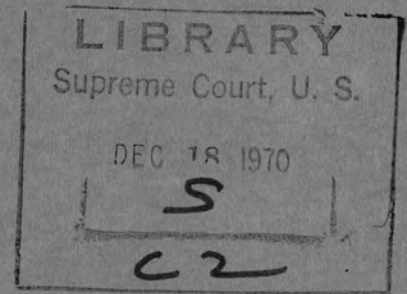


Supreme Court of the United States

OCTOBER TERM, 1970



Docket No. 85

In the Matter of:

----- x
GUY PORTER GILLETTE, :
 :
 Petitioner :
 :
 vs. :
 :
 THE UNITED STATES OF AMERICA :
 :
 Respondent :
----- x

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C O N T E N T S

1	<u>ARGUMENT OF:</u>	<u>P A G E</u>
2	Conrad J. Lynn, Esq., on behalf	
3	of the Petitioner	2
4	Erwin R. Griswold, Solicitor General	
5	on behalf of the United States	18
6	<u>REBUTTAL:</u>	
7	Conrad J. Lynn, Esq.	32
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

GUY PORTER GILLETTE,

Petitioner

vs

No. 85

THE UNITED STATES OF AMERICA,

Respondent

The above-entitled matter came on for argument at
10:05 o'clock a.m., on Wednesday, December 9, 1970.

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:

CONRAD J. LYNN, ESQ.
New York City
On behalf of the Petitioner

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

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in Number 85: Gillette against the United States.

ORAL ARGUMENT BY CONRAD J. LYNN, ESQ.

ON BEHALF OF THE PETITIONER

MR. LYNN: Mr. Chief Justice and may it please the Court: My name is Conrad Lynn; I represent the Petitioner and my co-counsel here are Leon Friedman and Mr. Marvin Kropotkin of New York City.

This appeal has been brought to some extent, as a selective conscientious objector claim. I feel that in fairness to the petitioner, that the Court keep in mind exactly what this young man has become and was at the time that he faced his draft board on the examination for the qualifications for conscientious objector.

This young man had graduated from high school and went to Texas to become a cowboy right after his graduation. After returning from Texas he attended a school, The Neighborhood Playhouse School in New York City for two years and he was granted a deferment, 2S deferment as a student for those two years. Before that he was classified 1-A.

In the spring of 1967 he felt called upon to write his draft board and when he was classified in the early spring -- in March of 1964 -- in his classification questionnaire he had not made any claim for being a conscientious objector.

1 But, by April 1967 this was, of course, at keying up of the
2 War in Vietnam, he wrote his draft board and I think I ought to
3 read the letter he wrote to his draft board, or part of it, at
4 least.

5 "I am requesting the classification of conscientious
6 objector on the basis of the following reasons: (1) --

7 Q Where does this appear?

8 A This is on page 3 of the brief of Petitioner.
9 I am sorry, Your Honor. Page 3 of the Petitioner's brief.

10 Q Thank you.

11 MR. LYNN: "I am requesting the classification of
12 conscientious objector on the basis of the following reasons:
13 (1) I believe that the United States Government is using all
14 the brutal instruments of modern war against a poor peasant
15 population which simply claims the right to have a government
16 of its own free choice; (2) I object to any assignment in the
17 United States Armed Forces while this unnecessary and unjust
18 war is being waged, on the grounds of religious belief;
19 specifically: humanism. This, essentially, means love and
20 respect for man, faith in his inherent goodness and perfecta-
21 bility and confidence in his capability to improve some of the
22 pains of the human condition."

23 Thereafter he was sent the Form 150 and he filled it
24 out and when it came to the question of whether he was
25 religious, he wrote in his form: "Religion to me means the

1 devotion of man to the highest ideal that he can conceive. A
2 respect for the dignity and race of every human being and the
3 capacity to enter into decent and just and lovely relations
4 with other human beings is not dependent upon being a member of
5 a specific religious sect or organization."

6 Now, as I understand from the brief of the Solicitor
7 General, there is no issue being made as to whether this young
8 man is religious under the Seeger and Welsh cases. I think
9 that that is not in dispute.

10 And the question of sincerity, if it please the
11 Court, was not disputed; it was -- Judge Wyatt who was the trial
12 judge in the Southern District Court in New York, he said,
13 "Aside from the question of sincerity." The Court of Appeals
14 for the Second Circuit also did not question the sincerity.
15 There was no specific statement from either court: "We believe
16 this young man to be sincere." It was simply not an issue in
17 the mind of the court, as it did not seem to be an issue in the
18 minds of the draft board, because the draft board simply said
19 that "This registrant seems to derive his objection to the war
20 mainly from the Vietnam War." I would like to read what the
21 draft board said, and that is on page 11; page 11 of the
22 Appendix -- the joint appendix here, at the bottom of the page.

23 "Registrant stated his conscience wouldn't let him
24 fight in Vietnam." This is the summary of the draft board
25 after the hearing.

1 Q What page is this?

2 A Page 11, near the bottom of the page; the
3 last paragraph --

4 Q Page 7 of your brief, I take it?

5 A Oh, is it also on page 7 of the brief? Oh,
6 yes; of course.

7 "Registrant stated his conscience would not let him
8 fight in Vietnam. Registrant also stated he could not honestly
9 say he would not defend his country if it were attacked. He
10 very well might fight in respect to the country being attacked.
11 The main source of information which brought about these
12 beliefs were from the news media in respect to publications on
13 the war.

14 "Registrant is opposed to military service in the
15 case of the Vietnam War; registrant formed his beliefs in the
16 past two years or so and is more or less a result of the
17 Vietnam War."

18 Q Mr. Lynn, may I ask you this?

19 A Yes.

20 Q What significance do you suppose the readers
21 would attach to his statement in the second paragraph that he
22 might very well -- he very well might fight if the country were
23 attacked?

24 A Yes.

25 Q What do you say that means?

1 A That means that he does not want to foreclose
2 a future contingency. I think it was an attempt to be as
3 honest as possible.

4 I recall very well, Your Honor, when we used to be
5 addressed by Norman Thomas, the Socialist candidate for
6 President, who was an absolute pacifist during the wars and he
7 was against all wars, as he made very plain and he was very
8 active in the movement against all wars. But when the second
9 World War came and we were attacked at Pearl Harbor, then
10 Norman Thomas gave what he called "constructive support" to
11 the war.

12 In other words, I believe, and I don't think anyone
13 ever questioned his sincerity -- between the two world wars,
14 that he was absolutely opposed to all war; he was an absolute
15 pacifist and even when he was questioned and with the advent
16 of Hitler to power he said that he thought that he should be
17 resisted with passive resistance.

18 But, nevertheless, when the United States of America
19 was attacked at Pearl Harbor there was something else in him;
20 he was an American citizen. And he said then, "I will have to
21 change my mind," and he gave constructive support to the war.
22 He was honest each time but there were different occasions
23 which greatly moved him. And so this young man

24 And so this young man, just as the young man in the
25 Sisson case, as Judge Wyzansky pointed out: he was being as

1 honest as he could be at this time when he's being questioned.
2 He's sure of what he's saying and what he believes at this
3 point. And therefore, he said, "I might defend the country
4 if it were attacked because he could not be certain of what
5 would happen to him in that contingency.

6 And I submit that that does not derogate from the
7 sincerity of his conviction of being opposed to the war.

8 Now, I say further that when he was questioned, as
9 it comes out in further questioning, that he would defend his
10 family or defend himself from attack; he would defend it by
11 every means necessary, defend from attack. These are excep-
12 tions that had been recognized because it is true that an
13 absolute pacifist does not resist at all; an absolute pacifist
14 does not resist at all, contrary to the statement on page 16
15 of the Government's answering brief, which says that "The
16 Congress has recognized conscientious objection as a basis for
17 exemption -- at the top of page 16 -- from military service has
18 it extended the privilege to persons other than those who were
19 total pacifists -- pardon me. I need to go back on page 15
20 at the end:

21 "Never in all the years in which Congress has
22 recognized conscientious objection as a basis for exemption from
23 military service has it extended the privilege to persons other
24 than those who were total pacifists; that is: opposed to all
25 forms of war."

1 Now, that is not altogether accurate, of course,
2 because the exception of the proviso that "I would defend my-
3 self; I would defend my friends; I would defend those close to
4 me," has not been considered to prevent a person from being
5 considered a conscientious objector. And of course, as the
6 Court is well aware, in the whole line of cases involving
7 Jehovah's Witnesses, culminating in the Sicurella case, this
8 exception on the part of the Jehovah's Witnesses, who have
9 written tracts that they publish -- they published a tract in
10 1951 and they are published in Watchguard, I think -- Watch-
11 tower -- they published an article saying, "Why we are not
12 pacifists," And the Court in Sicurella handled that by coming
13 to the conclusion that the Jehovah's Witnesses were not really
14 concerned with a war. They said "We are ready for a war that
15 is God-ordained; that our Jehovah sets that we should partici-
16 pate in. We are ready for that war." When they said that they
17 don't mean a real war on earth.

18 However, there are other authorities: Beyton(ph) for
19 example, who said that the Jehovah's Witness might very well
20 have considered that the first World War was one where the anti-
21 Christ was involved; the German Kaiser, and therefore they might
22 very well -- I don't personally know what the position of the
23 Jehovah's Witnesses was in the First World War, but it is this:
24 the Jehovah's Witnesses would not fight in any war if they felt
25 that a war were ordained -- a war right on earth and as

1 all the Justices know, many of the most bitter wars have been
2 religious wars.

3 So that when you exempt people who are in favor of
4 a war that conforms with their religion then you are making a
5 very major exemption and so therefore we have here the germ of
6 the approach to save the statute. Because, as I see it, the
7 Court has a choice in this argument of saving the statute by
8 interpreting it as it was interpreted for one way, in the Taffs
9 case, where the Court, a Court of Appeals in the 8th Circuit
10 felt that when the statute said, "participation in war in any
11 form," it was talking about a modification of participation in
12 any form of participation that was perhaps a semantic way of
13 dealing with the problem but they did have this question, this
14 logical question, that there are exceptions for a person not
15 being willing to engage in violent conduct and yet he is quali-
16 fied as a conscientious objector.

17 The Court has had this problem, of course, before
18 with this same statute. The law does read very clearly that a
19 person by reason of religious training and belief qualifies
20 as a conscientious objector and originally the statute said
21 also that the touchstone was whether the person believed in a
22 supreme being.

23 Now, of course, in the Seeger case the Court inter-
24 preted that statute in accordance, I submit, with the contem-
25 porary understanding of religion in large sections of the

1 population. We know of many sincere and religiously motivated
2 persons no longer believe in the -- God, and yet they are
3 stirred by the religious impulses and therefore, in Seeger,
4 this Court recognized that and they, in the Welsh case, which
5 was even further ahead, and the Welsh case went so far as to
6 say, and that is germane here that even if a person, as a part
7 of his moral stance, had taken into account political problems
8 as Welsh had very much so, and economic problems, and the social
9 destiny of the country, even though this was a part. And the
10 statute said that merely philosophical, social, political
11 beliefs cannot be a part of this religious feeling, nonetheless,
12 the Court pointed out, and I think very logically, and in
13 accordance with reality, that very often the political and
14 economic and social feelings of a person contributes to his
15 total moral position; that core of conscience which is supreme
16 for the individual.

17 Q Was there a Court opinion in the Welsh case,
18 Mr. Lynn?

19 A What's what?

20 Q There was not an opinion of the Court in the
21 Welsh case; was there?

22 A Yes.

23 Q I thought there was an opinion by Mr. Justice
24 Black, joined by three other members of the Court?

25 A Yes.

1 Q And that was not a Court opinion; of course.
2 That was not a majority of the Court.

3 A No, that is right. However --

4 Q And then there was another opinion by Justice
5 Harlan with quite a different rationale that led him to join
6 in the judgment of the Court. There was not a Court opinion,
7 in other words.

8 A Well, there was --

9 Q In the Welsh case, if my recollection serves
10 me.

11 A Your recollection is absolutely correct, Your
12 Honor, that one judge was speaking for four and Judge Harlan
13 had a separate opinion. However, it was a concurring opinion.

14 Q Well, in the judgment, but --

15 A The Court opinion in the judgment --

16 Q -- did not all join in the opinion of Mr.
17 Justice Black.

18 A No; and what Your Honor is saying here is that
19 there were only four judges who can be said to have the opinion
20 that was expressed in the opinion written by Justice Black --

21 Q That you are now relying on and of course,
22 four judges don't make a court.

23 A That's true.

24 Now, of course, when Judge Harlan wrote his con-
25 ccurring opinion he pointed out that, as in Seeger, the Court

1 concerned in an exercise of saving the statute and --

2 Q Mr. Justice Harlan expressly rejected the
3 statutory position expressed by Mr. Justice Black.

4 A Yes, he did, because he said that -- as I
5 understand what Mr. Justice Harlan--was saying was that the
6 Court was really, in a sense, repealing the statute. That's
7 how I understood it. And, this is the only way it can be
8 saved.

9 Now, I feel that this is the way it has been saved,
10 whether that was a majority opinion or not. At this time the
11 law stands because there were four judges concurring in an
12 opinion written by Mr. Justice Black and Mr. Justice Harlan
13 concurred in the judgment. So that Welsh was vindicated in the
14 judgment, even though, as Mr. Justice Stewart said, there was
15 no majority expression of a joint position in that case.

16 Q As I understand this case, however, Mr. Lynn,
17 I think you said at the outset of your argument: there is no
18 issue here as to the question of whether or not Mr. Gillette's
19 opposition to the Vietnam War is motivated by sincerely-held
20 "religious training and belief," to quote the statute, at least
21 as construed in the Seeger case in which there was a Court
22 opinion.

23 A Right.

24 Q As I read the Government's brief I think that
25 that is not an issue; that it is virtually conceded that Mr.

1 Gillette's opposition to the -- what's going on in Southeast
2 Asia, is supported by religious training and belief.

3 The only question is, since he has not indicated an
4 all-out opposition to all wars, whether or not the statute --
5 if not the statute, then the constitution -- requires that he
6 be exempted along with those whose opposition, religious opposi-
7 tion is to all war. Isn't that really what the issue is?

8 A That's the issue. And, Your Honor, if the
9 Court feels that the statute could not bear an interpretation
10 that this major emphasis, as I see Mr. Gillette's position, the
11 war triggered his thinking about it.

12 In 1964 when he registered, he said nothing. That
13 was in the very beginning of '64. It was before the war had
14 actually heated up in -- after the Gulf of Tonkin Resolution.

15 Now, he develops his position that he has watched
16 the war, as he said. This had an effect on this case and he
17 he became convinced, as a result of what he was witnessing, as
18 the board said, he had watched it in the news media: on TV,
19 over the radio; he had read the newspapers. This had a profound
20 effect on him. He didn't claim that he had read all the
21 philosophers like in Sisson. He -- Sisson had gotten his
22 Master's in Philosophy and no doubt he had more systematic
23 background, but this young man became convinced as he lived
24 through the events vicariously every day. And that's how he
25 formed his conviction.

1 And as he said -- as he testified before the draft
2 board when he was questioned, he had gotten through the Vietnam
3 War a feeling against war. Now, that is a position that I
4 think the Court should be aware of. Now, it may be that on
5 balance the draft board finding should be accepted. Now, if it
6 is accepted, then -- and if the statute cannot bear the inter-
7 pretation that a person, religiously motivated in the sense of
8 the Seeger case, can be a conscientious objector if the main
9 thrust of his feeling is against the war in which he is faced
10 with.

11 As he said, "I am against the war because this is the
12 war that I am faced with." If it cannot bear that interpreta-
13 tion then, of course, I don't see how the statute can stand
14 under the First Amendment, because there is no question but
15 that there is this position, this particular religious view
16 that he has, is sincerely held and to deny him the right to be
17 a conscientious objector when others are granted it who have a
18 more general position. Although, in my opinion, a person who
19 is so careful, as he was, to make plain that he didn't foreclose
20 the possibility that he might defend his country if it were
21 actually attacked, I would say that this is as profound and as
22 -- is a position that merits as great a respect as any possible
23 position.

24 Now, in the --

25 Q Do you know what percentage of our Armed

1 Forces are involved in Vietnam?

2 A I would say about one-quarter of all the armed
3 forces.

4 Q Because, if a person is opposed to all war by
5 reason of religious training and belief, it follows that for
6 him to serve in the military impinges seriously upon his
7 religious training and beliefs. But, if a person who is
8 opposed only to what's going on in Vietnam by reason of his ---
9 by his religious training and belief, then it does not follow
10 that it impinges upon his religious training and belief to
11 serve the United States of America with the Armed Forces dedi-
12 cated to the territorial defense of this nation or even to
13 serve in West Germany or in Belgium; does it?

14 A Yes, it does; because as he made it plain to
15 the draft board, as we quoted. He said, " I would not take
16 part in the war effort, period." That means, in other words,
17 if he were in the Continental United States he would be taking
18 the place of a man who would be serving and what his thrust
19 was, as you may notice that all the statements and the state-
20 ments of the draft board itself, his criticism is not of any
21 danger to himself; his criticism and his feeling, his moral
22 revulsion is directed towards what is happening to the people
23 over there.

24 At no time did the draft board say, and no time did
25 he express any feeling about his own safety that he doesn't

1 want to participate. He was opposed to taking part in the
2 war effort as a whole, because that would mean --

3 Q Serving in the Coast Artillery on one of the
4 coasts of the Continental United States would not be getting
5 involved with the peasantry in Vietnam; would it?

6 A Of course not, but because this war has
7 affected his beliefs to such a degree that he cannot take any
8 part whatsoever in its support. Therefore, he could not con-
9 scientiously serve even over here because he would be replacing
10 a man who might very well participate in that portion of it
11 which greatly revolts his feelings. And I think that this is
12 not only that he has this right, not just because of the
13 statute; I think he has this right under the First Amendment
14 because where you have conceded that this is a religiously
15 motivated impulse, then you recognize the supremacy of con-
16 science.

17 The one parallel case that comes to my mind is the
18 dissenting opinion of Chief Justice Charles Evans Hughes in
19 U. S. against MacIntosh, speaking for himself and Stone and
20 Holmes and Brandeis. And that position, I think, was later
21 adopted by Judge Douglas, in writing the majority opinion in
22 *Girouard*, and where this person had said that he could not
23 take an oath to participate in all wars that his conscience
24 would have to determine whether he could take, and of course,
25 he was denied the right to become a citizen.

1 But, in the Girouard case, of course, the Court
2 held that the domain of conscience is supreme, reading briefly
3 from the opinion which was adopted in the Girouard case,
4 reading from Judge Hughes' opinion:

5 "Undoubtedly in the form of conscience, duty to a
6 moral power higher than the state has always been maintained,"
7 and so I think that the United States Constitution recognizes
8 in the First Amendment this right of conscience, and was said
9 by Stone in his great essay which is quoted in the Seeger case:
10 a state should -- a state that we can support, should recog-
11 nize this supremacy of the conscience.

12 "All our history," he says, which is quoted in
13 Seeger at page 170: "All our history gives confirmation to the
14 view that liberty of conscience has a moral and social value
15 which makes it worthy of preservation at the hands of the
16 state, so deep in its significance and vital, indeed, is it to
17 the integrity of man's moral and spiritual nature that nothing
18 short of the self-preservation of the state should warrant such
19 violation, and may well be questioned whether the state which
20 preserves its life by a subtle policy of violation of the
21 conscience of the individual will not, in fact, ultimately lose
22 it by the process."

23 I think this is the core of the position of this
24 Petitioner.

25 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Lynn.

ORAL ARGUMENT BY ERWIN R. GRISWOLD, SOLICITOR
GENERAL ON BEHALF OF THE UNITED STATES

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

MR. GRISWOLD: May it please the Court: This case I believe, presents again the problem which was not decided last term in United States against Sisson --

Q And Welsh? Sisson and Welsh.

A And Welsh. The question which may be summarized is that of the selective conscientious objector; the objector to a particular war who does not claim to be fundamentally opposed to all wars.

Q And was I correct in understanding that there is no issue here as to the fact that his conscientious objection, quite apart from the scope of it, is statutorily supported; that is: is based upon his religious training and belief as that statutory phrase was construed in the Seeger case?

A There is no contention that his beliefs here are not religiously based, as that word was adumbrated in the Welsh case. And I believe adumbrated means --

Q Well, it was --

A -- I believe adumbrated means stated in a cloudy fashion(?) and --

Q -- in the Welsh case there were four members of the Court and --

A That's why I said "adumbrated" in the Welsh

1 case. Four members of the Court construed the words out of the
2 statute --

3 Q And four other members of the Court heartily
4 disagreed with it.

5 A And four other members of the Court disagreed
6 with that but none of them held that in order to maintain the
7 constitutionality of the statute it must be treated as if they
8 weren't there. And whatever the effect of it is, we make no
9 contention that this is not religiously based within the mean-
10 ing of the Seeger case, and I say the Welsh case, whatever it
11 is. Of course I do not seek to resolve that difference, ex-
12 cept that the consequence was that in one case -- in the case
13 of four Justices on grounds of statutory construction and in the
14 case of the fifth Judge on what I think must be said to be
15 statutory construction compelled by the constitution. The
16 result would be that the effect of religious training and be-
17 lief in the statute was, shall I say, "qualified."

18 At any rate, as so qualified, we raise no contention
19 that it was not religiously based here.

20 The question arises here, because of the finding of
21 the District Court, and this appears on page 11 of the -- excuse
22 me, on page 13 of the Appendix: "No; I made it plain that I
23 think if there was a basis in fact for the board concluding
24 that whatever moral views were held they were directed to the
25 Vietnam War."

1 This case was tried before Judge Wyatt with a jury.
2 It led to a verdict of guilty. The only issue which Judge
3 Wyatt submitted to the jury was the question of whether he
4 willfully failed to comply with an order to report for induc-
5 tion and the issue before the Court of Appeals and before this
6 Court is whether Judge Wyatt made any errors of law in connec-
7 tion with the conduct of the trial leading up to that submis-
8 sion to the jury and the only error of law which is suggested,
9 relates to this question of selective conscientious objection,
10 which is embodied in that ruling of Judge Wyatt's which appears
11 on page 13 of the record.

12 Similarly, the Court of Appeals stated it on the
13 same basis. Page 20 of the appendix, the second paragraph on
14 the page. The Court of Appeals says:

15 "Evidence derived from Gillette's Selective Service
16 file and from his testimony before Judge Wyatt reveals that
17 Gillette's beliefs were based on humanism and that's within the
18 Welsh case, and was specifically directed against the War in
19 Vietnam, which raises the selective conscientious objection
20 issue."

21 The statutory provision involved here seems to be
22 rather clear: it is Section 6J of the Military Selective
23 Service Act of 1967, which grants exemption from training and
24 service in the armed forces to any person found by his local
25 board to be, by reason of religious training and belief,

1 conscientiously opposed to participation in war in any form.
2 All of the applicable factors of statutory construction point
3 to the conclusion that, as a matter of interpretation or con-
4 struction, this passage of the statute, particularly the last
5 three words, should be construed to mean what it seems to say.

6 I suggest that this conclusion was supported on at
7 least five grounds: (1) the language of the statute: in any
8 form. (2) --

9 Q -- you don't -- to read as though it were
10 written, "In any form of war," rather "participation in any
11 form of war?"

12 A I don't think it really makes much difference,
13 but I do think it is "participation in war in any form," and --

14 Q So that if "in any form," modifies war rather
15 than participation --

16 A That is where it lies in the statute; it
17 doesn't say "participation in any form in war." I don't think
18 it would make much difference if it did. If you can't parti-
19 cipate in any form in war you are totally conscientious objec-
20 ting; if you can't participate in war in any form you are
21 totally conscientious objecting.

22 And second: the long history of provisions of this
23 sort; and third: the more immediate legislative history; fourth:
24 the practicalities of the situation and fifth: the decisions of
25 this Court and of other respected courts and judges.

1 And first: the language of the statute; it's as I
2 have indicated. It says "opposed to participation in war in
3 any form." The words are simple and sweeping. "In any form."
4 It is hard to see how the legislative intent could have been
5 more clearly put. I don't think there can be any doubt in the
6 light of all the setting as to just what Congress really meant.
7 The very shortness and simplicity of the language leads to the
8 conclusion that it means what it says and there is no ambiguity
9 here, such as the Court found in the words "religious training
10 and belief," or at least some members of the Court found in
11 religious training and belief involved in the Welsh case.

12 And next we have the history of provisions of this
13 sort. They go back at least to 1775 when the Continental
14 Congress adopted a resolution to honor the consciences of those
15 who "from religious principles, cannot bear arms in any case."
16 And all of our early legislation on conscientious objections
17 was in terms of numbers of the historic peace churches: the
18 Quakers, the Mennonites and others, all of whom were opposed to
19 war in any circumstances.

20 In our modern view the exemption cannot be limited
21 to members of particular churches. It must be extended to all
22 those whose views are "religious" in a broad and deeply-held
23 sense, including humanism. But this is no reason for changing
24 the scope of the exemption, which has always involved opposition
25 to war "in any form."

1 Q Mr. Solicitor General, has there ever been a
2 period in this history where Congress has denied any conscien-
3 tious objection status?

4 A I do not believe so, Mr. Justice. That his-
5 tory is outlined in detail in the appendix to the Seeger brief
6 five years ago. I read that through in connection with the
7 Welsh case. I don't recall that there has ever been a period
8 when conscientious objection is completely denied.

9 Q You have no doubt that Congress could do so if
10 it wished?

11 A I would have no doubt myself that Congress
12 could do so and you and the Court a generation ago said so, but
13 I don't know of any decisions on that point.

14 Q No.

15 A Next I turn to the more immediate legislative
16 history. At the time of World War II, Senator La Follette
17 proposed an amendment which would have granted exemption on the
18 ground of a conscientious objection to the undertaking of com-
19 batant service in the present war. This was rejected by the
20 Senate; no changes have since been made in the statute; it
21 continues to be applicable to those who are opposed to partici-
22 pation in war in any form.

23 And then there are the practicalities of the situa-
24 tion. As Congress saw when Senator La Follette's amendment was
25 proposed in 1917, there was a great practical difference; a

1 difference in kind between opposition to participation in war
2 in any form and opposition to a particular war. How particular
3 must the war be?

4 In World War II could a person have said that he was
5 opposed to the war in Europe and Africa, but not opposed to the
6 war in the Pacific on the ground that the Japanese had attacked
7 us but we hadn't been attacked in Europe and Africa? Or could
8 we, on sincere religious grounds, have said that he was opposed
9 to air war because it affected civilians, but was not opposed
10 to ground war?

11 Q Well, now, the question is: could he? Because
12 he obviously could, couldn't he?

13 A Could he successfully -- could he have come
14 within the language of "opposed to participation in war in any
15 form," and can it be practically determined how sincerely or
16 whether he really is sincere, particularly when the external
17 earmarks of conventional religion have been taken away from the
18 test.

19 Q Well here I thought, to go back, that there
20 was absolutely no issue at all about the basis of his, this
21 man's opposition --

22 Q There is no --

23 Q So we're not dealing here with difficulties of
24 proof --

25 A I'm talking about the question of construing

1 this statute as to whether the words "in any form" mean, shall
2 I say, "in any form?" And I am suggesting that if they are
3 construed to mean something other than that that the practical
4 questions which will be raised in other cases -- not in this
5 case, but in other cases -- will be very serious.

6 Congress is expressly given power by the Constitu-
7 tion to raise and support armies, but how it is possible to do
8 this as a practical matter, since each man must be asked each
9 time he is ordered to a specific duty whether he is conscien-
10 tiously opposed to participation in this particular segment of
11 war. And I don't say "of the war;" I say "of war."

12 In this connection it may be pointed out that it is
13 not possible to learn now whether either the petitioner here
14 or the petitioner in the next case would ever be sent to
15 Vietnam if he should see service in the Army. Not all drafted
16 men, by any means, are sent to Vietnam; the country has many
17 other responsibilities throughout the world which require the
18 maintenance of large units of the armed forces in many cases:
19 in Germany and elsewhere in Europe; in Korea; in the Philippines;
20 in Hawaii and many other bases in this country and the Arctic
21 and in the Mediterranean. It is hard to see on what basis the
22 petitioners can claim exemptions from combatant or noncombatant
23 training when they would conscientiously accept some combatant
24 or noncombatant service.

25 And finally, there are a number of decisions which

1 construe the statutory language the way it reads. And perhaps
2 the best known of these was that by the great Justice Augustus
3 Hand in his opinion in the United States against Kauten, cited
4 on page 18 of our brief, where he said that a belief sufficient
5 to qualify for conscientious objector status must be a general
6 scruple, "against participation in war in any form" and not
7 merely an objection to participation in a particular war.

8 Now, this interpretation has been followed in a
9 number of cases. Also cited on page 18 of our brief, including
10 the two courts below in the cases now before the court.

11 There is also the well-known passage by Mr. Justice
12 Cardozo as concurred in by Justices Stone and Brandeis and
13 Hamilton against the Regents and the Court's opinion in that
14 case quoting with approval from United States against MacIntosh.

15 And this seems to have been the unanimous view of the
16 Court in the Welsh case as we have indicated by references to
17 the three opinions in that case on page 19 of our brief. And
18 since the proper construction of the statute shows that Congress
19 has determined to limit the exemptions the remaining question
20 before the Court is whether this legislative judgment runs
21 afoul of some constitutional commands. And we submit that it
22 does not.

23 Turning to the constitutional argument we note first
24 that the constitution, in simple but broad and unqualified terms,
25 gives the Congress power to raise and support armies. This has

1 been broadly construed by this Court in the selected draft law
2 cases and more recently in United States against O'Brien. The
3 chief ground for limitation suggested here is that of religious
4 freedom under the First Amendment.

5 This Court has declared that Congress need grant
6 no exemption to conscientious objectors at all, in Hamilton
7 against the Regents, and United States against Mac Intosh. I
8 am glad that Congress does provide an exemption for conscientious
9 objectors. Indeed, my principal concern about this case is that
10 if the exemption is pushed to unintended and impractical
11 lengths it may jeopardize the whole concept of the exemption
12 which has, in fact, worked remarkably well over a period of
13 close to 200 years.

14 When there was, as there was for a long time, an
15 essentially religious meaning to the phrase "religious training
16 and belief," then there was an external standard which could be
17 used with some objectivity in determining the sincerity of the
18 claim. Now, that is largely gone. If selective conscientious
19 objection has to be recognized, the external standards almost
20 completely disappear. It then becomes almost entirely a matter
21 of personal preference or choice.

22 Many personal choices are passionately held,
23 sincerely and conscientiously maintained. Indeed, one of the
24 ecomments often made about youth is that they readily convert
25 any matter of choice or preference into a matter of sincerity or

1 conscience.

2 One of the problems about a conscientious objector
3 system is to administer it fairly; fairly to those who go, as
4 well as those who are allowed to engage in alternative service.
5 It needs to be remembered that for every conscientious objector
6 there is a man called to serve who would not otherwise be
7 called. He isn't here; he isn't before us, but in every case
8 it is a choice between this man and some other man.

9 If it becomes impossible to administer the system
10 fairly then Congress may conclude that it should be terminated
11 and many would agree, I think, that that would be unfortunate.

12 In the terms of the First Amendment there are two
13 aspects: the Establishment Clause and the Free Exercise Clause.
14 Now, both the history and the practice with respect to con-
15 scientious objector provisions show that Congress is seeking to
16 accommodate rather than to establish religion. This is, indeed,
17 the effect of the Welsh case. To make it clear that no form of
18 religion or nonreligion as long as it is deeply held, is
19 given special treatment. No religion is favored; none is
20 discriminated against; none is established.

21 In excluding selective objectors there is no reli-
22 gious difference; no religious discrimination; no one is called
23 because he holds a particular religion; no one is exempted be-
24 cause he holds a particular religion. What the statute does is
25 to recognize a qualitative difference between general and

1 selective objection without regard to religion if the claim is
2 deeply and sincerely held.

3 Selective conscientious objection necessarily in-
4 volves a form of political judgment, a conclusion in opposi-
5 tion to the policy reached by the duly elected government with
6 respect to a particular area at a certain time under stated
7 conditions. Though the response may be religiously or con-
8 scientiously motivated it rests in the first instance on a
9 decision that is particular and political.

10 In contrast, those who conscientiously oppose parti-
11 cipation in combat in any form do not invoke the same type of
12 contemporary political judgment. Their objection is to war;
13 all wars, independent of place, time or circumstances.

14 We have here a particular form of selected objection,
15 but there could be others: objections to particular weapons or
16 to the political makeup of our allies in any war; or to combat
17 on Sunday or on Saturday. Congress does not establish or dis-
18 establish any religion when it says that such matters need not
19 be gone into, that selective conscientious objection of any sort
20 will not be recognized, whether based on religious, humanistic
21 or purely personal grounds.

22 While the claims of the categorical objector will be
23 accepted if based on religious, humanistic or deeply held con-
24 scientious grounds. In this determination religion in the
25 conventional sense or the absence of it is irrelevant. There is

1 no establishment of religion here.

2 Q The statute does specifically exclude objection
3 that is based on political opposition to all war --

4 A Yes, in a further clause -- on -- I've for-
5 gotten the exact formulation of it, but a personal moral code
6 is excluded.

7 Q Well, what I am suggesting is, if I understand
8 your argument, you're saying that if you set the selective con-
9 scientious objector it runs pretty close to the specific thing
10 that -- you would run into the specific thing --

11 A You run into that language --

12 Q Excluded. Is that your argument?

13 A Yes, Mr. Justice.

14 Q In part, I mean.

15 A That has to do, I think, with construing the
16 intention of Congress with respect to these matters.

17 Finally, there is no violation of the free exercise
18 clause. Many persons conscientiously oppose many facets of the
19 law established by Congress and the state legislatures and
20 mention may be made of abortion, the death penalty, marijuana,
21 polygamy, divorce, vaccination, fluoridation and birth control.
22 These objections may be most sincerely held and based upon deep
23 religious teaching and conviction, or equally held conscientious
24 scruples. Yet it is long since established that the mere fact
25 that the objection is religious or deeply held does not give the

1 holder of such views any license to violate the duly established
2 laws.

3 Religiously-derived views do not prevail over
4 national policy and justify noncompliance with the law.

5 A contrary view would extend to the paying of taxes,
6 to compliance with laws for the education of children; to
7 health laws and many other aspects of our national life.

8 Indeed, it is not too much to say that to proceed very far down
9 that road leads to a form of anarchy where each person makes up
10 his own mind which of the laws established by the democratic
11 process he feels he can conscientiously comply with. And this
12 is essentially inconsistent with democratic government and
13 would undermine the integrity of the democratic process.

14 In allowing exemptions to those opposed to war in
15 any form, Congress has successfully charted a course that pre-
16 serves the autonomy and freedom of religious bodies while
17 avoiding any semblance of established religion, as this Court
18 said last term in the Welsh case.

19 And finally, there is no violation here of the
20 equal protection concepts which may be implicit in the Due
21 Process Clause of the Fifth Amendment, though that amendment
22 does not, itself, contain an equal protection clause in haec
23 verba.

24 As I have suggested, there is a qualitative differ-
25 ence between those who assert an unalterable "religious"

1 opposition to killing in any war and those whose scruples
2 against a particular war necessarily depend upon social or
3 political considerations of the moment. The classification
4 which Congress has adopted is a rational one. Congress could
5 of course, extend it, but this was not recommended by the
6 most recent comprehensive survey of the draft laws and the
7 Marshall Commission's Report cited on page 34 of our brief.

8 Congress has, in fact, maintained a choice which has
9 been a part of the fabric of our law and national practice for
10 nearly 200 years. There is no reason for concluding now that
11 this choice violates any provision or concept of our constitu-
12 tion.

13 We submit that the judgment below should be
14 affirmed.

15 MR. CHIEF JUSTICE BURGER: I thank you, Mr.
16 Solicitor General.

17 You have one minute remaining, Mr. Lynn.

18 REBUTTAL ARGUMENT BY CONRAD J. LYNN

19 ON BEHALF OF PETITIONER

20 MR. LYNN: Thank you, Your Honor. I just want to
21 call to the Court's attention that the draft board in this case
22 was -- disqualified him because he said, Mr. Gillette, that it
23 was the Vietnam War that caused him to have, was the motivating
24 force for him having a conscientious objector position. To
25 conclude from that that it was only this war he is objecting to,

1 I think, is an extension of what was really said and it was a
2 conclusion on the part of the draft board, which I think was
3 unjustified.

4 Andsecondly, I might point out that in Seeger, and
5 not waiving of Welsh altogether, but in Seeger, it was
6 acknowledged that political considerations might very well form
7 a part of the base of conscience. How can one in our time, and
8 especially young men who so must think deeply about these
9 problems completely put aside any political considerations in
10 coming to a moral stance: their conscience.

11 And I think it's artificial to say that there must
12 be no political considerations at all before a conscientious
13 objection is recognized.

14 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Lynn.
15 Thank you, Mr. Solicitor General. The case is submitted.

16 (Whereupon, at 11:00 o'clock a.m., the argument in
17 the above-entitled matter was concluded)
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