Office-Supreme Court, U.S.
FILED
DEC 1 1967
JOHN F. DAVIS, CLERK

Nos. 232 and 233

In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, PETITIONER

v.

DAVID PAUL O'BRIEN

DAVID PAUL O'BRIEN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

FRANCIS X. BEYTAGH, JR.,
Assistant to the Solicitor General,

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

LoneDissent.org

INDEX

Page

Opinions below 1

Jurisdiction 2

Questions presented 2

Statute and regulations involved 3

Statement 4

Summary of argument 7

Argument:

I. There is no constitutional bar to an act of Congress which prohibits the knowing destruction or mutilation of a Selective Service certificate.. 12

A. The 1965 amendment to the Universal Military Service and Training Act has at most an incidental and remote impact on First Amendment guarantees 13

B. The 1965 amendment represents a reasonable exercise of Congress' power to facilitate the proper functioning of the Selective Service System 21

II. Even if the statute is unconstitutional, the court of appeals did not err in affirming respondent's conviction 31

Conclusion 36

CITATIONS

Cases:

Abrams v. *United States*, 250 U.S. 616 17
Adderley v. *Florida*, 385 U.S. 39 14
American Communications Ass'n, CIO v. *Douds*, 339 U.S. 382 21
Ashton v. *Kentucky*, 384 U.S. 195 20
Barenblatt v. *United States*, 360 U.S. 109 .... 21, 29
Berra v. *United States*, 351 U.S. 131 32
Brown v. *Louisiana*, 383 U.S. 131 16
Carlson v. *California*, 310 U.S. 106 16
Cole v. *Arkansas*, 333 U.S. 196 .... 11, 34, 35

LoneDissent.org

Cases—Continued Page

Communist Party v. *Subversive Activities Control Board*, 367 U.S. 1 .... 21, 22, 30
Cox v. *Louisiana*, 379 U.S. 536, 379 U.S. 559 .... 14, 20
Daniel v. *Family Security Life Insurance Co.* 336 U.S. 220 29
Dennis v. *United States*, 341 U.S. 494 14
Edwards v. *South Carolina*, 372 U.S. 229 .... 12, 18, 20
Flemming v. *Nestor*, 363 U.S. 603 30
Garner v. *Louisiana*, 368 U.S. 157 16
Giboney v. *Empire Storage Co.*, 336 U.S. 490 13
Gomillion v. *Lightfoot*, 364 U.S. 339 30
Gore v. *United States*, 357 U.S. 386 25
Griswold v. *Connecticut*, 381 U.S. 479 22
Grosjean v. *American Press Co.*, 297 U.S. 233 30
Kennedy v. *Mendoza-Martinez*, 372 U.S. 144 30
Konigsberg v. *State Bar of California*, 366 U.S. 36 21
Kovacs v. *Cooper*, 336 U.S. 77 18
Lane v. *Wilson*, 307 U.S. 268 30
Lassiter v. *Northampton County Board of Elections*, 360 U.S. 45 30
Martin v. *Struthers*, 319 U.S. 141 .... 13, 17, 22
McCray v. *United States*, 195 U.S. 27 30
Milk Wagon Drivers Union v. *Meadowmoor Dairies*, 312 U.S. 287 17
N.A.A.C.P. v. *Alabama*, 357 U.S. 449 .... 21, 30
N.A.A.C.P. v. *Button*, 371 U.S. 415 .... 17, 20, 21
Panama Refining Co. v. *Ryan*, 293 U.S. 388 25
People v. *Stover*, 12 N.Y. 2d 462, appeal dismissed, 375 U.S. 42 18
Roth v. *United States*, 354 U.S. 476 21
Sansone v. *United States*, 380 U.S. 343 32
Schneider v. *State*, 308 U.S. 147 .... 13, 19
Schenck v. *United States*, 249 U.S. 47 14
Smith v. *United States*, 368 F.2d 529 15
Souzinsky v. *United States*, 300 U.S. 506 30
Stromberg v. *California*, 283 U.S. 359 16
Tenney v. *Brandhove*, 341 U.S. 367 30
Thornhill v. *Alabama*, 310 U.S. 588 16
United States v. *Beacon Brass Co.*, 344 U.S. 43 25
United States v. *Grimaud*, 220 U.S. 506 25

LoneDissent.org

Cases—Continued | Page

United States v. *Hutcheson*, 312 U.S. 219 33
United States v. *Kahriger*, 345 U.S. 22 29
United States v. *Kime*, 188 F.2d 677, certiorari denied, 342 U.S. 823 22
United States v. *Miller*, 367 F.2d 72, certiorari denied, 386 U.S. 911 ..... 14, 23, 30
United States v. *Petrillo*, 332 U.S. 1 20
United States v. *Rumely*, 345 U.S. 41 31
United States v. *Seeger*, 380 U.S. 163 31
United States v. *Turner*, 246 F.2d 228 13
Walker v. *City of Birmingham*, 388 U.S. 307 ..... 14, 18
West Virginia Board of Education v. *Barnette*, 319 U.S. 624 16
Williams v. *United States*, 168 U.S. 382 33
Wright v. *Rockefeller*, 376 U.S. 52 30
Zemel v. *Rusk*, 381 U.S. 1 18

Constitution, statutes and regulations:

United States Constitution:

First Amendment 7, 8, 9, 12, 13, 15, 17, 18, 21
Fifth Amendment 20

18 U.S.C. 443 20
18 U.S.C. 506 19
18 U.S.C. 2071 19
18 U.S.C. 5010(b) 4
26 U.S.C. 6001 24
26 U.S.C. 7203 24
Universal Military Training and Service Act, Section 12(b), 50 U.S.C. App. 462(b), as amended by 79 Stat. 786 ..... 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 19, 20, 21, 22, 24, 25, 27, 31, 32, 33
32 C.F.R. 1617.1 ..... 3, 6, 13, 22, 25, 31
32 C.F.R. 1617.11-1617.12 26
32 C.F.R. 1617.11(b) 27
32 C.F.R. 1623.5 ..... 3, 6, 13, 22, 31

Miscellaneous:

111 Cong. Rec. 19746 ..... 24, 25, 28
111 Cong. Rec. 19871 ..... 28, 29

LoneDissent.org

Miscellaneous—Continued Page

111 Cong. Rec. 19872 29
111 Cong. Rec. 20433 28
111 Cong. Rec. 20434 28
H. Rep. No. 747, 89th Cong., 1st Sess. 22, 24, 28
S. Rep. No. 589, 89th Cong., 1st Sess. 24, 27
Kalven, *The Negro and the First Amendment* (1965) 14

LoneDissent.org

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 232

UNITED STATES OF AMERICA, PETITIONER

v.

DAVID PAUL O'BRIEN

No. 233

DAVID PAUL O'BRIEN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals (R. 60-65, 67-69) are reported at 376 F. 2d 538. The memorandum opinion of the district court (R. 57) is unreported.

LoneDissent.org

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1967 (R. 66). A petition for rehearing in No. 233 was denied on April 28, 1967 (R. 72). On May 3 and 15, 1967, respectively, Mr. Justice Fortas extended the time for filing both petitions for writs of certiorari to and including June 9, 1967. The petition in No. 232 was filed on June 8, 1967 and the petition in No. 233 on June 9, 1967. Both petitions were granted on October 9, 1967 (R. 72-73; 389 U.S. 814). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. In No. 232, whether the 1965 amendment to the Universal Military Training and Service Act (50 U.S.C. App. 462(b)(3)), making it a crime knowingly to destroy or mutilate a Selective Service certificate, is a constitutional exercise of congressional power.

2. If the Court were to decide that the amendment is unconstitutional, it would then reach the question raised in No. 233, *i.e.*, whether, despite the invalidity of the statute, the court of appeals properly affirmed respondent's conviction on the ground that the draft-card burning in this case also violated an administrative regulation requiring that a registrant retain his registration certificate in his "personal possession at all times."

LoneDissent.org

STATUTE 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, provides:

> (b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates*, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title [said sections], or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title [said sections] or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or posses-

LoneDissent.org

sion of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury. [1965 amendment italicized.]

32 C.F.R. 1617.1 provides in pertinent part:

> Every person required to present himself for and submit to registration must, after he is registered, have in his personal possession at all times his Registration Certificate (SSS Form No. 2) prepared by his local board which has not been altered and on which no notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. * * *

32 C.F.R. 1623.5 provides in pertinent part:

> Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate * * * a valid Notice of Classification (SSS Form No. 110) issued to him showing his current classification. * * *

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, respondent[1]

[1] Petitioner in No. 233 is herein referred to as respondent.

LoneDissent.org

was convicted of knowingly destroying and mutilating his Selective Service Registration Certificate, in violation of Section 12(b)(3) of the Universal Military Training and Service Act, 50 U.S.C. App. 462(b)(3), as amended in August 1965 by 79 Stat. 586 (R. 3, 35). On July 1, 1966, he was sentenced under the Federal Youth Corrections Act, 18 U.S.C. 5010(b), to the custody of the Attorney General for a maximum period of six years for supervision and treatment (R. 58).

The evidence—which is not in dispute—reveals, in brief, that on the morning of March 31, 1966, respondent and three others burned small white cards (apparently their Selective Service Registration Certificates) on the steps of the South Boston Courthouse (R. 3, 8-10, 11-12, 14-16, 29-30; Gov't Exhs. 2-A, 2-B, see R. 52-53). A sizable crowd, which included several F.B.I. agents and representatives of the news media, witnessed the event. Immediately thereafter members of the crowd began attacking respondent and his companions. One F.B.I. agent ushered respondent to safety inside the courthouse. Respondent was thereupon interviewed by that agent and a second agent. After having been advised of his right of silence and right to counsel, he stated that he had burned his draft card because of his beliefs, knowing that he was violating federal law. He showed the agents, and permitted them to photograph, the "charred remains" of the certificate (R. 11-12, 15-16; see R. 52-53). Respondent, who represented himself at trial, did not contest the fact that he had burned his draft card (R. 29). He stated in argument to the

LoneDissent.org

jury (he did not testify as a witness) that he burned his card publicly in order to influence others to adopt his anti-war beliefs (R. 29).

Before trial, counsel representing respondent had filed a motion to dismiss the indictment on the ground that the 1965 amendment to 50 U.S.C. App. 462(b)(3) was unconstitutional (R. 3-6). That motion was denied by the trial court (R. 57),[2] but the contention was sustained on appeal. The court of appeals noted that, when the 1965 amendment was adopted, a regulation of the Selective Service System (32 C.F.R. 1617.1; see also 32 C.F.R. 1623.5) required Selective Service registrants to keep their registration certificates in their "personal possession at all times," and that therefore the knowing violation of the regulation was a crime under 50 U.S.C. App. 462(b)(6) (R. 61). Acknowledging that the regulation had a legitimate purpose, the court of appeals reasoned that no separate or valid function could be served by the 1965 statutory amendment, since conduct punishable under it was also punishable, and to the same degree, under the "possession" regulation. The court found that, in light of the existence of that regulation, the statute must have been "directed at public as distinguished from private destruction"

---

[2] In a memorandum opinion, the trial court stated that the statute does not, on its face, deprive persons of any constitutional rights, that the court was not "competent to inquire into the motives of Congress in passing this statute * * *" and "that, on its face, this statute is an entirely reasonable exercise of the power of Congress to raise armies in the defense of the United States * * *," and thus "meet[s] the standards of substantive due process" (R. 57).

LoneDissent.org

(R. 62-63), and it concluded that, in thus "singling out persons engaging in protest for special treatment," the law violated the First Amendment (*ibid.*). The court ruled, however, that respondent's conviction should be affirmed under the statutory provision making violation of the "possession" regulation a crime. It regarded that violation as included within the offense charged, noting that the proof at trial had clearly established knowing non-possession by respondent of his registration certificate. Because of the possibility that, "in imposing sentence, the [district] court took into consideration what the statute, by virtue of the amendment, indicated to be aggravating circumstances * * *," the court of appeals ordered the case remanded for resentencing in light of its opinion (R. 64-65).

In denying a petition for rehearing (R. 67-69), the court below reiterated its view that respondent could properly be convicted of wilful non-possession of a certificate on the facts of this case, even though there might be occasions when the particular mode of mutilation of a certificate would not violate the requirement of personal possession (R. 70-72).

SUMMARY OF ARGUMENT

I

The 1965 amendment to the Universal Military Training and Service Act proscribes the *act* of draft-card destruction, and is in no direct way aimed at restricting speech. Since the statute does not inhibit any mode of expression traditionally afforded protec-

LoneDissent.org

tion under the First Amendment, its constitutional validity turns on whether the legitimate purpose served by the legislation—*i.e.*, to facilitate the effective operation of the Selective Service System—outweighs whatever incidental effect the statute might have in limiting the expression of dissent. Since any intrusion on First Amendment rights which results from the 1965 amendment's enforcement is minimal, the statute should be upheld as a proper exercise of congressional power.

A. Draft-card destruction by burning, however labeled, is *conduct*, not speech. Terming that conduct "symbolic speech" does not transform it into an activity entitled to the same kind of constitutional protection given to words and to other modes of expression closely related to speech. Rather, the decisive consideration is whether the activity fits within this Court's decisions which have treated certain types of conduct as though they were in fact speech. Those decisions show that a limited class of activities will be treated as speech where the acts are inextricably tied to oral expression or where no reasonably effective alternative means of communication is available.

The burning of a document which has a valid place in the operation of the Selective Service process hardly qualifies under these decisions for protection as "symbolic speech". Such conduct has no time-honored, ritualistic connotations. Nor is it an essential means for the wide dissemination of a dissenting point of view, since an array of effective, alternative modes of expression exist. Draft-card burning undeniably adds

LoneDissent.org

a histrionic element to protest activity. But the First Amendment does not protect acts otherwise reasonably within the power of Congress to proscribe simply because they are theatrical or dramatic in character.

The 1965 amendment is narrowly drawn, with precision and clarity, to proscribe a specific type of conduct. A variety of statutes use similar language to prohibit the destruction of public property. The statutory words convey a definite warning as to the activity prohibited, and in no sense suffer from overbreadth or vagueness. None of the decisions which have struck down statutes on such grounds thus have relevance here.

B. The 1965 amendment serves a reasonable and justifiable purpose. The statutory prohibition of draft-card destruction is in aid of the administrative task of procuring and classifying manpower for military service. It thus provides a speedy method of identifying the Selective Service registrant, serves as a record of registration and classification, and reminds the registrant of various obligations. Since the draft card is a useful tool in the administrative process, Congress could properly decide to prohibit its destruction or mutilation.

Although the court of appeals recognized the administrative significance of requiring a registrant to retain and carry his draft card, it reasoned that, since existing regulations require possession of the card at all times, the only purpose of the prohibition on destruction was to inhibit dissent rather than ban conduct. In this respect, the court overlooked the

LoneDissent.org

fact that Congress need not rely upon administrative regulations to prohibit conduct which it seeks to prevent. As the legislative history of the 1965 amendment shows, Congress determined that an express statutory bar, in contrast a regulation requiring possession, would be likely to have a greater deterrent impact with respect to acts considered disruptive of the orderly operation of the Selective Service System. Congress is not restricted from exercising its legislative authority in a particular way simply because its enactment overlaps an existing administrative sanction. Nor are destruction or mutilation and non-possession of a draft card necessarily coextensive in all situations.

The legislative history of the 1965 amendment reveals no underlying congressional motive to stifle dissent. It shows only that, during the limited consideration of the legislation, three members of Congress indicated that the proposed amendment would serve not only a Selective Service purpose but would also put Congress on record to the effect that draft-card burning was unpatriotic. This is an appropriate occasion, particularly in light of the near-unanimous passage of the amendment, for application of the familiar principle of non-inquiry into the complex of motives which might have led to the exercise of congressional power.

II

While it found the statutory bar unconstitutional, the court of appeals nonetheless sustained petitioner's conviction on the ground that by burning his draft

LoneDissent.org

card he also violated the regulation requiring that a registrant have his draft card "in his personal possession at all times." If the Court reaches the question as to the validity of this holding—which it need do only if it finds the statute unconstitutional—it should uphold the result reached by the court below.

Neither the indictment, the government's evidence nor the trial court's instructions raised any question that by convicting the petitioner of draft-card destruction, the jury would not also be convicting him of failure to possess his card. Thus, in following the trial court's instructions—that in order to convict petitioner it had to find that he burned his draft card knowing that it was a wrongful act—the jury also must have found that petitioner did not possess his card.

Cole v. *Arkansas*, 333 U.S. 196, is inapposite. That case held only that a conviction could not be sustained on appeal under a statutory provision which, in light of the trial court's instructions, the jury could not have relied upon in convicting the defendants. Here, on the other hand, petitioner burned his draft card until it was only "charred remains". Without regard, then, to whether non-possession is technically speaking a lesser included offense of destruction or mutilation, a conviction for knowing destruction necessarily encompassed a finding of non-possession.

LoneDissent.org

ARGUMENT

I. There Is No Constitutional Bar to an Act of Congress Which Prohibits the Knowing Destruction or Mutilation of a Selective Service Certificate

The central issue in this case is the validity under the First Amendment to the United States Constitution of the 1965 amendment to the Universal Military Training and Service Act of 1948.[3] We stress at the outset that the statutory provision is neither directed at speech in its "most pristine and classic form" (*Edwards* v. *South Carolina*, 372 U.S. 229, 235), nor at any other recognized mode of expression traditionally afforded protection under the First Amendment. Rather, the legislative command brings within its proscription only discrete and specific conduct—conduct which Congress, in the exercise of its legislative judgment, could reasonably conclude would impair the effective operation of the Selective Service System if allowed to go unrestrained. The existence of this legitimate congressional purpose, we submit, should be held conclusive on the question of constitutionality. Since the statute has at most an ancillary and minimal impact on the expression of dissent, its function of facilitating the operation of the Selective Service system justifies the enactment as a proper exercise of congressional power.

---

[3] This is the issue posed in No. 232. The issue raised in the cross-petition (No. 233), upon which certiorari was also granted, concerns the propriety of the court of appeals' upholding of respondent's conviction, assuming the unconstitutionality of the statute. This issue need by reached only if the Court were to decide that the statute is unconstitutional. We discuss that question *infra*, pp. 31-36.

LoneDissent.org

A. *The 1965 amendment to the Universal Military Service and Training Act has at most an incidental and remote impact on First Amendment guarantees.*

As with other provisions of the statute to which it was added (see *supra*, pp. 3-4), the 1965 amendment to the Universal Military Training and Service Act is directed only at specific conduct—*i.e.*, the knowing destruction and mutilation of Selective Service Registration Certificates.[4] Accordingly, its validity under the First Amendment must be judged in light of the familiar distinction between legislation directed at speech *per se* and legislation which seeks, as here, to prohibit the performance of particular acts. However labeled, "draft-card" destruction by burning is *conduct*. As such, it is not entitled to the same kind of protection—if entitled to any protection at all—that has traditionally been accorded to speech and other closely allied modes of expression. See, *e.g.*, *Schneider* v. *State*, 308 U.S. 147, 160-161; *Martin* v. *Struthers*, 319 U.S. 141, 143; *Giboney* v. *Empire*

[4] Throughout this brief we use the term "registration certificate" and "draft card" interchangeably to designate both the "Registration Certificate" given to the registrant at the time he first registers for the draft and the "Notice of Classification" which is sent to him any time there has been a change in his classification. While 50 U.S.C. App. 462(b) does not specifically refer to the "Notice of Classification", it does explicitly bring within its terms any certificate "issued pursuant to * * * rules or regulations promulgated hereunder." The Selective Service Regulations (which are such "rules") provide for the issuance of the "Notice of Classification" as well as the "Registration Certificate" and require the registrant to have both documents "in his personal possession at all times" (32 C.F.R. 1617.1, 1623.5). See *United States* v. *Turner*, 246 F. 2d 228, 230 (C.A. 2).

LoneDissent.org

Storage Co., 336 U.S. 490, 498, 502; *Cox* v. *Louisiana*, 379 U.S. 536, 555, 379 U.S. 559, 563; *Adderley* v. *Florida*, 385 U.S. 39, 47-48; *Walker* v. *City of Birmingham*, 388 U.S. 307, 315, 316. The distinction was recently expressed by this Court in *Cox* v. *Louisiana, supra*, 379 U.S. at 555:

> We emphatically reject the notion * * * that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech. * * *

It is urged, however, that while the destruction or mutilation of draft cards admittedly constitutes conduct, it involves that special kind of conduct which falls within the category of "symbolic speech". So characterized, it is argued, draft-card burning is subject to control only if Congress meets the stringent requirements of the clear and present danger test. Cf. *Schenck* v. *United States*, 249 U.S. 47, 52; *Dennis* v. *United States*, 341 U.S. 494, 508. Simply to call conduct "speech" is not, however, enough to clothe it with constitutional protection. If it were, a wide variety of acts traditionally subjected to legislative proscription would be entitled to immunity through the simple expedient of terming them acts of "protest" [5]—whether they took the form of defacing a public building or

[5] "Political assassination is a gesture of protest, too, but no one is disposed to work up any First Amendment enthusiasm for it." Kalven, *The Negro and the First Amendment*, p. 133 (1965).

LoneDissent.org

"dumping * * * garbage in front of City Hall." *United States* v. *Miller*, 367 F. 2d 72, 79 (C.A. 2), certiorari denied, 386 U.S. 911.[6] Rather, the decisive consideration is whether the conduct for which the protection is sought fits into the selective and limited class of activity which this Court has held to be so analogous to speech as to be entitled to be treated as if it actually were pure speech.

The relevant decisions of this Court indicate that the kind of conduct involved here does not fall within this narrow category. Conduct has been treated as "symbolic speech" only in situations where the acts at issue were inextricably tied to oral expression or where no reasonably effective method of communication was alternatively available. Such a situation exists where the conduct is a natural extension of the verbalization; or where, without the conduct, the oral expression would lose meaning; or where the acts are the manifest equivalent of, or traditionally recognized substitute for, a verbal statement. Hence, when a municipality attempted to impose a flag-salute requirement in its public schools, that requirement was held to offend the First Amendment because "in connection with the pledges, the flag salute is a form of utterance" which the State cannot demand

[6] In *Miller* the Second Circuit squarely upheld the constitutionality of the 1965 amendment. The Eighth Circuit similarly so ruled in *Smith* v. *United States*, 368 F. 2d 529. After the First Circuit had decided the instant case (on April 10, 1967), and after the time for filing a petition for rehearing had expired, petitioner in *Miller* moved this Court for leave to file a petition for rehearing out of time. The Court has not yet acted on that motion.

LoneDissent.org

of its citizens. *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 632. In so ruling, this Court recognized that, since a pledge of allegiance is emptied of much of its ritualistic meaning when not accompanied by the time-honored ceremonial gesture of homage, the act of saluting is entitled to the same constitutional protection as speech itself. Under the same rationale, the peaceable display of a red flag or red banner, or placards in a labor dispute, has been deemed the equivalent of speech, for this is conduct which conveys, in generally understood terms, opposition to an existing government or to a particular labor-management situation. *Stromberg* v. *California*, 283 U.S. 359; *Thornhill* v. *Alabama*, 310 U.S. 588; *Carlson* v. *California*, 310 U.S. 106, 113. Similarly, the solemnity and sobering impact of orderly "protest by silent and reproachful presence" has been recognized as conduct which, in the context of opposition to enforced segregation, serves as a substitute for actual speech. *Brown* v. *Louisiana*, 383 U.S. 131, 141-142 (opinion of Mr. Justice Fortas, announcing the judgment of the Court); cf. *Garner* v. *Louisiana*, 368 U.S. 157, 202 (concurring opinion of Mr. Justice Harlan). Each of these cases, in short, represents an example of conduct which is the equivalent of speech, or significantly adds meaning beyond that conveyed by oral expression. As described by Mr. Justice Jackson in *Barnette*, *supra*, 319 U.S. at 632:

> The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind * * *. Associated with many of these symbols are appropriate ges-

LoneDissent.org

> tures of acceptance or respect: a salute, a bowed or bared head, a bended knee. * * *

The holding in *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 429-430, that the litigative activities of an organization seeking to aid the Negro in achieving his political rights is "a form of political expression" protected by the First Amendment, suggests an additional consideration related to the concept of "symbolic speech". Thus, if the proscription of certain conduct, normally and traditionally a part of peaceful advocacy, would realistically result in stifling an important—if not the only—means whereby a poorly organized or poorly represented minority can publicize its views to a broad audience, and thus enhance the opportunity for having its point of view "accepted in the competition of the market" (*Abrams* v. *United States*, 250 U.S. 616, 624, 630 (dissenting opinion of Mr. Justice Holmes)), greater leeway may be given to the use of action to emphasize ideas. As Mr. Justice Black stated the point in *Martin* v. *Struthers*, 319 U.S. 141, 146: "Door-to-door distribution of circulars is essential to the poorly financed causes of little people." [7]

In our view, the burning of a document which plays a valid and important role in the operation of the Selective Service System does not fit into any of the foregoing concepts of conduct protected as "symbolic speech". It has no time-honored ritualistic connotation like saluting a flag. Nor is it a method for the expression of views which otherwise would not be

---

[7] Similarly, see *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287, 293, stating: "Peaceful picketing is the workingman's means of communication" (majority opinion of Mr. Justice Frankfurter).

LoneDissent.org

conveyed to a wide audience. Indeed, the daily headlines show that there are all sorts of legitimate ways of vigorously expressing dissent—whether through the use of mass communcation media, the public meeting hall, the peaceable demonstration or the distribution of literature. Burning draft cards may add a theatrical aura to a protest.[8] But one does not have a constitutional right to perform acts otherwise subject to restraint simply because they are dramatic.[9]

In sum, the fact that draft-card burning is a way to dramatize opposition to governmental policies—or to government in general—is hardly conclusive of the constitutional question here involved.[10] The vital con-

---

[8] Paraders may not demonstrate in contravention of an injunction which they never sought to vacate, even though having marched in violation of the judicial order obviously heightened the drama of their protest. *Walker* v. *City of Birmingham,* 388 U.S. 307, 315. And the use of sound trucks is not constitutionally protected from reasonable regulation, since other "easy means of publicity are open," even though such devices are more akin to pure speech than to communicative conduct. *Kovacs* v. *Cooper,* 336 U.S. 77, 89 (opinion of Mr. Justice Reed, announcing the judgment of the Court). Nor can the act of draft-card burning be regarded as constituting a petition for redress of greivances (compare *Edwards* v. *South Carolina,* 372 U.S. 229, 235), and entitled as such to protection under the First Amendment.

[9] Likewise dramatic in effect was the bizarre display of offensive objects on a clothesline in protest against what were thought to be high property taxes; yet an ordinance prohibiting such clotheslines in front and side yards abutting streets was upheld against First Amendment attack in *People* v. *Stover,* 12 N.Y.2d 462, appeal dismissed, 375 U.S. 42.

[10] In a related context, in *Zemel* v. *Rusk,* this Court recently stated 381 U.S. 1, 17:

> * * * [T]he prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to

LoneDissent.org

sideration is that other effective means for expressing such ideas plainly exist—means which do not interfere in any significant way with the orderly functioning of government.[11] Protection of "symbolic speech", as distinguished from words alone, is admittedly attenuated, and is afforded by the Constitution where shown to be necessary to ensure effective communication of the ideas sought to be expressed. Such a situation, we submit, is not presented here.

2. The 1965 amendment to Section 462(b) is clearly drawn to punish specific conduct. The crucial statutory words—"destroys" or "mutilates"—have regularly been used in an array of criminal statutes.[12]

---

gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. * * *

[11] A classic statement of this fundamental proposition is contained in *Schneider* v. *State,* 308 U.S. 147, 160-161: "* * * [A] person could not exercise this liberty [of free speech] by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantees of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion."

[12] See *e.g.,* 18 U.S.C. 2071 ("[w]hoever, willfully and unlawfully * * * mutilates, obliterates, or destroys" documents); 18 U.S.C. 506 ("[w]hoever falsely * * * mutilates, or alters" the

LoneDissent.org

Laws and ordinances which prohibit the defacement of public buildings, the desecration of public parks, and the destruction of public property of other description are a commonplace throughout the Nation. Their validity is unquestioned. And they do not become unenforceable when the charge of violation is met by the defense that the offender was seeking to express dissent or to indicate his distaste for the city fathers.

Nor is there any problem of overbreadth. The language here is sufficiently precise and definite to pinpoint the exact type of conduct Congress intended to ban. It is obviously not comparable to that of those open-ended local "breach of peace" statutes which this Court has found to be unconstitutional. See, *e.g.*, *Ashton* v. *Kentucky*, 384 U.S. 195, 200; *Edwards* v. *South Carolina*, 372 U.S. 229, 237-238; *Cox* v. *Louisiana*, 379 U.S. 536, 551-552; see also *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432-438, and cases there cited.[13] Nor does Section 462(b)(3) contain statutory words which are indefinite or vague in Fifth Amendment terms. It "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more." *United States* v. *Petrillo*, 332 U.S. 1, 8;

---

seals of any department or agency of the United States); 18 U.S.C. 443 ("[w]hoever willfully * * * mutilates * * * destroys" contracts relating to the war effort).

[13] To the contrary, here we have a criminal conviction "resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed." *Edwards* v. *South Carolina, supra,* 372 U.S. at 236.

LoneDissent.org

Roth v. *United States*, 354 U.S. 476, 491-492; *N.A.A.C.P.* v. *Button*, *supra*.

B. *The 1965 amendment represents a reasonable exercise of Congress' power to facilitate the proper functioning of the Selective Service System.*

1. As we have shown (*supra*, pp. 13-21), the conduct here prohibited is not demonstrably within the ambit of "symbolic speech" protected by the First Amendment, as that concept has been developed in the decisions of this Court. Thus, under well-established principles, the validity of the statute depends upon whether the governmental purpose which the legislation serves outweighs any possible, incidental intrusion on First Amendment freedoms.[14] See, *e.g.*, *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 91; *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 49-51; *Barenblatt* v. *United States*, 360 U.S. 109, 126; *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 461.[15] Here, we submit, this test is fully satisfied.

---

[14] In *American Communications Ass'n, CIO* v. *Douds*, 339 U.S. 382, 399, this Court delineated the approach to be taken in such situations: "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented."

[15] Even those Justices who have regarded governmental authority to legislate in the First Amendment area as extremely narrow have recognized that a different situation is presented where acts, not words, are the subject of congressional prohibition. See, *e.g.*, *Barenblatt* v. *United States*, 360 U.S. 109, 141-142 (dissenting opinion of Mr. Justice

LoneDissent.org

Under its constitutional power "[t]o raise and support Armies * * *," Congress has the undoubted authority to classify and conscript manpower for military service. To that end, it may establish a system of registration of all those liable for training and service, and may reasonably require the active cooperation of those members of the citizenry subject to registration and possible induction. The issuance of draft certificates indicating the registration and classification of an individual is an administrative aid in that continuing process. Such a certificate was considered by the Congress which adopted the 1965 amendment to be "Government property". See H. Rep. No. 747, 89th Cong., 1st Sess., p. 1.[16] A requirement that the person to whom such a card is issued retain it in his possession at all times has been part of the Selective Service regulations for many years prior to current political controversies. See *United States* v. *Kime*, 188 F.2d 677 (C.A. 7), certiorari denied, 342 U.S. 823.[17]

Black); *Griswold* v. *Connecticut,* 381 U.S. 479, 507, 508 (dissenting opinion of Mr. Justice Black); *Communist Party* v. *Subsersive Activities Control Board,* 367 U.S. 1, 169, 173-174 (dissenting opinion of Mr. Justice Douglas); *Martin* v. *Struthers,* 319 U.S. 141, 143-144 (opinion of Mr. Justice Black, announcing the judgment of the Court).

[16] The Selective Service regulations similarly treat draft cards as government property by requiring their surrender to the military authorities upon induction (see 32 C.F.R. 1617.1, 1623.5).

[17] Administrative regulations require that the registrant have in "his personal possession at all times" his Registration Certificate (32 C.F.R. 1617.1) and his current Notice of Classification (32 C.F.R. 1623.5) (see note 4, *supra*).

LoneDissent.org

It is common knowledge that a draft card serves a variety of purposes. It provides a speedy means of identification. It serves as a ready record of registration and classification, particularly useful if a draft board file is lost or misplaced. It also serves as a reminder to the registrant of his duties under the Universal Military Training and Service Act. The "Registration Certificate" advises the registrant that he must notify his local board of any change of address. The "Notice of Classification" repeats this admonition and further advises the registrant of his legal obligation to advise promptly of any changes in his physical, occupational, marital, family and other status. See *United States* v. *Miller*, *supra*, 367 F.2d at 80-81.[18] In short, under our system, whereby the manpower of the nation is classified by local boards of citizens, the draft card serves as a useful tool in the administrative process. Congress could, therefore,

---

[18] While recognizing that the destruction of a single draft card will hardly interfere significantly with the Selective Service process, we point out that the statute here involved operates as a deterent on all those required to carry draft cards. In this regard, the Second Circuit's admonition in *Miller* is pertinent. There that court stated (367 F.2d at 81): "Proper functioning of the system depends upon the aggregated consequences of individual acts; in raising an army no less than in regulating commerce, cf. Wickard v. Filburn, 317 U.S. 111, 127-128 * * *, the seriousness of an individual's acts must often be assessed not only in isolation but under the assumption that they may be multiplied manifold." Congress must be assumed to have understood that, if one person might destroy his draft card, many might, and that if many did, the result would be chaotic for the Selective Service System and for the country.

LoneDissent.org

properly decide that such cards ought to be protected from private mutilation and destruction, just as it might properly decide that certain records be maintained and be subject to inspection by government agents, and that the failure to keep such records can subject a person to criminal penalties (see, *e.g.*, 26 U.S.C. 6001, 7203).

2. While recognizing that a Selective Service certificate implements the proper functioning of the draft machinery (R. 62), the court below was of the opinion that the 1965 amendment was unnecessary in light of the "possession" regulation (see R. 62-63). It therefore reasoned that the statute must have been enacted to inhibit dissent rather than to prohibit conduct. That conclusion, however, does not follow from its premise. The fact that Congress adopted the 1965 amendment even though administrative regulations were in existence which could generally be utilized to punish destruction or mutilation of draft cards (but see *infra*, pp. 26-27), establishes only that Congress did not deem it sufficient to rely upon an administrative rule to bar conduct which it considered disruptive of the Selective Service system.

The legislative history makes the congressional view explicit. The congressional purpose was to fill the gap in an existing statute by "provid[ing] a clear *statutory* prohibition" so "that no question whatsoever should be left as to the intention of Congress that such wanton and irresponsible acts [*i.e.*, draft-card destruction] should be punished." H. Rep. No. 747, 89th Cong., 1st Sess., pp. 1-2 (emphasis added); see also S. Rep. No. 589, 89th Cong., 1st Sess.; 111 Cong.

LoneDissent.org

Rec. 19746. Whatever may be the scope of existing administrative coverage as to a particular subject, we know of no constitutional rule that requires Congress to rely solely upon such "subordinate rules" (*Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 429), which may be modified or revoked by administrative discretion. Insofar as a regulation punishes conduct, it does so only as a satellite of a congressional enactment. See, *e.g.*, *United States* v. *Grimaud*, 220 U.S. 506, 517. It is in no way comparable to an express legislative judgment in the same area and on the same subject. Congress obviously felt that a greater deterrent impact would flow from an explicit statutory ban on draft-card destruction as contrasted to an administrative regulation which had substantially, though not identically, the same effect—just as it would be more significant to make forging, altering or making any change on the certificate a statutory offense (see 50 U.S.C. App. 462(b)(3)), even though such activities might also be covered by regulation (see 32 C.F.R. 1617.1). It has never been deemed improper for Congress to deal with various manifestations of a single unlawful transaction by a variety of regulatory controls. See, *e.g.*, *Gore* v. *United States*, 357 U.S. 386, 392-393; cf. *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45.[19] Much less should Congress be deemed barred from exercising its legislative authority in a

[19] This is surely true where no claim is made (as none is made here) that a registrant may be given consecutive terms of punishment for the same act of "burning" under both the "destruction" statute and the "possession" regulations.

LoneDissent.org

particular way because by doing so it may overlap an existing administrative sanction.

We point out further that, even though the regulation as well as the statute could have been invoked to punish destruction or mutilation in this case (see *infra*, pp. 32-35), these provisions are not coextensive in their reach. The regulation focuses on the "status" of draft-card possession rather than pinpointing, as the statute does, the particular act which results in loss of such possession. It would thus be possible (as the court of appeals recognized in its opinion denying a petition for rehearing (R. 71)), to mutilate a card, but still possess it, as where the mutilation was not sufficiently complete to render illegible the identifying information contained on the certificate. Moreover, registrants who destroyed cards could immediately request new ones,[20] so that their period of non-possession might well be insignificant. There is no danger in a prosecution under the amendment, as there would be in a prosecution under the regulations, that the jury might be led to believe that the violator was being charged for the seemingly innocuous offense of temporary non-possession. By making it plain through the statutory prohibition that the ease in obtaining duplicate certificates does not provide a facile device to immunize the act of destruction, Congress has provided a deterrent to a registrant's initial

[20] A local board has no authority to refuse the request for a duplicate or require that such a request be made within any particular period of time (see 32 C.F.R. 1617.11-1617.12).

LoneDissent.org

act of destruction.[21] It is in aid of the rapid and effective mobilization of manpower to avoid imposition on the government of the administrative burdens incident to replacing draft cards which are wantonly destroyed.

3. The legislative history of the 1965 amendment does not evince a congressional motive to restrain the expression of constitutionally protected dissent. All that the history shows is that during the limited consideration of the legislation, prior to its all but unanimous enactment as law, three members of Congress—one Senator and two Representatives—indicated that the amendment was meant to serve not only a Selective Service purpose, but also to put Congress on record as considering draft-card burning to be insulting and unpatriotic.

The authoritative Senate Armed Services Committee report explained the purpose of the amendment, in pertinent part, as follows (S. Rep. No. 589, 89th Cong., 1st Sess., p. 2):

> 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* [emphasis added].

While the House report further emphasized the "deep concern" of the House Armed Services Commit-

[21] The regulations authorize replacement of registration certificates upon satisfactory proof that the certificate has been "lost, destroyed, mislaid, or stolen" (32 C.F.R. 1617.11 (b)).

LoneDissent.org

tee that such conduct represented open defiance of governmental authority, it too stressed that "in the present critical situation of the country, the acts of destroying or mutilating these cards are offenses which pose * * * a grave threat to the security of the Nation * * *." H. Rep. No. 747, 89th Cong., 1st Sess., pp. 1-2.

There was very little floor debate on this legislation in either House. Only Senator Thurmond, Chairman of the Senate Armed Services Committee, commented on its substantive features in the Senate. In recommending its passage, he stated that it was "not fitting", while soldiers of this country "are giving their lives in combat with the enemy," that "mass public burnings of draft registration cards" should go unpunished (111 Cong. Rec. 19746). He thought such acts constituted "open defiance of the warmaking powers of the Government" and that recent acts of this kind "have demonstrated an urgent need for this legislation" (111 Cong. Rec. 20433). Without any additional substantive comments by any other Senator, the bill passed the Senate (111 Cong. Rec. 20434). In the House debate only two Congressmen addressed themselves to the amendment—Congressman Rivers, Chairman of the House Armed Services Committee, and Congressman Bray. Congressman Rivers stated, in part, that the enactment of the bill was "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" (111 Cong. Rec. 19871). Congressman Bray generally spoke in the same vein, criticizing

LoneDissent.org

those who by these acts seek 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" *(ibid.)*. He believed the proposed legislation was "only one step in bringing some legal control over those who would destroy American freedom" (*ibid.*). At the same time, Congressman Bray noted that by destruction and mutilation of Selective Service certificates "our entire Selective Service System is dealt a serious blow" (111 Cong. Rec. 19872). No further debate was had on the amendment which passed the House by a vote of 393-to-1 (*ibid.*).

If the limited content of this debate reveals anything as to underlying congressional motive, it is that some members of Congress felt strongly that conduct such as draft-card burning was not only detrimental to the efficient operation of the Selective Service System but also reflected disrespect for the government and disdain of our servicemen in Vietnam. In short, the congressional debates at most reflect several reasons—some less constitutionally justifiable perhaps than others—for prohibiting a specific course of *conduct*. This is an insufficient ground for holding that an otherwise lawful statute is unconstitutional.

Indeed, it is a familiar principle of constitutional adjudication that "[s]o long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power." *Barenblatt* v. *United States*, 360 U.S. 109, 132; see also *United States* v. *Kahriger*, 345 U.S. 22, 27-30; *Daniel* v. *Family Security Life Insurance Co.*, 336 U.S.

LoneDissent.org

220, 224; *McCray* v. *United States*, 195 U.S. 27, 55; cf. *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 84-87.[22] We recognize that this is not an inflexible precept automatically to be invoked to uphold legislation in each and every circumstance.[23] Rather, it is an aspect of the attitude of

[22] As stated by the Second Circuit in *United States* v. *Miller*, *supra*, 367 F.2d at 76: "[G]oing behind the terms of a statute to divine the collective legislative motive for its enactment is rarely, if ever, done by a court." Reliance was there placed on this Court's statement in *Sonzinsky* v. *United States*, 300 U.S. 506, 513-514, to the effect that "[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of the courts."

[23] For example, where the constitutional inquiry is whether the congressional action is regulatory or penal in nature, it may be necessary to examine, among other things, into the underlying congressional motive prompting passage of the legislation. See, *e.g.*, *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-170; *Flemming* v. *Nestor*, 363 U.S. 603. But even in an inquiry of that nature only "the clearest proof" as to underlying motive will suffice to establish unconstitutionality (*id.* at 617).

Cases like *Grosjean* v. *American Press Co.*, 297 U.S. 233; *Lane* v. *Wilson*, 307 U.S. 268, and *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, simply hold that where the impact or reach of statutory language cannot be reconciled with the Constitution, the underlying legislative motive is immaterial. Cf. *Wright* v. *Rockefeller*, 376 U.S. 52, 59, 61-62 (dissenting opinion of Mr. Justice Douglas). Indeed, this Court has frequently distinguished between, on the one hand, an analysis of the *effect* of legislative action, *e.g.*, *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347, and, on the other, an inquiry into the underlying *purpose* behind the particular legislation, *e.g.*, *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45, 53, or "into the *motives* of legislators," *e.g.*, *Tenney* v. *Brandhove*, 341 U.S. 367, 377.

LoneDissent.org

restraint which this Court has traditionally exhibited when faced with the contention that Congress has acted outside of its constitutional authority. See *United States* v. *Rumely*, 345 U.S. 41; *United States* v. *Seeger*, 380 U.S. 163, 188 (concurring opinion of Mr. Justice Douglas). Such an approach is particularly pertinent here. Application of the statute does not hinder protected methods of protest (see *supra*, pp. 13-21). On its face, the law represents a reasonable judgment by Congress that one who either "knowingly destroys" or "knowingly mutilates" a registration certificate acts to impair the effective functioning of the Selective Service System. That legislative determination should, we submit, be deemed to fall within the bounds of congressional power.

II. Even if the Statute Is Unconstitutional, the Court of Appeals Did Not Err in Affirming Respondent's Conviction

The question posed in No. 233 need be reached only if the 1965 amendment to Section 462(b)(3) is held unconstitutional. It would then be necessary to consider whether the court of appeals properly affirmed respondent's conviction on the ground that, by burning his card, he necessarily violated the regulation requiring a registrant to have his draft card "in his personal possession at all times" (32 C.F.R. 1617.1; see also 32 C.F.R. 1623.5).

In the particular circumstances of this case, we think the result reached by the court of appeals was justified. We do not, however, rely upon the "lesser-included offense" theory propounded by the court of appeals as the basis of its decision in this regard. As

LoneDissent.org

this Court has pointed out, 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" *Sansone* v. *United States,* 380 U.S. 343, 350; *Berra* v. *United States,* 351 U.S. 131. The statutory crime of draft-card destruction is not a "greater offense" than the regulatory offense of non-possession, since the punishment for the commission of either offense is identical (see 50 U.S.C. App. 462(b)(6), *supra,* pp. 3-4).[24] Moreover, in the instant circumstances, there was no additional ingredient necessary for commission of the statutory, as opposed to the regulatory, offense. Precisely the same evidence that established knowing destruction—that petitioner burned his card so that only its "charred remains" were left—also fully made out the offense of knowing non-possession proscribed by the regulations. In short, the only basis, in our view, for sustaining the ruling of the court of appeals on this aspect of the case is that when the jury convicted respondent of knowing destruction, it necessarily found all of the facts which it would have had to find under a charge of knowing failure to possess a draft card.

In its entirety, the indictment may fairly be read as encompassing the charge of non-possession. In pertinent part, it charged that respondent "willfully and knowingly did mutilate, destroy, and change by

---

[24] 50 U.S.C. App. 462(b)(6) provides that any person "who knowingly violates or evades any of the * * * rules and regulations promulgated pursuant" to the statute shall be subject to punishment to the same extent as for a violation of a specific provision of the statute.

LoneDissent.org

burning a certificate issued * * * pursuant to and prescribed by the provisions of the Universal Military Training and Service Act, as amended, *and the rules and regulations promulgated thereunder*, to wit, a Registration Certificate * * * in violation of Title 50, App., United States Code, Section 462(b)" (R. 3; emphasis added). The possession regulations (32 C.F.R. 1617.1, 1623.5) are such "rules". The fact that the indictment focused on the method by which respondent divested himself of possession does not mean that it must be construed as excluding from its terms a charge stemming from the natural consequences of the act described. 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. See *Williams* v. *United States*, 168 U.S. 382; *United States* v. *Hutcheson*, 312 U.S. 219, 229.

Nor was there anything in the government's proof or the trial court's instructions which in any way raised any factual matters which would warrant the conclusion that, by convicting respondent of knowing destruction of his draft card, the jury did not, of necessity, also find respondent guilty of non-possession of that card. While the trial judge admonished the jury that "the crime charged is the burning of a draft card" and that "[w]e are not concerned here with anything other than this statute which prohibits the burning or mutilating of a draft card" (R. 34), each of the elements he told the jury they were required to find to establish respondent's guilt on that charge were elements which would also support his

LoneDissent.org

conviction on a charge of non-possession. The court stated that the 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). A finding that these two elements were present would necessarily show intentional non-possession of the card.[25]

Thus, this case is distinguishable from *Cole* v. *Arkansas*, 333 U.S. 196. There, the defendants were charged and convicted under Section 2 of a statute which prohibited persons (1) from assembling near a place where a labor dispute existed and by force and violence preventing a person from engaging in a lawful vocation, and (2) from acting in concert to promote any such unlawful assemblage. The trial judge charged the jury that the defendants could not be convicted unless they were found to have promoted an *unlawful assemblage* for the purpose of preventing a named individual from engaging in a lawful vocation. On appeal, the Supreme Court of Alabama upheld the conviction under Section 1 of the statute which prohibited the use of force and violence to prevent a person from working. The State court thus found it unnecessary to reach any questions of constitutional validity or sufficiency of proof as to assemblage. This Court reversed, finding that the conviction on the re-

---

[25] While the evidence indicated there were "charred remains" (R. 11, 15-16) and "fragments" (R. 17) of respondent's draft card left after the burning (see R. 52-53), it seems clear that the court of appeals was correct in concluding that "[m]anifestly defendant no longer 'possessed' " what could properly be said to constitute a draft card (R. 71).

LoneDissent.org

lated charge could not be sustained "[w]ithout completely ignoring the judge's charge [under which] the jury could not have convicted petitioners for having committed the separate, distinct, and substantially different offenses defined in § 1" (333 U.S. at 200). The court of appeals' affirmance here does not have the effect of reading an important element out of the case, as in *Cole* v. *Arkansas*. As a matter of common sense, the very act of purposefully burning a draft card until it is wholly charred results in intentional non-possession of the document.

Nor does respondent demonstrate any prejudice by the affirmance of his conviction for having violated the "possession" regulation. His decision to waive counsel at trial could not fairly be said to have been influenced by the citation of a particular violation in the indictment. Not only is it plain that he had the advice of experienced and able counsel on all phases of the constitutional issues, but the facts, which showed non-possession as well as burning, were conceded. Nor is there support for an argument that respondent might have followed different strategy if the indictment had charged non-possession in express terms. As the court below noted (R. 64), the defense memorandum seeking to dismiss the indictment on constitutional grounds challenged the overall requirement that a registrant retain his draft card.[26]

[26] This memorandum argued, in pertinent part (R. 6):

> "To rely upon individuals having draft cards in their possession as a means of operative [sic] the selective service system would seem to be impractical if not down-

LoneDissent.org

In sum, if the Court deems it necessary to reach this ruling of the court of appeals, we submit that it should be upheld.

CONCLUSION

For the reasons stated in Point I, *supra*, it is respectfully submitted that the judgment of the court of appeals holding the statute unconstitutional should be reversed and the judgment and sentence of the district court should be reinstated. If, however, the Court finds that the court of appeals' ruling as to unconstitutionality was correct, it should affirm the judgment below for the reasons stated in Point II, *supra*.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

FRANCIS X. BEYTAGH, JR.,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

DECEMBER 1967.

---

right dangerous. * * * Whether Defendant O'Brien has had his draft card in his possession, whether he burned [or] mutilated [it] or whatever, will have little or no effect upon the selective service system."

☆ U. S. GOVERNMENT PRINTING OFFICE; 1967 282952 428

LoneDissent.org