Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

THE UNITED STATES OF AMERICA,

Appellant;

vs.

JOHN HEFFRON SISSON JR.,

Appellee.

Docket No. 305

Pt. 1

Place Washington, D. C.

Date January 20, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

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The above-entitled matter came on for argument at 1:27 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

ERWIN N. GRISWOLD, Esq.
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Counsel for Appellant

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will take No. 305, United States against Sisson.

Mr. Solicitor General?

ARGUMENT OF ERWIN N. GRISWOLD, ESQ.

ON BEHALF OF APPELLANT

MR. GRISWOLD: Mr. Chief Justice and may it please the Court:

This, too, is a draft case raising two new unrelated and difficult problems. In a third aspect it is like the Welsh case which has just been argued and for my argument on the question relating to religious training and belief, I rely on the argument in the case just concluded.

The defendant here was indicted for failing to report for induction. There was a trial before a jury, at which the defendant testified. The jury returned a verdict of "guilty." The defendant then made a motion in arrest of judgment. In his the defendant said that he could not participate in the Vietnam War without doing violence to the dictates of his conscience.

And he further stated that he cannot qualify as a conscientious objector within the meaning of the Military Selective Service Act of 1967, because he is not a pacifist and, in any event, his conviction that the Vietnam War is illegal, immoral and unjust is not based on religious training and belief.

The District Court granted the motion in arrest of

judgment. In so doing it referred to facts which had appeared at the trial, and noted that in particularly the defendant's own testimony, and noted that and I quote, "In substance the case arises upon an agreed statement of fact."

That appears on page 250 of the appendix.

I can state that none of the facts is controverted. We do not dispute that the appellee was sincerely and conscientiously opposed to the Vietnam Conflict based on his moral convictions, educational training, extensive reading both about Vietnam and such things as the U. N. Charter and the Nürnberg trial.

As I have indicated, his claim is selective, not against war in any form, as the phrase is in the statute, and he expressly asserts that it is not based on religious training and belief.

In this situation the District Court held that the appellee had a valid claim to be constitutionally exempted from combat in the Vietnam type of situation.

Q Do you think this is a motion for arrest of judgment or a motion for acquittal?

A Well, this is the subject to which I am about to address my argument. I was trying to give the setting, and the first half of my argument is devoted to jurisdiction and the second half to selective conscientious objection.

The Court concluded that the Military Selective Service

Act violated the free exercise and due process clauses. It held that, in the alternative, Section 6(j) of the exemption provision violated the establishment clause and that it unreasonably discriminated between religious and nonreligious conscientious objection.

From this decision the United States took this appeal purporting to act under the second clause of the Criminal Appeal Act of 1907 now found in Title XVIII of the United States Code, Section 3731, the relevant passages from which are set out on page 13 of the Government brief.

And now I will turn to the jurisdictional question, which in my mind is a very close question.

We contend that there is jurisdiction, but good arguments can be made both ways. There is no doubt that there was a trial here and if there had been a verdict of "not guilty," even a directed verdict of "not guilty," there could be no appeal no matter what error of law was made by the trial court.

An illustration of that is found in the case decided just last month in United States against Bowen, which is set out in an appendix to one of the briefs filed by amicus curiae, the one by the Los Angeles Selective Service law panel. In the Bowen case Judge ~~Wygal~~ WEIGEL directed a verdict for the defendant, who was a selective conscientious objector, based on religious training and belief.

We think that Judge Wygal was wrong as a matter of law,

but there is nothing we can do about it and we have, of course, taken no appeal.

The difference is that here there was a verdict of "guilty" followed by a motion in arrest of judgment, which was granted. Now if Judge Wyzanski had entered an order saying, "Having examined the record, I find there was no sufficient evidence to submit to the jury and the case should not have been allowed to go to the jury, and accordingly I direct the judgment of acquittal be entered," I think we would be so close to the situation in the Bowen case that we couldn't talk about it.

And it is easy, I think, to say that what Judge Wyzanski did was not different in substance from that, and that summarizes the difficulty of our position on the jurisdiction.

Q Well, there is one important difference, though, in that the verdict and judgment stand now, does it not? In your first illustration, a judgment notwithstanding the verdict, there would be no verdict any longer. The verdict still stands here, does it not?

A I am not sure, Mr. Justice. The judge has decided that there was no basis in law for the verdict.

Q Well, what was the language of his order?

A It is not in the appendix and I can't tell you the language. The opinion is here, but the actual judgment is not here, I discovered to my surprise last night. Page 264 -- enter forthwith this decision and this Court order granting

defendant Sisson in motion in arrest of judgment.

And there is ----

Q This is the language I had in mind. It is in arrest of judgment. He is knowledging the existence of the judgment, which presupposes that his arrest can turn upon a verdict. And he hasn't expressed or articulated any idea of setting aside that verdict, nor does he vacate the judgment. He arrests it.

A There had been no judgment.

Q What is the language you read again? Excuse me -- I am looking for it in the appendix, but I don't find it.

A 250 is the only place I can find it.

"Enter forthwith this decision and this Court order granting defendant Sisson on motion in arrest of judgment."

Now that is in arrest of judgment. There had not previously been any judgment, a motion in arrest of judgment, not an arrest of the execution of judgment, but an arrest in entering judgment, as I interpret it.

In your ---

Q Now that puzzles me a little bit. I did not know whether from this language he was arresting a judgment, the execution of a judgment entered, or arresting the entry of a judgment based on the verdict. But in any case the verdict stands, does it not?

A The verdict is a historical fact. There is no

doubt about that. Its legal effect has been undermined by the district judge's decision. He has decided that it is not a proper basis to found a judgment of the court of conviction.

Q But when a sophisticated, highly experienced district judge makes the choice between a judgment notwithstanding a verdict in this posture and the action which he did take, does that suggest anything to us?

A It may suggest that he was trying to preserve a situation which would make it possible for us to appeal to this Court.

Q That is among other things, one of the incidental factors which occurred to me. But in so doing, he has left the verdict extant on its face without ---

A I hate to be arguing against myself here, Mr. Chief Justice, but he let the verdict stand, but he pulled all the foundation out from under it, so it floats in space, I guess. It is no longer a basis for entering a judgment of conviction.

Q May I ask a question, Mr. Solicitor General? This is an appeal, isn't it? A direct appeal?

A Yes, Mr. Justice.

Q It must be from a judgment, must it not?

A It is from a judgment or order in arrest of judgment, which is expressed ---

Q Yes, my point is, I gather we have often said

that we don't review opinions here, we review judgments.

A No, Mr. Justice, we don't review opinions, but the criminal ---

Q (unclear) -- the statute says "from a decision."

A The Criminals Appeals Act provides that there is an appeal in Court from a decision arresting a judgment of conviction.

Q I know it is a decision. What form does a decision take for purposes of appeal?

A From a decision arresting a judgment of conviction for insufficient ---

Q Well, I ask you again. What form does the decision take? Do we have another jurisdictional question whether we have an appeal here at all?

A I don't think so, Mr. Justice. I think the decision is ---

Q The opinion?

A --- the opinion and the final order at the end, beginning on page 248 and concluding on page 264 of the appendix.

At any rate, that is not only the only order there is, but that is the order which protects Sisson and from which the Government is -- and there can be no doubt that while that stands, that Sisson is completely protected and that is the order from the Government is seeking to appeal.

Q General, aren't we further confused by the fact

that there was a motion to quash the indictment at the beginning of this, which he denied?

A There was a motion to what, Mr. Justice?

Q To quash the indictment.

A Yes, which was denied. There were several motions before trial, all of which were ---

Q One of them was that. Yet after the trial then he dismisses it.

A In this motion in arrest of judgment, to some extent the grounds are the same as those which were presented in motions made before the trial.

Now, in this case if the motion had been granted on the fact that the statute was unconstitutional on its face, there would, I think, be no doubt but that this Court would have jurisdiction of the appeal. But in fact the motion was granted on the ground that in light of the facts appearing at the trial, the statute is unconstitutional as applied to this particular defendant.

If those facts had appeared in an agreed statement of facts -- now this Court's decisionin United States against Halseth, in 342 U.S., would support the jurisdiction.

Here the facts appears in testimony, but are accepted by the Government, so that there is a basis for the District Court's statement that the case in substances arrises upon an agreed statement of facts. We never formally agreed to them,

but we don't dispute them.

Q If you dispute them, you are going to lose this case. You need to agree to them in order to give them a right to arrest the judgment.

A No, we would lose our right to appeal if ---

Q That's right.

A --- if we disputed them, I agree, and we don't.

(Laughter)

In this situation we have concluded, not without difficulty, that to construe the Criminal Appeals Act as precluding appeal of the decision below would unwarrantly exalt form over substance. There is no genuine difference between this case and one in which the nature of the appellee's conscientious objection would be set forth in the indictment itself, or formally stipulated to on a motion to dismiss.

We think, too, that the decision below is one on the construction of Section 12(a) of the Selective Service Act. Less clearly, we think that the Court decision with respect to Section 6(j) comes within the Criminal Appeals Act. You have to go through 6(j) to get to 12(a) in order to make it a construction of the statute.

Now there are two other clauses of the Criminal Appeals Act, one relating to a judgment setting aside or dismissing any indictment or information, and other relating to a sustaining of a motion in bar. And in its order postponing the question of

jurisdiction in this case, the Court requested the parties to direct their attention to these other provisions, and we have done so at some length in our brief.

I may say that there are a few problems which occur so frequently or present such extreme technical difficulty in the Solicitor General's office, and in the proper construction of the Criminal Appeals Act you have the Bjorn case last week, which was a problem. There are also other provisions in the Act relating to when you can appeal to the Court of Appeals.

We have that if we appeal to a Court of Appeals, they trasnfer it to the Supreme Court. So far we haven't had much problem with the Supreme Court transferring them back to the Court of Appeals, but the clauses are ---

Q May I ask, do you see any similarity in the problem here to that in Bjorn?

A No, Mr. Justice, I don't believe I do. In Bjorn, as far as the second trial was concerned, the defendant had not been put in jeopardy, and only issue is whether the jeopardy of the first trial is wiped out or not, so as to make an appeal available. Here the ---

Q Strictly speaking, that was only a second stage of the -- not a second trial, but a second stage of the same proceeding?

A Well, it was a second trial under the same indictment.

Q Under amended information?

A Information, yes, sir. I don't recall whether the amendment was made following the first trial or during the first trial.

Q After the first stage of the proceeding, I imagine.

A Yes.

Now the clause relating to motions in bar seems to us obviously inapplicable since by its terms it is available only when the defendant has not been put in jeopardy. Here the appellee has clearly been put in jeopardy. Not only was a jury impaneled, but a verdict was rendered against him.

Moreover, the legislative history, which is set out at some length in our brief, shows great concern on the part of responsible Senators that this new and, for its time, rather bold statute should not transgress any constitutional limits, particularly with respect to double jeopardy.

I just do not see how we can get any help from the motion in bar clause.

And finally, there is the clause relating to setting aside or dismissing any indictment or information. There is no verbal limitation there with respect to jeopardy and a literal reading of the provision might lead to the conclusion that it provides the basis for jurisdiction here.

In its original form this clause related to decisions on demurrer, and such decisions would be rendered before --

ordinarily at least -- before jeopardy.

Seven months following the enactment of the statute, this Court indicated that the provision applied, and I quote: "to judgments rendered before the moment of jeopardy is reached." And that is United States against McDonald in 207 U.S. This has been the consistent construction of the provision by the Department of Justice over a period of more than 60 years.

A little more than 20 years ago a case called Zisblatt came to this Court and Solicitor General Perlman -- actually it came through the Court of Appeals and was certified to this Court. Solicitor General Perlman moved that the appeal be dismissed because there jeopardy had attached.

We have searched through the files to try to find some greater statement of the reasons, but have not found that. There is no doubt, I believe, that it was the expectation of the legislators while the bill was going through Congress that the rulings to which the bill related would occur before a jury was sworn, except for decisions rendered on a motion in arrest of judgment.

We are not prepared to dispute this contemporaneous understanding and the interpretation of the Act, which has obtained since 1907. It is true that the statute has been amended, particularly when it was codified in 1908 -- 1948. But the revisers noted at that time, make it plain that the changes then made were editorial only and were not intended to alter

the scope of review.

Over the years the Department of Justice has repeatedly sought to get the statute changed, I might say modernized, and such an effort is pending now. But there have been no changes and the law today would seem to be essentially the same as it was enacted in 1907.

Q Did you say -- I am interested in it. Is there objection to it in Congress or is it just inertia?

A No, Jr. Justice, it is just hard to gets things through Congress even when there is no objection. Congressman McCulloch, the ranking minority member of the House Judiciary Committee, is interested in this now and we have hopes that he will make some progress not only on this, but on the statutes dealing with the direct appeals and Interstate Commerce Commission cases and from three-judge courts. And I can only say that were the statute passed, it would greatly simplify the work of the Solicitor General's office.

Q How about us?

A How about ---

Q Would it simplify our task, too?

A You might have more petitions for certiorari to examine, to review the Courts of Appeals. I don't know whether it would or not, because the existing effect is that a great many cases are not appealed at all that ought to be appealed, simply because we feel that we cannot appropriately bring such a

case to this Court, and we would take it to a Court of Appeals and would very likely abide by the decision of the Court of Appeals in such cases. I think Bjorn is a clear example. We were sorry to bring that case here, but there was no place else we could go.

Q Is Justice sponsoring this?

A Yes, Mr. Justice, it has the full support of the Department. But so it did over the past five or six years, there has been an active effort to get it done.

Q Is there any documentation of that in the Congressional REcord? What I mean, are there any committee -- did it ever get to committee?

A I don't believe it has gotten to a committee. We did refer to the fact in our brief in this case that we had efforts pending, but I don't know whether anything is cited now or not. I don't have any -- I am quite sure there is no committee report and I suspect that the only thing that is available is the usual letter from the Deputy Attorney General, which ordinarily is not a public document.

Now on these bases our position is that the only basis for jurisdiction here is the arresting judgment clause. Even that is a little shaky, as I have tried to indicate, but for the reasons I have given earlier, our submission is that that provision can appropriately be construed to support this Court's jurisdiction of the appeal.

Now, I turn to the merits in the Sisson case, assuming that I am validly here.

As I have already indicated, it involves a nonreligious selective objector. Judge Wyzanski held the indictment invalid on both grounds, religious and selective. We think he was wrong on both grounds.

If he was wrong on the selective objection ground, he need not have considered the nonreligious character of the objector.

As I have already indicated, we rely on the argument in the Welsh case insofar as the question of the reference to the religious training and belief in the statute is concerned.

That leaves for consideration here the question of selective conscientious objection. That is the question of the validity of the provision which Congress has included in the statute that exemption will be allowed when the registrant, and I quote from Section 6(j), "is conscientiously opposed to participation in war in any form."

There is no suggestion that the appellee here comes within the terms of that statute. We have no possible question of statutory construction with respect to that. His objection is to the Vietnam War.

He asserts that he is not a pacifist. Thus, unless the statute is in some way invalid, he is not entitled to an exemption quite without regard to whether his objection is based on religious training and belief. And it was for that reason

that I allocated the religious argument to the Welsh case and the selective argument to this case.

It may well be noted, in the first place, that the appellee has not been indicted for failure to obey an order to go to Vietnam. He is being prosecuted for failure to submit to induction in the Armed Forces. Thus, the Court undertook to excuse a deliberate violation of the law on the basis of events which may or may not occur in the future.

Assuming that the question is reached, we think that the District Court went far beyond the limits of the proper exercise of judicial power in undertaking to decide on the basis of its balancing of the considerations whether an individual's conscientious objection to a particular war gave him a constitutional right to disobey an Act of Congress.

In our view the constitutional grant of power to Congress to raise and maintain armies is not properly subject to the balancing approach applied in the instant case. It is not a power to raise and maintain armies when, in the view of a court, it seems thaton the whole the arguments in favor of it outweigh the particular objections which could be raised by an individual opposed to it.

The weighing of considerations, the determination of necessity and details is for Congress, and not the courts. Congress must, of course, act constitutionally, but it is not the province of the courts to decide whether a particular law or a

particular foreign policy is good or bad, or whether there is or is not any need for specified numbers of men in a particular place at a certain time.

Judges are not the persons charged with the responsibility for determining the national need for military manpower.

So far as the selective conscientious objector is concerned, Congress has made no discrimination between religious and nonreligious motivations. Thus, the establishment clause has no bearing on the issues here involved, even in its broadest conceivable construction. Nor can this case properly be brought within the free exercise clause.

Religious freedom does not require that religious scruples be recognized as justifying disodience to a valid law. This Court has so said quite clearly in Hamilton against the Regents in 293 U.S., where they quoted from the opinion in United States against Macintosh. This is on pages 44 and 45 of our brief, and then there is at the bottom of page 45 a quotation from an opinion of Judge Augustus Hand, who I think I may appropriately say is perhaps my favorite Federal judge.

There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances.

The latter and not the former may be the basis of exemption under the Act, and it surely never occurred to Judge

Hand that there was any legal question lying behind that statement.

The former is usually a political objection; for the latter we think may justly be regarded as a response of the individual to an inward mentor. Call it "conscience" or God," that is for many persons at the present time the equivalent of what has always been thought a religious impulse.

Only if the free exercise clause is broadened to encompass a general right of conscience would that provision be useful to the appellee. And there are extensive arguments in the briefs of emici curiae to the effect that the First Amendment does command a general right of conscience. That goes beyond what the amendment says, beyond anything that this Court has ever decided and seems to me would be wholly unwarranted and unjustifiable.

If that provision was given such sweeping scope, it would of necessity extend beyond the Selective Service Act to other areas, such as the payment of taxes or to people who had conscientious scruples against racial equality. And I have no doubt that there are such people whose conscience is perfectly clear on that matter, unless the Fourteenth Amendment was held to have pro tanto repealed the First Amendment, which seems a curious reversal operation of those provisions.

Such a construction of the First Amendment is without precedent. It would be wholly destructive of the orderly

functioning of government, and it would undermine the essential integrity of the democratic process.

It is true, of course, that we are a constitutional government, but we are also a government, one of whose great principles is majority rule. The acts passed by the elected representatives of the people are the law. They are subject to the Constitution, but the elective representatives of the people make the political decisions.

Q Mr. Solicitor General, may I ask you this? Would you see any difference in the posture of the basic claims of this appellant and that of a taxpayer who refused to pay any taxes so long as some of the taxes were being used to maintain a war that he objected to on the same grounds?

A Well, no, Mr. Justice, that is essentially the argument I was just trying to make, that pressing the First Amendment to establish a constitutional right of free conscience could not be limited to the Selective Service Act. It could apply to all across the board anything which a person sincerely conscientiously objects to. He would be protected in his objection by the Constitution, including as far as I can see. That, of course, would be another issue to be argued before the Court and decided, and the Court might find some way to make a distinction.

But I can't make the distinction now. It seems to me that it would follow, particularly since Flast and Gordon, that

not only since Flast and Gordon, but Flast and Cohen. But if the premise is that the Constitution protects people in conscientious nonreligious objection, then it seems to me that it would follow that a citizen could refuse to pay either any taxes or conceivably some kind of a pro rata allocation of his taxes insofar -- or perhaps we would have to set up separate funds and his taxes could go into a fund which couldn't be used for defense purposes and other people's taxes would go into the defense fund.

It seems to me that pressing the general language of the First Amendment that far would be pushing it to a dry, illogical extreme.

And, finally, we contend that the provision made by Congress does not violate the Fifth Amendment. Congress could rationally distinguish between persons opposed to war in any form and those whose objections extend only to a particular war or situation.

This is not a question of sincerity or depth of conviction, but opposition to a particular war necessarily involves a practical and essentially political judgment. It represents the individual's personal conclusion that the policy adopted by the duly elected representatives of the Government is wrong at a certain time in relation to a particular area of operation.

Those who oppose participation in combat in any form do not make the same of immediate political judgment. Congress

may validly conclude that there is a qualitative difference between persons whose beliefs cause them to oppose participation in all wars and those who wish to reserve the right to choose the wars in which they will fight.

Except for the Courts below and Judge Wygal in the District Court in California, to which I have made reference, all of the Courts which have considered the matter have held that Congress may validly draw a distinction between those who oppose all wars and those whose objections are only to a particular war.

The District Court took the position that the magnitude of an individual's conscientious objection is not appreciably lessened because his beliefs relate to a particular war. But it is not the magnitude or the sincerity of the objection which gives rise to the distinction. It is its nature.

Congress could reasonably construe in the exercise of its constitutionally granted power to raise and maintain armies that a viable government cannot allow political dissent to excuse a person from the duties which it feels it must impose on all persons of the same class.

Q Mr. Solicitor General, are you arguing that even if Sisson's claim were religious, the Government could nevertheless deny him an exemption because he doesn't oppose all wars?

A Yes, Mr. Justice.

Q But you don't quite reach that point in this case,

because I gather you claim his position isn't really this anyway?

A Well, Mr. Justice, the statute, as I see it, has two conditions in it: By reason of religious training and belief, which Sisson doesn't meet by his own assertion is constitutionally opposed to participation in war in any form. And Sisson by his own assertion does not meet the second ground.

I don't think it makes any difference whether his reason for not meeting the second ground is religious or intellectual and philosophical.

Now I would point out in the Bowen case there is cited by Judge Wygal ---

Q But if we said that his position must be religious in any event, that would be ---

A Then you would not need to decide the warrant in any form issue.

Q Mr. Solicitor General, suppose -- not this case, but there is an established religion that we will agree, they say that the war in Vietnam is bad for some reason and we are against it and we urge all not to participate, that wouldn't be sufficient, would it?

A Mr. Justice, I would ---

Q I am only trying to take care of the statute.

A This is a hard case which fortunately isn't here, but I would take the position that Congress can draw the line

and say that it recognizes religious objection only when it is based on opposition to war in any form.

That is what it has said in the statute. I don't know any reason why it shouldn't be taken at face value.

Q What's the excuse?

A I recognize that if that case came, and in some ways it is almost presented in the Bowen case. The Bowen case involves a sincere Catholic, who following certain teaching of the church with respect to just and unjust wars, and concluded that this was an unjust war and that he could not participate in it. And I need not make it plain that I have no question whatever about the sincerity of his beliefs or about the sincerity of Sisson's beliefs.

It is our position that this is a judgment which not only has been made by Congress, but which it was proper for Congress to make. We have not only the First Amendment, we have raise and maintain armies clause, and Congress has said that to qualify for a conscientious objection exemption, you must be opposed to war in any form.

And I would suppose that that would be true even though Congress repealed the religious training and belief exception, which it seems to me they might do. Australia and Great Britain get along without it, but that is a matter for the judgment of Congress.

Now suppose Congress did eliminate religious training

and belief, but simply said, as the Australians and the English do, "is opposed to war in any form." It seems to me it would not help the claimant to say, "I am not opposed to war in any form. I am only opposed to this war, but I am opposed on religious grounds." And brought in all kinds of documentation to show that he had sound religious grounds for doing it. He not only still would not come within the statute, but it would be my submission, and I know this is a difficult elusive area, but it would be my submission that there is nothing in the Constitution which can properly be regarded as restricting Congress in making that judgment.

Q What is the exclusionary language of the statutes that you referred to in the Bowen case, I think, which followed the amended language?

A The statute now says, on -- it's in the Welsh brief -- no, it's on page 3 of the Sisson brief, and this is the way it is now:

"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."

Now that line is not only a thin one at best, but in particular cases it can become extraordinarily thin. But it seems to me that there is room for a line there that Congress has drawn the line.

In this case there is no problem about it being close to the line or not. It is asserted that he does not base his claim on religious training and belief. And in the Sisson case we think, because on the agreed statement of facts, to use Judge Wyzanski's phrase, "the appellee does not qualify under the statute either by reason of religious training and belief or by reason to opposition to war in any form."

We submit that the judgment of the District Court should be reversed and that the case should be remanded to that Court, and here, Mr. Chief Justice, I come to what I think was your procedural point with directions to enter judgment on the verdict.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor.

Mr. Flym?

ARGUMENT OF JOHN G. S. FLYM, ESQ.

ON BEHALF OF APPELLEE

MR. FLYM: May it please the Court:

I would like, first, to address myself to the question whether the decision arresting judgment of conviction was, in fact, entered by the Court below. I note parenthetically that the Government's brief at pages 7 and 8 states, "Appellee's

motion, which the trial judge granted, purported to be and was treated by the district court as a motion in arrest of judgment."

Q Could you raise your voice a little?

A Yes, Your Honor.

It was submitted in accordance with the time spelled out in Rule 34 for the making of such motion aftery the jury's verdict for "guilty." The ground on which the motion rested was that the indictment did not charge an offense. Similarly spelled within the judicial scope of such motion is expressed in Rule 34.

I have assumed for purposes of my brief and argument before this Court today that the Government agreed with our position that what the judge, in fact, granted was a motion in arrest of judgment. I think that assumption is supported by the record.

On the date when the verdict of "guilty" was rendered by the jury, the judge said -- this appears at page 197 of the record -- he set March 31st as the date for sentencing. That is, had no motionin arrest of judgment been filed and there was no guarantee any such motion would be filed by Sisson in this case. Sentencing would have occurred on March 31st.

Q Could that motion have been made under the rules after the entry of the judgment?

A Yes, it would.

Q In other words, is it broad enough to allow a

motion in arrest of the execution of the judgment?

A I think Rule 34 expressly limits the time within which a motion and arrest of judgment can be made to a period of ten days following the verdict of "guilty," or within such period of time as the Court allows. But as of the date of the jury's verdict, there were ten days within which the motion would be filed.

If no such motion was filed on March 31st, the expiration of the ten-day period, sentencing was to occur. Moreover, the docket in the case is reproduced at the beginning of the record on appeal at pages 3, 4 and 5, as a matter of fact, as an indication spelling out the judgment, the decision of the District Court as follows: "The defendant with his counsel and Government counsel present, the Court reads it opinion granting defendant's motion in arrest of judgment pursuant to Rule 34 of the Federal Rules of Criminal Procedure." Excerpt quoted below: "In the words of Rule 34, the indictment of Sisson does not charge an offense. This Court's decision arresting a judgment of conviction points to insufficienty of indictment based upon the validity of the statute upon which the indictment is found within the meaning, and those places as used in 18 U.S., Section 3731."

Then the docket continues and concludes, "Court orders this decision in this Court Order granting defendent Sisson's motion in arrest of judgment entered forthwith."

On the question of the scope of the statute in conferrin

jurisdiction on this Court on direct appeal from judgments of the District Court granting a motion in arrest of judgment, we concur with the position of the Government that, indeed, this Court does have jurisdiction under the motion of arrest provision of Section 3731 of the Criminal Appeals Act.

In addition, it is our position that the Government's own arguments with respect to the other two clauses, the plea in bar as well as waived motion dismissing an indictment. It really is quite persuasive that the intent of the draftsmen of the Criminal Appeals Act was precisely to confer upon this Court jurisdiction in all cases which were not precluded by the Constitution by reason of the double jeopardy clause.

I have in mind, for instance, and I am simply selecting at randomly, on page 22 of the Government's brief there is a quotation from Senator Bacon, which indicates that the jeopardy clause was inserted in the motion in bar subdivision out of an abundance of caution. The caution, I suggest to the Court, in context was simply that they wanted to be quite clear that they were not purporting to grant jurisdiction in cases which was constitutionally prescribed.

There is a reference to the purpose which the statute was intended to serve on that same case, on page 22 of the brief. The purpose was simply to meet the problem of having district court judges dismissing criminal prosecutions, Particularly there was a case against Chicago Meatpeakers where the Court

dismissed the proceedings and the Government was powerless to do anything about it.

And Congress wanted to insure that that sort of result simply could not happen. It wanted to provide review in this Court to insure that those sorts of decisions would be reviewed by the Court. But I don't think there is a shread of evidence which indicates that the Congress intended to make it possible, by providing various loopholes, to -- well, supposedly the district judge bent on circumventing the appeals provision of the Criminal Appeals Act.

To simply avoid this result, namely, of providing review in this Court by, for instance, permitting the procedure which was followed in this case. It seems to me that the present case is the prototype of the situation which the draftsmen of the Criminal Appeals Act could not possibly have intended to result in precluding review by this Court.

And it would simply be much too easy to circumvent the purpose of the Act.

Now on page 23 Senator Nelson especially says, and I am quoting the quotation. Nelson said that the plea in bar section it was made clear, "out of extreme caution," that "where the defendant has been put in jeopardy he can not be reindicted."

The emphasis again was again on the question of whether the defendant, having filed whatever motion he filed and having that motion granted by the Court, whether he could be reindicted.

I don't think there is any question or is there any suggestion by the Government that in circumstances where a defendant files a motion in bar or a motion in arrest of judgment, that he could, in fact, be reindicted if the motion were granted. And subsequently that decision was the key.

Now, the Government at page 25 quotes Justice Holmes, in the case of United States against MacDonald. Justice Holmes refers to judgments rendered before the moment of jeopardy is reached. What is omitted immediately preceding the quotation, the text includes a citation to the decision in Kapp against the United States at 195 U.S., and that decision Justice Holmes -- we quote in our brief. And it is clear that he considered the double jeopardy question to be a very limited one.

As he pointed out, there are numerous circumstances in which a man can be retried after having once been tried and found guilty by a jury without contravening the double jeopardy safeguard in the Constitution.

I won't belabor the point any more. I would like again to refer to the testimony Senator Knox, which is quoted at pages 26 and 27 of the Government's brief, in which Senator Knox refers to all of the motions; that is, demurrer to indictment, motion to quash or set aside indictment, motion in arrest of judgment for insufficiency of the indictment, and judgment sustaining defendant's special plea in bar.

And he refers to all of these motions as motions, the

effect of which is to defeat jeopardy. I believe that that statute has been ---

Q Do you want us to affirm the judgments?

A Yes, Your Honor.

Q Then where does that leave your client?

A If the judgment is affirmed? Well, I believe that the conviction is set aside. It is the judgment of the Court is arrested.

Q That is all the judgment said. It is all the opinion said. How do you stand?

A Well, the judgment is arrested, Your Honor.

Q Well, it is still there, but it is arrested?

A Right.

Q I just wondered. How would you report that if somebody said you had been convicted? How would you report that?

A Well, ---

Q I mean, you are so busy giving this Court jurisdiction, I am just wondering what you were doing with it.

A Well, so far as we are concerned, Your Honor, quite frankly I am not prepared to respond to that. I hadn't thought of the problem. I will represent that it will be satisfied. The line of judgment, of course, can be affirmed.

I think we can deal with the problem once that action is taken.

By way of context -- there just isn't enough time remaining today to deal with all of the issues, particularly the First Amendment issue. I would like to refer, if I may, to some of the statements made by Solicitor General Griswold, because I consider that some of the difficulties in a hearing in this case arise from assumptions made by the Solicitor General which are not dealt with at all in any of the briefs.

The assumption, for instance, is that when Congress acts, that somehow there is a presumption which arises from the action of Congress, which is sufficient to simply overcome whatever claims an individual might make.

We are certainly not challenging our system of government in this case. We are not challenging democracy or majority rule. We are not requesting that this Court impose its judgment and substitute it for the judgment for the legislation of Congress.

Q Then you do not accept his extention and application of your position to, for example, Social Security payments or unemployment compensation or taxes?

A No, Your Honor.

Q Do you think this is just limited to the war problem?

A The issue presented before this Court is limited solely to the question of whether a man can be deprived of his liberty and compelled to kill, conceivably.

Q How do we know that he is going to be compelled to kill? That is an issue that didn't get discussed very much, but he might wind up working in the Embassy in Paris.

A That's true.

Q He wouldn't have to kill anybody.

A Initially, at the very least, we are only certain that he was to be deprived of his liberty. I would submit that that is sufficient for purposes of distinguishing this case from a tax case.

Q Well, wait a minute. Let's see. You haven't been concerned, as I understood the thrust of your case, with being deprived of his liberty, but being made to fight a war.

Now assume he were sent to Paris to work in the Embassy. Do you have a case?

A I think so, Your Honor.

Q Do you have a complaint?

A I think at this point we do. That is, it is somewhat difficult to speculate about where he might have been sent. We have statistics showing that he had two out of three chances of being sent to Vietnam.

But what happened was that if he refused to submit to induction and he refused to submit to obey an order which was issued to him, and the Government asserts in various places that whether this conduct is criminal or not depends upon the validity of the order.

Now we assert that the order as such, which precedes any assignment to any field of duty, whether to Paris or to Vietnam or any other location, we assert that that order was in and of itself invalid for a variety of reasons.

I would in the time remaining this afternoon simply like to address myself to two points. One will be in passing. I will refer to a recent book written by a man named Ronald Berger, entitled "Congress against the Supreme Court," in which the point is made, I think quite convincingly, that judicial review in this Court is not a matter of usurpation by this Court, but was something intended very definitely by the framers of the Constitution precisely to provide a safeguard against encroachment of individual liberty by Congress.

I would only like to refer to two quotations, one is from page 31 of this book -- it is a 1969 book -- by Jefferson. Jefferson in 1781 stated that 173 despots would surely be as oppressive as one, and elective despotism was not the government we fought for.

Similarly Madison, in dealing with the purpose of the Bill of Rights, stated these amendments are incorporated into the Constitution. Independent tribunals of justice will consider themselves in a peculiar manner guardians of those rights. We will be an impenetrable bulwark against every assumption of power in the Legislative or the Executive.

Now, the notion that the Federal Congress might

arrogate to itself powers and infringe individual liberty was something of which the framers were very, very conscious. They were concerned principally about the Federal Congress. They were not particularly concerned about state legislatures. They had faith in their state legislatures. They knew them.

But they knew nothing whatsoever about this new organ, this Federal Legislature that was to sit at times 1,000 miles away from some parts of this vast land, and the people were afraid that precisely the Federal Government would reach out and deprive them of fundamental liberty.

For this purpose this Court was vested with judicial review, the power of deciding whether has exceeded the limits of its powers, of its limited delegated powers conferred by the Constitution. This doctrine was asserted repeatedly throughout the time of the ratification and framing of the Constitution. That is set out in the Berger book.

It was reiterated by this Court in Luther against Gordon in the middle of the 19th Century.

The only other point that I wish to make is the repeated insistance by the Solicitor General to history, that on the basis of the history surrounding the adoption of the Bill of Rights there is no basis for this Court concluding that religion stands for the "rights of conscience."

I submit, and I do it diffidently -- I was one of his students, and he was a great man. I respectfully suggest that

his knowledge of the scope of the religion protection is not accurate. It simply is not accurate.

I refer, for instance, to the part of our brief at pages 97 through 102. Particularly I have reference to the pre-ratification statements; that is, before the Bill of Rights was in existence. I posit to this Court the situation where there is no Bill of Rights, where there is no First Amendment to be construed. And I ask this Court whether in that circumstance this Court could reach the conclusion that religion does not extend to the right of conscience or that the Constitution was intended to deprive individuals of the protection of the free exercise of religion.

I refer, in particular, to Declarations of Rights made by the Conventions of New York, Rhode Island, North Carolina and Virginia. These Declarations assert the existence of certain inalienable rights and make it clear that the Constitution was being ratified only with the expressed understanding that these rights were not infringed by the Constitution.

That was prior to the adoption of the Bill of Rights. One of these rights was: "That the people have an equal, natural and unalienable right, freely and peaceably to Exercise their Religion according to the dictates of conscience, and that no Religious Sect or Society ought to be favoured or established by Law in preference of others."

Q Well, how does that fit into this case?

A It gets into this case in this way, Your Honor. The argument that the Government relies on the proposition that somehow the word "religion" has grown beyond its intended scope.

Q Do you claim a religious exemption here? Are you now arguing for a religious exemption?

A On a constitutional basis we always have. That is, it is an inaccurate statement to describe Sisson as a selective nonreligious objector. He is a selective, nonreligious conscientious objector, and the very necessity for making that distinction between a religious objector -- or rather, a non-religious objector and a nonreligious conscientious objector is the fact that the Act, as the Solicitor General so ably defended it, makes that distinction.

It does not extend the scope of the exemption in the Act to the full measure of protection afforded religion under the First Amendment.

MR. CHIEF JUSTICE BURGER: We will postpone this until tomorrow morning.

(Whereupon, at 2:30 p.m. the argument in the above-entitled matter recessed, to reconvene at 10 a.m. of the following day, Wednesday, January 21, 1970.)