UNITED STATES OF AMERICA,
Petitioner,

—v.— No. 232

DAVID PAUL O'BRIEN,
Respondent.

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Petitioner,

—v.— No. 233

UNITED STATES OF AMERICA,
Respondent.

Washington, D.C.
Friday, January 24, 1968.

The above-entitled matter came on for oral argument, pursuant to notice,

BEFORE:

EARL WARREN, *Chief Justice of the United States*
HUGO L. BLACK, *Associate Justice*
WILLIAM O. DOUGLAS, *Associate Justice*
JOHN M. HARLAN, *Associate Justice*
WILLIAM J. BRENNAN, JR., *Associate Justice*
POTTER STEWART, *Associate Justice*
BYRON R. WHITE, *Associate Justice*
ABE FORTAS, *Associate Justice*

APPEARANCES:

ERWIN N. GRISWOLD, ESQ., *Solicitor General of the United States, Department of Justice, Washington, D.C. on behalf of Petitioner, Cross-Respondent.*

MARVIN M. KARPATKIN, ESQ., *600 Madison Avenue, New York, New York 10021, on behalf of Respondents, Cross-Petitioners.*

PROCEEDINGS

MR. CHIEF JUSTICE WARREN: Number 232 and 233, *United States,* Petitioner, versus *David Paul O'Brien,* and *David Paul O'Brien,* Petitioner, versus the *United States.*

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Solicitor General?

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ., ON BEHALF OF THE UNITED STATES

MR. GRISWOLD: May it please the Court:

This is a criminal case. It raises the question of the constitutional validity of an amendment, which Congress passed in August 1965, to the Universal Military Training and Service Act. The nature of the statutory provision involved can best be seen at page 3 of the Government's brief in this case, which sets out Section 12(b) of what is often called the Selective Service Act. That is the general criminal provision of the Selective Service Act, making a large number of specified actions subject to criminal penalty.

And I would call the Court's attention first to paragraph 6, at the bottom of page 3. The Section begins: "Any person," and 6: "who knowingly violates or evades any of the provisions of this Title, or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificates shall, upon conviction," and so on.

And then I would refer the Court to paragraph 3, at the middle of page 3, which is the paragraph directly involved in this case. Until 1965, it contained the words which are not printed in italics, making it a crime for any person to forge, alter, or in any manner change any such certificate; and what Congress did in 1965 was to add the four words which are printed in italics, "knowingly destroys, knowingly mutilates".

The case was tried in the District Court of the United States for the District of Massachusetts in June 1966 before Judge Sweeney and a jury. I would bring to the Court's attention the fact that the defendant had no counsel at the trial. This was his

own c took pains to see that he was advised as to his rights, or that he understood his rights. In this connection it should also be observed that he had counsel at his arraignment, that an appearance was entered for him, that he obviously had counsel in preparing a motion to dismiss which he filed on constitutional grounds, and that he has the help of counsel in this Court as he had in the court below.

The evidence at the trial was not in dispute. It showed that the defendant, and three others, burned small white cards on the steps of the South Boston Courthouse on March 31, 1966, in the presence of a sizeable crowd. Four photographs of this event were introduced into evidence, and they appear at pages 48 to 51 of the record. Photographs of the remnant of the draft card itself were also received in evidence and can be found on pages 52 and 53 of the record.

Immediately after the event, and after he had been advised of his right to remain silent and to have counsel, the defendant told an agent of the Federal Bureau of Investigation—and this is on page 11 of the record—"I asked him what he had done; what he had burned," said the agent. "He told me he had burned a Selective Service certificate, and that he knew it was a violation of Federal law, but that he had his own beliefs and his own philosophy why he did it. And he produced the charred remains of the Selective Service certificate, which he showed me, and it was in an envelope. I asked him if it was all right if I photographed it, and he said it was perfectly all right; and I called in Special Agent Brandt, who was with me, and we photographed the remains."

The defendant did not testify, nor call any witnesses. But he did make an argument to the jury during which he stated—and this is on page 29 of the record—"and I don't contest the fact that I did burn my draft card, because I did."

The jury returned a verdict of guilty. And, after careful consideration which is fully disclosed in the record, Judge Sweeney sentenced the defendant under the Youth Corrections Act. In the defendant's brief this is referred to as a six-year maximum indeterminate sentence, and in a very real sense, it is. But it is also quite different from an ordinary sentence because it can be much shorter than the maximum, and it can be terminated in such a way as to leave the defendant with no criminal record.

THE COURT: How old is the—

MR. GRISWOLD: He was 19 at the time of the offense.

THE COURT: And a person can be sentenced under that Act, up to what age?

MR. GRISWOLD: 21.

THE COURT: 21.

MR. GRISWOLD: That is, when the offense is committed: 21.

When the case went to the United States Court of Appeals for the First Circuit, that Court, in an opinion by Judge Aldrich, held that the 1965 amendment which made draft card burning specifically an offense was unconstitutional as a suppression of symbolic speech. Having reached the result of unconstitutionality, however, Judge Aldrich then exercised a certain measure of what might be called "Yankee ingenuity." He held that the judgment of conviction should, nevertheless, be sustained because the facts, necessarily proved to support the draft card burning charge, inevitably included proof of a related offense—namely, not being in possession of a draft card, as required by the Selective Service regulations, and made an offense under paragraph 6 of the statute to which I have already referred.

THE COURT: Was that on the theory of its being an included offense?

MR. GRISWOLD: Judge Aldrich said it was an "included offense." I would support the result on a slightly different verbal formulation: that it was an offense, the facts of which were proved, and the fact that the Government appeared to proceed under a different clause of the statute didn't negate the validity of the conviction which the facts proved showed a violation of Section 6, even though Section 3 was out.

THE COURT: Well, was there charged a violation of Section 6? Was there a charge of a violation of Section 6?

MR. GRISWOLD: The question with respect to Section 6, and the possession offense, is the issue in No. 233—the respondent's petition. I would prefer to deal with that after I've dealt with the constitutional argument.

THE COURT: That's quite all right.

May I ask this? Is this, the charge on page 3, is that the only one we're dealing with?

MR. GRISWOLD: The indictment is on page 3, and that is the entire—

THE COURT: And that is relied upon to support the conviction under both 3 and 6?

MR. GRISWOLD: Yes, Your Honor.

Fr sought certiorari; and the grant of both petitions brings the case here.

THE COURT: What case of ours is nearest to this case, insofar as a valid conviction is concerned, under 6? Where he's charged under 3?

MR. GRISWOLD: Are you talking about the constitutional argument now, Mr. Justice—Mr. Chief Justice?

THE COURT: Any decision that we have rendered saying that, in a case like this where he's charged with burning a draft card, we'll sustain a conviction for his not possessing one.

MR. GRISWOLD: I would suppose that the recent case which is closest to it is *United States* against *Hutcheson* in 312 U.S., where the Court said: "In order to determine whether an indictment charges an offense against the United States designated by the pleader of the statute under"—"An offense designated by the pleader, of the statute under which he purported to lay the charge, is immaterial. He may have conceived the charge under one statute which could not sustain the indictment, but it may nevertheless come within the terms of another statute."

Now, here it is not really another statute. It's another clause of the same statute.

THE COURT: Well, what is the reference of the word "it"? It says—you're talking about the evidence, or the charge? What you have here is a specific statement, in unmistakable language, of the charge; namely, "mutilation or destruction."

MR. GRISWOLD: That he burned his draft card. And it is an inevitable consequence of that that he was thereafter not in possession of his draft card.

THE COURT: I know, but the quotation that you have read seems to me to indicate that the language used in the indictment has to be susceptible of being construed as language laid under one section or the other—under one statute or the other. That's not true here. All you have here is the argument that the evidence shows that he could have been charged with a violation of 6—but, anyway, you said you're coming to that later. I don't want to press it.

MR. GRISWOLD: That is an issue that you get to only if you decide against us on the constitutional issue; and it was for that reason that I had regarded it as a subordinate issue and had planned to deal with it later.

THE COURT: Mr. Solicitor General, I don't want to interfere with you, or interrupt you, but are you saying that it would not raise a constitutional issue to charge a man with violation of one statute, and have his conviction affirmed for violation of another statute?

MR. GRISWOLD: Not if the facts which were required to prove the first offense were also facts which would prove the second offense.

THE COURT: And those facts were charged. Now I gather your argument is that this charge indicates that "mutilates, destroys, and change" not only charges an offense under one section of the statute, but an offense under another one, too?

MR. GRISWOLD: That is exactly our position, Your Honor. It is not verbally so; but it is logically so.

THE COURT: Well, Mr. Solicitor General, I gather that you still say, though, although this charge is only "mutilate, destroy, and change" by burning the certificate, without identification of Section 3, I take it you'd make the same argument even had the pleader here identified this as Section—

MR. GRISWOLD: I would make the same argument, even if it had referred to Section 3. And there are cases cited in our brief, where the Government has brought an indictment under one section of the revised statutes, or of the criminal code, and this Court has sustained a conviction under another section of the revised statutes.

THE COURT: This does not even refer to the section?

THE COURT: No, it doesn't.

MR. GRISWOLD: I'm sorry, Your Honor.

THE COURT: This charge doesn't even refer to the section?

MR. GRISWOLD: This charge does not refer to the section, at all, and it is all under the same section. I think we got into this by my saying that although Judge Aldrich had called it a "lesser included offense," I did not regard it as a lesser included offense; I regard it as another offense under the same section.

THE COURT: I regret that I asked the question, because it seems to me that we're off on a subsidiary issue. You're here on the constitutionality of the card burning in this case.

MR. GRISWOLD: That certainly is the primary question, to which I will now turn.

O 1, No. 232, there is only a question of constitutional law. There is no question of the construction of the statute; no question as to the effect or the weight of the evidence. The facts are clear, and as I have indicated, in effect admitted. On its face there can be no constitutional question about the statute. It forbids the doing of an act: "knowingly destroys, knowingly mutilates."

The contention is made, however, that in the circumstances of this case the act constitutes symbolic speech; and that Congress cannot proscribe it because that would violate the First Amendment's prohibition of laws abridging the freedom of speech. Of course it is clear that there can be symbolic speech. Or to put it another way, that acts may in effect be speech, though they are not vocal, oral, by voice—a nod, a shake of the head, a wink, a raising of an eyebrow at an auction sale, a gesture such as thumbs-down—may be modes of communication; and one can readily think of circumstances under which Congress could not forbid them, as, for example, in the case of an address delivered by hand signals to an audience of deaf persons.

But it does not follow from this that all acts are the equivalent of speech, or that Congress cannot forbid them even though there is an element of communication in them. I suppose that assaulting an official of the Selective Service System could be thought of as symbolic speech, or breaking a window of this Court building, under certain circumstances. In a sense, refusing to report for induction could be argued to be symbolic speech. It seems equally clear that all of these acts can be made unlawful by Congress.

In an effort to test this problem, there is one case which this Court has considered which I think is entirely out of the emotional zone, and therefore may be of particular use in considering this question. This is *People* against *Stover*, cited on page 18 of our brief. That is the case which came through the New York Court of Appeals, and it involved a married couple in New Rochelle, New York, who thought their taxes were too high. And so they strung dirty clothes and underwear and odds and ends of unattractive things on a clothesline in front of their house. And each year that they didn't get their taxes reduced, they put up another clothesline, so that in time they had six, both in the front and in the side of their yard. And thereafter, after the clotheslines were up, the City of New Rochelle passed an ordinance making it illegal to have clotheslines on the front or side of a house abutting a street, with certain exceptions in cases of necessity, and the defendant in that case did not claim the necessity.

They were then prosecuted under this City ordinance, and were convicted. And they took their case to the New York Court

of Appeals where it was very carefully considered in an opinion by then-Judge Fuld, who considered expressly the First Amendment argument that this putting up of a clothesline was symbolic speech, tended to show their opposition to the local government, and the conviction was affirmed by the New York Court of Appeals. And then, not content with that, the parties filed an appeal to this Court; and in 375 U.S., this Court dismissed the appeal on the ground that there was no substantial Federal question.

THE COURT: There's one very obvious difference from that case. That involved an affront upon at least the esthetic sensibilities of other people. It was not unlike a common-law nuisance. The present case, I guess, does not involved that; does not have that component.

MR. GRISWOLD: I don't see that that—no, I find nothing "esthetic" about this case.

THE COURT: No injury to other people, is there, in this case?

MR. GRISWOLD: I don't see that that has any bearing on the issue, which seems to me to be the one that is parallel with what is here, which is whether this is symbolic speech. And if it is, whether it can be proscribed by a law enacted—or, putting it another way, whether that law is contrary to the First Amendment, which is, of course, binding on Congress; and which, through the Fourteenth Amendment, was equally applicable to the City of New Rochelle in that case.

THE COURT: Well, I suppose somebody who had the very sincere belief that the laws against robbery were all wrong could not express that belief by going around and robbing houses, because that would be injuring other people. But here, you don't have any of that quality, do you?

MR. GRISWOLD: We don't have that quality, but we do maintain that there was a valid reason for the enactment of this statute. Not aesthetics, to be sure, but one related to the effective operation of the Selective Service System, which is within the power expressly granted to Congress to raise and support armies and to enact all laws necessary and proper to carry out the aforegoing powers.

Let me see if I can help to answer your question by turning to another one, which is more emotional, the flag. Neither side here has made much reference to the flag, I suppose because it comes close to the line. Of course the flag is a symbol, and burning, or defiling a flag, could be regarded as symbolic speech. As things

have d legislation with respect to desecration of the flag has been almost entirely left to the states. Nearly every state has such a statute. The only act of Congress relates to the District of Columbia. It is applicable to anyone who shall "publicly mutilate"—the same word as we have here—"deface, defile, or defy, trample upon or cast contempt, either by word or action, upon any such flag." That's Title IV of United States Code Section 3.

Can there be any doubt about the validity of such a statute? I would have thought not. And similar legislation has been applied in many state decisions. Of course a draft card is not a flag, nevertheless it can be regarded as a symbol of public authority. I suppose that the fact that it is such a symbol is what makes it attractive to burn. Is it not clear that maintaining public authority—not suppression of speech, but simply maintaining authority—is a proper exercise of Government, and specifically is something which Congress could properly regard as necessary and proper to the effective exercise of its undoubted power to raise and support armies.

The defendant relies extensively on the legislative history of the 1965 amendment. He makes extensive arguments about the difference in the motive behind the statute and the purpose of the statute, which are, I regret to say, too elusive for me to comprehend. Even on the defendant's ground, though, the legislative history, which is set out in full in the appendix to the defendant's brief, seems at best equivocal to me.

I think I should mention that in addition to the legislative history which the defendant sets out—and I only became aware of this myself yesterday afternoon—there is four pages of what I suppose technically would be called, Hearings before the House Armed Services Committee, dated August 6th, 1965. However, when this is examined, it is not a "hearing" in the usual sense, in that there were no outside witnesses. The only persons who participated were members of the Committee, and it is in effect the proceedings of the Committee at the time that they adopted the report which was presented to the House.

Only three members of both Houses spoke at all; two Congressmen and one Senator. The House passed the bill by a vote of 393 to 1. The Senate passed the bill by a voice vote, without a roll call. There were two Committee Reports, by the two Armed Services Committees. The earlier report is out of the Committee of the House and it states the purpose of the bill in these terms: "The purpose of the proposed legislation is to provide a clear statutory prohibition against a person knowingly destroying or knowingly mutilating a draft registration card."

And the report of the Senate Committee said: "If allowed to continue unchecked"—referring to draft card burning—"this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies." And can there be any doubt that that is true?

THE COURT: Had this burning taken place in the privacy of this man's home, and not in public, would it have been reached by this statute?

MR. GRISWOLD: If that—and if there had been publicity to it, it might be.

THE COURT: Why the publicity?

MR. GRISWOLD: The impact of this is, of course, in its—

THE COURT: The statute says nothing about—

MR. GRISWOLD: The statute says nothing about that, I recognize. The statute was, of course, enacted to meet the fact that there was widespread public burning of draft cards.

In *United States* against *Miller,* where this same question was considered by the Second Circuit Court of Appeals, and it's cited on page 15 of our brief, the court held that the statute was constitutional and said—and this bears on your question, Mr. Justice Harlan—"The proper functioning of the system depends upon the aggregated consequences of individual acts. In raising an army, no less than in regulating commerce, 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. Therefore the interest to be served, the efficient functioning of the Selective Service System, is furthered by the statute under attack."

THE COURT: Mr. Solicitor General, I take it that what you're doing is defending the constitutionality of this statute on the grounds that it is designed to punish contumacious conduct.

Now isn't there another approach to it? The statute requires that his draft card be kept in the personal possession of the registrant, and that—is it arguable that these provisions in (b) were to facilitate and aid in the enforcement of that regulatory provision? That is to say, that if there's widespread burning of draft cards, obviously it will be difficult to enforce the provision requiring that the draft cards be kept in the personal possession of the registrant. I'm not advancing that as a correct analysis, but I have been a little surprised that your argument seemed to be pitched in terms of defending the statute as a statute designed to punish contumacious conduct, which does bring it closely, quite closely, within the area of free speech.

MR. [illegible] ad no intention, Your Honor, to waive or to ignore the other line of argument which supports the statute. It is dealt with at length in the Second Circuit's opinion in *United States* against *Miller*, particularly at the bottom of page 80 and 81 of that opinion, where a considerable number of ways in which the draft card can be useful in the administration of the system are set forth. And I don't know of any place where this is more fully or comprehensively stated than in that opinion of the Second Circuit, and I surely intend to rely on it.

To begin with, the court says: "The notice of classification serves as proof of registration; and it also contains complete information as to a registrant's classification, including the type and date thereof and the period and date for which it is effective. Thus, inability to produce the card provides an easy means of initially detecting those attempting to evade their Selective Service obligations." And this goes on with other potential uses of a draft card for about a column; and of course I intended to rely on them. Perhaps it was because I was trying not to dodge away from what might be regarded as the hard part of the argument, that I came into the other part first.

THE COURT: Putting it on the basis that you and Justice Fortas have been discussing, it wouldn't make a particle of difference, would it, whether he did this publicly or privately?

MR. GRISWOLD: Not at all; not at all.

THE COURT: Or defaced, or altered, or mutilated—

MR. GRISWOLD: No difference whatever. That runs into another problem in that the offense, then, isn't essentially different from not being in possession of the draft card, to which I will turn in a moment.

The suggestion is made, in the defendant's brief, that this statute labors under some sort of an infirmity because Congress passed it on its own initiative and without any prodding from the Selective Service System or other officers of the Executive Branch of the Government. This seems a rather novel point. We're usually told that the Executive interferes too much in the workings of the Congress; that Congress should itself determine what are the laws of the land should need no defense. Certainly it is not a basis for showing that the statute that is passed by Congress is unconstitutional.

Congress did not forbid dissent. It could not do that. O'Brien was free, at all times, to express dissent by speech from the courthouse steps, or on the street corners, by letters to the editor, by pamphlet, by radio and television. This case does not involve a question of the line between speech and no speech, where the

answer would be clear in favor of speech. For the contention of the defendant is not that he can speak—which, of course, he can—but, rather, that he can do acts, despite the fact that they had been forbidden by that formal action of the representatives of the people in Congress assembled which we call a statute.

Of course the statute must comply with the terms of the Constitution. This one, we submit, does. In terms, it forbids an act clearly and specifically, so that there's no question of overbreadth or vagueness. The defendant knew exactly what was forbidden and what he was doing. What he did clearly constituted an interference with the effective operation of the Selective Service System. And Congress, as the Legislative arm of the Government, acting according to its judgment, determined that this should be unlawful.

Since there was no real impairment of any right to speak, and since adequate other avenues of communication were always open to the defendant, the contention that the defendant's action was symbolic speech should not take away from the Congress the power to do what it regarded as necessary and proper in order to carry out its power, granted by the Constitution, to raise and support armies. As this Court said in *Giboney* against the *Empire Storage Co.* case, "It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."

One other point is made by the defendant. He says that since nonpossession of the draft card was already forbidden, it follows that when Congress forbade draft card burning the only purpose and effect of the statute was to abridge symbolic speech. It is true that Congress, from the beginning of the draft laws, and specifically in the Universal Military Training and Service Act passed in 1948, has made it a crime knowingly to violate rules and regulations promulgated under the statute, relating to the issuance, transfer or possession of certificates under the draft law. Either or both the registration certificate and the classification certificate are generally lumped together in the term "draft card." Regulations under the Act have long provided that a registrant must have in his personal possession at all times his registration certificate and his notice of classification if he has been classified.

Again it is odd that Congress should be regarded as under a disability because it has chosen to put into a statute something which is closely related to a regulation. Some might think it better for the law to be stated in what Congress has itself written, rather than be delegated Executive action. Moreover, the regulation could be changed by the Executive Branch of the Government,

and n on grounds of construction or vagueness, or lack of validly delegated authority. The statute is clear and specific and subject to change only by Congress. It should surely stand no lower, constitutionally or otherwise, because it was preceded and is today accompanied by a closely related regulation.

The statute and the regulation are not coextensive. The regulation deals with what might be called a status of nonpossession. It might apply, for example, to a man who lost his draft card, and then deliberately and vocally did not seek a replacement; while the statute pinpoints a particular act which results in loss of possession.

For these reasons we submit that the statute enacted by Congress is constitutional. Application of the statute does not hinder protected protest. On its face the law forbids an act and represents a reasonable judgment by Congress that one who either knowingly destroys or knowingly mutilates a draft card does an act which impairs the effective functioning of the Selective Service System. That legislative determination, we submit, should be deemed to fall within the bounds of Congressional power.

I now turn to the question raised in No. 233, which is the defendant's position. As I've already pointed out, it need not be reached if our contention as to constitutionality is maintained. This is the question of whether the conviction can be sustained even though the amendment to Clause 3 of the statute is invalid, because it amounts to a charge of nonpossession.

As I have said, Judge Aldrich said that this was a "lesser included offense." We would differ verbally with this. The offense of nonpossession is not a lesser included offense; it's an offense under the same section of the statute, and subject to the same penalty. We would suggest the conclusion—we would support the conclusion of the Judge, on the grounds that the facts alleged were sufficient to embrace the offense of nonpossession; that the facts proved clearly showed nonpossession; and that there is no unfairness to the defendant in this as he was, in no sense, "taken by surprise."

THE COURT: Isn't this covered by *Cole* against *Arkansas*, just the other way?

MR. GRISWOLD: No, Your Honor. We have sought to distinguish *Cole* against *Arkansas*, on pages 34 and 35 of our brief. There, there was a real shift, so that the defendant was taken by surprise. And there was a clear element of unfairness. We think that there is no unfairness here.

THE COURT: You mean that there's no unfairness in charging

one thing, and then justifying conviction by reference to some totally different acts?

MR. GRISWOLD: Your Honor, not a totally different act; the very same section of the same Act.

THE COURT: But the acts are different. This man was charged with "knowingly and willfully mutilating, destroying, and changing," by burning.

MR. GRISWOLD: And that, logically, embraces the fact of nonpossession.

THE COURT: I beg to differ with you. I should think that a lawyer faced with one charge—that is, the charge of burning—would have a task ahead of him that differs in material and important respects from the defense of a client charged with nonpossession; and that his presentation of his case to the jury, his marshalling of evidence, the arguments that he presents, might be very different under one than they would be under the other.

MR. GRISWOLD: And if they were substantially different, I would agree with you on this. I think our case on this point turns on the fact that, as we see it, there is no substantial difference when you get right down to what's involved.

THE COURT: What was the defense in this case in the trial court? You told us the defendant admitted—at least in his argument to the jury; he didn't take the stand himself—but that he had violated the statute. What was the defense that was before the jury in this case?

MR. GRISWOLD: The only defense was the unconstitutionality of the statute. He filed a motion to dismiss on the ground of—

THE COURT: He asked the jury to decide—go ahead. Excuse me.

MR. GRISWOLD: I don't think the jury was called on to pass on the constitutionality of the statute. I think Judge Sweeney passed on that by denying the motion to dismiss, and the jury simply decided the question of fact, whether he did burn his draft card, which, I repeat, logically requires a conclusion that he was, thereafter, not in possession of it.

THE COURT: Yes, but his defense to the jury was simply, "I'm a pacifist. I think this war is morally wrong and I couldn't cooperate with it."

MR. GRISWOLD: And would have been exactly the same, on a charge—

THE [illegible]asis upon which he asked the jury not to convict him, wasn't it?

MR. GRISWOLD: That is right.

Defendant makes several closely related points at the end of his brief. He contends that the sentence was so excessive as to constitute a cruel and unusual punishment, contrary to the provisions of the Eighth Amendment. And he further objects to the words, or conduct, of the District Judge. With respect to these, it should be observed that they were not raised in the petition for certiorari, and thus are not before the Court. With respect to the conduct of the court, the entire proceedings on sentence are in the record. When this Court reads this portion of the record, it will see, I think, the concern of the Judge about this difficult case, and the care he took in the performance of the duty which was his.

One of the greatest achievements—

THE COURT: Are the maximum punishments for the two crimes the same?

MR. GRISWOLD: Yes, Your Honor. They are in the same words. The penalty is entirely in the final clause of this section, which has six clauses. Clause three is the one in which the "knowingly burns, knowingly mutilates," was inserted, and clause six is the one that deals with the violation of regulations.

THE COURT: Did the Government argue this in the Court of Appeals, or is this something that Judge Aldrich thought up on his own?

MR. GRISWOLD: This is something, I believe, that Judge Aldrich thought up on his own. I don't believe this was argued by the Government in the Court of Appeals. The Government's position there was that the statute was constitutional.

THE COURT: Well, of course I realize that, but I wonder if they had a fall-back position?

MR. GRISWOLD: I don't think they tried to put a second line of defense on that point.

THE COURT: What is the statute of limitations?

MR. GRISWOLD: Your Honor, I don't know what the statute of limitations is. I believe it is six years, under the Selective Service Act, but I'm not sure.

THE COURT: That, I think, would have some bearing on this question.

MR. GRISWOLD: Well, I simply am not informed as to what the statute of limitations is, whether there is a special one for this, or whether it comes under the General Act.

Whatever feelings of compassion or regret one may have for the defendant and his situation, it's clear that he violated the law. We submit that the law was validly made, and it is not fairly to be regarded as an abridgement of freedom of speech when it does not involve speech in any way, and when all avenues of speech remain open to the defendant.

Congress could conclude that the law it passed bears the proper relation to the maintenance of effective self-government. We submit that the judgment of the Court of Appeals holding the statute unconstitutional should be reversed.

MR. CHIEF JUSTICE WARREN: Mr. Karpatkin?

ORAL ARGUMENT OF MARVIN M. KARPATKIN, ESQ., ON BEHALF OF THE RESPONDENT

MR. KARPATKIN: Mr. Chief Justice, may it please the Court:

In the light of the presentation of factual background by the Solicitor General, insofar as concerns the facts of both the petition and the cross-petition, there is very little that need be added insofar as concerns such factual background. However, I believe a few factual type observations are appropriate, and are borne out not only by a reading of the record, but by the Solicitor General's presentation to this Court.

First, I believe it is clear, particularly from the passage which I believe Mr. Justice Brennan referred to, that the verbal conduct or symbolic act, or whatever words one chooses to use, on the part of David O'Brien, was intended as an act of dissent, as an act of expression of dissent to Government foreign policy, to Government military policy, to the War in Vietnam, and to the drafting of young men to serve in that War. I think it must also be conceded that this symbolic speech or verbal conduct on O'Brien's part attracted attention—attracted the attention of the media, attracted attention of the media audiences, attracted the attention of a hostile crowd—

THE COURT: What do you mean, "verbal conduct"? That's not what we're talking about here, is it?

MR. KARPATKIN: Mr. Justice Fortas, I—

THE COURT: We're talking about the burning of the draft card. And now you can say that that is symbolic First Amendment expression, if you want to, but we're not talking about verbal—we're not talking about anything he uttered here, are we?

MR. [illegible]stice Fortas. We're talking about the act of public demonstration on the part of O'Brien in publicly setting fire to his Selective Service certificate under the circumstances for which he did it. I use the word "verbal conduct" synonymously with "symbolic speech." And I believe that there may be some cases that support it, but I won't press that point.

THE COURT: Well, suppose this charge was that he had willfully placed this certificate in this dresser drawer, for all the reasons that you now say that he burned up the draft card. Would you be making a different argument? If he said nothing about it, there were no media persons and there was no publicity to it, but the Government discovered he didn't carry it, for all the reasons he burned here—he hid it, put it away in his dresser drawer, and walked out?

MR. KARPATKIN: Mr. Justice Brennan, I believe that some of the same questions would be involved.

THE COURT: The First Amendment questions?

MR. KARPATKIN: Some of the First Amendment questions would be involved, but not others. The question which I believe is a very serious one in this case, and that is our argument that there was a clear and unequivocal manifestation of improper Congressional purpose, would not exist in a nonpossession prosecution. Consequently, we respectfully suggest to the Court that it need not reach the issue of nonpossession if if decides the case in the manner in which we suggest that it should be decided.

THE COURT: But you would nevertheless be otherwise urging your First Amendment argument?

MR. KARPATKIN: Yes, Your Honor. We would be urging the First Amendment arguments if the symbolic act had the same manifestation and the same purpose.

THE COURT: Well, by "manifestation," you mean some public manifestation? What I'm trying to get at is: Are you making a special point of the fact that this was done publicly, in the presence of news media, with photographs taken and all of it?

MR. KARPATKIN: Yes, Your Honor, we are, because we believe that this brings it close to the line of symbolic speech cases which have been decided by this Court.

THE COURT: Well, in the hypothetical, I put to you—

MR. KARPATKIN: I believe that factor would be much less, Your Honor, and it would be much more difficult to make an

argument of symbolic speech under those circumstances.

THE COURT: So that symbolic speech requires some public manifestation. Is that it?

MR. KARPATKIN: Well, it requires an act of communication. I believe it was Mr. Justice Frankfurter in the *Metamore* case, who talked about free speech in the First Amendment, in terms of rational modes of communicating ideas; and I suppose that to be "communication," there has to be transmission and reception, and transmission and reception occurs when there are transmitters and receivers.

THE COURT: Well, in my hypothetical, you would be hard put to find any transmission and reception, wouldn't you?

MR. KARPATKIN: I think you probably would, Mr. Justice Brennan.

THE COURT: Then probably you wouldn't be making your First Amendment argument?

MR. KARPATKIN: That's why I started to respond to this colloquy, Your Honor, that I would hope that we would not have to argue this question here. This was not raised in the court below, and I do not believe that the Court has to decide the constitutionality of nonpossession.

THE COURT: Suppose a soldier over in Vietnam, in front of a large crowd of soldiers, broke his weapon and said it was a protest against the War and the foreign policy of the Government. Would that be symbolic speech?

MR. KARPATKIN: Mr. Chief Justice, I don't know whether that would or wouldn't be symbolic speech.

THE COURT: Well, we have to go a little farther than just this particular case, do we not?

MR. KARPATKIN: We certainly do not argue, as the Government in its brief suggests, that under our theory anything which communicates is protected, and that anything which communicates an idea is protected. We don't argue that the dumping of garbage is protected, or that political assassination is protected, or that any other of the fanciful notions which the Government seems to charge us with, is protected.

THE COURT: Where do you draw the line?

MR. KARPATKIN: We would like to suggest, Mr. Chief Justice, that the line should be drawn in accordance with the proper appli-

cation danger" test. However, we feel that even if the Court would choose to apply the ad hoc balancing test, that the various values which are placed in the balance on both sides are such that this statute could not survive constitutional scrutiny.

THE COURT: Well there was a lady—Virginia Kellums, I think it was—who protested the constitutionality of tax laws. Tax laws require the maintenance of certain books and records. Suppose, in order to show her deep aversion to the tax laws, she had burned her books and records, and done it publicly. Would that fall in the same category as your draft case? And would you defend it on the same basis?

MR. KARPATKIN: I don't know if I would defend it, Mr. Justice Fortas.

THE COURT: I don't mean personally.

MR. KARPATKIN: But I would think that it would be much easier to show a valid governmental purpose for the requirement that income tax records be preserved for a certain period of time than it is for the requirement that a person have in his possession or that a person be enjoined from mutilating or destroying the Selective Service certificate.

THE COURT: That's your problem, because now you're right back to a defense—to an attack upon the requirement of possession of a draft card. But in the *Kellums* case, then, you seem to concede that if there is a valid governmental purpose attached to the object, the burning of that object can be criminally punished regardless of the impact of the First Amendment?

MR. KARPATKIN: Well, I would think that these are items which could properly be weighed in the judicial constitutional balance.

THE COURT: That's what we're trying to do, and I want to know how, in your mind's eye, the scale tips.

MR. KARPATKIN: Well, let me address myself, then, at this point, Mr. Justice Fortas, to the various suggestions which have been made on the part of the Government, in this Court and in other courts, and by the learned Solicitor General, that this is a proper invocation of the power to raise armies, because it serves some role in the administration of the Selective Service.

Now I believe I counted three or four occasions when the Solicitor General repeated that this serves a valid function; but all he stated was referring to the Second Circuit's opinion. Now I

believe that if we outlined all of the rationales which are presented in the Second Circuit's opinion as well as those in the brief presented by the Government, we are left with no more than the possibility that the certificate may serve some notice-giving or identification purpose exclusively for the benefit of the registrant himself; and that only under the most remote possible conditions can it be suggested that it serves some function for the Government.

It is well known that the Selective Service System keeps elaborate records at its national headquarters, and emergency records of other kinds as well. Now I suggest that perhaps the reason why the Solicitor General was not more explicit in stating these reasons is that some of them are so fanciful as perhaps not to be worthy of mentioning in this Court. And I notice that two of those which have been suggested in the lower courts have not been suggested in this Court; namely, that in the event of an earthquake, disaster, or other flood or something of the nature of a flood, it would be possible for there to be a quick reconstruction of the records before men would be ordered to report to a certain place by radio or television. And the final suggestion which was made in the arguments below, but thankfully not in this Court, was that in the event of an enemy missile attack and a call-up by radio, why, persons could be ordered to report to certain places in accordance with their draft classifications, and that would serve a valid governmental purpose.

The only other purpose which it was suggested it would serve was that when a registrant goes to his local board, in the event he may have forgotten his number or forgotten the address of his board, why, it may assist in this identification if he has the card in his possession. Now it seems to me that if that is all that the Government can offer in support of this, it is a very, very light balance, indeed.

THE COURT: I thought it was an enforcement device, to help identify people who have registered.

MR. KARPATKIN: But enforcement of what, Mr. Justice Fortas?

THE COURT: Selective Service registration. No?

MR. KARPATKIN: There does not seem to be—it does not seem to play any role in the enforcement of the Selective Service laws. No mention of it can be found in any of the volumes and volumes of material which Selective Service has published, and the Selective Service System has been administering the Selective Service laws since 1940. I think it is most surprising indeed that not only was no Selective Service testimony presented to

Congress of all this litigation, in the trial courts and the appellate courts. Able attorneys for the Government have not been able to come forward with even a single statement on the part of any Selective Service official or Defense Department official, or governmental official, showing that this serves any purpose at all.

THE COURT: It does serve a purpose, doesn't it? Isn't its purpose to notify the registrant? Doesn't it serve a notification purpose?

MR. KARPATKIN: Of course it does, Mr. Justice Stewart. But is not that purpose served at the time that it's received?

THE COURT: But there is some reason that there is such a thing as a registration certificate, is there not?

MR. KARPATKIN: The reason is to—

THE COURT: —notify the registrant.

MR. KARPATKIN: There are two certificates, Mr. Justice Stewart. There's a registration certificate and a notice of classification. The registration certificate is permanent. The notice of classification changes with each classification. It is a means of notifying the registrant of classification. And certainly, upon receipt, it serves that notice purpose. But that is a purpose, presumably for the benefit of the registrant, which we would argue that the registrant can waive.

As a matter of fact, the Government states it is common knowledge that it serves many purposes. If one has to look for common knowledge, the common knowledge which most people know that the Selective Service certificates serve is that it helps to identify a registrant as being 18 years of age, in a state where 18-year-olds are allowed to purchase alcoholic beverages. That's the only "common knowledge" with regard to Selective Service certificates.

THE COURT: You mean a boy would burn up his card when it serves that function?

[Laughter.]

MR. KARPATKIN: Perhaps some are interested in other types of sustenance, Mr. Justice Fortas.

THE COURT: Well, if it serves only a notification purpose—there's a lot of other information on it. Does one have to be told the date of his birth? It has that on it, doesn't it?

MR. KARPATKIN: Yes, Your Honor.

THE COURT: The place of his birth. Do I have to be told the place of my birth? It tells the name and address of some person who will always know my address, the color of my eyes, the color of my hair, my height, my weight. Do I have to be told those things, if this serves only a notification purpose to me of my classification?

MR. KARPATKIN: I can see, Mr. Justice Brennan, how that serves a governmental purpose.

THE COURT: Well, perhaps it serves some other governmental purpose. Your suggestion is that all it does is to serve, as I understood you in your colloquy with Mr. Justice Fortas, that the only legitimate purpose is it notifies you of your draft classification. Once you get it, you've got the notice, and otherwise it serves no purpose. Obviously there's a lot of information on there which must serve other purposes.

MR. KARPATKIN: Well, if it tells you—if a piece of paper tells you of the date of your birth, I can't see what other purpose it serves other than to allow you to present some proof as to your date of birth.

THE COURT: Might it not give the Government some information needed in administering the Selective Service Act to have the young man carry a card that would show that he actually did register in a particular place, as this certificate shows: "Town of Framington, State of Massachusetts," and that the date of his registration was 12/11/1964, together with the certificate of the board on it to the effect that he did actually register?

Now we have millions of people in this country floating around from one part of the country to another. A lot of them are young men. Is the government entitled to have some knowledge of those facts, as obtained from the young men, in order to effectively administer the Selective Service law?

MR. KARPATKIN: Mr. Chief Justice, the Government has this knowledge. The Government has this knowledge at the time the young man registers, and the Government has many, many sources for obtaining this information.

THE COURT: Suppose this young man is found out in, say, Arizona. He's 19 years old and he has the same attitude that he has here, and he refuses to give the Government any information at all. And the Government wants him to have this card so they can know whether he did register in Framington, Massachusetts, or whether he didn't register. Don't you think that might be—in

the eve[illegible] did the same thing—don't you think t[illegible]ate purpose of the Government?

MR. KARPATKIN: Mr. Chief Justice, if there is any dereliction or delinquency or violation of the Selective Service Act, the possession or retention or nonpossession or nonretention of this card will have no effect on the Government's ability to prosecute.

THE COURT: But obviously it must serve the purpose of identification, does it not?

MR. KARPATKIN: Mr. Justice Brennan—

THE COURT: Not only of registration, but identification. It has a lot of things, including—indeed, at least this one does, I notice—obvious physical characteristics: scars on right shoulder and wears eyeglasses. As the Chief Justice suggests, why is it obviously prepared this way, and required to be carried so that the Government may be in a position to enforce the requirements of Selective Service?

MR. KARPATKIN: I would suppose that one could question whether or not any problems of self-incrimination might be raised by someone who—

THE COURT: You have a difficult enough constitutional question as it is.

[Laughter.]

MR. KARPATKIN: I know that, Mr. Justice Brennan.

THE COURT: Might he not have another, as the Court said recently—the right of privacy? The man might not want anybody to have that information? He might not want the Government to? His constitutional right to privacy, will it be invaded?

MR. KARPATKIN: We're not making any such argument.

THE COURT: You're not making that argument.

MR. KARPATKIN: But I do wish to repeat that David O'Brien was neither indicted nor tried nor convicted for nonpossession. He was indicted, tried, and convicted for burning, we respectfully submit before this Court, and there is a special area of constitutional questions which arise because of the manner of enactment of this statute. And I do not, with respect, believe that this can be avoided, notwithstanding the suggestion by the Solicitor General that the distinction between Congressional motive and Congressional purpose is elusive to the Government.

I believe that the entire legislative history which we have set forth as an appendix brief—and we have done it deliberately because we don't wish to be open to the suggestion that we are picking and choosing—demonstrates beyond any question that the only Congressional purpose here was the purpose of stamping out dissent, of stamping out this particular form of expression of dissent. The Government, indeed, so acknowledged it, and the Solicitor General acknowledged it in part of his argument, that the Government was seeking to punish contumacious conduct. The Government acknowledges that. It says that perhaps some of the purposes were less constitutionally justified than others. The Government acknowledges that at least one of the purposes was to declare draft card burning insulting and unpatriotic.

I respectfully suggest to this Court that it is not within the power of Congress to declare it a felony which can send a young man to jail for five years because Congress believes his conduct to be insulting and unpatriotic.

THE COURT: But somebody might say that it was insulting and unpatriotic to break a window in the White House. But I suppose you could also—the person who did it—could also be punished criminally, regardless of the fact that he might do it as an expression of opinion?

MR. KARPATKIN: Quite so.

THE COURT: It would be all of those things, wouldn't it?

MR. KARPATKIN: Quite so, Mr. Justice Fortas.

THE COURT: I think you answered it a while ago, but I'd like to ask you again: If this man had—if the petitioner had done this in private, in the privacy of his home, burned both the cards, would you be making your constitutional attack on this statute?

MR. KARPATKIN: The argument directed at the unconstitutional purpose, at the manifestation of the unconstitutional purpose, of the Congress would be the same, Mr. Chief Justice, yes.

THE COURT: You would?

MR. KARPATKIN: Yes, Mr. Chief Justice.

THE COURT: Now tell me what cases you have that would equate the private burning of a draft card, contrary to the statute, to the symbolic speech?

MR. KARPATKIN: Perhaps I do not understand your question, Mr. Chief Justice. What I was saying is that where there is such an extensive degree of Congressional excess—unconstitutional excess- hat the Act which is passed as a result of it is, on its face, unconstitutional. Congress could not have declared it to be a crime for someone to stand up and say, "This Selective Service certificate in my hand, I detest it and everything for which it stands," no more than can Congress declare it a crime for someone who at the time that he says it sets fire to it.

THE COURT: Have you got any case in which this Court's ever invalidated a statute solely because there was an improper motive on the part of Congress?

MR. KARPATKIN: May I first, with respect, Mr. Justice Fortas, comment on your terminology? I believe that the courts have distinguished—

THE COURT: Because I was commenting on yours, go ahead.

[Laughter.]

MR. KARPATKIN: Let me correct my own, then, Your Honor. But I believe that the distinction which we are urging upon this Court, and which has been utilized by courts of appeals but, I must admit, not yet directly and explicitly by this Court, is between that which is called motivation, which is the unrevealed reason why a member of the legislature passes, or doesn't pass, a bill.

THE COURT: We haven't yet explicitly done that; that's the answer I wanted.

MR. KARPATKIN: I do believe—

THE COURT: The answer to my question is: You have no authority to support your argument that this Court may look at the motive of Congress, and solely at the motive of Congress, and on that basis invalidate a statute as unconstitutional.

MR. KARPATKIN: I think I do have authority which points strongly in that direction, Mr. Justice Fortas. I refer to the case of *Grosjean* against *American Press Company* and the case of *Gomillion* against *Lightfoot*, the Tuskegee racial gerrymandering case. I believe that in both of those cases this Court came very close—came very close—to stating that where the legislative purpose is manifestly improper, the Court is not required to look any further. I believe that's in *Grosjean* perhaps even more strongly than the other one.

However, I do respectfully commend to the Court that the distinctions which were most explicitly stated by Circuit Judge Soper in *Patty*, on page 24 of our brief, and by Circuit Judge

Brown in the *Gomillion* case, before it came to this Court, on pages 25 and 26 of our brief, and in both of these cases I believe these distinguished members of the Fifth Circuit indicated that—forgive me—legislative motive, good or bad, is irrelevant to the process of judicial review. But legislative purpose is of primary importance in determining the propriety of legislative action, since the purpose itself must be within the legislative competence, and the method must be reasonably likely to accomplish that purpose.

Again, what the legislature of Alabama—as distinguished from its members—intended and underscored, and what the underscored purpose of the legislature—as distinguished from its members—was, in the enactment of this law: Is it then a traditional matter of concern for the Judiciary?

The best cases I can cite, of decisions by this Court, are the case of *Grosjean* and the case of *Gomillion*. Now in *Grosjean*, Mr. Justice Sutherland, writing for the Court, spoke of two things: He spoke both of the history of this type of legislation. This, if I may refresh the recollection of all of us, was the newspaper tax law enacted by the Huey Long Administration in the State of Louisiana in the '30s, which had the clear effect of discriminating against the large city newspapers in favor of the smaller rural newspapers, with obvious political consequences. And Mr. Justice Sutherland spoke both of the history of this type of legislation, and also the setting in which it was passed. Now it seems to me that the Court looked at the setting in 1930 in the *Grosjean* case—the Fifth Circuit looked at the setting—in which some of these statutes were passed in the *Patty* case and in the *Gomillion* case, and I respectfully suggest that this Court should not be, and will not be as Mr. Chief Justice Taft observed in another context, "too blind to see what all others can see," the setting and purpose of this law when it was passed by Congress. And the legislative history makes it abundantly clear that it had only one purpose in mind. Nobody was concerned with anything else. All of that is subsequent rationalizations, subsequent papering over by able attorneys for the Government at various levels.

The First Circuit saw that there was no rational legislative purpose. They cited *Grosjean* and *Gomillion*, but they didn't comment on it. They said, we won't comment on the purpose, on whether it was legitimate or illegitimate. We won't say whether it was illegitimate, because we find that there was no legitimate purpose. And it seems to me that a reading of the entire legislative history will make this clear.

THE COURT: Why do you think Congress repeats their concern?

MR. KARPATKIN: Mr. Justice Harlan, I think that in this

case— who has a deep respect for the Congress of the United States, and I have a number of personal friends who are in Congress—I think that the Congressional action in this case was an act of hysteria rather than an act of reflection; and there was a desire to do something real fast to punish something that they considered to be unpatriotic.

THE COURT: When you say that, you're getting into the area that this Court has consistently refused to get into. Namely, to inquiry into the motive of Congress in otherwise valid legislation.

MR. KARPATKIN: All that I can do, Mr. Justice Harlan, is to respectfully repeat that I am not suggesting that you look into the motives of the 393 persons who voted for it. I'm suggesting that you look at the two Committee Chairmen, who were two of the three people who spoke, and at the only other person who spoke, the authoritative spokesman.

Now the learned Solicitor General points out that only three spoke. But in fact this strengthens the argument because it would be otherwise perhaps if there were some distinction or some mixture in the legislative history, some non-unanimity; but here it's a unanimity. All three who spoke, spoke for one purpose: We have to do this to support our boys. We have to do this to punish those beatnik kids. That is the gist of it. I am not quoting out of context. It can be easily read and seen.

Now if there was ever a case where it is appropriate, I respectfully suggest, for this Court to follow the precedent which it reached in the *Grosjean* case and the suggestions made in those Fifth Circuit cases which I've cited, I believe that it would be appropriate in this case.

Can I continue, Mr. Chief Justice?

MR. CHIEF JUSTICE WARREN: Yes, continue until the red light goes on. You may finish your argument.

MR. KARPATKIN: Thank you.

I believe it's important to consider the—not cases which this Court has not decided, which the learned Solicitor General has referred to, the *Stover* case in New York, or the flag-burning case which has not yet come to this Court—but cases which this Court has developed and utilized and applied the doctrine of symbolic speech to.

The two chief cases, of course, are the red flag case, *Stromberg* against *California*; and the flag-salute case, *West Virginia Board of Education* versus *Barnette*. Now these cases are cited, passages are quoted in our brief, but it is very clear from these cases and from later gloss which this Court has put on it, that abstract discussion is not the only form of speech which is protected

by the First Amendment; that it does refer to certain types of action. And, to put it another way, that the only type of action which is protected by the First Amendment is not limited to the movement of the vocal cords; that it protects other kinds of action, as well.

Now Mr. Justice Frankfurter, in the *Meadowmoor* case, which pointed out that certain types of labor activity could not be protected by the First Amendment—

THE COURT: Was that an opinion for the Court?

MR. KARPATKIN: I believe it is, Mr. Justice Black.

THE COURT: The *Meadowmoor* case? It might have been.

MR. KARPATKIN: Yes, sir, *Milk Wagon Drivers Union* against *Meadowmoor Dairies.* According to my brief, it is.

THE COURT: I had an idea that I wrote that opinion.

[Laughter.]

MR. KARPATKIN: I'm embarrassed, and I apologize to the Court.

THE COURT: My Brother Frankfurter wrote a concurring opinion—at least that's in one *Meadowmoor* case. However, it's not improper to read it.

[Laughter.]

MR. KARPATKIN: I apologize to the Court for what probably is an oversight in the editing of the brief.

THE COURT: You may be right.

MR. KARPATKIN: The language which I am suggesting, and which carries forward the rationale of symbolic speech, is that the guarantee of free speech—back of the guarantee 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 communication that the guarantee of free speech was given so generous a scope.

THE COURT: Suppose the history read: "This form of dissent, because of its effect upon the enforcement of the Selective Service," would you still say that that was an illegitimate purpose?

MR. KARPATKIN: In that case, Mr. Justice Brennan, I would

say it [illegible]y one of the constitutional tests which is applied by this Court in First Amendment cases, either the clear and present danger case, or the balancing test.

THE COURT: The *Meadowmoor* case, at least the copy I have here from United States Reports, Mr. Justice Frankfurter wrote the opinion for the Court and Mr. Justice Black wrote a dissenting opinion.

[Laughter.]

MR. KARPATKIN: I think, under the circumstances, it would be appropriate for me to turn to a different case.

[Laughter.]

MR. KARPATKIN: I think the doctrine and notion of symbolic speech receives further development by Mr. Justice Harlan and this Court in what I am sure was the concurring opinion in *Garner* against *Louisiana*, and by Mr. Justice Fortas of this Court in what was called the prevailing opinion in *Brown* against *Louisiana*, in both of which I believe that the notion that speech means more than just the movement of the vocal cords was developed. In various cases, and also in a learned article by Professor Kalven, various shorthand expressions have been used to describe it: "The workingman's means of communication" has been used to describe peaceful picketing.

THE COURT: But it's also true, of course, that not all action is speech. Not all action is symbolic speech. Some action is symbolic speech; not all action is symbolic speech.

MR. KARPATKIN: Very true.

THE COURT: Your problem is where does this fall in that all-embracing duality of propositions?

MR. KARPATKIN: That's precisely the problem, Mr. Justice Fortas. And we are suggesting that this comes within the classical doctrines of symbolic speech; that it meets the criteria of symbolic speech which this Court has announced. It has all the hallmarks of it, the principal one of which is that it is peaceful and that it is nonviolent. And, indeed, distinctions could be made to show that the peaceful, ritual-like act of setting fire to a piece of paper as part of a demonstration against the Government's policy, which this piece of paper represents, is much more within the ambit of symbolic speech than some of the other cases where it has been applied.

There is no concerted action here, no action of large numbers of persons moving their bodies in any direction—either in a picket

line or in a radical march, which was the case in the *Stromberg* case. There is no large number of persons going into a place of private property as in the *Lunch Counter* and the *Garner* case, or into a public place like the library in *Brown* against *Louisiana.* This was an individual act of a single person. The First Circuit observed that there was no "active incitement or agitation of others involved."

THE COURT: Suppose somebody, as an act of protest, throws his quivering body in front of—on the railroad tracks, and insists on staying there, and blocks the passage of trains. Now is that symbolic speech? Or is it outside—or is it action which cannot be defended as symbolic speech because it is an interference with the rights of others?

MR. KARPATKIN: I would say that that kind of a case could not come within this Court's doctrine of symbolic speech.

THE COURT: And so your problem here is whether this is protected, as I see it—at the moment, anyway—is whether this is protected as symbolic speech, or whether it is an unprotected interference with the process of government, with a legitimate process of government.

MR. KARPATKIN: But I must respectfully insist, Mr. Justice Fortas, that if this Court is prepared to recognize the unconstitutional Congressional purpose, then it need not go into such a careful analysis of which side of the line it would go on.

THE COURT: That would simplify it. If that was the only problem that we have, that would simplify it greatly. But is that your total solution? Do you say that we have to find that this Act was animated by an improper motive on the part of Congress, in order to arrive at the result you seek?

MR. KARPATKIN: No, Mr. Justice Fortas, we don't say that at all. But this factor is so clearly and inescapably in the case that it seems to me that it just calls for consideration by this Court. But I believe that the Court can reach the solution which I respectfully urge upon it on grounds similar to those found by the First Circuit.

THE COURT: Tell me what they are? Because so far as I'm concerned, I'd have great difficulty with reaching a result here based upon—which requires this Court to act as a result of an assessment of the motivation of the Congress. So what are your other grounds?

MR. KARPATKIN: The grounds are that regardless of the

atmo[illegible] was introduced and passed that the act which it seeks to punish is an act of symbolic speech within the traditional decisions of this Court: recognizing symbolic speech; that it is as much, if not more, symbolic speech than peaceful picketing, than a peaceful sit-in, than a peaceful stand-up.

THE COURT: And that's because you say that it does not—that it is essentially expression, communication of a point of view, number one. Number two, that it does not interfere with the rights of others, or with the exercise, performance, or execution of any legitimate government function. Am I stating the position correctly?

MR. KARPATKIN: Yes, Mr. Justice Fortas.

But if I may elaborate on it, I would state that it certainly does not rise to the dignity of being a clear and present danger to the accomplishment of any substantive Congressional purpose.

THE COURT: We don't have to reach that, unless we cross the first one; unless we accept your first position, that this is to be considered as if it were speech. If we consider it not as speech but as action which interferes with the rights of others, which is an aggression on the rights of others or an aggression on the performance of governmental functions, do we still have to reach "clear and present danger"?

MR. KARPATKIN: No, Mr. Justice Fortas. It can be decided under the balancing test, or any other test which this Court would care to fashion or apply. But I must suggest that in every other case where this Court has applied symbolic speech, arguments have been used to defend the statutes saying that this is a proper legislative purpose. The very red flag law which this Court declared unconstitutional in *Stromberg*, the Supreme Court of Massachusetts said it's a proper governmental purpose to ban red flags, because they incite people to riot. We cite that case in our brief.

The mere fact that Congress passes something, and that Congress declares that in the opinion of the Members of Congress it has a proper Congressional purpose, is not sufficient. I suggest that it's incumbent upon this Court—I respectfully suggest, that it's incumbent upon this Court, when a constitutional attack is made and when something at least appears to have some kind of an effect on a First Amendment right, to apply one of the constitutional tests which has traditionally been applied.

I think it should also be mentioned that this might be one of those areas where there is a mixture, a melting, a hybrid, which is the language which was used in some of the picketing cases, I

line or in a radical march, which was the case in the *Stromberg* case. There is no large number of persons going into a place of private property as in the *Lunch Counter* and the *Garner* case, or into a public place like the library in *Brown* against *Louisiana.* This was an individual act of a single person. The First Circuit observed that there was no "active incitement or agitation of others involved."

THE COURT: Suppose somebody, as an act of protest, throws his quivering body in front of—on the railroad tracks, and insists on staying there, and blocks the passage of trains. Now is that symbolic speech? Or is it outside—or is it action which cannot be defended as symbolic speech because it is an interference with the rights of others?

MR. KARPATKIN: I would say that that kind of a case could not come within this Court's doctrine of symbolic speech.

THE COURT: And so your problem here is whether this is protected, as I see it—at the moment, anyway—is whether this is protected as symbolic speech, or whether it is an unprotected interference with the process of government, with a legitimate process of government.

MR. KARPATKIN: But I must respectfully insist, Mr. Justice Fortas, that if this Court is prepared to recognize the unconstitutional Congressional purpose, then it need not go into such a careful analysis of which side of the line it would go on.

THE COURT: That would simplify it. If that was the only problem that we have, that would simplify it greatly. But is that your total solution? Do you say that we have to find that this Act was animated by an improper motive on the part of Congress, in order to arrive at the result you seek?

MR. KARPATKIN: No, Mr. Justice Fortas, we don't say that at all. But this factor is so clearly and inescapably in the case that it seems to me that it just calls for consideration by this Court. But I believe that the Court can reach the solution which I respectfully urge upon it on grounds similar to those found by the First Circuit.

THE COURT: Tell me what they are? Because so far as I'm concerned, I'd have great difficulty with reaching a result here based upon—which requires this Court to act as a result of an assessment of the motivation of the Congress. So what are your other grounds?

MR. KARPATKIN: The grounds are that regardless of the

atmo was introduced and passed that the act which it seeks to punish is an act of symbolic speech within the traditional decisions of this Court: recognizing symbolic speech; that it is as much, if not more, symbolic speech than peaceful picketing, than a peaceful sit-in, than a peaceful stand-up.

THE COURT: And that's because you say that it does not—that it is essentially expression, communication of a point of view, number one. Number two, that it does not interfere with the rights of others, or with the exercise, performance, or execution of any legitimate government function. Am I stating the position correctly?

MR. KARPATKIN: Yes, Mr. Justice Fortas.

But if I may elaborate on it, I would state that it certainly does not rise to the dignity of being a clear and present danger to the accomplishment of any substantive Congressional purpose.

THE COURT: We don't have to reach that, unless we cross the first one; unless we accept your first position, that this is to be considered as if it were speech. If we consider it not as speech but as action which interferes with the rights of others, which is an aggression on the rights of others or an aggression on the performance of governmental functions, do we still have to reach "clear and present danger"?

MR. KARPATKIN: No, Mr. Justice Fortas. It can be decided under the balancing test, or any other test which this Court would care to fashion or apply. But I must suggest that in every other case where this Court has applied symbolic speech, arguments have been used to defend the statutes saying that this is a proper legislative purpose. The very red flag law which this Court declared unconstitutional in *Stromberg*, the Supreme Court of Massachusetts said it's a proper governmental purpose to ban red flags, because they incite people to riot. We cite that case in our brief.

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I think it should also be mentioned that this might be one of those areas where there is a mixture, a melting, a hybrid, which is the language which was used in some of the picketing cases, I

believe, of where there is speech admixed with action. I believe Mr. Justice Douglas used the phrase "speech related to action." I think it's necessary to analyze what it is that this statute seeks to reach.

Does this statute seeks to reach the action? Or does this statute seek to reach the speech? I suggest that not only the legislative history, but just a plain examination of what the statute seeks to do, shows that it seeks to reach the speech because, as the First Circuit pointed out, there was previously in existence a regulation with the same penalty which would presumably reach the action.

THE COURT: Examining the statute otherwise than by the legislative history, how do you come to that conclusion?

MR. KARPATKIN: Well, I believe that Chief Judge Aldrich of the First Circuit—

THE COURT: No. I am asking you.

MR. KARPATKIN: I come to that conclusion, Mr. Chief Justice, because there was already in existence a regulation seeking to punish the nonpossession of these pieces of paper, and that consequently there does not appear to be any other purpose which was served by it.

THE COURT: I haven't quite understood the scope of part of your argument. Suppose there is nothing in this case except the fact that a man wanted to burn his draft card—not to protest, but he just wanted to burn his draft card. Would you say that Congress is without power to make it illegal to engage in that conduct of burning a draft card?

MR. KARPATKIN: Well, I suppose all that I can do here, Mr. Justice Black, is refer to the same type of argument which might have been advanced by the spate of red flag laws which were enacted by state legislatures in the 1920s, and everybody thought that they were reasonable laws. And state supreme courts held that they were constitutional; that they were valid means whereby state legislatures could seek to control the dangers of incipient radical movements and of agitation caused by radical movements and of riots and violence and things of that nature.

THE COURT: Are you saying that Congress is without power to make it against the law to destroy draft cards which are issued in order to carry on its business, even without any protest in it? I'm trying to emphasize to you the difference between conduct and speech. There can be speech; conduct, plus speech. There can be press, advertising; there can be marching backwards and forwards

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[illegible] that has held that the Government is without power to regulate that kind of conduct, even though people want to do it, in order to picket, in order to express ideas? If so, what is the case?

MR. KARPATKIN: I think that—

THE COURT: I think you will find an opinion by Mr. Justice Douglas, in which I concurred, in which we pointed out that those things were different. One was conduct and one was speech—speech plus conduct. Have you found any case of this Court that held, without more, that it's unconstitutional for the state or the Federal Government to bar marching backwards and forwards in front of a place in order to protest something it's done?

MR. KARPATKIN: Well, I would say yes, Mr. Justice Black. I would say that there is perhaps a greater legislative power to regulate where there is an element of conduct involved than there is in a case where there's pure speech. And I believe that was the opinion of Mr. Justice Goldberg, writing for the Court in *Cox* against *Louisiana*. We don't challenge that there is greater regulatory power where there is conduct related to the speech.

THE COURT: You're saying that there should be some kind of balancing when it's shown that there's conduct plus speech, that there should be some kind of balancing to find out how important it is for the Government to enforce its law against the conduct which is included. As I understand it, that's what you're arguing?

MR. KARPATKIN: Yes, that's one of the arguments which we make in the alternative, Mr. Justice Black.

THE COURT: But I do not think—I know of no case of this Court that has expressly held that it violates the Constitution for a government to regulate marching backwards and forwards in front of or around buildings or homes or anything else.

THE COURT: How about *Thornhill* against *Alabama*?

MR. KARPATKIN: I was going to cite that.

THE COURT: It does not. If you will read it carefully, you will see it does not; and this Court has held that it does not.

MR. KARPATKIN: May I respectfully refer the Court, now that the red light has gone on, that a companion case to *Thornhill,* the *Carlson* case, actually brings the language of symbolic speech of this Court's prior decisions into peaceful picketing.

I can just say, in summation—I have, alas, not been able to

reach other points which I hoped I would have an opportunity to reach—that just as decisions of this Court have referred to peaceful picketing as the workingman's means of communication—

THE COURT: That was in *Swing*, was it not?

MR. KARPATKIN: I don't know if it was the *Swing* case, Mr. Justice Black, or if it was the *Thornhill-Carlson* cases. I certainly would not want to dispute that without actually having the books in front of me.

And just as the sit-in has been called the "poor man's printing press," I would like to respectfully suggest that perhaps the act of an obscure pacifist who wants to engage in a dramatic anti-war act of burning his draft card makes draft card burning the war protester's TV transmitter.

Thank you very much.

MR. CHIEF JUSTICE WARREN: We will adjourn.

[Whereupon, argument in the above-entitled matter was concluded.]