WELSH v. UNITED STATES: A NEW SUBSTANTIVE DEFINITION FOR CONSCIENTIOUS OBJECTORS

Historically, the United States has provided for and respected religious freedom. Congress, responding to historical and constitutional considerations, in addition to pressure group influences, included in the present federal draft law an exemption from military service based upon conscientious objection.[1] The provision carved out an exemption for any person

> . . . 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]

In recent decades, the Supreme Court has frequently been called upon to construe the Constitution as applied to statutes directly or indirectly relating to religious freedom.[3] Last year the Court was faced with the task of applying the religious conscientious objector provision to an applicant denied an exemption in *Welsh v. United States*.[4]

In December of 1965 Elliott Ashton Welsh, II, refused induction into the Armed Forces. This refusal brought to a swift close nearly two years of administrative conflict over his draft status. In addition, his refusal set in motion criminal five years of litigation resulting in a United States Supreme Court reversal of his conviction.

Early in 1964 Welsh executed and returned to his local draft board SSS Form 150, the questionnaire required by the Selective Service System of all applicants for religious conscientious objector exemptions. One section of the form required the applicant to affirm or deny a belief in a Supreme Being, which Welsh refused to do. Another section required the adherence to one of two pre-printed expressions of belief, one applicable to objectors to combatant training and the other for objectors to both combatant and non-combatant training. Initially, Welsh signed the portion applicable only to objectors to combatant training. However, prior to affixing his signature, he found that the pre-printed statement offered failed

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[1] *See generally* Brodie and Southerland, *Conscience, The Constitution, and The Supreme Court: The Riddle of United States v. Seeger*, 1966 WIS. L. REV. 306 (1966) *and* Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH. L. REV. 409 (1952) for an excellent discussion of the Universal Military Training and Service Act of 1948, 62 Stat. 604 (1948), as amended 50 U.S.C. APP. § 456(j) (1964).

[2] Universal Military Training and Service Act of 1948 § 6(j), 62 Stat. 612-13 (1948), as amended, 50 U.S.C. APP. § 456(j) (1964).

[3] *See* Abington School District v. Schempp, 374 U.S. 203 (1963); Torcaso v. Watkins, 367 U.S. 488 (1961); *and* Zorach v. Clauson, 343 U.S. 306 (1952).

[4] 398 U.S. 333 (1970).

to coincide with his position. He therefore altered the statement by striking "my religious training and," leaving his expression of belief to read:

> I am, by reason of . . . belief, conscientiously opposed to participation in war in any form. I therefore claim exemption from combatant training and service in the Armed Forces. /s/ Elliott A. Welsh, II.[5]

Based upon this questionnaire, Welsh's local board classifed him 1-A-0. This classification, exempting him only to the extent of combatant training, exposed him to both induction and non-combatant training. Shortly thereafter, Welsh requested his local board to consider his reclassification to class I-0, exempting him from induction and non-combatant training. His request for reclassification was denied, and an appeal was taken to the appeal board, whereupon Welsh was reclassified 1-A.

After having refused induction, Welsh was convicted and sentenced to three years imprisonment by a district court in California. On appeal he raised two alternative contentions, *inter alia*, in support of reversal. His first point asserted that the denial of exemption by the Selective Service System was contrary to law as set out by the Supreme Court in *United States v. Seeger*.[6] Alternatively, Welsh argued that should he not qualify for an exemption, the religious test resting upon the Supreme Being clause of the statute created an unconstitutional distinction between theistic and non-theistic religious beliefs.

The Court of Appeals for the Ninth Circuit applying the explicit language of *Seeger* to the present case found two criteria constituting the test. Strength of belief, although a *Seeger* requirement, was not in issue. The government conceded Welsh's beliefs were as strongly held as one would hold traditional religious convictions. Secondly, the court held Welsh to his self-appraisal and ruled his belief was not religious as used in the statute, thus disposing of his initial contention. Welsh admitted that his beliefs stemmed from moral and ethical grounds and expressly characterized his beliefs as non-religious. Similarly, the constitutional repugnance of the Supreme Being clause was resolved by interpreting the *Seeger* opinion as striking that clause from the statute, *sub silentio*:

> The facts and result of *Seeger* at the Supreme Court level lead to only one conclusion: The Supreme Court deleted the 'Supreme Being' clause from the statute . . . "in the candid service of avoiding a serious constitutional doubt."[7]

After deciding the remaining defense contentions adversely to Welsh the court of appeals affirmed his conviction.[8]

The Supreme Court, in reversing the court of appeals, took a different

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[5] Brief for Appellant at 3, 404 F.2d 1078 (9th Cir. 1968), *rev'd*, 398 U.S. 333 (1970).

[6] 380 U.S. 163 (1965).

[7] 404 F.2d 1078, 1082 (9th Cir. 1968).

[8] *Id.*

view of both Elliott Welsh's application for a conscientious objector exemption and the test to be applied thereto. Throughout the opinion, the Court made attempts to analogize the beliefs and factual circumstances of *Seeger* to the *Welsh* situation. Attention was initially directed to the similarity of Welsh and Seeger both having had the benefit of a religious church-attending upbringing, a practice not extended beyond childhood. The churches attended were not characterized as peace churches. Both registrants applied for conscientious objector exemptions some years following their initial registration. The SSS Form 150 was filled out in each case in similar fashion by modifying the pre-printed statement, Welsh by striking "my religious training and," and Seeger striking only "training and." Although he failed to strike exactly as did Welsh, Seeger did place quotation marks around the word "religious," indicating that the word took on a meaning other than the form intended. Further, the Court noted that each applicant was unable to express an affirmative belief in a Supreme Being, that both were concededly sincere in their belief that participation in war and killing was unethical and immoral, and that their strength of conscience was demonstrated by the choice of jail over induction.

As the Court compared the fact patterns of *Welsh* and *Seeger*, seemingly only two differences appeared. First, Welsh expressly denied that his objection to war was based on religious grounds, whereas Seeger had espoused a religious faith in a purely ethical creed. This factual distinction was not considered crucial, however, as the Court candidly admitted,

> 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 nonreligious is a highly unreliable guide for those charged with administering the exemption.[9]

The other distinguishing factor lay in the source of Welsh's beliefs. He conceded that his objection was, in part at least, motivated by politics. However, given that a substantial majority of one's beliefs are grounded in "essentially political, sociological, or philosophical views, or a merely personal moral code,"[10] it does not follow that the exemption should have been denied. One's beliefs must be solely grounded in politics or sociology and the like, but not resting at all upon moral, ethical, or religious principles in order to be denied exemption under *Welsh*. The Court, in applying this negative criteria to Welsh, found that his admission that his beliefs were political was of no consequence. The requirements of the statute were met and Welsh was "clearly" entitled to a religious conscientious objector exemption. In reversing the conviction, the Court failed to reach the constitutional issues raised in the court of appeals.

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[9] 398 U.S. 333,341 (1970).

[10] Universal Military Training and Service Act of 1948, 62 Stat. 604 (1948, *amending* 50 U.S.C. APP. § 456(j) (1964).

Mr. Justice Harlan, who concurred specially in *Welsh*, had joined the majority opinion in *Seeger* five years earlier. He did join the majority in *Welsh*, stating that there is a limit to the liberties that can legitimately be taken with this statute. He found that this statute ran afoul of the religious clauses of the first amendment, and therefore agreed with the Court's reversal. On the other hand, Justice Harlan adopted the majority's test of who should be granted conscientious objector status. His reasoning for adopting the majority's test is clear:

> Thus, I am prepared to accept the prevailing opinion'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 § 6(j) and can be administered by local boards in the usual course of business.[11]

The judicial power invoked by Mr. Justice Harlan is a curious one in that it builds new concepts into a statute that would fail but for his grafting of an addition thereon. This addition, although admittedly not a product of statutory construction, creates a federal judicial law, affirmatively not intended by Congress, but necessary, in Justice Harlan's view, to save the entire statutory concept.

I. HISTORICAL CONSTRUCTION OF CONSCIENTIOUS OBJECTOR PROVISIONS

A great deal of difficulty in the past has arisen from Congress tying statutes to the word "religion." Historically, the legislative meaning of "religion" has been restricted to organized, orthodox, theistic religions.[12]

It is interesting that this county's first conscientious objector exemption, enacted in 1673 by the Colony of Rhode Island, was not tied to a concept of religion.[13] To qualify for the exemption one's conscience merely had to forbid participation in war. This statute, one of a kind, endured only three years.[14] Subsequent legislative acts of Rhode Island,

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[11] 398 U.S. 333,366-67 (1970).

[12] *See* Conklin, *Conscientious Objector Provisions: A View In The Light Of Torcaso v. Watkins*, 51 GEO. L.J. 252 (1963) *together with* Russell, *supra*, note 1, for an extensive analysis of the legislative and judicial definitions of religion.

[13] SELECTIVE SERVICE SYSTEM, 2 BACKGROUND OF SELECTIVE SERVICE, pt. 12, 13, (Special Monograph 1, 1947), Rhode Island, Act of August 13, 1673. The pertinent section reads, in part,

> . . . the King's Majesty in the way of his wars doth not soe universally compell all, but permitts some, yea very many not to trayne or fight or war for him, whose consciences are that they ought not to learne war at all; yea, notwithstandinge his Majesty have great warringe, and useth men of other understandings to fight, yet not those against whose conscience it is to fight, that they who will lose their owne lives rather than destory other mens lives, can noe waies nor by noe means be compelled to fight to kill; . . .

[14] SELECTIVE SERVICE SYSTEM, 2 BACKGROUND OF SELECTIVE SERVICE, pt. 12, 18, (Special Monograph 1, 1947). The repealing section reads,

> . . . whereby great distrubance is in the severall Traine Bands; Therefore, for the en-

and the other colonies as well, carefully limited the exemption to those whose pacifist principles were religious in character. With the excessive manpower demands of the Revolutionary War upon the colonies, they haphazardly but collectively realized that an exemption without qualification was insufficient. Therefore, exemptions were also qualified by requiring one to supply the militia with a substitute warrior or support the cause monetarily by payment of a commutation fee. This pattern of exempting conscientious objectors, qualified to the extent of including only religious scruples, in addition to providing substitutes and/or commutation fees, remained largely unchanged until the Civil War.

At that point, the federal government took over the conscription responsibilities for the United States. The first federal draft act, passed in 1863, altered the previous colonial conscriptions by *not* exempting conscientious objectors, religious or otherwise, from military service.[15] This oversight was remedied in 1864 by an amendment providing that conscientious objectors who were affiliated with (unspecified) religious denominations could be inducted only as non-combatants.[16] A $300 payment, however, allowed an absolute exemption. The Confederacy was more specific in defining the religions that qualified by identifying which denominations were acceptable. Exemptions were granted only to Friends, Dunkards, Nazarenes, and Mennonites; the substitute or payment clause was also utilized.[17] The Confederate conscientious objector provision was repealed immediately prior to the end of the War. This probably resulted from the distrust of objectors coupled with excessive manpower needs.

The Selective Draft Act of 1917,[18] although recognizing religious conscientious objectors, no longer provided for service by substitute or payment. Each person qualifying for an exemption was bound to noncombatant duty as defined by the President. The focus of this provision was not the individual's religious scruples against participation in war, but rather membership in the established peace churches, a focus which effectively denied exemption to non-members. The exemption applied to anyone

> . . . who [was] found to be a member of any well-recognized religious sect or organization . . . whose existing creed or principles [forbade] its members to participate in war in any form . . . .[19]

An important difference between the Selective Draft Act of 1917 and the first federal draft act in 1863, as amended, was that the number of reli-

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couragement of the millitia in this Collony, the said clause in the said law is made voyd, null and repealed; . . .

[15] Act of March 3, 1863, ch. 75, § 2, 12 Stat. 731.

[16] Act of February 24, 1864, ch. 11, § 17, 13 Stat. 9.

[17] Confederate States of America, THE STATUTES AT LARGE 29 (1861-1864).

[18] Act of May 18, 1917, ch. 15, § 4, 40 Stat. 78.

[19] *Id.*

gious denominations within the 1863 Act was narrowed in the 1917 Act by requiring that the denominations be "well-recognized" and the pacifist tenets be existing. This apparently foreclosed the development of any new creed following the passage of the Act in 1917.[20]

The Act of 1917 overcame a general attack in the *Selective Draft Law Cases*[21] in 1918 and was later bolstered and solidified by the noted *Macintosh*[22] case in 1931. The 1917 Act was repealed in 1935.

II. ORIGIN AND DEVELOPMENT OF THE PRESENT CONSCIENTIOUS OBJECTOR EXEMPTION

With this historical backdrop, Congress was soon faced with providing manpower for World War II and the necessity of a new conscription statute. The original Burke-Wadsworth Bill contained a conscientious objector provision identical to the 1917 Act including its well-recognized sects requirement.[23] In 1940, both the Senate and House Committees on Military Affairs held hearings on the bill. Both religious and secular interest groups denounced the narrowly drawn conscientious objector provision.[24]

Religious interest groups wished to extend the narrow provision to include all religions, not merely well-recognized pacifist religions. The Friend's Organization offered a proposal enlarging the old provision by extending the exemption to one "who individually has religious scruples against the bearing of arms."[25] Other groups demanded even more liberal language. They argued for exemptions covering non-religious as well as religious objectors. Dr. Howard Beale, a representative of the American Civil Liberties Union, urged that the exemption should include one, "who is merely conscientiously opposed to participation in war in any form,"[26]

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[20] *Contra*, 6 CALIF. L. REV. 267,268 (1970) (footnotes omitted).

> This new act 1917 thus followed the spirit and letter of the 1864 enactment. It required both membership in a 'peace church' and personal adherence to that church's tenets, and added the 'war in any form' language—the requirement of total pacifism.

[21] 245 U.S. 366 (1918).

[22] United States v. Macintosh, 283 U.S. 605 (1931), *along with* United States v. Bland, 283 U.S. 636 (1931) *and* United States v. Schwimmer, 297 U.S. 644 (1929), were cases related to the congressional intent of the conditions of naturalization. *Macintosh*, *supra*, is the case in which Mr. Chief Justice Hughes formulated the traditional definition of religion stating in his dissent,

> The essence of religion is belief in a relation to God involving duties superior to those rising from any human relation as was stated by Mr. Justice Field, in Davis v. Beason, 133 U.S. 333,342: 'The term 'religion' has reference to one's view of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.' *Id.* at 633-34.

[23] H.R. 10132; S. 4164.

[24] *See*, Waite, *Section 5(g) Of The Selective Service Act, As Amended By The Court*, 29 MINN. L. REV. 22,31 (1945).

[25] *Hearings before the House Committee on Military Affairs*, 76th Congress, 3rd Session, on H.R. 10132, p. 152 (1940).

[26] *Hearings before the Senate Committee on Military Affairs*, 76th Congress, 3rd Session on S. 4164, p. 308 (1940).

or to "conscientious objectors on non-religious grounds who . . . can establish the sincerity of their objections."[27] Many other organizations criticized the proposals and offered various amendments at the hearings. Ultimately, the Friend's Organization, in collaberation with representatives of the Army, offered a proposal exempting one "who by reason of religious training and belief is conscientiously opposed to participation in war in any form."[28] This proposal became the heart of the 1940 Act's conscientious objector provision:

> Nothing 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.[29]

The final 1940 Act differed from the 1917 Act in several ways. First, the exemption was no longer tied to membership in any church, but it only touched upon the religious scruples of the individual conscience. Also, an applicant could object to both combatant and non-combatant service, thus allowing the objector to be free from induction itself. This latter change was of significant importance as evidenced by the treatment accorded to conscientious objectors performing non-combatant services. The greatest millstone the 1940 Act brought forth was assigning to the judiciary the task of interpreting the broad, nebulous words, "religious training and belief."

Congress' desire was demonstrated by the legislative history of the 1940 Act and the judicial interpretation of prior "religious" provisions. In the 1940 Act, it seemed clear that the word "religious" was used in the traditional, historical sense meaning religion based on a concept of diety.[30] Further, although the reason for Congress' rejection of an exemption covering non-religious objectors is not a matter of record, there is evidence that there was such a rejection.[31]

In 1943 a conflict arose in the federal courts in the interpretation of the religious training and belief clause. Judge Augustus Hand of the Second Circuit Court of Appeals delivered the opinion in *United States v. Kauten*,[32] including therein a reflection on the construction that *ought* to be placed on the religious training and belief clause:

> There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious

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[27] *Hearings on H.R. 10132, supra*, note 25, at 191.

[28] *Id.* at 211.

[29] Selective Training and Service Act of 1940, ch. 720, 54 Stat. 885.

[30] Conklin, *Conscientious Objector Provisions: A View In The Light Of Torcaso v. Watkins*, 51 GEO. L.J. 252,270 (1963).

[31] *See*, Conklin, *supra*, note 30; Russell, *supra*, note 1, at 426-28; *and* Waite, *supra* note 24, at 30-31.

[32] 133 F.2d 703 (2d Cir. 1943).

> objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons . . . the equivalent of what has always been thought a religious impulse.[33]

This construction can and has been characterized as reading out of the statute "religious training and belief" as a modification of "conscientiously" and extending the exemption to non-religious conscientious objectors.[34] This dictum was hailed for its liberal interpretation by those who attempted to implement this proposition in the original formulation of the Act. The Second Circuit had little difficulty in extending the exemption to non-religious objectors although Congress, specifically charged with that duty, refused to do so.

Three months later, the Second Circuit decided in a habeas corpus action that an agnostic registrant was entitled to exemption in *United States ex rel. Phillips v. Downer*.[35] Judge Clark cited as authority and quoted extensively the dictum in the *Kauten* case. The registrant held a deep-rooted belief that participation in any war violated a general humanitarian concept and this belief served as a religion for him. In early 1944, Judge Frank, speaking for the Second Circuit in *United States ex rel. Brandon v. Downer*,[36] stated that even though the registrant before the court failed to qualify for the exemption on other non-religious grounds, he characterized the registrant's statement of beliefs as "within the statute as we recently construed it in *United States v. Kauten*."[37] The registrant was an atheist, but stated he was opposed to participation in a war of any form because it was morally wrong. He was denied exemption because of a finding that, to some extent, his beliefs were not deep-rooted. Also in 1944, the same court in *United States ex rel. Reel v. Badt*[38] directed a lower court to apply the *Kauten* test to the registrant which, as simply stated by Judge Augustus Hand, is that an exemption should be granted if the registrant's beliefs were against participation in war of any form because of his conscience. However, on remand, the district court held that the registrant, Reel, was not sincere in his claim of conscientious opposition to war in any form, and denied him relief. On appeal to the Seocnd Circuit, a divided court reversed again and stated that there was no evidence in the record upon which the finding of a lack of sincerity could be based.[39] In the opinion, Judge Clark offered this observation:

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[33] *Id.* at 708.

[34] Waite, *supra* note 24.

[35] 135 F.2d 521 (2d Cir. 1943).

[36] 139 F.2d 761 (2d Cir. 1944).

[37] *Id.* at 765.

[38] 141 F.2d 845 (2d Cir. 1944).

[39] United States ex. rel. Reel v. Badt, 152 F.2d 627 (2d Cir. 1945).

> But our conclusion has not been accepted everywhere; . . . differences in view . . . are traceble to different conceptions of the extent of the Act. Hence a definitive interpretation of the Act by the Supreme Court is certainly to be desired.[40]

But Judge Clark's desire for review was thwarted. While a petition for certiorari was pending in the Supreme Court, the Solicitor General moved for dismissal and the motion was granted.[41]

The admission that the *Kauten* test was not universally accepted went without saying. In the Ninth Circuit, during 1946, a registrant sought to rely on *Kauten*, *Phillips*, and *Reel*, all Second Circuit decisions, in *Berman v. United States*.[42] The court affirmed his conviction for failing to submit to induction and denied his claim for conscientious objector status. The opinion of the court construed the words "religious training and belief" to distinguish

> . . . a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority and beyond any worldly one.[43]

The court frankly stated that, although the second circuit cases were similar or identical, there was fundamental disagreement between the rationale of the decision reached and the views expressed in *Phillips* and *Reel*. Only minimal respect was paid to the *Kauten* case. The dissent would have followed the rationale of the Second Circuit, granting Berman an exemption. Berman petitioned for certiorari, supported by the American Civil Liberties Union as *amicus curiae*; thus for the second time the circuits' conflict was at the threshold of resolution. The petition was denied and the conflict went unresolved until 1948 when Congress again was faced with the task of enacting a conscription statute.

The legislative history of the Selective Service Act of 1948 demonstrates the reaction of Congress to the liberal interpretation of the 1940 Act by the second circuit. The Senate Military Affairs Committee report expressly adopted the construction placed on the 1940 provision in *Berman*.[44] The language of the 1948 Act itself retained the "religious training and belief" clause of the 1940 provision; but a definition section was included,

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[40] *Id.* at 631 (footnotes omitted).

[41] 328 U.S. 817 (1946).

[42] 156 F.2d 377 (9th Cir. 1946), *cert. denied*, 329 U.S. 795 (1946), *rehearing denied*, 329 U.S. 833 (1947).

[43] 156 F.2d 377, 380 (9th Cir. 1946).

[44] *S. Rep. No.* 1268, 80th Congress, 2nd Session, 14 (1948):

> This section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 Act. Exemption extends to anyone who, because of religious training and belief in his relationship to a Supreme Being, is conscientiously opposed to . . . military service (See United States v. Berman 156 F.2d 377, certiorari denied, 329 U.S. 795.)

> 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.[45]

Congress, in formulating the definition section relied on the *Berman*[46] opinion by paraphrasing the exclusionary "political, sociological, etc." statement and utilizing Mr. Chief Justice Hughes' definition of religion in the *Macintosh*[47] case as the source of the "Supreme Being" clause. Defensively, Congress incorporated these decisions, not only into the legislative history, but also in the very words of the Act. By its actions, Congress attempted to avoid the liberal construction the Second Circuit had placed upon the earlier provision. Thus, Congress put forth a substantial effort to restrict exemptions to "religious," in a traditional sense, conscientious objectors.

The federal courts through the 1950's and into the 1960's applied the religious conscientious objector exemption in the restricted manner which Congress expressed in the 1948 Act. Early in 1964, the Second Circuit again lightened the burden borne by conscientious objectors whose claims, although sufficient under *Kauten*, fell short of the requirements of the 1948 Act. Judge Kaufman, in a well-reasoned opinion, reversed a registrant's conviction in *United States v. Seeger*[48] by striking the "Supreme Being" clause from the provision because it unconstitutionally favored religion based upon a concept of deity. This result would have been difficult to reach had Judge Kaufman not acknowledged the effect of the 1948 revision in the Act. In fact, the government conceded that Seeger was qualified under *Kauten* and would have received a conscientious objector exemption but for the 1948 revision and the congressional expression of approval of the *Berman* requirement of belief in a Supreme Being. The government petitioned the Supreme Court for a writ of certiorari attempting to resolve the conflict for the third time.

The Supreme Court granted certiorari and affirmed the decision of the Second Circuit.[49] In reaching it's decision, the Court did not rely on constitutional grounds as Judge Kaufman had, but rather it used an expansive interpretation of the coverage of the conscientious objector exemption in the 1948 Act. Since Seeger's claim of exemption rested on beliefs which were not founded in a religion based on a concept of deity, the Court had to explain away the efficacy of the "Supreme Being" clause added by Congress in 1948. The Court's analysis begins with the assertion that the requirements of the 1948 Act are no greater than those of it's predeces-

[45] 62 Stat. 612-13 (1948), as amended, 50 U.S.C. APP. § 546(j) (1964).
[46] 156 F.2d 377, 378 (9th Cir. 1946).
[47] 283 U.S. 605, 633-34 (1931).
[48] 326 F.2d 846 (2d Cir. 1964).
[49] 380 U.S. 163 (1965).

sor enacted in 1940. In reaching such a conclusion, the Court, referring to the Senate Report that expressly endorsed the *Berman* decision, stated that

> . . . an explicit statement of congressional intent deserves more weight than the parenthetical citation of a case which might stand for a number of things. Congress specifically stated that it intended to re-enact substantially the same provisions as were found in the 1940 Act. Moreover, the history of that Act reveals no evidence of a desire to restrict the concept of religious belief.[50]

Having then reversed a longstanding notion as to what Congress intended, not only in 1948 but also in 1940, the Court avoided the constitutional issue by interpretation, saying, when Congress adopted Mr. Chief Justice Hughes' definition of religion as used in *Macintosh*,[51] they purposely displaced "God" in favor of "Supreme Being" to demonstrate an embrace of all religions. The express test of *Seeger* then being that "religious training and belief" as connected to the "Supreme Being" clause means any deep-rooted and sincere belief commanding a position parallel to God in the possessor's life. This test, although expanding beyond the theistic religion concept left the nonreligious conscientious objectors beyond the reach of an exemption.

The stage was set by the reaction of the lower federal courts to the inherent inadequacy of the *Seeger* test for the Supreme Court to decide *Welsh*. Again the statutory concept of "religion" was strained to include nonreligious conscientious objectors and to avoid the constitutional issues raised. In *United States v. Sesson*,[52] a Massachusetts district court held that the conscientious objector provision unconstitutionally discriminates against atheists and agnostics who object to war on purely moral grounds. That opinion, however, goes further than the religious, nonreligious issue in granting the registrant an exemption when his beliefs are deeply-held, sincere and moral in source and content, but extending only to *war in Vietnam*, not to war generally. Although novel in as much as it countenanced "selective" conscientious objection, the opinion was utilized by other district courts as authoritative in its religious-nonreligious analysis.[53]

What the Court in *Welsh* considered necessary to be "religious" in the conscientious objector relationship is an extension and broadening of the *Seeger* test. An applicant possessing a sincere and deep-rooted conscientious belief, purely moral or ethical in source and content, which forecloses him from participation in war under any circumstances, the court in *Welsh* held, is sufficiently "religious" to be entitled to an exemp-

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[50] *Id.* at 177.

[51] *Id.*

[52] 297 F. Supp. 902 (D. Mass. 1969), *appeal dismissed*, 399 U.S. 267 (1970).

[53] Koster v. Sharp, 303 F. Supp. 837 (E.D. Pa. 1969); Goguen v. Clifford, 304 F. Supp. 958 (D. N.J. 1969); *and* United States v. Foran, 305 F. Supp. 1322 (E.D. Wis. 1969). *See also* 2 ST. MARY'S L.J. 81, 88-93 (1970).

tion. Indeed, the opinion of the Court concluded that one's beliefs need not be founded in any form of religion in order to qualify for an exemption:

> If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but 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.[54]

Also, there exists a negative test in *Welsh*: one whose beliefs do not stem from moral, ethical or religious grounds, but instead rest entirely upon "considerations of policy, pragmatism, or expediency," is beyond the reach of the exemption.

A fundamental question is raised by the very necessity of deciding *Welsh*. It could be asserted that Welsh was within the boundaries previously staked out five years earlier in *Seeger*. This assertion is strengthened by Mr. Justice Black's insistence on squaring the facts of *Welsh* with those of *Seeger*. An additional make-weight argument lies in the general passiveness of local boards to the *Seeger* decision,[55] *Welsh* thus afforded the Court a second round, not to formulate a new or expanded test, but to restate the identical test in an attempt to remedy the previous administrative inattentiveness to *Seeger*. On the other hand, it is equally likely that the Court became aware of the basic inconsistancy of the *Seeger* criteria of the religious-nonreligious dichotomy.[56] The functional approach of the religious concept taken in *Seeger* along with the substantive definition of nonreligious beliefs was recognized as unfortunate and unclear. The necessity of the *Welsh* decision can be seen as expanding upon *Seeger* to include in the test of religious beliefs the substantive concepts of moral and ethical beliefs, in addition to the essentially functional parallel concept developed in *Seeger*.[57] Two additional problems born in *Seeger* and laid to rest in *Welsh* were the self-characterization of beliefs and the balancing test. In *Seeger*, the Court accorded great weight to the registrant's declaration that his beliefs were religious but in *Welsh* where the Court was faced with a registrant characterizing his beliefs as nonreligious, such a self-appraisal was considered of no legal consequence. Also, the negative test of *Welsh* makes it quite clear that a practice of balancing the

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[54] Welsh v. United States, 398 U.S. 333, 340 (1970).

[55] *See*, Rabin, *Do You Believe In A Supreme Being: The Administration Of Conscientious Objector Exemption*, 1967 WIS. L. REV. 642, 670-71, 674-75, 679.

[56] Brodie and Sutherland, *supra* note 1.

[57] *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 32, 230-34 (1970).

sources of one's belief in determining whether such a belief is religious within the statute is erroneous. Once it is established that a registrant's belief is to *any* extent derived from ethical, moral, or religious sources, the inquiry is terminated and the registrant is to be granted exemption. The remaining portion of the registrant's belief, no matter how large or what the source is irrelevant.

III. EFFECTS OF MORAL AND ETHICAL RELIGION

The reaction to *Welsh* was quick and extensive. In the first week of July 1970, the Selective Service System issued new criteria to local boards for the classification of registrants applying for conscientious objector status.[58] The primary test to guide local draft and appeal boards is the sincerity of belief and that belief, if sincere, must be the primary force in the registrant's life. Secondarily, beliefs based entirely on moral and ethical grounds are not in any way grounds for exclusion from exemption. However, the guide expressly restricts the qualifying moral and beliefs by requiring them to be acquired "through training, study, contemplation . . . comparable in rigor and dedication to the processes by which traditional religious convictions . . ."[59] are acquired. In addition, the new criteria carry verbatim the negative test of *Welsh*.

In the Ninth Circuit, an applicant was held to be entitled to an exemption under *Welsh* in *United States v. Coffey*.[60] The court found that, as Coffey could not kill or harm anyone, and that to participate in war was unthinkable, his beliefs were deeply-held. His beliefs were characterized as resting on a moral principle consisting of a duty to preserve life, a duty arising between one man and another. In drawing the analogy between Welsh and Coffey, the court believed they both had

> . . . a special duty to preserve life. Both believed that the duty to preserve life was necessarily owing from one man to another.
>
> Both thought that from this duty to preserve life there flowed a duty radically inconsistent with participation in war . . .[61]

Thus having found the registrant's beliefs to be religious, as characterized in *Welsh*, and that those beliefs were deeply-held, or the moving force in his life, Coffey's conviction was reversed.

The Seventh Circuit in *United States v. Rink*[62] reversed an applicant's conviction by utilizing the *Welsh* opinion in an imaginative and interesting fashion. The determination had been made that Rink's religious beliefs

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[58] Local Board Memorandum No. 107, Criteria for Classification of Conscientious Objectors, SEL. SERV. L. REP. 2200:16 (1970).

[59] *Id.* at pt. 9.

[60] 429 F.2d 401 (9th Cir. 1970).

[61] *Id.* at 404.

[62] 430 F.2d 647 (7th Cir. 1970).

were insincere, not that his beliefs were insufficiently religious. Rink, in applying for a conscientious objector exemption, relied in part upon his traditional Roman Catholic religious training in addition to moral and ethical sources for his claim. The court held that the appeal board, in reaching the decision that his beliefs were not sincere, only considered his traditional theistic religious beliefs, not questioning the sincereity of his "secular" beliefs. The court stated,

> He referred to his Roman Catholic training and beliefs more because he felt the law required a religious basis for his beliefs, than that his religious training was the true source of his beliefs. But the rejection of his claim, so far as the record shows, is based solely on the fact that his conventional religious beliefs were not sincere. There is no mention anywhere in his file of the sincerity, or of the depth, of his secularly based beliefs.[63]

This holding is particularly well founded, for the claim was denied prior to *Welsh*, therefore a questioning of Rink's sincerity in regard of his "secular" beliefs was irrelevant to any resolution.

There is one area of the law of conscientious objection that the *Welsh* opinion seems not to have touched directly. The concept of *selective* conscientious objection has yet to be confronted directly by the Supreme Court, as *United States v. Sesson*[64] was disposed of for lack of jurisdiction. Yet, the very fact that *Welsh* was decided by interpreting "religion" as including nonreligious concepts, may be an indicator of the flexible attitude the Court will have when the issue of selective objection is squarely presented. Two courts of appeal cases[65] turning upon this issue have been docketed for consideration by the Supreme Court this term; hopefully a definitive answer is forthcoming.

IV. CONCLUSION

At the outset the United States was, in essence, a refugee camp for those seeking religious freedom from the English or continental orthodoxies. This attitude surfaced in 1673 with the first conscientious objector provision, untainted with religious concepts, theistic or otherwise. From the formalization of our Nation we turned our concerns inward supressing the very ideal considered the moving force of our beginning. Although arguably, the office of the judiciary may have been an improvident forum in which to initiate (or revive) a policy of this nature, it is largely the re-

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[63] *Id.* at 648-49.

[64] 297 F. Supp. 902 (D. Mass. 1969), *appeal dismissed*, 399 U.S. 267 (1970).

[65] *See*, United States v. Session, 399 U.S. 267, 270 at n. 1:

> We have today granted certiorari in Gillette v. United States (No. 1170), and Negre v. Larsen (No. 1669, Misc.), in order to consider the 'selective conscientious objector issue that underlies the case now before us but which we cannot reach because of our conclusion that we have no jurisdiction to entertain this direct appeal.

Gillette v. United States, 420 F.2d 298 (2d Cir. 1970), *cert. granted*, 399 U.S. 925 (1970) *and* Negre v. Larsen, 418 F.2d 908 (9th Cir. 1970), *cert. granted*, 399 U.S. 925 (1970).

sult of a thirty year conflict between two circuit courts of appeal and the refereeing efforts of the Supreme Court that have journeyed the concept of conscientious objection almost full-circle from our original position nearly three hundred years ago.

Jay R. Dingledy