must be a general scruple against participation in war in any form and not merely an objection to participation in a particular war); United States v. Valentine, 288 F. Supp. 957 (D.P.R. 1968) (exemption does not extend to those who assert only selective scruples against a particular war); United States v. Kurki, 255 F. Supp. 161 (E.D. Wisc. 1966) (court would not adopt a new particular war test).

18 297 F. Supp. 902 (D. Mass. 1969).

19 Quaere: Since prior to induction Bowen had no way of knowing if he would be sent to Vietnam, did he have standing to raise this question at this time?

20 293 U.S. 245 (1934).

> [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 to the justice or morality of the particular war or of war in general.

Id. at 264.

21 297 F. Supp. at 908.

22 United States v. Fallon, 407 F.2d 621 (7th Cir. 1969), *cert. denied*, 395 U.S. 908

this issue by citing *Sherbert v. Verner*,[23] for the proposition that, "although Congress may take certain privileges or benefits away altogether, it may not arbitrarily and unreasonably grant such privileges to some and not to others."[24] It is apparent that this court felt it arbitrary to consider the objections of total pacifists and not to consider those of selective objectors.

It is much easier to comprehend *Seeger* abolishing the necessity of religious belief as a violation of the first amendment, than it is to comprehend *Bowen's* finding that discrimination against selective objectors is a violation of due process by lack of equal protection of the laws. It is clear that Congress intended this privilege to be extended to a very limited degree.[25] To some, this decision may be a progressive extension of that privilege, but to many others it will be considered as another exercise of judicial exegesis, creating legislation that the legislature never intended.

Whether or not this decision is universally appreciated remains to be seen; however, potential benefits and detriments are readily apparent. Many draft eligible young men are sincerely opposed to fighting in Vietnam. For them, this decision may have a far-reaching effect. It offers the possibility of a reasonable alternative to being drafted, defecting, or going to jail. On the other hand, this case could encourage many registrants to abuse the exemption. Complications may arise, such as in the case of a registrant who sincerely believes that it is just to kill the North Vietnamese regulars, but not the Viet Cong, or one who believes it is unjust to kill civilians, and in light of recent developments,[26] believes that he might be subjected to such orders in Vietnam. If *Bowen* is upheld, it will be interesting to see how the courts will handle such situations.[27]

(1969); Cannon v. United States, 181 F.2d 354 (9th Cir. 1950); Morbeto v. United States, 293 F. Supp. 313 (C.D. Cal., 1968).

23 374 U.S. 398 (1963).

24 Cr. No. 42499 at 5. While *Bowen* indicated this to be the holding of *Verner*, it was, in fact, only dictum. See 374 U.S. at 404.

25 United States v. Kauten, 133 F.2d 703 (2d Cir. 1943).

26 United States Army 1st Lt. William Calley, Jr. is presently awaiting a court martial for allegedly ordering men in his platoon to participate in alleged atrocities committed on civilians at the village of My Lai in Vietnam.

27 *See* discussion of United States v. McFadden, 6 C.R.L. 1089 and 2405 (N.D. Cal., Feb. 20, 1970). This decision goes even further than *Bowen* in expanding conscientious objector status.