1929

Case Note, *United States v. Schwimmer*

Ernst Freund

CURRENT COMMENT

UNITED STATES v. SCHWIMMER

ERNST FREUND

IN this case[1] a woman, a well-known pacifist, was denied naturalization as an American citizen. The Supreme Court, speaking through Mr. Justice Butler (Justices Holmes, Brandeis, and Sandford dissenting) says: "The burden was upon her to show what she meant and that her pacifism and lack of nationalistic sense did not oppose the principle that it is a duty of citizenship by force of arms, when necessary, to defend the country against all enemies, and that her opinions and beliefs would not prevent or impair the true faith and allegiance required by the act. She failed to do so. The District Court was bound by the law to deny her application."

The decision deserves careful study.

Note that the court says: "The District Court was bound by the law to deny her application." In other words, the reason for the decision was not that the District Court exercised a fair discretion with which the Circuit Court of Appeals should not have interfered. That would have been a conceivable position but not a desirable one. It is better that naturalization should be controlled by law than by discretion, and those who applauded the Circuit Court of Appeals, when it reversed the District Court, cannot consistently criticize the Supreme Court merely for treating the whole matter as one of statutory right or disability.

The question then is: Was Mrs. Schwimmer judged according to the standards laid down by the statute?

Her rejection must be placed upon one of two grounds (or the two combined): the one relating to the oath of allegiance; the other to the statutory requirements concerning character, attachment, and disposition.

The required oath is to the effect that the applicant will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same. It is prescribed for applicants of both sexes and of ages however advanced; it must, therefore, be possible for women of fifty or men of seventy to take it. Mrs. Schwimmer was willing and ready to take the oath, and thought she could take it. Mr. Justice Holmes in his dissenting opinion says that it is agreed that she is qualified except so far as

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[1] 49 U. S. Sup. Ct. 448, decided May 27, 1929.

her views may show ". . . that she cannot take the oath of allegiance without a mental reservation." The quotation marks are Justice Holmes'. But I cannot find the words in the prevailing opinion. To permit an inquiry into mental reservations would be to set official conjecture above the law. The Supreme Court has done no such thing. The oath of allegiance may be laid out of the case.

The Supreme Court denies the right to citizenship because the applicant's conceded views as to the bearing of arms in defense of the country show that she is not attached to the principles of the Constitution or well disposed to the good order or happiness of the country.

What is legal evidence of the lack of these attributes? It might be a plausible answer to say that the best and conclusive evidence is found in a refusal to obey laws, and the Supreme Court seems to think that Mrs. Schwimmer fails by that test. Does she? She has not violated any law. Congress did in 1917 relieve from the selective draft members of religious organizations objecting to combatant service; for all we know Congress may in the next war exempt all conscientious objectors. To test law-abidingness by reference to non-existing laws lands us in speculation. As well ask an applicant: would you in 1850 have obeyed the Fugitive Slave law? The criterion of obedience to imaginary laws would open the doors to all kinds of arbitrariness. Fortunately, again, the Supreme Court has not committed itself to that criterion.

There remains, then, as the sole ground of the decision the inconsistency between opposition to bearing arms in the defense of the country and attachment to the principles of the Constitution. Suppose it is true that there are many citizens who hold Mrs. Schwimmer's views and who are as much entitled to their citizenship as the Judges of the Supreme Court: has not Congress applied a different test to those not yet citizens, which the courts must apply and, in order to apply, must interpret according to the best of their ability? Mr. Justice Holmes calls attention to the Eighteenth Amendment and those not attached to its principles. He might also have called attention to the difficulties of those who do not find themselves attached to the principles of the Constitution established by the many five-to-four decisions of the Supreme Court. If Mr. Justice Butler has the courage of his convictions, he is bound to declare all of them unworthy to be called citizens, for surely he would not claim power of discrimination between principles and principles, but, confronted with the embarrassments of pressing devotion to principles to logical conclusions, would shield himself behind the mandate of the statute: "*ita lex scripta.*"

Let us then examine the letter of the statute,—in too many cases, alas, the last thing that lawyers think of doing. Do we find that Congress set up so elusive and impossible a test for judicial administration as an abstract attitude of attachment to constitutional principles that

may mean anything or nothing? The law is to the effect that the applicant *during the last five years must have behaved* as a man of good moral character, attached to the principles of the Constitution of the United States. Congress, then, it appears was content to abide by the relatively practicable test of actual conduct, and there is no statutory authority to go beyond that.

Mr. Justice Holmes refers to the Eighteenth Amendment. A Federal Court once refused naturalization to a resident of El Paso, who ran a saloon across the border line in Mexico; that at least was capable of being construed as conduct showing lack of attachment to the principles of the Constitution. Had Mrs. Schwimmer between 1921 and 1926 conducted herself as a propagandizing pacifist, that should have been shown, and it would have been possible to judge what a person must do or avoid doing to behave as a person attached to the principles of the Constitution; but as to that, the opinion is silent. It goes without saying that a truthful answer to an official question concerning opinion cannot be distorted into a form of behavior. The difference between conduct and opinion as a qualification test is elementary and fundamental; it is recognized by Congress (opinion being made a test only in the case of disbelief in organized government), while it is overlooked or ignored by the Supreme Court. The decision should make a stronger appeal to militant patriots than to careful lawyers.

THE *I'M ALONE*

CLYDE EAGLETON

THE sinking of the Canadian vessel, the *I'm Alone*, has provoked an amazing amount of popular interest, in addition to the speculation on the part of international lawyers. The Canadian and American governments having failed to reach an agreement through correspondence, the problem will be referred to an arbitral tribunal in accordance with the terms of the treaty of 1924 with Great Britain.[1]

The *I'm Alone* was hailed, it is claimed,[2] at a point some 10½ miles

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[1]The treaty may be found in U. S. TREATY SER. 685; or in (1924) AM. J. INT. LAW 127. The tribunal provided is the Claims Commission set up by the agreement of 1910.

[2]The facts are taken from the correspondence exchanged between Canada and the United States. State Department Press Release, April 25, 1929; found also (in full) in the New York Herald Tribune for April 26.

Evidence is in conflict as to the distance from shore. The United States seems to have the better of this argument, for her claim is based upon the calculations of expert navigators, and supported by an impartial witness.