Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

ELLIOTT ASHTON WELSH, II,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Docket No. 76

Place Washington, D. C.

Date January 20, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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The above-entitled matter came on for argument at 12:34 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

J. B. TIETZ, Esq.
Los Angeles, California
Counsel for Petitioner

ERWIN N. GRISWOLD, Esq.
Solicitor General of the U. S.
Department of Justice
Washington, D. C.
Counsel for Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: No. 76, Welsh against the United States.

Mr. Tietz?

ARGUMENT OF J. B. TIETZ, ESQ.

ON BEHALF OF PETITIONER

MR. TIETZ: Mr. Chief Justice and gentlemen of the Court:

This is a draft prosecution for refusal to submit to induction because the petitioner didn't get the conscientious objector classification. Everyone concedes that he was truthful and sincere. He is not an athiest, so that is not involved. He objects to all wars, so that is not involved.

But the main objection of the Government is that his religion with which he started out by saying, "I am nonreligious" is the bone of contention. Before we get to the First Amendment point, I would like to deal with the two threshold matters that could be dispositive of the case.

The first is the short-circuit, the corner-cutting by the Government at the induction proceedings. I have briefed I think as adequately as I can the one point raised by the Government that there must be a showing of prejudice. I rely on the Ninth Circuit rationale in Welsh and -- rather, in Briggs and in Osak.

One point of the Government I didn't deal adequately

in the briefing is that the Government argues that the security questionnaire is for the benefit of the Army. Now that is the same argument that was made by the Government when the Briggs matter of not getting the last-minute cursory inspection came it. It is the same argument that was used by the Government in the Welsh matter when he didn't get tendered to him the security questionnaire. And for the rationale in there, they decided that it was required.

Now the same thing runs through the thread here. There is one point, though, that is not too material. That is, the Government keeps saying that he refused. Actually he didn't refuse, he raised the question and then the best reason why they short-circuited him is in the one sentence statement of the Government -- rather, in the majority opinion below -- that a district judge who wrote the opinion, concurred in by one of the circuit judges.

They put it this way: Rather than delay appellant's induction pending investigation, induction station personnel ordered him to step forward.

There is as brief a discussion of the short-circuit as possible. My thought is this: As long as it's a part of the Army regulations that no selectee shall be inducted when he either qualifies or refuses to execute the oath, pending a thorough investigation, he is entitled to that. And just as in these other cases I mentioned, that was held to have sufficient

prejudice, it should apply here, because not as the Government argues that he can by that avoid induction possibly for months and forcing the military to waste its intelligence resources, all the Government has to do is -- I mean, all the Army has to do is strike out a few words, substitute a word or two and they can have it in the Federal Register in two or three days.

Now, fortunately for the security of the country, the Army is alert and when it sees things it should deal with, it does so fairly promptly.

For example, when I got back in practice in '44, about the first man in the office was Yost. He was on leave from Camp Roberts where he said he had been forcibly inducted. He testified in the trial court, "I was standing with a great many other men who had passed the physical examination, and the inducting officer came over and said, "Hold up your right hand and repeat the oath after me'."

He testified as one of Jehovah's Witnesses, "I couldn't take the oath. I didn't raise my right hand. I said nothing." The trial judge believed him, granted a writ, the Government took an appeal. But before an en banc decision affirming the appeal, the Army saw the light and it changed the induction proceeding's crucial point, point of no return, from an oath to a stepping forward.

Now that still persists to this day. That is the way it is done for selectees to become inductees.

Ten years later, though, the Army had to consider another matter and that was when Corrigan came in the office. These are reported appellate decisions, of course, and Corrigan says, "I am in the stockade at Fort Ord and I am here because they are trying to make a good soldier out of me."

When I asked him how come if you are in the stockade you are here, he testified, "We were seated in a theater-like arrangement. I was in the back row when we jumped up as the sergeant told us to do when the officer came in. And the officer said, 'Now, when I call the name of each of you, you will take one step forward and that step is in the Army of the United States'."

He said the men were so crowded that no one except in the front row could do anything but shuffle his feet. They shuffled. I didn't make a move.

The trial judge decided this in another way. He asked, "When did you make up your mind you were a conscientious objector?" He said, "While I was standing there." And the judge said it was too late and I couldn't do anything about it. It was never too late to face civil penalties rather than go into the Military Service.

Now the Court of Appeals unanimously reversed on the basis that there was no evidence that he had moved his feet forward, and I think that one thing that helped them reach that opinion was an affidavit that I filed in the closing brief in

which I said, "I have gone down to the induction station and I see that they have seen the light. They now have a different procedure." They have a row of chairs around three sides facing the podium, as everybody can see the podium, and they have a white line painted four feet from the wall so the man can see when they cross the Rubicon, or any other expression that you might want, so that the Army learns. And I say in other cases for example -- I won't belabor it. I will just cite one more recorded case on the trial level "ex parte Barrial."

When Barrial secured a writ down in San Diego, the record which we got from the Selective Service System showed that he was a married man, and that in the Selective Service System records -- it was quite a bit of publicity of Stars and Stripes of Europe, Stars and Stripes of the Orient, and so on, so it alarmed the Army. And what they did, they got the Selective Service System to change the regulation from saying that a husband is to be given III-A to "father," and that is the way it is today.

Many other illustrations can be given of the Selective Service System, their one-word changes, but I don't want to belabor it. If there is any question about that, there are many that can be recited.

So I say that as long as it is the law, I think that Government agencies should follow their own regulations. It made them, it can do away with them in a few days.

The next point I wish to go into is also one that, if the Court agrees with me, can be dispositive of this case, and that is the point that Welsh, if he had been before this Court some years ago when Seeger with the other two were consolidated for the oral argument for decision, Jacobson and Peter, I say he would have had exactly the same decision.

He would have been held to have a parallel bridge.

Q Counsel, may I suggest to you that you have used about one-third of your time and really haven't got to the issue yet, as I see it. I think you might well address yourself to it more sharply.

A The point I am trying to make now is that he has exactly the same situation as Seeger did. He qualifies as the Circuit Judge Hamley put it, "He showed there is no basis, in fact, for saying he didn't have a parallel equivalent belief." In fact, I think he is in a better position than Seeger for this reason.

Q Was that one of the questions presented in your writ of certiorari?

A The three, that there is a constitutional point, that is a security questionnaire point, and that the man meets -- these have all been briefed. This point that I am arguing now, that he qualifies, has been brief thoroughly and, curiously enough, this is a very striking thing.

The Government's argument that he doesn't qualify is

almost word for word, follows the same path and frequently the very same phraseology, that the Government's brief in Seeger. The Government, very conveniently for everybody as a supplement to its brief, put in the argument portion of the Seeger decision.

Now pages 2-A and 3-A of the supplement show that they said then, Seeger doesn't meet this standard. Seeger has a personal moral code and, therefore, he must attack the constitutionality.

We attack it as a matter of insurance and because it is involved, but I think that when you run the parallel, you will find that this man was from early childhood to about 15 attended the Presbyterian Sunday School, then he attended the Christian Science Sunday School. His mother was a Christian Scientists, and I would assert, though I don't have to, that one session at one's mother's knee is all that one needs for training.

So he had the training. Now the opinion of the Court below in the words of the dissenting judge, they concede that he had the strength of conviction, the strength of belief, that he just doesn't have the religious background.

Well, he has as much religious background as Seeger did. Seeger, and he did almost the same thing with the farm, ---

Q Well, are you arguing now that his case is based on religious belief and conviction, or that it is not and it doesn't make any difference?

A I say "both of them," but I am arguing now the

former for this reason. That is precisely the conclusion that Circuit Judge Hamley came to. Although he went over the constitutional question, it is a grave one, he said that they need not reach it because he does comply.

That is what, fortunately for us, Circuit Judge Hamley concluded, and that is our conclusion.

Now when Seeger encountered the form, he struck out certain words and put quotation marks about the word "religion." Now I take that to mean that what Seeger was saying, "If you want to call what I believe religious," and fortunately the Court did say he has the equivalent. You can do that. But he disavows being religious.

Now Welsh did more. He struck out the word "relious," but as I argued in the briefing, a man is not wholly to be judged by what he says and especially he wrote a reply to the Attorney General's recommendation to the Appeal Board, a reply that he was permitted to encouraged and invited to write by the regulations in force. Congress has done away with that now.

He wrote a reply, which as Circuit Judge Hamley says, adequately answered, and he learned from the Seeger decision that under that definition he then could be considered to meet the requirements of law.

He has it made, I think, from that standpoint.

Now on the question of the constitutionality, that of course is one which I argued as thoroughly as I could. I pointed

out the four or five decisions of this Court which, as I interpret them, say not only may not Congress distinguish between religions, but it may not distinguish between religion and irreligion.

And I wish to save a few minutes of my time for possible rebuttal.

MR. CHIEF JUSTICE BURGER: Thank you.

Solicitor General Griswold?

ARGUMENT OF ERWIN N. GRISWOLD, ESQ.

ON BEHALF OF RESPONDENT

MR. GRISWOLD: May it please the Court:

This is a difficult and troublesome case. I hope that I can be of assistance to the Court in coming to a sound solution of the problem it presents.

The statutory provision is clear. It is set out near the top of page 9 of the Government's brief. At the time the events occurred here, this Court had already decided the case of United States against Seeger, but the statutory provision still contained the language which appears at the middle of page 9, defining religious training and belief as "belief in a relation a Supreme Being, involving duty superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

In 1967 this was amended to strike out the reference

to a Supreme Being, so it now says simply the term "religious training and belief" does not include "essentially political, sociological, or philosophical views or a merely personal moral code."

The facts in this case are not so clear. The majority of the Court below felt that the defendant had raised no constitutional question there. Applying the statute to the facts in the record and taking into account the narrow scope of review in these cases, the Court concluded with Judge Hamley dissenting that there was a basis, in fact, for the conclusion of the Selective Service authorities that Welsh's objection to service were not based on religious training and belief, and that he did not come within this Court's decision in the Seeger case.

The hearing officer who met and talked with him reported that he "stressed that his belief is that his opinions have been formed by reading in the fields of history and sociology, and that they are purely rational as opposed to religious."

Of course, we fully accept theconstruction of the statute made by this Court in the Seeger case. The statute which provides exemption from military service for persons who, in the statutory language, "by religious training and belief are opposed to war in any form."

Nevertheless, there was nothing there in the Seeger case which wrote out all content from the word "religious," which was applied to training and belief in that statute by

Congress. It does seem to us that to hold the decision of the defendant here comes within the statutory provision would be plainly contrary to the manifested congressional intent.

After all, Congress did say "religious training and belief."

I turn then to the constitutional question. If the Court should conclude that that question is open to the petitioner here, ---

Q Now just before you do, Mr. Solicitor General, if this man had come within the statute, as defined in Seeger, what would have happened to him? He would not have been exempt, would he? He would have been assigned to either noncombatant duty within the military or else nonmilitary civilian work?

A If his draft board had found that he came within the statute and there was not evidence on which it could have found otherwise, then he would have been entitled to one or the other of two classifications -- either I-A-O or I-O.

Now I-A-O is "available for military service, but noncombatant," essentially medical service you are put in, but there are other types of service.

I-O would be "completely exempt from military service, but subject to civilian service of," the statute says, "national importance." And they are usually assigned to civilian hospitals or to other types of nonmilitary work.

Q And are they assigned either to I-A-O or I-O and

obligated to serve at the same point in time as they would have been obligated to serve in the military had they remained I-A?

A Yes. At the time that they are so classified, they are entitled to the other classification: II-S for students, IV-F for ---

Q But if they have been otherwise have been I-A?

A --- for dependency, but if they get classified I-A, they then they can contend that they are entitled to I-O or I-A-O. Indeed they can contend for that before they are classified I-A, and if they are so classified, they are ordered to serve, but in the alternative capacities. Indeed, the civilian service is customarily called "alternative service."

Q And there is no exemption, statutory or regulatory, no exemption from -- altogether from compulsory service for one who would be in I-A except that he is a conscientious objector? As defined by the statute.

A They are all subject to service.

There are at least two constitutional provisions which are relevant. There is not only the First Amendment, but also the power explicitly given to Congress by Article I, Section 8, Clause 12 to raise and support armies. This is unqualified. It is not limited to time of war or otherwise restricted, except that appropriations for the purpose shall not be longer than a term of two years.

Let us look particularly at the First Amendment. I

need hardly say that it provides that Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof. There are two clauses: The establishment clause and the free exercise clause.

Generally they are in complete harmony, but occasionally there is some contention between them and this may be such a case.

With respect to the First Amendment I would like to divide my approach under several headings. These are one, the text, which has nothing to do with the problem of this case; second, the contemporaneous history; three, the practical construction; and four, the precedents. All of these, I think, support our position here.

In most field that would be enough, though perhaps and altogether they are but a slender reed. First, the text. The suggestion that what is involved here is an establishment of religion ignores what the members of the First Congress knew well. They were thoroughly familiar with established religions. They had them in at least Virginia, Massachusetts, and New Hampshire and probably in other states.

Indeed, one of their objections was to make it clear that Congress could do nothing to interfere with these existing established churches. I know that establishment has been carried further, but to take it as far as would be required here would be, it seems to me, a case of tyranny of words of what then-Chief Justice Cardozo referred to as the "tendency of a principle

to expand itself to the limits of its logic."

My one-time colleague, Paul Freund, in his book on law and justice has a passage which seems to me to be relevant here. He was referring to this Court's dealing with problems with respect to the regulation of commerce, and I quote: "Marshall's exuberant nationalism sought to solve the problem with clear-cut absolutes. The power over commerce among the states is exclusively vested in Congress. The power to tax involves the power to destroy. Goods in the original package are immune from local taxation when brought in from a sister state." All of these absolutes have had to be abandoned.

Whitehead used to compare his view of the world with that of his friend Bertram Russell. "Bertie sees it at noon on a brilliant sunny day. I see it at dawn on a misty morning."

John Marshall was, however improbable the spiritual ancestry appears in other respects, the precursor of Bertram Russell in his views of national and state powers over commerce has not a century and a half of experience shown that the Whitehead way was the path of greater wisdom.

And apart from the text of the amendment, the contemporanecus history and understanding of the First Amendment. It was for this reason that I had the argument portion of the Seeger brief reprinted and made available for the convenience, not only of the Court but of counsel. There is more reprinted here than is strictly necessary to my present argument, but I was fearful

that if I didn't include it all, someone might say that it was not fully representative of our position, and I am particularly interested in the fact that on pages 26-A to 45-A there was set out by Solicitor General Cox and his staff a full discussion of the historical development of the First Amendment.

I first thought that we would rework that and then I concluded that we were not going to be able to improve on it. I then thought we would simply cite it in our brief, but I thought that might be inconvenience and so I had this supplement prepared.

It is perfectly plain ---

Q I don't find that in my records.

A It has a gray cover like all Government documents. It is called "Supplement to Brief for the United States," and I hope that it is made ---

Q It is in the supplement?

A It is called "Supplement to Brief for the United States."

There was first the pre-revolutionary relief which was habitually given by nearly all of the colonies to the members of the four historic peace churches. There were similar actions by the Continental Congress. Then there was the consideration of the Bill of Rights in the First Congress.

There were numerous state proposals relating to churches, and these show that what was in the minds of those who sought amendments on religion were three concerns. They feared that

Congress might, one, infringe religious liberty; two, establish or accord preferential treatment to one particular religious sect; and, three, undermine the existing state religious establishment.

When what became the First Amendment was under consideration in Congress, the proposal of James Madison was that the provision read that no person religious scrupulous shall be compelled to bear arms.

Representative Scott made a very similar proposal, which is printed at the bottom of page 31-A of our brief. The provision, which was adopted by the House, simply referred to establishment of religion, "Congress shall make no law respecting and establishment of religion."

No, that is what the final provision was.

"Congress shall make no law establishing articles of faith or a mode of worship."

It then went on to the Senate, where we have no information as to what happened, and the Senate version plainly related to establishment in the sense of an established church. It then went to a conference from which the final version was adopted.

Similarly in connection with the War of 1812, there is set out on page 33-A of the supplement the provision which was adopted by one House relating to the historic peace churches, never enacted into law because the treaty terminating the war became before the statute was passed.

Now there is, of course, Jefferson's wall of separation, but he was not one of the draftsmen of the First Amendment. He was in France in 1789. His striking phrase came a number of years later and may have become an example of what he had in mind when he observed that the search is for the just words, the happy phrase that will give expression to the thought, but somehow the thought itself is transfigured by the phrase when found.

And then we have on page 35-A of the supplement the statute which was passed during the Civil War. Both the Confederate Congress and the United States Congress, the provision of the United States Congress is at the bottom of page 35-A, but both of them exempted members of the established organization.

The Federal statute reads: "That members of religious denominations, who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations," should be entitled to a certain kind of exemption.

And similarly the statute which was passed by Congress in the First World War, 125 years after the Constitution was adopted, exempted members of any well-recognized religious sect or organization as present organized and existing, and whose existing creed or principles forbid its members to participate in war.

That is on page 40-A of the supplement.

And then finally turning to the precedents, there is the decision of this Court in the Selective Draft Law cases cited on page 20 of our brief, where this question was briefed and argued by John W. Davis, the Solicitor General, and where the Court treated it rather summarily. It is not usually noted, but I think it is relevant to note here that one week later the Court decided on the authority of the Selective Draft Law cases the Ruthenberg case in 245 U.S. at 480, where the contention was specifically made that allowing exemption to members of a religious sect violated the First Amendment and the Court found that this could be disposed of on the basis of the Selective Draft Law cases.

There is also the Free Exercise Clause. It is obvious that Congress has over the years legislated within the influence of that clause, that Congress has endeavored to accommodate the various draft laws it has passed and claims made under the Free Exercise Clause.

Several cases decided by this Court within the past few decades support the power of Congress to make such an accommodation.

On page 21 of our brief we have cited the Everson case, where the Court found that public money could be used to pay the cost of transporting students to schools, even though some of the students went to parochial schools.

On page 21 we also cited Zorach against Clauson, the released time case, where it was held that it was valid under the First Amendment for public authority to release children from school to attend religious educational classes.

Then there are the Sunday closing law cases, decided on pages 22 and 23 of our brief, which not only it seems to me are relevant involving the interrelation of law and the First Amendment, but also the particular fact that it appeared that in 21 of 34 states which had Sunday laws, there were exemptions for Sabbatarians and provisions that if they kept closed on Saturday, they could be open on Sunday, and the Court at page 608 of 366 U.S. said, "This may well be the wise solution to the problem." And that, of course, was a clear accommodation.

There are analogies in other statutes passed by Congress. For example, this very statute, the Selective Draft Law, contains an outright exemption for ministers and for divinity students with which this Court has dealt in the Oestereich case, not suggesting at all that the exemption was unconstitutional.

There are numerous provisions in the tax laws not only allowing deductions for contributions to churches. There is in Section 1402(a)(8) of the Internal Revenue Code a special rule for computing self-employment income of an individual who is a duly ordained, commissioned or licensed minister of a church or a member of religious order.

In 81402(h) there is a really rather choice one,

exemption for persons who are members of a recognized religious sect or division thereof, and are adherrents of established tenets or teachings of such sects or division by reason of which they are conscientiously opposed to the acceptance of the benefits of any public or private insurance which makes payments for death, disability or old age or retirement or for medical care.

Persons who are within a particular division or sect of a religious group with respect to social insurance have an exemption.

The propriety of the exemption based on religious training and belief has at least been recognized and accepted by this Court in recent years. There is, first, I would mention the Witmer case in 348 U.S. where the Court said, "Because the ultimate question in conscientious objection cases is the sincerity of the registrant in objecting on religious grounds to participation in war in any form."

And then, finally, there is the Seeger case itself where the notion or the idea that the restriction to religious training and belief was valid is surely implicit. It is perfectly plain, of course, that the Court gave a very broad conception to the meaning of "religious training and belief," to which we take no exception whatever. But there is nothing in that case which indicates that the Court was intending to write the word "religious" out of the statute or to hold that it was unconstitutional.

Indeed, if the religious training and belief provision is invalid, why does not the whole exemption provision fall? Which would lead to the affirmance of the judgments below.

There is nothing arbitrary or capricious violative of the Fifth Amendment in the judgment Congress has made. The task of drawing the line is an exceptionally difficult one, but we believe that there is a qualitative difference, a difference of degree perhaps, but none the worse for that between religious and nonreligious objection to war, which Congress could reasonably recognize in deciding whom to subject to involuntary military service.

The Constitution does not set up freedom of conscience, despite appealing arguments made in briefs of amicus curiae to the effect that that might be a good thing to do. It does not equate conscience with religion.

Congress could reasonably draw the line as to who shall and who shall not be compelled to serve by taking into account, as the Constitution does, the right to exercise one's religion freely. This was an appropriate place for legislative judgment; that Congress has power to make this judgment is, in our view, implicit in the power expressly granted to raise and maintain armies.

The task of reconciling the constitutional command of the establishment and the Free Exercise Clause is not exclusively a matter of judicial concern. Courts are not the only agencies

of our Government which are bound to support and defend the Constitution of the United States. In circumstances where the tension between these provisions is tightened, the preferable course for the Courts to follow is to set outer limits. But to leave the Legislature considerable scope, for the alternative is to substitute judicial attitudes for those of the elected representatives of the people on matters where the constitutional lines are not clear and where the considered views of the representatives of the people is entitled to great weight.

The sound constitutional approach in construing the establishment clause in such circumstances is one of reasonable accommodation, not wooden application, of thoughtful resolution of difficult problems and not formalistic absolutes.

That is the approach we raise here. The petitioner has raised a further question, and I would point out, although I don't want to be technical, that in the petition in this case only two questions were raised. Only, first, the question of the constitutionality of the statute. There is no question presented as to whether petitioner comes within the statute and, second, this technical question about his failure to sign a form at the time ofinduction.

This latter question we have dealt with in our brief and I leave consideration of it to the discussion there.

For these reasons, I urge that the judgment of the Court of Appeals should be affirmed.

Q Are you going to argue some more on the merits of the petition?

A Mr. Chief Justice, ---

Q On this subject?

A Mr. Chief Justice, I am not planning to argue more about religion.

Q You are not?

A There are two problems in this simple little statutory phase by reason of religious training and belief is opposed to war in any form, and this is the argument I propose to make about religion.

Both questions are involved in the Sisson case and the argument there is essentially -- the way I have planned it is to deal essentially with the selective conscientious objection there.

Q Then I think I would like to ask you this question. It is not necessary to answer it now.

Supposing despite history of the Establishment Clause you take the very broad sweep this Court has given the Establishment Clause in its decision, and you start from the premise that while the Constitution did not require Congress to give any exemption, religious or otherwise, to anybody, that Congress in the interest of giving, in effect, some play to the Free Exercise Clause put in the religious exemption in order to give that effect, what is the answer to the argument that having

chosen that course, it perforce operates within the broad sweep of this Court's decisions as an establishment of religion?

A I don't know, Mr. Justice, that I can say much more than I have. My first argument on that would be that the Establishment Clause has been pushed very far and it oughtn't to be pushed any further. More specifically ---

Q Perhaps it ought to be cut back.

A And more specifically that it ought not to be pushed to apply to this particular situation, and I can find no doctrinal or historical basis on which there should be; indeed all the evidence seems to me to be to the contrary.

The other question is what I tried to deal with very summarily, in too short a time, but it seems to me to be essentially a Fifth Amendment question. That is, whether it is a proper classification, a classification which Congress could make and not be arbitrary under the Fifth Amendment, to allow exemption to persons who hold these views by reason of religious training and belief and not to allow them to others.

And on that here again, feeling as much as argument has a great deal to do with it I suppose, it does seem to me that an argument can be made that there is a difference in quality between objection which, in the broadest base, are religious in nature having some connotation with the unknown, with what is about and beyond us, on the one hand, and those which are merely intellectual, merely rational, merely internal,

on the other.

That is an argument which isn't easy for me to verbalize because in the Quaker tradition that I am familiar with, it is the inner voice which expresses the external force. So I can't say it is a question of whether it external or internal, but it does seem to me that it relates to whether it deals with the unknown and what is beyond us, on the one hand, and what the man out of his own intellectual activity rationalizes for a conclusion for himself.

And my position on that would be that that is a classification, a distinction which Congress has made for 175 years, which was well understood and contemplated at the time the amendment was adopted, that it would not be a construction of the Constitution to say that Congress cannot do it. It would be an extention of it beyond anything that was contemplated either at its drafting or in a century and a half since then.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Tietz?

REBUTTAL ARGUMENT OF J. B. TIETZ, ESQ.

ON BEHALF OF PETITIONER

MR. TIETZ: It is my belief that Seeger definitely decided that question, that there is to be no distinction between an internally derived belief and an externally derived belief. If I am wrong on that in the opinion of the Court, then Seeger

might be modified. I don't think Seeger should be modified.

Now, Witmer was one case that was cited. That case turned on veracity. He wasn't considered sincere because he jumped into conflicting claims.

In this case everybody considers this man sincere and that is, in essence, the most important single factor.

Q Please stay close to the microphone.

A Oh, I am sorry.

That is so important because no one on earth knows the truth except the man himself. We believe him or we don't believe him. In this case everybody believes him and they merely say he didn't have the origin of his beliefs.

Now the argument has been made historically on page 35-A and on that whole history helps the Government here. We have made very little effort to go back into history, but on page 6 of our reply brief we point out that Madison wrote to Jefferson, "I am sure that the rights of Congress in particular" and so on. So that the concern over conscience, and incidentally there was no statement there about right of conscience based on religion.

Now I am not saying that religion may not be the best source of conscience, but there are other sources, of course, for conscience, too.

The Court can come close to according conscience and religion. To many people now, as was stated 20-some years ago by

Judge Hand in the Cotton case, that is as much as most people have now.

Maybe the pendulum will swing the other way, but that is where we are. The question was asked about the I-A-O and I-O duties by Mr. Justice Stewart.

Well, a rather curious feature about this case is that when this man initially presented his claim, he was classified in I-A-O. It is only as his beliefs developed that he claimed the I-O and then the procedure was sent on for the big investigation and inquiry by the FBI and so on, and the result depending solely on the interpretation of the Department of Justice and his recommendation to the Appeal Board ended him up without even the I-A-O.

I am not saying that that was very wrong, but I am saying it was interesting that they thought what he said rang true.

Now with respect to the Selective Draft Cases, it is very true that Ruthenberg is based on, however, the Selective Draft Cases, but thatis like building a pyramid on a shaky point. We have attacked thatin our brief as much as we could.

I have some things to say in rebuttal to what has just been brought out. If the best statement -- it is the best statement, more concise than I can make it, is Circuit Judge Hamley on page 1091: "Welsh's disclaimer of religious motivation was predicated upon a misunderstanding of the statutory meaning of

the term as construed in Seeger. When he finally realized the broad reading which Seeger gave to that term, Welsh made it clear that he did have a religious motivation."

So all the Government has said in its brief, that great weight must be given to what the petitioner says, his last statement, which is unrefuted and not impuned in any way, is that he believes not only strongly in what he has always believed, but that he comes within the statute.

Q That comes pretty close to saying ---

A Pardon?

Q That comes pretty close to saying that Judge Hamley's opinion helped the petitioner understand the basis of his claims.

A Ah, the cart before the horse, Mr. Chief Justice.

Q Well, you just suggested that -- that he didn't articulate this position until after he read Judge Hamley's opinion?

A Oh, no, that's what you stated. It is a rather crude expression "the cart before the horse."

Judge Hamley is referring to the witness that was before that Court. He is referring to what I mentioned before, the provision of what we call the special appellate procedures for registering conscientious objection, provided that after the Attorney General made his analysis of everything and his recommendation to the State Appeal Board, the registrant is to be

permitted to file a rebuttal if he does it in 30 days. And that rebuttal included what I have been quoting, and that is what Judge Hamley was referring to. That was all in the record before the trial court and before the Court of Appeals, and I believe that when this is all read, it will be seen that even if the Court should have the feeling that the Government has some base for saying we didn't raise the point, which I dispute, that plain error exists and the Court then can say this man is the same as Seeger. This man should be dealt with the same as Seeger.

Now I am not saying that I give up the constitutional point. As I mentioned before, I put that in for insurance. It is a very strong insurance and a very strong case, as Judge Hamley points out. You don't have to reach it, but he went into it in quite a bit of detail.

He pointed out that the Everson and the other cases support the point that we are making, that to take religion as against nonreligion is forbidden by the First Amendment.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you very much. Your case is submitted.

(Whereupon, at 1:26 p.m. the argument in the above-entitled matter was concluded.)