In the

Supreme Court of the United States

C. 2

DONALD E. JOHNSON, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL.,

Appellants,

v.

WILLIAM ROBERT ROBISON, ETC.,

Appellees.

No. 72-1297

LIBRARY
SUPREME COURT, U. S.

Washington, D. C.
December 11, 1973

Pages 1 thru 51

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

DONALD E. JOHNSON, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL., Appellants,	:	
v.	:	No. 72-1297
WILLIAM ROBERT ROBISON, ETC., Appellees.	:	

Washington, D. C.
Tuesday, December 11, 1973

The above-entitled matter came on for argument at 11:35 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Assocaite Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

GERALD P. NORTON, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; for the Appellants.

MICHAEL DAVID ROSENBERG, ESQ., Langdell Hall, Cambridge, Massachusetts; for the Appellees.

- - -

C O N T E N T S

* * *

Afternoon session begins at page 19.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in Donald E. Johnson, Administrator of Veterans' Affairs v. William Robert Robison, Etc.

Mr. Norton, you may proceed.

ORAL ARGUMENT OF GERALD P. NORTON, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. NORTON: The ultimate question on the merits, as I indicated before, is the same here and the same jurisdictional questions arise.

After being classified I-O, which means a conscientious objector opposed to any participation in war in any form, even in noncombatant duty, Robison took a job in May 1968 with a hospital in Boston where he resided and was going to school. Under procedures I will describe later, he asked the local board to assign him to that hospital for his alternative service required under the Selective Service laws, which he was entitled to, in lieu of induction, having claimed his exemption from service as a conscientious objector.

In August 1968, the local board ordered him to work at the hospital he had selected effective the preceding May and he would have at that time been classified I-W, which is a classification of people who were I-O and have been ordered to do alternative service. And I may use those terms for convenience.

Two years later, in May 1970, he finished his alternative service and quit his hospital job and, having continued at school at night, he graduated from college in 1970 as well.

In 1971, he applied -- he began law school and he applied to the VA for educational benefits under Chapter 34, Title 38, the 1966 Veterans Readjustment Benefits Act. The VA decided that he was ineligible because he did not come within the statutory definition of eligible veterans, to whom such benefits are made available, because he had not been on active duty as those terms are defined in Title 38.

In February 1972, a complaint was filed against the VA and the Administrator as a class action for all persons who had served alternative service and completed their service, and seeking a declaratory judgment that the statute was unconstitutional in extending benefits to veterans of military service but not to persons who had rendered alternative service.

They also sought a declaratory judgment that plaintiff and members of the class were entitled to receive these benefits. No injunction or other specific relief was sought.

The ultimate question here, as in Hernandez, on the merits is whether it is unconstitutional for Congress to extend certain fringe benefits to a specified category of federal employees, namely certain members of the uniformed services and not to extend them to anyone else who might share some of the circumstances or background in common with some of those

receiving benefits.

I think it might help to provide some background about the statutory scheme involved here. Congress has, of course, a number of specifically enumerated powers pertaining to the armed forces under the Constitution, and for at least as long as this country has required the services of armed forces in its employ, it has exercised these powers to provide benefits to veterans of various types, veterans of military service.

The first veterans pension law was passed in 1789, for example, for veterans of the Revolutionary war and the history of veterans benefits may be traced ever since.

At present, Congress has established a number of programs for veterans of military service. Some are contractual in nature, some are non-contractual, involving essentially gratuitous benefits. They have a variety of eligibility restrictions. Each one has to be taken separately. We deal here only with the program concerning educational benefits under chapter 34.

The educational benefits program reflects a number of policy decisions by Congress in 1966. One of course was the level of benefits, which is not as generous as the benefits provided to veterans of the Korean War or World War II. The benefits available to any one of these plaintiffs is under the law under most circumstances not likely to exceed $10,000. There is an adjustment for the number of dependents, and you

would need a great number of dependents to be entitled to $10,000 over the course of the program.

The program is not intended to subsidize education but merely provide partial assistance. It is available, however, without regard to the need for the benfits, and it is also available without regard to whether your education has in fact been disrupted or hindered.

One limitation in the statute is that you be a veteran as defined in Title 38, which means a person who has served active duty in land and military forces, in the Air Force, and who has not been dishonorably discharged. The 1966 Act further limits the category of eligible veteran for the purpose of chapter 34 of the educational benefits to a person who has more than 180 days of active duty. Again, a person who is discharged under conditions other than dishonorable were discharged with a service-connected disability.

Q Doesn't it also deal with some other people, Public Health people?

MR. NORTON: It does. The statute itself does not in terms extend benefits to the Public Health Service or the Coast and Geodetic Survey, but --

Q Another law then, by reference.

MR. NORTON: Under the 1957 version of Title 38, active duty was defined in a way as to include active duty by commissioned officers of those two organizations within the term

"active duty" for veterans' benefits purposes. So that unless Congress took affirmative action to exclude them, it would be covered. Now, this reflects an historic equation of service in these two organizations to military service. It goes back to World War I days. These organizations have historically been from time to time under the direct control of the military, they have reserve corps, they have military structures, they at times are subject to military duty, and for purposes of pay and allowances they are included with the military in Title 37 covering compensation of the uniformed services.

The statutory background is rather detailed, and we haven't developed it in our brief. And if the Court would like, we would be happy to submit a supplemental memorandum on that point. But there was no affirmative provision of the 1966 Act which dealt with those categories.

There were several other decisions made in 1966 by Congress, with the question of whether to extend these benefits only to people who had active duty in a military zone or hostilities. But the purpose was broader than reward in such service, so that the act is broader.

There was a question of whether to limit benefits to draftees or to men who were enlisted, and again the statute has various purposes which ended up being served by including both. As I understand the claims in these cases, if the statute had been narrower and had not extended benefits as far as it does,

we might not have a case here. But the position is that Congress should have, indeed was constitutionally obliged to go even further than it did.

Q Well, it was always intended to extend these benefits to draftees, wasn't it? The only question before Congress was whether, as you understood, what you say, whether or not they also include volunteers?

MR. NORTON: That's right. There is a -- one purpose of --

Q And the argument by your brothers on the other side would still be made if the benefits had been limited to draftees, as they say that there is nothing in the -- no purpose of Congress to provide an incentive for enlistment or volunteering can be served when you just give these benefits to draftees.

MR. NORTON: Well, that's true. If you look at one purpose and try to measure all of the benefits in terms of that one purpose, there might be a problem. But there are multiple purposes here and each recipient of the benefits need not be justified by each of the purposes. I think there has been a tendency to cross-cross the lines.

Essentially, the plaintiffs' case comes down to the contention that looking only at people who are drafted into military service and conscientious objectors who performed alternative service, there are absolutely no factual distinctions between the nature of the service rendered that would

permit Congress rationally to conclude that it was an appropriate action to extend benefits to veterans of military service and not to anyone else.

Now, we think it plain that Congress took a different view, that Congress realized that there were a number of unique and distinctive features of military service which could have supported this distinction, so that the distinction cannot be said to be illusory of utterly lacking in substance or any of the other terms that this Court has said must be supported in order to say that the classification is unconstitutional.

Let me turn now to some of the distinctions that Congress had in mind, either explicitly or in the nature of things, could reasonably have had in mind. For one thing, someone who was drafted into the military service has an obligation of six years, four of which after active duty are in the Reserves. The person who serves alternative service as a conscientious objector has a maximum obligation of two years.

Now, that Reserve obligation is not merely a theoretical possibility, it can involve the burdens of training and weekend or summertime duty or other duty, and Congress had in mind particularly in 1965 and '66, when this act was being considered, the fact that only a few years before it had been necessary to call up the Reserves in connection with the Berlin Crisis. So this was something that was explicitly discussed and a very significant distinction between the two kinds of

service, because, as Congress indicated, having this additional liability hanging over his head, a person in the military has a kind of disruption and continuing disruption of his plans and his educational plans.

Now, there is the additional fact that service in the military involves the possibility of being sent anywhere in the world to face a variety of dangerous and hostile conditions. And the District Court in Robison agreed that it was unquestionable that military service was hazardous and vigorous and demanding, than alternative service.

There has been some suggestion in the briefs that conscientious objectors at times do serve abroad, but the fact that it is the police of the Selective Service, it was the policy, not to order anyone to report to work overseas, persons who ended up doing alternative duty overseas were ones who had indicated a willingness to work for one of the more established organizations who did overseas service and knew that that was what they were going to do and what they were going into. And even then they would not be assigned overseas but would be assigned to work for a group based in this country who then might use their services overseas.

There is also a very substantial difference in the way in which these two groups select or influence the work they do. Now, I think the influence that a draftee has over where he works and what he does is notoriously limited, if there is

any at all. He does what he is told and goes where he is told.

However, under the regulations that were in existence in 1965 and '66 and continued until 1971, a person doing alternative service had considerable opportunity to influence those decisions. He could, as Robison did, submit to three types of employment that he was qualified and willing to do. If the local board found any one of them appropriate, they would then order him to do one of those things. If they did not find any one of those appropriate, then they would come up with three and submit them to the registrant. And if he didn't find any one of those satisfactory, then they would have a conference with the state director, and if they still couldn't work out something, and finally the local board did have the authority to order the registrant to do work but only with the approval of the national director. This is a far cry from the situation presented to a military draftee.

It meant understandably that a conscientious objector who was going to do alternative service had much greater opportunity to fit his service in consistent with other obligations he might have, such as pursuing his education, as Mr. Robison was able to do.

Of course, the pay -- I think it important to note one misapprehension of the District Court. The District Court quotes what is cited as a regulation of the Selective Service which permitted local boards to assign and abruptly reassign

persons who were doing alternative service anywhere, at any time, even in combat zones. Now, the Selective Service knows of no such regulation. It is not contained in the regulation that is cited in the District Court's opinion, and there is none such that was in effect during the period that Congress was considering this Act or since. We simply don't know where it came from. I think there is a reference to it in one of the briefs which is based on the District Court's use of it in the opinion but, again, there is no way we can track it down.

Q Mr. Norton, I take it that Judge Garrity rejected this position of the government's, that there is a rational distinction between those who were subject to being assigned a hazardous combat duty and those who were not, on the grounds that if Congress had intended to rely on that distinction, that it probably could have. But I gather he said that that wasn't what Congress had in mind. What is the government's position with respect to that?

MR. NORTON: Well, we are not saying it is only a distinction between those subject to hazardous combat duty. We are saying that even if you look at all military draftees, the nature of the disruption of their lives was quantiatively and qualitatively different from that of anyone else who is affected by the Selective Service laws, and that Congress could rationally conclude that given these various distinctions that it was appropriate to extend benefits to the military draftees.

Even if you were to accept the contention that alternative service veterans, if you will, had some disruption of their education and hence had some need of the same kind of benefits, I think it is permissible, certainly from this Court's decision in Jefferson v. Hackney, for Congress to distinguish between different categories of people who might share in some general way a characteristic and extend benefits in a differential fashion, as long as a distinction, the classification is not altogether illustory or utterly lacking in any rational meaning.

Q Do you say there is a question of what Congress might have reasonable considered, not what the legislative history shows they did in fact consider?

MR. NORTON: Well, we say that the test that has been announced in this Court's decisions is the firmer, that could it rationally have been conceived, is there a state of acts that might have been conceived to justify this distinction, but we say in addition that the real distinctions that were directly addressed by Congress which support this distinction.

Now, another one that Congress specifically mentioned was the fact that military veterans have been subjected to deprivations of liberty and loss of freedom inherent in military discipline and military life is subject to the universal Uniform Code of Military Justice, and this kind of existence for two or more years creates additional transition problems in

returning to civilian life.

There is also the -- related to that -- the fact that in the military someone may, after serving, be discharged on grounds other than honorable, indeed on dishonorable grounds, because of things done in the military; whereas, someone doing alternative service is not faced with that possibility, if they complete their two years, even though they may have done something which would have warranted a dishonorable discharge in the military, they have no such adverse consequence attaching to their service. And this has a direct bearing in this case because a veteran of military service served, otherwise within the definition of an eligible veteran, but for some reason was dishonorably discharged, would not be entitled to these benfits. And under the District Court's decision here, if someone who did alternative service committed the same offense, they would be entitled. So the result of the decision below is to place alternative service people in a somewhat more favored position than --

Q When you complete your alternative service, you don't get any kind of piece of paper or anything, do you?

MR. NORTON: You get a piece of paper saying you have satisfied your --

Q It is not like a discharge?

MR. NORTON: No. It can only be a complete or an incomplete. If you haven't completed it, they can order you to

continue until you do.

Q But I mean are you given something like a card or anything?

MR. NORTON: I think the Selective Service --

Q I am not saying it is important to this case, it is just a matter of --

MR. NORTON: -- the Selective Service I think sends you a piece of paper that certifies that you have completed your alternative service.

There is another point along this line, another misapprehension of the District Court, as argued and as stated by the court, that a person in alternative service could be subject to prosecution for failure to comply with a reasonable order of his employer. Now, this was not a part of the scheme, the regulatory scheme when Congress was considering the Veterans' Benefits Act. This is under a regulation that was not adopted until 1971, and it can have no bearing, of course, on the rationality of the judgment made by Congress in 1966.

Similarly, there are repeated references to guidelines issued by the Director of Selective Service to the effect that the disruption of an alternative service person's life should be comparable to that of someone in the military. Again, these were not part of the regulatory scheme when Congress was considering the 1966 act. They were intorduced at a later time. They were not of binding, legal effect and indeed one

court has held that they were questionable legal significance in any event.

Of course, another distinction is the pay. A draftee, during the period that Mr. Robison started work, was paid I think at the rate of about $100 a month. Mr. Robison says that he started work at $80 a week. There is no indication in the record as to any increases he may have had after that time, any fringe benefits or allowances or other compensation. So that a draftee is in an especially difficult position to try to save money or to finance education, even if he had the time to do it while he was in the service.

Q Is there any limit on how much a person may receive under your alternative service employment?

MR. NORTON: There were not in 1965-66, when Congress was considering this act. At a later time, another one of these guidelines of the Selective Service Director suggested that the pay should be comparable to that of someone in the military, but it is a very general statement and it is not clear to what effect, what extent if at all it was applied.

Q It is not statutory?

MR. NORTON: It is not statutory. The statute contains none of these limitations.

Q Of course, the draftee gets free room and board.

MR. NORTON: Well, that's true, but it is free room and board where the military wants him to live, which may be at

a military base in the far reaches of the world, a place where he is unable to shape his life so as to pursue his education.

Q Well, of course, you have made that argument already, that this is one of the things that a draftee is subject to. If you treat that as -- I don't really see how you can separately treat the fact that it is some kind of a detraction from the room and board that the same thing happens, I mean if you are talking strictly in terms of compensation.

MR. NORTON: Well, we don't know whether on this record whether any of these alternative service people end up getting room and board. And it can't be assumed that they were getting it, generally getting it or generally not. The Congress might have reasonably concluded that the draftee's situation was sufficiently distinctive to justify these benefits.

Of course, as this Court has indicated, the question is not whether Congress' assumptions in these regard were actually warranted by the facts, it was whether there was a reasonable determination for Congress to make.

Q Well, McGowan v. Maryland goes a great deal beyond that, so if on any conceivable basis it could be supported, that would be enough.

MR. NORTON: Well, that's right, and that is what I was averting to earlier.

Q That was decided in the last term, the most

recent term, I think.

MR. NORTON: I would like to reserve the balance of my time, if any, for rebuttal.

MR. CHIEF JUSTICE BURGER: There is only one minute remaining, counsel. I don't think we will ask you to talk for one minute. We will let you begin fresh at 1:00 o'clock.

[Whereupon, at 11:59 o'clock a.m., the Court was in recess, to reconvene at 1:00 o'clock p.m., the same day.]

AFTERNOON SESSION - 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Mr. Rosenberg, you may proceed whenever you are ready.

ORAL ARGUMENT OF MICHAEL DAVID ROSENBERG, ESQ.,

ON BEHALF OF THE APPELLEES

MR. ROSENBERG: Thank you, sir.

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

This is a class action on behalf of conscientious objectors whose religious beliefs prevent them from serving under military authority. In every other respect, these men are treated precisely like every other registrant drafted under the Selective Service Act. They are drafted in accordance with the normal order of call. They are drafted no matter where they are and under what circumstnces their civilian life places them except as to the normal kind of exemptions and deferments.

Q How many of them were wounded or killed in the line of duty during the period of 1965 to 1973?

MR. ROSENBERG: Your Honor, as far as we can tell, only one, but the statistics are not kept. The fact is that numerous of them have been injured. Your question is quite correct, they have not served in the military capacity in combatant duties.

Q So there is that difference.

MR. ROSENBERG: But they are treated in every other

respect.

Q Well, you said in all respects but one. I am suggesting that there may be at least two.

MR. ROSENBERG: Well, Your Honor, the -- it goes directly to the question of whether or not there is any potential for hazardous duty. For these men, there is just as much potential as any other member of the service. These men can be deployed at the will of the President, at the will of the Selective Service; that the President and the Selective Service have not deployed these men to Vietnamon the whole during that period really only reflects in my mind that their service was more -- was needed more, that they were doing better service here. There is no inherent limitation --

Q They couldn't be deployed to combat duty.

MR. ROSENBERG: They couldn't be deployed to combat duty --

Q Well, that makes quite a bit of difference. It just doesn't make a great deal of difference to say they can be sent to Vietnam or out of the country.

MR. ROSENBERG: Well --

Q The question is whether they can be put into combat duty.

MR. ROSENBERG: Well, that is true, Your Honor, but there are 1A-O's in the service, conscientious objectors --

Q All right, let's just start with the proposition

that they may not be sent into combat.

MR. ROSENBERG: They may not be sent into combat, do combat duty.

Q Let's just don't forget that.

MR. ROSENBERG: Your Honor, I haven't forgotten it. It is obviously critical to this case.

Q How about the Code of Military Justice, are they subject to the jurisdiction of --

MR. ROSENBERG: No, Your Honor, they are not. But as the Senate report clearly indicates, the fact that these men are under discipline doesn't at all disturb their ability to become students. As a matter of fact, it enhances their ability to become students. Your Honor --

Q Well, I don't see any difference tat the time they are engaged in discharging their two-year period of service. Are they during that period of service subject to courts martial and military discipline?

MR. ROSENBERG: No, Your Honor, they are subject to felony, federal felony criminal prosecutions for their violations. They are not subject to courts martial prosecution. But at the heart of this case is the question of whether any of these differences -- and I concede there are differences -- whether any of these differences are relevant to the purpose that the act seeks to achieve. This act has stated, unlike all the others I think ever before considered by this Court, the

explicit purposes for what has turned out to be one of the major educational programs in the history of this country. The explicit that Congress established this program for was to compensate for the lost time that a man entails when he does service for his country. The fact that he is under military discipline, the fact that he might be sent into combat duty does not raise or lower or in any way affect the disruption that Congress had in mind when it granted these benefits.

As a matter of fact, Your Honors, it would be maybe a cruel irony if the rigors of service were taken into account when -- and by this Court in assessing legislation, when Congress refused to even parse out in the scale of benefits more benefits for those men who actually went into combat, more benefits for the people who actually faced death on the front lines.

Q It could be because all of them were subject to it.

MR. ROSENBERG: Yes, Your Honor, there is that potential --

Q The only difference is, they were all subject to it.

MR. ROSENBERG: Yes, Your Honor, the potential --

Q They were all subject to be thrown into the front lines wherever the government -- and these men were not subject to that.

MR. ROSENBERG: No, Your Honor, there are two questions

there. It is true that they were all subject; to some the potential wasn't real, in fact never materialized, and Congress well knew that.

Q There are p ople right now that are crossing the street they have been crossing all their life but this time they got hit.

MR. ROSENBERG: Your Honor, it is absolutely true that the potential is there. That potential though --

Q Don't you think that is some difference to be reckoned with?

MR. ROSENBERG: I think it is a difference to be reckoned with, Your Honor, only if the purpose of the act took that kind of difference into account, but the --

Q And they didnt?

MR. ROSENBERG: No, Your Honor. Specifically in the legislative history, throughout the legislative history is the indication that these benefits are not bonus, they are not a reward for hazardous duty or the risks of hazardous duty. This is given to men for the normal disruption they entail based on their time in service.

Q And these men, your man was disrupted how? He went to school, didn't he? Didn't he go to school?

MR. ROSENBERG: That's right, he went to school part-time at night as --

Q Well, is there any way for a man in the military

to have gone to school?

MR. ROSENBERG: Unquestionably, Your Honor. As a matter of fact, thousands have, and many of those thousands have gone with government -- have been financed in their educational pursuits by the government during their time in service.

Q That is with the government's permission. He doesn't need the government's permission --

MR. ROSENBERG: No, Your Honor, it is not with the government's permission --

Q Well, I don't believe that that man in Vietnam is going to a Boston college.

MR. ROSENBERG: No, that's right, but the man stationed at a Boston base is going to a Boston college at night and has the same --

Q Do you have anything in the congressional history that said that there was any question that this applied to people who were not in the active military service?

MR. ROSENBERG: That this did not apply to anyone in the active military service, yes, Your Honor.

Q No, outside.

MR. ROSENBERG: Yes, the National Health Service is specifically included, and those men receive benefits --

Q I am talking about this, what you want.

MR. ROSENBERG: Oh, Your Honor, not --

Q That you say is so replete with everything.

MR. ROSENBERG: Not in this legislation. Not in this legislative history, but --

Q Well, is your man a veteran?

MR. ROSENBERG: Your Honor, he is a veteran of alternative service. He has done two years in the service of his Nation --

Q He is a veteran?

MR. ROSENBERG: In those terms. Your Honor, it is true that the legislative history --

Q In order to be a veteran, don't you have to have an honorable discharge?

MR. ROSENBERG: He has a release from his service. I understand what you are saying. He is not a veteran of military service. He is a veteran of alternative service. The legislative history does not speak about this man, or at least the legislative history directed towards this Act. But the prior legislative history that surrounds these kinds of benefits in fact even the predecessors to this Act does speak, and it speaks very poudly.

Q Is this an action from mandamus?

MR. ROSENBERG: Your Honor, it was an action under the mandamus statute and under section 1331 --

Q Well, does mandamus change or does it still need a clear legal right --

MR. ROSENBERG: Your Honor --

Q -- the word "clear" being underscored?

MR. ROSENBERG: That has not been settled and, of course, the statute --

Q You mean that hasn't been settled, as to mandamus?

MR. ROSENBERG: No, Your Honor, because the statute says in the nature of mandamus, it doesn't say mandamus.

Q So in nature of a clear right?

MR. ROSENBERG: Well, Your Honor, I think if the Constitution --

Q But do you admit you don't have a "clear" legal right?

MR. ROSENBERG: Your Honor, if there is an affirmance, I think we do have a clear right. I think the Constitution does give us a clear right to these benfits. We have been excluded both arbitrarily and I believe excluded discriminatorily, invidiously. The history that we have to look at is the history that surrounds the veterans' benefits programs when they emerged during World War II. Conscientious objectors who did alternative service were specifically excluded by Congress during that period of time. The question came before Congress. It wasn't as if Congress overlooked the problem. Congress faced it several important times, and yet Congress refused to give these men the pittance that they need to compensate for the disabilities that they suffer just as much as anybody in the military. They receive no disability benefits for physical

injuries. They receive no dependency allowances. And in World War II they weren't even compensated for any of the service that they performed. This is the history that gives birth to the present legislation, since the present legislation is modeled almost directly after the Korean War GI Bill and after the World War II GI Bill.

Q The federal government isn't inevitably their employer, is it, during this period of service? Sometimes I guess it is, but often it is for a state or municipal or county hospital or institution, and I suppose sometimes for a private one, isn't it?

MR. ROSENBERG: That's exactly correct, Your Honor. But the fact is that there are no guarantees that these men will even get the kind of workmen's compensation that might cover some of their disabilities. In fact, one of the petitioners in the Hernandez case working a hospital contracted hepatitis and, as it turns out, he had no compensation whatsoever to cover that disability.

Q Well, he might have had Blue Cross.

MR. ROSENBERG: Well, if he could afford it. The fact is, Your Honor, these men are paid on a ratio that gives them the standard of living that a GI has. But a GI --

Q Is that true as to your case?

MR. ROSENBERG: Yes, Your Honor, he received $80 a month --

Q When was this?

MR. ROSENBERG: -- I mean $80 a week.

Q When?

MR. ROSENBERG: I'm sorry?

Q When?

MR. ROSENBERG: In -- when was it -- 1969 or '70.

Q Was that the same -- was this guideline out then?

MR. ROSENBERG: Yes, Your Honor, it was. It was always outstanding.

Q Was it applied?

MR. ROSENBERG: Yes, Your Honor, it did apply.

Q And he got $80?

MR. ROSENBERG: Yes, Your Honor, $80 a week to cover obviously room and board and food to the extent that that person in the military is covered. But beyond that he received no coverage. In fact, as I say, in World War II these men did that service and they received no compensation whatsoever.

When the question was brought before Congress whether the money they earned, which was in a frozen account, should be turned over to their dependents who in many cases were in very bad straits, Congress refused. And the colloquy that we reprinted in our brief indicates that Congress refused because it was afraid of public reaction. It was afraid that the public would react that these men were getting away with something when they definitely were not. It was an irrational public

resentment that has spurred Congress on to the deprivations that they have forced these I-O conscientious objectors to bear.

Your Honor, these men are subject to a policy of disruption of their lives that is by Presidential mandate supposed to be equal to the disruption generally that men in the military suffer. The government has indicated that this policy was not written form in 1966. I fail to see the relevance of that. The fact is that that policy was stated throughout by the Selective Service Director since the inception of the I-O conscientious objector program.

Q How did it apply to this man?

MR. ROSENBERG: It applied to this man in the sense that --

Q And stick to the record on this, please.

MR. ROSENBERG: Well, Your Honor, this is a class action. It is a class action because in fact there are men that --

Q Well, I want what is in the record about one of the named plaintiffs to show to what extent his life was disrupted, that is in this record.

MR. ROSENBERG: Your Honor, his life was disrupted to the extent that he was forced to go to night school to complete one year of college on his own on whatever money he could scrape together. When he left the service, he did not have enough money to go to school. He had to work a whole hear to

put together enough money to undertake his first year of law school. He had no savings when he left the service. He was as disadvantaged as any member of the military in that respect.

Q Is that in the record?

MR. ROSENBERG: Yes, Your Honor. As a matter of fact, we stated --

Q Is that a statement that is not in the record, that he was as disadvantaged as anybody else in the service?

MR. ROSENBERG: Well, I concede that, Your Honor. I didn't say that well.

Q Thank you. So the only disruption was he had to go to night school?

MR. ROSENBERG: The only -- Your Honor, that was a substantial disruption. He was not --

Q Well, what other disruption was there in this record?

MR. ROSENBERG: As I say, when he left the service, he had no money. It is stated in the complaint and in an affidavit on his behalf.

Q Well, is that because of his disruption?

MR. ROSENBERG: Yes, Your Honor, that is because he was --

Q Well, how was he disrupted other than the fact that he worked in the day and went to school at night?

MR. ROSENBERG: He was disrupted because he received

an $80 a week compensation for his work and wasn't able to save a cent.

Q Well, how much was he making before that?

MR. ROSENBERG: I believe --

Q Was that in the record?

MR. ROSENBERG: I believe he was in school, but I am not sure.

Q So he was making nothing before that?

MR. ROSENBERG: I don't know what he was doing precisely before he entered the service.

Q So that is the only disruption?

MR. ROSENBERG: Your Honor, as we state in the complaint, this man, when he entered law school, faced the problem that he would not be able to continue his law school education because he had no savings. That is why he brought this suit. That is why he applied for veterans' benefits. He had no money. He was poor, and he was left poor by the service he did. Now, nobody is saying that he shouldn't have done his service. This man doesn't say that. All he is saying is that when a man who does military service is left in that condition and Congress gives him compensation for it, this man deserves the same compensation.

Congress hasn't said that this man is disrupted less than the other and we will give him less compensation. It has decided that he should receive no compensation. This is --

Q At the time he went under this program, Mr. Rosenberg, did he then have the option to go into noncombat military service?

MR. ROSENBERG: He had that option, Your Honor, and of course our claim here is that under Sherbert the differential that the government has established places a burden on a man, and we don't say that this man would have bowed under to that burden, but places a burden on that man to give up his religious scruples and serve in the military in a capacity that would gain him benefits. He didn't do that.

Q Do you say that it was irrational, that it is irrational to reach a conclusion that a man in this category suffers less hardship, less disruption than those who go into the regular military service?

MR. ROSENBERG: I would say, Your Honor, that in both services there are men who suffer great or lesser disruptions. On the whole, I would say that the men in alternative service suffer the same general scope of disruption as the general run of those who do military service and those who do I-AO alternative conscientious objector service in the military. The fact is that there are thousands of people in the military who go to school at night and part-time, draftees who go to school at night and during the part-time period that they are not in service or they are not serving, or employed. Those men receive benefits just as our men I think should, even though he did go

to school part-time.

This act doesn't parse out when benefits should be given. It is given during wartime and peacetime. It doesn't relate at all to where the man serves or under what conditions he serves. All it requires, the sole criteria for receiving these benefits is 180 days' service.

Q Mr. Rosenberg, were these benefits available to people in the service between roughly the time that the Korean War had ended and the time that the Vietnam War started?

MR. ROSENBERG: Absolutely, Your Honor, because the act applies retroactively. It took up three to four million people who served between 1955 and 1966 and gave them benefits, all of them were made eligible by the act in 1966.

Q But how about the Korean Bill of Rights. When did that expire by its terms?

MR. ROSENBERG: That expired on the very day that the retroactive effect attacks. In other words, there has always been a GI Bill by virtue of the 1966 act.

Q But I don't think that quite answers my question, because I take it from what you say that although looking back post-1966 we can say that everybody has been covered. I take it that if one looked at the period of the late fifties and early sixties the veterans then serving were not by any law in force while they were serving.

MR. ROSENBERG: That is exactly correct, Your Honor.

But it is a fact that in 1966 the act applied retroactively to everyone who served between 1955, that is the termination date of the Korean GI Bill, and 1966, no matter where they served or under what conditions, and the scope is three to four million people that were brought under the coverage. As a matter of fact, this is an enormous education program which to date has expended over $8.8 billion.

Q Mr. Rosenberg, may I ask you, do I correctly read Judge Garrity's opinion as finding ending in effect with an interpretation of the statute as at least covering your clients?

MR. ROSENBERG: No, it is not an interpretation of the statute, Your Honor. It is --

Q He followed Justice Harlan's technique in Welch, didn't he?

MR. ROSENBERG: Yes, Your Honor, and of course I think the format set down in the Frontiero case, where the Court affirms that in a situation like this, where a program can be nullified or extended, the extension will be granted if it would probably -- if it was likely that Congress would want to maintain the program even with this additional coverage. And I can't see, Your Honor, how Congress would refuse and deny millions of people benefits just because a few others would get benefits.

Q But I gather from what your argument was earlier, you think the statute on its face reflects a deliberate

congressional interest to exclude --

MR. ROSENBERG: Yes, Your Honor, I do believe that. I do believe that, based on the legislative history we found since the District Court opinion. I will say we did not present it to the District Court. It was very hard to come by. But from the material we have been able to gather, I do believe now that it was a congressional intention, a deliberate intention to exclude these men.

Q Well, now, the extension that Justice Harlan suggested in Welch rested on his feeling that the statute we then had before us contravene the establishment clause?

MR. ROSENBERG: Yes, Your Honor, I believe that is true.

Q And what do you suggest that Judge Garrity hinges his extension to?

MR. ROSENBERG: On the Firth Amendment, that it violates the equal protection component of the Fifth Amendment, that these men have been arbitrarily excluded. Now, I will say, Your Honor, before this Court we reassert our position that under Sherbert v. Verner and under the heightened scrutiny demanded by the equal protection guarantee, we are entitled to that scrutiny and we are entitled to a constitutional ruling at that level.

In other words, we believe --

Q A constitutional ruling to what effect?

MR. ROSENBERG: A ruling that without a compelling state interest, without any compelling interested in this exclusion, this exclusion both denies the free exercise of religion under the First Amendment and denies equal protection under the Fifth Amendment.

Q With what consequence with the statute as written?

MR. ROSENBERG: The consequence would be, Your Honor, that the clause that excludes would be extended to cover or read not to exclude these people who have done alternative service for 180 days.

Your Honor, I do want to assert that while the District Court's ruling did cover the First Amendment claim we are making here, and I believe we are properly making it again, the government has not responded to it, we assert that under Sherbert v. Verner, just like Sherbert v. Verner, valuable government benefits, compensatory benefits are being denied to one who asserts, because of religious belief, a view that he or she cannot undertake some conduct which brings them within the scope of eligibility. In other words, this is a conditioning of veterans' benefits on this man's relinquishing his religious beliefs.

Your Honor, if there is a compelling interest in excluding these men as harshly as Congress has done, I would like to hear it and the government has offered none, none whatsoever. And we come down to that position. Is the government able to

supply any compelling or real reason why these men are excluded? The government may say that it is an attempt to save money. Your Honor, I submit, where a program of this size, covering these many people, would it be plausible that Congress wanted to save the pittance that we save if a few thousand were excluded? I don't believe that is true.

And in addition, I also don't believe that the mere objective of saving money is a compelling interest. On the whole, Your Honor, there has been no interest, affirmative interest asserted by the government whatsoever. The only interest that the government asserts is that there are some fine line distinctions in many cases between the kind of service one man does and the kind of service that another does.

Those distinctions don't obtain in every case and they don't warrant an absolute exclusion from these valuable benefits. If Congress wanted to draw that fine line, it has the languae to do it. It could have said we want to give benefits to those who have done military service because they face the rigors, and we want to give less money to those who have not faced those rigors of military service but who nonetheless have been disrupted. Congress could have chosen that route because, as the government concedes, both classes of people have suffered educational disruption. Congress invoked an absolue exclusion.

Q Well, you say they could have given less money

to the conscientious objectors. It is hard for me to figure out how they could constitutionally do that if they could not give them no money.

MR. ROSENBERG: Your Honor, I was pauciting on the government's position that there was a difference. If there was such a difference, it was likely Congress would have reflected it in its legislation. I don't believe there is a difference. I am pauciting my statement on a government assertion that there is a difference in the nature of service. But we have here an absolute exclusion, one that reflects no differences, and one that shuts out one man in the harshest type of situation. And it shuts him out from needed compensation in the same way that he has always been shut out from all the other kinds of needed compensation provided veterans.

Your Honors, if we have to come down drawing parallels, I submit there is no distinction between the service that a I-O man performs and the service that a I-AO man performs, that is the conscientious objector in the military. Both men are subject to the authority of the government. Both men have been drafted. Both are likely to serve in areas where combat is on-going, although both are prohibited by their religious beliefs from engaging in combat.

As I said, the I-O conscientious objector may be deployed at any time, anywhere by the President. That control means that his potential in any given situation is as great as

any other man who serves in this government in the national interest and in the national defense.

Q Mr. Rosenberg, is the --

MR. ROSENBERG: Yes, Your Honor.

Q -- personnel in the alternate service in organized units of any kind?

MR. ROSENBERG: The I-O conscientious objector?

Q Yes.

MR. ROSENBERG: In some cases, Your Honor. In some cases they serve in camps and are in units, not in terms of military units.

Q Well, what about the appellee in this case?

MR. ROSENBERG: The appellee, no. No. He served in a hospital.

Q I know. To whom did he report?

MR. ROSENBERG: He reported first to the director of the hospital, I imagine, and then to the state director of Selective Service, and finally to the President.

Q How often did he report to the state director of the Selective Service?

MR. ROSENBERG: Your Honor, I am not aware. I am not aware. Obviously, if he had done his service properly, there probably would be no contact, unless of course the decision was made on the part of the President that these men were needed some place else, and then there would be a whole

rearrangement of their circumstances, and they would be shipped off to whatever assignment the President deemed necessary.

Q Does the record show how many times the President made any such decision during the period in question?

MR. ROSENBERG: No, Your Honor. The fact is that I-O conscientious objector service has changed radically since its inception. First these men served in camps, in federal government camps, and now they are not serving in federal government camps and serving in mixed responsibilities. But as the exigencies of any critis period, they could be deployed wherever the President needs them the most, and the only assumption I think the Court can reach is that these men have been deployed where the President has deemed their services the most necessary and the most valuable.

I want to reiterate one further point: This Act states purposes that are explicit. This Court has never before, I believe, had the opportunity to review an Act with explicit stated purposes. If new purposes are to be added, new substantive purposes are to be added, I believe it cannot be done in this context. Congress has stated its purposes and by virtue of that statement I believe has excluded alternative purposes, and I think we --

Q Well, take the example of the National Labor Relations Act, when it was first passed. As I recall the recital of the legislative purpose there was that interstate

commerce was being disrupted because of strikes and so forth. Now, do you think it would have been open simply to come in on that legislative history and say, well, in fact, there was no disruption of interstate commerce here and so this doesn't meet the purpose that Congress said when it was enacted so we can't apply the case, even though by its terms it might apply?

MR. ROSENBERG: Your Honor, as I understand the question, it seemed to me that if Congress' decision were based on no facts whatsoever and purely arbitrary, then I believe the Court could enter that area, otherwise I think not, that the Court is bound by the stated purposes and those purposes are binding on the Court to the fullest degree, as they are here.

Q It is certainly different than some of our cases have said about equal protection with any conceivable set of facts.

MR. ROSENBERG: There is no question, Your Honor, and I concede that, but none of those cases involved legislation that stated on the face of the legislation there are four direct purposes to this education program we have just created. And that is what this legislation does.

Q Well, can you be that sure that in the legislation we were reviewing in the other cases, there weren't stated purposes but that the Court just didn't think they were important?

MR. ROSENBERG: Your Honor, I have canvassed many. I can't say that I have canvassed them all. And from what I can tell, there has never been a case like this.

I see that my time is almost up. Are there any further questions, because I do believe that this point I would just simply reiterate that we do assert that Sherbert v. Verner governs this case and a compelling interest is required and none has been offered by the government, that under equal protection we are entitled to the strict scrutiny review because in this case First Amendment protected activitity, that is religious liberty, is affected by the regulations that we are challenging. And in addition I submit, Your Honors, based on the history that we have disclosed inour brief, that the I-O conscientious objector during wartime is a suspect class that has no access to political forums, that is at the mercy of public resentment as the history discloses, and they have been ill-treated consistently throughout their history and deserves the protections of the suspect classification.

Thank you, Your Honor.

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

Mr. Norton, do you have anything further?

REBUTTAL ARGUMENT OF GERALD P. NORTON, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. NORTON: Just a few comments.

With respect to the last remark about the public

attitude toward conscientious objectors and the suggestion that Congress had a purpose somehow penalizing people who were conscientiously opposed to participation in war, there is not a shred of evidence of any such intention underlying the classification embodied in the 1966 statute. That is conceded in the plaintiff's brief.

What they have done is gone back to various things in World War II, very different circumstances, very different public attitudes towards war, towards conscientious objection. The attitudes and views expressed then by Congressmen have no bearing on what happened in 1966. Indeed, I think the Court has acknowledged that Congress has demonstrated in increasing degree of accommodation to the views of conscientious objectors in the statutes that have been enacted as time has gone on. I think it is wholly unsupported a contention to make.

The comment concerning the statement of purposes in the Act underlies one of the deficiencies of the District Court's approach in this case, we believe, and he took a very strict and narrow reading of the purposes. Now, this Court has never said that the Court is confined to an explicit statement of purposes in considering the validity of the statute. Indeed, in the Marino case, the Food Stamp case last year, the Court first considered the explicit purposes that were stated and then went on to consider whether there were other possible purposes that might have justified the statute. It is a

perfectly proper and established approach.

Now, there is one continuing misapprehension that pervades the argument on the other side, and that is that there is in this statute an exclusion. The statute does not in turn exclude anyone. All it does is extend benefits to a defined category of persons who rendered military service. People who rendered alternative service are not the only people who are denied benefits. Everyone else who is not in that category is denied benefits. Someone who has conscientious objection to participation in war and who does not happen to fall within the statutory exemption and therefore goes to prison instead, as Mr. Gillette chose to do, his life is disrupted by the Selective Service laws, but he is plainly not entitled to benefits. So it is wrong to think of --

Q But the plaintiff, as I understand at least, is under-inclusive, and that was the basic claim wasn't it in Welsh?

MR. NORTON: Well, that is the claim but I think it is wrong to characterize the statute as carving out an exclusion of any definable --

Q Well, it is under-inclusive.

MR. NORTON: Under-inclusive.

Q Would you think that is an unfair way to characterize the argument?

MR. NORTON: Well, they say they should be covered as

well, that's true.

Q They say it is unconstitutionally under-inclusive.

MR. NORTON: That's correct.

Q That is considerably different.

MR. NORTON: Well --

Q Suppose it is under-inclusive in the sense that it doesn't include the Peace Corps veterans in the broad sense, but the question in this case is whether it is constitutionally under-inclusive, as Justice White suggested.

MR. NORTON: Well, that is true, and I have that in mind, and I think we come back in that case to the question that was raised, whether it would be sufficient if there be any distinction between these two categories and whether then it would be permissible to grant a different level of benefits to military veterans than to alternative service veterans.

Q Mr. Norton, could the man who served in military service for 179 days make the same argument? His life has been just as much disrupted, but he is excluded by the statute.

MR. NORTON: He would have the same -- he could argue that it is irrational to cut it off at 179 or 180 days. Any statute that extends benefits or imposes restraints that draws lines is bound to create people on the other side of that line. These are legislative decisions. These are policy judgments which we feel are within Congress' power to make. But the

claim being asserted is as persuasive and as meritorious as the plaintiffs argued, is no reason to think that if it were addressed to Congress, so that Congress were to focus specifically on it, it would be turned down. They are asking this Court to do something that Congress has not explicitly ever done itself.

Q Mr. Norton, assume for the moment that section 211 is no bar to judicial consideration of the questions of this case. Does the government have any other objection to the jurisdiction of the Court, the District Court?

MR. NORTON: Well --

Q I suppose sovereign immunity, you say?

MR. NORTON: Well, as I indicated in Hernandez, the lesson --

Q How about, do you question the jurisdictional amount, for example, in the --

MR. NORTON: Well, we have raised the question whether under the law he would ever be entitled to as much as $10,000.

Q Well, he raises the question. Do you object -- do you make a jurisdictional objection based on --

MR. NORTON: Yes, that was asserted below.

Q Do you assert it here?

MR. NORTON: Yes, it is contended in our brief and we say that --

Q And you say there is no other basis for jurisdiction other than 1331?

MR. NORTON: Well, they have relied on the mandamus statute, but they are seeking a declaratory judgment.

Q Do you say that is inappropriate?

MR. NORTON: We say yes, that is inappropriate, that that offers relief in the nature of mandamus, but this is not a case that is within the terms of that statute as previously construed.

Q I don't believe the complaint asked for a writ of mandamus, did it?

MR. NORTON: No, it asks only for declaratory relief.

Q By contrast to the previous case?

MR. NORTON: That's right. And of course the declaratory judgment statute, this Court has said, does not grant jurisdictions, but merely provides --

Q This $10,000 here -- suppose this man cannot get an education without this help, would the difference be what a man who is educated makes in his lifetime or not?

MR. NORTON: Well, that would be going I think beyond the bounds of prior decisions concerning jurisdictional amount. What they are seeking in this case is a claim to a certain amount of money. Now --

Q And it is less than $10,000?

MR. NORTON: And it is less than $10,000.

Q As I understand, they are claiming an education which they can't get without that money. I am just giving you what --

MR. NORTON: I understand, and they are trying to boost up the monetary value by relying upon consequential events that may or may not happen later down the road.

Q What are the dollar amounts?

MR. NORTON: They vary, depending upon the size of the family. Originally, in 1966, the basic allotment for an individual who was full-time student was $130.

Q For how long?

MR. NORTON: For up to 36 months of education. And that has since twice been increased, and the current base figure I believe is $220.

Q For how long?

MR. NORTON: Again 36 months. Now, if you have dependents, are married -- I don't know if it goes by numbers or spouse, but there is a scale that increases the benefits depending upon the number of dependents.

Q Is tuition over and above that? Or is that the total?

MR. NORTON: That is the total.

Q So it comes out to about $8,000?

MR. NORTON: Something on that order.

Q Not $10,000. But in your brief at least you

relegate this to a footnote.

MR. NORTON: Well, I think that is because our principal reliance is on 211.

Q And what do you have to say about the asserted jurisdiction under 1361?

MR. NORTON: Well, we say that that does not apply here either because they are not seeking relief --

Q Now, under the previous case, they were seeking mandamus?

MR. NORTON: They did there, but --

Q If in this case they simply added that in the prayer of their complaint, you would find no difficulties under 1361?

MR. NORTON: Well, the relief they are seeking is not relief in the nature of mandamus, we don't believe. As Mr. Justice Marshall indicated, that traditionally involved a ministerial duty involving a clear legal right, and that was certainly --

Q Of course, as you know, there is a good deal in the legal literature about a written in nature of a writ of mandamus, whether or not that means what mandamus we all learn in law school meant, just a ministerial act.

MR. NORTON: But on the face of the statute they have clearly no legal right. They have to go beyond the statute to make their claim.

Q Mr. Norton, as I understand the law, it is established by decisions of this Court that a declaratory judgment act does not confer an independent basis of jurisdiction on this court if it is not present by some other jurisdictional grant. Have there been any decisions one way or the other as to whether 1361, the mandamus section, confers an independent grant of jurisdiction?

MR. NORTON: I am not entirely sure. I think there may be some lower court decisions both ways, but I think has been construed by some courts as granting jurisdiction within its rather narrow limits, if it is a case appropriate for that kind of relief.

Q This is not within those limits, you say?

MR. NORTON: That is our position.

I would just conclude with one comment about the First Amendment argument. We did address the First Amendment issues in our brief in Hernandez. We did not explicitly address them in a reply brief or in our brief in Robison but they are covered there. And I would say briefly that, unlike the situation in Sherbert v. Verner, where the denial of unemployment compensation constituted a continuing pressure upon the claimant to forego her religious scruples and to work on Saturday, here there is no such continuing pressure. A decision was made by Mr. Robison back in 1968 to take advantage of an exemption from military service that Congress had made

available, and that is the source of his present situation, and there is no continuing pressure on him. He does not claim that the possibility of receiving benefits exerted any pressure on him; in fact, if it did exert pressure, it wasn't very effective pressure because he went ahead anyway.

Thank you.

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

Thank you, Mr. Rosenberg.

The case is submitted.

[Whereupon, at 1:43 o'clock p.m., the case was submitted.]

- - -