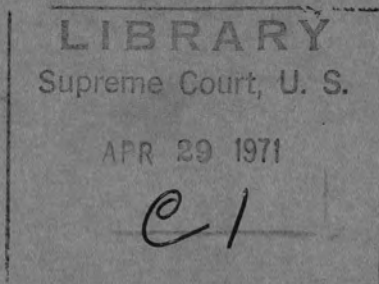


# Supreme Court of the United States



In the Matter of:

CASSIUS MARSELLUS CLAY, JR.  
a/k/a MUHAMMAD ALI,

Docket No. 783

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

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 CASSIUS MARSELLUS CLAY, JR.,  
 a/k/a MUHAMMAD ALI,  
 Petitioner

vs

THE UNITED STATES OF AMERICA,  
 Respondent

No. 783

The above-entitled matter came on for argument at  
 10:05 o'clock a.m. on Monday, April 19, 1971.

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  
 HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

CHAUNCEY ESKRIDGE, Esq.  
 123 West Madison Street  
 Chicago, Illinois 60602  
 On behalf of Petitioner

ERWIN N. GRISWOLD, Solicitor General  
 of the United States  
 Department of Justice  
 Washington, D. C. 20530  
 On behalf of Respondent

C O N T E N T S

ARGUMENT OF

PAGE

Chauncey Eskridge, Esq.  
on Behalf of Petitioner

2

Erwin N. Griswold, Solicitor General  
of the United States, on Behalf of  
the Respondent

14

REBUTTAL OF

Chauncey Eskridge,  
on Behalf of Petitioner

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1 tests and he had failed both and had been given a classifica-  
2 tion of "1-Y." Almost two years went by and after many years  
3 of newspaper copy he was then sent on 3 February of '66 a  
4 statement of his acceptability because the Selective Service  
5 System had lowered its qualifications for admission to the  
6 Armed Forces.

7 Q What is the classification 1-Y?

8 A 1-Y means that he would only be taken in  
9 case of war in a national emergency.

10 On 14 February '66 he wrote a letter to his local  
11 draft board, alleging the fact which he claims entitled him  
12 under the law to several lower classifications, including that  
13 of conscientious objector. Without more, on 17 February 1966  
14 his local board reclassified him. Then the next day the local  
15 board sent him the usual form 150 which is the application for  
16 a conscientious objector.

17 Then, on the 28th of February he sent the applica-  
18 tion back and which, showing on the face of the application  
19 what we consider to be a prima facie entitlement to the status  
20 of conscientious objector. In his handwriting he wrote:  
21 "Muslim means 'Peace', total submission to the will of the law,  
22 do not take the lives of anyone, nor war when not ordered by a  
23 law," and in parentheses he has the word (God); "keep our  
24 prayers and pay poor rates;" a quotation from his Form 150.  
25 And Form 150 may be found on page 17-A of the appendix.

1 I'm sorry; on page 12-A of the appendix.

2 He then appeared before his draft board on 17  
3 March 66 and the notes of the clerk, or the minutes of that  
4 meeting appear on page 17-A of the appendix, and they were  
5 very important, because the notes of the minutes of that  
6 meeting are later posed by the Government as being pertinent  
7 in this case.

8 Then the appeals process -- as you remember in  
9 those days you made an application to the appeal board and the  
10 appeal board refers the matter to the United States Justice  
11 Department and the United States Justice Department at that  
12 time appointed under the statute, a hearing officer, who was  
13 to have a hearing on good faith and character of the regis-  
14 trant.

15 In this case it is important that the hearing  
16 officer was an ex-judge, retired judge from the system of  
17 Kentucky, a man in his sixties who had been on the bench for  
18 many numbers of years. Add this judge had this hearing. His  
19 name was Judge Grauman.

20 Now, Judge Grauman heard several witnesses. He  
21 also had in front of him, the records show, an FBI Report of  
22 about six inches. He also was given at the hearing two  
23 books, one of which is called: "The Message to the Black Man,"  
24 written by the Honorable Elijah Muhammad; another book entitled  
25 "The Holy Qur'an," by Muhammad Ali -- not our Muhammad Ali;

1 another.

2 And there was also introduced a copy of a news-  
3 paper which is put out by his sect of Muslims, called:  
4 "Muhammad Speaks." Now, Judge Grauman, he had the first  
5 opportunity to determine the credibility of the witnesses and  
6 he could determine whether, how much credence to put into the  
7 testimony of the people who appeared in front of him. And,  
8 Judge Grauman wrote his report and his report appears on page  
9 17-A. In some of his notations in what we call "The Advice  
10 Letter," which is written by the Attorney General -- was  
11 written by the Selective Service System -- I mean the Justice  
12 Department.

13 And this is where we consider the crux of this  
14 case, is in the so-called "Advice Letter."

15 Now, the hearing officer wrote his report and he  
16 concluded at page 117-A in the appendix that: "The Registrant  
17 was sincere in his objections on a religious ground to par-  
18 ticipate in war in any form" and he recommended that the spon-  
19 sorious objector claim of the registrant be sustained,  
20 notwithstanding.

21 At that time the Justice Department had a con-  
22 scientious objector section and all letters were written by a  
23 man by the name of T. Oscar Smith, who was in charge of the  
24 section. And this letter was written back, signed by T. Oscar  
25 Smith. And then, after having said that the Hearing Officer

1 had found the registrant sincere; then at page 120-A he then  
2 quotes from "Muhammad Speaks," several lines from the news-  
3 paper "Muhammad Speaks." Then in the next paragraph he gives  
4 -- that is, the writer of the letter, gives his opinion of  
5 what Muhammad Speaks says and what the Message of the Black  
6 Man says, on page 120 and the beginning of 121.

7 Then he gives this opinion: "It seems clear" --  
8 I'm reading these two documents -- "that the teachings of the  
9 Nation of Islam preclude fighting for the United States, not  
10 because of objection to participation in war in any form, but  
11 rather because of political and racial objections to policies  
12 of the United States as interpreted by Elijah Muhammad."

13 Then he goes on and he reads part of a hypothetical  
14 question which Muhammad Ali, the Registrant, had answered at  
15 the hearing, before the hearing officer. Then he quotes part  
16 of the Registrant's testimony, and then he comes to this con-  
17 clusion:

18 "It is therefore our conclusion that the Regis-  
19 trant's claimed objection to participation in wars insofar as  
20 they are based upon the teachings of the Nation of Islam, rest  
21 on grounds which are primary political and racial."

22 Now, we say that when these men who are on the  
23 Appeal Board, who had to read this Advice Letter with this  
24 language, they interpreted it like we interpret it, that this  
25 is the same as saying that the -- his objections to the war



1 were based on political and racial grounds and not on his  
2 religious training and beliefs.

3 Now, we understand that now the Government in its  
4 brief -- page 27 in the Government's brief -- now says that  
5 that language was not intended to say they were not religious.  
6 Now the Government says that this language was -- or that Mu-  
7 hammad Ali was one who had his beliefs rooted in religious  
8 training and belief.

9 But now they say that political and racial, and  
10 if you interpret it, they say that the record infers the in-  
11 ference that Petitioner would fight "tomorrow" in a defensive  
12 war on behalf of Muslims. This reminds us of the case of  
13 Sicurella where the hypothetical question was put to a  
14 Jehovah's Witness of: what would they do if so and so; or "if  
15 so and so."

16 Now, they have taken some language juxtaposed  
17 against other language, and they come to this conclusion, but  
18 nowhere in the record has the Registrant ever said that he  
19 would fight with weapons against anybody.

20 Q To what extent do the Black Muslims follow  
21 the teachings of the Koran? I'm not the World's best authority  
22 on the Koran, although I have read most of it. As I read it  
23 the Koran itself provides for participation in so-called "Holy  
24 Wars."

25 A Yes, sir --

1 Q But I don't know about the Black Muslims;  
2 did they adopt the Koran?

3 A They adppt the Koran, especially the one  
4 that's edited by Muhammad -- let's see, there are two names  
5 -- Maulana Muhammad Ali; that's their official version, and  
6 if they use it and they couple it with the Black man's exper-  
7 ience in the United States and hence, it's not clear as to how  
8 much they interpret from the Holy Koran and how much they in-  
9 terpret from the Bible or from the "Message to the Black Man."

10 Q Are you acquainted with the Negre case  
11 recently decided by this Court?

12 A I am, sir.

13 Q There there was, apparently in the historic  
14 relation of that church, involved in that case was the segre-  
15 gation of "just wars." Is this Jihad in the Koran an equi-  
16 valent of the "just wars?"

17 A Well, Your Honor --

18 Q -- as opposed to the unjust wars?

19 A Your Honor, this is the first time I have  
20 ever heard anybody suggest that the Black Muslim theology came  
21 from any just or unjust wars.

22 A I'm talking about the Jihad which is  
23 in the Koran, as a war that the Koran embraces as the kind of  
24 war. I didn't agree with the Court in the Negre case, but I  
25 am just wondering about the relevancy of that here.

1                   A           That war means a theocratic war, which is  
2 the same kind of war as the Sicurella war, or the Jehovah's  
3 Witnesses. They believe in the War of Armageddon, which is  
4 the war against right versus wrong.

5                   Q           I think the Mediterranean literally has  
6 seen the Jihad           -- well, maybe not for several hundred  
7 years, but historically there have been quite a few; haven't  
8 there?

9                   A           There may be, but I doubt that they would  
10 be what the Muslims speak of, as the Nation of Islam. What  
11 they mean by that is not a territorial area, but it means the  
12 religious group.

13                  Q           But I'm not trying to attribute to the  
14 Black Muslims this teaching of the Koran, because I just don't  
15 know. But, my question is: does the record show what the  
16 Black Muslims believe in this respect?

17                  A           Yes, sir; the record would show that be-  
18 cause in the early part of his testimony he put on an Assistant  
19 Minister of the Temple and that was Sam X Saxon(?) and his  
20 testimony begins at page 22 or 23 of -- I'm sorry.

21                  Q           Of the appendix?

22                  A           Of the appendix; page 30 of the appendix.  
23 And he speaks of their -- of what their beliefs are and now he  
24 is asked the question: "What book do you follow?" What --

25                  Q           What page are you on now?

1 A I'm on page 40-A of the appendix.

2 "What books do you follow? What book for publica-  
3 tion, if any, do you use as the basis for the belief of the  
4 Nation of Islam or the objections of Muhammad Ali that were  
5 expressed in his papers that were filed with the draft board  
6 and which you have expressed to Judge Grauman here?"

7 "ANSWER: 'I think you could find them in the Holy  
8 Koran and this book that you've got here: Message to the Black  
9 Man," written by the Honorable Elijah Muhammad.'

10 Now, he then points to these two books. Similar  
11 quotations from the book: "Message to the Black Man," are here  
12 and are supposed to be relevant as to what the doctrines are,  
13 and this is where the Government gets their position that if  
14 you read that book, the book is saying that it supports  
15 tomorrow a defensive war on behalf of Muslims.

16 Well, this is the same as saying that they support  
17 the war against the church, was in the same opinion in Sicurella  
18 Sicurella, that there is no place in this record where either  
19 the Registrant or the Petitioner, or any of his co-religion-  
20 ists say this. And remember, the hearing officer, Judge  
21 Grauman, had six inches worth of an FBI report. They had done  
22 an extensive investigation of the background and acquaintances  
23 of the registrant.

24 Q Muslims as I understand it, the Nation of  
25 Islam, really has no particular --cannot be equated with the



1 Moslem religion of such nations as Iran, Pakistan and the  
2 Arab countries of the Middle East?

3 A No, sir.

4 Q It's different. Is it not pretty largely  
5 confined to North America; the United States of America?

6 A It is totally -- that is, they have indeed  
7 taken some parts of what they call "Orthodox Islam" and here  
8 they have fashioned the Black man's experience in the United  
9 States.

10 Q And so when they talk about of the defense  
11 of Islam, they are not talking necessarily about a war in  
12 which a Moslem country would be involved in, such as Iran or  
13 Pakistan --

14 A No, sir; no, sir.

15 Q -- a temporal kind of a war which the  
16 defense of Islam means, as I gather from the record, the  
17 defense of those who are adherents to this religion.

18 A Yes, sir.

19 Q Personal defense; isn't that correct?

20 A The defense -- where they use the word  
21 "defense" they mean the defense of Islam. They mean the  
22 defense of the religion, not persons.

23 Q Well, they talk about learning karate and  
24 so on.

25 A Well, sir --

1 Q That would involve personal and self-  
2 defense, I suppose, not -- rather than war.

3 A Yes, personal self-defense, but this is a  
4 young group, a group of men in the Temple called "The Fruit  
5 of Islam," who take physical exercise, some of which is march-  
6 ing, some of which is called drilling, which is marching, some  
7 of which is judo and it's those words which as juxtaposed,  
8 which the Justice Department have chosen, like "drill," and  
9 "judo," and key words like "military orders," which would give  
10 you the impression that this is a semi-military organization;  
11 it is not. This is a small group of men who are young men who  
12 are given this kind of training and they intend that it will  
13 be used only in defense of themselves or in defense of their  
14 leaders.

15 So that to suggest here that they would use this  
16 for a use for a weapon against other persons; they don't say  
17 it. They just say that they are totally -- their total  
18 defense is with their hands, when attacked. This is their  
19 position.

20 Now, we go farther; we say that if you read this  
21 Advice Letter in which the Department of Justice disparages  
22 the religion, and then it adds farther down, at page 125-A --  
23 then they go on after they say that this religion is racist and  
24 political, then they go on and the registrant -- this Advice  
25 Letter to the Appeal Board says:

1 "The main thrust of the letter he had written in  
2 which he claims other classifications," then they say that  
3 there is something wrong with this, that he has shifted his  
4 position. But, remember: he was 1-Y all the way up to  
5 February 1966 so that he had no occasion to try for a lower  
6 qualification because conscientious objector is higher, so that  
7 the hearing officer, when they wrote to the appeal board, they  
8 should have told the appeal board that it wasn't necessary for  
9 him to inform the draft board that he was then a conscientious  
10 objector because this is a higher classification, but not-  
11 withstanding that they go on and say:

12 "The Registrant has not shown manifest, overt  
13 manifestations sufficient to establish his subjective belief  
14 whereas here his conscientious objector claim was not asserted  
15 until military service became imminent."

16 In other words they are saying that he had a lack  
17 of sincerity. Now, not only did this mislead the appeal board,  
18 we say, but this even misled the Fifth Circuit, because in the  
19 last opinion of the Fifth Circuit on page 249, footnote 9, the  
20 Fifth Circuit in its opinion says:

21 "The Kentucky Appeal Board thereafter continued  
22 the 1-A classification of Clay. That there was also a basis  
23 in fact for the numerous local boards, state appeal boards, and  
24 Presidential appeal boards classification of Clay, thereby  
25 including an adverse determination of the question of Clay's

1 basic sincerity."

2 So that this language, we say, of his sincerity,  
3 threw off not only the appeal board, but threw off the Fifth  
4 Circuit. And we are asking the Court to take into account  
5 that Sicurella also said that where two rerroneous positions  
6 or one erroneous position was given to the appeal board or to  
7 a local draft board that this requires a reversal of the man's  
8 conviction because the Court has no way of knowing whether or  
9 not which one the draft board accepted, because here the  
10 record does not indicate which one of these grounds that the  
11 appeal board passed upon.

12 MR. CHIEF JUSTICE BURGER: Thank you, Mr.  
13 Eskridge.

14 Mr. Solicitor General.

15 ORAL ARGUMENT BY ERWIN N. GRISWOLD, SOLICITOR  
16 GENERAL OF THE UNITED STATES, ON BEHALF OF  
17 THE RESPONDENT

18 MR. GRISWOLD: May it please the Court:

19 This is an appeal from a judgment sustaining a  
20 conviction for refusal to report for induction. The defense,  
21 of course, is the question of whether the order to report for  
22 induction was valid. And in the posture of the case as it  
23 now stands, that turns on the propriety of the action of the  
24 Selective Service System with respect to a claim of con-  
25 scientious objection.



1           The claim was duly filed on the 'System's form  
2       SS 150, and was considered by the local board in Kentucky and  
3       was denied by that board. The Petitioner here took an appeal  
4       from that decision and under the procedure which was then  
5       established by law the matter was referred to a division of  
6       the Department of Justice. The statute provided, upon the  
7       filing of such appeal that appeal boards shall refer at such  
8       time to the Department of Justice for inquiry and hearing and  
9       the Department of Justice, after appropriate inquiry, shall  
10      hold a hearing.

11           And then it provided that the department should  
12      make its report to the appeal board, either way and said --  
13      the statute said: "The appeal board shall, in making its  
14      decision, give consideration to, but shall not be bound to  
15      follow the recommendation of the Department of Justice, to  
16      gether with the record on appeal from the local board. And

17           And that procedure was followed here. There was  
18      a hearing conducted by an able and experienced hearing officer  
19      and he made his report, including a transcript of the testi-  
20      mony and the voluminous number of exhibits to the Department  
21      of Justice, where it was reviewed, along with the experience  
22      which the department's officers had from reviewing many other  
23      hearings in this type of matter and the Department of Justice  
24      prepared its letter of advice, which appears in the record,  
25      beginning on page 112 and running for 16 pages, in which it

1 recommended against the allowance of the conscientious  
2 objector claim.

3 That was approved by the appeal board in Kentucky.  
4 It was later approved by an appeal board in Texas. There was  
5 an appeal to the so-called Presidential Board and it was  
6 approved by the Presidential Board. Thereafter the case was  
7 tried in the District Court and there were decisions sustain-  
8 ing the action of the Department of Justice Advice Letter in  
9 the District Court and the Court of Appeals and the case is  
10 now here on the grant of certiorari, limited to the question  
11 of the application of this Court's decision in the Welch case.

12 Now, the transcript of the hearing before the  
13 hearing officer, is in the appendix, but I think it is very  
14 important for the Court to bear in mind what the nature of  
15 that hearing was. It was not an adversary proceeding. The  
16 Government was not represented except through the hearing  
17 officer, who, it is perfectly plain, acted in the most impar-  
18 tial way and asked questions for the purpose of clarifying  
19 things for his own mind, but not in an adversary way.

20 No evidence was offered on behalf of the Govern-  
21 ment at this hearing, either with respect to the beliefs of  
22 the Black Muslim sect or with respect to the beliefs of the  
23 Petitioner, except insofar as that may appear from the resume  
24 of the FBI report which was made a part of the hearing.

25 Q Are you speaking now, Mr. Solicitor General,

1 of the hearing officer appointed in Kentucky?

2 A The hearing officer appointed by the  
3 Department of Justice, who held a hearing in Louisville,  
4 Kentucky.

5 In this situation it's perhaps surprising that  
6 there is as much evidence as there is of the selective nature  
7 of the Petitioner's objections. There has been one other case  
8 before the Court involving a Black Muslim. That's the case of  
9 the United States against Carson, in which this Court denied  
10 certiorari in 396 U.S. 865 and where the Solicitor General, in  
11 his brief in opposition, took the ground that the objection  
12 the Black Muslim was essentially a selective objector and I  
13 can refer in that connection to what this Court said in its  
14 recent Gillette opinion:

15 "There is danger, that is between two would-be  
16 objectors and both having the same complaint against the war,  
17 that that objector would succeed who was more articulate,  
18 better educated, had better counsel."

19 Q I think it's common knowledge, however, Mr.  
20 Solicitor General, is it not, that the dispositive question is  
21 the particularized beliefs of this individual registrant or  
22 that individual registrant, rather than the basic tenets of  
23 the religious sect to which he adheres?

24 A Yes, Mr. Justice and --

25 Q And you agree in this case there are two

1 sides to that coin?

2 A I agree it is the beliefs of this indivi-  
3 dual, except that in this case this individual has stated un-  
4 equivocally that who accepts the beliefs of the sect, and  
5 there has been introduced at the hearing establishing his  
6 beliefs, a document showing the beliefs of the sect and of the  
7 -- and I don't see how he can disassociate himself from these  
8 materials which he has offered in support of his position.

9 Q I wasn't suggesting that he could or should,  
10 but he didn't confine himself to that --

11 A No, Mr. Justice --

12 Q I incorporate all of that by reference and  
13 then analyze -- a few things.

14 A He not only incorporated all by reference;  
15 he said: "I stand on it."

16 Q Yes.

17 A Which is not merely incidental background.

18 Q That was rather a starting point, wasn't  
19 it? He went on from there?

20 A Yes, Mr. Justice.

21 Now, if the Court in this case reads and  
22 examines all of the evidence it will be able to make whatever  
23 finding it feels is appropriate, if you think that is what it  
24 should do and it can't be said that there is no evidence to  
25 support whatever finding is made here. It can't be said that



1 there is no basis in facts for whatever conclusion a tryor of  
2 the facts may be, but this is a question in which Congress has  
3 provided in the statute that the judgment of the draft board  
4 shall be final. And the Court has said that the standard of  
5 review is no basis in fact.

6 Many years ago in the Estep case the Court said,  
7 and I read from the opinion, referring to the provisions for  
8 finality in the statute: "It means that the courts are not to  
9 weight the evidence to determine whether the classification  
10 made by the local boards was justified. The decision of the  
11 local boards made in conformity with the regulations are final,  
12 even though they may be erroneous. The question of jurisdic-  
13 tion of the local board is reached only if there is no basis  
14 in fact for the classification."

15 And so I take it that the question here is whether  
16 there is any basis in fact, not whether the balance of the  
17 evidence, having in mind, among other things, that this was  
18 not an adversary proceeding, should go one way or another, but  
19 whether there is any basis in fact that the decisions had been  
20 reached by the administrative agencies and by the courts  
21 below.

22 And then I would call attention to this Court's  
23 decision in the Wittmer case in 348 U.S. where the Court said:  
24 "It is well to remember that it is not for the courts to sit  
25 as super draft boards, substituting their judgments on the

1 weight of the evidence for those of the designated agencies.  
2 Nor should they look for substantial evidence to support such  
3 determinations. The classification can be overturned only if  
4 it has no basis in fact."

5 Here the determination has been made by the draft  
6 board; approved by two state appeal boards, by the national  
7 appeal board and if the Court follows the no-basis-in-fact  
8 standard of review I think that there can be no doubt that  
9 there was a basis in fact for the decisions made by all of the  
10 agencies of the Selective Service System and by the two courts  
11 below.

12 Q And just so I can be clear that I follow  
13 your argument: the basis in fact was not, I suppose, like the  
14 Wittmer case, based on the applicant's insincerity, lack of  
15 sincerity, was it?

16 A Our position is that the question of  
17 sincerity is not before the Court now, not having been raised  
18 in the petition and not having been covered by the grant of  
19 certiorari. We think that the question of sincerity was pro-  
20 perly in it at an earlier stage and that some of the materials  
21 to which the petitioner objects in the Department of Justice's  
22 hearing letter were entirely relevant pursuant to the Wittmer  
23 case.

24 Q What I'm interested in learning is what,  
25 among the various possible bases, what was the basis in fact?

1 Now, the various possible bases, at least in this case, were:  
2 (a) that he was insincere; (b) that his objection is not  
3 religiously rooted or grounded; (c) that his objection is  
4 selective; that it was not to war in any form, but was par-  
5 ticularized, to a particular war; some wars but not other  
6 wars. There may be others, but which of those first three --

7 Q Well, I believe that the only one that is  
8 before the Court now is the latter one. That is the only  
9 question --

10 A Selective objection.

11 Q That is the only question that is covered  
12 by the grant of certiorari: whether Petitioner's conviction  
13 should be vacated in the light of this Court's decision in  
14 Welch because the denial to Petitioner of a conscientious  
15 objector's exemption may have been based upon the Department  
16 of Justice's erroneous characterization of his objections to  
17 participations in wars as political and racial, rather than  
18 religious.

19 A Well, then we're not involved with  
20 selective objection; are we?

21 Q Well, Mr. Justice, I believe it does, just  
22 as in the Negre case, I think this case has been, in effect,  
23 decided by the Negre case and that it is, in fact, indistin-  
24 guishable from the Negre case.

25 Now, let us look back at the Negre case. There is

1 a case where objection was undeniably religious; nobody  
2 questioned from beginning to end that Mr. Negre was anything  
3 but a sincere and devout Catholic, deriving his belief from  
4 instruction in the church and from teachings of the fathers.  
5 He believed, on undoubtedly religious grounds that it was his  
6 duty to participate in just wars and his duty not to parti-  
7 cipate in unjust wars.

8 Now, the Government never contended in any way  
9 that his objections were other than religious in nature,  
10 nevertheless the Government did contend that they were poli-  
11 tical and practical. This is a contention within the concepts  
12 of religion. The Government's argument sustained by the Court  
13 is that it is not enough that the objection be religious but  
14 it must also be an objection to participation in wars in any  
15 form.

16 And without that the Court's discussion of the  
17 establishment and the free exercise clauses of the First  
18 Amendment in its opinion, a very helpful and constructive  
19 discussion would have been wholly unnecessary because that is  
20 relevant only if the objections are clearly religious and so  
21 they were and so we concede here, that the objections are  
22 religious.

23 But the distinction between just and unjust wars  
24 though surely having a religious basis in Negre's mind,  
25 injected political and philosophical considerations into the



1 picture and it was with respect to this aspect of the matter  
2 that the Government contended in its brief that Negre's  
3 position involved the judgment that is "political and par-  
4 ticular;" that was (1) "based on the same political, socio-  
5 logical and economic factors that the Government necessarily  
6 considered" in deciding to undertake the war and those  
7 passages from the Government's brief are quoted by the Court  
8 in its opinion.

9 Similarly here, we do not contend that the  
10 Petitioner's claim is not religious and we never have conten-  
11 ded that it is not religious. The contention that it is  
12 political and racial is not necessarily a contention that it is  
13 not religious; it is a contention which is entirely consistent  
14 with its being religious. If a man sincerely believes that  
15 he can participate in racial wars or in just wars he is not  
16 a person who is opposed to participation in war in any form.

17 There is in this record, a basis in fact for the  
18 conclusion that the Petitioner's objection, though religious,  
19 is selective. Now, that is that he is not opposed to parti-  
20 cipation in wars in any form as the statute requires, but that  
21 is, in fact, opposed to fighting what he regards as the  
22 white man's wars although having no religious or conscientious  
23 scruples against participation in war which would defend the  
24 Black man's interests.

25 Q You don't question the sincerity of his

1 claim?

2 A No, Mr. Justice; we do not.

3 Q Nor, as I understand it, the fact that it  
4 was religiously rooted, religiously founded.

5 A Certainly not, Mr. Justice. We assert that  
6 it was religiously rooted just as we did in Negre. No one  
7 could have conceivably contended in Negre that his objection  
8 was not religion.

9 Q I assume you are going to deal with the  
10 Sicurella case, Mr. Solicitor General?

11 A Yes, Mr. Justice. The Petitioner just  
12 doesn't want to fight the white man's wars, and I can under-  
13 stand that, but it's not the same sort of belief as the  
14 opposition to participation in war in any form which is held  
15 by the pacifists and is required by the statute.

16 Surely, as has been pointed out, the traditional  
17 historical Moslem religion is not pacifist. One need only  
18 refer to the Crusades and to the more recent Seven Days Wars  
19 as adequate evidence of that fact.

20 And, although my counsel for the Petitioner here  
21 differentiated his client from the traditional Moslems, I would  
22 point out that they introduced in evidence in support of his  
23 position a modern, standard translation of the Koran, a  
24 translation by a Pakistani, not by a member of the Black  
25 Muslims. It's equally sure, it seems to me that the Black

1 Muslim religion is not regarded as pacifist in the sense, at  
2 least, that the Quakers and Mennonites are pacifists.

3 As this record shows there are strong racial  
4 undertones in the Black Muslim religion and in the Petitioner's  
5 beliefs. Now there is, thus a basis in fact, for a conclusion  
6 exactly parallel to that already reached by the Court in  
7 *Negre*, that the objections of the Petitioner here, though un-  
8 doubtedly religious, as *Negre's* were, are in fact, selective.  
9 A different selection, to be sure, than that made by *Negre*,  
10 but nevertheless selective and thus not within the statutory  
11 prescription which allows conscientious objection to those who  
12 are opposed to participation in war in any form.

13 A Well, what wars do you understand the  
14 record shows that he would not be opposed to?

15 Q He would not be opposed to wars in which  
16 the Black Muslims were attacked or involved, nor --

17 A That would be civil war; wouldn't it?

18 Q Nor opposed to --

19 A That would necessarily be a civil war if  
20 this religion is pretty well confined to the United States of  
21 America.

22 Q That would presumably be some kind of a  
23 civil war, but it might not necessarily be. Again I would  
24 like to point out that the record shows that the Petitioner  
25 went to the Middle East, was accorded the great distinction of

1 being allowed to enter the temple at Mecca. His dissociation  
2 with the traditional Muslim religion is by no means complete  
3 and as it is by no means clear that if the domestic hierarchy  
4 of the Black Muslims decided that its members should parti-  
5 cipate in general Muslim wars that he would not participate.

6 Q Well, I have difficulty with this. Are you  
7 submitting that this record shows that this registrant would  
8 fight in a war in which, say, Algeria or Jordan or Iraq or  
9 Pakistan or Iran are engaged? Do you think that's what --

10 A Well, he says so. He says specifically  
11 that --

12 Q The Nation of Islam --

13 A He says specifically that if Elijah  
14 Muhammed ordered him to do so, which he didn't think he would,  
15 but Elijah Muhammed ordered him to do so, he would. And  
16 that, I think, is inconsistent with a pacifist position.

17 Q I had understood that the Nation of Islam  
18 meant that those who make up the -- who constitute this  
19 religious sect in the United States of America, just like you  
20 would say you would fight in defense of the Episcopalian Church  
21 or the Methodist Church. Maybe I misunderstood the record.  
22 To me this is rather important.

23 A I shall refer to some parts of the record  
24 which I think will support the fact that there is a basis in  
25 fact for saying that his objections are selective; that is,



1 that he is not opposed to participation in war in any form,  
2 but that he wants to pick and choose his wars, and that his  
3 pick is essentially a racial and political choice.

4 Now, of course, in reviewing the case the Court  
5 will undoubtedly give close and careful attention to the  
6 report or advice letter of the Department of Justice. If,  
7 with the benefit of hindsight one goes through this letter  
8 looking for flaws, one can find some matters that might have  
9 been written differently, but if the letter is read from the  
10 beginning to end in its entirety, one will conclude, I think,  
11 that it is a very carefully thoughtful letter, written by a  
12 responsible officer in the special section of the Department  
13 of Justice which was set up for the purpose of examining into  
14 these difficult questions and which they were not binding on  
15 the draft board, but make a contribution toward thoughtful  
16 uniform national standards on these questions.

17 Q Does a copy of that letter at the time go  
18 to the registrant?

19 A I am not sure of that; I believe a resume  
20 or a summary went to the registrant.

21 Three objections are made to the letter and they  
22 don't present easy questions and if one reads the Petitioner's  
23 brief alone it's quite plausible, particularly when one is  
24 looking for flaws. On more careful examination, however, I  
25 believe that the views expressed in the Department of Justice's

1 advice letter were sound and are wholly consistent with this  
2 Court's decision, both before and after the letter was  
3 written.

4 And I think it should be borne in mind that the  
5 letter was written after the Seeger decision; of course before  
6 the Welsh decision, but on the whole there is not a great deal  
7 of difference between the Welsh and the Seeger decisions in  
8 their practical applications.

9 It's first said that the Department's conclusion  
10 that the Petitioner's beliefs were primarily political and  
11 racial was a violation of the First Amendment. I have already  
12 endeavored to deal with this. It is, I believe, entirely  
13 refuted by the Negre case itself. No one questioned that  
14 Negre's views were based on religious belief, yet they were  
15 found by the Court to be so political in essence, so incon-  
16 sistent with the pacifist position which Congress has recog-  
17 nized in the statute; a pacifist position which need not be  
18 based on orthodox religion as it was, but nevertheless, must  
19 still be a pacifist position, that they are not a basis for  
20 exemption.

21 And the Court specifically held that this was con-  
22 sistent with the First Amendment.

23 Similarly here, as I have said, the Petitioner's  
24 views are religious; that's not questioned, but they are also  
25 selective, just as Negre's were. And the Petitioner's

1 opposition to war is not total; there are political and  
2 racial exceptions to his objections and there may be room  
3 to argue about the evidence on this, but there is much  
4 evidence that it is so and thus there was an adequate basis in  
5 fact for the conclusions reached.

6 Probably the most difficult case for us on this  
7 point is the Sicurella decision, where the Court held and we  
8 surely do not disagree, that the willingness of a Jehovah's  
9 Witness to participate at some time in a theocratic war without  
10 carnal weapons, was not a sufficient basis for denying him ex-  
11 emption on the ground that he was not opposed to participation  
12 in war in any form.

13 Now, there is some related material in this  
14 record; there is some reference to Armageddon and to the  
15 ultimate battle of the Lord against the Devil and the sugges-  
16 tion that members of the Lost-Found Nation of Islam must be  
17 spiritually prepared for that eventuality.

18 As far as that's concerned, Sicurella certainly  
19 is applicable. There is also a reference in this record to a  
20 holy war. That's on page 68-A and here again we would show  
21 the tie-in between the Petitioner and the traditional Moslem  
22 religion. This is the Petitioner himself testifying at the  
23 hearing:

24 "But the Holy Koran do teach us that we do not  
25 take part of, in any part of war unless declared by Allah

1 Himself or unless it's an Islamic world war or a holy war" --  
2 and it goes as far as the Holy Koran is still talking, and  
3 saying "We are not to even as much as aid the infidels or the  
4 nonbelievers in Islam even to as much as handing them a cup  
5 of water during battle.

6 And there are other items of this record that  
7 support the selective nature of the Petitioner's objection.  
8 At page 18 the summary of his first hearing before the board,  
9 "Clay objects to being in service because he has no quarrel  
10 with the Viet Cong."

11 And at page 79-A and 80 of the record there is  
12 read to him a quotation from the Chicago Daily News which he  
13 not only says he made, but he says he believes it's true,  
14 beginning at the bottom of page 79-A:

15 "Let me tell you what Muslims are taught: to  
16 defend ourselves when we are attacked." Now, that's not con-  
17 sistent with the pacifist position. But then continging:  
18 "Those Viet Cong are not attacking me; these Viet Cong are  
19 riding a very nasty war over there. There is a lot of people  
20 getting killed. Why should we Muslims get involved? Besides  
21 I am fighting for the Government every day. I am laying out  
22 my life on the line for the Government. Nine out of ten  
23 soldiers would not want to be in my place in the ring; it's too  
24 dangerous."

25 Now, he says later on that he was chided by



1 Elijah Muhammed for making such a boastful statement but he  
2 does not deny that he made it.

3 Q What was the sentence that Clay got?

4 A I'm sorry, Mr. Justice?

5 Q What was the sentence imposed upon Clay?

6 A Five years I believe, Mr. Justice. Now,  
7 whether that was subject to reconsideration under the rule,  
8 I suppose that it is.

9 Then I would call attention to page 165-A of the  
10 record. This is a letter written by Clay himself to the draft  
11 board, and introduced in evidence at the hearing and four lines  
12 from the bottom of page 165-A: "Last but not least to mention  
13 is the stand that I took publicly as a conscientious objector  
14 to the war in Vietnam. The Illinois Boxing Commission chal-  
15 langed me and ruled that it would permit me to participate in  
16 the only fair fight to defend my World Championship Title  
17 which would have brought me \$2 million only if I would apolo-  
18 gize and retract the words that I stated publicly describing  
19 my conscientious scruples against participation in the War in  
20 Vietnam."

21 And then finally on page 185 of the record is an  
22 extract from a paper called "Muhammed Speaks," which was in  
23 introduced in evidence at the hearing and this is a statement  
24 of the Black Muslim belief. At page 185: "We believe that we  
25 who have declared ourselves to be righteous Muslims should not

1 participate in wars which take the lives of humans. We do  
2 not believe this nation should force us to take part in such  
3 wars for we have nothing to gain from it unless America agrees  
4 to give us the necessary territory wherein we may have some-  
5 thing to fight for."

6 Now, there are a number of other passages in the  
7 record to which reference is made in our brief and I shall  
8 have to refer to the brief for a further discussion of these.  
9 If one reads this letter like a jury charge perhaps one can  
10 find some error in it, particularly a passage on page 127 in  
11 the appendix. However, I don't think that it can be so fairly  
12 taken out of context and I call attention to the fact that in  
13 the Petitioner's brief itself it's referred -- in the  
14 Petitioner's petition at page 52 it is referred to as an im-  
15 plication. It has taken on greater strength in their later  
16 arguments.

17 We submit on the basis of the materials presented  
18 and further developed in our brief that the record clearly  
19 presents the basis in fact for the appeal board's decision.  
20 There is no question about the Petitioner's objections being  
21 religious in nature and so no question about the Welsh case is  
22 involved.

23 Insofar as there is a question remaining in the  
24 case that is covered by this Court's long-standing decision in  
25 SEstep, which -- the basis in fact rule. Using the words of

1 the Court in Wittmer against the United States: "It is the  
2 policy of Congress to make review within the Selective Service  
3 System final in all cases where there was conflicting evidence  
4 or where two inferences could be drawn from the same testimony.

5 Unless the Court is considered a super draft board,  
6 it should, I submit, affirm the judgment below.

7 MR. CHIEF JUSTICE BURGER: Thank you, Mr.  
8 Solicitor General.

9 Q Mr. Solicitor General, the question in the  
10 case you have argued is not that that was covered by our  
11 limited grant of certiorari; is it?

12 A To the best of my ability, Mr. Justice, it  
13 has been. I'm sorry if --

14 Q Well, I would point out that the question  
15 to which we limited this grant of certiorari was whether  
16 Petitioner's conviction should be vacated because the denial  
17 to him of a conscientious objector exemption may have been  
18 based upon the Department of Justice's erroneous characteriza-  
19 tion of his objections to participate in wars as political and  
20 racial, rather than religious.

21 And, as I understand it, you have begun this  
22 argument this morning by conceding that they were religious.

23 A And so we have all the way along, Mr.  
24 Justice. This is nothing --

25 Q And you argued the question as to whether

1 or not he is a selective objector, not the question of --

2 A That, Mr. Justice, I think, is precisely  
3 the situation in the Negre case. Our position in the Negre  
4 case, in those words in our brief, was that Negre's essential  
5 objection was political and philosophical and though based on  
6 religious grounds, was not the kind of religious objection  
7 which was covered by the statute and that is precisely the  
8 argument which we make here. We have never contended that  
9 Clay's objections were not religious; we have always contended  
10 the nature of Clay's objections are so infused with, so inter-  
11 twined with political and racial considerations that his  
12 religious objections do not meet the test of the statute;  
13 namely: that he is opposed to participation in war in any form.

14 And I have been endeavoring to try to develop my  
15 argument within the terms of the grant of certiorari, believing,  
16 or contending that our position here is exactly parallel to  
17 that in Negre where the contention was undoubtedly religiously  
18 motivated.

19 MR. CHIEF JUSTICE. Thank you Mr. Solicitor General.

20 REBUTTAL ARGUMENT BY CHAUNCEY ESKRIDGE

21 ON BEHALF OF PETITIONER

22 MR. CHIEF JUSTICE BURGER: Mr. Eskridge, we will  
23 enlarge your time by two minutes, in light of our extension  
24 to the Solicitor General.

25 MR. ESKRIDGE: Thank you, Your Honor.



1 Q May I ask you before you get under way and  
2 avoid an interruption, perhaps -- 185 of the appendix, the  
3 beliefs recited "We do not believe this nation"-- that is the  
4 United States, the reference is there --"should force us to  
5 take part in such wars for we have nothing to gain from it  
6 unless it agrees to give us the necessary territory wherein  
7 we may have something to fight for."

8 Would it be an unreasonable inference from that  
9 statement of the belief that if, for example, hypothetically,  
10 even though unlikely, there was some kind of agreement to give  
11 Hawaii or Texas or Alaska or some other area to the Black  
12 Muslim Nation that then they would fight?

13 Would that be a reasonable inference to draw from  
14 that statement of belief?

15 A No, sir.

16 Q It would not?

17 A No, sir.

18 Q Then what does it mean? "We have nothing  
19 to gain from taking part in such wars unless America agrees to  
20 give us the" -- something like that. Isn't that a conditional  
21 offer to fight under some conditions?

22 A Well, sir, if you take the first sentence  
23 -- there are two sentences there and now we are reading on the  
24 back of the Muhammed Speaks Newspaper, and the Solicitor  
25 General spoke of the Carson case. In that case these same

1 words: "We who believe that we who declare ourselves to be  
2 righteous Muslims should not participate in wars which take  
3 the lives of humans, period."

4 Then they go on: "We do not believe that this  
5 nation should force us to take part in such wars; should force  
6 us to take part in such wars if we have nothing to gain from  
7 this unlessssAmerica agrees to give us the necessary territory  
8 wherein we may have something to fight for."

9 Now, this language is ambiguous but it doesn't  
10 suggest that they will fight with weapons in war. And in the  
11 Carson case I would like to read you something that the Depart-  
12 ment of Justice said, that at best Carson's objection to war  
13 is based on "political, social, economic considerations and  
14 not religious," so that they are taking the position in the  
15 Carson case that he was not religious and they are taking the  
16 position here. I sense a prejudice against the so-called  
17 "Black Muslims" that appears in the Government's brief and in  
18 which it appears against this Defendant, who was the Heavy-  
19 weight Champion of the World, and who had announced he was a  
20 Muslim.

21 And with that, we submit, Your Honor, that this  
22 contrived language and the Advice Letter, now we don't say  
23 that the Advice Letter is one that's put to the Members of the  
24 Supreme Court. This Advice Letter went to laymen who made up  
25 the appeal board of Kentucky. They had to read this letter,

1 and if you all can't get this interpretation, how did this  
2 appeal board?

3 We say in Sicurella that if there are two  
4 erroneous grounds, in here they admit the sincerity; in the  
5 Advice Letter they did not admit the sincerity. In the Advice  
6 Letter the language is such that they didn't even admit that  
7 he was even religious.

8 So, we are saying, Your Honors, that you will  
9 have to reverse on the grounds of Sicurella because these  
10 issues are the issues in this case and not how the Justice  
11 Department finds them.

12 Q You think then it would be irrational on  
13 the record for the draft board and appeal board to have read  
14 this paragraph that I have quoted to you as a conditional  
15 refusal only?

16 A That one sentence, you mean? No, sir. It  
17 would have been unreasonable for them to have taken that one  
18 sentence to reach a conclusion that the Muslims would fight  
19 only in selective wars.

20 MR. CHIEF JUSTICE BURGER: Very well. Are you  
21 concluded, Mr. Eskridge?

22 MR. ESKRIDGE: Yes, sir.

23 MR. CHIEF JUSTICE BURGER: Thank you very much.  
24 The case is submitted. Thank you, gentlemen.

25 (Whereupon, at 11:05 o'clock a.m. the argument in  
the above-entitled matter was concluded)