

September 1971

Draft Law—Requirements for Classification and Exemption as a Conscientious Objector

Robert R. Fredeking II
West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Military, War, and Peace Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Robert R. Fredeking II, *Draft Law—Requirements for Classification and Exemption as a Conscientious Objector*, 73 W. Va. L. Rev. (1971).

Available at: <https://researchrepository.wvu.edu/wvlr/vol73/iss3/16>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

ments settling alimony and property rights of the parties upon divorce . . . [and] such agreements should no longer be held to be void *ab initio* as 'contrary to public policy.'²⁶ This decision is illustrative of a more situationalist approach to antenuptial alimony agreements. As the *Posner* court noted, "With divorce such a commonplace fact of life, it is fair to assume that many prospective marriage partners . . . might want to consider . . . the disposition of their property and the alimony rights of the wife in the event their marriage, despite their best efforts, should fail."²⁷

Henry C. Bowen

²⁶ *Posner v. Posner*, 233 So.2d 381, 385 (Fla. 1970).

²⁷ *Id.* at 384.

Draft Law—Requirements For Classification And Exemption As Conscientious Objector

Elliott Ashton Welsh, II, was convicted in a United States District Court for refusal to submit to induction into the Armed Forces.¹ Welsh contended that section 6 (j)² of the Universal Military Training and Service Act exempted him from service in the armed forces because he was conscientiously opposed to war as a result of his "religious training and belief."³ The United States Court of Appeals for the Ninth Circuit found that Welsh had no religious basis for his conscientious objection claim and therefore affirmed the conviction.⁴ Welsh then petitioned the United States Supreme Court for certiorari, which was granted on the basis of that court's decision in *United States v. Seeger*.⁵ *Held*, reversed. The decision of the court of appeals was found to be inconsistent with the Court's holding in *Seeger*.

¹ 50 App. U.S.C. § 462 (a) (1968).

² 50 App. U.S.C. § 456 (j) (Supp. V 1970):

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religion training and belief," does not include essentially political, sociological, or philosophical views, or a merely personal moral code. . . .

³ *Welsh v. United States*, 398 U.S. 333 (1970).

⁴ *Welsh v. United States*, 404 F.2d 1078 (9th Cir. 1968), *rev'd*, 398 U.S. 333 (1970).

⁵ 380 U.S. 163 (1965), *aff'g*, 326 F.2d 846 (2d Cir. 1964), *rev'g*, 216 F. Supp. 516 (S.D.N.Y. 1963).

The facts are quite similar in both the *Seeger* and *Welsh* cases. Both Seeger and Welsh were unwilling to sign the section of the Selective Service Form which stated: "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form."⁶ Welsh signed the statement only after striking the words "religious training and". Seeger struck the words "training and". Both were unable to affirm or deny that they believed in a "Supreme Being". Both did confirm that they were conscientiously opposed to taking part in any war which resulted in the loss of human life.

Originally, under the 1917 Draft Act,⁷ in order to qualify for conscientious objector status the registrant had to be a member of a well-recognized religious sect which forbade its members to participate in war in any form.⁸ However, our tradition allows a broad diversity in religious belief, and in recent years the prevailing wisdom has expanded this concept even further. This has resulted in the recognition that religious belief is a matter of fundamental attitude and disposition toward life and the world and not just a matter of theology.⁹ Consequently, the grounds for conscientious objection exemption have been broadened under new interpretations of the Draft Act.¹⁰

In 1965, in *United States v. Seeger*, a major decision reflecting this new train of thought was delivered by the Court. There were subsequent interpretations of this case upholding *Seeger's* flexible view of the requirement that the conscientious objection applicant have a conviction based upon religious training and belief.¹² In *Seeger*, itself, the Court had attempted to lay down a test:

⁶ *Welsh v. United States*, 398 U.S. 333, 336 (1970).

⁷ *Id.*

⁸ Selective Service Act of 1917, Ch. 15, § 4, 40 Stat. 78.

⁹ *United States v. Kauten*, 133 F.2d 703 (3rd Cir. 1942). Even under the 1940 Selective Service and Training Act it was held that a registrant whose opposition to war was based upon his philosophical and political convictions was not entitled to classification as a conscientious objector. *See United States v. Bowles*, 131 F.2d 818 (3rd Cir. 1942).

¹⁰ *See United States v. Seeger*, 380 U.S. 163 (1965); *Berman v. United States*, 156 F.2d 377 (9th Cir. 1946); *United States v. Kauten*, 133 F.2d 703 (2nd Cir. 1943). With the recognition of the existence of so many diverse religious beliefs, the problem with a narrow construction of the provisions of section 6(j) becomes apparent.

¹¹ *See United States v. Seeger*, 380 U.S. 163 (1965); *United States v. Irons*, 369 F.2d 557 (6th Cir. 1966); *United States v. Stolberg*, 346 F.2d 364 (7th Cir. 1965).

¹² *E.g.*, *United States v. Stolberg*, 346 F.2d 363 (7th Cir. 1965); Draft registrant Stolberg stated that by belief he was opposed to combat and killing of human beings. The court granted him conscientious objector status even though it found it difficult to determine exactly what Stolberg's religious beliefs were. Stolberg stated that he believed in a Supreme Being but he did not believe the Supreme Being constituted a force outside of man.

Within that phase [religious training and belief] would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to 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.¹³

This Supreme Court decision made it apparent that an applicant could not be denied exemption on the ground that his beliefs were based upon political, sociological, or philosophical views, or a purely personal code, *unless this was the only basis of his claim for exemption*.¹⁴ It appears to be unnecessary to determine the source of the belief as long as it is not derived *solely* from political, sociological, or philosophical views or a purely personal moral code.¹⁵

With the *Seeger* decision the fear arose that the "floodgates" to conscientious objection exemptions had been opened. The dissatisfaction with *Seeger* prompted the Committee on Armed Services to rewrite this section of the Act in 1967. The new law still provided that a conscientious objection exemption claim must be based upon religious training and belief. Congress changed the definition of "religious training and belief" intending to restrict the availability of the conscientious objection.¹⁶ However, it is difficult to put a construction on the section which varies greatly from the test set forth in the *Seeger* case.

The Court in *Welsh* closely followed the *Seeger* decision and the test set forth in that opinion. In *Welsh* the Court ruled that the exclusions set forth in Section 6 (j) "of those persons with essentially political, sociological, or philosophical views or a mere-

¹³ United States v. Seeger, 380 U.S. 163, 176 (1965).

¹⁴ Beliefs which are based exclusively upon political, sociological, or philosophical views, or a purely personal moral code, do not fall within the statutory exemption because they are not religious. United States v. Seeger, 380 U.S. 163 (1965); accord, Morin v. Grade, 301 F. Supp. 614 (W.D. Wis. 1969); *In re Weitzman*, 284 F. Supp. 514 (D. Minn. 1968); Lee v. Crouse, 284 F. Supp. 541 (D. Kan. 1967).

¹⁵ Fleming v. United States, 344 F.2d 912, 916 (10th Cir. 1965). The court stated:

The use by Congress [in Section 6 (j)] of the words "merely personal" seems to us to restrict the exception to a moral code which is not personal but which is the sole basis for the registrant's belief and is in no way related to a Supreme Being.

¹⁶ Morin v. Grade, 301 F. Supp. 614 (W.D. Wis. 1969). Congress deleted from the definition of religious training and belief (section 6 (j)) the phrase "an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation."

ly personal moral code,"¹⁷ should not be so construed as to exclude those persons "who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy."¹⁸ The Court went on to specify that there were two groups of registrants that were definitely excluded from conscientious objection status. These were those people who did not hold their beliefs deeply and those people whose objections were based "solely upon considerations of policy, pragmatism, or expediency."¹⁹

Basically, the test set out in *Welsh* is if an individual deeply and sincerely²⁰ holds ethical or moral beliefs [even though not predicated on traditional religion]²¹ which impose upon the individual the duty to refrain from participating in war in any form²² such individual is entitled to conscientious objection exemption, even if the belief is held in conjunction with, reinforced by, or even substantially founded on philosophical, sociological or political views.²³ As a further qualification, the belief must occupy "in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption. . . ."²⁴

Because of the decision in *Welsh* and *Seeger*, there will be some problems in applying the conscientious objection test to draft

¹⁷ *Welsh v. United States*, 398 U.S. 333, 339 (1970).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ In *Welsh v. United States*, 398 U.S. 333, 342 (1970), the Court stated that the individuals who do fall within the exclusions from the exemption are those individuals "whose beliefs are not deeply held".

²¹ *Id.* at 341: "Welsh struck the word 'religious' entirely and later characterized his beliefs as having been formed 'by reading in the fields of history and sociology.'" The Court pointed out that Welsh was not "aware of the broad scope of the word religious as used in § 6 (j) . . ." Upon reflection Welsh wrote a letter "in which he declared that his beliefs were certainly religious in the ethical sense of the word." (emphasis added). *Id.* at 341.

²² *Welsh* "strongly believed that killing in war was wrong, unethical, and immoral," and his conscience forbade him "to take part in such an evil practice." *Id.* at 337.

²³ In *Welsh v. United States*, 398 U.S. at 342, the court recognized that "Welsh's conscientious objection to war was undeniably based in part on his perception of world politics." However the court went on to note:

We certainly do not think that § 6 (j)'s exclusion of those persons with "essentially political, sociological, or philosophical views or a merely personal moral code" should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy. *Id.* at 342.

²⁴ *Welsh v. United States*, 398 U.S. 333, 339 (1970), quoting from *Seeger*, 380 U.S. at 176. "The government concedes that [Welsh's] beliefs are held with the strength of more traditional religious convictions." *Id.* at 337.

registrants.²⁵ The local boards will have to remember, when considering conscientious objection applications, that they are dealing with the beliefs of different individuals which will be articulated in a multitude of ways. In such a situation, the claim of the registrant that his beliefs are sincere must be given great weight.²⁶ The local boards and the courts should not reject beliefs merely because they are incomprehensible to them. It is their task to decide whether an individual sincerely holds his beliefs and whether those beliefs are, in the individual's own scheme of things, religious.²⁷

One must realize that the *Welsh* case has not removed religion as the basis for conscientious objection. It has merely broadened the definition of "religious" as used in the Selective Service Act.²⁸ The Court has no doubt stretched and pulled the meaning

²⁵ There does not appear to be any single standard by which the draft board, and subsequently the courts, can determine that one's conscientious objection is based upon "religious training and belief". The courts, in making their determination on the validity of the objection, may base their decisions to a great extent on the results of interviews conducted by chaplains or ministers. Since these interviews are oriented toward theological and philosophical doctrines, it is obvious that the more widely read and well-educated individual will more likely qualify for the exemption than will the less-educated individual. The advocate skilled in the art of persuasion is also in a favored position.

²⁶ *United States v. Seeger*, 380 U.S. 163 (1965): "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious Experiences which are as real to life to some may be incomprehensible to others." *Id.* at 184; *cf.* *United States v. Washington*, 392 F.2d 37 (6th Cir. 1968); *Berman v. United States*, 156 F.2d 377 (9th Cir. 1946); *State v. Amana Soc'y*, 132 Iowa 304, 109 N.W. 894 (1906).

²⁷ *Welsh v. United States*, 398 U.S. 333, 341:

The Court's statement in *Seeger* that a registrant's characterization of his own belief as "religious" should carry great weight . . . does not imply that his declaration that his views are nonreligious should be treated similarly. When a registrant states that his objections to war are "religious", that information is highly relevant to the question of the function his beliefs have in his life. But very few registrants are fully aware of the broad scope of the word "religious" as used in § 6 (j), and accordingly a registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption.

See also *United States v. Seeger*, 380 U.S. 163 (1965).

²⁸ In *Welsh v. United States*, 398 U.S. 333 (1970), the court said that it was not necessary, for purposes of § 6 (j), that a person's "religious" belief which he asserted as the basis for conscientious objection be of the traditional type. The Court held that the objection was based on "religious" grounds if it stemmed from the registrant's moral, ethical, or religious beliefs about what is right and wrong, so long as these beliefs were held with the same strength as traditional religious convictions. The court further said that § 6 (j) did not necessarily exclude those persons who have strong beliefs about the nation's foreign and domestic affairs, nor whose conscientious objection is founded to a substantial degree upon public policy considerations.

of religion so that it could avoid the first amendment question of whether Congress can constitutionally exempt conscientious objectors from military service.²⁹

Robert R. Fredeking, II

²⁹ It must be pointed out that there is a constitutional question involved in the conscientious objection cases. Section 6(j) of the Universal Military Training and Service Act does not exempt nonreligious conscientious objectors; consequently it could be argued that it discriminates between different forms of religious expression in violation of the first amendment's establishment and free exercise clauses and the due process clause of the fifth amendment. See Laurie, *Conscientious Objection—Some Constitutional Questions*, 73 W. VA. L. REV. 138 (1971).

Eminent Domain—De Facto Taking

Defendant was notified that its property was in an area to be condemned for urban renewal. The proposed condemnation was initiated in 1954 but postponed until 1967, at which time defendant's property was formally condemned under the authority of a provision of the New York General Municipal Law¹ which authorizes a city to condemn property for urban renewal projects. During the interim the project was highly publicized; as a result, property in the area came into disrepair causing property values to decrease appreciably. Defendant was ordered to move from its property, which it did in April, 1963. By the time defendant moved its property had become unsalable and unrentable, but defendant continued to maintain it, pay taxes and carry insurance on it. The trial court held the city's actions constituted a *de facto* taking of defendant's property at the time defendant vacated it in 1963, and that defendant should be reimbursed for its expenses in maintaining the property until acquired by plaintiff in 1967. *Held* modified and affirmed. The condemning authority's actions so interfered with the defendant's use and ownership of the property that the essential elements of ownership were destroyed and a *de facto* taking occurred even though there was no physical invasion or legal

¹ N.Y. GEN. MUN. LAW § 555 (McKinney Supp. 1970) amending N.Y. GEN. MUN. LAW § 555 (McKinney 1965) provides:

Real property or any interest therein, . . . necessary for or incidental to any urban renewal program or part thereof in accordance with an urban renewal plan may be acquired by an agency by gift, grant, devise, purchase, condemnation or otherwise and by a municipality for and on behalf of an agency by condemnation. Property may be acquired by condemnation by an agency or by a municipality for an agency pursuant to the condemnation law or pursuant to the laws relating to the condemnation of land by the municipality for which the agency is acting or the municipality, as the case may be.