Supreme Court of the United States

October [redacted] TERM, 1969

In the Matter of:

TIMOTHY J. BREEN,

Petitioner,

vs.

SELECTIVE SERVICE LOCAL BOARD NO. 16, BRIDGEPORT, CONN., etal.

Respondents.

Docket No. 65

Place Washington, D. C.

Date November 19, 1969

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November 19, 1969

The above-entitled matter came on for argument at 1:37 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: No. 65, Breen against the Selective Service Board.

ARGUMENT OF EMANUEL MARGOLIS, ESQ.

ON BEHALF OF PETITIONER

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

The question presented in this case, I think, can be fairly reduced to the following: Whether in the lights of this Court's decisions in Oestereich and Gabriel, Section 10(b)(3) of the Military Selective Service Act of 1967 precludes pre-induction judicial review of delinquency reclassification processes by a local draft board against a fulltime undergraduate student, who is statutory entitled to a II-S classification because he surrendered his draft card to a clergyman to register his dissent against the war in Vietnam.

To put it another way, the question is that does Oestereich control this case or does Gabriel control it?

The facts in the case are admitted for purposes of this appeal and are further agreed to in the agreed statement on appeal which is part of the appendix. The petitioner at the time in question was was a 19-year-old undergraduate student at the Berkeley School of Music in 1967, a school located in Boston, Massachusetts. At that time he was satisfactorily pursuing a fulltime course of instruction at the college and was properly

classified by his local board, Board No. 16 in Bridgeport, Connecticut, as a II-S for the academic year 1967-1968.

At enrollment time the petitioner maintained the necessary status for II-S in full compliance with all of the statutory requirements. On November 16, 1967, the petitioner along with numerous others took part in a meeting at the Arlington Street Church in Boston, protesting the war in Vietnam, and in the course of this meeting delivered his registration certificate along with a number of other registrants to a clergyman for the sole purpose of registering his dissent against the war in Vietnam.

The action by the petitioner was peaceful, it was nonviolent and it was expressed freedom of speech under the First Amendment.

A few weeks prior to this occasion a memorandum and letter was issued from the Director of Selective Service, General Hershey, which was addressed to all members and officials of the Selective Service System. This memorandum and letter, which we will hereinafter refer to as "the Hershey directive," instructed and advised the members of the system to strip deferments and exemptions from all registrants who in any way violate the Selective Service regulations or its related processes, or who take part in any so-called illegal demonstrations.

The Director further recommended that the delinquency

reclassification induction procedure be pursued for any registrant who abandoned his draft card or his classification card. Subsequent to the action by the petitioner, on January 9, 1969, he received a simultaneous declaration of delinquency and reclassification in the mail, reclassification from II-S to I-A. This was a clear implementation of the directive of General Hershey and as the court below artfully put it, "It was certainly in line with this directive."

The ground set forth in the delinquency notice was "failure to have registration certificate in your possession." Two days later the petitioner was ordered for a physical examination and in early February of 1968 he appealed the classification.

The litigation below was commenced on February 20, 1968, in the District Court for Connecticut wherein a declaratory judgment and injunction and other relief was asked by way of a remedy in behalf of the petitioner to go with other forms of relief, including damages.

The initial hearing before that court took place on March 1, 1968, where a temporary restraining order was obtained. However, on March 8, 1968, all of the petitioner's claims for relief were denied, the temporary restraining order was dissolved and the respondent's motion to dismiss was granted primarily on the ground that 10(b)(3) deprived the District Court of jurisdiction.

On April 30, 1968, subsequent to the litigation, the Appeal Board for Connecticut confirmed the classification of the petitioner' s I-A. Prior to that time he had passed his physical examination and was ordered to report for induction. He has not reported for induction based on stays obtained by the District Court, subsequently by the Court of Appeals and eventually by this Court.

The rationale of the Court of Appeals in upholding the action of the District Court was geared clearly to the differentiation which it drew between this Court's decisions and Oestereich and in Gabriel. The Court held that Oestereich was distinguishable based on a demarcation between exemption and deferment under the statutes with extremely heavy reliance upon Gabriel.

Petitioner contends that the essential error below is in the failure of the majority in its opinion to identify the case, as it should have, with Oestereich, rather than with Gabriel.

We submit that the Oestereich case clearly and unmistakably controls the case at bar and we submit this initially for factual reasons because the salient facts in both Oestereich and in the case at bar are absolutely identical in at least seven respects.

In the first place, both cases involve fulltime undergraduate students. Second, both involve the surrender of draft

cards as a conscientious dissent by personal commitment against the war in Vietnam. Third, both involve explicit and unqualified statutory rights at stake in both cases. Fourth, there is in neither case any discretion or any exercise of judgment or weighing of evidence by the local board.

Fifth, both involve the application of the delinquency regulations directly pursuant to the Hershey directive. Sixth, the registrants in both cases were punitively reclassified I-A pursuant to that directive. And seventh, there was a simultaneous declaration in both cases of delinquency and a I-A reclassification.

Petitioner submits that the facts in Gabriel was not reconcilable with any single one of those seven factual elements in Oestereich and Breen, and for that reason Gabriel is irrelevant to the consideration of the case at bar.

We submit by way of legal argument that the exemption deferment distinction which was drawn by the court below and on which heavy emphasis is placed by the respondents is totally unsupported in at least four respects.

In the first place, it is unsupported by the legislative history of the statute which reflects the congressional intent in passing the Military Selective Service Act of 1967. Secondly, it is unsupported by the wording of the statute itself. Thirdly, it is unsupported by the wording of the Selection Service regulations. And fourthly, it is unsupported by the

pertinent and relevant case law by Court of Appeals decision below.

The legislative history of this statute is extensively described in both the Senate and the House reports up to the passage of this Act and, in particular, on House Report No. 67, which stresses the importance in the passage of the new Act of immunizing fulltime undergraduate students from any disruption of their education by way of untimely induction and stressing further the fact that this was in the public interest for this clear and unmistakable immunity to apply.

There was a very distinct effort on the part of both the House and the Senate to remove local board discretion based on class standing in favor of what is described in the legislative history as a "uniform deferment policy with a statutory and clearcut criteria for all undergraduate student deferments."

And also significant, and I intend to go back to this later on, the new statute in 1967 removes the discretionary term "authorize," "the President is authorized" to grant student deferments and replaces it with the mandatory word "shall" and further goes on to remove the further discretionary language in the old Act which talked about authorizing deferments only when necessary to the maintenance of the national health, safety or interest. That was removed.

And what we now have in the statute are five clearcut statutory criteria, leaving no discretion to the local boards

whatsoever that these criteria are met, namely, that a II-S will be granted in the following instances:

First, that the student is pursuing a fulltime course of instruction; second, that he is attending a college or university or a similar institution of higher learning; third, that he is pursuing a course of instruction satisfactorily; fourth, that he has not yet obtained a baccalaureate degree; and fifth, that he has not attained his 24th birthday.

These are the clearcut statutory criteria set forth by the Congress deliberately and intentionally so that there should be no mistaking about when a student was or was not entitled to his deferment. And as far as the case at bar is concerned, there is no question, it is not contested that Mr. Breen met every single one of these criteria.

The national policy and the statutory criteria are further reflected in the specific restriction upon the President, which was also introduced in the 1967 statute and was nonexistent prior to that time, but shall deferment shall not be restricted or terminated without a specific finding by the President that the needs of the Armed Forces require such action of the courts.

There has been no such finding by the President of the United States, so that taking all of these elements together, it is not surprising that the dissenting opinion opinion below pointed out that this is about as clear a statement of congressio intent as you can get, made all the more specific -- or made all

emphatic, rather, by its appearance in the Selective Service Act for the first time in the 1967 amendment.

The statute, and as far as congressional intent is concerned, further buttressed in the following way by a very brief excerpt that I would like to read from the conference report of the Senate and the House prior to the passage of the Act. It is talking about these changes prior to the passage of the Act.

In talking about these changes, this is what the report says at 1359 of the House Report No. 267: "The language incorporates the original House recommendation in respect to undergraduate student deferments and provides them uniformly to all registrants who request it and qualify for such a deferment. These undergraduate deferments would continue only until the registrant has received a baccalaureate degree or in order to continue to pursue a fulltime course of instruction satisfactorily or reach the age of 24, whichever occurred first."

I submit there is no question about the legislative intent here.

Now the other main prop of respondent's argument has to do with the proposition that an exemption registrant, as in Oestereich, is somehow outside the system, outside the Selective Service System entirely, and it quotes a Court of Appeals decision, Anderson against Hershey, in support of this rationale.

The petitioner contends that an exempt student is no

more outside the system than a deferred system -- than a deferred student. Section 6(k) of the statute leaves us with absolutely no doubt on this point, as does the section prior to the statute where there are continuing references to deferred and exempt students. There are no distinctions drawn between exemptions and deferments for these purposes under the statute.

The regulations, Section 1625.1, state unconditionally that no classification is permanent. Now if we take the Oestereich situation and compare it with the Breen situation, we can see this in operation very clearly. If Oestereich, a divinity student, had finished his divinity school at the seminary, and having completed his school then decided that he was going to enter law school or that he decided that he then was going to drive a bus or become a carpenter, can there be any question at all that he would be outside the system simply because he a IV-D originally.

Let's reverse this situation. Let's take the case of the petitioner, who was attending the Berkeley School of Music and let's assume that, having concluded the Berkeley School of Music or even while he was there, he transferred to a divinity school. Would he be outside the system at that point simply because he had transferred to a divinity school? It is obvious under the statute as well as under the regulation that any change in the circumstances of a registrant can produce a change in his classification. That is what the classification regulation

are all about, and that there is clearly no person -- no registrant who is within the system who, simply because he has an exemption, is outside the system. That was never intended and it is nowhere to be found.

Indeed, it may be said and it has been said by several courts below, that both exempt and deferred registrants are outside the pool of manpower. And that is true. They are outside the pool of manpower. But that hardly places them outside the system.

This is further, I think, buttressed by the fact that the exemption deferment demarcation line which the Government tries so desperately to draw, particularly after Oestereich, is almost impossible to define when examining the various kinds of classifications which exist both under the statute and the regulation, when one moves from classifications as IV-F, which is an exemption, and I-Y, which is an exemption, and then moves on to I-D, which is a deferment, there is no logical order of priority, there is no systematic attempt to say that we have a series of exemptions which are going to be treated in one fashion exclusively, a series of deferments which are going to be treated in another fashion exclusively, and not not one is in the higher order of priority and one in the lower order of priority. Indeed, the regulations themselves show a mixture of exemptions and deferments of persons who are in the highest order of priority at I-A down the lowest order of priority, which is

I-C.

Another example, I think, time example to illustrate this point would be in the case of Federal judges, who under the statute and under the regulations have deferments. Federal judges obviously are appointed for life, but he only has a deferment.

Now is it going to be suggested by the Government that a Federal judge is somehow or other inside the system and a divinity student at the Andover-Newton Theological Seminary is somehow or other outside the system? It makes no sense. There is no rational distinction recognized by either the statute or by the regulation.

And I think that the three Justices of this Court who filed their dissenting opinion in Oestereich as much as said so, particularly as indicated in footnote 9 of their opinion, this was also practically conceded by counsel for the Selective Service System in the brief for the Solicitor General filed in the Oestereich case, calling the Court's attention particularly to the footnote on page 68. There again there was practically a confession that you couldn't draw these fine distinctions.

Q In your brief, I think you state that the Vice President of the United States is given an explicit deferment. Is that a deferment?

A That is a deferment.

Q He is deferred?

A Yes, sir, that is a deferment.

Q As long as he is Vice President?

A As long as he is Vice President he only has a deferment. That would be under classification IV-B. That's all he has. He has no exemptions.

Q That is also true of the members of this Court?

A That's true of members of this Court.

(Laughter.)

All of the members of this Court have are deferments and they are not exempt, at least not specifically under IV-B, if that is the classification.

Now the distinction, I think, which needs to be drawn and obviously some line in this case as in so many other cases before this Court should be drawn, is not between exemptions, on the one hand, and deferments, on the other, but rather between those exemptions and deferments which are unequivocably and unconditionally granted by statute on the one side, such as veterans, such as sole surviving sons, such as fulltime students, elected officials and the like, so you have exemptions and deferments there. And those exemptions and deferments which are granted by statute, but which are subject to findings of fact.

They are subject to exercise of judgment by local board and the weighing of evidence.

Where again you have got exemptions and deferments such as in the case of IV-F's, in the case of conscientious

objectors, in the case of dependency and hardship deferments. As a matter of fact, I would submit that the Gabriel case itself is a prime example to illustrate this point where you are dealing with a conscientious objector which involves an exemption. If he is entitled to conscientious objector status, that would be an exemption.

And yet you have got so clearly a case there that there has got to be discretion exercised by the board and there has to be a weighing of the evidence.

Q Would you care to -- maybe you have done it, but I didn't get it. Would you care to state your views as to the scope of the discretion of the Secretary or the Director -- Secretary, I guess it is -- under this student deferment statute?

A I think that the scope of his discretion would be limited only to the statutory criteria. The Director finds by way of the local board that a student is not pursuing a full-time course of instruction. That might be a factual determination.

Or if he finds that he is not pursuing that course of instruction satisfactorily, which are the statutory criteria, then I would certainly say that it would be a basis for weighing, for a judgment, for a discretionary act by the local board which may, indeed, be barred by 10(b)(3).

But certainly where there are criteria totally irrelevant to the statutory criteria, such as in the case at bar, the

only basis for doing what the board did, and this is conceded, is the turning over of a registration certificate to a clergyman by way of an expression of dissent, but that has nothing to do with the statute and at that point the Selective Service Director cannot do anything about taking away a II-S classification.

The final point that I would like to make so I can reserve a little time for later on, if the Court please, is that the cases cited by the Government, the three Court of Appeals cases cited by the Government give us small comfort -- give us no comfort in attempting to arrange for what is obviously a divorce of convenience, as between the exemption, on the one side, and the deferment, on the other.

The Kolden case which it cites by dictim was in full accord with the position of the petitioner in this case. There is a clear and rather repeated dictim indicating that 10(b)(3) would not be a bar in Kolden where a fulltime undergraduate student was involved.

The Kraus case, involving a III-A deferment, governed by statutory language, authorizing -- not mandating but authorizing the President to grant a deferment subject to certain conditions in 6(h)(2), is again not applicable.

And in Anderson against Hershey, which they cite in their brief, that is again the rationale that an exemption is outside the Selective Service Service, which we have already

dealt with.

The cases that we have cited, I think, are terribly important, particularly the Carey case, which was decided in the Second Circuit. It is important because it was a per curiam decision in which two of the three judges in that case ironically, and perhaps incongruously, held that 10(b)(3) would not be a bar to a review of a denial of a I-S classification and set forth that where is no basis for withdrawing it and where there is a statutory grant, it cannot be taken away by the Selective Service System, if there is a legal relationship involved, as there was in Carey, and where there is a statutory interpretation that should be applied, as there was in that case.

This is not a matter for the local boards nor is it a matter to await a conduct prosecution, but that it is a matter which is entitled to early judicial review.

Q Was that subsequent to this decision?

A I am sorry.

Q Was that per curiam subsequent to this decision?

A That was subsequent to the Oestereich decision?

Q No, subsequent to the decision ---

A Yes, subsequent to Breen decision. That's right, Mr. Justice Harlan.

Q Different panel?

A A different panel, but interestingly enough of the three judges on that panel, two of them -- Judges Moore and

Friendly -- are in the majority in Breen.

I would like to reserve the rest for my rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Margolis.

Is that cited in your brief, that case? Is it cited in your brief?

MR. MARGOLIS: Yes, it is. We did not have it at that time. It had not been published.

Q Well, what is it? Can you give it to me?

A I can give it to you, Your Honor.

ARGUMENT OF WILLIAM D. RUCKELSHAUS, ESQ.

ON BEHALF OF RESPONDENTS

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

At the outset I think in light of the statement of facts by the counsel for petitioners it might be well to state in the Government's opinion what this case is not about.

In our opinion this case is not about the advisability of the war in Vietnam, it is not about the advisability of present Selective Service laws. Quite obviously these are questions of policy for the Legislative and Executive Branches of Government.

Thirdly, I think that this case is not about free speech or the challenge to free speech under the Hershey directive. There was a specific finding by the Court below in this case to which petitioner did not object and which is set out on page 4 of our appendix, finding of fact No. 5, which states that the

Board's actions were entirely by virtue of the draft regulations. On page 3 in the statement of facts agreed to by the petitioner and the Government, in this case there is a statement at the bottom of paragraph 14 that the attached memorandum of decisions containing the following findings of fact which are not in dispute and the following conclusions of law.

There is no dispute about that finding in this case. The same question arises in the Gutknecht case which will follow this one, and there is also a specific finding in the Gutknecht case that there is no evidence that the acceleration was based on the expressions to the opposition to the war in Vietnam.

Now I think that the claims of the denial of First Amendment freedom in this case cannot be based upon pure speculation or on what might have been done. They must be based on the fact situation as we find it in this case, which I think leads to a complete denial that there was any abridgement of First Amendment freedoms in this case.

Here, as the counsel for the petitioner stated, in his opening argument, there was not an effort on the part of the local draft board to implement the Hershey directive in this case applying the delinquency regulations and accelerating Mr. Breen's induction. I think that it should be pointed out that while the Hershey directive was issued in October, under the statement of facts in this case it is clear that the petitioner was declared delinquent on January 8 and in our appendix, Appendix B to the

brief of the Government on page 41, is a joint statement of Attorney General Ramsey Clark and the Director of the Selective Service, in which it was stated that lawful protest activities, whether directed to the draft or other national issues, do not subject registrants to acceleration or any other special administrative action by the Selective Service System.

This statement is fully supported by the present Justice Department and we would not be here if the Department were of the opinion that in this instance Mr. Breen was denied his First Amendment rights or that the board below acted in derrogation of those rights, that he was accelerated for his views.

If I ---

Q Is there anything in the record to show why he was brought in?

A He was brought, Mr. Justice Marshall, because he violated one of the regulations. It was a delinquency regulation which was applied to him because he violated a regulation which advised that you must have your registration certificate ---

Q How did they know that he didn't have his certificate?

A Because it was reported to them apparently by the marshal -- at any rate, he turned in his registration certificate to the clergyman on November 16th of '67.

Q How did they find that out?

A I really can't recall exactly how they did find

that out.

Q Well, isn't it interesting that out of all the people they should pick him?

A Well, I think that anyone that violates a regulation of this nature, when it comes to the attention of the local board, would be accelerated.

Q And you consider that handing in of his registration certificate was not a form of expression?

A Well, I think it is a form of mixed expression and conduct, and under the cases in this Court there is a mixture and where there is a valid Government purpose to be had in the regulation which is violated -- in this case, the possession of his draft card -- that he cannot violate a law or regulation and call it "speech" and thereby exonerate himself from any sanctions under that law or regulation.

Q Do you mean sanction or punishment?

A Well, I will get to that, Mr. Justice Marshall, and I will address myself --

Q I would appreciate it now, if you care to.

A The question of punishment, as far as it is concerned in this case, involves the -- and it also involves the case that follows -- as to whether the delinquency regulations are punishment, And the question that we directly face is whether if they are punishment, that he should have been provided his Fifth and Sixth Amendment rights under that.

I think there is a threshold question in this case of Section 10(b)(3), but if you desire ---

Q I think that is part of the question in this case.

A Yes, I think it is.

Q Can you get to the other question or at least part of it ---

A I think that is right, Mr. Justice Stewart. The threshold question is the one to which the petitioner's attorney directed most of his attention.

I believe, Mr. Justice Marshall, that the question of punishment will be covered in great detail in the next case and I think that if you take the straight question of punishment itself, that probably there are elements of punishment in what happened here to the petitioner and there are arguments that can be made that it is not punishment.

I think that this tends to obscure the underlying issue, and that is whether ultimately the petitioner in this case is able to be afforded his full Fifth and Sixth Amendment rights. It is our position that both in this case and in Oestereich that what has happened with 10(b)(3) is that the raising of those rights has simply been delayed. He has not been denied the right to raise -- all of us have the right to counsel, the right to confrontation of witnesses. This is done when he refuses to submit to induction and at the criminal trial, or submits to induction and brings habeus corpus to contest his induction.

So that the question of whether or not it is punishment or not is only relevant in terms of whether he eventually receives his right that he claims he should have.

The threshold question, of course, is the question of 10(b)(3). The District Court and the Court of Appeals thought that this case should be dismissed under 10(b)(3). It is our contention that that decision by the Court of Appeals and District Court below was proper.

The Section 10(b)(3) clearly prohibits judicial review of classification and processing by local appeal boards, and that the questions of classification and processing can only be brought up as a defense to a criminal trial or by habeus corpus.

Now I don't believe that Oestereich is dispositive of this case. I think there are some distinctions which can be drawn between a deferment and an exemption which are relevant to Section 10(b)(3) and it is our contention that this section does apply here.

In the first place, I think the purpose of 10(b)(3) is twofold: Its first purpose is to avoid a litigious interruption with the Selective Service process, and I think the congressional purpose here was not to deny review, but to postpone it. And I think that the Selective Service process, if it is to go on smoothly, that Section 10(b)(3) and the purpose behind it must be at least applied to the situation as it exists in deferments.

Now I think that the petitioner can raise in all the

defenses that he has to his treatment at the end of the process. There is historical validity to the finality decision of an appeal board and we have decisions cited in our brief in Falbo and Estep, which modified the decision in Falbo, which said that all of these defenses of the board exceeding its jurisdiction by not having any basis in fact for its decision could be brought up at a criminal trial.

So what I believe has happened in Section 10(b)(3) is not a denial of review, but a postponement, and that there is historical validity for that postponement.

The second purpose that the Section 10(b)(3) has is to avoid having the courts becoming super draft boards, and certainly that if Section 10(b)(3) were not to apply to deferments to anybody who is deferred, the courts would be flooded with cases involving interpretation of draft board decisions, not only as far as they might be considered blatantly lawless because they were completely outside the manpower pool, as Judge Kaufman suggested was the rationale that could be applied to Oestereich, but also with all kinds of rationales that might be applied to the draft boards' refusal or the draft boards' decision to accelerate.

Now it is the Government's contention that this is a -- that Section 10(b)(3) is a proper exercise of national power, that Article III, Section 1 of the Constitution gives Congress the power to define and limit the jurisdiction of the inferior

courts of this country, and Article I, Section 8 gives the Congress the power to raise and support the Armed Forces.

That is precisely what Congress is attempting to do in Section 10(b)(3).

There is a constitutional question raised by petitioner as to the constitutionality of Section 10(b)(3). It is our position at the outset that this question has been decided by this Court in Clark against Gabriel, that it has been decided against petitioner and the Court there specifically found that there was no constitutional objection to Section 10(b)(3).

In Oestereich the Court stated its construction of 10(b)(3) left it unimpaired in the normal operations of the Act. So I don't believe that the question of constitutionality can be considered to be a serious one here.

The question of the distinction between this case and Oestereich, the question of whether there is any distinction that can be made between exemptions and deferments. And if there is no distinction, therefore Oestereich applies, I think, is very much before this Court today.

As I stated at the outset that all circuit courts which have faced this question since Oestereich have decided the question in the Government's favor. The Second, Fourth, Sixth and Eighth Circuits have decided the cases which are cited on page 18 of our brief. They have all decided that there is a distinction between a deferment and an exemption.

In the first place, the statutory distinction between a deferment and an exemption. In Section 6(g) of the Selective Service Act, the section involving the ministerial exemptions, their exemption is unconditional. It isn't given subject to the power of the President to adopt rules and regulations by providing for that exemption, but in the II-S deferment in Section 6(h)(1) there is a statutory condition placed upon it.

The deferment is provided "under such rules and regulations as the President may provide." Now that conditional ground is not in 6(g) involving the exemptions.

The Section 6(h)(1) specifically recognizes the delinquency regulations in the last sentence of the same section. For the first time the delinquency regulations are recognized as being in existence by Congress. And as Judge Friendly stated on page 26 of his opinion, that this was clear evidence that in the court that Congress did not suppose that reclassification pursuant to the delinquency regulations would violate provisions of 6(h)(1).

To say that Congress has not authorized the delinquency regulations, it seems to me is to ignore almost 30 years of their existence. In the 30 years of the existence of the delinquency regulations, which have essentially remained the same since 1948, Congress has amended the Act four times. It has either amended the Act by changing it very greatly or by adopting again basically the provisions that were already there.

I just cannot believe that if Congress has known of the existence of regulations of this kind, has gone into the whole Act involving the delinquency regulations four times over the last 28 years, that we can say in 1969 that Congress did not intend that the delinquency regulations be in effect, that there was no statutory authorization for those regulations.

I just can't believe that Congress is so blind.

I would suggest for this Court's analysis that Judg Kauman's analysis in Anderson against Hershey, the Sixth Circuit case which is cited on page 18 of our brief. On page 19 of our brief Judge Kaufman, I think, expresses very well the analysis which we recommend to this Court.

He said that in the case of an exemption, the Congress has made the decision that qualifying persons shall be beyond the pool of manpower available for military purposes. In the case of a deferment, Congress has tried to set priorities to provide predictability and to guarantee equality of treatment, but not immunity for those within the available pool of manpower.

An exempt person is predetermined to be outside this system. A deferred person is within. We deem this a significant line of demarcation.

Now I do not agree with the statement made by the counsel for petitioner that the deferred individual is outside the pool of manpower. Now I think he is inside the pool of manpower. He is simply postponed when he shall have to either be in the

pool that is immediately inductible under the order of call or if he should for some reason no longer qualify to be in that classification.

And I think that in the case of the exemption, the case of Oestereich, since he was outside the pool, the system simply didn't operate on him. There was no reason for him to comply with the regulations.

Q But is Oestereich had left the divinity school, what would have happened?

A He would have -- the question of permanency does not, I think, put him inside or outside the pool of manpower. I think the question is one of statutory construction. And in Section 6(g) it is an unconditional grant of an exemption to ---

Q Just one more question to help me. The petitioner emphasized the change of the word to "shall" for the student. He shall be put into a -- do they put great emphasis on that?

I think that, Mr. Justice Marshall, referring to the question of whether there is any discretion given to the President to defer students, in the 1967 Act there was no discretion given. It was made mandatory.

The deferment was made mandatory, but the deferment was not made unconditional. And the conditions were subject to such rules and regulations as the President may provide.

In Section 6(g) there is no such condition given and I think this makes a significant distinction between a deferment

and an exemption. I would also submit that there is a logical correlation here between the whole gamut of the regulations and the deferred status of the petition.

Now there are good reasons why all of these regulations exist. The registration itself, the filling in of a classification questionnaire, the carrying of draft cards, all of these things were found to be significant in the United States against O'Brien, when this Court found that the criminal statute against the burning of a draft card, the statute itself stated a legitimate Government purpose.

And I think there is a logical correlation between anybody within the pool of manpower and all of these regulations. I think that it may be admitted that single regulations may not be indispensable, but if the Courts are going to try to get into the business of saying which of the regulations are indispensable and which are not, when we are going to have again the Section 10(b)(3) frustrated, because all of these questions are going to come before the district courts below as to whether the draft boards properly saw a particular regulation as having a logical nexus with the status of an individual who was accelerated.

And I think that this piecemeal determination by the courts of what is and what is not indispensable are logically connected would frustrate the purposes of Section 10(b)(3) and serve no good purpose.

In the Oestereich decision great emphasis was placed on

the action of the draft board being blatantly lawless. And I think that what the Court meant there and what Justice Douglas meant in his decision was that there was no congressional authorization for the delinquency regulations to apply to a man once he was exempt. And that since there was no congressional authorization, any effort to apply them to the individual who was exempt was blatantly lawless.

And again in Gabriel where the Court said that the action would have to flout, in Mr. Justice Douglas's concurring opinion, where the action would have to flout the law by the draft board shows the reluctance of the Court to broaden the rule announced in Oestereich so that 10(b)(3) would apply as the cases of deferments.

I think there are strong policy reasons for eliminating Oestereich, as we have stated in our brief. These are policy reasons underlying 10(b)(3) itself against litigious interruptions of the Selective Service System. In the exempt category are a very few people. There are ministers, there are people under 19, there are veterans, reservists, sole surviving sons and, as was mentioned in the section involving Government officials, including Federal judges and the legislative officers.

But in the deferred status there are a much greater number of people. In 6(h)(1) and (2), involving not only students, but also those deferred for dependency or hardship or occupational problems -- if all of these people were not subject

to the jurisdictional bar of 10(b)(3) of bringing a preinduction injunction, again I believe the 10(b)(3) itself would be so emasculated, the purpose of the statute would be so frustrated that we would virtually rule it out of any effectiveness whatsoever.

And I think that this Court would be better to declare it unconstitutional rather than to effectively frustrate the will of Congress by saying that 10(b)(3) would not apply not only to those who are exempt, but also to those who were deferred. I think that based on these arguments and based on the arguments that the purpose of Congress in enacting Section 10(b)(3) is so clear, to allow the process to continue, to allow the Selective Service process with a minimum of interence to raise an army, to go all the way up to the point where the man is about to be inducted, and where he can raise all the objections that he has.

And at that point the process is essentially over and he can raise the objections to his induction at that point by submitting to criminal prosecution or by agreeing to go into the Army and submitting it on habeus corpus. This is a sound congressional purpose and that it should be in any way further emasculated or diminished by extending its nonapplication to the case of those who are deferred.

Q Under your argument would this man have any relief at all?

A Mr. Justice Black, he would have complete relief.

He would have relief by refusing to submit for induction and subjecting himself, as Mr. Gutknecht did in the case that follows, to a criminal prosecution where he could raise the questions of the constitutionality of the delinquency regulations as he seeks to do here. Or he could submit to induction and raise the question -- all the questions that he is trying to raise here in his habeus corpus case.

There is no facts question involved here. The boards have nothing to determine. As far as the board was concerned, he had clearly violated a regulation. And having violated one, it was clearly within their discretion to apply the delinquency regulations, and they did so.

Q Would it be too late for him now to raise the question about habeus corpus?

A Well, it would not be too late, Mr. Justice Black. I think he would have to wait until he submitted himself for induction. This has not happened yet. He has not even been given an induction notice as yet.

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

You have five minutes, so I think we will continue until it is complete.

REBUTTAL ARGUMENT OF EMANUEL MARGOLIS, ESQ.

ON BEHALF OF PETITIONER

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

Just very briefly on several of the points that were

stated by Mr. Ruckelshaus, I am interested to learn that he concedes that there are elements of punishment in what happened to the petitioner in this case. That is an important confession and I hope the Court will take thatinto consideration. It dovetails with the argument that we have made in our brief as well as the argument on the delinquency regulations, which we have incorporated from the Gutknecht case.

I would like to point out that as far as the Gutknecht case is concerned, it is very different from this in one major respect. Gutknecht was not reclassified punitively, as was the case here, and therefore it is a totally different factual situation. But I don't want to get into that, because the Honorable Members of this Court will be given all the facts in that case tomorrow.

As far as the statements by the Government that there has been no effort to implement the Hershey directive, that there is no evidence of this, this comes as a complete shock to petitioner in light of the fact that the agreed statements on appeal concede that the plaintiff's complaint and lists all of the allegations to that complaint which are crossed out or admitted in terms of the posture of the case, alleges that this action was taken pursuant to the terms of said directive.

The Court of Appeals below had no difficulty at all with that issue and stated in the course of its opinion, and I quote from it: "The majority stated that these actions of the board

were in line with a memorandum and letter, dated, respectively, October 24 and October 26, 1967." So I don't know really how that can be placed in issue at this time.

Furthermore, as far as the pursuit of these kinds of processes or procedures of punitive reclassification pursuant to the Hershey directive, I would call the Court's attention to a yet unpublished series of hearings before the Senate Subcommittee on Administrative Practices and Procedures of the Committee on the Judiciary, which were held before -- or rather on November 3, 1969. They are not as yet published. I have received a copy of the transcript and I would call the Court's attention to the testimony before that committee of former Attorney General Ramsey Clark, who concedes that in practice the kind of process and procedure pursuant to the Hershey memorandum and letter did, in fact, take place.

The policy argument of litigious interruption, I think, is one that really needs to be met. I had intended to meet, except that we are running out of time. But I think this may be the time.

This is something which, of course, is a policy argument that the Government has made throughout, not just in this case, but in prior case and I think it was amply answered not only by Mr. Justice Harlan in his concurring opinion in Oestereich with the reference to it, but it has also been answered particularly well by Judge Bazelon in the case of National Students

Association versus Hershey, in footnote 17 where he points out that in order to really preclude litigious interruption, Congress would in fact have to bar post-induction review as well as pre-induction review by way of defense to a criminal prosecution.

Then a validation made in a post-induction suit would have precisely the same effect as if it were made prior to induction.

Q But it wouldn't interrupt his service, though, would it?

A Your Honor?

Q It wouldn't interrupt his military service?

A No, I think the point -- when reference is made to litigious interruption and the policy is not with reference to interruption of service, but with reference to the interruption of calling men to service, and it has to do with whether with calling men into the Armed Forces.

Now in many of these situations -- I would submit in most of these situations where arguments geared to the law, geared to the procedures, geared to the statutes only are involved and no factual determinations are not involved. Would it not make more sense as a matter of policy to allow these matters to be heard preliminary by a Federal court, whether on a claim for an injunction or a declaratory judgment or both. Let me claim be heard on the basis of oral arguments and briefs at that time and at that point the registrant will know what his legal rights are

and the respondents will know what the legal duties are of the draft board, and certainly there will be no risk to be run by the registrant later in risking an indictment and a prosecution. And if he is wrong, of course he is facing not only the onus of that, but possibly five years in jail and a $10,000 fine.

This litigious interruption argument, I think, bears no real weight when examined carefully, as was suggested by Mr. Justice Harlan and as was suggested in the opinion by Judge Bazelon. And I would trust that the Court would give this the weight that it deserves, which is very little.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Margolis. Thank you, Mr. Ruckelshaus. The case is submitted.

(Whereupon, at 2:37 p.m. the argument in the above-entitled matter was concluded.)