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Selective Service-Conscientious Objectors-Section 6 (j) Requires Deferment for Registrants Whose Beliefs Emanate from Ethical or Moral Bases. Welsh v. United States (U.S. 1970)

Michael J. McCabe

that proof relevant to showing a "custom" need not be a demonstration of a specific practice as a "custom," but the showing of a long standing and still prevailing state enforced "custom" that would encompass the particular kind of practice challenged would be adequate.[54] The Court held as being too restrictive any suggestion that the exclusive means available for demonstrating state enforcement of a "custom" would be by showing that the State used a criminal statute for this purpose. "[A] state official might act to give a custom the force of law in a variety of ways. . . ."[55] In the instant case, petitioner might be able to show that when the police subjected her to false arrest for vagrancy, they were in fact enforcing a prevailing "custom" of racial segregation and the arrest was only to harass and punish her for her association with Negroes.[56] Or Miss Adickes might be able to show that the local police encouraged the enforcement of a "custom" of segregating the races in restaurants by intentionally tolerating violence or threats of violence directed at those who violated the "custom."[57] "[S]ettled practices of state officials may, by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior no less than legislative pronouncements."[58]

RICHARD H. MCCLURE

SELECTIVE SERVICE—CONSCIENTIOUS OBJECTORS—SECTION 6(j) REQUIRES DEFERMENT FOR REGISTRANTS WHOSE BELIEFS EMANATE FROM ETHICAL OR MORAL BASES. *Welsh v. United States* (U.S. 1970)

Elliott Ashton Welsh II was convicted in the United States District Court for the Central District of California of refusing to submit to induction into the armed forces in violation of the Military

54. *Id.*
55. *Id.* at 172.
56. *Id.*
57. *Id.*
58. *Id.* at 168.

Selective Service Act of 1964.[1] Welsh's chief defense was that he was a conscientious objector and as such should have been deferred under § 6(j) of the Universal Military Training and Service Act of 1948.[2] The Court of Appeals affirmed the conviction with but one judge dissenting.[3] That court, in purporting to apply the test laid down by the United States Supreme Court in *United States v. Seeger*,[4] found that Welsh's convictions were not religious in origin. On certiorari to the Supreme Court of the United States, *held*, reversed: Section 6(j) of the Selective Service Act requires exemption for those who hold conscientious scruples against participation in war in any form, regardless of whether such scruples arise from moral, ethical, or religious sources. *Welsh v. United States, 398 U.S. 333 (1970).*

In 1940, Congress laid the basis for the present controversy through its enactment of § 5(g) of the Draft Act of that year,[5] which exempted from service anyone whose opposition to war could be traced to "religious training and belief." This considerably broadened the spectrum of persons who could qualify for conscientious objector exemption as the 1917 Draft Act[6] had limited such exemption to membership in a well recognized "peace" church. No definition of the phrase "religious training and belief" was included in the enactment, however. Both the courts and the Selective Service System were immediately confronted with the problem of what that phrase was intended to mean. Judge Augustus Hand speaking for the Second Circuit in *United States v. Kauten*,[7] said, regarding the controversial phrase, that:

> Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow man—and to his universe—a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. *It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.*[8]

Later in the same year this court reiterated its position emphasizing that if a stricter rule were laid down, the effect would be a rever-

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1. 50 U.S.C. APP. § 462(a) (1964).
2. Act of June 24, 1948, ch. 625, § 6(j), 62 Stat. 609. This was the provision for conscientious objectors which was in force at the time Welsh applied for this deferment.
3. Welsh v. United States, 404 F.2d 1078 (9th Cir. 1968).
4. 380 U.S. 163 (1965).
5. Act of Sept. 16, 1940, ch. 720, § 5(g), 54 Stat. 885.
6. Act of May 18, 1917, ch. 15, § 4, 40 Stat. 76.
7. 133 F.2d 703 (2d Cir. 1943).
8. *Id.* at 708 (emphasis added).

sion to the requirements of the Act of 1917.[9] In *United States ex rel. Reel v. Badt* the Second Circuit again reaffirmed its contention that one need not believe in a Supreme Being in order to qualify as a conscientious objector under § 5(g).[10] As if in answer to the Second Circuit's pronouncements, the Ninth Circuit in *Berman v. United States*, opined that one could not be a religious conscientious objector within the meaning of the statute unless such objections sprang from a sense of duty to a being higher than man.[11]

Congress than intervened and enacted the Universal Military Training and Service Act of 1948, section 6(j) of which defined "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation."[12] To further clarify its position, Congress specifically indicated what "religious training and belief" was not; "essentially political, sociological, or philosophical views or a merely personal moral code."[13]

The Supreme Court, then, in *United States v. Seeger*[14] interpreted the "Supreme Being" clause of the 1948 Act in such a way as to render it religiously neutral thus avoiding the constitutional question of whether an exemption for traditional religious objectors only violated the first amendment establishment clause. The test which the Court formulated was: "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."[15]

In response to this judicial pronouncement, Congress amended its 1964 enactment of the Selective Service Act, which was identical in its provision for conscientious objectors with the Act of 1948, to read:

9. United States *ex rel.* Phillips v. Downer, 135 F.2d 521, 524 (2d Cir. 1943).
10. 141 F.2d 845, 847 (2d Cir. 1944).
11. 156 F.2d 377, 380 (9th Cir. 1946).
12. Act of June 24, 1948, ch. 625, § 6(j), 62 Stat. 609. Compare the language of Chief Justice Hughes in United States v. Macintosh, 283 U.S. 605, 633-34 (1931), which was quoted with approval by the *Berman* court: "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."
13. Act of June 24, 1948, ch. 625, § 6(j), 62 Stat. 609.
14. 380 U.S. 163 (1965).
15. *Id.* at 176.

> 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 participating in war in any form.[16]

The Government, in prosecuting Welsh, attempted to show that his convictions were not religious in origin by pointing out the fact that Welsh himself had denied that they were. In fact, he had stated that his beliefs had been formed "by reading in the fields of history and sociology,"[17] thus jeopardizing his position further by using language similar to that used by Congress in framing its exception to the exemption empodied in § 6(j). The Court, however, noted that very few registrants for the draft realized the legal implications of the word "religious" as used in the statute. Thus, a registrant's statement that his views are not religiously motivated should not be taken at face value. The Court then found that Welsh's beliefs were religious under the *Seeger* decision even though he disclaimed them because they were "certainly religious in the ethical sense of that word."[18]

The Government further attempted to distinguish Welsh's views from those of Seeger by positing that Welsh's ideas were "essentially political, sociological, or philosophical or a merely personal moral code."[19] The Court answered this contention by finding that Congress did not intend to deny conscientious objector status to those who otherwise met the stipulations for such status merely because they held strong convictions concerning the nation's domestic or foreign affairs. Nor did Congress intend, this Court went on to say, to deny deferment under § 6(j) to one whose views were substantially influenced by considerations of public policy, provided, of course, that such a person otherwise met the statutory qualifications.[20]

In deciding the *Seeger* case by interpreting legislation, rather than on constitutional grounds, the Supreme Court reached a result which Congress clearly did not intend. Congress was obviously aware of the inter-circuit conflict which the 1940 conscientious objector section[21] had engendered. The Senate Committee report on the proposed legislation quoted from Chief Justice Hughes dissenting opinion in *United States v. Macintosh*[22] which was also

16. Military Selective Service Act, 50 U.S.C. APP. § 456(j) (1964) *as amended* (Supp. III, 1968).
17. 398 U.S. at 341.
18. *Id.*
19. *Id.* at 342.
20. *Id.* at 342-43.
21. See note 6, *supra.*
22. 283 U.S. 605 (1931).

quoted by the Ninth Circuit in *Berman v. United States.*[23] In addition, the report cited *Berman* as a reference and completely omitted any reference to *Kauten* or any of the subsequent decisions of the Second Circuit.[24] The majority in *Seeger*, however, easily cleared this hurdle by determining that the citation to *Berman* in the Senate report was indicative only of what Congress believed "religious belief" was not.[25] This view completely overlooked the fact that Congress, in § 6(j) of the 1948 Act, defined "religious training and belief" in terms of a Supreme Being as had the Ninth Circuit in *Berman.*[26]

The *Welsh* Court has gone one step farther and has completely eliminated the religious requirement by interpreting it so as to render it meaningless. Justice Black, speaking for the majority, stated that even those persons whose objections to war are founded to a large extent on considerations of public policy should be accorded conscientious objector status. Further, the only two groups of persons whom Mr. Justice Black listed as obviously falling outside the purview of the exemption were those whose beliefs were not deeply held, and those whose convictions were merely the product of feelings based on policy, pragmatism, or expediency.[27] The obvious thrust of this pronouncement is to grant exemption to those who hold their convictions with the requisite strength even if their convictions spring from a "merely personal moral code." Thus, all that is now required to gain conscientious objector status under *Welsh* is that a person hold his personal moral code in the same esteem as the theistic objector holds the mandates of his God.[28]

Not only is the tack taken by the Court in this case internally inconsistent, it is also illegal. In construing § 6(j) so as to reflect its own will and not that of Congress, the Court has violated its own rules for interpreting legislation. In *Rosado v. Wyman*, decided but two months before *Welsh*, the Court specifically stated

23. 156 F.2d 377, 380.
24. 2 S. REP. No. 1268, 80th Cong., 2d Sess. 2002 (1948), 2 U.S. CODE CONG. SERV. 2002, 80th Cong., 2d Sess. (1948).
25. "Thus we think that rather than citing Berman for what it said 'religious belief' was, Congress cited it for what it said 'religious belief' was not." United States v. Seeger, 380 U.S. at 178.
26. 156 F.2d at 380.
27. 398 U.S. at 342-43.
28. *Id.*

that the limits of its power to stretch elastic statutory language are fixed by the context of its usage and its legislative history.[29] If indeed, the language contained in § 6(j) was intended to be elastic, it nevertheless seems as if the Court has violated its mandate in both respects. Further, in *Yu Cong Eng v. Trinidad,* the court conceived of its duty

> in considering the validity of an act to give it such reasonable construction as can be reached to bring it within the fundamental law. But it is very clear that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation.[30]

In *Welsh,* the Court, in effect, amended § 6(j) so as to allow ethical or moral beliefs to be grounds for exemption as well as religious ones.[31] In so doing, the Court exercised a purely legislative function in order to save § 6(j) from a constitutional collision with the establishment clause of the first amendment.

The only alternative basis for reaching the same result is to face the constitutional issue as Mr. Justice Harlan advocates in his concurring opinion. The test to be applied, he suggests, in determining whether or not an enactment violates the first amendment is to ask what the purpose and the primary effect of the enactment are.

> If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[32]

Arguably, the primary effect and possibly the purpose of the legislation under consideration was to grant a privilege to religious conscientous objectors not enjoyed by non-religious, a discrimination which the Court condemned in *Torcaso v. Watkins,*[33] and in *Everson v. Board of Education.*[34] In *Torcaso,* which involved the rights of a non-believer, the Court observed that "[n]either [the State nor the Federal Government] can constitutionally pass laws or impose

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29. 397 U.S. 397 (April 6, 1970).
30. 271 U.S. 500, 518 (1926).
31. "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." 398 U.S. at 344 (emphasis added).
32. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963).
33. 367 U.S. 488 (1960).
34. 330 U.S. 1 (1947).

requirements which aid all religions as against non-believers . . . ."[35]

To refute this argument, the *Welsh* dissent puts forth two possible explanations for Congress' action in granting deferment to religious conscientious objectors only, which the dissenters believe would render the legislation free from constitutional defects. The first of these is that Congress may have exempted these objectors out of purely practical considerations; due to the fact that they would be of no more use in combat than many others unqualified for military service.[36] Such explanation may obviate any objection to the effect that Congress intended to unconstitutionally discriminate between believers and non-believers. However, it is not responsive to the objection that the primary effect of such legislation was to invalidly create such discrimination. The second possible explanation put forth was that Congress may have granted this exemption because in its view withholding the exemption would possibly violate the free exercise clause.[37] Again, this explanation may correctly answer the question of purpose, but it is far from satisfactory in solving the primary effect problem. The foregoing analysis, then, leads to the conclusion that

> in the draft act, Congress unconstitutionally discriminated against atheists, agnostics, and men . . . who, whether they be religious or not, are motivated in their objection to the draft by profound moral beliefs which constitute the central convictions of their being.[38]

In a case like *Welsh*, where a statute is defective constitutionally because of underinclusion, the Court, in order to remedy the situation, may either eliminate the benefit with regard to the class currently receiving it or may extend this benefit to the class excluded.[39] As it would be highly impractical for the Selective Service System to revoke the exemptions currently enjoyed by religious conscientious objectors, and in view of the fact that such a course of action, as the *Welsh* dissent indicates, may be violative of those objectors; first amendment right to the free exercise of

35. 367 U.S. at 495.
36. 398 U.S. at 367.
37. *Id.* at 369-70.
38. United States v. Sisson, 297 F. Supp. 902, 911 (D. Mass. 1969), discussed at 7 SAN DIEGO L. REV. 100 (1970).
39. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942); Iowa Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931).

religion, the best course of action would be to extend the benefit of exemption to non-religious objectors like Welsh.

The only major obstacle to deciding the case on constitutional grounds is the question of whether Welsh has the standing to raise such an objection. In *United States v. Raines* the Court ruled that "one 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."[40] The *Welsh* dissent espouses the view that even if the section is unconstitutional by virtue of creating an establishment of religion in contravention to the first amendment, Welsh cannot complain as he is not affected thereby.[41] However, if Welsh is denied the equal protection of the law in violation of the fourteenth amendment, he is indubitably directly affected. As the Court stated in *Iowa Des Moines National Bank v. Bennett,* "[t]he right invoked is that to equal treatment . . . ."[42] Similarly in *Skinner v. Oklahoma*[43] the Court held that the defendant's right to equal protection had been abridged by a state statute under which he was sentenced to be sterilized as a habitual thief while those who engaged in embezzlement were not subject to such extreme punishment. *Welsh* is analogous to *Skinner* in that here, Welsh would be subject to induction into the armed forces for merely asserting his constitutional right to non-belief. In view of the foregoing, it would appear that if the case were decided on constitutional grounds, Welsh should have the right to bring forth such a challenge.

Regardless of the basis of decision, *Welsh* is the latest pronouncement as to what qualifications a registrant must possess in order to be granted exemption as a conscientious objector. The immediate effect of this ruling will probably appear within the Selective Service System. For good or ill, *Welsh* finally clears up the confusion which the *Seeger* decision created as to what "religious training and belief" is. In addition, *Welsh* will inevitably streamline the investigatory procedure required of the local boards in determining who is to receive conscientious objector exemption. This result will obtain because *Welsh* all but eliminates the need for inquiry into the source of an applicant's convictions. Under the *Welsh* decision, all that a local board need find in order to grant exemption

40. 362 U.S. 17 (1960) *quoting from* United States v. Wurzbach, 280 U.S. 396 (1930).
41. 398 U.S. at 368-69.
42. 284 U.S. at 247.
43. 316 U.S. 535 (1942).

is that the applicant's beliefs issue in some way from feelings of conscience, without regard to whether this conscience is guided by ethical, moral, or religious predispositions, and that they be held with the requisite strength.

Of course, the decision will also have the effect of making the conscientious objector exemption easier to obtain which will undoubtedly prompt many more registrants, especially college students, to apply for it. Thus, the local boards will probably have to devote just as much time to administering the deferment as before *Welsh* due to the fact that time saved in verifying an individual applicant's right to exemption will be more than offset by the increased volume of applications.

In the event the Selective Service System finds itself deluged with such applications, a not too unlikely eventuality, Congress may decide to abolish the classification altogether. This would bring the issue of whether the free exercise clause of the first amendment requires an exemption for religious objectors squarely before the Court. Previous pronouncements on the subject have all been to the effect that Congress need not exempt anyone. However, these cases have invariably stated their belief as dictum.[44]

MICHAEL J. MCCABE

44. *See, e.g.*, United States v. Macintosh, 283 U.S. 605 (1931); United States v. Schwimmer, 279 U.S. 644 (1929).