South Carolina Law Review

Volume 22 | Issue 5 Article 7

1970

Armed Services--Conscientious Objection--the End of the Road

Robert B. Pearlman

ARMED SERVICES—CONSCIENTIOUS OBJECTION—THE END OF THE ROAD*

Exemption of certain groups and their members from combatant military service is not new. In fact, since the Revolutionary War, the United States has exempted persons whose religious tenets will not permit fighting.[1] At the same time the federal government has never excused from military service those whose abhorrence of fighting and war is based upon purely personal reasons.[2] Between these two extremes lies a large, nebulous group whose members include those whose religion does not forbid fighting, those whose non-combative persuasions are only influenced by religious beliefs, and those whose objections stem from deeply held imperatives of conscience or ethics that play the same part in the objector's life as does religion in the lives of others.

It is this large middle group that has caused the most problems in the courts' struggles to construe the conscientious objector statutes properly through the years. It is not necessary to review these struggles here.[3] They have recently culminated, however, in the well-publicized case of *Welsh v. United States*.[4] This case, based largely on the prior case of *United States v. Seeger*,[5] drew attention because of the Court's expansion of the *Seeger* test to the test formulated in *Welsh* which excluded

> all those 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.[6]

The Court's perfunctory adherence to the requirement that the objection be based upon "religious training and belief" is significant, for it may herald the last time that even perfunctory adherence is observed.

Inasmuch as *Welsh* is founded upon *Seeger*, it should be useful to review the decision in that case. This is not to indulge in

* Welsh v. United States, 90 S. Ct. 1792 (1970).

1. Osberger, *The Three Eras of the Conscientious Objector*, 34 U. CIN. L. REV. 487 (1965).
2. *Id.*
3. A good review is provided by Osberger, *supra* note 1.
4. 90 S. Ct. 1792 (1970).
5. 380 U.S. 163 (1965).
6. Welsh v. United States, 90 S. Ct. 1792, 1798 (1970).

a careful analysis of *Seeger*, for that has already been well done,[7] but rather to illustrate the background which led to the decision in *Welsh*. In *Seeger*, three cases were consolidated for argument even though each involved different facts and circumstances.[8] The parties, convicted for refusal to submit for induc-

7. An excellent analysis may be found in Rabin, *When is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise*, 51 CORNELL L.Q. 231 (1966).

8. The three cases were *United States v. Seeger*, 326 F.2d 846 (2d Cir. 1964); *United States v. Jakobson*, 325 F.2d 409 (2d Cir. 1963); *Peter v. United States*, 324 F.2d 173 (9th Cir. 1963). The facts in each were as follows:

1. *Seeger*. Seeger was convicted in the District Court for the South ern District of New York of having refused to submit to induction in the armed forces. He was originally classified 1-A in 1953 by his local board, but this classification was changed in 1955 to 2-S (student) and he remained in this status until 1958 when he was reclassified 1-A. He first claimed exemption as a conscientious objector in 1957 after successive annual renewals of his student classification. Although he did not adopt verbatim the printed Selective Service System form, he declared that he was conscientiously opposed to participation in war in any form by reason of his "religious" belief; that he preferred to leave the question as to his belief in a Supreme Being open, "rather than answer 'yes' or 'no'"; that his "skepticism or disbelief in the existence of God" did "not necessarily mean lack of faith in anything whatsoever"; that his was a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." He cited such personages as Plato, Aristotle and Spinoza for support of his ethical belief in intellectual and moral integrity "without belief in God, except in the remotest sense." His belief was found to be sincere, honest, and made in good faith; and his conscientious objection to be based upon individual training and belief, both of which included research in religious and cultural fields. Seeger's claim, however, was denied solely because it was not based upon a "belief in a relation to a Supreme Being" as required by § 6(j) of the Act. He was convicted and the Court of Appeals reversed, holding that the Supreme Being requirement of the section distinguished "between internally derived and externally compelled beliefs" and was, therefore, an "impermissible classification" under the Due Process Clause of the Fifth Amendment.

2. *Jakobson*. Jakobson was also convicted in the Southern District of New York on a charge of refusing to submit to induction. Jakobson was originally classified 1-A in 1953 and intermittently enjoyed a student classification until 1956. It was not until April 1958 that he made claim to noncombatant classification (1-A-O) as a conscientious objector. He stated on the Selective Service System form that he believed in a "Supreme Being" who was "Creator of Man" in the sense of being "ultimately responsible for the existence of" man and who was "the Supreme Reality" of which "the existence of man is the *result*." (Emphasis in the original.) He explained that his religious and social thinking had developed after much meditation and thought. He had concluded that man must be "partly spiritual" and, therefore, "partly akin to the Supreme Reality"; and that his "most important religious law" was that "no man ought ever to wilfully sacrifice another man's life as a means to any other end . . . ." In December 1958 he requested a 1-O classification since he felt that participation in any form of military service would involve him in "too many situations and relationships that would be a strain on [his] conscience that

tion, raised a constitutional attack upon section 6(j) of the Universal Military Training and Service Act which then provided in part:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief is conscientiously opposed to participation in war in any form. 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

---

[he felt he] must avoid." He submitted a long memorandum of "notes on religion" in which he defined religion as the "sum and essence of one's basic attitudes to the fundamental problems of human existence," (emphasis in the original); he said that he believed in "Godness" which was "the Ultimate Cause for the fact of the Being of the Universe"; that to deny its existence would but deny the existence of the universe because "anything that Is, has an Ultimate Cause for its Being." There was a relationship To Godness, he stated, in two directions, i.e., "vertically, towards Godness directly," and "horizontally, towards Godness through Mankind and the World." He accepted the latter one. The Board classified him 1-A-O and Jakobson appealed. The hearing officer found that the claim was based upon a personal moral code and that he was not sincere in his claim. The Appeal Board classified him 1-A. It did not indicate upon what ground it based its decision, i.e., insincerity or a conclusion that his belief was only a personal moral code. The Court of Appeals reversed, finding that his claim came within the requirements of § 6(j). Because it could not determine whether the Appeal Board had found that Jakobson's beliefs failed to come within the statutory definition, or whether it had concluded that he lacked sincerity, it directed dismissal of the indictment.

3. *Peter.* Forest Britt Peter was convicted in the Northern District of California on a charge of refusing to submit to induction. In his Selective Service System form he stated that he was not a member of a religious sect or organization. . . . [h]e hedged the question as to his belief in a Supreme Being by saying that it depended on the definition and . . . that he felt it a violation of his moral code to take human life and that he considered this belief superior to his obligation to the state. As to whether his conviction was religious, he quoted with approval Reverend John Haynes Holmes' definition of religion as "the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands . . . [; it] is the supreme expression of human nature; it is man thinking his highest, feeling his deepest, and living his best." The source of his conviction he attributed to reading and meditation "in our democratic American culture, with its values derived from the western religious and philosophical tradition." Ibid. As to his belief in a Supreme Being, Peter stated that he supposed "you could call that a belief in the Supreme Being or God. These just do not happen to be the words I use." In 1959 he was classified 1-A, although there was no evidence in the record that he was not sincere in his beliefs. After his conviction for failure to report for induction the Court of Appeals, assuming arguendo that he was sincere, affirmed.

380 U.S. 163, 166-169 (1965).

> any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.[9]

The constitutional attack was brought under the first amendment's establishment and free exercise clauses; the defendants maintained (1) that section 6(j) does not exempt non-religious conscientious objectors and (2) that it discriminates between different forms of religious expression in violation of the due process clause of the fifth amendment. Two of the parties also claimed that their beliefs came within the meaning of the section.

In deciding the case, the Supreme Court sidestepped the constitutional attack and instead concentrated on giving section 6(j) the widest possible application. In its own words, the Court found the question of the case to be: "Does the term 'Supreme Being' as used in section 6(j) mean the orthodox God or the broader concept of a power or being, or a faith, 'to which all else is subordinate or upon which all else is ultimately dependent?' "[10] Searching for the answer, the Court pointed out that there were over 250 sects in our land with widely divergent tenets and concepts of deity and thus illustrated the difficulty in correctly interpreting the intent of Congress in its use of the phrase "Supreme Being".

The Court considered itself fortunate, however, in having two important guidelines to interpretation. First, Congress had adopted the words of Chief Justice Hughes in *United States v. Macintosh*[11]—"The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation,"[12]—but had substituted "Supreme Being" for "God." The change was significant, said the Court, for Congress had deliberately broadened its statutory definition. Further, Congress had not elaborated on the form or nature of this higher authority and had thereby indicated its awareness of the broad range of beliefs the authority could encompass.

The second guideline was the Senate Report on the bill which stated that section 6(j) was intended to re-enact "substantially the same provisions as were found" in the 1940 Act.[13] The Court explained:

9. 62 Stat. 612 (1958), *as amended* 50 U.S.C. App. § 456(j) (1967).
10. United States v. Seeger, 380 U.S. 163, 174 (1965).
11. 283 U.S. 605 (1931).
12. *Id.* at 633.
13. 380 U.S. at 176.

> Under the 1940 Act it was necessary only to have a conviction based upon religious training and belief; we believe that is all that is required here. Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: 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.[14]

The Court also stated that the section continued the congressional policy of providing exemption from military service for those whose opposition is based on grounds that can fairly be said to be "religious," and, "we believe this construction embraces the ever-broadening understanding of the modern religious community."[15]

The Court finally specified that the claim of the registrant that his belief is an essential part of a religious faith must be given great weight and that the validity of what he believes cannot be questioned. The duty of the local boards and the courts, it said, was to decide whether the beliefs professed were sincerely held and whether they were, in the objector's own scheme of things, religious.

The Court's approach to *Seeger* is made quite clear by Justice Douglas' concurring opinion. Justice Douglas said that, if the language of section 6(j) were construed differently from the interpretation given by the Court, the section would certainly fall to the constitutional attack. Any other construction would allow those who held one religious faith rather than another to be subjected to penalties in violation of the free exercise clause of the first amendment. Further, such a construction would also result in a denial of equal protection by preferring some religions over others in contravention of the due process clause of the fifth amendment.[16] Justice Douglas then certified that the Court had gone to great pains and indulged in a little judicial repair work in construing the section broadly enough to avoid violation of any constructional guarantees, but he said that the Court had not been overly broad in its interpretation

14. *Id.*
15. *Id.* at 180.
16. Justice Douglas cites *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Bolling v. Sharpe,* 347 U.S. 497 (1954) in support of these statements.

and that, even if it had, in a more extreme case than *Seeger*, the Court had said that "the words of a statute may be strained 'in the candid service of avoiding a serious constitutional doubt.' "[17]

In *Welsh* the Supreme Court reiterated its decision in *Seeger*, but also subtly expanded the test to include those whose sincere, deeply held objections were only remotely religious, if at all.[18] The Court compared the two cases very closely in every respect,[19] but, in explaining its previous decision, the Court seemed

17. United States v. Rumely, 345 U.S. 41, 47 (1953).

18. An amendment to the Universal Military Training and Service Act in 1967, subsequent to the decision in *Seeger*, deleted "Supreme Being" but retained the remainder of the religious requirements. 50 U.S.C. App. § 456(j) (1967).

19. The Court stated:

> The controlling facts in this case are strikingly similar to those in *Seeger*. Both *Seeger* and *Welsh* were brought up in religious homes and attended church in their childhood, but in neither case was this church one which taught its members not to engage in war at any time for any reason. Neither Seeger nor Welsh continued his childhood religious ties into his young manhood, and neither belonged to any religious group or adhered to the teaching of any organized religion during the period of his involvement with the Selective Service System. At the time of their registration for the draft, neither had yet come to accept pacifist principles. Their views on war developed only in subsequent years, but when their ideas did fully mature both made application with their local draft boards for conscientious objector exemptions from military service under section 6 (j) of the Universal Military Training and Service Act . . . .
>
> In filling out their exemption applications both Seeger and Welsh were unable to sign the statement which, as printed in the Selective Form, stated "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form." Seeger could sign only after striking the words "training and" putting quotations around the word "religious." Welsh could sign only after striking the words "religious training and." On those same applications, neither could definitely affirm or deny that he believed in a "Supreme Being," both stating that they preferred to leave the question open. But both Seeger and Welsh affirmed on those applications that they held deep conscientious scruples against taking part in wars where people were killed. Both strongly believed that killing in war was wrong, unethical, and immoral, and their consciences forbade them to take part in such an evil practice. Their objection to participating in war in any form could not be said to come from a "still, soft voice of conscience"; rather, for them that voice was so loud and insistent that both men preferred to go to jail rather than serve in the Armed Forces. There was never any question about the sincerity and depth of Seeger's convictions as a conscientious objector, and the same is true of Welsh. In this regard the Court of Appeals noted, "[t]he government concedes that [Welsh's] beliefs are held with the strength of more traditional religious convictions." 404 F.2d, at 1081. But in both cases the Selective Service System concluded that the beliefs of these men were in some sense insufficiently "religious" to qualify them for conscientious objector exemptions under the terms of Section 6(j). Seeger's conscientious objector claim was denied "solely because it was not based upon a 'belief in

to imply that it had actually meant more than it had said in *Seeger*. The Court restated that whether the objector's beliefs were, in his own scheme of things, religious was still the central consideration and specified that the test for this consideration was to be whether the beliefs play the role of a religion or function as a religion in the objector's life. The Court went on to say:

> What is necessary under *Seeger* for a registrant's conscientious objection to all war to be "religious" within the meaning of section 6(j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right or wrong and that these beliefs be held *with the strength* of traditional religious convictions. . . . If an individual deeply and sincerely holds beliefs which are *purely ethical or moral* in source and content but which nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by God' in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a "religious" conscientious objector exemption under section 6(j) as is someone who derives his conscientious opposition to war from traditional religious convictions.[20]

The result of this interpretation is a new test:

> That section [6(j)] exempts from military service all those 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.[21]

The Court has clearly moved forward here. From convictions based upon religious training and belief (which includes "all sincere religious beliefs which are based upon a power or being, or upon a faith"[22]) the Court has moved to "deeply held moral,

---

a relation to a Supreme Being' as required by Section 6(j) of the Act." United States v. Seeger, 380 U.S. 163, 167 (1965), while Welsh was denied the exemption because his Appeal Board and the Department of Justice hearing officer "could find no religious basis for the registrant's belief, opinions, and convictions." App., at 52. Both Seeger and Welsh subsequently refused to submit to induction into the military and both were convicted of that offense.

90 S. Ct. 1792, 1794 (1970).

20. 90 S. Ct. at 1796 (emphasis added).

21. *Id.* at 1798.

22. Seeger, 380 U.S. at 176.

ethical *or* religious beliefs."[23] Shifting from a belief which occupies a place parallel to that filled by God in others, the Court now requires a belief which is held with the *strength* of traditional convictions. And from a concern with construing the statute broadly enough to include all unorthodox and personal religious variations, the Court has shifted to a concern with all beliefs, except political, if sincerely and deeply held. At best, it seems that the Court has strained the bounds of permissible statutory construction to its limits in an attempt to save the section from constitutional attack. At worst, the Court seems deliberately to ignore the restrictions on exemption imposed by the Congress. In any case, it appears that the Court has removed, to a large extent, the religious requirement of the conscientious objector exemption.

The Court's move was also very controversial. Justice Harlan wrote a concurring opinion in which he renounced his concurrence in *Seeger*. There are limits, he said, to the liberties which may be taken in the name of the doctrine of construing federal statutes in order to avoid possible constitutional infirmities, and those limits were exceeded in *Seeger* and *Welsh*. As a result, the Justice said that he was unable to avoid facing the constitutional issue that *Welsh* presented. As he saw the Court's decision:

> Today the Court makes explicit its total elimination of the statutorily required religious content for a conscientious objector exemption. The Court now says: "If an individual deeply and sincerely holds beliefs which are *purely ethical* or *moral* in source and content but which nevertheless impose on him a duty of conscience to refrain from participating in any war at any time," he qualifies for a Section 6(j) exemption.[24]

Justice Harlan complained that it was Congress' will that must be determined; that it was one thing to construe statutes in order to adapt them to circumstances uncontemplated by Congress, but something entirely different to construe them to change expressed policy. He determined that the only construction of section 6(j) which was consistent with the legislative history was the "natural" one which drew a distinction between theistic and nontheistic religions and which, therefore, ran into constitutional difficulties.

23. Welsh, 90 S. Ct. at 1798 (emphasis added).
24. *Id.* at 1799.

Justice Harlan said that the constitutional question which must be faced was whether a statute that defers to the objector's conscience only when his beliefs derive from a theistic religious foundation was within the power of Congress. He pointed out that Congress could eliminate all exemptions for conscientious objectors and thus pursue a neutral course which, in his view, would not violate the free exercise clause. But having chosen to exempt conscientious objectors, Congress could not distinguish between theistic and non-theistic beliefs on the one hand, and secular beliefs on the other without offending the establishment clause of the first amendment.[25] This neutrality principle is the key to conforming with the requirements of the first amendment, but the statute at hand is not neutral:

> It not only accords a preference to the "religious" but disadvantages adherents of religions that do not worship a Supreme Being.[26]

Therefore, Justice Harlan decided that the statute was defective and that the conviction of *Welsh* must be reversed.

The Justice continued, however, by explaining that there were two ways to cure a statute defective because of under-inclusion: a court may either declare it a nullity and order that its benefits not be applied, or it may extend the coverage of the statute to include those excluded. So, while dissatisfied with the liberties taken by the Court in construing the section, Justice Harlan decided to concur in the opinion of the Court:

> When a policy has roots so deeply embedded in history, there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals, even though they entail, not simply eliminating an offending section but rather building upon it. Thus, I am prepared to accept the Court's conscientious objector test, not as a reflection of Congressional statutory intent but as patchwork of judicial making that cures the defect of under-inclusion in section 6(j) and can be administered by local boards in the usual course of business.[27]

It is apparent that, barring legislative interference, the religious base for the conscientious objector status is doomed if

25. Justice Harlan cites *Walz v. Tax Comm'n.*, 90 S. Ct., 1409 (1970).
26. 90 S. Ct. at 1805.
27. *Id.* at 1810.

indeed it still exists. The long road leading to exemption of all those conscientiously opposed to war for any reason appears to be reaching its end. Even objections based on political beliefs may soon be cause for exemption. Already a United States District Court has held that a defendant could not be convicted for refusing induction because of a conscientious objection to the Vietnam conflict. The court in that case, *United States v. Sisson*,[28] based its opinion on what it 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 of the Constitution. The court's conclusion was that the Constitution prohibited requiring Sisson to enter combat in Vietnam because "as a sincerely conscientious man," Sisson's interest in not killing in Vietnam outweighed "the country's present need for him to be so employed."[29] The Supreme Court dismissed the case for lack of jurisdiction,[30] but did grant certiorari in two cases to examine the "selective objector" legal theory of the district court in *Sisson*.[31]

Granting an exemption for political beliefs is not a natural expansion of the decisions in *Seeger* and *Welsh*. First, to exempt persons from performance of the duties of citizenship on the basis of political beliefs would be to open a virtual Pandora's box of difficulties in the administration of a national government, particularly in the field of national security. Second, an irate legislature would not stand for such a blatant contradiction of its will. And third, political beliefs are manifestly not of the same character as moral or religious beliefs. Our natural law background has left with us the lingering belief that there is a higher authority than the state and that in the final analysis, it is the imperative of this authority which must be obeyed. A moral, ethical, or religious authority has frequently been acceptable in this context, but a political authority, as the temporal creation of man, has been so only infrequently. And so it is submitted that the conscientious objector exemption has reached the end of its road, brought there by a combination of the principles of the old natural law, as expressed at Nuremburg and else-

28. 297 F. Supp. 902 (D. Mass. 1969).
29. *Id.* at 910.
30. United States v. Sisson, 90 S. Ct. 2117 (1970).
31. *Id.* at 2120 n.1. The cases are *Gillette v. United States*, No. 85 (U.S., February 11, 1970); and *Negre v. Larsen*, No. 325 (U.S., February 5, 1970).

where, and modern crises, reflecting the new natural law viewpoint:

> The legislator has only a fragmentary consciousness of this [new natural] law; he translates it by the rules which he prescribes. When the question is one of fixing the meaning of those rules, where ought we to search? Manifestly at their source; that is to say, in the exigencies of social life. There resides the strongest probability of discovering the sense of the law. In the same way when the question is one of supplying the gaps in the law, it is not of logical deductions, it is rather of social needs, that we are to ask the solution.[32]

ROBERT B. PEARLMAN

32. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 121 (1921), *quoting from* V. EYCKEN, METHODE POSITIVE DE L'INTERPRETATION JURIDIQUE 401, § 239.