Supreme Court of the United States

In the Matter of:

JAMES J. OESTEREICH Petitioner vs. SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 11, CHeyenne, Wyoming, et al. Respondent	**Docket No.** 46

Place Washington, D. C.

Date October 24, 1968

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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C O N T E N T S

ARGUMENTS OF: P A G E

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

- -x

James J. Oestereich :

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Petitioner :

:

vs. :

: No. 46

Selective Service System Local Board No. 11, Cheyenne, Wyoming, et al.:

:

Respondent :

- -x

Washington, D. C.
Thursday, October 24, 1968

The above-entitled matter came on for argument at 1:50 p.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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ERWIN N. GRISWOLD
Washington, D. C.

P R O C E E D I N G S

CHIEF JUSTICE WARREN: No. 46, James J. Oestereich versus Selective Service System Local Board No. 11, Cheyenne, Wyoming, et al.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Wulf.

ORAL ARGUMENT OF MR. MELVIN L. WULF

FOR PETITIONER

MR. WULF: Mr. Chief Justice, may it please the court. This case is here on Certiorari from the United States Court of Appeals from the 10th Circuit which affirmed decision of the District Court of the District of Wyoming dismissing petitioner's complaint. The facts are these.

Petitioner, as a duly enrolled student preparing for the ministry at a recognized theological and divinity school had been classified pursuant to the Military Selective Service Act and the regulations in class 4D by his local board in 1966. Class 4D entitles him to be exempt, not from registration but from training and service.

On October 16, 1967, the petitioner returned his registration certificate to the government, "solely for the purpose of registering his dissent from participation by the United States in the war in Vietnam."

The reasons supporting his dissent were contained in an affidavit filed with the complaint. He said he had turned

in his card as an act of collective conscience in support of our dying and suffering brothers who are presently fighting on our behalf in Vietnam and as a responsible expression of concerned citizens acting in light of the First Amendment.

He stated his belief that the Vietnam situation reveals this war to be in violation of most of the criteria of The Just Wars Doctrine and is a major threat to security and the peace of the world.

Upon receipt of his registration certificate, his local board on November 7, about two weeks after he had turned in his card, mailed him a delinquency notice, a standard Selective Service form, notifying him that he had become delinquent for two reasons.

One, for failure to have his registration certificate in his possession, and two, for failure to advise the board of his current status.

At the same time, simultaneously, a notice of classification was sent to the petitioner advising him that he had been re-classified 1A.

The petitioner appealed to the State Appeal Board which affirmed his 1A classification on December 27 and on the same day the local board sent him a notice to report for induction on January 24, 1968.

Suit was filed on January 19 in the District of Wyoming to enjoin the induction and to require petitioner's

re-classification back into 4D, the exempt status. On the 22 of January the District Court granted the government's motion to dismiss from the bench. We took expedital appeal to the Tenth Circuit which affirmed the decision below on February 21, and this decision for Certiorari was granted in May.

The questions in this case are all of first impression. For the first time since the adoption of the conscription in 1940 and after some dozens of millions have been conscripted during the first quarter of the century, this case brings to the attention of this Court some of the low visability machinery of the Selective Service System. The actual operation of the Selective Service System is of course controlled by the design of the regulations.

We believe that this case will reveal that the regulations involved in this case do not turn square constitutional corners.

Also involved in this case in the high disability of the Director of Selective Service. We contend and the government has agreed that General Hershey effectively invited the local boards around the country to use the the Selective Service System as a means to punish dissidents from national policy and he thereby not only punished some dissidents from national policy for expressing their political views but he also deterred many unknown numbers from expressing any views at all.

The threshold argument in this case, before we get

to the merits, involves Section 10 (b)(3) of the Military Selective Service Act of 1967, a new provision adopted by Congress in 1967. It reads, "No judicial review shall be made of the classification or processing of any registrant by local boards and appeal boards or the President except as a defense to a criminal prosecution instituted under Section 12 of this title after the registrant has responded either affirmatively or negatively to an order to report for induction."

The government, the Solicitor General, has agreed with us that in the circumstances of this case the revocation of petitioner's 4D classification was without authority because it was contrary to an express grant of the exemption by statute by Congress, and that for that reason the District Court should have granted the injunction and required petitioner's classification back into 4D.

We agree with the Solicitor General but we think the Solicitor General's concession is too narrow. We urge upon the court a rather broader interpretation of 10(b)(3) to one often described as the special circumstances exception, a doctrine applied to the statute, which, have purported either to deny review entirely or to limit it in one way or another.

The "special circumstances" doctrine in this case we contend, and I will come back to it in more detail in a moment, is that the local board acted beyond its jurisdiction in depriving petition of his 4D exemption and that to not allow

petitioner to sue, to regain his exempt classification will needlessly expose himself to prosecution.

The second and slightly broader ground on which we would have this court base its decision in reversing the court below is that the whole scheme, all of the events surrounding the withdrawal of petitioner's classification, violated the First Amendment, and in that respect we rely on the case of Wolff v. Selective Service decided by the Second Circuit in 1967.

We think that the court, without getting to the consittutional issue concerning 10(b)(3), can decide the case on either of those two grounds. However, we also argue that should the court disagree with us that this is a"special circumstances" case, or take the position that the First Amendment was not breached in this case, then we say that it is necessary to examine the constitutionality of 10 (b)(3) itself which seems to require that the only way petitioner could test the validity of the withdrawal of his exemption is to refuse to report for induction and to defend in a criminal prosecution.

Q What was the law prior to 10(b)(3)? What was the statute prior to 10, or wasn't there any?

A 10(b)(3) before the amendment said only that decisions of the local board shall be final, which was the statute as interpreted in Falbo v. Estep. There was no statute like the new amendment prior to its adoption.

The justification that the Selective Service System

has put forth in this case in objecting to any pre-induction litigation is what they describe as the litigious interruption of the functioning of the Selective Service System. Litigious interruptions of functioning of Selective Service System was put forward 25 years ago in Falbo where the question was whether a registrant could raise questions about the validity of a classificiation in defense of a criminal prosecution.

Mr. Justice Murphy, in dissenting in Estep, said of the government's position there that it is alleged that to allow a full hearing in a criminal proceeding under this act would be to extend an open invitiation to all inductees to disobey their induction orders and litigate the validity of the orders in a subsequent trials. He described it as a poor excuse for stripping petitioners of their right and process and thought it was a speculative concern at best.

Falbo specifically said that the question there was to be decided in the context of a wartime situation where the nation's manpower was fully mobilized. That was also the background of the Estep case where, as I say, the only question was whether Selective Service registrants could raise their objections in a criminal prosecution. Bothof those cases arose in a wartime situation where the nation was fully mobilized and where its very life was at stake.

The situation is entirely different today, where there is no declared war and the nation's life is not in the same

degree of jeopardy as it was during the Second World War.

Judge Zirpoli, in the Northern District of California who in an opinion striking down 10(b)(3) on the ground that it is unconstitutional, also addressed himself to the government's claim about litigious interruption, and he said the interruption was insignificant if it existed at all.

He said "it would not disrupt the Selective Service System because the court would indeed experience a net saving in time because the need for a few trials would be obviated by voluntary compliance with orders which have been judicially declared valid and some time will be saved the trial because the issue of the orders' validity probably might have to be litigated."

The Selective Service System also says in its portion of the government's brief that pre-induction suits will interrupt Selective Service because they are generally filed within a few days of the induction date.

That happens to be true in the case before you. It doesn't happen to be true in the general run of cases in which affirmative suits which I know about, amounting to about 20, have been filed. Most of those suits were filed after reclassification and before exhaustion of the administrative appeals process, during which time an induction order cannot issue.

The Solicitor General also says, as one of the government's reasons for opposing pre-induction review of these

cases, that if petitioner's induction is enjoined someone else will have to take his place.

As to that, I would just like to point out to the court that in the semi-annual report of the Selective Service, which the Solicitor General filed with the court yesterday, at page 13, the fact of the matter is that should petitioner's induction be enjoined it really would not affect the Selective Service System at all because in every year since 1949, in the table at the bottom of page 13, the Selective Service System is overbooked.

In 1967, for example, the Defense Department asked that they induct 288,000 men. They called 345,000. They inducted 298,000, which is indeed 10,000 more than the Defense Department had requested.

I also want to say something about habeas corpus as an alternative and alternate route to criminal prosecution. We don't think that habeas is really an effective alternate because it requires that the man go into service and perhaps, in compliance with an allegedly invalid order, it requires that he be subject to military law during the time he is in service and during the time that his habeas is pending. It may be that after induction he may be transferred a long distance from his home, which generally would be the case, away from his friends, away from the witnesses, away from the local board, away from all of the people who could testify in his behalf which would in fact

make it very difficult for him to bring an effective habeas corpus.

Also the habeas appeal, during the course of a habeas appeal, he would have to be subject to all of his military duties as contrasted to the appeal in the courts of a criminal prosecution or a civil proceeding where he would not be subject to military duties.

The special circumstances in this case are set. These are the circumstances which we urge upon the court as a reason and basis for granting pre-induction judicial review, in those cases where the board has acted without power, where it has acted beyond its jurisdiction.

There are seven such special circumstances.

One, that the board acted contrary to the statutory exemption.

Two, that the board's declaration of the petitioner as a delinquent, his re-classification and induction were unauthorized by the statute.

Three, that that procedure was unauthorized by the regulations.

Four, that it was unconstitutional because it subjected petitioner to punishment.

Five, that the delinquency regulations are unconstitutional.

Six, that turning in the registration certificate is

protected by the First Amendment.

Lastly, there is a fact of independent requirement of possession.

Q What are the special circumstances? Where does it come from?

A It comes from a fairly long line of cases, Justice Harlan -- Lipke v. Lederer in the twenties, which was a tax case which used the expression "special circumstances."

There are other cases during the 1920's -- Miller v. Standard Nut Margarine and other cases cited on page 38 of our brief.

More recently the doctrine if not the actual language has been used in Leedom v. Kyne and the National Labor Relations Board case, Harmon v. Brucker, question of the quality of discharge given to a member of the Armed Forces, and in a number of immigration and naturalization cases, Shaughnessey v. Pedreiro, Brownell v. WeShung, and Rusk v. Cort.

All of those cases, and I would like to talk just for a moment about Leedom v. Kyne, and McCulloch v. Sociedad which are labor relations cases, both of those cases allowed affirmative suits to be brought to test the jurisdiction of the National Labor Relations Act provided that review could be secured only by review of a certification order or on review of an unfair labor practice claimed by the court. Those would, of course, initiate in the Circuit Court.

However, in these two cases, in Leedom, where the board acted in flat contradiction to a statutory provision, this court allowed an affirmative suit to be brought into District Court, and the same in the McCulloch case where this court said that the question there involved international repercussions because it dealt with the power of the National Labor Relations Board to certify foreign flag seamen sailing on foreign flag vessels. So the "special circumstance" doctrine is one that has been applied by this court not infrequently in the face of statutory language which would seem to either deny District Court jurisdiction or to limit it in one way or another.

We also rely on the second ground on which we urge the court to permit in the circumstances of this case pre-induction judicial review, because of the compelling First Amendment circumstances in which it arose. In those circumstances we think that the decision in the Wolff v. Selective Service decided in an opinion written by Judge Medina in 1967 is the view that should be followed by this court.

Q That was just a pure protest case, was it not? It did not have the additional element of divesting himself of his classification card.

A. It was a protest that took place inside the office of the office of the local Selective Service Board, yes.

Q But it was not the alleged violation of a statutory duty to remain in possession of the card.

A. Well, the local board thought so. The Selective Service System thought so. The Second Circuit thought not.

Q. It was just a straight protest, a demonstration.

A. It was a dual holding actually. What the Second Circuit said, as I read the case, was:

One, that the local board did not have jurisdiction to re-classify the registrants involved in that case for, in effect, the alleged commission of a crime.

Secondly, it also pointed out that if re-classification for engaging in protests of any kind were permitted this would not only offend the First Amendment rights of the particular registrants involved, but would also deter their expression of First Amendment rights by other registrants who would not be able to discern the contours of what protected speech would be in the Selective Service context.

We think that this is precisely the case here. We think that petitioner's turning in his card was an act protected by the First Amendment and that as such it comes within the scope of the Wolff case.

We also believe that 10(b)(3), if applied in this case so as to cut off petitioner's right to pre-induction review, would be unconstitutional. I do not think that the court has to get to that. If it does we address ourselves to it in detail in the brief and I would rather go on to the delinquency regulations which underlie this entire case.

What happened here was that after petitioner turned in his card, and after it was received by the local board, they declare him a delinquent under the Selective Service Regulations, Part 1642. That whole delinquency procedure is most peculiar. It permits the local boards to do practically anything to any registrant without any standard and without any standards either in the regulations or any standards delegated by Congress by statute.

A delinquent is defined as anyone who has failed to perform any duty or duties required of him under the Selective Service law other than the duty to comply with the order to report for induction. That is the total sum definition of someone who is delinquent.

Once a delinquent is declare to be such by his local board he may be classified 1A with nothing more.

If he is classified 1A he shall be inducted.

Delinquent re-classified registrants are to be called before all other classes of individuals, before volunteers.

Lastly, the board in 1642(c) is given the power to revoke the delinquency, but there are no standards about how they do it. There is no requirement that they do it. It just says that a registrant who has been declared to be a delinquent may be removed from that status by the local board at any time, period.

We think, first, that this whole delinquency procedure

is overbroad in the protest First Amendment sense. We have pointed out a couple of examples at page 74 in our brief of the kinds of activity that subjected registrants to delinquency declarations. One man was declared delinquent for sitting in at a local board. That was the case with Wolff.

Another man was declared delinquent for peacefully demonstrating near a local board.

Another man was declared delinquent for distributing anti-war leaflets during Selective Service physical examinations.

Another was declared delinquent for counseling evasion of the Selective Service Law.

Another was declared delinquent for being a member of the Students for Democratic Society.

Another man, who recently came to my attention, and I sent a copy of this to the Solicitor General by mail, out of Colorado, has been declared delinquent because "of your activity in the protest march of December, 1967."

Any regulation, no less any statute which can be interpreted and applied against undoubted First Amendment protected activity of this kind, is in our view unconstitutional under the First Amendment.

We attack the delinquency regulation not only for being in violation of the First Amendment, but also because they are not authorized by the statute because, as used in this case, they are not authorized by the regulations themselves, or rather

as used in this case or as authorized by the regulations, and also and lastly, that if neither of those two suggestions are adopted by the court then delinquency regulations are unconstitutional.

There is no authority for the delinquency regulations in the statute. There is an acknowledgment in 1967 of the delinquency regulation but it was a very narrow section of the statute.

Our position on the declaration of delinquency of petitioner is not being authorized by the regulations, and that is the requirement of possession of a registration certificate, is not one of those"duties"required by the regulations. It has nothing to do with the discreet information-gathering function necessary for classification which it is the purpose of the delinquency regulation to enforce.

Lastly, we say that as applied in this case, and in general, the delinquency regulations are unconstitutional because what they do in effect is to punish the registrants by threatening to induct them if they do not coincide with the "duties" of the Selective Service law and its regulations.

I am afraid I have run out of time. I do want to save a few minutes for rebuttal.

We have other arguments relating to the First Amendment particularly, but I do urge upon the court that in our view the most important aspect of this is the invalid

delinquency procedure which we describe at some length in our brief.

Thank you.

ORAL ARGUMENT OF MR. ERWIN N. GRISWOLD

FOR RESPONDENTS

MR. CHIEF JUSTICE WARREN: Mr. Solicitor General?

MR. GRISWOLD: Mr. Chief Justice, may it please the court, this is a troublesome case. It involves only a question of the proper application and construction of two provisions in the same statute enacted at different times. Although there are some constitutional questions in the offing to which Mr. Wulf has alluded, I do not believe that they need be decided here.

The case comes here on an extremely short record, consisting of nothing but the complaint filed in the District Court, an affidavit of the plaintiff filed in the District Court, the exact status of which here I do not know, and the government's motion to dismiss the complaint based primarily on the provisions enacted by Congress in 1967 as Section 10(b)(3) of the Military Selective Service Act of 1967.

This is not the kind of a record, it seems to me, on which important and difficult constitutional questions should be decided.

As far as the petitioner's delinquency classification is concerned we know virtually nothing in the way of facts since no evidence has been presented.

Of course, the government waived this by filing its motion to dismiss, but the fact remains this is now a bare-bones case at best.

As a matter of fact, there is a way in which it is possible to treat the case as an easy one, as was done by the two courts below, and by the representatives of the government in presenting the case there. Perhaps that is the way it should be treated here.

Section 10(b)(3) is simple and clear on its face. It says that no judicial review shall be made of the classification or processing of any registrant except as a defense to a criminal prosecution after the registrant has responded either affirmatively or negatively to an order for induction.

There is no criminal prosecution here, so the statute says there shall be no judicial review.

Congress surely has considerable latitude in such matters.

Apart from special circumstances which may be present in this particular case, there is a good deal of basis to support such a conclusion, and this is in fact developed at some length in the first point in our brief at pages 15 through 35. Counter-vailing arguments are developed in the petitioner's brief.

I should like to make it plain that we do not regard Section 10(b)(3) of the Military Selective Service Act of 1967 as invalid on its face or anything like that. Where there are

no other factors involved, we are prepared to advance the proposition that it is valid.

There is a case now pending before the court on jurisdictional statement, Clark against Gabriel, No. 572 on appeal from the United States District Court for the Northern District of California, in San Francisco, where one of the judges of the District Court has held that Section 10(b)(3) is unconstitutional.

Actually there is a division on this question among the District Judges in San Francisco. Some have held that Section 10 (b)(3) is unconstitutional and others have held that it is valid and have given it effect.

We have taken a direct appeal in the Gabriel case where the decision went against constitutionality in order to get that question resolved.

I state this situation in order to make it plain that it is not the government's position here that Section 10 (b)(3) is invalid in the general case.

The problem arises here because of special circumstances which may be relevant inthis case.

When we take another look at Section 10(b)(3) its clarity becomes less evident. In the fifth and sixth lines of the statutory provision as it appears on page 3 of the government's brief we find that judicial review can be had only in "defense to a criminal prosecution after the registrant has

responded either affirmatively or negatively to an order to report for induction."

Just what does that mean? How can there be a criminal prosecution under Section 12 of the act where the registrant has responded affirmatively to an order to report for induction? For this we are referred to the legislative history, and it is suggested that this is to leave open the availability of the writ of habeas corpus after a registrant has accepted induction into the army. But that surely is not judicial review "in defense to a criminal prosecution." Obviously the statute means more or less than it says on its face, or at least something different from what it says on its face.

We are thus confronted with the problem of statutory construction, dealing with a statutory provision of sweep and generality, without explicit qualities or qualifications, but subject to one qualification which is accepted by all concerned, that is, that in addition to criminal prosecution there can also be judicial review in habeas corpus.

It should also be observed that this is a statute which is a part of a comprehensive statutory provision, much of which has been in effect for a long time, and different parts of which have been enacted at different times, sometimes perhaps without full attention being paid to the articulation of the several statutory provisions.

As Mr. Wulf has pointed out, when one seeks to apply

Section 10(b)(3) to certain types of cases, constitutional questions loom over the horizen. These are of two sorts: First, we have those which are based on the First Amendment, sometimes referred to as First Amendment overtones; and, second, those which are based on the Fifth and the Sixth Amendments.

Such questions arise, perhaps, most clearly, whereas here the so-called delinquency regulations are involved.

For reasons which I will develop a little later I do not think it is necessary to argue the old question of the validity and the effect of the delinquency regulations in this case.

It can be said, though,that the delinquency regulations are not as clear as they might be.

It should be observed in the first place that they are entirely a matter of regulation. There is no affirmative grant of power by Congress to deal in this way with delinquents except that it can be said that the regulations have, in a way, been ratified by Congress, by a provision first appearing in the 1967 amendments relating to the order in which registrants are to be inducted, putting delinquents into the top priority.

But there is at no place any definition of delinquency. Obviously there are defaults which are trivial and others which are more serious.

There is nothing in the statute or the regulations which spells out which is which. Whether a person is in fact

to be declared a delinquent is left to the unfettered judgment of the local board, guided to some extent by general statements of the Selective Service System.

Then as Mr. Wulf has pointed out, there is a further provision in Section 1624.4 of the regulations which provides that a registrant who has been declared to be a delinquent may be removed from that status at any time, and a similar provision in Section 1642.14.

In either case, though, is there any standard. There is no provision that the board must give the registrant an opportunity to correct his delinquency, no definition as to what actions will be sufficient to life the delinquency classification. All the regulation says is that the board may remove the registrant from delinquency status. But it is all left to the board.

Whether this would be a sufficient standard in the case of delegations to other types of administrative agencies I do not know. Whether it is enough in the case of the Selective Service System need not, in my view be decided here.

The eventual problem of the validity of the delinquency regulations is furthur complicated by their essentially punitive nature.

It is said they provide a sanction which is analagous to civil contempt. If that were the correct analogy, though, the delinquency would be removed whenever the registrant brought

himself into compliance and he would have to be given an opportunity to do so.

At this point we encountered General Hershey's letter and memorandum which are printed in the Appendix to the petitioner's brief.

If this is a penalty, or if it is being used in a punitive fashion, we have the multiple problems that there was no indictment by a grand jury, no right to counsel, no trial by jury and indeed no trial.

Perhaps there are answers to all of these questions. They can be considered in another case when that becomes necessary, and hopefully on a record which will contain more facts than are available here.

Although these questions need not be considered here the fact that we come close to them is, it seems to me, quite relevant in considering the question of statutory construction on which, in my view, the case can be determined.

One of the important statutory provisions in this case, of course, is Section 10(b)(3), expressing the will of Congress that there should not be litigious interruption of the Selective Service process.

Section 10(b)(3) is clear, specific, and unqualified. I have already pointed out that both courts below felt that it was sufficient to dispose of the case after urging by government counsel to do so.

But there is also another section in the same statute. It was enacted at a different time, and it expresses a policy which has been in all of our Selective Service acts for more than 50 years at least. This is Section 6(g) of the act, quoted on pages 3 and 4 of our brief.

Under this provision, "ministers of religion and students preparing for the ministry, who are satisfactorily pursuing full time course of instruction in recognized theological or divinity schools, shall be exempt from training and service under this title."

There are no exceptions or qualifications. "Such students shall be exempt from training and service under this title by act of Congress."

There is nothing about an exception for delinquency or anything else. Congress clearly intended that such students should be exempt as long as they maintained themselves as full-time students in good standing at recognized theological schools.

In this case the petitioner specifically alleged that he is such a student. This is in paragraph 5 of his complaint, on page 3 of the Appendix. By filing its motion to dismiss, the government admitted the accuracy of this allegation.

Of course, if the case is remanded for trial this will be the subject of proof along with the other allegations of the complaint.

How can these two strong unqualified provisions of the

same statute be construed together? They are not, I suppose literally inconsistent.

It is perfectly possible to say that Section 10(b)(3) can be applied so as to prevent any judicial review except in defense to a criminal prosecution, and to await that event for the application of the equally unqualified Section 6(g). That is verbally possible, and practically, it seems to me not very satisfactory. For the exemption from training and service under this act is clear. On refusing to respond for induction, it would be the duty of the Attorney General, responding to the Congressional mandate, to refuse to prosecute the petitioner, despite the fact that he had refused to report for induction.

And if the Attorney General did seek and obtain an indictment it would be the duty of the District Court, or any appellate court, to dismiss the prosecution.

Q Is it a crime under the act not to be in possession of the registration certificate?

A Mr. Justice, it is not a crime under the act not to be in possession of the registration certificate. Well, perhaps I should qualify that. It is a regulation which requires possession of a registration certificate, and it is a crime under the act to violate the act or any of the regulations.

Q Then would your argument lead you to say that this petitioner could not be prosecuted for the crime of violating the regulation which requires him to have it?

A. No, Mr. Justice.

Q. He could be prosecuted for that.

A. He could be prosecuted for that crime.

Q. Because the statutory exemption extends only to service and training.

A. Yes, Mr. Justice.

Q. So that his failure to be in possession of his certificate is a crime for which he could be punished.

But then you get, at first glance, into a startling situation where the petitioner here, a ministerial student, is not in possession of his certificate. That is a violation of the law. A non-ministerial student, not in possession of his certificate, also violates the law and they can both be prosecuted.

A. Yes, Mr. Justice as I understand it, subject to arguments which can be made about the validity and effect of the regulations.

Q. Surely, I understand that.

But you nevertheless say that the procedural provision in the statute is applicable to one and not to the other, that is to say that judicial review cannot be obtained except in certain circumstances.

A. Because one comes within the terms of the statute which says that he shall be exempt from training and service under this act and the other does not.

Q Yes, but the next question is this: does that affect the jurisdictional or procedural provisions of the statute which says that the person, the registrant, has to exhaust his administrative remedies or whatever?

A. Well, Mr. Justice, in this case, the allegation is that he did exhaust his administrative remedies. There is no problem about that.

My position here is applicable only to the case of a person who comes within a clear and explicit exemption provided by the statute. I find nothing in the statute which authorizes a draft board under any circumstances to ignore that exemption, and I am then confronted with the problem of construing these two provisions together, 10(b)(3) and 6(g).

Q But in effect this petitioner, because he is a ministerial student in your submission, can bring an action to challenge, let us say, the validity of the regulation requiring him to have in his possession the registration certificate.

A. No, Mr. Justice. Perhaps it is a quibble, but what I suggest he can do is to challenge the order to report for induction, which is what he has done by this suit.

Q But he could not challenge the regulations requiring him to be in possession of his registration certificate?

A. I think not --

Q Would you make clear what is bothering me, Mr. Solicitor General?

A. Yes. I think he could not simply enjoin his prosecution for a crime, which is what the other actions would be, whereas it seems to me that the combination of Section 6(g) with Section 10(b)(3) can best be resolved by saying he is free to raise the question whether he can be validly ordered to report for induction.

The construction of these two provisions which would let 10(b)(3) have full operation until there was a criminal prosecution is in my submission not a desirable one. This court had a somewhat similar problem before it in Clark v. Uebersee Finanz-Korp involving the Treating With the Enemy Act which has a somewhat similar history, a comprehensive statute with different amendments enacted at different times.

The court said that its task was to give all of the statutes enacted at different times the most harmonious comprehensive meaning possible. To do otherwise would be to imput to Congress a purpose to paralyze with one hand what it sought to promote with the other.

What the result would be in other cases involving different provisions of the Selective Service Act need not be decided here. In this case we are dealing with a divinity student who is expressly exempted by Section 6(g).

In the light of that fact, in the whole complex of factors involved here, including the constitutional doubts that might be raised here both under the First Amendment and

under the Fifth and Sixth Amendments with respect to delinquency re-classification, the two statutory provisions can best be reconciled in my submission by giving effect to the exemptions contained in Section 6(g) and holding that Section 10(b)(3) must yield in the light of the facts of this case.

I should make it plain that it is the position of the Selective Service system, in essence, that it is Section 6(g) which must yield in the adjustment of these two statutory provisions.

I have tried to summarize the arguments to this effect in the final portion of the government's brief, and I know that the court will give this its careful consideration.

I have also asked that there be distributed to each member of the court a copy of the semi-annual report of the Director of Selective Service for the six months ending December 31, 1967.

This includes on pages 10 and 11 a statement by the director about delinquencies and also on pages 21 to 23 a summary of the director's views, particularly with respect to the letter which he issued to all local boards in October, 1967.

For what it is worth, my own conclusion is, as I have indicated, that the clear and unqualified provision for exemption in Section 6(g) should be given effect here, thus making it unnecessary to consider other questions, including constitutional questions which have been argued by the

petitioner, and which may come up for decision in some later case which does not involve an exemption provision such as Congress has provided here.

Q I suppose that if you regard the 1967 Congressional reference to delinquency as a ratification of the delinquency procedure you might have to acknowledge that it was a ratification of the delinquency procedure across the board, that is to say, as applied to ministerial students and ministers as well as other persons.

A That is a possible construction. I find it very difficult to find any trace of any suggestion or evidence that Congress contemplated when it put that one word in the provision of the statute referring to delinquents that it was thereby repealing the exemption for ministers --

Q I am not talking about that. Congress knew from these reports, I suppose, it was certainly a matter of public knowledge and general knowledge in 1967, that ministers of the gospel had been classified as delinquent by Selective Service boards, and then in 1967 it did include the word "delinquency" in its enactment.

I thought I heard you at the beginning of your argument refer to the possible argument that that constituted a ratification of the delinquency procedure.

A That, Mr. Justice, is certainly a possible argument. To me it is just too slender a reed to stand on in this

particular case in view of the clear language of 6(g) and its long continued historical background.

Here in this particular case we find it difficult to see why the court should reach a construction of which, to use the court's words in Estep requires the courts to march up the hill when it is apparent from the beginning that they will have to march down again -- because even in the case you mention, Mr. Justice, when you get to the point of prosecution it will, I submit, while 6(g) remains on the book, remain the duty of the Attorney General not to prosecute and of the courts to dismiss a prosecution if one is begun. This is under 6(g).

Accordingly we submit that the judgment below should be reversed and the case remanded to the District Court for a trial on the allegations of the complaint, with an injunction to issue if those allegations are adequately proved.

MR. CHIEF JUSTICE WARREN: Mr. Wulf?

MR. WULF: Mr. Chief Justice, may it please the court. I want only to say that we think that the facts as alleged in the complaint are simple, stark, uncluttered. They are in fact the facts of the case and adequate for the court to reach the constitutional issues in this case which we believe the court must do.

Thank you, Sir.

MR. CHIEF JUSTICE WARREN: We will adjourn.

(Whereupon, at 2:45 p.m. the Court recessed)