SPHEX CLUB

October 10, 1947

NATURALIZATION AND QUALIFIED LOYALTY

by James R. Cooke

During the "late unpleasantness", it was my fortune or misfortune to serve as a member of the Selective Service Appeal Board in this section. Our jurisdiction covered all appeals from twenty-two counties and the cities and towns in those counties. Our duties were to pass on all appeals from classifications by the local Boards in the district. While so serving I became interested in the matter of conscientious objectors, which proved one of the most difficult problems with which our Board had to deal.

The subject of this paper results from that background and a recent decision of the Supreme Court of the United States (April 22, 1946) dealing with the question of naturalization and the right of an applicant to qualify the oath of loyalty. This particular decision, frankly, riled me as a lawyer, not by reason of the result of the decision, but because of the fact that it seems to me that under the circumstances existing the decision of the Judges of the Supreme Court of the United States was unjustified and inexcusable.

As stated, I would have no particular quarrel with the decision on the pure merits, had it been an original decision, even though, frankly, I do not think then I would have agreed with them. I was riled because I felt that the decision under the particular facts and circumstances existing was dictated, not by what had always been accepted as definite and positive

rules of law to govern in the question of construction of statutes, but by blind subservience of a hierarchy of New Deal packerism to a philosophy for which they had been definitely appointed, and thus it showed only loyalty to the fallacious principle that the end justifies the means, and that power is equivalent to right.

The naturalization statutes for the United States require certain qualifications of applicants, such as that the applicant must be a person of good character; that he is not opposed to organized government; that he is not a member of any organization teaching such opposition; does not advocate the killing of officers of the government to accomplish changes; that the applicant is not a polygamist, etc. In addition, the law requires an oath of the applicant, as follows:

> "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign princes, potentate, state or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without mental reservation or purpose of evasion, So Help Me God!"

In order to carry out the purpose of the requirements of naturalization, the government department in charge requires the applicant to fill out an application and answer certain questions, one of which is "If necessary, are you willing to take up arms in the defense of this Country?" The application, of course, contains other questions to give the information showing that an applicant conforms to

all the necessary requirements provided by statute and general information which would bear on these qualifications.

Up until 1926 it seemed to have been assumed by the authorities that the oath of allegiance in providing that the applicant would "defend the constitution and laws of the United States" and that the oath is taken "without mental reservation or purpose of evasion" required that an applicant must answer in the affirmative the question of willingness to take up arms in the defense of the country. Apparently no other contention had been made up to that time, or, if so, no case had been appealed to the Supreme Court of the United States to pass on the question.

Under our system of the division of the government into legislative, judicial and executive departments, the right to legislate, of course, so far as the national government is concerned, rests in Congress, and the right to construe all legislation rests in the courts.

It will be noted that the question with regard to willingness to bear arms is not contained in the statutes but merely in the application form provided by the authorities to elicit the information which they deemed pertinent in regard to the statutory requirements.

At the outset, it is probably well to clear up a misconception which generally prevails, that is, that the Constitution of the United States, in providing for freedom of thought and freedom of religion, protects all and every one from the requirement of armed service if such armed service would be contrary to their conscientious

religious convictions. This is not the case. It is recognized by all courts that such protection can only come from Congress. In times of war constitutional guaranties give way to the necessity of defense, and many rights such as freedom of thought, freedom of the press, the writ of habeas corpus, etc. are available in times of war only to the extent that Congress may allow.

Historically, it is unquestionably true that since the formation of our government, and in the case of every war, Congress, true to the general spirit and philosophy of the Constitution, has in fact granted exemption from military service to conscientious objectors, and doubtless will continue to do so. This, however, is the prerogative of Congress, and there never has been any contention otherwise.

There have been four cases which have arisen since 1926, which reached the Supreme Court of the United States, and which involved the question now under consideration, and which cases I propose to review for the purposes of this paper.

The reasoning and the arguments pro and con on the merits of the original question, that is, whether an applicant should be allowed to qualify the oath of allegiance to the extent that he accepts it in full, except that he would not bear arms, even in time of war, since such would violate his conscience, are set out in the opinions.

Actually, there is no reason why this particular question should ever have reached the Court, and if the form of

application had not contained the question with reference to the willingness to bear arms, the question would doubtless not have reached the Court, since the applicants would have taken the oath of allegiance with their own interpretation of the meaning, and then if and when such applicants should have been called on to take up arms they could then have raised the question and taken it to court, if necessary, or if, as heretofore, Congress provided exemptions for conscientious objectors, then no question could have arisen.

The first case to reach the Supreme Court of the United States, and which seems to be an ideal case, so far as the question is concerned, in that the applicant seems highly qualified in every way with the one exception, was the Schwimmer case, decided in April, 1929, by a divided court four to three.

Rosika Schwimmer was born in Hungary and was a citizen of that country. She came to the United States in 1921 to lecture and had resided in Illinois since August, 1921. She filed her petition for naturalization in 1926. Her petition stated that she fully understood and believed in our form of government and was willing to take the oath of allegiance. She was a woman of high culture and education and widely read, was more or less proficient in French, German, Scandanavian and Italian languages, and highly proficient in the English language. She was forty-nine years of age, a lecturer and writer, and apparently a woman of impeccable character. To the question as to whether she was willing to bear arms in defense of the country, if necessary, she answered: "I would not take up arms personally." In Court she stated that she

did not wish to remain a subject of Hungary, that she found the United States the nearest to her ideal of a democratic republic, and would wholeheartedly take the oath as she construed it, and further stated:

"I cannot see that a woman's refusal to take up arms is a contradiction to the oath of allegiance."

She further stated that before arriving in the United States she had defended American ideals and had defended America in 1924 during an international pacifist congress in Washington. She further stated that she was an uncompromising pacifist and had no sense of nationalism, but only a "cosmic consciousness of belonging to the human family."

She further stated that she was entirely willing to do everything that an American citizen has to do except fighting, and that if admitted to citizenship and American women were called on to do that she would not do it, as it was with her a matter of conscience.

When questioned as to pacifist propaganda, she stated that she was always ready to tell any one who wanted to hear it that she was an uncompromising pacifist and would not fight, and that in her writings and lectures she took up the question of war and pacifism, if she was asked for that.

Of course, the fact that she attended an international pacifist convention classified her for that purpose. The majority opinion of the Court was written by Justice Butler and denied citizenship, based on the following holdings:

1. That naturalization is a privilege to be given, qualified or withheld, as Congress might determine, and which the alien might claim as a right only upon compliance with the terms which Congress imposes. This holding has

never been and could not be successfully controverted and is agreed to by the Judges in all the cases, whatever view they might have taken of the merits of the question.

2. That it is the duty of a citizen by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution.

3. Whether citizens shall be exempt from serving in the armed forces in time of war will depend upon the will of Congress, and not upon the scruples of the applicant, except as Congress may provide. This principle is also agreed to by all parties.

4. The substance of the oath has been definitely prescribed by Congress. The words of the statute do not admit of the qualification upon which the applicant insists. For the Court to allow it to be made is to amend the act and thereby usurp the power of legislation vested in another department of the government. The difference between the Judges is the question arising out of the interpretation of the oath of allegiance.

6. That citizenship is a high privilege and when doubts exist concerning a grant of it, generally, at least, the doubts should be resolved in favor of the United States and against the claimant. This is a principle well established by numerous decisions of the Court.

7. That the common defense was one of the declared purposes for which the people ordained and established the Constitution, which provided for Army, Navy and Militia, and that the "right of the people to bear arms shall not be infringed."

8. Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in defense of their country detracts from the strength and safety of the government. Therefore, their opinions and beliefs indicating a disposition to hinder in the performance of that duty are proper subjects of inquiry and of vital importance, for "if all or a large number of citizens oppose such defense the good order and happiness of the United States cannot long endure" and that "the influence of conscientious objectors against the rise of military force in defense of the principles of our government is apt to be more detrimental than the mere refusal to bear arms."

It will be observed that the majority opinion construes the oath of allegiance to demand a willingness to bear arms when Congress requires it, despite conscientious objections. We might say that this opinion will be classed as based on a conservative or practical point of view in construing the will of Congress, as expressed in the oath of allegiance.

The opposite view is expressed in the dissenting opinion written by Justice Holmes and concurred in by Justice Brandeis and Justice Sanford. The opinions of Justice Holmes were always beautifully express and show the philosophic and to some extent idealistic mind. He and his brothers in the dissent were apparently more impressed by the philosophic or idealistic viewpoint, and the opinion of Justice Holmes forcibly expresses this view. It recites the superior intelligence and character of the applicant, and states that, while

she apparently is an extreme pacifist and will not take up arms, yet that it would not seem that the adequacy of the oath is affected by her statements in this regard, since she was a woman over fifty years old and would not be allowed to bear arms in any event, that she believed fully in the American form of government, though apparently she thought it could be improved, but that in this she was doubtless agreeing with what most intelligent people think; that her particular improvement looking to the abolition of war seemed not to be different in its bearing on the case from a wish to establish cabinet government, as in England, or a single House, or one term of seven years for the President. I quote further from the opinion of Justice Holmes, as follows:

> "To touch a more burning question, only a judge mad with partisanship would exclude because the applicant thought that the 18th Amendment should be repealed."

The opinion then recites that the applicant is apparently an optimist and believes that war will disappear, and that the impending destiny of mankind is to unite in peaceful leagues, and then proceeds:

> "I do not share that optimism nor do I think that a philosophic view of the world would regard war as absurd. - - - Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought - not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within, this country."

Justice Holmes then proceeded to suggest in regard to the majority opinion denying citizenship, that the Quakers

had done their share to make this country what it is, that many citizens agree with the applicant's belief, and that he had not supposed hitherto that we regretted our inability to expel them "because they believe, more than some of us do, in the teachings of the Sermon on the Mount."

To me, both of the above opinions, while ably presenting the respective viewpoints, really fail to consider the one and only practical question before the Court. One opinion, from a conservate or practical standpoint, decides the question on that basis, while the other decides it from a philosophic or idealistic standpoint. Both admitted that Congress alone had the right to prescribe the qualifications for citizenship. Thus, the only real question was "did Congress intend in the requirements set forth that an applicant must give unqualified allegiance to the United States government, or was Congress willing to permit an alien applicant to provide a qualification based on conscientious convictions?" Of course it is true that up to that point the Court had nothing to guide it except the language of the oath, but it seems to me that when the oath required the applicant "to defend the Constitution and laws of the United States against all enemies, foreign and domestic", and that the oath was taken "without mental reservation or purpose of evasion", the language was sufficiently broad to negative any idea that an applicant might add qualifications.

The majority opinion in effect held this in its holding that citizenship was a high privilege and that where there is doubt of construction the doubt should be resolved in

favor of the United States and against the claimant, though this point was not greatly stressed in the opinion.

In short, as I see it, both opinions were based on what the Judges on each side thought should be the law, one from a conservative and practical standpoint, and the other from a philosophical or idealistic standpoint, rather than deciding from the point of view of what was the law as set out in the Acts of Congress. Possibly this is merely the result of human nature in action and that, where there is no positive and inescapable construction required, Judges, being human, are apt to decide according to their own predelictions and viewpoints.

Looking at the matter coldly, I personally agree with the decision of the majority on the basis that, to my mind, the statute not only requires this construction, but that such construction had been the practical construction adopted by the administrative officers of the Government over a period of many years. Ordinarily in construction of statutes, this practical construction placed by administrative officers on the act over a period of years is held to have great weight in determining the construction.

The Schwimmer case was decided in April, 1929. Two years later - May - 1931, the McIntosh case was decided. The decision here was five to four. The majority opinion following the Schwimmer case, was written by Justice Sutherland, while the dissenting opinion was written by Chief Justice Hughes, with Justices Brandeis, Holmes and Stone concurring in the dissent.

McIntosh was a Canadian and had come to this country in 1916, and in 1925 declared his intention to naturalize. There was no personal objection to him in any way, except with regard to the question of willingness to bear arms. On this subject he stated that he would not promise in advance to bear arms in defense of the United States, and that he would only do so upon condition that he believed the war to be morally justified. He stated that he recognized the principle of submission of the individual to the will of the majority in a democratic country, but did not believe in having his own moral principles solved for him by the majority. This case was very fully argued out in the majority and minority opinions of the Court, and we therefore consider these opinions at some length.

For the majority opinion denying citizenship, the Court followed very largely the argument of the majority opinion in the Schwimmer case, to the effect that the right of citizenship was a high privilege; that doubts must be solved in favor of the United States and against the claimant, etc., but called attention to other points which deserved consideration.

The question was apparently raised in that case of the right of the administrative authorities to ask the question in regard to bearing arms. On this point the opinion stated that in view of the acts of Congress it was important to know whether the applicant was willing unable "to support the government in time of war as well as in time of peace, and to assist in the defense of the country, not to the extent or

the manner he may choose, but to such extent and in such manner as he lawfully may be required to do."

The opinion refers to the exalted and noble dream of peace on earth and the hatefulness of war, and then states:

> "But thus far mankind has been unable to devise any method of indefinitely prolonging the one or of entirely abolishing the other; and, unfortunately, there is nothing which seems to afford positive ground for thinking that the near future will witness the beginning of the reign of perpetual peace for which good men and women everywhere never cease to pray. The Constitution, therefore, wisely contemplating the ever present possibility of war, declares that one of its purposes is to 'provide for the common defense." In express terms Congress is empowered 'to declare war,' which necessarily connotes the plenary power to wage war with all the force necessary to make it effective; and 'to raise --- armies,' which necessarily connotes the like power to say who shall serve in them and in what way."

> "From its very nature the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams: 'This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life.' To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to prevent our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war.

> "These are but illustrations of the breadth of the power; and it necessarily results from their consideration that whether any citizen shall be ex-

> empt from service in the armed forces of the nation in time of war is dependent upon the will of Congress and not upon the scruples of the individual, except as Congress provides."

It will be noted here that the quotation above apparently adopts fully the ideas expressed by me following the treatment of the Schwimmer case, namely, that the sole power of the Court shall be to construe the intent of Congress in the language used in the statutes for naturalization and presents very forcibly from a practical standpoint considerations which would indicate that intent.

The opinion then refers further to the fact that Congress has always, by express enactment, in every war relieved from the obligation of armed services those who were "conscientious objectors" and that this policy is of such long standing that it is generally thought that it will always be followed, but states that this is a question for Congress to decide, not the courts, since "of course, there is no such principle of the Constitution, fixed or otherwise. The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. - - - The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution, but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be

withheld, the native-born conscientious objector cannot successfully assert the privilege."

No judge would be so brash as to deny the holding in the last quotation. The opinion here stands on firm legal grounds and it will be seen from the above that an alien applying for naturalization, if accepted subject to the qualification that he would not bear arms, would be in effect in a preferred position as compared with a native-born citizen, since, having been accepted subject to the qualification that he could not be compelled to bear arms, and even though Congress should not see fit to exempt conscientious objectors and all native-born citizens might be required to serve, regardless of such objections, the naturalized citizen would be exempt under the terms of his admission to citizenship. There would certainly seem to be no reason to put the naturalized citizen above the native-born citizen as to rights and privileges, and certainly it would not seem to be the intent or purpose of Congress to authorize or permit such discrimination against the native-born citizen. It would seem more logical to assume that the purpose of Congress was to have one and the same obligation for all citizens, and that the naturalized conscientious objector should, as the native-born one, have to rely on the will of Congress for exemptions, and take his chances as any other citizen must take that Congress would continue the policy heretofore followed in providing for such exemption.

The opinion then states further:

Quote

"It is not within the province of the courts to make bargains with those who seek naturalization. They must accept the grant and take the oath in accordance with the terms fixed by law, or forego the privilege of citizenship. There is no middle choice. If one qualification of the oath be allowed the door is opened for others, with utter confusion as the probable final result."

Unquote

Dissenting opinion McIntosh case.

Chief Justice Hughes, three other Justices concurring, filed a dissenting opinion, in which he refers to the question as being wholly a question of law, and that therefore it was not a question of whether naturalization was a privilege to be granted or withheld, that such is admitted, and further it must be freely admitted that Congress has the power to fix the conditions; and also unquestioned that Congress has power in its discretion to compel service in the army in time of war or punish for the refusal to serve; that Congress has the right to and can exact a promise to bear arms as a condition of naturalization; and that the sole question before the Court was whether Congress has exacted such a promise, that is, whether such exaction is implied from certain general words "which do not, as it seems to me, either literally or historically, demand the implication. I think that the requirement should not be implied, because such construction is directly opposed to the spirit of our institutions and to the historic practice of the Congress. --- If such a promise is to be demanded, contrary to principles which have been respected as fundamental, the Congress should exact it in unequivocal terms, and we should not, by judicial decision, attempt to perform

Unquote

what, as I see it, is a legislative function."

It will be noted that in this dissenting opinion, also, the Court accepts the principle that the real question is only to ascertain the intent of Congress in the Naturalization Act, a point which seems to have been largely overlooked in the Schwimmer case in the zeal of the opposing judges for their varying viewpoints.

Justice Hughes calls attention to the fact that Congress has laid down certain specific rules concerning the opinions and conduct of the applicants, that is as to their opposition to organized government, the teaching of such opposition, advocacy of the killing of officers of the government, a polygamist, etc., and calls attention to the fact that Congress in the Naturalization Act has said nothing positive with reference to the matter of conscientious objection to war or belief as a pacifist. He calls attention to the fact that applicant was a Baptist minister of high character, a member of the Yale Divinity School, Chaplain of the Yale Graduate School and Dwight Professor of Theology; that he had been a voluntary chaplain in the Canadian Army in the first world war, and the only possible objection was that he refused to bear arms as a matter of conscience and belief, and declared that his first allegiance was to the will of God, and that he could not put allegiance to government above allegiance to the will of God as he sees it.

The opinion calls further attention to the fact that

the oath of allegiance, which is the only requirement from which any possible requirement to bear arms could be inferred, is the same oath in effect as oaths required of civil officers generally and of Senators and Representatives in Congress, and that the law provides:

> "No religious test shall ever be required as a Qualification to any Office or public Trust under the United States;"

that in taking such general oath of office, in effect identical with the oath required of applicants for naturalization, no one would suggest that it was the intent to impose a religious test contrary to the express provisions of the statute prescribing the oath; that no such religious test should be applied; that, considering the history of the struggle for religious liberty, the large numbers of our citizens from the very beginning who have been unwilling to sacrifice their religious convictions, and in particular those who have been conscientiously opposed to war and who would not yield what they sincerely believed to be their allegiance to the will of God, I find it impossible to conclude that such persons are to be deemed disqualified for public office because of the requirements of the oath which must be taken before they enter on their duties. The terms of the promise to 'support and defend the Constitution of the United States against all enemies, foreign and domestic,' are not, I think, to be read as demanding any such result. There are other and more important methods of defense, even in time of war, apart from the personal bearing of arms."

The opinion further calls attention to the defense, both in industry and in the field of workers of all sorts, by engineers, nurses, doctors, chaplains, etc. in a way which did not require the overriding of religious scruples. I quote further from the opinion of Chief Justice Hughes, as follows:

> "I think that the requirement of the oath of office should be read in the light of our regard from the beginning for freedom of conscience,"

and so he concluded that, since the oath of allegiance is substantially the same, its meaning should be governed by the same considerations and interpreted in the same way.

It will be noted that Justice Stone, who had joined the Court after the decision in the Schwimmer case, joined with Chief Justice Hughes in his dissent in the McIntosh case. In short, Justice Stone was also of opinion that the refusal to agree to bear arms was not a qualification of the oath of allegiance, nor a ground for refusal of citizenship.

At the same term of Court at which the McIntosh case was decided, the Court decided the Bland case involving the same question. It is unnecessary to review the Bland case, as the decision was by the same division as in the McIntosh case, that is, five to four, and the opinion and dissenting opinion were very brief, simply relying upon the corresponding opinions in the McIntosh case.

I have quoted at length from the McIntosh case

on account of the force with which the opposing viewpoints were presented, and in order to present, as far as practicable, the various views, reasons and logic or lack of logic, according to the viewpoint in the different holdings. In the McIntosh case the Court apparently really considered the actual question before the Court, that is, the will of Congress, and which in my judgment received but scant consideration in the Schwimmer case. In any event, throughout all the opinions we see the same divisions on the basis of viewpoint, that is, whether from a practical or utilitarian or philosophic or idealistice, or conservative or liberal disposition of the various judges.

There is one other case decided in April, 1946, at a time when the personnel of the Court, with the exception of Justice Stone, who was then Chief Justice, had been completely changed, all the other Justices being Roosevelt appointees. This is the Girouard case decided April 22, 1946, by a vote of five to three, one Justice, namely Jackson, being then in England. This was the decision which riled me and which I shall now consider.

To my mind as a lawyer, the decision in the Girouard case is inexcusable. It reversed the holdings of the Court in the previous cases, adopting the principles as set out in dissenting opinions in the previous cases. I would have had no quarrel had the dissenting opinions in the previous cases been the majority opinions, even though my agreement would have been contrary to the majority opinions in such case. There is excellent force and logic on both sides of

the question, and were I deciding what should have been the intent of Congress it would have been quite difficult for me to reach a decision or feel sure that my decision was right, yet I would have been impressed by the view indicated in some of the majority opinions of the previous cases, that to construe the Acts of Congress to allow qualification of the oath of allegiance would be a dangerous construction for the country, on the basis of what was indicated forcibly in the majority opinion written by Justice Butler in the Schwimmer case, to the effect that, if a large number of citizens should oppose defense, then the good order and happiness of the United States could not long endure, and that the influence of conscientious objectors against the use of military force is apt to be more detrimental than the mere refusal to bear arms, and further, that the construction allowing the qualification would put a naturalized citizen in a preferred position over the natural citizen. Further than this, it seems to me that under such construction, when it became generally known, our country would become a dumping ground for pacifists, and in the course of time such a large percentage of our citizenship, from the influx of these and the ever increasing pacifist propaganda, might become pacifists and objectors that we might be put in a position in which there would not be a sufficient proportion of our citizens willing to bear arms to protect us against the might of a strong attacking power, and thus not a sufficient number to preserve either our political freedom, our religious

freedom, or our right to freedom of conscience.

Coming specifically to the Girouard case, the arguments pro and con on the merits of the question having been presented fully in the previous cases, we shall not deal with this feature in our discussion of the Girouard case, but shall only discuss the additional principle which was involved in the Girouard case, and which, as we see it, according to definite legal and common sense principles, should have been definitely determinative of the decision. In the Schwimmer, McIntosh and Bland cases, decided in 1929 and 1931, the decisions of the Court had construed the oath for naturalization to require that it be taken without qualification, and that a naturalized citizen should stand on no higher ground than a natural citizen, and like the latter should trust himself and his conscientious scruples as to bearing arms to the will of Congress, which historically had always protected such scruples with exemption provisions in time of war, and the natural assumption is that Congress will continue to follow this course.

In the Girouard case, as stated, the decision was five to three, reversing the previous decisions. We can best illustrate the point in regard to this case by dealing fully with the dissenting opinion of then Chief Justice Stone. This was one of the last opinions written by the Chief Justice, as he died shortly thereafter. In our judgment the opinion of Justice Stone was impregnable and unanswerable in law according to long established and definitely

fixed legal principles of construction and decisions which should govern judges, and this case, as we shall try to show, accorded not only with legal principles but also with sound common sense reasoning.

Justice Stone, apparently felt in duty bound as a judge to dissent in the Girouard case, even though that opinion was in entire accord with the views which he had previously expressed in the McIntosh case. When that case and the Bland case were decided in 1931, the question was relatively new, the only previous case being the Schwimmer case decided two years before, and sufficient time had not elapsed to determine whether the decision in the Schwimmer case interpreted the actual will of Congress or was not in accord with the actual will of Congress, which, under our Constitution, alone had the right to determine the qualifications for citizenship, as must be admitted by all judges.

Justice Stone fought valiently in the McIntosh case for the view of the majority in the Girouard case, and the latter case upheld the actual personal views of Chief Justice Stone. To a lay mind this might be considered inconsistent or to indicate that Chief Justice Stone had changed his views. This is not true. In the dissent in the Girouard case he expressly stated that the majority opinion accorded with his personal views, as set out in his previous dissent, and that he was not changing his views on the merits of the question as an original proposition. However, he was truer to his obligations as a Judge than to his personal views and

his opinion was thus based, not on his personal views, but on what he considered had been established as the meaning and will of Congress, as shown by what had followed the decisions in the previous cases, and that as a judge he was bound by the legal principle of stare decisis. Thus he felt compelled to protest the majority opinion in the Girouard case.

The legal principle of stare decisis was directly involved in the Girouard case, though not in the previous cases. The basis of this principle, so far as the present question is concerned, is that where a rule or principle in construction of an act by the legislative branch has been laid down by the Court and has stood over a period of time sufficient to show acquiescence by the law making department, and such department has done nothing to overrule or change such construction, then it must be considered as stare decisis, that is, standing decided, or settled, and that for a court to change such rule or principle, so accepted and acquiesced in, constitutes usurpation by the Court of the lawmaking power, which under our system of government belongs solely to the legislative department. This is especially true and accords with common sense as well as law, when the attention of the legislative department has been specifically called to the construction placed by the court on their act, and it has, either by express act or failure to act, refused to make any change or correction in the construction so laid down by the court. On the basis of this principle Justice Stone filed his dissenting opinion and called attention to the following:

1. "In three cases decided more than fifteen years ago, the Court denied citizenship to applicants for naturalization who had announced that they proposed to take the prescribed oath of allegiance with reservations or qualifications that they would not as naturalized citizens assist in the defense of this Country by force of arms or give moral support --- in any war which they did not believe to be morally justified or in the best interests of the Country."

2. That with three other Justices he had dissented in the McIntosh and Bland cases (he was not on the Court in 1929 when the Schwimmer case was decided) for reasons which the Court has now adopted for overruling them.

3. "Since the Court in the considered earlier opinions has rejected the construction of the statute for which the dissenting justices contend, the question which for me is decisive of the present case is whether Congress has likewise rejected that construction --- and confirmed the Court's earlier construction of the statutes in question. A study of Congressional action taken with respect to proposals for amendment of the naturalization laws since the decision in the Schwimmer case leads me to conclude that Congress has adopted and confirmed the Court's earlier construction of the naturalization laws. For that reason alone I think that the judgment (of the lower court, denying citizenship) should be affirmed."

Justice Stone then calls attention to the Congressional activities on the subject subsequent to the Schwimmer case, namely:

(a) That following the Schwimmer case the decision of the Court immediately became the target for an active and publicized legislative attack in Congress, which persisted for a period of eleven years;

(b) Two days after the Schwimmer decision a bill was introduced to change the principle of construction adopted in the Schwimmer case by legislative act, which bill was not acted on by Congress;

(c) That the efforts for action by Congress were resumed, without success, after the decision in the McIntosh and Bland cases, and the efforts were continued for about ten years;

(d) Hearings were had on these bills before the House Committee on Investigation and Naturalization in the 71st Congress, at which proponents had clearly

stated their purpose to be to set aside the interpreation placed on the oath of allegiance by the Schwimmer, McIntosh and Bland cases;

(e) Two identical bills were introduced in three later Congresses. None were returned out of the committee. All the proposals failed.

(f) For six successive Congresses over a period of more than a decade there were continuously pending before Congress, in one form or another, proposals to overturn the previous rulings of the Supreme Court on this question and Congress declined to adopt these proposals after full hearings and after speeches on the floor advocating the change;

(g) Meanwhile, the previous decisions had been followed in a number of cases in the lower courts, and in one of which the Court properly said:

Quote

"We must conclude, therefore, that these statutory requirements, as construed by the Supreme Court, have Congressional sanction and approval."

Unquote

(h) Since the Schwimmer, McIntosh and Bland decisions with the Supreme Court construction of the oath of allegiance, the Naturalization Act has been amended by Congress (1940) and no change was made in the oath of allegiance, which remained identical as before, and which the Supreme Court decisions had expressly construed contrary to the majority decision in the Girouard case.

The opinion then stated that from the facts of the legislative history the conclusion was inescapable that Congress had not only acquiesced in the previous decisions construing their will, but had expressly approved the same by its refusal to accede to the views of the opponents of the previous decisions by making any change in the requirements of the Naturalization Act or oath which would override the previous decisions of the Court. I quote the final conclusion of the dissenting opinion of Chief Justice Stone, as follows:

Quote

"It is the responsibility of Congress, in reenacting a statute, to make known its purpose in a

controversial matter of interpretation of its former language, at least, when the matter has, for over a decade, been persistently brought to its attention. In the light of this legislative history, it is abundantly clear that Congress has performed that duty. --- By thus adopting and confirming the Courts' construction of what Congress had enacted in the Naturalization Act of 1906, Congress gave that construction the same legal significance as though it had written the very words into the act of 1940.

"It is not the function of this Court to disregard the will of Congress in the exercise of its constitutional power." Murphy

Justices Reed and Frankfurter concurred in the dissenting opinion of Chief Justice Stone.

At the time of the decision in the Girouard case, Justice Jackson was in Europe in the war trials. I have no doubt that had he been sitting with the Court the decision would have been five to four instead of five to three, for decisions of Reed, Frankfurter and Jackson have consistently shown that, though Roosevelt appointees, they have consideration for their integrity as Judges and are not utterly subservient to the purposes of Roosevelt in practically all his appointments to the Supreme Court, namely, to render their decisions to accord with the New Deal philosophy and sociological concepts.

When we call the roll of the Judges constituting the majority in the Girouard case and uniting in the majority opinion, we find, as I have said before, the hierarchy of New Deal packerism. This roll is as follows: Justices Douglas (who wrote the opinion), Black, Murphy, Rutledge and Burton. These Justices, with the possible exception of Burton, have ever been faithful to the voice of their master,

which they conceived to be the voice of Roosevelt, and to the purposes for which they were appointed. They have not hesitated, as shown by decision after decision, to overrule the principles of law laid down in decisions which have stood the test of time and have thus become established as the law of the land, thereby usurping the function of Congress, violating the principles of constitutional and legal rights, unsettling the law so that no one can rely thereon, nor have an attorney to advise them what are their rights or what is the law.

The Court unquestionably had the power, since it is a court of last resort, to do what it did, but it clearly had no right. This decision forcibly illustrates that this hierarchy follows the unconscionable and devastating totalitarian principle that power makes right and that any means are justified to accomplish, what is in their minds, and to me distorted minds, a purpose which they consider good or expedient.

From the above you will probably suggest that I am prejudiced. I frankly admit it, and I think the prejudice is thoroughly justifiable. But for my view of the principles under which this hierarchy acts, I would possibly have read the majority opinion in the Girouard case with less anger and contempt. However, as I see it, it was written by judges who were obviously and patently appointed, not to give a calm and judicial consideration of legal questions, but to establish and enthrone New Deal ~~ideals~~ concepts,

philosophical and sociological concepts by court decisions, rather than by the constitutionally appointed method of legislative action by the elected representatives of the people.

As a lawyer, the majority decision in the Girouard case is to my mind absolutely inexcusable and unjustified from any viewpoint of legal or common sense reasons, as shown by legislative history, as detailed by Chief Justice Stone.

In taking the above view, I am not intending to deliver a Philippic against the decision in the Girouard case, so far as the merits are concerned. I realize fully that as an original proposition the point was debatable, with excellent reasoning to be considered on each side. However, the reversal of the previous opinions in the Girouard case was, to my mind, clearly usurpation of power. It is to be hoped that the matter will again be brought up in Congress and, if the then Congress, made up of the elected representatives of the people, accepts the decision in the Girouard case, I would have no quarrel with such acceptance. Congress has both the right and the power to determine the question. Congress represents the people and Congress should and ought to put the matter at rest. Personally, as I see it, and for reasons stated above, I hope that Congress will override the decision of the Court in the Girouard case, since to my mind the construction there placed by the Court on the oath of allegiance is fraught with serious dangers to our Country, and furthermore, to my mind, gives to naturalized citizens an unfair preference over natural citizens.

Practically, so far as the results of the right to exemption from bearing arms on account of conscientious scruples is concerned, I do not think that it makes much difference one way or the other, since Congress always has, and doubtless always will grant such exemptions. However, I do not want to extend an invitation to pacifists the world over to make our country a haven and propaganda base, and, as I see it, the present decision of the Court certainly might have that result.

In closing, I might call attention to the fact, which illustrates the closeness of the original question, that of the Supreme Court Judges who have taken part in the various cases, as to their actual views on the original question, they are about evenly divided. If, however, the last decision had come up before any other court than the packed court, I have no doubt that the conservative or practical viewpoint would have had a comfortable margin of majority. In the language of Holmes, J. in the Schwimmer case, I think that the personnel of the majority of the Court in the Girouard case is "mad with partisanship."