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SEMANTICS, SINCERITY AND SECTION 6(j): *WELSH v. UNITED STATES*[1]

Whatever the reason, be it national conscience camouflaged under the doctrine of legislative grace or obedience to a belief in a constitutional requirement, the Government has historically provided exemption from military service to those who "by reason of religious training and belief" are "conscientiously opposed to participation in war in any form."[2]

The pendulum of distinctions and discriminations in defining the phrase "religious training and belief" has swung from one extreme to the other. The different views appear in the form of opposing opinions among the circuits, ranging from a more traditional orthodox interpretation which has been held both constitutional and unconstitutional, to a broad philosophical approach to a definition of religion which cures any constitutional defects. Curiously, the divergent interpretations have all puported to achieve results consistent with Congressional intent.

The Supreme Court has faced the problem of construing the conscientious objector exemption, section 6(j) of the Draft Act of 1948[3] and its predecessor, many times, most notably in *United States v. Seeger*[4] and now in *Welsh v. United States*.[5] The controversy among the lower federal courts has apparently been settled.

As of April 30, 1970 there were 9 to 10 million men in the 19 to 26-year old group registered, of which approximately 1,500,000 were in classifications available for military induction.[6] About 40,000 men were registered in conscientious objector exemption categories.[7] *Welsh v. United States* will add to that 40,000.

Elliott Ashton Welsh, II was convicted in a United States District Court of refusing to submit to induction into the Armed Forces in violation of 50

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1 398 U.S. 333 (1970).

2 Selective Training and Service Act of 1940, ch. 720, § 5(g), 54 Stat. 889.

3 "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." Selective Service Act of 1948, ch. 625, § 6(j), 62 Stat. 612-613 (1948), *as amended*, 50 U.S.C. App. 456(j) (1964).

4 380 U.S. 163 (1965).

5 398 U.S. 333 (1970).

6 L.A. Times, June 17, 1970, at 9, col. 1.

7 L.A. Daily Journal, June 16, 1970, at 1.

U.S.C. App. section 462(a), and was, on June 1, 1966, sentenced to imprisonment for three years.[8] One of the defenses was that section 6(j) of the Universal Military Training and Service Act exempted him from combat and noncombat service because he was "by reason of religious training and belief . . . conscientiously opposed to participation in war in any form."[9]

Welsh did not adhere to the teachings of or belong to any religious organizations.[10] He was not certain whether he believed in a Supreme Being and originally characterized his beliefs as nonreligious, they having been formed "by reading in the fields of history and sociology."[11]

He did, however, possess the belief that killing in war was wrong, unethical, and immoral and concluded that he could not "conscientiously comply with the Government's insistence that [he] assume duties which [he felt were] immoral and totally repugnant."[12]

After finding no religious basis for petitioner's conscientious objector claim, the court of appeals, Judge Hamely dissenting, affirmed the conviction.[13] The Supreme Court granted certiorari "chiefly to review the contention that Welsh's conviction should be set aside on the basis of this Court's decision in *United States v. Seeger*."[14]

In reversing Welsh's conviction and finding him entitled to a conscientious objector exemption under section 6(j), the Supreme Court, in an opinion by Justice Black, held:

> That section 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.[15]

The *Welsh* majority[16] did not find it necessary to discuss the propriety of its interpretation of section 6(j) in relation to the Congressional intent or purpose behind its enactment, because the Court felt its decision was a mere reaffirmation of the *Seeger* interpretation of section 6(j), not an extension. For this reason, and because Welsh was found exempted from military sevice, the majority opinion did not reach the constitutional issues raised by his counsel.

The majority in *Welsh* viewed the facts in this case as "strikingly similar to those in *Seeger*."[17]

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8 398 U.S. at 335.

9 *Id., quoting* Selective Service Act of 1948, 50 U.S.C. App. 456(j) (1964).

10 398 U.S. at 336.

11 *Id.* at 341.

12 *Id.* at 337, 343.

13 404 F.2d 1078, 1086 (9th Cir. 1968).

14 398 U.S. at 335 (citation omitted).

15 398 U.S. at 344.

16 Majority opinion by Justice Black with whom Justice Douglas, Justice Brennan, and Justice Marshall joined, 398 U.S. at 335.

17 *Id.*

Both Seeger and Welsh developed their views against war subsequent to their registration for the draft. Both made application to their local draft boards for conscientious objector exemptions.

In filling out their exemption applications both Seeger and Welsh were unable to sign the statement which, as printed in the Selective Service System Form,[18] stated "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form." Seeger struck out the words "training and", put quotation marks around the word "religious" and then signed the form. Welsh struck out the words "religious training and", and then signed.

Neither Seeger nor Welsh could affirm or deny belief in a "Supreme Being". Both stated that they preferred to leave the question open.[19] Both 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."[20]

Moreover, in *Welsh*, as in *Seeger*, there was never any question as to the sincerity with which the beliefs were held.[21] The problem in both cases was that the Selective Service System found that the beliefs of both Seeger and Welsh were insufficient to qualify them for conscientious objector exemptions.[22]

By contending that *Welsh* is a mere reaffirmation of *Seeger*, the Court attributed to *Seeger* the concept that those whose opposition to war is based upon ethical or moral grounds are entitled to exemption. At best, such a position is extremely dubious; in fact there are good reasons to believe that it is untenable.

Justice Harlan, in his concurring opinion[23] recognized the majority opinion as being an extension of the *Seeger* interpretation of section 6(j). He went on to find that under a proper interpretation of section 6(j), the Establishment Clause[24] of the First Amendment was violated, and then cured the constitutional defect in a way which reached the same result as the majority opinion.

The dissenting opinion of Justice White, with whom the Chief Justice and Justice Stewart joined, also recognized the majority opinion as an extension of *Seeger*, and not in accord with legislative intent, but found that the proper

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18 Selective Service System Form 150. The Form has since been amended. *See* 32 C.F.R. § 1621.11 (1971).

19 398 U.S. at 337.

20 *Id.*

21 *Id.*

22 *Id.* at 337-38.

23 *Id.* at 344-67.

24 "Congress shall make no law respecting an establishment of religion. . . ." U.S. CONST. amend. I.

construction of section 6(j) does not violate the Establishment Clause and is constitutional in all respects.[25]

A close look at the Court's analysis and interpretation of *Seeger* indicates that the majority has indeed extended the *Seeger* interpretation of section 6(j). A determination of the question of extension is important for several reasons.

The constitutionality of section 6(j) was discussed in *Seeger*. That Court dispensed with the constitutional attacks on section 6(j) by holding that the petitioners construed the section too narrowly and under its broader interpretation the section was constitutional. Consequently, if the *Welsh* decision did indeed merely apply the *Seeger* test then the issue is whether Welsh falls within the protected class of conscientious objectors as defined by *Seeger*. On the other hand, if the holding in *Welsh* is an extension of the *Seeger* test then two questions are raised. First, is such an extended interpretation of section 6(j) in accord with legislative intent, and second, if in light of a proper interpretation of Congressional purpose Welsh is denied an exemption, is section 6(j) constitutional?

The next reason is a practical one. The threshold question in all conscientious objector exemption claims is the sincerity of the registrant.[26] A registrant who files for conscientious objector exemption late in his Selective Service career, for example a few months before his induction notice is to arrive, may be looked upon by his local board members and his appeal board as being insincere. The "lateness" of a conscientious objector claim has been held to be objective evidence of insincerity in more than a few cases.[27] Consequently, where a registrant who is an ethical, rather than a religious, conscientious objector files for exemption after *Welsh* and late in his Selective Service career, the sincerity of the registrant's claim is drawn into question.

However, if *Welsh* is understood as representing "new law" in that *Seeger* only exempted religious conscientious objectors[28] and *Welsh* extends the *Seeger* interpretation of section 6(j) to exempt non-religious objectors as well, then the registrant has a valid reason for his "lateness".

Since most of the publicity surrounding the *Welsh* decision characterized that holding as "new law",[29] the registrant can provide an explanation for his "lateness" to his local board by showing that the cause of his present

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25 398 U.S. at 367-74.

26 380 U.S. at 185.

27 United States v. Henderson, 411 F.2d 224 (5th Cir. 1969), *cert. denied*, 399 U.S. 916 (1970) and cases cited therein.

28 380 U.S. at 176.

29 In commenting on the *Welsh* decision, the new head of the Selective Service System, Director Curtis W. Tarr, was quoted as saying, "There is little question that many young men who felt themselves unlikely to qualify as conscientious objectors now will find reason to apply." L.A. Times, June 17, 1970, at 1, col. 2.

claim was the realization that the *Welsh* decision now extends conscientious objector exemption to his non-religious opposition to war.

And finally, the determination of this question is also important when one considers that only four Justices supported the majority's opinion.[30] In considering future litigation in this area, it should thus be noted that a slight change in the make-up of the Court could bring about a different holding in those cases. If *Welsh* is found to be an extension of the *Seeger* doctrine, then seemingly the broad construction of section 6(j) advanced by the majority in *Seeger* without dissent, would still be good law, even if subsequent decisions find *Welsh* to go beyond the limits intended by Congress in establishing this exemption.

If, on the other hand, *Welsh* is a proper interpretation of *Seeger*, then a finding that *Welsh* misconstrued legislative intent would necessarily bring about the fall of *Seeger*, as well as *Welsh*. One should remember that the majority in *Seeger* interpreted section 6(j) to avoid constitutional difficulties and therefore, with that holding invalid, the constitutional questions could very well be before the Court again, with the conscientious objector exemption facing a possible threat of invalidation.[31]

Therefore, with the importance of the issue in mind, is *Welsh* an extension of *Seeger*?

The *Seeger* Court began its inquiry into the meaning of "religious training and belief" by first "noting briefly those scruples expressly excepted from the definition."[32] The Court concluded that "[t]he section excludes those persons who, disavowing religious belief, decide on the basis of essentially political, sociological or economic considerations that war is wrong and that they will have no part of it."[33] The Court also expressly asserted that there was no issue before them concerning the claims of an atheist.[34]

Having found that Congress, in using the words "religious training and belief", intended a broader concept of "a power or being, or . . . a faith, to which all else is subordinate or upon which all else is ultimately dependent",[35] rather than a restriction to a traditional belief in God, and again emphasizing that "all of the parties here purport to base their objection on religious belief", the Court propounded their now famous rationale for granting Seeger conscientious objector exemption under section 6(j):

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30 *See* note 16 *supra*. Justice Blackmun did not take part in the decision.

31 Justice Douglas, concurring in United States v. Seeger, 380 U.S. 163, 188 (1965), stated:

> If I read the statute differently from the Court, I would have difficulties. For then those who embraced one religious faith rather than another would be subject to penalties; and that kind of discrimination . . . would violate the Free Exercise Clause of the First Amendment.

32 *Id.* at 173.

33 *Id.*

34 *Id.*

35 *Id.* at 176.

> 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.[36]

The *Seeger* Court took the position that its requirements were no different from those required under the Act of 1940,[37] and 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."[38]

Justice Black, speaking for the majority in *Welsh*, argued that:

> The reference to the registrant's "own scheme of things" was intended to indicate that the central consideration in determining whether the registrant's beliefs are religious is whether these beliefs play the role of a religion and *function* as a religion in the registrant's life. (emphasis added)[39]

This is the foundation for the Court's construction of an opinion which finally holds that either "moral, ethical or religious" beliefs qualify for exemption under section 6(j). The structure is only as strong as its supporting foundation, and this foundation has serious weaknesses.

The important issue here is whether a sincerely held belief, one which *functions as a religion* in the registrant's life, is equivalent to a sincerely held belief which is "in his own scheme of things, religious."

It would seem that a belief which functions as a religious belief need not be religious in any sense. Long debates could no doubt result from the abstract question of whether a belief functioning in a person's life as a religion should be accordingly referred to as a religious belief, but one should remember that, considering the opinion of the *Welsh* majority, the term "religious belief" was supposedly construed as the *Seeger* majority meant it to be.

Admittedly, moral or ethical beliefs may be held with all the strength and fervor of religious beliefs by some to the extent that they might function as religious beliefs. But to the *Seeger* majority these beliefs were not the equivalent of religious beliefs within the meaning of section 6(j). This fact is illuminated by an examination of the case of an atheistic objector.

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[36] *Id.*

[37] Selective Training and Service Act of 1940, ch. 720, § 5(g), 54 Stat. 885.

[38] 380 U.S. at 185. The phrase "religious training" has been of little importance since *Seeger*. In fact, consistent with the broad interpretation given to the phrase "religious belief", there can be no requirement that the applicant have had any formalized, institutionalized religious training. Hence, in United States v. Haffner, 301 F. Supp. 828 (D. Hawaii 1969), the court in reversing the local boards denial of a conscientious objector claim because the registrant had no "religious training", said that such a conclusion by the local board

> indicate[s] conclusively that the decision of the Local Board to retain defendant in class I-A was based upon the now impermissible distinction between a belief "due to religious training" and "religious belief".
>
> The clear implication of the decision of the Local Board, namely that a belief based on religious training is a prerequisite to granting conscientious objector status, cannot stand in light of Seeger. . . . *Id.* at 830.

[39] 398 U.S. at 339.

In *United States v. Shacter*,[40] it was said that a registrant who was an atheist in the sense that "he claimed no belief at all that was a product of faith . . . would not under [6(j)] be entitled to classification as a conscientious objector"[41] as that court interpreted *Seeger*.

However, it would seem that the majority's statement in *Welsh*, that a belief which *functions* as a religion in a registrant's life would entitle him to exemption under section 6(j), grants exemption to an avowed atheist. An atheist who has a sincere conscientious objection to war could be said to have a belief which functions as a religion in his life. Yet, the *Seeger* Court expressly held that it was not deciding the status of an avowed atheist under section 6(j).[42]

In short, could not any strongly, deeply, and sincerely held view opposing participation in war function as a religion in the registrant's life yet not *be*, in his own scheme of things, religious? Numerous cases since *Seeger* and before *Welsh* have also shown an intention to grant exemption under section 6(j) only to those whose beliefs are "religious" in content, although admittingly dropping the requirement of "religious training".[43] The only indication that *Seeger* might include non-religious beliefs is found in statements such as the one made in *United States v. Levy*:[44] "Any type of sincerely held belief opposing war generally would be difficult to rule out under *Seeger*."[45] This was dicta, and also a long way from the unequivocal statements qualifying secular beliefs for exemption that were made in *Welsh*.[46]

The *Welsh* Court does more than merely extend the *Seeger* definition of what a religious belief is. In interpreting the exclusionary phrase of section 6(j), the Court also goes beyond the limits set forth in *Seeger*.

The Government contended that Welsh's views, distinguished from those of

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[40] 293 F. Supp. 1057 (D. Md. 1968).

[41] *Id.* at 1063.

[42] 380 U.S. at 173.

[43] Cases showing that § 6(j) under *Seeger* requires a "religious" content in the registrant's beliefs are: United States v. Neamand, 302 F. Supp. 1296 (M.D. Pa. 1969); United States v. Shacter, 293 F. Supp. 1057 (D. Md. 1968); United States v. Prescott, 301 F. Supp. 1116 (D.N.H. 1969). *See also* United States v. Sisson, 297 F. Supp. 902 (D. Mass. 1969), *appeal dismissed*, 399 U.S. 267 (1970) where § 6(j) was declared unconstitutional because it discriminates between religious beliefs and non-religious beliefs; *accord*, Goguen v. Clifford, 304 F. Supp. 958 (D.N.J. 1969). In addition, there are two recent cases holding § 6(j) unconstitutional in that it discriminates between religious objection to some wars and objection to all wars. In both cases, the presumption is that § 6(j) exempts only religious conscientious objectors. United States v. McFadden, 309 F. Supp. 502 (N.D. Cal. 1970); United States v. Bowen, 2 SSLR 3421 (N.D. Cal. 1969).

[44] 419 F.2d 360 (8th Cir. 1969).

[45] *Id.* at 368.

[46] The court in *Levy* was only concerned with the "religious content" of the registrant's beliefs. There are few cases, if any, expressly holding that under Seeger beliefs which are purely "moral, ethical, or religious" qualify for conscientious objector exemption, as does the majority opinion here.

Seeger, were "essentially political, sociological, or philosophical views or a merely personal moral code."[47]

Welsh did base his conscientious objection to war in part on his perception of world politics.[48] The *Welsh* majority, however, easily avoided this pitfall by concluding that:

> Once the Selective Service System has taken the first step and determined under the standards set out here and in *Seeger* that the registrant is a "religious" conscientious objector, it follows that his views cannot be "essentially political, sociological, or philosophical." Nor can they be a "merely personal code."[49]

The majority also stated that the "exclusion of those persons with essentially political, sociological or philosophical views or a merely personal moral code" from conscientious objector exemption under section 6(j) should not be read so as to exclude from exemption:

> those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a *substantial* extent upon considerations of public policy. (emphasis added)[50]

What, then, is the status of the word "essentially" in section 6(j)? Take, for example, the situation of a registrant who, in the words of *Seeger*, "disavow[s] any religious belief."[51] Under *Seeger* if this same registrant "decide[s] on the basis of essentially political, sociological or economic considerations that war is wrong and that [he] will have no part of it,"[52] he falls within the exclusionary phrase and ought to be denied exemption under the section.

However, under *Welsh*, if the same person who has "disavowed" any religious belief, maintains an ethical or moral conscientious objection to war based *substantially* upon public policy, he does not fall within the exclusionary phrase and may obtain a conscientious objector exemption.

The Court went on to say that there were two groups which "obviously" do fall within the exclusionary phrase:

> [1] those whose beliefs are not deeply held and
> [2] those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests *solely* upon considerations of policy, pragmatism, or expediency. (emphasis added)[53]

To the first group of persons *Welsh* lists as persons who "obviously" do fall within the exclusion, the word "obviously" is appropriate. Under any interpretation of 6(j), be it that of General Hershey, *Seeger*, or *Welsh*, the

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47 398 U.S. at 342, *quoting* United States v. Seeger, 380 U.S. 163 (1965).
48 398 U.S. at 342.
49 *Id.* at 343.
50 *Id.* at 342.
51 380 U.S. at 173.
52 *Id.*
53 398 U.S. at 342-43.

belief must be sincerely held to qualify for exemption.

However, the manner in which the Court defined the second excluded class creates interpretive problems. By the use of the word "solely", did the Court intend that *only* in those cases where a registrant's objection to war rests "solely upon considerations of policy, pragmatism, or expediency" is he to fall within the exclusionary phrase? Or was the Court truly stating the "obvious" by saying anyone whose objection to war rests "solely" upon these improper criteria is to be denied exemption under section 6(j)?[54]

Moreover, the *Welsh* Court has replaced the words in section 6(j)'s exclusionary clause (political, sociological, and philosophical) with "policy, pragmatism, and expediency."

The *Welsh* Court's liberal construction of section 6(j) does extend the limits of the conscientious objector exemption far beyond the range of the Court's holding in *Seeger*. By equating beliefs that function as a religion with religious beliefs, the majority in *Welsh* includes within the reach of this exemption applicants who could not obtain such an exemption under *Seeger*.

Justice Harlan, in his concurring opinion, also recognized the fact that the majority opinion is an extension of *Seeger* rather than a mere reaffirmation.[55] And the three dissenters expressly agreed:

> Whether or not *United States v. Seeger* accurately reflected the intent of Congress in providing draft exemptions for religious conscientious objectors to war, I cannot join today's construction of § 6(j) extending draft exemption to those who disclaim religious objections to war and whose views about war represent a purely personal code arising not from religious training and belief as the statute requires but from readings in philosophy, history, and sociology.[56]

When the majority opinion in *Welsh* is realistically recognized as a broader interpretation of section 6(j) than the *Seeger* holding, and considering the doubts raised as to the propriety of the *Seeger* interpretation, one is immediately faced with the question whether this broadening of section 6(j) is a proper exercise in judicial statutory construction.

The issue in this case, to use the words of Justice Harlan, is "whether Welsh's opposition to war is founded on 'religious training and belief' and hence 'belief in a relation to a Supreme Being' as *Congress* used those words",[57] and the test for this issue is fixed by an inspection of the Congressional language with respect to "the context of its usage and legislative history . . . ."[58]

"Governmental recognition of the moral dilemma posed for persons of cer-

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[54] United States v. Coffey, 429 F.2d 401, 404 (9th Cir. 1970), suggests that exclusion from the § 6(j) exemption applies *only* against the enumerated groups.

[55] 398 U.S. at 344-45.

[56] Dissenting opinion by Justice White, with whom The Chief Justice and Justice Stewart joined, 398 U.S. at 367 (citation omitted).

[57] *Id.* at 346.

[58] *Id.* at 347.

tain religious faiths by the call to arms came early in the history of this country."[59]

Federal statutory recognition came with the Federal Conscription Act of 1863, and in the 1864 Draft Act[60] exemptions were extended to those conscientious objectors who were members of religious denominations opposed to the bearing of arms and who were prohibited from doing so by the articles of faith of their denominations.[61]

The Draft Act of 1917[62] afforded "exemptions to conscientious objectors who were affiliated with a 'well-recognized religious sect or organization [then] organized and existing and whose existing creed or principles [forbade] its members to participate in war in any form.' "[63]

The 1940 Selective Training and Service Act removed the requirement of affiliation with a "well-recognized religious sect or organization" from the law by providing that:

> 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.[64]

The phrase "by reason of religious training and belief" became the center of controversy between 1940 and 1948 when two courts of appeal expressed different viewpoints as to its intended meaning. These conflicting viewpoints are represented by the decisions of *United States v. Kauten*[65] and *Berman v. United States.*[66]

In *Kauten*, the Second Circuit, while holding that the applicant's views did not satisfy the act's requirements, expressly unveiled its concept of what beliefs would qualify for an exemption under this Act. The court distinguished a course of reasoning which would result in a conviction that a particular war was wrong from a conscientious objection to participation in any war and then stated:

> 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 at the present time the equivalent of what has always been thought a religious impulse. (emphasis added)[67]

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59 380 U.S. at 170.

60 Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 9.

61 380 U.S. at 171, *citing* CONSCIENTIOUS OBJECTION 40-41 (SELECTIVE SERVICE MONOGRAPH No. 11 1950).

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

63 United States v. Seeger, 380 U.S. 163, 171 (1965), *quoting* Act of May 18, 1917, ch. 15, § 4, 40 Stat. 78.

64 Selective Training and Service Act of 1940, ch. 720, § 5(g), 54 Stat. 889.

65 133 F.2d 703 (2d Cir. 1943).

66 156 F.2d 377 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946).

67 133 F.2d at 708.

That the court intended to extend the exemption to a class of beliefs beyond the scope of traditional religion is illustrated by its description of an "inward mentor" as either God or conscience.

The fact that the Second Circuit intended not to restrict the exemption to religious beliefs in the traditional sense is substantiated by that court's decisions in two subsequent cases.

In *United States ex rel. Phillips v. Downer,*[68] the applicant's opposition to war was based on a general humanitarian concept which he described as "essentially religious in character."[69] The court in answering the Government's claim that the oppostion to war must be traceable to some religious belief or training stated:

> But if a stricter rule than was announced in the Kauten case is called for, one demanding a belief which cannot be found among the philosophers, but only among religious teachers of recognized organizations, then we are substantially or nearly back to the requirement of the Act of 1917. . . .[70]

The court then concluded by quoting from the *Kauten* decision, holding that the provisions of the 1940 statute "make the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed, the basis for exemption."[71]

In *United States ex rel. Reel v. Badt,*[72] the applicant denied that he believed in a deity.[73] Yet, the court remanded the case; from the evidence it appeared that a conscientious objector exemption was denied him solely because his opposition to war was not based upon an obligation to a deity and therefore was in violation of *Kauten.*[74]

In contrast to the Second Circuit's decisions is the decision by the Court of Appeals for the Ninth Circuit in *Berman v. United States.*[75] In that case the appellent argued that "a person's philosophy of life or his political point of view, to which his conscience directs him to adhere devotedly, or his devotion to human welfare without the concept of deity, may be religious in nature."[76] The court, in denying appellant's claim said:

> It is our opinion that the expression "by reason of religious training and belief" is plain language, and was written into the statute for the specific purpose of distinguishing between 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 higher and beyond any worldly one.[77]

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[68] 135 F.2d 521 (2d Cir. 1943).
[69] *Id.* at 523.
[70] *Id.* at 524.
[71] *Id.*; United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943).
[72] 141 F.2d 845 (2d Cir. 1944), *cert. denied,* 328 U.S. 817 (1946).
[73] *Id.* at 846.
[74] *Id.* at 847, 849.
[75] 156 F.2d 377 (9th Cir. 1946).
[76] *Id.* at 378.
[77] *Id.* at 380.

The Ninth Circuit, by making this distinction and impliedly eliminating social, moral and philosophic beliefs from the statute's cover was laying the foundation for its conclusion that to be religious within the meaning of the statute, one had to believe in a deity.

The court referred to the words of Chief Justice Hughes, dissenting in *United States v. MacIntosh*:[78] "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."[79] It then concluded:

> However, no matter how pure and admirable his standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion in the sense of that term as it is used in the statute.[80]

These two schools of thought were ever present when, in 1948, Congress amended the Universal Military Training and Service Act, and declared that religious training and belief was to be defined as "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."[81]

The legislature's definition of religious training and belief was the only addition to the 1940 Act. In fact, the report of the Senate Armed Services Committee recommending adoption reads:

> 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 combatant military service or to both combatant and noncombatant military service [citing *Berman v. United States*].[82]

It is difficult to avoid the conclusion that Congress, in amending the 1940 Act, intended to solve the dispute that existed between the different circuits of the Court of Appeals and accepted the Ninth Circuit's interpretation in *Berman* as the national standard. This is evident for two reasons. The first is the obvious fact that the Senate Report cites *Berman*. The second is that Congress in adopting this section defined religious training and belief almost word for word from the *Berman* Court's interpretation of the same language.[83]

It should be remembered that the *Berman* majority used the words of Chief Justice Hughes in defining religious training and belief as a "belief in a relation to God involving duties superior to those arising from any human rela-

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[78] 283 U.S. 605, 633 (1931).

[79] *Id.* at 633-34.

[80] 156 F.2d at 381.

[81] Selective Service Act of 1948, ch. 625, § 6(j), 62 Stat. 612 *as amended*, 50 U.S.C. App. § 456(j) (1964).

[82] S. REP. No. 1268, 80th Cong., 2d Sess. 14 (1948).

[83] 156 F.2d at 381.

tion."[84] Congress substituted the words "Supreme Being" for "God" but otherwise the wording is identical.

Justice Harlan, in his concurring opinion in *Welsh*, attached great significance to these two factors in concluding that Congress by section 6(j) deemed to distinguish between theistic and non-theistic religions. In his opinion he stated

> [t]hat Congress intended to anoint the Ninth Circuit's interpretation of § 5(g) would seem beyond question in view of the similarity of the statutory language to that used by Chief Justice Hughes in his dissenting opinion in *Macintosh* and quoted in *Berman* and the Senate report.[85]

In 1965, the Court in *Seeger* was faced with an applicant who desired to leave the question of his belief in God open and, in finding him entitled to a conscientious objector exemption, was forced to interpret these references to the *Berman* opinion in a manner consistent with its conclusions. To find that Seeger was not entitled to an exemption would have required the Court to consider the constitutional question presented to it by the Court of Appeals.[86]

One must give the *Seeger* Court credit for the ingenuity it demonstrated in reconciling its conclusion with the intent of the Congress in enacting section 6(j). The Court, confronted with a statute that defined a religious belief as a belief in a "Supreme Being," recognized the "vast panoply of beliefs"[87] prevalent in the United States and assuming that the Congress would not deviate from "its long-established policy of not picking and choosing among religious beliefs",[88] interpreted the meaning of religious training and belief so as to "embrace all religions".[89]

The majority's opinion in *Seeger* raises questions about their interpretation of the legislature's intent. It is not easy to accept their conclusion that section 6(j), which referred at that time to belief in a relation to a Supreme Being and is impliedly founded on a holding that one must have a belief in a deity in order to qualify for exemption, embraces all religions.

The *Seeger* majority attempted to appease any such criticism of their interpretation by discussing these subjects. They recognized the similarity in language of section 6(j) with the views expressed by Chief Justice Hughes, and concluded that it was apparent that Congress deliberately broadened the Chief Justice's language by substituting the phrase "Supreme Being" for that of "God".[90] It then noted the Senate Report stating that Congress was substantially reenacting the 1940 Act and stated:

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84 *Id.*
85 398 U.S. at 349.
86 326 F.2d 846, 854 (2d Cir. 1964).
87 380 U.S. at 175.
88 *Id.*
89 *Id.* at 165.
90 *Id.* at 175.

> 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.[91]

The conclusion of the *Seeger* majority then, was that the addition to the statute of a definition which expresses religious training and belief in terms of a relation to a Supreme Being does not in any way change the meaning of that statute.

In one sense the *Seeger* Court was correct; this amendment was purely a clarification of the then existing law. The difficulty with the *Seeger* approach is that the Court perceived that, both before and after the amendment, *Kauten* and *Berman* were consonant. It was not therefore precluded from adopting the *Kauten* standard simply because Congress alluded to *Berman* and language found therein. The *Seeger* position on this point is indefensible.

The *Kauten* standard exhibited a broad interpretation of religious training and belief while the majority in *Berman* construed the language of the statute very strictly. It would seem that the section 6(j) definition defines limits to what a religious belief can be by excluding those beliefs not held in a relation to a Supreme Being.[92] Such a construction is not consistent with the principles set forth in *Kauten*, but instead is a narrow construction consistent and in accord with the *Berman* holding.

Clearly, the *Seeger* Court, in construing section 6(j) to mean nothing more than a reaffirmation of the 1940 Act, necessarily overlooks the legislature's attempts to clarify and limit the conscientious objector exemption.

That Congress was attempting to adopt the *Berman* standard is further substantiated by the citation to *Berman* in the Senate report.[93] The *Seeger* Court felt that this citation was entirely proper because certiorari was denied in *Berman* and not in *Kauten*. But, if the Court was implying that the *Berman* decision carried greater weight because of denial of certiorari, such an implication is contrary to a long-standing Supreme Court view that

> denial of a writ of certiorari imports no expression of opinion on the merits of the case, and carries with it no implication whatever regarding the Supreme Court's views of the merits of the case, or no support of the lower court decision nor of any of the views in the opinion supporting it . . . .[94]

In light of the statute's and *Berman's* similarity in language, it is hard to perceive how the *Seeger* Court put so little emphasis on the citation if it was truly trying to construe the legislature's intent. It should be remembered that under the *Kauten* standard, beliefs stemming from either God or con-

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91 *Id.* at 176.

92 Such as beliefs based on Taoism and Buddhism.

93 S. REP. No. 1268, 80th Cong., 2d Sess. 14 (1948).

94 32 AM. JUR. 2d *Federal Practice and Procedure* § 229 at 682 (1967) (footnotes omitted).

science could qualify for exemption[95] while under *Berman* one's beliefs must have been derived from an obligation to God.[96] Yet the Court seemed oblivious to this interpretational battle and dismissed the problem by stating that there was no indication of "congressional concern over any conflict between *Kauten* and *Berman.* Surely, if it thought that two clashing interpretations as to what amounted to 'religious belief' had to be resolved, it would have said so somewhere in its deliberations."[97] In other words the Senate report, rather than simply citing *Berman,* should have cited *Berman* and included a notation not to cite *Kauten.*

The Court then expresses the view that *Berman* was cited not for what a religious belief is but for what it is not, noting that *Kauten* and *Berman* agree that exemption is denied to those whose beliefs are essentially political, sociological, or philosophical.[98] It should be recognized that nowhere did the Senate report concern itself with the question of what a religious belief was not.[99]

The fact is that *Kauten* and *Berman* are utterly hostile to each other. The fact is that the Senate report cited *Berman.* The fact is that the Hughes definition of religious belief was almost in its entirety adopted into the statute. The fact is that Congress did define religious training and belief in terms of a relation to a Supreme Being and excluded those whose beliefs are essentially political, philosophical, or sociological or a mere personal moral code.

Justice Harlan, in his concurring opinion stated:

> In my opinion, the liberties taken with the statute both in *Seeger* and today's decision cannot be justified in the name of the familiar doctrine of construing federal statutes in a manner that will avoid possible constitutional infirmities in them.[100]

He considered the majority opinion as a

> wholly emasculated construction of a statute to avoid facing a latent constitutional question, in purported fidelity to the salutory doctrine of avoiding unnecessary resolution of constitutional issues . . . . [citing *Ashwander v. Tennessee Valley Authority*][101]

Justice Harlan's reference to *Ashwander* was in approval of the limits of statutory construction as delineated by the concurring opinion of Justice Brandeis:

> When the validity of an act of Congress is drawn in question, and even if a serious doubt of unconstitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.[102]

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95 133 F.2d at 708.
96 156 F.2d at 381.
97 380 U.S. at 178.
98 *Id.*
99 S. REP. No. 1268, *supra* note 93.
100 398 U.S. at 345.
101 *Id.* at 354 (citations omitted).
102 297 U.S. at 348.

Further reference is made to *Aptheker v. Secretary of State*,[103] which discussed the permissible limits within which the Court may construe a possibly unconstitutional statute in order to save it. A construction which "perverts" the purpose of the legislation is impermissible.

Realistically, the *Seeger* Court's construction of section 6(j) was not in harmony with the will of Congress. It is arguable, however, that the Court's interpretation was not so discordant as to pervert Congressional intent in view of the fact that *Seeger* expressly required religious belief of some kind as a condition of exemption.

On the other hand, since *Welsh* extends *Seeger*, it may fail the test which *Seeger* has passed. The purpose and intent of section 6(j) is clearly perverted when it is construed so as to embrace religious and non-religious views alike. A statutory construction which embraces beliefs of a class expressly authorized to receive its benefits, as well as beliefs of a class expressly excluded from its benefits, is not justifiable under the doctrine of avoiding the constitutional question. Such questions are latent in a proper interpretation of the kind of statute involved here. As Justice Frankfurter pointed out, "An omission at the time of enactment, whether careless or calculated, cannot be judicially supplied however much later wisdom may recommend the inclusion."[104]

Justice Harlan concluded rather sarcastically:

> Its justification cannot be by resort to legislative intent, as that term is usually employed, but by a different kind of legislative intent, namely the presumed grant of power to the courts to decide whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend, constitutional.[105]

A finding that the *Welsh* Court did not properly construe the legislative intent in enacting section 6(j) presents a second major problem. In the words of Justice Harlan:

> I therefore find myself unable to escape facing the constitutional issue that this case squarely presents: whether § 6(j) in limiting this draft exemption to those opposed to war in general because of theistic beliefs runs afoul of the religious clauses of the First Amendment.[106]

The majority of course, did not reach the constitutional issue. The broad interpretation which the majority gave to section 6(j) eliminated any con-

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103 378 U.S. 500, 515 (1964).

104 Frankfurter, *Reflections on Reading Statutes* in THE SUPREME COURT: VIEWS FROM INSIDE 74 (A. Westin ed. 1961).

105 398 U.S. at 355-56. Furthermore, it should be noted that as Justice Frankfurter points out, the word "intent" as used here and in Justice Harlan's discussion, does not mean that a court should delve into the minds of the legislators, but rather "legislative intent" is synonomous with "legislative purpose" which does not require a psychoanalysis of the legislators. Frankfurter, *supra* note 104, at 74, 86.

106 398 U.S. at 345.

stitutional difficulties with respect to the Free Exercise and Establishment Clauses.

Justice Harlan, in rejecting the majority's broad interpretation for the narrower construction discussed above, found section 6(j) violative of the Establishment Clause and hence unconstitutional.

On the other hand, Justice White in his dissent also rejected the majority interpretation and accepted the same construction of section 6(j) as Justice Harlan, but did not believe that the Section contravened the Establishment Clause.

Before discussing the Establishment Clause issue, Justice Harlan disposed of the argument that the Constitution requires exemption of conscientious objectors. He stated that Congress could constitutionally eliminate all exemptions. He cited his dissent in *Sherbert v. Verner*,[107] for its proposition that such a course would be wholly neutral and would not offend the Free Exercise Clause.[108]

In *Sherbert,* the appellant was a Seventh-day Adventist who was unable to work on Saturdays. She was therefore deemed "unavailable for work" and denied compensation under a South Carolina unemployment statute. However, persons who, for religious reasons refused to work on Sunday were exempted from the statute's "unavailable for work" limitation.

In his dissent in *Sherbert*,[109] with which Justice White joined, Justice Harlan could not

> subscribe to the conclusion that the State is constitutionally *compelled* to carve out an exception to its general rule of eligibility in the present case. Those situations in which the Constitution may require special treatment on account of religion are, in my view, few and far between, ...[110]

And in *Dickinson v. United States*,[111] it was noted that an exemption is a matter of legislative grace and thus "the Selective Service registrant bears the burden of clearly establishing a right to the exemption."[112]

Having found that Congress is not compelled to grant exemptions, Justice Harlan next questioned whether Congress, having created the exemption, did so constitutionally. At first, he stated the issue quite narrowly:

> [W]hether a statute that defers to the individual's conscience only when his views emanate from adherence to theistic religious beliefs is within the power of Congress.[113]

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107 374 U.S. 398, 418 (1963).

108 398 U.S. at 356.

109 374 U.S. at 418.

110 *Id.* at 423. *See, e.g.*, Braunfield v. Brown, 366 U.S. 599 (1961); Cleveland v. United States, 329 U.S. 14 (1946); Prince v. Massachusetts, 321 U.S. 158 (1944); Jacobsen v. Massachusetts, 197 U.S. 11, 29 (1905) (dictum); Reynolds v. United States, 98 U.S. 145 (1878).

111 346 U.S. 389 (1953).

112 *Id.* at 395.

113 398 U.S. at 356.

This statement of the issue places undue emphasis upon the "Supreme Being" clause of the 1948 Amendment. A declaration that section 6(j) is unconstitutional only because the section discriminates between theistic and non-theistic religious beliefs would have no effect on the present conscientious objector exemption section because of the 1967 Amendment[114] which deleted the "Supreme Being" clause.

Justice Harlan appeared cognizant of the problem:

> The constitutional infirmity [of § 6(j)] cannot be cured, moreover, even by an impermissible construction that eliminates the theistic requirement and simply draws the line between religious and nonreligious. This in my view offends the Establishment Clause and is that kind of classification that this Court has condemned.[115]

Hence, the crux of the constitutional question is the issue of whether a statute that defers to the individual conscience only when his views emanate from adherence to religious beliefs, theistic or non-theistic, is within the power of Congress.

It was the view of Justice Harlan that Congress' choice to exclude non-religious persons from a conscientious objector exemption is incompatible with with the Establishment Clause of the First Amendment.[116] Justice Harlan stated that to conform with the requirements of the First Amendment's religious clauses, the legislation must be "neutral".

His view was that an implementation of the neutrality principle requires "an equal protection mode of analysis."[117] He explained that:

> In any particular case the critical question is whether the scope of legislation encircles a class so broad that it can be fairly concluded that [all groups that] could be thought to fall within the natural perimeter [are included].[118]

Since Justice Harlan believed that section 6(j) cannot logically be construed to exempt non-religious exemptors,[119] the section must be unconstitutional. He relied upon past Supreme Court decisions to support his position. A review of these decisions will show that Justice Harlan views the neutrality principle as having a dual function. It forbids not only governmental preference of one religion over another, but also forbids governmental preference of religion over non-religion.

In *Walz v. Tax Commission,*[120] Justice Harlan, in his concurring opinion, agreed with the majority holding that a grant of property tax exemption to religious organizations for properties used solely for religious worship was not violative of the Establishment Clause. Principally he concurred because the breadth of the statute was such that the tax exemption was extended to non-

114 50 U.S.C. App. § 456(j) (Supp. V, 1970).
115 398 U.S. at 357-58.
116 *Id.* at 356.
117 *Id.* at 357.
118 *Id., quoting* Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970).
119 *Id.* at 357-58.
120 397 U.S. 664 (1970) .

religious groups involved in "cultural, moral, or spiritual improvement" as well as similarly active religious groups.[121]

Section 6(j) may be distinguished from *Walz* on this very ground. This is not a statute which grants conscientious objector exemption to religious and non-religious beliefs against war; on the contrary, it grants exemption solely to religious objectors.

On this point, Justice Harlan stated that "If the exemption is to be given application, it must encompass the class of individuals it purports to exclude, those whose beliefs emanate from a purely moral, ethical, or philosophical source."[122] In such a situation, the principle of "neutrality" would be achieved. The statute on the one hand would not violate the Establishment Clause in that religion would not be the sole criterion to be within the statute's benefits, and on the other hand it would provide for the Free Exercise of all religions.

In *Engel v. Vitale,*[123] the Supreme Court in a 6-1 decision held a public school system's admittedly nonsectarian prayer was unconstitutionally an establishment of religion. The prayer was not "neutral" in the sense that religious prayer prefers religion in general over non-religious activities.

In *Walz,* Justice Harlan cited with approval Justice Goldberg's statement in *Abington School District v. Schempp*:[124]

> The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief.[125]

The *Schempp* case also involved the reading of "denominationally neutral" religious prayers in a public school system.

And more specifically in *Torcaso v. Watkins,*[126] it was said that the state cannot

> constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can [it] aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[127]

It is plain that there is support for Justice Harlan's position that section 6(j) is unconstitutional. A logical construction of that statute, which was enacted as a matter of legislative grace rather than compulsion, is that Congress indeed favored religious over non-religious objectors in violation of the Establishment Clause.

The dissenting opinion written by Justice White accepted Justice Harlan's

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121 *Id.* at 697.
122 398 U.S. at 358.
123 370 U.S. 421 (1962).
124 374 U.S. 203, 305 (1963) (concurring opinion).
125 397 U.S. at 695, *quoting* 374 U.S. at 305.
126 367 U.S. 488 (1961).
127 *Id.* at 495 (footnotes omitted).

construction of section 6(j) but rejected his proposition that the section violates the Establishment Clause:[128]

> As Mr. Justice Frankfurter, joined by Mr. Justice Harlan, said in a separate opinion in the *Sunday Closing Law Cases* . . . , an establishment contention "can prevail only if the absence of any substantial legislative purpose other than a religious one is made to appear."[129]

Justice White found that section 6(j) has a "substantial legislative purpose" other than a religious one. He believed that the exemption was designed to maximize the effectiveness of the Armed Forces, not to bestow benefits upon religious objectors.[130] However, the quotation upon which Justice White relied has been taken out of context. Justice Frankfurter was careful to qualify his statement:

> Or if a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone—where the same secular ends could equally be attained by means which do not have consequences for promotion of religion—the statute cannot stand.[131]

This is precisely the situation in the case at hand. Justice White was entirely correct in his assertion that section 6(j)'s primary purpose is purely secular. But he does not recognize that a sincere non-religious conscientious objector is no more prepared to undertake the fighting than a sincere religious conscientious objector. And as indicated by Justice Harlan, Congress could just as well have included sincere non-religious objectors within the exemption of section 6(j), thus securing the secular ends of conscripting only individuals ready to fight which Justice White considers the primary purpose of the section, without the consequences of promoting religion.

Another basis for Justice White's contention that section 6(j) does not violate the Establishment Clause was that Congress may have granted this exemption because to force religious objectors into conduct which their religions forbid might violate the Free Exercise Clause "or at least raise grave problems in this respect."[132]

Precedent is plainly against this proposition. In *Hamilton v. Regents of the University of California*[133] the Court said:

> The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has been accorded with the policy of Congress thus to relieve him.[134]

And the majority opinion in *United States v. MacIntosh*[135] referred to

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128 Justice White stated:

> I cannot hold that Congress violated the Clause in exempting from the draft all those who oppose war by reason of religious training and belief. 398 U.S. at 369.

129 *Id.* (citations omitted).

130 *Id.*

131 McGowan v. Maryland, 366 U.S. 420, 466-67 (1961).

132 398 U.S. at 369-70.

133 293 U.S. 245 (1934).

134 *Id.* at 264, *quoting* United States v. MacIntosh, 283 U.S. 605, 623 (1931).

135 283 U.S. 605 (1931).

the Court's decision in *Jacobson v. Massachusetts*:[136]

> [A]nd yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, *or even his religious* or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense. (emphasis added)[137]

These cases expressly denote the principle that the requirement of military service is not a violation of First Amendment rights. They do not imply that to require one to fight and kill for his country might not be opposed to and inhibit one's exercise of his religious beliefs. The Free Exercise Clause of the First Amendment is not violated by this requirement because this constitutional guarantee is not absolute. In certain situations this constitutional right must give way to stronger countervailing public policies.[138]

Fighting in defense of one's country would seem to pursue an overriding public policy. Since wars are fought to restore peace and tranquilty, enforcement of the requirement of military service does not violate the freedom of religion guarantee even though it might inhibit one's exercise of his religious beliefs.

Justice White cited *United States v. Sisson*[139] to fortify his free exercise argument. The court in *Sisson* held that section 6(j), in as much as it exempted religious conscientious objectors but not Sisson, violated the Free Exercise Clause,[140] but the court expressly stated that it did not hold that "[t]he Government has no power to conscript the generality of men for combat service . . . ."[141] In other words, the Congress does not have to grant conscientious objector exemptions, but if it chooses to do so, it must grant them to all who are conscientiously opposed to war, for to respect the religious practices of some but not others, no matter how unorthodox, is to inhibit, comparatively, the free exercise of religion of those excluded.

Justice White tried to overcome the legal precedents in this area by noting that the Court is not the only body obliged to construe the Constitution in its course of work. He noted that in *Katzenbach v. Morgan*[142] the Court stated that it was sufficient "to perceive a basis upon which the Congress might resolve the conflict as it did."[143] He perceived such a basis for section 6(j):[144]

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136 197 U.S. 11 (1905).

137 283 U.S. at 624, *quoting* 197 U.S. at 29.

138 The United States Supreme Court has expressed such a principle where it held that the right to Free Exercise of Religion of chosen form is not absolute, in that "[c]onduct remains subject to regulation for protection of the society." Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

139 297 F. Supp. 902 (D. Mass. 1969), *appeal dismissed*, 399 U.S. 267 (1970).

140 297 F. Supp. at 911.

141 *Id.* at 912.

142 384 U.S. 641 (1966).

143 398 U.S. at 371, *quoting* 384 U.S. at 653.

144 398 U.S. at 371-72.

> We should thus not labor to find a violation of the Establishment Clause when free exercise values prompt Congress to relieve religious believers from the burdens of the law at least in those instances where the law is not merely prohibitory but commands the performance of military duties that are forbidden by a man's religion.[145]

Justice White, in citing *Katzenbach*, overlooked one of the limitations of the Court's holding. While the Court in *Katzenbach* did acknowledge that great respect should be shown to the findings of Congress, it expressly held that the remedies utilized by Congress may not be violative of any constitutional provisions.[146] In other words, congressional enactments within the power of Congress are limited by other provisions of the Constitution, especially by those respecting individual rights. Justice White ignored this principle when he found that the Establishment Clause does not restrict the powers of Congress in enacting section 6(j) to comply with the free exercise values. He appeared to balance these competing clauses, one against the other. His conclusion that section 6(j) is not violative of the Establishment Clause represented his view that in this instance the values of free exercise of religion are to be preferred.

It is interesting to note that in subordinating the establishment values to those of the Free Exercise Clause, Justice White was not confronted with the doctrine of "neutrality" as applied by Justice Harlan. The latter's concept of "neutrality" in the case required an analysis of the Establishment Clause alone; he did not perceive a free exercise problem. Justice White, because he perceived a conflict between the clauses, adopted a balancing approach. His conclusion was that congressional provision for religious conscientious objection avoids religious inhibition and should not be disturbed.

However, the balancing approach ignores one very important factor which is present here. In the case at hand the secular ends of section 6(j) could have been achieved just as easily by drafting a conscientious objector exemption statute which would benefit not only religious conscientious objectors but non-religious as well. If the statute was drafted in this manner it would fulfill the requirements of both the Free Exercise and Establishment Clauses. Where it is possible to draft a statute which would achieve the congressional end yet be wholly neutral in every sense of the word, there is no good reason to let such deficient legislation stand.

The dissenting opinion offered an alternative ground for upholding Welsh's conviction. Justice White took the position that since Welsh was among that class of persons whom Congress had expressly denied exemption, he did not have standing to raise the establishment issue even if section 6(j) did

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145 *Id.* at 373.
146 384 U.S. at 648-51.

present constitutional problems. Justice White quoted a passage from *United States v. Raines*:[147]

> [O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.[148]

This issue of standing was practically ignored by the Court in *Engel*[149] and *Schempp*.[150] However in *Schempp,* Justice Clark, writing for the majority, explained that part of the reason why the Court invoked the Establishment Clause rather than the Free Exercise Clause was that one need not show that the statute operates in a coercive fashion against him to support an establishment violation. "Consequently it is much easier to satisfy the 'standing' requirement in an establishment suit than in a free exercise case."[151]

Moreover, one could argue that Welsh, as a member of the public, has as much interest in preserving the First Amendment guarantee of separation of church and state as any other citizen, and can thus act as a "non-hohfeldian" plaintiff.[152]

Furthermore, if only those who obtain the benefit of exemption under section 6(j) have standing to raise its unconstitutionality, as a practical matter section 6(j) might never be challenged.

In view of all of the above considerations Welsh might be said to have standing to raise the establishment issue. However, as Justice White pointed out, while Welsh might have attacked the constitutionality of section 6(j), he was in no position to benefit from a decision holding the section unconstitutional,[153] unless of course, the Constitution requires that Welsh's non-religious beliefs in opposition to war should be exempt from military service.

For example, assuming *arguendo* that Justice White is correct in his assertion that the Free Exercise Clause requires Congress to provide exemptions for religious conscientious objectors, and if Justice Harlan's view of the Establishment Clause is accepted, then his "neutrality" principle would require that Congress construct a conscientious objector exemption section in a manner that would not favor religious beliefs over non-religious beliefs. In this situation Welsh would definitely be entitled to exemption if the Court were willing to re-draft the statute to comply with the First Amendment, and therefore Welsh could have standing to attack the constitutionality of section 6(j) and benefit from a decision holding the section unconstitutional.

Neither Justice Harlan nor Justice White took this position. As previously

147 362 U.S. 17 (1960).
148 398 U.S. at 368-69, *quoting* 362 U.S. at 21.
149 Engel v. Vitale, 370 U.S. 421 (1962).
150 Abington School Dist. v. Schempp, 374 U.S. 203 (1963).
151 C. PRITCHETT, THE AMERICAN CONSTITUTION 578 (2d ed. 1968).
152 Flast v. Cohen, 392 U.S. 83, 119 n.5 (1968) (dissenting opinion).
153 398 U.S. at 368-69.

discussed, Justice White believed that the Free Exercise Clause did require that Congress exempt religious conscientious objectors. He therefore found no violation of the Establishment Clause.

On the other hand, Justice Harlan found that no constitutional provision required exemption of religious conscientious objectors, yet "having chosen to exempt, [Congress] cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment."[154]

However, instead of declaring section 6(j) a nullity and removing any conscientious objector exemption from the Draft Act, Justice Harlan proposed to remedy section 6(j)'s constitutional defects by "extend[ing] the coverage of the statute to include those who are aggrieved by exclusion."[155] Since section 6(j)'s defect was that of under-inclusion, Welsh could only benefit from a declaration of its unconstitutionality by a redrafting of the section so as to qualify his non-religious opposition to war for exemption. A reason for invoking the remedy of inclusion of non-religious beliefs is the long-standing policy of Congress in providing some sort of conscientious objector exemption.

Justice Harlan concluded:

> 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 administration 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 underinclusion in §6(j) and can be administered by local boards in the usual course of business.[156]

There is no strong authority in support of the remedy suggested by Justice Harlan. His main cited authority, *Skinner v. Oklahoma*,[157] provides only recognition of the available remedial alternative of inclusion:

> It is by no means clear whether, if an excision were made, [referring to the severability clause] this particular constitutional difficulty might be solved by enlarging on the one hand or contracting on the other . . . .[158]

Aside from the weakness of this authority, Justice Harlan's remedy of re-drafting section 6(j) so as to include Welsh's non-religious beliefs raises another problem. Justice Harlan's remedy is inconsistent with his view that Congress was not constitutionally compelled to provide for religious objection to war in the first place. If one accepts the view that conscientious

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154 *Id.* at 356.
155 *Id.* at 361.
156 *Id.* at 366-67 (footnote omitted).
157 316 U.S. 535 (1942).
158 *Id.* at 543.

objection is a matter of legislative grace, and Congress unconstitutionally attempts to exempt only religious conscientious objectors, there is no logical reason why a court should be able to rewrite the defective statute in a manner that would exempt religious as well as non-religious beliefs opposing war. Such a remedy would be consistent only where religious conscientious objection is treated as a matter of right, and to avoid a statutory collision with the Establishment Clause, non-religious beliefs must also be included.

Where there is no right to religious exemption, the logical solution to section 6(j)'s unconstitutionality is to strike the section from the Draft Act entirely. In such a situation, Justice White's argument that Welsh cannot benefit from the section's unconstitutionality would foreclose any other remedial alternative.

Indeed, there is a long list of political and sociological considerations which would deem it unwise to eliminate all conscientious objector exemptions from the Draft Act by declaring section 6(j) a nullity due to its unconstitutionality. It is not unreasonable to suppose that Justice Harlan was indeed subjectively aware of the present social and political feelings of those most affected by the Draft.

When the end sought is so very important to the community, and there remains no road to reach this end except the road of a judicial statutory construction clearly perverting the purpose behind the enactment, then, as here, rationalization for such a departure from the will of Congress may be found.

However, the concurring opinion of Justice Harlan achieves the same socially, as well as legally desirable result without resorting to a mythical interpretation of section 6(j). He faces the constitutional issue head-on. His redrafting of section 6(j) to include non-religious beliefs in opposition to war in order to cure its constitutional defects does raise some problems.

His remedy is as much an instance of judicial legislation perverting the purpose of a statute as is the majority opinion. Its logical inconsistency could be cured by admitting to a constitutional requirement which would exempt religious conscientious objectors from military service. However, the fact still remains that merely striking the section would seem to be the legally correct approach.

Although the *Welsh* decision will have a marked impact, it will very likely be considered in conjunction with the 1967 Act,[159] which deleted the "Supreme Being" clause from the 1948 Act. The effect of that deletion requires interpretation. If the intent as stated by Congressman Rivers, the late Chairman of the House Armed Services Committee, was to narrow *Seeger*, and return to the *Berman* definition of religious training and belief,[160] then the present Act has severe constitutional defects. However, Senator

159 50 U.S.C. App. § 456(j) (Supp. V, 1970).

160 113 CONG. REC. 14140 (1967) (remarks of Congressman Rivers).

Russell, the late Chairman of the Senate Armed Services Committee, said the Senate did not accept the House explanation of the bill and in his opinion the Act did not overrule *Seeger*.[161]

Congressman River's opinion as to the 1967 Act is hard to accept. Eliminating the "Supreme Being" clause would be a strange way of overruling *Seeger*. If this was truly the intent of Congress, a clearer approach would have been to replace the "Supreme Being" phrase with the word "God".[162]

In *United States v. Levy*,[163] it was held that

> the 1967 Act in eliminating reference to a "Supreme Being" and retaining the "religious training and belief" clause has worked no change in the requirements for a conscientious objector classification, and the construction placed upon the 1948 Act in the *Seeger* case is the applicable standard.[164]

Hence, since the majority opinion purports to base its decision upon the *Seeger* case, the *Welsh* decision would therefore apply with equal force to the present conscientious objector statute. The fact that the *Welsh* majority opinion does take note of the 1967 Amendment and the manner of its notation, supports this conclusion.[165]

The majority opinion represents an instance of judicial consideration of the feelings of a large part of our society; the results it achieves coincide to a large extent with the temper of the times.

This highly desirable result does not come without its costs. The fictions that the majority opinion would have us accept concerning legislative intent, objective evidence to the contrary, represent a dangerous means of achieving this result. As long as the Court desires to avoid the constitutional question it will be forced to pursue its path of distorted judicial construction to achieve the same end that Justice Harlan obtained in his concurring opinion.

Notwithstanding this distortion the result is now the law. The Court's decision has now dramatically broadened the class to which conscientious objector exemption will be granted. In holding that all sincere, religious, ethical and moral beliefs can qualify for an exemption the Court has opened the door to many to whom it had been closed for a very long time.

Michael Carl Cohen
David C. Wright

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161 113 CONG. REC. H. 6285 (Daily ed. May 25, 1967).
162 United States v. Levy, 419 F.2d 360, 366 (8th Cir. 1969).
163 419 F.2d 360 (8th Cir. 1969).
164 *Id.* at 366.
165 398 U.S. at 336 n.2.