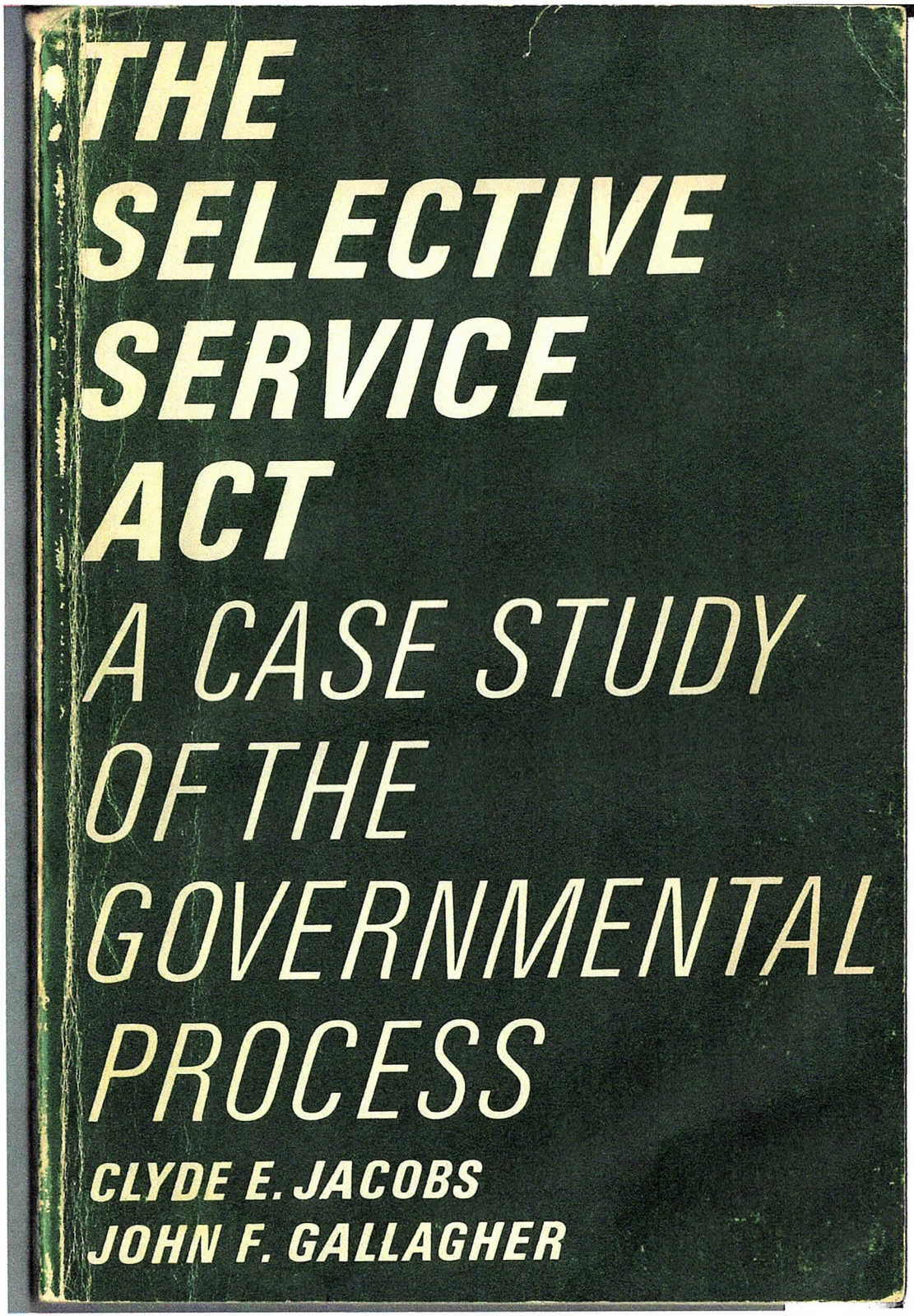

The Selective Service Act: A Case Study of the Governmental Process

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VI. The Case of Daniel A. Seeger, Conscientious Objector

American conscription legislation has almost always made special provision for the conscientious objector, as was noted in Chapter I. The 1940 Selective Service Act contained a provision, quoted earlier in this chapter, that anyone ". . . who, by reason of religious training and belief, is opposed to war in any form," was not to be subject to combatant training and service. Later court opinions found exemption inapplicable to persons whose objections were based on political, sociological, or philosophical views, or on a merely personal moral code.

Section 6 (j) of the 1948 Selective Service Act incorporated the 1940 Act's provision and added the court-defined exclusion of claims based on political, sociological, philosophical, or moral beliefs. It defined religious training and belief as ". . . belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." The 1951 amendments to the Selective Service Act of 1948 did not change this definition, but those objecting to noncombatant service were again made liable for national service in a civilian capacity. Such persons were deferred under the original 1948 Act.

The 1948 Act, as amended and retitled in 1951, was in effect when Daniel A. Seeger registered for the draft on September 4, 1953. His registration gave no suggestion that within five years he would be a *cause célèbre* in selective service. He had complied to the day with the requirement that he register on his eighteenth birthday. His answers to the preliminary classification questionnaire were direct and concise. He did not respond to the section of the questionnaire that dealt with conscientious objectors.

Seeger's background also gave no clues of future problems with selective service. He was a lifetime New Yorker, born into a highly religious Roman Catholic family. Two of his uncles were priests. Daniel Seeger, however, was not a professed member of the Catholic Church. His scholarship record was outstanding. He had attended St. Kevin's Elementary School in Flushing, New York, and had gone on to Bayside High School, where he ranked thirty-fifth in a class of 594.

He began college at the Cooper Union School of Engineering, which he was attending when he registered for the draft. After one year as a chemical engineering major, however, he ranked only twenty-second in a class of twenty-five, and some of his instructors and counselors advised that he move to another school. Seeger transferred for his sophomore year to Queens College, where he became a physics major, and compiled an illustrious extracurricular record. He was editor of the college newspaper, the *Crown,* and a justice on the student court. In his senior year his name appeared in *Who's Who in American Colleges and Universities.*

Seeger indicated on the 1953 questionnaire that he felt he should be classified "II-S," the standard college student deferment. Apparently his local draft board agreed; because it granted him II-S [3] deferments in 1955, 1956, and 1957. On July 12, 1957, however, Seeger identified himself as a conscientious objector. In a letter to his draft board, Local 66 of the Eastern Division of New York, he stated:

> As the result of the resolution of a number of problems of conscience with which I have been preoccupied for the past months, I am bound to declare myself unwilling to participate in any violent military conflict, or in activities made in preparation for such an undertaking.
>
> My decision arises from what I believe to be considerations of validity from the standpoint of the welfare of humanity and the preservation of the democratic values which we in the United States are struggling to maintain. I have concluded that war, from the practical standpoint, is futile and self-defeating, and that from the more important moral standpoint, it is unethical.

The draft board's response was routine. One week later it sent Seeger a copy of Selective Service Form 150, the special form for conscientious objectors.

Form 150, briefly discussed earlier in this chapter, included a series of questions pertaining to registrants' claims to being conscientious objectors. Seeger was first asked to indicate whether his

[3] The classification of II-S, deferring college students who were satisfactorily pursuing a full-time program, was established by Executive Order on September 25, 1951.

objection was to combatant service only, or to noncombatant duty as well. He chose the latter, and signed a statement which read, "I am by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces." Seeger, however, put quotes around the word *religious,* and crossed out the word *training.*

The next question asked Seeger if he believed in a Supreme Being, and offered him the choices of yes or no. Seeger added a third box, checked that, and indicated that his answer appeared on an attached sheet. His attached answer included the following statements:

> Of course, the existence of God cannot be proved or disproven, and the essence of his nature cannot be determined. I prefer to admit this and leave the question open rather than answer "yes" or "no." However, skepticism or disbelief in the existence of God does not necessarily mean lack of faith in anything whatsoever. . . .
>
> The cosmic order does, perhaps, suggest a creative intelligence. But considering the natural world distribution of cataclysmic natural phenomena, one may doubt that this intelligence is informed with a moral purpose. Rather it would appear that in human history the principle of righteousness has emerged very gradually from man's own painful efforts, uncertain and unblessed.

Seeger's religious skepticism was further reflected in other answers on Form 150. In response to the next question, which asked him to describe the nature of his belief, and to indicate if his belief in a Supreme Being involved duties superior to those arising from any human relation, Seeger responded: "Before atomic or hydrogen bombs were even dreamt of Tolstoi observed that men do far more harm and inflict more injury on one another by attempting to prevent evil by violence than if they endured the evil." He continued with a lengthy philosophical dissertation on the inadequacy of military mobilization as a means toward peace.

Seeger suggested:

> A possible alternative to violence is offered by the Quakers in their pamphlet *Speak Truth to Power,* from which much of my thought is

derived. Although I disagree with them on several basic philosophical points, I endorse their program as the best I have seen advanced. The possibility of peace is preferable to certain disaster.

The next question asked him to explain how, when, and from whom or from what source he received the training and acquired the belief which was the basis of his claim. Seeger answered: "I rely on no particular person for religious guidance. I resolve spiritual and ethical problems by reading relevant essays or books, by discussion and debate with colleagues, and ultimately, by following the dictates of my conscience."

It was obvious that Seeger was basing his conscientious objection to war on unorthodox grounds. He was not claiming a belief in a relation to a Supreme Being which was superior to any human relation, but was basing his objection on his own conscience. He had not, however, denied the existence of a Supreme Being. He acknowledged the possibility of a creative intelligence, but questioned that it was informed with a moral purpose.

Form 150 then required Seeger to indicate under what circumstances, if any, he believed in the use of force. He presented a lengthy answer, citing several philosophers, and concluded by substantially agreeing with a quote from Bertrand Russell: "No one who holds that human conduct ought to be such as to promote certain ends—no matter what ends may be selected—will expect any absolute hard and fast rules of conduct to which no exception can be found." Seeger's skepticism thus extended to the identification of circumstances in which he might use force; as far as he was concerned, no person could identify with absolute confidence the circumstances under which he might perform a given act. Seeger offered no answer to the next question, which asked him to describe the actions and behavior in his life which in his opinion most conspicuously demonstrated the consistency and depth of his religious convictions.

The final question on Form 150 which directly dealt with conscientious objection stated: "Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim (of conscientious objection)?" Seeger answered that

he had not, but that his friends and acquaintances were aware of his position.

Local Board 66 considered his claim and made a predictable decision. Since Seeger had not indicated a belief in a relation to a Supreme Being which was superior to any human relation, he was legally ineligible for a conscientious objector deferment. The board so ruled and informed Seeger of its decision.

Seeger immediately wrote to the appeal board for the Eastern District of New York. He stated that "... the registrant believes himself to be a conscientious objector, by virtue of his aversion to war in any aspect, including civilian aid or medical assistance to the armed forces." The appeal board responded by sending him a questionnaire, which Seeger returned on November 25, 1958. His responses were similar to those offered to the local board. When asked his views on the use of force, he continued to refer to philosophers. Aldous Huxley, he stated, had argued that the use of force by police or armies operates with the universal consent of the community which employs them. Seeger thus placed the blame for the use of violence on the community at large, rather than on the practitioners of violence.

The appeal board made the required preliminary review of his appeal and examined the file forwarded them by the local board. It tentatively ruled on March 16, 1959, that Seeger was not entitled to a conscientious objector classification, and referred his case to the United States Attorney for the Eastern District of New York for a recommendation from the Department of Justice. Hearing Officer John Marshall Lockwood heard Seeger's case on September 10, 1959. Seeger was represented by two witnesses: a Professor of English at Queens College, and a classmate.

Lockwood reported that Seeger had answered all questions in a straightforward and willing manner. When asked about serving in a medical unit, Seeger declined, maintaining that it would just be "patching them up to put them back at firing again." He agreed to perform work in the national health, safety, or interest, if it did not involve the manufacture, preparation, or sale of weapons of war. Seeger's witnesses were favorable. The professor testified that

Seeger was sincere in his views; the classmate testified that he disagreed with Seeger's views, but felt them to be genuine.

Lockwood recommended that Seeger's appeal for conscientious objector status be sustained. He commented favorably on Seeger's integrity, and reported no reason to suspect his loyalty. Lockwood stated that Seeger was intelligent and lucid, and if drafted could use these skills to the military's disadvantage by preaching nonviolence. A report from the Federal Bureau of Investigation indicated on June 24 that Seeger had good character, conduct, and moral behavior.

The examiner's recommendation was subject, however, to review by the Chief of the Conscientious-Objector Section of the Justice Department, T. Oscar Smith. Smith's report to the appeal board largely consisted of a review of Lockwood's findings and the reasons for his positive recommendation. However, Smith recommended that the appeal board reject Seeger's claim for conscientious objector status. Seeger had not presented evidence that his belief in relation to a Supreme Being included obligations superior to human relations, and he was therefore ineligible for a conscientious objector classification under the act. Smith reported his findings to the appeal board on November 23, 1959. The board reported the findings to Seeger and asked him to respond within thirty days. Seeger returned his objections in person on December 3. The appeal board reviewed his objections and unanimously voted on May 23, 1960, to classify him I-A.

Seeger appealed the next day to National Director Lewis B. Hershey, and to the Director of the New York State Selective Service System. Because the decision of the appeal board had been unanimous, Seeger had no right to appeal to the President. Hershey, perhaps moved by new evidence submitted by Seeger (which included a report of his recent marriage), appealed to the President on July 13, 1960. This actually meant that the National Selective Service Appeal Board would consider Seeger's case. The National Board unanimously classified Seeger I-A on August 25, 1960.

All statutory appeals had now been exhausted by Seeger. His chances for further review rested with the judiciary. The courts had declared in earlier opinions that registrants could not appeal classification decisions to them until all administrative remedies within the Selective Service System had been exhausted. Registrants could then appeal only when no evidence existed for their classification or when a basic constitutional issue was raised. Seeger felt that his treatment as a conscientious objector raised a substantial constitutional issue; under the doctrine of having to exhaust his administrative remedies, however, he had to wait until he was ordered to report for induction.

Seeger was ordered on October 3, 1960, to report for induction on October 20. He reported to the induction center, but when his name was called, he refused to move forward. The induction officer called his name again, and Seeger again refused to take a forward step. Seeger was then warned that his refusal to undergo induction could result in penalties up to five years of imprisonment or a fine of not more than $10,000, or both. He still refused to respond to the induction officer's call. The induction officer reported that Seeger had failed to co-operate in induction and was therefore subject to the penalties specified under the act. Subsequently, Seeger was charged with draft evasion.

The case of Daniel A. Seeger would now go before the courts. He had been registered, classified, and called for induction under the legislative policy contained in the statute. His case had been processed through several administrative levels, from the local board to the appeal board, through an investigation by the Department of Justice, to the National Selective Service Appeals Board, and ultimately to his induction officer. Congress and administrators had prescribed policies to govern Seeger's behavior, and he had refused to conform. The dispute between Daniel A. Seeger and the United States Government would be decided by the national judiciary.

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Chapter 5

The Courts and Daniel Seeger

I. The Prosecution Begins

Having refused to submit to induction, Daniel Seeger was liable to criminal prosecution under Title 50 of the United States Code, Section 462.[1] Because of his refusal to be sworn into the military forces, he remained a civilian, and prosecution, if undertaken, would proceed before a civil court of the United States rather than a court-martial. The induction officer, in a letter to the United States Attorney for the Southern District of New York, certified on October 20, 1960, that Seeger had refused to submit to induction. About a month later the legal officer of the Selective Service Office for New York City notified the local board that the director of that office had determined that Seeger should be reported to the United States Attorney for prosecution as a delinquent.

[1] This section provides for the penalties which may be imposed for violation of the act.

The offense for which Seeger was to be prosecuted carried a maximum penalty of five years in prison or a fine of $10,000, or both. A penitentiary sentence might be imposed under the statute; therefore, the crime was "infamous" within the provision of the Fifth Amendment of the Constitution that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." If Seeger did not waive this guarantee, he could be formally charged only upon indictment by a grand jury.

Nearly two years later, after consulting with the Department of Justice, the United States Attorney for the Southern District of New York presented to a grand jury the Government's *prima-facie* case for prosecution, and, on November 13, 1962, the grand jury voted a so-called "true bill," charging:

> On or about the 20th day of October, 1960, in the Southern District of New York, DANIEL ANDREW SEEGER, the defendant, being a registrant under the Universal Military Training and Service Act, Title 50 Appendix, United States Code, Section 451 *et seq.*, unlawfully and knowingly did fail, neglect and refuse to perform a duty required of him under and in execution of said Act and the rules and regulations and directives made pursuant thereto, to wit, to submit to induction at the time and place fixed in an Order to Report for Induction mailed him by his Selective Service System Local Board.

A week later, Seeger was arraigned on the charge in open court, entered a plea of not guilty after the indictment was read to him and his attorney, and was released on his own recognizance (i.e., without bail) to await trial.

II. In the District Court

The District Courts. Seeger was brought to trial in the District Court of the United States for the Southern District of New York—one of the eighty-six district courts established by Congress.[2] These are courts of original jurisdiction before which all cases involving

[2] There are five additional United States District Courts—four for the territories and one for the District of Columbia.

prosecutions under federal criminal statutes, as well as nearly all civil cases originating in the federal courts, are tried for the first time. There are one to four such courts in every state, and each has one or more judges, as determined by Congress. The United States District Court for the Southern District of New York, with the heaviest federal case load in the country, has twenty-four judges. Most trials before the district courts are conducted before a single judge. The court may sit with or without a jury, depending upon the nature of the case, and, in criminal prosecutions, upon the wishes of the defendant.

Trial. The case of *United States of America* v. *Daniel Andrew Seeger* was set down for trial on March 26, 1963, before District Judge Richard Levet. The United States Attorney for the district, Robert Morgenthau, assisted by Ezra Friedman, represented the prosecution, and the defense fell chiefly to Kenneth Greenawalt, one of several attorneys representing Seeger.

The primary responsibility of the courts is to hear and decide specific cases or controversies involving parties whose claims and interests are in conflict. In performing this duty, trial courts (1) determine the material facts of the case as disclosed by admissible evidence, (2) define the legal issues raised by the facts, (3) find and formulate the legal principles or "law" applicable to the issues, and (4) apply the law to the facts and issues in order to reach a verdict and judgment. If the court sits without a jury, the trial judge performs all of these functions. When a jury is used, it is primarily (but not exclusively) responsible for determining what the facts are and for reaching a verdict by applying the law to the facts. The judge defines the legal issues and states the applicable law of the case.

The Facts. Seeger waived his constitutional right to trial by jury, and opposing counsel stipulated to the following facts: Defendant is the person named in the indictment; the selective service file presented by the United States is the file of the defendant; the defendant was ordered to report for induction; and upon presenting himself, the defendant claimed that he had been wrongfully denied exemption as a conscientious objector and thereupon refused to submit to induction.

This stipulation established the material facts of the case; therefore it was unnecessary to call for testimony by witnesses. Seeger's attorney, in the course of the trial, requested a delay in order to call expert witnesses, mainly theologians, to testify that Seeger's objections were religious in character even if not based upon belief in a Supreme Being. This request was withdrawn when the prosecution agreed to stipulate that such witnesses, if called, would testify to that effect.

The Legal Issues. At the trial the arguments of the prosecution and the defense turned largely upon the constitutional and legal issues raised by the facts. The Government, in its brief and argument before the court, contended that Seeger was not entitled to exemption as a conscientious objector because Section 6 (j) of the draft law required "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." While conceding that Seeger would have qualified for exemption under the 1940 act, as previously interpreted in that circuit, the inclusion of the foregoing phrase in the 1948 law effectively precluded Seeger's claim. The prosecution also contended that the clause requiring belief in a Supreme Being did not violate the Constitution. Congress could grant or withhold exemptions, and, so long as it did not act arbitrarily, there was no conflict with the First Amendment injunction: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Nor was the Due Process Clause of the Fifth Amendment violated.

The defense, at the close of the Government's argument, moved to dismiss the indictment. Although Mr. Greenawalt maintained that his client qualified for exemption under the act as written—a conclusion reached by the hearing officer but rejected by the Department of Justice and the Selective Service System—his principal contention was that Section 6 (j) was unconstitutional. The substance of the defense, still somewhat blurred at this early stage, was summarized in defense counsel's extemporaneous argument on the motion to dismiss:

For the record now, I would like to state that this motion is also based on the unconstitutionality of the section because it is in violation of the First Amendment of the United States Constitution, the religious clause, both inherently and as applied against the registrant in this case.

I also wish to move to dismiss on the ground that it is a violation of the Fifth Amendment of the United States Constitution, and also Article VI, Section 3, of the United States Constitution.

I also wish to point out the argument that we made before briefly, that we do not accept the point that this classification in the section referred to is constitutional. On the contrary, we take the position that the statutory classification has no reasonable relation to the legitimate purpose of government and is discriminatory against people who do not have a religious belief based on a Divine Being or a Supreme Being.

In other words, we take the position that this classification in the Selective Service Act is unreasonable and arbitrary and in violation of the Fifth and First Amendments of the United States Constitution.

We also take the position that Seeger, on the basis of Seeger's papers alone, that he should have been entitled to exemption under the Act. We feel that the hearing officer was correct in giving him exemption, and the Justice Department was wrong in denying him exemption.

This, of course, involves a definition of religious training and belief, and whether or not the definition which is contained in the Act itself can be accommodated to Mr. Seeger's position as set forth in his papers. We realize that there is a difference of opinion in the record as to whether it can or can't, but we don't want to foreclose the argument at least that Seeger was entitled to exemption status under the present Act, quite apart from the prior act, on the basis of the statement which he made in his papers. I think that is the essence.

If the Supreme Being clause of the statute were declared unconstitutional, and, under the separability provision of the law effectively striken from the section, Seeger would qualify for an exemption as a conscientious objector. At the conclusion of the trial, Judge Levet reserved his decision on the dismissal motion.

Precedent and Policy. Both the prosecution and the defense, in their written briefs and oral arguments, cited numerous judicial decisions to support their respective positions. American courts, like those of other common-law countries, observe the doctrine of *stare decisis*. Under this doctrine a court treats its previous decisions and those of higher courts as binding precedents in the case before it, if those decisions were rendered in identical or similar

situations. The doctrine has the obvious merit of encouraging certainty and stability in the law. It expresses a social policy that as to some things it is better that the law be settled than that it be settled right. If applied mechanically, however, *stare decisis* may result in excessive rigidity. For this reason the doctrine is subject to judicial limitation and exception, especially in areas of broad public policy where the law must respond continuously to changing conditions and needs. In the realm of constitutional law *stare decisis* has enjoyed relatively restricted application, particularly by the Supreme Court of the United States. Inferior courts are naturally somewhat more concerned with squaring their decisions with the precedents established by higher courts. Otherwise their decisions would suffer frequent reversals when appealed.

In the *Seeger* case the precedents cited by both sides were not directly controlling. To be sure, the Supreme Court of the United States had decided the *Selective Draft Law Cases* in 1918, and that decision practically foreclosed any serious question of Congress' constitutional power to enact a military conscription law. But what of Seeger's claim—that the exemption in the 1948 act requiring belief in a Supreme Being violates the First Amendment? Although the Court in its 1918 decision tersely dismissed a somewhat similar challenge that the exemption granted under the World War I law to members of well-recognized peace churches violated that amendment, the decision was not an altogether compelling precedent. Between 1918 and 1963 the attitude of the Court toward First Amendment claims had become much more libertarian, and for this reason the 1918 disposition of the First Amendment challenge was of doubtful vitality.

The decisions of the Court of Appeals for the Second Circuit were also binding upon the District Court of the United States for the Southern District of New York. But these, also, were either inconclusive or readily distinguishable on their facts. Of considerable interest was *United States* v. *Kauten,* which defined religious belief broadly as "finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets." This identification of the command of conscience with the voice of

God had been given, however, in a case involving claims of a conscientious objector under the 1940 act, which did not expressly require belief in a Supreme Being. Moreover, some other courts of appeals had taken a much narrower view of the 1940 exemption. For example, in *Berman* v. *United States* the Court of Appeals for the Ninth Circuit held in 1946 that belief in a Supreme Being was an indispensable ingredient of religious belief, required for exemption under the 1940 law. Congress wrote a requirement for such belief into the 1948 act, and Seeger was indicted under the later law.

The critical question was whether the clause of Section 6 (j) of the 1948 act, requiring belief in a Supreme Being, was unconstitutional for the reasons cited by Seeger's counsel. In *United States* v. *Bendik* (1955) the Court of Appeals for the Second Circuit upheld the constitutionality of the challenged section, but that case also was readily distinguishable from Seeger's because it was concerned with the distinction between religious and nonreligious objectors. Seeger presented a different claim—that the section discriminated between two kinds of religious objectors—those believing in a Supreme Being and those not professing such belief.

So, as in many cases, the precedents were inconclusive. Judge Levet might, without serious violence to *stare decisis,* decide either way on Seeger's claim.

Opinion and Verdict. On April 24, 1963, Judge Levet announced his verdict in a written opinion. After summarizing the facts of the case, Judge Levet discussed the court's power to review actions of Selective Service Appeal Boards. The scope of that power, he noted, is governed by statute and is the "narrowest known to the law." Courts have no general authority to revise the decisions of draft boards, and their function is simply to examine the record relating to the registrant's claim and to determine if there is any basis in fact to support the board's determination. If there is any such basis, the court may not inquire into the correctness of the board's decision.

In disposing of the constitutional claims presented by Seeger, Judge Levet noted that Section 6 (j) 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." Explicit adoption of this definition by Congress made the broad rule approved in *Kauten* and related cases in the second circuit inapplicable. The sole question was whether this statutory test was contrary to the First Amendment. The court's answer was summed up in the final paragraph of the opinion:

> In short, defendant's attack on the clause here involved is not new. Congress is bound to raise armies. No invidious discrimination exists. It is within the power of Congress to enable reasonable classifications to achieve the ends sought. No religion is thereby established. No freedom of worship is invaded. No compulsive acts are required. All persons of the class of defendant receive equal treatment. Congress, which has a right to refuse all exemptions, has a clear right to limit such exemptions. The statute determines those who may come within the terms of the exemptive grace, the policy which the legislative branch is empowered to select. The section involved is constitutional and there was a "basis in fact" for the Appeal Board's denial of exemption.

Seeger was found guilty as charged, since his constitutional claims had been rejected. On May 28, after receiving the customary report from a probation officer, Judge Levet entered a final judgment in the following language:

> On this 28th day of May, 1963 came the attorney for the Government and the defendant appeared in person and by counsel.
>
> It is ADJUDGED that the defendant has been convicted upon his plea of not guilty and a finding of guilty by the court, defendant having waived trial by jury of the offense of a registrant under the Universal Military Training and Service Act, unlawfully and knowingly failing, neglecting and refusing to perform a duty required of him under and in execution of said Act and the rules and regulations and directives made pursuant thereto, to wit, to submit to induction at the time and place fixed in an Order to Report for Induction mailed to him by his Selective Service System Local Board (Title 50, App., Section 462, U.S. Code) as charged and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court. It is adjudged that the defendant is guilty as charged and convicted.
>
> It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and one (1) day.
>
> Defendant released on his own recognizance pending appeal.
>
> It is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.
>
> Richard H. Levet, *United States District Judge,*
> James E. Valeche, *Clerk*

Thus, Seeger was sentenced to a prison term and released without bail while an appeal was taken.

III. To the Court of Appeals

Functions. Review of Judge Levet's decision by a higher court depended upon action by Seeger, the aggrieved party. If Seeger appealed, his case would go to the Court of Appeals for the Second Circuit. Congress has created eleven courts of appeals, each having appellate jurisdiction over cases decided by inferior federal courts within its circuit. Depending upon the case load and the disposition of Congress, the courts of appeals have from three to nine judges, but most cases are heard by panels of three judges. When cases are brought before these exclusively appellate tribunals, they review the record of proceedings in the inferior courts. They do not perform the fact-finding function peculiar to trial courts, and they never sit with juries.

The Appeal. In order to obtain review of a district court's decision, the aggrieved or losing party (the appellant) must institute an appeal within ten days after final judgment is rendered. Seeger's attorney, Mr. Greenawalt, moved promptly to initiate an appeal by filing notice with the clerk of the district court. The latter thereupon transmitted notice of the appeal to the Court of Appeals for the Second Circuit, and notified the appellee (the United States) that appeal papers had been filed.

Subsequently, Mr. Greenawalt designated those portions of the district court record which he desired to have sent up for review. These were served upon the appellee who, in turn, might designate

additional portions to be included in the appeal papers. The clerk of the district court prepared the record, incorporating the designated portions, together with the court's judgment and opinion, and a statement by the appellant of the points upon which he would rely. Seeger's basic claim was that Judge Levet had erred by refusing to dismiss the indictment and by holding him guilty over his claim that Section 6 (j) was unconstitutional.

The appeal was docketed for oral argument, with both the appellant and the appellee filing briefs in support of their positions. These briefs covered much the same ground as that canvassed in the briefs submitted to the district court. However, the issues had come into sharper focus, centering upon Judge Levet's opinion. Some minor issues were dropped by both sides. On November 15, 1963, the case came up for oral argument before a panel of three judges—Chief Judge Edward Lumbard and Circuit Judges Irving Kaufman and Paul Hays—with each side granted the usual forty-five minutes for presentation. As counsel for the appellant, Mr. Greenawalt made the opening argument; Assistant United States Attorney Friedman presented the appellee's case; and Greenawalt made the concluding argument.

Opinion. In an opinion delivered by Judge Kaufman on January 20, 1964, the Court of Appeals for the Second Circuit unanimously reversed Seeger's conviction. The court read Judge Levet's opinion as holding that "the exemption for conscientious objectors was an act of legislative grace and could hence be granted upon any condition Congress desired to impose." Judge Kaufman rejected this absolute principle in the following language:

> We find it unnecessary to determine whether an exemption for some or all conscientious objectors is a constitutional necessity, or is merely dependent upon the will of Congress. . . . For it now seems well-established that legislative power to deny a particular privilege altogether does not imply an equivalent power to grant such a privilege on unconstitutional conditions. . . . It could hardly be argued, for example, that the ability of Congress to deny an exemption to all conscientious objectors would permit Congress to limit that exemption to objectors of one particular religious denomination. We are thus compelled to determine the constitutionality of the particular limitation involved,

> and to consider whether the requirement of a belief in a Supreme Being could be validly employed to reject Seeger's claim to an exemption under existing constitutional doctrines.

In determining this issue, Judge Kaufman noted that the Supreme Court has been steadfast in its insistence that government refrain from aiding one religion or religion generally and that "it has been equally vigilant in rejecting any reading of the First Amendment which might dictate a policy of governmental hostility to religion or religious beliefs." Government must be neutral in its relations with groups of religious believers and nonbelievers.

The Government's argument, Kaufman continued, is that Congress in enacting Section 6 (j) sought to give the greatest possible latitude to the free exercise of religion and that, in doing so, it created a reasonable distinction upon the basis of belief in a deity. To this he replied:

> It is, of course, vital to such a line of reasoning that "religion" and "religious" be properly defined. "A statute could scarcely be defended . . . if it protected the 'free exercise' of only a few favored religions or preferred some religions over others without reasonable basis for doing so."... In this regard, the government attempts to justify the "Supreme Being" definition by asserting the propriety of a distinction between beliefs which are solely the result of individual reflection and those which the believer assumes to be the product of divine commands. Congress would be justified, or so it is argued, in refusing to defer to those individuals who merely invoke their own fallible judgment in opposition to that of the legislature; it would be less so with respect to those whose refusal to serve is based upon obedience to a power higher than that exercised by a mortal Congress.
>
> But while we find this argument persuasive, we are unable to consider it dispositive of the case before us. For we feel compelled to recognize that a requirement of belief in a Supreme Being, no matter how broadly defined, cannot embrace all those faiths which can validly claim to be called "religious." Thus it has been noted that, among other well-established religious sects, Buddhism, Taoism, Ethical Culture, and Secular Humanism do not teach a belief in the existence of a Supreme Being. . . . Indeed, our country has long prided itself on the enormous diversity of religious beliefs which have been able to find acceptance and toleration on these shores. . . . In the face of this

vast conglomeration of differing ideas and ideals, it is not surprising that no single concept may be found which is common to all.

In *Torcaso* v. *Watkins*, 367 U.S. 488 (1961), the Supreme Court struck down as invalid a state statute requiring notaries public to affirm their belief in the existence of God. Although referring to the evils historically attendant upon the requirement of a religious oath for public office, the Court was careful to place its decision on far broader grounds. Government could not, the *Torcaso* court declared, place the power and authority of the state "on the side of one particular sort of believers—those who are willing to say that they believe in 'the existence of God.'" Belief in a Deity was, for the Court, "a belief in some particular kind of religious concept." And the requirement that candidates for office affirm their devotion to such a concept was, the court held, beyond the constitutional powers of the state.

In a very real sense, our decision in *Kauten* was the precursor of *Torcaso*. For in *Kauten's* broad definition was embraced the recognition that "religion" could not be confined to a belief in a supernatural power; that today, a pervading commitment to a moral ideal is for many the equivalent of what was historically considered the response to divine commands. The *Kauten* test represents an acknowledgment that for many in today's "skeptical generation," just as for Daniel Seeger, the stern and moral voice of conscience occupies that hallowed place in the hearts and minds of men which was traditionally reserved for the commandments of God. It is in this respect that *Kauten* has found its way into the pages of the United States Reports, generally accompanied by a recognition of the impropriety inherent in a governmental determination of what is a "true" or "acceptable" religious belief. . . .

And if a distinction between internally derived and externally compelled beliefs raises serious theoretical problems, the practical difficulties which it engenders are no less perplexing. When Daniel Andrew Seeger insists that he is obeying the dictates of his conscience or the imperatives of an absolute morality, it would seem impossible to say with assurance that he is not bowing to "external commands" in virtually the same sense as is the objector who defers to the will of a supernatural power.

So Seeger's claim to exemption was upheld on broad constitutional grounds, the challenged section was declared invalid, and the conviction was set aside.

IV. The Supreme Court

The Solicitor General. The United States, as the losing party in the Court of Appeals, decided to take action to bring the case before the Supreme Court. Thus far the Government had been represented by the United States Attorney for the Southern District of New York and his deputy. Further proceedings in behalf of the United States would be in the hands of Solicitor General Archibald Cox, the principal legal counsel of the Government before the Supreme Court.[3]

Appeal and Certiorari. The Supreme Court does not consider every case in which a party—even if that party is the Government of the United States—has been disappointed by the decision of a lower court. In fact it examines only a minute fraction of cases decided by inferior federal courts and a still smaller portion of cases arising in the state courts. Until 1925 most cases reaching the Court went up on writ of error, the so-called "writ of right." If the losing party in the court below could raise substantial claims of prejudicial legal error—and if, in cases coming from state tribunals, a federal question were involved—he might as a matter of right obtain review in the Supreme Court. As a result of this obligatory appellate jurisdiction the Court was deluged with cases.

Congress, at the urging of the Court, responded to this problem by enacting the Judiciary Act of 1925, aimed at giving the Court itself broad discretion to determine which cases it would accept for review. The writ of error was abolished and replaced by appeal, which also lies as a matter of right. But the grounds upon which an appeal to the Supreme Court may be instituted were sharply restricted, and, in recent years, only 7 per cent of the cases reaching the Court have gone to that tribunal in this way. Appeal from a court of appeals to the Supreme Court is available only in certain *civil* cases in which a federal law or treaty is declared uncon-

[3] The Attorney General, head of the Department of Justice, is the chief legal officer of the United States. However, he rarely represents the Government before the Court. This function usually is performed by the Solicitor General, who is responsible to the Attorney General but who possesses considerable independent discretion conferred by law and custom.

stitutional as well as in cases in which a state law or constitutional provision is held invalid for conflict with the Federal Constitution, law, or treaty. Federal statutes also severely limit appeals to the Supreme Court from state courts and from the district courts of the United States.

Nearly all other cases coming within the appellate jurisdiction of the Supreme Court reach that tribunal on writ of certiorari—a writ granted by the Supreme Court to a lower court directing it to send up the case for review. The writ of certiorari is not issued as a matter of right. It may be granted or withheld by the Supreme Court at its discretion, a power enabling the Court to determine which cases it will hear and decide. A writ of certiorari may be issued to a federal court of appeals where its decision in either a civil or criminal case involves interpretation or application of the Constitution, federal statutes, or treaties,[4] or where state constitutional provisions or laws are upheld over challenges of conflict with federal law.

In the *Seeger* case the court of appeals had declared unconstitutional a section in a federal statute, but the proceeding was criminal rather than civil. Therefore the Solicitor General could obtain review of the decision only by petitioning for a writ of certiorari. The Court would decide whether it would accept the case for decision. The Solicitor General, however, could be confident that the writ would be granted, for the case raised questions of general public significance. As a result of the decision by the appeals court, a clause in Section 6 (j) of the draft act had been made legally inoperative within the second circuit. Moreover, the Courts of Appeals for the Third and the Ninth Circuits had rejected claims very similar to Seeger's in opinions interpreting the Constitution differently. To achieve uniformity in the interpretation of the Constitution and the statute, determination of the issues by the Supreme Court was necessary.

The Petition. On March 20, 1964, Solicitor General Cox filed

[4] It should be noted that certiorari jurisdiction does not depend upon a declaration of unconstitutionality by the court of appeals. The only requirement is that the case involve an interpretation of the Constitution or federal law.

a petition for a writ of certiorari with the clerk of the Court. The petition, a document of nine pages, with appendices setting out the opinions of the district court and the court of appeals, outlined the principal arguments of the Government and urged the Supreme Court to grant the writ. Copies were served on Mr. Greenawalt, who responded on April 22. The response, unlike many, did not oppose the petition itself. While the respondent argued that the decision of the court of appeals was correct and should be affirmed, he recognized "that sound reasons exist in this case for the granting of the Government's petition for a writ of certiorari." The petition and response, together with a transcript of record, were distributed to the members of the Court immediately.

An affirmative vote by four of the nine Justices is sufficient to grant a petition for certiorari, and in rare instances a petition may be granted when even fewer members of the Court favor it. Deliberations on whether to grant or deny a writ are shrouded in judicial secrecy, and, when the determination is announced, supporting reasons are seldom stated. The decision is made at a Friday conference of the Court, usually within two weeks after the petition is distributed, and the Court announces its order a few days later. If the writ is granted, the case may be set down for argument on the merits, but the Court may reverse or affirm the lower court's decision summarily, without allowing oral argument. Denial of the petition for a writ of certiorari (and approximately 90 per cent are denied each year), while leaving intact the decision of the court below, does not constitute an affirmance. It simply means that fewer than four Justices, in the exercise of their discretion, thought that the case should be reviewed by the Supreme Court at that time.

Certiorari Granted. In a terse order issued on May 4 the Court announced:

> United States, Petitioner v. Daniel Andrew Seeger. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted and case placed on the summary calendar.

The *Seeger* case had been accepted by the Court for argument and decision.

Granted on the same day were petitions for certiorari in two other cases involving conscientious objectors, *United States* v. *Jakobson* and *Peter* v. *United States*. Like Seeger, both Jakobson and Peter had been convicted in district courts for refusing to submit to induction. Both maintained that they were entitled to exemption under Section 6 (j). And they also argued that the section was unconstitutional if construed in such a way as to deny them exemptions. Jakobson stated a belief in a Supreme Being who was "ultimately responsible for the existence of man" and who was "the Supreme Reality." Peter acknowledged "some power manifest in nature . . . the supreme expression" that aids man in ordering his life. The Court of Appeals for the Second Circuit reversed Jakobson's conviction, while the appeals court in the Ninth Circuit upheld the conviction of Peter.

Because of the similarity of the claims presented in all three cases, they were placed on the summary calendar, which allows each side thirty minutes for oral argument rather than the hour permitted in cases assigned to the regular calendar. It was probable that the Court would dispose of all three cases in a single opinion.

The Briefs. Upon grant of the writ of certiorari, attorneys in the Department of Justice prepared a written brief arguing for the reversal of the decision of the court of appeals and reinstatement of Seeger's conviction. The brief, a printed document of eighty-three pages, was filed by Solicitor General Cox on September 22, and Mr. Greenawalt filed his seventy-three page brief for the respondent on November 2. A reply brief by the United States, in which the Solicitor General answered some of the points made by Seeger's counsel, was submitted a few days later.

The Government's written argument consisted of two basic propositions: (1) The First Amendment permits Congress to accommodate the free exercise of religion with the needs of national defense by assigning to noncombatant service outside the armed forces persons who, by reason of belief in a divine obligation, are opposed to participation in war in any form. (2) The definition of the class exempted from combatant service and training by Section 6 (j) is a permissible classification reasonably accommodating the needs of national defense with the interest in religious liberty

safeguarded by the First Amendment. The second proposition was supported by two subsidiary arguments: (a) the historical evolution of the definition of a religious objection to participation in war in any form shows that it is neither arbitrary nor invidious and (b) the statutory definition is reasonably adapted to promoting the free exercise of religion.

The brief for Seeger, like that for the Government, repeated and reexanvassed the arguments presented in the lower courts. According to Greenawalt Section 6 (j) violated both the Establishment Clause and the Free Exercise Clause of the First Amendment. He maintained that Seeger's objections were religious in character, although, to be sure, these objections were not based upon a belief in a Supreme Being. And Congress, in enacting the challenged section, aided one type of religion (those based upon a belief in the Supreme Being) as against religions founded on other beliefs. This, said the respondent, constitutes a preference of one religion and therefore it is contrary to the First Amendment. The section, moreover, is in conflict with the Free Exercise Clause inasmuch as it extends the privilege of exemption to some on religious grounds while denying it to others having religious beliefs of a different kind. As a final argument the respondent claimed that the section violated the Due Process Clause of the Fifth Amendment because the classification was arbitrary and discriminatory.

Both the petitioner and the respondent argued that the case law, i.e., the precedents, supported their respective contentions. And, as often happens, both sides found support for their positions in the same cases. But, as already indicated, the precedents were inconclusive. In a real sense the *Seeger* case was, for the Supreme Court of the United States, one of "first impression."

Amicus Curiae. Under the rules of the Court an individual or group that is not a party in a case may be granted the privilege of filing a brief as an *amicus curiae,* "friend of the court." The Supreme Court sometimes invites the Solicitor General or legal counsel for a particular government agency to file such briefs when the United States is not a party in a case raising significant issues of public policy. And the United States is always entitled to present such a brief on its own initiative. Private groups, on the other hand,

No. 50

In the Supreme Court of the United States

OCTOBER TERM, 1964

UNITED STATES OF AMERICA, PETITIONER

v.

DANIEL ANDREW SEEGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, Jr.,
Assistant Attorney General,
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CITATIONS

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may do so only if both parties to the case consent in writing or, in default of such consent, by permission of the Court.

In the *Seeger* case the requisite written consent was obtained by three organizations—the American Civil Liberties Union, the American Humanist Association, and the American Ethical Union. All argued, on broad grounds, that Section 6 (j) was unconstitutional. The brief of the American Humanist Association took the position that exemptions should be extended, as a matter of right, not only to adherents of theistic and nontheistic religions but to nonbelievers as well.

While it is always possible that an *amicus* brief will present arguments and facts not included in the briefs of the parties, most tend to be redundant, offering little, if anything, new. And there is scant evidence that such briefs, with the exception of those filed by the Government, receive much attention or significantly influence the Court's decisions.

Oral Argument. Because the contentions of each side are often fully expounded in the written briefs, there is some tendency on the part of lawyers to downgrade the importance of oral argument. However, most judges who have commented on the matter emphasize that oral argument plays a significant part in the appellate process. It offers opposing counsel an opportunity to bring their case into sharp focus at a critical time, shortly before the Court votes on the decision. And the interchange between the Court and counsel, as questions are posed and answers given, may attain the excellence of Socratic analysis.

During its first sixty years the Supreme Court imposed no limits on the length of oral arguments. Attorneys were generally permitted to go on for hours, even days, until they voluntarily concluded or the Chief Justice, as an act of mercy toward his colleagues, announced termination of argument. As the case load on the Court became heavier, however, time limits were established, and under present rules the time normally allowed to each side in cases on the regular calendar is one hour and in cases on the summary calendar thirty minutes. These limits are strictly enforced by the Chief Justice.

Oral arguments are heard at public sessions in a term beginning

in October and ending in June. During this period the Court usually holds public sessions for two weeks, on Monday through Thursday, and then recesses for two weeks to study pending cases and to prepare opinions.

At 10:00 A.M. on November 16, 1964, the red velours curtains at the front of the courtroom parted, and, according to prescribed ritual, Chief Justice Warren, flanked by Associate Justices Black and Douglas, the senior members of the Court, entered, followed by the other Justices in order of seniority. The public section of the courtroom was filled to capacity, but only a few attorneys were at the tables before the bar of the Court, as the whole audience rose and the crier intoned: "Oyez, Oyez, Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court." Chief Justice Warren was seated at the center of the bench and the eight Associate Justices, in order of seniority, on his right and left. November 16 was a Monday—under existing rules the day for delivering opinions from the bench, and this was the first order of business before commencement of oral argument.[5] Two cases preceded the *Seeger, Peter,* and *Jakobson* cases on the Court's calendar. By noon argument in the first case had been completed and counsel in the second case had begun his presentation. Promptly at that hour, in accordance with established practice, the Court recessed until 12:30 P.M., at which time the argument was resumed. When counsel had completed his presentation, the Chief Justice nodded to Solicitor General Cox, who went to the lectern facing the Court. He began with the customary salutation: "Mr. Chief Justice, may it please the Court . . ." Argument in *United States* v. *Seeger* was under way.

By prearrangement with the attorneys for Seeger, Peter, and Jakobson the thirty-minute periods allotted to the Solicitor General for argument in each case were to be consolidated into a single presentation of not more than an hour and a half. Each of the opposing counsel would follow with thirty-minute arguments, and

[5] The court has recently abandoned the practice of delivering its opinions on Mondays only. It now may deliver an opinion during any open session.

if the Solicitor General did not use all of his time, he might, under Court rules, resume argument for whatever time remained to him after opposing counsel had finished.

Speaking extemporaneously from notes, Solicitor General Cox briefly summarized the facts of each case and stated the issues as the Government saw them. He then proceeded to his argument, asking for reversal of *Seeger* and *Jakobson* and affirmance of the *Peter* decision. Cox, who was experienced before the bar of the Supreme Court, knew that within the allowed time brevity was necessary to secure emphasis and that almost inevitably a considerable portion of his time would be taken up by questions from the bench. His argument focused upon Seeger's claims, which he thought presented the constitutional issues most cogently.

Although Cox conceded that the registrant was undoubtedly sincere, Seeger professed no belief in a Supreme Being. His opposition to war, being based upon judgments as to its effects upon mankind, was essentially humanitarian or political in character. Seeger believed in goodness for its own sake, in a purely ethical code.

Justice Goldberg now interposed the first question, asking Cox if Seeger's beliefs were not like those of the Quakers, who clearly qualify for exemption. The Solicitor General replied that a Quaker might hold the same beliefs, but such beliefs are political, and to that extent the Quaker's belief would be political.

According to the Solicitor General the problem for Congress, in defining the limits of the conscientious objector exemption, was to draw a "fair line" on the continuum of beliefs ranging from the revealed commands of a personal God through modern Protestant theology, moral philosophy, and ending in purely political or material judgments. The line had been drawn so as to exempt those professing "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." Congress did not choose to exempt persons having no religious convictions, however sincere their opposition to war might be. Political, sociological, and economic views against war, by the terms of the statute, afforded no basis for exemption.

Mr. JUSTICE GOLDBERG: "I would assume that political, as used by the statute, means, for example, a Communist who would say I refuse to take up arms against Russia." [6]

Mr. Cox . . . did not think this was a tenable assumption. He pointed out that Section 6 (j)'s language derived ultimately from the dissent of Chief Justice Hughes in *United States* v. *Macintosh*. Chief Justice Hughes there stated that "the essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.". . .

To support this conclusion the Solicitor General traced the history of the statute. The 1917 draft law had exempted, as conscientious objectors, only members of the so-called "peace churches." This policy, he said, had met with two objections: (1) that it was unfair to members of other sects not opposed to war but some of whose members were, and (2) that all persons having conscientious scruples against war should be exempted, including those whose scruples were not religious in character. According to Cox, Congress responded favorably to the first, but not to the second, an objection when it enacted the Selective Training and Service Act of 1940. And the authors of the 1948 statute had followed the restricted definition of religion laid down by the court of appeals in *Berman* v. *United States*—a belief in a relation to God involving duties superior to those arising from any human relation. The *Berman* definition, moreover, was simply a restatement of Chief Justice Hughes' definition in his *Macintosh* dissent.

Continuing his argument, Solicitor General Cox addressed himself to Seeger's contention that Section 6 (j) discriminated against persons professing religious convictions but having no belief in a Supreme Being. Because, according to the Government's view of the case, Seeger's judgments were political and not religious, he was in no position to assert claims in behalf of any class of religious believers.

[6] Excerpts from the oral argument are quoted by permission from *The United States Law Week*, Volume XXXIII, No. 19 (November 24, 1964), pp. 3185-3189. Copyright by the Bureau of National Affairs, Inc., Washington, D.C.

Mr. JUSTICE DOUGLAS: "Are you now arguing standing?"

Mr. COX: "I suppose so, in the sense that no constitutional right of his was interfered with."... The registrant could only represent that class whose views are entirely sociological or political. This flows from the fact that the registrant did not engage in any worship, accept any catechism, belong to any organized sect, or accept any religious code of moral conduct.

Mr. JUSTICE GOLDBERG: "You're not really referring to the Supreme Being requirement but back to the religious training and belief requirement."

Mr. COX... The key to the distinction is the difference between the duty to another as a member of the human community and the duty imposed by divine command, or, in other words, belief based on considerations that Congress has to debate in its legislative capacity and belief based on other considerations.

No matter where Congress has drawn the line, the line would have to be based on belief.... "What course could Congress have followed with less constitutional difficulty?"

The distinction drawn represents a reasonable accommodation of the free exercise of religion and the defense power resting in Congress. Americans generally accept the belief that some people should not be required to violate their religious scruples by serving in the armed forces. In the absence of some sort of division based on belief, all kinds of reasons for not serving could be asserted. The continuum ranges all the way from obligations based on a clearly apprehended command of God to purely material or political considerations. Although Selective Service deals with secular conduct, Congress could not get around drafting an exemption in terms of belief. It could have exempted no one and it could have exempted everyone with any belief against war. It chose, instead, to provide for noncombatant service by those whose objections were based upon religious belief.

The Solicitor General proceeded to a consideration of the constitutional meaning of religion. He argued that the scope of religion, as protected by the Constitution, depended upon the nature of the legislation in question. Where the law seeks to regulate or punish belief, the meaning of religion must be given broad scope. But the Selective Service Act was secular legislation, and the definition of religion here—involving relief from a general obligation because of belief—might be narrower. The exemption provided in the act

neither encourages nor discourages any religion, and the purposes of the First Amendment's Establishment Clause would not be furthered by requiring Congress to ignore religious convictions against combatant service.

Mr. JUSTICE GOLDBERG: "Suppose the statute said anyone who is conscientiously opposed shall be exempt from combatant service?"

Mr. COX... indicated that even that type of exemption would create a differentiation according to belief. The distinction as now drawn by Congress is a permitted differentiation on the basis of belief. In the Selective Draft Law Cases the distinction upheld by the Court was not merely between religion and nonreligion but between peace churches and other religions. A significant number of recent decisions of this Court recognize, and even require, that accommodations be made to minimize conflict between religious belief and governmental regulation [citing the Sunday Blue Law Cases, the School Prayer Cases, and *Sherbert* v. *Verner* to support the proposition that nothing in the Establishment Clause forbids the application of secular legislation in such a way as to alleviate burdens upon the free exercise of an individual's religious beliefs].

He wondered how else one could draw the line between religion, conscience, and political judgment? Should the test be stubbornness, rather than the source of belief?

Mr. JUSTICE STEWART: "If we, rather than Congress, were to decide on the definition of religion, wouldn't that be tinkering a little bit with the First Amendment?"

Mr. COX: "I think so."... For the Court to choose between the many definitions of religion would be far removed from the spirit of the First Amendment. Of course, the line drawn by Congress must be carefully scrutinized. However, there is no suggestion that the distinction here challenged is based upon any judgment of Congress as to the validity or worth of different religious views.

Mr. JUSTICE GOLDBERG: "Isn't the distinction you're making between organized and unorganized religion?"

Mr. COX... did not think so. The difference is between divinely imposed commands and obligations arising out of the sense of duty to humanity. Many people would describe the registrant's beliefs as religious. However, that what is decisive is that Congress has the power to draw a reasonable line in terms of separating out what is religious from that which is merely political, ethical, or moral.

Mr. JUSTICE GOLDBERG: "Congress doesn't have to draw any lines."

Mr. Cox: "You don't escape line drawing by introducing the word conscience."

Mr. JUSTICE GOLDBERG: "Wouldn't such a line be more compatible with the First Amendment?"

Mr. Cox . . . did not think so. Such a line would still have to do with belief. Moreover, it would go beyond anything that can fairly be called the free exercise of religion. For example, it would clearly be against the conscience of any Supreme Court Justice to give early release of an opinion, but such a dictate of conscience could not be called religious.

If you or I were Congress, we might have drawn the line somewhere other than in the area that Congress did. However, the question is whether the line that Congress has drawn is constitutional. Further support for such a line can be drawn from history, from its proven workability down through the years, and from the obvious conclusion that it does take care of what seem to be the vast majority of cases satisfactorily. The definition conforms to what has been the national sense of religion over the years. . . .

Promptly at 2:30, with the Solicitor General still at the lectern, the Justices arose and filed from the room. Remaining argument would be continued on the following day. When the Court reconvened at 10:00 A.M. on November 17, Cox resumed his argument and directed attention to the *Peter* and *Jakobson* cases. The *Peter* case did not, in his view, clearly present a nonreligious as opposed to a religious objection. Still he thought that the facts were equivocal: the registrant's family was not affiliated with any church and the registrant himself was introspective, independent, and possessed of strong convictions regarding many matters. While Peter was a mystic, a mystical sense of oneness with existence might properly be regarded by the local draft board as not meeting the definition of religion contained in the statute.

The Government's argument with regard to Jakobson turned on still narrower grounds. While the registrant had sincere and substantial claims that his objection rested on religious training and belief, the record was such that selective service officials might find that his objections flowed from humanitarian and political considerations rather than from a belief in a Supreme Being. Under such circumstances the courts should not upset the administrative determination.

As the Solicitor General was speaking, a red light on the lectern flashed, indicating that his time had expired. Completing his sentence, he returned to his seat. Counsel for Seeger, Peter, and Jakobson would now be heard in that order.

Kenneth Greenawalt faced the Court. At the outset he challenged the Government's statement of the issue: it was not whether Congress can draw a line between religious and nonreligious belief. His client's objections were religious, at least as religion was defined in the *Kauten* case. The issue to be decided is whether Congress can discriminate between those religions teaching a belief in a Supreme Being and those that do not. According to Greenawalt the *Kauten* definition of religion—conscience which is the voice of God—should govern.

Mr. JUSTICE STEWART . . . observed that the record seemed to indicate that the objection to service was based on love of his fellowman. . . . "That's the foundation of this case."

Mr. GREENAWALT . . . rephrased it as "devotion to goodness for its own sake." Such devotion is not compelled from outside but this was not required as religion was defined in *Kauten*.

Mr. JUSTICE STEWART: "He indicated he was skeptical about any divinity?"

Mr. GREENAWALT . . . replied that the registrant was not a disbeliever, but had merely indicated that he did not think that the existence of God can be proved or disproved.

Mr. JUSTICE GOLDBERG . . . wondered whether any devout Christian or Jew could conscientiously assert the belief in the Supreme Being required by the statute. He referred to the statutory requirement that the belief in a relation to a Supreme Being involve "duties superior to those arising from any human relation." He said his basic understanding of the Supreme Being in the Judeo-Christian tradition is that the duty to God is not in fact superior to the duty owed your fellowman. . . . Ezekiel taught that a man may follow all external observances of religion but if he does not do justice to his fellowman, he is not a religious man.

Mr. GREENAWALT . . . compared Section 6 (j) to the invalidated

Maryland statute requiring that no one could hold a commission as a notary public unless he declares his belief in a Supreme Being. The invalidation of such a requirement in *Torcaso* v. *Watkins* requires the striking down of the Supreme Being test in the draft act.

Mr. JUSTICE STEWART: "Are you suggesting that it's the duty of Congress, if it exempts anyone, to exempt the whole spectrum of First Amendment beliefs? If you are right, Congress couldn't draft anybody. I could say it is my religion to be against war and it is against my religion to tell you why."

Mr. GREENAWALT . . . pointed to the experience in several foreign countries wherein the only test is sincerity. This refutes the argument that Congress would not be able to draft anybody.

Mr. JUSTICE STEWART: "Ninety-nine out of one hundred people would sincerely not want to be drafted."

Mr. GREENAWALT . . . again insisted that he was not arguing for the exemption of nonreligious objectors.

Mr. JUSTICE STEWART: "Your definition of a religion does not require any belief in divinity."

Mr. GREENAWALT . . . pointed to the Ethical Culture Society which is chartered as a religious corporation even though it does not accept the traditional belief in a Supreme Being.

Mr. JUSTICE STEWART: "How about all-out belief in classical Greek Stoicism or Epicureanism?"

Mr. GREENAWALT: "I don't know."

Mr. JUSTICE STEWART . . . offered the following hypothesis. Would an Epicurean qualify under Mr. Greenawalt's definition if he refused to serve in the army because army beds were not soft enough and the life would not meet the standards of comfort required by a true Epicurean belief?

Mr. JUSTICE GOLDBERG . . . observed that "you don't have to go that far." He pointed to Buddhism as an example of a recognized religion that does not accept the belief in a Supreme Being.

Mr. GREENAWALT . . . agreed that you do not have to run through the whole gamut of religions. The simple question is whether the government can overlay the term religion as used in the First Amendment with the conception of belief in a Supreme Being. Nothing in the Constitution refers to God. If Congress passed a law specifying that no religious test shall be required for public office except a test requiring belief in a Supreme Being, that would be unconstitutional. . . . Seeger's beliefs are shared by a lot of people. To exclude them from the conscientious objector provision would be to exclude perhaps 45 per cent of the population. He noted that Abraham Lincoln belonged to no formal church and accepted no formal religious doctrine.

Mr. JUSTICE STEWART: "The difference is that your man has said he is very skeptical."

Mr. GREENAWALT: "He said he didn't think the existence of God could be proved or disproved."

Mr. JUSTICE STEWART: "He's a nonbeliever as opposed to a disbeliever. He didn't believe in the Supreme Being, unless you call conscience a divinity. I don't."

Greenawalt claimed that Section 6 (j), by penalizing persons who do not believe in a Supreme Being, violated the Establishment and Free Exercise Clauses of the First Amendment. And the classification of religions according to belief or nonbelief in a deity was in conflict with the Due Process Clause of the Fifth Amendment. All religions must be treated alike, and the exemption must be extended to everyone having sincere religious convictions against war. This is the only statute, he contended, in which Congress has defined religion in terms of belief in a Supreme Being.

Mr. JUSTICE HARLAN . . . citing the free-speech cases in which the Court has rejected the view that freedom of speech is an absolute right, wondered if there was not equal room for accommodation of the First Amendment's protection of the free exercise of religion and Congress' power to provide for an army.

Mr. GREENAWALT . . . did not think there was room for an accommodation that draws a line between different types of religion. Whether the line could be drawn between religion and nonreligion need not be urgued in this case.

Mr. JUSTICE GOLDBERG: "You would say that the line drawn here is not a rational one while in Mr. Justice Harlan's free-speech cases the line was rational."

Mr. GREENAWALT . . . insisted that once Congress exempts any religions it must exempt all or it violates the First Amendment.

Mr. JUSTICE STEWART: "That's a Fifth Amendment argument."

Mr. GREENAWALT: "It's both. Because the statute violates the First Amendment, it's invidious under the Fifth Amendment."

Mr. JUSTICE STEWART . . . suggested that if counsel were right about

the exemption violating the Free Exercise Clause, then the Constitution requires rather than permits the exemption of those conscientiously opposed to serving in the armed forces.

Mr. GREENAWALT . . . did not wish to go that far. He was content to rest on the position that once Congress granted an exemption to some religious beliefs, it must be granted to all.

The remaining cases were argued by Duane Beeson, for Peter, and Herman Adlerstein, for Jakobson. Both maintained that the record offered ample proof that their clients believed in a Supreme Being. Under the statute, if properly construed, their clients should have been granted exemptions. They also adverted to the constitutional arguments raised by Greenawalt.

The Conference. Oral arguments in *United States* v. *Seeger* and in the companion cases completed the presentation of opposing counsel. The cases were now ready for disposition, and until the decision was announced from the bench, judicial proceedings would be enveloped in strict secrecy.

Cases are decided by the Justices at conferences held regularly on Friday of each week, usually beginning at 11:00 A.M. and continuing through the afternoon. Only members of the Court are admitted to these conferences. According to established practice, cases heard during the previous week or two are called up in order by the Chief Justice, who summarizes the important facts, states his understanding of the issues, and presents his tentative conclusions. The Associate Justices, in order of seniority, offer their views on the case. The Court then proceeds to vote, with the members indicating their vote in reverse order beginning with the junior Associate Justice and proceeding through the others to the Chief Justice. This vote is tentative, and any member of the Court may change his position before the opinion is finally approved. If the decision is unanimous, or if the Court is divided and the Chief Justice is on the prevailing side, the latter assigns the task of preparing the opinion of the Court either to himself or to some member voting with the majority. Otherwise the assignment is made by the senior Associate Justice on the prevailing side. These assignments are usually made shortly after the conference adjourns.

In making assignments the Chief Justice takes into account various factors—the equitable distribution of the workload, the specialties of individual members, and the position of each member in the pending case as revealed in the conference discussion. If those on the prevailing side have divergent views in support of a decision, it may be difficult to obtain agreement on a single opinion, particularly if a member entertaining a more extreme view is designated as its author. Concurring opinions (those agreeing with the decision for reasons other than or in addition to those given by the majority) and dissenting opinions (those reaching a different decision) may be authored by one or more Justices. Occasionally the Court is divided between concurring and dissenting opinions in such a way that there can be no majority opinion at all. In these cases the Court's decision or judgment is announced in one of the concurring opinions.

Opinions of the Court, while usually assigned to individual members for preparation, are not solo performances. After a Justice has prepared a draft of his opinion, it is printed in the Court's printing plant and then circulated to all members of the Court, including any dissenters, for their consideration and comments. Sometimes the comments express simple agreement with the author's reasoning, but often there are suggestions for substantial changes. While the writer may disregard a suggestion, he may lose the support of the member who offered it. A Justice is free to reverse the position which he took in conference, and on occasion the persuasiveness of a dissenting opinion or the weakness of a majority opinion may cause a change of heart and, in cases where the Court is closely divided, a reversal of the result tentatively reached in conference.

After a final printed draft of the opinion has been distributed to his colleagues, the writer announces in conference that the case is ready for disposition. A definitive vote is then taken, and the Court is ready to announce its decision and opinion.

Opinion of the Court. On March 8, 1965, the Court handed down a single opinion deciding *United States* v. *Seeger* as well as the *Jakobson* and *Peter* cases. Shortly after the Court convened in public session, Chief Justice Warren nodded to Associate Justice

Clark, who announced the decisions and summarized his opinion for the Court.[7] When Clark had finished, Justice Douglas, noting that he agreed with the Court, stated some individual views set down in a separate opinion. There was no dissent.

In view of the broad constitutional issues canvassed by the lower courts, the Supreme Court's opinion was something of an anti-climax. While the Court upheld the claims of all three registrants for exemptions as conscientious objectors, it declined to reach the constitutional issues. Its decisions turned on an interpretation of the contested section of the statute:

> We have concluded that Congress, in using the expression "Supreme Being" rather than the designation "God," was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, *the test of belief* "in a relation to a Supreme Being" *is whether a given belief that is sincere and meaningful occupies in the life of its possessor a place parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.*[8] Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is "in a relation to a Supreme Being" and the other is not. We have concluded that the beliefs of the objectors in these cases meet these criteria. . . .

While both Jakobson and Peter had claimed exemption under Section 6 (j), Seeger had virtually abandoned this argument by the time his case reached the court of appeals. How did the Supreme Court justify its conclusion that the Supreme Being test, written by Congress into the 1948 act, was intended to exempt those professing a belief parallel to a belief in God? The question as posed by Clark was "the narrow one: Does the term 'Supreme Being' as used in Section 6 (j) mean 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'?"

In answering this question the Court resorted to the legislative history of the provision.

[7] Although the author of an opinion may read it in full, this once common practice is now very rare.

[8] Emphasis added.

Few would quarrel, we think, with the proposition that in no field of human endeavor has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man's predicament in life, in death or in final judgment and retribution. This fact makes the task of discerning the intent of Congress in using the phrase "Supreme Being" a complex one. Nor is it made the easier by the richness and variety of spiritual life in our country. Over 250 sects inhabit our land. Some believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace. There are those who think of God as the depth of our being; others, such as the Buddhists, strive for a state of lasting rest through self-denial and inner purification; in Hindu philosophy, the Supreme Being is the transcendental reality which is truth, knowledge and bliss. . . . This vast panoply of beliefs reveals the magnitude of the problem which faced the Congress when it set about providing an exemption from armed service. It also emphasizes the care that Congress realized was necessary in the fashioning of an exemption which would be in keeping with its long-established policy of not picking and choosing among religious beliefs.

In spite of the elusive nature of the inquiry, we are not without certain guidelines. In amending the 1940 Act, Congress adopted almost intact the language of Chief Justice Hughes in *United States* v. *Macintosh, supra:*

> "The essence of religion is belief in a relation to *God* involving duties superior to those arising from any human relation. . . ."

By comparing the statutory definition with those words, however, it becomes readily apparent that the Congress deliberately broadened them by substituting the phrase "Supreme Being" for the appellation "God." And in so doing it is also significant that Congress did not elaborate on the form or nature of this higher authority which it chose to designate as "Supreme Being." By so refraining it must have had in mind the admonitions of the Chief Justice when he said in the same opinion that even the word "God" had myriad meanings for men of faith. . . .

Moreover, the Senate Report on the bill specifically states that §6 (j) was intended to re-enact "substantially the same provisions as were found" in the 1940 Act. That statute, of course, refers to "religious training and belief" without more. Admittedly, all of the parties here purport to base their objection on religious belief. It appears, therefore,

that we need only look to this clear statement of congressional intent as set out in the report. Under the 1940 Act it was necessary only to have a conviction based upon religious training and belief; we believe that is all that is required here. Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.

The Government takes the position that since *Berman* v. *United States* . . . was cited in the Senate Report on the 1948 Act, Congress must have desired to adopt the *Berman* interpretation of what constitutes "religious belief." Such a claim, however, will not bear scrutiny. First, we think it clear that an explicit statement of congressional intent deserves more weight than the parenthetical citation of a case which might stand for a number of things. Congress specifically stated that it intended to re-enact substantially the same provisions as were found in the 1940 Act. Moreover, the history of that Act reveals no evidence of a desire to restrict the concept of religious belief. . . .

As for the citation to *Berman*, it might mean a number of things. But we think that Congress' action in citing it must be construed in such a way as to make it consistent with its express statement that it meant substantially to re-enact the 1940 provision. As far as we can find, there is not one word to indicate congressional concern over any conflict between *Kauten* and *Berman*. Surely, if it thought that two clashing interpretations as to what amounted to "religious belief" had to be resolved, it would have said so somewhere in its deliberations. Thus, we think that rather than citing *Berman* for what it said "religious belief" was, Congress cited it for what it said "religious belief" was not. For both *Kauten* and *Berman* hold in common the conclusion that exemption must be denied to those whose beliefs are political, social or philosophical in nature, rather than religious. Both, in fact, denied exemption on that very ground. It seems more likely, therefore, that it was this point which led Congress to cite *Berman*. The first part of the §6 (j) definition—belief in a relation to a Supreme Being—was indeed set out in *Berman*, with the exception that the court used the word "God" rather than "Supreme Being." However, as the Government recognizes, *Berman* took that language word for word from *Macintosh*. Far from requiring a conclusion contrary to the one we reach here, Chief Justice Hughes' opinion, as we have pointed out, supports our interpretation.

Admittedly, the second half of the statutory definition—the rejection of sociological and moral views—was taken directly from *Berman*. But, as we have noted, this same view was adhered to in *United States* v. *Kauten*, *supra*. Indeed the Selective Service System has stated its view of the cases' significance in these terms: "The *United States* v. *Kauten* and *Herman Berman* v. *United States* cases ruled that a valid conscientious objector claim to exemption must be based solely on 'religious training and belief' and not on philosophical, political, social, or other grounds. . . ." Selective Service System Monograph No. 11, Conscientious Objection, 337 (1950). . . . That the conclusions of the Selective Service System are not to be taken lightly is evidenced in this statement by Senator Gurney, Chairman of the Senate Armed Services Committee and sponsor of the Senate bill containing the present version of §6 (j):

"The bill which is now pending follows the 1940 act, with very few technical amendments, worked out by those in Selective Service who had charge of the conscientious-objector problem during the war." 94 Cong. Rec. 7305 (1948). Thus we conclude that in enacting §6 (j) Congress simply made explicit what the courts of appeals had correctly found implicit in the 1940 Act. Moreover, it is perfectly reasonable that Congress should have selected *Berman* for its citation, since this Court denied certiorari in that case, a circumstance not present in *Kauten*.

Section 6 (j), then, is no more than a clarification of the 1940 provision involving only certain "technical amendments," to use the words of Senator Gurney. As such it continues the Congressional policy of providing exemption from military service for those whose opposition is based on grounds that can fairly be said to be "religious." To hold otherwise would not only fly in the face of Congress' entire action in the past; it would ignore the historic position of our country on this issue since its founding.

Applying the approved test to Seeger's claims, Justice Clark noted that the court of appeals had failed to find sufficient "ex-

ternally compelled beliefs." However, that court did state that it was impossible to say that Seeger "is not bowing to 'external commands' in virtually the same sense as the objector who defers to the will of a supernatural power." The claimant was, moreover, sincere. He professed religious beliefs and, while skeptical, he did not disavow any belief in a "relation to a Supreme Being." Under the test he should have been granted exemption.

In his separate opinion Justice Douglas posed the constitutional issues which would have confronted the Court if the statute had been interpreted literally to deny exemptions to religious objectors professing no belief in a Supreme Being:

> If I read the statute differently from the Court, I would have difficulties. For then those who embraced one religious faith rather than another would be subject to penalties; and that kind of discrimination, as we held in *Sherbert* v. *Verner*, 374 U.S. 398, would violate the Free Exercise Clause of the First Amendment. It would also result in a denial of equal protection by preferring some religions over others—an invidious discrimination that would run afoul of the Due Process Clause of the Fifth Amendment. See *Bolling* v. *Sharpe*, 347 U.S. 497.
>
> The legislative history of this Act leaves much in the dark. But it is, in my opinion, not a *tour de force* if we construe the words "Supreme Being" to include the cosmos, as well as an anthropomorphic entity. If it is a *tour de force* so to hold, it is no more so than other instances where we have gone to extremes to construe an Act of Congress to save it from demise on constitutional grounds. In a more extreme case than the present one we said that the words of a statute may be strained "in the candid service of avoiding a serious constitutional doubt." *United States* v. *Rumely*, 345 U.S. 41, 47.

The term "Supreme Being" has no narrow technical meaning. It encompasses many concepts as revealed by the Hindu, Buddhist, and Judeo-Christian religious traditions, and these concepts find expression in religious communities in the United States. He concluded that the Court should attribute to Congress "tolerance and sophistication . . . commensurate with the religious complexion of our communities." For this reason, he accepted the broad interpretation of Section 6 (j) which the Court approved.

An Appraisal. The Supreme Court's opinion in *United States* v. *Seeger*, aside from approving a broad definition of religion, disposed of none of the constitutional problems posed by current policies toward conscientious objectors:

(1) Does the Court still subscribe to the traditional view that the exemption of conscientious objectors is a matter of legislative grace and not of constitutional right?
(2) Must Congress, when it exempts religious objectors, exempt nonreligious objectors as well?
(3) May Congress, when it grants exemption to religious objectors, constitutionally limit that exemption to those professing belief in a deity?
(4) May Congress, in granting exemption, distinguish between those who object to all war as against those having equally sincere and compelling convictions against the morality of a particular war?
(5) What recognition, if any, must be accorded the absolutist, the person who conscientiously objects to registration, as well as to all forms of prescribed service, however remote from military activity?

Only the third question was squarely raised in the *Seeger* case, but the Court sidestepped the constitutional issue by interpreting the challenged provision broadly.

At best the Court's reading of Section 6 (j) was strained, even tortured. The draftsmen of the act, in introducing language requiring belief in a Supreme Being, probably intended to sanction expressly the narrow definition of religious training and belief which has been advanced by the court of appeals in the *Berman* case. The conscientious objector provision was worked out by the Senate Armed Services Committee in consultation with selective service officials, principally General Hershey. The latter, in a 1942 communication to local boards, interpreted the religious training and belief provision of the 1940 act as requiring belief in a divine source of all existence, a meaning very close to that later adopted in *Berman*. The appellate courts, moreover, were in disagreement over the definition of religion as used in the 1940 law. It is probable that the draftsmen of the Selective Service Act of 1948, in response to suggestions of General Hershey, introduced the Supreme Being

test for conscientious objection in order to lay down a uniform national standard. The Armed Services Committee's reference to *Berman* in its report on the bill was meant to explain and support, in terms of the opinion in that case, the language recommended by the committee.

For all its limitations and weaknesses, however, something may be said in favor of the Supreme Court's approach. The Court had observed a self-imposed rule limiting the scope of judicial review—"when the validity of an act of Congress is drawn in question or even if a serious doubt of constitutionality is raised, the Court will first ascertain whether a construction of the act is fairly possible by which the question may be avoided." This rule is one expression of the broader doctrine that the Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. Moreover, it conforms to the principle that each of the three branches of the national government, in the exercise of its powers, will accord proper respect to the determinations of the other branches. Judges, after all, in taking an oath to support the Constitution, are no different from other officers of government.

The Court's approach, moreover, has practical merit. Had Seeger's claim been sustained on constitutional grounds, Congress (if it wished to withhold exemptions to religious objectors professing no belief in a supreme deity) would have been confronted with the necessity of denying exemptions to all religious objectors. By sustaining Seeger's claim upon the basis of a broad reading of Section 6 (j), the Court permitted greater latitude in legislative policy-making. Congress may, of course, do nothing, and inaction will leave the Court's "parallel belief" test in effect. Or it may amend the statute so as to override the Court's interpretation. If Congress does so, however, it is on notice that its action may raise grave constitutional questions. In any case the Court, by its holding, has invited Congressional reconsideration of the matter. And in the meantime valuable administrative experience under the parallel belief test will be obtained. If the test proves unworkable—opening, as some critics have predicted, the floodgates to insincere claims—Congress may react by limiting the exemption to those professing a belief in a more or less orthodox deity. And when and if the Court

has occasion to pass upon the constitutional validity of such a restricted exemption policy, it too may assess the actual consequences of the more liberal standard enunciated in the *Seeger* case.

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