Conscientious Objectors, the Supreme Court and United States v. Seeger:

How the Definition of Conscientious Objection Evolved in the Eyes of the Court

Claire Marblestone

Senior Honors Thesis

March 21, 2008

The First Amendment to the Constitution says, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."[1] These provisions, known as the Establishment and Free Exercise clauses, form the foundation of the separation of church and state doctrine. Despite this fundamental doctrine, when it comes to national defense, people with religious scruples have received special treatment as conscientious objectors to military service. Federal legislation and judicial interpretation have altered the definition throughout the years, but a conscientious objector is generally defined as someone whose religious beliefs prohibit him or her from participating in the waging of war.[2]

Conscientious objection is one area where church and state interests intersect. Understanding this dynamic provides insight into how First Amendment issues are balanced in United States government. In the twentieth century, the Supreme Court began addressing the issue of conscientious objection to military service. During World War I, the Court declared military conscription constitutional, which granted the federal government significant power to raise a national army. Although there were conscientious objectors in WWI, the first Supreme Court cases dealing with the issue was a series of cases involving naturalization during the 1930s. Applicants for citizenship who were conscientiously opposed to pledging the oath of citizenship were gradually acknowledged by the Court. The Universal Military Training Act during World War II was the first instance in which conscientious objectors who were not members of Historic Peace Churches were granted exemption from military service. Conscientious objection came to the forefront again in the early 1960s as the United States' involvement in the Vietnam War grew.

---

[1] United States Constitution, Amendment 1.

[2] Mulford Q. Sibley, and Philip E. Jacob, *Conscription of Conscience: The American State and the Conscientious Objector, 1940-1947* (Ithaca, New York: Cornell University Press, 1952), 1.

In the 1965 case, *United States v. Seeger*, the Supreme Court removed restrictions for conscientious objector requirements, which seemingly expanded the number of people who could qualify for exemption. The plaintiffs argued that the Universal Military Training and Service Act of 1948 included exemptions for conscientious objectors which violated the Free Exercise clause of the First Amendment by not exempting non religious objectors. Additionally, the plaintiffs maintained that the Act discriminated between different forms of religious expression, which violated the Fifth Amendment.[3] Rather than ruling on these constitutional questions, the Court chose to interpret the intent of Congress in creating the Act. The Court created the "*Seeger* test" which sought to determine if an applicant qualified as a conscientious objector. In choosing to decide *Seeger* this way, the Court found a way to evade the First and Fifth Amendment issues presented by the plaintiffs.

The *Seeger* decision represented a continuation of the Court's history of ruling on limited issues in conscientious objector cases. Additionally, the Warren Court adhered to precedent of earlier Courts and avoided addressing First and Fifth Amendment questions in conscientious objector cases. The social and political climate of the 1960s set the stage for the Court to issue a significant constitutional decision in *Seeger*, but instead the Court chose to keep with existing precedent and rule on limited issues. Concern over the escalating war in Vietnam, outside political forces, and internal factors caused the Court to skirt the constitutional questions of *Seeger*, thereby leaving the conscientious objector issue largely unresolved.

There are three basic constitutional questions with conscientious objection which will be briefly outlined here and explained further later. The first question is: Does conscientious objection from military service establish a "national religion" in violation of the Establishment

[3] *United States v. Seeger* 380 U.S. 164 (1965), 165.

Clause?[4] If members of certain religious denominations are granted privileges based on their religious beliefs, Congress favors particular religious beliefs over others, which violates the Establishment Clause. This leads to the second question which is: Has the government arbitrarily made a distinction between people based on religion, thereby violating the due process clause of the Fifth Amendment?[5] If the government arbitrarily makes a distinction between people based on religion, then the government violates the due process clause by depriving people of their right to life, liberty, and property. The final question is: Does Congress violate the Free Exercise Clause of the First Amendment if conscientious objectors are not allowed exemption from military service?[6] The First Amendment guarantees the right of conscientious objectors to freely practice their religious beliefs. If participation in military service violates one's religious beliefs, and Congress requires all religiously devout people to participate in the military, religious believers are prohibited from freely practicing their religion.

The majority of scholarly work on conscientious objection adopts a sympathetic attitude towards the subject. Conscientious objectors are studied by a variety of groups including religious followers, military experts, historians, and legal scholars. This paper will focus on the historical and legal literature on the subject. In *Conscience in America: A Documentary History of Conscientious Objection in America* Lillian Schlissel surveyed the long history of conscientious objection through a composition of primary sources, and traced the development throughout American history.[7] Stephen Kohn wrote extensively about conscientious objection,

---

[4] The Establishment Clause the section of the Constitution which reads, "Congress shall make no law respecting an establishment of religion…" United States Constitution, Amendment 1.

[5] The Due Process Clause the section of the Constitution which reads, "[No person shall]. . .be deprived of life, liberty, or property, without due process of law. . ." United States Constitution, Amendment 5.

[6] The Free Exercise Clause is the second half of the First Amendment after the Establishment clause in the Constitution which reads, "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof. . ." United States Constitution, Amendment 1.

[7] Lillian Schlissel, *Conscience in America: A Documentary History of Conscientious Objection in America, 1757-1967* (New York: E.P. Dutton & Co. Inc., 1968).

and greatly sympathized with draft law violators who were imprisoned for refusing to renounce their beliefs and participate in military service.[8] Ronald B. Flowers work on cases of conscientious objection to the naturalization oath during the 1930's also portrays the objectors in a positive light.[9]

Following a Supreme Court decision affecting conscientious objectors, law professors and legal historians publish articles analyzing how the case impacts conscientious objector's legal status. While no one legal scholar in particular has emerged as an expert on the subject, certain articles are referenced more than others. Forest Revere Black's article criticizing judicial activism in the *Selective Draft Law Cases* is frequently referred to as one of the first major critiques of the Court on this case.[10] Harrop A. Freeman built on Black's argument, and published many articles denouncing the Constitutionality of conscription during peacetime. Freeman also traced the historical roots of conscientious objectors to the writing of the Constitution and advocated their continued protection under the law.[11] Rodric B. Schoen's discussion of the Supreme Court's treatment of Vietnam cases is an outstanding analysis of this period of the Court's history, and demonstrates how the Court intentionally evaded the issue.[12]

While there is a wealth of literature about conscientious objectors, much of the legal scholarship on the issue has been written immediately following a Supreme Court decision. Additionally, scholars like Lucas A. Powe and Alexander M. Bickel who wrote generally about

---

[8] See Stephen M. Kohn, *Jailed for Peace: The History of American Draft Law Violators, 1658-1985* (Westport, Connecticut: Greenwood Press, 1986), and Fredrick L. Brown, Stephen M. Kohn, and Michael D. Kohn, "Conscientious Objection: A Constitutional Right," *New England Law Review* 21 (1986): 545-569.

[9] Ronald B. Flowers, *To Defend the Constitution* (Lanham, Maryland: The Scarecrow Press Inc, 2003), and Ronald B. Flowers, "Government Accommodation of Religious-Based Conscientious Objection," *Seton Hall Law Review* 24 (1993) 695-735.

[10] Forrest Revere Black, "The Selective Draft Cases-A Judicial Milepost on the road to Absolutism," *Boston University Law Review* 37 (1931): 37-53.

[11] Harrop A. Freeman, "The Constitutionality of Peacetime Conscription," *Virginia Law Review* 31 (1944): 40-82, and Harrop A. Freeman, "A Remonstrance for Conscience," *University of Pennsylvania Law Review* 106 (1958): 806-830.

[12] Rodric B. Schoen, "A Strange Silence: Vietnam and the Supreme Court," *Washburn Law Review* 33 (1994): 275- 322.

the Supreme Court, survey a wide variety of cases rather than focusing on the Court's treatment of one subject.[13] This paper seeks to combine the legal scholarship on conscientious objectors with a historical perspective on the Court. By incorporating an analysis of the Court over time as well as contextualizing the cases with an historical framework, this paper will contribute a different perspective to the current literature.

How the Supreme Court Works

The Supreme Court interprets the Constitution as it applies to State and Federal laws, reviews appellate cases, and sets binding precedent for lower courts. The United States judiciary is composed of Federal Courts, U.S. Courts of Appeal, and the Supreme Court. Cases involving federal questions and constitutional issues are initially tried in federal district courts. If parties are unsatisfied with the district court's decision, they can appeal to the U.S. Court of Appeal. If not satisfied with the ruling in the Court of Appeals, the parties may request review in the Supreme Court by filing a writ of certiorari, which asks the Court to exercise appellate review of the case.[14] Although many cases are appealed to the Supreme Court, only a handful of cases are granted review. Each Justice on the Court traditionally employs a few law clerks who sort through the hundreds of cases applying for review. Supreme Court clerkship is an incredibly prestigious position, and since they review incoming cases, recent scholarship has granted increasing significance to the Supreme Court law clerk.[15] If the Court denies the case, the lower courts' ruling stands.

---

[13] Lucas A Powe Jr., *The Warren Court and American Politics* (Cambridge: The Belknap Press of Harvard University Press, 2000) and Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merril, 1962).

[14] T.R. Van Geel, *Understanding Supreme Court Opinions*. 5th ed. (New York: Pearson Education Inc., 2007), 9-10.

[15] Bernard Schwartz, *Decision: How the Supreme Court Decides Cases* (New York: Oxford University Press, 1996), 48-60.

When the Supreme Court grants certiorari in a case, both sides submit briefs to the court. Additionally, parties not involved in the cases can submit amicus curiae briefs. These briefs are submitted by parties who believe that the Court's decision will affect their interest.[16] The Supreme Court hears oral arguments from October through April. At the hearing, both parties are given thirty minutes to present their case before the nine Justices. After oral argument, the Justices discuss the case in conference, which is traditionally held on Fridays. The Justices hold a preliminary vote on the case, which loosely determines where the Justices stand. If the Chief Justice sides with a majority of Justices, he decides who will write the majority opinion. The Chief Justice can assign the opinion to himself, but if he chooses not to write it, the next senior Justice siding with the majority is usually assigned to the opinion.[17]

Once assigned, the draft of the opinion goes through an extensive review process. The opinion of the Court must be agreeable to all nine Justices. Each draft is circulated among the Justices for suggestions and corrections.[18] A majority opinion is one on which five or more Justices agree. When a Justice disagrees with the opinion of the Court, they can write a dissent explaining the reasoning behind their opinion.[19] Although dissents have no legal authority and do not establish precedent, the arguments of dissenting opinions are not completely disregarded.[20] If a Justice agrees with the outcome of a majority or dissenting opinion, but finds different reasons for supporting the outcome, he or she can write a concurring opinion. Concurring opinions offer different legal reasoning for a particular decision. A case can still be considered a "unanimous decision" even if there are one or more concurrence. A case where the Court reaches a

---

[16] William H. Rehnquist, *The Supreme Court: How It was, How It Is* (New York: Morrow, 1987), 89.
[17] Van Geel, 11-12.
[18] *Ibid*, 40.
[19] *Ibid*, 11-12.
[20] In the *Seeger* case the Court quoted from Justice Holmes's dissent in *United States v. Macintosh* in order to support the majority opinion. See *United States v. Seeger*, 169, 173, 176 and 178.

unanimous decision is considered to have more weight than cases with a split decision because it suggests the unity of the Court on a particular subject.[21]

Conscience and the Constitution

The origins of conscientious objection in America can be traced back to the ratification of the Constitution. James Madison proposed a series of Amendments to the draft of the Constitution which ultimately became the Bill of Rights. Included in Madison's proposals was an amendment which read, "No religion shall be established by law, nor shall the equal rights of conscience be infringed."[22] Before going to the Senate for approval, the final House version of the amendment read, "Congress shall pass no law establishing a religion or to prevent the free exercise of, or to infringe upon the rights of consciousness."[23] In the Senate, the provision protecting rights of conscience was cut from the amendment, and the final version agreed upon by both houses was the beginning phrases of the First Amendment.[24] At the time, the delegates referred to "rights of conscience" and conscientious objection as one of the same.[25] Throughout the debates, the delegates expressed a desire to protect religious peoples' beliefs, and did so by including "rights of conscience" in the amendments.

Although conscientious objection was not included in the final draft of the Bill of Rights, the proposition to include this clause revealed the importance of conscientious objection to the Founding Fathers. Religious freedom from government oppression was one of the reasons the

---

[21] Van Geel, 12.

[22] John Witte Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties* (Boulder, Colorado: Westview Press: 2000), 66. As quoted from the *Annals of Congress* from the First Session of the United States Congress of 1789, vol. 1 cols. 451, 452.

[23] *Ibid*, 70. As quoted from the *Annals of Congress* from the First Session of the United States Congress of 1789, vol. 1 col. 796.

[24] *Ibid*, 71-72.

[25] In the House of Representatives Journal, when discussing the rights of consciousness, one representative noted, "The rights of conscience may be violated as there is no exemption of those persons who are conscientiously scrupulous of bearing arms." As quoted in Bernard Schwartz, *The Bill of Rights: A Documentary History Vol 2*(New York: Chelsea House Publishers: 1971), 1107.

colonists came to America and the Framer's attempt to preserve this freedom was consistent with the country's historical tradition. If the provision had been included in the First Amendment, conscientious objection would certainly have taken a different path. The Congressional record on debates over the Constitution prove that the Framers intended to acknowledge the conscientious objectors' obligation to a power higher than the State by protecting rights of conscience.

World War I and the Selective Draft Law Cases

World War I was the first global war in which all the major powers of the world participated. In 1916, President Woodrow Wilson won re-election on an isolationist platform with the help of isolationists and pacifists. However, when German submarines attacked U.S. battleships Wilson called for war against the Germans. On April 6, 1917 Congress declared war on Germany, and the United States entered into WWI.[26]

On May 18, 1917, Congress enacted the first federal military conscription act. The act required all men between the ages of twenty one and thirty to register with local draft boards. Congress granted President Wilson the authority to draft men for military service, who would remain in service until Wilson deemed their services no longer necessary. Local draft boards were set up to administer the act and register draftees. The act allowed those who were physically incapable of fighting exemption from military service.[27] Those who belonged to the historic peace churches of the Mennonites, Church of the Brethren, and Society of Friends (Quakers), whose religious beliefs prohibited them from participating in military conflict were granted conscientious objector status and exempted from military service. Conscientious objectors were assigned to noncombatant service, but Congress waited until May of 1918 to decide what the service would entail. As a result, 20,000 conscientious objectors were sent to

[26] Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* (New York: WW Norton & Company, 1979), 60-61.

[27] Selective Service Act of May 18, 1917, 40 Stat. 76

military controlled camps during the first year of WWI, but not assigned civilian duties until one year later.[28]

Enthusiasm for WWI was palpable during initial stages of the war. President Wilson initiated a large scale propaganda campaign which south to increase the support for American intervention in the war.[29] However, there was a small yet strong pacifist movement which opposed American participation in the war. Roger Nash Baldwin was a member of American Union Against Militarism (AUAM), and was a well known opponent of the war.[30] When Wilson decided to enter the war, many members of the AUAM felt betrayed by Wilson's isolationist campaign promises, and yearned to adopt a more activist stance against the war. Baldwin was committed to protecting individual freedom from the government. He emphasized the importance of providing legal aid for conscientious objectors and challenging the constitutionality of military conscription. Under this pretext, Baldwin formed the Civil Liberties Bureau in July of 1917, which is now the American Civil Liberties Union.[31]

The Civil Liberties Bureau helped in consolidating the first constitutional challenge to the Selective Draft Law. In December of 1917, the federal cases of *Jones v. Perkins*, *Goldman v. United States*, *Kramer v. United States*, and *Ruthenberg v. United States* were unified and brought before the Supreme Court.[32] The plaintiffs in these federal cases were convicted of failing to register for the Selective Service, and collectively challenged the constitutionality of the Selective Draft Law of 1917. The plaintiffs argued that by exempting members of Historic Peace Churches, the act violated the Establishment Clause of the First Amendment. Since the

---

[28] David M. Kennedy, *Over Here: The First World War and American Society* (New York: Oxford University Press, 1980), 163-164.
[29] *Ibid*, 49-59, 143.
[30] Murphy, 60.
[31] *Ibid*, 154.
[32] *Jones v. Perkins* 245 U.S. 390 (1918), *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).

Act allowed members of the Mennonite Church, Church of the Brethren, and Society of Friends exemption from combatant military service, the plaintiffs argued that Congress granted privileges to particular religious denominations, and established a national religion. Therefore, the Act violated the Establishment Clause because those who were not members of particular religious sects did not receive conscientious objector exemption. Additionally, they plaintiffs maintained that the act required involuntary servitude which violated the Thirteenth Amendment.[33]

On January 7, 1918, the Court issued a unanimous decision upholding the constitutionality of the Selective Service Act. Justice White wrote the opinion of the Court, which cited Article I Sections 8 and 10 of the Constitution as the basis for the decision. The clauses give Congress the power to raise and support a militia, and to declare war.[34] In the opinion, White found the power of Congress to conscript an army as a necessary function of government which served to protect the nation. Additionally, White pointed to the current English system of conscription, and listed thirty three countries which had adopted similar programs.[35] Citing foreign countries military service acts as justification for United States conscription advanced the idea that if one country permits certain practices, the United States should as well. This comparative justification contradicts Supreme Court precedent dating back to 1850, which declared that the U.S. Constitution and form of government must be the only guide for U.S. policy.[36] Finally, the Court dismissed the argument that conscription violated the

---

[33] *Selective Draft Law Cases*, 245 U.S. 366 (1918), 390.

[34] The Court quoted sections of the Constitution which gave Congress the power "to declare war;. . . to raise and support armies. . .to make rules for the government and regulation of the land and naval forces. . .to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." United States Constitution, I §8. The Court also cited Congressional power over the State which states, "No state shall, without the consent of Congress. . . keep troops, or ships of war in time of peace. . .or engage in war. . ." United States Constitution, I §10.

[35] *Ibid*, 354;

[36] *Fleming v. Page*, 50 U.S. 9 How. 603 (1850), 618.

Thirteenth Amendment because White asserted that citizens have a supreme and noble duty to defend the nation.[37]

The majority of the opinion addressed Congressional power to conscript, and the Court largely ignored the Establishment Clause challenge. In the conclusion, White briefly referred to the First Amendment issue when he stated, "And we pass without anything but statement the proposition than a establishment of 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."[38] With little explanation, the Court dismissed the First Amendment challenges about conscientious objector exemption. The Court upheld Congressional power to conscript, as well as the power to allow for conscientious objection. Apparently the Court believed that restricting the exemption to particular religious denominations did not constitute an establishment of religion. Although the Court did not state the rationale for this part of the decision, the Court may have wanted to uphold First Amendment protections for members of the Historic Peace Churches. Members of those Churches had the constitutional right to freely practice their religious beliefs. Since participation in military service is against their religion, if Congress were to force these members to participate, Congress would violate the Free Exercise Clause of the First Amendment. The effect of the *Selective Draft Law Cases* for members of the Historic Peace Churches was permission to apply for exemption as conscientious objectors.

The Court's ruling in the *Selective Draft Law Cases* ruled in favor of government power under the Constitution, which established the precedent for future Courts to follow. The war fervor which swept the nation during WWI, was reflected in the Court's opinion. The decision

---

[37] *Selective Draft Law Cases*, 389-390.
[38] *Ibid.*

received mass support and the draft continued throughout the war. In other WWI cases involving government authority during wartime, the Court ruled in favor of governmental power. In 1919 the Court handed down *Schenk v. United States* which produced the "clear and present danger test, and *Debs v. United States*, which ruled the Espionage Act of 1917 constitutional.[39] Some free speech activists viewed the Court's decision in *Schenk* and *Debs* as the Court's willingness to rule on the side of government power and suppress individual liberty during wartime.[40] The Court's decision in the *Selective Draft Law Cases* was one of a series of cases during WWI in which the Court ruled in favor of government power.

Although the *Selective Draft Law Cases* did not receive much criticism at the time, Columbia law professor Forrest Revere Black wrote a critical review of the cases a few years later. Black referred to the *Selective Draft Law Cases* as ". . .the most unconvincing utterance of that tribunal [the Supreme Court] since Reconstruction. . .", which suggested Black's disdain for the Court's decision.[41] According to Black, the Court handed down a highly political opinion because the Court ruled in favor of government power and popular support for the war. [42] In fact, Black argued that the Constitution was vague when it came to war powers, and the Court was reading too much into Sections 8 and 10. Black disagreed with the Court's liberal reading of the

---

[39] *Charles T. Schenk v. Untied States* 249 U.S. 47, the clear and present danger test stated that Congress has the right to limit speech which produces a clear and present danger, which some view as a limitation on First Amendment right to free speech. *Debs v. United States* 249 U.S. 211 permitted the government to suppress Eugene V. Debs' speeches which opposed war and had socialist undertones.

[40] The Espionage Act of 1917 made it a crime for a person to convey information with intent to interfere with the United State's operations in WWI and is considered to be a suppression of free speech. For more information about how the cases were received at the time see Zechariah Chafee Jr., "Freedom of Speech in War Time," *Harvard Law Review* 32 (1919): 932-973.

[41] Forrest Revere Black, "The Selective Draft Cases – A Judicial Milepost on the Road to Absolutism," *Boston University Law Review* 37 (1931): 37.

[42] *Ibid*, 38.

Congressional military power, and claimed that the Court neglected parts of the Constitution which gave some military authority to the States.[43]

The *Selective Draft Law Cases* were the first time the Supreme Court ruled on Congressional power to conscript. The Court briefly referred to the conscientious objector provisions in the Act, and since the Act was upheld, the exemption was upheld as well. Additionally, the Court's willingness to broadly interpret the war powers of the Constitution to include conscription suggested how the Court ruled in favor of governmental power in times of war.

The *Selective Draft Law Cases* represent a mixed victory for conscientious objectors. On the one hand, members of Historic Peace Churches were allowed exemption. On the other hand, activists groups like the Civil Liberties Bureau were upset by the decision, because they viewed it as the Court giving Congress the authority to infringe on civil liberties during wartime. The Civil Liberties Bureau felt that the government greatly infringed on civil liberties by compelling citizens to enlist in the military and fight in defense of the country. Members of the Historic Peace Churches were allowed exemption, but the Civil Liberties Bureau yearned for a broader conception of a conscientious objector under the law. The *Selective Draft Law Cases* established precedent for the Court's attitude towards conscientious objectors because it is the first instance when the Court had the opportunity to articulate reasons for ruling in favor of the objection, but chose not to address the issue.

Conscientious Objection and the Naturalization Cases

Conscientious objectors faced new difficulties after World War I. Applicants for U.S. citizenship posed conscientious objection to requirements for citizenship. The Supreme Court's rulings on these naturalization cases are referred to in conscientious objectors cases during

[43] *Ibid*, 47. Black refers to the United States Constitution, Article I, §8.

WWII and the Vietnam. In 1906, Congress passed the Naturalization Act which established new requirements for U.S. citizenship. In addition to a residency requirement, the Act required an applicant to swear in a federal district court that he or she would "Support and defend the Constitution of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same."[44] The Act also required the applicant to be of good moral character and attached to the moral principles of the Constitution.[45] Although conscription is clearly different from naturalization, refusing to bear arms in defense of the U.S. was an issue for conscientious objectors in both settings. Therefore, the Supreme Court's decisions in the Naturalization Cases of the 1930's established precedent for conscientious objectors to military conscription.

United States v. Schwimmer

The case of *United States v. Schwimmer* was the first instance where the Court was forced to decide if an alien who was conscientiously opposed to war could qualify for United States citizenship. Rosika Schwimmer was fifty one years old when she applied for citizenship in 1921. Schwimmer was well known for her speeches promoting female equality and pacifism, and was the Hungarian ambassador to Switzerland.[46] On the application for citizenship, Question 22 asked, "'If necessary, are you willing to take to arms in defense of this country?,'" to which Schwimmer replied, "'I would not take up arms personally.'"[47] Schwimmer's case was heard before the Federal District Court in October of 1927, where she reiterated her loyalty to the United States, but refused to swear to take up arms in defense of the country.[48] Schwimmer

---

[44] Naturalization Act of 1906, 34 Stat. 598.
[45] *Ibid*
[46] Flowers, *To Defend the Constitution*, 87-88.
[47] Transcript of Record, *The United States Court of Appeals for the Seventh Circuit, Rosika Schwimmer v. United States*, 13 October 1927, 2. As printed in Flowers, Appendix D, 374.
[48] Flowers, *To Defend the Constitution,* 93.

claimed, "'I am an uncompromising pacifist for whom even Jane Addams is not enough of a pacifist. I am an absolute atheist. I have no sense of nationalism, only a cosmic consciousness of belonging to the human family.'"[49] The District Court denied Schwimmer's petition for citizenship, but the Court of Appeals reversed the decision The Court of Appeals found that Schwimmer was not required to swear to bear arms in defense of the country, because her age and sex disqualified her from doing so. As a fifty one year old woman, Schwimmer did not qualify for conscription under the Selective Service Act. Therefore, the Court reasoned that her personal objection to bearing arms in defense of the country was not a reason to deny citizenship.[50]

True to her character, Schwimmer was determined to continue fighting the case to the Supreme Court. The American Civil Liberties Bureau (formerly known as the Civil Liberties Bureau) came to Schwimmer's defense.[51] The case was heard in April of 1929, and decided one month later. In a 6-3 decision, the Supreme Court reversed the ruling of the appellate court, and denied Schwimmer citizenship.[52] Justice Butler's opinion for the Court addressed the issues of naturalization and conscientious objection, and claimed that ". . . it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution."[53] Citing the *Selective Draft Law Cases*, Justice Butler affirmed Congressional power to conscript. Buttler believed that Schwimmer's history as a lecturer and public speaker indicated her ability to influence others to endorse pacifism, which distinguished her from conscientious objectors in the *Selective Draft Law Cases*. Schwimmer

---

[49] Transcript of Record, *The United States Court of Appeals for the Seventh Circuit, Schwimmer v. U.S.* As printed in Flowers, *To Defend the Constitution*, Appendix D, 374.
[50] "Files Plea to Bar Rosika Schwimmer," *New York Times*, September 30, 1928, pg.33.
[51] Flowers, *To Defend the Constitution*, 110-111.
[52] *United States v. Schwimmer*, 279 U.S. 644 (1929), 653.
[53] *Ibid*, 650.

was a self proclaimed atheist and not a member of an Historic Peace Church. Therefore, her objection was not rooted in religious beliefs. Buttler also found that Schwimmer's "cosmic sense of nationalism" conflicted with the Constitution. Since Schwimmer could influence others, Buttler believed she was capable of persuading U.S. citizens to defy Congress' power to conscript.[54]

Buttler found support for his decision in previous Supreme Court cases. In *United States v. Manzi*, the Court declared, "Citizenship is a high privilege, and when doubt exist concerning the grant of it, generally at least, they [issues of citizenship] should be resolved in favor of the United States and against the claimant."[55] Schwimmer's refusal to bear arms to defend the country, and her ability to influence others, constituted doubts about granting the high privilege of citizenship. According to Buttler, Schwimmer did not prove that she deserved this privilege, and therefore the Court denied her citizenship.[56]

Justice Holmes, Brandeis, and Sanford dissented, with Sanford upholding the views of the Circuit Court. Justice Holmes's dissent would lay the foundations for future cases overturning *Schwimmer*, and expanding the rights of all conscientious objectors. With the exemption of her reservation against bearing arms, Holmes believed Schwimmer was qualified for citizenship. Schwimmer's age and sex disqualified her from serving in the armed forces, so her reservations against bearing arms did not affect the adequacy of her oath of citizenship.[57] Holmes distinguished Schwimmer's position from that of *Schenk v. United States*, and concluded that her ability to influence others to adopt pacifism would not qualify as a violation of this

---

[54] *Ibid*, 652.
[55] *United States v. Manzi*, 276 U.S.463 (1928), 467.
[56] *United States v. Schwimmer*, 653.
[57] *Ibid*, 653.

precedent.[58] Although Holmes acknowledged that some might disagree with Schwimmer's pacifism, he stated that ". . .if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate."[59] Holmes concluded by noting the great contributions of pacifist religious sects throughout American history, and applauded pacifists for steadfastly upholding classic religious theory.[60]

The Court's decision in *Schwimmer* revealed two opposing views about the critical issue of the case. The majority believed the case dealt with the compatibility of pacifism and the Constitution, while Holmes's dissent argued that issues of free thought were the heart of the matter. Depending on the way one views *Schwimmer*, both views were reconcilable. From the perspective of the conscientious objector, Holmes's dissent articulated key issues which conscientious objectors would later hope to establish as legal precedent. The free exercise of beliefs, not the pacifist nature of Schwimmer's thoughts were the crux of the Court's problem. According to the majority, since Schwimmer was in the process of applying for citizenship, she could not yet enjoy the benefits of free exercise, and her pacifist beliefs were held against her. Holmes took the opposite view. Holmes believed Schwimmer exercised her freedom of belief by voicing her objection to the oath. Even though she was not yet a U.S. citizen, Holmes thought Schwimmer should be allowed to exercise her beliefs. Protecting the "freedom for the thought that we hate" implied Holmes's willingness to grant Schwimmer constitutional liberties regardless of her citizenship status. Although *Schwimmer* did not expand the rights of conscientious objectors, Holmes's dissent advanced principles that would help conscientious objectors in future cases.

---

[58] *Ibid*, 654.
[59] *Ibid*, 654-655.
[60] *Ibid*, 655.

Schwimmer also highlights the battle between the State and the individual with respect to religious practice. As with many cases of conscientious objectors, the government's ability to conscript was viewed as a compelling interest which overruled Schwimmer's freedom to exercise her pacifist beliefs. The majority's opinion also highlighted the special place of religion in society. By claiming she was an atheist, Schwimmer distinguished herself from devoutly religious people who were consciously opposed to war. One could argue that Schwimmer's atheism influenced the Court's opinion because she could have been seen as a subversive who was a threat to the religious establishment. Nevertheless in the eyes of the Court, Schwimmer's atheism was not considered a religious doctrine. Nor did her pacifism qualify as sufficient objection to war.

United States v. Macintosh

Two years after *Schwimmer*, the Court was faced with another naturalization case where the applicant's conscientious objection to bearing arms for the U.S. prohibited him from taking the oath of allegiance. Douglas Macintosh was a Canadian Baptist preacher who joined the faculty at Yale Divinity School.[61] During WWI, Macintosh served as a Chaplain for the Canadian Army, and upon returning to Yale, he became the Dwight Professor of Theology.[62] In 1925, Macintosh applied for citizenship at the U.S. District Court in New Haven, and was asked the same questions as Rosika Schwimmer on the application. In response to question 22, Macintosh replied he would be willing to, but would reserve the right to judge the necessity of taking up arms.[63] When Macintosh's case was before the District Court, the Naturalization board claimed that Macintosh's' answer to question 22 conflicted with his answer to question 20,

[61] Jeffrey M. Anderson, "Conscience in the Court, 1931-1946: Religion as a Duty and Choice," *Journal of Supreme Court History* 26 (2001): 30.

[62] Ibid, 31. Question 22 read, "If necessary, will you be willing to take up arms in defense of this country?"

[63] *United States v. Macintosh* 283 U.S. 605 (1931), 617-618.

where he affirmed his willingness to take an oath to become a citizen. In his defense Macintosh distinguished himself from Rosika Schwimmer by stressing his experience in WWI, which proved he was not a pacifist. Macintosh also distinguished himself from Schwimmer by stating that he did not want to engage in propaganda against any future wars. Therefore, Macintosh argued, he was not capable of influencing other U.S. citizens to oppose Congressional power to declare war. The District Court denied Macintosh's application for citizenship, claiming he did not demonstrate an attachment to the principles of the Constitution.[64]

The American Civil Liberties Union took interest in Macintosh's case, and appealed the case to the Second Circuit Court of Appeals. In June 1930, the Court of Appeals reversed the District Court's decision, and ruled that Macintosh qualified for citizenship. The court claimed the government should not treat citizens and non citizens differently, and that Macintosh's beliefs revealed a sense of obligation to God and a willingness to uphold the Constitution.[65] The government appealed the decision, and in April of 1931 the Supreme Court heard Macintosh's case.

In a 5:4 decision, the Court reversed the appellate court's decision and denied Macintosh citizenship.[66] Justice Sutherland's opinion for the majority described how Macintosh's expressed desire to judge for himself the morality of individual wars violated the Congress' Constitutional power to declare war. Additionally, the ability of natural born citizens to conscientiously object to war is a privilege granted by Congress, and was not guaranteed in the Constitution. Like Justice Buttler in *Schwimmer,* Sutherland pointed to *United States v. Manzi*, which held that citizenship is a high privilege. When the government doubts the applicant's reasons for

---

[64] Flowers, *To Defend the Constitution* ,152.
[65] Ibid, 158.
[66] *United States v. Macintosh*, 627.

citizenship, the Court is compelled to rule in favor of the government.[67] According to Sutherland, Macintosh was assuming the privileges of a conscientious objector, which was only granted to national born citizens. Therefore, the Court had doubts about Macintosh's citizenship. Since Macintosh was in the process of applying for citizenship, Sutherland believed he misinterpreted the Constitution and should therefore be denied the privilege of U.S. citizenship.[68]

Chief Justice Hughes, Justice Holmes, Brandeis, and Stone dissented, with Hughes writing the opinion. The key issue for Hughes was whether the Naturalization Act of 1906 established the premise that in order to be granted naturalization, one must promise to bear arms.[69] Hughes did not deny Congress' power to establish this requirement. However, he contended that if promising to bear arms was a premise for citizenship, Congress must make this explicitly clear. According to the Congressional record, they failed to do so, which meant that promising to bear arms is not a requirement for citizenship. Additionally, Hughes noted that the oath in question was the same as that required for Congressmen and Judicial officers.[70] Those conscientiously opposed to bearing arms would not be able to take this oath in good conscience, and therefore would not qualify for office. Hughes believed the oath constituted a religious test which was unconstitutional and was certainly not Congress' intent when creating the statute. Therefore he concluded that Congress did not intend willingness to bear arms as a precondition for citizenship. Since Macintosh qualified for citizenship on all other grounds, he should be granted citizenship.[71]

In the dissent, Hughes addressed Sutherland's discussion of individual duty to the state. While Hughes recognized the supremacy of State authority, when it comes to issues of

---

[67] *United States v. Manzi*, 467.
[68] *United States v. Macintosh*, 625.
[69] *Ibid*, 627.
[70] *Ibid*, 630.
[71] *Ibid*, 635.

consciousness, Hughes believed that a ". . . duty to a moral power higher than the State has always been maintained."[72] Although Hughes was careful not to attach a definition to religion, he stated, "[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."[73] This important discussion of the essence of religion revealed Hughes' reluctance to define religion, while also attempting to explain how religious beliefs can compel one to contest State law. Even though Hughes' dissent was not adopted by the majority, future Courts would use Hughes' ideas to reverse the narrow ruling of *Macintosh.*

Chief Justice Hughes's religious background and feelings towards religion may have influenced his decision to dissent in *Macintosh.* As the child of a Baptist minister, Hughes was brought up in a religious household. His parents wanted him to pursue a career in theology, but Hughes was very resistant to the constraint of religious dogma. Hughes was dedicated to the idea of religious tolerance, and while ". . .Hughes personally deplored religious creeds and doctrines, he nevertheless displayed patience and respect for them because he knew they were very important to others."[74] Similarly, Hughes valued religious freedom from government control, and strongly opposed any form of a religious test.[75] In this context, Hughes's dissent was consistent with his personal philosophy about religion, and the importance of upholding a flexible definition of religion.

Similar to *Schwimmer*, the Court's two opposing opinions presented the case from different perspectives. Although neither opinion denied the privilege naturalization, the question at hand was whether Congress had explicitly defined the requirements for citizenship, or if Macintosh was misinterpreting his rights as an applicant for citizenship. The opinion of the

---

[72] *Ibid* 633.

[73] *Ibid*, 633-634.

[74] Jay Alan Sekulow, *Witnessing Their Faith: Religious Influence on Supreme Court Justices and Their Opinions* (Lanham, Maryland: Rowman and Littlefield Publishers Inc, 2006), 185.

[75] *Ibid*, 186, 191.

majority found that Macintosh was misinterpreting Congress' requirements for citizenship by claiming to be a conscientious objector. According to Sutherland, Macintosh misinterpreted Congressional intent and his rights as an applicant for citizenship. However, Hughes found no evidence that Congress wanted to exclude from citizenship those who were religiously opposed to participating in war.[76] The difference between the two opinions was that Sutherland believed Macintosh did not understand Congress' intent, and Hughes believed the Court did not properly interpret Congress' intent. Although Hughes, Holmes, Brandeis, and Stone sympathized with Macintosh, a majority decided with Sutherland, and Macintosh was denied citizenship.

One important implication of *Macintosh* was the end of selective conscientious objection. A selective conscientious objector is a person who objects to a particular war, and not all war in general. *Macintosh* was seen as a loss for the selective conscientious objector cause, because Macintosh was denied the ability to retain judgment about the morality of individual wars.[77] However, as Sutherland noted, if citizens or applicants for citizenship were allowed to object from particular conditions which they feel are not morally justified, how can Congress or the Courts draw the line?[78] Establishing a precedent which allows selective objection to laws could lead down a dangerous path where citizens could object to policies they disagreed with. Allowing citizens to disobey particular laws or policies could result in the weakening of government authority. Although *Macintosh* did not grant a conscientious objector citizenship, the claim of conscientious objectors was strengthened by the decision. Conscientious objectors cannot pick and choose what aspects of war they are opposed to; their convictions prohibit them from participating in all war. This strengthened the conscientious objector's position by further

---

[76] *United State v. Macintosh*, 628.

[77] John A. Rohr, *Prophets Without Honor: Public Policy and the Selective Conscientious Objector*, (Nashville: Abingdon Press, 1971), 26.

[78] *United States v. Macintosh*, 625.

defining what qualifies as an objection to war. One cannot object to particular wars because conscientious objectors must have a deeply held opposition to *all* war. By denying selective conscientious objection, the Court legitimized the position of the conscientious objector.

Girouard v. United States

Between the *Macintosh* decision in 1931, and the case of James Girouard in 1943, Congress enacted the Selective Service Act of 1940, the Naturalization Act of 1940, and entered World War II.[79] Although these events affected conscientious objectors to WWII, the *Girouard* case will be discussed here because it pertains to conscientious objection for citizenship and overruled the precedents of *Macintosh* and *Schwimmer*. James Girouard was a Canadian Seventh-day Adventist who applied for U.S. citizenship in 1943. Like Schwimmer and Macintosh, in his application for citizenship Girouard said he would not take up arms in defense of the United States, and attributed this response to his religious convictions.[80] Although the Naturalization Board recommended denying Girouard's request, the District Court granted Girouard citizenship, and the case went to the First Circuit Court of Appeals. The First Circuit Court denied citizenship. In a furious dissent, Judge Woodbury decried the court's decision and advocated overruling *Schwimmer* and *Macintosh* in light of the Naturalization Act of 1940, a subsequent amendment to the act in 1942, and the Selective Service Act.[81] Woodbury claimed that taken together, these Acts suggested that Congress agreed with Chief Justice Hughes' dissent in *Macintosh*, which implied that requiring an oath for citizenship was not Congress' intent.

---

[79] I will discuss the Selective Service Act of 1940 and the 1948 Amendment in greater detail in the WWII section.

[80] Flowers, *To Defend the Constitution*, 271.

[81] Ibid, 276.

The Supreme Court heard the *Girouard* case in March of 1946, and issued a 5:3 decision in favor of Girouard.[82] Justice Douglas wrote the opinion of the Court, which affirmed the dissents of Justice Hughes in *Macintosh* and Holmes in *Schwimmer*. Douglas recognized the key issue Hughes saw as central to the *Macintosh* case, and ruled that requiring naturalized citizens to bear arms was not Congress' intent in creating the statute. Citizens of the United States who conscientiously objected to provisions in the oath required for public office would not be banned from holding these positions, and Douglas stated that Girouard should not be treated differently.[83] Requiring public officials to take an oath that is against one's religious beliefs constituted a religious test. Douglas claimed that religious tests were abhorrent to the American tradition, and believed Congress did not intend to impose such a test in the Naturalization Act.[84] *Girouard* upheld Holmes' dissent in *Macintosh*, and reversed Supreme Court precedent on conscientious objection since 1929. The composition of the Court had changed dramatically between 1929 and 1946, which could attribute to the reversal.

Justices Stone, Frankfurter, and Reed dissented, which was peculiar considering the personal histories of Stone and Frankfurter. Justice Stone participated in both *Schwimmer* and *Macintosh*, and joined in Justice Hughes' dissents *Macintosh*.[85] Also, Stone wrote sympathetically about conscientious objectors before he became a Justice.[86] Justice Frankfurter historically supported civil liberties and was a founder of the American Civil Liberties Union which submitted a brief on behalf of Girouard.[87] Despite this contradictory history, the rationale behind the dissent revealed Stone and Frankfurter's commitment to judicial restraint rather than a

---

[82] *Girouard v. United States* 328 U.S. 61 (1946), 61, 70. Justice Jackson did not take part in the decision.
[83] *Ibid*, 65-66.
[84] *Ibid*, 69.
[85] *United States v. Schwimmer*, and *United States v. Macintosh.*
[86] Harlan Fiske Stone, "The Conscientious Objector," *Columbia University Quarterly* 21(1919): 253-272.
[87] *Girouard v. United States*, 61.

departure from their previous convictions.[88] Stone countered Douglas' argument by pointing to Congress' failure to enact special provisions for conscientious objector citizenship applicants, and the lack of explicit clarity in the Naturalization Act of 1940 and the amendment in 1942.[89] In his conclusion, Stone reaffirmed his commitment to judicial restraint and stated, "It is not the function of this Court to disregard the will of Congress in the exercise of its constitutional power."[90]

Additionally, Frankfurter's vote in *Girouard* was similar to his views of religious liberty in the Flag Salute cases.[91] Jehovah's witnesses were religiously opposed to saluting the flag and stating the Pledge of Allegiance. In *Minersville School District v. Gobitis*, Frankfurter wrote the opinion of the majority, which forced Jehovah's witnesses to act against their religious beliefs. When the Court reversed *Gobitis* in *West Virginia State Board of Education v. Barnette*, Frankfurter dissented. Frankfurter's history on the court in religious cases suggests his reluctance to rule in favor of government power, and helps to explain his decision in *Girouard*.

Girouard revealed an interesting shift in the Court's attitude towards conscientious objectors. Douglas' opinion drew on ideas present in *Schwimmer* and *Macintosh*. The circumstances of the *Girouard* case, along with changes to Naturalization laws, allowed the Court more leniency in granting conscientious objection for citizenship applicants. Allowing citizenship applicants to conscientiously object to the oath requiring them to bear arms reversed *Macintosh* and *Schwimmer*. The Court's actions in *Girouard* established favorable precedent for conscientious objectors. In future cases, conscientious objectors built on the sympathetic ruling in *Girouard* and dissents in *Macintosh* and *Schwimmer*, which strengthened their position.

---

[88] Flowers, *To Defend the Constitution* ,295.
[89] *Girouard v. United States*, 77.
[90] *Ibid*, 79.
[91] *Minersville School District v. Gobitis 310 U.S. 586 (1940)*, and *West Virginia State Board of Education v. Barnette* 319 U.S. 624 (1943).

World War II and Civilian Public Service Camps

By 1940, it was becoming increasingly evident that the United States might enter into World War II. Although Congress had not officially declared war, in June of 1940, Congress passed the Selective Service Act which originally did not include provisions for conscientious objectors. After members of the Society of Friends, Mennonites, and other religious sects testified before Congress, Congress included conscientious objector provisions.[92] The final version of the Selective Service Act included Section 5(g) which stated, "Nothing contained in this act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the US who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[93] If a person's objection to military service was sustained by a local draft board, the registrant would be directed to participation in "noncombatant civilian service as defined by the President," or "work of national importance under civilian direction."[94] Registrants who were denied conscientious objector status were allowed to appeal their classification.

Similar to World War I, public support for American involvement in World War II was high in the beginning of the war, and conscientious objectors were again in the minority. Of the 34,506,923 men registered for the draft during WWII, approximately 72,354 (less than 1%) applied for conscientious objector status. About 25,000 of the applicants entered into noncombatant service, 11,950 were assigned to work in civilian camps, and 20,000 were not granted conscientious objector status. 6,086 men were imprisoned for violating the Selective Service Act during WWII, but only a minority of them were religiously opposed to the war and

---

[92] Sibley and Jacob, 49-50.
[93] Universal Military Training and Service Act of September 16, 1940, 54 Stat. 885.
[94] *Ibid.*

considered conscientious objectors.[95] Jehovah's Witnesses comprised the majority of the religious opposers who were imprisoned. Jehovah's Witnesses believed that all members of their faith are ministers. Many Jehovah's Witnesses during WWII were granted conscientious objector exemptions, but contested this classification. Jehovah's Witnesses believed they should all be classified as ministers and granted clergy exemption rather than conscientious objector exemption.[96] The majority of those imprisoned for violating the Selective Service Act during WWII were generally considered pacifists, and believed that it was the individual's responsibility to make a personal choice about the morality of participating in the war.[97]

The Civilian Public Service Camps (CPS) of World War II were criticized as the government's failed experiment in how to tolerate conscientious objectors' beliefs while not forcing them to participate in combat duty.[98] Since the majority of CPS workers were religious conscientious objectors, the responsibility for the camps was shared by local religious organizations and government agencies. Conscientious objectors lived at the camp and worked 40 hours a week without pay, lived at the camp, and were prohibited from leaving camp grounds without authorization.[99] CPS workers built roads, constructed dams, planted trees, built public facilities, cared for the mentally ill, and were subjected to medial experimentation. If CPS workers were paid for their services, the government would have spent over $18,000,000.[100] Many CPS workers were unhappy with their experience because even though they were required to service their country in alternative military service, they were not entitled to the benefits of traditional military veterans. Many CPS workers believed they were being unfairly punished for

---

[95] Selective Service System, *Conscientious Objectors Special Monograph No. 11*, 314-315, as quoted in Kohn, *Jailed for Peace*, 46-47.
[96] Sibley and Jacob, 31-35.
[97] Kohn, *Jailed for Peace*, 51.
[98] Sibley and Jacob, 111.
[99] *Ibid*, 209-211. The work week increased to 54 hours a week towards the end of the war.
[100] *Ibid*, 124.

their religious beliefs.[101] Although local and state governments attempted to reform the CPS system, ultimately the federal government's "experiment in tolerance" of conscientious objection did not have the desired effect.

Conscientious Objectors and the Court in WWII

Registrants who were denied conscientious objector status during WWII were allowed to appeal their classification, and although some of these cases reached federal courts, the Supreme Court denied review to all conscientious objector directly related to the Selective Service Act of 1940. The Warren Court eventually acknowledged two major federal cases of conscientious objection after the 1940 Selective Service Act, *United States v. Kauten* and *Berman v. United States*. While these cases were denied review by the Supreme Court, the precedent established by the cases had important implications for conscientious objectors.

United States v. Kauten

Mathias Kauten was a thirty year old artist from upstate New York who was convicted for failing to report for induction into the Army.[102] In the spring of 1941, Kauten's local draft board denied him conscientious objector status on the grounds that Kauten's "conscientious opposition to war in any form" was not rooted in religious training or belief as stipulated by the Selective Service Act of 1940.[103] The District Court of New York sided with the government and upheld Kauten's conviction.

Kauten appealed the conviction to the Second Circuit Court, which upheld the District Court's ruling. Judge Hand's opinion described the court's reasons for dismissing Kauten's conscientious objector claim. While Kauten's opposition to war might be sincere, his beliefs were not based on a religious training or belief. Therefore, Hand found that Kauten's beliefs

---

[101] *Ibid*, 226.
[102] "Musicians Exempt From 'Work-Fight,'" *New York Times*, February 9, 1943.
[103] *United States v. Kauten* 133 F.2nd 703 (1943), 705-706.

were based on philosophical and political principles.[104] Hand believed Kauten opposed this particular war, and that in order to be considered a conscientious objector under the 1940 Act one must object to any war under any circumstances.[105] Hand considered conscientious objection as a ". . .response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been though a religious impulse."[106] Hand attempted to convey Congressional intent in including "religious training and belief" in the Selective Service Act without going so far as to explicitly define religion.

Hand also recognized the difference between the Selective Service Act of 1917 and of 1940. Accordingly, Hand believed Congress took ". . .into account the characteristics of a skeptical generation and make the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed, the basis of the exemption."[107] Without guidance from the Supreme Court or Congress, the Second Circuit was left to interpret the meaning of "religious training and belief." In the 1940 Selective Service Act, Congress expanded the conscientious objector exemption to people who were not members of Historic Peace Churches. The court believed this action signified that Congress intended to expand the qualifications for conscientious objection. According to *Kauten*, Congress intended the "religious training and belief" clause to include beliefs which derive from an internal source rather than from membership in Historic Peace Churches. In this sense, Hand's decision permitted conscientious objectors to be members of non-traditional religious sects. However, Kauten's beliefs were not found to be religious at all, so how he derived these beliefs was immaterial for the court. By defining Kauten's beliefs as non-religious, the court avoided attaching his system

---

[104] *Ibid*, 707- 708.
[105] *Ibid*, 708.
[106] *Ibid.*
[107] *Ibid*, 708.

of beliefs to the meaning of religious, but created a precedent for an expanded view of religious training.

Berman v. United States

Three years later, the Ninth Circuit Court of California heard the case of *Berman v. United States*, which contradicted the findings of the Second Circuit and set the stage for the Supreme Court's review of conscientious objectors. Herman Berman was a Los Angeles resident who was denied conscientious objector status. Berman was a socialist who believed in a brotherhood of all men, and that war as a method was wrong.[108] When he was called up to the armed services, he was charged with refusing induction. Berman appealed the case to the Ninth Circuit, where the court upheld his conviction.[109] Although the result of *Berman* and *Kauten* was the same for the individuals involved, the different reasoning behind the court's rulings revealed a discrepancy in the Selective Service Act.

Judge Stevens of the Ninth Circuit court wrote the opinion in *Berman*, which criticized the reasoning of *Kauten*. Berman cited *Kauten* in support of his claim that ". . .a person's philosophy of life or his political viewpoint, to which his conscience directs him to adhere devotedly, or his devotion to human welfare, without the concept of deity, may be religious in nature."[110] The court found that regardless of how devotedly one adheres to certain philosophies, without the concept of a Deity, those philosophies were not considered religious under the 1940 Act.[111] The court believed Congressional intent in the 1940 Selective Service Act required that religious beliefs dictated a conscientious objectors' way of life. According to the Ninth Circuit,

---

[108] *Berman v. United States*, 156 F.2nd 377 (1946), 379.
[109] *Ibid*, 382.
[110] *Ibid*, 378.
[111] *Ibid*, 381.

Berman did not meet this qualification. The court denounced the Second Circuit's more liberal interpretation of the 1940 Act in *Kauten*, and upheld Berman's conviction.

Judge Stevens's interpretation of Berman's beliefs relied heavily upon Berman's religious training, and thus interpreted Section 5(g) in a different way from the Second Circuit. Since Berman could not cite any concrete training as a basis for his belief, Stevens maintained that Berman's beliefs did not qualify as a religious. Judge Denman dissented from the opinion of the court, and believed that Steven's emphasis on training was faulty reasoning. Denman noted that the majority neglected to include sections of Berman's testimony where he listed well-known socialists whose theories were based on Christian thought.[112] Although Berman did not attribute his beliefs as deriving from a kind of god, Denman noted that there are many religious denominations which do not recognize a "God." Finally, Denman recognized the conflict between this court's findings and the Second Circuit which revealed the flaw in Steven's opinion.

The Second and Ninth Circuits read Section 5(g) of the Selective Service Act differently. While the Second Circuit held that the statute implied a more lenient interpretation of belief, the Ninth Circuit held that Congress sought to expand conscientious objection only slightly in the Act. The conflict between the circuit courts centered on Congressional intent in creating the Selective Service Act of 1940. Even though the conflict between these federal courts was readily apparent, the Supreme Court declined review of *Berman* in December of 1946, which only further confused the lower courts.[113] Without guidance from the Supreme Court as to how to interpret the act, cases of conscientious objection had vastly different outcomes across the country.

---

[112] *Ibid*, 383. Denman discusses Norman Thomas who was a Presbyterian and humanist, and Eugene Debs who was a Christian socialist.

[113] *United States v. Berman* 329 U.S. 795 (1946).

Torcaso v. Watkins

Between WWII and Vietnam, conscientious objector cases took new form. During this time, the Supreme Court continued clarifying the meaning of the First Amendment. In *Minersville School District v. Gobitis*, the Court ruled that Jehovah's Witnesses could be forced to salute the American flag against their will.[114] Three years later, the Court found this infringed on the free exercise of religion, and overruled *Gobitis* in *West Virginia State Board of Education v. Barnette*.[115] The Court clarified the meaning of the Establishment clause in *Everson v. Board of Education* which upheld using government tax money to bus parochial students to school.[116] In *McGowan v. Maryland*, the Court upheld a state law prohibiting certain businesses to open on Sundays.[117] The Court was slowly clarifying the implications of the First Amendment.

In addition to the Court's First Amendment decisions, Congress attempted to resolve the discrepancy between *Kauten* and *Berman*, in order to refine the conscientious objector exemption. In June of 1948, Congress passed a series of amendments to the Selective Service Act of 1940. In order to qualify for conscientious objection under Section 5(g) the 1940 Act, a petitioner's objection had to be based on a religious training and belief. In 1948, Congress added Section 6(j), which defined "religious training and belief" as ". . .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."[118] This addition to the conscientious objector exemption meant that in order to receive conscientious objector status, one must profess a religious training o belief based on a relationship to a Supreme Being.

---

[114] *Minersville School District v. Gobitis*, 598.
[115] *West Virginia State Board of Education v. Barnette*, 640-642.
[116] *Everson v. Board of Education* 330 U.S. 1 (1947).
[117] *McGowan v. Maryland* 366 U.S. 420 (1961).
[118] 50 U.S.C. §456 (j) (1948).

Within this context, *Torcaso v. Watkins* came before the Court. Roy Torcaso applied to be a Notary Public in Bethesda, Maryland. County Clerk Clayton Watkins denied Torcaso the commission when he refused to sign an oath which read "I, Roy R. Torcaso, do declare that I believe in the existence of God."[119] According to Article 37 Maryland's Constitution, a religious test or oath cannot be required in order to qualify an individual for office except a declaration of belief in the existence of God.[120] Essentially, the law prohibits atheists from becoming officers of the State.[121] Additionally, Torcaso believed the provision violated the First Amendment by discriminating against non-believers and establishing a religion.[122] This case is important to the development of conscientious objector status in the United States because Torcaso confronted the same dilemma faced by many conscientious objectors; that is, either to deny one's personal beliefs and take an oath, or to contest the laws which challenge one's personal beliefs.

The Supreme Court decided to review *Torcaso*, and the case was argued on April 24, 1961. In responding to Torcaso's challenge of the Maryland Constitution, the State held that the petitioner was not compelled to believe or disbelieve in the existence of God, but simply declare the existence of God. While the State recognized that if Torcaso did not make the declaration he cannot hold public office, the State maintained that he is not compelled to hold office.[123] On June 19, the Court issued a unanimous decision which dismissed the State's argument, and declared Article 37 of Maryland's Constitution unconstitutional.[124]

Justice Black wrote the opinion for the Court, and Justices Frankfurter and Harlan concurred. According to the Court, Article 37 of the Constitution constituted a religious test

---

[119] "Ban on Non-Believer Goes to High Court," *New York Times,* November 7, 1960.
[120] *Torcaso v. Watkins 367 U.S. 488* (1961), 489.
[121] Atheism defined as one who believes that there is no deity (Merriam-Webster Dictionary).
[122] "Ban on Non-Believer."
[123] *Torcaso v. Watkins*, 495.
[124] *Ibid*, 496.

because anyone who refuses to declare a belief in the existence of God cannot hold public office.[125] Black pointed to the naturalization case of *Girouard v. United States*, which claimed that religious tests were abhorrent to our national tradition.[126] On the First Amendment issues, the Court explicitly claimed that ". . . neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[127] Finally, the Court dismissed the State of Maryland's argument against *Torcaso*, and held that just because a person is not compelled to hold public office does not imply that the State can ban him from holding office by state-imposed criteria.[128]

Torcaso was an important case for conscientious objectors and atheists. The Selective Service Act of 1940 and the 1948 Amendment still governed conscientious objectors. The Act permitted those who were religiously opposed to military service by means of religious training and belief in relation to a Supreme Being to apply for conscientious objector status.[129] In light of *Torcaso*, the Supreme Being requirement seems contradictory. The Court declared that the State or Federal government cannot pass any law which aids religious believers over non-believers. Nor can the government aid religions based on a belief in the existence of God against those not based on the existence of a God. Since conscientious objectors were required to state a belief in a relation to a Supreme Being, the government seemingly aided those who believe in a Supreme

---

[125] *Ibid*, 489-490.
[126] *Ibid*, 491.
[127] *Ibid*, 495.
[128] *Ibid*, 496.
[129] Universal Military Training and Service Act, 54 Stat. 885 (1940) § 5 (g), and the 1948 Amendment 50 U.S.C.S. § 456(j) (1948).

Being against those who do not. In other words, the conscientious objector requirement as stated in the Selective Service Act of 1940 and 1948 Amendment aided those who professed religious beliefs in a Supreme Being over atheist believers.

Another important aspect of the Court's decision in *Torcaso* was a broadening view of religious beliefs. In a footnote, Black acknowledged that Buddhism, Taoism, Ethical Culture, and Secular Humanism are religious sects in America which do not teach "... what would generally be considered a belief in the existence of God...."[130] Since this was in a footnote, Black's reference to these religions is not binding for lower courts, but this signified a larger acceptance of non-Western religious traditions. Additionally, Secular Humanism combines reason, ethics, and philosophy, and is very different from traditional religions. The fact that Black recognized the existence of these different religious sects signified the Court's more accepting view of religious beliefs.

In *Torcaso*, the Court recognized that forcing someone to declare a belief in the existence of God in order to hold public office was unconstitutional. Although the language of *Torcaso* might have indicated at the time that the Court was prepared to rule the Supreme Being clause of the Military Service Training Act unconstitutional, there is one major distinction between the *Torcaso* case and conscientious objectors.[131] Torcaso was forced to declare a belief in the existence of God in order to hold public office. The Maryland law prohibited Torcaso from entering a profession. Conscientious objection, however, is considered an act of legislative grace, and a privilege granted by Congress.[132] The Maryland law only applied to Maryland residents

---

[130] *Ibid*, 495 at footnote 11. Black states, "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."

[131] For arguments in favor of overruling the Supreme Being clause at the time see Francis J. Conklin, "Conscientious Objector Provisions: A View in Light of Torcaso v. Watkins," *Georgetown Law Journal* 51 (1963) at 253, 279-281.

[132] *United States v. Manzi*, 467.

seeking public office, while the Military Service Training Act applied to all draft-age men. Allowing more Maryland citizens to hold public office would not have the same effect on the nation as removing the Supreme Being clause from the conscientious objector requirement. The later could have an effect on national defense. Conscientious objector provisions also touch upon issues of individual obligation to the State, whereas public office positions are individuals *choosing* to work for the State. Since conscientious objection deals with issues of national concern which are acts of legislative grace, applying *Torcaso* to conscientious objection can be difficult.

Torcaso addressed the issue of atheist objectors, which had important implications for conscientious objectors. Torcaso successfully argued that requiring atheists to take a religious oath in order to hold public office was unconstitutional. Although conscientious objectors were encouraged by the Court's decision, it was uncertain if the Court would view conscientious objector exemption in the same way. The principles outlined by the Court in *Torcaso v. Watkins* opened the door for future conscientious objector cases.

United States v. Seeger

The mid 1960's was a critical time in United States history. In order to fully comprehend the significance of the Supreme Court's decision in *United States v. Seeger*, it is crucial to understanding the political and social context at the time. Earl Warren was appointed Chief Justice of the Supreme Court in 1953, and beginning with *Brown v. Board of Education*, the Warren Court handed down many decisions which sought to address social issues.[133] President John F. Kennedy appointed Justice Byron White and Justice Arthur Goldberg to the Court in 1962, and the Court had a liberal bloc of Justices who changed the way the Court was perceived

[133] Lucas A. Powe Jr., *The Warren Court and American Politics* (Cambridge: The Belknap Press of Harvard University Press, 2000), 27.

in society.[134] The Warren Court's interpretation of the Constitution expanded the rights of accused criminals, granted equal access to education for African Americans, protected voting rights, and expanded the right to privacy.[135]

The executive and legislative branches were also concerned with advancing individual rights. President Lyndon B. Johnson's Great Society program included bills which addressed civil rights, the right to medical care, and the right to a quality education. The passage of the Civil Rights Act of 1964 signaled the administration's acknowledgement of civil rights for all.[136] While all branches of government became increasingly concerned with civil liberties, American involvement in Southeast Asia was emerging as a major foreign policy issue. In response to an alleged attack on U.S. destroyers in North Vietnam, Congress enacted the Gulf of Tonkin resolution on August 7, 1964 with overwhelming support. The resolution gave the President the power to "take all necessary measures" to defend U.S. forces in Southeast Asia, and Johnson began planning for increased U.S. involvement in Vietnam.[137]

United States v. Seeger combined issues of individual rights with a looming military involvement in Vietnam, and was brought to the Court when these issues are at the forefront of the nation's conscience. *Seeger* combined the cases of Daniel Seeger, Arno Sascha Jakobson, and Forest Britt Peter, who all claimed to be conscientious objectors, and were challenging Section 6(j) of the Universal Military Training and Service Act. Section 6(j) required a petitioner's objection to war be rooted in "religious training and belief," which was defined as ". . . an individual belief in a relation to a Supreme Being involving duties superior to those arising

---

[134] *Ibid*, 212-213.

[135] *Ibid*, 209-216.

[136] Steven M. Gillon, *The American Paradox: A History of the United States Since 1945* (Boston: Houghton Mifflin Company, 2007), 172.

[137] Fredrik Logevall, *The Origins of the Vietnam War* (Harlow, England: Pearson Education Limited, 2001), 66-67. The constitutionality of the Gulf of Tonkin resolution in light of U.S. involvement in Vietnam is beyond the scope of this paper but see John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (New Jersey: Princeton University Press, 1993).

from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."[138] The Federal Court cases of *United States v. Kauten* and *Berman v. United States* interpreted the meaning of the Selective Service Act differently, which established different precedents for the lower courts. When a conflict arises between to Federal Courts, the Supreme Court is expected to resolve the conflict, and *Seeger* provided the Court with this opportunity.

Each of the defendants professed different kinds of religious beliefs, and all had slightly different grounds for challenging Section 6(j). Daniel A. Seeger was raised in a Catholic household in New York.[139] Seeger was an outstanding college student, and during his studies he became interested in the Quaker religion.[140] Although he did not formerly join the Quaker religion until 1967, Seeger solicited the group's services when he attempted to register as a conscientious objector.[141] In his application for conscientious objection, Seeger made it clear that his beliefs were slightly different from traditional Quaker beliefs because he did not necessarily believe in a Supreme Being. On his draft questionnaire, Seeger claimed he could not answer if he believed in a Supreme Being with a yes or no. He contended that skepticism in the existence of God did not mean he lacked faith in anything whatsoever. Rather, he believed in "'goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.'"[142] Daniel Seeger believed the language of 6(j) violated the Free Exercise Clause of the First Amendment because there was no exemption for non religious conscientious objectors. Seeger claimed the statute violated the Due Process Clause of the Fifth Amendment because the law discriminates between

---

[138] 50 U.S.C. § 456(j) (1948).

[139] *United States v. Seeger* 326 F. 2nd 846 (1964), 849.

[140] Daniel A. Seeger, "I have called you friends: A Quaker Universalist's Understanding of Jesus," Essay Presented by Quaker Universalist Fellowship, 1997.

[141] Daniel A. Seeger, *The Seed and the Tree: A Reflection on Nonviolence*, (Lancaster, Pennsylvania: Pendle Hill Pamphlet 269, 1986), 1.

[142] *United States v. Seeger* 380 U.S. 164 (1965), 166.

different forms of religious expression.[143] Seeger was the only petitioner to challenge Section 6j on constitutional grounds.

Arno Sascha Jakobson identified himself as a partly spiritual man who believed in a "Supreme Being" who was "ultimately responsible for the existence of man." Additionally, Jakobson believed in a relationship to "Godness" in a vertical and horizontal sense. The draft board found his explanation to be insincere and based on a personal moral code, so Jakobson was denied conscientious objector status.[144] Forest Britt Peter claimed that talking a human life was against his moral code, and he considered this belief superior to his obligation to the State. He cited New York clergyman and pacifist Reverend John Haynes Holmes' concept of religion as a consciousness about man's harmony with nature.[145] Additionally, Peter cited American democratic culture, western religion, and philosophical traditions as the source of his beliefs. He claimed that one could call his collection of beliefs a belief in a Supreme Being, but those were not the words he chose to use.[146] In sum, Seeger, Jakobson, and Peter's collective reasoning for conscientious objector status included a belief in "goodness and virtue for its their sakes," a relationship to "Godness," and a belief in a higher moral code superior to that of the State.

Oral arguments for the case were heard in November of 1964, and the decision was announced in March of 1965. Although a unanimous decision was ultimately reached, the Justices' papers reveal that in the days leading up to the announcement, there was significant disagreement about the way the Court should address *Seeger*. The Court could decide *Seeger* on a statutory basis, which meant that the Court would interpret Congressional intent in creating the Military Training Act. Another way the Court could have decided *Seeger* was from a

---

[143] *Ibid,* 164-165.
[144] *Ibid,* 167-168.
[145] "Dr. Holmes Dies; Crusading Cleric," *New York Times*, April 4. 1964, pg. 1.
[146] *United States v. Seeger*, 168-169.

constitutional standpoint, meaning that the decision would find constitutional reasons for opposing the law. Interpreting *Seeger* this way would give conscientious objectors some degree of rights under the Constitution.

Justices Goldberg, Harlan and Black initially favored ruling on the case from a constitutional standpoint, and were in the final stages of writing concurring and dissenting opinions in March of 1965. However, the Court eventually decided on Justice Clarks' opinion which decided *Seeger* on a statutory basis. Additionally, Justice Douglas's concurrence hinted at constitutional issues, but ultimately decided the case on a statutory basis as well.[147] In order to understand the debate over the *Seeger* decision, Clark's opinion and the creation of the *Seeger* test will be discussed first. The opinions of Black, Goldberg, and Harlan will then be addressed as a response to Clark's opinion. The reasoning behind the Justices' change in opinion will be discussed in light of increased American involvement in Vietnam.

On March 8, 1965, the Court announced the unanimous decision in *United States v. Seeger*. Justice Clark wrote the opinion of the Court. Justice Clark discussed the history of conscientious objectors during World War I and World War II, and notes how the legal definition of conscientious objectors changed from the Selective Service Acts of 1917, 1940, and Amendment in 1948. Rather than deciding on the constitutional issues brought forth by Seeger, Clark focused on Congress' intent when including the "Supreme Being" clause in the 1948 amendment. The Court believed that Congress intended to include Chief Justice Hughes' description of one's relationship to God from *United States v. Macintosh* in the "Supreme Being" clause of the 1948 Amendment. Hughes' dissent in *Macintosh* stated, "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."[148]

---

[147] *Ibid*, 192.
[148] *United States v. Macintosh* 283 U.S. 605, 633-634.

The final version of the 1948 Amendment almost directly quoted from Hughes' definition. The only significant change was Congress replaced the word "God" with "Supreme Being." Therefore Clark concluded that Congress intended to include a more expansive definition of religion in the Act.[149]

With this broad definition of Supreme Being in mind, Clark addressed the beliefs of Seeger, Jakobson, and Peter. Clark outlined what became known as the "Seeger test" in order to determine if a petitioner's beliefs qualify for conscientious objector exemption. Clark wrote 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."[150] Clark emphasized the importance of draft boards determining the sincerity, not the truth of a one's belief when determining conscientious objector exemption. According to Clark, the draft boards and courts should be concerned with determining if a professed belief is sincerely held and ". . .whether they are, in his own scheme of things, religious."[151] In the conclusion of the decision, Clark found that if the registrants meet the standards set by the *Seeger* test, then the registrant's beliefs are not based on a "merely personal code," and that they qualify the petitioner for conscientious objection.[152] The application of this test implied that it is not necessary to have a belief in a "Supreme Being" in order to qualify as a conscientious objector, because the Court concluded that this was not Congress' intent in writing Section 6j.

Clark explicitly stated that the *Seeger* test was not applicable to atheist believers. Before outlining the test, Clark stated that *Seeger* was not dealing with issues of atheism because none

---

[149] *United States v. Seeger* , 175-176.
[150] *Ibid*, 166-165.
[151] *Ibid*, 185.
[152] *Ibid*, 186.

of the petitioners claimed to be atheists. Additionally, Clark stated the decision did not address "monotheism" which he defined as the belief in one God. Clark's interpretation of Section 6(j) wanted to clarify if Supreme Being meant ". . .the orthodox God or the broader concept of a power or being, or a faith 'to which all else is subordinate or upon which all else is ultimately dependent....'"[153] Even though the Court recently addressed atheism in 1961 with *Torcaso*, Clark made it clear that *Seeger* was not applicable for atheist conscientious objectors. Ignoring atheist objectors would later become a significant point of discontent with the Court's opinion.

The *Seeger* decision represented a slight change in Justice Clark's treatment of religion. Clark was a relatively conservative Justice, and one commentator named Clark the "only dependable conservative member of the Court."[154] Clark's opinion in *Seeger* interpreted Section 6(j) in a broad sense and favored a more liberal perspective.[155] Although Clark's seemingly liberal interpretation of the statute may initially have appeared as a departure from his usual stance, Clark later admitted that his decision was highly influenced by theologian Paul Tillich. When reflecting upon *Seeger*, Clark stated, "Since I was reading Tillich, I decided that, perhaps we could read that concept into the statute. And that [concept] was that some people's supreme being is not the supreme being of other people...And if this is sincere, that would be in so far as that individual is concerned, in the eyes of Tillich, a religion."[156] In addition to quoting Tillich's *Systematic Theology* at length in the opinion, the *Seeger* test resembled Tillich's philosophy of

---

[153] *Ibid*, 173-174

[154] *U.S. News & World Report*, 13 July 1969.

[155] By this I mean that traditional liberal perspectives champion individual rights over the state, and *Seeger* upheld the individual over state in conscientious objection.

[156] Tom C. Clark, "Personal Reflections on the Schempp Decision," in Peter Bracher ed. Religion studies in the Curriculum: Retrospect and Prospect, 1963-1983 (Dayton, Ohio: Public Education Religion Studies Center, Wright State University, 1974), 20, as quoted in Sekulow, 255.

God.[157] Therefore, Clark's liberal interpretation of Section 6(j) and the apparent switch from a more conservative view, can be attributed to the influence of Tillich.

Justice Douglas' concurring opinion acknowledged potential constitutional issues with conscientious objection, and expanded on Clark's references to religious beliefs. Originally, Douglas dissented in part from Justice Clark's decision, but on February 20 he changed to concurring.[158] Douglas stated if he had read the Military Service Act differently from the Court, he could have seen the possible infringement upon the Establishment and Free Exercise clauses. Douglas believed Congress had a broad concept of religion in mind when including the "Supreme Being" clause in the 1948 Amendment. Douglas explained how Hinduism and Buddhism include broad conception of a higher power in their beliefs, and Douglas believed Congress intended to include this definition in writing Section 6j.[159] Just as Congress did not intend to exclude Hindus and Buddhists from conscientious objection, Douglas concluded Congress did not intend to exclude Seeger's beliefs either.[160] In *Torcaso* the Court briefly referenced Hinduism and Buddhism as religious sects not based on belief in a Deity, and Douglas' concurrence expanded on the Court's ruling. The inclusion of these beliefs in the body of the opinion signified how the Court adopted a continuously broadening perspective of religion.

---

[157] "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 meaningless, or certitude within doubt, is not the God of traditional theism but the 'God above God,' the power of being, which works though those who have no name for it, not even the name God" (Tillich systematic theology vol. 2 NY: Scribners, 1957) p. 12; quoted in *United States v. Seeger*, 180, 187.

[158] Draft of Douglas concurring opinion, February 20, 1965, Box 1342, William O. Douglas Papers, Manuscript Division. Library of Congress, Washington D.C.

[159] Douglas notes that in the Hindu belief, the Supreme Being is ". . .conceived in the forms of several cult Deities", and that the Buddhist belief in a Supreme Being is a loosely defined concept which the idea of a "God" is not necessarily attached. *United States v. Seeger*, 190-191.

[160] *United States v. Seeger*, 191-193.

The Court's Varying Opinions

Although his opinion was not included in the final decision, Justice Goldberg wrote a lengthy concurrence which heavily criticized the *Seeger* test. Goldberg's opinion discussed why the Court needed to address constitutional issues, Congressional intent when writing Section 6(j), and constitutional problems with 6(j). Goldberg stated that the Court initially granted certiorari to *Seeger* in order to determine if Congress had the constitutional right to limit conscientious objector exemption to those who professed a belief in a relation to a Supreme Being.[161] Goldberg criticized the Court for "reading out the clear limitation on the conscientious objector exemption which Congress wrote in order to restrict the exemption to those holding a belief 'in a relation to a Supreme Being....'"[162] In other words, Goldberg believed it was clearly the intent of Congress to restrict conscientious objection to persons who believe in a relation to a Supreme Being. Additionally, Goldberg criticized the Court's interpretation of the *Berman* case, which Clark included in an earlier draft of his decision.

Goldberg's principle argument against Clark's opinion was that the Court misinterpreted the legislative history of Section 6(j). Goldberg believed that the intent of the Supreme Being clause was in fact to exclude those who do not believe in a Supreme Being from conscientious objector status. Clark's opinion heavily relied on the fact that Section 6(j) used Justice Hughes's *Macintosh* definition of religion almost verbatim. The only noticeable change was Congress replaced the word "God" with "Supreme Being." Clark believed this indicated Congressional intent to expand the *Macintosh* definition of religion. Under this premise, Clark interpreted the beliefs of Seeger, Jakobson, and Peter as qualifying for conscientious objector status. Goldberg objected to Clark's reasoning because he found no evidence in the Congressional record that

[161] Draft of Justice Goldberg's concurrence, February 4, 1965, Box A 171, Folder 1, Tom C. Clark Papers, Tarlton Law Library, University of Texas, Austin.

[162] *Ibid.*

Congress intended to expand the *Macintosh* definition. Therefore, in Goldberg's opinion, the basis of the Court's argument relied upon a faulty premise.[163] Goldberg found that Seeger's belief in "devotion to goodness and virtue for their own sakes" was in no way connected to a belief in some form of Supreme Being or Deity, and therefore Seeger did not qualify for conscientious objector status. In sum, Goldberg argued against the Court's interpretation of the Supreme Being clause, and that Seeger's beliefs did not fall into Congress' intent in creating the statute.

In the opinion, Goldberg acknowledged the value in not deciding every case before the Court on a constitutional basis. However, Goldberg found the constitutional arguments of *Seeger* too significant to ignore, and felt the Court was compelled to rule on a constitutional basis. In light of *Torcaso v. Watkins* and *Everson v. Board of Education*, Goldberg concluded that Section 6(j) unconstitutionally discriminates among religions.[164] Goldberg noted that many Americans belonged to religious sects which did not teach a belief in the existence of a "Supreme Being," including Buddhism, Confucianism, and Taoism.[165] Similar to Justice Douglas, Goldberg recognized the existence of religious not based on belief in one Deity, which suggested a widening concept of religious beliefs. Finally, Goldberg resented how the *Seeger* test required draft boards to determine whether or not particular religious belief systems rely on a belief in a Supreme Being. Theologians and religious scholars grapple with this question, and forcing draft boards and courts to determine if a relation to a Supreme Being is within a petitioner's belief system is an unnecessary and almost impossible task.

---

[163] *Ibid.*

[164] *Ibid. Everson v. Board of Education* was a 1947 Supreme Court decision which clarified the meaning of the establishment clause. Goldberg refers to the portion of the decision which states that neither a State nor Federal Government can ". . .pass a law which aid one religion, aid all religions, or prefer one religion over another". *Everson v. Board of Education* 330 U.S. 1 (1947), 16.

[165] *Ibid.* Goldberg cited these groups as ". . .religious sects which do not teach what would generally be considered to be a belief in the existence of a 'Supreme Being'".

Ultimately, Goldberg found that, ". . .the Supreme Being limitation of § 6(j) distinguishes between religions and prefers some over others."[166] In the conclusion, Goldberg used a quote from the First Congress in 1789, which stated that when it comes to areas controlled by individual conscience, ". . . the rights of conscience are, in their nature, of peculiar delicacy, and will bear the gentlest touch of government hand."[167] Since the *Seeger* test required draft boards and the courts to critically examine the beliefs of a petitioner, Goldberg believed the test amounted to more than a "gentle touch" of government hand upon individual conscience. The "gentle touch" test signified Goldberg's use of the Framer's intention when creating the First Amendment. The Framers did not want government infringement upon man's conscience. The implications of 6(j) would infringe on rights of conscience, which contradicted the Framer's intent. In light of the Framer's intention, Goldberg found Section 6(j) unconstitutional.

Justice Black initially concurred with Justice Goldberg, and opposed Clark's opinion for similar reasons. Like Harlan and Goldberg, Black believed the Court should decide *Seeger* on Constitutional grounds. Black found Section 6(j) unconstitutional because it required petitioners to choose between religious beliefs which include a belief in a Deity, and religious beliefs not based on a belief in God.[168] Black strongly opposed the use of any "test" in evaluating a petitioner's religious beliefs because tests imply that ". . .despite the First Amendment, discriminatory penalties and favors enacted by Congress will be upheld by this Court depending upon its view of the gentleness of the touch or its appraisal of the Government's need to penalize

---

[166] *Ibid.*

[167] *Ibid*, as quoted from Representative Daneil Carroll of Maryland during debate upon the proposed Bill of Rights in the First Congress, August 15, 1789 1 Annals of Cong. 730. At the time "rights of conscience" were akin to religious beliefs.

[168] Draft of Justice Black's dissent, February 24, 1965, Box 526, Folder 2, Earl Warren Papers, Manuscript Division. Library of Congress, Washington D.C.

individual belief."[169] According to Black, freedom of belief cannot survive these sophisticated tests. Although Congress has the power to conscript an army, this does not mean that Congress can run "roughshod over the First Amendment."[170] Furthermore, Black maintained that Section 6(j) violated *Torcaso*, by requiring petitioners to profess a certain kind of belief in order to be granted exemption. Addressing *Torcaso* highlighted how Clark's opinion explicitly claims not to be concerned with atheists objectors. Black concluded by ruling in favor of the petitioners on the ground that Section 6(j) discriminated against people because of their beliefs, and therefore violated the First Amendment.[171]Black's opinion presented a very strong objection to Section 6(j). The need to preserve individual beliefs was very important to Black in this case, and his dissent found constitutional support for this freedom.

Justice Harlan also circulated a dissent from Clark's opinion. In the dissent, Harlan noted, "For the reasons stated in the concurring opinion of my Brother Goldberg, I agree with his view that the constitutional issues presented in these cases cannot be avoided."[172] Harlan claimed that the "Supreme Being" clause of the Selective Service Act was within the power of Congress to enact, and that Congress included the phrase in order to distinguish between theistic and non-theistic beliefs. Harlan acknowledged this infringed on First Amendment rights by allotting some benefits to religious sects which are not enjoyed by others. However, Harlan believed Congress included the "Supreme Being" clause in an attempt to provide draft boards with a guide to classifying conscientious objectors, and not to provide certain religious groups with benefits.

Harlan explained that since the statute infringed upon First Amendment rights, the Court needed to apply additional scrutiny to the Act in order to determine if the law is constitutional.

---

[169] *Ibid.* Harlan's balancing test will be discussed later in greater detail, but the test weighed government interest in raising an army against an individual's conscientious objection.

[170] *Ibid.*

[171] *Ibid.*

[172] Draft of Justice Harlan's dissent, February 16, 1965, Box 526, Folder 2, Warren Papers.

Harlan alluded to the "gentle touch" test outlined in Justice Goldberg's concurring opinion, but disregarded the test, and offered a "balancing test" instead. Harlan weighed Congress' power to raise an army against the how the Supreme Being clause infringes on First Amendment rights. In applying the test, Harlan found the importance of Congressional power to raise an army outweighed the "gentle touch" of government hand upon individual conscience. Harlan noted that Seeger did not have an absolute right to conscientious objection from military service, and believed that the "gentle touch" of the law on Seeger's conscience was so gentle that it was inconsequential. Ultimately, Harlan ruled in favor of Congressional power, and decided that the "Supreme Being" clause was not unconstitutional.[173]

Behind the Scenes

In their dissents Goldberg, Black, and Harlan articulated the major problems of Clark's opinion, and other Justices on the Court were aware of these issues. Justice Clark circulated an initial draft of his opinion in late January, but the draft was unsatisfactory for the Justices. Chief Justice Warren's law clerk, John Hart Ely wrote an extensive review of Clark's opinion, which highlighted major flaws in Clark's argument. According to Ely, the Court's insistence on approaching *Seeger* from a statutory perspective was inherently flawed. *Seeger* was clearly a case where the doctrine of avoidance should not be applied. The doctrine of avoidance is a Supreme Court policy which is invoked in order to keep the Court from touching upon areas that would have dangerous complications for future law. Justice Goldberg referenced this policy in his concurrence, but determined that it did not apply in this case. As Ely explained, ". . .the doctrine says that in general a non-constitutional ground is preferable, because its implications are narrower and less immutable. It exists to keep the Court from getting into a mess."[174]

---

[173] *Ibid.*

[174] John Hart Ely, *to* Chief Justice Warren, January 26, 1965, Box 526, Folder 2, Warren Papers.

Although Ely did not disagree with the doctrine of avoidance, he believed that Clark's use of the principle in the *Seeger* case was unwarranted and would create future problems.

Ely's review attacked Clark's standard for evaluating conscientious objectors. The *Seeger* test forced the Court to define and examine the religious beliefs of conscientious objectors, and the First Amendment was enacted to protect against such government intrusion. Furthermore, the original draft of Clark's opinion stated that when Congress included "Supreme Being," it intended to ". . .exempt from military service any conscientious objector whose opposition to war was derived from an innate conviction of paramount duty, as distinguished from conscience. . . ."[175] Ely believed this distinction would be impossible for draft boards to decipher, and is therefore the *Seeger* test was an unworkable standard. According to Ely, determining the place in one's life that an opposition to war holds is a nearly impossible task. Ely questioned how a draft board could determine what place religious beliefs occupy in a religious persons' life. If that is possible to determine, Ely questioned how draft boards would determine what place one's objection to war occupies in the life of an applicant for conscientious objection.[176] These confusing and complex question are almost impossible for draft boards to figure out, and were harshly criticized in Clark's first draft.

On February 15, Clark circulated a memo to the Justices, which explained why Justices Goldberg, Black and Harlan misinterpreted the meaning of his opinion. Clark contended that Goldberg and Harlan's opinions were dealing with "monotheism," whereas his opinion addressed belief in "a God," which explains his broad interpretation of "Supreme Being."[177] Clark attempted to clarify what the *Seeger* test implied, by stating that the test ". . . requires religious training and belief in a power or being comparable to the God in the religion of the

---

[175] *Ibid.*
[176] *Ibid.*
[177] Clark defined monotheism as the belief in one God.

orthodox." According to Clark, dictates of conscience which are internally derived (meaning thought of on one's own) were not included in this interpretation. Noting these misconstrued interpretations, Clark stated he would revise his opinion.[178]

The revised version of Clark's opinion was circulated on February 18th, and outlined the reasons for not addressing constitutional issues. In the revised opinion, Clark prefaced the discussion of Dr. Paul Tillich's views on God with a discussion about avoiding grave constitutional issues whenever possible. Clark defended the *Seeger* test by stating that the test is a legitimate way of avoiding constitutional issues because it incorporates a realistic understanding of the modern religious community.[179] The inclusion of this section proves that Clark realized his opinion intentionally avoided constitutional questions. However, this section was omitted from the final draft of the opinion. Other Justices strongly opposed Clark's opinion because he avoided important constitutional questions, so it is strange that Clark would delete this section from the final draft. Perhaps Clark deleted this section because incorporating a "realistic understanding of the modern religious community" could be considered dangerous precedent. If a realistic understanding is required for a test to be legitimate in the eyes of the Court, the test could be dismissed when a future community determines that it is no longer realistic. In other words, this section would make *Seeger* relevant only within the historical context of the opinion. If the Court's decisions are only relevant to the particular time they were issued, the context of the decisions would become more important than the decisions themselves. Whatever the reason, Clark chose to omit this section, even though it addressed an enormous problem with the decision.

---

[178] Justice Thomas Clark, *to* the Conference, February 15, 1965, Box 526, Folder 2, Warren Papers.
[179] Draft of Clark's opinion, February 18, 1965, Box 526, Folder 2, Warren Papers.

Ely also reviewed Clark's February 18 draft. In the review, Ely revealed that Warren, ". . . would strongly prefer reversal on a non-constitutional ground. . ." which indicated the Chief Justice's extreme reluctance to rule on the constitutional issues in *Seeger*.[180] Ely generally approved of Clark's February 18th draft, but warned that that the Court's ruling would force lower courts and draft boards to evaluate the belief systems of a petitioner. Ely believed the examination of beliefs conflicted with the First Amendment, and that Clark's opinion was incomplete because it did not address this issue.[181]

Explaining the Switch

Justice Goldberg's dissent, Black's concurrence, Harlan's dissent, and Ely's critique of the opinion, reveals that the Court was well aware of the problems with Clark's opinion. Even Clark acknowledged that his opinion could only be applied to non-atheist believers. Additionally, investigation into the Justices papers revealed that in the days leading up to announcing *Seeger* the Court was very divided. Chief Justice Warren, Justices Douglas, Clark, Brennan, Stewart, and White agreed to Clark's opinion with Douglas concurring. Justice Goldberg and Black concurred with the decision of the Court but were adamantly opposed to Clark's grounds for the opinion. Justice Harlan dissented from the Court's opinion. While the Court can issue a decision with many opinions, the role of the Chief Justice is to assist in creating unanimity among the Court when possible. Warren was confronted with a challenge in *Seeger* because in the beginning of March, the Court stood to issue a 8:1 decision, with five separate opinions.

The Court's seemingly dramatic switch from a divided to unanimous decision appears confusing. Although the papers of the Justices are noticeably incomplete in this regard, internal documents provide a clearer picture of the Court's inner workings the week before the decision

---

[180] John Hart Ely, *to* Chief Justice Warren, February 19, 1965, Box 526, Folder 2, Warren Papers.
[181] *Ibid.*

was announced. On Thursday March 4, 1965, Justice Douglas received a note from Clark, which stated that if Black were to join or concur in Clark's most recent draft, Goldberg and Harlan would also concur.[182] The Court traditionally holds conference meetings on Friday, and it is likely that the Court discussed the *Seeger* decision at conference. Unfortunately notes from the conference are missing, but on March 5, Goldberg sent a memo to the conference stating that he withdrew his concurring opinion, and joined with Clark.[183] Either at the conference or sometime between March 4 and March 8, Justices Black and Harlan must have withdrawn their opinions and joined Clark as well. Obviously the Justices changed their opinion on the case; however, their actions beg the question, why did the Court switch from a decision with one majority, three concurring, and one dissenting opinion, to the final unanimous opinion with one concurrence just days before the decision?

Understanding the logic behind the Supreme Court and the interworking of the Justices' decisions is a complicated task. Justices are free to change their opinion whenever they please, and it is almost impossible to know for certain what went on in the minds of the Goldberg, Harlan, and Black during this time period. Deciphering the reasons behind a particular decision can be a series of educated guesses, but there are two forms of explanations which could accounting for the switch *Seeger*. The first way to account for the switch is by explaining the external forces on the Court, which includes the growing United States involvement with the conflict in Vietnam, and the role of the Court in potential wartime. A second way to explain the switch is by assessing the forces within the Supreme Court. These internal forces include a combination of individual Judicial philosophies, determining the key Justices in the switch, and addressing the Judicial politicking within the Court. The following is an exploration of these

---

[182] Justice Thomas Clark, *to* Justice William O. Douglas, March 4, 1965, Box 1342, Folder 10, Douglas Papers.

[183] Justice Arthur Goldberg, *to* the Conference, March 5, 1965, Douglas Papers.

possibilities, but in the end, only the Justices of the Warren Court could truly explain the motivations behind the *Seeger* decision.

External Forces

American involvement in Vietnam was a growing national concern in the months leading up to *Seeger*. On February 7, 1965 a group of Vietcong guerrillas attacked United States helicopter base and barracks near the South Vietnam city of Pleiku.[184] Eight Americans were killed, 126 were wounded, and ten U.S. aircrafts were destroyed. Additional attacks on targets throughout South Vietnam produced the highest number of American casualties from a single incident in the conflict thus far.[185] Johnson ordered an air strike against North Vietnam, but claimed this was a limited response to the attack, and did not signal an expanding war.[186] However, Pleiku received national attention, and signaled a change in U.S. military policy in Vietnam.

Additionally, the State Department released the "White Paper" on February 27, which addressed Hanoi's involvement in South Vietnam. The report was a detailed account of how the North Vietnamese supplied communist forces in the South, and aided aggression against Saigon. In the conclusion, the State Department found Hanoi's actions in violation of the Geneva Conventions, and that Hanoi posed a fundamental threat to South Vietnam's liberty. The report stated that the United States has an obligation to assist South Vietnam, and implied the State Department's position on the increasingly violent conflict.[187] Behind closed doors, the State Department decided to implement the first attack on North Vietnam not in retaliation. Operation

---

[184] Seymour Toppings, "Seven G.I.'s Slain in Vietcong Raid," *New York Times*, February 7, 1965.
[185] Logevall, 1.
[186] Tom Wicker, "Capital is Tense," *New York Times*, February 8, 1965.
[187] United States State Department, "Aggression from the North: State Department White Paper on Vietnam," Department of State Bulletin: February 27, 1965. As printed in the *New York Times* "Text of U.S. White Paper on North Vietnam's Growing Role in War in the South," *New York Times,* February 27, 1965.

Rolling Thunder was a series of sustained fire bombings on North Vietnam, which began on March 2, 1965. Although the attacks were not made public until later, many observers of the crisis warned against the possibility of escalating American involvement in Vietnam.[188]

While the public remained in the dark about Operation Rolling Thunder, on March 6, 1965, the *New York Times* announced that 3,500 Marines were deployed to North Vietnam.[189] 23,500 Americans were already stationed in South Vietnam, and this was the first time American ground troops were sent into North Vietnam. There is no direct evidence that the Supreme Court Justices were aware of the ground troops in North Vietnam before the announcement was made public. That is to say, there were not any articles about the deployment of U.S. troops, or notes between Justices about the incident in any of the papers. However, the Justices were undoubtedly aware of U.S. foreign affairs, and one can reasonably assume they read newspapers. Furthermore, the Justices on the Warren Court were very well connected in Washington, so it is possible that they knew of the military plans beforehand.

One reason why Goldberg, Black and Harlan chose to side with Clark's opinion in *Seeger* could be the fear of ruling conscientious objection unconstitutional in light of recent events. With troops going into North Vietnam, and the White Paper exposing the State Departments' increasingly aggressive position, the Justices may have anticipated an escalating conflict in Southeast Asia. An increased U.S. role in Vietnam would mean more Americans being drafted, and therefore more conscientious objector applications. If the Court found Constitutional reasons for omitting the Supreme Being clause, it is possible that the entire conscientious objector exemption could be challenged. Based on the Court's historically accommodating treatment of conscientious objectors, the risk of eliminating conscientious objector exemption might have

---

[188] Logevall, 76.

[189] Jack Raymonds, "3,500 U.S. Marines Going to Vietnam to Bolster Base," *New York Times*, March 6, 1965.

been an uneasy proposal for the Justices. Goldberg, Black, and Harlan's opinions regarded the position of conscientious objectors with great respect, and there is little indication that the Justices wanted to do away with conscientious objection. The three Justices may have chosen to withdrawal their opinions and side with Clark, for fear that conscientious objectors may no longer have the opportunity to apply for exemption from military service.

Another reason Goldberg, Black and Harlan may have chosen to side with Clark is fear of seeming unsupportive of the military when the United States was in a potential time of war. As seen in the *Selective Draft Law Cases*, *Schenk v. United States,* and *Korematsu v. United States*, the Court tended to rule in favor of governmental power during wartime.[190] Particularly when the country has the potential of entering a conflict (as newspapers at the time suggested), patriotic support in favor of executive power and the military historically increases. Some critics of the conscientious objector exemption claim that objectors negate their patriotic duty by opting out of military service.[191] Even though members of the Court may not agree with this appraisal, Goldberg, Black, and Harlan's opinions were sympathetic to the plight of the conscientious objector. If *Seeger* included these other opinions which expressed a kind of constitutional sympathy towards conscientious objectors during a time of increased support of the military, the Court might have faced harsh criticism. Although by 1965 the Warren Court was certainly used to criticism, perhaps the issue of conscientious objection was not considered an important enough concern to come out with a constitution based decision. While these explanations may not have actually played a role in the Court's process, they are possible reasons why the Court would have a dramatically different opinion in the course of four days.

---

[190] See *Charles T. Schenk v. United States* 249 U.S. 47 (1919), and *Fred Korematsu v. United States* 323 U.S. 214 (1944). For explanation about *Schenk* see footnote 37. *Korematsu v. U.S.* ruled that the internment of Japanese Americans was permissible during WWII.

[191] Alexander Burnham, "Draft Resistance: An Old Problem," *New York Times*, January 21, 1965.

Another external reason the Court might have avoided constitutional issues is avoiding infringing on the balance of power under the Constitution. Conscientious objection involves all three branches of government. Congress creates draft legislation which gives the President the authority to draft troops, and exempts conscientious objectors from military service. Conscientious objectors can appeal a draft board's decision under the Court system. In *Seeger*, the Supreme Court was asked to review the status conscientious objectors in light of the Constitution. The Court needed to balance the interests of Congress and the President, and determine if this balance could be upheld under the Constitution.

Perhaps the Court did not want to disrupt the way all three branches functioned in this matter. Finding constitutional grounds for conscientious objection grants citizens' the authority to exempt themselves from a national law. Therefore, the power of Congress and the President, to conscript all draft age citizens is hindered, because certain groups are allowed exemption under the Constitution. If the Court were to rule in favor of conscientious objectors in this way, the Court would be making a statement about the proper role of Congress and the President. Perhaps the Court was not prepared to issue such a statement. The Court might have opted to avoid constitutionality because the conscientious objectors touched upon the power of other branches, and the Court did not want to infringe on those powers.

Internal Forces

While the Supreme Court is considered "apolitical" in the sense that the Justices are not elected, within the Court the Justices are known to partake in a degree of "politicking" or attempting to persuade each other to vote certain ways. One of the duties of the Chief Justice is to attempt to create cohesion within the Court's opinions. The Court was very divided on *Seeger*

in the days leading up to the decision, and the Justices' attempt to persuade each other to vote in particular ways might help explain the switch.

Justice Douglas and Justice Black had an alliance during their tenure together. In their early years on the Court, Black and Douglas tended to vote together and constituted part of the liberal consensus on the Court.[192] Once the liberal bloc on the Warren Court began announcing more liberal decisions less concerned with a strict reading of the Constitution, Black slowly departed from the Court's increasingly activist position, and sided with Douglas less frequently. According to Black, Justice Douglas began interpreting the Constitution too broadly, and issued "sloppy" decisions during the later years of the Warren Court.[193] However, Black continued to hold Douglas in high regard, and believed he was a brilliant Justice. In *Seeger*, Douglas and Black were initially on opposing sides. Considering their long history on the Court as allies, Douglas could have persuaded Black to side with Clark's opinion.

Black was also close with Chief Justice Warren, who might have persuaded him as well. Warren considered Black a trusted ally, who was willing to compromise in order to form a cohesive decision. Black was also capable of persuading other Justices to change their votes, and Warren often solicited Black's assistance.[194] Taking into account Black's relationship with Douglas and Warren, Black appeared to be the key vote in changing the *Seeger* outcome.

Additionally, on March 4, 1965, Clark wrote a memo to Douglas explaining the situation of the *Seeger* votes. The memo stated, "If Hugo [Black] joins or concurs in the newest Author [Goldberg] and John [Harlan] say they will join me".[195] Since Goldberg withdrew his concurring opinion on March 5, Black must have joined with Clark in his March 4 opinion, which made the

---

[192] Jeffrey Rosen, *The Supreme Court: the personalities and rivalries that defined America* (New York: Time Books, Henry Holt and Co., 2006), 144-145.
[193] *Ibid*, 160-162.
[194] *Ibid*, 159-160.
[195] Memo from Justice Clark *to* Chief Justice Warren, March 4, 1965. Douglas Papers.

opinion unanimous under Clark's opinion. Black's vote was the key in changing the outcome of *Seeger*, which resulted in a decision avoiding constitutional concerns.

Backlash against Seeger

After *Seeger*, legal scholars were quick to criticize the Court for handing down an unclear test, ridden with flaws. While most of the legal scholarship on *Seeger* announced the Court's decision without a critique, there were a considerable amount of articles condemning the Court, and encouraging the Court to revisit the conscientious objector exemption.[196] Scholarship focused on the Court's reluctance to rule on the constitutional issues, which resulted in an opinion broadly interpreting the intent of 6j, and the faulty "*Seeger* test." Critiques of the decision criticized the Court for framing conscientious objection around what Congress intended as law, rather than addressing if the standards enacted by Congress were justifiable under the Constitution. By choosing Clark's opinion as the majority, the Court avoided addressing these issues all together. This created the problem of establishing precedent based on interpretation of individual laws rather than the broader issue of conscientious objection.

Another issue the Court left unanswered in *Seeger* was that of atheist objectors. In *Torcaso v. Watkins*, the court ruled that the government cannot enact a law which ". . .aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs".[197] The *Seeger* test acknowledged that the Supreme Being clause differentiates between religious beliefs (between

---

[196] Summaries of the Court's opinion were included in *University of Chicago Law Review*, *Notre Dame Law Review*, *New York University INTRA Law Review*, *Harvard Law Review*, and *Utah Law Review*. Prominent critiques of *Seeger* include, Abner Brodie and Harold P. Southerland, "Conscience, the Constitution, and the Supreme Court: The Riddle of United States v. Seeger," *Wisconsin Law Review* 2 (1966): 306-330, Raymond B. Marcin, "Conscientious Objector Exemption as an Establishment and an Accommodation of Religion," *Connecticut Bar Journal* 40(1966): 426-439, Christopher H. Clancy and Johnathan A. Weiss, "The Conscientious Objector Exemption: Problems in Conceptual Clarify and Constitutional Considerations," *Main Law Review* 17 (1965) 143-160, and Robert L. Rabin, "When is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise," *Cornell Law Review Quarterly* 51(1966): 231-249.

[197] *Torcaso v. Watkins*, 495.

those who do or do not acknowledge a Supreme Being), but it did not address if the statute provided aid to religious believers against non-religious believers. If objectors whose beliefs were considered non-religious were denied conscientious objector status solely because their beliefs were non religious, would violate the Due Process clause by favoring religious objectors over non religious objectors.

Scholarship also focused on the "parallel to God" component of the *Seeger* test. In order to be considered a conscientious objector under the *Seeger* test, one must hold a belief in opposition to war that occupies the place in one's life similar to religiously orthodox believers. However, since Clark's opinion considered Seeger, Jakobson, and Peter's beliefs "religious" and not atheist in nature, the "place in one's life" part of the test is contingent upon the requirement that the beliefs are considered "religious." In other words, ". . .a virtually infinite number of value systems or beliefs. . . could in theory attain to such equivalence," yet the Court explicitly points out that atheism does not qualify as one of these beliefs.[198] As long as the draft board considers a petitioner's beliefs "religious," virtually any kind of belief in opposition to war could qualify the petitioner for conscientious objector exemption. Therefore, under the *Seeger* test, specific reasons for conscientious objection could be vastly different, but they can qualify petitioners as long as the draft boards consider the beliefs "religious." The Court's refusal to address the question of atheism in *Seeger* resulted in this questionable aspect of the test, and was one major inconsistency with the decision.

There is also a problem of inconsistency with the "parallel to God" requirement as it applies to atheist objectors. Say an atheist held a belief against joining the armed forces and applies for conscientious objector status. A draft board believed this person's belief occupied a

---

[198] Abner Brodie and Harold P. Southerland, "Conscience, the Constitution and the Supreme Court: The Riddle of United States v. Seeger," *University of Wisconsin Law Review* Spring (1966): 318.

place in his/her life parallel to the place a belief in God occupies in the mind of an orthodox religious person. Additionally, the atheist was found to be very sincere in his/her belief. The atheist's opposition would seemingly satisfy the *Seeger* test because he/she has a sincerely held belief which occupies a "parallel to God" position in his/her life. However, since the atheists' beliefs are not "religious in nature," the *Seeger* test cannot apply. Because the Court explicitly stated that a conscientious objector must have beliefs which are considered religious, an atheist can never qualify for conscientious objector exemption under the *Seeger* test. Therefore, the *Seeger* test does not apply to atheist objectors, even though they might be able to pass the "parallel to God" test.

Requiring conscientious objector beliefs to be "religious" in nature resulted in another problem of the *Seeger* test. According to critics, this requirement contradicts the Court's ruling in *Torcaso* which states that the government cannot require individuals to profess a belief or disbelief in any religion, or impose requirement which aid some religions over others.[199] Under the *Seeger* test, the government requires individuals to profess a religious belief, an aids those who claim this belief by granting them exemption from combatant military service. In *Torcaso* the Court based this ruling on the Fifth Amendment right to due process of law. Since the *Seeger* test violated the provisions of *Torcaso*, critics assert that the due process rights of conscientious objector applicants were violated by the *Seeger* test.[200]

An additional problem with the *Seeger* decision was the difficulty of implementing the *Seeger* test. As Ely acknowledged in notes about Clark's decision, determining the place a belief is held in a petitioners' life is a nearly impossible task, and four Justices (Warren, Goldberg,

[199] *Torcaso v. Watkins*, 495.
[200] *Brodie*, 309-310.

Black and Harlan) were aware of this problem when the decision was handed down.[201] The Court knew the *Seeger* test would be the draft board's guide to determining conscientious objectors. Although draft boards were under the Federal government's control, the draft was organized at the local level. Draft age men were required to register with the national Selective Service, and were then assigned to local draft boards. The local boards were intended to be a "little group of neighbors," who would determine each applicant's status.[202] Studies on the socioeconomic makeup of local boards revealed that the majority of the "neighbors" were white, upper-class, conservatives, who tended to have a bias against drafting young, white, middle-class men.[203] The status of draft registrants relied upon how individual draft boards interpreted national guidelines and court decisions on an individual case basis. Therefore, enacting national standards proved to be very difficult because the system was dependent on the opinions of local draft boards.[204]

Although large-scale inquiries into the Selective Service System did not occur for the most part until the late 1960's, the Justices must have been at least somewhat aware of the discrepancy between draft boards. The Justices received many petitions for review of conscientious objector cases, and the petitioners revealed vastly different draft board experiences. Additionally, discontent with the Selective Service System was reported in newspapers across the country, and the Justices must have been at least somewhat aware of this.[205] Differences between draft boards coupled with an unclear standard for determining conscientious objectors created discontent among draft boards and conscientious objector

[201] Warren received feedback about this from John Hart Ely. Goldberg, Black, and Harlan all wrote about the problems of *Seeger* in their opinions.

[202] George Q. Flynn, *The Draft 1940-1973*, (Lawrence, Kansas: University Press of Kansas, 1993), 19-20.

[203] Michael E. Tigar and Robert J. Zweben, "Selective Service: Some Certain Problems and Some Tentative Answers," *George Washington Law Review* 37 (1969): 522-531.

[204] Robert M. Brandon, "The Conscientious Objector Exemption: Discrimination against the disadvantaged," *George Washington Law Review* 40 (1971): 275.

[205] In national newspapers like the *New York Times*, *Los Angeles Times*, and the *Wall Street Journal*, there were editorials, opinion pieces, and special reports on draft boards and conscientious objection. More articles were written after 1967, but there was a considerable amount of press about the draft beginning in 1961.

applicants. The *Seeger* test did not rectify this discrepancy, but only provided further confusion for local draft boards.

Ultimately, the *Seeger* test presented draft boards and the lower courts with a nearly impossible way of determining who qualified for conscientious objection. Perhaps the Supreme Court intended to leave the application of the *Seeger* test to the lower courts, and hoped that the lower courts would be able to make sense of the decision. Whether this was the Court's intention or an unforeseen consequence, the lower courts were handed down an unclear test with no constitutional support. Without constitutional reasoning, or a strong Supreme Court decision, conscientious objector cases were interpreted very differently among lower courts. Although the Court had the opportunity to amend the flaws of the test, by choosing to ignore constitutional issues the Court handed down a faulty decision. Events in Vietnam which may have contributed to the Court's ruling would eventually lead to an unforeseen increase in conscientious objector applicant, and five years later the Court decided to amend the *Seeger* test.

Welsh v. US

In the years following the *Seeger* decision in 1965, American presence in Vietnam significantly increased. President Johnson reinstated the draft with the Military Selective Service Act of 1967. The definition of "religious training and belief" in section 6(j) in the new Selective Service Act read, "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."[206] The Supreme Being clause was removed from the statute, but controversy over the loopholes in *Seeger* remained.

After 1965, the United States presence in Vietnam significantly escalated. Young men were drafted into the armed service with the increased possibility of being sent into combat.

[206] Military Selective Service Act of June 30, 1967, 81 Stat. 1432, §456(j).

Many factors contributed to the rise in conscientious objector applicants after 1965, including the surge in youth population, youth activism, and a growing anti-war contingent. Compared to WWI and WWII, the ratio of conscientious objector exemptions to actual inductions into the army after 1965 was tremendous. In both WWI and WWII for every 100 men inducted into the army there was .014 (or less than 1) conscientious objector. By 1966 there were 6.10 conscientious objector exemptions for every 100 inductees, and by 1970 the number skyrocketed to 25.55 per every 100 inductees.[207] This indicates the growing resistance to the military draft among draft-age youth. In addition, civil rights activist Dr. Martin Luther King Jr. came out against the conflict in Vietnam and encouraged young people to register as conscientious objectors.[208]

The growing number of conscientious objector applicants indicated the increasing resistance among draft-age youth to the conflict in Vietnam, but there was a discrepancy between the "popular notion" of a conscientious objector and a more legal definition. In the minds of many Americans during this period, a conscientious objector became closely associated with a peace-loving hippie who evaded the draft by moving to Canada.[209] If petitioners challenged their classifications, draft boards and courts had a less encompassing vision of conscientious objection. The unclear *Seeger* test required conscientious objector's beliefs to be rooted in a religious training and belief, and many boards were hesitant to read too much into the test. Studies conducted during the 1960s' revealed the declining position of religion in American

---

[207] U.S. Bureau of Census, *Historical Statistics of the United States* (1975) and the Selective Service System, *Conscientious Objectors Special Monograph No. 11*, 53, 314-315 as quoted in Kohn, *Jailed for Peace*, 93.

[208] Douglas Robinson, "Dr. King Proposes A Boycott of War" *New York Times*, April 5, 1967.

[209] Wallace Turner, "Criticism and Evasion of Draft Grow With Unpopularity of the Vietnam War," *New York Times*, May 14, 1969, page 20, and Saul Braun "From 1-A to 4-F and all points in between," *New York Times*, November 29, 1970, pg. 244.

society, specifically among American youth.[210] Draft aged men, therefore, were less likely to find religious reasons for objecting to conscription, and were not eligible for conscientious objector classification.

Many draft law violators argued against the conflict in Vietnam In many federal court cases, draft violators argued that U.S. involvement in Vietnam was unconstitutional. They argued that the Gulf of Tonkin Resolution was not a declaration of war, and therefore Congress was not authorized to draft citizens.[211] Many cases addressing the constitutionality of the conflict in Vietnam applied for review, but the Supreme Court denied every request.[212] Between 1965 and 1973, various cases concerning the constitutionality of the conflict in Vietnam appealed to the Supreme Court. Justice Douglas wanted to grant certiorari in a majority of these cases, but he was not able to persuade three other Justices to vote on any one case.[213] In *United States v. O'Brien*, the Court found burning one's draft card was not protected under the First Amendment.[214] Antiwar activists were discouraged by the Court's position in *O'Brien* and the Court's silence on Vietnam. However, one way the Court addressed the conflict in Vietnam was through conscientious objector cases.

Although the Court had the opportunity to review many conscientious objector cases, the decisive (and some would say final) case was that of *Welsh v. United States* in 1970. Elliot Allen Welsh was convicted of refusing to submit to induction into the Armed Forces, but claimed that he was a conscientious objector under the Military Selective Service Act. Welsh was raised in a religious home, but did not belong to a religious group at the time of his conviction and did not

---

[210] "Toward a Hidden God," *Time Magazine*, Friday April 8, 1966. Accessed through http://www.time.com/time/magazine/article/0,9171,835309,00.html.

[211] Schoen, 276-277.

[212] *Ibid*, 304.

[213] Robert H. Keller Jr., *In Honor of Justice Douglas: A Symposium on Individual Freedom and the Government* (Westport, Connecticut: Greenwood Press, 1979), 150-153. At times, Justices Black, Brennan and Stewart voted to rule on these cases, but no case received the required four votes.

[214] *United States v. O'Brien*, 391 U.S. 367 (1968), 375.

initially consider his beliefs "religious." Welsh believed that killing in war was wrong and immoral, and that these beliefs came from a voice of conscience so lout that he would rather go to jail than serve in the Armed Forces.[215] When Welsh appealed his conviction, the Department of Justice investigated his beliefs. During this time, Welsh reassessed his beliefs and decided that they were in fact religious. The government was not convinced, and although they found Welsh's beliefs to be sincere, they, "'. . .could find no religious basis for the registrant's beliefs, opinions and convictions'", so Welsh did not qualify for conscientious objector status.[216] The Second Circuit Court of Appeals upheld the government's findings, and Welsh appealed the decision to the Supreme Court.

The transcript of the Supreme Court's hearing of *Welsh v. United States* revealed the connection to *Seeger* and the effect of the Military Training Act of 1967. Chief Justice Burger interrupted the Solicitor General during his argument in defense of the State. Burger asked, "'If this man [Welsh] had come within the statute, as defined in *Seeger*, what would have happened to him? He would not have been exempt, would he?'" The Solicitor General agreed that Welsh would not have qualified for exemption under the 1940 Selective Service Act or the 1948 Amendment.[217] Additionally, during the argument Welsh's attorney reminded the Justices of the Framer's discussions when creating the First Amendment. The Framers wanted to protect "rights of conscience," and Welsh argued that his beliefs were protected under this interpretation. The Justices were clearly aware of the significant changes affecting conscientious objection since *Seeger*, and were prepared to decide *Welsh* accordingly.

---

[215] *Welsh v. United States* 389 U.S. 333 (1970), 335-336.
[216] *Ibid*, 337-339.
[217] Transcript of Argument, Supreme Court of the United States, October Term 1969, In the matter of Ashton Welsh II v. United States; Docket no 76, January 20, 1970, Box I:210, Folder 9, William J. Brennan, Jr., Papers, Manuscript Division, Library of Congress, Washington, D.C.

In a 5:3 decision, the Supreme Court ruled to reverse the Second Circuit opinion, and qualified Welsh as a conscientious objector.[218] Justice Black wrote the opinion for the Court, which Justice Harlan concurred. Justices White, Burger, and Stuart dissented. The Court's ruling in *Welsh* highlighted the problems of *Seeger*, while also creating a new and very broad standard for conscientious objector beliefs. Black claimed that Welsh's beliefs in opposition to war were akin to Seeger's, and the case was therefore controlled by the *Seeger* test.[219] While Black quoted the *Seeger* test, he also stated that ". . .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 nonreligious is a highly unreliable guide for those charged with administering the exemption. Welsh himself presents a case in point."[220] The Court acknowledged that many petitioners incorrectly declared themselves as not religious, when the Court actually intended the *Seeger* test to be more encompassing of beliefs.

Black claimed Welsh's beliefs were not "essentially political, sociological, or philosophical views or a personally moral code," which the Congress had the right to exclude from conscientious objection.[221] Black concluded that Welsh satisfied the *Seeger* test because his convictions were as sincere as the convictions of traditional religious objectors. Finally, Black believed section 6(j) would exempt ". . . from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."[222] By this standard, petitioners, like Welsh, who believe in the immorality of killing in military service would be

---

[218] *Welsh v. United States,* 344. The decision was 5:3 because Justice Blackmun took no part in the consideration or decision of the case.

[219] *Ibid,* 335-339.

[220] *Ibid,* 341.

[221] *Ibid,* 342.

[222] *Ibid,* 344.

granted conscientious objector status. Instead of addressing constitutional issues, Justice Black's opinion stretched the meaning of section 6(j) to include a variety of beliefs.

The Court once again decided a conscientious objector case on a statutory basis. However, Justice Harlan chose to write a strong concurring opinion articulating constitutional reasons for reversing *Welsh's* conviction. In the beginning of his opinion, Harlan admitted having reservations about *Seeger*, and heavily critiques the case for avoiding constitutional issues. Harlan claimed Black's opinion ignored legislative history of 6(j) and ". . .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.'"[223] In Harlan's opinion, Congress enacted these limitations in order to limit the realm of conscientious objection, not expand it as Black did. However, noting the historical importance of conscientious objection, Harlan stated he is prepared to accept Black's definition, ". . .not as a reflection of congressional statutory intent but as a patchwork of judicial making that cures the defect of underinclusion in § 6(j) and can be administered by local boards. . ."[224] In other words, Harlan disagreed with Black's interpretation of Congressional intent. Instead of objecting to Black's opinion outright, Harlan recast Black's opinion as fixing the problems of Section 6(j). Harlan argued that 6(j) was not all encompassing, and believed Black's opinion would provide much needed clarity for local boards.

Although White's dissenting opinion disagreed with Black's decision, White focused on attacking Harlan's concurring opinion. White believed the Court's ". . .obligation in statutory construction cases is to enforce the will of Congress, not our own. . .constructing § 6(j) to include Welsh exempts from the draft a class of persons to persons to whom Congress has

[223] *Ibid*, 351.
[224] *Ibid*, 366-367.

expressly denied an exemption."[225] According to White, Welsh's beliefs were specifically the types of beliefs Congress intended to prohibit in creating the Military Service Act. Furthermore, White dismissed Welsh's argument that the Act violated the Free Exercise Clause because since his beliefs were not religious, Congress was not preventing him from freely exercising his beliefs.[226]

Welsh signaled a change in the way conscientious objectors were perceived by the Court. By construing section 6(j) as broadly as possible, the Court seemingly invited all who opposed war on moral grounds to apply for conscientious objector exemption. *Welsh* mended unresolved problems with the *Seeger* test because the interpretation of 6(j) was so broad that atheist believers could qualify as conscientious objectors. Additionally, by stressing the importance of sincerity in Welsh's beliefs, the Court clarified parts of the *Seeger* test. While a belief still needed to occupy a "parallel place to God," *Welsh* highlighted the importance of sincerity of belief rather than the religious nature of a petitioner's belief.

Although many criticized Black for seemingly abandoning First Amendment issues, the decision can also be viewed as a steadfast protection of the rights of conscience. On the surface, *Welsh* does not adhere to Black's steadfast support of the First amendment, because the decision provided the opportunity to establish a constitutional protection for conscientious objectors. However, Black was heavily invested in a literal interpretation of the First Amendment, and favored the Framers' perspective on the issue. In a speech at New York University Law School ten years prior to *Welsh*, Black quoted James Madison's proposal to include protections for "rights of conscience" in the First Amendment.[227] By stretching section 6(j) to include virtually

---

[225] *Ibid*, 367-368.
[226] *Ibid*, 368-369.
[227] Hugo L. Black, "The Bill of Rights," *New York University Law Review* 35 (1960), 874. The article was delivered as a speech on February 17, 1960.

any kind of sincerely held belief, Black extended the conscientious objector provision. This would include anyone who believed their conscience opposed participation in war.[228] *Welsh* did not explicitly protect First Amendment rights, but the statute was interpreted broadly enough to include a variety of beliefs. Therefore, by extending the standards for conscientious objector exemption, Black extended the protection of "rights of conscience" from government intrusion.

Conclusion

In 1973, President Nixon fulfilled his campaign promises and ended peacetime conscription.[229] Since then, the United States military has been comprised of all volunteers. However, all males between the ages of eighteen and twenty-five are still required to register with the Selective Service System.[230] Some may argue that the end of conscription signified the end of conscientious objection. However, the plight of the conscientious objector is far from over. In 2003, Representatives Charles Rangel and John Conyers proposed military conscription legislation if the United States declared war on Iraq.[231] As we approach the fifth anniversary of U.S. military involvement in Iraq, military recruiters are having an increasingly difficult time meeting their volunteer quotas.[232] Although the President has not asked to reinstate the draft, dwindling army recruits, and predictions for a continuing military presence in Iraq could force Congress to reinstate conscription.

While the Supreme Court gradually expanded the qualifications for conscientious objector exemption during the twentieth century, constitutional questions still remain. Throughout the history of conscientious objectors, Judges, activists, and the objectors themselves

---

[228] Stephen M. Joseph, "Selective Service System – Scope of Conscientious objector exemption after Welsh," *University of Kansas Law Review* 19 (1971): 248-250.

[229] "Draft Ends in '73," *Los Angeles Times*, August 28, 1972, pg. 1.

[230] The Military Selective Service Act of July 9,2003, 50 U.S.C. 451.

[231] Matthew G. Lindenbaum, "Religious Conscientious Objection and the Establishment Clause in the Rehnquist Court: Seeger, Welsh, Gillette and §6(j) Revisited," *Columbia Journal of Law and Social Problems* 36 (2003), 239.

[232] Brian Murphy, "Five Years and Counting," *The Associated Press*, March 17, 2008.

point to religious freedom as a cornerstone of American identity. The ability to freely exercise one's religious beliefs is a sacred component of American democracy, and is one way Americans can distinguish our system of government from foreign oppressive governments. The Court's history of protecting conscientious objectors reflects the importance of religious freedom. However, since the Court has yet to decide conscientious objection on a constitutional basis, there has yet to be decisive protection for the exemption.

The predicament of the conscientious objector affects all Americans, regardless of religious belief. Conscientious objectors represent one way in which individuals can reconcile their personal beliefs with the policies of the government. The way in which the American system of government accommodates different individual beliefs through Congress and the Courts is truly a triumph of democracy.

Bibliography

Primary Sources

Associated Press, March 2008.

Berman v. United States, 156 F.2nd 377, (1946).

Debs v. United States 249 U.S. 211 (1919).

Everson v. Board of Education 330 U.S. 1, (1947).

Fleming v. Page, 50 U.S. 9 How. 603, (1850).

Girouard v. United States 328 U.S. 61, (1946).

Goldman v. United States 245 U.S. 474, (1918).

Jones v. Perkins 245 U.S. 390 (1918).

Kramer v. United States 245 U.S. 478 (1918).

Korematsu v. United States 323 U.S. 214 (1944).

McGowan v. Maryland 366 U.S. 420 (1961).

Military Selective Service Act of June 30, 1967, 81 Stat. 1432.

Military Selective Service Act of July 9,2003, 50 U.S.C. 451.

Minersville School District v. Gobitis 310 U.S. 586 (1940).

Naturalization Act of 1906, 34 Stat. 598.

New York Times, February 1943 – April 1967.

Ruthenberg v. United States 245 U.S. 480 (1918).

Schenk v. Untied States 249 U.S. 47 (1919).

Selective Draft Law Cases, 245 U.S. 366, 390 (1918).

Selective Service Act of May 18, 1917, 40 Stat. 76.

Torcaso v. Watkins 367 U.S. 488, (1961).

United States v. Berman 329 U.S. 795 (1946).

United States v. Kauten 133 F.2nd 703, (1943).

United States v. Macintosh 283 U.S. 605, (1931).

United States v. Manzi, 276 U.S.463, (1928).

United States v. O'Brien, 391 U.S. 367 (1968).

United States v. Schwimmer, 279 U.S. 644, (1929).

United States v. Seeger, 380 U.S. 164 (1965).

Universal Military Training and Service Act of September 16, 1940, 54 Stat. 885

50 U.S.C. §456 (j) (1948).

West Virginia State Board of Education v. Barnette 319 U.S. 624 (1943).

Manuscript Archives

Blackmun, Harry A. Papers, Manuscript Division, Library of Congress, Washington, D.C.

Brennan, William J. Jr. Papers, Manuscript Division. Library of Congress. Washington, D.C.

Clark, Tom C. Papers, Tarlton Law Library. University of Texas, Austin.

Douglas, William O. Papers, Manuscript Division. Library of Congress. Washington D.C.

Marshall, Thurgood Papers, Manuscript Division. Library of Congress. Washington D.C.

Warren, Earl Papers, Manuscript Division. Library of Congress. Washington D.C.

Books and Articles

Anderson, Jeffrey M. "Conscience in the Court, 1931-1946: Religion as a Duty and Choice."

Journal of Supreme Court History 26 (2001): 25-52.

Belknap, Michal R. "The Warren Court and the Vietnam War: The Limits of Legal Liberalism."

Georgia Law Review 33 (1998): 65-154.

Bickel, Alexander M. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics.* Indianapolis: Bobbs-Merril. 1962.

Black, Forrest Revere. "The Selective Draft Cases-A Judicial Milepost on the road to Absolutism." *Boston University Law Review* 37 (1931): 37-53.

Black, Hugo L. "The Bill of Rights." *New York University Law Review* 35 (1960): 865-881.

Brandon, Robert M. "The Conscientious Objector Exemption: Discrimination against the disadvantaged." *George Washington Law Review* 40 (1971): 274-311.

Brown, Fredrick L., Stephen M. Kohn, and Michael D. Kohn. "Conscientious Objection: A Constitutional Right." *New England Law Review* 21 (1986): 545-569.

Brodie, Abner and Harold P. Southerland. "Conscience, the Constitution and the Supreme Court: The Riddle of United States v. Seeger." *University of Wisconsin Law Review* Spring (1966): 307-330.

Chafee, Zechariah Jr. "Freedom of Speech in War Time." *Harvard Law Review* 32 (1919): 932-973.

Clancy, Christopher H., and Johnathan A. Weiss, "The Conscientious Objector Exemption: Problems in Conceptual Clarify and Constitutional Considerations." *Main Law Review* 17 (1965) 143-160.

Conklin, Francis J. "Conscientious Objector Provisions: A View in Light of Torcaso v. Watkins." *Georgetown Law Journal* 51 (1963): 252-283.

Easterbrook, Frank H. "Due Process in Selective Service Appeals." *University of Chicago Law Review* 39 (1972): 331-361.

Ely, John Hart. *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath.* New Jersey: Princeton University Press, 1993.

Flowers, Ronald B. *To Defend the Constitution*. Lanham, Maryland: The Scarecrow Press Inc, 2003.

Flowers, Ronald B. "Government Accommodation of Religious-Based Conscientious Objection," *Seton Hall Law Review* 24 (1993) 695-735.

Flynn, George Q. *The Draft 1940-1973*. Lawrence, Kansas: University Press of Kansas. 1993.

Freeman, Harrop A. "A Remonstrance for Conscience." *University of Pennsylvania Law Review* 106 (1958): 806-830.

Freeman, Harrop A."The Constitutionality of Peacetime Conscription." *Virginia Law Review* 31 (1944): 40-82.

Gillon, Steven M. *The American Paradox: A History of the United States Since 1945*. Boston: Houghton Mifflin Company, 2007.

Greenwalt, Kent. "All or Nothing at All: The Defeat of Selective Conscientious Objection." *The Supreme Court Law Review* 91 (1971): 31-94.

Houston, Bruce R. "Conscientious Objection: The Aftermath of U.S. v. Seeger," *Albany Law Review* 30 (1966): 304-316.

Joseph, Stephen M. "Selective Service System – Scope of Conscientious objector exemption after Welsh." *University of Kansas Law Review* 19 (1971): 231-250.

Keller Robert H. Jr. *In Honor of Justice Douglas: A Symposium on Individual Freedom and the Government* . Westport, Connecticut: Greenwood Press, 1979.

Kennedy, David M. *Over Here: The First World War and American Society*. New York: Oxford University Press, 1980.

Kohn, Stephen M. *Jailed for Peace: The History of American Draft Law Violators, 1658-1985*. Westport, Connecticut: Greenwood Press, 1986.

Lindenbaum, Matthew G. "Religious Conscientious Objection and the Establishment Clause in the Rehnquist Court: Seeger, Welsh, Gillette and §6(j) Revisited." *Columbia Journal of Law and Social Problems* 36 (2003) 237-263.

Logevall, Fredrik. *The Origins of the Vietnam War*. Harlow, England: Pearson Education Limited, 2001.

Marcin, Raymond B. "Conscientious Objector Exemption as an Establishment and an Accommodation of Religion" *Connecticut Bar Journal* 40 (1966): 426-439.

McGrath, Mary Ann Theresa. "Justice Hugo Black-A Question of Conscience and Consistency: Welsh v. United States." *Loyola Law Review* 17 (1970-71) 105-146.

Montgomery, Robert E. Jr. "God, the Army, and Judicial Review: The In-Service Conscientious Objector." *California Law Review* 56 (1968): 379-447

Murphy, Paul L. *World War I and the Origin of Civil Liberties in the United States*. New York: WW Norton & Company, 1979.

Palmer, William D. "Time to Exorcise Another Ghost from the Vietnam War: Restructuring the In-Service Conscientious Objector Program." *Military Law Review* 140 (1993): 179-247.

Powe, Lucas A. Jr. *The Warren Court and American Politics*. Cambridge: The Belknap Press of Harvard University Press, 2000.

Rabin, Robert L. "When is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise." *Cornell Law Review Quarterly* 51(1966): 231-249.

Rehnquist, William H. *The Supreme Court: How It was, How It Is*. New York: Morrow, 1987.

Rohr, John A. *Prophets Without Honor: Public Policy and the Selective Conscientious Objector*. Nashville: Abingdon Press, 1971.

Rosen, Jeffrey. *The Supreme Court: the personalities and rivalries that defined America*. New York: Time Books, Henry Holt and Co., 2006.

Schlissel, Lillian. *Conscience in America: A Documentary History of Conscientious Objection in America, 1757-1967.* New York: E.P. Dutton & Co. Inc., 1968.

Schoen, Rodric B. "A Strange Silence: Vietnam and the Supreme Court." *Washburn Law Review* 33 (1994): 275- 322.

Schwartz, Bernard. *Decision: How the Supreme Court Decides Cases.* New York: Oxford University Press, 1996.

Schwartz, Bernard. *The Bill of Rights: A Documentary History Vol 2.* New York: Chelsea House Publishers, 1971.

Seeger, Daniel A. "I have called you friends: A Quaker Universalist's Understanding of Jesus." Essay Presented by Quaker Universalist Fellowship. 1997.

Seeger, Daniel A. *The Seed and the Tree: A Reflection on Nonviolence.* Lancaster, Pennsylvania: Pendle Hill Pamphlet no. 269. 1986.

Sekulow, Jay Alan. *Witnessing Their Faith: Religious Influence on Supreme Court Justices and Their Opinions.* Lanham, Maryland: Rowman and Littlefield Publishers Inc, 2006.

Sibley, Mulford Q., and Philip E. Jacob. *Conscription of Conscience: The American State and the Conscientious Objector, 1940-1947.* Ithaca, New York: Cornell University Press, 1952.

Stone, Harlan Fiske. "The Conscientious Objector." *Columbia University Quarterly* 21(1919): 253-272

"The Conscientious Objector and the First Amendment: There but for the Grace of God…" *The University of Chicago Law Review* 34 (1966): 79-105.

Tigar, Michael E. and Robert J. Zweben, "Selective Service: Some Certain Problems and Some Tentative Answers." *George Washington Law Review* 37 (1969): 510-535.

Tillich, Paul. *Systematic Theology, volume 2.* London: Nesbet, 1957.

"Toward a Hidden God." *Time Magazine*, April 8, 1966.

Van Geel, T.R. *Understanding Supreme Court Opinions*. 5th ed. New York: Pearson Education Inc., 2007.

Witte, John Jr. *Religion and the American Constitutional Experiment: Essential Rights and Liberties*. Boulder, Colorado: Westview Press, 2000.