Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

Docket No. 77

UNITED STATES OF AMERICA,	
Appellant	
vs.	
THOMAS WILLIAM WELLER,	
Appellee	

Place Washington, D. C.

Date December 10, 1970

ALDERSON REPORTING COMPANY, INC.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

UNITED STATES OF AMERICA, Appellant	)	
vs	)	No. 77
THOMAS WILLIAM WELLER, Appellee	)	

The above-entitled matter came on for argument at 11:41 o'clock a.m., on Thursday, December 10, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice
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
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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On behalf of the Appellant

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On behalf of the Appellee

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in Number 77, United States against Weller.

Mr. Springer, you may proceed whenever you are ready.

ORAL ARGUMENT BY JAMES van R. SPRINGER, ESQ.

ON BEHALF OF APPELLANT

MR. SPRINGER: Mr. Chief Justice and may it please the Court:

The question on the merits of this case is the validity of the selective Service regulation that says that a registrant may not be represented by a lawyer when he has his personal appearance before his local draft board.

The Appellee, Weller, was classified 1-A after such a personal appearance, or rather his 1-A classification was retained --I will go into the procedures after a bit, after such a personal appearance.

But he refused to submit to induction when ordered to report by the board and accordingly he was indicted. The District Court dismissed the indictment before trial, based on a motion filed actually before there was a plea to indictment on the ground that Weller's lack ofcounsel at the personal appearance invalidated the order to report. And the United States has appealed from that order dismissing the indictment.

But, before the Court might reach the merits, there

is a threshold question of appellate jurisdiction. There is no doubt that the Government can appeal this simple order of the District Court to some court; the question is, and it's a difficult one under the Criminal Appeals Act whether the appeal should be to this Court or to the Court of Appeals, initially to --

Q Tell me, Mr. Springer, we were given the rather welcome news a few weeks back that something was being done by the Congress for the Criminal Appeals Act. Where does that stand; do you know?

A I understand -- I don't have a report as to what happened this morning -- the report I had yesterday afternoon is that a bill in which the Senate has adopted in substance the Government's proposal to clear up this area -- is now before a conference committee. The House had not passed it -- it is a matter of getting it through the conference committee and then having it passed by the House.

Q Well, it may happen within the next week or so, we hope?

A Yes, it may, Mr. Justice. I am told that it is unlikely, however, that it would be intended to be retroactive to the cases pending on appeal. That may be an issue that will come back to grieveus.

Q At least it can't be much longer than it has.

A We can hope not.

Q I hope we don't get any new problems with the same order.

Q Is the Solicitor General's office still of the view that this case should be in the Court of Appeals and not here?

A Yes; very much so, Mr. Chief Justice. Of course I will get into that. Although, of course we initially filed a notice of appeal to this Court on further reflection the Solicitor General concluded that the case was one that should be in the Court of Appeals and we --

Q Is that --

A That would not be necessary, Mr. Justice Brennan, because of the provision in the Criminal Appeals Act that says that appeals improperly brought here --

Q Transferred --

A Remanded is the word that is used. And, of course, we filed -- in lieu of the jurisdictional statement, we filed something called a motion to remand and the Court has deferred the issue of jurisdiction until this time.

So, I would like to speak for a few minutes at the outset about the jurisdictional question. As I indicated, this case comes up on the grant of the motion of -- of a pretrial motion to dismiss the indictment under Rule 12 of the Criminal Rules of Procedure.

The motion to dismiss was originally based on two

grounds: first a claim that Weller's 1-A classification was improper because there was no basis in fact for denial of his conscientious objector claim and second: the motion asserted the claim which is what is before -- more specifically before the Court now that the order to report was invalid because Weller was, in several respects, denied due process at his personal appearance before the board.

Principally, in that he was not allowed to be represented by counsel, and that is the only issue that survived as a live issue to this point, but he also contended initially in his motion that the local boards had improperly denied his request to have witnesses with him and to have a court reporter transcribe the proceedings of the personal appearance.

There was no hearing on the motion to dismiss the indictment and the Diestrict Court granted the motion on the basis of the indictment itself and WEller's selective service file, which of course, was undisputed as to its contents, which had been attached as an exhibit to the motion to dismiss that he had filed.

The selective service file showed on its face that Weller's lawyer had written letters to the draft board asking that he be allowed to appear with Weller and for the other procedures that are mentioned and that the local board had denied them in reliance on the regulations.

The District Court concluded in a written opinion that the selective service regulation in question here, the one that provides that "No registrant may be represented before their local board by anyone acting as attorney or legal counsel," was an invalid regulation. It did not directly hold that the regulation was unconstitutional under the Due Process Clause; instead it followed th rubric that that this Court followed in the Greene and McElroy case, some eleven years ago relating to the rights of confrontation in Defense Department security clearance proceedings.

The District Court considered that the denial of counsel before the local draft board at a personal appearance was a matter of doubtful constitutionality and therefore it considered that the regulation could not be valid unless there was express Congressional authority for its promulgation by the President. And the District Court found, despite the circumstances that I will discuss when I reach the merits, as I will, the District Court decided that the general statutory grant of authority for the President to establish selective service procedures did not clearly enough authorize him to promulgate a regulation that excluded representation by counsel.

As I indicated, it's plain that this dismissal order is appealable somewhere, since it came before the trial and was done as a matter of law on the basis of approcedural defect that was apparent on the face of the selective service

record.

So, the only question under the Criminal Appeals Act is whether the judgment was one "based on the invalidity or construction of the statute upon which the indictment or information is founded," or in the alternative, whether it was a "decision or judgment sustaining a motion in bar."

If it was either of those then the appeal would be directly to this Court. We say, however, that it was neither, so that the appeal should be in the Court of Appeals for the Ninth Circuit, under that part of the statute which gives Courts of Appeals jurisdiction over any decision or judgment dismissing any indictment except for a direct appeal to the Supreme Court as provided by the section.

Of course, this --

Q Mr. Springer, what is the reasons for your deep concern about this. If it went to the Ninth Circuit would it be here anyway in due course?

A WEll, it would be here, Mr. Justice Blackmun, only on a petition for a writ of certiorari. Our concern is, rather than a narrow concern with this particular litigation, is with the administration of justice. I think it's fair to say, assuming that we do not have the new legislation, there are serious questions which, if nothing else, are very difficult ones for the Government in deciding where to proceed and we think it's appropriate to make the point here. Also we do

believe strongly in the general principle underlying much of this Court's jurisdiction that cases should be considered in the Courts of Appeals before they come here.

And I think that general consideration is reflected in the principle that underlies the majority view in the Sisson case last term as well as the number of other of this Court's cases under the Criminal Appeals Act.

With that act --

Q May I ask you, Mr. Springer, I gather that your position is that it's not under that first paragraph because the decision was not based upon the invalidity or construction of a statute; is that right?

A Yes; that's right, Mr. Justice.

Q And on the second one, that this is not a motion in bar; is that it?

A Yes. I will try, I hope, briefly to articulate on --

Q I mean it's not a motion in bar, not that it's not a motion in bar, when the defendant is -- that it is a motion in bar, but not one when the defendant is not been put yet.

A No. I think it is clear there is no question of jeopardy here. This motion was filed even before the pleadings --

Q It's just simplistic that it's not a motion

in bar. That's the Governments fact.

A Yes, yes.

Q The Government's in the peculiar position of having brought it here and now it is wishing it hadn't; is it not?

A Well, I brought it in by the filing of a piece of paper in the District Court called "a notice of appeal" to the Supreme Court. Of course, we raised this at the first stage at which we filed any papers in this Court. We had a dilemma, frankly, as we frequently have under this Act, in knowing where to go first.

But I think the principle -- the basic principle in which this question ought to be considered is the principle, as I indicated, that the Court has recognized ona number of occasions that the Criminal Appeals Act is a technical statute that historically arose from a clear Congressional compromise, rather than from any single coherent, all-embracing legislative purpose and therefore that it should be read narrowly. And I think that principle is especially apt in this situation where the issue is not whether there is an appeal or not, but simply where it should be.

So, in a sense, the practical issue is an issue of the management of appellate business rather than deciding whether or not a litigant, that is the Government, has a right to appeal or not. In that sense, I think it might be said that

less is at stake than, for example, in the Sisson case where there was an issue of whether or not there would be any appeal at all.

In light of that we think it is fair to say that the burden of argumentative persuasion should be on those who say that this appeal should come directly to this Court, short-circuiting the more conventional initial review in the Courts of Appeals. In this respect it is somewhat like the principles that are under -- that underlie some of the Court's decisions in the three-judge court area in civil cases where there is a similar principle of narrow reading of a technical statute.

Let me then turn to the two statutory issues. First, the question whether the dismissal of Weller's indictment on the ground that the procedural regulations followed by the local draft board was insufficiently authorized by the statute. The Appellee says that that is -- that decision amounted to a construction of the statute on which the indictment is based; that is: the Selective Service Act.

The clear answer to that is that the dismissal was based on the regulation, not on the act and the Court held the regulation to be invalid under a principle of, I guess you would call general law, that regulations, impairing procedural rights are invalid unless Congress has specifically authorized them. The only reference to the statute, therefore, was a negative one. And we do not think that a determination that an

act does not say something on the subject has to be treated as a construction " of the statute" under this technical act which, as we say, could be read narrowly.

Q The regulation itself didn't purport to either constitute the offense, establish the offense or to interpret the statute of what the offense was?

A No, it does not; it's a regulation under a general authorization. So in that respect it is different from the Mersky case, I think.

Q That's a lot of difference.

A Where the regulation was, first, a substantive regulation and second: one directly contemplated by the statute to fill out our gap --

Q Could I ask you one more question. I don't want to interrupt you. Was this motion of the Government's to remand the appeal before or after Sisson?

A It was filed before the Sisson decision --

Q It was filed before Sisson came down?

A Yes, yes. Clearly it was -- I'm not sure; I think it was early this year.

Q January, I think; yes.

A Yes.

Q Is it your position that the Court cannot consider this case for jurisdictional reasons, or that it should not?

A I think it's clearly a matter of cannot, Mr. Justice.

Q How old is this now?

A Pardon?

Q How old is this now? This man who was about to be drafted.

A He was born in 1944, so he would not be 26. But he is under the -- the issue is the criminal indictment for failure to report. He was due to report in, I believe, the summar of 1968 and the criminal proceedings have been pending since.

Q Is he beyond the age now?

A I'm not sure exactly when his birthday is, Mr. Justice Black, nor can I speak authoritatively as to the effect that all of this may have on the -- on his future --

Q What is the effect on cases of this kind. Whether it would be a better procedure if maybe not and maybe we can't, if the Court could, in instances where a delay is wholly unnecessary and is crippling the efforts of the Government, where it wouldn't be better if this Court could, in some cases, decide it. This has been pending two years, hasn't it?

A Yes. Of course, Mr. Justice Black, I believe that once the case is in the Court of Appeals as we say it should be, then it would be open to a --

Q That's right.

A -- to a certiorari before a judgment. I think that's not available now because the case is not in the Court of Appeals.

Q That may be an adequate reason.

A So, we do think that this is a very different kind of situation from the Mersky situation where the Court could say and did say, again over the Government's contrary arguments that the regulations were so closely intertwined with the statute that the issue of interpretation of the regulations should be considered as an issue of interpretation of the statute.

This brings me to the motion in bar point which the Appellee urges alternatively as a basis for this Court's jurisdiction. I think Sisson again makes it clear that the question of what a motion in bar is is a question that is still open but we would urge the Court to adopt the definition suggested by Mr. Justice Stewart's opinion in the Mersky case, whcih would limit a motion in bar to matters in confession and avoidance, such as res adjudicata or the statute of limitations or a denial of speedy trial. That is, limit it to defenses that do not go to the general issue, but which solely on the basis of new matter would prevent a conviction, even if the defendant committee the criminal acts that are charged.

Q Well, this is pretty close to it, isn't it?

A Well, except, Mr. Justice Harlan, I think

that this is not new matter. I think it has to be said that implicit in the indictment is an allegation that the process of classification -- that is the order to report for induction, was a valid and proper order.

MR. CHIEF JUSTICE BURGER: We will resume after lunch.

(Whereupon, at 12:00 o'clock p.m. the argument in the above-entitled matter was recessed to be resumed at 1:00 o'clock p.m. this day)

1:00 o'clock p.m.

MR. CHIEF JUSTICE BURGER: Mr. Springer, you may continue.

ORAL ARGUMENT (CONTINUED) BY JAMES van R. SPRINGER, OFFICE OF THE SOLICITOR GENERAL

ON BEHALF OF THE APPELLANT

MR. SPRINGER: Thank you, Mr. Chief Justice.

I would like to say just a couple of words more about jurisdiction and then move on to the merits, if I can.

We were in the middle of a point about the applicability of a motion in bar clause at the lunch hour. As I indicated, we think that that clause should be interpreted in terms of the common law concept of a special plea in bar and there are indications in the legislative history that that is, in fact, what Congress had in mind in 1907 when it passed the act.

That is, the principle is that a motion in bar relates only to a defense; it does not go to a general issue and which on the basis of new matter, would prevent the conviction even if the defendant committed the act alleged in the indictment.

Q Would that necessitate overruling Mersky?

A I think not, because Mersky held nothing about a motion in bar. In Mersky, the Court found -- the majority found jurisdiction on the basis of the construction of

the statute.

Q That was a little sideline --

A A sideplay on the --

Q Sideplay on the -- you would have to resolve that bifurcation that's involved --

A Yes. That, unfortunately, is necessary, finally, I think, in this case.

Q What's the status now of the new criminal appeals, proposed criminal appeals?

A Well, I just heard another indication at lunch time. It is in the -- as I indicated earlier -- it is in the House-Senate Conference Committee on the Law Enforcement Assistance -- well, it's a little more complicated than that -- I understand it's the Law Enforcement Assistance Bill. It has been passed by the Senate with the Criminal Appeals Act Amendment in it but the House has not -- well, the House is going to pass the basic bill. The House has not passed specifically the amendment, so it's a matter of working it out in conference and getting it --

Q Would it affect this --

A I think it would, because as I understand, the bill would quite clearly resolve this problem. In fact I've had some indications that the bill may eventually come out with a provision only for appeal to the Court of Appeals, reserving this court for certiorari. In any event, I think it's clear

that the bill, if it's accepted in anything like the form in which it has been so far, would not allow direct appeal in any case that does not involve the validity of the underlying statute. So that we wouldn't have this construction of the statute issue or themotion in bar issue, I think clearly, as I understand the bill.

The point I think on this motion in bar, is something raising new matter that would prevent a conviction even if the defendant has committed the act with which he's charged, is that the defense that Weller has raised here is not that kind of defense. His defense raised in his motion is that there was no offense. He's not confessing the offense and saying that "There is some external reason why I can't be convicted for it;" he says there is no offense because implicit in the indictment is an allegation that the order to report for induction was invalid. He claims that this order -- excuse me -- that the order to report was valid. He claims that the order to report was invalid because of the procedural defect and hence, that he committed no crime when he failed to take his step forward at the induction station. So we think that his motion presented a purely legal defense, based on the face of the record and under the common law principle of special plea in bar, a motion in bar that that does not qualify.

So, for that reason we think that the case should be remanded to the Court of Appeals and that this Court may not

reach the merits. But, since the Court might disagree with that, I will now proceed to the merits.

Q What is viewpoint of your adversary on that?

A He has taken, as I understand it, the unqualified position that the Court does have jurisdiction.

Q This Court?

A Yes.

As I indicated, the question on the merits, quite simply, in the terms of the District Court's opinion, as well as the President, had authority from Congress to promulgate the selective service regulation which has been in force, I might say, since 1940, that is throughout the entire modern history of selective service. Whether he had authority to adopt that regulation which reads: No registrant may be represented at his personal appearance before the local board by anyone acting as attorney or legal counsel.

And we do not deny that if the District Court was right in holding that regulation invalid that the indictment should, in fact, have been dismissed. So, the question is the validity of that regulation on its face.

Before I go on to discuss the arguments made by the District Court and by the Appellee, I think it would be helpful to put the question in context by describing the role that the personal appearance has in the selective service classification process.

That process begins, of course, when a young man registers with his local board. Subsequently the board sends him a classification questionnaire which he fills out and which then goes into a selective service file bearing his name, together with any other written information of any kind that the registrant or anyone else on his behalf chooses to provide to the board.

In the case of someone who, like Weller, claims to be a conscientious objector, this includes the form 150, the special CO form and it can include, under the regulations, any other written request for a particular classification or any documents, affidavits or depositions, subject only to the condition that they are as concise and as brief as possible.

That is, there is nothing to stop a registrant from filing a complete legal brief with his board on his classification if he chooses to.

Then when the time comes, the board classifies each registrant at a formal meeting and the regulations provide, and I think this is important, quite explicitly that the classification must be done on the basis of the entire file and nothing other than written material that appears in that file. And of course the registrant or anyone he authorizes, has the right to inspect that file.

Then, after the board makes its initial classification decision they send a notice of classification to the

registrant. And then, for the first time, he has a right to the personal appearance that we are talking about, before the board or a member or members designated for the purpose. In order to have such an interview he has to request it in writing within 30 days after his notice of classification.

The nature of the personal appearance is described in this language from the selective service regulations, which, incidentally, appear on page 60 of our brief. The regulation says: "At any such appearance the registrant may discuss his classification, may point out the class or classes inwhich he thinks he should have been placed and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing or, if oral, shall be summarized in writing by the registrant and in either event, shall be placed in the registrant's file."

The section before that, of course prohibits counsel -- that's the specific regulation we are concerned with -- and that regulation also provides that no person other than a registrant shall have the right to appear in person before the local board but the local board may, in its discretion, permit any person to appear before it with or on behalf of the

registrant. Then there is a provision that if he doesn't speak English he can have an interpreter.

There either is not a stenographic transcript of the discussion at the personal appearance, but the board may prepare a summary as the board itself or one of the members of the board did here, and put it in the file and as I indicated, the registrant is directed by the regulations to prepare his own summary so that there will be that record in the file of what went on and this ties in again with the regulation that the board can classify only on the basis of written material contained in the file.

Q Mr. Springer, there is discretion of the board, as I understand it, to allow someone else to appear with the registrant?

A Yes, there is, subject to the --

Q And --

A -- to the explicit provision of excluding representation by an attorney or legal counsel.

Q Where is the provision excluding representation?

A That's the end of that same regulation, which I think is on page 61 of our -- 60 or -- I'm sorry -- it's Section 1624.1.

Q Oh, yes.

A This all appears in subsection 8 of that

regulation --

Q Well, the proviso means then, that although the board may permit any person to appear before it, with or on behalf of the registrant, it can't be a lawyer. Is that what it means?

A It can't be a lawyer representing him.

Q He could have a lawyer there --

A He could have a lawyer there but not strictly as a lawyer and --

Q He couldn't be acting on behalf of the registrant?

A Well, I think it -- if he's acting on behalf of the registrant it amounts to legal representation, which in the context of this case, is what the Appellee is talking about and what the District Court is talking about -- the lawyer asking questions, making arguments --

Q As a customary matter do the boards permit registrants to bring someone with them?

A I think not as a customary matter. It can be done.

Q It can be done and it could be a lawyer as long as he just said, "I'm a friend."

A Yes, and of course that would be in the discretion of the board. The board might, in its discretion, assuming that it is reasonable, say, "we don't want anybody

here.

And of course, if the case ultimately gets into court there is frequently testimony about what went on at the personal appearance bythe registrant and by board members. Then after the personal appearance the board meets again to reconsider the classification and sends a new notice of classification, reporting the results. After that the man has 30 days to appeal to the State Appeal Board and he can submit, with his notice of appeal a statement specifying the matters in which he believes the local board erred. In other words, again a brief on appeal if he so pleases. And the appeal board then classifies him again de novo and there are certain limited further appeal rights to the national appeal board.

Of course a lawyer can assist the registrant in preparing any of these written materials which, again, in the regulations direct the board to make its decision on. It's only when he goes in to discuss his case orally with the board or designated members of it that he is on his own.

Q Has there been any statement in connection with the publication of these regulations or anything, an explanation for the exclusion of legal representation from the hearing?

A Well, I had planned to get to that --

Q Go ahead.

A Congress has spoken quite clearly on this.

Q Well, at the hearing, the board in its discretion can let anybody under the sun in except a lawyer?

A Yes. That's is so.

Q Which could mean a political leader?

A I think that the discretion is subject to some limits --

Q Including the Chamber of Commerce?

A Theoretically, yes.

Q Or any other good person -- well, what's wrong with a lawyer? Why is he excluded?

A Well, Congress, and as I say, I had planned to get to that -- Congress --

Q Congress is made up of lawyers and said that they didn't want themselves to be let in.

A I think I can summarize the reasons which Congress has gone through in 1967 in connection with the latest revision of this Selective Service Act. Proposals were made at that time both in the House Committee, and in fact, an amendment was introduced on the Floor of the Senate by Senator Morse; both proposals specifically to allow representation by counsel at these personal appearances.

Q And a real full hearing; wasn't that in there too?

A I am --

Q I mean a more detailed hearing was in there,

wasn't it?

A Well, of course that -- I am not sure -- I think Senator Morse's amendment was restricted to counsel Of course, one of the problems and one of the reasons, I think, why Congress shied away from this was that when we had representation by counsel you inevitably had a different kind of proceedings from the relatively informal discussion that Congress had in mind.

But, as I indicated, Congress expressly rejected these proposals in the 1967 Act. Congress has spoken on this issue at other times. There is a provision in the Selective Service Act that expressly exempting selective service proceedings in the Administrative Procedure Act. Also in 1965 there was a statute passed relating to a general right to have counsel before administrative agencies and the House Report on that bill made an express statement --

Q So that in this case Congressman X could appear at the hearing as Congressman X, but he couldn't appear there as Lawyer X?

A Well, I think in context perhaps I should have -- the regulation referred to speaks about a person's appearing on behalf of a registrant. It is possible there are provisions allowing the board to subpoena witnesses, so I think -- it's not done --

Q I thought you said that within the discretion

of the board that they could let anybody come in.

A Well, I think perhaps as I look at it more closely, I think I should amend what I said, because what it says, "but the local board may, in its discretion, permit any person to appear before it with or on behalf of the registrant." Whereas this separate subpoena --

Q WEll, if Congressman X could come in there on behalf of him as Congressman X, but if he says, "I appear here as Lawyer X," representing him, he's out?

A Yes, well I think there is a distinction. Congressman X comes in and says, "I have known this boy all my life and he's a good boy and he's sincere in his conscientious objection." I think what a lawyer --

Q That's not representing him.

A No, that's speaking on his behalf.

Q Doesn't it say "or representing?"

A No. "may appear with or on behalf of." And then the prohibition against lawyers, it says: "No lawyer may represent."

Q If a lawyer should come in there and say that "I knew the registrant for a long time," et cetera, et cetera, et cetera.

A But what Congress has intended to exclude is a lawyer who comes in for the purpose of what I'm doing right now, arguing with the board, citing cases to it, saying the

Welsh case means this and the Seeger case means that, perhaps of course, asking questions of the registrant to help him -- designed to help him to state his conscientious objector views or if it's a hardship exemption case, to try to help him explain his exemption, and that is what -- I think it is quite clear that Congress has specifically and by design excluded.

Now, in --

Q Mr. Springer, is this any more, really, than a limitation to keep this from becoming an adversary proceeding?

A No; I think that that is exactly -- that is exactly the purpose --

Q It doesn't use the term "lawyer," at all. It says "attorney." That means agent and a legal counsel is a separate category. You can't be functioning as a legal counsel in this hearing, but he can have all the fans there he wants, within limits.

A Yes, and within the discretion of the board. And of course, in this case, Weller's lawyer asked to come in as a lawyer and the District Court decided on the basis that he should be there as a lawyer so that he can ask questions to clarify matters and help the board make its decision and in the sense in which lawyers ordinarily do when they are acting as lawyers.

Q The board can, if it wishes, permit him to have a lawyer to proceed as a lawyer?

A No, no. The regulation says absolutely not. I am just indicating a little further what the purpose is that Congress had in mind in trying to keep this in a relatively informal nonadversary proceeding. In this 1965 legislation I referred to relating to general rights of counsel before administrative agencies. The House Report on that bill noted specifically that under regulations prescribed by the President a registrant may not be represented before a local draft board by an attorney. This is because of the large number of registrants involved; the informality of procedures and the need for a capacity to provide large number of men quickly for service.

And again, in connection with the 1967 draft legislation there is a certain amount of Congressional discussion about the reasons for rejecting the proposals then that there should be lawyers, again suggesting that it's inconsistent with the basic duty of the Selective Service System which, of course this Court has recognized in numerous cases and recognized, for example in Clark against Gabriel in the context of preinduction judicial review, that the purpose of the Selective Service System is to raise large numbers of men without litigious interruptions which Congress has, I think reasonably, believed would incur that obligation.

There is some further suggestion in the legislative history of 1967 that another Congressional feeling which, again I think is reasonable, that the more formalized these

proceedings become the greater advantage is given to those who, for one reason or another are in a better position to take advantage of formalized proceedings --

Q Do you happen to know whether these draft boards -- to what extent are the draft boards themselves composed of lawyers?

A I don't have any figures on that. I would assume that a substantial percentage, just as a substantial number of people in jobs like that tend to be lawyers, and a substantial number are. But there are by no means required to be lawyers and --

Q Is there such a functionary as a lawyer to the board?

A No, there is not; and that again I think, a problem that Congress could reasonably consider. If a lawyer comes in on behalf -- before a board of part-time laymen on behalf of a registrant to argue with them about what the Welsh case means, for example, I think the board would rightly feel that it should have somebody to give it comparable advice --

Q Well, when this thing was set up wasn't there some legal representation for the Selective Service?

A Well, there is a -- of course there is a national office. There are state offices, I believe and there may be lawyers in the state offices.

Q But I thought there were always lawyers.

A I think there are experts --

Q The board get their legal advice, I thought from --

A But there is no provision under the existing system for --

Q For the board to have a lawyer --

A -- to be with it at its meeting, except that there is a provision for the appeal agent. There is supposed to be one for each board and he may attend meetings at the request of the board, but he is an unpaid volunteer and I think it would quite drastically change the setup which is something that has been basically in existence, as I indicated, for 30 years. It would rather substantially change the set up, I think, if you started to make these adversary proceedings by having a lawyer coming in and performing the kind of job that a lawyer ordinarily does and Congress has made the express decision that it did not want to have that happen and have articulated, I think, a reasona He basis for so deciding.

Of course the Appellee relies quite heavily on the Court's decision last term on the Goldberg-Kelly case on procedural rights with respect to welfare determinations.

I think it, as with all of these matters, you can't proceed by a process of deductive reasoning. You can't say that, as he does, that the personal appearance is obviously an important matter for a draft registrant. It's a matter

in which his personal rights are determined; therefore it is an adjudicative hearing and in every adjudicative hearing you must have a lawyer because the court said so in Goldberg against Kelly, therefore there must be a lawyer.

I think the whole premise of the Goldberg against Kelly decision is that you balance each situation. The result there was a relatively limited kind of hearing, but to be sure, the court did say a lawyer should be present. But I think that the draft situation can't be deduced from that; I think it's a matter of making the same kind of balancing process in the draft context, which is something that Congress has done, for the reasons that I have indicated, and I think that cannot be said to be so inconsistent with -- so unreasonable or so inconsistent with the principles of fundamental fairness so that should be held to be a violation of the due process clause.

Q As a practical matter, what's been going on in the Northern District of California since the day of the District Court's decision? Has anybody been inducted?

A I don't honestly know the practical facts. I do know that since this decision the Ninth Circuit has had occasion -- this was a District Court decision -- the Ninth Circuit has had occasion to reject the position taken by the District Judge, Judge Peckham in this case. I confess that I don't -- I'm determined that the practical effect of the conflict is. Presumably the boards can rely on the Ninth Circuit

rather than on the District Court.

I think in this context it's -- perhaps the Appellee overestimates and it's easy to overestimate the range of decision-making discretion that a local board has. In this regard there have been a number of quite significant changes in recent years, and in fact, recent months. For example, this Court's Gutknecht decision last term took away from the boards the entire power that they had previously to reclassify people whom they found to be delinquents, which was obviously an area with considerable discretion which the Court felt the boards hadn't been given. So that area is out.

As of last spring, occupational deferrments were discontinued, so the questions of what's an essential occupation and what is not are now matters that the boards have to consider.

Q That was by administrative directive, was it?

A Yes. That was by executive order. These regulations are made by the President.

And last summer in the conscientious objector area, which we are dealing with here, following a decision in Welsh, specifically last term, the National Director of Selective Service put out a two-page statement of the consideration that the boards should take into account in determining whether a man is a conscientious objector, which I think boils down --

I think they are quite comparable to the kind of instructions that a trial judge might give to a jury. So the board is focused, and it's focused principally on the sincerity issue in the conscientious objector area, and a question which I think has to be answered necessarily in terms of what the registrant says out of his own mouth. I think it's not a matter of confronting adverse witnesses; it's not a matter of dealing with self-incrimination problems or forfeiting rights and there is nobody there arguing against him.

Basically the job in a CO case is to come in and say words to the board which will convince the board of the nature his beliefs and of the sincerity of them.

Q Mr. Springer, did you say that the Ninth Circuit has already taken a view contrary to Judge Peckham's?

A Yes, it has, in a case which we cite in our brief.

Q So that if we say we have no jurisdiction this case goes tot he Ninth Circuit, doesn't it?

A I believe that's --

Q So you know what the result is going to be, then?

A If you have that panel, I suppose, that it might become an en banc question which might well be resolved differently in that court.

Q Does that enter in any way into the

jurisdictional problem? Do we consider the consequences of the jurisdictional question when we make it?

A No. I think the question answers itself. I think I think that's not so.

So, I think, in summary, inlight of the kind of situation we have in the draft classification process and the unique role of the personal appearance, I think it's not enough to say that since every other kind of administrative proceeding, or most others, allow counsel, that counsel should be allowed here.

I think the Court, as it did in Goldberg, is called upon to weigh the unique factors in the Selective Service System, in order to determine what fundamental fairness is there.

I'd like, if I have a minute or two left, I'd like to reserve it for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Karpatkin.

ORAL ARGUMENT BY MARVIN M. KARPATKIN, ESQ.

ON BEHALF OF APPELLEE

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

This is the third Selective Service case which the Supreme Court is hearing this week. Unlike Gillette and Negre, which were argued yesterday, however, this case does not involve the cosmic questions of the definition of a man's

conscience or the nature of his religious beliefs, the character of conscientious objection, the relationship between total objection and selective objection. It involves, rather, the more mundane, but no less ubiquitous question of fairness in the operation of the Selective Service System.

The administrative agency determines which man shall be drafted and which man shall not. Last term this Court was deeply divided in a case which raised the question of the proper definiton of conscientious objection and the relationship between the religious and the nonreligious objector. I'm referring, of course, to the Welsh case.

But this Court was unanimous in its declarationin the Mulloy case, that full and fair and administrative review is indispensable to the fair operation of the Selective Service System.

I respectfully submit that the backdrop in the Mulloy case, as is likewise the backdrop in this case, is the extremely limited judicial review of Selective Service administrative decisions. This is a standard of judicial review which this Court has declared since the Estep case in 1936 and continues to reiterate whenever there is a Selective Service case before it, that the decisions of the local boards and the appeal boards of the Selective Service System must be approved by the courts, even if they are erroneous decisions, so long as they are not without a basis in fact.

I submit that the essence of this case is the emergence of the doctrine that the Selective Service System is to be treated like any other administrative agency which adjudicates personal and property rights. And that it can operate fairly unless and only if the person has a right to a meaningful hearing before action is taken which affects him. And that under a parade of decisions of this Court and of other courts, there is no meaningful hearing unless the person who is subjected to these sanctions by an administrative agency, who is subjected to these deprivations and effects upon his personal and property rights, has a right to the advice, the assistance, and the presence of counsel at the scene of such hearing.

This is the essence of the decision of Judge Peckham below and I respectfully disagree with the Solicitor General when the Solicitor General states that Judge Peckham's decision in the Northern District of California is based only on the question of whether or not the regulation was authorized by statute. The same words which Judge Peckham used to declare the denial of counsel, that is the regulation prohibiting the appearance of counsel as not being authorized by Congress, is likewise the same words which Judge Peckham uses in concluding that the prohibition of counsel is without constitutional sanction.

I must say, finally, in terms of the setting of this

case, that this case also involves, I respectfully submit, the exorcising of the myth, the myth that Selective Service local boards are not administrative tribunals like hundreds of thousands of other administrative tribunals around the country, Federal and State; that some kind of informal kaffee klatch, after church discussion groups, colloquially called "little groups of neighbors(?) and that therefore, they should not held to the same standards as other agencies which affect personal and property rights.

This myth, I submit, was always based on fiction, but the myth has now been officially disembodied by a change in the regulations mentioned in my brief which I will get to later in my argument; and the time has long come for it to be finally exorcised.

If I may touch upon the jurisdictional question. Frankly, the first point which I was going to make was that which I believe came out in the colloquy between Mr. Justice Brennan and my learned adversary. The Ninth Circuit has quite clearly indicated that it disagrees with the position of Judge Peckham. They indicated that in several decisions which the Government cites in its brief prior to his decision and at least one decision subsequent thereto.

Now, the question was asked whether the Government---

Q (Inaudible)

A I believe that is the Cassidy decision, Mr.

Justice Stewart and -- I beg your pardon; it's the Evans decision, Mr. Justice Stewart. It's cited on page 37 of the Government's brief and someplace in our brief.

The question before this Court, I submit, on the jurisdictional point, is whether the Government was right when it first took the position that there was exclusive and mandatory jurisdiction in this Court, or whether the Government was right after it reconsidered it and took the position that it should remand and have a go at the Ninth Circuit.

Well, of course, I don't deny for one minute that the Department of Justice and the Solicitor General's office are as interested in the administrative of justice as those of us in the defense bar are, but the fact is that one cannot overlook the fact that any experience there would recognize the inevitability of the Ninth Circuit overruling Judge Peckham and I do not believe that the Government was unaware of that.

If the question is asked as to why this case was brought to the Supreme Court in the first place, I would refer the Court to Appendix C to the Government's brief, which is a letter written by the distinguished former Director of the Selective Service System, General Lewis B. Hershey, addressed to the Attorney General. This is reprinted at pages 74 and 75 of the Government's brief.

General Hershey takes the view, and I quote, "The effect of this decision, if allowed to stand unchallenged,

would be to place an intolerable upon the administration of the Selective Service System in the Northern District of California, and if extended to other jurisdictions, would result in constructive paralysis of the Selective Service System in the performance of its mission of procurement of manpower for the Department of Defense."

Then it cites various decisions, including the Ninth Circuit and then states: "The Congress of the United States, in enacting and reenacting the selective service laws during the past 29 years, has been well aware of those provisions of the selective service regulations which discouraged the presence of legal counsel for registrants."

The finally: "I am, therefore, making this formal request on you, under the authority given to me in the statute to proceed as expeditiously as possible in asking for an appeal to the Supreme Court of the United States."

And may it please the Court, as I read all of the opinions in the Sisson case and in the Mersky case and in the Blue and in all of the other cases they grapple with the same problems that the Solicitor General's office grapples with, one thing, I think, becomes clear, and that is that it was the -- it is the philosophy of the Criminal Appeals Act that where there are truly vital important constitutional questions in criminal cases, that the path should be smooth for their being resolved by the Supreme Court immediately and without the

intermediate step of the Courts of Appeals.

And I suggest that where the --

Q What about Sisson?

A Well, I think that the Sisson case, Mr. Justice White, went off on a number of other problems. Obviously the man appeared before the jury and there was jeopardy in that case.

But, it seems that where the man who has been heading the Selective Service System for 30 years, virtually screams to high heaven that the system is going to be destroyed and bugs the Attorney General to take the case directly to this Court. That, whether he's right or wrong, and of course, we say that he is wrong on the merits, that that is thekind of situation which Congress had in mind when declaring as the philosophy of the Criminal Appeals Act, that major constitutional decisions would come to this court directly.

Q The motion filed here by the Government to send the case to the Court of Appeals, came before the Court of Appeals' decision in the Adams case; did it not? Because I looked at the chronology. I think that the motion was filed here on January 16th of this year and the Evans decision was in April of this year.

A That is correct, Mr. Justice Stewart.

Q Wasn't the motion on jurisdiction made bythe Government earlier than January of '70?

A WEll, the Government's motion to remand, Mr. Chief Justice, which I have before me, is dated December, 1969; the date is crossed out and it's stamped January 1970.

Q Wasn't there an earlier motion to the same effect, though?

A If there is I am not aware of it, Mr. Chief Justice.

Q Mr. Springer is indicating in the negative.

A Yes.

Q So that answers it.

A The practical consideration, of course, is that which was revealed in the colloquy between Mr. Justice Brennan and Mr. Springer that if the Government succeeds on its jurisdictional point the case will go to the Ninth Circuit and the decision of the Ninth Circuit has been clearly foreshadowed by the Evans case and others. Then, of course, the probability is that we will be back here again, but this time we will be back as supplicants, as petitioners for certiorari, rather than as parties with a legal right to a decision by the highest court of the land.

Q What about Mr. Springer's point that your position is that no crime was committed?

A Mr. Justice Marshall, our position is that the facts alleged in the indictment did, indeed, occur and our position is that there was, in fact, an induction refusal, as

indeed is not contested and was rarely contested in conscientious objector cases.

Q The only crime could have been that there was a valid induction order. That's the only way the crime could have been committed. And you say that the induction order was invalid.

A We do, indeed, Mr. Justice --

Q Then there is no crime.

A If I can go back to my understanding of the position taken by the dissenters in the Mersky case, Mr. Justice Marshall. They spoke for the traditional view of the motion in bar provision and likened it to, as is in specific ancient pleas, if I'm not being prejudicial in using that word, specific venerable pleas, such as the statute of limitations ultra fori acquit, ultra fori convict, pardon, and suggested that it has to be something in the nature of confession --

Now, I suggest that confession and avoidance as I have always understood it was a matter of pleading, whether it's common law pleading or modern pleading, is that you admit to the indictment, but you say that there is something else which gives you a legal right to be exonerated, notwithstanding the admission of the act of the indictment.

Q Well, then the only difference to whether or not the valid induction order is a part of the act; the Solicitor General said it is a part and you say it is not a

part. The act is only the failure to take the one step forward. Is that your position?

A That is our position, Mr. Justice Marshall. May I also point out that the indictment itself refers to all of the selective service regulations, at least applicable selective service regulations, as being part of the crime of which the defendant is accused. And the indictment specifically specifies the whole body of regulations, including the regulations governing the rights of personal appearance and the absence of counsel thereof.

Of course, under the view of motion in bar, which was taken by Mr. Justice Brennan in his concurring opinion in the Mersky case, we should confine the medieval pleading motions to the dusty bookshelves, if I recall the adjectives correctly, and that a motion in bar exists where there is a termination of the cause and an exculpation of the defendant. And of course, that clearly occurred in this case.

In this case the judge decided that the regulation was not authorized by the statute in the first instance. In the second instance he decided that the regulation, in any event, could not have been authorized, that it was beyond constitutional power because of the nature of this type of a hearing.

And, in either case, there was a major decision concerning unconstitutionality of a vital part of the Selective

Service Administration.

I would take the position that all of the starry and interesting discussions in Sisson really does not take our case any further than it was before, I say with respect. I think that we are exactly in the same situation which Mr. Justice Harlan projected in the Blue case, where the question is do we apply Mr. Justice Brennan's standard of the Mersky case, or do we apply the standard of Mr. Justice Stewart and the other dissenters in the Mersky case?

And that under any standard, whether it's the only thing which exculpates standard or the confession and avoidance standard, that just as Blue made it to the Supreme Court directly -- he had a right to in that case, Weller should have a right to make it directly to the Supreme Court in this case.

Q Mr. Karpatkin, suppose the Government had, however, appealed to the Ninth Circuit. What would have been your avenue of relief, by way of getting here? Where would you be in the Ninth Circuit, period?

A I would suppose, Mr. Justice Blackmun, that we would probably make a motion to dismiss the appeal on the grounds that there was direct and exclusive jurisdiction in the Supreme Court of the United States.

Q So that you would interpret 3731 to where it says an appeal may be taken, into mandatory language, then?

A My friend is showing me the statute.

Well, I believe something similar to this happened in the Ninth Circuit in the case of the United States against Fix, which is cited without very much discussion in the government brief and I believe that the Ninth Circuit in that case, recognizing the dilemma, certified the question directly to this court.

Now, so much for the --

Q Well, wasthat the -- was that an avenue by certification, separate and distinct from any concern that 3731 was mandatory?

A I believe that the Ninth Circuit expressed its uncertainty about that, in that case, Mr. Justice Blackmun.

The other aspect of the jurisdcitional point, concerns statutory construction. Now, here I believe that we rest firmly with the majority opinion in Mersky. Mersky is clear, as I see it, that where a regulation is so closely linked or closely coupled or associated with the statute, that the validity of one must perforce be determinative of the validity of the other that what the court has done in dismissing the indictment based upon the construction of such a statute -- brings it within the statutory construction language of 3731.

Q Do I understand correctly that here the statute is silent as to whether or not counsel could or couldn't be provided by the executive?

A Absolutely silent, Mr. Justice White.

Q And the regulation expressly says that you may not have counsel?

A Yes, Mr. Justice.

Q And I suppose the District Judge says there is some rule of law in this context which means that a silent statute just doesn't authorize the regulation. Now, is that a construction of the statute?

A Well, I think it is a construction of the statute, but I believe that the District Judge went further than that --

Q You mean because you read it and said it was silent, that's the construction or --

A As I see what the District Judge did, Mr. Justice White, is that he looked to the provisions of the statute and found them silent. But he did find that the statute directed the President to select men for military service in a fair and impartial manner. He did authorized and directed the President to set up a network of local boards and appeal boards. He did find that the statute authorized and directed these local boards to make -- to hear and determine all questions concerning inclusions, exemptions and deferrments and he did specifically find that the statute authorized the President to make the necessary rules and regulations.

Q Yes, mm hmm.

A It seems to me --

Q But that isn't why the regulation wasn't authorized.

A As a matter of law, I certainly feel that the District Judge is absolutely correct in invoking the principle of Greene against McElroy and Hanna against Larche and many other decisions of this court to find that wherever something gets so close to a constitutional right, Congress must act explicitly.

Q Well, that's not construing the statute; that's not construing the statute. That's just saying that there is a principle about regulations that some are good and some are bad, depending on how close they are to constitutional issues and unless the statute expressly authorizes them --

A Well, it seems to me again, Mr. Justice White, that the District Judge was looking with a magnifying glass or microscope from the beginning of the statute to the end, looking through every clause which could possibly have some relationship with it and he found that there was none.

Q But if a District Judge reads a decision of this court which says that any regulation which denies counsel must at least have express Congressional authorization. He looks in the statute; he doesn't find any authorization and he says that the regulation is invalid.

Now, is that a construction of a statute or is it

basing a decision on a decision of this Court?

A Well, I believe, since the Government takes the position that the statute, properly construed, should indicate Congressional acquiescence in the existing pattern of denial of counsel, that the District -- and since I am sure his position was ably urged by the United States Attorney in the Northern District of California, the District Judge had to examine the statute and to see if it shouldbeconstrued from the point of view advocated by the Government.

I guess perhaps there may be some --

Q Instead of saying -- what you are saying is that the Government is either -- is arguing both sides of the road when it says that the statute is silent on the one hand, but it isn't silent on the other, because of Congressional acquiescence.

A You have anticipated my next observation much more aptly, Mr. Justice White. I was going to say, indeed, that to serve its purposes on the Congressional authorization point, the Government tried to couple or link the statute and the regulation as closely together as possible. It even tries to fuse them together with the best writing(?) material that it has.

That, for purposes of meeting its jurisdictional argument, the government tries to separate them and this leads to a little bit of schizophrenia in the Government's brief

because they refer at one place they refer to the statute and the regulation combined as "the law" of selective service. It obviously suits their purpose to argue that this is "the law" of selective service on the merits while it doesn't suit their purpose to do so on the jurisdictional point.

I think, though, that the final point on jurisdiction has to do with the Government's concession, as it must concede that there was direct jurisdiction in this Court on statutory construction in the Eisdorfer case. The Government argues that there is some difference between Eisdorfer and this case because Eisdorfer involves the delinquency regulations while this case involves a regulation prohibiting counsel.

Well, the Government says that there is this difference. It doesn't say why this makes a difference. It argues that one is more remote than another. But, I submit, that the delinquency regulations, as anyone who has read the Oestereich and Guchknect and Blue decisions of this Court, knows involves procedure perhaps even more so than it involves substance.

And the regulation involved in this case is obviously also a procedural regulation.

Q The Eisdorfer case wasn't a decision of this Court, was it? It was dismissal under Rule 60.

A It certainly was, Mr. Justice Harlan; yes. It was not a decision of this Court.

Q Yes, Yes.

A I'm pointing out that the Government is trying to explain the illogic in its position and I believe they had a lot of explaining to do.

IF I may move now to the point on the merits. We start with the proposition announced by this Court in Greene against Mc Elroy, and foreshadowed the previous decisions and following later decisions, that since only Congress can draft, only Congress can deny the right to counsel as part of the drafting process. It seems that this is self-evident and the Government almost admits it and except for one place, page 22 of its brief where it seems to suggest that maybe this is not so and that maybe there are limits on Presidential power to deny counsel or to otherwise structure the hearings and the implication perhaps is that maybe there are not even any limits on other Presidential war powers, a point which the Government tantalizingly suggests, and doesn't move on. And then once again it talks about nonjusticiability and to my surprise, the case which it cited is an order of this Court denying certiorari.

And of course, Iwas taught from my first breath of constitutional law that one should never see a denial of a petition for certiorari as having any kind of a significance on the merits, but perhaps when -- perhaps that's the best thing that the Government could cite for this proposition, so they

cited it.

Q Which case is that?

A I'm referring, Mr. Justice White, to the footnote on page 22 of the Government's brief where Mora v. McNamara, an order of this Court denying certiorari is presumably cited in favor of the proposition that what the Government regards as nonjusticiable controversies of a political nature should not properly be brought before the Court.

The -- it seems as we read the Greene case, the requirement of explicit authorization before there may be a tampering with fundamental constitutional rights, is so clear that it is hard to see what the Government is belaboring, except that one must identify what appears to be a complete nimble effort on the part of the Government to read the Greene case to stand for its opposite.

The Government seems to read the Greene case as saying that purposeful inaction means the same thing as action. It seems quite clear to me from anybody who reads it, that the Greene case specifically said that mere acquiescence or inaction is sufficient-- is insufficient; that Congress must specifically authorize a departure from a fundamental constitutional right.

Now, the Government mentions Hanna against Larche which was, of course, this Court's decision, split 5 to 4 on

the amount of due process which was available to witnesses before the Civil Rights Commission. Now, it seems to me that the decision in Hanna against Larche is completely different from that which we have here.

In Hanna against Larche, there was indeed -- there were indeed, two proposals before Congress; two complete proposals: one which provided for a greater measure of due process and another which provided for a lesser measure of due process. And both, interestingly, provided for rights of counsel, but to different extents.

And the legislative history of Hanna against Larche is clearly revealed by the majority decision of this Court, and the legislative history of the Civil Rights Commission, indicated that Congress explicitly selected one of these schemes and specifically rejected the other scheme.

The ultimate of Congressional acquiescence has -- was not followed in this Court in Greene; not followed in this Court in Tussy(?), a selective service matter. The matter involving selective service administration last year, last term.

Now, the Government finally argues about the legislative history of the 1967 Act. It appears to us as we read the same legislative history that it means a great deal other than what the Government says it means. Of course there were extensive hearings. As we recall, and if the Court may

well take judicial notice, these hearings were essentially about student deferrments, about the lottery, about occupational deferrments. Very little attention was given to selective service procedures; very little attention was given to conscientious objection.

The Government argues, points to the testimony given by General Hershey in an interim report which was prepared, but as we point out in our brief, the House Armed Services Committee expressly disclaimed that it was any reflection of General Hershey's views, as indeed it might, for General Hershey distinguished himself at these hearings by making the statement that he was opposed to any amendments to the law because, and I quote:"You can do almost anything under this law, which is more than you can say for a great many laws that are on the books."

I can understand the House Armed Services Committee wishing to disassociate itself with that sentiment. The Floor debates are not any more helpful. My learned friend was wrong when he says that there was debate on the Floor of the House concerning counsel at local boards.

The proposal made by Congressman Kastenmeier was exclusively confined to appeal boards. There was no discussion at all on the Floor of the House about local boards.

It is true, indeed, that the Morse Amendment was entered on the Floor of the Senate, but it is quite clear, I

believe, as we pointed out in our brief, that Senator Morse, who raised the question and Senator Russell, the Chairman of the Senate Armed Services Committee, and other Senators who participated in the debate, were, and I must say this with all respect, acting upon complete misinformation as to what was involved. We indicate the colloquy on page 34 in our brief, that Senator Russell, Chairman of the Senate Committee, was stating quite incorrectly that the Government appeals agent is independent; he does not have divided loyalty and stated quite clearly that there is a -- there are separate counsel available for the board and for the registrant.

Now, this is clearly wrong. WE indicate in our brief in the long footnote on page 35 a number of other places where there was just clear factual error clear misinformation on the part of the Senators engaged in this debate. Now, what does one make of all this? I suggest that this is an apt illustration of what Mr. Justice Jackson characterized floor debates, and I quote, "not always distinguished for candor or accuracy."

The -- and perhaps illustrates the wisdom of the doctrine that one should not resort to legislative history except where the face of the act is inescapably ambiguous. But here the fact of the act is not inescapably ambiguous; it was just silent on the subject.

Q Well, silence sometimes is the source of the

ambiguity; is it not?

A That is quite so, Mr. Chief Justice; yes. But, at the very least, if I must retreat from my position, though I don't think I am obliged to, it seems that it is hardly the clear showing which the Government argues is clear Congressional action. I do not think that that occurred in this case, by a long shot. And I think that the Government's statements about the legislative history will -- should be and will be read in the light of the actual legislative history in the contentions which we make.

The essential constitutional point which we make, may it please the Court, is that a local board -- personal appearance -- is such a vital and necessary part of the procedure whereby young persons are ordered to submit themselves to the demands of military service that it just be properly reviewed as an adjudicatory proceeding and indeed, as this word has been used in many court decisions, as an adversary proceeding.

We start with that same local board personal appearance. As my adversary pointed out, this is a formalized part of the structure. Indeed, it is one of the few things which is formal within the structure. It is a means of contest; it is an arena which is created for the registrant who was dissatisfied with his classification to attempt to come forth and secure a change in his classification. Everything

else, it can almost be stated without hazard, is by supplication; is by discretion with regard to selective service. This is one of the few guaranteed rights which the regulatory scheme sets up: the right to contest your classification and to have a personal appearance for the purpose of contesting it.

Q Does Judge Peckham's decision stand alone among the decisions on this question in the lower courts?

A There are -- the short answer to your question is "yes," Mr. Justice Harlan, but I must observe, that, as we cite in my brief, there are about half a dozen decisions of judges who have indicated great discomfort with the denial of counsel and quite clearly indicated how it produces injustice in many cases. I refer to many decisions by District Judges and a few decisions by Courts of Appeals.

The -- it is by its nature an adversary proceeding, because if one had gone no further than to recall the language of Mr. Justice Brandeis in the Abilene Railroad case, which we quote on page 42 of our brief, that even in the case where the determination must be made as to which of two carriers would get a more favorable rate. I quote: "Every proceeding is adversary in substance if it may result in an order in favor of one carrier as against another one."

Obviously, in favor of one registrant as against another one.

Q Well, who is your adversary here?

A There are two ways of responding to that question, Mr. Justice Marshall. One can indeed say that the local board and the power which it represents is adversary to the young man.

Q Well, then, why don't you object if the prosecutor and jury and judge are all the same. You don't argue that.

A Because, Mr. Justice Marshall --

Q Because you can't.

A There is a difference between the administrative process and the judicial process.

Q Because you can't.

A I can't and I wouldn't.

Q Well, theonly people there are the board, the clerk and the man. So, it's got to be the clerk or the board in order for you to get your adversary. You put so much weight on this adversary proceeding.

A Well, I'm suggesting, Mr. Justice Marshall, that as viewed by Mr. Justice Brandeis in the Abilene Railroad case, that is only one way of determining whether something is adversary or not. That, wherever a choice must be made between two contestants as to who gets the benefits and who gets the burden, that is an adversary proceeding.

Q Well, that's why I am trying to find who are are the two contestants?

A The contestant in a sense --

Q I'm just using your language of Justice Brandeis. I'm trying to find out who's the other one.

A I suggest that the contestant is any other young man who may get that particular deferrment and any other young man who may be called if that deferrment is granted.

Q But he isn't there, and that would be the negation of the adversary contest, to treat as a party someone who isn't there.

A At the time that -- if the rule for which we are contending is adopted, then at the time that he receives his 1-A classification, preliminary to an order to report for induction, he will have an opportunity to have a personal appearance and to indicate the grounds for his contest and to have the opportunity for a meaningful hearing.

Q But, Justice Brandeis was talking about the tripod situation where you had two contending parties and a tryer. Here you do not have, or I think Justice Marshall is concerned about the same thing. Where are the two contending parties and the tryer, the three legs on the stool?

A I am saying that the philosophy of it, as I read the Abilene case, is that wherever a benefit may be bestowed upon one person rather than another, that even if that person is not before the tribunal he is in an adversary posture.

Q But the Congress in both Houses, filled with a great many lawyers, Mr. Karpatkin, and certainly when they drafted this, didn't see it as an adversary proceeding in that sense, did they?

A It would not appear to have been when it was drafted in 1940 and the regulations that we have are still the harbingers from the 1940 statute, but a great deal has happened in the evolution of standards of administrative due process, as a result of the decisions of this Court and of other courts since then.

And this also answers why there have been a large number of District Court and Court of Appeals decisions, all of which we seek to distinguish in our brief, particularly in the early days, which almost started as an ipse dixit, that of course there is no right to counsel; who would everthink of it?

But, under the rulings of this Court in Goldberg against Kelly, in in re Gault and in a number of decisions which we cite in our brief, it seems to me that there is an emerging recognition of the fact that whenever any person's private or property rights may be subjected to any deprivation, may be subjected to any loss, may have any baleful effect upon them, that there is a right to a hearing, to a meaningful hearing and that an essence of a meaningful hearing is the right to be heard and the right to be heard with counsel.

And I don't know that it's necessary to rehearse the catalogue of decisions where that isn't held.

We set forth in our brief a long -- a discussion of the various possible classifications and a various possible classification which the local board may give and we indicated each one of them. There are questions of law as well as questions of fact which must be decided. Take, for example, conscientious objection.

A local board must decide whether someone is a 1-O or 1-A-O. A local board must decide whether someone is a religious or ethical and moral objector within the context of the Seeger, Sicurella and Welsh decisions or whether someone's objection is based on policy pragmatism or expediency, and consequently he is not entitled to conscientious objection. A local board must decide if a prima facie case has been presented so as to justify reopening. Surely that also is a question of law.

A local board must decide if there has been a post-induction maturation of conscientious objector views, raising the questions that are before this Court in the other case for argument, I believe, for next month. A local board must decide whether a registrant's statements about the readiness to use self-defense come within the exception of the Sicurella case or whether these statements indicate a general objection -- indicate an inconsistency with a general statement of

conscientious objection.

And of course, perforce on all of these questions, as this Court has reminded us over and over again since the Witmer case, a board must decide the basic question of sincerity.

Now, the incidence of a personal appearance, the regulations provide for the administration of an oath, for the subpoena power. Words like "evidence," and "hearing," and "jurisdiction" are used. The regulations bristle with these characterics of administrative practice. We do cite in our brief some decisions where courts have recognized the adversary character of selective service local boards, the adjudicative character and the fact that the things which they do affect people's personal and property rights.

Q This personal appearance, this right of personal appearance, is a creature of the statute; isn't it?

A I believe it's a creature of regulation, Mr. Justice Stewart. I don't think the word "personal appearance" appears in the statute.

Q It still was a creature of, like you say, the regulations.

A That is correct, Mr. Justice Stewart.

Q Well, it is no doubt a circular reason, but I'm sure that's the answer to what my question is going to suggest: if the Selective Service in creating this right by

statute, had considered anything like the adversary hearing that you are, in your submission there, saying that it is, it would follow, of course, that it couldn't possibly have promulgated the regulation in issue; could it?

A I guess it's not the --

Q You guess the answer is that circular reasoning?

A Yes, sir; and also is not the first set of regulations which betray inconsistencies. On the one hand the regulation talks about oaths and witnesses and adversaries and subpoenas and jurisdictions and on the other hand, the regulation says no counsel.

Now, this doesn't take us to the special, what I call the "special mythology" of selective service. We had a little project in my office this summer; with the assistance of a number of law students, we presumed to read the statutes and the regulations governing every Federal administrative agency searching for similar regulations dealing with right of counsel, and our findings are revealed in our brief.

We found some 36 agencies which expressly provide for the right of counsel, either by statute or regulation. We did not find a single other agency in the Federal system, with the exception of the Selective Service System, where, either by statute or regulation, there was an express prohibition of counsel under any circumstances.

Now, it seems to me that there has to be some better argument for sustaining this "everybody is out of step except selective service" argument. Other than the quaint notion that it's just little groups of neighbors sitting around the general store and deciding what's best for neighbor John's son.

Now, the fact is that a whole series of cases in the District Court and one in this Court, where, unfortunately, certiorari was denied, have presented very, very strong proof that many of the local board members do not reside in their district. And the response by the Selective Service System to this avalanche of cases has been simply to amend the regulation to rescind the regulation requiring local board members, wherever practicable to reside within the geographical jurisdiction of their board.

Q What about the matter Justice Stewart was pursuing? Do I understand you to concede that administratively the regulations could be amended so as to eliminate any personal appearance at all?

A Oh, no, Mr. Chief Justice; if I conceded that, I am --

Q Well, I got a hint of it; that was all, and I wanted to be sure.

A No, indeed --

Q If it's the creature -- if the regulation is

the creature of administrative action, "things so wrought may be unwrought so," may they not?

A Subject to the constitution, Mr. Chief Justice.

Q But --

A And I would suggest that if the Selective Service System would attempt to abolish all regulations governing procedures and --

Q Not all; just the one about personal appearance.

A Oh, about personal appearance, Mr. Chief Justice --

Q Yes, that this would be taking away the

A Yes, that this would be taking away the right to be heard, unless something were substituted which is the equivalent thereof. The only thing that seems to me the equivalent of the right to be heard with counsel is the right to be heard at all.

Q Well, then, of necessity you are suggesting that when the administrative regulations were promulgated, the purpose was to give effect to a constitutional right to be heard?

A I would not, in truth, say that that was the purpose in 1940, Mr. Chief Justice. I think the purpose in 1940 was to quickly set up set of regulations to deal with a total

national mobilization and an impending world emergency problem and then nobody would have thought very much about what the constitution required.

Q Sometime in between 1940 and now, then, the constitution has intruded itself, with the aid of the courts.

A I would say that the recognition of the constitutional compulsions have intruded themselves and, indeed, with each term of this Court, the recognition increases, and I would hope that there would be a similar increase in recognition resulting from this case.

May I just point out, finally, that the right to counsel is already recognized in certain aspects of conscientious objector cases. It is recognized by themilitary in all of the in-services hearing procedures, something which was noted by Judge Peckham and not responded to by the Government, and it was recognized for a period of 20 years, may it please the Court, under the old hearings held before the Department of Justice Hearing Officers. I know; I participated in a number of those hearings in 1965 and 1966 and '67, and indeed, it is clear in the Nugent case and it is clear in the four decisions by this Court in 1955 that these all had to deal with the proper status of due process in the Department of Justice hearings, where it was acknowledged that there was a right of counsel.

Now, finally, in response to the cries of alarm which are reflected in the letter by General Hershey in the

record, and reflected rather uncritically I respectfully suggest in the Government's brief in their arguments that this will be the end of the Selective Service System; this will be paralysis; the nation will be left defenseless and similar hand-wringing. I think it's instructive to the Court, and with the Court's permission I should like to read into the record, and I will make copies available to the Clerk, of the recent communication by the present National Director of the Selective Service System.

Q Why don't you just give us the essence of it in view of the hour, and then put it in -- file it with us.

A Yes. The essence of it is one sentence. I've advised the Government of my intention to read this: "We are aware, of course, of cases currently before the Supreme Court which deal with collective conscientious objection and representation of registrants by counsel. It is our hope that should changes be made by the Court in either of these areas, you will be able to help us meet the resulting challenges.

Though hardly an enthusiastic endorsement of my position, it is quite different from the cry that the Selective Service System will be dismembered if this Court decides that there is a constitutional right to counsel.

Q That's a letter to you?

A This is a letter, Mr. Justice Stewart, to the Chairman of the National Interreligious Service Board for

conscientious objectors; copies of which have been made available to other organizations.

Q Mr. Karpatkin, it's your footnote 46, which your law student task force reviewed these various agencies and with prohibition of counsel, or the absence of prohibition provisions, do you know anything about the agricultural review committees which have some parallel, anyway, to the local board, their duty being to determine how much acreage will go into the soil bank; this kind of thing. Do you know whether there is a prohibition of the appearance of counsel?

A I do not knowthe answer to that, Mr. Justice Blackmun, but I would be delighted to research it and present a memorandum to the Court.

Q Well, it isn't necessary. I just noticed it wasn't listed here and I --

A I can say for sure that we did not find an express prohibition.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Karpatkin. Mr. Springer, your time is exhausted. If you have something of extreme urgency we will give you one moment.

MR. SPRINGER: Thank you, Mr. Chief Justice; I don't unless there are questions.

MR. CHIEF JUSTICE BURGER: I see no indication of it. Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:15 o'clock p.m. the argument in the above-entitled matter was concluded)