6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 232 and 233

UNITED STATES OF AMERICA,
Petitioner,

—v.—

DAVID PAUL O'BRIEN,
Respondent.

DAVID PAUL O'BRIEN,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR DAVID PAUL O'BRIEN, RESPONDENT IN NO. 232 PETITIONER IN NO. 233

MARVIN M. KARPATKIN
660 Madison Avenue
New York, N. Y. 10021

HOWARD S. WHITESIDE
60 State Street
Boston, Mass. 02109

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y. 10010

Attorneys for David Paul O'Brien

Of Counsel:

WILLIAM E. CRAIN
RHODA H. KARPATKIN
HENRY P. MONAGHAN
ELEANOR HOLMES NORTON
HENRY M. DI SUVERO
ROBERT S. ROBBIN

INDEX

Table of Authorities

PAGE

Cases:

PAGE

PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 232 and 233

UNITED STATES OF AMERICA,

Petitioner,

—v.—

DAVID PAUL O'BRIEN,

Respondent.

DAVID PAUL O'BRIEN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR DAVID PAUL O'BRIEN, RESPONDENT IN NO. 232 PETITIONER IN NO. 233

Questions Presented

1. Whether the August 30, 1965 amendment to Section 12(b)(3) of the Universal Military Training and Service Act, 50 U. S. C. App. §462(b)(3), which made it a felony to knowingly destroy or knowingly mutilate a Selective Service certificate, is an unconstitutional abridgment of freedom of expression guaranteed by the First Amendment,

on its face, because the legislative history unequivocally reveals that it was deliberately enacted for the purpose of suppressing dissent.

2. Whether the statute, as applied to the facts in this case, is an unconstitutional abridgment of freedom of expression because the conduct which it sought to punish was a peaceful act of symbolic speech protected under the clear and present danger test, and likewise protected under the balancing test.

3. Whether the statute serves any legitimate purpose in the administration of the Selective Service System, or any other rational legislative purpose, and whether, in the absence of any legitimate or rational legislative purpose, the statute is an unconstitutional deprivation of individual liberty without due process of law, in violation of the Fifth Amendment.

4. Whether the Court of Appeals was correct in holding respondent guilty of a violation of the regulation proscribing non-possession of a Selective Service certificate, for which he was neither indicted, nor tried, nor convicted in the trial Court on the theory of lesser included offense.

5. Inasmuch as the Government concedes that the lesser included offense theory was improperly applied by the Court of Appeals, whether the respondent can be held guilty by the alternative theory advanced by the Government in this Court.

6. Whether in any event the respondent can be held guilty, for a crime for which he was neither indicted, nor tried, nor convicted, on any theory, without violating his

constitutional right to due process of law, under the principles of *Cole* v. *Arkansas,* 333 U. S. 196 (1948).

7. Whether determination by this Court of the constitutionality of the Selective Service regulation requiring possession of a Selective Service certificate and penalizing nonpossession, which was at most only intimated at in the proceedings below, is necessary in order to decide this case, and if so, whether it would not be more appropriate to remand the case so that such question can be properly and carefully developed before being decided by this Court.

8. Whether the imposition of a sentence of an indeterminate term of imprisonment, whose maximum is four years imprisonment and an additional two years of conditional release under the supervision of the Attorney General, for the act of burning a Selective Service certificate, is punishment so shockingly excessive, disproportionate, cruel, unusual and inhumane as to constitute cruel and unusual punishment in violation of the Eighth Amendment.

9. Whether the imposition of an indeterminate sentence of up to six years under the Federal Youth Corrections Act, in punishment for the burning of a Selective Service Registration Certificate as a symbolic expression of protest against war, accompanied by statements of the sentencing judge that the duration of the confinement will depend on the defendant's changing his beliefs and associations, is an unconstitutional abridgment of freedom of expression and association protected by the First Amendment, and constitutes cruel and unusual punishment forbidden by the Eighth Amendment.

Constitutional Provisions, Statutes and Regulations Involved

Section 12(b) of the Universal Military Training and Service Act, 50 U. S. C. App. §462(b), as amended, 79 Stat. 586, is set forth on page 3 of the Government's brief.

Portions of 32 C. F. R. §§1617.1 and 1623.5 are set forth on page 4 of the Government's brief.

This case also involves the First, Fifth and Eighth Amendments to the United States Constitution:

> Amendment I—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.

> Amendment V—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

> Amendment VIII—Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Likewise involved, should the Court reach the question of sentencing, are the following provisions of the Federal Youth Corrections Act, Title 18 U. S. C. §5006(e), (f) and (g); §5010(b); and §5017(c):

> §5006(e) "Youth offender" means a person under the age of twenty-two years at the time of conviction;
>
> (f) "Committed youth offender" is one committed for treatment hereunder to the custody of the Attorney General pursuant to section 5010(b) and 5010(c) of this chapter;
>
> (g) "Treatment" means corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders;
>
> §5010(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter;
>
> §5017(c) A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

Statement of the Case

The Statement in the Government's brief, pages 4 through 7, sets forth the basic chronological events with accurate record references. In respondent's view, the following additional facts are of significance to the various issues in this case:

Respondent's public burning of a Selective Service certificate, outside of the South Boston courthouse, was open, unconcealed, and in the presence of a large gathering of spectators. News media, television and newspaper men were present (R 8). Many of the spectators were hostile to respondent, and this expression on his part resulted in efforts to physically assault him by some of the hostile persons (R 10).

Respondent described to the jury the reason for the ceremonial burning as follows:

> "I am a pacifist and as such I cannot kill, and I would not cooperate.
>
> I later began to feel that there is necessity, not only to personally not kill, but to try to urge others to take this action, to urge other people to refuse to cooperate with murder.
>
> So I decided to publicly burn my draft card, hopefully so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position.
>
> And I don't contest the fact that I did burn my draft card, because I did.
>
> It is something that I felt I had to do, because I think we are basically living in a culture today, a so-

> ciety that is basically violent, it is basically a plagued society, plagued not only by wars, but by the basic inability on the part of people to look at other people as human beings, the inability to feel that we can live and love one another, and I think we can (R. 29).
>
> * * * * *
>
> So in this sense I think we are all on trial today. We all have to decide one way or the other what we want to do, whether we are going to accept death or whether we will fight to sustain life" (R. 30).

There was no dispute below as to any of the facts of the burning of the certificate. However, whether or not these conceded facts can lawfully support a conviction for non-possession as a matter of law, as well as the constitutionality of the possession regulation, are questions which were not raised in the appeal, nor at the trial, and only inferentially referred to in a pre-trial motion to dismiss (R. 5-6).

The decision of the Court of Appeals essentially held the burning statute unconstitutional on two grounds. On First Amendment grounds it held that the statute was designed to abridge freedom of speech, and that it was in effect an impermissible abridgment of symbolic speech protected by the First Amendment (R. 62-63). It also held the statute to be devoid of any proper legislative purpose (R. 62). In applying the doctrine of lesser included offense to affirm respondent's conviction, it assumed the constitutionality of the non-possession requirement without discussion.[1]

---

[1] The only case cited is *United States* v. *Kime*, 188 F. 2d 677 (7th Cir. 1951), cert. den. 342 U. S. 823. The *Kime* decision does affirm that the non-possession regulation is constitutional but only

Respondent respectfully suggests that the issue of constitutionality of non-possession is not ripe for decision in this Court because it was not briefed and argued below. Indeed it was never anticipated that the Court of Appeals might rule as it did. Respondent therefore urges that this Court should decide this case purely on the question of the constitutionality of the 1965 amendment. However, if it is deemed necessary to consider the much more complicated constitutional questions involved with regard to the non-possession regulation, it is, in that event, respectfully suggested that the matter be remanded for reargument on such question.[2]

The court below vacated the sentence and remanded for resentencing because of its concern that the application of an unconstitutional statute may have aggravated the sentence (R. 65).

However, the Court of Appeals did not rule on two questions presented to it concerning the sentence. Consequently, should this Court reverse the Court of Appeals and hold the statute constitutional there will once again be presented the propriety of the term and the manner of imposition of the sentence.

Violation of the "anti-burning" statute is a felony, with a maximum penalty of five years imprisonment and $10,000 fine. 50 App. U. S. C. §462(b). The Government had rec-

---

as part of a holding that the entire conscription statute is constitutional. It contains very little discussion of the constitutional questions raised in this case, or the constitutional questions which might be raised in any prosecution for symbolic non-possession. See Point V, *infra*.

[2] Nevertheless, it is apparent that some but not all of the constitutional questions involved in the burning statute will also be involved in the non-possession regulation. See Point V, *infra*.

ommended two years imprisonment (R. 45). The District Judge, however, saw fit to sentence respondent under a provision of the Federal Youth Corrections Act, 18 U. S. C. §5010(b), which carries a maximum penalty of six years under the custody of the Attorney General, the first four years of which may be prison incarceration (R. 58). See 18 U. S. C. §5017(c).

During the pre-sentence discussion with the respondent and his father, the District Court indicated that its purpose was to utilize the treatment and rehabilitative procedures of the Youth Corrections Act to the end that the respondent would "disassociate yourself from certain activities and otherwise lead a normal life" (R. 37). The Court characterized what appellant did as "such a silly gesture" (R. 38). It strongly implied that the persons with whom appellant was "associated with in this youth movement" could not give him "good advice" (R. 38). [Respondent identified his organization as the Committee for Non-Violent Action, and pointed out that it was "not a youth movement" (R. 38).] Respondent also stated that he had acted entirely on his own. "They haven't advised me to do anything" (R. 39).

The Court suggested that respondent's "good friends" were pushing him forward "to have his head cut off" (R. 40). Respondent denied this and said that he didn't want to be a martyr (R. 40), and that he didn't want to go to jail (R. 39).

The Court stated that the purpose of a sentence under the Youth Corrections Act was to cause respondent "to undo what he has done that is wrong" (R. 41). It stated further that he would not have to serve the full six years under the Youth Act, unless "you are such a hardened case that

they can't do anything with you" (R. 42). The Court stated it hoped that respondent would change his attitude "if you were removed from the influence of these friends of yours" (R. 42).

Respondent's father was present in court during the discussion and imposition of sentence and had indicated concurrence with the Court's sentiments (R. 39, 40, 41, 42). Finally, the court imposed the six year maximum sentence, observing "I have discussed this with you and your father, and I have given you every opportunity to recognize and try to correct your violation of the law. * * * [T]his must be a government of law, and not individual opinions" (R. 47).

Summary of Argument

I.

The legislative history of the 1965 amendment to the Universal Military Training and Service Act which made it a felony to wilfully mutilate or wilfully destroy a Selective Service certificate reveals the clearly unconstitutional Congressional purpose of suppressing dissent. It does not reveal any other purpose, much less any rational purpose. Chronological examination of the legislative history establishes such Congressional purpose beyond any doubt. It is appropriate for this Court to examine legislative history to determine if there was an unconstitutional congressional purpose. The Government confuses the propriety of examining legislative purpose, as revealed through authoritative statements of committee chairman and other appropriate sources, with the unrevealed motivations of individual Congressmen. The court below correctly found that there

was no proper legislative purpose, and that the only legislative purpose revealed was manifestly unconstitutional. The statute cannot be saved by giving it a narrow reading.

II.

The Court of Appeals correctly characterized the statute as attempting to restrict "symbolic speech", which has long been recognized under decisions of this Court, starting with *Stromberg* v. *California,* 283 U. S. 359 (1931) and *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943). The Government's attempt to develop a rationale which would severely circumscribe symbolic speech, and make the doctrine unavailable in this case is not in accord with the decided cases. Moreover, even under the Government's rationale, the conduct proscribed by the anti-burning amendment would still be protected under the First Amendment. Decisions of this Court have held that there is a constitutional right to deliver one's speech at the place where, the time when, and the manner in which the speaker deems it to be most effective. This includes dramatizing one's speech via a symbolic act such as the burning of a piece of paper. The only limitation is the proper constitutional test. Respondent suggests that the proper test is the clear and present danger test, but even if the *ad hoc* balancing test is to be applied, the statute must still be set aside as unconstitutional. The various justifications of the statute's usefulness proposed by the government indicate at most some benefit for the Selective Service registrant, and only the most remote contingent benefit for the Government. No justification of the statute's usefulness or desirability that has been expressed by the Selective Service system or any other branch of Government has been set forth, and in fact there is none.

III.

In addition to being in violation of the First Amendment, the statute is a deprivation of substantive due process under the Fifth Amendment, in accordance with the principles laid down in *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925), and *Meyer* v. *Nebraska,* 262 U. S. 390 (1923), and recently reiterated in *Griswold* v. *Connecticut,* 381 U. S. 479 (1965). The ordinary presumption of constitutionality of a legislative act does not exist when the legislation infringes on freedom of speech. Substantive due process places limits on all government power, including the war power.

IV.

The Court of Appeals erroneously applied the lesser-included offense doctrine when it held respondent guilty of non-possession, after it found the anti-burning statute unconstitutional. The lesser-included offense doctrine does not apply because the indictment did not include several elements necessary to charge non-possession. The Government concedes that the court below erred and suggests that the respondent be held guilty in this Court on the theory that the indictment may fairly be read as encompassing the charge of non-possession. The government's theory is based on a misreading of decisions of this Court and is not supported by the charge given to the jury. In any event, the principle of *Cole* v. *Arkansas,* 333 U. S. 196 (1948), that conviction upon a charge not made is a denial of due process compels reversal of the conviction and dismissal of the indictment.

V.

The court below assumed the constitutionality of the non-possession regulation although the various constitutional questions raised thereby were not systematically argued and briefed by either side. If this Court agrees with respondent's arguments in Points I through IV, it is not necessary to decide the constitutional question of non-possession. However, should this Court feel that final decision of this case should not be made until the constitutionality of non-possession is determined, it is suggested that remand would be appropriate.

VI.

By imposing an indeterminate sentence with a six-year maximum for the offense of burning a Selective Service certificate, the District Court imposed punishment so excessive and disproportionate as to constitute a violation of the Eighth Amendment. Furthermore, by its presentencing and sentencing remarks to the effect that the term of imprisonment and its duration would be conditioned on respondent's abandoning his anti-war and anti-draft beliefs and associations, the First Amendment was likewise violated. Inasmuch as the Court below vacated the sentence and ordered resentencing where "impermissible factors" introduced by the unconstitutional statute would not be presented, the foregoing questions concerning duration and manner of sentence will only be before this Court should it reverse the Court of Appeals' holding that the anti-burning statute is unconstitutional.

POINT I

The 1965 amendment to the Universal Military Training and Service Act which made it a felony to willfully mutilate or willfully destroy a Selective Service certificate is an unconstitutional abridgment of freedom of speech guaranteed by the First Amendment because the legislative history unequivocally reveals a deliberate congressional intent to suppress freedom of speech, and a lack of any rational legislative purpose.

Incensed by reports of draft card burnings by young men who were thereby symbolically expressing their opposition to the Vietnam war and the draft, Congress hurriedly amended the Universal Military Training and Service Act to make it a felony to knowingly destroy or knowingly mutilate a Selective Service certificate. There were no legislative hearings. There were no requests for the legislation by the Selective Service System, or by any other agency concerned with national defense or military manpower. Nor were their views or comments solicited. The only legislative purpose, unequivocally expressed by statements of the sponsors and by committee reports in both houses, was to punish this form of symbolic dissent.

The Court of Appeals acknowledged the clearly revealed unconstitutional purpose and invalidated a statute which, by its legislative history, was self-evidently a law abridging freedom of speech. The Court noted that the amendment singled out "persons engaging in protests for special treatment," and that such legislation "strikes at the very core of what the First Amendment protects" (R. 63). It characterized the statute as being in the category of those which "go beyond the protection of those [legiti-

mate] interests to suppress expressions of dissent" (R. 63). It noted that the impact of the statute "on certain expressions of dissent is no mere random accident, but quite obviously the product of design" (R. 63, fn. 7).

Finally, it stated that it was vacating the sentence because of its concern that the Court might have been influenced in the imposition of sentence by the same "impermissible factors" as Congress, the effect of which "would be to punish defendant . . . for exactly what the First Amendment protects" (R. 65).

The Government's brief attempts to throw some doubt upon the legislative history by suggesting that several purposes were intended to be served "some less constitutionally justifiable perhaps than others . . . . " (Government's brief, p. 29). The Government concedes that one of the purposes was to declare draft card burning "insulting and unpatriotic" (*Id.* at 27).

A review of the entire legislative history, however, reveals that an intention to punish draft card burning because it was deemed "insulting and unpatriotic" was the only purpose. The legislative history is presented chronologically in the next section of this brief, and the entire documentation of legislative history is set forth *in haec verba* as an appendix, *infra.* [3]

---

[3] The Government refers to the sparseness of the legislative history as strengthening it case, presumably on the theory that the legislative history is so brief that it is difficult to ascertain Congressional purpose. But in fact the reverse is true. The compactness of the legislative history, the fact that only a limited number of persons addressed themselves to the bills, and that each of them reiterated the same unconstitutional purpose makes a much clearer case for unconstitutionality than if there were a lengthier history containing less unanimous statements of purpose.

A. *Examination of the legislative history.*[4]

On August 5, 1965, Representative L. Mendel Rivers (Dem.-S. C.) introduced H.R. 10306 providing for the amendment of §12(b)(3) of the Universal Military Training and Service Act of 1951, Title 50, App., U. S. C. §462 (b)(3), as follows:

> "(3) who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate or any notation duly and validly inscribed thereon;" (Proposed amendment italicized).

On August 9, 1965, H.R. 10306 was favorably reported to the Committee of the whole House by the House Committee on Armed Services and Representative Rivers submitted House Report No. 747, 89th Congress, 1st Session in connection with the bill (p. 1a, *infra*). The House Report states that the amendment is not intended to protect against the destruction of government property, but rather to suppress open defiance of governmental authority:

> "The House Committee on Armed Services is fully aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidence in which individuals and large groups of individuals openly defy and encourage others to defy the author-

---

[4] On the importance of legislative materials in determining statutory purpose, see *Galvan* v. *Press,* 374 U. S. 522, 526-8 (1954) (sponsor, floor debates, subsequent memorandum of sponsor as "weighty gloss"); *NLRB* v. *Denver Building & Construction T. Council,* 341 U. S. 675, 686-9 (1951) (sponsor, Conference Report); *Elder* v. *Brannan,* 341 U. S. 277, 284-6 (1951) (author, Committee Chairman, Reports, Hearings); *Ahrens* v. *Clark,* 335 U. S. 188, 191-192 (1947) (Senate Manager, floor discussion); *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643, 648 (1931) (entire Congressional history).

ity of their Government by destroying or mutilating their draft cards.

"While the present provisions of the Criminal Code with respect to the destruction of Government property may appear broad enough to cover all acts having to do with the mistreatment of draft cards in the possession of individuals, the committee feels that in the present critical situation of the country, the acts of destroying or mutilating these cards are offenses which pose such a grave threat to the security of the Nation that no question whatsoever should be left as to the intention of the Congress that such wanton and irresponsible acts should be punished" (p. 2a, *infra*).

On August 10, 1965, Representative Rivers, speaking in the House in support of the bill, stated:

"The purpose of the bill is clear. It merely amends the draft law by adding the words 'knowingly destroys and knowingly mutilates' draft cards. A person who is convicted would be subject to a fine up to $10,000 or imprisonment up to 5 years. It is a straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards.

"We do not want to make it illegal to mutilate or destroy a card per se, because sometimes this can happen by accident. But if it can be proved that a person knowingly destroyed or mutilated his draft card, then under the committee proposal, he can be sent to prison, where he belongs. This is the least we can do for our men in South Vietnam fighting to preserve freedom, while a vocal minority in this country thumb their noses at their own Government." (Congressional Record—House, August 10, 1965, at 19135) (p. 6a, *infra*).

Representative Bray (Rep.-Ind.), in support of the bill, eloquently delineated its purpose: it was to suppress expressions of contempt for the United States, to punish those who disrespect American institutions, to facilitate a rebirth of patriotic sentiment, and to end toleration of evil. In the words of the Congressman:

> "The need of this legislation is clear. Beatniks and so-called 'campus-cults' have been publicly burning their draft cards to demonstrate their contempt for the United States and our resistance to Communist take-overs. Such actions have been suggested and led by college professors—professors supported by taxpayers' money."
>
> * * *
>
> "These so-called 'student' mobs at home and abroad make demands and threats; they hurl rocks and ink bottles at American buildings; they publicly mutilate or burn their draft cards; they even desecrate the American flag. Chanting and screaming vile epithets, these mobs of so-called 'students' and Communist 'stooges' attempt to create fear and destroy self-confidence in our country and its citizens and to downgrade the United States in the eyes of the world.
>
> "Such organized 'student' groups in the United States have sent congratulations and money to Ho Chi Minh and have made anonymous and insulting calls to families of our servicemen killed in Vietnam.
>
> "This proposed legislation to make it illegal to knowingly destroy or mutilate a draft card is only one step in bringing some legal control over those who would destroy American freedom. This legislation, if passed, will be of some assistance to our country if the officers

> and courts charged with the enforcement of the law will have the energy, courage, and guts to make use of it.
>
> "The growing disrespect for our law and institutions in America holds a real threat to our country and to our freedom. Just 5 short years ago no one would have believed that disrespect for our country could have grown to the proportions that it has today."
>
> * * *
>
> "One of America's greatest sources of strength in discouraging these demonstrations is to pause and consider the greatness of America—to appreciate what our country has done for the benefit of mankind. Let us be proud, possessed not of an arrogant pride, but a humble pride in our greatness, in our heritage" (pp. 7a-8a, *infra*).

Without benefit of any additional debate (save the comments of Congressmen Rivers and Bray), on August 10, 1965, with 393 yea votes against a solitary negative, the bill passed the House.

On that same day Senator Strom Thurmond (Rep. S. C.), introduced an identical bill in the Senate, and stated:

> "Mr. President, recently the public and officials of our country have been appalled by reports of mass public burnings of draft registration cards. It is not fitting for our country to permit such conduct while our people are giving their lives in combat with the enemy" (Congressional Record—Senate, August 10, 1965, at 19012) (p. 16a, *infra*).

On August 12, 1965, with a technical amendment as to section numbering, the Senate Committee on Armed Services favorably reported the proposed amendment and submitted Senate Report No. 589, 89th Congress, 1st Session (p. 17a, *infra*) in support of the bill. The Committee explained that the bill was directed at political dissenters. It stated:

> "The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies" (p. 18a, *infra*).

On August 13, 1965, Senator Thurmond remarked on the Senate floor:

> "Recent incidents of mass destruction of draft cards constitute open defiance of the warmaking powers of the Government and have demonstrated an urgent need for this legislation."
>
> * * *
>
> "Such conduct as public burnings of draft cards and public pleas for persons to refuse to register for their draft should not and must not be tolerated by a society whose sons, brothers, and husbands are giving their lives in defense of freedom and countrymen against Communist aggression" (Congressional Record—Senate, August 13, 1965, at 19669) (pp. 20a-21a, *infra*).

With no more before it than the Senate Committee Report, and the pithy statements of Senator Thurmond, the Senate adopted the bill without objection on August 13, 1965 (p. 21a, *infra*).

Thus, within the space of eight days, without hearings, with two short Committee Reports and with floor statements by two Representatives and one Senator, the amendment was literally hurried through Congress. Fifteen days later, on August 30, 1965, H. R. 10306 received Presidential approval and became Public Law 89-152, 79 Stat. 586.

It would be hard to find a statute whose legislative history more succinctly and unanimously sets forth the purpose sought to be achieved. The evil at which the statute is directed is "open defiance" and "contempt" for governmental authority expressed by "dissident persons who disapprove of national policy." A more obviously illegitimate purpose could hardly be devised. The legislative history bears all the hallmarks of a frenzied rush to suppress dissent. There was no free and fearless debate, no sober reflection and reasoning heard in the halls of Congress. There was only a single point of view expressed, and it went unchallenged except for one solitary, albeit unexplained, negative vote.

Unanimity of viewpoint, hurried enactment, and imposition of heavy criminal punishment for political dissent emblazon the amendment with the typical characteristics of oppression. Furthermore, the statute's purpose is superficially and clumsily disguised, so as to present the appearance, despite its unconstitutional purpose, of innocuous legitimacy. It wears the dress of innocent language in transparent attempt to avoid the broad proscriptions of the First Amendment.

This is hardly the first instance recorded in American jurisprudence where unconstitutional laws have been enacted under a hypocritical cloak of propriety. The English sought to suppress the American colonists' speech, not

directly, but through stamp taxes. Cf. *Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936). States have sought to curtail civil rights activity, not directly, but through improper prosecutions, see *Cox* v. *Louisiana,* 379 U. S. 536 (1965); or through corporate registration schemes, see *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449 (1958). Illustrations of attempted repression by indirection are, unfortunately, numerous, ranging from anti-Negro grandfather clauses, *Lane* v. *Wilson,* 307 U. S. 268 (1939), to anti-oriental laundry ordinances, *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886), to "white only" membership qualifications, *Nixon* v. *Condon,* 286 U. S. 73 (1932).

But the devious manner in which the statute achieves its illegitimate end does not render its objective any less invalid. To paraphrase Mr. Justice Frankfurter: The First Amendment "nullifies sophisticated as well as simple-minded modes of" suppressing speech. *Lane* v. *Wilson, supra.*

B. *The propriety of examining legislative history.*

The Court of Appeals was plainly correct in reading the legislative history to determine if the Congressional purpose was unconstitutional and concluding, in fact, that it was. It cited *Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936) and *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960) (R. 63, fn. 7).

Grosjean is particularly appropriate because a newspaper advertising tax statute, pushed through the Louisiana legislature by the administration of Senator Huey P. Long was held by this Court to be an unconstitutional violation of freedom of the press. The tax was deliberately designed to affect large city newspapers, but not rural

newspapers " . . . with the plain purpose of penalizing the publishers. . . . " 297 U. S. at 251.

Mr. Justice Sutherland, for a unanimous court, held that the tax was unconstitutional " . . . because in the light of its history and its present setting it is seen to be a deliberate and calculated device in the guise of a tax . . . " in violation of "constitutional guarantees." *Ibid.*[5]

In *Gomillion* v. *Lightfoot, supra,* this Court held that a statute must be declared unlawful if its *purpose* is the attainment

---

[5] That this Court was fully apprised of the "plain purpose" and "present setting" of the tax statute is evident from Appellees' Brief in that case:

> "The newspapers published by the appellees have, from time to time, in their editorials, severely criticized the political practices and policies of the 'Long Faction' and for some time prior to, and during, the Regular Session of the 1934 Legislature there had been open and vigorous opposition by said newspapers to the policies and practices of said faction. The leaders and various members of said faction, during said time, openly and vehemently denounced said newspapers in political addresses and speeches on the floor of the Legislature, and in circulars widely distributed through employees of the various State departments under their control, and threatened the newspapers with taxation on their advertising (R. 42).
>
> "During said Regular Session of the Legislature of 1934 after the introduction and prior to the final passage of Act No. 23, a circular was issued over the names of Governor Oscar K. Allen and the late Senator Huey P. Long, and was widely distributed throughout the State. Copies thereof were laid on the desk of each member of the Legislature during its Regular Session of 1934 while said Act No. 23 was under consideration. This circular contained the following language:
>
> " 'The lying newspapers are continuing a vicious campaign against giving the people a free right to vote. We managed to take care of that element here last week. A tax of 2% on what newspapers take in was placed upon them. That will help their lying some. Up to this time they have never paid any license to do business like everybody else does. It is a system that these big Louisiana newspapers tell a lie every time they make a dollar. This tax should be called a tax on lying, 2¢ a lie' (R. 43)."

of an unconstitutional end. See *Lamont* v. *Postmaster General,* 381 U. S. 301 (1965) affirming, *sub nom. Heilberg* v. *Fixa,* 236 F. Supp. 405 (N. D. Calif. 1964); *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449 (1958); *Lane* v. *Wilson,* 307 U. S. 268 (1939); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886).

The Government, on pages 29 to 31 of its brief, challenges the propriety of the First Circuit's reading of the legislative history, in the first instance by citing a number of cases where this Court has held that it is improper to examine Congressional "motives."

By the use of the word "motive" the Government confuses the essential difference between that which motivates an individual legislator to cast his vote, and the formal expression of collective legislative purpose via Committee reports, sponsors' explanatory statements, and similar authoritative sources. This distinction was elucidated by Circuit Judge Soper in *National Association for the Advancement of Colored People* v. *Patty,* 159 F. Supp. 503, 515, n. 6 (E. D. Va. 1958); rev'd on other grounds, sub nom. *Harrison* v. *N. A. A. C. P.,* 360 U. S. 167 (1959):

> "While it is well settled that a court may not inquire into the legislative motive (Tenney v. Brandhove, 341 U. S. 367, 377, 71 S.Ct. 783, 95 L.Ed. 1019), it is equally well settled that a court may inquire into the legislative purpose. (See Baskin v. Brown, 4 Cir., 174 F. 2d 391, 392-393, and Davis v. Schnell, D. C., 81 F. Supp. 872, 878-880, affirmed 336 U. S. 933, 69 S. Ct. 749, 93 L.Ed. 1093, in which state efforts to disenfranchise Negroes were struck down as violative of the Fifteenth Amendment.) Legislative motive—good or bad—is irrelevant to the process of judicial review; but legisla-

> tive purpose is of primary importance in determining the propriety of legislative action, since the purpose itself must be within the legislative competence, and the methods used must be reasonably likely to accomplish that purpose. Because of this necessity, a study of legislative purpose is of the highest relevance when a claim of unconstitutionality is put forward. Usually a court looks into the legislative history to clear up some statutory ambiguity, as in Davis v. Schnell, D. C., 81 F. Supp. at page 878; but such ambiguity is not the *sine qua* for a judicial inquiry into legislative history. See the decision in Lane v. Wilson, 307 U. S. 268, 59 S.Ct. 872, 83 L.Ed. 1281, in which the Supreme Court showed that the state statute before the court was merely an attempt to avoid a previous decision in which the 'grandfather' clause of an earlier statute had been held void." [6]

The majority Judges in the 5th Circuit in *Gomillion* held themselves barred from examining what they referred to as the legislative motive. To this, Judge Brown responded:

> "What the Legislature of Alabama, as distinguished from its members, *intended* and what the *purpose* of

---

[6] *Cf.* Mr. Justice Douglas' concurring opinion in *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 445-446 (1963):

> "The Virginia Act * * * reflects a legislative purpose to penalize the NAACP because it promotes the desegregation of the races.
>
> " * * * Judge Soper, writing for the Court in NAACP v. Patty * * * did not indulge in guesswork. He reviewed the various steps taken by Virginia to resist our *Brown* decision * * * [T]hey made clear the purpose of the present law—as clear a purpose to evade our prior decision as was the legislation in *Lane* v. *Wilson* * * * "

> the Legislature, as distinguished from its members, was in the enactment of this law is then a traditional matter for concern to the Judiciary. Obviously the Legislature of Alabama could have had the purpose of discriminating against Negro voters. Many states have had such purpose as the cases discussed . . . attest. All that Doyle can mean is that in the judicial process of ascertaining *legislative* purpose and intention the individual motives and expression of the individual members is not pertinent. But where the collective purpose and intention of the body is expressly stated or is ascertained on a trial by the exercise of traditional rules of statutory construction in the light of record facts, the judicial ascertainment and declaration of that purpose and intention is not prohibited by the fact that individual legislators, either in legislative chambers or through the press, may have uttered statements of startling candor." (Footnote omitted.) *Id.* at 610.

Statements of precisely such "startling candor" were uttered by Representative Rivers and Senator Thurmond, the two Committee Chairmen,[7] in enacting the statute here under attack. The First Circuit recognized these statements as the embodiment of Congressional purpose and declared the statute unconstitutional.

---

[7] The remarks of Rep. Bray were even more candid. See, *supra*, p. 18. The Government's brief makes occasional references to the fact that statements indicating unconstitutional purpose were made by "only two" Representatives (p. 28) and were confined to "three members of Congress" (p. 10). But the inescapable fact is that all three of them expressed the same purpose, and no one expressed any other purpose.

The cases cited in the Government's brief on this point either involved a confusion of motivations and consequently the impossibility of ascertaining true intentions, *United States* v. *Kahriger,* 345 U. S. 22 (1953); *Daniel* v. *Family Security Life Insurance Co.,* 336 U. S. 220 (1949); *Sonzinsky* v. *United States,* 300 U. S. 506 (1937); cases where the court, after its study of the legislative history, determined that the Congressional purpose was not unconstitutional, *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1 (1961); see *Flemming* v. *Nestor,* 363 U. S. 603 (1960); or cases where the court applied the axiomatic principle that it would not rule on the wisdom of legislative acts; see *McCray* v. *United States,* 195 U. S. 27, 55 (1904).

Elsewhere the Government misreads or confuses the difference between Congressional motive and Congressional purpose. *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 169 (1963) has nothing to do with divination of Congressional motives; what it did hold was that "objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive." The Government's suggestion that in *Grosjean* v. *American Press Co., supra,* this court held the underlying legislative motive to be immaterial (Brief, p. 30, footnote 23) is rebutted by a reading of the case which shows that the court was most concerned with the legislative *purpose.*[8]

---

[8] The second paragraph of footnote 23 on page 30 of the Government's brief contains several confusing references to "purpose" and "motive". It suggests that the only distinction is between "the *effect* of legislative action" on the one hand, and *purpose* or *motive,* used interchangeably, on the other hand. That *purpose* and *motive* refer to two completely different concepts is demonstrated by the decisions discussed above. In support of this confusion, however,

The Government's final argument is that the Court should give the statute a narrow construction to avoid a holding of unconstitutionality, citing *United States* v. *Rumely,* 345 U. S. 41 (1953), where the Court "strained words" to save a statute and narrowly construed a resolution of the House of Representatives "since Congress put no gloss upon it at the time of its passage." (*Id.* at 44-45.) But neither the *Rumely* case nor any other decision of which counsel is aware has held that the doctrine of judicial restraint which dictates narrow construction to avoid unconstitutionality has ever been applied in a case where the unconstitutionality appeared from the declared Congressional purpose. The Court of Appeals was clearly correct in its determination that a statute enacted where the "purpose is to punish", see *United States* v. *Constantine,* 296 U. S. 287, 294 (1935), does not fall within the bounds of Congressional power.

---

the Government implies that *Lassiter* v. *Northhampton County Board of Elections,* 360 U. S. 45, 53 (1959) is a case involving inquiry into legislative *"purpose"*, while in fact the word "purpose" is not at all used in the case in such context.

POINT II

The statute is unconstitutional as applied to the facts of this case because the conduct which it seeks to punish is a peaceful act of symbolic speech designedly conducted in an effective but constitutionally permissible manner under circumstances which fall well within the limits of the clear and present danger test, and which, in the application of the balancing test, compel a determination that the free speech consideration outweighs all countervailing considerations.

A. *Symbolic speech is protected by the First Amendment.*

In order to reach its decision that the amendment was an unconstitutional attempt "to suppress expressions of dissent" the Court of Appeals succinctly stated it as "beyond doubt that symbolic action may be protected speech" (R. 63). The Government's brief makes an extensive effort to overturn this holding of unconstitutionality by means of an assault on the symbolic speech doctrine. It is not a head-on attack, but rather an attempt to minimize, weaken and circumscribe symbolic speech to such an extent that the doctrine will be inapplicable in this case. A review of the development of the judicial recognition of symbolic speech is therefore appropriate.

In defining the scope of the First Amendment, and ascertaining if any proscribed activity is within its coverage, it is clear that "abstract discussion is not the only species of communication which the Constitution protects;" *National Association for the Advancement of Colored People* v. *Button,* 371 U. S. 415, 429 (1963). As this Court has "repeatedly stated", the Constitutional guar-

antees of freedom of speech, freedom of assembly, and freedom of petition "are not confined to verbal expression. They embrace appropriate types of action. * * * " *Brown* v. *Louisiana,* 383 U. S. 131, 141, 142 (1966). Chief Judge Sobeloff has written, summarizing the applicable decisions of this Court: "The First Amendment affords protection not merely to the voicing of abstract opinions upon public issues. It also protects implementing conduct which is in the nature of advocacy." *National Labor Relations Board* v. *International Longshoremen's Association,* 332 F. 2d 992 (4th Cir. 1964).[9]

Respondent urges that his symbolic act of publicly burning a Selective Service certificate as part of a demonstration against the war and against the draft was no more than an "appropriate type of action" embraced within the constitutional guarantee. It was "implementing conduct * * * in the nature of advocacy." A series of decisions of this Court have established the doctrine that symbolic speech is such an "appropriate type of action" as is embraced within the First Amendment.

The author of the concept "symbolic speech" was Mr. Justice Jackson. The occasion for its authorship was the decision of the Supreme Court holding that a compulsory

---

[9] Cf. Mr. Justice Brennan's Alexander Meiklejohn Lecture, delivered at Brown University on April 14, 1965:

> "Many forms of expression have presented questions under the First Amendment. These questions have been raised in cases involving sit-ins and other forms of racial demonstrations, the picket line, the motion picture, the lawsuit when employed as political expression to seek legal redress for violation of civil rights * * * and many others."

Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment", 79 *Harv. L. Rev.* 1, 4 (1965) (footnotes omitted).

flag salute was an unconstitutional violation of the First Amendment rights of Jehovah's Witnesses school children. Writing the opinion of the Court, in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 633 (1943), Mr. Justice Jackson recalled the Court's 1931 decision holding unconstitutional California's anti-radical "red flag" law:

> "Over a decade ago Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guarantees of the Constitution. *Stromberg* v. *California,* 283 U. S. 359. Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual *to communicate by word and sign* his acceptance of the political ideas it thus bespeaks." (Emphasis added.)[10]

Elsewhere in the opinion, Mr. Justice Jackson had this to say about expression via symbols:

> "There is no doubt that * * * the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution or personality, is a short cut from mind to

[10] Although there is no express articulation in the opinion of the Court, the dissenting opinion recognized that the court had decided that "the mere display of a flag as the emblem of a purpose, whatever its sort, is speech within the meaning of the constitutional protection of speech and press * * *." *Id.* at 376. Cf. Chafee, *Free Speech in the United States* 336 (1941): "As Mr. Justice Butler was quick to observe, a flag is not speech. It does not talk." New York's "red flag" law was held unconstitutional on the express authority of *Stromberg* v. *California,* in *People* v. *Altman,* 241 App. Div. 858 (1st Dept. 1934).

> mind. * * * A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." *Id.* at 632-633.

Although not articulated in terms of "symbolic speech" until Mr. Justice Jackson wrote his memorable *Barnette* opinion, *supra,* the precedent of the "red flag" case assisted the Court in determining that peaceful picketing is protected by the First Amendment. On the same day that it decided *Thornhill* v. *Alabama,* 310 U. S. 88 (1940), the Court also decided *Carlson* v. *California,* 310 U. S. 106 (1940). Holding a municipal anti-picketing ordinance unconstitutional, Mr. Justice Murphy wrote for the Court:

> "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information of matters of public concern. *Stromberg* v. *California,* 283 U. S. 359." *Id.* at 112-113.

In a later case, *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.,* 312 U. S. 275, 293 (1941), Mr. Justice Frankfurter wrote, for the Court: "Peaceful picketing is the workingman's means of communication." [11]

The concept of communication via symbols or other nonverbal acts has likewise played a role in the formulation of constitutional doctrine to cope with civil rights demon-

[11] Prof. Kalven has observed that the sit-in demonstration is the "poor man's printing press." Kalven, *The Negro and the First Amendment,* 133 (1965). Cf. *Martin* v. *Struthers,* 319 U. S. 141, 146 (1943): "Door to door distribution of circulars is essential to the poorly financed causes of little people."

strations. A most carefully articulated statement is that of Mr. Justice Harlan, concurring in *Garner* v. *Louisiana,* 368 U. S. 157, 185 (1961): "We would surely have to be blind not to recognize that petitioners were sitting at these counters, where they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country." *Id.* at 201. Mr. Justice Harlan developed this line of thought by express reference to *Stromberg* v. *California, supra,* and to *West Virginia Board of Education* v. *Barnette, supra*:

> "Such a demonstration, in the circumstances of these two cases, is as much a part of the 'free trade in ideas' *Abrams* v. *U. S.,* 250 U. S. 616, 630 (Holmes, J. dissenting), as is verbal expression, more commonly thought of as 'speech'. It, like speech, appeals to good sense and to 'the power of reason as applied through public discussion' *Whitney* v. *California,* 274 U. S. 357, 375 (Brandeis, J., concurring), just as much as, if not more than, a public oration delivered from a soapbox at a street corner. This court has never limited the right to speak, a protected 'liberty' under the Fourteenth Amendment, *Gitlow* v. *N. Y.,* 268 U. S. 652, 666, to mere verbal expression. *Stromberg* v. *California,* 283 U. S. 359; *Thornhill* v. *Alabama,* 310 U. S. 88; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 633-4. See also *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 460. If the act of displaying a red flag as a symbol of opposition to organized government is a liberty encompassed within free speech as protected by the Fourteenth Amendment, *Stromberg* v. *California, supra,* the act of sitting at a private lunch counter with the consent of the owner, as a demonstration of

> opposition to enforced segregation, is surely within the same range of protections. This is not to say, of course, that the Fourteenth Amendment reaches to demonstrations conducted on private property over the objection of the owner * * * just as it would surely not encompass verbal expression in a private home if the owner has not consented." *Id.* at 201-202.[12]

The civil rights demonstration as a form of communication received further consideration by this Court in *Brown* v. *Louisiana, supra.* By a vote of 5-4, the Court reversed breach of the peace convictions of five Negro members of CORE who, in a deliberate effort to desegregate a public library in Clinton, Louisiana, staged a peaceful, silent, sit-in and stand-up demonstration. The "prevailing opinion"[13] of Mr. Justice Fortas describes what happened:

> "Petitioners, five adult Negro men, remained in the library room for a total of ten or fifteen minutes. The first few moments were occupied by a ritualistic request for service and a response. We may assume that

---

[12] This portion of Mr. Justice Harlan's opinion is quoted at length, and apparently with approval, by Mr. Justice Brennan, concurring in *Brown* v. *Louisiana, supra,* at 143, 146, fn. 5. Prof. Kalven writes: "This passage * * * quite deliberately associates the sit-in as a form of communication with the passionate free speech rhetorics of Holmes in *Abrams* and Brandeis in *Whitney.* Indeed, the identification of the sit-in with a First Amendment freedom could hardly be more vigorous * * *." Kalven, *op. cit.* at 131. *Cf.* "The Supreme Court: 1961 Term," 76 *Harv. L. Rev.* 54, 124, n. 167 (1962).

[13] The phrase is that of Mr. Justice Black who wrote the dissenting opinion. *Id.* at 151, 152, fn. 1. Mr. Justice Fortas' opinion was joined in by the Chief Justice and Mr. Justice Douglas. Mr. Justice Brennan and Mr. Justice White wrote separate concurrences.

> the response constituted service, and we need not consider whether it was merely a gambit in the ritual. This ceremony being out of the way, the Negroes proceeded to the business in hand. They sat and stood in the room, quietly, as monuments of protest against the segregation of the library. They were arrested and charged and convicted of breach of the peace under a specific statute." *Id.* at 139.

The conclusion was that the Louisiana breach of the peace statute "cannot constitutionally be applied to punish petitioners' actions in the circumstances of this case", *id.* at 142, since they were "engaged in lawful, constitutionally protected exercise of their fundamental rights." *Id.* at 143.[14]

The meaning of all of the decisions which have just been discussed is that symbolic speech is nevertheless speech, and commands the protection of the First Amendment.

---

[14] The Government's brief infers (p. 16) that only Mr. Justice Harlan reached the constitutional question in the sit-in case, *Garner* v. *Louisiana, supra.* In *Brown* v. *Louisiana, supra,* it is clear that at least four Justices, and perhaps five, reached this constitutional question. See concurring opinions of Mr. Justice Brennan and Mr. Justice White. Furthermore, whatever may be the case with respect to *sit-in* demonstrations, a clear majority of the court has agreed that street civil rights demonstrations are protected by the First Amendment, notwithstanding the fact that they include the communication of ideas "by *conduct* such as patrolling, marching and picketing." *Cox* v. *Louisiana,* 379 U. S. 536, 555 (1965). (Emphasis added.) The Court pointed out that the First Amendment did not afford such conduct the "same kind of freedom" as "pure speech". But it explicitly recognized that in both instances, pure speech and conduct, ideas were communicated, and the First Amendment applied, albeit to differing extents.

It is respondent's contention that a constitutionally proper definition of the scope of the First Amendment[15] is one which is broad enough to include all modes of symbolic speech, or communication of ideas by conduct, *Cox* v. *Louisiana, supra,* at 555. The test is not the form, or method, or mode of expression, but rather whether all of the circumstances present a clear and present danger, or require that a balance be struck in favor of restricting the expression, depending on which of these tests is to be invoked.[16]

In the 1941 decision of *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc., supra,* the Court reaffirmed but distinguished its then recent decisions in *Thornhill* v. *Alabama, supra,* and *Carlson* v. *California, supra,* and held that there was no free speech protection for acts of violence committed on the picket line. The Court's opinion, written by Mr. Justice Frankfurter, includes the following rationale:

> "It must never be forgotten, however, that the Bill of Rights was the child of the Enlightenment. Back of the guaranty of free speech lay faith in the power of an appeal to reason by *all the peaceful means for gaining access to the mind.* It was in order to avert force and explosions due to restrictions upon *rational modes* of communications that the guaranty of free speech

---

[15] The free speech clause of the First Amendment is not the only constitutional provision concerned with speech which has been given a broad definition. Art. I, Section 6, provides that "for any Speech or Debate in either House" members of Congress "shall not be questioned in any other Place." This Court has held: "It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible * * * to things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson,* 103 U. S. 168, 204 (1880); *U. S.* v. *Johnson,* 383 U. S. 169, 179 (1966).

[16] See discussion of both tests, *infra,* at pp. 43-54.

> was given so generous a scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. *Such utterance* was not meant to be sheltered by the Constitution." *Id.* at 293. (Emphasis added.)

The First Amendment does not protect, according to *Meadowmoor,* "utterance in a context of violence." But, *absent the violence,* it does protect *"all* the peaceful means for gaining access to the mind", all *"rational modes* of communication" (emphasis added). We discuss below the applicability of the clear and present danger test or the *ad hoc* balancing test to the statute and the facts of this case. But the inevitable conclusion which emerges from the argument thus far, is that there is nothing *a priori* illicit in an attempt to gain access to the mind by means of the symbolic act of burning a piece of paper as a portion of a public demonstration directed at criticism of the Governmental action which the piece of paper symbolizes. It is surely a "rational mode of communication".

The Government's brief launches several flanking attacks on symbolic speech and its application to this case. First it argues that since the statute has only "an ancillary and minimal impact on the expression of dissent" (p. 12), draft-card burning should not have the same degree of constitutional protection as other forms of communication. However, in the *Stromberg* red flag case and the *Barnette* flag salute case[17] as in the instant case, the statute's impact on expression of dissent is not subject to such facile quantitative analysis.[18]

---

[17] The two classical symbolic speech cases relied on by the Court below (R. 63).

[18] The Government's brief states, on page 14, that "Simply to call conduct 'speech' is not, however, enough to clothe it with con-

The government contends that symbolic speech is entitled to less constitutional protection than any other speech. But this Court did not hold in the red flag and flag salute cases that symbolic speech is entitled to a lesser degree of protection than any other speech. See *Stromberg* v. *California, supra,* and *West Virginia Board of Education* v. *Barnette, supra.*[19]

Having attempted to limit the area of protectable speech, and then in turn to limit the protectability of symbolic speech, the Government finally acknowledges that there is such a thing as symbolic speech but attempts to water it down to where it would be meaningless in this case. On pages 15 through 19 various rationales, some self-contradictory, for the symbolic speech doctrine are articulated. However, many of the suggested distinctions merely underscore how comfortably respondent's verbal conduct falls within the doctrines of symbolic speech.[20] It is stated, for example, on page 16, that each of the cases decided by the Court "represents an example of conduct which is the

---

stitutional protection." Of course, fixing a name to an act is obviously insufficient to convert the act into that which it is called. The questions are rather: Is it a rational mode of communication? See *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc., supra.* Is it a "peaceful means for gaining access to the mind"? (*Ibid.*) Does it otherwise meet the proper constitutional test?

[19] The Court below correctly held that the symbolic speech in this case is entitled to no less protection than in the classical symbolic speech cases (R. 63).

[20] *Stromberg* v. *California, supra,* is explained as being the "equivalent of speech" because the peaceable display of a red flag "conveys, in generally understood terms, opposition to an existing government . . . " (p. 16). Can it be doubted that the peaceable ceremony of draft-card burning "conveys, in generally understood terms, opposition to an existing government" policy, i.e., the Vietnam war?

equivalent of speech or significantly adds meaning beyond that conveyed by oral expression." Surely Mr. O'Brien's public ritual burning of his draft card on the courthouse steps was the "equivalent of" a speech which he might have made denouncing the draft, and even more surely it had "meaning beyond that conveyed" by any oral expression.[21]

The final effort at rationale-creating is the statement that symbolic speech protection is available only "where shown to be necessary to ensure effective communication of the ideas sought to be expressed." No authority is cited in support of this extravagant statement which stands all traditional doctrines of freedom of expression on their head. The Government would have it that free speech under the Constitution is not always available, but only where "shown to be necessary . . . " for some purpose. Such limitations as are imposed on free speech are based on other constitutional criteria, but not on whether or not any court deems that a particular mode of speech is "necessary".[22]

---

[21] Another government rationale is that symbolic speech covers an act which is a "traditionally recognized substitute" for a verbal statement (p. 15). Traditions, of course, develop at varying rates of speed. Is the Government suggesting that draft card burning can only be held to come within the symbolic speech doctrine after a sufficient number of years have passed so that a "tradition" can be said to have developed recognizing it as a substitute for a verbal statement? If the extent of public recognition is the criterion, surely the legislative history which led to the amendment establishes this beyond doubt. And if one must look to the historical tradition of the symbolic and peaceful burning of a document or a thing, one can recall from American history the popular Nineteenth Century political practice of burning dummies in effigy, and the practice prior to the Civil War of burning Fugitive Slave warrants.

[22] This is not the same argument as the constitutional right to make one's speech as effective as possible, which is discussed in the next section. The citizen has this right and may exercise it within constitutional limits. But government does not have the power,

B. *There is a constitutional right to make one's speech as effective as possible, subject to the proper constitutional standard.*

With acerbic allusions to the dumping of garbage in front of City Hall (p. 15), and to demanding unauthorized entry into the White House (p. 18, fn. 10), and even to political assassination (p. 14, fn. 5), the Government's brief implies that respondent is insisting on a constitutional right to do anything which is in the nature of communication of protest. Respondent makes no such argument. We agree with the Court below that the First Amendment does not give anyone "carte blanche" (R. 64). There are obviously limits.

In respondent's view, the constitutional limits are measured by the clear and present danger test, although we urge that the same result will be reached via application of the *ad hoc* balancing test. Both tests are discussed in the next section of this brief.

What we do urge, however, is that *within the limits established by any applicable constitutional test,* the First Amendment does, in fact, include the right to make the most dramatic and compelling speech possible.[23] To put it another way, the First Amendment does not circumscribe its protection to only the most boring and least effective

---

under the Constitution, to determine that any particular mode of speech is not "necessary to ensure effective communication. . . ." If such were the case the State of California would have had the right to tell Miss Stromberg that it was not "necessary" for her to carry a red flag in order to project her radical ideas. See *Stromberg* v. *California, supra.*

[23] The Government concedes that draft card burning may heighten the dramatic effectiveness of the protest (p. 18), but makes two arguments in opposition: (1) that "one does not have a constitutional right to perform acts otherwise subject to restraint simply because they are dramatic", and (2) that there are other ways of vigorously expressing dissent. The first argument is an example

speech possible. " * * * [O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State,* 308 U. S. 147, 163 (1939).

Subject always to reasonable limitations imposed by the necessity of traffic controls and the application of the proper constitutional test, the speaker has the right to choose the place where he can be most effective, *Martin* v. *Struthers,* 319 U. S. 141, 150 (1943), *Schneider* v. *State, supra;* the time when he can be most effective, *Mills* v. *State of Alabama,* 384 U. S. 214 (1966); and the manner in which he can be most effective, *Saia* v. *New York,* 334 U. S. 558 (1948), *Kovacs* v. *Cooper,* 336 U. S. 77, 87 (1949); see *Williams* v. *Wallace,* 240 F. Supp. 100 (M. D. Ala. 1965) (mandatory injunction authorizing 45 mile protest march on public highway from Selma to Montgomery, Alabama, by civil rights demonstrators); *United Electrical, Radio & Machine Workers of America* v. *Baldwin,* 67 F. Supp. 235, 242 (D. Conn. 1946) (allowing picketing at home of Governor, Judge Smith held: "To ban such activity because it is unpleasant to have such publicity at home is to admit the effectiveness of this kind of free expression * * * ").[24]

---

of bootstraps reasoning. The dramatic element neither adds to *nor detracts from* the existing constitutional right. The question is whether the acts are *properly* subject to restraint, i.e., the proper constitutional test, and its application. The second argument is rebutted by the cases cited in the text. Cf. *Amalgamated Food Employees Local 590* v. *Logan Valley Plaza, Inc.,* 425 Pa. 382, 227 A. 2d 874, cert. granted 389 U. S. 911 (1967) where this Court will have before it the question of whether peaceful picketing in a privately-owned shopping center can be enjoined because, among other reasons, picketers can remove their picket line to the distant edges of the premises.

[24] The issue of effectiveness arises in two contexts. In one, the speaker, because of limited resources, if he desires to be effective,

The obvious rationale for the protection of the most effective means of expression has been well stated by Mr. Justice Black:

> "I cannot accept * * * [the] view that the abridgment of speech and press here does not violate the First Amendment because other communications are left open. This reason for abridgment strikes me as being on a par with holding that governmental suspension of a newspaper in a city would not violate the First Amendment because there continues to be radio and television stations. First Amendment freedoms can no more validly be taken away by degrees than by full swoop." *N. L. R. B.* v. *Fruit & Vegetable Packers,* 337 U. S. 58, 79-80 (1964) (concurring opinion).

---

has no other choice but the mode of expression which is proscribed. Thus the concept of "the workingman's means of communication," and the "poor man's printing press". See footnote 3, *supra,* and accompanying text. In the other context, the speaker has several options available, but elects to utilize the mode of expression which he regards as most effective for his purposes. See *Mills* v. *Alabama, supra; N. L. R. B.* v. *Fruit & Vegetable Packers, infra; U. E. R. M. W. A.* v. *Baldwin, supra.*

C. *The proper constitutional standard is the clear and present danger test, and application of such test compels a determination of unconstitutionality. However, even if this Court prefers to apply the balancing test, the balance of interests is strongly weighted in favor of freedom of expression, and likewise requires a holding of unconstitionality.*[25]

D. *The clear and present danger test.*

Respondent urges that the constitutional validity of the statute, and his conviction, must be evaluated in accordance with the requirements of the clear and present danger test:[26]

> "The question in every case is whether the words used are used in such circumstances and are of such a nature to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." [27]

---

[25] The court below does not appear to have applied either test. The Second Circuit, in *United States* v. *Miller,* 367 F. 2d 72 (1966), cert. den. 386 U. S. 911 (1967), specifically rejected the clear and present danger test and applied the balancing test.

[26] The Government notes the "stringent requirements of the clear and present danger test" (Brief, p. 14) and then seems to contend that it may be applied only to what the Government regards as bona fide symbolic speech (p. 15). Cf. *United States* v. *Miller, supra,* 367 F. 2d at 80, which seems to hold a much broader area of speech outside the reach of the clear and present danger test. The Government espouses the balancing test (p. 21), because of its view that draft card burning is not symbolic speech. Thus, the Government appears to concede that if it is symbolic speech, then the clear and present danger test should be applied, in which case it is inferred that respondent may prevail. In any event, the Government makes no effort to analyze the clear and present danger test as applied to this case.

[27] This is the classic expression by Mr. Justice Holmes in *Schenck* v. *U. S.,* 249 U. S. 47, 52 (1919). See *Whitney* v. *California,* 274 U. S. 357 (1927). See also, *Wood* v. *Georgia,* 370 U. S. 375 (1962);

Applying this test in *Herndon* v. *Lowry,* 301 U. S. 242 (1937), this Court reversed the conviction of a Communist Party organizer who was admittedly advocating among Georgia Negroes the establishment of a Negro Black Belt separate Republic. Mr. Justice Roberts wrote for the Court:

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterance of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered." *Id.* at 258.

What is the substantive evil which Congress sought to prevent by enactment of the statute under review? There is certainly no apprehension of danger to organized government. We argue elsewhere in this brief that the statute is unconstitutional on its face, because its legislative history discloses a blatantly unconstitutional purpose—the deliberate suppression of a specific form of dissent. See Point I, *supra.*

But assuming bona fide legislative purpose, the most that can be said for the "substantive evil" is that Selective Service registrants who destroy or mutilate their certificates will not have them available for inspection, for either their own benefit or the government's benefit. The court below did not articulate any legislative purpose which

---

Thomas v. *Collins,* 323 U. S. 516 (1945); *Taylor* v. *Mississippi,* 319 U. S. 583 (1943); *Bridges* v. *California,* 314 U. S. 252 (1941); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1941); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Sellers* v. *Johnson,* 163 F. 2d 877 (8th Cir. 1947), cert. den. 332 U. S. 851 (1948).

would provide justification for the statute.[28] The Government's brief, however, attempts to set forth a number of purposes (pp. 22 to 24).

First, it is asserted that there is a constitutional power to conscript and classify manpower.[29] But this hardly implies a constitutional sanction for every piece of related legislation.

A number of instances are then set forth where a draft card may serve an identification or notice-giving purpose (p. 23) but it is submitted that these are almost exclusively for the registrant's benefit, and provide at best only some remote government utility.[30]

---

[28] The Court considered and rejected one argument which was not made below, "the pecuniary loss to the government by the destruction of a card. . . ." (R. 62, fn. 5). The Government apparently attempts to rebut this holding by referring to a single sentence in the House Report, p. 2a, *infra,* which speculated as to whether or not a certificate might be deemed "government property." (Brief, p. 22.)

[29] The last occasion where this Court ruled on the constitutionality of conscription was *Arver* v. *U. S. (The Selective Draft Law Cases),* 245 U. S. 366 (1918), which upheld World War I conscription legislation enacted while the nation was at war pursuant to Congressional declaration.

[30] It is interesting that the most dramatic purposes suggested by the Government in its argument below, and apparently adopted by the Second Circuit in *United States* v. *Miller, supra,* 367 F. 2d at 80-81, i.e., the contemplated usefulness of the card in the event of disaster or emergency mobilization, have apparently been abandoned in this Court. The Government's brief states that it is "common knowledge" that a draft card serves a variety of purposes. The most common knowledge of the purpose it serves is that it provides proof that a young man has reached the age of 18 years, in a state where 18-year-olds are allowed to purchase alcoholic beverages. But clearly, this, like the others, is a service for the registrant of which the registrant can presumably waive the benefit.

It is noteworthy that in all of the trial court and appellate court litigation involving draft card burning cases[31] there has never been presented a single statement of justification for the statute by the Selective Service System, the Department of Defense, or any agency or official of the Executive branch. This Court can take note of the fact that the present Selective Service System has been in existence since 1940. It has amassed a vast accumulation of annual reports, policy statements, local board memoranda, speeches by the distinguished Director, and undoubtedly considerable other material. Yet not one word can be produced by the Government in support of the argument that the statute, or indeed, the possession regulation, serves some useful purpose.[32]

In sum, respondent submits that if the "stringent requirements of the clear and present danger test" (Govt's

---

[31] Several of the counsel in this case are also counsel in other draft card burning cases.

[32] The ingenuity of Government counsel in suggesting purposes which were never contemplated or suggested either by the Selective Service System or by Congress, has been commented upon by Professor Lawrence Velvel:

> "Of course, the Court has said in the past that the reasons which provide the basis for upholding the constitutionality of a statute need not be the reasons which prompted its passage. Indeed, where economic matters are involved, the Court has indicated that a legislative judgment must be upheld if it is possible to conjure up any reasonable state of facts which might support the judgment. But surely less heed should be paid to this sort of conjurings in the vital area of first amendment freedoms than in other less vital areas, such as economic matters. There should, after all, be a right to demand more, before first amendment rights are curtailed, than that government lawyers have dreamed up *some* hypothetical state of facts which might support such an inroad on freedom. There should at least be a right to demand that the requisite state of facts will be a likely one. It would seem that, unless hypothetical conjurings are viewed with suspicion in the first

brief, p. 14) are to be applied, none of the justifications advanced, real or fanciful, can save the statute.[33]

1) The *ad hoc* balancing test.

While respondent urges the application of the clear and present danger test, it is recognized that in the light of certain First Amendment decisions of this Court, the *ad hoc* balancing test might also be considered.[34] The test states that in each individual case the Court must balance the interest in freedom of expression against "the magnitude of the public interests which the * * * [statute is] designed to protect" and "the pertinence which * * * [the statute bears] to the protection of those interests." *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, 93 (1961) (per Mr. Justice Frankfurter). See also *Cox* v. *Louisiana, supra; Barenblatt* v. *U. S.,* 360 U. S. 109 (1959); *NAACP* v. *Alabama,* 357 U. S. 449 (1958); *American Communications Association* v. *Douds,* 339 U. S. 382 (1950).

---

amendment area, there is a great danger that basic freedoms will be lost to the imaginations of government attorneys." (Footnotes omitted.) 16 Kansas L. Rev. 149, 162-163.

[33] On pages 24 through 27 of the Government's brief, argument is presented seeking to rebut the position taken by the Court below, that given the existence of the possession regulation, the burning statute serves no rational purpose. This argument presumes the validity of the possession requirement, which respondent sharply contests. See Point V, *infra.* However, assuming *arguendo* the constitutionality of the possession regulation, the Court of Appeals was indeed correct in its trenchant observation that "If there is a big hole in the fence for the big cat need there be a small hole for the small one?" See *Jarecki* v. *G. D. Searle & Co.,* 367 U. S. 303, 307 (1961) (R. 62-63).

[34] For an analysis of both the clear and present danger test and the balancing test, see Emerson, "Toward a General Theory of the First Amendment", 72 *Yale L. J.* 877, 910-912, 912-914 (1963). For a well-reasoned critique of the balancing test see Frantz, "The First Amendment in the Balance", 71 *Yale L. J.* 1424 (1962).

What is the magnitude of the public interests which the statute is designed to protect? And how pertinent is the statute to the protection of those interests? For the purposes of this argument, respondent assumes that there is substantial magnitude to the public interest sought to be protected, i.e., the proper functioning of the Selective Service System. But we have already shown that this statute has no relation whatsoever to the achievement of such purpose.[35]

On the other side of the balance is the restriction of freedom of expression. Even if non-verbal communication is entitled to less weight on the free speech side of the balance than "pure" speech, *Cox* v. *Louisiana, supra,* it must nevertheless be balanced. Respondent urges that the application of the balancing test compels a conclusion that our society loses more in free speech than it gains in Selective Service administration by the application of the statute to respondent.

It is clear that Congress could pass no law which by its express terms provided, "Any speech which criticizes, attacks, insults or mocks the government's efforts in Vietnam shall be punished, etc. * * * " Nor could Congress provide that "Any speech where the speaker announces that he will refuse to serve in the armed forces, or otherwise expresses defiance of the authority of the Federal government shall be punished, etc. * * * "

If a Selective Service registrant, addressing a public meeting criticizing the government's foreign policy, held aloft his Registration Certificate, and said words to the effect that "I detest and execrate this piece of paper and

---

[35] See discussion of purposes at footnotes 27-32 and accompanying text, *supra.*

everything for which it stands", surely the attempted punishment of such verbal action would be beyond Constitutional limits. It is submitted that insofar as Congressional power under the First Amendment is concerned, the symbolic expression of destroying or mutilating the piece of paper in such a context creates no constitutionally significant difference.

A statute which expressly prohibits the right to express political dissent would admittedly violate the First Amendment. It would be palpable incongruity to uphold a statute which achieves the same result because accomplished under another guise. "It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost & Trucking Co.* v. *Railroad Comm.,* 271 U. S. 583, 594 (1926); *Gomillion* v. *Lightfoot,* 364 U. S. 339, 345 (1960).

POINT III

Since the statute does not serve any rational legislative purpose, it is an unconstitutional deprivation of individual liberty without due process of law contrary to the guaranty of substantive due process contained in the Fifth Amendment, both on its face and as applied to respondent.

It has long been recognized that there exists a constitutional right of substantive due process which protects individual liberty from improper Federal action under the Fifth Amendment, and corresponding state action under the Fourteenth. "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is

arbitrary or without reasonable relation to some purpose within the competency of the state to effect." *Meyer* v. *Nebraska,* 262 U. S. 390, 399-400 (1923). Accord: *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925); see *Truax* v. *Raich,* 239 U. S. 33, 43 (1915).

In *Meyer,* this Court held it was a deprivation of the liberty of teacher and student to ban the teaching of the German language in the Nebraska public schools. *Pierce* held unconstitutional, as a deprivation of the liberty of parents to educate their children, an Oregon statute which compelled attendance at public schools, to the exclusion of private religious schools. Both *Meyer* and *Pierce* noted the absence of any emergency requiring such extraordinary measures. *Meyer* v. *Nebraska, supra* at 403; *Pierce* v. *Society of Sisters, supra* at 534. *Truax* held unconstitutional an Arizona statute which sought to restrict the employment of aliens. In each case there was a deprivation of individual liberty in violation of the principle of substantive due process.

There was a period in our nation's judicial history when courts invoked this doctrine to set aside welfare legislation, and measures seeking to regulate industry in the public interest. See *Lochner* v. *New York,* 198 U. S. 45 (1905). But, as Mr. Justice Douglas observed, writing for the Court in *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 488 (1955):

> "The day is gone when this Court uses the due process clause of the 14th Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out-of-harmony with a particular school of thought."

In *Griswold* v. *Connecticut,* 381 U. S. 479, 482 (1965), the Court again speaking through Mr. Justice Douglas, developed the argument somewhat further in considering the constitutionality of Connecticut's anti-contraceptive law:

> "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."

The holding of the Court was that the statute violated a constitutional right of marital privacy contained within the penumbra of several specific guarantees of the Bill of Rights, including the Fifth Amendment. And it specifically reaffirmed "the principle of the *Pierce* and the *Meyer* cases." *Id.* at 483.

Respondent submits that this passage in *Griswold* means that there is a constitutionally significant distinction between the application of the due process clause to economic, business and social regulation, and its application to Federal and State laws which infringe on individual liberty.[36] The individual "liberty" of which a person may be deprived includes "the full range of conduct which the individual is free to pursue." *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954). This includes not only the various rights comprehended in the *Meyer, Pierce* and *Truax* cases, but also the right of privacy, *Griswold* v. *Connecticut, supra;* the

---

[36] *Cf.* Henkin, " 'Selective Incorporation' in the Fourteenth Amendment", 73 *Yale L. J.* 74, 85 (1963): "Substantive due process, as is well known, found its origin and its wild and questionable growth in regard to economic regulation; only comparatively recently has it begun to protect political and civil liberties."

right to travel, *Aptheker* v. *Secretary of State,* 378 U. S. 500, 505 (1964), *Kent* v. *Dulles,* 357 U. S. 116 (1958), and "In the light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress * * * " *Galvan* v. *Press,* 347 U. S. 522, 530 (1954), undoubtedly other rights as well.[37]

Viewed from another angle, the ordinary presumption of constitutionality of a legislative act does not exist where the legislation infringes on individual liberty or any other preferred constitutional right enshrined in the Bill of Rights. *U. S.* v. *Carolene Products,* 304 U. S. 144, 152, fn. 4 (1938); *Schneider* v. *State,* 308 U. S. 147, 161 (1939); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940) ("Mere legislative preference for one rather than another means for combating substantial evils, therefore, may well prove an inadequate foundation on which to rest regulations which are arrived at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Id.* at 95-96); *A.F. of L.* v. *Swing,* 312 U. S. 321, 325 (1941); *Murdock* v. *Pennsylvania,* 319 U. S. 105, 115 (1943); *Thomas* v. *Collins,* 323 U. S. 516 (1945) (" * * * the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment * * * that priority gives these liberties a sanctity and a sanction not permitting dubious intrusions." *Id.* at 529-530); *Marsh* v. *Alabama,* 326 U. S.

---

[37] *Cf.* Mr. Justice Goldberg, concurring in *Griswold* v. *Connecticut, supra,* at 492: "As any student of this Court's opinions knows, this Court has held, often unanimously, that the Fifth and Fourteenth Amendments protect certain fundamental personal liberties from abridgment by the Federal Government or the States. [Citing cases.]"

501, 509 (1946); *United States* v. *C.I.O.*, 335 U. S. 106 (1948) ("The presumption rather is against the legislative intrustion into these domains." *Id.* at 140; concurring opinion, Rutledge, *J.*).

The Government argues that the enactment of the statute is a reasonable exercise of the powers of Congress to raise armies. But substantive due process imposes limitations "upon all powers of Congress, even the war power" *Galvan* v. *Press, supra.*[38] The test continues to be whether the legislative action is "arbitrary or without reasonable relation" to some competent legislative purpose. *Meyer* v. *Nebraska, supra.*

That the enactment of the statute was *ab initio* arbitrary and for an improper legislative purpose, is evident from a review of the legislative history, *supra.* That it bears no legitimate or reasonable relationship to the war power is demonstrated by the prior discussion of legislative purposes advanced by the Government, the opinion below,[39] and other public facts of which this Court can take notice.

---

[38] Although war powers are broad, legislation enacted under such powers has been sustained, however, in cases where the courts have found a persuasive, rational relationship between the enactment and the economic and military conditions of war preparedness. See, e.g., *Arver* v. *United States,* 245 U. S. 366 (1918) (enactment of World War I conscription legislation while nation at war pursuant to Congressional declaration); *Yakus* v. *United States,* 321 U. S. 414 (1944) (authority to prescribe commodity prices); *Bowles* v. *Willingham,* 321 U. S. 503 (1944) (authority to prescribe maximum rents); *Lichter* v. *United States,* 334 U. S. 742 (1948) (renegotiation of profits from war contracts); *Woods* v. *Miller,* 333 U. S. 138 (1948) (rent control). In all of these cases, the legislation was essential either to increase the size of our armed forces or to make our economic resources available for the war effort.

[39] The Court of Appeals noted "the absence of any proper [purpose]" (R. 62, fn. 6).

The destruction of a Selective Service certificate by its bearer, in no way affects the economic or military capabilities of the United States. It is common knowledge that the Selective Service System, through the local boards, and various City, State and National Headquarters, maintains extensive records of each male American citizen. Perhaps the destruction of *these* records might endanger national security. To punish an individual citizen who destroys *his own* certificate as a form of public protest is to strike at conduct which is entirely too remote from the waging of and preparation for war.

The legislation was not sought by the Selective Service System. There were no hearings, and there is no indication in the legislative history that the views of the Selective Service System were solicited, or even of any concern to those who pushed through the amendment. Indeed, such evidence as there is of the views of the Selective Service System is that the legislation was completely unnecessary for the operation of the System. See *Philadelphia Evening Bulletin,* October 29, 1965, p. 5, where Lt. Gen. Lewis B. Hershey, Director of the System, is reported to have stated in a speech that the law was not necessary.

Nevertheless, the Government urges that the legislative determination should not be pronounced unconstitutional because it has some relationship to a proper purpose. It is interesting to note that very similar language was used by the Supreme Judicial Court of the Commonwealth of Massachusetts in a pre-*Stromberg* decision which upheld the constitutionality of the Massachusetts red flag law.[40]

---

[40] *Commonwealth* v. *Karvonen,* 219 Mass. 30, 32-33 (1914):

> "Its [the legislature's] determination in this regard cannot be pronounced by the courts contrary to the fundamental law, as being arbitrary or unreasonable, or as having clearly no relation to the ends for which the police power may be exercised."

Respondent submits that this Court is not being asked to exercise legislative judgment. It is being asked to exercise the recognized judicial function of declaring a statute to be unconstitutional as beyond Congressional power.

POINT IV

The judgment of the Court of Appeals in holding respondent guilty of a violation of the regulation proscribing non-possession, for which he was not indicted, notwithstanding its holding that the burning statute was unconstitutional, is invalid.

A. *The Court of Appeals incorrectly applied the lesser included offense theory, as the Government concedes in this Court.*

The Court of Appeals held that F. R. Crim. P. 31(c) provided the basis for a conviction for non-possession after it had held the "burning" statute unconstitutional. As the Government correctly concedes "The statutory crime of draft card destruction is not a 'greater offense' than the . . . offense of non-possession, since the punishment for the commission of either offense is identical. . . ." (Brief, p. 32).[41]

The parameters of the lesser offense doctrine have been delineated by this Court in *Sansone* v. *U. S.*, 380 U. S. 343, 349-350 (1965):

---

[41] That such a different degree of punishment is an indispensable element of the doctrine of lesser-included offense is clear from the very language of Rule 31(c) and the fact that no decision wherein the "lesser-included" crime did not in fact have a less severe penalty has been found by respondent's counsel. Cf. 27 Am. Jur. 105, 193, 194.

> "The basic principles controlling whether or not a lesser-included offense charge should be given in a particular case have been settled by this Court. Rule 31 (c) of the Federal Rules of Criminal Procedure provides, in relevant part, that the 'defendant may be found guilty of an offense necessarily included in the offense charged.' Thus, '[i]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie[s] it . . . [is] entitled to an instruction which would permit a finding of guilt of the lesser offense.' *Berra* v. *United States, supra,* at 134. See *Stevenson* v. *United States,* 162 U. S. 313. In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense. *Berra* v. *United States, supra; Sparf* v. *United States, supra,* at 63-64."

Thus "a chargeable lesser offense must be such that the greater offense cannot be committed without also committing the lesser. See, *e.g.,* Larson v. United States, 296 F. 2d 80 (10th Cir. 1961); James v. United States, 238 F. 2d 681, 16 Alaska 513 (9th Cir. 1956); Giles v. United States, 144 F. 2d 860, 10 Alaska 455 (9th Cir. 1944). This construction accords with the general common law rule. See 4 WHARTON CRIMINAL LAW and PROCEDURE §1888, p. 754 (1957)." *Crosby* v. *United States,* 339 F. 2d 743 (D. C. Cir. 1964).

There is a grave question as to whether the Court of Appeals had jurisdiction to convict respondent under the non-possession regulation, notwithstanding lack of indictment, after it set aside the conviction under the burning statute. Compare *U. S.* v. *Ciongole,* 358 F. 2d 439 (3d Cir. 1966) cited below (R. 64), with *U. S.* v. *Martini,* 42 F. Supp. 502 (S. D. Ala. 1941).[42]

Assuming the court below did have jurisdiction, however, it is necessary to examine the indictment. It charges that at a given time and place, respondent "willfully and knowingly did mutilate, destroy, and change by burning a certificate issued by Local Board No. 18, Selective Service System, Framingham, Massachusetts, pursuant to and prescribed by the provisions of the Universal Military Training and Service Act, as amended, and the rules and

---

[42] In *Martini,* the Court held:

> "Section 565 [Rule 31(c)] authorizing the verdict of guilty of a lesser offense contemplates that the verdict must be by the finder of fact to which the question of guilt is submitted. This means in this case the jury. Where the jury finds a defendant guilty of one offense it is not within the power of the court after setting aside the verdict to find the defendant guilty of a lesser offense. The statute is no doubt intended to cover offenses such as are included in the charge of murder, which embraces the lesser offenses of manslaughter—Sparf and Hansen v. United States, 156 U. S. 51, 63, 64, 15 S. Ct. 273, 39 L. Ed. 343, 347; Stevenson v. United States, 162 U. S. 313, 315, 16 S. Ct. 839, 40 L. Ed. 980, 981; Ball v. United States, 163 U. S. 662, 670, 16 S. Ct. 1192, 41 L. Ed. 300, 303; or of burglary and felonious breaking which includes larceny—United States v. Dixon, Fed. Cas. No. 14,968; United States v. Read, Fed. Cas. No. 16,126. If the defendants had been charged with a violation of Section 193 they would have had an opportunity to introduce evidence which was not pertinent to the charge under Section 502. There is testimony in the record which was irrelevant under Section 193 but as to which the defendants raised no objection on the trial because they were being prosecuted under Section 502 as to which such testimony was relevant." 42 F. Supp. at 57.

regulations promulgated thereunder, to wit, a Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App. United States Code, Section 462(b)."

No contention is made that, constitutional questions aside, this language is not technically adequate to charge a violation of subsection (b)(3), the burning statute. However, it would seem to lack three elements necessary to charge non-possession under subsection (b)(6).[43]

First, there is no allegation that respondent was required to register under the Selective Service System. Even assuming he is adequately identified as a male, there is nothing to show that he was not a boy of 17 or an old man of 85, neither of whom would ever have been required to register. See 50 App. U. S. C. §453. Nor can it be rationally assumed that Congress intended the amended subsection (b)(3) to apply only to military age men.

Second, there is no allegation that respondent burned his own registration certificate. Rather he is charged with burning "*a* Registration Certificate" (emphasis supplied); language which would quite obviously encompass the destruction of anyone else's certificate. It is obviously essential to a non-possession charge that the certificate burned be the defendant's own. Should he burn another's card while his own remains securely in his wallet, he surely cannot be convicted of non-possession.

Third, there is no allegation that respondent ever lost possession of his card. It is not alleged that he did "totally

[43] For an example of a non-possession indictment, see *United States* v. *Smith*, 249 F. Supp. 515, 520, ftnte. 4 (S. D. Iowa, 1966, aff'd 368 F. 2d 529 (8th Cir. 1966). This particular count was held faulty for failure to include the word "knowingly" but the Court made no suggestion it was otherwise defective).

mutilate, destroy and change by burning" a certificate. As both the Court of Appeals and the Government have agreed—"a burning in some circumstances would not violate the possession requirement." (R. 71, Government's petition for Cert., p. 7.) For example, one who burns the blank corners of a certificate would still be in possession of the certificate but would nevertheless be an apparent violator of the burning proscription.

To summarize, the test of whether an offense is "necessarily included in the offense charged" turns upon the language of the indictment and the present indictment lacks at least three of the elements to charge non-possession in violation of subsection (b)(6). Thus Rule 31(c), and the doctrine of lesser-included offense is clearly inapplicable. Accordingly the conviction should be reversed and the indictment dismissed.

B. *The Government's contention that respondent should be found guilty by this Court on another theory is without merit.*

Realizing that the lesser-included offense doctrine was improperly relied upon by the Court of Appeals, the Government concedes this point and attempts to fashion its own rationale for allowing a defendant to be convicted upon a charge (other than a lesser-included one) for which he was not indicted. This is violative of the Fifth Amendment and contradicts a well-established line of decisions of this Court.

As a preface to this argument the government tries to suggest that respondent actually was indicted for non-possession. "In its entirety, the indictment may fairly be read as encompassing the charge of non-possession." (Brief, p.

32.) The short answer to this suggestion is that if the government wished to indict a registrant for both the offense of burning and the offense of non-possession then a two count indictment might have been sought, see *U. S.* v. *Smith,* 249 F. Supp. 515, 520 (S. D. Iowa 1966), aff'd 368 F. 2d 529 (8th Cir. 1966). In *Smith,* after a first count for "burning" that was essentially identical to the indictment herein, Count II was specified:

> "On or about the 22nd day of October, 1965, at Iowa City, in the Southern District of Iowa, STEPHEN LYNN SMITH, being a person required to present himself for and submit to registration with the Selective Service System of the United States of America, and being so registered, did fail to have in his personal possession the registration certificate issued to him by the Selective Service System of the United States of America in violation of Title 50 App., Section 460 United States Code, and the regulations promulgated pursuant thereto." *U. S.* v. *Smith, supra,* at 520, fn. 4.

The palpable difference between the notice provided the defendant in *Smith* and respondent regarding the non-possession offense demonstrates that the indictment herein was for burning and *not* for non-possession. The purpose of the indictment is to give the defendant fair notice of the charge against him in order that he may be able to best prepare for his defense. *Russell* v. *U. S.,* 369 U. S. 749 (1962); *Kelly* v. *United States,* 370 F. 2d 227 (D. C. Cir. 1966); *Stirone* v. *U. S.,* 361 U. S. 212 (1960); *Cole* v. *Arkansas,* 333 U. S. 196 (1948); *DeJonge* v. *Oregon,* 299 U. S. 353, 362 (1937). Moreover, the suggestion that the reference to "rules and regulations promulgated thereunder" was an

allusion to the regulation proscribing non-possession and therefore was sufficient to indict respondent for its violation is a rather flagrant violation of the well-established rule that mere quotation of statutory language does not set forth a proper indictment. *The Schooner Hoppet* v. *U. S.*, 7 Cranch 389 (1813); *Evans* v. *U. S.*, 153 U. S. 584 (1893); *Russell* v. *U. S., supra.* In *The Schooner Hoppet,* Chief Justice Marshall stated:

> "It is not controverted that in all proceedings in courts of common law, the allegation that the act charged was committed in violation of law, or *of the provisions of a particular statute* will not justify condemnation, unless, independent of this allegation, a case be stated which shows that the law has been violated. The reference to the statute may direct the attention of the court, and of the accused, to the particular statute by which the prosecution is to be sustained, but forms no part of the description of the offense." 7 Cranch at 393. (Emphasis added.)[44]

---

[44] More recently, the vitality of these principles were vigorously reaffirmed in *U. S.* v. *Russell, supra*:

> "It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,—it must descend to particulars.' *United States* v. *Cruikshank,* 92 U. S. 542, 558. An indictment not framed to apprise the defendant 'with reasonable certainty, of the nature of the accusation against him . . . is defective, although it may follow the language of the statute.' *United States* v. *Simmons,* 96 U. S. 360, 362. 'In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; . . .' *United States* v. *Carll,* 105 U. S. 611, 612. 'Undoubtedly

In its charge to the jury, the trial court stated: "Now, the crime charged is the burning of a draft card. . . . We are not concerned here with anything other than this statute which prohibits the burning or mutilating of a draft card" (R. 34). The Court of Appeals, although affirming the conviction, evinced some doubt as to the soundness of the indictment by its final remark "that any future indictments should be laid under subsection (b)(6) of the statute" (R. 65).[45]

The Government then cites *Williams* v. *U. S.*, 168 U. S. 382 (1897) and *U. S.* v. *Hutcheson,* 312 U. S. 219 (1941), apparently in support of the proposition that "In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purports to lay the charge is immaterial" (p. 33). These are indeed appropriate citations. In *Williams* this Court held that "The indorsement on the margin of the indictment constitutes no part of the indictment and does not add to or weaken the legal force

---

the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.' *United States* v. *Hess,* 124 U. S. 483, 487. See also *Pettibone* v. *United States,* 148 U. S. 197, 202-204; *Blitz* v. *United States,* 153 U. S. 308, 315; *Keck* v. *United States,* 172 U. S. 434, 437; *Morissette* v. *United States,* 342 U. S. 246, 270, n. 30. Cf. *United States* v. *Petrillo,* 332 U. S. 1, 10-11. That these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7 (c) of the Federal Rules of Criminal Procedure, is illustrated by many recent federal decisions." 369 U. S. at 765-766.

[45] That the Government also had some doubts as to the validity of the indictment to sustain a conviction for non-possession is evident from its Memorandum in response to the cross-petition for certiorari in No. 233, p. 3.

of its averments. We must look to the indictment itself." *Id.* at 389.

In *Williams,* the body of the indictment was substantial and sufficient. Here, not only is there no direct mention of the section number of the non-possession regulation, but the body of the indictment itself does not even suggest the necessary allegations for a non-possession indictment. Moreover, these decisions seem at the very most to support the proposition that an indictment is not demurrable if its sole defect is failure to properly designate the statute. See Government's Memorandum in Response to Cross-Petition in No. 233, p. 3.

C. *The action by the Court of Appeals, as well as the proposal of the Government in this Court, is a denial of due process to a defendant in a criminal case, in violation of the principle laid down in* Cole v. Arkansas, *333 U. S. 196 (1948).*

Finally, the Government argues that the jury verdict of guilty necessarily included the finding that the Respondent violated the non-possession statute. Although stating that the crime charged was the violation of the statute proscribing burning of the draft card and nothing else (R. 34), the Court charged the jury that the two elements the government had to prove beyond a reasonable doubt were "one, that the defendant O'Brien burned his draft card and two, that he did it intentionally knowing that it was a wrongful act" (R. 34). As we have indicated, the jury could have convicted respondent of burning without finding three essential elements of the non-possession charge. The court's charge did not even put in issue the extent of burning or whether or not respondent was subject to the Selective Service Act.

But even if every fact necessary for a non-possession conviction was inherent in the burning verdict, the conviction for an offense without an indictment is violative of the Fifth Amendment. The contention of the Government that the sufficiency of the proof, rather than the sufficiency of the indictment determines the validity of the conviction is not a new one. Indeed, this very question was carefully considered by Chief Justice Marshall in *The Schooner Hoppet* v. *United States,* 7 Cranch 389 (1813):

> "The rule that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded, should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced.
>
> The reasons for this rule are,
>
> 1st. That the party accused may know against what charge to direct his defense.
>
> 2. That the court may see with judicial eyes that the fact, alleged to have been committed, is an offense against the laws, and may also discern the punishment annexed by law to the specific offense. . . . It is therefore a maxim of the civil law that a decree must be *secundum alegata* as well as *secundum probata.* It would seem to be a maxim essential to the due administration of justice in all courts." *Id.* at 394-395.

It is axiomatic that "conviction upon a charge not made would be a sheer denial of due process." *DeJonge* v. *Oregon,* 299 U. S. 353, 362 (1937); *In re Oliver,* 333 U. S. 257 (1948);

Cole v. *Arkansas, supra; Stirone* v. *U. S.,* 361 U. S. 212 (1960). *Cole* is simply an outstanding example of a line of cases establishing a defendant's constitutional right to be informed of the charge against him by way of indictment and his entitlement to a trial on that charge. Thus the attempt to factually distinguish *Cole* is misplaced. As this Court stated in *Cole*:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. In re Oliver, 333 U.S. 257, 68 S.Ct. 499, and cases there cited. If, as the State Supreme Court held, petitioners were charged with a violation of § 1, it is doubtful both that the information fairly informed them of that charge and that they sought to defend themselves against such a charge; it is certain that they were not tried for or found guilty of it. It is as much a violation of process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. De Jonge v. State of Oregon, 299 U.S. 353, 362, 57 S.Ct. 255, 259, 81 L.Ed. 278." 338 U. S. at 201.

The decisions of this Court in *Shuttlesworth* v. *City of Birmingham,* 382 U. S. 87 (1965) and *Ashton* v. *Kentucky,* 384 U. S. 195 (1966), as well as *Cole* v. *Arkansas, supra* require reversal if the court finds that the burning statute is unconstitutional. In *Shuttlesworth,* the Alabama Supreme Court ultimately narrowed what had, at the time of trial, been a clearly unconstitutional ordinance. Thus when

the case reached this Court, the statute could pass constitutional muster. This Court reversed, however, because it was "unable to say that the Alabama courts in this case did not judge the petitioner by an unconstitutional construction of the ordinance". 382 U. S. at 92. Here, as there, it is impossible to tell whether or not the trial court and jury found respondent guilty of only the conduct that was constitutionally protected. Perhaps the jury found nothing more than intent to wilfully burn someone's card and some actual burning. Perhaps they also were influenced by a charge which reflected the same impermissible considerations as those which caused the enactment of an unconstitutional statute.[46]

The Government's contention and the holding of the Court of Appeals is unconstitutional for yet another reason. An important corollary of the right to be charged by sufficient indictment is the rule that a court does not have the power to enlarge an indictment.

> "Ever since *Ex parte Bain,* 121 U. S. 1, was decided in 1887 it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself."
>
> "The *Bain* case, which has never been disapproved, stands for the rule that a court cannot permit a de-

[46] The Court of Appeals felt that a remand was necessary for resentencing out of "fairness to the defendant" "upon considerations affirmatively divorced from impermissible factors." R. 65. If there is a danger that the trial court may have been influenced by "impermissible factors", surely there is even a greater danger that the jury may have been so influenced, thereby depriving respondent of his right to a fair trial. See *In re Oliver,* 333 U. S. 257 (1948), and cases cited therein.

> fendant to be tried on charges that are not made in the indictment against him. See also *United States* v. *Norris,* 281 U. S. 619, 622. Cf. *Clyatt* v. *United States,* 197 U. S. 207, 219, 220. Yet the court did permit that in this case. The indictment here cannot *fairly be read* as charging interference with movements of steel from Pennsylvania to other States nor *does the Court of Appeals appear to have so read it." Id.* at 217. (Emphasis added.) *Stirone* v. *U. S.,* 361 U. S. 212, 217 (1960) (emphasis added).

The Government's contention that notwithstanding the lack of indictment, respondent can be convicted of non-possession if all the elements of the offense of non-possession were contained in the government's proof and the Judge's charge to the jury cannot meet this constitutional test. Consequently, the judgment of the Court of Appeals finding respondent guilty of non-possession of his draft card should be reversed, and the indictment dismissed.

POINT V

Should this Court hold that either the lesser included offense doctrine was properly utilized by the Court of Appeals, or that the alternative route for holding the defendant guilty suggested by the Government is appropriate, it should first remand to the Court of Appeals for purpose of allowing full briefing and argument on the constitutionality of the non-possession regulation.

The decision of the Court below which held the statute in question unconstitutional, declared the respondent guilty of violation of another statute. We argue elsewhere that this secondary holding was improper—as the Government concedes—and that the respondent cannot be held guilty on the alternative theory advanced for the first time in this Court.

In order to reach its holding of guilt, the Court of Appeals assumed the constitutionality of the possession regulation, citing only *United States* v. *Kime,* 188 F. 2d 677 (7th Cir. 1957), cert. den. 342 U. S. 823.[47]

Respondent respectfully urges that such an assumption was not anticipated, and that, consequently, the non-possession question was not systematically presented and argued below by either side. We urge, therefore, that if this Court is disposed to rule on the constitutionality of non-possession it should first remand for a thorough development of the questions and their implications.

---

[47] The *Kime* case, while affirming the constitutionality of the possession regulation, is hardly a thorough exposition of the various constitutional questions presented. This Court has never ruled on these questions.

We make this remand suggestion even though our views on the constitutionality of the non-possession regulation are akin to those on the constitutionality of the anti-burning statute. There are certainly similarities between the two which compel the same constitutional treatment. If a draft card's public destruction as a form of peaceful protest constitutes protected symbolic speech, it is no less protected insofar as concerns the possession regulation. See Point II, *supra.* And if the infliction of punishment for this type of verbal conduct—or symbolic speech—by reason of a criminal conviction for willful destruction, is a deprivation of liberty without due process of law, the unconstitutional deprivation occurs no less where the conviction is for non-possession. See Point III, *supra.*

But there are differences as well as similarities. We have argued that the burning statute is uniquely unconstitutional because of the manifested unconstitutional intent. See Point I, *supra.* Obviously this factor would not exist in a case involving non-possession under the regulation.

On the other hand, there are constitutional arguments that may be considered in a non-possession prosecution, which would be absent in a prosecution for destruction or mutilation. To list a few: (1) Whether or not there is Congressional power to require virtually all male citizens (and many aliens as well) over the age of 18 to carry an "internal passport" for the rest of their lives.[48] (2) Whether or not there was a proper delegation of power by Congress to the President and the Selective Service System to enact such regulations, carrying with them the risk of

---

[48] There is nothing in the regulations which sets an age limit. *Cf.* discussion of South Africa's "pass laws" in Landis, South African Apartheid Legislation II, 71 Yale L. J. 437, 457-462 (1962).

felony punishment. Cf. *United States* v. *Laub,* 385 U. S. 475 (1967). (3) Whether there would be a constitutionally significant difference between the validity of such a statute as applied in a peaceful protest context, and as applied as part of a scheme to defraud.

Even though some of these questions may have been intimated in the course of the proceedings below, it is evident they were never extensively and systematically presented and considered. Respondent therefore respectfully urges that these questions are not yet ripe for disposition.[49] It is submitted that this case can be decided without ruling on these questions. However, if the Court feels otherwise, we urge a remand for full and proper development of these questions prior to consideration by this Court.

[49] There are pending prosecutions for non-possession in various stages of progress. See, e.g., *United States* v. *Palmour,* Cr. No. A-25,329 (U. S. D. C. for N. D. of Ga.).

POINT VI

Should the Court reverse the determination of unconstitutionality made by the Court of Appeals it should then hold that the sentence imposed on respondent was unconstitutional both in its term and in its manner of imposition.

A. ***The imposition of an indeterminate term of imprisonment with a maximum of six years of deprivation of liberty for the act of destruction or mutilation of a Selective Service certificate is punishment so shockingly excessive, disproportionate, cruel, unusual and inhumane as to constitute cruel and unusual punishment in violation of the Eighth Amendment.***

The maximum term of imprisonment authorized by the amended statute is five years. 50 U. S. C. App. §462(b). On the other hand, the maximum term authorized by the Federal Youth Corrections Act is six years, the first four of which may be under incarceration. 18 U. S. C. §5010(b), §5017(c). There appears to be a conflict between certain decisions which hold that under these circumstances the maximum permissible term is five years, and other decisions which hold that the whole six years authorized by the Youth Corrections Act is the maximum. Compare *Chapin* v. *United States,* 341 F. 2d 900 (10th Cir. 1965); *Workman* v. *United States,* 337 F. 2d 226 (1st Cir. 1964), with *Rogers* v. *United States,* 326 F. 2d 56 (10th Cir. 1963); *Tatum* v. *United States,* 310 F. 2d 854 (D. C. Cir. 1962).

But regardless of whether or not the District Court exceeded its jurisdiction by sentencing respondent to six years under the Youth Corrections Act, when the maximum

legal term of punishment was five years, in either case, such a lengthy term of punishment, for the act involved, is so excessive and disproportionate, as to constitute a violation of the Eighth Amendment.

The Eighth Amendment bars "cruel and unusual" punishment. The Chief Justice has explained, in *Trop* v. *Dulles,* 356 U. S. 86, 99-100, 101 (1958):

> "The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court. But the basic policy as reflected in these words is firmly established in the Anglo-American tradition of criminal justice."
>
> * * *
>
> "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

Constitutional limits to the length of punishment are established by the "standards of decency" of our society. In 1910, the then prevalent "standards of decency" compelled the striking down of a statute prescribing 12 to 20 years imprisonment for the entry of known false statements in a public record. *Weems* v. *United States,* 217 U. S. 349 (1910). *Cf. State ex rel. Garvey* v. *Whitaker,* 48 La. Ann. 527, 19 So. 457 (1896) (six years imprisonment for illegally picking flowers in a public park voided as cruel and unusual punishment because it shocked the conscience of the court); see *People* v. *Elliot,* 272 Ill. 592, 112 N. E. 300 (1916).[50]

---

[50] By 1947 the prevalent "standards of decency" had so evolved that four Justices of this Court held it would be cruel and unusual punishment to subject a capital convict to a second attempt at electrocution, the first having failed. *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459 (1947).

Although the Supreme Court has not explicitly reversed a conviction on Eighth Amendment grounds since *Weems,* a number of recent decisions have provided some insights. Thus, in *Trop* v. *Dulles, supra,* Mr. Justice Brennan's concurring opinion condemns punishment which he finds to be nothing "other than forcing retribution from the offender —naked vengeance." (*Id.* at 112.) And in *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 187 (1963), Mr. Justice Brennan restated his view that punishment was cruel and unusual, in violation of the Eighth Amendment, where it does not have a "rational or necessary connection" with the substantive evil at which it is presumably directed.

In *Robinson* v. *California,* 370 U. S. 660, 667 (1962), this Court reversed a conviction and 90 day sentence under a California statute which made it a criminal offense for a person to be addicted to the use of narcotics. Mr. Justice Stewart, for the majority, held:

> "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."

In determining contemporary "standards of decency" in Eighth Amendment terms, it will be helpful to compare the statute which is the subject of this indictment to the similar statutory provisions governing alien registration certificates. Had respondent been convicted of destroying an alien registration certificate, rather than a Selective Service System registration certificate, he would have been subject to disproportionately different punishment. Con-

viction of failure to possess an alien registration certificate is a misdemeanor carrying a maximum sentence of thirty days imprisonment and/or $100 fine. Immigration and Nationality Act of 1952, §264(c); 8 U. S. C. §1304(8).[51] An alien who wilfully fails to register, still a misdemeanor, is subject to a maximum sentence of six months imprisonment and/or $1,000 fine. *Ibid.*, §266(a); 8 U. S. C. §1306 (a). Only if the defendant has been found guilty of counterfeiting alien registration certificates, can he receive the felony punishment of up to five years imprisonment and/or $5,000 fine. *Ibid.*, §266(d); 8 U. S. C. §1306(d).

Prior to the 1965 amendment, the evil to which the statute seemed to be directed was the act of making an alteration or change in the registration certificate. Until the words "knowingly destroyed, knowingly mutilated" were added, there was little distinction in penalties between acts of counterfeiting and fraud in connection with alien registration certificates, and similar acts in connection with Selective Service System registration certificates.

It may be arguable that a five (or six) year penalty is not inappropriate for counterfeiting or similar fraudulent act in connection with a certificate issued by a government agency. But respondent's conviction, under this statute, has nothing to do with counterfeiting, fraud, stealth, deceit, or any other attempt to inveigle the government.

Respondent was sentenced to enormously heavy punishment for an act which, even if held to be within Congress' constitutional power, is considerably less heinous than the acts proscribed by the statute prior to the amendment.

---

[51] Similar misdemeanor punishment involving a maximum penalty of $100 and/or thirty days imprisonment is imposed for mutilation or defacement of the United States flag. 4 U. S. C. §3.

Such punishment, it is submitted, does not, in the words of this Court, "comport with the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles, supra,* at 101. It does not meet these standards because it is "so disproportionate to the offense committed as to shock the moral sense of the community * * *." 21 Am. Jur. 2d 564 [citing *Weems* v. *U. S., supra; Roberts* v. *Warden of Md. Penitentiary,* 206 Md. 246, 111 A. 2d 597 (1955); *State* v. *Evans,* 73 Idaho 50, 245 P. 2d 788 (1952); *Weber* v. *Commonwealth,* 303 Ky. 56, 196 S. W. 2d 465 (1946); *Cox* v. *State,* 203 Ind. 550, 181 N. E. 469 (1931)].[52]

B. ***The imposition of an indeterminate sentence of up to six years under the Federal Youth Corrections Act in punishment for the burning of a Selective Service registration certificate as a symbolic expression of protest against war, accompanied by statements of the sentencing judge that the duration of the confinement will depend on the defendant's changing his beliefs and associations, is an unconstitutional abridgment of freedom of expression and association protected by the First Amendment, and constitutes cruel and unusual punishment forbidden by the Eighth Amendment.***

The proceedings in the District Court on sentencing as revealed by the record (R. 35-47), disclose that the sentencing judge imposed a six-year maximum indeterminate sentence with the express intent that respondent would serve less than the maximum if he changed his beliefs and

[52] See *Rudolph* v. *Alabama,* 375 U. S. 889 (1963), opinion by Mr. Justice Goldberg (joined in by Mr. Justice Douglas and Mr. Justice Brennan) dissenting from denial of certiorari and arguing that certiorari should have been granted to consider, *inter alia,* whether death penalty for rape violates " 'evolving standards of decency' * * *" (*id.* at 890).

associations. The Court attempted to extract from respondent a disavowal of his philosophy of pacifism and his personal and organizational friendships and associations. See statement of the case, pp. 9-10, *supra.*

When the respondent remained steadfast, and refused to repudiate his friends, his organization (The Committee for Non-Violent Action), and his ideas, the Court imposed the maximum sentence. The Court expressed its hope that respondent might yet change "if you were removed from the influence of the[se] friends of yours" (R. 42). That the Court expressly conditioned the length of the indeterminate sentence on the respondent's changing his views and associations is candidly demonstrated by the warning that he would serve the full six years if "you are such a hardened case that they can't do anything with you" (R. 42).

The apparent purpose of an indeterminate sentence under the Federal Youth Corrections Act is to allow the prison authorities flexibility in "treatment" of youthful offenders. *United States* v. *Lane,* 284 F. 2d 935 (9th Cir. 1960). Treatment is defined as "corrective * * * guidance * * * designed to protect the public by correcting the antisocial tendencies of youth offenders." 18 U. S. C. §5006(g).

It is axiomatic that freedom of belief and association are protected by the First Amendment. *NAACP* v. *Alabama,* 357 U. S. 449 (1958); *Thomas* v. *Collins,* 323 U. S. 516 (1945). And it should be equally clear that a person convicted of a crime cannot have the terms and conditions of his incarceration and release conditioned upon his abandoning or changing his beliefs and associations. See *Jones* v. *Commonwealth,* 185 Va. 335, 38 S. E. 2d 444 (1946) (reversing disorderly conduct convictions of juveniles, "sentenced" to attend church and Sunday school each Sunday

for a year, on grounds of unconstitutionality of sentence under First Amendment).

A person under incarceration is obviously deprived of a great deal of his liberty, but he does not surrender all of his rights under the Constitution. He cannot be denied reasonable access to religious services of his own choice, where religious services are made available to other inmates, because of the unorthodoxy of his religion. *Pierce* v. *Lavalle,* 293 F. 2d 233 (2d Cir. 1961); *State* v. *Cubbage,* 210 A. 2d 555 (Del. 1965) (Black Muslims).

It would be plainly unconstitutional to condition the length of a prisoner's confinement to his abandoning his associations with the Black Muslims, or any other unorthodox religious group. It is similarly unconstitutional to condition the length of his confinement on his repudiation of his pacifist beliefs and associations. The imposition of unconstitutional conditions, particularly conditions impinging on freedom of belief and association, renders invalid governmental action which is otherwise valid. See *Speiser* v. *Randall,* 357 U. S. 513 (1958).

A defendant may be young enough to come within the ambit of special statutes dealing with the "treatment" or "rehabilitation" of juvenile or youthful offenders. But this does not mean that he can be deprived of the right to be fairly treated, *In re Gault,* 387 U. S. 1 (1967), and it certainly does not mean that a court can paternalistically force its own views on him. Juvenile courts may not order young persons to refrain from constitutionally protected civil rights demonstrations. *Griffin* v. *Hay,* 10 Race Rel. L. Rep. 111 (E. D. Va. 1965). See *In re Wright,* 251 F. Supp. 880 (M. D. Ala. 1965). Similarly, a Federal Court may not order a young pacifist, convicted of a Selective Service vio-

lation, to abandon his anti-war, anti-draft beliefs and associations, at the peril of serving the longest sentence which the Court can fashion.

It is submitted that such a sentence is not only a violation of First Amendment rights. It is likewise out of harmony with the "evolving standards of decency" that should characterize a civilized society, where freedom of belief and association are cherished. See *Trop* v. *Dulles, supra.* As such, it is cruel and unusual punishment, forbidden by the Eighth Amendment.

CONCLUSION

For the reasons stated, it is respectfully submitted as follows:

1. This Court should affirm so much of the judgment of the court below as held the statute unconstitutional.

2. So much of the judgment below as held the respondent guilty under the doctrine of lesser included offense should be reversed and the indictment dismissed either on the ground (a) that the doctrine of lesser included offense was not properly applied, (b) that due process considerations preclude the respondent's being held guilty under the theory advanced by the Government or any other theory; or (c) that the regulation penalizing non-possession is likewise unconstitutional.

3. In the alternative, if the Court affirms the holding below of unconstitutionality of the burning statute, it should not rule on the question of non-possession until such

question has been ruled on by the courts below, and for that purpose the case should be remanded.

4. If this Court should reverse the First Circuit's holding of unconstitutionality of the burning statute, it should review the constitutionality of the sentence in accordance with point VI *supra,* and for the reasons set forth therein it should reverse the judgment below on the grounds that the term and/or manner of sentencing were in violation of the Eighth and First Amendments.

MARVIN M. KARPATKIN
HOWARD S. WHITESIDE
MELVIN L. WULF
Attorneys for David Paul O'Brien

Of Counsel:

WILLIAM E. CRAIN
RHODA H. KARPATKIN
HENRY P. MONAGHAN
ELEANOR HOLMES NORTON
HENRY M. DI SUVERO
ROBERT S. ROBBIN

January 1968