No. 07-607

IN THE
SUPREME COURT OF THE UNITED STATES

AGUSTÍN AGUAYO,

Petitioner,

v.

**PETE GEREN, Secretary,
Department of the Army,**

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the District of Columbia Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

PETER GOLDBERGER
Counsel of Record
JAMES H. FELDMAN, JR.
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200

February 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, Statutes and Rules:

Regulations and Miscellaneous:

ARGUMENT IN REPLY

This petition presents important questions concerning federal court review of military decisions rejecting applications for discharge on the basis of conscientious objection -- a sensitive subject touching simultaneously on the relationships between civilian and military authority, and between judicial and executive authority, and on the need both to respect the free exercise of religion and to avoid "establishment" violations. Yet the Solicitor General opposes granting the writ here by disregarding the serious issues raised by the decision of the court below and the actual decision of the Army's Conscientious Objector Review Board ("DACORB"), in light of the facts in the record. Instead, the Brief in Opposition relies on a series of casual references to the language of the Army's regulation.

But it is not the regulation as written that petitioner challenges: it is the misapplication in this case of the Department of Defense regulation,[1] together with

[1] Contrary to the respondent's suggestion (BIO 2 n.1), it was petitioner who first brought to this Court's attention that the Defense Department directive governing conscientious objector discharges had been removed from the Code of Federal Regulations. Moreover, it was not "removed as duplicative," id., but rather on the basis that it concerned only internal personnel matters and thus did not require publication. See Letter dated Jan. 16, 2008, from petitioner's counsel to the Clerk, copied to the Solicitor General's office (and transmitted again by electronic mail, at the request of an Assistant to the Solicitor General, on January 25). Moreover, there was nothing inappropriate about the court of appeals' referring to the former 32 C.F.R. part 75 (and none in the

the Army's rules implementing it, which gives rise both to a conflict with this Court's precedent and with the approach taken by other circuits in similar cases. Moreover, as shown in the petition, and as confirmed in the brief of amicus curiae, The Center on Conscience & War, the rationale of the court below raises serious questions under both the First Amendment and the Religious Freedom Restoration Act. None of the respondent's contentions provides a persuasive basis to deny the petition.

1. Respondent Secretary distorts petitioner's argument by claiming that petitioner contends "that the court of appeals erred in considering whether his stated beliefs were developed through an activity comparable in rigor and dedication to the process by which traditional religious convictions are formulated." BIO 9. Petitioner does not argue that the lower court's error lies in "considering" this; the regulation permissibly invites such consideration. What petitioner contends (and demonstrates) is that the court of appeals erred in approving this as the sole a basis in fact for the denial of discharge. Pet. 17. (This error takes two forms: first, the court below improperly applies the "rigor and dedication" test in a manner which unconstitutionally favors traditional religious claims, and second, it does so without any genuine factual basis in the record. The petition acknowledges that this factor can be considered, if applied properly -- but we insist that it "cannot be turned into a sine qua non." Pet. 18.

_____(cont'd)

petition's references, either); those provisions were in effect throughout time petitioner's application was being considered, and when the court of appeals rendered its decision.

Respondent asserts that petitioner is "mistaken in asserting" that the court of appeals looked only to whether Aguayo "developed his stated beliefs through 'study or contemplation" in claiming to have found a basis in fact for the Army's denial of the CO discharge application. To support this position, the government first points to the fact that the COA "expressly noted" that the Army regulation provides "a list of factors to be considered." BIO 9. That is true, but beside the point. While the court below did note this fact about the regulation, it upheld the district court's denial of habeas corpus relief -- that is, it found a basis in fact for the DACORB decision -- only by pointing to the manner in which petitioner's beliefs developed (or the way they did not develop).

The government appears to argue that the court below relied for a "basis in fact" not only on petitioner's supposed lack of "rigor and dedication" in his faith development but also on all the other alleged "reasons" given by DACORB for its decision; that is, that petitioner's beliefs "appeared to have existed at the time of his enlistment," that his asserted beliefs were not "the product of a conscious thought process" which "left him with no choice but to act in accordance with them," and because of the asserted "suspect timing" of his claim. BIO 9-10. The government's account of the D.C. Circuit decision does not bear scrutiny.

What the court below concluded was that various Army officers who had "doubts" about these points had some basis for their suspicions. Appx. A19. The court thus suggested that "Aguayo's own application materials provide reason to doubt whether his beliefs developed through 'activity comparable in rigor and dedication to

the processes by which traditional religious convictions are formulated' or 'are the product of a conscious thought process resulting in such a conviction as to allow the person no choice but to act in accordance with them.'" Appx. A18. But under this Court's precedent, denial of a prima facie valid claim "solely on the basis of suspicion and speculation" is impermissible. Dickinson v. United States, 346 U.S. 389, 397 (1953); see also Hager v. Sec'y of the Air Force, 938 F.2d 1449, 1463 (1st Cir. 1991) (Breyer, J., concurring).

The only one of the Army's "reasons" for denial for which the court below found any basis in fact was DACORB's assertion that his claim "lacks the religious foundation" and that petitioner had not "provided any significant source of his beliefs," Appx. A6, that is, the asserted lack of rigor in petitioner's process of faith development. It is that conclusion which gives rise to the important legal questions presented in this petition.

It is true that under the regulation "rigor" is but one of half a dozen relevant factors that reviewing officers are directed to consider in evaluating whether an asserted moral belief qualifies as equivalent to traditionally religious scruples. This fact in no way undercuts petitioner's argument. DACORB mentioned none of these factors in its memorandum of decision, and the court below relied on only one factor to affirm. Appx. A18-A19. It is also true that the court of appeals was "careful to observe that '[n]o single fact or statement is dispositive,'" and stated that it "reached its conclusion 'based on the entire record' and not one factor alone." Appx. A17. Yet in the end only one point was actually cited and justified factually. Thus, while the COA made this statement, what it apparently meant is that after

reviewing the entire record, the court was convinced that there is was a basis in fact to support the "lack of rigor" reason for denial.

Respondent claims that the Army's decision would in any event "be supported by the other remaining, valid factors considered by the Board," BIO 10, but in truth there are no such "other" factors, that is, not "valid" ones. While the Board gave other "reasons" for the denial of petitioner's claim, the court of appeals did not claim to have found a basis in fact for any of them, and respondent cites none.[2] The D.C. Circuit held that the "DACORB could properly find that the circumstances surrounding Aguayo's application constituted a factor that weighed against its approval," Appx. A19, but the court never held that timing actually provided a basis in fact to deny the application. In fact, the court acknowledges -- as established by the Army's own regulation -- that "suspect timing ... is not, in itself, sufficient grounds for ... denial." Appx. A19.

The court of appeals' contention that the process by which petitioner became a conscientious objector lacked a level of "rigor and dedication" equivalent to that seen in the acquisition of a traditional faith is itself a dubious and unverifiable proposition, not because of any softness in petitioner's process but because the varieties

[2] For example, DACORB claimed that petitioner's pre-enlistment doubts disqualified him, but the district court never relied on that "reason" (see Pet.Appx. B7), and the court of appeals likewise did not endorse it. To the contrary, the court below noted that while petitioner's father was a pacifist, he himself averred that he "was not a conscientious objector when he volunteered for the Army." A18. There is no evidence in the record to the contrary.

of traditional religious experience are so varied. The court of appeals' reliance on this comparison is precisely what gives rise to the constitutional problems highlighted in the petition. It would allow the Army to decide and judge what is and what is not the preferred or acceptable way for someone to develop new religious beliefs.

The government argues that we are "mistaken" in arguing that the Army prefers beliefs developed in a particular way. BIO 12. Respondent points out that the regulation provides for beliefs "developed in any number of ways." Those ways, according to the government are "'training, study, contemplation, or other activity comparable in rigor and dedication.'" BIO 11-12 (emphasis original). Under United States v. Seeger, 380 U.S. 163 (1965), and Welsh v. United States, 398 U.S. 333 (1970), beliefs which are not traditionally considered to be "religious" are nevertheless treated as "religious" under the draft law (upon which the military CO regulations are based). While the regulations does approve of more than one way for a non-religious CO to have his claim approved, he must satisfy the Army that he developed his beliefs through some sort of "rigor and dedication" that is "comparable" to the "training, study [or] contemplation" by which traditional religious beliefs are presumed to be acquired.

As interpreted by the court of appeals, this standard is higher for the non-traditional conscientious objector than for someone who, for example, is born into a Mennonite family and acquires his beliefs through acceptance of family tradition or who is converted by hearing a single, powerful sermon. The court below approved an interpretation of the Defense Department

regulation which prefers beliefs developed in a certain way over beliefs developed some other way. The respondent ignores the obvious constitutional problem, which lies not in the wording of the rule but in its application in petitioner's case by the court below.

2. The government contends that "there is no disagreement among the circuits regarding the weight to be given the process by which an applicant for conscientious objector status developed his beliefs." BIO 12. All the cases cited in the petition, however, state -- in the context of the holding in each case that "rigor" is not a factor in judging whether a belief qualifies as "religious" in the pertinent sense. And petitioner's alleged lack of "religious foundation," after all, is the DACORB "reason" for which the court below claimed to find a "factual basis."

Thus, for example, in United States v. Stetter, 445 F.2d 472, 479 (5th Cir. 1971), the court ruled, "It is not the form or amount of training that is crucial. Sincerity of belief is the touchstone. The extent of training may, and often does, have no correlation with sincerity." The court below used the "rigor and dedication" issue not to dispute petitioner's sincerity but to support an indefensible DACORB conclusion that his beliefs lacked a "religious foundation." DACORB in this case never made a finding of insincerity. All the cases cited in the petition involved traditionally religious COs who developed their beliefs without rigorous training. The courts in those cases held that the extent of religious training is not important, and thus cannot provide a legally sufficient "basis in fact" to support a denial of CO discharge.

The conflict between the court below and the other circuits is thus on the question of whether a

criterion which may not be used for judging traditionally religious COs may nevertheless be invoked as the basis to deny a non-traditional CO. In other words, may the military reject a non-traditional (moral-ethical) CO claim for failure to demonstrate "rigor and dedication" in the faith development process, "comparable" in seriousness (in the judgment of a panel of military officers and then a court) to traditional religious faith-development, when traditionally religious COs do not, under the cases, have to meet that amorphous and undefined standard?

For these reasons certiorari should be granted.

3. The petition contends that the interpretation of the Defense Department directive and Army regulation by the court below is also impermissible because it violates the Establishment Clause and conflicts with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. Respondent contends that petitioner waived the RFRA argument by not "press[ing]" it below. BIO 10. That position misses the point. Properly construed and applied so as to ensure religious neutrality, the military's regulations do not raise these issues. Thus, petitioner's claim below was presented on narrow and uncontroversial grounds that would be sufficient to decide the case. The First Amendment and RFRA issues only arose in this case because of the erroneous application of the regulation by the court of appeals. Accordingly, they were articulated first, other than in passing, in the D.C. Circuit petition for rehearing and then in this Court.

The general rule under the Religious Freedom Restoration Act ("RFRA") is a total prohibition on governmental action which "burdens" an individual's

"exercise of religion." 42 U.S.C. § 2000bb-1(a). Compelling a person's continued membership in the military after that person has developed a religious objection to participating in "war in any form" surely burdens that person's religious exercise. The Act then provides an "exception" to that rule where the government can "demonstrate" that the objectionable requirement is nevertheless the "least restrictive means" of accomplishing a "compelling governmental interest." Id. § 2000bb-1(b). The term "demonstrates" is defined to mean "meets the burden of going forward with the evidence and of persuasion." Id. § 2000bb-2(3) (emphasis added). See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006). The military service branches are not exempt from this federal law. Id. §§ 2000bb-2(1), 2000bb-3(a).

Not only does RFRA place the burden on the government rather than on the applicant for exemption, but RFRA also utilizes a definition of the scope of "religious exercise" that is broader than that protected by the Defense Department's existing conscientious objector provisions. See id. § 2000bb-2(4), adopting id. § 2000cc-5(7)(A) (exercise at issue need not be "central" to individual's "system of religious belief"). Any unduly restrictive application of DoD Instruction 1300.06 (2007) (formerly 32 C.F.R. part 75), or a service branch regulation implementing that Instruction, such as AR 600-43 (2006), thus raises the serious question whether the Defense Department is honoring this Congressional mandate.

Similarly, and at least equally disturbing, the interpretation and application of the military's CO rule by the court below, as endorsed by the respondent,

would raise serious questions under the Establishment Clause. No First Amendment constitutional principle is more fundamental than that which holds the government to a standard of strict neutrality as between one form or religion and another. See, e.g., McCreary County v. American Civil Liberties Union of Kentucky, 545 U.S. 844, 875-76 (2005). It was the avoidance of such problems that led to this Court's broad construction of the statutory definition of religious objection under the Selective Service Act in Seeger and Welsh.[3] Petitioner need not have argued those points affirmatively in his appellate brief to protest now that the rationale of the court of appeals decision is inconsistent with the core principles protected by those precedents.

In the posture of this case, then, the Establishment Clause and RFRA issues not only could not have been raised earlier, but also have now achieved greater importance.

4. Respondent denies any inconsistency between the opinion of the court below and this Court's decision in Witmer v. United States, 348 U.S. 375, 381 (1955). BIO 13-14. The inconsistency, however, is palpable. The court below cited not a single "objective fact[that]

[3] In Gillette v. United States, 401 U.S. 437, 449-60 (1971), this Court rejected an Establishment Clause challenge to the restriction of CO status to those who object to participation in all wars, while excluding selective objectors. The Court identified numerous practical and constitutional problems which it saw arising if the absolute/selective line were breached. No similar problems would be created by requiring the military not to favor traditional religious claims over those founded on equally fundamental moral grounds, in terms of the "rigor" demanded in any explanation of the belief's development.

cast[s] doubt on the sincerity of [petitioner's] claim." Id. 382. But without such facts, the DACORB decision cannot be upheld. Instead, the court below, like DACORB itself, simply ignored the most powerful objective fact in the record that corroborated petitioner's sincerity -- his refusal to load his weapon during an entire combat tour in Iraq. Respondent cites nothing in the record to support a conclusion of insincerity, and indeed it does not appear that DACORB believed petitioner to be insincere. Rather, its decision (like the opinion of the court below) is best read as concluding that petitioner's stated scruples did not qualify because they were not enough like some ideal form of traditional religious belief arrived at through rigorous study, training or contemplation. That conclusion is insupportable either legally or factually.

The decision of the court below places in severe doubt the constitutionality and statutory validity of the military's well-established procedures for recognition and discharge of sincere conscientious objectors, such as petitioner Aguayo. Certiorari should be granted for this final reason as well.

CONCLUSION

For the reasons offered in this Reply and in the original petition, a writ of certiorari should be granted.

Respectfully submitted,

PETER GOLDBERGER
Counsel of Record
JAMES H. FELDMAN, JR.
Attorneys for Petitioner

February 2008.