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Conscientious Objectors - A Test of Sincerity. *Welsh v. United States*, 90 S. Ct. 1792 (1970)

Peter M. Desler

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same rights to "seamen" heretofore bereft of an unseaworthiness claim within state waters.³⁰ The Court advocates, without explicitly holding, exclusive use of maritime remedies and duties of care, thereby precluding the necessity of accommodating maritime law with state remedial statutes.³¹

In spite of the sweeping authority of *Moragne*, maritime law must still live with the effects of piecemeal legislation. While all voids are filled, litigation remains unduly complicated by the need to search various authorities to determine the most beneficial award.³² Congress should respond by extending the coverage of the Death on the High Seas Act—applicable to "any person"—from *beyond* the three-mile limit up to the shoreline.³³

LAWRENCE J. LIPKA

Armed Services—CONSCIENTIOUS OBJECTORS—A TEST OF SINCERITY.
Welsh v. United States, 90 S. Ct. 1792 (1970).

In 1966, Elliot A. Welsh, II, claimed exemption from military service as a conscientious objector.¹ His claim was denied. Upon refusal to submit to induction into the armed forces, he was convicted of violating the Universal Military Training and Service Act.² The Court of Appeals for the Ninth Circuit affirmed his conviction.³ In *Welsh v. United States*,⁴ the Supreme Court reviewed its previous decision in *United States v.*

30. See note 28 *supra*.

31. 90 S. Ct. 1791-92 (1970).

32. The *Moragne* Court refrained from spelling out the elements of the new cause of action under general maritime law. Certain technical aspects such as the statute of limitation and the list of beneficiaries who can assert the claim can be determined by analogy to existing federal maritime statutes.

Moragne should have expressly overruled *Tungus* by declaring that state statutes, if used, should only provide a remedy and not state substantive duties. But this was not done. Conceivably, therefore, one beneficiary claiming for wrongful death under general maritime law, might assert his right by analogy to existing federal maritime statutes, while another might assert his claim by analogy to state statutes using the state statutory list of survivors and standards of care.

33. A bill has been introduced in the United States Senate which would, among other things, extend the Death on the High Seas Act to include deaths in state territorial waters. To date no hearings have been scheduled or other action taken on the bill. S. 3143, 91st Cong., 1st Sess. §§ 2, 9 (1969), reprinted in 115 CONG. REC. S 14,355 (daily ed. Nov. 14, 1969).

1. Universal Military Training and Service Act, 50 U.S.C. APP. § 456(j) (1964).

2. 50 U.S.C. APP. § 462 (1964).

3. *Welsh v. United States*, 404 F.2d 1078 (9th Cir. 1968).

4. 90 S. Ct. 1792 (1970).

Seeger.⁵ Reversing Welsh's conviction, the Court held that "[i]f an individual deeply and sincerely holds beliefs which are purely ethical or moral in source and content but which nevertheless impose upon him duty of conscience to refrain from participating in any war at any time . . ." he is entitled under the Military Selective Service Act of 1967⁶ to a conscientious objector exemption.⁷

Religious objectors have been provided with some form of conscription exemption since 1775 when the First Continental Congress unanimously passed a resolution exempting those who, because of "religious" principles, could not lend themselves to the war effort.⁸ The Draft Act of 1917⁹ expressly exempted those of "any well recognized sect . . . whose existing creed or principles [forbade] . . . its members to participate in war in any form."¹⁰ In 1940, Congress included in the exemption not only members of the accepted peace churches, but also individuals "who, by reason of religious training and belief," are opposed to war in any form.¹¹

After the passage of this legislation, the Second Circuit granted conscientious objector exemptions to those who were opposed to war not on any basis of a religious obligation to a deity but solely on humanitarian grounds.¹² But the Ninth Circuit applied a more stringent definition to the word "religion," and refused exemption in the absence of an express "belief in God, involving duties superior to those arising from a human relation."¹³ The resultant dichotomy of the circuits prompted Congress to attempt a resolution of the problem.¹⁴ Thus in 1948, the

5. 380 U.S. 163 (1965).

6. Military Selective Service Act of 1967, § 7, 81 Stat. 100, 104, 50 U.S.C. APP. § 456(j) (Supp. 1968).

7. 90 S. Ct. at 1796.

8. 2 JOURNALS OF THE CONTINENTAL CONGRESS 189 (1905). Although the Federal Conscription Law of 1863, 12 Stat. 731, contained no such exemption, it reappeared in the Conscription Law of 1864, ch. 13, § 17, 13 Stat. 6, 9.

9. Act of May 18, 1917, ch. 15, § 4, 40 Stat. 76.

10. 40 Stat. 78.

11. Selective Training and Service Act of 1940, ch. 720, § 5(g), 54 Stat. 889. Until this time, the exemption was limited to members of religious denominations specifically prohibited by their respective articles of faith from bearing arms.

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

13. Berman v. United States, 156 F.2d 377, 380 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946).

14. The Second Circuit was holding that a conscientious belief against war, not necessarily based on any obligation to a deity, qualified as a religion, while the Ninth Circuit had concluded that the petitioner's philosophy, morals, and social policy

Selective Training and Service Act of 1940 was amended to provide that conscientious objector exemptions were to be granted only when the petitioner's religious convictions were based on belief in a Supreme Being.¹⁵

In 1963, the Second Circuit avoided determining the constitutional validity of this amendment by reverting to its pre-1948 definition of "religion" in granting exemption to an agnostic.¹⁶ The Supreme Court, in a similar interpretation of the "religion" test in *United States v. Seeger*,¹⁷ held that as long as the objector's belief was neither insincere nor accompanied by a disavowal of all conventional beliefs he was entitled to an exemption. The test was apparently one of sincerity and nothing more; belief in a Supreme Being was not required.¹⁸

While *Seeger* took the monumental step of declaring that a conventional "religious" belief was no longer required,¹⁹ *Welsh* went one step further in allowing exemption to a party who expressly denied that his beliefs were religious. While logically this is but a natural extension of the *Seeger* doctrine, it does make it clear that courts are not conforming to the legislative intent, and that standards for determining conscientious objector status have become ultimately subjective.²⁰ While the Court has not expressly discarded the "religion" test, by holding that sincere and

without the concept of a deity did not qualify as "religion" under section 5(g). See cases cited in notes 12 and 13 *supra*.

15. Selective Service Act of 1948, § 6(j), 62 Stat. 604, 612, 50 U.S.C. APP. § 456(j) (1964).

16. *United States v. Jakobson*, 325 F.2d 409 (2d Cir. 1963). Had the court chosen to hear the constitutional issue, it would have had to determine if the statutory requirement of a belief in a Supreme Being is consistent with the First Amendment's free exercise clause in exempting members of certain religions advocating belief in a God while members of non-theistic religions (Buddhism, Taoism) would be refused consideration as conscientious objectors.

17. 380 U.S. 163 (1965).

18. See generally *United States v. Stolberg*, 346 F.2d 363 (7th Cir. 1965) where petitioner was granted conscientious objector status despite his non-belief in a Supreme Being, not believing in any after-life, and nonaffiliation with any established, or even known, religious sect. See also *United States v. Owen*, 415 F.2d 383 (8th Cir. 1969); *Bishop v. United States*, 412 F.2d 1064 (9th Cir. 1969); *United States v. Persall*, 302 F. Supp. 217 (N.D. Ala. 1969); *United States v. Naves*, 304 F. Supp. 230 (D. Colo. 1969).

19. For a sound treatment of the events and history leading to the landmark *Seeger* decision, see Rabin, *When is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise*, 51 CORNELL L.Q. 231 (1966); Comment, *Conscientious Objectors—The New "Parallel Belief" Test—United States v. Seeger*, 14 CATHOLIC U. OF AM. L. REV. 238 (1965).

20. See *The Supreme Court, 1952 Term*, 79 HARV. L. REV. 113, 116 (1965) for an excellent discussion of the unworkability of the *Seeger* standards.

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, the test has become unworkable.²¹ The present effect is clearly not what the framers of the Universal Military Training and Service Act envisioned.

PETER M. DESLER

Evidence—DOCUMENTARY EVIDENCE—THE RIGHT OF CONFRONTATION. *Robertson v. Commonwealth*, 211 Va. 62, 175 S.E.2d 260 (1970).

The defendant was found guilty of the rape of two girls, ages nine and eleven. His conviction was based on the testimony of the girls and the results of laboratory tests performed on vaginal specimens taken from the victims. A copy of the laboratory report was admitted into evidence under the authority of section 19.1-45 of the Virginia Code.¹

The defendant on appeal contended that the admission of the laboratory report into evidence violated his constitutional right to cross-examination of witnesses,² but the Supreme Court of Appeals of Virginia affirmed the conviction.³ The court construed the Code section as permitting investigation reports by the Chief Medical Examiner, which were not related to post-mortem examinations, to be prima facie evidence of the facts stated therein, and held that the Chief Medical

21. So unmanageable has this determination become that the *Welsh* court stated that if petitioner classifies his beliefs as "religious" this is to be given "great weight," while if he characterizes his views as not religious "this is a highly unreliable guide for those charged with administering the exemption." 90 S. Ct. at 1797.

1. VA. CODE ANN. § 19.1-45 (Repl. Vol. 1960):

Reports and Records Received As Evidence.—Reports of investigations made by the Chief Medical Examiner or his assistants or by medical examiners, and the records and reports of autopsies made under the authority of this chapter, shall be received as evidence in any court or other proceeding, and copies of records, photographs, laboratory findings, and records in the office of the Chief Medical Examiner or any medical examiner . . . shall be received as evidence in any court or other proceeding for any purpose for which the original could be received without any proof of the official character or the person whose name is signed thereto.

2. U.S. CONST. amend VI; VA. CONST. art. I, § 8. The Sixth Amendment right of confrontation derives from the English common-law right which developed as a reaction against the use of affidavits in the trial of Sir Walter Raleigh. Note, *Confrontation, Cross-Examination, and the Right To Prepare A Defense*, 56 GEO. L.J. REV. 939, 957 n.136 (1968).

3. *Robertson v. Commonwealth*, 211 Va. 62, 175 S.E.2d 260 (1970).