In the

Supreme Court of the United States

CLIFFORD L. ALEXANDER, JR., SECRETARY OF THE ARMY.,

PETITIONER,

V.

LOUIS J. FIOTO, ETC.,

RESPONDENTS.

No. 75-1704

Washington, D. C.
March 1, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

CLIFFORD L. ALEXANDER, JR., SECRETARY OF THE ARMY, Petitioner,	:	
v.	:	No. 75-1704
LOUIS J. FIOTO, ETC., Respondents.	:	

Washington, D. C.

Tuesday, March 1, 1977

The above-entitled matter came on for argument at 10:46 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

STEPHEN L. URBANZCYK, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Petitioner.

DAVID GOLDFARB, ESQ., 42 Richmond Terrace, Staten Island, New York, 10301, for the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-1704, Clifford Alexander against Louis Fioto.

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

ORAL ARGUMENT OF STEPHEN L. URBANZCYK, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on appeal by the Secretary of the Army from a judgment of the three-judge district court in the Eastern District of New York.

The case generally concerns a provision of the Army and Air Force Vitalization and Retirement Equalization Act, a statute enacted in 1948 to establish retirement pay for non-regular military servicemen.

The provision at issue here, 10 U.S.C. 1331(c) precludes Appellees and others from becoming eligible for benefits or retirement pay under this Act.

The District Court held that that statutory eligibility bar, as it applies to Appellees, violates the principle of equal protection that inheres in the Due Process Clause of the Fifth Amendment. And the District Court has, in effect, enjoined the continued enforcement of that provision.

The pertinent facts of this case are simple and straightforward. The Act was passed in 1948, after the War. In the Act, Congress for the first time established a modest form of retirement pay for members of the Armed Forces Reserve and the National Guard.

I use the term, "modest," because under the computation formula the amount of retirement pay that an eligible reservist usually would receive is relatively modest and relatively small.

In this case, for example, the record shows that, if he were eligible, Appellee Fioto would receive annually $1100.

Now, to be eligible to receive retirement pay under this Act, the statute provides, generally, that an individual must be at least 60 years old and have performed 20 years of eligible or qualifying service. But those general eligibility criteria are expressly made subject to the exception in Section 1331(c) which is the statutory provision under consideration in this case.

Section 1331(c) pertains to all individuals who were in the reserves prior to August 16, 1945. That date marks the announcement by Japan that they would unconditionally surrender and the beginning of demobilization in World War II.

As originally enacted, the statute provided that

individuals in the non-regular military service before that date were ineligible to receive retirement pay if they failed to perform active duty service during either world war.

In 1958, the statute was amended to permit such individuals to receive retirement pay or to become eligible to receive retirement pay if they had subsequently served on active duty in the Korean War.

Appellee Fioto's case, I think, illustrates the application of this statute. Mr. Fioto was in the National Guard from 1933 to 1940. The record does not explain the reasons why his enlistment was discontinued at that time, but, in any event, his enlistment was discontinued and he did not serve on active duty in World War II.

In 1947, shortly after the war, Mr. Fioto rejoined and reenlisted in the National Guard and he, thereafter, served for 20 years until his mandatory retirement age in 1967. Fioto did not serve on active duty during the Korean War.

Now, the Retirement Pay Act, as I mentioned earlier, was enacted in 1948, less than a year after Mr. Fioto re-enlisted in the Reserves in 1947.

QUESTION: The reason he didn't serve in the Korean War was becuase his unit wasn't activated; isn't that true?

Mr. URBANZCYK: That's what the record -- The record shows that he did not serve on active duty in the Korean War because -- that's what the court found -- because his unit was not activated. That's correct.

QUESTION: So it was no fault of his.

MR. URBANZCYK: The reason for his not serving on active duty in the Korean War, the court found, was through no fault of his own; that's correct.

QUESTION: What is the significance of the dates September 8, 1940, on the one hand, and January 1, 1947, on the other --

MR. URBANZCYK: I can give you the answer to the second --

QUESTION: -- rather than December 7, 1941, and August of '45?

QUESTION: Wasn't that the date of the activation of the National Guard?

MR. URBANZCYK: That's correct, Mr. Justice Blackmun. On August 27, 1940, Congress passed, and the President signed, a bill authorizing him to call up the National Guard in this hemisphere for a year. And also on September 16th the Selective Service Act was passed, so about that time the Government was beginning to mobilize in preparation for the war.

Now, the January 1, 1947, date is an interesting

one. December 31, 1946, was the date that President Truman formally announced an end of hostilities in the World War. So, even though --

QUESTION: He was a little late getting around to it.

(laughter)

MR. URBANZCYK: That's correct. I think the history books show that he did that primarily to reduce excise and other luxury taxes and -- but in any event, that was the date --

QUESTION: It had an effect on other legislation and Executive Orders, I suppose.

MR. URBANZCYK: That's right.

In any event, that does mark the, I guess, the official historical end to World War II for this country.

QUESTION: Mr. Urbanzcyk, I suppose you concede that had Mr. Fioto not served prior to World War II he would be eligible?

MR. URBANZCYK: That is correct. We have conceded that in this case. That's right, Mr. Justice Blackmun.

After his retirement, Fioto's applications for retirement pay were denied, predictably, under Section 1331(c), and he then filed this lawsuit on behalf of himself and others similarly situated.

Now, in the complaint in the District Court and,

indeed, until the brief on the merits in this Court, Appellees have implicitly conceded that they were barred from eligibility by Section 1331(c). Their sole contention, instead, was that that statute was unconstitutional, and that has been the focus of this litigation.

Now, for the first time, in their brief, they make the contention and it appears to be their principal contention now, that the Section 1331(c) does not bar Appellees. We can only take this to be an implicit acknowledgement of the weakness of their constitutional argument.

But, before addressing that argument, I should make mention, then, of what we stated briefly in our brief and that is that there can be no doubt that Section 1331(c) bars individuals like Appellees from receiving retirement pay under this Act.

QUESTION: A person would be barred even though he had 20 years of service, quite apart from any service he may or may not have had during these critical dates?

MR. URBANZCYK: That's correct, Mr. Justice Stewart. The class is defined as individuals who have had, now, 20 years of service since 1945, but who also were in the non-military service at some point prior to 1945, and did not serve on active duty during the war.

QUESTION: So they are penalized for having been in the service prior to 1945?

MR. URBANZCYK: I hate to use the word, "penalize," Mr. Justice Stewart --

QUESTION: Then made ineligible by the very fact that they were in the Reserves prior to 1945.

MR. URBANZCYK: That's right. This class must be presumed to have known in 1948 -- that's when the statute was enacted -- that they would not be eligible, or that they could not become eligible to receive retirement pay. And this Appellee class, nevertheless, continued their enlistment.

As I was saying, the statute could not be written in any plainer terms. The general eligibility criteria of Section 1331 are made expressly subject to subsection (c). That provision says that no individual who was in the non-regular military service, before August 16, 1945, quote, "is eligible for retired pay under this chapter, unless he performed active duty," unquote, and then it goes on to specify the dates that correspond to the beginning and end of the world wars and the Korean War.

There is only one reasonable construction of that statute, I think, and that is that persons described by it, including Appellees, are, quote, "not eligible for retired pay under this chapter."

Moreover, as we explained in our brief, Congress understood, both at the time of the statute's enactment and subsequently thereafter when it was reconsidering this statute,

that that was the effect of Section 1331(c).

QUESTION: How many people are affected, do you know?

MR. URBANZCYK: No, I am sorry. One of the problems with the judgment in this case is that we would have to go through several million files in order to identify who it was that might be eligible for this retirement pay.

QUESTION: And if he had not mentioned this when he made his claim, he would have gotten it, I guess?

MR. URBANZCYK: If he had not mentioned what, Mr. Justice Marshall?

QUESTION: The earlier service.

MR. URBANZCYK: No. I think the application would then have called for the bringing forth of his records and the reviewing of his records.

I am not sure what his application looked like. It is in the record, now, and I forget whether he made mention of his prior service, but in any event the record was found and it was seen that he had served prior to 1945 and he was explicitly denied retirement benefits on the basis of that prior service.

QUESTION: Has there been an administrative determination that an applicant can't simply waive any prior service and say, "I am relying only my 20 years' service after 1945"?

MR. URBANZCYK: Well, that --

QUESTION: -- '47?

MR. URBANZCYK: -- the waiver would not be permitted by the express terms of the statute.

QUESTION: Has that been decided?

MR. URBANZCYK: Well, it has been decided, I would think implicitly, in this case.

QUESTION: Well, in this case, except there was no effort to waive. It was all brought out, "Here is my service."

MR. URBANZCYK: Well, Mr. Fioto, I think, in his current brief, has indicated --

QUESTION: He is well aware of it now, I am sure.

MR. URBANZCYK: -- that he would be unwilling to -- or that he would be willing to forego those seven years and just count on these twenty.

But, the point is, in 1948, Congress made the determination that it was unwilling to offer this retirement pay incentive to this individual.

QUESTION: Does the amount of the pension depend on the years of service over twenty, i.e., my question is: If one has served twenty years does he get the same pension as a person who has served twenty-nine years?

MR. URBANZCYK: No. The computation formula is a little complex, but what it is basically is you take the

monthly pay that this person would have received as a reservist, you multiply it times, 2½% times the years of service that he performed.

Now, the catch on that is that a reservist's year of service may only count -- one year of serving may only count as 50 days for the purpose of computing the amount of retirement pay he would receive. So that, typically, it would take seven years of service to count for one year in terms of computing how much retirement pay that person would receive.

QUESTION: So if the person did waive his pre-1947 years of service, he would be waiving something.

MR. URBANZCYK: That's right. He would be receiving less retirement.

I think, though, that the crucial constitutional question, since I think there can be no doubt that the statute does pertain to Appellees and does bar them from receiving retirement pay, is whether the Section 1331(c) is rationally related to a valid legislative purpose.

As we have explained at length in our brief, the statute under consideration here is related to the two principal purposes of the Act. The Act was designed first as a cost-effective method of enlisting and maintaining a peacetime reserve of individuals who would be willing to fight if necessary, and who would be trained or have the

experience to fight effectively.

And second, the Act was designed to reward the past service of those who had performed the functions for which a militia is maintained by serving on active duty in wartime.

I don't think I need to elaborate these general considerations beyond what is said in the brief.

In response, Appellees seem to suggest that the statute was intended to provide, essentially, an undifferentiated incentive to one and all to join the Reserves.

QUESTION: What would happen with another man who was in another National Guard that was activated in Korea, but didn't go to Korea?

MR. URBANZCYK: Well, if he was activated and put on active duty and, therefore, served his country --

QUESTION: And never went to Korea, he would be eligible?

MR. URBANZCYK: Yes, that's correct, he would be eligible under the statute.

QUESTION: Both of them would be in the same area.

MR. URBANZCYK: The point of the Korean statute, or the Korean amendment, was to permit individuals who, for one reason or another, had been unable to fight in the war, World War II or -- if they were called on active duty then to be able to become eligible to receive retirement pay.

QUESTION: So it all depends on the luck of the draw as to which one was activated.

MR. URBANZCYK: I think the general statute pertains to people that --

QUESTION: Well, that's true. There is no way around that. He can't change from one National Guard to the other, can he?

MR. URBANZCYK: I don't know that, Mr. Justice Marshall. I don't know --

QUESTION: You don't know that?

MR. URBANZCYK: -- what he could do to have joined on active duty during the Korean War.

QUESTION: Don't you think it is material?

MR. URBANZCYK: Well, no, I don't. I think that the essential point here --

QUESTION: The whole point is that whether or not he is activated is absolutely beyond his control.

MR. URBANZCYK: But the essential point in the statute --

QUESTION: Is that true?

MR. URBANZCYK: That may well be correct, Mr. Justice Marshall.

QUESTION: Isn't that true?

MR. URBANZCYK: That it was beyond his control as to whether or not he served on active duty in the Korean War?

QUESTION: Yes.

MR. URBANZCYK: I am afraid I can't answer the question yes or no.

QUESTION: Do you know whether there was any provision during that period of hostilities for volunteers to join the Army? Was there any statute prohibiting people from joining the Army?

MR. URBANZCYK: I am sure there wasn't, Mr. Justice Marshall.

QUESTION: Well, he certainly had a power to join the Army, didn't he?

MR. URBANZCYK: That's correct.

QUESTION: Well, isn't that the answer to Justice Marshall?

MR. URBANZCYK: Well, there is another answer, too, I think, although that is certainly one answer.

QUESTION: Would that have affected his money?

MR. URBANZCYK: Well, if he had served on active duty, in any capacity, I think he would then have been qualified to receive retirement pay, or to become eligible for retirement pay. The point is --

QUESTION: If he had enlisted the last day of the Korean War, he would have been okay?

MR. URBANZCYK: Yes, I think that's right. If he had served on active duty. The gist of the statute, I think,

is directed at individuals who failed to serve on active duty during the two world wars. The rationale was that those people should not be given an incentive to continue on.

Now, people who served on active duty for the -- in the Korean War were excused from that exception, but in the case of Fioto there was simply no reason to excuse him from the general rationale which supported the exclusion of him from the retirement benefit statute in the first place.

Now, the District Court's and the Appellee's constitutional analysis rests principally on a present comparison of Appellee with another individual who first joined the service after 1945. Both individuals served for twenty years after 1945 and the argument is that there is now no rational basis for paying one and not the other.

The argument is mistaken, however, I think, principally because a present comparison of these individuals is not the relevant or appropriate comparison.

The Act, as I said, was passed in 1948 mainly to create an incentive for future service by promising payment upon the completion of that service.

QUESTION: Was that not directed, specifically, to encourage men with combat experience -- with active service experience, at least -- to go into the Reserves?

MR. URBANZCYK: That was one of the essential purposes --

QUESTION: Wasn't that the testimony of Colonel Maas that you refer to in your brief?

MR. URBANZCYK: That's correct, Mr. Chief Justice, and, as I was saying, the whole point of the Act was to revitalize the militia. Congress understood that this country had not been adequately prepared for World War II and that one of the ways to be prepared was to revitalize the militia and prepare a strong national defense.

Now, the question then --

QUESTION: Excuse me, before we go on. The focus of that revitalization was to get not desk soldiers or just the ordinary National Guardsmen, but get the young men who had been in active service during the wartime to move into the Reserves so that they would have, at least a partially combat-trained Reserve.

MR. URBANZCYK: That's correct, and that is, as you say --

QUESTION: You rest on that as the basis for a different treatment of those who have had active duty service?

MR. URBANZCYK: That's correct. I think that was part of a multi-faceted rationale which was based, generally, on a practical assessment of the likely future availability of these individuals and their training for active wartime duty.

That was the whole purpose of the Act and I think Congress pursued that purpose rationally here.

Certainly nothing more than that was required by the Due Process clause. If the Act was constitutional in 1948, it would not seem that it should be subsequently held unconstitutional at the behest of Appellees who knew, or must be presumed to have known in 1948, that Congress had not made the promise of retirement pay to them.

The holding of unconstitutionality would be, in a sense, to supply Appellees with a payment of money that Congress had explicitly promised would not be paid to them.

I think such a holding would endanger any other Congressional efforts to provide selective incentives for future action, individuals as to whom Congress had chosen not to provide an incentive that it had chosen to provide others, to go ahead and act as if the incentive had been offered to them, confident that when all was said and done in the future their expectations would be fulfilled by the courts.

Thus, viewed from Congress' perspective in 1948, which is the perspective, I think, we must use in this case, this statute is plainly constitutional.

As to Fioto and the Appellee class, Congress may well now decide to provide them retirement pay, but that is something that Congress and not the courts should decide.

The final point I wish to make is with regard to the argument of the amicus brief that as to certain members of the Appellee class, that is Merchant Marines who fought -- or served on Merchant Marine ships in World War II, the rationales for exclusion don't pertain.

This argument is a little late in coming in this litigation. Counsel for the Appellee class did not make it in the district court and thus the Government hasn't had an opportunity to develop a factual record on the matter.

I think I should spend a minute or two, if I may, on the merits of the amicus argument.

Of course, one answer to the claim is that even if the rationales pertain with less force to Merchant Marines who were in the war, that is certainly not a basis under the Constitution for invalidating the statute.

To hold a statute unconstitutional because certain individual members of the class don't fit very well within the statute's rationale you are contravening the well-established principle that a statute is not unconstitutional simply because it is mathematically imprecise.

Such a holding would prevent Congress from legislating in this area on the basis of general reasonable classifications and would require them, instead, to legislate on the basis of more particularized, even individualized, consideration.

That certainly is not required by the Due Process clause. Certainly not in this case which involves a statute indicative of Congress' attempt to prepare the Nation's defenses and provides no occasion -- this case certainly provides no occasion for strict scrutiny of the legislation.

But, even given the legal inadequacy or insufficiency of the amicus argument, I don't think it can be said that the rationale for exclusion does not pertain to these people.

As we indicated, there are two rationales in the statute: to reward past service and to provide an incentive for future service.

I would submit that neither rationale requires the extension of the retirement pay to Merchant Marines who are members of the Navy Reserve.

With respect to the first of these rationales, the reward rationale, the amicus brief admits that these individuals were paid more than members of the Armed Services in the war, and in addition that they received hazardous duty bonuses for the time that they were in war zones.

Congress could reasonably have determined, therefore, that an additional reward for their service in the form of a Government retirement pay is simply unnecessary.

As to the incentive rationale, the amicus points out that during the war Merchant Marine officers were required

to be in the Navy Reserve, and that today they are strongly encouraged to join the Navy Reserves as a part of their sea-going profession.

Membership in the Reserves, thus, is a -- has a close nexus or is, in a sense, an attribute of membership in the Merchant Marines.

In that respect, Congress could reasonably have determined that Appellees who were Merchant Marines in the war needed no further incentive to join the Navy Reserves.

It is true, as the amicus points out, that Merchant Marines who first served after 1945 can become eligible for retirement pay under the Act, and I suppose as to those people, if they didn't need a further incentive, as I have indicated, to join the Navy Reserves, the statute is, perhaps, over-inclusive as to them.

But certainly over-inclusion is not a basis for requiring the Congress to make the statute more over-inclusive by extending retirement pay to members of the Appellee class.

That kind of argument was rejected in Matthews v. Lucas and it should be similarly rejected here.

Thus, the argument of the amicus with respect to certain of the Appellees is not persuasive.

For the foregoing reasons, as well as for those indicated in our brief, I respectfully submit that the judgment of the district court should be reversed.

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

Mr. Goldfarb.

ORAL ARGUMENT OF DAVID GOLDFARB, ESQ.,

FOR THE RESPONDENTS

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

I'd like to first point out in response that our complaint in this action did challenge the statute both on its face and as applied, and the lower court, in its decision -- and I think it stressed that they felt that the court need not and should not defer to the Army's construction of the statute which they felt was clearly against the goals and intent of Congress.

And, therefore, we felt it important here to raise the issue of the construction of the statute and the Army's interpretation -- and the Army's construction of the statute as opposed to how it might be construed.

Secondly, under the question of waiver, our client, as every other member of this class, does not need his years before 1945 to qualify.

In the letter to the Secretary of the Army which I wrote on behalf of this client, we said we felt that there were two independent periods of service.

I think it was clear at that point. Our letters to the Board of Correction of Military Records and everybody

else bringing this through the administrative proceedings from the very beginning made it clear that we wished our client to proceed on his twenty years after 1947, and although we mentioned the previous years because it was clear that they were there, we did not feel that there should be a reliance on it.

We felt that the intent of Congress in passing this Act was in 1948 they created a point system to measure what was a year of good service. The Senate, in its amendments to the bill that were finally adopted, said not anyone who serves a year will qualify. You have to have so many days in summer camp and you have to have so many days of service, making fifty points in all and that gives you a year to qualify.

Now, the problem was before 1948 there was no such point system and the question then arose what to do with people who had years of service before 1948.

Now, the Congress decided -- and this is what we feel is the purpose of this proviso -- that in order to have your years before 1945 qualify you must have served on active duty in World War I or World War II, and later as amended they allowed people who served in the Korean War to qualify.

QUESTION: What is unreasonable and unconstitutional about that?

MR. GOLDFARB: We feel that the intent of Congress was to let you -- In order to get credit for those years you must have served in the war, but they never intended to exclude people with twenty years of measurable service under the new point system.

We feel that the record here in the Senate and the House shows that this was to confer benefit and encourage people to enlist, that the intent is not here to create a perpetual bar to men such as our client.

QUESTION: Must you not concede that the statutory language is very clear? "That a person isn't eligible," it says, "for retired pay under this chapter."

MR. GOLDFARB: Well, we think that both the court below and the U.S. Attorney, at that time -- that it was legislative oversight in the wording of this statute, that the intent --

QUESTION: Would you answer my question, and then you can explain it.

Don't you think that the language of the statute, looking nowhere else but to the language of the statute, quite clearly disentitles your client to retired pay?

MR. GOLDFARB: The plain meaning of the statute, we will agree, would disentitle our client to retired pay. However, we feel that a different construction is to be given to that --

QUESTION: That that's not what Congress meant to say.

MR. GOLDFARB: We feel that is not what Congress meant to say and that the Court can give a different interpretation to the statute, that you can read in the words, "shall not qualify for credit for those years before 1945."

QUESTION: Instead of "shall not be eligible for retired pay under this chapter"?

MR. GOLDFARB: That is correct. Originally --

Of course there have been some changes in wording here and codification which didn't intend to change the meaning and which is pointed out by the amicus brief.

Originally, it stated "shall not qualify for retirement benefits," and in other parts of the statute the words "retirement benefits" were often used to mean to accrue retired credit during those years.

It is only through codification in 1956, and when they adopted that same codification in the amendment in 1958, that this statute became clear in its plain meaning.

We feel there was at least an ambiguity between '48 and '56 as to the reading of the plain meaning of the statute.

QUESTION: Mr. Goldfarb, even under your view of the statute, a man, say -- You have two men in 1945, each of whom has had twenty years in the Reserves, but say one of them,

like your client -- say your client needed the five prewar years to get his twenty. Assume he did. Take two men like that.

Under your view, the statute would discriminate against the man a portion of whose twenty years' service was earned before the war.

MR. GOLDFARB: Yes, because we feel --

QUESTION: You think that's what the statute means.

Why do you think the Congress did that?

Why did it discriminate against prewar service?

MR. GOLDFARB: Well, in the --

The reason we feel like that is that there was no measurable way of knowing whether that -- how good that service was before 1948 when they passed the point system. Therefore, they were in a quandry of what to do with people before 1948. They were creating, in a sense, a future benefit, a future benefit which Mr. Fioto and his class are entitled to by their twenty years.

Now, if he had only fifteen years, there were five years that were in doubt. And they decided in favor of not giving them credit for those five years, because there was no measurable way, since they had not served in a war they were not giving them that benefit. There was no way to measure those other five years.

QUESTION: How did they measure the benefit post-'48 any differently than just showed up for so many drills and wasn't put on report, and so aren't the military records available to tell how often he served during the prewar period?

MR. GOLDFARB: No. There was not a way to measure what the National Reservists were doing. In '48, they were revamping the whole structure of this. They started the drill system. They started giving them payment for attending these drills. They started giving them credit for a different number of hours they served.

In fact, the House bill, originally, did not make this kind of distinction, and it was the Senate who said we will greatly cut down in the number of people who we are going to give benefits for, but we are going to make sure that a year of measurable service in the future is a year in which they put in what we know to be good service.

They call it satisfactory service. They call it measurable service. They were very concerned with that. And they said every member of our class has those years after 1945 of what Congress was looking for, good service, measurable service, satisfactory service.

They are only perpetually barred by having some previous service.

And also it is very important that that previous

service must be previous service in the National Guard or the Reserves.

If they had military service before -- and Mr. Fioto did have service in the Coast Guard, back in '27 to '31, that does not disqualify him. They don't care for what reason he dropped out of that or what reason another man dropped out of the military. Maybe he was in the military and the war started and he dropped out. That's not a bar. The only bar is having Reserve service before 1945 and not participating on active duty during World War I or World War II.

QUESTION: Wasn't pre-World War II Reserve service compensated?

MR. GOLDFARB: It is my understanding that Reserve service, that the compensation system, Reserve service, was passed at around the same time in 1948 that this came into effect. That is my only knowledge of it. I don't have a complete --

QUESTION: But there was no retirement, isn't that it?

MR. GOLDFARB: No, my understanding is that along about -- We mentioned in our brief another statute that was passed around the same period of time that gave compensation for the drills that reservists participated in. And before that, it is my understanding, it was not compensated.

QUESTION: Mr. Goldfarb, you mean they just went out and went to camp every year for nothing?

MR. GOLDFARB: Yes, but they were in the Reserves without pay.

QUESTION: Of any kind?

MR. GOLDFARB: Without pay of any kind. It is my understanding the first pay for this was brought in in '48 as an incentive. But there was another incentive. That was the incentive to induce men to enlist in the Reserve and in the legislative history of this bill they talk about that, in saying --

QUESTION: I am not talking about Reserve. I am talking about the National Guard. Are we talking about two different groups? I am talking about the -- The National Guard was paid, wasn't it?

MR. GOLDFARB: I do not know whether the National Guard was paid or not at that time.

In the legislative history of this bill, they speak about the fact that we are trying to induce people to have long-term service of ten, fifteen and twenty years, that there is another Act which is passed by Congress to pay them for their drill, that will encourage them to come into the Reserves.

What they were trying to encourage was to retain men over long periods of time. They had talked about the

exodus between World War I and World War II of people going in and out of the Reserve, and they say, "These are the very people we want to encourage to stay in the Reserves and, therefore, we are going to give a retirement benefit for twenty years of service."

We think that the statutory history shows, the legislative history shows no intent to penalize and no intent to create a perpetual bar.

In fact, we feel that the concept here is one of credit. And we feel that the words used by the Senators and in our quotes there show that if there was no wartime duty they intended not to give credit for pre-1945 years, that they did not foresee the man in 1948 who might have twenty measurable satisfactory years of service and still have, after that date -- and still have years before 1945 which would bar him under the words of the statute.

And we contend that this Court should affirm the lower court in construing the proviso of dealing with this concept of credit.

If the Government's construction is given to the proviso, we feel that type of a perpetual bar and the way it works here is an irrational classification and contrary to the overall purpose of Congress in passing this legislation.

As we pointed out before, a man the same age as Mr. Fioto, with no wartime experience -- the only difference

is he enters the Reserves for the first time in 1947. He serves the same twenty years. He gets all the benefits of the statute. He can even have the same Coast Guard service as Mr. Fioto, that's no bar. The only difference is that Mr. Fioto had years in the Reserve previous to 1945.

The age is no distinction. Both men, coming into the National Guard or the Reserves in 1947 could be of the same age. And this was another point that was asked before about -- I do not believe that Mr. Fioto during the Korean War could have enlisted, possibly because of his age.

QUESTION: As you read the District Court's opinion, do you read it to adopt your first argument, i.e., that under the statute, as properly construed, your client is entitled to retirement pay?

Or, do you read it as adopting your second argument, i.e., that the statute can only be construed as it is written, but that such a statute is unconstitutional?

MR. GOLDFARB: I believe -- It is not completely clear.

QUESTION: It is not clear to me either.

MR. GOLDFARB: But they do say that it would be unconstitutional if they adopted the Army's construction. And, therefore, they put in the sentence and we have it in our brief, page 16 at Footnote 8 --

QUESTION: "We need not and should not defer to the

Army's construction," --

MR. GOLDFARB: Right.

QUESTION: -- "when that construction is at odds with Congress' clear purposes and goals..."

MR. GOLDFARB: Right.

So it appears to me that they have adopted constitutional construction in order -- the statutory construction in order to avoid a constitutional problem, because it is clear from their decision they do feel that it would be unconstitutional.

QUESTION: They say earlier that it is unconstitutional.

MR. GOLDFARB: Yes.

QUESTION: They didn't have to say both, did they?

MR. GOLDFARB: Well, I guess they felt that the statutory construction would be enough, but I think they explained -- the possibility of explaining their reason that if you don't reach the statutory construction, you would have to reach to a constitutional question.

QUESTION: Accordingly, we hold that as applied to Plaintiff the statute violates the minimum requirements imposed by the Equal Protection clause.

MR. GOLDFARB: As applied. As applied by the Army.

QUESTION: Yes. As applied to the Plaintiff --

MR. GOLDFARB: But they don't say --

QUESTION: -- and the other members of his class.

MR. GOLDFARB: Yes. They don't say it has to be applied that way. In fact, they say it should not be applied that way.

QUESTION: They say it is unconstitutional to apply it.

. GOLDFARB: That way.

QUESTION: But, then, later they say we don't construe the statute to disqualify him.

MR. GOLDFARB: But they say the Government has and the Government has applied it.

I think, maybe, they are making the distinction between --

QUESTION: Well, it is not your burden to justify every sentence in the opinion.

MR. GOLDFARB: Right.

But we felt, as I said, that they had made the statutory construction argument in the opinion and that we felt it was an important argument because this Court has said that the plain meaning of the statute will not necessarily control where the legislative history shows an intent for something other than that.

QUESTION: Well, I suppose if the Court had just stopped with saying that the statute was unconstitutional, as construed, to cover your client, to exclude him, does it

automatically follow that the Government would have to pay retirement?

MR. GOLDFARB: If the statute does not bar for either reason, our client, I think it automatically follows that the Government --

QUESTION: Equal Protection argument. An Equal Protection violation. Which way does the Government -- The Government can cure that in either one of two ways, I suppose.

MR. GOLDFARB: I think in either case if that proviso is either construed to include our client because he was -- only credit they were talking about, or the proviso is struck down as being unconstitutional and is no longer a bar. In either case, retirement benefits would have to be paid because --

QUESTION: If the constitutional violation is that you are treating two classes differently that should have been treated the same, there is more than one way of curing the discrimination. You would just not pay any to anybody.

MR. GOLDFARB: I think the problem is there that the court would only declare the proviso unconstitutional. They did not declare the rest of the statute --

QUESTION: How do you know what Congress' intention might be if they knew that half their statute was

unconstitutional?

MR. GOLDFARB: Well, the thing is that we have the legislative history here which shows the purpose of the entire statute which was to confer this benefit on people with twenty measurable years.

The problem here is the words they chose to make this proviso coming to a head-on collision with the purpose of the entire statute. The purpose of the entire statute, I think, is clear and the legislative history on that is there, that they intended to confer the benefits on every man with twenty measurable years of service.

It is the proviso and the way they chose to word it that creates the problem that when they were talking about a concept of giving men credit for their pre-1945 service what happened was the Army has construed that as being a perpetual bar to any man with pre-1945 service.

As I said, the age is not a distinction here because the two men similarly situated, both entering in 1947, could be the same age.

Now, the Congress has seen other ways of preventing -- when they wanted only younger men, and in the amicus brief they point out a number of these ways that they have done it, with the ROTC limiting it to men between the ages of 17 and 25, with different branches of the service, that they must come in at different ages.

So, it seems to be clear that Congress was not trying to do that here and that they were allowing older men to come into the Reserves for the first time.

The war experience does not seem to be the distinction because neither of the men who came in in 1947 had wartime experience. The only difference is one didn't have previous Reserve service. They both may have had previous non-wartime service in one of the branches of the military. The problem was that Mr. Fioto had seven years in the Reserves.

We feel that the only difference here is the additional Reserve service, and we feel that this is completely irrational in light of the Congressional purpose of this Act.

There is one other contention that the Government raises, their last contention, which deals that if the statute is held not to be a bar to Mr. Fioto and his class they felt that the district court could not award what they characterize as retroactive pay.

Now, I would like to make it clear that no matter when the military notifies a man that he is eligible for retirement pay, no matter when the date is he puts in his application, by statute he is entitled to pay as of the first day he met all of the requirements. This is 10 U.S.C. Section 1331(e), which we put in the beginning of our brief as an

additional section of the statute.

QUESTION: What if you agreed, what if it were as perfectly clear as it could possibly be in the legislative history, or a recital in the statute that the purpose of this exclusion was to discourage as many people as possible who had served prior to the war from staying in after the war unless he had had wartime service, unless he had had active duty service? What if they just said that?

MR. GOLDFARB: The problem is that the words of the statute do not carry out that purpose. The words of the statute --

QUESTION: How do you know they don't? How do you know how many were discouraged by this provision from not staying in? They said, "Well, we would never get our retirement. We didn't serve before the war. They don't want us and they wouldn't pay us any retirement. We could stay in but we wouldn't get retirement, so we are not going to stay in. We are just going to --"

How do you know?

MR. GOLDFARB: What I am saying is that they are not discouraging everyone with no wartime service, only one class --

QUESTION: I understand that, but how do you know? As I say, "We are going to discourage as many as we can by this particular provision."

MR. GOLDFARB: Well, first of all, we feel --

QUESTION: You wouldn't say that -- You couldn't really say with any confidence that that provision never discouraged anybody, could you?

MR. GOLDFARB: We feel that it would not have a -- that this proviso would not fit in with the purpose of the statute which was to encourage --

QUESTION: I know. You keep saying that. You are bound to win, but what if there is another purpose to the statute? What if one of the purposes of the statute is to discourage some people, as many people as possible, without wartime experience, from staying in the Army? That is a purpose.

MR. GOLDFARB: Our feeling is --

QUESTION: The purpose is not to give them pay, the purpose is not to give them retirement.

MR. GOLDFARB: Our feeling is that the way this statute works it creates an irrational classification, because there is no rational reason to discriminate between the man --

QUESTION: You keep saying that, but I'm just positing to you that -- Let's just assume that it was perfectly clear in the statute that the purpose was to discourage people from staying in, and they were doing it -- they were going to discourage them by not providing for

retirement pay.

MR. GOLDFARB: It would be an irrational purpose and against the purpose -- The purpose of this one subsection, then, would be working against the purpose of the whole statute, and we feel it would be still unconstitutional.

QUESTION: Congress couldn't have more than one purpose in the same statute?

MR. GOLDFARB: Yes, but I think when you have a purpose of a small subsection which is in head-on collision with the purpose of the entire statute, you have to look to the purpose of the entire section. And secondly, the problem here is that --

QUESTION: Do you think it was unconstitutional to discourage people from staying in the Army?

MR. GOLDFARB: It was unconstitutional to make this kind of irrational classification between two groups of men. There was no basis for having one that would stay in and one that would not stay in. The two groups of men being the two that came in in 1947 and served their twenty years, and just because one had --

QUESTION: I know the Act didn't succeed in discouraging your client, but there may have been a lot of people who were discouraged and didn't stay in, and maybe the Act accomplished its purpose in thousands of instances.

MR. GOLDFARB: Well, as I said at first, we do not

feel that this was -- There is no legislative evidence that they were trying to discourage or penalize any group of people.

QUESTION: Well, they certainly were trying to encourage, were they not, the combat active duty members to stay in the Reserve? That was the testimony of Colonel Maas.

MR. GOLDFARB: That was a very small part of the testimony, among lots of other purposes.

QUESTION: Well, as Justice White suggested, there would be many purposes they would have in mind, but certainly that testimony indicates that the military were very much interested in keeping these younger men with active duty in the Reserves.

MR. GOLDFARB: I think -- There appears to be a benign purpose to give a retirement benefit to those who had served on active wartime duty, and to include that along with the rest of the Act.

As I said, they felt that they should not penal -- They did not want to -- That does not say that they meant to create a penalty for everyone else. It appears that there was a secondary purpose to make sure that people with active wartime duty get the benefit of the statute, but there was no indication that they meant for people with twenty measurable, satisfactory years of service to be completely

and perpetually barred because of some additional service, regardless of the reasons why they may not have had active wartime duty.

QUESTION: Would it have been a rational purpose had it been expressed -- Would it have been a rational purpose to say that a man who had some substantial prewar service and then some substantial twenty years after the war, but not be given any special favors as compared with the men who had those factors plus active duty?

Here was a man who had seven years. He could have been useful somewhere in the war, could he not?

MR. GOLDFARB: The finding of the court below in this case was that he was not able to participate in the war. There are many people, as the amicus points out, who for different reasons could not -- Merchant Marines -- were excluded because the Government felt that their use was more necessary in other areas. There were many people with civilian jobs that the Government felt were more important than active wartime service --

QUESTION: Does this man fall in any one of those categories?

MR. GOLDFARB: This man, according to the findings of fact of the court below, was a victim of a car accident at approximately the time he dropped out of the Reserves and had not sufficiently recovered to be in the Reserves at the

time of the war.

QUESTION: For five years after the accident.

MR. GOLDFARB: Right. He was in a serious accident. In 1947 he was able to get back into his Reserve unit.

QUESTION: Does the record support that?

MR. GOLDFARB: It was a finding of fact of the court below. It was never put in our statement of agreed upon facts.

QUESTION: Where did he find the evidence to make the finding of fact?

MR. GOLDFARB: As I recall, I think it was from questions of oral argument.

We did not feel that the reason that someone was in or out of the Reserves was relevant to the class. Obviously, it varied greatly.

QUESTION: So there is no evidence then, at all?

MR. GOLDFARB: No.

QUESTION: Well, in the class -- Whatever this individual's reasons were, that doesn't affect the class, does it?

MR. GOLDFARB: Right. It does not affect the class.

QUESTION: The class might include people with reasons similar to this asserted reason, or for no reasons or

reasons of cowardice or reasons or heroism, or all sorts of different reasons. The class just is a broad class of those who have twenty years but some of their service was prior to these effective dates and during that service they didn't participate in active duty.

MR. GOLDFARB: I think our point which we feel is important on that is that there were people who also did not have prior wartime service who came in in '47 or '45 for the first -- after August 16, 1945, for the first time, were not even required to serve in the Korean War and could get the benefit of the statute.

QUESTION: But they, inferentially, as a group, were younger men.

MR. GOLDFARB: Not necessarily --

QUESTION: Not necessarily, but --

MR. GOLDFARB: No, many of them, in fact, weren't because they came in in relation to needing the jobs because they were Merchant Marines or because they had another civilian job which required them to be in the Reserves.

QUESTION: Well, that is some of them but -- What are the ages for original enlistment in the Reserve components?

MR. GOLDFARB: They put no age limit on it --

QUESTION: Certainly a 70 year old man can't enlist, can he?

MR. GOLDFARB: There is mandatory retirement at 60, and in order to get your 20 years in you would have to come in before you were 40.

QUESTION: Isn't there some age limit for an original applicant?

MR. GOLDFARB: It is not my understanding that there is an age limit, other than the mandatory retirement age at age 60, and you have to reenlist, I think, every five years. So, Mr. Fioto's last period of enlistment was between the ages of 55 and 60.

They have a weeding out process. Not everybody is kept in the Reserves, and, as I said, the mandatory retirement age of age 60 does prevent a lot of people from ever accruing 20 years and ever getting --

QUESTION: So, at least you would concede that you can't originally apply if you are over 60.

MR. GOLDFARB: Correct.

QUESTION: Because you are eligible to retire, mandatorily retire --

MR. GOLDFARB: You are mandatorily retired at 60.

QUESTION: Perhaps I didn't get straight your answer to my brother Stevens' question as to what you thought the purpose of Congress was in barring, as you seem to concede are barred by the statute, a man who had 15 years after and 5 years before, without wartime service before.

MR. GOLDFARB: When the statute was created, they created the measurement of how -- what is a good year of service? A good year of service is a year in which you accumulate a 50 point. They went through a great lot of detail in the Senate to put in this 50 point system. They said they wanted to assure that not every branch of the military service would design its own system, that there was a uniform system between all of the branches of the service, that it applied equally and that there be no discrimination against --

QUESTION: Here are two people both with 15 years after the war and 5 years before. One of them had wartime overseas service and the other one didn't. Now, the distinction between those two is what?

MR. GOLDFARB: They decided that since there was no point system before '48, they would give people credit for the years before '48 if they had active wartime --

QUESTION: I know that. Why?

MR. GOLDFARB: That is because there was no way to measure the other service other than whether or not you were in active wartime duty.

QUESTION: Why did they say one gets retirement and one not? Is it just a desert thing or a punishment thing, or what?

MR. GOLDFARB: No, they said that, "We can measure

years after '48." Like, Mr. Fioto has 20 measurable years. Therefore, we know he did good service --

QUESTION: I wasn't talking about Mr. Fioto. I am talking about those two people I posited.

MR. GOLDFARB: Okay. Before '48, they had no way of measuring his service, no way to know it's good. The only test they had was whether or not he was an active wartime --

QUESTION: You are describing what the test is but what is the rationale for distinguishing between those two men?

MR. GOLDFARB: I think it was a purpose to say, "We are going to give them the benefit of the doubt, that we are going to give a benign --"

QUESTION: What doubt?

MR. GOLDFARB: That the service before '48 was definitely good enough to qualify.

QUESTION: It's a merit thing, you think? It's a deserts thing. You served and the other fellow didn't, and therefore we are going to give you retirement. You don't think it indicates that Congress was really trying to keep ahold of the people who had wartime service?

MR. GOLDFARB: I do not think that that's evidenced from the legislative history. I think the legislative history shows that it was a benefit that they were conferring, a merit

or a deserts.

QUESTION: Mr. Goldfarb, what is your support for your suggestion that there was an inability on the part of the military establishment to evaluate the quality of the service performed before 1948?

MR. GOLDFARB: They -- Congress, in passing the legislation in 1948, in the Senate hearings, said they wanted to create a uniform system among all the branches of the service and they created the point system. And they said that they did not want to leave it up to the branches of the service where the Navy would make one system and the Army make another system and they would evaluate.

Before '48, there does not appear to have been an evaluation when they were tallying people's service and I think the records on military men show they just got -- you just put down how many years of service you had.

Now, when you compute someone's years of service, after '48, you go through a point system of how many weeks of drill you had, how many weekends you attended. There does not appear to be that kind of --

QUESTION: Does the record tell us whether records were available so that kind of computation could have been made with respect to pre-1948 service? I imagine that such records are kept. Records are pretty detailed over there.

MR. GOLDFARB: The Congressional hearings are blank

as to that. The only feeling was that --

QUESTION: They wanted a new point system that would be uniform as between the Army and the Navy.

MR. GOLDFARB: Right. All branches of the service. They felt that this was significant, that they would not be --

QUESTION: But they are counting the pre-1948 service for those who did serve during World War II, are they not?

MR. GOLDFARB: They gave that as a --

QUESTION: So the problem wasn't insurmountable with respect to those years.

MR. GOLDFARB: They gave that as a benefit, sort of a -- so as not to penalize them, in a sense. They gave that to them as an additional benefit because they said, "We can't measure those years. We will take that as the criteria."

QUESTION: Well, they also gave it to people who might not have been in the war but first did Reserve service in '46 and '47.

MR. GOLDFARB: Yes, because I think the only --

QUESTION: And there were records available for those years.

MR. GOLDFARB: There were no records. I think they gave that because there was no other system. There was a

cutoff year for the last of the war. They just made that as a presumption.

QUESTION: I mean they didn't need a point system to decide those years qualified, is what I am saying.

MR. GOLDFARB: No, they just gave that.

MR. CHIEF JUSTICE BURGER: Thank you, counsel.

Do you have anything further, Mr. Urbanzcyk?

REBUTTAL ORAL ARGUMENT OF STEPHEN L. URBANZCYK, ESQ.,
ON BEHALF OF THE PETITIONER

MR. URBANZCYK: Just a minute or two, if I may, Mr. Chief Justice.

I agree with you, Mr. Justice Stewart, that the district court's opinion is somewhat vague on its intent, but I think the most reasonable construction is that the district court held this statute unconstitutional as applied to Appellees.

I would point out that at Appendix 9 which has the cause of action stated by the Plaintiffs, that's the only cause of action stated, that the statute is unconstitutional on its face or as applied to these particular individuals.

Nevertheless, in spite of that and the plain language of the statute, there is still the insistence that the Section 1331(c) doesn't mean that at all.

Now, this point system, as we explain in our brief, is a system, generally, of measuring an individual's

involvement in the Reserves or the National Guard. An individual must get 50 points to a year to have that year count as part of his or her 20 qualifying years.

Appellees argue that Section 1331(c) was simply intended to prevent anyone from including any of their pre-1945 years of non-regular military service as a part of their 20 years necessary for eligibility.

QUESTION: Mr. Urbanzcyk, will you explain to me how they computed the year in 1946 and '47?

MR. URBANZCYK: Well, that's my point. The point I would like to make is that if that were Congress' only concern, I think they would have pegged the statute to pre-1949 service.

The point system was instituted in 1949, July 1, 1949. Prior to that, they simply presumed that anyone who was eligible had achieved the 50 points.

The statute provides that any service, and it lists the kind of service: in the Armed Services, in the National Guard, in the Reserves.

QUESTION: Does that mean attending one drill in 1947 would give a man a full year's credit?

MR. URBANZCYK: That is correct. As I understand it, if you were a member in good standing in the National Guard or the Reserves, and I am not certain what that involved, there was a presumption that that was an eligible year of service.

And the point is if 1331(c) was intended simply to nullify years before the point system was instituted for fear that that was not a qualifying year, they would have pegged it to 1949 rather than 1945, because the point system was instituted only in 1949.

Besides, I think, the structure of the statute belies their suggestion. The discussion whether -- or the provisions determining whether a year of service was a qualifying year was in Section 1332, dealing with that subject matter.

This section is in Section 1331 dealing with general eligibility criteria, and I don't think that there is any argument that it was intended to pertain to these Appellees and to preclude them from earning retirement pay.

The original language of the statute, my opponent alluded to, is no different in that regard. The original language of the statute simply says that no person shall be eligible for retirement benefits.

Elsewhere in the statute, retirement benefits is used with reference to words like accrued, and in that context it was construed as meaning accruing points for retirement benefits.

Our final comment, then, is in regard to the constitutional argument, and that is that one characteristic that Mr. Fioto and the other Appellees had that nobody else had

in this statute was prior service in the non-regular military service, but a failure to perform in active duty during the war.

In 1948, Congress looked at these people and they said, "As between these individuals and others we want to provide an incentive to these other people and we want to discourage Fioto and the members of his class from joining the non-military regular service."

That distinction was rational in 1948 and it should not be held unconstitutional now on behalf of someone who was not discouraged.

For those reasons, we respectfully submit that the judgment of the district court should be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:44 o'clock, a.m., the case in the above-entitled matter was submitted.)