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WELSH REAFFIRMS SEEGER: FROM A REMARKABLE FEAT OF JUDICIAL SURGERY TO A LOBOTOMY

Theodore F. Denno†

It is now settled constitutional law that "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." And although the Supreme Court has not so ruled, lower federal courts have held that "[t]he exercise of this power to conscript and train men does not depend on the contemporaneous existence of a war. It may be exercised in time of peace."  

At the present time it is assumed that Congress may take any citizen for service regardless of his particular circumstances. Therefore, as things now stand, no one has a constitutional right to refuse induction. Yet draft exemptions are fairly common above and beyond the happenstance luck of lottery numbers. Exemptions are granted as a matter of "legislative grace." Perhaps the most difficult of interpretation and classification, by the immanent nature of conscience itself, is the one granted under conscientious objection.

Certain persons have firm and sincere religious beliefs which make them conscientiously opposed to participation in the armed forces. Although not constitutionally compelled,

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4. However, as Judge Wyzanski pointed out in United States v. Sisson, 297 F. Supp. 902 (D. Mass. 1969) [hereinafter cited as Sisson], the constitutional issue of a possible violation of the free exercise (of religion) clause of the First Amendment is not precluded. He declares that Professor Powell's statement of 1941 still holds in 1969: "Notwithstanding all judicial declarations, it has not been actually decided that a conscientious objector, not within any group exempted by Congress, can be put into the front line trenches or put into the army where certain refusals to obey orders may be punished by death." 297 F. Supp. at 908.
recognition has been given to these beliefs in the form of an exemption from military training and service... This statutory exemption is a matter of legislative grace and has long been recognized as such.⁵

As in so many other matters there is a legal and/or statutory definition—extrinsic, public, categorical—set alongside an existential condition—affective, personal, adumbrative—and designed to house and bespeak the definition in the public institutions. It is the judicial officer that finds recognition before the law; it is the judicial officer that is a creature of the law; and within the law, this judicial officer takes the measure of any existential condition. Here is another example among the thousands that exist in a legal state, a nation whose basic public fabric is commonly deemed to be the law, of the indispensable need to translate a virtually indefinable set of intimately held intense values into a communicable, practically acceptable, verbal public formula. The existential condition is itself widespread enough and, one way or the other, is generally understood, such that a need for its recognition in law arises. Yet it often cannot be reduced to anything approaching a numerical or quantitative standard to be legislatively adopted and administratively applied. Discretion, judgment and common sense—coupled with a generous amount of experience and understanding—must necessarily be substituted for exact measurement. When the risk is one of ultimate value such as giving several years of one's life, if not that life itself, to publicly mandated military pursuits that are beyond the wishes of the great majority of candidates, it is of supreme importance to insure the best of judgment and common sense. If a test of those qualities were administered to the congressional definition of conscientious objection to war, surely that definition would fail.⁶

There is much more darkness than light in the present negative approach to so publicly broadcast and profound a question. But of course politicians cannot afford, in such sensitive areas, to be positive and precise even if they could so agree. Given the three functional instances of legislation, administration and adjudication there appears to

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⁶ A conscientious objector is defined as...

... any person who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological or philosophical views, or a merely personal moral code. 50 U.S.C. App. § 456(j) (Supp. V, 1965-69).
be a descending order of public exposure, attention, possible reaction and wrath which would largely go to explain the vague negativism of much legislative action. Congress sets a rather vague but general public policy in terms least calculated to offend; administrators are required to establish more precise rules and meanings for the application of the policy; courts are frequently the agents of last resort that are forced to nicely define and face the issues. However, the cycle does not stop here. The judicial stage is only one of several points of decision in the constant turn of making, enforcing, changing and applying public policy.  

The problems and controversies surrounding the current definition of what and who is a conscientious objector, legally and constitutionally began when Congress passed a new Universal Military Training and Service Act in 1948. That Act read in part:

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.  

Thus, comparing the statutory language presently in force as a part of the 1967 Amendments with this obsolete definition, the obvious difference lies in the current absence of the Supreme Being clause, reading:

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. . . .

This clause was intended by Congress to narrow the meaning of

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7. While it operates through legal forms that often mystify the layman, the judiciary is as much a product of the political culture and a part of the government as the legislative, executive and administrative branches. It is in fact one of the major governmental mechanisms for resolving peacefully both private controversies and conflicts between all kinds of groups and interests. In turn, the law that courts and judges apply is itself the accumulated product of rules laid down as a consequence of individual and group conflict.  

9. See note 6 supra.  
"religious training and belief" but it was seized by the Supreme Court as the occasion to considerably expand the definition in the well-known Seeger case of 1965. Since the current Act is virtually identical to the Act as it stood during World War II, Congress has apparently taken a regressive step to legislatively block the interpretive liberal move of the Court in Seeger. In 1943 the Kauten case had not only barred "philosophical and political considerations" as qualifying for conscientious objector status but also had decided that persons opposed to a particular war (selective conscientious objectors) could not qualify. The first point, extra-religious beliefs, was overturned by Seeger and reaffirmed in Welsh as we shall see, and the second point, the issue of the selective conscientious objector, is now also under review by the Supreme Court in United States v. Gillette. Congress's attempt to overshadow the expanding judicial interpretation has not worked.

Between Seeger (1965) and Welsh (1970) Congress removed the "Supreme Being" clause, as mentioned, in order to frustrate the rule established in Seeger, namely:

We believe . . . 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.

The Court had cleverly tied this unorthodox interpretation of

12. United States v. Seeger, 380 U.S. 163 (1965) [hereinafter cited as Seeger]. Seeger had failed to indicate an affirmance or denial of his belief in a "Supreme Being." The Court said that the test intended by Congress was not the usual understanding of the term "Supreme Being." See also United States v. Gillette, 420 F.2d 298 (2d Cir. 1970), cert. granted, 399 U.S. 925 (1970).
15. Welsh v. United States, 398 U.S. 333 (1970) [hereinafter cited as Welsh]. Here the Court reversed the lower court conviction for refusing to submit to military induction. Relying on Seeger, the Court granted conscientious objector status to Welsh because he deeply and sincerely [held] beliefs which are purely ethical or moral in source and content but which nevertheless impose upon him a duty . . . to refrain from participating in any war at any time . . .
16. 420 F.2d 298 (2d Cir. 1970), cert. granted, 399 U.S. 925 (1970). Gillette refused induction because he felt the Vietnam war was "immoral and unjust." The circuit court affirmed his conviction. "[T]he potentiality, arising upon his induction, that Gillette would have to violate his conscientious objection to service in Vietnam is not sufficient to outweigh . . . Congressional power . . . ." 420 F.2d at 300.
17. 380 U.S. at 165-66.
Supreme Being to Congress's plainly orthodox intent by simply accepting any definition which was sincerely and meaningfully possessed as equivalent to the orthodox God, provided, that the Supreme Being does for the communicant what God presumably does for the orthodox conscientious objector. A parallelogram of legal equivalence is set up without touching the substance.

Once the Supreme Being clause was removed from the statute it became necessary to move the substance of Seeger to a new foundation. Welsh accomplished this task but considerably expanded the thesis in the doing. The Supreme Court has accepted the very unusual Sisson case for the same term in which Welsh was already on the docket.

Why did the Court reaffirm Seeger through Welsh and avoid the substantive decision in Sisson, as it did? In contrast to Elliott Welsh, John Sisson, Jr. had never applied for conscientious objector status, nor was he religious by his own statement, and he was a conscientious objector with respect to the war in Vietnam but not “war in any form.” Before discussing the rationale of Welsh an explicit examination of Judge Wyzanski's opinion rendered in Sisson's District Court case is mandatory. Doubtless the Supreme Court found good reason in Sisson to prefer discussing Welsh in light of Judge Wyzanski's forthright declaration of unconstitutionality in the statute “as applied to Sisson.”

It is perhaps best to begin at the end where the Sisson opinion makes several trenchant disclaimers:

To guard against misunderstanding, this Court has not ruled that:

(1) The Government has no right to conduct Vietnam Operations; or

(2) The Government is using unlawful methods in Vietnam;

or

19. Nos. 305 and 76 respectively—October term, 1969 Welsh was decided June 15 and Sisson on June 29, 1970.
20. The Court said:

... [w]e conclude that the decision below, depending as it does on facts developed at Sisson's trial, is not an arrest of judgment but instead is a directed acquittal. As such, it is not a decision that the Government can appeal. 399 U.S. at 270. Judge Wyzanski had specifically categorized his action as a “decision arresting a judgment of conviction for insufficiency of the indictment.” 297 F. Supp. at 912.
22. 297 F. Supp. at 909.
23. Id. at 908.
24. Id. at 911. The court continued, stating that “... Congress unconstitutionally discriminated against atheists, agnostics, and men, like Sisson ...” in violation of the establishment clause of the first amendment. See note 29 infra.
(3) The Government has no power to conscript the generality of men for combat service; or
(4) The Government in a defense of the homeland has no power to conscript for combat service anyone it sees fit; or
(5) The Government has no power to conscript conscientious objectors for non-combat service.

Indeed the Court assumes without deciding that each of these propositions states the exact reverse of the law.\(^2\)

In an obvious allusion to the Supreme Court, where he expected the case to eventuate,\(^2\) Judge Wyzanski noted how the appellate process places an inferior court in the position of having to dispose of all arguments without being able to resolve the case on one issue thereby allowing the remainders to lapse. There is also here an implied rebuke to the practice of thus lumping a broad question under a narrow issue.

\[\ldots\text{[I]}\text{f this court were a court of last resort, this court would adopt the prudential principle of striking for the jugular alone.}\]

But this inferior court cannot say that any of the issues is clear. It cannot by ruling on one surely make the others moot. This court's ruling is appealable. Hence any constitutional issue whatsoever which defendant here alleged as a ground for having judgement arrested remains open in an appellate court.

More significantly at least all those issues which are raised under the First Amendment are so interlocked textually and substantively, that one of those issues cannot properly be considered apart from the others. Sound interpretation of any phrase of the Amendment requires reconciliation both with every other phrase of that Amendment and with the Constitution as a whole.\(^2\)

Of course this observation would also justify an extensive review of the constitutional issues by the district court, and indeed, the principal issue is stated before the rationale for its elaboration is discussed:

\[\ldots\text{whether the government can constitutionally require combat in Vietnam of a person who is conscientiously}\]

\(^2\) 297 F. Supp. at 912 [emphasis in original].
\(^2\) The judge stated that since plaintiff had raised judicial power questions, these contentions would prevail in the Supreme Court, receive a ruling, or be remanded.
\(^2\) 297 F. Supp. at 906.
\(^2\) Id. at 905-06.
opposed to American military activities in Vietnam because he believes them immoral and unjust, that belief resting not upon formal religion but upon the deepest convictions and ethical commitments. . . .

This issue is then broken down into a broad and a narrow contention. The broad one is based upon the "free exercise of religious phrase" of the First Amendment, which precludes the statutory enforcement of combat service when religious or religious-like principles exist. The narrower contention rests upon the "establishment clause" of that amendment and states that the Selective Service Act prejudices Sisson by favoring certain religious objectors.

Thus, Wyzanski states that no clear decision has been made regarding the argument that Congress may make no law prohibiting the free exercise of religion by requiring military service of conscientious objectors except that

... this Court [sic] . . . assumes that a conscientious objector, religious or otherwise, may be conscripted for some kinds of service in peace or in war. This court further assumes that in time of declared war or in defense of the homeland against invasion all persons may be conscripted even for combat service.

The judge fails to note that in the debate over Vietnam the advocates of military activity rely upon the claim that that campaign is "in defense of the homeland against invasion," i.e., where modern military technology may forestall the old-fashioned necessity for a seaborne attack and landing. He nevertheless injects a legal distinction between "not declared" and "undeclared" war relying on the factual situations of a wholly foreign military activity and an immediate defense of the physical territory of the United States. "There are two main categories of conflicting claims. First, there are both public and private interests in the common defense. Second, there are both public and private interests in individual liberty." Where the individual's interest is coterminous with the public interest in

28. Id. at 904.
29. . . . that no statute can require combat service of a conscientious objector whose principles are religious or akin thereto and the narrower contention growing principally out of 'the establishment' of religion phrase, that the 1967 draft act invalidly discriminates in favor of certain types of religious objectors to the prejudice of Sisson.
30. Id. at 906.
31. Id. at 908 [emphasis in text].
protection, and where the public interest is coterminous with the individual's in personal liberty, there is obviously no disagreement. The dissident contributes a worthy democratic and moral value to society by advocating discussion based upon the relative merits. When these various interests are not coterminous, public debate is often required for adequate resolution, and the dissident more nearly assures that all available facts and views enter into the final determination. This process is in the public interest. Where that divergent interest ceases and the public interest in unified action begins is ever one of the basic questions affecting American society. The free right of each individual to control and dispose of his life and affairs is, however, also a public interest. Where does that interest cease and the legitimate power of society to coerce conformity begin? When the question is war, the values in question are publicly and privately very high, perhaps, the highest. 82

With the traces of judicial notice of public affairs plainly implanted on each page, the decision shows a conflict of claims clearly weighing in Sisson's favor. Finally, the holding is established:

Sisson's case being limited to a claim of conscientious objection to combat service in a foreign campaign, this court holds that the free exercise of religion clause in the First Amendment and the due process clause of the Fifth Amendment prohibit the application of the 1967 draft act to Sisson to require him to render combat service in Vietnam.

The chief reason for reaching this conclusion . . . is the

32. The district court set forth this collision of interests:

The sincerely conscientious man whose principles flow from reflection, education, practice, sensitivity to competing claims, and a search for a meaningful life, always brings impressive credentials. When he honestly believes he will act wrongly if he kills, his claim obviously has great magnitude. That magnitude is not appreciably lessened if his belief relates not to war in general, but to a particular war or to a particular type of war. Indeed a selective conscientious objector might reflect a more discriminating study of the problem, a more sensitive conscience, and a deeper spiritual understanding.

It is equally plain that when a nation is fighting for its very existence there are public and private interests of great magnitude in conscripting for the common defense all available resources, including manpower for combat.

But a campaign fought with limited forces for limited objects with no likelihood of a battlefront within this country and without a declaration of war is not a claim of comparable magnitude.

Nor is there any suggestion that in present circumstances there is a national need for combat service from Sisson as distinguished from other forms of service by him. The want of magnitude in the national demand for combat service is reflected in the nation's lack of calls for sacrifice in any serious way by civilians.

Id. at 908-09.
magnitude of Sisson's interest in not killing in the Vietnam conflict as against the want of magnitude in the country's present need for him to be so employed.

The statute as here applied creates a clash between law and morality for which no exigency exists, and before, in Justice Sutherland's words, "the last extremity" or anything close to that dire predicament has been glimpsed, or even predicted or reasonably feared.32

Judge Wyzanski decides the "selective conscientious objector" issue and the constitutionality of the religious requirement for conscientious objection status in a single paragraph. Both are decided against the government. Thus, conscientious objection to a particular war as well as nonreligious belief qualify for the exemption. The judge avoided a clear pronouncement that section 456(j) of the 1967 Act was unconstitutional by using the qualifying phrase "as applied to Sisson."34 With this expansive statutory construction, the district court aligned itself to the second of the viable alternatives that would be given by Justice Harlan in his concurring opinion in Welsh.35

It is clear that Judge Wyzanski extended the law further than the Supreme Court had in Seeger or would in the Welsh appeal. He had

32. Id. at 910.
34. Id. at 910. [T]he administrators [of the Selective Service System] and this court both agree that Congress has not provided a conscientious objector status for a person whose claim is admittedly not formally religious. In this situation Sisson claims that even if the Constitution might not otherwise preclude Congress from drafting him for combat service in Vietnam, the Constitution does preclude Congress from drafting him under the 1967 Act. The reason is that this Act grants conscientious objector status solely to religious conscientious objectors but not to nonreligious objectors.

... [I]t is difficult to imagine any ground for a statutory distinction except religious prejudice. In short, in the draft act Congress unconstitutionally discriminated against atheists, agnostics, and men, like Sisson, who, whether they be religious or not, are motivated in their objections to the draft by profound moral beliefs which constitute the central convictions of their beings.

This Court, therefore, concludes that in granting to the religious conscientious objector but not to Sisson a special conscientious objector status, the Act, as applied to Sisson, violates the provision of the First Amendment that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

Id. at 911.
35. 398 U.S. at 361:

Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, 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 (1942); Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1931).
squared pushed the constitutional issues to the focus of judicial attention; he had deliberately challenged the Court to pronounce its final judgment with respect to both the selective and the nonreligious conscientious objector. It seems Wyzanski believed he had prepared a plain red carpet for the Justices. The statute, arguably blatant unconstitutional discrimination,\textsuperscript{36} is so held only in discriminatory application to the nonreligious and, less clearly, when applied to the selective objector. The judge was entering an area that appears to be exclusively reserved for the Supreme Court itself: taking a very commonsensical and practical look at the pertinent current facts of American life and applying those facts by way of innovative constitutional construction, to the case before the Court. The sound basis for this method of analysis is of course that the case is itself a particular distillate of the general facts observed; it arises out of and eventually disappears into the flow of the general, while resolving the particular. Wyzanski's attempt to influence the Supreme Court was followed with considerable interest as evidenced by the recent federal court decisions in \textit{United States v. Shields}\textsuperscript{37} and \textit{United States v. Gillette}\textsuperscript{38}.

There exists an additional point, rather subtle and perhaps innocuous, in \textit{Sisson}, that could not have escaped notice at the Supreme Court jurisdictional debate\textsuperscript{39} (on which the substance was finally not


37. 416 F.2d 935 (7th Cir. 1969). Shields claimed that the statutory distinction between religious and nonreligious was unconstitutional. The court of appeals disregarded the claim saying: “The same questions were raised in United States v. Sisson . . . which case is now before the United States Supreme Court.” The case was reversed and remanded to the district court with instructions for that court to return the file to the local draft board for it to determine “the ‘selective conscientious objector’ Constitutional argument.” \textit{Id.} at 936.

38. 420 F.2d 298 (2d Cir. 1970). The court affirmed the conviction of a selective (anti-Vietnam War) conscientious objector without reaching the issue of the defendant’s religiosity. The argument, based on Wyzanski’s ruling in \textit{Sisson} was rejected.

The future effect of that decision upon the application of the Act to so-called “selective” conscientious objectors and nonreligious conscientious objectors must await a determination by the Supreme Court.

\textit{Id.} at 299. The court also rejected the argument on its own merits.

We reaffirm our holdings in \textit{United States v. Mitchell}, 369 F.2d 323 (2d Cir. 1951) that allegations that a particular employment of the armed services is in violation of the Constitution, International treaties or a moral code do not raise a defense to a prosecution for failure to report for induction into the armed forces. For these reasons Gillette cannot challenge the legality of the war in Vietnam in these proceedings.

420 F.2d at 299.

Note the conspicuous absence of the term “religion” in the phrase “Constitution, International treaties or a moral code.” As indicated in note 2 \textit{supra}, this case is now pending before the Supreme Court.

reached). The defendant Sisson has never formally filed for conscientious objector status because he considered himself ineligible under the stated conditions. He was, in himself, truly a conscientious objector. However, he was not legally a conscientious objector in view of the terms of the statute. Since Sisson never applied for conscientious objector classification the Selective Service Administration or the draft board could not be criticized for failing to grant the classification. This unique predicament between the factual and legal condition of the exempt status results in the possibility that, absent congressional alteration of the statute, the System and/or the local draft boards could be required to inquire on their initial registration forms as to whether the registrant is a conscientious objector. This would most likely be opposed by the government because by simply raising the question there might be a corresponding increase in the rate of applications. Presently, the initiative is upon the registrant to secure conscientious objector status but should the draft board become the moving party, they might be swamped with conscientious objectors. The Supreme Court, traditionally a slow moving institution, apparently prefers to adjudicate these various issues on established factual situations of administrative denial, thus, avoiding the question of who should be the initiating party.

Wyzanski considered Seeger determinative of Sisson despite the fact that the Supreme Court had gingerly sidestepped the issue of "selective" conscientious objection in that precedential case. In addition to relying on Seeger, the district judge also saw fit to comment further on what the Supreme Court had failed to do. One might conclude he was tempting the high court, perhaps daring it to reverse his decision.

40. As Judge Wyzanski elaborately described:

On the stand Sisson was diffident, perhaps beyond the requirements of modesty. But he revealed sensitiveness, not arrogance or obstinacy. . . . He was entirely without eloquence. No line he spoke remains etched in memory. But he fearlessly used his own words, not mouthing formulae from court cases or manuals for draft avoidance. . . . But Sisson's table of ultimate values is moral and ethical. It reflects quite as real, pervasive, durable, and commendable a marshalling of priorities as a formal religion. . . . What another derives from the discipline of a church, Sisson derives from the discipline of conscience.

Thus, Sisson bore the burden of proving by objective evidence that he was sincere. He was genuinely and profoundly governed by his conscience as would have been a martyr obedient to an orthodox religion.

Sisson's views are not only sincere, but, without necessarily being right, are reasonable.

297 F. Supp. at 905.

41. As precedent now stands, it may be quite proper to grant conscientious objector status to both religious and nonreligious applicants. To erase any doubt of propriety, perhaps Congress should eliminate any reference to religion.
The [Supreme Court] purported to look at a particular statute. It piously disclaimed any intent to interpret the Constitution or to examine the limitations which the First and Fifth Amendments place upon Congress.\footnote{297 F. Supp. at 909.}

Regarding the question of nonreligious conscientious objection arguably opening a floodgate for the release of insincerity and fraud, the judge felt that the problems in this area were perhaps minor. He strongly advocated that the religious prerequisite added nothing to the test of sincerity.\footnote{The judge stated the argument and his conclusion in answer thereto as follows:}

Some suppose that the only reliable conscience is one responsive to a formal religious community of memory and hope.

Others fear that recognition of individual conscience will make it too easy for the individual to perpetrate a fraud. His own word will so often enable him to sustain his burden of proof. Cross-examination will not easily discover his insincerity.

Seeger cut the ground from under that argument. So does experience. Often it is harder to detect a fraudulent adherent to a religious creed than to recognize a sincere moral protestant. . . . We all can discern Thoreau's integrity more quickly than we might detect some churchman's hypocrisy.

The suggestion that courts cannot tell a sincere from an insincere conscientious objector underestimates what the judicial process performs every day. Ever since, in Edginton v. Fitzmaurice (1882) L.R. 29 Ch. Div. 359, Bowen, L.J. quipped that 'the state of a man's mind is as much a fact as the state of his digestion,' each day courts have applied laws, criminal and civil, which make sincerity the test of liability.\footnote{297 F. Supp. at 909-10.}

The Chief Justice was looking considerably beyond the technical legal question—possibly into the effects on public opinion if not politics. But if Judge Wyzanski's constitutional opinion became insulated be-

\footnote{42. The class of nonreligious conscientious objectors is not likely to be a small one. Indeed under the impetus of this holding it is likely to grow. Yet whether or not a member of that class can constitutionally be punished for refusing to submit to induction now depends on where that person is tried and by whom. That one district judge may entertain a different view of the Constitution than does another is an extraordinary reason for differing results in cases which rationally ought to be decided the same way—and with appellate review available to insure that end. The conclusion that this is not a "motion in arrest" insulates the judge's constitutional decision from review anywhere—here or in the Court of Appeals.}

\footnote{339 U.S. at 319. Burger, C.J. dissenting joined by Douglas, J. and Black J. This concern appears strange because Welsh was decided two weeks prior to Sisson and seemed to finalize the nonreligious conscientious objector situation as shown at note 15 supra.}
cause of non-reviewability from the Chief Justice’s point of view, it probably became satisfactorily isolated from the point of view of the Court majority which may mean the Court had even a more distant and political perspective.

Quite apart from the fact Congress removed the Supreme Being clause from the Selective Service Act to defeat the definitional meaning of the 1965 Supreme Court Seeger decision, that meaning was not crystal clear. The circuit court and Judge Hamley, dissenting, agreed in Welsh that the Supreme Being clause had been removed by the Seeger decision when it tried the test of the relation to a parallel position in the believer’s mind to the position occupied by God in the mind of a qualified orthodox believer and conscientious objector. In effect the Supreme Court had established no standard but had discussed the problem by utilizing the test phrase “by reason of religious training and belief” with an expanded definition of “religious.” Though the circuit court majority and dissenter agreed upon the meaning of Seeger, they disagreed as to its resultant application to Welsh. The majority claimed that the Supreme Being test, being obviated, was disallowed as a basis for Welsh’s discrimination contention since he had previously attacked his 1-A classification as being a result of that clause. It also found he could not qualify under the expanded Seeger definition of “religious.” “He denied that his objection to war was premised on religious belief.” The dissent accepted the discrimination rationale in Welsh’s reply brief:

If this Court should hold that appellant’s belief is outside the scope of the Act, then the constitutionality of the Act is in issue. For the reasons cited by the Second Circuit at 326 F.2d 846, appellant respectfully submits that the granting of privileges to the religious which are not granted to the nonreligious upon the same basis is an establishment of religion and violates the guarantees of the First Amendment and the Due Process clause of the Fifth Amendment.

However, the court read Seeger to authorize relief because of philosophical and religious objections to participating in war, but to deny beliefs based on political, sociological or economic considerations. Thus, the court used Seeger to deny Welsh.

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45. Welsh v. United States, 404 F.2d 1078, 1082-87 (9th Cir. 1968) (rehearing denied).
46. See notes 12 and 17 supra, and accompanying text.
47. 404 F.2d at 1082.
48. Id. at 1087.
49. Relying on the following quotation from Seeger, the circuit court denied con-
However, the Supreme Court found the Welsh decision practically ideal to reassert and expand Seeger. The first page of the opinion states:

The controlling facts in this case are strikingly similar to those in Seeger. Both Seeger and Welsh were brought up in religious homes and attended church in their childhood, but in neither case was this church one which taught its members not to engage in war at any time for any reason. Neither Seeger nor Welsh continued his childhood religious ties into his young manhood, and neither belonged to any religious group or adhered to the teachings of any organized religion during the period of his involvement with the Selective Service System. At the time of their registration for the draft, neither had yet come to accept pacifist principles. Their views on war developed only in subsequent years, but when their ideas did fully mature both made application with their local draft boards for conscientious objector exemptions from military service under § 6(j) of the Universal Military Training and Service Act.50

Not only were these general facts and background developments similar but when it came to the immediate administrative and decisional questions of completing the forms relative to their objections and beliefs neither person accepted the plain declaratory statement "by reason of my religious training and belief." Seeger struck out "training and" while putting quotation marks around "religious," while Welsh struck out "religious training and" entirely. Although Welsh had originally denied a belief in a Supreme Being, he later revised his response so that question was unanswered.51 This too was Seeger's position, both young men had to leave the question open.

But both Seeger and Welsh affirmed on those applications that they 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

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50. See 380 U.S. at 173.
51. This religious test has been dropped from the conscientious objector application form since 1968 when the corresponding phrase was eliminated from the Act.
consciences forbade them to take part in such an evil practice. Their objection to participating in war in any form could not be said to come from a "still, soft voice of conscience"; rather, for them that voice was so loud and insistent that both men preferred to go to jail rather than serve in the Armed Forces. There was never any question about the sincerity and depth of Seeger's convictions as a conscientious objector, and the same is true of Welsh. 52

The draft boards and appeal boards in both cases decided that there existed insufficient religious grounds for these men to qualify as conscientious objectors. Criminal convictions ensued when Seeger and Welsh refused induction. As to Seeger the exemption specifically was denied because of the Supreme Being test. Seeger failed to possess a "belief in a relation to a Supreme Being" as required by section 6(j) of the Act 53 and as to Welsh the exemption was denied "because his Appeal Board and the Department of Justice hearing officer 'could find no religious basis for the registrant's belief, opinions, and convictions.' " 54

These two cases are virtually identical except for the technical bases of denial: the Supreme Being clause for Seeger and a finding of "no religious basis" for Welsh. If it is true that the Supreme Court removed any legal significance in the Supreme Being clause, even prior to the congressional revision of the Act, by establishing the "place parallel" or equivalency test, 55 then this one distinctive technical element never existed and Welsh can serve to reaffirm and extend the Seeger holding. This intention is clearly manifested by Justice Black in the initial paragraph of Welsh.

We 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, .... For the reasons to be stated, and without passing upon the constitutional arguments which have been raised, we reverse the conviction because of its fundamental inconsistency with United States v. Seeger, supra. 56

Not only could the cases be rendered legally identical but the previous decision, which had expressly avoided the constitutional arguments by

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52. 398 U.S. at 337.
53. 380 U.S. at 167.
54. 398 U.S. at 338.
55. See note 16 supra and accompanying text.
56. 398 U.S. at 335 [citations omitted and emphasis added].
simply extending the definition of "religious" beyond Congress's orthodox wishes, could then justifiably be used to maintain the refusal to test the constitutionality of the statute. The only task remaining before the Court was to place Welsh firmly upon the foundation created by Seeger and then to assert an expansion.

Welsh accomplishes this by a cogent review of the main point in Seeger, reiterating that:

In resolving the question whether Seeger and the other registrants in that case qualified for the exemption, the Court stated 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." 380 U.S. at 185 . . . . [Emphasis added] 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.57

Thus, the meaning of "religion" here is almost entirely subjective and depends on what one's beliefs mean to himself, "in his own scheme of things." While this certainly does not relinquish the requirements of sincerity nor end a burden of proof, it is vastly more liberal than the World War I test of membership in a publicly known religious sect which practices pacifism, and even the test of World War II where individual belief had to be the consequence of formal and institutional training. Now the test is the possession of certain subjective values, when viewed as a portion of the individual's personal belief structure, which must exceed the requirement of being sincerely religious as the individual sees it for and within himself.58 The vague and obviously rather orthodox statutory intention of Congress is given a virtual coup de grace with the pronouncement that beliefs "purely ethical or moral in source and content" that "function as a religion" in the life of a registrant entitle him to conscientious objector status.59 Assuming the search for sincerity

57. Id. at 339.
58. See the excellent, concise discussion in S.S.L.R., Practice Manual ¶ 1036, 1038.
59. The Court made it clear that these sincere and meaningful beliefs which prompt the registrant's objection to all wars need not be confined in either source or content to traditional or parochial concepts of religion. It held that § 6(j) "does not distinguish between externally and internally derived beliefs" [380 U.S. at 186], and also held that "intensely personal," convictions which some might find "incomprehensible" or "incorrect" come within the meaning of "religious belief" in the Act. Id., at 184-85. What is necessary under Seeger for a registrant's conscientious objection to all war to be "religious" within
and the existence of deeply held convictions is complete, this decision can only be a clear judicial expansion of Seeger. That pronouncement extended the meaning of "religious" by analogy, and plainly stated that "ethical or moral" beliefs were exemption qualifying on a basis similar to that which was traditionally religious. The Court justified the fact that the Court of Appeals had accepted Welsh's word that his claim was not religious because Welsh did not understand that "religious" could mean "ethical" or "moral." The decision continues and by dicta expands even further the definitional meaning of "religious":

We certainly do not think that § 6(j)'s exclusion of those persons with "essentially political, sociological, or philosophical views or a merely personal moral code" should be read to exclude 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 consideration of public policy.60

This statement may be fairly translated to indicate that a reasonably intense political, sociological or philosophical conviction that one or more of our national policies, positions, or institutional practices, as well as all corresponding activities, is right or wrong should not be in and of itself, determinatively disqualifying when seeking conscientious objector status. Thus, the test emerges: Is this objection to all war a genuine life ruling refusal stemming from a determining conviction based in part on ethical, moral or religious considerations? Even though the conviction may also result from other social or political consideration, it should not be invalidating.

Referring to the "essentially political, sociological or philosophical views or a merely personal moral code", the Court discussed the criteria essential to determine "the two groups of registrants" who continue to be legitimately excluded from the conscientious objector status. The first

the meaning of § 6(j) is that this opposition to war stem 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. Because his beliefs function as a religion in his life, such an individual is as much entitled to a "religious" conscientious objector exemption under § 6(j) as is someone who derives his conscientious opposition to war from traditional religious convictions.

398 U.S. at 339-40.
60. Id. at 342.
group consists of those whose “beliefs are not deeply held” and the second “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.” The exclusion has no basis whatsoever in the moral, ethical, or religious but is completely founded upon “policy, pragmatism, or expediency.” This is most definite and deliberate.

The Court continued its discussion of those attributes precluding the exemption and said:

In applying § 6(j)’s exclusion of those whose views are ‘essentially political, etc.’, it should be remembered that these exclusions are definitional and do not therefore restrict the category of persons who are conscientious objectors ‘by religious training and belief.’ 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 moral code.’ See United States v. Seeger, 380 U.S. at 186.

Whether this decision in toto constitutes a demolition of “religious” or only an interpretive extension to encompass the present social reality is of little moment. This is now the meaning of section 6(j) of the Act. Considering the judicial interpretation used to maintain its constitutionality in the face of an apparent unconstitutional content, it is unlikely Congress will engage the battle further.

Congressional inaction will not however, preclude public reaction. With the announcement of Welsh, there were widespread ideas that all barriers were ended except for simply declaring oneself a conscientious objector and thereby being accepted upon the declaration. Visions appeared of millions of young men escaping their military obligation through

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61. 398 U.S. at 342-43 [emphasis added]. While exclusionary terms exist and are here emphasized, the historic conscientious objector exemption was drafted in the negative.

62. This was not the first occasion when a court had not allowed religious factors to exclude all others from consideration. It may be true that appellant has been influenced, in the words of the hearing examiner “more by sociological and philosophical views than by religious beliefs or the dictates of a deity.” But, it is also clear that he has been influenced by religious training and belief. Therefore, Fleming comes clearly within the definition of a conscientious objector as defined by the Supreme Court. . . .

344 F.2d at 916.

63. 398 U.S. at 343.
the legal loophole. Within a day of *Welsh* the Director of Selective Service, Dr. Curtis Tarr, held a news conference at which he announced a series of new instructions to draft boards. In some respects his works seemed to compound, rather than explain, the confusion and enlarged the question of what the new policy would be.

The Selective Service Director, Curtis W. Tarr announced today [June 16, 1970] stringent new standards to be applied by draft boards to determine if young men can qualify for exemptions as conscientious objectors under yesterday's Supreme Court decision...

At a news conference this morning Mr. Tarr described the substance of guidelines that will require young men to prove that their views are not only deeply felt but are also the product of "some kind of training" and consultation with a "system of belief" beyond a purely personal moral code.

Mr. Tarr stated in his own words the substance of four standards that each applicant for conscientious objector status will be expected to satisfy if he is to be granted exemption. They are:

1. There must be 'no question' that the applicant's belief is sincere.
2. The applicant must be opposed to war in all forms, and not just to the war in Vietnam.
3. The applicant's belief must be something more than a personal moral code. He must have taken into account the thoughts of "other wise men" and must have consulted "some system of belief" beyond the scope of his own thoughts.
4. The applicant's views must be the product of "some kind of rigorous training."

Mr. Tarr conceded that these criteria would operate to the disadvantage of uneducated men who might be unable to point to studies or training as the foundation of their opposition to military service.

"The better trained a man is and the more sharpened his intellect in the matter of religion and philosophy," the better his chance of gaining draft-exempt status, Mr. Tarr said.

He added that uneducated men were already at some
disadvantage in applying for draft-exempt status. The new system only "augments to some degree the burden" on an uneducated man, Mr. Tarr said. He expressed the hope that the system could eliminate as many of these inequities as possible....

Asked today if Mr. Welsh could qualify as a conscientious objector under the new criteria which require proof of "rigorous training," Mr. Tarr replied that Mr. Welsh could qualify because the Supreme Court has said that he qualifies....

"It certainly would make our job easier," he said, "if Congress would amend the Selective Service Law to reverse the Court's decision." 64

It is not only the Director's avoidance of directly measuring Welsh's eligibility for exemption under his "standards"—considering the "rigorous training" requirement and perhaps the "some system of belief" measure, Welsh would probably be unsuccessful—but also the entire tone and content of his position which indicates a strong tendency toward resistance to the Supreme Court's rather obvious mandate. It would serve little purpose to examine this initial reaction because it appears that upon reflection of the matter, the administrative leadership of the Selective Service System somewhat altered this position with the promulgation of official guidelines. 65

Under Local Board Memorandum No. 107 to be eligible for a conscientious objector exemption a registrant (a) must show sincerity, (b) hold a belief which is "the primary controlling force" in his life, but (c) that belief may be either moral or ethical and not necessarily religious. He (d) does not have to believe in God or a Supreme Being, and (e) must hold his belief "with the strength of traditional religious conviction." The applicant (f) must demonstrate that the belief arose from "training, study, contemplation, or other activity" equal to those of "traditional religious convictions," and (g) that the belief directs his life the way "traditional religious convictions" direct the lives of those who hold them. Reduced to tabular form, and allowing for the excision of words, we have:

a) Sincerity in

64. N.Y. Times, June 17, 1970, at 1, 13, col. 1.
65. See Local Board Memorandum No. 107, Criteria for Classification of Conscientious Objectors, July 6, 1970, especially parts 4-9, 15 and 16.
b) a life-controlling belief

c) which is ethical, moral, or religious—

d) without a necessary belief in God—

e) but as strong as traditional religion

f) and arises from "training, study, contemplation, or other activity" equal to that of traditional religion

g) and directs life the way traditional religious belief does for its believers.

While this is perhaps far from being perfect and leaves some ambiguity as to what constitutes the practical tests, it does appear to follow the basic propositions set forth in Seeger and Welsh. Sincerity, of course, is a highly subjective matter and the local draft boards generally will be unable to apply any finite uniformity. Whether a belief is "life-controlling" is often an open-ended question, as is the assumed strength of "traditional" religion. Much of this entire problem arises precisely because of the weakness of one's traditional religion. Perhaps the most potentially difficult factor is the "training, study, contemplation, or other activity" requirement which tends to discriminate in favor of the educated and intellectually aware. In the final analysis it is likely to be singly a question of sincerity and clear thinking on the part of the local draft board members. They will be required to exercise judgment and understanding beyond the normal, often expedient routine, historically common to the system. Variations in human personality and belief based upon other than orthodoxy are not commonly appreciated by worka-

66. SSS Form 150, Special Form for Conscientious Objection, has not been revised since the Welsh decision.


68. In United States v. Rink, 3 S.S.L.R. 3184 (7th Cir. July 29, 1970) the court used Welsh and reversed the conviction of failure to report for induction. The local draft board had earlier determined that because "appellant displayed a secular based moral code" he was ineligible for classification I-O (conscientious objector). In United States v. Eades, 3 S.S.L.R. 3185 (4th Cir. August 5, 1970) the court said that failure to assert a claim of belief in a Supreme Being will not preclude conscientious objection relief.

69. In United States v. Coffey, 429 F.2d 401 (9th Cir. 1970) the court reversed an induction refusal conviction and found that Coffey's beliefs were most similar to those held by Welsh. Holding that the draft board could have refused classification I-O by finding his beliefs insincere, the court required either a finding that Coffey did not in fact believe the statements made on the Form 150, or a determination that his beliefs were not "deeply held." "... [T]he local board must state the reasons for its denial of the classification sought." Id. at 405. See also United States v. Lemmens, 3 S.S.L.R. 3185 (7th Cir. August 4, 1970) and United States v. Nathan, 3 S.S.L.R. 3190 (N.D. Calif. Feb. 5, 1970) as to the specificity required by a local board in rejecting the exemption.
day bureaucracy. Since the draft system recently has received much criticism, this recent Memorandum may force the once believed thoughtless fiat of thoughtless draft boards to be a practice of the past.  

In his opinion, concurring in the Welsh result, Justice Harlan enters a mea culpa with respect to Seeger and seeks the outright constitutional rejection of section 6(j). "Today the prevailing opinion makes explicit its total elimination of the statutorily required religious content for a conscientious objector exemption." He believes that the Court failed to squarely face the constitutional issue in Seeger and that it now avows that same omission in Welsh. But Harlan does not comment upon the effects of simple unconstitutionality. He sums up his own views:

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. There are limits to the permissible application of that doctrine, and . . . those limits were crossed in Seeger, and even more apparently have been exceeded in the present case. 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. . . . I believe it does, and on that basis I concur in the Court's judgment reversing this conviction . . . and adopt the test announced by Mr. Justice Black, not as a matter of statutory construction, but as the touchstone for salvaging a congressional policy of long standing that would otherwise have to be nullified.

70. In United States v. Burns, 3 S.S.L.R. 3191 (10th Cir. August 10, 1970), the court reversed the failure to report conviction because the local board's executive secretary failed to provide SSS Form No. 150 when appellant had previously told her he was a "pacifist and didn't believe in killing" and inquired as to alternatives to induction.

For in-service conscientious objectors who have successfully obtained a writ of habeas corpus under the Welsh rationale, see Gresham v. Franklin, 3 S.S.L.R. 3206 (N.D. Calif. July 29, 1970) (where petitioner was inducted); United States ex rel. Lehmann v. Laird, 3 S.S.L.R. 3211 (4th Cir. July 31, 1970) (where petitioner enlisted for military duty); also Shirer v. Hackel, 3 S.S.L.R. 3211 (N.D. Calif. August 12, 1970) (where a dilatory conscientious objection claim, filed subsequent to the receipt of orders to serve in Vietnam, was singly not presumptive evidence of insincerity).

71. 398 U.S. at 345.

72. "...[w]ithout passing on the constitutional arguments which have been raised . . ." Id. at 335.

73. Id. at 345.
The result is the same. The Court creates a fig-leaf to cover the bare facts but Justice Harlan wants the fig-leaf labelled a touchstone. He views the intent of Congress as plainly theistic in its use of the word “religious.” After a brief review of the congressional history and precedent cases he states:

Against this legislative history it is a remarkable feat of judicial surgery to remove, as did Seeger, the theistic requirement of § 6(j). The prevailing opinion today, however, in the name of interpreting the will of Congress, has performed a lobotomy and completely transformed the statute by reading out of it any distinction between religiously acquired beliefs and those deriving from “essentially political, sociological, or philosophical views or a merely personal moral code.”

In the end, Justice Harlan’s independent position subsides at his own admission.

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 administrative framework of the statute and without impairing other legislative goals, even though they entail, not simply eliminating an offending section but rather building on it. Thus I am prepared to accept the prevailing opinion’s conscientious objector test, not as a reflection of congressional statutory intent but as a patchwork of judicial making that cures the defect of under inclusion in § 6(j) and can be administered by local boards in the usual course of business.

The problem was that of eliminating all conscientious objector exemptions upon a pronouncement that section 6(j) was unconstitutional. This the Court could not do. These cases are somewhat unique in the fact that a finding of no constitutional infirmity, yet rejecting a congressional act, did not simultaneously grant relief to the individual appellants. In other words, the defendants could not gain reversal if granted their claim as to the simple unconstitutionality of the statute without further interpretation and inclusion. Here there exists a basic, curious question of justiciability if not jeopardy by non-litigants. Declaring the statute

74. Id. at 351.
75. Id. at 366-67 [footnotes omitted]. In footnote 19, the Justice commented on the test set forth by the majority and found it managerily “easier than the arcane inquiry [as to] . . . whether beliefs are religious or secular in nature.” Id. at 367
unconstitutional and holding nothing more would not relieve the defendants of their obligations and pending criminal charge, but it would immediately invalidate the opportunity of achieving conscientious objector status, as well as void the existing status.

Justice White, in his dissent, not only agreed with Harlan's "lobotomy" charge but noted the primary lack of constitutional remedy for Welsh.

Even if Welsh is quite right in asserting that exempting religious believers is an establishment of religion forbidden by the First Amendment, he nevertheless remains one of those persons whom Congress took pains not to relieve from military duty. Whether or not § 6(j) is constitutional, Welsh had no First Amendment excuse for refusing to report for induction. If it is contrary to the express will of Congress to exempt Welsh, as I think it is, then there is no warrant for saving the religious exemption and the statute by redrafting it in this Court to include Welsh and all others like him.\(^{76}\)

White then cites the free exercise clause of the First Amendment as sufficient justification for the congressional grant of exemption for religionists in the orthodox sense and denies the charge of discrimination and "establishment" or promotion of religion. He sees the "rationally based judgment of Congress" promoting "the free exercise of religion" when it "calls for shielding religious objectors from compulsory combat duty. . . ." But that that clause cannot include nonreligionists is no reason for "striking down the statutory exemption." He supports his conclusion in part under the decision in *Sherbert v. Verner*,\(^{77}\) wherein the Court "construed the free exercise clause to require special treatment for Sabbaterians under the state's unemployment compensation law."\(^{78}\) However, that latter case also elaborated a doctrine of "greater power" and "lesser power" where it can be said that the power, universally acknowledged, of Congress to conscript everyone does not necessarily include the power to do so in any form whatsoever. It may not set "unconstitutional conditions" in the exercise of the lesser power of exempting from or conditioning the greater power.\(^{79}\)

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\(^{76}\) *Id.* at 368.


\(^{78}\) 398 U.S. at 373.

\(^{79}\) 374 U.S. at 404-06.