

ruled by *Zorach*. As professor Kauper has stated: "One may well agree with the dissenters [in *Zorach*] that the majority decision in the *Zorach* case . . . amounted in substance to an overruling of the *McCullum* case."¹⁴⁶

The "on-the-premises," "off-the-premises" distinction between the two cases seems not significant in view of the principal point made by the majority in *McCullum*, that the released time program there was unlawful because it encouraged recruitment into religion classes. This coercive element was equally present in the dismissed time program considered in *Zorach*, and the dissenting justices in *Zorach* indeed deemed *McCullum* to be overruled. It is interesting to note that the Department apparently agrees.¹⁴⁷

Zorach v. Clauson

In view of what has hitherto been stated herein with respect to the *Zorach* decision, only the following brief comments remain to be directed to the Department's appraisal thereof.

It must be stated that the Department Memorandum largely misconceives the teaching of the *Zorach* case. The Memorandum states: "The most that can be said [of *Zorach*] is that the opinion evidenced a more flexible attitude toward problems of separation."¹⁴⁸ Whatever legal meaning can be derived from this description is most uncertain. The dissenting opinions in *Zorach* were more definite. Justice Black saw in the majority opinion therein a new interpretation of the first amendment.¹⁴⁹ So did Justices Jackson and Frankfurter.¹⁵⁰

In attempting to establish its thesis, the Department encounters formidable difficulty in attempting to reconcile *Zorach* and again resorts to vague expression in appraising that case: "*Zorach* reaffirms that the state may not actively support a religious organization. On the other hand, it may, and perhaps under some circumstances must, temper its secular requirements if religious observances conflict with them."¹⁵¹ Notably, the Court in *Zorach* made it clear that the Constitution does not require in all respects a separation of church and state and that

¹⁴⁶ Kauper, *Frontiers of Constitutional Liberty* 122 (1956).

¹⁴⁷ HEW Memorandum 363.

¹⁴⁸ *Ibid.*

¹⁴⁹ 343 U.S. at 315-20.

¹⁵⁰ *Id.* at 320-25.

¹⁵¹ HEW Memorandum 358.