CONSTITUTIONAL LAW—CONSCIENTIOUS OBJECTOR—OBJECTION BASED ON MORAL AND ETHICAL GROUNDS—*Welsh v. United States*, 398 U.S. 333 (1970).

Elliott Ashton Welsh II was convicted[1] for refusing to submit to induction into the Armed Forces in violation of the Selective Service Act of 1948,[2] and on June 1, 1966 was sentenced to three years imprisonment for the violation. It took more than four years and a highly doubtful decision for Welsh to be finally vindicated.

Welsh had been brought up in a religious atmosphere, attending church during his childhood, but belonged to no religious organization at the time of his involvement with the Selective Service. After registering for the draft, he applied for conscientious objector status under Section 6(j) of the Selective Service Act of 1948.[3] However, before signing the Selective Service form which contained the words "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form," Welsh struck the words "religious training and." He believed that killing in war was wrong, unethical, and immoral, and his conscience would not let him take part in it; in the minds of the members of the Selective Service Board there was no doubt as to the sincerity of his objection. Welsh, however, was denied his 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. Welsh contended, as a defense to his subsequent prosecution, that he was entitled to an exemption from combatant and noncombatant service under the provisions of Section 6(j) because he was "by reason of religious training and belief . . . conscientiously opposed to participation in war in

1 United States v. Welsh, No. 36138 (S.D. Cal., decided June 1, 1966).

2 Act of June 24, 1948, ch. 625, § 12(a), 62 Stat. 622, *as amended* 50 U.S.C. app. (Supp. 1970). This section provides in part:

> Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under . . . this title . . . shall, upon conviction . . . be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both . . . .

3 Act of June 24, 1948, ch. 625, § 6(j), 62 Stat. 612, *as amended* 50 U.S.C. app. § 456(j) (Supp. 1970). This section provides 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

any form."[4] Welsh's conviction was affirmed,[5] and certiorari granted.[6] The Supreme Court, Justice Black writing the majority opinion, reversed Welsh's conviction on the ground that, although his beliefs were ethical or moral in source,[7] they were deeply and seriously held, and occupied in his life a place parallel to that filled by God in traditionally religious persons. On this basis and the conclusion of the court of appeals that he held his beliefs "with the strength of more traditional religious convictions,"[8] the Court concluded that Welsh was entitled to an exemption within the scope of Section 6(j).

In reviewing Welsh's conviction, the Supreme Court affirmed its adherence to the view it expounded in an earlier Section 6(j) case, *United States v. Seeger*.[9] In *Seeger*, a case similar in its facts to the present case, the Court stated that the task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are "in his own scheme of things, religious."[10] The Court in *Welsh* stated:

> If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that 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 § 6(j) as is someone who derives his conscientious opposition to war from traditional religious convictions.[11]

---

essentially political, sociological, or philosophical views, or a merely personal moral code.

4 Welsh v. United States, 398 U.S. 333, 335 (1970). Although he originally characterized his beliefs as nonreligious, Welsh later wrote a letter to his Appeal Board in which he declared that his beliefs were "certainly religious in the ethical sense of the word," and that he believed the taking of life to be morally wrong. *Id.* at 341.

5 Welsh v. United States, 404 F.2d 1078 (9th Cir. 1968).

6 396 U.S. 816 (1969).

7 398 U.S. at 343.

8 404 F.2d at 1081.

9 380 U.S. 163 (1965). *See also* 1 SETON HALL L. REV. 167 (1970).

10 380 U.S. at 185. To determine if the registrant's beliefs function as a religion in his life within the meaning of § 6(j), the Court set out a test:

> 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.

Id. at 176. Moreover, the sincere and meaningful belief is not confined to traditional concepts of religion, and local boards and courts are not free to reject beliefs because they consider them incomprehensible. *Id.* at 184-85.

11 398 U.S. at 340.

The substance of the *Welsh* decision, then, is that it is no longer necessary for a conscientious objector to maintain and hold religious beliefs in the traditional sense of the world "religious" in order to qualify for the privilege[12] of exemption from service in the Armed Forces. This rule applies even though the registrant himself would characterize his beliefs as being "nonreligious," as did Welsh.[13] As a result of this decision, a registrant may now qualify for the exemption if his views are moral, ethical *or* religious in source or content.

The issue of conscientious objection based on religious training and belief has long been present in this country, its history extending back to colonial times. The Federal Government became involved in the issue of conscientious objection during the period of the Civil War and again during World War I.[14] In those times a conscientious objector, in order to qualify for exemption, had to prove he was a member of a pacifist religious *group* which prohibited members from serving in the military or participating in war in any form.[15] During World War II, the concept was broadened to include registrants whose claims for exemption were based on religious training and belief, it no longer being necessary to be a member of a pacifist group.[16] This concept was further broadened in 1948 when Congress amended the language of the statute, providing that a registrant's claim for exemption should be grounded on belief in relation to a "Supreme Being."[17]

---

12 United States v. Carson, 282 F. Supp. 261, 268 (E.D. Ark. 1968):

> Exemption from combatant or noncombatant service in the armed forces on the grounds of conscientious objection is not derived from any constitutional right, but rather is a matter of congressional grace; exemption is actually a privilege rather than a right.

See also 1 SETON HALL L. REV. at 170 (1970).

13 398 U.S. at 341:

> [F]ew 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 nonreligious is a highly unreliable guide for those charged with administering the exemption.

14 E. WRIGHT, CONSCIENTIOUS OBJECTORS IN THE CIVIL WAR 40 (1931); CONSCIENCE IN AMERICA 18, 88 (L. Schlissel ed. 1968).

15 Act of May 18, 1917, ch. 15, § 4, 40 Stat. 78. This section provides in part:

> [N]othing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form . . . .

16 Act of September 16, 1940, ch. 720, § 5(g), 54 Stat. 889. This section provides in part:

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

17 *See* note 3 *supra.*

The *Seeger* decision removed the requirement of belief in a supreme being and extended exemption to the registrant as long as his claim was based on a sincere and meaningful belief which paralleled a belief in God. Congress subsequently amended the statute in 1967 and deleted reference to a supreme being.[18] However, under *Seeger*, and prior to this decision, a registrant's beliefs still had to be religious in nature. This latest decision completely eliminates any requirement or necessity for a religious basis to a registrant's conscientious objection to military service.

In announcing its decision, the Court made clear that it was not passing upon the constitutional argument that Section 6(j) violates the establishment clause of the first amendment[19] in that it distinguishes between theistic and nontheistic beliefs, extending exemption to those who profess a religious basis for their beliefs.[20] Justice Harlan, however, in a separate opinion dealt with that issue and on the basis that there was, in fact, a violation of the first amendment, concurred with the majority in reversing Welsh's conviction. Harlan felt that the guides to be used when interpreting a congressional statute are its usage and legislative history, and that in the case of Section 6(j) the only interpretation consistent with its legislative history is that it draws a distinction between theistic and nontheistic beliefs. He considered it "a remarkable feat of judicial surgery to remove, as did *Seeger*, the theistic requirement of § 6(j),"[21] and felt that in the present decision the Court completely misinterpreted the statute.

For Harlan, the constitutional question is whether a statute that draws a distinction between theistic and nontheistic beliefs, and defers to the individual's conscience only when his beliefs are theistic in nature, is compatible with the establishment clause of the first amend-

---

18 50 U.S.C. app. § 456(j) (Supp. 1970). This section provides 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.

19 Ashwander v. TVA, 297 U.S. 288, 347 (1936) (concurring opinion):

> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.

Zschernig v. Miller, 389 U.S. 429, 444 (1968) (concurring opinion):

> Even in this age of rapid constitutional change, the Court has continued to proclaim adherence to the principle that decision of constitutional issues should be avoided wherever possible.

20 U.S. CONST. amend. I. This amendment provides in part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

21 398 U.S. at 351.

ment. His opinion was that any such distinction is incompatible with this amendment and therefore that Welsh's conviction should have been reversed as inconsistent with the establishment clause.[22] But Harlan accepted the decision of the majority, and its conscientious objector test, on the basis that it cured the fundamental defect of Section 6(j), that of "underinclusion." He felt that the "radius" of Section 6(j) should be determined by the conscientiousness with which an individual opposes war in general, and that the statute, as construed prior to this decision, excluded individuals who should have been included—individuals motivated by teachings of nontheistic religions and "individuals guided by an inner ethical voice that bespeaks secular and not 'religious' reflection."[23] For legislation to conform with the requirements of the first amendment it must, at the very least, be neutral.[24]

Justice White, in his dissenting opinion, stated that he could not join the majority in exempting from the draft those who disclaim religious objections to war and whose views are purely personal. White felt that to exempt these individuals would be to include a class of persons within the purview of Section 6(j) to whom Congress specifically denied an exemption; White would deny Welsh his exemption on the ground that he did not qualify as having "religious" beliefs.[25]

The effect of this decision is that it will enable a person to be exempted from military service if he has strong moral, ethical or religious objections to war in any form. The decision raises as many questions as it answers, however, not the least of which is the interpretation of a "strong moral belief" or a "strong ethical belief." Who is to judge these beliefs? By what standards will the judgment be made?

The Director of the Selective Service System, Dr. Curtis W. Tarr, issued guidelines to the local draft boards to assist them in deciding which young men are entitled to conscientious objector status.[26] The essential factor for a board to consider when evaluating a claim is whether the belief is sincere and deeply held, and not whether it is comprehensible to the board members; further, the applicant must hold his beliefs with the strength of traditional religious convictions, and must demonstrate that his ethical or moral convictions were gained through training, study, contemplation, or other activity comparable in vigor and dedication to the processes by which traditional

22 *Id.* at 362.

23 *Id.* at 357.

24 *Id.* at 361. See also 1 SETON HALL L. REV. at 168 (1970).

25 398 U.S. at 367.

26 N.Y. Times, July 7, 1970, at 1, col. 3.

religious convictions are formulated.[27] This undoubtedly will place a heavy burden on the members of the draft boards, since they will have to judge and evaluate a registrant's claims without the benefit of objective criteria as were formerly available, *e.g.*, the fact of membership in a religious group or organization. The test of sincerity, however, is not a new test[28] and in most cases the boards will probably have had some experience in dealing with previous claims that required a judgment as to the claimant's sincerity. However, the burden will remain upon the members of the local draft boards to ascertain which objectors are sincere and which are not. The end result will probably be a wide variation in interpretation of the Court's ruling and the guidelines as issued by Dr. Tarr.

One problem that perhaps will develop, and which has been acknowledged by Dr. Tarr as likely to do so, is that of discrimination against uneducated men who have not had access to ethical and philosophical writings.[29] Dr. Tarr has urged that the draft boards be aware of this problem and "make every effort" not to give "particular advantage to a registrant who is learned or glib."[30]

The result reached in this decision is most acceptable; however, the reasoning used by the Court in reaching this result is not. In order to "save" Section 6(j) and not have to rule on the constitutional issue involved, Justice Black applied too broad an interpretation to the crucial word "religious." Interpreting the word to include not only religious views in the conventional sense but also ethical and moral views was to completely change the meaning and intention of the section and remove it from the context of its past usage and legislative history. In order to achieve this result the majority disregarded the fact that Welsh himself denied that his views were religious and further stated that he did not fully understand the broad scope of the word religious as used in Section 6(j).

Clearly, as pointed out by the concurring opinion of Justice Harlan[31] and the dissenting opinion of Judge Hamley in the court of appeals,[32] the constitutional question was present and should have been

---

27 *Id.*

28 Witmer v. United States, 348 U.S. 375, 381 (1955):

> [T]he ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form.

See also United States v. Carson, 282 F. Supp. 261, 269 (E.D. Ark. 1968) (registrants sincerely opposed on religious grounds to military service are entitled to Selective Service exemption).

29 N.Y. Times, July 7, 1970, at 1, col. 1.

30 *Id.* at 7, col. 1.

31 398 U.S. at 345.

32 404 F.2d at 1087 (9th Cir. 1968).

decided. An evaluation of the history of Section 6(j) leads inescapably to the conclusion that it afforded the privilege of exemption from military service only to those persons whose conscientious objection to all wars was predicated upon some sort of religious training and belief, and denied the exemption to those persons whose beliefs were non-theistic in nature. This is clearly a violation of the establishment clause of the first amendment. The Court should have addressed itself to and decided the case on the strength of this issue.

Frank V. Burke