6-21-1971

06-21-1971 Justice Stewart, Per Curiam

Potter Stewart
US Supreme Court Justice

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: JUN 21 1971

No. 783.—October Term, 1970

Recirculated: _____

Cassius Marsellus Clay, Jr., also known as Muhammad Ali, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

See Potter's Please join me

[June —, 1971]

Per Curiam.

The petitioner was convicted for willful refusal to submit to induction into the Armed Forces. 50 U. S. C. § 462 (a). The judgment of conviction was affirmed by the Court of Appeals for the Fifth Circuit.[1] We granted certiorari, 400 U. S. 990, to consider whether the induction notice was invalid because grounded upon an erroneous denial of the petitioner's claim to be classified as a conscientious objector.

I

The petitioner's application for classification as a conscientious objector was turned down by his local draft board, and he took an administrative appeal. The State Appeal Board tentatively classified him I–A (eligible for unrestricted military service) and referred his file to the Department of Justice for an advisory recommendation, in accordance with then-applicable procedures. 50

[1] The original judgment of affirmance, 397 F. 2d 901, was set aside by this Court on a ground wholly unrelated to the issues now before us, *sub nom. Giordano* v. *United States*, 394 U. S. 310. Upon remand, the Court of Appeals again affirmed the conviction. 430 F. 2d 165.

II

In order to qualify for classification as a conscientious objector, a registrant must satisfy three basic tests. He must show that he is conscientiously opposed to war in any form. *Gillette* v. *United States*, 401 U. S. 437. He must show that this opposition is based upon religious training and belief, as the term has been construed in our decisions. *United States* v. *Seeger*, 380 U. S. 163; *Welsh* v. *United States*, 398 U. S. 333. And he must show that this objection is sincere. *Witmer* v. *United States*, 348 U. S. 375. In applying these tests, the Selective Service System must be concerned with the registrant as an individual, not with its own interpretation of the dogma of the religious sect, if any, to which he may belong. *United States* v. *Seeger, supra; Gillette* v. *United States, supra; Williams* v. *United States*, 216 F. 2d 350, 352.

In asking us to affirm the judgment of conviction, the Government argues that there was "a basis in fact," cf. *Estep* v. *United States*, 327 U. S. 114, for holding that the petitioner is not "opposed to war in any form," but is only selectively opposed to certain wars. See *Gillette* v. *United States, supra.* Counsel for the petitioner, needless to say, takes the opposite position. The members of the Court are divided on the issue, but it is one that need not be resolved in this case. For we have concluded that even if the Government's position on this question is correct, the conviction before us must still be set aside for another quite independent reason.

III

The petitioner's criminal conviction stemmed from the Selective Service System's denial of his appeal seeking conscientious objector status. That denial, for which no reasons were ever given, was, as we have said, based

on a recommendation of the Department of Justice, overruling its hearing officer and advising the Appeal Board that it "finds that the registrant's conscientious-objector claim is not sustained and recommends to your Board that he be not [so] classified." This finding was contained in a long letter of explanation, from which it is evident that Selective Service officials were led to believe that the Department had found that the petitioner had failed each of the three basic tests for qualification as a conscientious objector.

As to the requirement that the registrant must be opposed to war in any form, the Department letter said that the petitioner's expressed beliefs "do not appear to preclude military service in any form, but rather are limited to military service in the Armed Forces of the United States. . . . These constitute only objections to certain types of war in certain circumstances, rather than a general scruple against participation in war in any form. However, only a general scruple against participation in war in any form can support an exemption as a conscientious objector under the Act. *United States* v. *Kauten*, 133 F. 2d 703."

As to the requirement that the registrant's opposition must be based upon religious training and belief, the Department letter said: "It seems clear that the teachings of the Nation of Islam preclude fighting for the United States not because of objections to participation in war in any form but rather because of political and racial objections to policies of the United States as interpreted by Elijah Muhammad. . . . It is therefore our conclusion that registrant's claimed objections to participation in war insofar as they are based upon the teachings of the Nation of Islam, rest on grounds which primarily are political and racial."

As to the requirement that a registrant's opposition to war must be sincere, that part of the letter began

by stating that "the registrant has not consistently manifested his conscientious-objector claim. Such a course of overt manifestations is requisite to establishing a subjective state of mind and belief." There followed several paragraphs reciting the timing and circumstances of the petitioner's conscientious objector claim, and a concluding paragraph seeming to state a rule of law—that "a registrant has not shown overt manifestations sufficient to establish his subjective belief where, as here, his conscientious-objector claim was not asserted until military service became imminent. *Campbell* v. *United States*, 221 F. 2d 454. *United States* v. *Corliss*, 280 F. 2d 808, *cert. denied*, 364 U. S. 884."

In this Court the Government has now fully conceded that the petitioner's beliefs *are* based upon "religious training and belief," as defined in *United States* v. *Seeger*, *supra:* "There is no dispute that petitioner's professed beliefs were founded on basic tenets of the Muslim religion, as he understood them, and derived in substantial part from his devotion to Allah as the Supreme Being. Thus, under this Court's decision in *United States* v. *Seeger*, 380 U. S. 163, his claim unquestionably was within the 'religious training and belief' clause of the exemption provision." [4] This concession is clearly correct. For the record shows that the petitioner's beliefs are founded on tenets of the Muslim religion as he understands them. They are surely no less religiously based than those of the three registrants before this Court in *Seeger*. See also *Welsh* v. *United States*, 398 U. S. 333.

The Government in this Court has also made clear that it no longer questions the sincerity of the petitioner's beliefs.[5] This concession is also correct. The Department hearing officer—the only person at the administra-

[4] Brief for the United States, 12.

[5] "We do not here seek to support the denial of petitioner's claim on the ground of insincerity. . . ." Brief for the United States, 33.

tive appeal level who carefully examined the petitioner and other witnesses in person and who had the benefit of the full FBI file—found "that the registrant is sincere in his objections." The Department of Justice was wrong in advising the Board in terms of a purported rule of law that it should disregard this finding simply because of the circumstances and timing of the petitioner's claim. See *Ehlert* v. *United States*, 401 U. S. ——, ——; *United States ex rel. Lehman* v. *Laird*, 430 F. 2d 96, 99; *United States* v. *Abbott*, 425 F. 2d 910, 915; *United States ex rel. Tobias* v. *Laird*, 413 F. 2d 936, 939–940; *Cohen* v. *Laird*, 315 F. Supp. 1265, 1277–1278.

Since the Appeal Board gave no reasons for its denial of the petitioner's claim, there is absolutely no way of knowing upon which of the three grounds offered in the Department's letter it relied. Yet the Government now acknowledges that two of those grounds were not valid. And, the Government's concession aside, it is indisputably clear, for the reasons stated that the Department was simply wrong as a matter of law in stating that the petitioner's beliefs were not religiously based and were not sincerely held.

This case, therefore, falls squarely within the four corners of this Court's decision in *Sicurella* v. *United States*, 348 U. S. 385. There as here the Court was asked to hold that an error in an advice letter prepared by the Department of Justice did not require reversal of a criminal conviction because there was a ground on which the Appeals Board might properly have denied a conscientious objector classification. This Court refused to consider the proffered alternative ground:

> "[W]e feel that this error of law by the Department, to which the Appeal Board might naturally look for guidance on such questions, must vitiate the entire proceedings at least where it is not clear that the

> Board relied on some legitimate ground. Here, where it is impossible to determine on exactly which grounds the Appeal Board decided, the integrity of the Selective Service System demands, at least, that the Government not recommend illegal grounds. There is an impressive body of lower court cases taking this position, and we believe that they state the correct rule." *Id.*, at 392.

The doctrine thus articulated 16 years ago in *Sicurella* was hardly new. It was long ago established as essential to the administration of criminal justice. *Stromberg* v. *California*, 283 U. S. 359. In *Stromberg* the Court reversed a conviction for violation of a California statute containing three sepaarte clauses, finding one of the three clauses constitutionally invalid. As Chief Justice Hughes put the matter, "[I]t is impossible to say under which clause of the statute the conviction was obtained." Thus, "if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld." *Id.*, at 368.

The application of this doctrine in the area of selective service law goes back at least to 1945, and Judge Learned Hand's opinion for the Second Circuit in *United States* v. *Cain*, 149 F. 2d 338. It is a doctrine that has been consistently and repeatedly followed by the federal courts in dealing with the criminal sanctions of the selective service laws. See, *e. g.*, *United States* v. *Lemmens*, 430 F. 2d 619, 623–624 (CA8 1970); *United States* v. *Broyles*, 423 F. 2d 1299, 1303–1304 (CA4 1970); *United States* v. *Haughton*, 413 F. 2d 736 (CA9 1969); *United States* v. *Jakobson*, 325 F. 2d 409, 416–417 (CA2 1963), aff'd *sub nom. United States* v. *Seeger*, 380 U. S. 163; *Kretchet* v. *United States*, 284 F. 2d 561, 565–566 (CA9 1960); *Ypparila* v. *United States*, 219 F. 2d 465, 469 (CA10 1954); *United States* v. *Englander*, 271 F. Supp. 182

(SDNY 1967); *United States* v. *Erikson*, 149 F. Supp. 576, 578–579 (SDNY 1957).

In every one of the above cases the defendant was acquitted or the conviction set aside under the *Sicurella* application of the *Stromberg* doctrine. If this petitioner is to receive equal justice under law, his conviction must be set aside too.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.