TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

OLIVER T. FEIN,

Petitioner,

vs.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7, YONKERS, N. Y., et al.

Respondents.

No. 70-58

Washington, D.C.
October 12, 1971

Pages 1 thru 39

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vs.	No. 70-58
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Washington, D. C.,

Tuesday, October 12, 1971

The above-entitled matter came on for argument at 11:00 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, 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:

MICHAEL B. STANDARD, ESQ., (Rabinowitz, Boudin & Standard), 30 East 42nd Street, New York, New York 10017, for the Petitioner

ERWIN W. GRISWOLD, Solicitor General, for the Respondents

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Next we will hear argument in the matter of Oliver T. Fein against the Selective Service System Local Board No. 7.

Mr. Standard, you may proceed.

MR. STANDARD: I would like to introduce David Rosenberg, who worked on the brief in this case.

This case is here by writ of certiorari to review a decision of the Court of Appeals for the 2nd Circuit which affirmed the finding of the District Court that it had consistent with the standards of 10(b)(3) of the Military Selective Service Act of 1967 no jurisdiction to review answers of the Selective Service System which removed a conscientious objector classification given out to petitioner by his local board.

I should alert the Court at the outset to the fact that since the briefing in this case on September 28 of this year Congress has enacted a new statute. You will find only cursory reference in our reply brief filed on Friday of the week just passed to that statute. That statute will become, I think, of considerable prominence as the argument unfolds.

What Congress has done is to suggest that it is now its policy that a fair hearing shall be given to a registrant. I will read the pertinent portion of the brief.

"It is hereby declared to be the purpose of this section to guarantee to each registrant asserting a claim before a local or an appeal board a fair hearing consistent with the informal and expeditious processing which is required by Selective Service cases."

It then goes on to recite four particular standards which it suggests should be the basis for --

QUESTION: What is the citation of that?

MR. STANDARD: It is Public Law 92-129, Your Honor, and its effective date is September 28, 1971, just two weeks ago.

QUESTION: Public Law --

MR. STANDARD: Public Law 92-129 growing out of H.R. 6531, the same session.

It then recites four particular instances which shall be standards used by the President or the Selective Service System to create reasonable rules and regulations. Two of those standards are of prominence in this case because in effect it is the enshrining by Congress of the due process arguments which we have made in our brief. I will read those two. They are brief.

"Each registrant shall be afforded the opportunity to appear in person before the local or any appeal board of the Selective Service

System to testify and present evidence regarding his status."

The second applicable regulation, statutory division, is:

"In the event of a decision adverse to the claim of a registrant the local or appeal board making such decision shall upon request furnish each registrant a brief written statement of the reasons for its decision."

QUESTION: Mr. Standard, would you say that that is --

MR. STANDARD: I am sorry, Your Honor, I said that cursory mention was made in petitioner's reply brief --

QUESTION: But not the text as you read it.

MR. STANDARD: You will find the text, I believe, on page 2 of the reply brief. At least, the text of the provisions I have just read to you.

The facts are simple and they are not in dispute essentially. The plaintiff is a doctor of medicine. In September of 1967, while occupationally deferred as an intern at Western Reserve Medical School, holding a 2-A classification, he wrote to his board and he indicated to his board that moral convictions are empty unless substantiated by moral acts, and he asked his board to send him a 150 conscientious objector form.

QUESTION: How long has he been an M.D.?

MR. STANDARD: He completed his internship in June, 1967 -- I am sorry, 1968 in June, and he has been a doctor since then. He is now 31 years of age.

QUESTION: So he has been a licensed physician for three years. Am I correct in my impression that prior to that time he evinced an interest in political science and had even registered at Columbia some place?

MR. STANDARD: Yes, that is correct.

QUESTION: And then reversed his direction and went to medical school.

MR. STANDARD: That is correct, Your Honor.

QUESTION: When would you fix as the time that his claim ripened?

MR. STANDARD: Well, I would say it ripened at the moment when he wrote to his board, although it is quite clear -- and his application makes quite clear in terms of the length of time that it took him to get to that position -- I would say that the day you would fix it would be the day when he wrote to his board in 1967 saying my claim has matured.

Now, the history of the registrant in this regard is quite pertinent. The registrant has -- and it is reflected in the CO application -- a traditional Lutheran background.

QUESTION: In that connection, which Lutheran

church? There are many.

MR. STANDARD: Well, I don't suggest that he has ever been a formal member of the Lutheran church in recent years. I cannot tell you which -- I am not a Lutheran, myself, Your Honor. I never thought to inquire, Mr. Justice Blackmun.

QUESTION: You don't know whether it is the Missouri, Wisconsin, Lutheran Church of America --

MR. STANDARD: I am sorry, I do not know that, but the petitioner doesn't rely on a particular sect that he or his family may have been a member of in coming to his conscientious objector position.

He refers to early training by his parents, early and intensive training by his parents in the church tradition. He refers to his matriculation at a Quaker college, to his activity in the civil rights movement, and finally to the vocation of medicine which for him reflected a vocational method of acting out his views with regard to nonviolence.

His application in response to the question "Do you believe in a supreme being" was answered in the affirmative.

In addition to the strict religious basis for his application, however, he referred to a broader moral standard. He believes that man lives in the community among men and one cannot take life under any circumstance.

It is certainly clear, although I do not think it

is an issue in this case because the posture of this case at this moment, as I understand it, is that there is no question about the propriety of his classification of processing, but what we are here doing is attacking an appellate regulatory procedure which is with due process violations. The application which he filed with the board, however, between September and November of 1967 was supported by reference letters from clergymen, from the dean of the medical school, from colleagues and from friends, all of them attesting to two things.

First, to his sincerity; and, second, to the nature of his belief.

In November of 1967, Fein appeared for an interview before his local board. At that interview, he was canvassed rather carefully in detail as were his reference letters with regard to the nature of his religious belief and to whether he would perform alternative service. That is, alternative noncombatant service. Fein unequivocally took the position at that time that he would perform any work in the national interest anywhere in the United States. He expressed the hope that he might use his capacity as a physician to aid in some activity, preferably in a ghetto concentrated area, and in addition, parenthetically, he said, "My wife is a physician and if we could find a place to work together that would please us, but it is not necessary."

He was then asked about the nature of his religious

belief. Unequivocally he asserted a belief stated in both traditional supreme being and in what I suppose we would now call in shorthand in safer terms, relying on the moral imperative.

The board, in response to the 2-A classification which the registrant then held, said we would not find you a conscientious objector at this time. We will retain you in your 2-A classification, and it said we will give you a right to appeal when and if the moment ever comes.

Well, that moment did come. In February of 1968 the registrant was reclassified 1-A from his 2-A classification and in timely fashion he asked his board for another personal interview. The board granted that interview on May 22.

In anticipation of that interview,the registrant filed with the board a series of answers to questions which appeared to be troubling the board at its early in November interview, particularly those with regard to the position of the Lutheran Church.

You will find I believe annexed to Government's brief at page -- I don't have the citation, I am sorry.

The substance of the second meeting before the board was similar to the first. They asked if he would perform alternative service. He said, "Of course, I would." They asked the nature of his religious belief and a series of questions which he apparently answered satisfactorily because

his board on that day, May 22, 1968, gave him his conscientious objector classification.

Ten days later the State Director appealed to the New York State Appeal Board. Procedurally, what the State Director did was to notify not the registrant of that fact but notify the Appeal Board and the Local Board, and it is the Local Board which in turn notifies the registrant. As soon as the registrant became aware that there was an appeal taken after a finding by this Local Board, that phenomena which is your friends and neighbors, your community, in theory if not in fact, the registrant wrote to the Appeal Board and said, "I don't understand this. I am not only bewildered and surprised but I would like an opportunity to get a statement of reasons from the State Director or from the Appeal Board. I don't know what it is that he has in mind when he in effect reverses all appeals from a finding of 1-A classification.

There was no pertinent response to that letter. A second letter. Registrant inquires of the Appeal Board what are the issues? What are the reasons? No pertinent response from the Appeal Board.

Registrant then says, "I would like a chance to appear before the Appeal Board or at least to rebut somehow issues which I am in the dark about." No pertinent response except for a minute of action dated in July which in effect

revoked his conscientious objector classification by unanimous vote and returned him to a 1-A classification.

Now by Selective Service regulation a registrant has no right to appeal to the Presidential Appeal Board unless there has been a dissent below. The registrant nevertheless wrote to the then Selective Service Director, General Hershey, and described his case and asked the good offices of General Hershey to ask the Appeal Board to review this case.

General Hershey did so, although he made no recommendation of any kind. Although neither he nor the Appeal Board -- now the Presidential Appeal Board -- never stated what issues there were present as a reason for the appeal, never stated any reasons -- that is, the Appeal Board never stated any reasons.

Following transmission of the file, the Presidential Appeal Board unanimously stating no reasons found that the registrant should be retained in a 1-A classification. It is important to remember, particularly in terms of the issue of standing to raise this question, that in this period two things occurred. In the period of May through October. No. 1, the registrant was ordered to report for induction. That notice report for induction, as it must by regulation, was postponed during the appellate process and eventually canceled. In February, 1969 this action was brought in the

District Court, Southern District of New York. Judge Tyler never reached the merits of the case at all. He never reached the question of the constitutionality and due process terms of the appellate regulatory system. He expressed uncertainty to be sure about the findings of this Court in its procuring opinion in Boyd v. Clark, but said Clark v. Gabriel controls. 10(b)(3) is a bar.

On appeal to the Court of Appeals there were three decisions. Judge Blumenfeld sustained what Judge Tyler did below. Namely, he said 10(b)(3) was a bar. Judge Blumenfeld suggested that merely because issues were framed in a legal manner, that that would not permit us to avoid the questions of classification on processing which he found that we were attacking.

Let me repeat. We are not here today, nor have we been in any court, attacking the question of propriety of classification in any manner. We are rather attacking the method used by this complex Selective Service regulatory body. We are attacking the standards -- or the lack of standards -- in the sense that they never frame any issues. A registrant is always in the dark.

QUESTION: Specifically, you are attacking the due process integrity of the administrative appeal process.

MR. STANDARD: That is correct. That led, to be sure, to a certain result. It led to a revocation.

But we are attacking the process only, not the finding. We are not doing what Congress has warned us against. We are not introducing litigious interruption into the process. What we are trying to do, in fact, is to avoid litigious interruption of that process. What we are trying to do is to say, as Justice Steele said in the Weiner case where there was a similar question in the propriety of an appellate review by a State director, send it back to the Local Board, let them know the reasons.

In fact, there are perhaps four or five cases in which issues of similar construction of the appellate regulatory system have been at issue. One of them just a year ago Mr. Justice Blackmun sat in, U.S. v. Cummins. I don't know if Your Honor recalls it. There you concurred in a finding that there was a violation of procedural due process. The issue in that case is only slightly different than in this case. What has happened was that the registrant had been the subject of an appeal by the State director and there had been a number of reasons but he had never been notified on what the State director's position was.

Now, I think that the statement of facts in this case effectively states the due process argument. I don't want to burden the Court with reference to the cases which we have briefed, which we feel are particularly relevant here. I think this case can be disposed of on the merits -- that

is, on the substantive merits -- by referring to Simmons and Gonzales and more general cases regarding due process such as Goldberg v. Kelly.

Now we come to the procedural question, which is of some importance. It is our view that given the new statute to which I have referred Congress has enshrined in effect the constitutional standard which we have always argued was implicit in the 1967 Act and we suggest that this case be remanded to the Appeal Court, to the Selective Service System, for processing consistent with the standard which we now know and which we have always argued but which Congress has now set as a standard.

QUESTION: You are not suggesting that that statute was by its terms or by implication retroactive, are you?

MR. STANDARD: Well, that is a puzzle, Your Honor. I can't pretend since the Act was effective on September 28 to have done any thorough research but I can refer Your Honor to two cases quite apart from the retroactivity with regard to other Selective Service registrants who are somewhere in the process. I don't refer to them at all. But with regard to Fein, it has been -- this Court has reflected in U.S. v. Alabama, which you will find in 362 U.S. and in Ciffron v. the U.S. which you will find in 318 that where there is a change in the law between the court of original jurisdiction's decision and the Appeal Court's decision, that

the new law applies, and we suggest that it applies here.

QUESTION: In this case.

MR. STANDARD: In this case.

QUESTION: Even though the statute --

MR. STANDARD: It applies to this petitioner. There has been a change between --

QUESTION: This case is still pending.

MR. STANDARD: That is correct. I take no position because I don't pretend to have briefed the question of retroactivity for others.

Now, should this Court find that the new statute not apply, and I can't conjure a reason why you might, but should you find that it doesn't apply, we are back to the gloss which this Court in Oestereich and Breen placed on section 10(b)(3). The Court will recall that in those two cases, one a case of ministerial exemption and one a case of student deferment, there was an explicit statutory authorization given both those classifications, and a Local Board, as a majority of this Court found in an excess of its authority, there was a Local Board which in excess of its authority reclassified an accelerated induction.

Now, if we are back to the old problem of Oestereich-Breen on the one hand and Clark v. Gabriel on the other hand and understand that we do not attack classification or processing here but we are only attacking an appellate

regulatory scheme, then I suggest this is clearly within the Oestereich decision by statute when a Local Board gives a registrant conscientious objector status by statute that is filed unless an appeal is authorized by rules and regulations.

Here if you referred back to that appellate regulatory scheme you find no authorization except the generally "shall prescribe such rules and regulations."

It seems to me in a case which touches so clearly on an area of personal liberty there have to be as in Caton Brill v. Dulles, there have to be standards which are explicit. Congress understands that point clearly because in the new Act it doesn't merely say there is a right to appear before an Appeal Board, or you have a right to written findings or written reasons, rather. What it says pursuant to such rules and regulations as the President may prescribe, and then it creates the standards, but nowhere in the 1967 Act are there any standards which are authorized by Congress. So I believe that we are in a classic Oestereich situation.

With regard to the burden of the Government's arguments which has been that there really is lurking here a question of classification of processing, I notice that the Solicitor General finally on page 13 of its brief agrees that this Court supports our position. It says this Court is not now called upon to determine whether the assigned classification is wholly without factual basis. I would point out

parenthetically that while we are not asking the Court to deal with the question of classification, that the Government seems to suggest although it is silent as to reason that there was no prima facie case made out here for conscientious objector classification. Well, maybe there is something that I don't know about, although it doesn't appear in the record. The record is silent in this regard. The Government has unequivocally taken the position that there was no statement given by the State director to the Appeal Board. If that is so, I do not understand how it can, as it does in this Court, contest the validity of the CO classification. Was there an oral communication which is not part of the record? We don't know. That is precisely why the due process standard we are urging here is as important as we feel it is. This is not however merely a case of prima facie classification. Here we have a Local Board having come to a conclusion that a registrant was classifiable as 1-O. I would suggest that the Court do either one of two things, that it apply under new Public Law 92-129, follow the standards there set, refer this back to the Selective Service System for review in light of those standards, and pending that the District Court reinstate Fein in his 1-O classification. That is No. 1.

Alternatively, although the relief we believe should be the same, it might apply the standards it has recited as

the gloss in Oestereich and Breen to 10(b)(3) of the Act, that it understand that we are attacking the system of classification and not classification itself.

Thank you.

QUESTION: Mr. Standard, before you sit down I would like to ask you just one question. Is there any legislative history on this recent amendment which suggests that the new provisions are to make explicit what you say was previously implicit?

MR. STANDARD: Yes. Well, I confess, Your Honor, because of the newness of the statute, that while I have begun what is now a 2,000-page search to canvass both the Senate hearings and the House hearings, I find only two references having gone through the Senate hearings. The only testimony which explicitly suggested that these appellate rights, these procedural due process rights were offered by Mr. R. E. Nyer of the American Civil Liberties Union. There is however -- I believe I can give you the citation in a moment.

QUESTION: That won't necessarily help us very much unless Congress adopted the view.

MR. STANDARD: That is true. I do not pretend that the search has ended. It has just begun, given the newness of the statute, and I would be glad if the Court desired to brief that and ask permission to do so. There is

however in the 91st Congress, 1st Session, a study made of the Selective Service System with recommendations for administrative improvement that was submitted by the Sub-committee on Administrative Practice and Procedure to the Senate Judiciary Committee. There you will find, and particularly on pages -- it would be the section running 9 through 11 -- you find precisely these recommendations. Others, of course, not followed nor followed by the conference report here.

For example, one of the issues raised was the right to counsel at a Local Board appearance. Congress, in the conference report, did not adopt the recommendations for administrative improvement made in the study I just referred to but rather took the position that it would really impede the Selective Service classification process and therefore did not adopt that. The other four recommendations however of the Senate Committee were adopted at the conference.

QUESTION: Mr. Standard, an issue that seemed to stir up the Court of Appeals a little bit was this problem of the jurisdictional amount requirement of Section 1331.

MR. STANDARD: I have briefed that question, Your Honor. I will be glad to allude to it briefly in the following way:

First, there is a classic and standard answer. There has been an allegation in this complaint of a $10,000

amount in controversy. I don't think it can be gainsaid by anyone that this petitioner can meet that statutory amount. I think however that there lurks here a constitutional question of real proportion. If this action had been begun in the District of Columbia there would be no $10,000 jurisdictional amount because Congress doesn't impose that amount in the District, unlike every other district in the United States. More important, and I think the full answer, the full answer I choose to give was that given by Judge Edelstein in dissent below in the three-judge court in Boyd v. Clark. I don't believe you can exhalt a 19th century notion of property in cases where substantial Federal rights are at issue. I think the Government has acknowledged that there are substantial Federal rights at issue here and I don't think that 1331 should be heard to be a bar to the assumption of jurisdiction.

QUESTION: You say it is unconstitutional.

MR. STANDARD: I would say so.

QUESTION: You don't think Congress can constitutionally exhalt a 19th century notion of property.

MR. STANDARD: Let me amend what I said. I think it can. I think it is erroneous when it does so.

Thank you.

QUESTION: Mr. Standard, in the appendix on 89-F is reproduced an affidavit by you in which you direct comment

to a so-called brief, and I put that in quotations, by Miss Jackylin Jones intimating that this was some kind of additional information placed in the file by the Board. Do you recede from that position at this point?

MR. STANDARD: Do I recede from the position that that is in fact what occurred? No, Your Honor, not at all. I have never seen that. It has been characterized by the then United States Attorney Martin Soloman as merely a summary prepared by the clerk to enable the Appeal Board to understand what the issues are. You will find his affidavit I believe on the pages following. You will find it on page 89-I.

I certainly don't recede. But that is not the kind of notice which I think both the Constitution then and always and Congress now requires.

QUESTION: Well, I get from your affidavit that you are insinuating that there is additional information in this brief.

MR. STANDARD: What had happened was that subsequent to the argument before Judge Tyler in this case in reviewing the record I found a letter which was dated June 10 from the clerk of the Local Board to the Appeal Board and it said, "Please be advised that we have already made up the brief on the above-named subject and is to go into today's meeting."

I therefore submitted a post-argument affidavit,

post the argument before Judge Tyler, and I indicated that it was central to the Government's position that nothing else had happened and now I find that indeed something else had happened. There had been some notification. The Assistant United States Attorney in response then said there was nothing which was meritorious, nothing which went to the substance in that regard, but rather was merely a synopsis by the clerk to aid the Appeal Board in its process.

QUESTION: Well, I gather again that you are insinuating that this is a lawyer's brief that was submitted. Are you receding from that position or is my statement incorrect?

MR. STANDARD: No, I think, Mr. Justice Blackmun, you misunderstood if you thought I was ever insinuating it was a lawyer's brief. I used the phrase "brief" in the colloquial sense. It was a synopsis, a placing, if you will, of what was going to be presented to the Appeal Board, but it was prepared not by a lawyer but by a clerk, not by anyone in the State director's office. Of that, I am satisfied.

QUESTION: Are you still then dissatisfied with the Assistant United States Attorney's affidavit, and I read:

"It is merely a summary of the registrant's Selective Service file."

MR. STANDARD: No, I am not dissatisfied with that.

QUESTION: Of course, any summary would necessarily involve editorial judgment and selection.

MR. STANDARD: Yes, sir.

QUESTION: Or it may be merely a listing of the dockets.

MR. STANDARD: Well, I think if it were a listing of the docket entries which are ordinarily attached to the cover sheet, which I understand is an appellate practice that would never occur, I think it would have been referred to as docket entries. I think the use of the English language is simple. When the word "brief" is used, it means a brief, though not necessarily in a lawyer's sense. If docket entries were sent up, they would be called docket entries.

QUESTION: This was just as you say a young lady who was the clerk of the Board.

MR. STANDARD: She was the clerk of the Board and she could have made an error. The record silent in that regard. We really don't know.

CHIEF JUSTICE BURGER: Mr. Solicitor General.

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

This case can become quite complicated and I am going to try, if I can, to present it in a somewhat simple form. Insofar as there is a constitutional question in it, it seems to me to be essentially one of the framework within which this Court sits. That is, the separation of powers and the proper function of this Court with respect to the functions of specifically Congress in this case.

The case I believe turns on the application of two relatively simple statutory provisions which are quoted on pages 2 and 3 of our brief. First is the jurisdictional amount provision to which Mr. Standard referred at the close of his argument and which is discussed at the close of our brief. The District Court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000. Now, there is not a trace of evidence in this case that $10,000 or any other amount is involved. The argument made by Mr. Standard in his brief is in essence that that provision really should not be taken seriously. Maybe it is unconstitutional, though he wasn't willing to say that it was unconstitutional this morning, and that at any rate it is a 19th century anachronism and the courts should not really pay much attention to it.

Now, it may be wise or it may be unwise --

QUESTION: There was an allegation however in his pleading that --

MR. GRISWOLD: There is an allegation in the pleading but the nature of the transaction is such that it is not susceptible to monetary evaluation. It is like the question this Court decided a century ago that custody of a child, which can be a crucially important matter, is not susceptible of monetary evaluation.

QUESTION: Two years at military pay as contrasted with two years income as a physician --

MR. GRISWOLD: Two years of military pay as a physician is considerably higher than two years military pay as a first-class private. This man would have gone in the Service as a commissioned officer with pay and allowances. Besides, I am not sure that that is the proper measure in a case such as this.

QUESTION: I am not sure either.

MR. GRISWOLD: I merely suggest if the District Court did not have jurisdiction, this Court does not have jurisdiction, and there is something to be said for not giving advisory opinions on important and difficult questions of constitutional law in cases in which the jurisdiction is not established.

QUESTION: Mr. Solicitor, how about Haige against

the CIO?

MR. GRISWOLD: In that case a majority of the Court quite plainly made it clear that it was not proceeding under this section because it felt that the jurisdictional amount couldn't be there, and it found a way to proceed under another section which is not available here, so I think that the Haige case rather supports the position I am taking. I wouldn't want to be misunderstood. If I were a Member of Congress, which I am not, it seems to me that this provision might well be reconsidered with respect to cases of this type, but it is what Congress has provided and Congress has not made any change in it and I find it difficult to see why the Court should not respect it and carry it into effect.

Now, the other statutory provision is Section 10(b)(3) of the Selective Service Act, which has been before this Court in a number of cases and which is quoted at the bottom of page 3 of our brief. No judicial review shall be made of the classification -- and here I emphasize the next two words -- or processing. Mr. Standard has said he is talking about the procedures used here. I suggest that "all processing" could not be a clearer expression of the intention of Congress that the procedures shall not be subject to judicial review of any registrant by a Local Board, Appeal Board or the President except as a defense to a criminal

prosecution after the registrant has responded either affirmatively or negatively to an order to report for induction.

The question in this case, it seems to us, is really the construction and application of Section 10(b)(3) and let me point out, too, that the ultimate question is simply one of timing. If Mr. Standard has substantial questions to raise on behalf of his client, we do not contend that there is not a place where they can be raised. We are not contending that these questions are forever foreclosed from judicial review. Our position is simply that they cannot consistently with the enactment by Congress and enactment properly made by Congress in its judgment both with respect to its power to control the procedures in the lower Federal courts and with respect to its powers to raise and maintain armies that Congress has provided that no judicial review shall be had of the classification or processing except after either affirmative or negative response to an order to report for induction.

Now, obviously, of course, this turns on several cases which have recently been before the Court, the first of which -- and the one I supposed most relied on by Mr. Standard -- is the Oestereich case. I would point out that that case is markedly different from this case. I would point out, too, that Justice Stewart wrote a dissenting

opinion in that case in which Justices Brennan and White concurred in which they said that there was no inherent or inevitable conflict between the statutory provisions which were before the Court. The position which was taken by the Government there was that 10(b)(3) said no judicial review shall be had but there was another provision in the statute which said that students of theology "shall be exempt from training and service under this Act."

In the struggle in my mind which went on in connection with that case I found those two provisions, though not necessarily inherently inconsistent, so close to inconsistent that I found it impossible to support the literal construction of Section 10(b)(3) in that situation. The then Director of the Selective Service System was unhappy about that and he may well have been more far-seeing to see cases such as this over the horizon. I recognized that the conflict was not absolute or literal, as was pointed out by Mr. Justice Stewart's opinion, but I ascertained that if this case went forward that the Criminal Division of the Department of Justice would not institute a criminal prosecution against a man where the statute provided that he shall be exempt from service or training under this Act. It was perfectly clear in my mind that if such a prosecution were instituted and if it got through to the Solicitor General's office that I would confess error in such a case

and I have little doubt that the Court would support such a confession in view of the expressed provision of the statute, and referring to an opinion of this Court in a draft case some 20 years ago where it was said that it was unnecessary to walk up the hill and then march down again, I felt that the conflict was so close that a construction of Section 10(b)(3) was called for.

I point out that that problem arose only because there were two statutory provisions at least nearly in conflict with each other. There is nothing of that sort here.

QUESTION: In the 1971 amendments, was any effort made to change the rule of that case?

MR. GRISWOLD: No, Mr. Justice. The only substantive amendment in the Draft Act that was made, or at least the only one that is anywhere near that, near this case, is the addition of Section 22 at the end, which contains these provisions which Mr. Standard referred to and to which I plan to make reference to a little later in my argument.

QUESTION: But 10(b)(3) was substantially --

MR. GRISWOLD: It is entirely unchanged. There is no reference to it in the statute.

Now, on the same day that Oestereich was decided there was also decided Clark against Gabriel, which it seems to me clearly supports the position that I have taken that

Oestereich turns on the clash in the presence of two virtually inconsistent provisions -- shall I say practically inconsistent provisions -- of the statute. I fully agree they were not literally inconsistent but I felt they were practically so and the majority of the Court took that position, too.

Clark against Gabriel involved a pre-induction effort to enjoin the induction with respect to a claim of conscientious objection and the Court held that 10(b)(3) barred that position. I might also point out that in the Oestereich case itself, Mr. Justice Harlan concurred in the judgment on grounds which are very close to the position of Mr. Standard today. I think perhaps oversimplifying it it was on the ground that if it was a question of fact there couldn't be an injunction but if it was a question of law there could be. But that view, though he repeated it in the Gutknecht and Breen case, or particularly the Breen case, was not adopted by any other member of the Court.

And then the case which I think is the closest to this case was decided only a few weeks later than Clark against Gabriel, and that is Boyd against Clark. That is a decision of the Court, two or three lines long, bypassing the jurisdictional amount questioned but otherwise simply affirming the judgment of the court below.

But Boyd against Clark was a pure question of law.

There was a question suggested therefore enjoining induction that there was an unconstitutional discrimination against non-college students in that they, perhaps because of inadequate financial support, were subjected to the draft while college students were deferred. That contention was denied by a three-judge District Court which also dismissed for want of jurisdiction on the jurisdictional amount question. Appeal was taken to this Court and this Court affirmed pro curium without reaching the question under Section 1331 which is the jurisdictional amount case.

Then finally the construction of 10(b)(3) which I am urging here it seems to me is confirmed by the Breen case in 396 U.S. Both the Oestereich case and the Breen case arose out of delinquency reclassifications. The Oestereich case involved a statutory provision which said that the individual shall be exempt. The Breen case involved a situation where there was no doubt, no contention, that the individual was a bona fide full-time student and the statute, as it then read, said that such student shall be deferred, and the contention was made before this Court that there was a difference a deferral and an exemption. Formally, I think one can make that difference.

QUESTION: The Court of Appeals upheld it, as I remember it.

MR. GRISWOLD: And the Court of Appeals, not in

the Breen case -- oh, yes, Mr. Justice, in the Breen case the Court of Appeals had made that.

QUESTION: Judge Friendly.

MR. GRISWOLD: Had made that distinction. I find it confusing to keep Gutknecht and Breen separate. Gutknecht has nothing directly to do with this because it was a criminal case, not a 10(b)(3) case, and the Court held that there was no difference between an expressed staturory provision by Congress that Oestereich should be exempt and that Breen should be deferred. I think perhaps some of the trouble in later cases has come from shall I say somewhat broad language in the Oestereich case. The lower courts have sometimes quoted the words blatantly lawless from the Cstereich case and we find occasionally that anything that anybody finds that he can argue was not in accordance with law becomes blatantly lawless in order that it can be brought within the Oestereich case.

But the result of these decisions it seems to me is that Section 10(b)(3) means what it says, should be read to mean what it says, except in situations where the Court finds conflicting provisions in the enactments of Congress. Such conflicting provisions were found in Oestereich. Such conflicting provisions were found in Breen. They were not found in Clark against Gabriel where the underlying issue was one of fact. They were not found in Boyd against Clark

where the underlying issue is one of law.

And so I suggest that the issue in this case has in fact been cited by this Court in Boyd against Clark.

QUESTION: Can you tell us again briefly, Mr. Solicitor General, what was the underlying legal issue in that case?

MR. GRISWOLD: In Boyd against Clark?

QUESTION: Yes, in Boyd against Clark.

MR. GRISWOLD: It was the question with respect to discrimination against non-students.

QUESTION: Yes, thank you.

MR. GRISWOLD: With economic undertones involved in it, which is a question of due process and equal protection, which is not unrelated to the procedural due process which is referred to here.

QUESTION: Mr. Solicitor General, do I understand it that as of today if the State director took an appeal, as happened in this case, that there would be a notice and an opportunity for a personal appearance before the State Appeal Board under the new statute?

MR. GRISWOLD: Under the new statute, there would. I hesitated only for a moment because the President had not issued his regulation under the new statute.

QUESTION: Let's assume he would have a right to a personal appearance before the State Appeal Board and then

let's assume that today a case came up like this one where he was denied a personal appearance. He was not given notice and he was not given a personal appearance and his classification was changed to 1-A, as it was in this case, and then he brought pre-induction review. Would you say 10(b)(3) in that situation would bar pre-induction review where the statute expressly called for a personal appearance but he was expressly denied it?

MR. GRISWOLD: Well, Mr. Justice, I haven't had any chance to think about this in advance but I think I would. I think I would say that it was barred by 10(b)(3) and you might say well, why isn't this also a case of inconsistent statutory provisions, and I think I would say well, the inconsistency here relates to procedures, to the processing, and 10(b)(3) has expressly precluded --

QUESTION: If it were not barred by 10(b)(3), then it probably wouldn't be barred in this case either if there was a constitutional requirement.

MR. GRISWOLD: I agree, Mr. Justice, and let me reiterate that we are not suggesting that Mr. Fine cannot present his issues before a proper court at a proper time, a completely impartial court at a proper time. We simply say that 10(b)(3) says that he can't present it now. It leaves him a difficult alternative, I agree, but that is the --

QUESTION: You mean a proper court at the proper time. I gather, Mr. Solicitor General, you are suggesting it be either habeas or in defense --

MR. GRISWOLD: Or in defense of a criminal prosecution. I agree that is a different place but it is a full day in court before an impartial judicial tribunal. These provisions in the statute which was enacted on September 28, there is nothing in the statute to indicate that Congress intended that they should be in any way retroactive. The effective date on the statute is September 28. The only provision which varies from that is that the extension of the draft from July 1, 1971 to July 1, 1973 is expressly provided to take effect from July 2, 1971. Apparently July 1 was included in the previous statute.

I have here conference report, which is Report No. 92-433, House Report No. 92-433. These amendments were made in the Senate. They were not included in the House bill. The Senate included a fifth provision which provided for counsel before draft boards. The conference committee, the report reads after extensive discussion the House conferees agreed to accept the Senate amendments with regard to Items 1, 2, 3 and 4, and Items 1 and 4 are the ones to which Mr. Standard referred.

QUESTION: I suppose these are readily available.

MR. GRISWOLD: I have not tried to find it in your

library. Mr. Reynolds found it for me with a considerable amount of difficulty, but found it.

The Senate conferees pointed out that under the language of this amendment these rights would be granted pursuant to such rules and regulations as the President may prescribe, and the regulations under which the rights were granted should be drafted in such a way as to preclude abuses and obvious delaying tactics. The Senate conferees pointed out further that the right to present witnesses is specifically subject under their amendment to reasonable limitations on the number of witnesses and the total time allotted. With the understanding therefore that the regulations implementing these provisions will be drafted in such a way as to protect the orderly and efficient functioning of the Selective Service System, and not result in an unreasonable burden on local draft boards, the House accepted the Senate position on Items 1 to 4 and then the report goes on to say that the Senate receded from its position with respect to counsel, and because of concern about two things that it would impose a serious procedural burden on civilian draft boards and that it might provide inequities in that some people's economic status would enable them to have counsel or more effective counsel than others would have.

QUESTION: In part the new law I gather is not very different from prior Regulation 32 of the code, Section

1626.12 that you cite on page 40, in the footnote on page 45. The personal appealing may attach to his appeal a statement.

MR. GRISWOLD: Well, the person appealing may attach to his appeal -- in this case it was the State Director of Selective Service who appealed. We agree that if he had attached a statement --

QUESTION: How could he appeal without making a statement?

MR. GRISWOLD: He simply sent a letter to the Board saying I appeal.

QUESTION: Without stating any reason?

MR. GRISWOLD: Without stating any position whatever. This is the way it is usually done. What that means is that the file is then transmitted to the Appeal Board and the Appeal Board treats the file as we lawyers would say as a trial de novo and considers the whole thing.

QUESTION: There was no argument?

MR. GRISWOLD: No argument, no appearance before either the --

QUESTION: No statement of what the position was?

MR. GRISWOLD: No statement of position.

QUESTION: That is almost beyond belief.

MR. GRISWOLD: Well, Mr. Justice, I am afraid I can't accept that as it must have been done in hundreds

thousands of cases over the past 25 years and on the whole has worked pretty well.

QUESTION: Not even an assertion that they want this reversed?

MR. GRISWOLD: I take it the effect of the appeal is to indicate that somebody thinks it ought to be looked into. I may say it doesn't necessarily mean they want it reversed. In this particular case, after Mr. Fein lost in the State Appeal Board, he lost unanimously and under the regulation he had no right to appeal to the Presidential Board. He wrote to the Director of Selective Service and the Director of Selective Service took an appeal for him. I have no reason to believe that the Director of Selective Service thought that it ought to be reversed. He apparently thought it ought to be reviewed, and it seems to me entirely appropriate for the administrative officer to say to the tribunal we think this is a matter which ought to be reviewed, and without putting any weight as to which way it ought to go. I think that that is just the position here. In any event, it is a part of the procedure, it is a part of the processing of the registrant's case and that is precisely what Section 10(b)(3) says should not be subject to judicial review. We submit that is in effect what this Court decided in Boyd against Clark and that this is wholly consistent with the Court's decisions in Oestereich and Breen.

CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Thank you, Mr. Standard.

Case is submitted.

(Whereupon, at 12 o'clock noon the arguments in the above-entitled matter were concluded and the Court adjourned for lunch.)

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