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Immigration and Naturalization - An Analysis of the Conscientious Objector Exception

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IMMIGRATION AND NATURALIZATION— AN ANALYSIS OF THE CONSCIENTIOUS OBJECTOR EXCEPTION

Brenda Barbara Weitzman, born in South Africa, married Ronald Weitzman, a United States citizen, in Tel Aviv, Israel. Upon entering this country she affirmed that she was attached to the principles of the Constitution of the United States and in 1966 filed a petition for naturalization. During the preliminary examination before the naturalization examiner and during the *de novo* hearing before the district judge, Mrs. Weitzman refused to take that portion of the oath which would require her to bear arms on behalf of the United States or to perform noncombatant service in the Armed Forces of the United States. She gave as the reason her pacifist beliefs, which had a non-religious basis as that term traditionally has been interpreted. She described her pacifism as biological and instinctive, testifying that she did not believe in a supernatural power, Supreme Being or other Superior Relationship. In the district court[1] Mrs. Weitzman contended in the alternative that her pacifism conformed to the requirements of "religious training and belief" as that phrase had been interpreted in *United States v. Seeger*;[2] she also contended that section 337(a) of the Immigration and Nationality Act of June 27, 1952[3] was unconstitutional.

1. *In re* Weitzman, 284 F. Supp. 514 (D. Minn. 1968).

2. 380 U.S. 163 (1965).

3. 8 U.S.C. § 1448(a) (1964) provides that "(a) A person who has petitioned for naturalization shall, in order to be and before being admitted to citizenship, take in open court an oath (1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state or sovereignty of whom or which the petitioner was before a subject or citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5)(A) to bear arms on behalf of the United States when required by the law, or (B) to perform noncombatant service in the Armed Forces of the United States when required by the law, or (C) to perform of national work importance under civilian direction when required by the law. Any such person shall be required to take an oath containing the substance of clauses (1)-(5) of the preceding sentence, except that a person who shows by clear and convincing evidence to the satisfaction of the naturalization court that he is opposed to the bearing of arms in the Armed Forces of the United States by reason of religious training and belief shall be required to take an oath containing the substance of clauses (1)-(4) and clauses (5)-(B) and (5)-(C) of this subsection, and a person who shows by clear and convincing evidence to the satisfaction of the naturalization court that he is opposed to any type of service in

She confined her petition for review, however, solely to the constitutional question. In a *per curiam* opinion the Eighth Circuit Court of Appeals held that an applicant for citizenship whose objection to military service is based on his "biological" and "instinctual" aversion to killing and a belief in the "order of existence," rather than religious teachings or belief in a Supreme Being, is entitled to naturalization upon taking the oath to perform work of national importance under civilian direction when required by law. *In re Weitzman*, 426 F.2d 439 (8th Cir. 1970).

Section 337(a) of the Immigration and Nationality Act of June 27, 1952,[4] requires an applicant for citizenship to take an oath to bear arms on behalf of the United States unless, by reason of "religious training and belief," he is conscientiously opposed to the bearing of arms or to any type of noncombatant service in the Armed Forces. "Religious training and belief" is defined as:

> [A]n 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. . . .[5]

It is the intent of this note to present a review of the statutory and judicial treatment of the naturalization of aliens, especially with regard to the provisions for exemption as a conscientious objector. Attention will also be given to the parallel development under similar language in the selective service context with special emphasis on developments since the 1965 decision of *United States v. Seeger*.[6] Finally, an evaluation of the significance of *Weitzman* will be made including recommendations for the future.

The power to enact naturalization legislation rests with Congress, as provided by the Constitution in Article I, Section 8: "Congress shall have power . . . to establish a uniform Rule of Naturalization . . . ." Several fundamental principles have further been established by judicial decisions. The 1817 case of *Chirac v. Chirac*[7] held that Congress was to have exclusive power over naturalization. This principle was qualified by Mr. Justice Marshall, in *Osborn v. The President, Directors, and Co. of the Bank of the*

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the Armed Services of the United States by reason of religious training and belief shall be required to take an oath containing the substance of said clauses (1)-(4) and clause (5)-(C). The term 'religious training and belief' as used in this section shall mean 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."

4. 8 U.S.C. § 1448(a) (1964).
5. 8 U.S.C. § 1448(a) (1964).
6. *Supra* note 2.
7. 15 U.S. (2 Wheat.) 259, 269 (1817).

United States[8] with the proviso that the rules established be applied *uniformly*.[9] Citizenship through naturalization, as noted by Mr. Justice McReynolds in *United States v. Manzi*,[10] is a privilege, granted only upon a showing that the statutory requirements have been strictly met.[11] In addition, the applicant is viewed as the moving party in such a proceeding; thus, it is recognized that doubts should be resolved in favor of the United States and against the claimant.[12] Therefore, the burden is on the alien applicant to show his eligibility for citizenship.[13] Finally, under whatever theory he advances, the applicant, if claiming conscientious objection, must show, by clear and convincing evidence, that he comes within the statutory exemption.[14]

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8. 22 U.S. (9 Wheat.) 738, 837 (1824).

9. *Id.* at 827-28, where J. Marshall wrote: "A naturalized citizen is, indeed made a citizen under an act of Congress but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it so far as respects the individual. The constitution then takes him up, and among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue. He is distinguishable in nothing from a native citizen, except as far as the constitution makes the distinction; the law makes none."

10. 276 U.S. 463 (1928).

11. *See also*, Maney v. United States, 278 U.S. 17 (1928); Tutun v. United States, 270 U.S. 568 (1926); United States v. Ginsberg, 243 U.S. 472 (1917); United States v. Ness, 245 U.S. 319 (1917); Luria v. United States, 231 U.S. 9 (1913); Johannessen v. United States, 225 U.S. 227 (1912); Zartarian v. Billings, 204 U.S. 170 (1907); and Swan and Finch Co. v. United States, 190 U.S. 143 (1903).

12. *See* Immigration and Nationality Act § 316(a), 8 U.S.C.A. § 1427(a); *see also* Berenyi v. District Director, 385 U.S. 630 (1967); United States v. Macintosh, 283 U.S. 605 (1931); Taylor v. United States, 231 F.2d 856 (5th Cir. 1956); Burkiewicz v. Savoretti, 211 F.2d 541 (5th Cir. 1954); Petition of Giz, 264 F. Supp. 252 (E.D. Cal. 1965); and Petition of Suey Chin, 173 F. Supp. 510 (S.D.N.Y. 1959).

13. Immigration and Nationality Act § 316 (a), 8 U.S.C.A. § 1427 (a); *see also* Macintosh, *supra* note 12 at 626, Preisler v. United States, 238 F.2d 238 (2nd Cir. 1956) *cert. denied* 352 U.S. 990 (1957); Johnson v. United States, 186 F.2d 588 (2nd Cir. 1951); *In re* Matz, 296 F. Supp. 927 (E.D. Cal. 1969); *In re* Russo, 259 F. Supp. 230 (S.D.N.Y. 1966); and Sodo v. United States, 406 Ill. 484, 96 N.E.2d 325 (1959).

14. *See* Rase v. United States, 129 F.2d 204 (6th Cir. 1942); United States v. Hein, 112 F. Supp. 71 (N.D. Ill. 1953); Berenyi v. District Director, *supra* note 12, where Justice Stewert observed: "When the government seeks to strip a person of citizenship already acquired, or deport a resident alien and send him from our shores, it carries the heavy burden of proving its case by 'clear and unequivocal and convincing evidence,' *Woodley v. Immigration and Naturalization*

Initial legislation required both that the applicant affirm by oath his support of the Constitution[15] and that the naturalization court find that the alien was "attached to the principles of the Constitution."[16] The subsequent Act of 1906 expanded the oath to include the words "support and defend the Constitution and Laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same."[17] Thus, the earliest legislation required a finding that the applicant was attached to the principles of the Constitution and a person of "good moral character."[18] With the 1906 legislation, the requirement that the applicant affirm his willingness to bear arms began to emerge, although it was not yet an express part of the statutory oath. By 1923, however, the Immigration and Naturalization Service felt that a requirement to bear arms was inherent in the existing oath to support and defend the Constitution; therefore, a question to this effect was included in the application and treated as a prerequisite to the granting of citizenship.[19]

Service, 385 U.S. 286, 17 L. Ed. 2d 369 (1966). But when an alien seeks to obtain the privilege and benefits of citizenship the shoe is on the other foot. He is the moving party affirmatively asking the Government to endow him with all the advantages of citizenship. Because that status once granted, cannot lightly be taken away, the Government has strong and legitimate interest in insuring that only qualified persons are granted citizenship. For these reasons it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect. This court has often stated that doubts 'should be resolved in favor of the United States and against the claimant.'" Berenyi v. District Director, *supra* note 12 at 636-37.

15. Act of March 26, 1790, ch. 3, § 1, 1 Stat. 103, which provided: "That any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen on application to any common law court of record, in any one of the states wherein he shall have resided for the term of one year at least, and making proof to the satisfaction of such court, that he is a person of good character, and taking the oath or affirmation prescribed by law, to support the constitution of the United States, which oath or affirmation such court shall administer; . . ."

16. Act of June 29, 1795, 1 Stat. 414 which provided: "He Shall (the applicant) at the time of his application to be admitted declare an oath or affirmation, . . . that he will support the Constitution of the United States; . . . Thirdly . . . and he shall further appear to their satisfaction, that during that time (of residence in the United States), he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same.

17. Immigration and Naturalization Act of June 29, 1906, 34 Stat. 596.

18. Immigration and Naturalization Act of June 29, 1906, 34 Stat. 596. *See also In re* Halas, 274 F. Supp. 604 (E.D. Pa. 1967); United States v. Sherman, 40 F. Supp. 478 (E.D. N.Y. 1941); *In re* McNeil, 14 F. Supp. 394 (N.D. Cal. 1936); United States v. Wexler, 8 F. Supp. 880 (E.D.N.Y. 1925); *In re* Sigleman, 268 F. Supp. 217 (E.D. Mo. 1920); United States v. Leles, 236 F. 784 (N.D. Cal. 1916).

19. *See* the court's discussion to this effect in *In re* Weitzman, 426 F.2d 439, 446 (8th Cir. 1970).

Such an interpretation by the Service was, upon challenge by the individual claiming to be a conscientious objector, upheld by the Supreme Court in three significant decisions. The first of these, *United States v. Schwimmer*,[20] involved a fourty-eight year old woman who refused to take the oath to bear arms, claiming to be an uncompromising pacifist, with no sense of nationalism, but only a cosmic sense of belonging to the human family. Pointing out that the defense of the Constitution and laws of the nation was a necessary feature of organized government, Mr. Justice Butler, concluded that the act of this conscientious objector "evidence[d] a want of that attachment to the principles of the constitution of which the applicant is required to give affirmative evidence by the Naturalization Act."[21] Thus, a willingness to bear arms was established as an essential qualification for citizenship. Similar reasoning was also found in *United States v. Macintosh*,[22] in which a divinity student was unwilling to swear to bear arms unless he believed the war to be morally justified. Mr. Justice Sutherland, again emphasizing that the Constitution provided for the common defense and war power of Congress and that the privilege of conscientious objection comes not from the Constitution but from acts of Congress, concluded that admission to citizenship was properly denied to such an applicant. The third decision, decided on the same day as *Macintosh*, was *United States v. Bland*,[23] in which the Court, by identical reasoning as in the two previous decisions, held that naturalization was properly denied where the applicant refused to take the oath to defend the Constitution and laws against all enemies without the written insertion of the words "as far as my conscience as a Christian will allow."[24]

These three decisions were ultimately overruled by *Girouard v. United States*[25] in which the Supreme Court held that the promise to bear arms could not be implied from existing statutory language; therefore, an objection to bearing arms was not proper grounds on which to deny a petition for citizenship. In considering the petition for citizenship of a Seventh-day Adventist, who was willing to perform noncombatant service but would not affirm a willingness to bear arms, Mr. Justice Douglas reasoned that the bearing of arms is not the only way in which the nations' institutions may

20. 279 U.S. 644 (1929), with Holmes, Brandeis and Sanford dissenting.

21. *Id.* at 652-53.

22. 283 U.S. 605 (1931), with Hughes, Holmes, Brandeis and Stone dissenting.

23. 283 U.S. 636 (1931), with Hughes, Holmes, Brandeis and Stone dissenting.

24. *Id.*

25. 328 U.S. 61 (1946).

be supported and defended. Also he reasoned that similar religious beliefs would not disqualify the petitioner from holding public offices which require identical oaths. Therefore, without unequivocal language to the contrary, it could not be assumed that Congress intended to make a promise to bear arms a prerequisite to naturalization. Thus, a willingness to bear arms was eliminated by *Girouard* as a prerequisite to the granting of citizenship.

Subsequently, by an act of September 23, 1950,[26] Congress amended the oath to require that the applicant promise to bear arms on behalf of the United States *or* perform noncombatant service in the Armed Forces. An alternative oath was also provided for the applicant who demonstrated that he was opposed to performing noncombatant service by reason of "religious training and belief."[27] "Religious training and belief," which was enunciated in the 1952 act,[28] is defined as: "[A]n individual's belief in a Supreme Being involving duties superior to those arising from any human relation, but . . . not . . . political, sociological, or philosphical views or a merely personal moral code."[29] The requirement of a promise to bear arms was, therefore, reinstated as a prerequisite to citizenship; however, special provision was made for those who express a conscientious objection to bearing arms.

Since this initial 1950 provision, the language regarding conscientious objection in the naturalization act has remained nearly constant. Because virtually all cases interpreting the requirement of "religious training and belief" have arisen under the selective service statutes, naturalization applications have traditionally been considered in the light of the standards established thereunder. Therefore, a review of the statutory and judicial treatment of conscientious objection in the selective service context is appropriate for an insight into how naturalization claims are treated.

Initial provisions under the draft laws for conscientious objection were found in the Selective Draft Act of 1917,[30] which provided exemption only

26. Act of Sept. 23, 1950, ch. 1024, § 2, 64 Stat. 987.

27. 8 U.S.C. § 1448 (a) (1964).

28. 8 U.S.C. § 1448 (a) (1964).

29. 8 U.S.C. § 1448 (a) (1964). The definition was then identical to that provided in the Universal Military Training and Service Act, 62 Stat. 613 (1948) as amended 50 U.S.C. App. § 456 (j) (1968). By the Selective Service Act of 1967 Pub. L. 90-40, 81 Stat. 104, the term "Supreme Being" was deleted from the statute's definition of religion. Thus in the Selective Service context, the definition presently states that, "[t]he 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) (1968). The reference to a Supreme Being remains, however, in the naturalization statute.

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

for members of a "well-organized religious sect or organization . . . whose existing creed or principles forbid its members to participate in war . . . ."[31] Exemption based upon "religious training and belief" was first granted under the Selective Service and Training Act of 1940.[32] Early decisions under this act approved exemption where the registrants' beliefs were based solely on broad philosophical or humanitarian principles, interpreting such views as essentially religious in nature.[33] However, the Selective Service Act of 1948[34] rejected this approach, following the reasoning of *Berman v. United States*,[35] which held that a religious belief must be based upon a belief in a Supreme Being, resulting in the definition of "religious training and belief."

This restrictive interpretation of the Selective Service Act of 1917[36] was initially applied in the naturalization context; however that interpretation was later relaxed by the decisions of *In re Nissen*[37] and *In re Hansen*,[38] both of which were interpreted in the light of the 1952 definition of "religious training and belief." The *Nissen* decision involved a fourty-eight year old applicant for naturalization who, as a member of the Lutheran faith, asserted as a personal belief that it was wrong to bear arms. In granting a motion for reconsideration, the court held that Congress viewed training as "meaning no more than individual experience supporting belief, a mere background against which sincerity could be tested."[39] Therefore, the fact that the applicant was not a member of a pacifist sect should not serve as a barrier to his naturalization. Similarly, the *Hansen* decision involved a fifty-nine year old applicant for naturalization whose religious code was also found to stem from a sincere personal belief in a Supreme Being, rather than from formal religious training. In granting the conscientious objector exemption, this court held that "religious training and belief" was a single concept. A personal religious code based on a relation to a Supreme Being, thus, was sufficient, notwithstanding the fact that it was not

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

32. Selective Training and Service Act of 1940, ch. 720, § 5 (9), 54 Stat. 889.

33. *See, e.g.*, United States *ex rel* Reel v. Badt, 141 F.2d 845 (2nd Cir. 1944), *aff'd on rehearing*, 152 F.2d 627 (2nd Cir. 1945), *petition for cert. dismissed*, 328 U.S. 817 (1946); United States *ex rel* Phillips v. Downer, 135 F.2d 521 (2nd Cir. 1943); and United States v. Kauten, 133 F.2d 703 (2nd Cir. 1943) (dictum).

34. 62 Stat. 612 (1948), as amended, 50 U.S.C. App. § 456 (j) (1968).

35. 156 F.2d 377 (9th Cir. 1946), *cert. denied* 329 U.S. 795 (1946).

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

37. 137 F. Supp. 483 (D. Mass. 1955), reconsideration granted 146 F. Supp. 361 (D. Mass. 1956).

38. 148 F. Supp. 187 (D. Minn. 1957).

39. *Supra* note 37, 146 F. Supp. at 363.

derived from the formal tenents of a church. While religious training may serve as evidence supporting the sincerity of the professed belief, the court ruled that it may not be viewed as a prerequisite to such belief. The *Hansen* decision, therefore, reduced to a minimum the significance of the word "training" as used in the statute. Both decisions indicate that the fact that an applicant's belief was based on a personal religious code, rather than the tenets of a church to which he belonged, no longer served to disqualify him for the exemption.

It is apparent from the above that the bases recognized for conscientious objection have undergone continual expansion from the initially restrictive 1917 provision.[40] This trend culminated in the decision of *United States v. Seeger*[41] in which the Supreme Court, in the selective service context, formulated a new definition of *religion,* the object of which was to decide whether the beliefs professed by the registrant were sincerely held and whether they were, by his *own* philosophy, religious in nature. As stated by the court:

> [T]he 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 the possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.[42]

The *Seeger* decision significantly broadened the scope of the conscientious objector exemption with the result that the exemption now extended beyond traditional religious beliefs. Whereas previously belief in an orthodox God or Supreme Being was required, that term was broadened with this interpretation to encompass a power or being, or a faith "to which all else is subordinate or upon which all else is ultimately dependent."[43] The conscientious objector no longer had to derive his opposition to war from belief in a Supreme Being. If the beliefs held appeared to occupy a place in the life of the possessor sufficiently similar to the place occupied by the beliefs of one who was clearly within the statutes' definition of religion, the beliefs in question would qualify as "religious" within the terms of the statute. This test has come to be known as the "parallelism" (or "parallel belief") test. The Court further emphasized the scope of the exemption in stating:

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

41. *Supra* note 2, a consolidation of three cases in which local boards had denied conscientious objector status because of the registrants' failure to base their objections to war on the belief in a Supreme Being. The two other decisions were United States v. Jakobson, 325 F.2d 409 (2nd Cir. 1963) and Peter v. United States, 324 F.2d 173 (9th Cir. 1963).

42. *Supra* note 2, at 165-66. As noted, *supra* note 29, the subsequently enacted Selective Service Act of 1967 deleted the reference to a Supreme Being in its definition of religious training and belief.

43. *Supra* note 2, at 174.

[T]he use by Congress of the words "merely personal" seems to us to restrict the exemption to a moral code which is not only personal but which is the sole basis for the registrants' belief and is in no way related to a Supreme Being.[44]

Under the new parallelism test then, a registrant would fail to qualify only if his opposition to war was based *solely* on a personal moral code.

With the notion that applications for the conscientious objector exemption in naturalization cases are traditionally interpreted in the light of decisions in the selective service context, several decisions in the latter area subsequent to *Seeger* which have further expanded the parallelism test to include traditionally non-religious objectors should also be examined. Significant among these is *United States v. Shacter*,[45] in which an avowed athiest was granted conscientious objector status under the Universal Military Selective Service Act of 1967.[46] Admitting that a belief which is purely the product of reason and logic would not qualify, the court nevertheless interpreted the *Seeger* test to mean that if conscientious objection results from a religious belief or one based substantially on a faith holding the same place in the believer's life as "a traditional belief in God holds in the life of one clearly qualifying for exemption, then the exemption should be granted."[47] The court concluded that atheistic beliefs could have been reached by reason of "religious training and belief," as that term has been construed by the Supreme Court in *Seeger*.

The Eighth Circuit Court of Appeals in *United States v. Levy*[48] granted conscientious objector status to a registrant who ascribed as the basis for his beliefs several non-religious literary works. Pointing out that while some of the beliefs may not have wholly resulted from a belief in a Supreme Being, the exemption should be granted where at least one belief was derived from some Force or Supreme Being which prompted him to act according to what he believed was right, such obligation being greater than those owed to secular authorities. The court ruled that the registrant still qualified, since his beliefs were also derived from previous religious training and did not stem purely from a personal code.[49]

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44. *Supra* note 2, at 186.

45. 293 F. Supp. 1057 (D. Md. 1968).

46. 50 U.S.C.A. App. § 456 (j) (1968).

47. *Supra* note 45, at 1060.

48. 419 F.2d 360 (8th Cir. 1969).

49. The 1970 decision of *United States v. Sisson*, 399 U.S. 267 (1970), involved a registrant conscientiously opposed to American military activities in Vietnam but who was not, in a formal sense, *a religious conscientious objector*. In the district court 297 F. Supp. 902 (D. Mass. 1969), Chief Judge Wyzanski, finding that Sisson's beliefs were the equivalent of a formal religion, held that § 6 (j) of the Universal Military Training and Service Act of 1967, violated the establishment

The registrant in *Welsh v. United States*[50] in applying for exemption as a conscientious objector stated in his application that he would not affirm or deny belief in a Supreme Being and struck the words "my religious training and" from the form. The Ninth Circuit Court of Appeals had held that the beliefs were not sufficiently religious to meet the terms of section 6(j) and affirmed the conviction.[51] On appeal Mr. Justice Black, writing for the Court, determined that Welsh qualified under the *Seeger* test; however, consideration was not given to the constitutional questions which Welsh had raised. Black, in considering the *Seeger* test, concluded that

> if an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that 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 objection under § 6(j) as is someone who derives his conscientious opposition to war from traditional religious convictions.[52]

Thus, *Welsh* appears to have eliminated the requirements of "religious belief," in that such belief may now have purely an ethical or moral basis.[53] It is noteworthy for our consideration of *Weitzman* that Black went on to observe that in view of the broad scope of the word "religious" a registrant's characterization of his beliefs as "non-religious" is not a reliable guide in administering the exemption.[54]

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of religion clause of the first amendment and that the same provision of the Constitution along with the due process clause of the fifth amendment prohibited Congress from subjecting Sisson to military orders that might have required him to kill in Vietnam. The Supreme Court upon review held that it lacked jurisdiction and did not give consideration to the merits of the case.

However, in the recent decision of *Gillette v. United States,* 39 U.S.L.W. 4305 (U.S. March 8, 1971), Mr. Justice Marshall held that one cannot claim conscientious objection only to a particular war, rejecting the argument that § 6 (j) as construed to cover only objectors to all wars is violative of the free exercise and establishment clauses.

50. 398 U.S. 333 (1970).

51. 404 F.2d 1078 (9th Cir. 1969).

52. *Supra* note 50, at 340.

53. In a concurring opinion, Mr. Justice Harlan felt that the expansion of the *Seeger* test in the prevailing opinion has worked a total elimination of the required religious content for a conscientious objector exemption and views the issue to be "whether a statute that defers to the individual's conscience only when his views emanate from adherence to theistic religious beliefs is within the power of Congress." *Supra* note 50 at 356.

He concludes that the statute contravenes the establishment clause of the first amendment, however, he accepts the prevailing opinion's expanded parallelism test rather than declare the statute void.

54. *Supra* note 50, at 341.

Seeger and subsequent decisions illustrate the expanded interpretation given to the phrase "religious training and belief" as used in both the selective service and naturalization statutes. It is evident that a "personal moral code" may be viewed as religious if it occupies a prominent and motivating position in the life of the believer. The consequence of this development is the classification of atheistic beliefs as religious under a parallel-belief test which qualifies them for the exemption. *Weitzman* gives consideration to a deeply held belief which the believer steadfastly refuses to call religious, alleging as its basis a "biological" and "instinctual" aversion to killing and belief in the order of existence. Thus, the case presents an opportunity, not only for consideration of the constitutionality of the relevant legislation, but also for further interpretation of the Court-pronounced parallelism test.

Judge Lay, in *Weitzman*, sought to reverse the lower court's decision and chose not to consider the constitutional questions raised. He found that an applicant who had demonstrated sincere belief on the basis of conscience and conviction has exhibited religious belief within the statutory requirements, despite his disclaimer of belief in a Supreme Being.[55] He considered Mrs. Weitzman to be a sincere pacifist and in light of other recent decisions following the *Seeger* guidelines, held that her beliefs qualified as "religious" beliefs.[56]

Judge Blackmun,[57] seeking to affirm the district court decision addressed himself to the constitutional questions raised and concluded that the statute is constitutional and that the applicant has not met its requirements. He regarded the "religious training and belief" requirements as a basis for conscientious objection, not as an establishment or prohibition on the free exercise of religion, but rather as a legislative accommodation of religious freedom.[58] Referring to the district court decision in *United States v. Sisson*,[59] Blackmun conceded that while the language may ulti-

55. *Supra* note 19, at 458.

56. *Supra* note 19, at 457.

57. Judge Blackmun was subsequently appointed by President Nixon to be an associate justice of the United States Supreme Court.

58. Blackmun cites as a basis for his point the Selective Draft Law cases, 245 U.S. 366 (1918) in which Mr. Justice Brandeis said: "And we pass without stating anything but the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the Act, to which we at the outset referred because we think its unsoundness is too apparent to require us to do more." Similar rulings appeared in the other cases of this controversy—Goldman v. United States, 245 U.S. 474 (1918); Kramer v. United States, 245 U.S. 478 (1918); Ruthenberg v. United States, 245 U.S. 480 (1918); Yanyar v. United States, 246 U.S. 649 (1918); and Stephens v. United States, 247 U.S. 504 (1918).

59. *Supra* note 49.

mately be declared unconstitutional in the draft-criminal law context, he would hold otherwise in the naturalization context, where the government has bestowed a privilege.[60]

For Judge Heaney, concurring with Judge Lay in reversing the decision of the lower court, the issue was whether the statute should be interpreted as permitting all who sincerely object, out of conscience, to bearing arms to be excused from the oath, or whether the court should hold that the statute was unconstitutional. He preferred the former. Placing significance in the use of the words "merely personal code," Heaney emphasized that the legislature has been careful not to specifically exclude from the benefits of the exemption those whose objections stem from conscience.[61] Finding support for his position in the legislative hearings,[62] Heaney felt that Mrs. Weitzman had sustained her burden of proving that she was opposed to bearing arms as a matter of conscience. He therefore concluded that she should be permitted to take the oath and become a citizen. Thus, possibly with a view to the limitations of the *Seeger* parallel-belief test and a reluctance to declare the statute unconstitutional, Heaney took the most advanced position of the three judges by urging a recognition of beliefs stemming purely from conscience.

Mrs. Weitzman, therefore, having established the sincerity of her pacifism, was allowed to take the naturalization oath as a conscientious objector. The split in the appellate court, however, detracted from the strength and significance of the opinion.

While the question of atheistic beliefs was not directly dealt with, previous decisions have implied that such beliefs may qualify under the parallelism test, if they can be shown to: (1) be the product of previous religious training; (2) function as a religion for the believer; or (3) hold a position parallel to religious beliefs. While not admitting a belief in a Supreme Being or superior force, Mrs. Weitzman did not reject the notion of an ordered universe. Under previous interpretations of the parallelism test, her beliefs do appear to qualify. However, Judge Heaney went beyond the limitations of the *Seeger* test in concluding that Congress cannot, consistent with the first amendment, treat non-religious conscientious ob-

60. *Supra* note 19, at 454.

61. *Supra* note 19, at 462.

62. Heaney quotes S. Rep. No. 1515, 81st Cong. 2d Sess., 742, 746 which states: "The subcommittee realizes and respects the fact that the question of whether or not a person must bear arms in defense of his country may be one which invades the province of religion and personal conscience. Thus, it recommended that an alien not be required to vow to bear arms when he asserted his opposition to participation in war in any form because of personal religious training and belief.

jectors differently from those whose beliefs are religiously based. Thus, with the opinion of Judge Heaney, *In re Weitzman* advocates the recognition of conscience as the only justifiable basis for administration of the conscientious objector exemption, regardless of whether such beliefs have a religious or personal basis.

That severe problems have developed in applying the parallelism test in differentiating between religious beliefs and personal moral codes is apparent from the above discussion. The test does not define "religion" under the statute and the lower courts have been unable to understand the test sufficiently to develop standards which are predictable and capable of uniform application. For many the test has created more problems than it has solved. While it has permitted the courts to avoid the constitutional issues, the test's uncertainties demand greater clarification if they are to have a meaningful application in the area of conscientious objection. The statute in both the naturalization and selective service area should be revised by Congress or interpreted by the courts as permitting all who hold strong and conscientious beliefs to qualify, with no distinction between religious and non-religious beliefs. Such an approach complies with the original intention of the exemption—not to require men to act in violation of their conscience. While it may be difficult for the judiciary to evaluate the strength and sincerity of an applicant's beliefs, this task is no greater than that presently faced under the parallelism test. Any further expansion of this test would be futile, as any attempt to distinguish between religious beliefs and personal moral codes is doomed to failure. The conflict between the demands of government and one's convictions has historically been an area where adjudication is most difficult. However, with the collapse of distinctions based upon religion in other areas of the law and in view of the inadequacies and uncertainties of current standards, the formal recognition of non-religious conscientious exemption is desirable, if not required.

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