Supreme Court of the United States

October [redacted] TERM, 1969

In the Matter of:

Docket No. 71

DAVID EARL GUTKNECHT,

Petitioner,

vs.

THE UNITED STATES,

Respondents.

Place Washington, D. C.

Date November 20, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

- - -

ENHAM

IN THE SUPREME COURT OF THE UNITED STATES

October TERM 1969

DAVID EARL GUTKNECHT,

Petitioner

vs

No. 71

THE UNITED STATES,

Respondent

Washington, D. C.
November 20, 1969

The above-entitled matter came on for hearing at 10:10 o'clock a.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:

MICHAEL E. TIGAR, ESQ.
School of Law
University of California, L.A.
Los Angeles, California 90024
Counsel for Petitioner

WILLIAM D. RUCKELSHAUS
Assistant Attorney General
Department of Justice
Washington, D. C.
Counsel For Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 71, Gutenecht against the United States.

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

ORAL ARGUMENT BY MICHAEL E. TIGAR, ESQ.

ON BEHALF OF PETITIONER

MR. TIGAR: Mr. Chief Justice and may it please the Court: This case presents a serious question. Here and Oestereich against the Selective Board but not decided in that case of whether the Selective Service System is being used to punish or sanction dissention behavior without due process, without Congressional authorization and under standards so vague and broad as to offend the First Amendment.

There is, in addition here two serious questions. There are here two serious questions concerning criminal procedure in the 9.7 percent of all Federal criminal prosecutions which are represented by Selective Service prosecutions today.

Q You say almost 10 percent of all Federal criminal cases?

A Yes, Mr. Justice Stewart. 9.7, I believe, in the last report.

QThe Petitioner, David Gutknecht, participated in an anti-war, anti-draft demonstration on the 16th of October, 1967, during the course of which he dropped his registration

certificate and notice of classification, along with a mimeographed statement of position on the Vietnam War and conscription, at the feet of a United States Marshal in the Federal Building in Minneapolis.

Eight days later on the 24th of October 196", General Hershey, the Director of the Selective Service System, issued the letter to all local board and Local Board Memorandum Number 85, which are reprinted in Appendix B.

Q What was the Petitioner's classification at that time?

A At that time, Mr. Chief Justice, he was classified 1-A, although he had an appeal pending, which meant that he could not be inducted.

Q Does the record show anything about how long a time is involved in processing appeals in that particular board?

A No, Mr. Chief Justice; it does not. The average time is a meaningless figure; it varies greatly, depending on the workload. Those figures are collected most recently in the Marshall Commission Report, "In Pursuit of Equity."

The local board memorandum and letter urged local boards to use the delinquency power to reclassify and order for priority induction registrants who engaged in illegal demonstrations.

As soon as it could, under the regulations, the Petitioner's board on December 21, 1967 sent him a delinquency notice, reprinted on Page 44 of the appendix. And a week -- a day and Christmas day after that, sent him an order to report for priority induction, taking him out of his statutorily and regulatorily mandated position in the order of call. And ordering him for military service ahead of the time he would otherwise have had to report.

Q Was a subpoena pending from his 1-A classification at this time?

A No. If it had been pending, Mr. Justice Stewart, it would have beenillegal under the regulations. It was not pending.

Q Thank you.

A The Petitioner concededly reported for induction but did not obey the order of the induction center officials relating to his processing. A prosecution for refusal to report for and submit to induction followed, and he is currently under sentenceof four years in prison.

The delinquency regulations, if theCourt please, provide that when a registrant fails to perform any duty, a term given no further definition, under the Act or regulations he may in the unfettered discretion of the board be declared delinquent. If he is deferred or exempt, he may again, with the unfettered discretion of the board be classified in the

class available for service.

If he is already 1-A he is sent to the head of the list for induction. Now, if he is reclassified out of the deferred or exempt status he has a personal appearance before the board at an appeal.

If, like the Petitioner, he is already 1-A, he is entitled to no hearing whatever before the local board, under the regulations, save that hearing which the board in its absolute discretion may choose to give him.

The decision to declare, retain or remit to delinquency status, resides under the regulations with the discretion of the board.

It's our contention, as set forth in our brief, that this kind of administrative sanctioning procedure involving the summary deprival of a benefit or privilege under a regulatory system, knows no parallel in Federal administrative law today. And when coupled with administration under the broad ranging directive that the Director of Selective Service, to have local boards reach out to get at dissention behavior, the regulations have a fearsome, deterrent effect upon the exercise of protective freedoms.

Q How much of your case depends upon whether he did or did not have the right to a hearing at that time?

A Mr. Chief Justice, I would say our case depends not at all upon that point. We do, of course, contend that

the regulations imposed punishment and therefore he was entitled to a judicial trial.

Second, that they impose a sanction at least and he is entitled to due process, an adversary hearing, but even if the Court should decide those questions against us, we believe that Greene and McElroy compels reversal here.

Greene and McElroy, it will be recalled, did not require the Court to reach the constitutional issue; all the Court held was that given our presumption in favor of fairness we would not presume that the Congress authorize an administrative agency to dispense with these fundamental procedural decencies, without an express statement by the Congress and an express statement by the President of an intention to do so.

And if the Court were to adopt that position, which seems to me sensible and supported by the former decisions of the Court, the constitutional issue need not be reached.

However, we do believe thatif the constitutional issue must be reached it should be decided in our favor. These regulations in their purpose, their language, their administration and their effect, are punitive. Even the Government cannot evade this issue.inIn its brief it asserts on the one hand that they are not punitive and in the Appendix to its brief it reprints a letter from General Hershey to Mendel Rivers which makes their punitive intent abundantly

clear.

On Page 81, General Hershey says: "The Selective Service should not be used for punitive purposes." If by that it is meant that one should be inducted into the armed forces as punishment for an offense which is not related to Selective Service, leaving the regulations to be applied in that vast number of Federal offenses which may be found in the interstices ofthe Selective Service Act and regulations.

Indeed, the delinquency regulations are far broader than is necessary to achieve the limited nonpunitive purpose which the Government would ascribe to them. Under the regulations a registrant is presumed to be 1-A unless he supplies the board with information about his status. And perhaps properly so. That compels him to go in there and tell the local board what he's been doing, whether he's entitled to a deferrment or exemption.

A delinquency system which limited local board discretion and which provided that a registrant's classification was to be frozen and he could be frozen in 1-A, for example, and that no request for deferrement would be considered until he started cooperating with the local board in supplying information if again placed under a limited, nondiscretionary, regulatory scheme, might be nonpunitive, but taking the further step of priority induction, illustrates, I think, the punitive purpose which lies at the base of these

regulations.

Q Within that hypothetical you have just given would you say that the regulation so-construed, was authorized by the statute?

A No, Mr. Justice Harlan, we would not. I think that this regulatory scheme finds no authorization whatever in the Selective Service Act. And it ought to be held unauthorized and the President left, if he wishes to, to -- excuse me, I misunderstood your question.

If the regulations were redrafted with the limitation I have just suggested, perhaps this Court could find then, approval under the statute authorized by the President's general rule-making power.

Q That was my question.

A That would be a different case; yes, Mr. Justice Harlan.

The present scheme with posing in local boards this absolute discretion, finds no authorization in the statute and there is no indication that the Congress has ever explicitly and carefully considered it, as it has explicitly and carefully considered every other Federal regulatory scheme that I know of, which involves the imposition of a sanction of this character.

We turn, therefore, to the inhibitory effect of the Hershey directive upon the exercise of protected freedoms.

Q Where did you say that letter was?

A The letter, Mr. Justice Black, appears at Page 81 of the Government's brief. It is a response to a letter from -- to a request from Mendel Rivers for information.

The Government has attempted to evade the free speech issue in this case, in its brief and oral argument yesterday, by denying that it exists. It overscores this by saying that the Petitioner's turning in of his card is not protected conduct. We argue in our brief that it is. But, the Court needn't reach thatissue in order to find a First Amendment fault with the Hershey directive.

The record in this case indicates that the board had before it the following information:

First, a letter from the United States Attorney, reprinted at Pages 42 and 43 of the Appendix, stating that the Petitioner had participated in an anti-war, anti-draft demonstration and turned in his card.

Second, the board had before it the indubitably persuasive words of General Hershey, counseling it to use its broad range of discretionary powers to punish the aim here which the five ay members of the board conceived to be illegal.

And finally, there is the delinquency notice. We have here a case, therefore, in which the directive, the regulatory scheme, the Hershey directive, local board

memorandum supplemented by this very vague system of procedural provisions in the delinquency regulations, is unconstitutional on its face.

And here, as in N.A.A.C.P. and Button; as in Freedman and Maryland; Aptheker against the Secretary of State; it doesn't matter whether the Petitioner's conduct could be reached and punished under a more narrowly drawn regulatory and statutory scheme. The directive, being unconstitutional on its face; the regulations supplementing this chilling effect by their vagueness in the discretion they vest in local boards, requires a reversal of the Petitioner's conviction.

This reading is indeed supported by the only prior Selective Service decision of this Court which is inpoint: Sicurella against the United States. In Sicurella the local board had before it the illegal recommendation by the Department of Justice that the Petitioner's conscientious objector claim be not sustained and the Court held that given the presence, though mistaken recommendation that the conviction had to be reversed because it did not affirmatively appear in the Selective Service file; that the board had disavowed the unlawful and mistaken views of the Department of Justice.

The final point, in which I would address myself in oral argument today, leaving the remainder of our rather technical arguments to our very lengthy brief, is the

variance question.

The Petitioner was indicted, if the Court please, for refusal to report for and submit to, induction. In a part of our brief that I don't propose to argue, we say that that indictment fails to state an offense because it's bad under Rule 7 of the Rules of Criminal Procedure.

But that aside, repeatedly the Petitioner reported; the Government doesn't deny that. He then went to the induction center and when there refused, the record shows, to obey certain orders by induction center officials that he submit to processing. He was never given an opportunity to refuse to submit to induction.

Submitting to induction, as this Court had occasion in Mr. Justice Douglas's opinion to the Court in Billings and Truesdell, to consider at some length is a well-defined, orderly step in the process of selection of men into the armed forces of the United States.

Q What do you say he did if he did not refuse to submit to induction.

A Mr. Chief Justice, there is an offense. There is a duty of a registrant to obey the orders of the induction center officials and the failure to perform that duty can be prosecuted under Section 12-A. We have here, therefore, a case that is on all fours with Stirone against the United States in which the indictment charged a conspiracy respecting the

importation of sand into Pennsylvania and the proof at trial showed a conspiracy involving both the importation of sand and the exportation of steel.

In other words, the proof at trial was quite different fromthe offense with which the Petitioner was charged. And I would say that that is a not inconsiderable problem. Given the large number of these offenses that are being prosecuted in the courts, it devolves upon the Government with an especial burden, I think, to plead with accuracy and above all to present to the grand jury all of the facts so that at the time the charge is made there has been a thorough and full consideration of what it is the defendant should be prosecuted for.

Q Perhaps I didn't make my question clear enough, Mr. Tigar. If the man presents himself at the induction center and, as you say, refuses to take the medical examination or refuses to fill out forms, has he refused to comply with those induction orders?

A He has, Mr. Chief, refused to comply with that part of the induction process that deals with the physical and mental examination.

Q Is that an offense under the statute?

A Yes, it is. It's an offense under the regulations of the statute. 12-A of the Act makes it a crime to refuse to perform any duty under the regulations. The

regulations make it a duty to comply with those orders of induction center officials.

Q Did I understand you to say that he did not refuse tocomply with induction orders which the statute contemplates to make out an offense?

A No, Mr. Chief Justice, that is not my point. My point is that if he committed any offense at all it was the offense of refusing to obey orders that he take physical and mental examination at the induction center. And it was not the offense of which he was indicted; the refusal to submit to induction, which is a very precisely-defined offense in the Selective Service and Army Regulations which this Court had before it in Billings against Truesdell.

Q And was that raised at the trial?

A The variance question?

Q Yes.

A No, Mr. Chief Justice, it was not raised at the trial. The issue arose during the trial and I think from the record in the Court of Appeals that the contention that was focused on was the failure of the indictment to inform the Petitioner of the offense with which he was charged. I think that this question is fairly compassed within that and itis certainly a question upon which certiorari was granted.

Q Is it your position that every destruction or failure to carry a draft card in your possession is an exercise

of First Amendment rights?

A Mr. Chief Justice, the destruction question, I believe, is foreclosed by the Court's decision in O'Brien against the United States. It is our position that under the circumstances of this case in which the surrender of the card was a part of a constitutionally-protected course of conduct, that it was a protected First Amendment activity.

Q That is, assuming that it is surrender -- the act of surrendering falls in that category. Does that mean that the actor is forever, thereafter excused from complying with the requirement to carry his draft card in his possession?

A I would say not, Mr. Chief Justice, although it is a question that had not occurred to me until you asked it. If the board were to send him another card and if his failure to possess it is unrelated to a course of conduct in which he is exercising his First Amendment right of dissent, then I think that would be a different case than the one that we have before us.

Our point there is that there is a difference, as I believe the Court said in O'Brien, between permanently rendering one's certificate unavailable and the abandonment of it. And that there has been by the Government no showing that this conduct by the Petitioner and similar conduct by others across the country has interfered with the operation of the Selective Service System. Thus, we do not have a showing by the

Government that counterveiling interest is paramount, cogent, important, strong or any of the other words which the Court has used in defining the permissible scope of limitations of speech and nonspeech conduct when they are brigaded together.

Q Is it the duty of the board to send somebody another card when it learns that that person's card has been alleged by third parties that that person's card has been lost, or destroyed?

A According to regulations, Mr. Justice Stewart, no statement that the board has such a duty.

Q I suppose a registrant who loses his card through his own negligence or carelessness or because it was stolen or something, that he can apply and get a new one; can't he?

A He can get a new one. The difficulty -- another difficulty with these regulations, of course, is that if the board gets a card which the registrant has lost it has no way of knowing the reason why he's abandoned it and there is no provision under the regulations to give him a hearing. Indeed, in this record the board never had any evidence that the Petitioner surrendered his card. His Selective Certificates aren't even in the file. I don't know where they are. The only evidence the board had was the United States Attorney's letter.

Q Well, that was hearsay evidence but there is no

dispute about what did happen, is there, in this case?

A There is no dispute, no. But I think it underscores one of the dangers in this regulatory scheme, sir.

Q I wonder do they need a regulation of any kind to guide the boards in what to do if , draft card turns up under some lost and found process. Do they need a regulation to tell the board to send that card to the registrant again?

A No, Mr. Chief Justice, I would not say that they would. And if the actions of the board werelimited to sending the card back to the registrant we wouldn't have the case we have.

It's only when the board seeks to use the coming into its office of the card as the predicate for depriving of a benefit conferred by the statute and regulations that a quite serious congressional authorization and due process problem is raised.

Q Would it make a difference in that situation whether the board was aware that there had been a deliberate disposition of the card as compared with an inadvertent loss of the card?

A No, Mr. Chief Justice, it would not make a difference, unless that determination were made after the kind of adversary hearing which this Court has in other cases involving imposition of sanctions regarded as indispensable.

Q Well, do I understand you to be suggesting that

if the card shows up that the board by any process must hold an adversary hearing to determine whether it was lost or deliberately thrown away.

A It is our position that the regulations are invalid for failure to provide such a hearing. Yes, that seems reasonable that if the board is going to take away the registrant's statutory, regulated and mandated position in the manpower pool, that it ought to have some means -- reliable, fair, orderly means for informing itself.

That is our position.

In conclusion I find it quite difficult to state my sense of urgency about this case. Mr. Ruckelshaus perhaps set our theme for us yesterday in brief. There is today a rising tide of protest activity. Much of that activity involves conduct which under this Court's decisions, can clearly be punished.

That is not the issue in this case. The War in Vietnam is not the issue in this case, nor is conscription. The issue is whether, having chosen to fight a war in Vietnam with a conscript army, we ought to tolerate in doing so, departure from the principle that delegations of power are mistrusted when personal liberty is at stake. That no man should be condemned before he's heard. And however outrageous a man's political conduct, it cannot be punished by invoking a system of rules which are vague and overbroad on their face.

I think if we depart from these principles, then these very difficult times the constitutional compact is more thar dishonored, it will have become the cruelest of illusions.

MR. CHIEF JUSTICE BURGER: Mr. Ruckelshaus.

ORAL ARGUMENT BY WILLIAM D. RUCKELSHAUS,

ASSISTANT ATTORNEY GENERAL OF THE U. S.

ON BEHALF OF RESPONDENT

MR. RUCKELSHAUS: Mr. Chief Justice and may it please the Court: I think again today we find ourselves at the outset faced with the same problem that we faced at the outset of the Breen case. And that is that throughout both Breen and Gutknecht, throughout the briefs filed by the Petitioners in both cases and throughout the amicus briefs filed in both cases, there is this overtone or undertone of accusation against the Selective Service System focused in on the Hershey directive, somehow implying that the reason people are being declared -- registrants are being declared delinquent in this country today is because of their protest activities.

Now, I don't happen to believe that that is true. However, even if it is true, it has not been proven in either one of these cases.

Let me give just one fact that was omitted. On December 20th Mr. Gutknecht was declared delinquent. The Hershey directive was issued in October. On December 9th at Page 41 of our brief is reprinted in Breen -- the brief in

Breen is reprinted the joint statement of then Attorney General Ramsey Clark and General Hershey, specifically repudiating the idea that any registrant could be inducted or his induction could be accelerated because of his beliefs; because of any protest activity unrelated to any violation of the delinquency regulation that he engaged in.

In the Court below --

Q I can't find that.

A That's on Page 41 of Breen's brief.

Q Oh, Breen; thank you.

A The boards and the Selective Service System had this directive or had this joint memorandum of General Hershey and then Attorney General Clark before them after they had the Hershey directive before them.

In the Court below on Page 35 of the Appendix, the Court states: "Defendant now claims that he was being unlawfully punished for his political views on the Vietnam War.' And states that the board's punitive action was in violation of his First Amendment rights." This is the Appellate Court speaking.

The District Court, however, found that there was no [illegible] at trial to support Defendant's contention that his delinquency order was based upon his political views. The District Court found that the delinquency order was based upon the Defendant's violation of the regulation that he had the

required cards in his possession at all times. That's what's involved in this case.

Q I thought something different was involved. Certainly we don't sit to pass judgment on whether the large number of protests result in revocation of classification. We weren't only concerned with this man. And I thought the question was whether or not as a matter of procedural due process or statutory requirement, each should be entitled to a hearing on whether or not what the District Court said and the Court of Appeals said is true.

A Mr. Justice Douglas that is certainly part of this case. But what I am attempting todo at the outset is to find narrowly just what is involved here.

Q It seems to me that would be the narrowest one, as a matter of statutory, not the constitutional.

A I think that's correct, Mr. Justice Douglas. They have launched their brief, a rather massive attack on the delinquency regulations themselves, saying that they are not authorized by statute that even if they were authorized the statute is so vague as to be devoid of standards.

Q I spent a lot of timein the Oestereich case reading a brief filed by the Solicitor General and it seemed to me that the attack made by this Petitioner is more massive than the made by the Solicitor General who I see is absent from this particular brief.

A Well, Mr. Justice Douglas, the Solicitor General in his brief in Oestereich suggested that sound arguments could be made along the lines that Petitioner here makes them. I think that if there is any disagreement it would be that I would delete the word "sound." I think an argument can be made along the lines that Petitioner has made them but I don't believe they are sound. In our brief we relate why we believe they are not.

Q I think you're protected by the First Amendment.

A Mr.Chief Justice, and may it please the Court: the Court below decided this question on rather narrow grounds on the validity of the delinquency regulations in acceleration within a class; within the class in this case, 1-A. I think that question is covered in our brief, but I think the overall question of the validity of the delinquency regulations, as far as reclassification is concerned, is what is either going to be before this Court in this case if they decide not to take it on the narrow grounds or will be in some other cases that are pending here on petition for certiorari and for that reason I think this argument can best be had in terms of the broader question.

Q What would happen if in this case the man had had his draft card stolen from him or burned or lost.

A If it were burned without his consent or without his knowledge, I think clearly, Mr. Justice Marshall, that if

this happened and it came to the board's attention and they --

Q Well, suppose it didn't come to the board's attention; the only thing that came to the board's attention was he didn't have his card. Under these regulations is it -- not probable, but is it possible that a board could accelerate him?

A I think it is possible that a board could do so but I think if they did, Mr. Justice Marshall, it would be a clear abuse of their discretion. And if this is what had happened in this case we would not be here in this Court today.

Q Why not?

A Because we would have confessed error prior to coming here.

I think if, under our interpretation of the regulations, if a regulation is violated by inadvertence or by mistake of a registrant and the board attempts to accelerate him under a strict reading of the regulations that this is a clear abuse of discretion on the part of the board; that it is only willful violations on the part of registrants and not only willful, but violations in which the registrant shows no desire to come back into compliance again with the regulations.

Q Was he ever offered a new draft card?

A He was never offered a new draft card, Mr. Justice Marshall.

Q Was it ever suggested that he apply for one?

A But on Page 44 of the Appendix is a copy of the delinquency notice that was sent to Mr. Gutknecht inthis case and in that delinquency notice in paragraph two it says: "You are hereby directed to report to the local board immediately in person or by mail or to take this notice to the local board nearest you for advice as to what you should do.

Now, Mr. Gutknecht did not do that. He says that because five days later he was reclassified, that this, in effect, did not give him the amount of notice that he needed to bring himself back into compliance. If he had tried to get back into compliance by showing a willingness topossess his cards at any time prior to induction or certainly prior to the notice of induction. I think that again, clearly the board would have been abusing its discretion by not permitting him to come back into compliance.

This is consistent with our theory of the delinquency regulations not being punishment, but being remedial in their effect.

Q The regulations don't give any of that protection, it leaves it up to the board.

A Well, I respectfully would state, Mr. Justice --

Q That's the point that worries me is if the authority that the board has is uncontrolled authority.

A Well, the board is given discretion without question under the regulations. But I think, like any

discretionary grant, there is -- there are times when that can be abused. It is our contention that consistent with the analysis of civil contempt inthis case that where someone attempts to bring himself back into compliance with the regulations there is a clear abuse in this Court --

Q In the Breen case I would assume that he couldn't get into Court before that; could he? In your position in the Breen case he couldn't have that litigated.

A In Breen he could bring himself back into compliance by simply agreeing to --

Q I mean when he was classified and got his notice in five days to report he couldn't have litigated that.

A In Breen he has never been given --

Q No, I meant in this case, that he couldn't litigate.

A He has never been given a notice of induction.

Q How can this man in this case test out the discretion of the draft board legally --

A He's doing it in a criminal action in which we are here before this Court, Mr. Justice Marshall.

Q It's the only way he could.

A That's right, under the regulations; under the law; under Section 10(b)(3) this is the vehicle that he can use to test his rights. And that's precisely what he's doing, here in this Court.

As a further example of what I'm saying in Number 623 before this Court now, Troutman against the United States, a confession of error -- a virtual confession of error will be filed by the Justice Department; by the Solicitor General, tomorrow where Mr. Troutman attempted to bring himself back into compliance --

Q But that won't help this man's four years.

A Mr. Justice Marshall, what I am saying is that attempting to focus what Mr. Gutknecht could have done in order to bring himself back into compliance and to focus on the fact that is the draft boards; if the boards themselves do not permit him to come back into compliance, we're prepared to confess error. We're prepared to admit that they have abused their discretion.

And I think that in the regulations themselves where it says -- the board itself may change its mind at any time; in antoher regulation where it says it may open the whole proceeding as to his classification at any time --

Q My real difficulty is that as to whether or not the government confesses error is up to one person: the Attorney General of the United States, his uncontrolled discretion and we have the uncontrolled discretion of the board; controlled only by the uncontrolled discretion of the Attorney General of the United States. Is that your position?

A Mr. Justice Marshall, I don't think that we can

look at a discretionary grant assuming that it is going to be abused. Obviously, with over 4,000 draft boards in this country, there are abuses. I would not stand here and say there weren't, but where abuses are found; where abuses of that discretionary grant to the boards are found there is a process by which those abuses can be set right. And I think that just as any administrative board is given a discretion and where that discretion is abused the person who is wronged has a power and a right to raise that wrong in a court of law and if it comes to the attention of thosewho are meant to enforce the law, then this is the way it works in any case. But the Attorney General will be the last one to admit the abuse of discretion or the Solicitor General in this Court.

I don't see that that's any different in terms of a grant of discretion to the draft boards than it is to any other administrative agency.

Q I only raised it because you said that that's cured the discretion of the draft boards. That's the only reason I raised it.

A I don't think that's the only thing that cures them, Mr. Justice Marshall. I don't think the --

Q Do you think a case like this could cure it?

A Could cure it?

Q Sure.

A Well, he has the right to --

Q To raise it -- you didn't block it you let him raise it, and now it's up here. If that's the way youthink it should be I don't see anything wrong with this position for you to take.

Q Mr. Ruckelshaus, are you saying to us that any registrant -- any draft registrant who loses his card or is otherwise dispossessed of it through inadvertence and nto intent has the key to the solution of the problem by simply getting another card and himself back into compliance at any stage?

A Absolutely, Mr. Chief Justice. This is our position; this is our position that this is clearly what is intended by the regulations themselves when they say that the classification may be reopened at any time without regard to other regulations; that he has the right when he is reclassified tc notice; that he has a right to a hearing; and he has a right to appeal to the State Appeal Board; that these regulations read as a whole clearly draw the analogy between civil contempt that we have drawn and make them remedial.

The question of punishment that Mr. Justice Marshall addressed himself to yesterday, I think is verymuch involved in this case as to whether or not the delinquency regulations themselves amount to punishment and acceleration and that if it does amount to punishment, is it done so without due process or the Fifth Amendment and Sixth Amendment guarantees?

Now, yesterday when I just mentioned in passing your question, Mr. Justice Marshall, about what the punishment question that bothered you that there may be elements of punishment in the delinquency regulations; the counsel jumped with glee in his rebuttal argument that I was willing to admit that there may be elements of punishment, but I think that really it would do this Court a little good to get into the semantical argument of just exactly what amounts to punishment.

It is our position on Page 39 and following of our brief that some of the indicia of legal punishment are present here just as they were outlined in the Kennedy-Mendoza case. Among those indicia that are outlined in that case are the sanctions that are here ultimately involved in affirming a disability. He is going to be restrained if he is in the army.

Secondly, it comes into play only in the finding of cienterre(?). This is in line with our theory that there has to be a willful violation of the regulations and a willful refusal to come back into compliance with the regulations before the board has properly exercised its discretion in declaring someone delinquent.

Thirdly, the behavior to which it applies is already a crime and this is true in this case. It is already a crime, a violation of the regulations. Does it promote one of the traditional aims of punishment in deterrents and retributions

which were named in the Kennedy-Mendoza case. I think that while there are some questions about the deterrents as being only used and only defined in terms of punishment, but there are the deterrent aspects of this.

But there are indicia thatdo not point to punishment as outlined in the Kennedy-Mendoze Induction has not historically been regarded as punishment.

Secondly, whether there is an alternative purpose may be assigned; a nonpenal purpose assigned to the regulations involved. AndI think the delinquency regulations do have an alternative purpose. The purpose of the regulation is, essentially, twofold. It's to induce cooperation with the Selective Service System on the part of all draft eligible men and this is where the civil contempt analogy comes in.

If we are trying to define this in a remedial sense; if we're trying to get cooperation, just as in a civil contempt proceeding if somebody comes back into compliance; if he does what the regulations say, then he will be put back into his prior classification. Otherwise it would be an abuse of discretion.

And in this case the purpose of the regulations was to cure what has happened and not to punish what has happened. And just as in the Troutman case we have confessed error and I think we would be willing to do soin any instance in this Court or in any court where it was shown that an effort was

made to cure the error.

The second purpose of the -- this is a nonpenal purpose -- is the maintenance of the nondelinquent morale of those who do comply withthe regulations. It should not, it seems to me be discouraged by the success of those who do not and for this reason I think there is a goodpurpose of the -- alternative purpose of the statute, but as I said at the beginning, I think to get into an order(?) in this Court about whether this amounted to legal punishment might really cause the Court to miss the point. Because the point inthis case is: why are we talking about punishment? We are talking about punishment in terms of the delinquency regulations to find out whether he has beendeprived of due process or his Fifth and Sixth Amendment rights.

And what is, in this case, the punishment of which Mr. Gutknecht, the Petitioner complains, it is that accelerated induction. This is what he complains of and before he can be inducted in an accelerated matter he has the right to refuse induction just as he did here and thereby submit himself to a criminal prosecution in which the has the full panoply of Fifth and Sixth Amendment rights.

And I think that this is a clear distinction between this case and the case in Mendoza-Martinez where the Court went into the admittedly difficult question of what amounts to punishment and what doesn't. Because Mr. Mendoza was never

given a hearing; he was denationalized; he left the country in order to avoid the draft and having left he was immediately denationalized. He had no right to a hearing to contest that denationalization and there was no way he could bring up a contesting of his rights and the Court there said that that was punishment without the due process of Fifth and Sixth Amendment rights which he should have.

I think we can draw an analogy between what has happened here and a grand jury proceeding. When a man id indicted under a grand jury proceeding he is in a very real sense, punished. He may be put in jail if he's indicted and without bail in a non-bailable offense or bail may be set so high that he can't meet it and he stays there. He has had none of His Fifth or Sixth Amendment rights and probably little due process at that time.

But in this case where the board itself has found him delinquent because he violated one of the regulations, I say the analogy between this and the grand jury is very close.

And secondly, as far as the board hearing itself is concerned if he is given notice of the delinquency itself, the notice that I read right on Page 44 of the Appendix, where it says come in and let us tell you how we can show you how to avoid a further delinquency. In this case -- in my estimation, although it is contested by the Petitioner, if he had asked for a hearing he would have been given one. There is no evidence

that he asked for a hearing in this case because what was there to hear? He had turned in his draft card. They are not going to hear whether he is willing to take them back or not. There is no fact situation for the board to hear. There is a clear regulation which Mr. Gutknecht violated and under that regulation it is within the discretion of the board to apply the delinquency regulations which they did in this case.

Now, again under our theory he would have the right to purge himself from this violation and I think had he shown a desire to do so and the board had refused to let him do it we would have been the first to confess error. But he made no effort to do that and in this case I submit that there is no fact situation with which this Court could focus on to say whether the procedure of due process in the hearing at the board level has been violated.

Now, I submit that the Kennedy-Mendoza analysis is simply not sufficient in this case to determine that what we're talking about is legal punishment. I think there are some differences, but even if you find that the line between punishment and nonpunishment; if you find this falls slightly over the line toward punishment, I thinkthat even if that is true, he has been given at one stage at the end of this process all of his Fifth and Sixth Amendment rights. He has been given the complete due process.

Q That is in this criminal trial, you mean?

A Yes, that's right, Mr. Justice Stewart. This is the statutory framework that the Congress has set up whereby this man can raise his rights and there is no such statutory framework in the Mendoza situation.

The other argument of the Petitioner was in their brief that even if it wasn't punishment we have not provided the procedure of due process thatis necessary. And I think in pointing out that he did receive notice it is our contention that a fair reading of the regulations would be that he could receive a hearing if he so requested. Now, this is a completely speculatory question before this Court because he didn't request a hearing, either before he received the delinquency notice or after he received his reclassification and I don't see how he can be heard to complain here when he has not asked for a hearing.

As far as the variance between the charge and the proof is concerned, I think that it is fairly stated in the brief and I think that question, plus the argument that the affidavit itself or the indictment itself was duplicitous, borders on the frivolous. There are cases cited in our brief which I think clearly point out the questions involved.

Yesterday we discussed the problem of Congressional authorization and I think that in the broad sense that the delinquency regulations are a fair grant to the administrative branch by Congress of an effort to implement what is admittedly

a difficult statute. To implement a Selective Service law in at a time in this country in which many people are opposed to the results that might occur from going into the army but I think that given the policy as set down by the Congress in its Executive Branch that this is a fair way of implementing thatpolicy. And that this Court should affirm the Court below and uphold the delinquency regulations as adopted by the President.

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

Mr. Tigar.

REBUTTAL ARGUMENT BY MICHAEL TIGAR, ESQ.

ON BEHALF OF PETITIONER

MR. TIGAR: Mr. Chief Justice and may it please the Court: If it is the Government's position that these regulations ought to be limited, the President has the powerto limit them by a stroke of the pen. The Selective Service System is exempt from the rule-making requirements of the Administrative Procedure Act and in tomorrow morning's Federal Register the position of the Executive Branch will be made indisputably clear.

But if that is not to be done, then we accept the Government's concession. If willfullness is required and that if a hearing must be given if one is asked for.

And this conviction must therefore be reversed, because there is in this record in the Selective Service file,

which as this Court held in Cox against the United States, is the sole basis of review. No finding of willfulness and there is no showing that the Petitioner was ever offered a hearing.

Q I'm looking at Page 30 of the Appendix which is the opinion of the Court of Appeals, which indicates that there was contained in the Selective Service Board file in this case the information as to the circumstances under which the Petitioner separated himself from the -- from his draft card.

A Yes, Mr. Justice Stewart, there is on Page 42 and 43 that information. Of the Appendix. It consists of a letter from an Assistant United States Attorney, tothe Deputy State Director of the Selective Service System.

It would be our position that that could not be relied upon to establish that there was --

Q Well, all right, but there was information in the record. There was information in the record if this is accurately reproduced here in the Appendix as to the circumstances under which this man and his draft card became separated; isn't that right? Indicating a willful separation on his part as contrasted to a careless or a negligent or accidental one.

A It is true, Mr. Justice Stewart, that there is evidence in the record. If I said there was none, I mispoke myself.

Q I understood you to say that and I just wanted to be sure.

A Yes. I misspoke myself. My position would be and it is that there is not sufficient evidence to warrant a finding by the board of willfulness. And I believe I went on to say that there was no finding by the board of willfulness.

Q Do you think that in the file in the District Court there is an actual basis for a finding of willfulness?

A There is, Mr. Chief Justice, a factual basis there. But the review of the Selective Service decision is on file made by the Selective Service System in the register.

Which brings me to another point here. Mr. Ruckelshaus has said that the criminal trial that the registrant receives is a substitute for the due process hearing which we claim he is entitled to before the agency. But, of course that trial has been the most constricted standard of judicial review of board determinations, particularly an effectual determination of any judicial review; of any administrative action that the Court has had the power to review.

Q And by the same token the standard of proof on the Government is infinitely higher; is it not?

A But only as to the factual issues, Mr. Chief Justice. The issue of whether there is any evidence in the file to support the board's determination has, this Court has held, the character of an issue of law and therefore the

Government does not have the obligation of proof beyond a reasonable doubt with respect to it.

So that there is not that safeguard provided with respects tothe facts presented to the agency.

Q Was Mr.Gutknecht limited in the defense that he was allowed to tender during the trial of this case? And did he put in as defensive matter the First Amendment claim and so on? I gather from reading the Court of Appeals opinion that he was permitted to do so.

A Yes. Those, too, are issues of law which he would be entitled to present.

Q And was entitled to present -- I mean and was allowed to present.

A He was; yes, sir.

Q What is your position if you assume that the record does show that this conduct was willful, the loss of his card?

A Our position then, Mr. Justice Black, is that the regulations are invalid as not having been authorized by Congress. They are nonetheless invalid for failure to provide procedural safeguards and that the Hershey memorandum is an incommutable system of regulation and scheme of regulations which violates the First Amendment on its face.

Q It would be invalid because of what?

A That the regulations here, the delinquency

regulations; the Hershey memorandum and the local board memorandum, taken together on a scheme for regulating dissent, which is unconstitutional on its face.

And that, therefore, because the board acted in reliance upon a part of this scheme the conviction must be reversed.

Q I would understand that argument a great deal better is you were arguing to us that when he received this delinquency notice he had asked for a hearing and had been refused a hearing. But he did not ask; did he?

A Mr. Chief Justice, the regulations do not provide for a hearing. A fair reading of Regulation 1642.14(b) establishes that in a case such as this where the Registrant is already 1-A that the onlyhearing that can be granted reposes in the absolute, unfettered discretion of the local board; second --

Q But that was not tested out by asking for it; was it?

A My response to that would be twofold, Mr. Chief Justice.

First, the delinquency notice, although ti asks the registrant to come into the board, says he can come into any board. The regulations provide that what is to happen to him there is not telling him that he is entitled to a hearing.

And second, that this Court held in McKart against

the United States, he would be excused from failure to exhaust because of the futility of doing so, both against the Selective Service Board 372 Fd.2d 817.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Tigar. Thank you for submission and thank you for your submission, Mr. Ruckelshaus. The case is submitted.

(Whereupon, at 11:05 o'clock a.m. the argument in the above-entitled matter was concluded)