CONSTITUTIONAL LAW—STATUTORY CONSTRUCTION—ELIMINATION OF RELIGION REQUIREMENT FOR CONSCIENTIOUS OBJECTOR STATUS

In 1965, the United States Supreme Court made its first dramatic departure from the traditional concept of granting individuals subject to the draft conscientious objector status based on religious beliefs. In a unanimous opinion the Supreme Court held in *United States v. Seeger*[1] that a person could receive conscientious objector status if his sincere belief in opposition to war "occupies a place in [his] life . . . parallel to . . . the orthodox belief in God" of persons who opposed war on true religious grounds.[2] This has been stated as the "parallel belief" or "parallel to God" test.[3] But what about the person who opposes war and its destruction on no religious basis whatever? This question was specifically answered in *Welsh v. United States*[4] and marked another milepost for those who oppose war.

Elliott Ashton Welsh, II purposely deleted all reference to religion on his conscientious objector application form and was given I-A-O[5] draft status by his local draft board. Appellant wanted I-O status, however, and appealed. The appeal board reclassified him I-A and he was subsequently called for induction. His refusal to be inducted brought about his conviction in the district court which was affirmed by the appeals court based upon the absence of any religious belief.[6] The Supreme Court granted certiorari[7] based on its decision in *Seeger*,

1. 380 U.S. 163 (1965). There were actually three appeals court cases decided in the *Seeger* decision: United States v. Seeger, 326 F.2d 846 (2d Cir. 1964); United States v. Jacobson, 325 F.2d 409 (2d Cir. 1963); Peter v. United States, 324 F.2d 173 (9th Cir. 1963). For a detailed analysis of the case, *see* Brodie and Southerland, *Conscience, the Constitution, and the Supreme Court: The Riddle of United States v. Seeger*, 1966 WIS. L. REV. 306 (1966); Rabin, *When Is a Religious Belief Relgious: United States v. Seeger and the Scope of Free Exercise*, 51 CORNELL L.Q. 231 (1966).

2. 380 U.S. at 165-66. The Court stated that "the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."

3. 30 ALBANY L. REV. 304 (1966); 6 SANTA CLARA LAW. 230 (1966); Comment, *Conscientious Objectors—The New "Parallel Belief" Test-United States v. Seeger*, 14 CATHOLIC U. L. REV. 238 (1965).

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

5. I-A-O draft status permits the Government to induct the individual in the armed forces but must place him in a non-combat position. I-O status frees the individual from having to serve in the military because of his belief; but, he is available for civilian work contributing to national health, safety, or interest. 32 C.F.R. § 1622 (Rev. 1970).

6. Welsh v. United States, 404 F.2d 1078 (1968).

7. Welsh v. United States, 396 U.S. 816 (1969).

reversed the decision, and held that conscientious objector status can be acquired by those who only profess a *sincere* moral or ethical belief, or a religious belief.

The majority's opinion stressed the similarity between *Seeger* and *Welsh*. Both litigants had based their case on the wording of section 6(j) of the Universal Military Training and Service Act's[8] requirement for a belief in relation to a Supreme Being. Both questioned the constitutionality of section 6(j) based upon the first amendment's establishment and free exercise clauses, claiming the section did not exempt irreligious conscientious objectors, thus showing favoritism to religious persons. The Supreme Court side-stepped the constitutional question in *Seeger* by extending the coverage to those whose belief passed the "parallel to God" test.[9] The Court was now faced in *Welsh* with an individual who had unqualifiedly asserted that his belief had nothing to do with any "religious" concept. As in *Seeger*, only with more standing logically, as here appellant had stipulated he had *no* religious belief, the advocate of the United States asserted that the appellant's beliefs were specifically excepted by the Act as his creed amounted to "political, sociological, or philosophical views or a merely personal moral code."[10] The Court once again avoided the constitutional question by enlarging the canopy of coverage to protect confessed irreligious persons whose belief was founded on a purely moral or ethical basis. The Court in reaching this decision expanded its "parallel to God" test by classifying beliefs into three categories—moral, ethical, or religious—and permitting each to be capable of passing the test although void of "religious" content in two instances.[11]

---

8. 62 Stat. 612-13 (1948). The pertinent section reads:
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.

9. 404 F.2d at 1087.

10. 62 Stat. 612-13 (1948).

11. 90 S. Ct. at 1796.
What is necessary under *Seeger* for a registrant's conscientious objection to be 'religious' within the meaning of § 6(j) is that this opposition to war stems from the registrant's moral, ethical, *or* religious *beliefs* about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions . . . . If an individual deeply and sincerely holds beliefs which are purely *ethical or moral* in source and content but which nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by . . . God' in traditionally religious persons. (Emphasis added).

The Supreme Court frontally assaulted the appeals court for basing their decision on the appellant's confessed absence of religion in his belief. His "statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption."[12] The draft boards and appeal boards will not be required to study each applicant's statements to determine if his beliefs have acquired the requisite *religious* content to satisfy the new "parallel to God" test. Part of this belief, even to a substantial extent, can be based upon "world politics" and "public policy."[13] The plastic meaning of these terms will also cause deep consternation for the aforementioned boards.

The legislative history is replete with religion, as known in its relation to a Supreme Being or God, as being the requirement for exemption under section 6(j) of the Act. The Draft Act of 1917[14] required an individual to belong to one of the recognized religions whose teachings prohibited its congregation from engaging in war. When Congress adopted the next major military training act in 1940,[15] the necessity of belonging to an established religion was eliminated and conscientious objector status could be granted based on individual belief so long as the foundation was on "religious training and belief." When Congress amended the 1940 Act in 1948,[16] they attempted to define "religious training and belief" by relating it to a Supreme Being.[17] With such an abundance of legislative history, the majority definitely ignored traditional assistance in statutory construction in extending coverage to non-religious individuals. It appears that the Act is very explicit in not exempting those individuals whose belief is "essentially political,

12. *Id.* at 1797.

13. *Id.* at 1797-98.

14. 40 Stat. 76 (1917).

15. 54 Stat. 885 (1940). *See* United States v. Kauten, 133 F.2d 703 (1943). Judge Augustus Hand, recognizing the changing times, stated in *Kauten* that the 1940 Act must "take into account the characteristics of a *skeptical generation* and make the existence of a conscientious scruple against war in any form, rather than allegience to a definite religious group or creed, the basis for exemption." (Emphasis added). *But see Berman v. United States*, 156 F.2d 377 (1946), for a narrow interpretation of the same Act.

16. 62 Stat. 612-13 (1948).

17. The 1948 Act was amended in 1967 because of *Seeger* to eliminate all imputation to a Supreme Being. The text now reads:

> Nothing contained in this title shall be construed to require any person 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. As used in this sub-section, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code. 81 Stat. 104, 50 U.S.C. App. § 456(j) (1968).

This statute was found to violate the first amendment in *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969); this is probably moot since the *Welsh* decision.

sociological, or philosophical views, or a merely personal moral code." The draft board will face constant difficulty in determining who falls within this category. But the board will be faced with even more of a dilemma when the individual professes a moral or ethical belief "parallel to God" as the Supreme Court has already ruled that this claim "must be given weight."[18]

Decidedly the best approach would appear to be that of Mr. Justice Harlan, who, in a lengthy concurring opinion, pointedly concludes that the Supreme Court has completely removed the statutory religion requirement in section 6(j) through unjustifiable statutory construction.[19] He felt the Court should have met the constitutional issue squarely because of section 6(j)'s discrimination between religious and non-religious individuals. Looking at the statute in this light, it was unconstitutional because it violated the first amendment.[20] Where possible, however, the courts will construe statutes to prevent their being declared unconstitutional.[21] Although he had concluded that the Act as written literally was unconstitutional because of the preferential treatment given to religious persons, the Court could retain constitutionality through the inclusion of *all* persons under the statute.[22] (He has reached the same result as the majority only by a different route). He also overlooks unconstititionality and finds the statute valid because of "long-standing tradition in this country and accords recognition to what is, in a diverse and 'open' society, the important value of reconciling individuality of belief with practical exigencies whenever possible."[23] Therefore, because of the long history of the statute and the conclusion that morals and ethics are usually derived from religion, he reluctantly accepted the majority opinion's expanded test.[24]

---

18. 380 U.S. at 184. *See* United States v. Ballard, 322 U.S. 78 (1944).

19. 90 S. Ct. at 1799-1800.

20. *Id.* at 1805. *See also* Walz v. Tax Comm'n, ___ U.S. ___, 90 S. Ct. 1409 (1970) (concurring opinion of Mr. Justice Harlan); Epperson v. Arkansas, 393 U.S. 97 (1968); School District of Abington Township v. Schempp, 374 U.S. 203 (1963) (concurring opinion of Mr. Justice Goldberg); Engel v. Vitale, 370 U.S. 421 (1962); Torcaso v. Watkins, 367 U.S. 488 (1961); Fowler v. Rhode Island, 345 U.S. 67 (1953).

21. Moore Ice Cream Co. v. Rose, 289 U.S. 373 (1933) (opinion by Mr. Justice Cardozo).

22. 90 S. Ct. at 1807-1808.

> Where a statute is defective because of under-inclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class . . . or it may extend the coverage of the statute to include those who are aggrieved by exclusion. *Cf.* Skinner v. Oklahoma, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942); Iowa Des-Moines National Bank v. Bennett, 284 U.S. 239, 52 S. Ct. 133, 76 L. Ed. 265 (1931).

23. *Id.* at 1810. *See* Girouard v. United States, 328 U.S. 61 (1946).

24. *Id.*

The dissenting opinion,[25] while agreeing with *Seeger*, did not think the Court could extend coverage to irreligious persons. They base their conclusion on the premise that Welsh has no standing in court because he was specifically exempted by the statute and is therefore in no position to raise the constitutionality issue.[26] The dissent also surmised that Congress, facing practicalities, exempted "religious" conscientious objectors because they "would be of no use in combat" and because engaging in war *is* against the religion of some individuals and would therefore violate the first amendment.[27] The dissent further attempted to reinforce their position in finding the statute valid by referring to the power of Congress to make laws necessary "to raise and support armies" granted by the Constitution.[28] This being so, the statute would not have to be extended to non-religious persons. The dissent concludes that it is within the power of Congress, and still be within the establishment and free exercise clauses of the first amendment, to exempt religious conscientious objectors in order to protect their rights while not extending this exemption to non-religious objectors.[29]

As can readily be discerned, the Supreme Court has made its second dramatic departure in reference to granting conscientious objector status. Exemption possibility has been extended to those not originally contemplated by Congress, as garnered from the legislative history. A person who seriously opposes war on moral or ethical grounds will be granted conscientious objector status. The Supreme Court has already ruled that the individual's statements will be accorded due validity of sincerity. In our rapidly changing times; in a period of an "unpopular" war; liberal, individual thinking; and, when the rights of the individual are foremost in court decisions, it is not surprising that the Supreme Court made its decision in *Welsh*. More and more individuals are basing their opposition to war not upon religion, but upon personal principles or code of life. Are we going to force an individual who has a strong or ethical belief against fighting to be drafted just because he confesses that he is a non-religious person? The Court's decision should now be sufficiently broad to protect those individuals as the "religious" conscientious objectors were protected by *Seeger*.

This leaves the question remaining of what is a belief that is not within

25. Written by Mr. Justice White, and joined by Mr. Chief Justice Burger and Mr. Justice Stewart.

26. 90 S. Ct. at 1811-12. *See* United States v. Raines, 362 U.S. 17 (1960).

27. *Id.* at 1812.

28. U.S. CONST. art. I, § 8.

29. 90 S. Ct. at 1814.

the statute granting conscientious objector status; or, what is a belief that is "essentially political, sociological, or philosophical views, or a merely personal moral code?" The Supreme Court in both *Seeger* and *Welsh* made no attempt to clarify the posture of this phrase. However, by giving *Welsh* broad meaning and interpretation, the local draft board will find little justification for withholding I-O or I-A-O status by relying on that part of the statute. Those who seriously, morally or ethically, oppose service in the armed forces need only express their *sincere* position to the local draft board to receive conscientious objector status.

J.D. BENSON