Supreme Court of the United States

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OCTOBER TERM, 1970

In the Matter of:

IB OTTO ASTRUP,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Docket No. 840

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Date April 21, 1971

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

IB OTTO ASTRUP, Petitioner	)	
vs	)	No. 840
IMMIGRATION AND NATURALIZATION SERVICE, Respondent	)	

The above-entitled matter came on for argument at 10:20 o'clock a.m. on Tuesday, April 21, 1971.

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

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments now in Number 840, Astrup against the Immigration and Naturalization Service.

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

ARGUMENT OF PAUL N. HALVONIK, ESQ.

ON BEHALF OF PETITIONER

MR. HALVONIK: Thank you, Mr. Chief Justice and Members of the Court:

Actually this case is quite simple. The principal facts occur in the years 1950 to 1952. The Petitioner here lawfully entered the United States for the purpose of permanent residency in the year 1950.

In the summer of that year he registered for the draft. He was later that summer drafted, but he did not submit to induction; he signed an exemption from military service as provided by the 1948 Selective Service Law. That exemption provided that aliens who were permanent residents would be exempted from the draft if they executed the form. In exchange the would be relieved of liability for service in the Armed Forces.

The following year 1951, Congress amended the draft law to provide that permanent resident aliens could be drafted, thus removing the exemption part of the bargain in

favor of Petitioner. As we pointed out in our brief, this was a drastic departure from prior law. Never before had neutral aliens been drafted bythis country if they chose not to be.

Petitioner was drafted again. This time he went down to submit to induction but he was rejected because he did not -- he was not physically fit for service.

The next significant date is 1952 when Congress adopted Section 315 of the Immigration and Nationality Act, the section which Petitioner contends controls here. Section 15 provides what this Court has characterized as a two-pronged test where an alien who has signedexemption from military service is seeking citizenship. It provides that, one: that the alien must have sought the exemption, and two: must have been relieved from military service, prior to 1952 law which required this exemption because the execution of the exemption also grants relief from liability.

But Congress, evidently because of the intervening law, taking away this release from liability for anyone who signed the exemption now provided that two events had to occur and we contend that Petitioner was not relieved from liability since he was drafted, and therefore, that he should be admitted to citizenship.

The judgement, at least below, and I assume still takes the position that had Petitioner actually served in the Armed Forces he would be eligible for citizenship and we contend

that that is a misreading of the statute; it says "liability for military service," not service in the Armed Forces; not actual service. If the Congress meant actual service it would have said so. It merely said those who are not relieved from liability are eligible for citizenship and Petitioner was not relieved from liability. Moreover, it wouldn't make much sense to make a distinction between those who were physically fit and could act in the service and those who just weren't physical. The Congressional scheme makes a good deal of sense.

Now, the Government in its reply brief in this case has raised a new argument that was not raised before and that is that this section that has been the focus of all the litigation up to now, Section 315, isn't applicable to the case ???? because --

But the Government contends that the savings clause, Section 406(a) of the Immigration and Naturalization Act keeps Petitioner's status the same as it was inthe year that he signed the exemption. There are a number of problems with the argument. First of all, it's inconsistent with the Government's general position that if Petitioner had served he would be eligible for citizenship, because the Section 315 of the Act doesn't apply to people who signed the exemption before 1952.

Q Mr. Halvonik, the Government filed only brief in this case?

A That is correct.

Q You talked about a reply brief.

A Their reply brief; right. That's the only brief they filed. They filed other briefs in the courts below but I just was referring to -- they have filed only the one brief and in the brief essentially relies on this point.

I want to emphasize that it does seem to be inconsistent with their general theory that if he had served he would be eligible for citizenship because if that saving clause saved all of the disabilities of everybody then it also saved those who also had served in the Armed Forces and thus Congress, in trying to create this new status in 1952 for people whom it was drafting it would be unsuccessful.

Now, the inconsistency, I think, in the Government's position points up, I think their misreading of Section 406(a) in relation to Section 315, because Section 315 is an exception to the savings clause in 406(a). Section 315 was meant to change status. That's whatit's there for. It's meant to change the series of events that result in ineligibility for citizenship and add a new condition before one becomes ineligible. That's pre

That's precisely what it's for and it therefore is a specific exemption to the savings clause. It begins with the language "notwithstanding anything contained in Section 405(b) which is another savings clause that deals with the

petition for naturalizations that are pending.

The Government takes the position that since, there is this notwithstanding Section 405(b) language, therefore Congress meant to leave Section 405(a) as a continuing status quo in all of these cases. Well, that's inconsistent with the case relied on by the Government in Shomberg. Shomberg also started out with"notwithstanding Section 405(b) language" -- didn't refer specifically to Section 405(a) but this Court said: Well, it may well be that the draftsman could have been more exact, but there is no question that since in that case Section 318 was designed specifically for this problem, designed specifically for a change of status that it was an exception to the savings clause. And here all you need to do is look at the language of Section 316 to see that it's supposed to have retroactive effects. The past tense refers to those who have applied in the past for exemption.

Moreoever, I think probably Section 315 doesn't have that much prospective impact; it's main impact is retrospective. There are very few people under the change in the laws who could properly receive this exemption and then ever be in a position to apply for citizenship or to apply for permanent residence. I think Section 315 is perfectly designed for cases such as that one here. It's perfectly designed for retrospective applications.

I won't dwell too much longer on Section 315. We

have in our brief gone into some length about the history of this exemption; about the history extending back to the Civil War, telling aliens: you can either accept the burdens of citizenship or not and you make your decision and that's that. You will be released from the obligations of citizenship and you won't get the benefits.

What 315 is designed to do it to take care of those people who did have the obligation imposed on them, the citizen obligation of military service after they had signed the exemption. That's also relevant to our second contention in this case.

We contend in the brief there that Petitioner didn't make a knowing waiver of his eligibility for citizenship because he wasn't apprised properly of the nature of the bargain he was making. We rely there on the Moser case. In Moser it was held that though the alien had signed an exemption form he would not be bound to it because he had been officially told by both the United States Government and the Swiss Legation that it didn't really mean that he couldn't become a citizen and the Court here didn't rely on estoppel theory; they said there wasn't a knowing waiver of the eligibility, because he wasn't properly apprised of the consequences.

Well, we say the same thing happened here, that he wasn't given any real choice because the choice was illusory and he wasn't told really what was going to happen. He was

told: if you take this exemption you will receive this benefit.

Q When you say he wasn't told what was really going to happen, precisely what are you alluding to?

A I'm alluding to the fact thathe was told that he wouldn't be able to become a citizen but he was also told that he would be released from liability for service in the armed forces and thus he made his choice, looking at these two alternatives. But, those alternatives, it turns out, weren't real. He wasn't getting that; he wasn't getting that release from liability.

Well, the Government said: Well, it's just a change in law and that sort of happens when you enter into a bargain you have to perhaps anticipate that somebody will change the law. And that may be a good argument where it's a private contract, but here the party he made the agreement with was the Government, and it was that Government that told him that he would not have to serve; he would be released from liability for military service.

Well, then the Government, the very institution with which he made the agreement went back on its promise. Because the consideration was initially illusory and he was not given a fair oppoertunity to make a choice between the exemption and service.

I think it's significant in Moser where this was

referred to as a rule of elementary fairness that the Court cited Johnson v. United States, which is in 318 U. S. Report, and what happened in Johnson is this: it was a matter of during a criminal trial the defendant had taken the stand and was testifying and then tried to invoke the privilege against self-incrimination and the judge permitted him to invoke that although it is clear, at least in retrospect and on appeal that he ruled improperly; he shouldn't have allowed the defendant to exercise the privilege against self-incrimination.

Nevertheless, the defendant did exercise his privilege. But then the Court permitted the prosecutor to comment and that was held error and a violation of the rule of elementary fairness for this reason: because, although he did get what he was told he would get; he was allowed to forego testifying, he wasn't told that the prosecutor would comment upon it. And the Court said in Johnson if he had been told that this was going to happen he might have acted very differently. He would have then been presented with different sorts of alternatives; he might have made a different sort of judgment and we can't lead somebody on and not tell them all of the facts and then, inconsistent with elementary fairness, elemental fairness, hold him to his original position.

Q How about that rule of elementary fairness; is that a constitutional rule?

A Well, I have seen from both Moser and

Johnson that it's a rule of -- that this Court would enforce if there were no objection to it, any other constitutional objection the other way. I don't look upon it as necessarily a constitutional rule.

Q Is it anything that a majority of this Court thinks of as elementary fair or unfair?

A Well, I think it's the resulting situation such as was decided in Moser whether a man intelligently waived his right to become a citizen, which is also the question here. When you are deciding a question like Johnson, whether a man intelligently exercises the privilege against self-incrimination one necessarily looks to see what's fair and if he's been misled by the Government it's hardly fair to make him suffer the consequences --

Q Is it illegal or unconstitutional, that's what we're here to decide, not whether it's fair or unfair, in our subjective opinions?

A Well, we're here, I suppose to decide two things: first of all, whether there was an intelligent waiver and that's where Johnson and Moser are relevant, and in deciding whether there is an intelligent waiver the question goes back to what's a fair arrangement when you offer somebody something and then take it away. And that goes to the intelligent waiver.

The second point, I suppose, goes to

one of statutory construction in trying to determine what Congress meant to do with Section 315. Now, it's our contention if Congress had realized what it had done wasn't fair and was trying by the amendment of 1952 to take care of those cases where it had been moved to consideration.

Q This case does involve, does it not, a matter of statutory construction; it was not a constitutional issue.

A Well, this doesn't involve a constitutional issue except to the extent that one would think considerations that were relevant to this Court in reaching constitutional determinations should also be relevant to Congress when they are trying to construct a statute. In fact effect, it is to that extent that we raise those issues. We are relying on _____, but unless Congress is explicitly exercising its power in a way that would conflict generally with fundamental liberties it would be assumed that Congress would accord these guarantees the same sort of respect that this Court would.

And it does seem to me also, Mr. Justice Stewart, in talking about fairness when there might be an ambiguity in the statute or there can be some reasonable difference between people about what the statute means --

Q I see you have in your brief, made constitutional arguments including Eighth Amendment arguments.

A Yes. Our constitutional arguments, as I say, are, it seems to me inconceivable that the Court would declare Section 315 unconstitutional on the basis of the arguments that we have made. What we have said is that if Section 315 were interpreted as the Government wants it interpreted, that we have a number of strange things. We have a man not becoming a citizen because he can't pass an army physical which is very peculiar. This has no relation to being a good citizen. Additionally it seems to be a forfeiture because of an illness.

We raised this point that Congress didn't intend that at all. When Congress said "liability," it referred to the liability, not actual service in the armed forces. And therefore, that the statute, consistent with constitutional principles ought to be interpreted to -- well, interpreted in such a way that it would result that the Petitioner is eligible for citizenship, and that Congress would have these things in mind, too, and that's why it used the language it did.

Fairness, to come back to it again, may be relevant, too in wondering about the Government's distinction between people who actually served and people who would not serve. This Petitioner, everybody agrees, would make a fine citizen. He's lived in this country for twenty years. He's a vital member of the community in San Francisco which is referred to as the East Bay. He's of good moral character; he's

attached to the principles in the constitution. It's quite understandable his execution of that exemption back in 1950. He had just arrived in the country; he was looking around and he hadn't made a decision one way or the other. He had just done 14th months tour of duty with the Danish Navy; was a young man and he didn't want to go again into the service of a country he wasn't sure now was going to take the place of his native land where he had already served.

He had come here from Denmark in 1950. He wasn't after all, leaving an area of famine or political oppression from to come to this country; he was looking around at that time.

Q How old was he?

A He was 23 at that time.

Q You have emphasized, I think exclusively, a change in the law. Was there another change factor here that enters into this equation that they "_____ him? The change in his physical status?

A Yes; there was -- there may have been a change in his physical status. I don't know --

Q If he had known at the outset that he could never pass the physical examination would he have signed this -- entered into this engagement waiving the right to become a citizen?

A If I understand your question, Mr. Chief Justice. You mean if he knew that he could avoid service

through another way would he have executed the exemption? I would think --

Q Well, for example, if he had had his right leg off at the knee at the outset, would he have just stood by until they called him up and then demonstrated his lack of physical fitness?

A Well, I imagine that's true. It would be a very unusual thought here --

Q His physical condition, his acceptability for military service altered during his span of time, didn't it? At least they found him A-1 physically at the early stage and later they rejected him. Now, it was that rejection which plays a very important part, the rejection for physical disability plays a very important part; does it not?

A Yes, it does. He would have served had he not been rejected for the physical disability. I don't think we know necessarily whether it was an intervening disability. I mean, it may well be that it was there back in 1950 also. In these examinations, in my experience, some of them aren't that thorough and something might be picked up one time and not the next and it's entirely possible that he had the disability in 1950 and that had he actually reported for induction it would have been discovered at that time.

Q What is the chronology. Initially did he not apply for exemption after he had been accepted physically

and had passed his physical --

A Yes.

Q And the second examination was held how long after that? About a year and a half?

A Yes; about that; a year and a half to -- about a year later.

Q It wasn't very long.

A No; itwasn't very long.

Q Is there any question at all of the integrity of his disability. I take it it --

A It must be conceded that there is no question about it because the Government admits that he's a man o good moral character and I assume that any man who malingered or came up with a fraudulent illness in order to avoid military service wouldn't be deemed by the Government to be a man of good moral character.

Q What was the cause of the -- it was -- was it bursitis?

A It was bursitis; yes.

Q Which doesn't last forever.

A No; it doesn't, but what happened here was that he then became over age after he had not passed his physical he was then later classified as over the age of liability.

Q Mr. Halvonik, what is the --

A Well, Tobias (?) didn't qualify under the 1952 statute. The Court said there it was in 1951 and thus he didn't have advantage of the two-pronged test. Tobias raises some other points that seems to me may be relevant I should distinguish with relation to the Moser argument. This idea of the Government entering into a bargain and then not keeping its part, and whether that's pertinent here.

Tobias is a little different case because it isn't the Government; it wasn't any action of the Government that took away from him, that had made the bargain. It was a status change and that's something I suppose you have to respect when you take advantage of a neutral alien's status that your country may become _____belligerent(?).

So, it was events that changed the bargain there. Events on the outside that here would change the bargain was the Government's taking away its part of the consideration, the Government itself.

Q Had he -- the second time around had he served do I understand then that the Government would not have opposed the petition for naturalization?

A I believe that's the case. You will have to ask the Government, but that has been the Government's position in the Courts below.

Q And there have been holdings to this effect in the Second Circuit and other --

A In the Ninth Circuit. The Lacher case in the Ninth Circuit.

Q So that your position then focuses on the fact of his not passing the physical examination?

A That's right; that's the significant factor here. The passage of time, of course, and getting back to his physical change, the passage of time --your military service certain interesting things are liable to occur in between to make the kind of service you do different than it would have been. These may be in your favor or they may not be in your favor at all.

Lacher, for example, is a case that the Government says was decided correctly in the Ninth Circuit. A man who applied for the exemption, but after he served and got advantage of the two-pronged test. But in Lacher it is interesting to note, by postponing his induction, was able to avoid a Korean War, which made life somewhat simpler for him, I suppose. He didn't go in when there was really a shooting war.

Now, this Petitioner on the other hand, handicapped physically, would have been in during the Korean War. And he didn't know he wasn't going to pass the physical. He wrapped up his life and went down and tried to get into the service, tried to recognize the obligation that was imposed by the order to report for induction.

When a man actually serves after signing his exemption and being told he won't have to, the unfairness, the lack of a bargain here, the Government's not meeting its end of the bargain here is obvious, just different; but I can't see where it's any different when a man doesn't serve because he can't pass the physical. He has done everything in his power that he can possibly do to accept the obligation and to manifest his recognition of the obligations he has assumed now.

That happens in both cases, that the man does everything possible. One man just physically isn't able to enter the armed forces. And there can't be a distinction between whether the man becomes a citizen or not and the language of the statute doesn't say that. I submit that if Congress wanted only those people to be admitted to citizenship who had entered the armed forces, it would have said: "Applied for the exemption and actually did not serve in the armed services," that those are people who are ineligible for citizenship. But, it doesn't say that. It says people who are ineligible for citizenship are people who (1) signed the exemption and (2) were relieved from military liability. And, military liability is what Petitioner had. He wasn't relieved from that. Andthat's the language of the statute and that's the language that should control here.

Q Well, in this case it comes down, doesn't it -- I'm oversimplifying it -- to: he's eligible for

citizenship if he passes a physical examination?

A That is, as I contend, the Government's position, and I think that is untenable, and isn't supported at all by the language of the statute, which again I emphasize refers to liability and in any cases where we are talking about liability for military service. We're talking about having to submit to induction is not actually serving in the armed forces.

In every area of law by liability you mean that you are classified 1-A in order to report for induction. But, you become liable if you don't recognize your obligation; you are prosecuted. But, the liability is demonstrated when that order to report for induction comes, not if you pass the physical examination.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Halvonik.

MR. HALVONIK: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Stone.

ORAL ARGUMENT BY RICHARD B. STONE, ESQ.

ON BEHALF OF RESPONDENT

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

The Government's view of this case raises essentially two questions: One, whether a Petitioner's eligibility for citizenship is, in fact, governed by the

Selective Service Act of 1948 or by the Immigration and Nationality Act of 1952.

And two: assuming that the 1952 Act applies, whether Petitioner is, nonetheless, ineligible for United States citizenship now by virtue of his having applied for and obtained an alien's exemption from the draft in 1950.

I think both of these questions raise rather difficult issues of statutory interpretation of the 1952 Act. Without reiterating material that has already beengone over or that is familiar to this Court I think it might be helpful right now if I very briefly place the 1952 statute in its context.

Under the Selective Service Act of 1948 and under the predecessor statute in 1940, the alien who applies for an exemption from the draft on the grounds of alienage, was thereby fundamentally permanently debarred from seeking citizenship. Thus, when Petitioner Astrup sought and obtained an alien's exemption shortly before his scheduled induction in 1950 and he passed the physical examination for the draft.

The sole test inthe military service area of an alien's eligibility for United States citizenship was, in fact, whether that alien had committed a valid application for an exemption on the grounds of alienage.

Now, I take it that we're all agreed that if the 1948 Act is applicable to this case Mr. Astrup is clearly

ineligible for citizenship and I guess there could be no dispute on this point in view of this Court's holding in Ceballos v. Shaughnessy in which a unanimous Court in an opinion by Mr. Justice Brennan held thatunder the 1948 Act an exempt alien subsequently loses his exemption, but like the Petitioner here fails to pass the physical examination, continues to be ineligible for citizenship.

Late in June of 1951,as the Korean War grew in intensity, Congress did what it had done several times before during wartime is put increasing pressure on aliens residing inthe United States to participate in the war effort. In the case of permanent resident aliens, such as Petitioner, Congress simply amended the Selective Service Act of 1948 to provide that permanent resident aliens were no longer leligible for draft exemptions on grounds of alienage. And this law affected both those aliens who had already sought and obtained alienage exemptions and those who had not done so.

Well, what about citizenship status of those aliens who had, in fact, obtained alienage exemptions which were no longer valid and who were now eligible theoretically, at least with respect to their alienage, to be called to military service. It certainly would have been possible, but by no means necessary, for Congress to have provided in the 1951 Amendment that some sort of adjustment to the ineligibility for citizenship of those persons like Petitioner, who were no

longer exempt by virtue of that amendment. And I guess, in any event, it would have been logical for Congress to have said nothing one way or another in the 1950 statute directly about the citizenship eligibility of those persons whose eligibility had been taken away by that statute.

But, Congress said nothing; that is, nothing more than that permanent resident aliens were no longer exempt by virtue of their alienage. And I take it also that one day after that statute became effective then, for the at least year and a half until the effective date of the 1952 Immigration and Nationality -- no one doubted that the Selective Service Act of 1948 continued to govern the citizenship eligibility of those persons like Petitioner and then consequently, those who had applied for alienage exemptions, continued to be debarred from seeking citizenship.

Then finally in 1952 Congress passed the Immigration and Nationality Act of 1952 which is the statute that gives rise to the problems in this case, and which for the first time, incorporated the rules governing citizenship eligibility of aliens in a context other than the Selective Service Act and citizenship eligibility and its relationship to military service.

Now, as we know, the 1952 Act set out a somewhat different test for citizenship eligibility. In the words of this Court in Ceballos v. Shaughnessy, a two-pronged test, and

that is the formulation that has been used ever since but it hasnever been clearly elaborated what exactly that test meant.

And by that two-pronged test aliens were debarred from seeking citizenship if he both applied for an alien's exemption and "is or was relieved from service on such grounds."

Now, again, certainly it was possible for Congress at that time to have settled the question of citizenship eligibility for those whose exemptions had been removed from the 1951 Amendment, by specifying that the two-pronged test set out in the 1951 Act would be applied to those persons.

But, again Congress did not significantly at all refer to that class of persons like Petitioner, who had applied for alien's exemptions prior to the passage of the 1952 Act -- of the 1951 Amendment that took that exemption away. Instead, what Congress did was to put a savings clause in the 1952 Act, which is Section 405(a) of the Act, printed now as a note to 8 USC 1101, which said that "unless otherwise specifically provided" all preexisting conditions, rights, acts, things, liabilities, obligations or matters arising under prior law shall continue in effect.

Q Mr. Stone, what class of aliens would have better title to take advantage of Section 315(a) under the "or has applied" language?

A I want to get to that, Mr. Justice White. That is a somewhat difficult question to answer precisely if we

take the assumption that that applied or "has applied," must be parsed word for word, then it is difficult for me to think of anyone who, at the time the 1952 Act was enacted, had already applied, he would not come under the rule in this case.

But, this Court in --

Q Under your savings argument no one who had applied before would be subjected -- would be entitled to take advantage of --

A That's right; that's right.

Q That Section 315 would more be applicable in the future.

A That's right, and there was still a considerable class of aliens to whom it would --

Q And at some date the --

A I think it is not unusual for Congress to place a statute like that both in the present and past tense, simply to be all-inclusive and make it unambiguous at any time that it's read. I think there is an implication that it means to be retroactive with respect to the Congress as enacted, but it isn't necessarily so and in Ceballos v. Shaughnessy this question was raised and this Court did, indeed, specifically say that the savings clause was preserved intact but that the general language is or as applied did not apply to the Petitioner in Ceballos v. Shaughnessy, who was in an identical position, as I shall shortly elaborate, to the Petitioner here.

The scheme is that unless it is otherwise specifically provided, Petitioner's debarrment from citizenship arises under the Selective Service Act of 1948. And, of course that debarrment is clearly a preexisting liability under Section 405(a) of the Act. It simply continues in effect and is not affected by the tests set out in Section 315.

Now, this Court had held that the savings clause we're dealing with here is a very broad and inclusive clause which is gotten around only with great difficulty. Mr. Justice Clark described Section 405(a) in the Menasche case in 348 US, in which this Court very carefully examined the history of the savings clause as contained in the Immigration acts and now I'm quoting 338 US 535:

"The consistent broadening of the savings provision, particularly in its general terminology indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress. An implication of the Menasche case seems to be quite clearly that the savings clause of Section 405(a) is inapplicable unless Congress makes a deliberate and specific statement of its intentions to eliminate its preexisting liability."

And Congress did not do that in Section 315 in our view, and appropriately for our purposes here, what Congress did was to say that Section 315 shall apply

notwithstanding the provisions of Section 405(b). Section 405(b) is also a savings clause contained in the 1952 Act and it is significant to us, although not necessarily dispositive, in light of other overwhelming evidence that this Court held in Shomberg, that Section 315(a) does specifically except 405(b) but not 405(a).

With respect to 405(a) we have only the general language of Section 315 which covers an alien who applies for, has applied for an alien's exemption. And I think that the Ceballos case really forecloses considering that clause as sufficiently general language to override the savings clause.

As I say, the Petitioner in Ceballos and Shaughnessy was in a position virtually identical to that of Petitioner for these purposes. He had filed his application for exemption before the date of the 1952 Act. The only difference here is that in Ceballos the procedural posture of the case was slightly different. It involved a review of an order of deportation rather than a naturalization petition. So that another clause of Section 405(a) involving proceedings to suspend deportation was brought into play.

But, the crucial issue in Ceballos and here was citizenship eligibility of an alien who applied for an exemption, was later exposed to the draft and was subsequently found to be physically unfit for the service. And the Court found the general language of Section 315 was simply not a specific

exemption to the savings clause of Section 405(a).

Now, on the assumption that Section 315 of the 1952 Act does redefine the citizenship eligibility of Petitioner and others in his situation, in what way -- I'm questioning this now: in what way does that statute, that is the 1952 Act, change Petitioner's eligibility for citizenship?

The Committee Report of the Senate Committee on the Judiciary, which made a comprehensive preliminary study of many provisions of the 1952 Act, makes reference to Section 315 and what little there is implies to us thatthe Committee thought it was incorporating the ineligibility test set forth in the prior Selective Service laws. I guess that language can't have very strong effects, because after all, the language of Section 315 as this Court has held, does make a significant addition to the test of eligibility in that it requires that an alien both apply for an exemption and has to be "relieved from the service on such grounds."

Q Mr. Stone, with that savings clause, would an alien choose to --

A No, they don't.

Q -- in this day and age?

A They don't, Mr. Justice Marshall; they are not affected by this because if --

Q This says "any person" --

A Well, I assume --

Q -- as a matter of practice?

A As a matter of practice I assume that no court would interpret that to include that -- in the United States the idea here, after all, the statute is -- that aliens in order to obtain citizenship must subject themselves to the burdens of American citizenship and the American females at this point in time don't have military service.

Q Well, your argument, as I gather from the -- are that if he had served he would be in a different category?

A Well, that's right; that's right. This is what we consider to be the essential result of the language of Section 315. Several Courts of Appeals and as the Government now agrees, aliens who are subsequently drafted under Section 315 and actually serve in the armed forces are no longer ineligible for citizenship.

In other words, "relieved from service," means effectively and permanently relieved from service.

Q Mr. Stone, do you agree with that result in the Second and Ninth Circuits?

A Second, Third and Ninth Circuits; yes, Mr. Justice Blackmun, I think that -- the Government didn't argue those cases, test those cases. I think it now agrees with the position taken. I think it is somewhat -- in the statutory language it is a somewhat difficult position, but I suppose it

seems repugnant to many that those who did actually end up serving and incurring that obligation and performing the duty of military service, were really should be relieved from their initial choice --

Q But, what bothered me is that then your position would make your eligibility depend upon a successful physical examination.

A Well, I think, Mr. Justice Blackmun, that on the surface when you think of it, is rather troublesome, and we do find that there are aspects of our application of Section 315 that are somewhat somewhat harsh, as we pointed out in our brief, and as I am going to get to, but I don't think it's that specific aspect. Because, as I think about it, what is, after all, what is at stake here is service. The distinction made with respect to whether an alien has or has not served and if he has not served he can't get out of his original choice, regardless of what ground ultimately relieved him when he lost his exemption.

The fact that -- of his failure to pass the physical examination, which ultimately leads to his not serving on the second chance, is really an incidental aspect of the fact that we make actual service as the test. Once a person declares that he is an alien and wants to avail himself of the alien's exemption and chooses not to become a citizen, we make service a test and the fact that the physical exam comes into

play is rather an incidental effect.

After all, there are many benefits which Congress has conferred upon veterans, people who have served in the armed forces that it doesn't bestow upon American citizens who wanted to serve but were unable to do so, ineligible to do so, for one reason or another, including failure to pass the physical examination.

Q Mr. Stone, would the Government say the same result wouldhave been reached if there hadn't been an amendment in '52 --

A Well, in all those cases, Mr. Justice White, as has been stipulated, and I'm afraid the Government has not been totally consistent in the aftermath of Ceballos and Shaughnessy in arguing whether the '48 Act or '52 Act would apply. It has been stipulated that we would construe this onto the '52 Act and the only reason I can really think of for this is that the language of the '48 act seems to make it clearly irrelevant whether a person served ultimately or not. But that position is just rather difficult to stomach in some way.

Q But, the -- under your applicability act, one of the decisions -- I suppose you make the same argument with respect to whether the 315 is applicable --

A I'd rather not think that, but I suppose we would make the same argument, that under the '48 Act actual

service didn't matter and in one case that was argued and held that actual service did not matter under the '48 Act.

Q And actual service wouldn't make any difference in terms of the applicability of 315?

A That's right; that's right.

Q Mr. Stone, in your comparison with the man who actually -- and not an alien and doesn't pass the phsyical -- am I correct that here if he passes the physical and is taken and is subsequently dishonorably discharged, he would be covered?

A I suppose he would be, Mr. Justice Marshall. I suppose that under these cases which hold that service itself -- well, I suppose -- that actually if he were dishonorably discharged, I suppose it could be argued that, depending on what time it was in the service; it could be argued that he hadn't been effectively relieved because he hadn't actually served --

Q My problem is with being subject to the draft and actually being drafted. He was subject to the draft.

A He was theoretically subject to the draft.

Q He was rejected. He took the physical.

A He took the physical, and unlike the first time he took the physical he failed it; yes. Now, let me just --

Q Mr. Stone, let me ask you one more question. Following through with Mr. Justice White, suppose, under the old statute he had reconsidered and had volunteered and had passed and served. Still ineligible under Government's theory?

A That theory is not involved in this case, Mr. Justice Blackmun, and we have not argued that position with respect to the '48 statute. We have acquiesced in the opinions with respect to the 1952 statute, but I suppose theoretically the answer to that question is: yes.

Now, I think it is very important to see exactly what language we are dealing with in terms of the distinction between a person who has been relieved from physical service and a person who has actually served. Petitioner proposes that even though an alien who applies for an exemption on the grounds of alienage, is effectively and permanently relieved from service in the armed forces -- that is he never serves in the armed forces, he is not ineligible for citizenship if any other ground for exemption ultimately comes into play that contributes in any way to his permanent relief from service.

In other words, though he doesn't specifically say that, he would read the phrase "relieved from service on such ground," as meaning relieved from service exclusively on grounds of alienage. This would have been, of course, a rather

radical departure from the 1948 statute which arguably wouldn't even have saved him if he had served. But Congress certainly could have chosen to adopt this more generous provision and to relieve from the consequences of their initial choice, not to become citizens, all aliens who apply for exemptions, or are later exposed to theoretical liability for the draft.

As we have pointed out in our brief it may be considered somewhat harsh, in fact that Congress did not do so, although not for the reasons suggested by Petitioner that the distinction is one of passing a physical examination, because we consider that quite incidental. But we do feel that there is perhaps something harsh in the fact that Petitioner did, after all, originally make his election not to serve in the armed forces and not to become a citizen on the assumption that he would continue to enjoy the assurance of an alien's exemption from the draft. And he was by no means entitled to presume that Congress was foreclosed from removing his exemption. There is no evidence that anyone told him that Congress was so foreclosed.

But, nonetheless, he probably did assume, vaguely or otherwise, that because of his alienage he would not have to think about liability for military service any more.

Q Couldn't he assume something else, too? That he would remain physically eligible?

A I guess he would assume that, Mr. Chief

Justice. He could assume that he would stay in the same condition he was in prior to 1952. And for that reason we consider Petitioner in a much less harsh application of the statute than perhaps others similarly situated who might not have had a change in their physical status between the time they sought their first exemption and the time of the --

Q I wonder if a layman, as this man was, not a lawyer, thinking in technical terms, if he really sat down and had a debate with himself of all of the elements that he ought to weigh, surely he would have given priority to the continued physical condition that would render him eligible and would be far less likely to be trying to predict whether Congress was going to change or not change the law. I should think that should be true; wouldn't it?

A I'm afraid I don't quite see --

Q If he sat down and tried to evaluate what were the problems, what he should consider in his choice, he would certainly immediately stop and consider: well, am I going to be able to get out of this military service on the grounds of physical disability. And if he knew -- suppose he were consulting a doctor at the time and the doctor said you've got an incipient diabetic condition. He probably then wouldn't have tried to rest on the other grounds.

A Would not apply for an alien's exemption. That's precisely the point. That's why I think that, though we

really do have to take into account whether Congress -- Section 315 is not, after all, crystal clear as to whether Congress intended to hold all aliens to their end of this so-called "bargain arrangement" sort of like a contract.

I don't think that really that the harshness of our interpretation of Section 315 such as it is, would apply to a case where an alien had passed his physical examination originally and only decided to choose his alien's exemption after the fact of knowing that he was physically fit for the draft.

In fact, several Courts of Appeals have made related arguments and every Court of Appeals that has decided this precise issue has, in fact, decided in the Government's favor and several have pointed out in connection with this issue that many things can take -- happen.

An alien can assess his chances of getting an exemption on some other ground that would not debar him from citizenship before he chooses to claim his alien's exemption and then he may later lose his exemption but in the interim theory anything could happen that would change his draft status; things like marriage at one point, occupational deferments or illness. Any of those things can happen during the period when he holds his exemption from the draft which might provide him with permanent relief from the draft that he would not have had because of his original choice of an alien's

exemption.

With respect to this Petitioner, even though this Court were to take, let's say, an intermediate position with respect to Section 315, that the alien doesn't have to have been relieved exclusively on the grounds of alienage, but somehow the Government must show that the alienage was a substantial or even the major factor contributing to the results of that belief. Petitioner can't withstand that test, either, I don't think.

In any event, we, on balance feel that the language in Section 315 is quite badly strained by construction that his relief from alienage must rest exclusively on grounds of alienage. We feel that a more normal reading of that language refers to an alien who is or was relieved from service -- not from liability, but from service on grounds of alienage is that as long as the alien's exemption was one of the grounds contributing to an effective and permanent release from service, he had been relieved on such grounds within the meaning of Section 315.

We think that this reading is far more in line with Congress's attitude as expressed in the prior legislation and we think that the prior legislation, the basic concepts of that legislation were meant to be retained in the 1952 Act.

It is for that reason that we ask that this Court affirm the judgment of the Ninth Circuit.

MR. CHIEF JUSTICE BURGER: Thank you Mr. Stone. Mr. Halvonik, you have five minutes left.

REBUTTAL ARGUMENT BY PAUL N. HALVONIK, ESQ.

ON BEHALF OF PETITIONER

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

Let me just go to the last point that was raised here on what happens with this interim period. You've got a postponement of the period for induction into the services. That obviously can cut both ways: if you have an opportunity to postpone your induction and you do it during peacetime and find yourself called two years later to this war, obviously it's a less than dangerous setting for entry into the armed services.

But, this man didn't set out to postpone anything. The arrangement that he was given was that he wasn't going to be draft. They said he was going to be relieved from liability. He wasn't going to consider whether his physical status was going to changeand at 23 one doesn't expect that within the next couple of years that he is going to be physically unfit for service, anyway. And that didn't even enter into his thinking at all.

The arrangement was: you are never going to be a citizen; on the other hand you will never have this obligation of citizenship; never have the obligation -- not that it's postponed, but that it's extinguished, that that's a job for citizens and you are not going to be one. And he didn't have

any theoretical liability. He was actually called and he had to change his life, wrap up his business, go down, and he was all prepared to serve.

And in doing that action he demonstrated as much as he was able to demonstrate that he was willing to assume that obligation. He demonstrated to the same extent as those who passed the physical.

Now, one other point raised by Mr. Stone was whether Section 405(a) savings clause is applicable to Section 315 by virtue of the Tobias decision. He's referring to footnote 17 in Tobias.

Tobias, as I knew it before, was a 1951 case. The 1952 statute had been withheld -- was held inapplicable to his case. There is also a note that says that as the procedures initiated against him for deportation were saved by the clause, and therefore even if he had come afterwards he probably would not be able to stop the deportation.

It's a Shomberg case and that's what the referance is to. It's true there is nothing in Section 315 that specifically changes any procedures that would be going into at the time. There is no procedural specific exemptions to the prior law. So that if a procedure had begun against the Petitioner, for example, for deportation, it would be decided that he had a new status after 1952 because he couldn't take advantage of it because the proceedings for deportation would

go pursuant to the 1948 law.

But, what Section 315 does do specifically, is change the status. It doesn't change procedures but it changes status. It makes eligible for citizenship those who were not eligible before and we submit that the reason Congress did that was because it was not living up to its prior bargain and now tried to meet its obligation. And it has retroactive language and it seemed the most reasonable thing in the world for Congress to do. It seems the fairest thing for Congress to do and it's very hard to explain the language as applied, as Mr. Justice White pointed out, without applying this thing retroactively.

Finally, I again point out, as Mr. Justice White did, that the Government's position is totally inconsistent as to those who actually served. Either '52 applies retroactively or it doesn't. It can't apply retroactively to people who pass physicals and not apply retroactively to people who flunk physicals.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you Mr. Halvonik. Thank you Mr. Stone.

The case is submitted.

(Whereupon, at 11:15 o'clock a.m. the argument in the above-entitled matter was concluded)