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Armed Services - Conscientious Objectors - Belief in Orthodox Concept of God Not Required for Exemption

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Recent Decisions

ARMED SERVICES—CONSCIENTIOUS OBJECTORS—BELIEF IN ORTHODOX CONCEPT OF GOD NOT REQUIRED FOR EXEMPTION—The Supreme Court of the United States has held that § 6(j) of the Universal Military Training and Service Act exempts individuals who deeply and sincerely hold beliefs, purely ethical or moral in source and content, which impose a duty of conscience to refrain from participating in any war at any time.

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

The petitioner sought an exemption from combatant service in the Armed Forces of the United States as a conscientious objector pursuant to § 6(j) of the Universal Military Training and Service Act.[1]

That section reads, 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 any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.[2]

Although petitioner was raised in a religious home, he did not belong to a religion which taught its members not to engage in war at any time for any reason. During his early manhood, he dropped all ties with organized religion. And at the time of his initial draft registration, he had not yet come to accept pacifist principles.

When petitioner did make application for Conscientious Objector status, he had difficulty with certain portions of the signed statement. He could only subscribe to the statement, "I am by reason of my religious training and belief, conscientiously opposed to participation in war in any form," after crossing out the words "religious training

1. Act of June 24, 1948, ch. 625, § 6(j), 62 Stat. 612.
2. *Id.* An amendment to the act in 1967, deleted the reference to a "Supreme Being" but continued to provide that "religious training and belief" does not include "essentially political, sociological, or philosophical views, or a purely moral code." 81 Stat. 104, *see also* 50 U.S.C. App. § 456(j) (1967).

and." He also chose to leave open the question of his belief in a Supreme Being.[3]

The petitioner was denied the exemption because no religious basis for his beliefs could be found.[4] He subsequently refused to submit to induction.

The petitioner was convicted by a United States District Court of refusing to submit for induction into the United States Armed Forces in violation of 50 U.S.C. App. § 462(a). The Court of Appeals, Judge Hamley dissenting, affirmed the conviction.[5] The United States Supreme Court reversed.

The Supreme Court granted certiorari to determine whether this case falls under the Court's decision in *United States v. Seeger*.[6] The Court held that section 6(j) exempts from military service all objectors whose conscience would give them no rest because of deeply held moral, ethical or religious beliefs.[7]

In deciding this case, the Court, Mr. Justice Black speaking for the majority, found its decision in *Seeger*[8] controlling.

In that decision, the Court sought to define the phrase "religious training and belief" as used in section 6(j) of the Universal Military Training and Service Act. Its conclusion was that, "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 with the statutory definition."[9]

Mr. Justice Black, interpreting the *Seeger* test for religious objection, said, "What is necessary . . . is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions."[10]

In the instant case, the Government sought to distinguish the holding in *Seeger* on two grounds. First, the Government argued that Welsh specifically denied that his views were religious. In filling out

3. In his original application in April of 1964, Welsh stated that he did not believe in a Supreme Being but in a letter to his local draft board in March of 1965, he requested that his original answer be stricken and the question be left open. Brief for Appellant at 29, Welsh v. United States, — U.S. —, —, 90 S. Ct. 1792 (1970).
4. *Id.* at 52.
5. 404 F.2d 1078 (1968).
6. 380 U.S. 163 (1965). *Certiorari granted,* 396 U.S. 816 (1969) to determine whether the case at note was controlled by *Seeger.*
7. Welsh v. United States, — U.S. —, —, 90 S. Ct. 1792, 1798 (1970).
8. *Id.* at 1794.
9. United States v. Seeger, 380 U.S. 163, 176 (1965).
10. Welsh v. United States, — U.S. —, —, 90 S. Ct. 1792, 1796 (1970).

the conscientious objector application, Seeger placed the word "religious" in quotation marks, while Welsh deleted the word entirely from his statement. Welsh subsequently stated that his beliefs had been formed "by reading in the field of history and sociology."[11]

The Government also sought to distinguish *Seeger* by arguing that Welsh's views were "essentially political, sociological, or philosophical 'or' a merely personal moral code." In this case, he would be specifically excluded by the language of § 6(j).[12]

The Court responded to the first argument by saying that undue emphasis was placed on Welsh's own denial of the religious basis of his beliefs.[13] It argued that when a registrant characterizes his own beliefs as "religious" it is highly relevant, but very few registrants are fully aware of the broad scope of the word "religious" as used in § 6(j), and accordingly a registrant's statement that his beliefs are non-religious is a highly unreliable guide for those charged with administering the exemption.[14]

The second government argument was similarly dismissed because the Court felt that registrants who had strong feelings toward public policy were not automatically excluded. Only two groups were so excluded: 1) those whose beliefs were not deeply held, and 2) those whose objection to war rested solely upon pragmatism or considerations of policy as opposed to moral, ethical, or religious principles.[15]

Based on this analysis the majority of the Court held that Petitioner's beliefs were "religious" under the *Seeger* test and constituted a sufficiently important aspect of his opposition to war so as to qualify him for an exemption under § 6(j).[16] Mr. Justice Douglas, Mr. Justice Brennan and Mr. Justice Marshall joined in this opinion.

Mr. Justice Harlan provided the necessary fifth vote by concurring in the result while rejecting the majority opinion's logic. In a separate concurring opinion, Mr. Justice Harlan, objecting to the interpretation given to § 6(j), said:

> Unless we are to assume an Alice-in-Wonderland world where words have no meaning, I think it fair to say that Congress' choice of language cannot fail to convey to the discerning reader the very policy choice that the Court today completely obliterates:

11. *Supra* note 3, at 22.
12. Welsh v. United States, — U.S. —, —, 90 S. Ct. 1792, 1797 (1970).
13. *Id.*
14. *Id.*
15. *Id.* at —, 90 S. Ct. at 1798.
16. *Id.*

> that between conventional religions that usually have an organized and formal structure and dogma and a cohesive group identity, even when non-theistic, and cults that represent schools of thought and in the usual case are without formal structure or are, at most, loose and informal associations of individuals who share common ethical, moral, or intellectual views.[17]

Mr. Justice Harlan argued that the real issue in this case was whether the Establishment Clause of the First Amendment precludes refusing exemptions to persons holding views not based on organized theism.[18] Feeling that it did, he found only two alternatives: declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or extend the coverage of the statute to include those who are aggrieved by exclusion.[19]

Mr. Justice Harlan chose the second alternative in the instant case because it provided the only possible remedy for the Petitioner.[20]

Mr. Justice White wrote the dissent in which the Chief Justice and Mr. Justice Stewart joined. The dissent raised two major points: First, the construction of the statute given by the majority fails to reflect the apparent intention of Congress. And, as Mr. Justice White said, "Our obligation in statutory construction cases is to enforce the will of Congress, not our own; this construction exempts from the draft a class of persons to whom Congress has expressly denied an exemption."[21] Second, the Establishment Clause argument of Mr. Justice Harlan fails for two reasons:

1) Welsh did not have standing to raise the issue. Mr. Justice White argued by analogy: "If the Constitution expressly provided that aliens should not be exempt from the draft, but Congress purported to exempt them and no others, Welsh, a citizen, could hardly qualify for exemption by demonstrating that exempting aliens is unconstitutional."[22] And, he concluded, "He has no standing to raise the establishment issue even if § 6(j) would present no First Amendment problems if it had included Welsh and others like him."[23]

2) Congress had the power to limit exemptions from the draft to those opposed to war by virtue of religious training and belief. Citing

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17. *Id.* at —, 90 S. Ct. at 1803.
18. *Id.* at —, 90 S. Ct. at 1805.
19. *Id.* at —, 90 S. Ct. at 1807.
20. *Id.* at —, 90 S. Ct. at 1808.
21. *Id.* at —, 90 S. Ct. at 1811.
22. *Id.*
23. *Id.*

Sunday Closing Cases,[24] Mr. Justice White maintained that an Establishment Clause argument can only be sustained in the absence of a secular legislative purpose. In the case of § 6(j), the purpose could either be "a purely practical judgment that religious objectors, however admirable, would be of no more use in combat that many others unqualified for military service."[25] In the alternative the reason could have been a legislative belief that "to deny the exemption would violate the Free Exercise Clause or at least raise grave problems in this respect."[26]

Whichever of these reasons motivated the decision to exempt religious objectors, the Minority concludes, Welsh was clearly not one of those who prompted Congress to so decide.[27]

The issue of whether or not exemptions for conscientious objection require a belief in God have been the subject of a good deal of argument. *Welsh* represents a choice on the part of the Court that such belief is not required.

The discussion of the requirement that Conscientious Objectors believe in a more or less orthodox concept of God was highlighted by a seeming debate between the Second and Ninth Circuit Courts of Appeal.

In 1943, the Second Circuit in *Kauten v. United States*[28] held that the phrase, by reason of "religious training and belief," included a response to an "inward mentor" whether that was God or conscience. *Kauten* also held that those excluded were those who believed a particular war to be "inexpedient or disastrous."[29] This same view was advanced again that year and the following.[30]

The Ninth Circuit responded to this interpretation in *United States v. Berman*.[31] Quoting Chief Justice Hughes in his dissent in *United States v. Macintosh*,[32] the Court held that the belief required was one in relation to "an authority higher and beyond any worldly one," and that "the essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."[33]

24. 366 U.S. 420 (1961).
25. Welsh v. United States, — U.S. —, 90 S. Ct. 1792, 1812 (1970).
26. *Id.*
27. *Id.* at —, 90 S. Ct. at 1814.
28. 133 F.2d 703 (1943).
29. *Id.* at 708.
30. United States *ex rel.* Phillips v. Downer, 135 F.2d 521 (C.A.2d Cir. 1943); United States *ex rel.* Reel v. Badt, 141 F.2d 845 (C.A.2d Cir. 1944).
31. 156 F.2d 377 (1946).
32. 283 U.S. 605, 633 (1931).
33. 156 F.2d 377, 380 (1946).

In 1948, Congress took the statute which at that time made no reference to a deity and defined religious training and belief as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation. . . ."[34]

The introduction into the statute of "Supreme Being" was striking enough. Congress then went on to utilize the very words of Chief Justice Hughes' dissent in *Macintosh* and to cite *Berman* as authority.[35]

United States v. Seeger[36] was the next opportunity that the Supreme Court had to consider the question of the theistic requirement for conscientious objection. *Seeger* was an ironic consolidation of three circuit court decisions. Two were Second Circuit reversals of district court convictions. The remaining case was a Ninth Circuit affirmation of a district court conviction.[37]

Mr. Justice Clark dealt extensively with the inter-circuit debate and the congressional statutory charge. He addressed himself to the apparent congressional espousal of the Ninth Circuit interpretation. First, he argued that Congress had used the expression "Supreme Being" instead of Chief Justice Hughes' "God" so as to "embrace all religions or philosophical views."[38] He supported this interpretation by quoting the Senate Armed Services Committee which recommended adoption, saying, "This section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 act."[39] Secondly, Mr. Justice Clark stated that the real issue to be determined is "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[40]

The decision did not specifically state how to determine whether something holds a parallel position to an orthodox belief in God. It did make clear that an exemption based on conscientious objection

34. Act of June 24, 1948, ch. 625, § 6(j), 62 Stat. 612.
35. S. Rep. No. 1268, 80th Cong., 2d Sess. 14 (1948).
36. 380 U.S. 163 (1965).
37. Certiorari, No. 50 was granted to review a decision of the United States Court of Appeals for the Second Circuit, 326 F.2d 846, which reversed a conviction by the United States District Court for the Southern District of New York. Certiorari, No. 51 was granted to review a decision of the United States Court of Appeals for the Second Circuit, 325 F.2d 409, which reversed a conviction by the United States District Court for the Southern District of New York. Certiorari, No. 29 was granted to review a decision of the United States Court of Appeals for the Ninth Circuit, 324 F.2d 173, which affirmed a conviction by the United States District Court for the Northern District of California, Southern Division.
38. 380 U.S. 163, 165 (1965).
39. *Id.* at 173.
40. *Id.* at 166.

does not require an applicant to believe in a traditional concept of God. It also clearly demonstrated that the Court rejected the narrow interpretation of "religious training and belief" of the Ninth Circuit. The case represents then a rejection of a narrow interpretation without an outer limit for broadness being set.

In this light, the *Welsh* decision takes on its real significance. *Seeger* is authority for the point of view assumed in *Welsh*. But the instant case takes that logic far further than *Seeger*.

The Court could have attempted to define "God" or "Supreme Being" in so broad a manner as to include practically any belief. It did not choose to do this. Rather, it returned to the *Seeger* test, calling for beliefs parallel to an orthodox belief in God and said:

> 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.[41]

The Court thus extended the *Seeger* test so as to include not only unorthodox views of God, but also purely ethical and moral views which occupy a position in the life of the holder parallel to that of God for orthodox theists.

Of course, there are real problems with this line of argument. The statute specifically states, "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation. . . ."[42] This possibly explains Mr. Justice Black's restatement of the arguments from *Seeger* defining "Supreme Being" in such an expansive manner.[43]

But his position might embody a far more profound logic than at first appearance. Granted, for persons steeped in orthodox theism, it seeems quite evident that when Congress defines "religious training and belief" as being in relation to a "Supreme Being" it means exactly that. But if one considers the practicality of the distinction between those exempted and those not, the certainty is shaken. Congress refuses exemptions to those holding views which are essentially political, phil-

41. Welsh v. United States, — U.S. —, —, 90 S. Ct. 1792, 1796 (1970).
42. Act of June 24, 1948, ch. 625, §6(j), 62 Stat. 612.
43. Welsh v. United States, — U.S. —, —, 90 S. Ct. 1792, 1795 (1970).

osophical, sociological or personal. It grants exemptions to views involving duties superior to human relationships.

The distinction seems to be between views which are academic, which are debated and discussed and rarely acted upon, and those views which require their holder to follow a certain course of action regardless of consequences. Certainly, this distinction seems logical if one considers that we are talking about who is going to serve in the armed forces of the United States. For example, applicants for exemption might have a purely pragmatic reason for not wishing to serve, whether or not they thought war was wrong. At the same time they might be able to produce objective data of religiosity and belief in God. However, absent sincerity, once ordered to report, they would probably do so. And once inducted, they would probably serve as well as anyone else.

But for that group of men for whom opposition to war in any form is more important than any duties arising from human relations, jail is the only alternative. Men holding views this intensely, when faced with the draft, eventually go to jail. The waste is appalling and senseless.

They go to jail because at some point conscience refuses to allow them to act in opposition to it. At that point they face jail because of bravery, and an utter disregard for their person in the face of what is to them a moral wrong.

It can be reasonably argued that Congress did not intend this result. Rather, in the course of raising an army, they simply intended to exempt men who, for sincere moral reasons, would not serve anyway. But men raised in orthodox theism normally associate belief in God with a force which causes one to act in a certain way as opposed to merely thinking in a certain way. Therefore, they could have verbalized the distinction between sincerity and insincerity as that between views grounded in a belief in God and political, philosophical, sociological or personal ones.

Possibly this is the thrust of Mr. Justice Black's opinion. Freed from parochial religiosity, the honest meaning of the statute is to exempt men from service who hold beliefs parallel to those held by believers in orthodox theism. The rationale behind it being that honest and sincere men should not go to jail simply because they do not believe in the majority God, for this would be a violation of some of our most basic principles.

Even if this is an accurate analysis of Mr. Justice Black's position, the practical effects of the decision remain to be considered. First, it is important to note that an actual majority of the Court concur on only one slim point. Mr. Justice Harlan in casting the fifth vote said, "I am prepared to accept the Court's conscientious objector test,[44] not as a reflection of congressional statutory intent, but as a patch work of judicial making that cures the defect of underinclusion in § 6(j) and can be administered by local boards in the usual course of business."[45]

Secondly, despite initial fears to the contrary, the decision does not open the floodgates for conscientious objection. Based on the *Welsh* test, it is no easier to prove conscientious objection. Some persons who could not have qualified before will be able to gain exemption—namely those who hold sufficiently strong convictions based on something other than an orthodox God. But the decision reemphasizes the requirement of sincerity. Certainly this decision does not suddenly create large numbers of sincere persons. And it may well eliminate objectors whose claim rests solely on objective data of religious affiliation.

Thirdly, the new test is not appreciably harder to administer than older ones.[46] The most difficult thing to determine has always been sincerity. This decision requires a draft board to look beyond the mere objective criterion of belief in God to determine the quantity and quality of one's belief. The determination to be made is still that one's belief is not held conveniently, based on purely practical considerations. Therefore, only in those draft boards that have assumed that sincerity flowed automatically from a belief in God will an adjustment have to be made.

Fourthly, in terms of the human consideration, the decision is eminently valid. *Welsh* stands for the proposition that the imprisonment of men so brave as to accept any fate rather than to commit a moral wrong serves no one. Men such as these are the subjects of congres-

44. *Id.* at —, 90 S. Ct. at 1797. §6(j) exempts from military service those with 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 . . . ," with the explanation that "(i)f 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."

45. Welsh v. United States, — U.S. —, —, 90 S. Ct. 1792, 1810 (1970).

46. *Id.* at —, 90 S. Ct. at 1810. Mr. Justice Harlan points out in footnote 19 that during both World Wars grave difficulties were had limiting exemptions to religious objectors based on even the most objective criterion. Based on the World War I experience, a presidential regulation dated March 20, 1918 opened exemptions to all conscientious objectors without regard to religious qualifications.

sional exemption regardless of their belief in an orthodox God, because this is the only way that the nation can benefit from their sincerity.

The *Welsh* decision does not represent an attempt to enforce the letter of the congressional will. Rather, it is an attempt to preserve the practical thrust of § 6(j) without interpreting it so narrowly as to raise grave first amendment doubts. The end result is a construction of the statute that is undoubtedly offensive to some. But one that is quite valid given the reason for exemptions based on conscientious objection.

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CRIMINAL LAW—MURDER—FELONY MURDER RULE—The Pennsylvania Supreme Court, utilizing language indicating dissatisfaction with the felony murder rule,[1] has expressly overruled its prior decision in *Commonwealth v. Almeida*.[2]

Commonwealth ex rel. Smith v. Myers, 438 Pa. 218, 261 A.2d 550 (1970).

On January 30, 1947, James Smith, along with Edward Hough and David Almeida, engaged in the armed robbery of a Philadelphia supermarket. An off-duty police officer was shot and killed while attempting to frustrate the escape of the felons. Evidence as to whether one of the felons fired the shot resulting in the officer's death was conflicting at the trial level; the court however, charged the jury that the identity of the individual who fired the shot was irrelevant:

> Even if you should find from the evidence that Ingling was killed by a bullet from the gun of one of the policemen, that policeman having shot at the felons in an attempt to prevent the robbery or the escape of the robbers, or to protect Ingling, the felons would be guilty of murder, or if they did that in returning the fire of the felons that was directed toward them.[3]

The jury returned a verdict of guilty of murder in the first degree, with punishment fixed at imprisonment for life.

1. In Pennsylvania, the felony murder rule punishes as first degree, all murders which shall be committed in the perpetration of, or in attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping. PA. STAT. ANN. tit. 18, § 4701 (1939).
2. 362 Pa. 596, 68 A.2d 595 (1949).
3. Commonwealth *ex rel.* Smith v. Myers, 438 Pa. 218, 220, 261 A.2d 550, 558 (1970).