

# Supreme Court of the United States

OCTOBER TERM

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Supreme Court, U. S.  
FEB 5 1970

In the Matter of:

Docket No. 305

-----X  
 UNITED STATES, :  
 Appellant, :  
 vs. :  
 JOHN HEFFRON SISSON, JR., :  
 Appellee. :  
 -----X

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Place Washington, D. C.

Date January 21, 1970 ←

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ORAL ARGUMENT OF:

P A G E

John G. S. Flym, Esq. on behalf of  
Appellee . . . . . 40

REBUTTAL ARGUMENT OF:

Erwin N. Griswold, Solicitor General of the  
United States, on behalf of Appellant . . . . . 67

— — —

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

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UNITED STATES,	)	
	)	
Appellant	)	
	)	
vs	)	No. 305
	)	
JOHN HEFFRON SISSON, JR.,	)	
	)	
Appellee	)	
	)	

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The argument in the above-entitled matter resumed at 10:12 o'clock a.m. on Wednesday, January 21, 1970.

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:

(The same as heretofore noted)

P R O C E E D I N G S

1  
2 MR. CHIEF JUSTICE BURGER: Number 305, the United  
3 States against Sisson. Mr. Flym, you may pick up where you  
4 left off.

5 ORAL ARGUMENT (Continued) BY JOHN G. S. FLYM, ESQ.

6 ON BEHALF OF APPELLEE

7 MR. FLYM: Mr. Chief Justice, and may it please the  
8 Court: I think we left off suggesting that if there were no  
9 Bill of Rights at all, this Court would, nonetheless, be re-  
10 quired by the Constitution as adopted by the framers, by the  
11 State Ratifying Convention as they understood the constitution,  
12 would require this Court, nonetheless, to protect individual  
13 rights of citizens.

14 Q You say as they understood it?

15 A Yes, Your Honor.

16 Q Do you have a particular focus to put that on?

17 A Yes, Your Honor; I do. On pages 98 through 99  
18 of our brief -- I'm sorry, it's pages 100 through 101, we quote  
19 from a statement made by the Rhode Island Ratifying Convention,  
20 which is virtually identical -- I think there are very minor  
21 changes in language -- almost identical to the statements made  
22 by the North Carolina and Virginia Ratifying Conventions; and  
23 the States, that is just a very small portion of the statement  
24 made by the Ratifying Convention.

25 The Ratifying Convention said: --

1 Q Was made by whom?

2 A By the Ratifying Convention of the State of  
3 Rhode Island, Your Honor, almost identical to the statement  
4 made by the Ratifying Convention of the State of North Carolina,  
5 as well as from the State of Virginia.

6 These statements expressly asserted that Ratification  
7 of the Constitution was based on an express understanding that  
8 it did not infringe on the unalienable rights of the individual  
9 citizens.

10 The fourth paragraph, the fourth proposition stated  
11 in that ratifying statement, that: "Religion or the duty that  
12 we owe to our Creator, and the manner of discharging it can be  
13 directed only by reason and conviction and not by force or  
14 violence. Therefore, all men have an equal, natural and in-  
15 alienable right to a free exercise of religion according to the  
16 dictates of conscience, and that no particular religious sect  
17 or society ought to be favored or established by law in pre-  
18 ference to others."

19 Q What page is that on in your brief?

20 A 100 and 101, Your Honor. The bottom of 100  
21 through the top of 101.

22 That statement is virtually identical to the statement  
23 made in the Ratifying Convention of the State of New York,  
24 quoted back at the end of the argument yesterday.

25 Q When did Rhode Island get around to ratifying

1 the Constitution; pretty late in the game, wasn't it?

2 A That's right, Your Honor.

3 Q When?

4 A I'm not sure, but I think among the four  
5 states represented in these statements, I'm perfectly sure that  
6 there would have been no ratification of the constitution but  
7 for the express understanding that these rights were safeguarded.  
8 There was no need for a Bill of Rights to protect religion as  
9 understood by the persons who drafted and who ratified the  
10 constitution; and it's true that a Bill of Rights was sub-  
11 sequently enacted.

12 As Madison explained, and that's quoted at the bottom  
13 of 98 through the top of 99: "Although I know whenever the  
14 great rights of a trial by jury, freedom of the press, liberty  
15 of conscience, coming questioning that body, the invasion of  
16 them is resisted by able advocates, yet their Magna Carta does  
17 not contain any provision for the security of those rights;  
18 respecting which the people of America are most alarmed." --

19 Q Is that the only reference you have?

20 A Oh, I have -- these are just random --

21 Q I mean to this. I don't see anything in here  
22 that would necessarily lead to the conclusion that they thought  
23 a man could get out of going to the Army constitutionally, be-  
24 cause of his religious beliefs.

25 A That's a separate question, Your Honor. That

1 certainly is related and that's why I mentioned it at this  
2 point.

3 I'm simply addressing myself now to the assertion  
4 made by the government that religion does not mean conscience;  
5 and I think that's clearly wrong from the standpoint of his-  
6 tory. I can't understand the government's inclination so to  
7 construe the protection of religion in the Bill of Rights. I  
8 understand why they would like to limit it, but it's flatly  
9 inaccurate as a matter of history; that's just not what they  
10 understood 180 years ago.

11 What we're calling for is not something which we're  
12 destroying orderly government at all. Obviously, what would  
13 be most destructive of orderly government would be if the  
14 constitution were ignored; and we want the constitution en-  
15 forced. And the constitution says certain things about what  
16 powers Congress had and I will come very quickly to that central  
17 question: What powers did Congress receive through the con-  
18 stitution to draft individuals, whether in peace or in war?

19 That's the central issue; obviously the constitution  
20 did not delegate this power to Congress; Congress doesn't have  
21 it. Even if Congress would like to have it, even if Congress  
22 thinks that it is absolutely indispensable in its judgment to  
23 have that, if that power was not conferred by the constitution,  
24 it's perfectly plain they don't have the power.

25 The constitution sets the limits of the power that

1 was in fact, conferred to Congress.

2 Q Is it your idea that anything, any time a man  
3 believes it's wrong to go to war, if he couldn't be conscripted,  
4 that would almost, necessarily, do away with conscription;  
5 wouldn't it?

6 A That is not our proposition, Your Honor. I  
7 think there is a very important distinction between a man who  
8 acts on the basis of conscience, that is, he simply can't obey  
9 the order; that's our man, Sisson, and a man who thinks, well,  
10 it would be a bad policy to go fight a war in Vietnam --

11 Q It would be pretty hard to distinguish between the  
12 two, wouldn't it when you begin to probe their minds?

13 A Yes, Your Honor; but that's a very customary  
14 function in law, that is we're constantly -- the courts -- are  
15 constantly about the business of establishing whether a man  
16 intended to do something or other. It's just awfully hard to  
17 avoid that.

18 Q Well, Counsel, this familiar history is very  
19 interesting, but could you bring it down to the particular case,  
20 if I may put to you again, the question I suggested yesterday;  
21 would his rights of conscience be violated if, in fact, he were  
22 taken and assigned as a security guard at the American Embassy  
23 in Paris for the entire tour of his duties; would his rights of  
24 conscience be invaded?

25 A I think so, Your Honor. That is --



1 Q I thought his objection was to the particular  
2 war being conducted in Vietnam.

3 A Well, in a sense that's true, but --

4 Q Well, is it all military service or just the  
5 War in Vietnam?

6 A Well, it's to military service; that is, he  
7 disobeyed an order. He disobeyed that order on the basis of  
8 his conviction that the order was invalid. At this point I  
9 really don't think that the question is whether his subjective  
10 belief was well-founded. The threshold question is whether  
11 from an objective point of view he was right, whether the order  
12 was valid. Did Congress, in fact, have the power to issue the  
13 order to this man to report for induction; because if Congress  
14 had no such power, simply to induct him into the Army, then the  
15 refusal to obey the order simply is not a criminal act. And  
16 that is independent about what he may have believed about the  
17 Vietnam War or not have believed.

18 Q I have difficulty reconciling the points  
19 as you state them now and his own declarations which, if I  
20 understood this record, were all aimed at military action in  
21 Vietnam. Now, did I misread the record?

22 A I think so, Your Honor. I respectfully  
23 suggest that from the outset, the motion that was filed, the  
24 pretrial motion that was filed in this case, squarely raised,  
25 and the government has so recognized, squarely raised that the

1 initial question raised by the Appellee was simply the power  
2 of the Congress to issue that order to him. He said, "No,  
3 Congress does not have that power." That is, if he had said  
4 nothing about his beliefs.

5 Q Well, I'm making a distinction about what he  
6 said and what you are saying and I can, at least, see a dif-  
7 ference.

8 A Well, I think, Your Honor, that if I under-  
9 stand Your Honor's question, that bears on the issues which  
10 were properly raised. One issue very definitely is the issue  
11 which the District Judge, in fact, based his decision on. That  
12 is: "The right of Johnny Sisson to exercise freely his religion  
13 under the First Amendment.

14 Or, alternatively, the question, the issue whether  
15 the Selective Service Act of 1967 constitutes an establishment  
16 of religion. But, those were just two of the issues raised.  
17 Repeatedly we asserted, and we asserted again in a motion in  
18 arrest of judgment.

19 The threshold question obviously has to be whether the  
20 order issued to Johnny Sisson was invalid. It might have been  
21 invalid for a number of technical reasons. Now, those techni-  
22 cal reasons, technical deficiencies in the order, did not appear  
23 at the trial. If such deficiencies had appeared, in fact, the  
24 case would not be here; certainly not on direct appeal.

25 That is, the only questions presently being raised are

9  
1 questions bearing on the validity, constitutionality of that  
2 order. And the point we repeatedly stress is that Congress  
3 just does not have power to conscript citizens now.

4 Q Is it because -- well, for a variety of  
5 reasons, but what reason in your submission, what particular  
6 reason are you submitting now, that's what I'm not very clear  
7 about.

8 A The particular reason, Your Honor, is that  
9 Congress's power to raise and support armies, which is the  
10 clause upon which the government relies squarely, does not  
11 extend -- it is not an unlimited power.

12 Q Well, all right. And it's limited in what  
13 respect, vis-a-vis this case?

14 A It is limited, first of all, to circumstances  
15 when an emergency exists. I know that is somewhat vague, but  
16 I think that by looking at the historical interpretation of  
17 Congress's power we can derive a very definite meaning as to  
18 what the framers of the constitution understood; what the  
19 Members of the first Congress understood by "the power to raise  
20 and support armies."

21 Q Well, now, you're saying -- I know in your  
22 brief you say a variety of things, but now are you directing  
23 yourself to the argument that Congress has no constitutional  
24 power to enact a Selective Service Act when there is no declared  
25 war, or are you saying it has no power to conscript people into

1 the military when there is the situation going on that is going  
2 on in Southeast Asia, which violates international law. What  
3 point are you arguing now that is what I don't quite get.

4 A I think the most solid point we have is the  
5 fact that Congress has no power to grant in an emergency, which  
6 usually will mean the same thing as no power to grant, absent  
7 a declaration of war. The reason we do not assert that in that  
8 form, that is that Congress can't conscript unless there has  
9 been a declaration of war is that we concede that in a number  
10 of emergencies, even if there were no declaration of war,  
11 Congress would have the power to conscript, because I just  
12 don't believe that Congress is powerless to defend this  
13 country. This country must have the power to survive.

14 Q Well, then you are saying that there is no  
15 power, constitutional power to conscript when there is no  
16 imminent danger of invasion of this country?

17 A I'm not saying that, either, Your Honor.

18 Q I don't understand your argument. I gather  
19 the argument you are making now has nothing to do with Sisson,  
20 as such?

21 A That's right.

22 Q This could be John Smith, who is a religious  
23 or irreligious person who has no particular ideas about Vietnam.  
24 You are talking about general Congressional power.

25 A Yes.

1           One example of an emergency, Your Honor, would be  
2 the civil war. That is, civil war is not a declared war; it  
3 is an insurrection and indeed, Congress did adopt the Con-  
4 scription Act and we're not challenging the power of Congress--

5           Q       Well, what are you challenging?

6           A       We're saying that this war in the presence  
7 circumstances, just doesn't amount to the kind of emergency  
8 that must have been contemplated by the draftsmen of the con-  
9 stitution.

10          Q       You mean because they do not have a right to  
11 conscript in the time of peace; is that the argument you are  
12 making?

13          A       Yes, Your Honor. The time of peace, again, is  
14 somewhat misleading, because that may be thought to mean the  
15 absence of a declaration of war. I think what is at issue is  
16 the existence of an emergency that makes it very, very clear  
17 that Congress has no choice; it must conscript, because if it  
18 doesn't conscript our national security is, in a very immediate  
19 sense, at stake.

20                I don't think there is much ambiguity about what the  
21 power of Congress has meant for the first 150 years of the  
22 existence of this country. Peacetime conscription, as we know,  
23 is very, very recent.

24          Q       Do you deny the power -- you say the Congress  
25 has no constitutional power to conscript from, like universal

1 military training?

2 A Oh, definitely not.

3 Q Definitely yes or no?

4 A Definitely no. I just don't think they have  
5 that power. If that had been even remotely suggested at the  
6 time that the constitution was ratified, absolutely no question  
7 but that the constitution would not have been ratified.

8 Q Mr. Flyn, can you help me with my problem of  
9 getting conscience and legality together?

10 A I'll try, Your Honor. There are several steps  
11 to our argument. We begin with the broadest one and with a  
12 relatively narrow argument based on Johnny Sisson.

13 The first argument is whether Congress has the power  
14 to draft anybody at this time.

15 Q So you put in the same barrel the fact that I  
16 disagree with the legality of an Act of Congress with my con-  
17 science?

18 A No. That has been suggested two or three  
19 times. I hope I can make it very clear that that's not what we  
20 mean. That is, if Congress has the power to draft people in  
21 general then the argument we are now making is not relevant at  
22 all.

23 There would remain a subsequent, different question,  
24 that is, assuming that Congress has the power to draft a gener-  
25 ality of men at this time, are they nonetheless restricted by

1 the individual right of conscience, the right to free exercise  
2 of religion. So that they can't conscript certain classes of  
3 men.

4 Q But, because I disagree, my conscience tells  
5 me I can't abide by that law.

6 A Oh, no. I don't think that that follows at  
7 all. You might disagree on political grounds, on economic  
8 grounds, sociological grounds.

9 Q Well, I have great problem with conscience and  
10 politics.

11 A Well, all I can say, Your Honor, is again I'd  
12 like to quote Madison and well, it was about the time of --

13 Q I am sure you will agree that that argument  
14 can be made by anybody other than Sisson. It don't have to be  
15 Sisson.

16 A It is a difficult problem. The judicial system  
17 is full of very, very difficult problems.

18 Probably no more important questions arise than when an  
19 individual's rights are pitted against the government's power.

20 Q I agree. It's a difficult problem to tell me  
21 how being on duty at the Embassy in Paris is aiding the Vietnam  
22 I have great difficulty with that.

23 A That is not the question at this point, Your  
24 Honor, if you please, Your Honor. The question is not where he  
25 would be assigned right now, the question is --

1 Q The question is that he doesn't want to serve  
2 anyplace in the military? Is that right?

3 A Whether he wants to or not is not the issue;  
4 not the issue. He might want to and nonetheless his refusal  
5 might be justified if there was no power to issue that order.

6 Q Do you think that the Congress does not have  
7 the right to say that this man shall be put in the army and  
8 assigned to his hometown?

9 A That's exactly what we say.

10 Q Then he rejects military service.

11 A No; no. I'm sorry, Your Honor.

12 Q Well, I don't understand the point that got  
13 involved in this case. The Solicitor and everybody, I thought,  
14 understood that this was a case of selective choosing of not  
15 fighting in the Vietnam War.

16 A Your Honor, it got in this case because we  
17 raised it and we stressed it at every point. This is not a new  
18 point on appeal at all.

19 Q Well, so far you haven't come to the issues  
20 discussed by the Solicitor General. You are, so far, making a  
21 much broader argument, as I understand it. You haven't come to  
22 Mr. Sisson yet.

23 A Yes.

24 Q You are telling us that Congress has no con-  
25 stitutional power to compel military service, at least in the



1 absence of a declared war or a "national emergency," whatever  
2 that might be; and you say that there is not now a national  
3 emergency; is that right.

4 You haven't come to Mr. Sisson and his conscience or  
5 lack of it; is that correct?

6 A That's correct, Your Honor.

7 Q Do you feel that we should sustain the judgment  
8 below on other grounds?

9 A I think this Court is charged --

10 Q Well, that's accurately what you are doing?

11 A Yes, it is. That is, there are a number of  
12 grounds which we assert.

13 But, I would simply, as a last comment to Mr. Justice  
14 Marshall's remarks, with respect to the difficulty of ascertain-  
15 ing the meaning of conscience. It is indicated that the drafts-  
16 ment of the constitution had no problem with that. That is,  
17 and I quote from Madison: "The freedom of the press and rights  
18 of conscience, those choicest privileges of the people, are  
19 unguarded in the British Constitution." He

20 He had no question that if there were no Bill of  
21 Rights, man's right of conscience would nonetheless be protected.  
22 You didn't need a Bill of Rights. As a matter of fact, pre-  
23 cisely the argument which the government now makes was the  
24 argument here that if you provided a Bill of Rights then some-  
25 body would say, "Well, that's all you have," but they --

1 Q Did you allege the violation of the Bill of  
2 Rights? Sure you did; didn't you?

3 A I missed that, Your Honor.

4 Q Wasn't the basis of your complaint that to  
5 induct this man would violate his rights protected by the Bill  
6 of Rights?

7 A Yes, sir.

8 Q Now you are abandoning the Bill of Rights?

9 A No, we are not. We made several arguments and  
10 we maintain they are wrong. That is, generally speaking there  
11 are two arguments and the first argument is: What power does  
12 Congress have under the clause which empowers it to raise and  
13 support armies, independently of the First Amendment.

14 Our second argument is whether that power is, in some  
15 specific way, limited by the First Amendment. I am now  
16 addressing myself solely to the first question.

17 Forgetting about the Bill of Rights altogether, what  
18 power did the constitution confer upon Congress to raise and  
19 support armies? I do suggest, respectfully that the history of  
20 the ratification of the constitution, the debates at the con-  
21 stitutional convention, simply do not lend themselves to any  
22 interpretation that would suggest that had then it was thought  
23 that the Federal Government, Congress, could simply reach out  
24 and pluck people up for universal military service.

25 Q Do you say we must read Article I as meaning

1 that the Congress has the power to raise and support armies in  
2 time of war and they were limited to that?

3 A And time of national emergency, Your Honor.

4 Q In time of national emergency. And who's  
5 going to define the national emergency?

6 A Well, certainly Congress.

7 Q Congress?

8 A But, Congress defines it for legislative  
9 purposes.

10 Q Well, what if the individual person being  
11 inducted did not agree that it was a national emergency. Does  
12 he escape service on the grounds of conscience?

13 A Oh, no; no. That is a perfect example to  
14 distinguish the two arguments. That is, as a matter of fact,  
15 that sort of argument has a parallel with what happened during  
16 the War of 1812. That is, the President issued quotas to the  
17 governors of the various states, and the war was thought to be  
18 an unconstitutional war by many governors, particularly in New  
19 England. They simply refused to obey that order. They said,  
20 "We're not going to supply you militia."

21 Now, furthermore, some --

22 Q Who was President then?

23 A The President at that time, Your Honor, was  
24 Madison.

25 Q Madison?

1 A Yes, Your Honor.

2 Q Madison, the man whom you quoted a while ago?

3 A Yes, Your Honor, the man who acted not under  
4 the power to raise and support armies, but rather under the  
5 militia clauses of Article I. That is, the constitution pro-  
6 vides a very, very plain -- it provides for standing armies.  
7 Those were very, very much feared.

8 In addition to standing armies, for instance, the  
9 garrison, the frontier posts against the possibility of hostili-  
10 ties with the invasions. The constitution says, "Well, if you  
11 have an insurrection or if you have an invasion or if you have  
12 a problem with executing the laws, you can call out the state  
13 militia. But calling out the state militia meant something  
14 very specific. It meant you could only call them for three  
15 months in any one year; you could only call them in rotation so  
16 that if you called them in once you couldn't call them in again  
17 until every other able-bodied man and his battalion had been  
18 called. Furthermore, you didn't call them for a specific  
19 length of time, you just called him out for that particular  
20 purpose.

21 If you had a problem with the Indians in one location  
22 you called out the militia and they dealt with the Indians  
23 there and then they went back home to their jobs: farming, and  
24 various other jobs which they had.

25 That was the scheme which the constitution provided.

1 That is, that's the way in which Congress was to deal with  
2 problems of national defense.

3 We are conceding that in addition to what is clearly  
4 provided, in a clear case of national emergency where national  
5 survival is at stake, it's perfectly clear that Congress must  
6 have the power to mobilize every resource. That was contem-  
7 plated. It is not denied; in the constitution, therefore we do  
8 not deny that it must exist by inference. But, when we read  
9 the historical record, without which that clause simply cannot  
10 be read.

11 That is, you just can't read "raise and support  
12 armies," literally. You must understand what they meant by  
13 "raise and support armies."

14 We deal with the historical argument at length in  
15 our brief. I think we have demonstrated very clearly that the  
16 power to conscript was feared; it was not even used in the  
17 revolutionary war, except in very limited circumstances. At  
18 the height of the idealism which motivated the men who were  
19 fighting for the freedom of this country.

20 Q If Congress enacted a resolution declaring the  
21 situation in Vietnam a national emergency, would you then dis-  
22 miss your appeal?

23 A We would have a very, very different case. That  
24 is precisely what we have in mind. That is, a declaration of  
25 war is --

1 Q I did not say a declaration of war.

2 A I understand that, Your Honor. But that would  
3 be one very clear example of a declaration of national emergency.

4 It's one thing to say we really need to do this, and  
5 it's quite another matter to enact the statute which is designed  
6 not simply to meet with national emergencies, but to deal with  
7 peacetime conditions, and to apply it in peacetime, rather than  
8 limiting its application to wartime conditions or national  
9 emergency conditions. It just was beyond anything that any of  
10 the draftsmen or any of the people at the time that the con-  
11 stitution was adopted, that this body of people could simply  
12 reach out and conscript people. If they can do it now, why  
13 couldn't they have done it back then? Why couldn't they simply  
14 conscript one million men; "we're going to have a standing army  
15 of one million men. Furthermore, we're going to induct them;  
16 we're going to conscript them for ten years, because we think we  
17 ought to have a very strong army."

18 It is just inconceivable that that power was granted;  
19 just was not granted.

20 Q Is your central argument against the standing  
21 army on constitutional grounds?

22 A I'm not against the standing army, Your Honor.  
23 A standing army composed of volunteers is precisely --

24 Q I know, but against conscripting a standing  
25 army.

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A Of conscripts; yes, Your Honor.

During the first 150 years of the history of this country, that's precisely what Congress did continuously. It resorted to volunteers. Now, for various reasons of social policy Congress has decided, "Well, we don't trust that scheme."

Q What you're challenging, as I understand it is this Court's first holding that there could be conscription of an army to be used in a time of peace, as well as war.

A That's correct, Your Honor. We concede the power to conscript when you have a genuine national emergency. There just was no power which was --

Q How do you determine whether there was a national emergency?

A Yes, Your Honor. You can determine it in many, many ways.

Q Well, who would decide it finally?

A Well, the final arbiter, with respect to the limits of power which Congress has --

Q Who would decide it?

A Always this Court. That is, I don't think it is --

Q This Court.

A I think ultimately this Court must decide any argument that Congress has exceeded the limits of its power.

1 But, certainly action taken by Congress, unequivocal action,  
2 declaring the existence of an emergency would be very per-  
3 suasive; not necessarily conclusive, but I think we would have  
4 very, very little hope of prevailing if Congress had said,  
5 "Well, we have a national emergency and we absolutely need to  
6 conscript men."

7 But, we don't have that situation at all. For the  
8 last six years there have been studies upon studies as to  
9 whether a voluntary army was feasible, clearly testified time  
10 and time again, both by government persons who are opposed to an  
11 all-volunteer army, as well as by men who preferred the volun-  
12 tary army, that it is feasible.

13 Manpower is available. It just costs money, but  
14 that's the way in which the standing army has been raised for  
15 150 years. And it was never suggested that Congress could  
16 simply say, "Well, we don't think we ought to be spending money  
17 in this way. We aren't going to do it. We'll save money, and  
18 furthermore we think it's democratic. We don't want the  
19 mercenary army."

20 Maybe Congress does think that there are valid  
21 reasons for conscripting men instead of simply having volunteers  
22 to man this standing army in peacetime, but that doesn't change  
23 the power that was delegated to Congress at the time the con-  
24 stitution was adopted.

25 Q Did England have a standing army at the time t.



1 this country was organized?

2 A Standing armies were recognized, Your Honor,  
3 but no Board of Conscripts. Conscription for a standing army as  
4 historical fact, did not even occur until after the Constitution.

5 Q Did they have a standing army or did they have  
6 an army that was called in service from year-to-year or two  
7 years?

8 A Well, I think it was of limited duration. My  
9 recollection is that the standing army in England was, for a  
10 limited period of time. I don't remember exactly, Your Honor.

11 Q It was what?

12 A I don't remember exactly, but it was for a  
13 limited period of time.

14 Q That's right.

15 A But, it was not composed of conscripts; it was  
16 volunteers, entirely, except for beggars; that is, beggars could  
17 be impressed but that was as a form of punishment.

18 Q Well, might that have been the reason they put  
19 into the constitution "the power of Congress to raise armies?"

20 A Well, I think, Your Honor, the historical  
21 record is clear that the "power to raise and support armies,"  
22 is included because a standing army, as feared as it was, and it  
23 was very, very much feared, because the fear was that Congress  
24 would use this standing army to eliminate the powers of states  
25 and to oppress individual citizens in the states.

1 Q They favored a militia?

2 A Oh, absolutely. There are at least five  
3 separate references to militia. That is, you have at least  
4 three clauses in Article I which deal expressly with militia.  
5 And, again, militia were to be called in specified circumstances  
6 only while the emergency lasted.

7 In the Second Amendment, for instance, the Second  
8 Amendment provides that individual citizens have the right to  
9 keep and bear arms because you need a strong militia so that the  
10 state can defend itself.

11 The argument that a standing army was all right was  
12 based repeatedly on the argument that Congress could never  
13 amass a standing army of such power that it could overcome the  
14 powers of states, because they had the militia and the militia  
15 were very, very numerous.

16 Q As I recall it, and my memory may be entirely  
17 wrong, those who insisted on having nothing but a militia, state  
18 militia were defeated at the Constitutional Convention and it  
19 was provided that the Congress could raise armies.

20 A That's absolutely correct, Your Honor. But,  
21 it's important to bear in mind that the concept of a standing  
22 army was agreed to in a very, very limited way. That is, pre-  
23 cisely the opposition which Your Honor noted, that people said,  
24 "Well, you don't need a standing army; we've got our state  
25 militia." The argument was, "Well, are you going to take

1 farmers and post them on garrison posts on the frontiers to  
2 combat the Indians? We need an army, a standing army." But,  
3 what did that mean?

4 The very first Congress enacted a bill. As a matter  
5 of fact, starting at 1789, 1790, 91, 92, 3, 4, 5, there are  
6 separate bills, numerous, dealing with the standing army as well  
7 as with militia, but in quite separate ways.

8 In the standing army that was provided consisted of,  
9 I think, 1,200 men, meant to deal very expressly with the  
10 problem of the frontiers.

11 Q May I remind you, Mr. Flym, you are now using  
12 your rebuttal time.

13 A I'm sorry, Your Honor; I have no rebuttal.

14 Q Excuse me. You were on yesterday; yes. Go  
15 right ahead.

16 A In any event, I really don't think I should  
17 spend more time on this argument.

18 I would like to mention another separate argument that  
19 I simply mentioned in passing. That is that if an all volunteer  
20 army is feasible, Congress just can't pick and choose ways of  
21 raising men and say, "Well, we're not going to spend the money,  
22 so that we will have this money available for the projects.  
23 That is, if they can raise volunteers, they are required to  
24 raise volunteers for this standing army; that was the original  
25 concept.

1           The word "raise armies," is used repeatedly by the  
2 First Congress, by the early Congresses and they specified that  
3 they mean volunteers and they deal with militia entirely  
4 separately. As a matter of fact, in one case they increased  
5 the size of the authorized army, I think, to 5,000 men.  
6 And they said, "We want to make it clear that as soon as this  
7 emergency is over the army is to be disbanded; we don't want  
8 it around; we want that number reduced to 1,500."

9           Now, I won't even touch on the argument that the  
10 power of Congress is further limited so that it can't raise an  
11 army for an illegal war. That's dealt with in our brief and I  
12 think it's much too complex to even begin at this point.

13           I would, if I may, like to turn for the remaining  
14 time to the Solicitor's argument with respect to establishments  
15 issue, as well as the free exercise issue.

16           Incidentally, Mr. Justice Marshall, I checked with the  
17 various authorities on the question bearing on whether we have  
18 an arrest of judgment decision. Moore and -- well, another  
19 authority simply don't indicate that there is anything to be  
20 done after you grant the motion of arrested judgment. You  
21 grant it and that's it.

22           And I checked the records in this Court in the cases  
23 of Bramlet , as well as the case of Green. They are cited at  
24 page 15 of our brief. And I looked at the order entered by the  
25 lower courts in those cases and that's all they say. Motion of

1 arrest of judgment granted. I found no indication that there  
2 is anything else which anyone else thought needed to be done.

3 On the establishment question, it's simply indicated  
4 that on the basis of the Solicitor General's argument, it's  
5 perfectly clear that the Act tends to establish pacificist  
6 religion. That's what the act has intended -- well, it isn't  
7 intended for establishment, but it is intended to protect mem-  
8 bers of pacificist religions.

9 Now, the Solicitor General says, "That's all right;  
10 that's all right, because religion doesn't mean what we say it  
11 means within the First Amendment, and that's because the First  
12 Amendment, somehow can't be used in this way to limit the power  
13 of Congress to raise and support armies.

14 I think that logically it follows from everything I've  
15 said up to now that this isn't true. Historically that is  
16 completely inaccurate.

17 Now, on the free exercise of religion argument there  
18 is an important misconception that must be dealt with. We're not  
19 dealing here with a nonreligious objective -- I mentioned that  
20 yesterday. This man is a nonreligious, in a statutory sense,  
21 conscientious objector. The question is whether he is --

22 Q You say he's a nonreligious, conscientious,  
23 selective objector?

24 A Yes, Your Honor.

25 Now, the question is not whether he can pick and

1 choose his wars, but whether religions, including established  
2 religions, recognize the concept of just wars.

3 I don't think there is any question about the fact  
4 that today, at least, protestant, catholic, jewish, organizations,  
5 the Vatican Council, all have made it perfectly plain that they  
6 think that there are differences between wars. Some wars are  
7 okay and some aren't. Then, as religious organizations, it  
8 just doesn't seem to me that the argument can be made that if  
9 a man objects to a particular war he necessarily has a "politi-  
10 cal" objection as opposed to religious objection. That just  
11 doesn't square with the facts.

12 Again, I think that whether you reach this conclusion  
13 or not, depends on your concept of the power of Congress to  
14 raise and support armies. If you concede that it is being  
15 completely uncontrollable, then it might make sense to apply  
16 a much more restricted notion of what is meant by religious  
17 in the First Amendment insofar as it related to the power of  
18 Congress to raise and support armies. But, I just don't think  
19 there is any support; any historical support for the view that  
20 Congress in 1789 could simply reach out and say, "I'm going to  
21 take you. I know it's peacetime; I know we don't have any wars,  
22 but we've got to have a strong army." There is just absolutely  
23 no support for that view.

24 If there are no questions, I'll submit.

25 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Flym.

1 Mr. Solicitor General.

2 REBUTTAL ARGUMENT BY ERWIN N. GRISWOLD,

3 SOLICITOR GENERAL OF THE UNITED STATES

4 ON BEHALF OF APPELLANT

5 MR. GRISWOLD: May it please the Court: First, with  
6 respect to the jurisdictional question, Mr. Justice Harlan asked  
7 me yesterday about the statute which has been proposed in  
8 Congress. It is referred to in a footnote on pages 15 and  
9 particularly on page 16 of our brief where there is a reference  
10 to the Congressional Record. I have obtained a Xerox copy of  
11 that page of the Congressional Record, and also a copy of the  
12 bill and I will lodge it with the Clerk if that is helpful to  
13 the Court.

14 The proposed statute is as simple and, I think, clear.  
15 It provides -- it supercedes the first seven paragraphs of the  
16 present Section 3731 and would substitute: In a criminal case an  
17 appeal by the United States shall lie to a Court of Appeals  
18 from a judgment or order of a District Court dismissing an  
19 indictment or information or terminating a prosecution in favor  
20 of a defendant as to any one or more counts, except that no  
21 appeal shall lie from a judgment of acquittal. Provided, how-  
22 ever, that when the judgment or order is based solely on a  
23 determination of the invalidity of an Act of Congress the appeal  
24 shall lie directly to the Supreme Court."

25 The direct appeal would only be in the case of the

1     invalidity, not the construction --

2             Q             Do you have any question, Mr. Solicitor  
3     General, about this, the ability of this Court, the power of  
4     this Court to transfer to the Court of Appeals? This case.

5             A             There would be no such provision under this --  
6     yes, I suspect there would be, the provision for transfer would  
7     still --

8             Q             You think would be applicable to this type --

9             A             -- would still stand, because this simply is  
10    a substitute for the first seven paragraphs and the transfer  
11    provisions are in subsequent paragraphs.

12            Q            Under existing law we could do that?

13            A            So that if this Court concluded that no  
14    question of the constitutionality of the statute was involved,  
15    it could transfer it to a Court of Appeals.

16            Now, in addition --

17            Q            Are you talking about the present bill, Mr.  
18    Solicitor General, or the present statute, or --

19            A            The present statute provides for transfer both  
20    ways, from the Court of Appeals to the -- and we have recently  
21    filed a motion for a transfer of a case from this case to a  
22    Court of Appeals, which I regretted having to file, but we find  
23    it very baffling to tell in some cases where the appeal should  
24    lie.

25            I may say that have, in addition, have prepared Xerox



1 copies of all of the pages of the Congressional Record back in  
2 1909 when the Criminal Appeals Act was discussed and I will  
3 lodge that with the Clerk because it might be convenient in  
4 examining the matter.

5 Q Mr. Solicitor, to go back to that statute for  
6 a moment, as you read it, as you see it, the direct appeal to  
7 this Court did not foreclose the application of a transfer  
8 statute, and therefore, the direct appeal is, I take it, simply  
9 to provide expedition in a proper case where important interests  
10 were involved; is that it?

11 A Yes. Where the constitutionality of the Act  
12 of Congress is involved. That's the only section that --

13 Q But, I'm addressing myself just to the reasons,  
14 the Congressional reasons that you've seen for the direct  
15 appeal was because time might well be of the essence in those  
16 cases.

17 A The Department felt and it has been the prac-  
18 tice of Congress elsewhere that when an Act of Congress is held  
19 unconstitutional that is an important question which ought to  
20 come to this Court.

21 Q It might not always involve a great judicial  
22 time, necessarily; would it?

23 A It might not be essentially a great issue, but  
24 holding an Act of Congress unconstitutional is a great issue.

25 Q Without regard to the time factors involved?

1           A           Without regard to the time factors involved,  
2 I believe.

3           Q           Could I ask you, Mr. Solicitor General, suppose  
4 a trial judge makes some findings of fact as a basis for his  
5 order of arresting judgment, facts which weren't stipulated to  
6 or anything else, and suppose that these weren't evident on the  
7 face of the indictment, and so on. And that this couldn't  
8 properly be called an arrest of judgment. What happens then,  
9 in terms of appeal. I suppose it wouldn't, and assume it isn't  
10 a plea in bar or it isn't -- it certainly wouldn't be just a  
11 dismissal of the indictment, since he's made factual findings.

12          A           If it can't be called a motion in arrest of  
13 judgment, then the only basis for appeal would be to cause a  
14 motion in bar where the statute expressly says, "When the  
15 defendant has not been put in jeopardy." Whether it would or  
16 would not be a motion of bar is a point upon which Members of  
17 the Court have been in disagreement.

18          Q           Your position is that he has been placed in  
19 jeopardy in this case.

20          A           My position is that he has been placed in  
21 jeopardy.

22          Q           So that you wouldn't think an appeal would lie  
23 under that --

24          A           And also he would then have to come under from  
25 a decision or judgment setting aside or dismissing any indictment

1 or information or any count thereof where it is based on the  
2 invalidity or construction of the statute.

3 Q Now, does the same sort of fact-finding  
4 vitiate an appeal under that provision like it does in the  
5 arrested judgment?

6 A Mr. Justice, rightly or wrongly, we don't get  
7 to that because we construe that in the light of the legislative  
8 history as also involving the question of whether the defendant  
9 has been put in jeopardy, and if the defendant has been put in  
10 jeopardy, we not only so construe it, but there's a long prac-  
11 tice within the Department of Justice, at least accepted by  
12 this Court to the same effect.

13 Now, if your findings of fact were held, were made  
14 before the empaneling of the jury, for example if the Court  
15 said, "I AM greatly troubled by the validity of the statute in  
16 this case, and I am not sure about the facts, and can we have a  
17 factual hearing at which we'll have evidence and we then find  
18 facts on which he concludes that the statute is unconstitutional,  
19 no jury ever having been empaneled, then I would suppose that  
20 the first clause would apply.

21 Q But if it -- if we disagreed with the govern-  
22 ment here and said that there were fact-finding -- there was a  
23 species of fact-finding here in this case which removes it from  
24 the arrested judgment category, then there just wouldn't be an  
25 appeal anyway?

1           A           Then we are unable to find a basis for juris-  
2           diction of this Court on appeal. If this Court could find it,  
3           we, of course, would accept --

4           Q           Well, if we could not, could it be transferred  
5           to the Court of Appeals?

6           A           I think not, Mr. Justice.

7           Q           In other words, there is no appeal anywhere?

8           A           There would be no appeal anywhere.

9           Q           Well, what do you think the case -- should  
10          happen to the case on that set of assumptions?

11          A           If the Court can prove that it has no juris-  
12          diction the sole basis of the appeal being with respect to the  
13          Court's construction and determination of the constitutionality  
14          of the Act of Congress, then I think the Court should dismiss  
15          the appeal.

16          Q           And what posture does that leave the case?

17          A           That leaves the decision in arrested judgment  
18          outstanding and that means that while that is outstanding and  
19          no one can, either this Court nor the Court of Appeals can  
20          upset it and it would not be possible to proceed further on the  
21          verdict of the jury.

22          Q           Well, would it be possible to vacate the  
23          proceedings below, send it back to the District Court and let  
24          him do what he thinks should be done by way of a new trial or  
25          something else?

1           A           Mr. Justice, with respect, I think not. If  
2 this Court has no jurisdiction, it has no jurisdiction.

3           Q           I realize that.

4           Q           Then you would be carving out, Mr. Solicitor  
5 General -- you would not be, but the consequence of your  
6 position would be -- that there would be carved out a final  
7 decision of a District Judge holding an Act of Congress un-  
8 constitutional, which is unreviewable by anyone.

9           A           Mr. Chief Justice, that was what the law un-  
10 doubtedly was in all respects until 1909 and all that we can say  
11 is that Congress in its great care with respect to double  
12 jeopardy simply has not yet made available an appeal in that  
13 case. We are trying to persuade the Congress to take care of  
14 the problem and I hope we can.

15          Q           I suppose, Mr. Solicitor General, however, if  
16 this Court in some other case, some related case, in some other  
17 case, should express its views and if those views were incon-  
18 sistent with the views reached by Judge Wizansky in this case,  
19 there would be nothing to prevent the government from going to  
20 the District Court and asking, making a motion for a modifica-  
21 tion for the arrest of judgment, would there?

22          A           Well, that's -- we'll keep it in mind, Mr.  
23 Justice. I don't --

24                   (Laughter)

25                   I don't know whether it would be good policy or not.

1 I don't know --

2 Q Well, wouldn't you be up against at least the  
3 problem whether even that wouldn't constitute a violation of  
4 double jeopardy?

5 A That would, of course, be a problem, but off-  
6 hand it seems to me it is answerable. For example, suppose  
7 there had been a petition for rehearing filed before Judge  
8 Wizansky the next day. One reason I'm hesitant is I'm not  
9 familiar with what the rule provisions are as to the time and  
10 there might come a time when it would be said that that was  
11 final and amounted to an acquittal and it was in form, an  
12 acquittal.

13 Q We certainly have enough jurisdiction to de-  
14 cide whether we have jurisdiction or not?

15 A Yes, Mr. Justice, the Court has decided that  
16 it has jurisdiction --

17 Q Now, the next question I'm putting to you is  
18 assuming that much jurisdiction, at least, and assuming on the  
19 underlying question that the conclusion is that there is no  
20 direct review up here. Does that limited jurisdiction that we  
21 have, give us the power under 2106 to send the case back to the  
22 District Court which gives us general power to make --

23 A Mr. Justice I would think that if you concluded  
24 that you had no jurisdiction the case has never left the  
25 District Court and you would not have power to send it back

1 with any directions or instructions of any kind.

2           There is a suggestion here in the argument today that  
3 Sisson's objection was not a selected one. On that, I would  
4 simply refer to page 151 of the appendix, Sisson's testimony,  
5 which the government accepts as part of the agreed statement of  
6 facts here. "I refuse induction because I believe the war in  
7 Vietnam, that is, the United States war-making in Vietnam to be  
8 wrong." He then went on and said, "Therefore, I felt that by  
9 accepting induction that even though I might not be sent to  
10 Vietnam, I would be consenting to the government's waging of  
11 war in Vietnam and I believe this is my duty not to consent  
12 with that action because I did not consent in my own mind."

13           With respect to the power of Congress to impose a  
14 peacetime military service, I was fortunate enough to grow up in a  
15 country which did not have conscription and I suppose I regarded  
16 that as something which would last for all time. It would be  
17 fine if we could get to that situation. I would point out,  
18 though, that Congress enacted the modern conscription laws in  
19 1940 which was technically, a time of peace, actually a time of  
20 peace in this country. But the problem of reenacting that  
21 statute in 1941 also came up in a time of peace in this country  
22 and it would be rather surprising if it should now be held that  
23 Congress has no power to pass those statutes.

24           Let me conclude by simply saying that our professional,  
25 historian friends are rather skeptical of lawyers' history.

1 They refer to it as "law apples history" and regard it as, to  
2 use the appropriate word: as highly selective. C. V. Wedgewood,  
3 the noted historian wrote one time: "We know the end before we  
4 consider the beginning and we can never wholly recapture what  
5 it was to know the beginning only."

6 And our submission here is that the Court should not  
7 find in history something that surely was not there. Our  
8 predecessors were sensitive to the First Amendment, but the  
9 founders accepted exemption from military service for members  
10 of the peace churches without any question and this was accepted  
11 explicitly in the Acts of Congress for 130 years, right through  
12 the First World War.

13 It would be odd, indeed, if the invalidity of this  
14 unbroken practice was now discovered for the first time in 180  
15 years after the adoption of the Bill of Rights.

16 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor  
17 General, for your submission. Thank you, Mr. Flym, and the  
18 case is submitted.

19 (Whereupon, at 11:06 o'clock a.m. the argument in the  
20 above-entitled matter was concluded)