In the

Supreme Court of the United States

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HENRY HERNANDEZ, et al., Petitioners,	)	
v.	)	No. 72-700
VETERANS ADMINISTRATION, et al., Respondents.	)	

Washington, D. C.
December 11, 1973

Pages 1 thru 40

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

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HENRY HERNANDEZ et al.,

Petitioners,

v. No. 72-700

VETERANS ADMINISTRATION et al.,

Respondents.

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

The above-entitled matter came on for argument at 10:32 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JACK R. PETRANKER, ESQ., 44 Montgomery Street, San Francisco, California 94104, for the petitioners.

LAWRENCE L. CURTICE, ESQ., San Francisco Neighborhood Legal Assistance Foundation, 532 Natoma St., San Francisco, California 94103, for the petitioners.

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

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 72-700, Hernandez against Veterans Administration.

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

ORAL ARGUMENT OF LAWRENCE L. CURTICE ON BEHALF OF THE PETITIONERS

MR. CURTICE: Mr. Chief Justice, and may it please the Court, the issue involved in this case is a jurisdictional one, namely, whether 38 U.S.C. section 211(a) bars judicial review of a lawsuit challenging the constitutionality of an act of Congress concerning veterans' educational benefits.

In the companion case of Robison v. Johnson, the merits of the claim will be discussed. The issue here is only whether 38 U.S.C. 211(a) bars judicial review.

During my 15 minutes I will discuss the question of the proper statutory construction of 211(a) and the due process limitations which we feel are inherent in a contrary construction of 211(a). My colleague, Mr. Petranker, will discuss the question of whether Congress has the power to so limit judicial review and the question of the extent to which sovereign immunity is involved in this lawsuit.

The facts are simple and undisputed. Petitioners herein are conscientious objectors who have performed two years of alternative service as required under section 456 of 50 U.S.C. Thereafter they applied for veterans' educational

benefits with the Veterans Administration. Their claim for benefits was denied under the statute since they did not fall within the definition of those individuals who have served more than 180 days on active duty. Thereafter, petitioners filed a lawsuit in Federal District Court in California challenging the constitutionality of the Veterans Readjustment Benefits Act on the grounds that it was in violation of the First and Fifth Amendments of the Constitution.

QUESTION: What is the jurisdictional basis of the lawsuit?

MR. CURTICE: There were two main jurisdictional bases, the mandamus 38 U.S.C. section 1651 and the $10,000 requirement under 1331, 28 U.S.C. 1361 and 1331.

QUESTION: Those were both recited and relied on in the complaint, were they?

MR. CURTICE: Yes, in both cases.

QUESTION: The relief requested is what?

MR. CURTICE: The relief requested was declaratory relief, injunctive relief, and affirmative relief, namely, that they receive the benefits.

QUESTION: Was a mandamus requested?

MR. CURTICE: Yes.

QUESTION: Where does the complaint appear here in these papers, can you tell us?

MR. CURTICE: The complaint appears as appendix --

It's in the record, but I'm not exactly sure where it is.

QUESTION: You don't know where it is in the papers we have?

MR. CURTICE: No, I do not.

The District Court dismissed the lawsuit, and the Ninth Circuit affirmed on the grounds that 38 U.S.C. section 211(a) is a bar to our claim that petitioners are entitled to veterans educational benefits.

The first issue that I would like to address myself to is the proper statutory construction of 211(a). We submit that under a proper interpretation of 211(a) the more difficult constitutional question involved in a contrary construction of 211(a) need not be faced. We submit under the plain meaning of the statute that this case should not be barred by 211(a). The statute provides that the decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration shall be final and the courts shall have no power to review any such decision.

By the terms of the language of that statute, this lawsuit is not barred, for we are not seeking review of the decision of the Veterans Administration. The Veterans Administration has refused to consider petitioners' constitutional claims, and we contend rightfully so, that they don't have the power to consider our challenge to the constitutionality of the Act which they administer.

Furthermore, under the language of the statute, we are not seeking review of any question of the law administered by the Veterans Administration. We are instead contending that the statute itself is unconstitutional. So we are not seeking review on any question of law by the Veterans Administration.

The statutory history of section 211(a) and particularly the 1970 amendment support our conclusion. The Government suggests that 211(a) -- the 1970 amendment of 211(a) was meant to cut out judicial review even in this type of case where we are challenging the constitutionality of an Act of Congress. It's apparent from the legislative history that the purpose of the 1970 amendment was merely to overrule certain decisions of the Circuit Court in the District of Columbia concerning questions involving the termination of benefits. The D.C. Circuit had held that 211(a) was not a bar to cases involving determination of benefits in contrast to those cases involving the application for benefits, and we submit that the 1970 amendment was only meant to overrule this type of case.

There is nothing at all in the legislative history of the 1970 amendment or the earlier enactment of the predecessors of 211(a) that indicate that Congress wished to cut off judicial review in this type of case, namely, where we are seeking judicial review of the constitutionality of the statute.

QUESTION: What act is it you claim is unconstitutional?

MR. CURTICE: The Veterans Readjustment Benefits

Act.

QUESTION: Which says what?

MR. CURTICE: Which says that veterans who serve more than 180 days on active duty are entitled to veterans' educational benefits.

QUESTION: You say that's unconstitutional?

MR. CURTICE: Yes.

QUESTION: Why?

MR. CURTICE: I would like to defer that to the Robison case. We are going to strictly limit ourselves to the jurisdictional question.

QUESTION: Mr. Curtice, suppose that your client had sought a benefit from the Veterans Administration, was denied it by the Administrator, and then sought to challenge it in the District Court, not on the grounds of unconstitutionality, of the statute, but on the grounds that the Administrator had unconstitutionally discriminated against him as compared with other similarly situated applicants? Do you think 211 would permit that sort of review or not?

MR. CURTICE: Well, previous cases have held that it would not permit such review. We do not have that question before us at this time. Ours is a much narrower issue where therehas been absolutely no review by any court or no decision by the Administrator at all on the questions presented. Ours is a case in which the Administrator has refused to consider

the constitutional challenges to the statute. We are not seeking review of a factual, legal question which the Veterans Administration has already resolved.

This construction of the statute would also be in line with this Court's theory that judicial review of statutes should not be cut off unless it is within the plain meaning of the statute and the legislative history supports that interpretation. And we submit there is none such here. Also, this interpretation of the statute would save this Court the necessity of facing the constitutional issues involved in the case which we submit are grave.

Now, I would like to get into the due process limitations which are inherent in the contrary construction. If 211(a) were construed not to apply to a case like this, we submit that petitioners' due process rights have been violated, namely, they have been denied an opportunity for a meaningful hearing appropriate to the nature of their claim. They have had absolutely no hearing whatsoever on their constitutional claim, which is the one that is appropriate to the nature of their claim in this case. And we submit that the protections of the due process clause come within the meaning of Board of Regents v. Roth, because there has been a legitimate -- petitioners do have a legitimate claim of entitlement to benefits.

QUESTION: They have a reasonable expectation, is

that the point residing on the Roth case?

MR. CURTICE: No, not the reasonable expectation, because under the statute, it is clear that they didn't have a reasonable expectation. So we submit that the statute provides the basis for the claim, and the Constitution provides a legitimate claim of entitlement to the benefits. For example, if the statute had said that no blacks were to receive benefits under the statute, we submit that Roth would cover the situation even though it's quite clear that they have no reasonable expectation of receiving it. In other words, the Constitution provides a source of legitimate claim of entitlement to these benefits.

QUESTION: That's a substantive constitutional right you are talking about there, isn't it?

MR. CURTICE: Yes.

QUESTION: The right to be free from denial of equal protection. I think the Government argues herein, and to me with some persuasiveness, that Mr. Justice Stewart's opinions in Perry v. Sindermann are basically procedural due process types of situations where you don't have any substantive claim, but there you have to show some sort of property that's created by a statute that you are not attacking really.

MR. CURTICE: I think that the Roth decision should be extended to the extent that it covers claims for property interests which, but for the unconstitutional statute, they

would be entitled to receive those benefits. I would say that again if the statute had provided that all veterans are entitled to receive benefits except for black veterans, they would have a right, a due process right, a property right, that they should have a meaningful opportunity to present their claim of entitlement to these benefits.

QUESTION: Where in your submission is there a right to a hearing, in the Agency?

MR. CURTICE: No, in this type of case the only place where there would be such a right when you are challenging the constitutionality would be in the Federal court.

QUESTION: In other words, your argument would cover this situation: I could go into a Federal court and attack the constitutionality of the program for aid to mothers with dependent children saying that while I am not a mother and I don't have dependent children, I am a father whose children are independent, and nonetheless this statute is unconstitutional as to me, and there is some ground of independent jurisdiction based on this kind of a claim? That I'm entitled to a hearing on that claim?

MR. CURTICE: We still have standing to sue because we are seeking the benefits in question.

QUESTION: Well, I would be seeking the benefits that are given to mothers with dependent children on the proposition that the statute is unconstitutional because it doesn't give it

to me who is a father with independent children.

MR. CURTICE: Well, that would get into the question of a legitimate claim to entitlement.

QUESTION: I would have a good-faith claim. It might be quite wrong, but I would believe in it, my hypothesis.

MR. CURTICE: I would submit that that is distinguishable.

QUESTION: How? And why?

MR. CURTICE: In our case, we have a legitimate claim of entitlement. That is our contention.

QUESTION: That would be my contention, too, in my lawsuit.

MR. CURTICE: Well, I would say that it would come within that, but it's a case that would be --

QUESTION: The Constitution absolutely itself confers jurisdiction upon a district court and compels the district court to give me a hearing on that claim.

MR. CURTICE: No, not the Constitution.

QUESTION: Well, Roth is a constitutional decision, wasn't it, and you are relying on Roth.

MR. CURTICE: I am relying upon Roth, but --

QUESTION: Roth v. United States.

MR. CURTICE: I am relying upon the statute itself. I am relying upon the Veterans Readjustment Benefits Act.

QUESTION: Well, I would be relying on the legislation

that gives aid to mothers with dependent children.

MR. CURTICE: Then under the writ of mandamus statute, we are submitting that we are entitled to make a claim for benefits on the grounds that the statute is --

QUESTION: Of course, anybody is entitled to make a claim for anything, but the question is whether or not there is a duty of the Federal court to grant you a hearing on this claim as against legislation in the Congress that seems on the face, at least, to say that the decisions of the Veterans Administration are unreviewable in these cases.

MR. CURTICE: We submit in the case, for example, again where the statute which says that no black was to receive benefits, that that would come under the Roth rationale. In other words, you would be entitled to a hearing to challenge the statute, that it was unconstitutional.

QUESTION: Suppose, counsel, that a young man had been in the Peace Corps and he made the same claim for educational benefits that your client is making here. The Veterans Administration presumably would deny that claim administratively, wouldn't they?

MR. CURTICE: Yes.

QUESTION: Because he is not a veteran.

MR. CURTICE: Yes.

QUESTION: Now, isn't the Veterans Administration administratively saying they have denied this claim for

substantially the same reason, that he is not a veteran?

MR. CURTICE: They have said that, but we submit --

QUESTION: But in that sense, procedurally -- lay aside the substantive claim -- procedurally he is in the same posture as a Peace Corps, former Peace Corps man who wanted veterans' benefits, isn't he?

MR. CURTICE: Yes.

I will yield to Mr. Petranker.

QUESTION: One question, here in your record I find a complaint from some Peter Miller and Gary Leon.

MR. CURTICE: Yes.

QUESTION: What's that doing in this record?

MR. CURTICE: There are two cases; they were consolidated. I brought one action and Mr. Petranker brought another, and they were consolidated for purposes of appeal to the Ninth Circuit.

QUESTION: Mr. Curtice, isn't your argument basically kind of independent of your Roth contention that --

MR. CURTICE: Yes.

QUESTION: -- 1331 confers Federal credit question jurisdiction when you allege $10,000 in controversy. You allege substantive constitutional claim, and that the statute in question deprived your clients of the equal protection component of their Fifth Amendment due process.

MR. CURTICE: That's correct.

QUESTION: And, therefore, the Federal court has ju-

risdiction under 1331 to at least hear your claim. Quite apart from any Roth.

MR. CURTICE: That's right. We're saying also that the statute as construed does not apply to a case like this, 211(a), on its face does not apply.

QUESTION: That would be the same claim, again, going back to the Peace Corps case.

MR. CURTICE: Yes, it would.

QUESTION: The former Peace Corps man said this is denial of equal protection or otherwise raises a constitutional question. You say he has a right to have a Federal court decide that constitutional question.

MR. CURTICE: Yes.

QUESTION: And, as I understand it, you say the statute if properly construed doesn't apply to this kind of a case.

MR. CURTICE: That's right.

QUESTION: But that if you did construe the statute this way, it would deny you some sort of a constitutional right to a hearing.

MR. CURTICE: Right. And Mr. Petranker will go into other constitutional problems.

MR. CHIEF JUSTICE BURGER: Mr. Petranker, we have detained your colleague a little longer, and we will enlarge your time about 3 minutes to compensate for that.

ORAL ARGUMENT OF JACK R. PETRANKER, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. PETRANKER: Thank you, your Honor.

Mr. Chief Justice, and may it please the Court, at the outset, I would like to turn to a question which Mr. Justice Stewart raised. I think that Mr. Curtice correctly answered that question, but I sense that there may be some confusion left in the minds of the Court. Mr. Justice Stewart raised the question whether an individual could come into court and claim a right to a hearing on his claim that he was entitled to benefits under the Aid to Dependent Children's Act even thought he was not a mother and did not have dependent children.

I think the distinction between that case and this one is that there would be an independent basis there for denying jurisdiction, and that is simply that his claim would be frivolous. Whether or not it was brought in good faith, I think once the terms of the statute were taken into account and the purposes of the statute, that there simply would be no valid constitutional claim.

In this case our position is that once the statute is properly considered in the light of its purposes, there is a substantial constitutional claim that conscientious objectors who perform alternative service, like persons who are in the armed forces, are entitled to those benefits.

QUESTION: You say that any time you allege a constitutional claim, the Federal court must hear it unless it is determined that that's insubstantial. The court might decide that its insubstantial, a frivolous claim, not this particular

one, but a claim, and then not hear it. But otherwise, if the constitutional issue is raised, you say it must be heard.

MR. PETRANKER: That's correct, your Honor. We think that's fundamental.

QUESTION: And it was your complaint also, grounded on 28 United States Code, section 1331.

MR. PETRANKER: Yes, 1331; also section 1361, and in addition in my complaint, we raised as an additional jurisdictiona ground 5 U.S.C. section 701 and the following sections, the Administrative Procedure Act, which specifies that a person aggrieved by Agency action has the right to go into Federal court to seek relief.

QUESTION: But doesn't that Procedure Act exclude the case where review is precluded by statute?

MR. PETRANKER: That's correct. Our contention is that since section 211(a) doesn't apply here, the Administrative Procedure Act does.

QUESTION: On what basis did you, under 1331, allege an amount in controversy of more than $10,000, excluding interests and costs?

MR. PETRANKER: Essentially, the value of an education to the individual plaintiffs involved, the benefits that they are seeking would enable them to obtain a college education or higher education, and without those benefits they might well not be able to commence or complete a college education, and over

the course of their lifetime that certainly would result in an economic deprivation to them in excess of $10,000. That is the basis of our allegation.

QUESTION: You were in the Hernandez case?

MR. PETRANKER: Yes, that's right.

QUESTION: Representing Mr. Hernandez and purportedly all those similarly situated?

MR. PETRANKER: Mr. Hernandez and Thomas Wolf were the two named plaintiffs, andin addition it was a class action, yes.

Mr. Curtice has already addressed himself to the due process issue involved in this case. In addition, I would simply like to point out as the Court already has, I believe, what the other constitutional problems are in the Government's position that even though petitioners have raised purely a constitutional claim, a substantive constitutional claim, that nonetheless they can be denied relief or review of the constitutionality of an Act of Congress in the Federal courts, or for that matter in any court. Essentially, that proposition, of course, runs afoul of the rule recognized in countless decisions of this Court as fundamental to this form of government. And that is that the courts must always be open to hear claims that the Constitution has been violated by Congress.

QUESTION: Do you think that's true if the claim were less than $10,000?

MR. PETRANKER: If there were no other forum, judicial forum in which that claim could be heard, then I think essentially the same problem would be raised here, yes.

QUESTION: But you wouldn't say it would have to be raisable in the Federal court.

MR. PETRANKER: No, your Honor. Under the terms of section --

QUESTION: That's what we have got here, is a Federal court.

MR. PETRANKER: Under the terms of section 211(a), Congress apparently sought to cut off review in every court, your Honor. The statute provides that the decision of the Administrator shall be final, and that would appear to cover State courts as well.

QUESTION: I know, but it reads, "or in a court of the United States."

MR. PETRANKER: Well, that term is ambiguous. Our position is that there is really no basis for Congress to decide that the Federal courts cannot review decisions by the Veterans Administration but the State courts can. That would run contrary to the normal presumption that review of Federal agencies should be in the Federal courts.

QUESTION: I suppose if the Administrator was sued in a State court, he could remove to Federal court, couldn't he under the removal statute?

MR. PETRANKER: There might be a problem there, your Honor, in that the removal statute would seem to conflict with what the Government says section 211(a) is, since they contend --

QUESTION: No, it wouldn't be removable if the Federal court didn't have jurisdiction in the first place.

MR. PETRANKER: That's correct, your Honor. So that there might be a problem there, and that's another reason that it wouldn't seem to make sense to construe section 211(a) to allow suit in the State courts. There would be still a further problem in that the ultimate review of State court decisions, the Supreme Court, this Court, would seem to be barred from consideration of claims coming from the State courts by that interpretation.

QUESTION: I take it your position is that if 211 said that the United States courts shall not have jurisdiction in any action challenging the constitutionality of any provision of this statute, that you would be arguing that statute is unconstitutional, the provision is unconstitutional in itself, barring those sort of suits from Federal courts.

MR. PETRANKER: If the State courts were left open, I don't think there would be a constitutional problem.

QUESTION: Well, then, let's assume that this present section is construable that way.

MR. PETRANKER: I misspoke myself to some extent. I think there would be a constitutional issue raised. I don't

think it would be as difficult as the issue posed here. And I think it would certainly go much further toward protecting the rights of petitioners here, since they would at least receive --

QUESTION: One of the issues in the case is how do you construe this section.

MR. PETRANKER: Yes.

QUESTION: What did Congress intend to preclude litigation about in the Federal court. Now, let's assume for the moment that we decided that Congress intended to preclude constitutional challenges to the statute. Then your case is much different, would you say?

MR. PETRANKER: On the assumption that exclusion was intended to apply in Federal courts but not in State courts?

QUESTION: Well, we discussed -- it's hard to say about the State courts. But at least let's assume we are clear about Congress' intention with respect to the Federal courts. Because after all, that is what it does say, the courts of the United States.

MR. PETRANKER: The term "courts of the United States has been construed in other statutes to include courts of the States, so that in itself I don't think is a sufficient indicator. But if that construction were possible, I think we would take the position that unless it at the same time appeared that there was a definite right to go into State court, that the constitutional requirements of a hearing on questions of

constitutionality would not have been satisfied. There would also be an additional problem under Article III, which we have addressed ourselves to in the briefs as to whether those questions could be entrusted completely to the State courts without the possibility of review in this Court. But as I say that is a much more narrow question, and it's one that would not pose as serious constitutional problems as are involved here.

Now, the Government has relied on two basic arguments for their view that the courts can indeed be deprived of jurisdiction to hear constitutional claims. First, they point to the fact that Congress can, of course, control the jurisdiction of the Federal courts, and I suppose at least within limits the State courts as well. But they failed to point to any case which has held that Congress can remove the jurisdiction of the courts to consider constitutional claims where the result would be that no court could consider a constitutional claim. And that's what's involved here, and that is the rule that we believe the decisions of this Court, and in fact the entire theory of this Government requires, that some court must be able to hear constitutional claims.

In addition, the Government relies on an application of the sovereign immunity doctrine. They contend that since in the normal case Congress must give its consent before the United States can be sued, that then in this case since Congress appears

to, under the Government's construction, have withdrawn its consent to be sued, that sovereign immunity doctrine does bar consideration of petitioners' claims. But, of course, again there is a clear exception in the sovereign immunity doctrine when it is alleged that an officer of the United States is acting pursuant to an unconstitutional statute, and that is the situation that we have here. So that again the position that the Government has taken is unsupported by the decisions of this Court and by --

QUESTION: Do you think there is any difference between asking for a declaratory judgment and an order to an officer to pay out funds of the United States?

MR. PETRANKER: Well, in asking for a declaratory judgment, the Court does not impose an affirmative duty on Congress or on an officer of the United States. It does give Congress the option in this particular act; for example,if the Court declared that the Veterans Readjustment Benefits Act was unconstitutional, Congress would have the option of enacting a new law, terminating the law, or proceeding to include conscientious objectors within the terms of the Act, so that there is not as direct an interference.

QUESTION: So again I ask you do you think in terms of sovereign immunity that there is a difference between asking for an order for benefits as distinguished from just a declaration that the statute is unconstitutional?

MR. PETRANKER: I think there is that difference to which I just tried to address myself.

QUESTION: All right. You think if you do ask for an order, actually for an order to pay money, that you are barred by sovereign immunity?

MR. PETRANKER: If that were the only kind of relief that could satisfy the claims of the petitioners.

QUESTION: Could I just ask you in terms of the complaint in this case. It says, enter injunctions, require them to cease refusing to grant plaintiffs' benefits.

MR. PETRANKER: I believe the second paragraph of the prayer for relief does also request declaratory relief.

QUESTION: Yes, but let's --

MR. PETRANKER: Focusing on the first, there was a suggestion in Larson v. Domestic & Foreign Finance Corp. that even in a case involving an allegation of unconstitutionality where affirmative relief would be required in order to effectuate an order of the court, that sovereign immunity might operate as a bar. I think the correct interpretation of that suggestion is that in a case where affirmative relief would cause a substantial interference with the function of the Government, in other words, a variant of the compelling interest test, if you will, if the Government could come in and show a compelling interest which would lead to the conclusion that it should not be required to make affirmative relief, then it might be

that despite the allegation of unconstitutionality, the court would not have jurisdiction, because of the sovereign immunity doctrine. But in a case where affirmative relief could be granted without any substantial interference, and that is a question, I submit, for the Court, then the court would not be barred by the sovereign immunity doctrine.

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

Mr. Norton.

ORAL ARGUMENT OF GERALD P. NORTON ON

BEHALF OF THE RESPONDENTS

MR. NORTON: Mr. Chief Justice, and may it please the Court, I lost my voice to a cold over the weekend, and if I don't come across loudly enough at times, let me know; I will try to speak up.

There are two consolidated cases before the Court, Hernandez presenting the same issues on the merits and on jurisdiction as will be considered also in the Robison case next on the calendar. We don't have an extensive factual record below because the case went off in a motion to dismiss, and the allegations of the complaint do not provide substantial background about the plaintiffs here. We do know that they did, as alleged, serve two years of alternative service and were denied benefits when they applied to the VA for educational benefits provided by the 1966 Veterans Readjustment Benefits Act.

I think I will start,turning directly to the question of whether section 211 applies here. By its terms it says that the decision of the Administrator, the VA, under any of the laws administered by the VA with certain exceptions for contractual benefits not involved here, shall be final and conclusive and no other official or any court of the United States shall have jurisdiction or power to review such a decision.

Now, we think this statute clearly covers this case by its terms. The plaintiffs are seeking here to review a decision of the Administrator, namely, that they are not entitled to benefits. Their effort to get out of the terms of the statute clearly involves an assertion that there are reasons why the Administrator should have come to a contrary decision. They say he should have decided that they were entitled to benefits for reasons that he did not consider, namely, the constitutionality of the statute. But you cannot avoid the fact that these cases seek to review a decision of the Administrator to the effect that they were not entitled to benefits, and therefore these cases are squarely within the terms of 211.

To appreciate the scope of preclusion of review that Congress intended, I think it is important to trace the background of this statute. A forerunner of 211 was enacted in 1921 which provided that the Director of the Veterans Bureau,

then administering the veterans' benefit laws, adopted after World War I, shall decide all questions arising under the Act. Now, in the Silberschein case and a series of decisions in the 1920's, this Court decided that while any questions of fact were not subject to judicial review under that statute, that a question of law or question of whether the Administrator's decision was arbitrary or whether there was any evidence whatever to support the decision might not be subject to the preclusion.

Then in 1933 Congress enacted the Economy Act as part of the effort to reduce Government expenditures and made various changes in the veterans' benefits programs, and in that statute there was another preclusion provision which provided that all decisions of the Administrator under provisions of law for noncontractual benefits shall be conclusive on all questions of law and fact and no official or court of the United States shall have jurisdiction to review those decisions by mandamus or otherwise.

In Lynch v. United States in a unanimous opinion by Mr. Justice Brandeis, this Court observed that the 1933 provision was obviously intended by Congress to eliminate even the scope of review that the Court had previously said was available under the 1921 Act, and there was no intimation that the constitutional problem was presented by that action. Indeed, in Lynch the Court discussed at some length the enormous power that Congress has to grant or withdraw benefits, gratuitous and noncontractual

benefits, and the enormous power that Congress has to grant or withdraw a forum in which to press for relief under a statute granting such benefits.

In 1957,the 1933 provision and a similar provision adopted in 1940 were combined into the immediate predecessor of 211. That statute included the language to the effect that the Administrator's decision on any question of law or facts concerning a claim for benefits under these noncontractual provisions was conclusive and not subject to judicial review. A series of decisions in the District of Columbia Circuit construes 211 as not precluding review of a decision concerning termination or reduction of benefits, distinguishing between claim and termination.

Now, this led Congress in 1970 to amend the statute retroactive to 1940 to make it perfectly clear that Congress intended that all decisions of the Administrator under the provisions of the statutes providing for noncontractual benefits were not subject to judicial review.

QUESTION: What about -- go ahead.

QUESTION: Is there anything in the legislative history that gave to the Veterans Administration the right to determine the constitutional question?

MR. NORTON: There is not. There is some indication --

QUESTION: Well, isn't that this case?

MR. NORTON: I would not say that is this case because we do not contend that the VA has decided the constitutional question.

QUESTION: But suppose the VA decides that nobody who didn't go overseas shouldn't collect? How would you touch that?

MR. NORTON: I'm sorry, I couldn't hear you.

QUESTION: The VA says you can't get veterans' benefits because you didn't go overseas, you stayed in Camp Lee. What could be done with that?

MR. NORTON: Under a statute that makes that distinction or --

QUESTION: No, no, under this present statute. How do you get to that?

MR. NORTON: The cases construing the present statute, and Roth v. United States in the Ninth Circuit is an example, say that 211 precludes review of any decision, even where it is claimed that the Administrator committed an error of law or of constitutional dimension in applying the statute.

QUESTION: Roth said constitutional dimension?

MR. NORTON: It was claimed in the Roth case that the decision of the Administrator was based on either a lack of evidence or the way in which the claim was treated resulted in a denial of due process to the claimant.

QUESTION: Because of the treatment of the evidence,

the factual evidence.

MR. NORTON: Well, that was the nature of the case.

QUESTION: That's not a constitutional question.

MR. NORTON: That was the allegation. And the Court said even with that allegation of a denial of a --

QUESTION: So in this case if the Administrator just deliberately violates the Constitution of the United States, he is the only man in Government who goes scot free.

MR. NORTON: There is nothing in the terms of 211 that makes any exception for that situation, and the observation of the Court in the Lynch case where they said that the similar statute eliminated review of an arbitrary decision by the Administrator would lead in that direction.

QUESTION: It didn't say unconstitutional; it said arbitrary.

MR. NORTON: I think you can in large measure equate the two because the way the question of due process has developed to be often interchangeable with arbitrary action.

There is another indication of the Congress' intent in the 1933 Economy Act in that under a separate provision of that statute involving not contractual benefits, but reduction of pay to certain people, Congress had another provision precluding judicial review, except in cases where a constitutional issue was presented. So Congress knew how to make the distinction when it wanted to and/none of the statutes leading up to 211 has in

it done so.

QUESTION: Mr. Norton, what if the petitioners here instead of having presented a claim to the Administrator had simply gone into the District Court under 1331 and 1361 and challenged the constitutionality of the statute? Could the Government have asserted the provision of 211(a) as a defense to that action?

MR.NORTON: Well, 211(a) would not seem to apply on its face because it would not -- if the Administrator had taken no action whatever on this issue, it would not seem that there would be a decision of the Administrator to review. Of the other questions raised in such a suit, as to whether it was premature, whether there had been exhaustion of administrative remedy, and, of course, sovereign immunity or another basis for jurisdiction would be additional issues that would have to be confronted. That, of course, is not this case.

The desire of Congress to preclude judicial review in this area seems amply justified by the potentially enormous burden that review of VA decisions would place on the courts. VA takes about 15 million adjudicative actions annually, and the Board of Veterans Appeals alone disposes of some 30,000 cases. The vast majority of these involve claims under the various noncontractual benefits programs that are the subject of section 211(a).

Now, the plaintiffs claim that if the suit is barred,

that they are denied their due process rights. But the critical provision of the Fifth Amendment that they never really face up to is that the Fifth Amendment only protects against denial of life, liberty, or property without due process of law. And as this Court's decision in the Roth case indicates, every person who seeks some benefit or is disappointed by the action taken by Government concerning him does not have the basis for a claim under the Fifth Amendment. It must be a property interest of some sort created either by statute, contract, practice or common law. The plaintiffs concede that under the statute on its face they have no property interest in these benefits. They try to construe, or to contend that the statute has to be read as unconstitutional if it does not extend benefits to them, and therefore by combining the Constitution and the statute, they have a property interest. But the Court indicated in Roth that the Constitution does not create property interest and that approach does not have any merit, we believe.

In addition, there is the problem that if the claim made is that a statute unconstitutionally distinguishes between groups by giving something to one and taking away or not giving to someone else, all the plaintiffs can really claim is that that distinction is invalid. It doesn't necessarily follow that they are entitled to get what someone else got. It may be that the answer is the benefits should not have been extended to either group, it was to everyone or to none. But the

Constitution itself, even in conjunction with the statute, does not give them a right to benefits.

The plaintiffs have contended that they have a right to a court hearing because Article III of the Constitution they say basically requires that the Federal court be available to hear any and all constitutional questions that may be raised. Now, just last term in the Palmore case this Court rejected the proposition that Congress was obliged under Article III to vest in the Federal courts all of the judicial power authorized by Article III, and it is still the law and has been throughout our history that to have jurisdiction in a court there has to be a statute extending that jurisdiction. And Congress has the power to grant jurisdiction and it has the power to limit jurisdiction, and as the Court said in Lynch, their power knows virtually no limits.

On the question whether 211 applies to State court proceeding, that has not previously been raised in this case. This case arose in a Federal court. The question of State court jurisdiction over a case like this is one that I think would require additional consideration. It is certainly not the position of the Veterans Administration that all these cases should be litigated in the State courts. And if a case were filed in the State court, there would be a question of sovereign immunity just as there is a question of sovereign immunity in the Federal court.

To determine whether there would be State court jurisdiction, you would have to know the nature of the proceeding, the nature of the State law and the relief sought and other matters that I do not think can be decided in the abstract.

But on the question of sovereign immunity, this is a suit against the Veterans Administration by name, its Administrator, and the regional Administrator concerning the actions of these officials in the course of their duties. The relief sought would require the affirmative action of these officials and turning over to the plaintiffs funds, property, money that is unquestionably belonging to the United States. We feel that this makes the case squarely one against the United States in substance even if in form against its officials.

QUESTION: What if there was no request for an injunction of any kind.

MR. NORTON: Well, in the Larson case -- I assume you mean just a declaratory judgment request?

QUESTION: Yes, against only the officials.

MR. NORTON: In the Larson case, the Court indicated that even if only declaratory relief had been sought, there would still be a sovereign immunity problem. Indeed, it is suggested that there might be a greater one because it could be a binding declaration of rights. It has always been said in the sovereign immunity cases that the action can proceed against

the officer, but it is not binding against the Government.

QUESTION: This would be an interesting decision in the light of some of the welfare cases, wouldn't it?

MR. NORTON: Well, I would not come here to try to square those cases with all of the sovereign immunity doctrine which the Court has recognized as not an area of perfect logical symmetry. But in the cases where courts have entertained suits against officials, who are officials of the United States, they have tended to involve property -- land or coal or something tangible. There was a claim that the property really belonged to the plaintiff and that this officer was retaining it against the rights of the plaintiff. And the question of possession could be determined as between the two with the question of ultimate title, vis-a-vis the United States, left to another forum.

QUESTION: Well, then, if we go with you on sovereign immunity, we don't need to bother with 211 then, do we? That was just wasted. If sovereign immunity is a good defense, you don't need 211, so Congress wasted its time.

MR. NORTON: I wouldn't say that Congress has wasted its time, because there may be suits that would be subject to 211 that would not necessarily be subject to the sovereign immunity doctrine. But in this case, given the nature of the relief sought and the nature of the parties, we say that it is barred both by sovereign immunity and 211.

The Court could, if it so chose, resolve this case on the basis of whether the statute is constitutional without necessarily reaching the merits. This was the approach taken in Brooks v. Doer where a difficult question was raised concerning the jurisdiction of a State court to grant relief against a Federal official in the performance of his duties. The court said that where the plaintiff's claim was lacking in substance, it wasn't essential to reach that difficult jurisdictional issue, because they could affirm on the merits. That is the position we would take here, that the Court can affirm in this case on either ground. Of course, if the Court is going to reject our position in the Robison case on the merits, it is essential that it resolve both jurisdiction and the question on the merits.

QUESTION: The ultimate question in this Ninth Circuit case, if we come to the merits at all, is not the constitutionality of the Act, but whether the question of constitutionality is sufficiently substantial to warrant the convening of a three-judge court, isn't it?

MR. NORTON: Yes, that is exactly my next point that the alternative would be the second point decided by the District Court in Hernandez, which was that after holding that 211 barred jurisdiction, the court also denied the request for a three-judge court, holding that no substantial constitutional question had been raised.

Now, if that was a correct determination, then the Court can affirm the action of the District Court on the jurisdictional rule, because it was properly made by a single judge, as we contend. Now, the District Court's determination that there was no substantial question, constitutional question, was made in view of what the court thought were the manifest differences between alternative service and military service and the reasonableness of providing fringe benefits to veterans of military service in the absence of any cognizable burden on the free exercise of religion and also the lack of an establishment of religion in the statutory scheme. The substance of that ruling really requires the consideration of the merits which is presented in the Robison case and has not been touched in the arguments here. So I think it would be appropriate to defer that further discussion until that case. If I were to begin it here, it would be unfair to the other side, although I would not want to give up my time here and not be able to continue. So I think I would rest at this time, but defer the constitutional question to Robison.

QUESTION: I take you agree with Mr. Curtice's response to the hypothetical question I gave about a Peace Corps veteran who came and made the same claim that is being made here. You agree that the District Court could say the claim is so insubstantial, the constitutional claim, that I will not convene a three-judge District Court?

MR. NORTON: Yes. That is precisely what happened in this case.

QUESTION: Well, you think that's true here, too, but that's because you think both cases tend to equate to each other, that is, the Peace Corps veteran and the petitioners here.

MR. NORTON: That's true. We would say that there no greater constitutional question presented there than here and in either case the District Court could properly dismiss both the lack of jurisdiction and the lack of a need to convene a three-judge court because of the insubstantiality of the question presented.

QUESTION: Of course, here the dismissal is squarely, as I understand it, on the basis of section 211(a), wasn't it?

MR. NORTON: That's correct.

QUESTION: With a footnote in the Court of Appeals' per curiam affirments that there might be something so egregiously unconstitutional that the constitutionality of 211(a) itself might have to be reconsidered. But this dismissal wasn't on the basis that it was an insubstantial question, was it?

MR. NORTON: The District Judge denied a request for a three-judge court.

QUESTION: Right, well, because of 211(a), didn't he?

MR. NORTON: No, because he said there were no

substantial constitutional questions presented. He may have felt that he had to do that in order to be authorized, as a single judge, to grant the motion to dismiss.

QUESTION: As you know, there is no appendix in this case, and I have before me page 16 of the petition for writ of certiorari, the Court of Appeals' characterization of what the District Court did, saying the District Court dismissed the plaintiffs' complaints for lack of jurisdiction under 211(a).

MR. NORTON: That is true, but the court also denied the request for a three-judge court on the ground --

QUESTION: Any court, if 211(a) is valid, three-judge court, one-judge court, or ten-judge court. 211(a) says there shall be no judicial review.

MR. NORTON: That is true. We are not saying that he had to convene a three-judge court to determine whether he could dismiss under 211. He may have felt that it was appropriate to consider both of those issues in order to make his dismissal proper as a single judge.

QUESTION: I see what you are referring to is the 339 Fed. xerox in the very back of the petition which has Judge Carter's opinion.

MR. NORTON: That's right.

QUESTION: Beginning on page 18.

QUESTION: Justice Marshall put a question to you or perhaps to one of your friends a while ago, saying that if

the Veterans Administration had confined educational benefits to those veterans who had served overseas, that that might conceivably raise a constitutional question, and a single District Judge might conceivably, I take it, decide to call or convene a three-judge court for that purpose. You would not agree with it perhaps.

I am trying to distinguish that kind of a case raising what would appear to be a significant constitutional question from the one which you consider insubstantial here. In short, you wouldn't say it was an insubstantial claim if the Veterans Administration was /denying benefits to all veterans except those who went overseas, when the statute obviously gives no such authority.

MR. NORTON: Well, we say that 211 bars any review of a decision of the Administrator. And on 211 alone the District Court properly dismissed the case. We don't think it was necessary for it to address the three-judge court question. The motion was before him; he may have felt it was an appropriate thing to do not to leave it unresolved in order to make it clear that his action on the motion to dismiss was properly taken as a single judge.

QUESTION: Let's take an extreme case, that the Veterans Administration Administrator decides that because of the shortage of funds, inflation, and a lot of other factors, he is not going to pay any education benefits to anybody; he is just going to nullify that section of the Act of Congress.

would you say that that would not be open to mandamus under 211?

MR. NORTON: We believe 211 supersedes whatever jurisdiction is otherwise available under one of the general jurisdictional statutes, whether it be 1361, the mandamus statute, or 1331, the general question statute.

QUESTION: I suppose you might also answer that by saying that if the Veterans Administrator did that, he would be fired by the President, and the problem would solve itself politically.

MR. NORTON: Yes. There are other remedies and restraints on --

QUESTION: But you are saying that there is only political remedy in that situation.

MR.NORTON: Under 211.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:34 a.m., the oral arguments in the above-entitled matter were concluded.)