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Conscientious Objectors - Definition of Religious Belief - A Belief Which Occupies a Place in the Life of Its Possessor Parallel to That Ordinarily Filled by an Orthodox Belief in God Is a Religious Belief

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is enough to take the devise out of the doctrine of worthier title.[23] Therefore, Jane B. Darling took not as heir, but as devisee. Since the title which was quieted in Mary Sander was derived from Jane B. Darling, the decision of this case included, by necessary inference, the first decision that a possibility of reverter was devisable in Colorado.[24]

Nothing pertaining to the devolution of a possibility of reverter would be gained by a further study of the chain of title. The first transfer, on June 4, 1930, required a holding that a possibility of reverter was inheritable in the ordinary manner in Colorado, and this was expressly stated by the court. The next transfer on May 20, 1950, necessarily involved a decision that a possibility of reverter was devisable in Colorado. The decision left unanswered the question as to whether a possibility of reverter could be conveyed by deed in Colorado, because there was no such transfer in this chain of title until November 5, 1962, after the estate had reverted.

*Thompson G. Marsh**

CONSCIENTIOUS OBJECTORS—DEFINITION OF RELIGIOUS BELIEF —A BELIEF WHICH OCCUPIES A PLACE IN THE LIFE OF ITS POSSESSOR PARALLEL TO THAT ORDINARILY FILLED BY AN ORTHODOX BELIEF IN GOD IS A RELIGIOUS BELIEF. *United States v. Seeger*, 85 Sup. Ct. 850 (1965).

Daniel Seeger claimed exemption from military service as a conscientious objector,[1] but left open the question as to his belief in a Supreme Being. He declared, however, that his agnostic philosophy did "not necessarily mean lack of faith in a purely ethical creed."[2] Although the government conceded that Seeger's abhor-

[23] Harper & Heckel, *supra* note 20 at 639-640.

[24] The applicable statute, COLO. STAT. ANNO. 1935, Ch. 176, § 36, said, " . . . shall have the power to . . . devise . . . any or all the estate, right, title and interest in possession, reversion or remainder . . . of, in and to any lands, tenements, heriditaments, annuities or rents charged upon or issuing out of them . . . . " COLO. REV. STAT. § 153-5-1 (1963) says, " . . . may devise . . . real . . . property or any interest therein . . . . "

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[1] 50 U.S.C. App. § 456(j) (1951): Seeger's claim was made under § 6(j) of the Universal Military Training and Service Act:

> Nothing contained in this title [§ § 451-454 and 455-471 of this Appendix] 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.

[2] 85 Sup. Ct. at 854.

rence of war was both sincere and predicated on "religious training and belief,"[3] the selective service board denied his claim solely on the grounds that it was not based upon a "belief in a relation to a Supreme Being" as required by § 6(j) of the Universal Military Training and Service Act.[4] Seeger was convicted in the District Court for the Southern District of New York of having refused to submit to induction in the armed forces.[5] The Court of Appeals for the Second Circuit reversed the conviction, holding that the Supreme Being requirement of the act violated the due process clause of the fifth amendment by creating an impermissible classification between internally derived and externally compelled "religious" beliefs.[6] The Supreme Court affirmed without reaching the constitutional issue, holding that "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."[7]

Religious objectors have been provided with some form of military exemption since 1775 when the First Continental Congress passed a resolution to exempt those who, because of their "religious principles," could not bear arms.[8] The Federal Conscription Law of 1863[9] contained no such exemption but one was included in the 1864 Draft Law.[10] The Draft Act of 1917[11] restricted exemption to members of "any well-recognized religious sect . . . whose existing creed or principles [forbade] . . . its members to participate in war in any form."[12] In 1940 Congress broadened the exemption significantly by including not only members of the historic peace churches but also individuals "who, by reason of religious training and belief" are opposed to war in any form.[13] The 1940 act was modified in 1948[14] to include within the definition of "religious training and belief" the requirement of "belief in a relation to a Supreme Being" with which the *Seeger* case deals.

Although the Court of Appeals decided *Seeger* on constitution-

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[3] United States v. Seeger, 326 F.2d 846, 847 (2d Cir. 1964).
[4] 85 Sup. Ct. at 854.
[5] United States v. Seeger, 216 F. Supp. 516 (S.D.N.Y. 1960).
[6] United States v. Seeger, 326 F.2d 846 (2d Cir. 1964).
[7] United States v. Seeger, 85 Sup. Ct. 850, 854 (1965).
[8] 2 JOURNALS OF THE CONTINENTAL CONGRESS 189 (1905).
[9] Act of March 3, 1863, ch. 75, § 2, 12 Stat. 731.
[10] Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 9. The exemption extended to conscientious objectors who were members of religious denominations prohibited from bearing arms by the articles of faith of their denominations.
[11] Act of May 18, 1917, ch. 15, § 4, 40 Stat. 76.
[12] *Id* 40 Stat. at 78.
[13] Selective Training and Service Act of 1940, ch. 720, § 5(g), 54 Stat. 889.
[14] 50 U.S.C. App. § 456(j) (1951).

al grounds,[15] the Supreme Court eschewed any constitutional determination.[16] Instead it chose to define the term "Supreme Being" as something other than the orthodox concept of God. This definition served to resolve a conflict between the Second and Ninth Circuits which existed between 1940 and 1948, and continued even after Congress attempted to settle it in the 1948 amendment.

The conflict had its origin in 1943 in the broad definition of "religious training and belief" supplied by Judge Augustus Hand in *United States v. Kauten*.[17] Hand said that "the provisions of the present statute [the 1940 act] . . . take into account the characteristics of a skeptical generation and make the existence of a conscientious scruple against war in any form, . . . the basis of exemp-

[15] 326 F.2d 846 (1965). The Court of Appeals had decided *Seeger* on the due process clause of the fifth amendment.

[16] The Supreme Court has thus far refused to consider the constitutionality of the "religious training and belief" and "Supreme Being" provisions. Etcheverry v. United States, 320 F.2d 873 (9th Cir.), *cert. denied*, 375 U.S. 930 (1963); Clark v. United States, 236 F.2d 13 (9th Cir.), *cert. denied*, 344 U.S. 843 (1952). However the Selective Draft Law Cases, 245 U.S. 366 (1917), held that an even narrower religious exemption (see notes 8 and 9 and accompanying text *supra*) did not violate the guarantee of the first amendment. Recent opinions of the Court contain language which indicates that there is at least some doubt as to whether the Court will uphold the Supreme Being test of § 456(j) against first amendment challenges when it chooses to decide the question. See Abington School Dist. v. Schempp, 374 U.S. 203, 217 (1962); Torcaso v. Watkins, 367 U.S. 488 (1961); McGowan v. Maryland, 366 U.S. 420, 442-43 (1961); McCollum v. Board of Educ., 333 U.S. 203, 210-11 (1948); Everson v. Board of Educ., 330 U.S. 1 (1946). These decisions can be read to indicate that restricting the conscientious objector draft exemption to those who are "religious" and also who believe in a "Supreme Being" would be unconstitutional as (1) aiding all religions, or believers as against non-believers; (2) aiding religions based on belief in the existence of God as against those religions founded on different beliefs, grounds seemingly contrary to the prohibitions of *Everson* and *Torcaso*. See Conklin, *Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins*, 51 GEO. L.J. 252 (1963).

[17] 133 F.2d 703 (2d Cir. 1943). However, it should be noted that the language concerning the definition of religion is no more than dictum, albeit persuasive since later cases have followed it. Kauten's appeal was turned down on procedural grounds. See 133 F.2d at 705-06.

tion."[18] He went on to say that religious belief under the act means "a compelling voice of conscience," or "a response of the individual to an inward mentor, call it conscience or God . . . ."[19] In a later Second Circuit decision, *United States ex. rel. Phillips v. Downer,*[20] absent the procedural infirmity which made the *Kauten* definition dictum, Judge Clark reaffirmed the language of *Kauten* that a "conscientious scruple against war in any form" is a sufficient basis for exemption.[21] In *United States ex. rel. Reel v. Badt,*[22] the Second Circuit again approved the *Kauten* language and held that opposition to war based on humanitarian considerations and not on any obligation to a deity or supernatural power was sufficient to entitle the registrant to a exemption.[23]

The Court of Appeals for the Ninth Circuit rejected the reasoning of the Second Circuit and set forth a second, and narrower, definition of "religion" in *Berman v. United States.*[24] The court said:

> the expression "by reason of religious training and belief" is plain language, and was written into the statute [the 1940 act] for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any wordly one.[25]

The court concluded that the registrant's "philosophy and morals and social policy without the concept of deity" does not qualify as "religion" under § 5(g).[26] Religion, according to *Berman,* is "belief in relation to God involving duties superior to those arising

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[18] *Id.* at 708.

[19] *Ibid.*

[20] 135 F.2d 521 (2d Cir. 1943).

[21] *Id.* at 524. At the same time, Judge Clark warned that if a stricter rule than was announced in the *Kauten* case is called for, one demanding a belief which cannot be found among the philosophers, but only among religious teachers of recognized organizations, then we are substantially or nearly back to the requirement of the Act of 1917.

[22] 141 F.2d 845 (2d Cir. 1944). Mr. Justice Frankfurter also quoted the *Kauten* language with approval in a dissenting opinion in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 658 (1943).

[23] 141 F.2d at 847.

[24] 156 F.2d 377 (9th Cir.), *cert. denied,* 329 U.S. 795 (1946). It is interesting to note that the same procedural circumstances were present in *Berman* that were present in *Kauten* but the United States Supreme Court, in Falbo v. United States, 320 U.S. 549 (1944), had since decided that they did not prevent the registrant from questioning the decision of the local draft and appeal boards application of the "religious training and belief" requirement.

[25] 156 F.2d at 380.

[26] *Id.* at 381.

from any human relation,"[27] while in *Kauten, Downer,* and *Badt,* a conscientious scruple against war, not necessarily based on any obligation to a deity, qualifies as "religion."

Congress apparently resolved the resultant dichotomy in 1948[28] when it amended the 1940 Selective Training and Service Act. Congress not only adopted the language from the *Berman* case nearly word-for-word,[29] but also expressly cited *Berman.*[30] The Court of Appeals for the Third Circuit accordingly held that an agnostic could not be granted an exemption because his objections could not be based on belief in a relation to a Supreme Being.[31] However, in *United States v. Jakobson,*[32] the Second Circuit said that the Supreme Being clause must be liberally interpreted to avoid constitutional difficulties and continued to substantially follow its pre-1948 views defining religion broadly.[33] Despite the efforts of Congress, the disparity in the definition of religion had been judicially perpetuated. It was in this atmosphere that the Supreme Court decided the *Seeger* case.

In *Seeger,* the Supreme Court purported to construe the words of Congress in order to reach the conclusion that the "legislative intent," as manifested in the language of the act, was to adopt a broad definition of "religion" analogous to that applied in *Kauten.* The Court determined that when Congress added the Supreme Being qualification to the 1940 act it did so only to clarify its original intent.[34] According to the Court, the intent which Congress felt obliged to clarify was not who *was* entitled to military exemption under the statute, but rather who *was not* so entitled.[35] The Court then concluded that the requirement of belief in a relation

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[27] *Id.* at 381, quoting the language of Mr. Justice Hughes in his dissent in United States v. Macintosh, 283 U.S. 605, 633 (1931).

[28] 62 Stat. 612 (1948), 50 U.S.C. App. § 456(j) (1958).

[29] The language of § 456(j) declares that "religious training and belief" is to be defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation . . . ." This language differs in only one particular from that in *Berman,* 156 F.2d at 381, which in turn had been quoted from United States v. Macintosh, 283 U.S. 605 (1931). The statute contains the words "Supreme Being" in place of the word "God" which appears in *Berman* and *Macintosh.*

[30] S. REP. No. 1268, 80th Cong., 2d Sess. 14 (1948): "This exemption [§ 456(j)] extends to anyone who, because of religious training and belief in his relation to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and non-combatant military service. (See United States v. Berman, 156 F.2d 377, *certiorari denied,* 329 U.S. 795.)"

[31] United States v. De Lime, 233 F.2d 96 (3d Cir. 1955).

[32] 325 F.2d 409 (2d Cir. 1963). *Jakobson,* as well as Peter v. United States, 324 F.2d 173 (9th Cir. 1964), was decided by the Supreme Court as a companion case to *Seeger.*

[33] *Id.* at 413-14.

[34] 85 Sup. Ct. at 861.

[35] *Id.* at 860.

to a Supreme Being was not a restrictive test and a conscientious objector could qualify for exemption even though he could *not* avow a belief in a Supreme Being.[36] Consequently, the Supreme Being requirement which caused Seeger's draft board to refuse him an exemption[37] was judicially interpreted out of existence. It seems to be stretching logic to conclude that Congress intended an amendment to clear up an area where there was no disagreement[38]

[36] *Id.* at 854.
[37] 326 F.2d 846, 847 (2d Cir. 1964).
[38] See, *e.g.*, Berman v. United States, 156 F.2d 377 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946); United States v. Kauten, 133 F.2d 703 (2d Cir. 1943). The decisions agreed that exemption must be denied to those whose beliefs were political, social, or philosophical in nature.

and intended to ignore an area where there was a great deal of conflict.[39]

In searching for the proper congressional intent to enable it to avoid the constitutional issues, the Court decided that Congress did not intend to solve any conflict between *Berman* and *Kauten* because "if it [Congress] thought that two clashing interpretations as to what amounted to 'religious belief' had to be resolved, it would have said so somewhere in its deliberations."[40] The Court minimized the fact that Congress in the 1948 amendment used, almost word-for-word,[41] language from the *Berman* opinion.[42] Neither was the Court influenced by the Government's argument that since Congress cited *Berman* in the Senate Report[43] Congress intended to adopt the *Berman* definition of religion. The Court avoided that construction by saying that the citation was for a different purpose: to reaffirm what was not, rather than what was, a sufficient "religious belief" to qualify for exemption.[44] This conclusion, however, is of doubtful validity when the citation is considered in the context in which it was made.[45] The Court also attempted to minimize the import of the citation by saying a mere "parenthetical citation of a case which might stand for a number of things"[46] is outweighed by the "explicit statement of congressional intent"[47] that, "this section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 act."[48]

Perhaps the most intellectually honest basis for the decision was expounded by Justice Douglas in his concurring opinion in which he said the case was just another instance "where we have gone to extremes to construe an Act of Congress to save it from demise on constitutional grounds."[49] It would be accurate to say that rather than finding what Congress's intent *was,* the Court found what Congress's intent *should have been.*

The test established by the Court in *Seeger* directs the local

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[39] *I.e.,* the *Berman - Kauten* conflict as to the definitions of "religion".
[40] 85 Sup. Ct. at 860.
[41] See *supra* note 29.
[42] 85 Sup. Ct. at 859. The court did this by saying that the language used came originally from United States v. Macintosh, 283 U.S. 605 (1931), an earlier opinion by Mr. Chief Justice Hughes which the Court pointed out "supports our interpretation." 85 Sup. Ct. at 860.
[43] S. REP. No. 1268, 80th Cong., 2d Sess. 14 (1948).
[44] 85 Sup. Ct. at 860.
[45] *Supra* note 30.
[46] 85 Sup. Ct. at 859.
[47] *Ibid.*
[48] 85 Sup. Ct. at 857, quoting from S. REP. No. 1268, 80th Cong., 2d Sess. 14 (1948).
[49] 85 Sup. Ct. at 865. See Ullman v. United States, 350 U.S. 422, 433 (1956); United States v. Rumely, 345 U.S. 41, 47 (1953); Ashwander v. TVA, 297 U.S. 288, 341, 348 (1936); Crowell v. Benson, 285 U.S. 22, 62 (1932).

draft boards and courts to "decide whether the beliefs professed by a registrant are [1] sincerely held and [2] whether they are, in his own scheme of things, religious."[50] A belief is "religious" when it "occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption . . . ."[51] These beliefs may be either externally or internally derived.[52] The Court also gave approval to the portion of the act which says that objection cannot be based on a "merely personal moral code,"[53] although its application may be limited by the Court's statement that there can be no distinction "between externally and internally derived beliefs."[54]

In spite of the broad interpretation the Supreme Court has given § 456(j), two things are apparent. First, the Court is still faced with the potential issue of whether § 456(j) violates the establishment clause of the first amendment, but that question can be properly raised only by an atheist.[55] If the statute is held to be unconstitutional on that ground, Congress will have to draft another exemption and avoid conditioning it on "religious beliefs." Failure to provide *any* exemption could in turn be challenged as a violation of the first amendment right to the free exercise of religion. Second, those who must administer the act — the draft boards and the courts — still must make two difficult determinations from rather nebulous standards: (1) Is the applicant sincere? (2) Are the applicant's objections based on a "religious belief" as defined in *Seeger*? While the Court's decision in *Seeger* broadened the definition of "religion," it certainly did not make the standards for exemption any clearer. Resolution of both the constitutional and administrative problems presented by § 6(j) of the Universal Military Training and Service Act could be realized if Congress would grant a military service exemption to all those persons who sincerely object to participation in war in any form. After *Seeger*, the next step in the evolution of the conscientious objector exemption should be taken by the Legislature. However, it is doubtful that Congress will choose to act.[56]

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[50] 85 Sup. Ct. at 863.
[51] *Id.* at 859.
[52] *Id.* at 864.
[53] *Ibid.*
[54] *Ibid.*
[55] 85 Sup. Ct. at 858.
[56] The American Civil Liberties Union urged a somewhat similar non-religious exemption in 1940 which was rejected by Congress. *Hearings on S. 4164 Before the Senate Committee on Military Affairs*, 76th Cong., 3d Sess. at 308 (1949).