

10-1-1970

## Conscientious Objector - Welsh v. United States

Deborah Mailman

Follow this and additional works at: <https://archives.law.nccu.edu/ncclr>

 Part of the [Religion Law Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Mailman, Deborah (1970) "Conscientious Objector - Welsh v. United States," *North Carolina Central Law Review*: Vol. 2 : Iss. 2 , Article 8.

Available at: <https://archives.law.nccu.edu/ncclr/vol2/iss2/8>

This Note is brought to you for free and open access by History and Scholarship Digital Archives. It has been accepted for inclusion in North Carolina Central Law Review by an authorized editor of History and Scholarship Digital Archives. For more information, please contact [jbeeker@nccu.edu](mailto:jbeeker@nccu.edu).

## NOTE

### **Conscientious Objector—*Welsh v. United States***

Already well known as the “conscientious objector case,” *Welsh v. United States*<sup>1</sup> (June 14, 1970), reversed the conviction of Petitioner Elliott Ashton Welsh II for refusing to submit to induction into the Armed Forces. Welsh had been convicted by a District Court judge whose decision was affirmed by the Court of Appeals, 404 F.2d 1078 (1968). The appeals court had affirmed his conviction because it found no religious basis for his conscientious objector claim.

The statute which provides for exemption based on conscientious objection is found in the Universal Military Training and Service Act.<sup>2</sup>

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.

The petitioner had applied for a conscientious objector exemption but rather than sign the form statement “I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form,” he crossed out the words, “religious training and,” signing the statement without them. Also on the same application, he could not affirm any belief in a supreme being. There seemed to be no dispute as to the sincerity and depth of Welsh's conviction, and the only issue therefore became whether his areligious objection to war entitled him to an exemption from the armed forces under 50 U.S.C.A. App. 456(j); and/or if the statute would not grant him the exemption, would it then be in conflict with the establishment clause of the First Amendment.

The ruling of the court in a decision by Justice Black held that the statute did not exclude the conscientious objection of Welsh and that in spite of his own unwillingness to label his beliefs religious, he qualified for

---

<sup>1</sup> *Welsh v. United States*, 398 U.S. 333 (1970).

<sup>2</sup> Military Selective Service Act of 1967, 5 U.S.C.A. App. Sec. 456(j) (1968).

the conscientious objector exemption based on 50 U.S.C.A. App. 456(j). The decision by Black was written for a majority of four. They were joined in result by Justice Harlan whose concurring opinion made the argument that the statute should be declared unconstitutional for discriminating against those who do not hold conventional religious beliefs. The dissent by Justice White spoke for a minority of three.

At the beginning of the ruling, the court specifically ruled out passing on the constitutional question urged by the petitioner and declared instead that the reversal was based on the court's decision in *United States v. Seeger*.<sup>3</sup> In that case, Seeger had been denied a conscientious objector exemption because he would not say that his beliefs were in relation "to a Supreme Being." He asserted his skepticism in the existence of God, though he would not deny it, and except for his failure to tie his beliefs to a supreme being, his objection was found to be in good faith. The same constitutional question that was raised in *Welsh*, namely that the "Supreme Being" clause of the statute unconstitutionally discriminated between theistic and non-theistic (religious) beliefs, was raised but side-stepped in *Seeger*. There were four petitioning parties in that case, and of them only Seeger would not adhere to the existence of a god or gods. It was therefore made easy for the court to find an answer in a test for the definition of a supreme being and for the definition of religion. The main problem faced in defining these terms was to get around the words in the statute that "religious training and belief . . . does not include essentially political, sociological, or philosophical views or a merely personal moral code."

The court turned for its solution to the works of theologian Dr. Paul Tillich, the Bishop of Woolrich John A. T. Robinson, and Ethical Culturist Dr. David Saville Muzzey. Of Tillich the court quoted from the book *Systematic Theology*,

I have written of the God above the God of theism. . . . In such a state (of self-affirmation) the God of both religious and theological language disappears. But something remains, namely, the seriousness of that doubt in which meaning within meaninglessness is affirmed. The source of this affirmation of meaning within meaninglessness, of certitude within doubt, is not the God of traditional theism but the 'God above God' the power of being, which works through those who have no name for it, not even the name God.<sup>4</sup>

---

<sup>3</sup> *United States v. Seeger*, 380 U.S. 163 (1965).

<sup>4</sup> *Id.* at 180.

They also cite Robinson's book *Honest to God*, ". . . we are reaching the point at which the whole conception of a God 'out there,' which has served us so well since the collapse of the three-decker universe, is itself becoming more of a hindrance than a help."<sup>5</sup> And even more convincing is this quote from the book *Ethics as a Religion* by Dr. Muzzey,

everybody except the avowed atheists (and they are comparatively few) believes in some kind of God, . . . "Instead of positing a personal God," whose existence man can neither prove or disprove, the ethical concept is founded on human experience. It is anthropocentric, not theocentric. *Religion, for all the various definitions that have been given of it, must surely mean the devotion of man to the highest ideal that he can conceive* (italics added). And that ideal is a community of spirits in which the latent moral potentialities of men shall have been elicited by their reciprocal endeavors to cultivate the best in their fellow men. . . . Thus the 'God' that we love is not the figure on the great white throne, but the perfect pattern, envisioned by faith, of humanity as it should be, purged of the evil elements which retard its progress toward 'the knowledge, love and practice of the right.'<sup>6</sup>

In effect, the court in *Seeger* used these theoretical works to establish a standard for clarification of the religious requirement of section 6(j). In so doing the court was able to come to a conclusion which it felt justice demanded while avoiding a confrontation with the Constitution. The value of such a compromise is debatable as an issue, but it appears for the immediate present that the effect has been much the same. Any doubt that was left by the *Seeger* decision was eliminated in *Welsh*.

The *Welsh* court interpreted the *Seeger* decision as establishing the following test:

What is necessary under *Seeger* for a registrant's conscientious objection to all war to be 'religious' within 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 war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by . . . [G]od' in traditionally religious persons.

---

<sup>5</sup> *Id.* at 181.

<sup>6</sup> *Id.*, 183.

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 objection from traditional religious convictions.<sup>7</sup>

As to Welsh's own refusal to classify his beliefs as religious, the court made this curious distinction,

When a registrant states that his objections to war are 'religious' that information is highly relevant to the question of the function his beliefs have in his life. But very few registrants are fully aware of the broad scope of the word "religious" as used in 6 (j) and accordingly a registrant's statement that his beliefs are non-religious is a highly unreliable guide for those charged with administering the exemption.<sup>8</sup>

As far as the ends of justice are concerned, the *Welsh* decision is good. In order to make this decision, the Court relied on and even strengthened the operational definition of religious as laid out in *Seeger*. The impact of a decision made this way rather than by facing the constitutional question as is urged by Justice Harlan in his separate opinion is that the law of the case and the Court itself acquire an existential nature. In other words, the Court has said in effect—we will define religion operationally. As long as that definition holds, or as long as a majority of the court wish to accept that definition, these cases (*Seeger* and *Welsh*) shall be law.

From this, the *Welsh* case assumes its significance because it works to make the *Seeger* decision more permanent. But the *Seeger* decision was unanimous, while the *Welsh* case was a closer call. The possibility now exists that a conservative court—less erudite than that which quoted ethical culturism and less sensitive to the depth of feeling that an individual can have about war—will merely redefine "religious" in a traditional manner thereby erasing the substance of *Seeger-Welsh* law with ease.

This possibility seems to be the result of an overall politization of the Court in recent years. The secure feeling that the United States Supreme Court was the final, unquestioned authority of the law is disappearing. And the Court itself manifests this loss of imperishability in decisions like this one. Although the influence on the court of the Vietnam War, the increasing repression, and worsening domestic violence cannot be quantitatively measured, one cannot help but feel that these conditions have

---

<sup>7</sup> *Welsh v. U.S.*, *supra* 1796.

<sup>8</sup> *Id.*, 1797.

made the Court somewhat insecure; and that this insecurity has fostered a feeling of impermanence within the Court.

This sensation pervades the *Welsh* decision even though it is absent in most of the contemporary cases which have less substantive law at stake. The consequences in law of this feeling of transience are as yet indeterminable. One can only hope that the *Seeger* and *Welsh* cases will endure, and even more importantly—that the ends of fairness and justice that they serve will not be lost.

DEBORAH MAILMAN

# We'd like to complement you.

That's our business.

To provide you with those services that aid you in advising your clients about their trust and estate needs.

To serve you with the most sophisticated tools of investment management, the most thorough research and analysis.

To assist you in the organization and management of holdings, in that manner which best meets the individual needs of your client.

To offer you the efficiency of our specialized experience in unusual tax situations and the complexities of closely held family businesses.

We value our working relationship with hundreds of attorneys, and strive continually to expand and improve our ability to complement yours.

Whenever we can be of assistance in estate and trust matters, please call any Wachovia Trustman.

**Trust Division**  
**Wachovia Bank & Trust Company, N.A.**