The Burger Court Opinion Writing Database

United States v. Sisson

399 U.S. 267 (1970)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 10, 1970

Re: No. 305 - U. S. v. Sisson

MEMORANDUM TO THE CONFERENCE:

If no one else tenders a dissent to a holding of no jurisdiction, I will write. My view is that we have jurisdiction and that we should reverse -- summarily and emphatically.

WEB

W. E. B.

P. S. -- I assume Justice Black will make provision for the reassignment of this case.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan ✓
Mr. Justice Stewart
Mr. Justice White
~~Mr. Justice Fortas~~
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

No. 305. --October Term, 1969.

From: The Chief Justice

Circulated: 3/5/70

Recirculated: ———

United States of America, Appellant, v. John Heffron Sisson, Jr.) On Appeal from the United States District Court for the District of Massachusetts.

[ ]

Memorandum to the Conference from MR. CHIEF JUSTICE BURGER.

Both the government and Sisson have argued that this Court has jurisdiction to review the District Court's action by virtue of the "arrest of judgment" clause in the Criminal Appeals Act, 18 U. S. C. § 3731, which provides:

> "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> . . . .
>
> "From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded. "

Justice Harlan has concluded that the Court has no jurisdiction to hear this appeal, and has provided the reasons for his position in his

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

SUPREME COURT OF THE UNITED STATES

From: The Chief Justice

No. 305.—October Term, 1969

Circulated: JUN 13 1970

Recirculated:

United States, Appellant, v. John Heffron Sisson, Jr. | On Appeal From the United States District Court for the District of Massachusetts.

[June —, 1970]

Mr. Chief Justice Burger, dissenting.

Both the Government and Sisson have argued that this Court has jurisdiction to review the District Court's action by virtue of the "arrest of judgment" clause in the Criminal Appeals Act, 18 U. S. C. § 3731, which provides for a direct appeal to this Court

> "[f]rom a decision (1) arresting a judgment of conviction (2) for insufficiency of the indictment or information, (3) where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded."

In rejecting the arguments of the parties the Court holds that we have no jurisdiction to hear this appeal, opting for the view that the "arrest of judgment" clause carries with it all of its common law antecedents and that the present case does not meet the criteria required by the common law. My disagreement with the Court's result and rationale is prompted by a fundamental disagreement with the Court's mode of analysis and its excessive reliance on ancient practices of Common Law England long superseded by Acts of Congress.

Section 3731 appears to set three requirements for jurisdiction in this Court: (1) the decision from which the appeal is taken must be one "arresting a judgment of conviction"; (2) the decision must be engendered by the "insufficiency of the indictment or information"; and (3) it must be "based on the invalidity or construction

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 19, 1970

Re: No. 305 - U. S. v. Sisson

Dear Byron:

Please join me in your dissenting opinion of June 13.

Regards,

WEB

Mr. Justice White

cc: The Conference

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Changes as marked

To: Mr. [illegible] Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

From: The Chief Justice

Circulated: _____

Recirculated: JUN 23 1970

No. 305.—October Term, 1969

United States, Appellant, v. John Heffron Sisson, Jr. | On Appeal From the United States District Court for the District of Massachusetts.

[June —, 1970]

Mr. Chief Justice Burger, with whom Mr. Justice Douglas and Mr. Justice White join, dissenting.

Both the Government and Sisson have argued that this Court has jurisdiction to review the District Court's action by virtue of the "arrest of judgment" clause in the Criminal Appeals Act, 18 U. S. C. § 3731, which provides for a direct appeal to this Court

> "[f]rom a decision [1] arresting a judgment of conviction [2] for insufficiency of the indictment or information, [3] where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded."

In rejecting the arguments of the parties the Court holds that we have no jurisdiction to hear this appeal, opting for the view that the "arrest of judgment" clause carries with it all of its common law antecedents and that the present case does not meet the criteria required by the common law. My disagreement with the Court's result and rationale is prompted by a fundamental disagreement with the Court's mode of analysis and its excessive reliance on ancient practices of Common Law England long superseded by Acts of Congress.

Section 3731 appears to set three requirements for jurisdiction in this Court: (1) the decision from which the appeal is taken must be one "arresting a judgment of conviction"; (2) the decision must be engendered by the "insufficiency of the indictment or information"; and (3) it must be "based on the invalidity or construction

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

February 6, 1970

Re: No. 305 - United States v. Sisson

Dear Byron:

My vote in this case was based on the fact that I was of the opinion that Judge Wyzanski's whole handling of the case, as stated by Brother Brennan, added up to a verdict of acquittal. I assume that the case could be decided that way either by an affirmance or by a dismissal on the jurisdictional basis.

Sincerely,

H. L. B.

Mr. Justice White

cc: Members of the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

February 26, 1970

MEMORANDUM FOR THE CONFERENCE

Re: No. 305 - United States v. Sisson

I am reassigning the above case to Mr. Justice Harlan.

H. L. B.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

May 25, 1970

Re: United States v. Sisson

Dear John:

Please note at the end of your opinion as follows:

Mr. Justice Black concurs in the judgment of the Court and Part II, C of the opinion beginning at page 13 and ending on page 20.

H.A.B.

Mr. Justice Harlan

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

June 24, 1970

3.5

Dear John:

Re: Selective Conscientious Objector Cases

Your suggestions of June 22nd are satisfactory to me.

Sincerely,

H. L. B.

Mr. Justice Harlan

cc: Members of the Conference

cir 10-8-69

No. 305 - United States v. Sisson

Proposed Order Postponing Jurisdiction

Agree
CW

Further consideration of the question of jurisdiction in this case is postponed to the hearing of the case on the merits. In addition to the questions presented on the merits, counsel are requested to discuss in their briefs and oral arguments, not only the issue of jurisdiction under the "motion in arrest" subdivision of 18 U.S.C. §3731, but also the questions of whether jurisdiction exists under either the "motion in bar" subdivision or the "decision ... setting aside or dismissing" subdivision of 18 U.S.C. §3731.

February seventh
1970

Dear Chief:

In No. 305 -- United States v. Sisson, there seems to be a ground-swell in the Court for dismissing the appeal for want of jurisdiction.

I take the other view and agree substantially with the ideas you expressed at Conference. I am writing this note to express the hope that if it becomes necessary, you will set out your views on that phase of the controversy.

William O. Douglas

The Chief Justice

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

March sixth
1970

Dear Chief:

In Re No. 305
U. S. v. Sisson

I agree with your views as to our jurisdiction to review the District Court's action under 18 USC §3731, as set forth in your memorandum of March fifth.

William O. Douglas

The Chief Justice

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

March tenth
1970

Dear Byron:

In No. 305 -- U. S. v. Sisson, I have already agreed to the memo of the Chief, and I see no reason why I should not join you. In time, I suspect that you and the Chief Justice will want to iron out some minor differences. But I think you have done a good job and you can include me in your troops.

William O. Douglas

Mr. Justice White

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.
5/21/70

No. 305.—October Term, 1969

United States, Appellant, v. John Heffron Sisson, Jr. | On Appeal From the United States District Court for the District of Massachusetts.

[May —, 1970]

Mr. Justice Douglas, dissenting.

I agree with The Chief Justice and with Mr. Justice White that the case is properly here under the arrest of judgment provisions of the Criminal Appeals Act, 18 U. S. C. § 3731. I therefore dissent from a dismissal of the case for lack of jurisdiction and, going further, I dissent on the merits.

Sisson's objection is to combat service in an overseas campaign and the basis of his objection is his conscience. His objection does not put him into the statutory exemption which extends to one "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." [1] Sisson has conscientious objections to participation. His objections are concededly not "religious" in the statutory meaning of the word. The District Court summarized his position as follows: ". . . Sisson's table of ultimate values is moral and ethical. It reflects quite as real, pervasive, durable, and commendable a marshalling of priorities as a formal religion. It is just as much a residue of culture, early training, and beliefs shared by companions and family. What another derives from the discipline of a church, Sisson derives from the discipline of conscience." 297 F. Supp., at 905.

There is no doubt that these views of his are sincere, genuine, and profound.

[1] Section 6 (j), Military Selective Service Act of 1967, 50 U. S. C. App. (Supp. IV) § 456 (j).

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Chief's Handout

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

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 305.—October Term, 1969

Circulated: _____

Circulated: 6/12/70

United States, Appellant, v. John Heffron Sisson, Jr. | On Appeal From the United States District Court for the District of Massachusetts.

[June —, 1970]

Mr. Justice Douglas, dissenting.

I agree with The Chief Justice and with Mr. Justice White that the case is properly here under the arrest of judgment provisions of the Criminal Appeals Act, 18 U. S. C. § 3731. I therefore dissent from a dismissal of the case for lack of jurisdiction and, going further, I would find for the appellee on the merits.

Sisson's objection is to combat service in the Vietnam war, not wars in general, and the basis of his objection is his conscience. His objection does not put him into the statutory exemption which extends to one "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[1] The District Court summarized his position as follows: ". . . Sisson's table of ultimate values is moral and ethical. It reflects quite as real, pervasive, durable, and commendable a marshalling of priorities as a formal religion. It is just as much a residue of culture, early training, and beliefs shared by companions and family. What another derives from the discipline of a church, Sisson derives from the discipline of conscience." 297 F. Supp., at 905.

There is no doubt that these views of his are sincere, genuine, and profound.

[1] Section 6 (j), Military Selective Service Act of 1967, 50 U. S. C. § 456 (j) (1964 ed. Supp. IV) (emphasis added).

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305

June 17, 1970

Dear Chief:

Please join me in your dissent in the Sisson case.

William O. Douglas

The Chief Justice

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

305

June 17, 1970

Dear Byron:

Please join me in your dissent in the Sisson case.

William O. Douglas

Mr. Justice White

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 25, 1970

305

Dear John:

As respects the cases being held for Sisson, 1669-Misc. - Negre v. Larsen seems to be the best of the lot to take. No possible complications on exhaustion seem possible.

W. O. D.

Mr. Justice Harlan

cc: The Chief Justice
Mr. Justice Black
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

CONSCIENTIOUS OBJECTOR CASES

From: Harlan, J.

Circulated: OCT 6 1969

Recirculated:

No. 305.—*United States* v. *Sisson.*
No. 76.—*Welsh* v. *United States.*
No. 35, Misc.—*Vaughn* v. *United States.*
No. 88, Misc.—*McQueary* v. *United States.*

[October 6, 1969.]

Memorandum to the Conference from MR. JUSTICE HARLAN.

Review is sought this Term in several cases which raise issues concerning the appropriate treatment under the Selective Service Act and the Constitution of persons who are opposed to war but are not religious, at least in the conventional sense. The best known of these cases, and the one which it has perhaps been assumed the Court would review on the merits, is *United States* v. *Sisson,* No. 305 (current Conference List, p. 4).

In *Sisson* the Government seeks direct review by an appeal pursuant to the Criminal Appeals Act, 18 U. S. C. § 3731. My inquiries have convinced me that the Court lacks jurisdiction to consider the Government's appeal, at least under that provision of § 3731 upon which the Solicitor General relies. I thought that perhaps a statement of my reasons for this conclusion might be helpful to other members of the Conference, if only because the appellee in *Sisson* has concurred in the Solicitor General's claim that jurisdiction exists.

The jurisdictional problems in *Sisson* are so substantial that I think it unwise for this Court to rely on that case to consider the conscientious objector issues now reaching this Court. I believe that instead certiorari should be granted in *Welsh* v. *United States,* No. 76 (current Conference List, p. 4), to consider (1) whether § 6 (j) of the Selective Service Act should be interpreted

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October 8, 1969

MEMORANDUM TO THE CONFERENCE

Re: No. 395 - United States v. Sisson

Dear Brethren:

In accordance with the instructions of the Conference, I am attaching a proposed order postponing to the merits further consideration of the question of jurisdiction in this case.

Will you kindly let me know whether the proposed order meets with your approval so that I can advise the Chief Justice accordingly.

Sincerely,

Memo sent agree. 10-9-69

J. M. H.

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No. 305 - United States v. Sisson

Proposed Order Postponing Jurisdiction

Further consideration of the question of jurisdiction in this case is postponed to the hearing of the case on the merits. In addition to the questions presented on the merits, counsel are requested to discuss in their briefs and oral arguments, not only the issue of jurisdiction under the "motion in arrest" subdivision of 18 U.S.C. §3731, but also the questions of whether jurisdiction exists under either the "motion in bar" subdivision or the "decision ... setting aside or dismissing" subdivision of 18 U.S.C. §3731.

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

SUPREME COURT OF THE UNITED STATES

No. 305.—October Term, 1969

From: Harlan, J.
Circulated: MAY 20 1970
Recirculated:

United States, Appellant, v. John Heffron Sisson, Jr. | On Appeal From the United States District Court for the District of Massachusetts

[May —, 1970]

Mr. Justice Harlan delivered the opinion of the Court.

The Government seeks to appeal to this Court a decision by a District Court in Massachusetts holding that appellee Sisson could not be criminally convicted for refusing induction into the Armed Forces. The District Court's opinion was bottomed on what that court understood to be Sisson's rights of conscience as a nonreligious objector to the Vietnam War, but not wars in general, under the Free Exercise and Establishment Clauses of the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution of the United States. The District Court's primary conclusion, reached after a full trial, was that the Constitution prohibited "the application of the 1967 Draft Act to Sisson to require him to render combat service in Vietnam" because as a "sincerely conscientious man," Sisson's interest in not killing in the Vietnam conflict outweighed "the country's present need for him to be so employed," 297 F. Supp. 902, 910 (1969).

The District Court characterized its own decision as an arrest of judgment, and the Government seeks review here pursuant to the "arresting judgment" provision of the Criminal Appeals Act, 18 U. S. C. § 3731, an Act that narrowly limits the Government's right to appeal

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Sec 12, 18, 20, 28, 31-23

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan ✓
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

From: Harlan, J.

Circulated:

Recirculated: MAY 26 1970

SUPREME COURT OF THE UNITED STATES

No. 305.—October Term, 1969

United States, Appellant, v. John Heffron Sisson, Jr.	On Appeal From the United States District Court for the District of Massachusetts.

[June —, 1970]

Mr. Justice Harlan delivered the opinion of the Court.

The Government seeks to appeal to this Court a decision by a District Court in Massachusetts holding that appellee Sisson could not be criminally convicted for refusing induction into the Armed Forces. The District Court's opinion was bottomed on what that court understood to be Sisson's rights of conscience as a nonreligious objector to the Vietnam War, but not wars in general, under the Free Exercise and Establishment Clauses of the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution of the United States. The District Court's primary conclusion, reached after a full trial, was that the Constitution prohibited "the application of the 1967 Draft Act to Sisson to require him to render combat service in Vietnam" because as a "sincerely conscientious man," Sisson's interest in not killing in the Vietnam conflict outweighed "the country's present need for him to be so employed," 297 F. Supp. 902, 910 (1969).

The District Court characterized its own decision as an arrest of judgment, and the Government seeks review here pursuant to the "arresting judgment" provision of the Criminal Appeals Act, 18 U. S. C. § 3731, an Act that narrowly limits the Government's right to appeal

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REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

1, 19-21, 27-28
31-36

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

5

From: Harlan, J.

Circulated:

Recirculated: JUN 19 1970

SUPREME COURT OF THE UNITED STATES

No. 305.—October Term, 1969

United States, Appellant, v. John Heffron Sisson, Jr. | On Appeal From the United States District Court for the District of Massachusetts.

[June —, 1970]

Mr. Justice Harlan delivered the opinion of the Court.*

The Government seeks to appeal to this Court a decision by a District Court in Massachusetts holding that appellee Sisson could not be criminally convicted for refusing induction into the Armed Forces. The District Court's opinion was bottomed on what that court understood to be Sisson's rights of conscience as a nonreligious objector to the Vietnam War, but not wars in general, under the Free Exercise and Establishment Clauses of the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution of the United States. The District Court's primary conclusion, reached after a full trial, was that the Constitution prohibited "the application of the 1967 Draft Act to Sisson to require him to render combat service in Vietnam" because as a "sincerely conscientious man," Sisson's interest in not killing in the Vietnam conflict outweighed "the country's present need for him to be so employed," 297 F. Supp. 902, 910 (1969).

The District Court characterized its own decision as an arrest of judgment, and the Government seeks review here pursuant to the "arresting judgment" provision

*Five members of the Court join Part II (C) of this opinion. Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Marshall join Mr. Justice Harlan's entire opinion.

June 22, 1970

Re: No. 395 - United States v. Nixon

Dear Chief:

Byron White has asked me to put over the announcement of this case until Monday next. I am of course perfectly willing to do this, and suppose that this will be agreeable to you and the other members of the Court.

Sincerely,

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN M. HARLAN

CJ -
HLB -
WED -
WJB - Shields ok,
PS - " "
BRW - put over to Mon.
TM -
HAB - Shields ok.

305

June 22, 1970

MEMORANDUM TO THE BRETHREN

At the last Conference I suggested, and I understood it to be the general consensus, that it would be appropriate and desirable to state in the prevailing Sisson opinion that the Court had granted certiorari in one of the cases we had been holding for Sisson, to consider the "Selective" conscientious objector issue not reached in Sisson, because of our jurisdictional holding. To that end, I was asked to explore the cases we have been holding for Sisson, with a view to recommending the most appropriate one for such a grant.

I attach a memorandum canvassing the four cases involving the "Selective" conscientious objector issue, which we have been holding for Sisson and recommending that we grant the Government's petition for certiorari in No. 1040, United States v. Shields.

If a majority of the Brethren are satisfied that Shields is the appropriate case, I can make the necessary addition to my Sisson opinion in time for the case to come down tomorrow, as presently scheduled. On the other hand, if any of the Brethren prefer to have more time to consider the accompanying memorandum, I of course would have no objection to the announcement of the case going over until next Monday.

I would appreciate your views as soon as possible since, if the case is to come down tomorrow, we should give the printshop time to reprint the opinion with the necessary addition.

Sincerely,

J.M.H.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN M. HARLAN

June 22, 1970

Memorandum for the Conference
from Mr. Justice Harlan

Re: Selective Conscientious Objector Cases

Four of the cases being held for Sisson and Welsh present the issue of whether it is constitutional, under the existing Selective Service law, to draft someone who is conscientiously opposed to the Vietnam war, but not to war "in any form." They are Pratt v. United States (CA 6) (No. 666); United States v. Shields (CA 7) (No. 1040); Gillette v. United States (CA 2) (No. 1170); and Negre v. Larsen (CA 9) (Misc. No. 1669). My recommendation is that we grant the Government's petition in United States v. Shields so that the Court may consider the merits of the selective conscientious issue involved but not reached by us in Sisson.

(1) In Shields, a criminal prosecution for refusing induction, the defendant attempted to tender evidence of his conscientious objector beliefs and sought to rely on Judge Wyzanski's Sisson opinion. The District Court rejected the tender on the ground that the defendant had failed to exhaust his administrative remedies, in that he had not applied for a C. O. exemption. On appeal, the CA 7, after noting the pendency of Sisson in this Court, remanded to the District Court so that it might return defendant's file to his local Board in order that the Board might pass on Shield's constitutional claim. The Government, in seeking certiorari, notes that if it prevails on the merits of this case, there would be no need to have the Board pass on these issues.

(2) In Gillette, the CA 2 said that petitioner's sole defense "was that he should have been classified as a conscientious objector" on the basis of his humanistic beliefs "directed against

the war in Vietnam." The court cited, but did not follow Judge Wyzanski's Sisson, instead holding that petitioner's "conscientious objection to serve in Vietnam is not sufficient to outweigh the application of Congressional power to him." Gillette, like Shields, presents the Selective C. O. issue very well. Unless we waive our Rule, however, the petition in Gillette is three days out-of-time.

(3) In Pratt, although the petitioner tenders the Selective C. O. issue in this Court, the court below only decided Pratt's related claim that the alleged illegality of the war provided a defense to his induction. Of the three pre-induction cases, I think it is the least suitable.

(4) Negre v. Larsen also presents the selective conscientious objector issue, but in the context of a habeas corpus suit by a soldier who had been ordered to duty in Vietnam. Petitioner, who applied for a discharge from the Army and is a Catholic, was found by the Army not to be conscientiously opposed to participation in all wars, but only in Vietnam. The CA 9 below, in affirming the District Court's denial of the writ, held there was a basis in fact for the Army's determination that petitioner did not qualify for classification as a conscientious objector.

In each of the three cases involving refusals to submit to induction, as in Sisson itself, the registrant did not apply to the Board for a C. O. deferment. Respondent Shields did, however, submit an affidavit below stating that in deciding whether to apply to his Board, he had sought the advice of counsel who informed him that the statutory exemption applied only to those opposed to war "in any form," and that consequently filing a Form 150 would not be appropriate. Moreover, the Government in Shields, although claiming that the Board should have been consulted so that it might have passed on the registrant's sincerity, concedes that a local board "cannot properly pass upon a claim that the underlying statute or any part thereof is unconstitutional," Petition in Shields, No. 1040, at 4. Given the present statute, which by its terms would have prevented a Board from giving a deferment, and given the Government's concession concerning the limits of the Board's power to pass on the constitutionality of that statute, I do not think

the "exhaustion" problem would prevent the Court from reaching the merits of the constitutional issue if certiorari were granted in Shields. There is, of course, no exhaustion problem at all in Negre for the petitioner there, as the court below found, "exhausted his administrative remedies" under the applicable Army regulations.

1, 10, 11, 16, 19, 21, 28-29, 31, 32-38

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

From: Harlan, J.

Circulated: JUN 23 1970

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 305.—October Term, 1969

United States, Appellant, v. John Heffron Sisson, Jr. | On Appeal From the United States District Court for the District of Massachusetts.

[June —, 1970]

Mr. Justice Harlan delivered the opinion of the Court.*

The Government seeks to appeal to this Court a decision by a District Court in Massachusetts holding that appellee Sisson could not be criminally convicted for refusing induction into the Armed Forces. The District Court's opinion was bottomed on what that court understood to be Sisson's rights of conscience as a nonreligious objector to the Vietnam War, but not wars in general, under the Free Exercise and Establishment Clauses of the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution of the United States. The District Court's primary conclusion, reached after a full trial, was that the Constitution prohibited "the application of the 1967 Draft Act to Sisson to require him to render combat service in Vietnam" because as a "sincerely conscientious man," Sisson's interest in not killing in the Vietnam conflict outweighed "the country's present need for him to be so employed," 297 F. Supp. 902, 910 (1969).

The District Court characterized its own decision as an arrest of judgment, and the Government seeks review here pursuant to the "arresting judgment" provision

*Mr. Justice Black joins only Part II C of this opinion. Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Marshall join the entire opinion.

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STYLISTIC CHANGES ~~THROUGHOUT.~~
SEE PAGES: 2, 10, 12, 28, 34, 38

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

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7

From: Harlan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 305.—October Term, 1969

Recirculated: JUN 25 1970

United States, Appellant, v. John Heffron Sisson, Jr. | On Appeal From the United States District Court for the District of Massachusetts.

[June —, 1970]

Mr. Justice Harlan delivered the opinion of the Court.*

The Government seeks to appeal to this Court a decision by a District Court in Massachusetts holding that appellee Sisson could not be criminally convicted for refusing induction into the Armed Forces. The District Court's opinion was bottomed on what that court understood to be Sisson's rights of conscience as a nonreligious objector to the Vietnam War, but not wars in general, under the Free Exercise and Establishment Clauses of the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution of the United States. The District Court's primary conclusion, reached after a full trial, was that the Constitution prohibited "the application of the 1967 Draft Act to Sisson to require him to render combat service in Vietnam" because as a "sincerely conscientious man," Sisson's interest in not killing in the Vietnam conflict outweighed "the country's present need for him to be so employed," 297 F. Supp. 902, 910 (1969).

The District Court characterized its own decision as an arrest of judgment, and the Government seeks review here pursuant to the "arresting judgment" provision of the Criminal Appeals Act, 18 U. S. C. § 3731, an Act

*Mr. Justice Black joins only Part II C of this opinion. Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Marshall join the entire opinion.

circ 10-8-69

I agree

No. 305 - United States v. Sisson

Proposed Order Postponing Jurisdiction

Further consideration of the question of jurisdiction in this case is postponed to the hearing of the case on the merits. In addition to the questions presented on the merits, counsel are requested to discuss in their briefs and oral arguments, not only the issue of jurisdiction under the "motion in arrest" subdivision of 18 U.S.C. §3731, but also the questions of whether jurisdiction exists under either the "motion in bar" subdivision or the "decision ... setting aside or dismissing" subdivision of 18 U.S.C. §3731.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 6, 1970

RE: No. 305 - United States v. Sisson

Dear Byron:

My vote on the merits was contingent on the resolution of my doubts regarding jurisdiction of the appeal.

In connection with No. 84, Jorn, I studied the legislative history of the Criminal Appeals Act. On the basis of that study, I am now satisfied that no appeal lies in this case either to this Court or to the Court of Appeals. I think that John was right in his Memorandum of October 6, 1969 in concluding that the appeal does not lie under either the motion in arrest of judgment clause, or the clauses allowing appeals from dismissals based upon the invalidity or construction of a statute. And I don't share John's doubts as to the availability of the motion in bar provision - that provision too is not a basis in my view for this appeal.

I think that Judge Wyzanski's whole handling of the case adds up to a verdict of acquittal, and the legislative history makes crystal clear that Congress precluded any appeal to any court from acquittals however erroneous. As in Jorn, therefore, I think this appeal must be dismissed and that no transfer of it can be made to the Court of Appeals.

Sincerely,

W. J. B. Jr.

Mr. Justice White

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 26, 1970

RE: No. 305 - United States v. Sisson

Dear John:

I enthusiastically join your circulation No. 4 in the above. I appreciate your consideration of my suggestions.

Sincerely,

Bill

W.J.B.Jr.

Mr. Justice Harlan

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

305

June 22, 1970

Re: Selective Conscientious Objector Cases

Dear John:

I think that Shields looks like the best choice and would vote to grant it and note in Sisson that we have done so.

Sincerely,

Bill

Mr. Justice Harlan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 27, 1970

305 - United States v. Sisson

Dear John,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.I.

Mr. Justice Harlan

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 22, 1970

305

Re: Selective Conscientious Objector Cases

Dear John,

I would be in favor of granting certiorari in one of these cases, and of announcing that fact in a footnote in the Sisson opinion, as well as on the Order List for next Monday, June 29. Based upon your memorandum, United States v. Shields, No. 1040, would seem to be the best vehicle, although Gillette, No. 1170, is an alternative possibility.

Sincerely yours,

P.S.

Mr. Justice Harlan

Copies to the Conference

October 8, 1969

Re: No. 305 - United States v. Sisson

Dear John:

Your proposed order satisfies me.

Sincerely,

EBW

Mr. Justice Harlan

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

February 9, 1970

Re: No. 305 - United States v. Sisson

Dear Chief:

I am returning this case for reassignment since it now appears that Justices Harlan, Brennan, Stewart and Marshall are firm in their views that there is no jurisdiction in this Court. Also, Hugo seems to agree with Bill Brennan. At least a dismissal would be proper in his view.

Sincerely,

B.R.W.

The Chief Justice

cc: The Conference

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

From: White, J.
Circulated: 3-10-70
Recirculated:

No. 305.—October Term, 1969

United States, Appellant, *v.* John Heffron Sisson, Jr.	On Appeal From the United States District Court for the District of Massachusetts.

[March —, 1970]

Memorandum to the Conference from Mr. Justice White.

While I am in substantial agreement with the views set forth in The Chief Justice's memorandum concerning the jurisdictional issue in this case, my own research thus far has convinced me that we have jurisdiction under either the "motion in arrest" or "motion in bar" provisions of the Criminal Appeals Act. I am circulating this memorandum stating my reasons for so concluding.

I

Motion in Arrest

The Act, 18 U. S. C. § 3731, provides for a direct appeal to this Court:

> "[f]rom a decision [1] arresting a judgment of conviction [2] for insufficiency of the indictment or information, [3] where such decision is based upon the invalidity of construction of the statute upon which the indictment or information is founded."

I agree with Mr. Justice Harlan that the third requirement—that the decision be based on the invalidity or construction of the statute—should be read to include the entire statute on which the indictment is founded, not simply the penalty provisions. The indictment here charged Sisson with willfully failing to perform a duty required by the Act in that he refused to comply with

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

SUPREME COURT OF THE UNITED STATES

From: White, J.

Circulated: 6-13-70

Recirculated:

No. 305.—October Term, 1969

United States, Appellant, v. John Heffron Sisson, Jr. | On Appeal From the United States District Court for the District of Massachusetts.

[June —, 1970]

Mr. Justice White, dissenting.

I

I agree with The Chief Justice that this case can be appealed by the Government under the "motion in arrest" provisions of the Criminal Appeals Act. In contrast to the rather clear remedial purpose of the Act, not a single passage in the legislative history indicates congressional awareness that the words it was using had the effect of distinguishing cases where a congressional act was held invalid on its face, from cases where it was invalidated as applied to a sub-class within the Act's intended reach. In both cases, the indictment is "insufficient" to state a valid offense.[1] In both cases, any "factual findings" necessary to give the particular defendant the benefit of the constitutional ruling are little more than findings as to the defendant's standing to raise the constitutional issue—they are not findings as to the sufficiency of the evidence to prove the offense alleged in the indictment.[2] Thus, if Judge Wyzanski, without

[1] Failure to set out the elements of a *valid* offense against the named defendant is the only way an indictment could ever be "insufficient" because of the unconstitutionality (as opposed to the construction) of the underlying statute.

[2] The majority, as The Chief Justice's opinion makes clear and as I discuss in more detail later, *infra*, at —, repeatedly ignores this difference between the facts necessary to secure relief for Sisson on his constitutional claim, and the facts relevant to the offense of wilfully refusing induction.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 18, 1970

Re: No. 305 - United States v. Sisson

Dear Chief:

Please join me in your dissenting opinion in this case.

Sincerely,

B.R.W.

The Chief Justice

copies to The Conference

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1 8849, 12-16, 19-20, 24

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

SUPREME COURT OF THE UNITED STATES

No. 305.—October Term, 1969

From: White, J.

United States, Appellant, v. John Heffron Sisson, Jr. | On Appeal From the United States District Court for the District of Massachusetts.

Circulated:

Recirculated: 6-20-70

[June 23, 1970]

Mr. Justice White, with whom The Chief Justice and Mr. Justice Douglas join, dissenting.

I

I agree with The Chief Justice that this case can be appealed by the Government under the "motion in arrest" provisions of the Criminal Appeals Act. In contrast to the rather clear remedial purpose of the Act, not a single passage in the legislative history indicates congressional awareness that the words it was using had the effect of distinguishing cases where a congressional act was held invalid on its face, from cases where it was invalidated as applied to a sub-class within the Act's intended reach. In both cases, the indictment is "insufficient" to state a valid offense.[1] In both cases, any "factual findings" necessary to give the particular defendant the benefit of the constitutional ruling are little more than findings as to the defendant's standing to raise the constitutional issue—they are not findings as to the sufficiency of the evidence to prove the offense alleged in the indictment.[2] Thus, if Judge Wyzanski, without

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[2] The majority, as The Chief Justice's opinion makes clear and as I discuss in more detail later, *infra*, at —, repeatedly ignores this difference between the facts necessary to secure relief for Sisson on his constitutional claim, and the facts relevant to the offense of wilfully refusing induction.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 24, 1970

305

Dear John:

With respect to the Sisson holds, I would prefer to grant Gillette rather than Shields, but either will do the job it seems to me.

Sincerely,

B.R.W.

Mr. Justice Harlan

cc: The Conference

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 2, 4-6, 8-10, 24-25;
12-21 reorganized with additions

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

SUPREME COURT OF THE UNITED STATES

Mr. Justice White, J.

No. 305.—October Term, 1969 Circulated: _____

Recirculated: 6-24-70

United States, Appellant, v. John Heffron Sisson, Jr. | On Appeal From the United States District Court for the District of Massachusetts.

[June —, 1970]

Mr. Justice White, with whom The Chief Justice and Mr. Justice Douglas join, dissenting.

I

I agree with The Chief Justice that this case can be appealed by the Government under the "motion in arrest" provisions of the Criminal Appeals Act. In contrast to the rather clear remedial purpose of the Act, not a single passage in the legislative history indicates congressional awareness that the words it was using had the effect of distinguishing cases where a congressional act was held invalid on its face, from cases where it was invalidated as applied to a sub-class within the Act's intended reach. In both cases, the indictment is "insufficient" to state a valid offense.[1] In both cases, any "factual findings" necessary to give the particular defendant the benefit of the constitutional ruling are little more than findings as to the defendant's standing to raise the constitutional issue—they are not findings as to the sufficiency of the evidence to prove the offense alleged in the indictment.[2] Thus, if Judge Wyzanski, without

[1] Failure to set out the elements of a *valid* offense against the named defendant is the only way an indictment could ever be "insufficient" because of the unconstitutionality (as opposed to the construction) of the underlying statute.

[2] The majority, as The Chief Justice's opinion makes clear and as I discuss in more detail later, *infra*, at —, repeatedly ignores this difference between the facts necessary to secure relief for Sisson on his constitutional claim, and the facts relevant to the offense of wilfully refusing induction.

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October 9, 1969

Re: No. 305 - United States v. Sisson

Dear John:

Your proposed order meets with my approval.

Sincerely,

T.M.

Mr. Justice Harlan

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 18, 1970

Re: No. 305 - U. S. v. Sisson

Dear John:

Please join me.

Sincerely,

T.M.

Mr. Justice Harlan

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 22, 1970

MEMORANDUM

305

To: Mr. Justice Harlan

Re: Selective Conscientious Objector Cases

Your suggestion that No. 1040 be the vehicle to present the issue in question certainly has my approval. No. 1170, Gillette v. United States, looks even a little cleaner to me, but as you point out has a question of timeliness. If the time factor is not important the Gillette case would be a good one too. Certainly Shields and Gillette in my view are better than the Pratt and Negre cases.

HAB.

H. A. B.

cc: The Conference