

1970

Administrative Law--Selective Service-- Conscientious Objector Dilemma--Question Still Unresolved

Richard D. Pompelio
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Administrative Law Commons](#), and the [Military, War, and Peace Commons](#)
Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Pompelio, Richard D. (1970) "Administrative Law--Selective Service--Conscientious Objector Dilemma--Question Still Unresolved," *Kentucky Law Journal*: Vol. 59 : Iss. 2 , Article 10.
Available at: <https://uknowledge.uky.edu/klj/vol59/iss2/10>

This Comment is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@sv.uky.edu.

The ominous consequences of an extension of *Allen* to political trials is suggested by Mr. Justice Douglas. He asks:

Would we tolerate removal of a defendant from the courtroom during a trial because he was insisting on his constitutional rights, albeit vociferously, no matter how obnoxious his philosophy might have been to the bench that tried him? Would we uphold contempt in that situation?⁴⁶

A third unresolved problem area involves trials used as a tactic by radical minorities for their own political ends. Deliberate disruption, designed to incite the extreme right into promulgating repressive measures, has historically been utilized by extremist groups to rally support for their attack on the system.

Each of these situations, like *Allen*, involves not simply a struggle between right and wrong, but a confrontation between two conflicting "rights." Each demands careful and responsible consideration of the interests on both sides.⁴⁷ The primary importance of *Illinois v. Allen* may well lie in its application to these complex and menacing cases of the future.

Donna H. Terry

ADMINISTRATIVE LAW—SELECTIVE SERVICE—CONSCIENTIOUS OBJECTOR DILEMMA—QUESTION STILL UNRESOLVED—Elliot Ashton Welsh refused to submit to induction into the military service and was found guilty in a United States District Court for violating federal law which makes it a crime to refuse service in the Armed Forces.¹ On June 1, 1966, he was sentenced to three years in prison. Welsh asserted in his defense that he was conscientiously opposed to participation in war in any form and therefore should be exempted from combat and noncombat service based on Section 6 (j) of the Universal Military Training and Service Act which exempts "any person . . . who, by reason of religious training and belief, is conscientiously opposed to participation in war

⁴⁶ *Id.* at 1067.

⁴⁷ See generally, Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943); Note, *The Supreme Court and Fundamental Rights—A Problem of Judicial Method*, 23 VAND. L. REV. 792, 807-08 (1970).

¹ 50 U.S.C. App. § 462 (a) (1964) which provides in part:
[A]ny person . . . who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections] . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or both . . .

in any form."² The Ninth Circuit, finding no religious basis for the defendant's conscientious objector claim, affirmed the conviction.³ The United States Supreme Court granted certiorari. *Held*: Reversed. Conscientious objector status must be given to "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war." *Welsh v. United States*, 90 S. Ct. 1792 (1970).

Several of the various conscription acts prior to World War I contained a limited number of conscientious objector exemptions.⁴ However, the Draft Act of 1917⁵ was the first exemption to apply in general. Exemption was predicated on an objector's affiliation with a "well recognized sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form."⁶ This act was challenged in 1918 as contrary to the free exercise and establishment clauses of the first amendment⁷ in that it denied equal protection for the free exercise of all religions by giving preference to only certain religions.⁸ The Court rejected this contention as unsound and emphasized the necessity for granting Congress the unlimited power to wage war successfully. The Court then went one step further in restricting the scope of draft exemptions by stating in *Kramer v. United States*⁹ that the Act would not protect any objector whose convictions were based on philosophical, social, or humanitarian beliefs. Two months later, President Wilson issued an executive order¹⁰ removing the affiliation requirement thus exempting any person who conscientiously objected to the war based on "his own" religious beliefs.

² 50 U.S.C. App. § 456 (j) (1964) which provides:

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. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

³ 404 F.2d 1078 (9th Cir. 1968).

⁴ See, e.g., 12 Stat. 731 (1863); 13 Stat. 6 (1863); 32 Stat. 775 (1903).

⁵ 40 Stat. 76 (1917).

⁶ *Id.* at 78.

⁷ The full text of the first amendment is:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. CONST. amend. I.

⁸ Selective Draft Law Cases, 245 U.S. 366 (1918).

⁹ 245 U.S. 473 (1918).

¹⁰ Exec. Order No. 2823, 11 Panama Canal Record 369 (1918).

The next draft act, in 1940, changed the requirement so that an exemption would be granted to anyone "who, by reason of religious training and belief is conscientiously opposed to participation in war in any form."¹¹ In no provision of the act was the phrase "religious training and belief" defined, soon leading to an amount of confusion in the lower federal courts. In a 1943 decision,¹² the Second Circuit interpreted "religious training and belief" to be:

A response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.¹³

Applying this definition in a later case,¹⁴ the same court granted an exemption finding that one's humanitarian opposition to all wars was based on religious rather than political views. Rejecting the Second Circuit's broad interpretation, the Ninth Circuit in 1946¹⁵ found the phrase to mean "a responsibility to a supernatural authority." The court quoted with approval Mr. Chief Justice Hughes in his dissenting opinion in *Macintosh v. United States*,¹⁶ where he stated: "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."¹⁷

With the Supreme Court apparently having no desire to wade into the confusion,¹⁸ Congress, adopting the Ninth Circuit's interpretation, passed the Selective Service Act of 1948 which defined "religious training and belief" as:

[A]n individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.¹⁹

This act was challenged in the Ninth Circuit in 1952²⁰ on the grounds that the "Supreme Being" test was unconstitutional under the establishment and free exercise clauses of the first amendment in that it denied

¹¹ Selective Training and Service Act, § 5 (g), 54 Stat. 885, (1940). For a complete discussion of this act, see Lane, "Conscientiously opposed," "by reason of religious training and belief," as used in the Selective Service and Training Act of 1940, 31 GEO. L.J. 60 (1942); Tinnelley, *The Conscientious Objector Under the Selective Act of 1940*, 15 ST. JOHN'S L. REV. 235 (1941).

¹² *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943).

¹³ *Id.* at 708.

¹⁴ *United States ex rel. Phillips v. Downer*, 135 F.2d 521 (2d Cir. 1943).

¹⁵ 156 F.2d 377 (9th Cir. 1946), cert. denied, 329 U.S. 795 (1946).

¹⁶ 283 U.S. 605 (1931).

¹⁷ *Id.* at 633-34.

¹⁸ The Supreme Court was given the opportunity to resolve the issue in *Berman*, however it denied certiorari. See note 15 *supra*.

¹⁹ 62 Stat. 604 (1948), as amended, 50 U.S.C. App. § 451 (1958).

²⁰ See *George v. United States*, 196 F.2d 445 (9th Cir. 1952).

free religious practice to those whose religion did not worship a Supreme Being. The Court, as it did in the first draft law cases,²¹ upheld the act by emphasizing the power of Congress in areas of national defense.

Nine years later, however, the Supreme Court began moving in the opposite direction as evinced in *Torcasco v. Watkins*²² where it struck down as contrary to the establishment clause a provision of the Maryland Constitution which required public officials to take an oath affirming their belief in the existence of God. The constitutionality of the existing law was finally challenged in 1965 in *United States v. Seeger*.²³ The Second Circuit had declared Section 6 (j) unconstitutional stating that the Supreme Being test amounted to a distinction between "internally derived and externally compelled beliefs" and that by preferring one religion to another, the act violated the due process clause of the fifth amendment.²⁴ The Supreme Court, however, passed over the constitutional questions and developed a new and somewhat broad definition of religion. Under this "Seeger Test" a conscientious objector's opposition to war may stem from:

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. . . .²⁵

With the Supreme Being test rendered meaningless, Congress passed the Military Selective Service Act of 1967²⁶ which removed the Supreme Being requirement from the definition of religion within the statute.

In the aftermath of *Seeger*, confusion, dissatisfaction, and concerned speculation exists as to how far the decision will be extended and as to how broadly religion will be defined.²⁷ The Tenth Circuit has held that a claimant, even though predominantly influenced by sociological and philosophical views, may nevertheless be granted an exemption

²¹ See note 8 *supra*, and accompanying text.

²² 367 U.S. 488 (1961).

²³ 380 U.S. 163 (1965).

²⁴ 326 F.2d 846 (2d Cir. 1964).

²⁵ *United States v. Seeger*, 380 U.S. 163, 176 (1965). For a complete discussion of this case, see Houston, *Conscientious Objectors: The Aftermath of United States v. Seeger*, 30 ALBANY L.R. 304 (1966); Comment, *Conscientious Objectors: The New "Parallel Belief" Test—United States v. Seeger*, 14 CATHOLIC U.L. REV. 238 (1965).

²⁶ 81 Stat. 100 (1967) codified in 50 U.S.C. App. §§ 451-71 (1968). Thus, the wording returns to that of the 1940 statute. See text at note 11 *supra*.

²⁷ See, e.g., *United States v. Stolberg*, 346 F.2d 363 (7th Cir. 1965) where the court stated:

It is difficult to state just what Stolberg's religious beliefs were. . . . In view of the decision in *United States v. Seeger*. . . . [W]e are forced to conclude that Stolberg's beliefs qualified him for classification of conscientious objector. *Id.* at 364-65.

if there can be found some influence exerted by religious training.²⁸ One federal district court granted conscientious objector status to a declared atheist by holding that such atheistic beliefs could have been "reached by religious training and belief as that term [had] been construed by the Supreme Court in *Seeger*."²⁹ The courts are now facing the problem that two people may have the same reasons for application for exemption, but by phrasing the application in religious terms, one may be granted an exemption where the other may not.³⁰ Finally, another federal district court recently suggested that the Court should overlook the religious requirement of the statute and grant exemption to all those who strongly oppose war for any reason be it moral, social, philosophical, or religious, or that Congress should step in and revise the present statute.³¹

While the instant case could have been the turning point in reaching a practical solution to the conscientious objector dilemma, it appears to be a confusing and perplexing extension of *Seeger*. Three separate opinions presented in the case represent the present Court's attempted resolution of this problem.

The majority opinion of Mr. Justice Black stated that Welsh's conviction must be reversed because it was inconsistent with the Court's decision in *Seeger*. By finding some "religious basis" for the defendant's convictions and beliefs, he was found to be exempted under the statute. Although the defendant was unable to claim an objection because of "religious training and belief" as required by statute, the Court nevertheless found him to be conscientiously opposed to war.³² This performance of judicial magic is explained in the following statement by Mr. Justice Black:

²⁸ See *Fleming v. United States*, 344 F.2d 912 (10th Cir. 1965).

²⁹ See *United States v. Shacter*, 293 F. Supp. 1057, 1058 (D. Md. 1968).

³⁰ See, e.g., *In re Weitzman*, 284 F. Supp. 514 (D. Minn. 1968) where an alien was refused naturalization because her objection to rendering military service was based on a "biological push" and not any "theological pull." An examination of parts of the trial record infer that the petitioner could have rephrased her motives in religious terms and have had her objection accepted.

³¹ See *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969), *appeal dismissed*, 90 S.Ct. 2117 (1970). There the court stated:

Earlier this opinion noted that it is practical to accord the same status to non-religious conscientious objectors as to religious objectors. Moreover, it is difficult to imagine any ground for a statutory distinction except religious prejudice. In short, in the draft act Congress unconstitutionally discriminated against atheists, agnostics, and men like Sisson, who, whether they be religious or not, are motivated in their objection to the draft by profound moral beliefs which constitute the central convictions of their beings. *Id.* at 911.

³² While applying for conscientious objector status, Welsh was unable to sign the statement in the Selective Service form which read: "I am by reason of my religious training and belief, conscientiously opposed to participation in war in any form", and would only sign when the words "religious training and" were deleted.

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 non religious is a highly unreliable guide for those charged with administering the exemption.³³

Thus the Court is now stretching the exemption under Section 6 (j) to apply to anyone who is conscientiously opposed to all wars, even if his beliefs are based on policy considerations. The majority opinion explains that the reason for the exemption is that these certain views are *not* "essentially political, sociological, or philosophical views or a merely personal moral code" as rejected by the statute.³⁴ Mr. Justice Harlan, in his concurring opinion perhaps best characterizes the majority's reasoning:

Today the Court makes explicit its total elimination of the statutorily required religious content for a conscientious objector exemption. The Court now says: "if an individual deeply and sincerely holds beliefs which are *purely ethical or moral* in source and content but which nevertheless impose on him a duty of conscience to refrain from participating in any war at any time (emphasis added), he qualifies for a § 6 (j) exemption."³⁵

The most reasonable and practical answer to the conscientious objector question is put forth by Mr. Justice Harlan: "§ 6 (j) in limiting this draft exemption to those opposed to war in general because of theistic beliefs runs afoul of the religious clauses of the First Amendment."³⁶ He thoroughly attacks the majority opinion on two major points. First, he criticizes the majority's manner of statutory construction and interpretation in "transforming" the statute with an interpretation designed to avoid the constitutional defects of its plainly intended purpose. Secondly, Justice Harlan attacks the overbroad definition of religion presented in the majority opinion concluding that "any asserted and strongly held belief" would satisfy this new requirement of religion. Justice Harlan's theory is that the will of Congress should be strictly enforced by interpreting the wording of a statute in the manner it was originally intended to be read. An elaborate discussion of previous Congressional interpretations of the word "religion" demonstrates that in no way can the word "religious" be applied to the present beliefs of this defendant. Thus, the issue which has so long been avoided by the Court, and which Justice Harlan deems the major issue demanding resolution is "whether a statute that defers to the individual's conscience only when his views

³³ *Welsh v. United States*, 90 S.Ct. 1792, 1797 (1970).

³⁴ *Id.* at 1798.

³⁵ *Id.* at 1799 (Harlan, J., concurring).

³⁶ *Id.*

emanate from adherence to theistic religious beliefs is within the power of Congress."³⁷ Concluding that the establishment clause strictly forbids such a statute, Justice Harlan suggests legislation which would encompass all groups of theistic or non-theistic believers. He states: "The common denominator must be the intensity of moral conviction with which a belief is held."³⁸ The source of such a belief does not have to be of the traditional religious nature.

The dissenting opinion through Mr. Justice White is in agreement with Justice Harlan concerning the need for a strict interpretation of the statute, but disposes of the defendant's contentions on the ground that he has no standing to challenge Section 6 (j) irrespective of whether it is contrary to the Constitution. The defendant's arguments are rejected on two major points: (1) his objection to war is not inspired by any form of "religion" based on the original interpretation of the word as intended by Congress; and (2) "[n]othing in the First Amendment prohibits drafting Welsh and other nonreligious objectors to war."³⁹ Justice White presents two reasons why Congress should grant an exemption based solely on one's religious beliefs. First, as a matter of practicality, anyone holding strong anti-war convictions would burden and decrease the efficiency of the military. Secondly, to compel one to fight in a war, contrary to his religious beliefs would be denying him the free exercise of his religion as guaranteed by the first amendment. In interpreting the first amendment, Justice White distinguishes between the religious objector and the non-religious objector. The free exercise clause protects the beliefs and conduct of the religious objector to the extent that such conduct does not become socially harmful. The non-religious objector has the right to believe and to speak, but in no section of the first amendment is the freedom to act safeguarded. He concludes that Section 6 (j) does not in any way violate the establishment clause by stating:

The Establishment Clause as construed by this Court unquestionably has independent significance; its function is not wholly auxiliary to the Free Exercise Clause. It bans some involvements of the State with religion which otherwise might be consistent with the Free Exercise Clause. But when in the rationally based judgment of Congress free exercise of religion calls for shielding religious objectors from compulsory combat duty, I am reluctant to frustrate the legislative will by striking down the statutory exemption because it does not also reach those to whom the Free Exercise Clause offers no protection whatsoever.⁴⁰

³⁷ *Id.* at 1805.

³⁸ *Id.* at 1806.

³⁹ *Id.* at 1812 (White, J., dissenting).

⁴⁰ *Id.* at 1814.

In view of the three opinions presented by the Court, the problem becomes not only what paths of decision Congress and the Court will take in achieving some pragmatic and just solution to the conscientious objector dilemma, but also, in a complex society of free men, how can the dignity and respect of each free man be preserved? Thus, the scope of the problem becomes two dimensional. By expanding the definition of "religion", as the majority of the Court has done, to include almost any strongly held belief, the second dimension becomes satisfied but the first is totally frustrated. This frustration is evident in the confusion existing in the lower courts and local draft boards. Each courts is faced with the question of what exactly does the Supreme Court mean by "religion" and in what way is this meaning restricted or contradicted by the wording of the statute. The local draft boards face the problem of applying the *Welsh* criteria for granting an exemption while Congress states that beliefs, no matter how strongly held, will not grant the applicant an exemption if his objection is based on philosophical views or a purely personal moral code.⁴¹ The difficulty of such a chore is reflected by an expert of the Justice Department: "It'll take the good Lord Himself to know what a CO really is."⁴² In addition, many objectors may state their beliefs to be religious for the sole reason of obtaining an exemption, when in fact, the strength and sincerity of such beliefs is questionable and held with less force than one who is refused exemption because his belief is philosophically or socially derived.

The proposed solution of the dissent in the *Welsh* case, *i.e.* of defining religion in its traditional terms and upholding the present law, leaves the two-fold problem completely unattended. The conscientious objector question would be thrust backward thirty years⁴³ and the chances of reaching any rational solution would be totally obscured. Such a restrictive view taken by the highest court in the

⁴¹ See note 2 *supra*. Subsequent to the decision in the present case, the national draft director, Curtis W. Tarr established the following guidelines to be followed by the local draft boards:

(1) "The man's belief must be sincere."

(2) "The man must be opposed to war in all forms. This decision does not open the door to exemption for opposition to a particular war."

(3) "It must be something more than a personal moral code. He needs to have taken into account the thoughts of other wise men; he needs to have consulted some system of belief."

(4) "His belief needs to be the result of some rigorous kind of training."

See U.S. NEWS & WORLD REPORT, June 29, 1970, at 18.

⁴² NEWSWEEK, June 29, 1970, at 19.

⁴³ The present grounds for a conscientious objector exemption are the same as those in the 1940 Selective Service Act. See note 11 *supra*, and accompanying text. Thus a strict interpretation of the wording of the statute would just recreate the problems which developed after that act was passed.

United States would also have the effect of outwardly rejecting the importance of individual thought, philosophy, and morality.

Thus, two important questions remain: Will Congress realize that it has created a law which has been robbed of all legislative intent through rewording by the Court? Will the Court realize that it has taken the word "religion" and turned it upside down, inside out, and stretched its definition to the point where no one can accurately define it? The decision ultimately will rest in the hands of Congress. The Court has attempted to provide guidelines in trying to preserve the conscientious objector exemption, but such guidelines have been carried beyond practical application. What is needed is a new format laid down by Congress redefining the exemption, or in the alternative, a total renunciation of all exemptions. Since the latter would merely cause a recycling of the problems created under the religious clauses of the first amendment, the former appears to be the *only* solution.

The most pragmatic and fair answer to the question of who should qualify as a conscientious objector would be, in accord with the views prescribed by Mr. Justice Harlan, a new law which grants the exemption based on the strength, not label, of the applicant's conscientious objection. Thus, one may be granted exemption from the military service because he is firmly opposed to all war. The fact that his beliefs originate from philosophical, religious, social, or moral ideas should only be important in determining how strongly he possesses these beliefs. Such a law would establish a test that could be uniformly applied by the lower courts and local draft boards, thus alleviating much of the present confusion. The term "religion" must be placed in a more modern perspective. Religion is a personal experience; a set of internally based convictions created from socially derived forces. Does not such an experience also fit the definition of one's morality or philosophy? But religion is only one aspect of one's convictions, and its definition should not be expanded beyond the traditional concepts. In our present democratic society each individual is granted the right to extract from the vast amounts of knowledge placed before him, a set of principles making up his own personal code. And one may adhere to his set of principles as firmly as any other, regardless of their origin. Thus one's "biological push" may possess the same vigor as another's "theological pull".⁴⁴

The Constitution of the United States forbids the establishment of any religion while guaranteeing the same and equal protection of all laws to every citizen, regardless of his beliefs. One's personal con-

⁴⁴ See note 30 *supra*, and accompanying text.

victions, be they religiously, morally, or philosophically inspired should be given the same weight by Congress and the courts in determining who may be excused from participating in a war.

Richard D. Pompelio

FEDERAL RULES OF CIVIL PROCEDURE—ANCILLARY JURISDICTION—THIRD-PARTY DEFENDANT'S COUNTERCLAIM AGAINST PLAINTIFF WITHOUT AN INDEPENDENT BASIS OF FEDERAL JURISDICTION—In an action brought in United States district court for breach of contract, negligence and misrepresentation with respect to two construction contracts, movant Revere Copper and Brass, Incorporated [hereinafter Revere] sued Aetna Casualty and Surety Company [hereinafter Aetna] as surety on performance bonds it executed on the two contracts for George A. Fuller Company [hereinafter Fuller]. Fuller had agreed to indemnify Aetna for all losses it sustained on the bonds. Aetna, therefore, impleaded¹ Fuller as a third-party defendant under Rule 14(a) of the Federal Rules of Civil Procedure.² Fuller counterclaimed under Rule 14(a)³ alleging breach of warranty, negligence, wanton and willful misconduct, and misrepresentation on Revere's part. Both Revere

¹ Federal Rule of Civil Procedure 14 allowing impleader does not establish a right of reimbursement indemnity, nor contribution; but where there is a basis for such right Rule 14 expedites the presentation and in some cases accelerated the accrual of such right. 3 J. MOORE, FEDERAL PRACTICE [hereinafter cited as MOORE]

1403 (2d ed. 1968). See also. C. WRIGHT, LAW OF FEDERAL COURTS [hereinafter cited as WRIGHT] § 76 (2d ed. 1970).

² Rule 14. Third-Party Practice.

(a) WHEN DEFENDANT MAY BRING IN THIRD PARTY.

At any time after commencement of the action defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . . The person served with the summons and third-party complaints, hereinafter called third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. *The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.* The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. . . . FED. R. CIV. P. 14(a) (emphasis added).

³ This counterclaim under Rule 14(a) is not a true counterclaim since the parties are not "opposing" prior to its service. MOORE ¶ 14.17.