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Constitutional Law - Religious Belief Necessary for Conscientious Objector Exemption

Edwin K. Hunter

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the validity of state anti-discrimination legislation.[40] It was but a short step for the Court, under the prior jurisprudence, to bring the regulation of public accommodations within the ambit of the commerce power.

James F. Abadie

CONSTITUTIONAL LAW — RELIGIOUS BELIEF NECESSARY FOR CONSCIENTIOUS OBJECTOR EXEMPTION

Seeger claimed exemption as a conscientious objector under section 6(j) of the Universal Military Training and Service Act, which exempts from combatant duty in the Armed Forces of the United States those persons who by reason of their religious belief are conscientiously opposed to participation in war.[1] Seeger's conscientious objections were based on a belief in and devotion to goodness and virtue for their own sake, and a religious faith in a purely ethical creed. His local Selective Service Board found his beliefs to be sincere and honest but denied Seeger's claim because it was not based upon a "belief in a relation to a Supreme Being" as required by the act. In fact, Seeger was unwilling to assert or deny the existence of a Deity. He refused to submit to induction and was subsequently convicted in a federal district court.[2] The Court of Appeals for the Second Circuit reversed on the grounds that the statute limiting the conscientious objection to persons who believe in a Supreme Being violated the due process clause of the fifth amendment by creating an impermissible classification between internally derived and externally compelled beliefs as applied to one whose abhorrence of war was sincere and predicated on religious training and belief.[3] The Supreme Court granted certiorari[4] and affirmed the result, but did not pass on the con-

40. Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948).

1. 72 Stat. 711 (1958), 50 U.S.C. § 456(J) (1964): "Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service . . . 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 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 of a merely personal moral code."

2. United States v. Seeger, 216 F. Supp. 516 (S.D.N.Y. 1963).

3. United States v. Seeger, 326 F.2d 846 (2d Cir. 1964).

4. Certiorari was also granted in two other cases: United States v. Peter, 324 F.2d 173 (9th Cir. 1963); United States v. Jakobson, 325 F.2d 409 (2d Cir.

stitutional issue, preferring to place a construction on the statutory definition which avoided imputing to Congress an intent to discriminate between religious beliefs. In finding that Seeger's belief entitled him to an exemption, the Court *held,* the test of religious belief within the meaning of the 6(j) exemption 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.[5] *United States v. Seeger,* 380 U.S. 163 (1965).

Congress, in implementing its war powers and its inherent authority as a sovereign to compel citizens to serve in the Armed Forces,[6] has long recognized the moral dilemma posed for those of certain religious faiths by the call to arms.[7] The Draft Act of 1917 exempted conscientious objectors who were affiliated with well-recognized religious sects whose tenets prohibited participation in war. The act required all to be inducted but allowed the objectors to perform only noncombatant service. Although the 1917 act excused only religious objectors belonging to established, traditionally pacifist sects, the Secretary of War instructed that "personal scruples against war" be considered as constituting "conscientious objection."[8] In adopting the Selective Service Act of 1940, Congress broadened the exemption by

1963). These cases were consolidated for argument and disposed of together. Neither of the companion cases involved unqualified skepticism. Jakobson and Peter argued that their beliefs met the requirements of the act. Jakobson believed in "Goodness" as the "Ultimate Cause for Being" and a Supreme Being who was the creator of man and the "Supreme Reality." Peter believed in a moral code which forbade the taking of human life. He hedged on the question as to his belief in a Supreme Being by saying that it depended on the definition.

5. Seeger, as described by the Court: "He was a product of a devout Roman Catholic home; he was a close student of Quaker beliefs from which he said 'much of his thought is derived'; he devoted his spare hours to the American Friends Service Committee and was assigned to hospital duty." 380 U.S. 163, 186-87. The Court concluded Seeger professed religious belief and religious faith and did not disavow any belief "in relation to a Supreme Being; indeed he stated that the cosmic order does, perhaps, suggest a creative intelligence." *Id.* at 187. In answer to the question as to his belief in a Supreme Being Seeger said: "Of course, the existence of God cannot be proven or disproven, and the essence of his nature cannot be determined. I prefer to admit this and leave the question open rather than answer 'yes' or 'no.'" 216 F. Supp. 516, 518.

6. The Supreme Court has categorically sustained the constitutionality of conscription. Arver v. United States, 245 U.S. 366 (1918).

7. For a historical survey of the conscientious objector exemption, see Smith & Bell, *The Conscientious Objector Program; A Search for Sincerity,* 19 U. PITT. L. REV. 695 (1958); Russell, *Development of Conscientious Objector Recognition in the United States,* 20 GEO. WASH. L. REV. 409 (1952); Note, 36 MINN. L. REV. 65, 70-74 (1951).

8. Selective Service Memorandum 11 — Conscientious Objection 54-55 (1950). This act was upheld against constitutional attack. Selective Draft Law Cases, 245 U.S. 366 (1917).

discarding the membership requirement of the 1917 act in order to include any person who "by reason of religious training and belief is conscientiously opposed to participation in war."[9] In construing the 1940 act, the Second Circuit held that a sincere abhorrence of war as ethically wrong which proceeds from a religious conviction, sufficed to meet the test of religious training and belief as set forth in the statute.[10] A diametrically opposite conclusion was reached by the Ninth Circuit in *Berman v. United States*,[11] which interpreted the statute as exempting only those who believed in a Diety commanding abstinence from war under pain of supernatural sanction.

In enacting section 6(j) of the 1948 act Congress, in an apparent endeavor to resolve the conflict as to the proper interpretation of religious belief, explicitly 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] (Emphasis added.) This exemption was upheld against constitutional challenges in the courts of several circuits on the theory that the exemption was an act of legislative grace and hence could be granted upon any condition which Congress desired to impose.[13]

Adhering to the broad construction of the statute that it developed prior to the 1948 amendment, the Second Circuit, in *Jakobson*, found that belief in "goodness" as the "ultimate cause of being" met the test of 6(j)[14] and criticized the Ninth Circuit's narrow construction in *Berman*.[15] In *Seeger*, however,

9. Act of Sept. 16, 1940, ch. 720, 20 Stat. 887.

10. United States *ex rel.* Reel v. Badt, 141 F.2d 845 (2d Cir. 1944); United States *ex rel.* Phillips v. Downer, 135 F.2d 521 (2d Cir. 1943); United States v. Kauten, 133 F.2d 703 (2d Cir. 1943).

11. 156 F.2d 377 (9th Cir. 1946).

12. 72 Stat. 711 (1958), 50 U.S.C. § 456(j) (1964). Section 6(j)'s language derived ultimately from the dissent in United States v. Macintosh, 283 U.S. 605, 611 (1931), where Chief Justice Hughes stated that the "essence of religion is belief in a relation to God involving duties superior to those arising from any human relations." Justice Hughes' position in *Macintosh* was adopted to Girauard v. United States, 328 U.S. 61 (1946), which overruled *Macintosh*.

13. Etcheverry v. United States, 320 F.2d 873 (9th Cir. 1963); Clark v. United States, 236 F.2d 13 (9th Cir. 1956); United States v. Bendik, 220 F.2d 249 (2d Cir. 1955); George v. United States, 196 F.2d 445 (9th Cir. 1952).

14. The Second Circuit, in refusing to follow *Bendik*, *Clark*, *George*, and others, was influenced by the Supreme Court's decision in Speiser v. Randall, 357 U.S. 513 (1958), wherein that court pronounced that the legislative power to deny a particular privilege does not imply an equivalent power to grant such a privilege on unconstitutional conditions. This, in the opinion of the Second Circuit, sapped the strength of the reasoning of the earlier cases.

15. "Moreover, the statutory definitions need not be regarded as precisely bounded by the *Berman* opinion when the compulsion to read it broadly is so

the Second Circuit, in what seems to be a retreat from its broad interpretation of 6(j) in *Jakobson*, held the exemption to be a violation of the due process clause of the fifth amendment in that it created an impermissible classification between religious beliefs.[16] The Ninth Circuit in *Peter* held that the local Selective Service Board had basis in fact for denial of conscientious objector classification to Peter who was not a member of any religious organization or sect and did not clearly manifest a belief in a Supreme Being to whom he owed obedience. This treatment of *Peter* indicates that the Ninth Circuit never departed from the rationale of *Berman*. As evidenced by these three decisions, the 1948 amendment did not resolve the conflict.

This was the state of the law when the Supreme Court granted certiorari in *Seeger, Jakobson*, and *Peter*, and consolidated the cases for argument and disposition. Each raised the basic question of the constitutionality of 6(j). The attack launched under the first amendment was two-fold: (1) the section does not exempt non-religious conscientious objectors in violation of the establishment clause, and (2) it discriminates between different forms of religious expression in violation of the free exercise clause and the fifth amendment's due process clause. In addition Peter and Jakobson claimed their beliefs fit within the exemption. The Supreme Court sidestepped the constitutional issues[17] by reading the definition of "religious training and belief" in 6(j) as broadly as the words would permit, and concluded that under the Court's enunciation of the test Seeger, Peter, and Jakobson were entitled to the exemption.

The heart of the problem was to discern and articulate what Congress meant when it defined "religious training and belief" as "belief in relation to a Supreme Being." The Solicitor Gen-

strong. A contemporary theologian of high distinction and wide influence, who has taught at great universities on both sides of the Atlantic, Professor Paul Tillich, has written of God in terms that would surely embrace Jakobson's beliefs. As the footnote shows, Jakobson's definition of religion as 'the sum and essence of one's basic attitude to the fundamental problems of human existence' and his insistence that man can know nothing of God and that Goodness can be approached only through psychic involvement in reality parallel the views of this eminent theologian rather strikingly. We cannot believe that Congress, aware of the constitutional problem, meant to exclude views of this character from its definition of religion." 325 F.2d 409, 415 (2d Cir. 1963).

16. For a detailed review of the Second Circuit's decisions in *Seeger* and *Jakobson*, see Note, 64 COLUM. L. REV. 938 (1964).

17. In so doing the Court was merely following the time-honored principle of construing a statute to avoid "grave and doubtful" constitutional questions. See United States v. Delaware & Hudson Co., 213 U.S. 366, 407-08 (1909).

eral, arguing for the Government, insisted that the statutory language adopted in 1948 rejected the Second Circuit's broad definition and accepted the narrow approach adopted by the Ninth Circuit in *Berman.* In rejecting the Government's contention, the Court recognized the intensely elusive nature of the inquiry, but in reviewing the legislative history was most emphatic in its opinion that the statute was not meant to be restrictive in application and available only to those who held traditional beliefs in God. In using the expression "Supreme Being," Congress, according to the Court, was merely clarifying the meaning of "religious training and belief" in order to embrace all religions. The Court concluded that section 6(j) of 1948 was no more than a clarification of the 1940 provision involving only technical amendments, and as such, continued the congressional policy of providing exemption from military service for those whose opposition is based on grounds that can fairly be said to be religious. The opinion recognized that Congress adopted almost intact the language of Chief Justice Hughes' dissent in *United States v. Macintosh,* the "essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."[18] However, the Court felt that the single departure from the phraseology of *Macintosh* was entitled to great weight. The substitution of the phrase "Supreme Being" for Hughes' appellation "God" was interpreted as an expression of liberal intent and a mandate for broad construction.[19] Considerable discussion was devoted to theological views concerning the meaning of "Supreme Being," and the Court utilized legislative history in the context of the American religious tradition to discern the meaning. Religion in the United States is characterized by diversity, Justice Clark reasoned, and a tolerant Congress would never have formulated an inflexible definition of religion in the face of our national heritage of multifarious creeds. The Court also noted the evolution in orthodox theology and pointed out that many modern churchmen have expressed much of the same ethic that motivated Seeger. The Court concluded that its construc-

18. 283 U.S. 605, 633 (1931).

19. The Court easily disposed of the Government's argument that since *Berman* was cited in the Senate Report on the 1948 act, Congress must have intended to adopt the *Berman* interpretation of "religious belief," by finding that Congress cited *Berman,* not for what it said the "religious belief" was, but for what it said "religious belief" was not, i.e., claim based solely on political, sociological, or philosophical views.

tion of the statute embraced the ever-expanding ecumenism of the modern religious community.

Under the Court's test the exemption is extended to anyone having a sincere objection to war derived from a belief based upon a power or a being or upon a faith to which all else is subordinated, or upon which all else is ultimately dependent. The statute excepts from the exemption those registrants whose beliefs are based on a "merely personal moral code." The Supreme Court, having interpreted the exemption broadly to avoid a serious constitutional question, proceeded to interpret narrowly the exception to the exemption, and held the term "merely personal" restricted the exception to a moral code which is not only peculiar to the applicant but which is the sole basis for the applicant's belief and is in "no way related to a Supreme Being." Consequently, when the Court applies its test for belief in a Supreme Being, a registrant who sincerely places an absolute value in a personal belief could be outside the ambit of the "merely personal" exception.

As a result of *Seeger* the respective Selective Service Boards now have an articulated, avowedly flexible test to guide them. The question will be one of fact: Does the registrant have a sincere and meaningful belief which occupies in his life a place parallel to that filled by the orthodox belief in God of those admittedly qualified for exemption? Or, paraphrasing Justice Douglas' concurring opinion: Is the registrant opposed to war on the basis of a sincere belief which in his life fills the same place as the belief in God fills in the life of an orthodox religionist?

Congress has not as yet reacted to the Supreme Court's decision in *Seeger* and it is unlikely that it will quarrel with the Court's enunciation of congressional intent, primarily because any definition restricting the conscientious objector exemption to those with a traditional belief in God would not conform to the requirements of the first and fifth amendments.[20] The Su-

20. In Torcaso v. Watkins, 367 U.S. 488, 490 (1961), the Supreme Court struck down as invalid a state statute requiring notary publics to affirm their belief in the existence of God. The government cannot, the *Torcaso court* declared, place the power and authority of the state "on the side of one particular sort of believers — those who are willing to say that they believe in the existence of God." See United States v. Kauten, 133 F.2d 703 (2d Cir. 1943); see also Conklin, *Conscientious Objector Provisions: A View in the Light of Torcaso vs. Watkins*, 51 GEO. L.J. 252, 256-57 (1963).

preme Court, by tradition, avoids constitutional issues by construing questionable legislation within constitutional limits.[21]

The ultimate worth of *Seeger* lies in the utility of the test enunciated by the Court.[22] This test conforms to the congressional policy of placing primary responsibility for determining Selective Service status with the local boards which are in the best position to judge sincerity and ascertain the nature of the beliefs;[23] but the Court did not state in what way the applicant's belief must be parallel to a belief in God.[24] It is quite possible that this may lead to inequalities in application as the touchstone appears to lack selectivity. Marxism, existentialism, and anarchism could fit under the umbrella.[25] An anarchist, for example, might have a pervading faith in a moral urge intrinsic in man that is powerful enough to survive the destruction of authority. Such an anarchist would believe that the state and its works undermine this urge and would therefore be conscientiously opposed to war because it is a state activity.[26] His beliefs would appear to be within the ambit of the court's test although they would ordinarily be classified as political.

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21. *Cf.* Hirabayashi v. United States, 320 U.S. 81, 93 (1943).

22. If the test proves so broad as to seriously reduce the military manpower or so subjective as to adversely affect the morale of the armed forces, then it may be necessary to reformulate the "conscientious objector" exemption. Congress, in an effort to avoid constitutional difficulty, might well find it wise to return to the test of 1917, note 26 *infra*, which could be sustained as an evidentiary requirement of sincerity rather than a religious test. *Cf.* Note, 48 MINN. L. REV. 771, 776 (1964).

23. The Director of the Selective Service System has broad discretion (32 C.F.R. 1622:60, 1962) and no classification is permanent (32 C.F.R. 1651:1). The Selective Service authorities are not required to accept without inquiry a mere statement of religious tenets. They are empowered to inquire concerning sincerity and good faith to the end that the law shall not be a shield for the hypocrite or the faker.

24. The local Selective Service Boards are now faced with the problem of determining what the Court meant by parallel. A number of possible parallels are suggested. Must it be parallel in ritual, in faith, in transcendental experience, in influencing behavior or molding a world-view? Ritual is shared as much by ceremonies of state as by religion. Faith, in the sense of acquiescence to certain postulates, is common to science and religion. Laws and customs influence behavior as effectively as religion. A political philosophy can mold a world-view. Is the definition of parallel any less difficult than the definition of belief in a Supreme Being?

25. The task of finding a common denominator for all forms of religious beliefs without including those beliefs which are basically economic, political, or philosophical is extremely difficult. For a review of the problem see HUXLEY, RELIGION WITHOUT REVELATIONS (1948), where "the sentiment of sacredness" is adopted as the ultimate definition.

26. During World War I the Draft Act exempted only objectors who were members of a recognized, established religious sect "whose existing creed or principles forbid its members to participate in war." However, executive orders and