NATURALIZATION LAW: THE PROMISE TO BEAR ARMS IN THE OATH OF ALLEGIANCE

Rafferty v. United States, 477 F.2d 531 (5th Cir. 1973)

Petitioner, an Irish national applying for naturalization, refused to promise to bear arms in defense of the United States and requested permission to take a qualified, alternative oath of allegiance.[1] Despite a recommendation by the naturalization officer to the contrary, the federal district court denied petitioner's request.[2] The Fifth Circuit Court of Appeals reversed and *held*: The religious parallel test[3] should

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1. Immigration and Nationality Act of 1952 § 337, 8 U.S.C. § 1448 (1970), provides in part:

Oath of Renunciation and Allegiance

(a) A person who has petitioned for naturalization shall, in order to be and before being admitted to citizenship, take in open court an oath (1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5) (A) to bear arms on behalf of the United States when required by the law, or (B) to perform noncombatant service in the Armed Forces of the United States when required by the law, or (C) to perform work of national importance under civilian direction when required by the law. Any such person shall be required to take an oath containing the substance of clauses (1) to (5) of the preceding sentence, except that a person who shows by clear and convincing evidence to the satisfaction of the naturalization court that he is opposed to the bearing of arms in the Armed Forces of the United States by reason of religious training and belief shall be required to take an oath containing the substance of clauses (1) to (4) and clauses (5) (B) and (5) (C) of this subsection, and a person who shows by clear and convincing evidence to the satisfaction of the naturalization court that he is opposed to any type of service in the Armed Forces of the United States by reason of religious training and belief shall be required to take an oath containing the substance of said clauses (1) to (4) and (5) (C). The term "religious training and belief" as used in this section shall mean an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

2. Bernard Gerard Rafferty, No. 3129/30169 (W.D. Tex., Nov. 4, 1971). The petitioner, a former priest in the Roman Catholic Church, claimed his belief was an outgrowth of religious training, but independent of Roman Catholic tenets. Since opposition to the bearing of arms is not a tenet of the Roman Catholic Church, the district court found that the petitioner had not proven his unwillingness to bear arms "by reason of his religious training and belief," and felt his refusal was based more on a personal moral code. Rafferty v. United States, 477 F.2d 531, 533 (5th Cir. 1973).

3. This test was outlined in two Selective Service cases, United States v. Seeger,

be applied to determine whether an applicant for naturalization should be permitted to take a qualified oath of allegiance.[4]

An oath of allegiance has been a prerequisite to the granting of citizenship since Congress passed the first naturalization law in 1790.[5] It was not until 1906, however, that Congress added to the oath a promise to defend the Constitution and laws of the United States.[6] Implied in this promise, the Supreme Court held, was a promise to bear arms in the country's defense.[7] Consequently, applicants who were unwilling to promise to bear arms, for whatever reason, were denied citizenship.[8] In 1946, however, the Supreme Court rejected

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380 U.S. 163 (1965), and Welsh v. United States, 398 U.S. 333 (1970). *See* notes 20 & 22 *infra* and accompanying text.

4. Rafferty v. United States, 477 F.2d 531 (5th Cir. 1973). The court, in applying the religious parallel test, stated:

> The question to be asked is whether or not an individual's opposition to the bearing of arms stems from his moral, ethical or religious beliefs about what is right and wrong, and whether or not these beliefs are held with the strength of traditional religious convictions.

Id. at 533-34.

5. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 ("any alien . . . taking the oath or affirmation prescribed by law, to support the constitution of the United States . . . shall be considered as a citizen of the United States"); Act of Jan. 29, 1795, ch. 20, 1 Stat. 414, *as amended*, ch. 28, 2 Stat. 153 (1802), required an oath of support to the United States Constitution and renunciation of all foreign allegiance; Naturalization Act of 1906, ch. 3592, § 4, 34 Stat. 596, required a promise to support and defend the Constitution and laws of the United States as well as renunciation of all foreign allegiance; Nationality Act of 1940, ch. 876, § 335, 54 Stat. 1157, contained the same promise required in the 1906 act; Act of Mar. 27, 1942, ch. 199, tit. X, § 701, 56 Stat. 182, *amending* Nationality Act of 1940, ch. 876, § 335, 54 Stat. 1157, provided for immediate naturalization of aliens serving in the Armed Forces, but did not exclude noncombatants who performed some type of military duty, from this privilege; Internal Security Act of 1950, ch. 1024, § 29, 64 Stat. 1017; Immigration and Nationality Act of 1952, 8 U.S.C. § 1448 (1970).

6. Naturalization Act of 1906, ch. 3592, § 4, 34 Stat. 596, provided, in part:

> Third. He shall, before he is admitted into citizenship, declare an oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all foreign allegiance . . . ; that he 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.

7. United States v. Macintosh, 283 U.S. 605 (1931); United States v. Bland, 283 U.S. 636 (1930); United States v. Schwimmer, 279 U.S. 644 (1929). *See also In re* Warkentin, 93 F.2d 42 (7th Cir. 1937); *In re* Roeper, 274 F. 490 (D. Del. 1921).

8. United States v. Macintosh, 283 U.S. 605 (1931). The applicant qualified his willingness to take up arms in defense of the United States in response to a question on his naturalization application. The Court held that a naturalization examiner could properly deny citizenship to an alien who was unwilling to take up arms. Justice Sutherland stated:

the implication of a requirement to promise to bear arms as a prerequisite to conferring citizenship, and expressly overruled previous decisions to the contrary.[9] Unfortunately, the Court failed to provide any standard for determining how to deal with naturalization applicants who were unwilling to bear arms.

After some years of judicial uncertainty,[10] Congress amended the naturalization law in 1950 explicitly to require a promise to bear arms in defense of the United States as a condition to the granting of cit-

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> Naturalization is a privilege, to be given, qualified or withheld as Congress may determine, and which the alien may claim as of right only upon compliance with the terms which Congress imposes.
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> . . . [T]he Court may . . . ascertain . . . whether his oath to support and defend the Constitution and laws of the United States . . . will be taken without mental reservation or purpose inconsistent therewith . . . .

Id. at 615-16. The suggestion in *Macintosh* that an alien must take the oath of allegiance "without any mental reservation" was incorporated explicitly into the Nationality Act of 1940, ch. 876, § 335(b), 54 Stat. 1157.

In contrast to the absolute standard applied to aliens, Selective Service legislation passed in 1864, Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 9, exempted from combatant duty those who were unwilling to bear arms by virtue of their membership in a pacifist sect, thereby providing a qualified exemption from the duty to bear arms in the Armed Forces.

9. Girouard v. United States, 328 U.S. 61 (1946). The Court dealt with the Nationality Act of 1940, which had replaced the 1906 act. The two acts were identical regarding language pertinent to the opinion. The Court held:

> The oath required of aliens does not in terms require that they promise to bear arms. Nor has Congress expressly made any such finding a prerequisite to citizenship. To hold that it is required is to read it into the Act by implication. But we could not assume that Congress intended to make such an abrupt and radical departure from our traditions unless it spoke in unequivocal terms.

328 U.S. at 64. The opinion also pointed out, *id.* at 70, that Congress had indicated it did not support an absolute standard by allowing aliens who were noncombatants in the United States military to be naturalized without delay, *see* Act of Mar. 27, 1942, ch. 199, tit. X, § 701, 56 Stat. 132. As a result, the applicant, a Seventh Day Adventist, was granted citizenship.

10. Lower courts did not interpret *Girouard* uniformly. They were unsure about the breadth of its holding and had no guidance in determining what effect unwillingness to bear arms should have on availability of citizenship. *Compare In re* Crescenzi, 79 F. Supp. 461 (S.D.N.Y. 1948) (petitioner, an Italian, refused to bear arms against Italy or Italian people but was nevertheless permitted to take oath), *with In re* MacKay, 71 F. Supp. 397 (N.D. Ind. 1947) (petitioner, member of Communist Party, who would bear arms to support the United States only if in his opinion the war was justifiable, was denied naturalization on these and other grounds based on view that *Girouard* held only that "[absent] congressional action, a refusal to bear arms because of religious scruples was no bar" to citizenship). *See also In re* Scarpa, 87 F. Supp. 366 (E.D.N.Y. 1949); *In re* Weibe, 82 F. Supp. 130 (D. Neb. 1949); *Developments in the Law—Immigration and Nationality*, 66 HARV. L. REV. 643, 710 (1953).

izenship.[11] Examination of the statutory language indicates that an applicant's refusal to promise to bear arms was to be assessed according to the same standard provided for conscientious objectors in the Selective Service and Training Act of 1940.[12] This Act excused a potential draftee from combatant service in the Armed Forces if, "by reason of religious training and belief," he was conscientiously opposed to such service.[13] Use of this standard permitted an applicant to fulfill an alternative oath requirement if his opposition to bearing arms was based on religious training and belief. Two years later Congress revised and combined all existing immigration and naturalization laws into the Immigration and Nationality Act of 1952,[14] which adopted a definition of "religious training and belief" from the Selective Service Act of 1948.[15] As used in the Immigration and Nationality Act, the phrase refers to

> an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include

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11. Internal Security Act of 1950, ch. 1024, § 29, 64 Stat. 1017. The statute provided, in part:

> (a) A person who has petitioned for naturalization shall, before being admitted to citizenship, take in open court [an oath] (1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or a citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5) to bear arms on behalf of the United States when required by law, or to perform noncombatant service in the Armed Forces of the United States when required by law . . . .

12. Ch. 720, § 5(g), 54 Stat. 888.

13. *Compare* Selective Training and Service Act of 1940, ch. 720, § 5(g), 54 Stat. 889 ("Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form"), *with* Internal Security Act of 1950, ch. 1024, § 29, 64 Stat. 1017 ("[T]hat any such person shall be required to take the oath prescribed [*see* note 11 *supra*] unless by clear and convincing evidence he can show to the satisfaction of the naturalization court that he is opposed to the bearing of arms or the performance of noncombatant service in the Armed Forces of the United States by reason of religious training and belief . . . ."). It is curious that although the 1940 Selective Service law had been changed prior to passage of this naturalization amendment to include a definition of "religious training and belief," Selective Service Act of 1948, ch. 625, § 6(j), 62 Stat. 604, Congress chose not to include such a definition in the naturalization statute.

14. Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-503 (1970).

15. Ch. 625, § 6(j), 62 Stat. 604.

essentially political, sociological, or philosophical views or a merely personal moral code.[16]

The definition of "religious training and belief" in the Selective Service Act and Immigration and Nationality Act has been subject to frequent judicial interpretation.[17] Generally, the naturalization cases adopt the construction given the statutory language by prior Selective Service cases, although one naturalization decision construed the exemption language more broadly than had a previous Selective Service case.[18] In some instances, Selective Service case opinions have cited naturalization cases in their discussions.[19]

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16. Immigration and Nationality Act of 1952 § 337(a), 8 U.S.C. § 1448(a) (1970). *But see* Selective Service Act of 1948, ch. 625, § 6(j), 62 Stat. 613:

> Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

It was the apparent intention of Congress that the naturalization act put the naturalized citizen on equal footing with the native-born citizen. *See* H.R. REP. No. 2096, 82d Cong., 2d Sess. 129 (1952). *See also* H.R. REP. No. 1365, 82d Cong., 2d Sess. 82 (1952); note 27 *infra*.

17. The judicial interpretation relevant to this discussion has been based on statutory construction. Alternative arguments have been constitutionally based. The essential contention is that both the Selective Service Act and the Immigration and Nationality Act unconstitutionally abridge the petitioner's or registrant's first amendment rights by violating the establishment clause. Other arguments deal with denial of equal protection and infringement of the free exercise clause. The acts allow exemption based on a religious belief in the sense of involving a Supreme Being and deny exemption based on non-religious belief or a belief not involving the concept of a Supreme Being. Nevertheless, no legislation providing for either an alternative naturalization oath or a draft exemption has been held unconstitutional by any court. *See In re* Weitzman, 426 F.2d 439, 440-62 (8th Cir. 1970) (separate opinions). Basically, this problem seems to have been met by liberally construing the language in both laws to prevent them from being unconstitutionally applied. Any sincere belief would probably be acknowledged as a valid basis for refusal to bear arms under existing rulings. *See* United States v. Stetter, 445 F.2d 472 (5th Cir. 1971); *In re* Ramadass, 445 Pa. 86, 284 A.2d 133 (1971).

18. *Compare In re* Hansen, 148 F. Supp. 187 (D. Minn. 1957) (naturalization case which read phrase "religious training and belief" as single nonseverable concept so that proof of personal religious code is sufficient and petitioner need not prove that his religious beliefs were obtained directly from religious training), *with* Roberson v. United States, 208 F.2d 166 (10th Cir. 1957) (Selective Service case that held registrant's "right to exemption under the law can[not] rise above the tenets of his faith as taught by the church through which he finds spiritual expression"). *See also* 19 OHIO ST. L.J. 351 (1958); 32 ST. JOHN'S L. REV. 105 (1957).

19. *See* United States v. Seeger, 380 U.S. 163, 180 n.3 (1965); United States v. Burton, 472 F.2d 757 (8th Cir. 1973); Cassidy v. United States, 428 F.2d 585 (8th Cir. 1970).

In *United States v. Seeger*,[20] a Selective Service case, the Supreme Court created the religious parallel test, which construed the definition of "religious training and belief" as embracing those individuals who held a sincere and meaningful belief parallel to a traditional religious belief.[21] The Court clarified the religious parallel test in *Welsh v. United States*[22] by holding that a deeply held moral or ethical belief, although not necessarily characterized by the Selective Service registrant as religious, was nevertheless a valid basis for exemption from combat duty.[23] The religious parallel test advanced in *Seeger* has never been explicitly adopted by the Supreme Court as a basis for interpreting naturalization law.[24] Subsequent state and lower federal cases, however, have concluded that the *Seeger* test is controlling in the construction of naturalization law.[25]

Rafferty is the first federal appellate decision to rely solely on the religious parallel test as the basis for permitting an applicant for naturalization to take the alternative oath. This reliance on the Selective Service test is consistent with the congressional practice of referring to Selective Service law when drafting naturalization legislation concerning unwillingness to bear arms.[26]

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20. 380 U.S. 163 (1965).

21. [A] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition [of religious training and belief].

Id. at 176. In addition, a "merely personal moral code," which did not warrant an exemption from the duty to bear arms, *see* note 16 *supra* and accompanying text, was interpreted as one which is "not only personal but which is the *sole* basis for the registrant's belief and is *in no way* related to a Supreme Being." *Id.* at 186 (emphasis added).

22. 398 U.S. 333 (1970).

23. Four members of the Court interpreted § 6(j) as exempting all whose "consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war." *Id.* at 344. Justice Harlan concurred in the result because he found § 6(j) to be unconstitutional. *Id.* (Harlan, J., concurring).

24. In *In re* Weitzman, 426 F.2d 439 (8th Cir. 1970), a naturalization case, Judge Blackmun voted to deny petitioner's naturalization application on a constitutional basis, *id.* at 440; Judge Heany voted to grant the petition on constitutional grounds, *id.* at 459; and only Judge Lay voted to grant the petition upon his statutory construction of the Act, *id.* at 454. Hence the applicant was permitted to take the alternative oath.

25. *See In re* Ramadass, 445 Pa. 86, 284 A.2d 133 (1971); *In re* Nomland, No. 264215 (C.D. Cal., Jan. 30, 1968).

Prior to *Rafferty*, only one district court had applied *Welsh* to a naturalization case. *See In re* Thomsen, 324 F. Supp. 1205 (N.D. Ga. 1971).

26. *See* notes 12-15 *supra* and accompanying text.

The rationale behind this practice, however, needs reassessment.[27] The Supreme Court seems to have created the religious parallel test to avoid ruling on the constitutionality of the Selective Service law's requirement to bear arms,[28] for individuals eligible for the draft are

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27. The purpose of the 1952 naturalization act's incorporation of the Selective Service act's language regarding the bearing of arms is suggested by the House Committee Report:

> The bill is designed to put the naturalized citizen in the same position as the native born citizen by requiring the naturalized citizen to promise to bear arms on behalf of the United States when required by law, or to perform noncombatant service in the Armed Forces of the United States when required by law, or to perform work of national importance under civilian direction when required by law.

H.R. REP. No. 1365, 82d Cong., 2d Sess. 82 (1952). If that was the aim of the bill, the naturalized citizen was already in the same position as the native-born citizen since all citizens are subject to Selective Service provisions. If the House Committee meant to say the statute put the alien seeking naturalization in the same position as the native-born citizen, it could only be in the sense that both groups, although required to be willing to bear arms, were allowed to refuse to do so because of religious convictions. The two provisions were aimed at differently composed groups and were required for different purposes. Therefore the legislative history cannot mean that to keep the alien seeking naturalization in the same position as the native-born citizen, the provisions dealing with the requirement to bear arms must have identical standards or must be identically construed. Indeed, the pertinent language of the two statutes does not contain identical standards. The Selective Service law no longer refers to a belief in a Supreme Being but simply defines the limitation on what constitutes "religious training and belief" as an exclusion of "essentially political, sociological, or philosophical views, or a merely personal moral code." Military Selective Service Act of 1967 § 1(7), 50 U.S.C. App. § 456(j) (Supp. II, 1972). The Immigration and Nationality Act of 1952 § 337, 8 U.S.C. § 1448(a) (1970), still contains "Supreme Being" language. Therefore, even if a persuasive argument could have been made that the intent of Congress was to construe the exception to the bearing of arms in the 1948 Selective Service act and the 1952 naturalization act identically, Congress obviously no longer intends the two exceptions to be viewed identically because it has not revised the naturalization law to parallel the Selective Service revision.

28. [T]he Court's expansive reading of the test represents much more than an interpretation of legislative intent or an endeavor to effectuate congressional policy. By construing the statute to exempt [the defendants], the Court protected the conscientious objector provision from a constitutional crossfire.

The Supreme Court, 1964 Term, 79 HARV. L. REV. 56, 115 (1965) (commenting on *Seeger*). *See also* United States v. Seeger, 380 U.S. 163, 188 (1965) (Douglas, J., concurring):

> If I read the statute differently from the Court, I would have difficulties. For then those who embraced one religious faith rather than another would be subject to penalties; and that kind of discrimination . . . would violate the Free Exercise Clause of the First Amendment. It would also result in a denial of equal protection by preferring some religions over others—an invidious discrimination that would run afoul of the Due Process Clause of the Fifth Amendment.

protected by the first and fifth amendments.[29] Aliens seeking naturalization may not be protected by the first and fifth amendments, however, thus obviating any need to construe the naturalization law in the same manner as the Selective Service law. Only after attaining the status of resident alien or naturalized citizen is the alien entitled to the constitutional protection accorded the status of residency and citizenship.[30] If, then, the Constitution does not protect the alien seek-

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United States v. Levy, 419 F.2d 360, 367 (8th Cir. 1969), also viewed the *Seeger* test as perhaps necessary "to avoid constitutional objections."

29. United States v. Seeger, 380 U.S. 163 (1965); *cf.* note 17 *supra.*

30. The Supreme Court has held that resident aliens are entitled to protection by the first amendment, *see* Bridges v. Wixon, 326 U.S. 135, 148 (1945) (dealing with deportation of resident for affiliating with subversive organizations), the fifth amendment, *see* Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (deportation case), and the equal protection clause of the fourteenth amendment, *see* Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915) (dealing with right of resident alien to work). In his concurrence in Bridges v. Wixon, *supra* at 161, Justice Murphy stated:

> The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens.

This supports the view that residency is a privilege which, once conferred, vests a right in the alien to access on equal footing as the resident citizen to all the privileges of residency, and the right not to be denied his status without due process—hence his right to work and his right not to be deported summarily. The privilege of citizenship, however, is not an incident of residency and therefore is not necessarily entitled to constitutional protection by analogy to right to work and deportation cases.

For cases holding that aliens seeking the status of resident aliens are not constitutionally protected, see Bridges v. Wixon, 326 U.S. 135, 161 (1945); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 289-90 (1904); Chinese Exclusion Case, 130 U.S. 581, 603 (1889).

Similarly, aliens seeking citizenship status have no constitutional protections. The Supreme Court has not held otherwise. *See* United States v. Macintosh, 283 U.S. 605 (1931); note 8 *supra.* Girouard v. United States, 328 U.S. 61 (1946), *see* note 9 *supra*, did not negate this premise that naturalization is a privilege, nor did it state that the alien seeking citizenship is entitled to constitutional protection. The Court refused to read an absolute requirement to promise to bear arms into the oath because Congress *did not* explicitly require such a promise, not because Congress *could not* require such a promise. *But see* Note, *Constitutional Limitations on the Power of Congress to Confer Citizenship by Naturalization*, 50 IOWA L. REV. 1093 (1965), where the author assumes that, absent a specific statement to the contrary, aliens seeking citizenship are entitled to constitutional protection:

> [U]nless a logical argument can be advanced for not applying a substantive due process limitation in the area of naturalization, a refusal to apply such

ing citizenship, the requirements to obtain citizenship are not subject to the first amendment, and the courts therefore are not obliged to adopt the religious parallel test in order to protect the naturalization provision from constitutional attack.

Even beyond constitutional considerations, it would appear that the different purposes of the Selective Service and naturalization laws should dictate an individualized and independent construction of each law. When the draft is operating,[31] only those persons actually subject to military service are required to bear arms.[32] This duty to bear arms is necessary to ensure an adequate national defense.[33] In contrast, the Immigration and Nationality Act requires *all* aliens seeking citizenship, even those aliens who could never be subject to service in the military,[34] to promise to be willing to bear arms. The purpose of the naturalization oath requirement must be broader than maintenance of an adequate national defense.[35] The oath is imposed because of its evidentiary value in assessing the applicant's loyalty to the United States.[36] Unlike the requirement to bear arms in the Selective Service

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a limitation premised solely upon precedent considerations and analogies to deportation cases would seem somewhat tenuous.

Id. at 1101 n.45. *See also In re* Weitzman, 426 F.2d 439, 454-62 (8th Cir. 1970), in which two judges assumed the Bill of Rights applied to aliens seeking citizenship.

31. Since the draft was terminated on July 1, 1973, the willingness to bear arms is no longer required of any citizen. Selective Service Act of 1967, § 1(12), 50 U.S.C. App. § 467(c) (1970), *as amended*, (Supp. II, 1972).

32. For those individuals subject to the draft (generally men between the ages of eighteen and twenty-six), see 50 U.S.C. App. § 454(a) (1970).

33. The power to maintain Armed Forces is given to Congress in the Constitution. U.S. CONST. art. I, § 8.

34. Although the applicant in *In re* Weitzman, 426 F.2d 439 (8th Cir. 1970), was female and hence not subject to the draft, she nevertheless was required to promise to bear arms. *See also* United States v. Bland, 283 U.S. 636 (1931); *In re* Thomsen, 324 F. Supp. 1205 (N.D. Ga. 1971); *In re* Pisciattano, 308 F. Supp. 818 (D. Conn. 1970); *In re* Nissen, 138 F. Supp. 483 (D. Mass. 1955) (applicant required to take oath although he was forty-eight years old and therefore not subject to draft).

35. Relaxation of the naturalization oath requirement could arguably allow pacifist elements to enter the country who would promote anti-war ideas and thus indirectly decrease the size of the Armed Forces. However, only a small number of naturalized citizens are pacifist, presumably only a small number of those would actively encourage others to refuse to bear arms, and a still smaller number would be successful in this endeavor. *See* United States v. Schwimmer, 279 U.S. 644, 653 (1929) (Holmes, J., dissenting). *See also* 16 ST. LOUIS U.L.J. 510, 523-24 (1972) (statistics showing that percentage of pacifist aliens is negligible).

36. Justice Douglas assumed the purpose was evidence of loyalty when he argued that a refusal to bear arms was not necessarily a sign of disloyalty or lack of attachment to our institutions. Girouard v. United States, 328 U.S. 61, 64 (1946). The

situation, where no alternative means to the objective of creating armed forces is available, other means are available to measure the loyalty of an applicant besides the requirement that he promise to bear arms.[37] Therefore, since the promise of willingness to bear arms is not conclusive in establishing loyalty, interpretation of the requirement to take the oath may be more flexible in the naturalization than the Selective Service context. An alien should be able to refuse to bear arms and still prove he would be a loyal citizen.

Although the courts were not compelled to adopt the religious parallel test in interpreting the naturalization provision, the conclusion that the provision should be construed with flexibility in light of its purpose indicates that adoption of the religious parallel test is consistent with that purpose. *Rafferty* may therefore be explained by reasons independent of Selective Service case law, and although naturalization cases need not construe the willingness to bear arms language in the same manner as Selective Service cases, they may independently adopt the same construction.

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very label "Oath of Allegiance" indicates that the elements of the oath are assurances of allegiance or loyalty to the United States. *But see* Note, *supra* note 30, at 1110-11: "The apparent purpose of Congress in requiring an oath to bear arms is to promote the nation's defense by requiring aliens to declare their willingness to serve in the armed services." The author provides no support, however, for his conclusion.

37. The oath itself has five components, *see* note 1 *supra*, which indicate loyalty, of which the promise to bear arms is only one.