Supreme Court of the United States

October Term, 19 69

In the Matter of:

DANIEL JAY SCHACHT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Docket No. 628

Place Washington, D. C.

Date March 31, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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Washington, D. C.
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The above-entitled matter came on for argument at 11:39 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:

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Counsel for Petitioner

ERWIN N. GRISWOLD, Esq.
Solicitor General
Department of Justice
Washington, D. C. 20530
Counsel for Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear 628, Schacht against the United States.

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

ARGUMENT OF DAVID H. BERG, ESQ.

ON BEHALF OF PETITIONER

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

Petitioner's case arises out of his conviction under Title VXIII, U. S. Code 702, which prohibits in pertinent part the unauthorized wearing of distinctive parts of Armed Forces uniform or parts similar to distinctive parts of the Armed Forces uniform.

The appendix to our brief sets out the statutes in total. The conduct that the defendant at the trial below engaged in was taking part in a Vietnamese protest. The protest took place in front of the Army Induction Center in Houston, Texas, on December 4, 1967. Petitioner was wearing as part of the protest parts of a military uniform.

His part in the protest was to squirt a watergun filled with red ink to someone dressed as the Viet Cong. The Viet Cong would fall, he would run shouting "Be an able American," and they would shoot the Viet Cong and say, "My God, this is a pregnant woman."

After his performance a few hours later he was arrested, tried and convicted on the charge that I set out before. His

sentence was six months to be served and a $250 fine.

The case was appealed to the Fifth Circuit Court of Appeals, which affirmed the conviction, and the Supreme Court granted first on December 15, 1969.

Q Has he served his present sentence?

A No, sir, he has not.

Q He hasn't served any part of it?

A Well, inadvertently he did. The petition was filed out of time. He was committed for three weeks. We lodged a motion for leave to submit out of time. It was granted and he was released.

It is our contention that Danny Schacht engaged in symbolic speech by wearing parts of a military uniform during the skit. We feel that the Court's first inquiry must be made on the basis of the holding of the O'Brien decision, draft card burning case. That case held, if we understand it correctly, that there are certain areas of freedom of speech which the Government may inpinge upon if there is a clear, compelling interest of the Government to be protected by the regulation it seeks to enforce.

It is our contention in this case that there is no compelling governmental interest in regulating the wearing of distinctive parts or parts similar to distinctive parts of Armed Forces uniforms.

Q I notice, counsel, that you describe this in your factual statement as a demonstration in front of the recruiting

headquarters or some such thing. You do not make a claim that this is a theatrical production?

A Your Honor, we do make that claim. We make the claim that he is entitled to a submission on this question. I did not characterize it entirely. It was a skit rehearsed the day before.

Q Then you are describing it as a demonstration and was not intended to preclude your claim in your brief.

A No.

Q I wondered if you were changing your ---

A As if it were a play within a play.

Q Well, I take it if you are right on that ground, we don't have any constitutional question.

A Yes, Your Honor, we still reach a constitutional question.

Q He told the jury that if they found it was within the statutory exception, that they should acquit him.

A Yes, and incidentally that charge was submitted by the Government's attorney.

Q Yes, so you did get the benefit of that instruction

A Yes, we did at the trial.

Q Rightly or wrongly.

A Yes, sir.

Q You say rightly and the Government says wrongly, although you are not telling us it was at the Government's expense

A That is correct.

Q I'm sorry, I still don't follow you. If you are right that you are within the exception under the statutes, then I don't understand you. Why would it be a constitutional question?

A Because the statutory scheme created by the exception itself is unconstitutional. We feel that the Government -- by that I mean that the constitutional scheme is one which --

Q Yes, but this is a prosecution for violating a statute?

A Yes, sir.

Q And it is a statute that says there can't be any prosecution if you fall within an exception, isn't that right?

A Yes, sir.

Q And if you fall within the exception, why isn't that the end of the case? You could not be prosecuted or convicted.

A Well, in this instance he was given a submission on that issue. The jury, nontheless, found him guilty and we say that the entire statute is unconstitutional.

Q Then you are up against a jury finding that you are not within the exception?

A No, sir. That we cannot tell from the case either.

Q But you did have the general verdict that you cannot identify.

A That's correct. We don't know why this man was convicted. We don't know whether he was in a play or was in a play that was discredited.

Q Yes, well ----

A Someone wearing distinctive parties, and if that be the case, we feel that part of the exception is clearly unconstitutional.

Q Well, I gather the facts are not in dispute, are they?

A No, sir.

Q Suppose that we were to feel thaton the basis that there was no issue for the jury.

A If there is no issue for the jury on the basis of the facts as to the exception, then we still have to deal with whether or not there is a compelling interest.

Q You are anxious to get a constitutional proceeding out of this.

A Yes.

Q You are not as concerned to get your fellow off.

A Yes, sir, we feel that a constitutional decision would get him off.

Q That would be nice, but if we can decide that it comes within the exception, that is the end of the case, isn't it? Your nam is off.

A Your Honor, if the facts of the case clearly

indicate that he fell within the exception, we have no way of knowing still whether or not that exception is ---

Q I know, but if that says it should not have gone to the jury and the conviction, therefore, should be set aside, that is the end of the case, isn't it?

A It did go -- unless I misunderstand it, sir, it did go to the jury.

Under the holding of the O'Brien decision it is our contention whether or not he is entitled to an instruction on the statutory -- exception to the main statute, the Government has exhibited no compelling interest in controlling whether or not one may wear distinctive parts of an Armed Forces uniform or parts similar to distinctive parts.

Q When -- I am sorry to interrupt you again.

A Yes, sir.

Q When you told my brother Brennan that there was no substantial dispute to the facts in this case, does that mean you do concede that your client was wearing the uniform or distinctive part thereof of any the Armed Forces of the United States?

A Mr. Justice Stewart, I would concede only that he had on parts of a military uniform, but would not characterize it as distinctive.

Q Well, it has to be. As I read it, it has to be the uniform, which I suppose would mean the complete uniform or a distinctive part thereof. Isn't that what this statute says?

A Yes, sir.

Q And do you or don't you concede that the ---

A Well, one of the questions we raised, sir, is that we don't know what the word "distinctive part" means, and we don't know whether ---

Q I suppose khaki-colored socks, for instance, would not be a distinctive part of the Army uniform, although soldiers do wear khaki-colored socks ---

A Yes.

Q --- or a handkerchief or maybe an undershort, or underwear, I wouldn't know, or tan shoes.

A Excuse me, sir. It doesn't really matter to us if we want to characterize it as having worn the distinctive part. Our point, we feel, is still the same.

Q I am not sure that I understand whether I understand you and I am not sure that I understand whether you do or whether you don't concede that the dress, the garb in which the petitioner was dressed at this time was within the statutory definition.

A Well, if I understand the question correctly, the question is whether or not the fact was in dispute that he was wearing a distinctive part of the uniform..

Q The uniform or a distinctive part there. That is what the statute says, and if he was not, of course he wasn't covered by this statute at all.

A All right, and it is our contention that is one of the problems of the statute. We have no way of telling whether or not he was wearing a distinctive part. If he wasn't, then he is not guilty, to begin with. If he was, then we still have problems with the statute.

Q The jury must have found that he was. They did not find he was wearing a complete uniform, did they?

A Your Honor, from the verdict that was returned, we can only assume that ---

Q There wasn't any evidence at all that he was wearing an entire uniform?

A No. But we don't know that they did not convict him on the ground that he was wearing a part similar to a distinctive part.

Q They at least found that he was wearing a distinctive part.

A That's right.

Q That was the order of distinction.

Q Do you know ---

Q In order to convict him, do you have to define that?

A Yes, sir. That would be the prerequisite finding.

Q What did the evidence show he was wearing?

A An eagle insignia turned upside down.

Q A what?

A An eagle insignia turned upside down with an obsolete World War II hat, a blouse, some buttons and a green pair of ---

Q What kind of blouse?

A An Army blouse, buttons on the blouse.

Q What kind of buttons?

A Military buttons on the blouse, and the khakis, as I remember, were not military issue, and some civilian boots.

Q And his eagle -- the eagle turned upside down, that is the ---

A Spread eagle, yes, sir.

Q -- on the commissioned officer's cap of the United States Army?

A The spread eagle, yes, sir.

Q Is it that kind of an eagle?

A Yes, sir.

The Government would seek to tell us to justify the imposition or impingement of Danny Schacht's First Amendment rights, the right to wear these parts of the uniform on the basis the Government has some sort of overwhelming interest in regulating this wearing.

It is our contention from the facts at file that the Government, in fact, sells to jobbers all over the nation the parts of the uniform which later end up in the hands of the people who wear it.

This Court might take note of the fact that the Army jacket is worn by many people, the Army raincoat, parts that look similar to parts of an Army uniform are widespread worn by young people, especially by young people, and if the interest in regulating this wearing were so overwhelming that it would appear to us that the Government would not sell on a wholesale basis to jobbers across the nation.

If there is a Government interest in the distinctive wearing, they simply have not sought to assert that interest. We have been unable to find very many cases under the statutes where convictions have occurred under 18702. There are, in fact, four since 1940, and I believe the statute in one form or another has been on the books since 1916.

Q What should we draw from that? That the Government has been negligent in enforcing this statute or what is your point?

A My point appears to be that there is some evidence that the Government is not interested in enforcing this statute.

Q Oh, what should the Court do about that when it gets a case where they are interested in enforcing it?

A In this particular case, we feel it is evidence of the Government's lack of compelling interest in regulating the wearing and, therefore, impinging his constitutional rights.

Q Is there -- I suppose there is. Do you know if there is other Federal legislation making it a criminal offense

to impersonate an officer or enlisted man of the Army?

A Yes, sir, I read the statute ---

Q There is.

A There is, yes, sir. And that would be our point, that this kind of protection could be guarded for the Government by a more narrowing drawn statute.

Q And you say there is such more narrowly drawn statute.

A I believe there is a penalty for impersonating an officer, very definitely, for making a meal-ticket of a uniform in one way or another.

I raise briefly the question of the vagueness of the statute. We feel that if the Court should find that if there is some compelling interest in regulating the wearing of distinctive parts of the uniform, that there is still a question under the statute 18702 as to what "authority authorized" means under the statute, to whom does one turn for authority and the concomitant question under what conditions the authority will be granted.

And we don't know what "similar to distinctive parts" means. It is hard to tell that that would apply to a woman wearin a khaki dress with epaulettes on it.

At the trial Denny sought to rely on 10 U.S.C. 772(f), exception to the statute in the main. The Government says that he is not entitled to a submission on this issue. We say that he was. We say that even if we accepted the Government's definitio

of what a theatrical production is, he may still be entitled to the submission of the issue.

The trial judge, the U. S. district attorney and the Fifth Circuit Court of Appeals saw no problems with the submissio of this issue. At the very minimum, we feel the issue was raised by the facts at the trial.

Q Is there any indication in the record as to where he acquired these clothes?

A No, sir, there is not.

Q There is not.

Q Going back to your point for a moment about the compelling interest, I don't recall in the last -- there may have been some -- but I don't recall in the last 14 years any frequency of prosecutions for impersonating a Federal agent. Would you draw from that that the Federal Government has lost its interest in prosecuting people for impersonating Federal agents, or perhaps would another inference be that there have not been very many people doing it?

A Yes, of course, that inference could be drawn, but we say that doesn't preclude us from the other inference that the Government simply has, because of the widespread wearing of the parts of the uniform, that the Government has lost its interest in enforcing the statute.

Q What do we have in this record of the widespread use?

A Your Honor, we have the evidence that it is sold on the basis throughout the nation to whomever walks in a store and we the Court to take judicial notice.

Q With the military insignia and buttons on it?

A Yes, Your Honor.

Q Or are they removed before the sale?

A There is nothing in the evidence to indicate which way. We feel that that wouldn't be a question, because one could still fall within the proscription of the statutes about wearing parts that are distinctive parts of the uniform.

This is, of course, the first time -- the point I had raised before as to the constitutionality of -- I would like to raise the question as to the constitutionality of the statute under which the defendant was forced. If it can be agreed that he was entitled to at least to an interest to a submission to the jury on the issue, then we must deal with the exception, which says that one may wear distinctive parts in a play, so long as that portrayal does not discredit the Armed Force portrayed.

We feel that the words "tend to discredit" are unconstitutional, on two and possibly on three ways. One, there is a grant of power of privilege to act in a play under the statute. And then it is unconstitutionally conditioned on the substance of what is in the play.

We feel, secondly, that the play itself, that one engaged in criticism of the Government is constitutionally

protected and, thus, the net effect of this portion of the exception of the statute is to kill First Amendment freedom. One really doesn't know exactly what he can say or what he can do under the exception.

Finally, of course, we don't understand what the words "tend to discredit" mean anyway. "Tend to discredit" is possibly the vaguest words that could be with words "are being prohibited."

We are left, then, if we can accept the exception to the exception of being unconstitutional, we are left simply with 18 U.S.C. 702, an exception which says that one may wear these parts in a play.

And what does this leave us with? We are left with the question of what "theatrical/motion picture production" actually means. The only way to be certain in this area is to go ahead and appear in what you think is the motion picture or theatrical production and see if you brought to trial if you are wearing, as in Danny's case, parts of an Armed Forces uniform.

The vagueness contained therein is in relation to the Fifth and First Amendments. It kills First Amendment rights. Actually, what it does is grant a license to whomever is in charge of bringing charges. It gives a license to officials of Government to bring charges in cases where he doesn't agree with what is being said in a play. And he can use the vagueness of the word "production" to justify the imposition of this charge.

We touched briefly before on consideration of the verdict

itself, the general verdict.

The first consideration is whether or not we can tell under the exception itself, if we can agree that the exception should have been submitted, why petitioner was convicted. He was either convicted because, first, he was wearing part of the uniform. And, secondly, because he was either in a play that discredited, in which case we feel he should have been acquited, or he was not in a play at all, in which case we feel the holding of the Street case would at least compel a reversal on this one.

Q Mr. Berg, do you know any of the legislative history of this statute, of this legislation?

A Your Honor, it was enacted in 1916 with -- and we were unable to obtain any of the history at that time.

Q During World War I.

A Yes. It was revised in 1940 and then in 1956. In 1940 was ---

Q Any history relevant that you could find?

A The only history that I have seen was in testimony that was introduced by the Government in its brief, which said that there was no intention to substantively change the law.

If this Court were to find that the statute is constitutional on its face, that petitioner Schacht was, in fact, not entitled to a submission on the issue, that it was applied on the basis of constitutional law to him and by virtue of the acts that he performed, we still say that the application of this law

to Schacht denied him certain fundamental freedom of speech.

There is evidence of widespread wearing of the uniform. There is evidence and we ask the Court again to take judicial notice that actors constantly not only discredit but ridicule the Armed Forces that they seek to portray.

Dr. Strangelove is a good example of that. We again point to the fact of lack of prosecution under the statute. The fact that Danny Schacht was strangely taking parts in a protest against the war in Vietnam, and the law was suddenly applied to him. We ask the Court to read the record and check the vindictiveness of the U. S. district attorney's closing argument.

(Whereupon, at 12:00 Noon the argument in the above-entitled matter recessed, to reconvene at 1:00 p.m. the same day.)

(The argument in the above-entitled matter resumed at 1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Berg, you may proceed.

ARGUMENT OF DAVID H. BERG, ESQ. (resumed)

ON BEHALF OF PETITIONER

MR. BERG: Thank you.

Mr. Chief Justice, may it please the Court:

Mr. Justice Brennan, I would address myself to the question you initially asked me. I did not understand the question as well as I should have.

Of course, if this Court were to find as a matter of law that the defendant was entitled to the defense, then we would be very happy with it. The point that I wanted to make was that our defendant at the trial admitted that he intended to discredit the uniform he was wearing.

Q If he didn't know what "discredit" meant, how could he know that?

A Well, that of course is the point as to whether or he was entitled to submission, but at least he admitted that point, and my point was that I would ask the Court to find that that part was unconstitutional.

If, in the fact, the Court does find the words "tend to discredit" are unconstitutional, again we are left with Title XVIII, which grants an exception in instances of plays in which one is wearing distinctive parts of the uniform. There are pages

and pages and pages in the transcript which exemplify the the prosecuting attorney, the defense lawyer and the judge's confusion over what "production" means. Nobody knows exactly what it means within the framework of the statute and they finally decided on the Wester Dictionary definition.

Of course, if this kind of confusion exists for lawyers and for the judge and the trial, think of the burden it imposes on anyone trying to make a good-faith effort to ascertain under the statute whether or not he is going to be in a motion picture or a theatrical production.

We say the statute fails for this reason. This presents a chilling on First Amendment rights. One must accept that and just fail to exercise the right to free speech to act in play if you don't know whether or not it is accepted under the statutes. But more important to us, it presents an opportunity to any Government official who has the opportunity to bring charges under the statute based on what he feels is a violation of the act, and in cases where he does not feel that the production can be proved by the defendant.

What this means to us is that the defendant Schacht was tried under a statute that is seldom used. Although there is widespread disuse -- or widespread wearing of distinctive parts of the uniform or parts similar, he wore it in a part of the country in which dissent is not very popular.

We feel that the law was unconstitutionally applied to

him for the sole purpose of punishing his participation in the anti-Vietnam War skit. There are record references which support this contention, very short.

The prosecuting attorney at 209 says, "If the Court please, in our original charge we found with the Court we did provide a separate charge. We feel the defendants are entitled to a charge with respect to the defense." And if I may present this to the Court now.

Mr. Bognell, the defense attorney, says, "Excuse me, you have the word 'betrayal.' We are getting kind of bad, aren't we, instead of 'portrayal'."

Mr. Case, the prosecuting attorney, says, "Excuse me, we have a portrayal." The Court, some people might view it as a betrayal. What about the definition of those terms.

In the closing argument at 382, Mr. Hartman for the U. S. Government, in indicating the viewpoint of this office about this sort of thing that Danny engaged in, "if it please the Court, ladies and gentlemen, the only thing, I gather, with the argument of these defendants is they are displeased with the Government and the war.

"But I have a simple answer to that. There is a plane and a boat leaving two or three times a day for other parts of the world. I could probably name you gentlemen the place to go. You can leave any time if you don't like it."

At 384 he says, if he, referring to the defendant, "comes

to my house and expresses himself like this, he will not be able to walk into this courtroom and be tried again.

"I say to you there are many others like them. I don't want to rub shoulders with these two, do you?"

We say that this is clear evidence that what we have here is not a case involving simply wearing of distinctive parts of the uniform. This case involves suppression of my client's rights of free speech.

Q The words you were quoting were spoken by whom when?

A The prosecuting attorney in the closing argument.

Q The closing argument?

A And prior to that one of the prosecuting attorneys submitting the charge. It indicates to us the attitude toward what Danny did, to what he said in that, at least in the Southern District of Texas.

In conclusion, we would say, having addressed ourselves, we believe, to the legal questions involved in this case, that there is a question of social concern here. We feel that the imposition of this sentence on Danny Schacht represents a certain breach of faith with young people attempting to protest certain things that they feel must be rectified, which are wrong.

This Court has a perfect opportunity to rectify that situation and to correct a breach of faith that was promulgated not on the fact that Danny Schacht was wearing parts of the

uniform, but on the fact Danny Schacht dared to engage in a skit against the war in Vietnam.

Q Was there any violence connect with this?

A None whatsoever, no, sir.

Q Threats or anything?

A No, sir. There was no contention anywhere in the record that there was anything but a peaceful and orderly demonstration.

Q Mr. Berg, with respect to the jurisdictional questio are you going to rest on your brief?

A I would address myself to that point briefly, Your Honor. We feel that the jurisdictional question, as we understand it, raised by the Government is answered in the delegation of power to this Court was unrestricted. The restriction was placed on it by itself.

The Court, in effect, said, we will place the restriction of 30 days and the power to make that rule being unrestricted we feel this Court has a right to abrogate that rule. Further, there is another contention in the -- I hope I am understanding if correctly.

There is another contention in the Government's brief that in the cases where this Court has waived the rule and I think specifically the Heflin case, the Government did not submit a brief and, therefore, it is not bound by its holding.

As we understand its contention, we feel it should fail

in that it is the business of the Court to raise the question of jurisdiction itself. Having considered that point, we do not see any difference whether the full submission was made by the Government or not.

Q You don't see any difference between a delay of under 90 days and one of over 90 days?

A We will rest on our brief on that.

Q It is a distinction made by Government, you know.

A As I understood it, the distinction by the Government, it was that there were statutes which prohibit a granting of cert after 90 days.

Q That is the outside limit of any statutory length of time, and that the power of the Court is only to shorten the time within that 90 days. That is their submission, isn't it?

A Yes, it is.

Q Does the record show why this delay occurred?

A Yes, it does, Your Honor. There was a submission. We submitted, of course, the motion for leave to file out of time and along with it a transcript of a short hearing to ascertai exactly why the brief was not filed on time.

I can tell you some of the testimony that was adduced at that time that ---

Q That's all right. It is in the record?

A Yes, sir. You said to go on?

The point of that hearing, that small hearing, was that

the defendant and his attorney at the time, an ACLU lawyer, apparently just had a breakdown in communications and let the time go by without obtaining the money for the filing of the transcript.

Q In other words, the essence of it is it was negligence of counsel, is that what you are suggesting?

A Yes.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ARGUMENT OF ERWIN N. GRISWOLD, ESQ.

ON BEHALF OF RESPONDENT

MR. GRISWOLD: May it please the Court:

I will direct myself first to the jurisdictional question, which has been raised in the Government's brief. And when I first came to my present office some time ago, I was surprised to find occasional briefs coming across my desk in which it said the petition was filed out of time. Nevertheless, there is no reason for granting certiorari and then going on to argue the question of certiorari.

I raised the question with my associates and they said, "Oh, it is not jurisdictional." I was puzzled by that, but there are a lot of things that I find puzzling and we don't always answers to. I went along and noticed those cases continuing until this case came, when the Court granted certiorari 131 days after the judgment of the court below.

I couldn't see any reason why if they could grant it 131 days, it could not be granted 1,131 days or at any time, and I asked my associate, Mr. Connally, to look into it and we dug into it rather thoroughly and I will endeavor to summarize here what we found in loking into it.

Of course, there was originally the basic statute of 1925, which provided a period of three months for certiorari with respect to all types of judgments with a power in the Court or a justice of the Court to extend that for 60 days on an application made within the three months' period.

Then in 1933 Congress authorized the Court by a statute which says that the Court shall have the power to prescribe -- and I think "prescribe" has some significance -- from time to time rules of practice -- and I think "rules" has some significance." And by an amendment made in 1934, it was provided that the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari.

In the committee reports at that time, they read in a way which sounds contemporary: "Existing rules of the United States District Court and Circuit Courts of Appeals lend themselves to delay. Many cases are now pending in the Federal Courts for months and even years have elapsed since the verdict of guilty, and cases have not finally been disposed of in the United States Circuit Courts of Appeals, and the accused have been at large on bail. Nothing tends more to discredit the

administration of criminal justice than such delays."

There was an article by Professor Orfield, who has been a member of the Advisory Committee on Criminal Rules, which referred to the time limits in Rule XI, which was adopted in 1934 and which fixed a single period of 30 days, referred to that as jurisdictional.

And then the next thing that happened was, rather to my surprise and due to the careful work of Mr. Connally, we find that the very question was decided by the Court in United States ex rel Coy against the United States, 316 U.S. 342, where a petition for certiorari was filed more than 30 days after the judgment and the Court said, on page 344, "The petition for certiorari was filed too late and we are without jurisdiction."

Q Is that case in your brief?

A Oh, yes, this case is the essence of my brief, Mr. Justice.

Q I was glancing at the index of your brief.

A Well, it is under United States ex rel. Coy, I believe, in the ---

Q You find it on pages 13 and 14.

A I am sorry, Mr. Justice, it is under Coy. It is cited on pages 14 and 17.

Q Thank you.

A Of our brief.

Q Yes.

A The Court also referred in the Coy opinion, saying since the purpose in adopting the rules was to expedite criminal appeals, and it seems rather odd that the net effect in this case has been a very substantial delay over the time that would have been involved were the rules not enforced.

Now, since 1934 when Rule XI was first adopted, the rules have gone through various changes. In 1946 the language was changed from "shall" to "may," and someone might think, well, that is just permissive and it means it isn't really binding.

Beginning in 1946, it says, "may be made within 30 days." Another change was made in 1946 which was to grant authority to a justice of the Court to extend the time not to exceed 30 days, if the application was made "within the 30-day period following judgment."

And the Advisory Committee at that time in its note said, "This rule continues existing law except that it grants to the Supreme Court or a justice thereof the authority to extend the time."

Now of course the existing law included not only the text of the rule, but also this Court's decision in the Coy case.

And at other places in the notes to the preliminary drafts of the rules of 1946, the Coy case is cited, so that it was not overlooked. And this Court several times in percuriam decisions denying petitions, cited the Coy case.

The next case we have is the United States against

Smith, Smith being a district judge, and there having been an application for mandamus against him which the Court of Appeals had refused, and this was certiorari to this Court to review the Court of Appeals refusal.

Judge Smith had granted a new trial long after the five days put in the rule. He attempted to justify it on the ground that he had done it sua sponte, that the rule simply said that application must be made within five days, but it said nothing about what the judge did himself.

But this Court reversed the Court of Appeals. I may point out, too, that this rule with respect to appeal also contained the "may" language which was introduced in 1946, both with respect to appeals and with respect to certiorari.

Q For some reason, Mr. Solicitor General, I am having trouble in the index. In the index to your brief I can't find United States against Smith under either United States or Smith.

A Well, then the index is sadly deficient and, indeed, Mr. Justice, it may not be in the brief. It may be the result of some of my subsequent continued research.

Q Could you let me have the citation again?

A It is 331 U.S. 469, and it is a very relevant opinion by Mr. Justice Jackson.

Q 331, 469.

A 331, 469.

Q Thank you.

A The Court held that mandamus should have been granted to require the district judge to revoke its order granting a new trial. There is very interesting language in the opinio and relevant language, and I quote: "The rules in abolishing the term 'rule' did not substitute "indefinitely." The policy of the rules was not to extend power indefinitely, but to confine it within constant time limits."

And otherwise said Mr. Justice Jackson in a phrase which seems to me to be very relevant here. "Otherwise the power lingers on indefinitely."

And that is what we are apparently confronted with, with the situation as it now stands.

Now in 1954 the relevant rules were transferred to the rules of this Court. Rule XXII, paragraph 2. And that is where they are now.

But I suggest that the power to prescribe them is not derived from some inherent judicial power of this Court to manage its own business, but it is still derived from the Acts of 1933 and 1934, or since things have since been codified, it is now actually 18 U. S. Code Section 3772, which carried forward in virtually identical language the provisions of the Acts of 1933 and 1934.

Q Mr. Solicitor General, may I ask you a question. You are saying in this case, which is 129 days overtime, that it is jurisdictional. Suppose it had been one day overtime.

A Mr. Justice, I would say under my argument that it would be exactly the same. But under the rule, the Court has no jurisdiction after the time or the time as extended by an application made within time not to exceed 30 days has expired.

This, of course, would be entirely without prejudice to the Court by an exercise of the rule-making power to provide, as it has in Rule IV(a) of the appellate rules, the Court -- the Rules of Appellate Procedures, the Court has provided that upon a showing of excusable neglect, the District Court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

And I would say, I don't want to pass upon it now, because there may be arguments various ways, but it would seem to me to be entirely appropriate for the Court to provide by rule with a fixed time limit for an extension of time, even though it is not sought within the time.

It is the unlimited ---

Q Did the gentlemen working with you look up the cases to see how many times this Court has accepted jurisdiction when it was over the time limit?

A Well, Mr. Justice, Stern and Gressman have some reference to this, and I gather that there are 10 or 12 or 15, and I will come to those after a while.

Some state criminal appeals, some Federal ones. Indeed,

I am putting this -- a case called Robison against the United States in 390 U.S.. I confessed error in a case in which the petition was filed one or two days late. I may say at that time I was aware of it, but one or two days just didn't upset me. But 131 days I found rather a large order and I did find the Coy case, which seems to me to have decided the question, and my suggestion is that in these other cases, the Court has slipped or fallen or drifted or lapsed into an error without ever having focussed on the relevant materials which I am trying to present to the Court now.

Q Maybe we did it with design.

A Mr. Justice, I have suspected that. Nevertheless, in one of the places where you, Mr. Justice, have referred t- this, which is in a dissent you wrote in a case called Hicks against the District of Columbia ---

Q That is probably a case we should not have taken at all anyway.

A Also not cited in my brief, it is in 383 U.S., you ---

Q It is easier to invoke those things in cases you don't like than in cases in which you are interested.

A Well, in one of these cases where you have written an opinion, you referred to the fact that the Court has discretion for granting, and I suggest that putting it on discretion is, in effect, a denial of the fact that the statutory power is

to grant rules and is a recognition of the fact that this is not done pursuant to rule and is something which I think perhaps the Court might not have done if there had been an opportunity for full briefing and argument.

Q What is that page citation?

A Mr. Justice, it is in my notes here, and it was not the Hicks case.

Q Well, what is the one you stumbled in?

A Coy.

Q No, the other one.

A Robison.

Q Robison.

A Robison was 390 U.S.

Q Mr. Solicitor General, may I ask, am I correct that certiorari in civil cases is governed by an express statute which ---

A Yes, Mr. Justice.

Q --- says that the petition in civil cases must be filed within 90 days of judgment?

A With an extention of 60 days.

Q Whereas here we are dealing with a criminal case where we have no comparable explicit statute, do we?

A No, Mr. Justice. But what you have is a statute authorizing the Court to prescribe by rule the time, and I am suggesting that the practice which has grown up of doing this on

an open-ended basis, does not comply with the statutory authorization to prescribe by rule.

Q Well, then, I suppose in the criminal case under that authority we might prescribe six months even though it is only 90 days?

A Oh, yes, Mr. Justice, I suspect that you could prescribe two years if you thought that was appropriate. I don't advocate it, but I would think that would come within the term of statutory authorization.

I would not think you could properly say, "may be filed at any time." I do not think that is prescribing by rule.

Q Did you suggest earlier that there may be 12 or 15 cases in which we have, indeed, extended?

A Yes, Stern and Gressman lists them.

Q I suggest I think I can count 12 or 15 cases in the last couple of weeks.

A Not in which you have granted review.

Q Oh, in which we have granted review.

A Oh, no, there have been many more cases than that in which the application has been filed late. I am only referring to ---

Q And we have ignored it.

A Somewhere between 12 and 20 would be my estimate ---

Q Were granted.

A --- where you have granted it and proceeded to

hear the case.

Q Going back to this rule, Mr. Solicitor General, once adopted, is it your position that it has the same force as the same statute in the civil cases?

A Yes, Mr. Justice, my position is that although the Court has the power to change the rule, where it doesn't have the power to change the statute -- that is, the rule-making power is a continuing power -- that once the Court has adopted a rule, that is a piece of delegated legislation.

That is made pursuant to the authority granted by Congress in what is now found in 18 U.S.C. 3772.

Q Now you are speaking of the rule-making power where it is unilateral or where it is with the concurrence of Congress?

A In this case, it is unilateral. In the case of proceedings after verdict, Congress has given to the Supreme Court power to prescribe by rule a time for filing petitions for certiorari ---

Q And the essence, I gather, Mr. Solicitor General, is that if we prescribe a time period, that has precisely the same effect as if it had been written into the enabling law itself

A Yes, Mr. Justice, that would be my position. I think that that was what was contemplated by Congress. I think that is what the words "prescribed by rule" mean. That was clearl the understanding of the informed commentators at the time,

Professor Orfield, for example, referred to the fact that the rule is jurisdictional, and that was the almost contemporaneous decision in the Coy case.

Now I referred to the fact that the language has changed to "may." It also changed to "may" with respect to appeals, and this Court in the Robinson case in 361 U.S. -- this is cited in our brief -- and involved a late filing of a notice of appeal and the Court held that the "may" language there was compulsory, that the appeal -- that the Appellate Court got no jurisdiction when the appeal was filed more than five days late, and it quoted with approval the language of United States against Smith, the phrase about "lingers on indefinitely."

And in concluding its opinion, it said something further, which seems to me to be relevant here, that powerful policy arguments may be made both for and against greater flexibility with respect to the time for taking of an appeal is, indeed, evident, but that policy question, involving as it does many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicional decision.

If by that process the Courts are ever given power to extend the time for the filing of a notice of appeal upon a finding of excusable neglect, it seems reasonable to think that some definite limitation upon the time within which they may do so would be prescribed.

So, it seems to me that the case is tolerably clear.

The purpose of the rules was to cut down delays, to restrict time. Congress was not clear just how much would be workable and delegated the authority to cut down the time to the Court.

And then there is the language of the statutory authorization, power to prescribe by rule. And then there is the language of the rules themselves, the rules provide that the petition should be filed within 30 days. They provide, further, that a justice may extend the time within 30 days and then there is a very interesting further provision in the rules of the Court, in Rule XXXIV, that whenever any justice of this Court is empowered by law to extend the time and applications seeking such extension must be presented to the Clerk within the period sought to be extended.

There it is "must," not "may." It is specific.

And, finally, there is a decision of this Court in the Coy case, in 316 U.S., and in the Smith and Robinson cases.

Now what happened to upset this clear picture? Nothing deliberate. I may point out that in the Coy case, in the order granting certiorari, the Court expressly directed the attention of counsel to the question of the time limits involved and asked that that question be briefed, and it was. But at no time has the Court ever had briefing and argument in these cases in which certiorari has been granted after the time that it expired.

Q Mr. Solicitor General, may I ask at the time Coy was decided did the predecessor of Rule XXII read as Rule XXII

now reads?

A Yes, Mr. Justice, it was Rule XI of the 1934 Rules.

Q But the phrasing was the same?

A It read exactly the same except for the change of "shall" to "may," to which I have already referred, and to the fact that at the time Coy was decided, there was no power to extend the time.

Q The reason I ask you this is it is rather unusual wording. It is phrased not that a petition is out of time unless filed within 90 days, but that a petition shall be deemed in time when filed within 90 days.

A I think that is essentially the language of the 1925 Act with respect to civil cases, in which they were simply carried forward.

Now ---

Q Before you go on, I think I misunderstood part of your argument in your brief, because here in oral argument in response to a question from Mr. Justice Black, you said that your jurisdictional argument would be precisely the same if this case were one day late, rather than over 100 days late. And I gathered from page 18 of your brief -- well, I understand that you make that as your basic argument.

I Gather from page 18 in your brief you say even if you are mistaken about the one day, certainly if the delay is more 90 days, which is the longest time allowed by statute, then clear

it is jurisdictional.

A Yes, Mr. Chief Justice, I recognize the one-day argument is a hard one. And if it is too hard for the Court to accept, I will fall back and say, "Well, at least you have got to have some time limit on it," and the only feasible one is the old 90-day statutory one.

Q Or three months, which is it? 90 days?

A --- to expedite criminal appeals. But I think that logically I stand by my answer to Mr. Justice Black. The rules are jurisdictional. They now provide for 30 days plus an extension of 30 days, if by the express terms of the rules the application is made within the 30 days, and if that is the ground upon which I stand, that if the Court won't accept that ground, I do say that certainly they should not be construed to leave completely open-ended.

Q Beyond 90 days.

A Beyond, and if it isn't completely open-ended, where should it stop? Well, it seems to me at the place where it was before the rule came into the picture, which to be technical was three months rather than 90 days.

Q I misunderstood you then, because I understood you to say to Mr. Justice Brennan that you thought it would be confined to the rule-making, even if the Court said it will take two years.

A It is at least within the language to prescribe

rules. You would have to read into that, well, Congress couldn't have intended that the Court would enlarge the time. All the Congress was meaning was that the Court should shorten the time.

And that is another case which we don't have here. And my guess is the Court is not going to prescribe a rule which fixes it two years.

Q I hope not.

But from what you said to Mr. Justice Stewart, I would support you would now say that 90 days was the outside limit.

A I would argue in an Advisory Committee working to assist this Court in a rule-making process that the Court could not appropriately make a rule of more than 90 days.

Q You say the legislative history of the statute conferring rule-making power indicates that it was to enable the Court to expite.

A It would enable the Court to expedite the decision in criminal cases ---

Q But that takes it beyond 90 days.

A --- and this Court has so recognized.

Q Is there any indication that Congress ever knew of the error from your standpoint which the Court has been falling or ---

A No, Mr. Justice. When it was only a day or two here and there, I was just puzzled, but I didn't think it was appropriate to report to Congress that the Clerk was violating

its rules.

When this case came along, we dug into it and found out quite a lot.

The Court fell into this error, if I may put it that way, in Heflin against the United States in 358 U.S., where the question came up only in a most back-handed way. It was not dealt with in briefs of any of the parties and it is dealt with in a footnote in the Court's opinion, the complete text of which is because no jurisdictional statute is involved. That is all.

Q Maybe that was thought to be enough. Maybe it was thought that it didn't deserve any more lengthy discussion.

A Well, Mr. Justice, if so, I apologize for the time of the Court that I have taken. It seems to me that if that was the overruling of the Coy case, that the Coy case was entitled to be present at its own funeral. And I don't think that the Court -- there is nothing to indicate that the Court was aware of the Coy case at that time or that it would have dealt with it in such a completely summary fashion.

Q Was there dissent in the Coy case?

A No -- well, Mr. Justice, yes, there was. It was hard to tell what happened in the Coy case. It is a very intricate decision arising in criminal procedures in the District Courts and the Court decided that what the District Court has done was wrong, but the consequence of that was to make it a criminal appeal, and since it was a criminal appeal, it was too

late because it was filed -- the petition was filed more than 30 days, and then the Clerk said in the footnote, "But a majority of the Court feels that in order to avoid circuity because it was pointed out that they could go back in the District Court and start over again and raise the same question, and since the point is not jurisdictional, that they would hear the case."

Q Your premise has been violating our rules in another respect, namely, we have numerous applications where the application for an extension is not filed within the time limits and those order -- and I have signed many of them, where I thought there might be something to the merits -- application for extension granted subject to the approval of the full Court. We do it constantly.

A Well, Mr. Justice, I admire you with extent to that.

Q Yes, I think it would ---

A It would seem to me, at least in civil cases, that it is completely unjustifiable. I can find no reason why it is not equally unjustifiable in terms of this Court's own rules.

Now with respect to all of these things, if the rules so construed are too inflexible, then I submit that the change should come through the rule-making process and not in essence by acquiescence.

And if there is a change made through the rule-making process, it will certainly have an eventual time limit and also some statement of the grounds or consideration on which such an

extension will be granted.

In sum and substance the situation which leaves this matter wholy at large, not even good cause shown or excusable neglect, as things now stand, cannot with true propriety be called a rule. And it is only the power to prescribe rules, which Congress has given to the Court in this area.

Incidentally, Mr. Justice Douglas, I have now come to the Taglianetti case, in 394 U.S., which is not one of your dissents, where again in a footnote and wholly conclusory the Court said, "The time limit is not jurisdictional, citing Heflin, and does not bar our exercise of discretion to consider the case."

Q What is the name of that case?

A Taglianetti, 394 U.S. 316, and that is cited in our brief.

Q Mr. Solicitor General, did I understand that Rule XI under which Coy was decided, that wasn't just the Rules of Practice of this Court?

A No, Mr. Justice.

Q That was part of the First Edition of the Federal Rules.

A That was the Rules of Practice in criminal cases before verdict.

Q Right.

A And which included, because of a special provision in the statute, the authority of the Court to prescribe rules

fixing the time for taking appeals and for filing petitions of certiorari.

Q Well, that Rule XI was adopted like the present Rules of Federal Criminal Procedure?

A Yes, Mr. Justice.

Q And was Rule XI part of a set of rules that was placed before the Congress?

A No. Rule XI was not.

Q That set of rules?

A That whole set of rules is made under the authority granted by the Congress to the Courts to make rules of its own. That was not placed before Congress and that has been true all the way along.

Q But then that Rule XI was taken out of the Rules of Criminal Procedure and placed in the rules of this Court?

A For a while it was in both places.

Q I see.

A It was in the Rules of Criminal Procedure by way of cross-reference. It was in Rule XXXVII of the Rules of Criminal Procedure until 1967 or 1968, when the Court abrogated Rule XXXVII, and since that time it has been exclusively in the rules of this Court.

Q But up until '67 it was also in the Rules of Criminal Procedure?

A By way of a cross-reference, Mr. Justice. Rule

XXXVII, too.

Q And that rule had been placed by that time before the Congress?

A No, Mr. Justice, those three chapters of those rules were not placed before the Congress. There was a complicated submission by which all of the rules except these three chapter were before the Congress. But these three chapters relating to appeals were prescribed by the Court effective on the same day as the rules laid before Congress became effective.

Q Mr. Solicitor, I ---

Q I see this footnote in Taglianetti is not my footnote either.

A No, no, Mr. Justice, I apologize for that. I was quite wrong. The Hicks case was the one in which you referred to Heflin and said that it was not jurisdictional. Heflin was a percuriam and I wouldn't know who wrote it.

Q Mr. Solicitor General, I have great trouble with the statement, which is usually taken for granted, that the Court usually has discretion to waive its rules, but never to waive the statutes.

In this case you say that we cannot waive a statute. And so now we can't waive a rule. Well, that doesn't apply to all of the rules?

A No, Mr. Justice, that only applies to rules which are made by the Court acting pursuant to a grant of authority

given by Congress to act in essentially a legislative manner.

Q And that is restricted to this one rule?

A That would be restricted to any rules made pursuant to the power originally granted in 1933 or '34 and now granted by Title XVIII, U. S. Code Section 3772.

Q You don't know whether it would apply to any other rules. You see, my problem is you say we have been violating the law. I wonder if we might be violating the law in some other rules.

A Well, Mr. Justice, I don't think so. Although insofar as it does deal with rules which have been laid before Congress, which includes the whole busines of Rules in Civil Procedure ---

Q No, I am talking about the rules of this Court, the volume you were just reading from.

A It would only be with respect to those rules of this Court which are made pursuant to a grant of power by Congress, and I would not suggest that it would be claimed that this Court had power to fix the time for filing petitions for certiorari or to take appeals simply out of its inherent power, but that that power has never been thought to come to the Court except pursuant to the grant which Congress has made.

Q That I think that is legislative fallacy.

A Yes, Mr. Justice, a grant of delegated legislation. It is a problem in separation of powers, but it is one that --

I have gotten over being puzzled by that one. I used to be puzzled somewhat, but I can accept that.

Q It might be the power created by Article III itself, the congressional power. That is going to the jurisdictional --

A Yes, Mr. Justice, I would assume that it was. This is a part of the power of Congress to make law. It has long since established that Congress can do that in certain cases and under proper conditions by delegating it to other governmental bodies, and it is appropriate that this particular item should be dealegated to this Court.

But what this Court does pursuant to that power is essentially legislative and our submission is that it should be so treated and perhaps, most important of all, that this Court so decided in the Coy case and has never since decided to the contrary with any indication of a treatment of the issues in the problem, or of the continuing validity of the Coy case itself.

Q Let me ask you this. To pursue Mr. Justice Stewart's question, you said you were somewhat puzzled by this possible conflict between the branches. But if it arises out of Article III, which gives Congress the power to define the jurisdiction, I believe, then would not the power to assign jurisdiction include all the incidental powers to define how it is to be executed, how the jurisdiction is to be implemented, including the fixing of the number of days within which filing must be had.

Q Article III itself, and I am reading from it, says

that the Supreme Court shall have appellate jurisdiction both as to law and facts with such exceptions and under such regulation as the Congress shall make.

A And in this case the regulation the Congress has made has been to delegate this to the Court, but I suggest that Congress never contemplated that was a simple open-ended delegation whenever the Court thinks in its good discretion it would be a good idea to take the case and it shall, which as near as I can see ---

Q There has slipped into the vocabulary recently the idea of a restricted interpretation of the Constitution. Do you think that is a restricted interpretation?

A Oh, I don't know, Mr. Justice. It depends on how you define "restricted." I can define it in such a way that it is now, I think. Even strict perfectionists, I believe, believe in a certain measure of flexibility, and that flexibiltiy which we not only have been able to live with, but which we have come to accept.

We find it more frequently, of course, in delegations to administrative bodies, but in this area it is most appropriate that there be a delegation to the Court.

Q Going back to your earlier statement, if we have the power to waive ---

A I haven't even started the merits, Mr. Chief Justice.

Q I am not getting on the merits. I am still on jurisdiction.

Your earlier statement on the question of time, if we can casually waive this late filing of a week, we can do it, you said, for two years.

A It seems to me that what has been done in this case is the Court can, if in its discretion, whatever that means, it thinks it appropriate, it can grant a writ of certiorari to review any decision of the Court of Appeals made at any time in the past which isn't moot for some reason or other. And that I don't think was contemplated by Congress, and yet I think that is what I think is involved in this case.

I don't think that that ---

Q But we have common law writs of certiorari under all the writ statutes?

A Yes, Mr. Justice. I really don't know much about them ---

Q I don't either.

A --- or what the time limit would be. There are bills of review which people found when there had been corruption in the Court, and they upset the judgments long after the event, and in equity you can do a lot of remarkable things.

Professor Casey taught me that a long time ago, but I don't -- this particular write of certiorari is a pretty technical term of art, which I don't think comes within those others.

Well, now with respect to the merits of the case, the first is the constitutional validity of Title XVIII, Section 702. It is hard for me to see how there can be any doubt about this. This is a provision which makes it a crime for an unauthorized person to wear the uniform or any distinctive part thereof.

Incidentally, let me clear up one possible misconception which came from the petitioner's argument. He suggested that there might be a simulation of the uniform here. But actually the indictment is simply that he did wear a distinctive part of th official uniform and the trial was conducted throughout on the basis that he wore a distinctive part of the uniform.

There is no basis for saying that it was something which simulated the uniform.

Q Mr. Solicitor General, we have absorbed a great deal of your time with jurisdictional problems. We will extend your argument ten minutes over the four remaining, and we will accordingly accommodate your friend, if he needs the time.

A Thank you, Mr. Chief Justice.

Now, in that connection I would call attention to pages 45 and 46 of the appendix where -- and Exhibit 12 was introduced in the trial and read to the jury, Official Army Regulations, and on page 46 about two inches down in quotation marks: "The following uniforms and articles thereof for male members of the United States Army are distinctive. Distinctive components of the uniforms are limited to caps, coats, jackets and trousers,

except as indicated."

So that the socks and handkerchiefs are out. Even shoes are out.

Q Page 45 of the appendix refers to Exhibit 12, but does not contain Exhibit 12, but I suppose that is in your records.

A This is a quotation from Exhibit 12. Exhibit 12 is the regulation and this is the quotation from Exhibit 12. I do not have Exhibit 12 in my hand. Indeed, I have not examined it.

I believe this to be a quotation from Exhibit 12, which it purports to be.

I would also point out that further down on the page that buttons are referred to and I would also call attention to the fact that on page 13 an FBI agent testified ---

Q Page what?

A Page 13 of the appendix in response to the question would you just describe the jacket he had on when you saw him? A green jacket with brass buttons of the type issued associated with military uniforms.

And you will note that jackets are one of the things that are distinctive parts. And then on page 20, a U. S. Army colonel -- down at the bottom of the page -- "On his head he had the fur felt Army officer's cap with the loose strap, and hanging down and with an Army officer's insignia upside down."

Q It reminds me of some skits I have seen at the Gridiron Club. The uniform and so forth.

A That, I believe, by some stretch of the imagination, Mr. Justice, is a theatrical production. We will argue here later that it is not, that this was not. That, of course, is given under circumstances and in a situation where everyone present knows that it is simulated.

Q And what was given in Houston?

A It was given in Washington, which is close to the Pentagon, and where other things have happened.

But there is no doubt that that is a simulation and here there was a considerable reason to doubt whether the person involved was or was not a member of the Armed Forces.

Now, petitioner here, perhaps his oral argument belies this, but as I read his brief it seemed to me that he made no claim that he did not come within the terms of the statute. That is, that he was wearing a distinctive part of the uniform.

It seems to me to leave no question which was not, in substance, covered by this Court's decision in the United States against O'Brien, the case involving the burning of a draft card. Surely there is power in Congress to protect the integrity of the uniform of the Armed Forces of the United States. This is a matter which is of importance not only to the Army, but also to citizens.

We have to be able to rely on the fact when we see a policeman, that he is a policeman. And at these times we have to be able to rely on the fact that when we see a man in military

uniform that he is a member of the military.

The Constitution expressly gives to Congress the power to raise and maintain armies and to do all things necessary and proper to carry that power into effect. And surely the protection ---

Q Mr. Solicitor General, on this disgrace to the Army, does that apply to the dozens of Bowery bums I used to see every day with Army jackets on?

A I think, Mr. Justice, you will almost always find that the buttons have been removed. That seems to be the convention.

Q No, I have seen plenty with button on. I have seen them with jackets and overcoats and fur hats.

A Mr. Justice, if I can get to that case soon enough, maybe I could exercise some prosecutorial discretion in respect to that case. That seems to me to be a situation where discretion might be appropriate.

In this case where the prosecutor exercised his discretion otherwise and where two courts below have sustained that, I found no effective way that I could proceed, except by defending the actions which they have taken.

This Court in United States against Barnow, which involved a prosecution for impersonating an officer, a cognate question, said that one of the purposes of such a statute is to maintain the general good repute and dignity of the Service itself.

And this is essentially an argument which I made somewhat against the advice of some of my associates in the O'Brien case, where I contended that it was within the power of Congress under the necessary and proper clause in connection with the power given to raise and defend armies, to protect the dignity of the Selective Service proce-s by making it a crime to burn draft cards.

I did that because I found it somewhat difficult myself to find that draft cards themselves were of very great importance in the process.

The Court took the latter ground in its opinion and thus the O'Brien case is not a decision on that point, but I think that the decision reached is very close to the one which is involved here.

So, our position would be that the criminal code provision is constitutional and that the defendant clearly came within it and was properly found by the jury to have come within it. So we come to the exemption in 10 U. S. Code 772(f).

Our contention is that the petitioner was not by any reasonable stretch of the interpretation of the words in that statute an actor in a theatrical or motion picture production.

Now obviously it was not a motion picture, so you can throw that out. So you have to make him an actor in a theatrical production.

Now originally this statute -- we have spelled out the history in our brief. The statute prohibited any person from

wearing the uniform in any playhouse or theater or in moving picture films. It was codified, I think, in 1954 and the sponsors emphasized that no substantive change was intended. The objective was to make it plain that television performances would be covered which might not come within playhouse or theaters.

But the intention of Congress that is manifest in the original language and in the revision, and that is that it is confined to situations where the make-believe role of the person wearing a uniform is clear from the setting. Thus, it seems to me that Dr. Strangelove or the Caine Mutiny come within it, because everybody knows that that is a simulation. It doesn't mean that a performance must be given in a building. It could be an outdoor theater, could be an area set aside for it.

It means only that the performance wherever given must preserve some of the traditional characteristics of the dramatic presentation, such as the defined area set apart for the actors and an audience comprised of events which they observed are portrayed and not real.

The skit here was not a theatrical production in any reasonable meaning of the term. It was intermittent events in a demonstration in the street in front of an induction station, which also included picketing and distributing leaflets. Pedestrians and motorists who either stopped or passed by the demonstration could reasonably believe that the petitioner was, in fact, a soldier as he was wearing distinctive parts of the uniform

was intended to convey.

The petitioner's conduct here has all the elements of picketing and no real similarity to the theatrical production which Congress contemplated. And no one would suggest, I believe, that a person would be entitled without authority to wear the uniform of the Army merely because he was picketing. To seek to bring the petitioner's action here within the statutory language is pressing that language to its dryly logical extreme.

Or to use another passage from Holmes, of being led by a technical definition to apply a certain name and then to deduce consequences which have no relation to the grounds on which the name was applied.

Q What you are really saying, then, is that in this act it was a question of law and not a question of fact?

A Yes, Mr. Justice, and because of that we, since we think that as a matter of law that what he did does not come within the exemption in the statute, the qualification on that exemption about tending to discredit the Armed Forces is irrelevant.

This is a little like a, for example, the Lopez case which the defense of entrapment and the contention was made that the charge about entrapment was not quite right, and the Court held that it was not necessary to decide that because it was a matter of law. There wasn't any entrapment and he was not entitled to any charge with respect to entrapment.

We would contend here that the defendant was not entitled to any charge with respect to the defense of actor in a theatrical production and, therefore, the question of discredit becomes irrelevant.

I would be prepared myself to defend the discredit exception to the exception to the statute if it was necessary, although I agree it is getting very close to the line, but on grounds similar to those which were involved in the O'Brien case with respect to draft card analogy is the copyright law.

After all, the uniform is the uniform of the United States and the United States is entitled to have some control over the way in which it is used, but as I contended, the petitioner does not come within the exception in any of the exemption, in any event.

All that is happening here was that the petitioner received the benefit of the defense, to which he was not entitled.

Q Was there any evidence in the record as to why he wore the uniform?

Q Does not his own statement suggest the answer to that? The petitioner's own statement was that he was doing it to express his views on the war in Vietnam?

A Yes, Mr. Chief Justice. It was part of a demonstration. There is no doubt about that, and had he simply stood outside and made a speech against the war in Vietnam, wearing the uniform, I cannot see any basis upon which the fact that he was

making a speech would entitle him to exemption from the statute which makes it an offense to wear the uniform of the United States without authority.

Q What did he say as to why he was doing it, indirectly, do you remember?

A The Court said -- this is page 337 of the transcript --"Was the portrayal without reference to the fact you had on full uniform calculated to discredit the Army or the Armed Forces?"

"THE WITNESS: I think the uniform shows disapproval and my intention was to show my disapproval of the actions of the Army."

Q There is evidence in the record, I think, that he rehearsed this skit?

A Yes, Mr. Justice.

Q With the water pistol?

A There is some evidence that they rehearsed this skit, if you can call it a skit.

Q Demonstration or whatever it was.

A Yes, I think it was reaching quite a bit to call it even a skit.

Q It would have been completely meaningless and unintelligible if everybody had been in civilian clothes, wouldn't it?

A Oh, I don't think. They could have worn other types

of uniforms. You can get uniforms other than the uniform of the U. S. Army from theatrical supply houses. If there had been some theatrics here, they might have done something.

Q But it was a kind of a theatric performance, even though they called it a protest.

A Mr. Justice, I think no. I think to be a theatrical performance, you have to have something like a stage. I don't mean indoors, I don't mean formal. But you have to have someplace where there are players, someplace where there is audience.

This was, in essence, a demonstration, not a theatrical performance. Our position would be that as a matter of law, this was not a theatrical performance. For the reasons ---

Q That would be a pretty strong holding to the law, wouldn't it?

A No, I don't think so, Mr. Justice.

Q What do you think is required to make it a theatrical performance? The Jitney Players, I suppose. I don't know if you have ever seen the Jitney Players.

A Oh, yes, yes. What we have put into our brief essentially is a separate place for the players and circumstances under which it is evident that it is a simulation and not actual fact.

Q Well, I suppose it was clear enough in this episode that it was a simulation. Nobody was deceived into thinking

somebody was getting shot?

A No, but whether the person was or was not a member of the Armed Forces.

Q That is the important part.

A That is the important part. There was nothing here to indicate that he was not a member of the Armed Forces.

Q That's right, and whereas there would be if there was in some play?

A Yes, if there was some kind of an indication that it was a play.

Q But he wouldn't have to make a statement that "I am not a member of the Armed Forces."

A That would have helped in this case, but indeed if he had had a sign on his back "Not a member of the Army," that might have made it enough so that the jacket was not a distinctive part of the uniform. I don't know.

We are very close to the line in each case.

Q Even though they called it a protest, you are really getting a pretty close line.

A Yes. Of course, that is part of the problem. The Government tries to protect itself in various ways and then whatever you do is either speech or is symbolic speech, and the First Amendment you completely engulfed it, and the Government's powers are sharply restricted.

Now obviously there is a line, a very important line

and a difficult line, but it is perfectly plain, it seems to me, that this protest could be made and could be made without interference at that place at that time.

The problem was the making it in the way in which it was made regardless of the place and the time, including the wearing of the uniform, which Congress for more than 50 years has made an offense when not authorized.

Well, our first submission is that the Court should dismiss this petition as having been granted without jurisdiction. If we are not successful on that, and I hope that we will be, because I am greatly troubled by the unopen-ended situation in which we now are, that the decision below on the merits should be affirmed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Berg?

REBUTTAL ARGUMENT OF DAVID H. BERG, ESQ.

ON BEHALF OF PETITIONER

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

I would make one last point to the Court. We have failed, at least in our opinion, to find any compelling interest suggested by the Government for the enforcement of that statute. The Government acknowledges by the testimony that it has read that the uniform itself was symbolic of speech.

We submit again that absent any compelling interest

to regulate that action, the impingement on the freedom of expression, the symbolic acts that the petitioner took part in, was that sort of inpingement is not allowable until the holding of the O'Brien case.

Q I did not understand the Solicitor General to concede that wearing of this apparel was symbolic speech. He said that each time that these problems are raised in Court, he is met with the argument that this is symbolic speech.

A If I misunderstood his argument, I believe that the facts still remain that Schacht testified that he meant the uniform as showing discredit or criticism of the United States.

Q So his intention, then, is not in dispute?

A No, sir.

Q You have not resting wholly on this constitutional claim, are you?

A No, sir. We still would say that the statute was -- the problems of construction of the statute was applied.

MR. CHIEF JUSTICE BURGER: Thank you for your submission, Mr. Berg and Mr. Solicitor General.

The case is submitted.

(Whereupon, at 2:12 p.m. the argument in the above-entitled matter was concluded.)