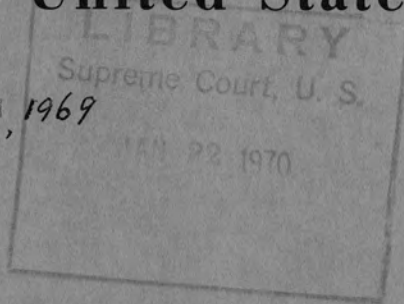


LIBRARY

PREME COURT, U. S.

# Supreme Court of the United States

OCTOBER TERM, 1969



In the Matter of:

Docket No. 441

-----X  
 ROBERT I. TOUSSIE,  
 Petitioner,  
 vs.  
 UNITED STATES OF AMERICA,  
 Respondent.  
 -----X

RECEIVED  
 SUPREME COURT, U.S.  
 MARSHAL'S OFFICE  
 JAN 22 1 10 PM '70

Duplication or copying of this transcript  
 by photographic, electrostatic or other  
 facsimile means is prohibited under the  
 order form agreement.

Place Washington, D. C.  
 Date January 14, 1970

**ALDERSON REPORTING COMPANY, INC.**

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

1	<u>ORAL ARGUMENT OF:</u>	<u>P A G E</u>
2	Murray I. Gurfein, Esq., on behalf	
3	of Petitioner . . . . .	2
4	Francis X. Beytagh, Jr., on behalf	
5	of The United States . . . . .	23
6	<u>REBUTTAL ARGUMENT OF:</u>	
7	Murray I. Gurfein, Esq., on behalf	
8	of Petitioner . . . . .	46

\*\*\*\*

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

NHAM

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

-----

ROBERT I. TOUSSIE,	)	
	)	
Petitioner	)	
	)	
vs	)	
	)	No. 442
UNITED STATES OF AMERICA,	)	
	)	
Respondent	)	
	)	

-----

The above-entitled matter came on for argument at 1:45 o'clock p.m. on Wednesday, January 14, 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:

- MURRAY I. GURFEIN, ESQ.
- 655 Madison Avenue
- New York, N. Y.
- On behalf of Petitioner
  
- FRANCIS X. BEYTAGH, JR., A
- Assistant to the Solicitor General
- Department of Justice
- Washington, D. C.
- On behalf of Respondent

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 441, Toussie against  
the United States.

MR. GURFEIN: Mr. Chief Justice --

MR. CHIEF JUSTICE BURGER: Mr. Gurfein.

ORAL ARGUMENT BY MURRAY I. GURFEIN, ESQ.

ON BEHALF OF PETITIONER

MR. GURFEIN: May it please the Court: The Petitioner  
in this case was born in 1941, in June. He became 18 on June  
23, 1959. He failed to register for the draft; the reason was  
conscience and was indicted after an arrest in February of 1967,  
almost eight years after his initial failure to register.

Q Now, Mr. Gurfein, when you say he failed to  
register for reasons of conscience; he did not make any record  
or take any step, or did he at that time, to record that fact?

A He took no steps, but if I may, Your Honor, in  
connection with my argument on the First Amendment, I should  
try to expand on it a little further. I'm trying to make a  
summary statement of the facts now so that I can indicate to the  
Court the three points we should argue within the short space  
of time allotted.

Q Very well; very well.

A The first statement I want to make on that is  
that I will not get involved at this time in the reasons why the  
record indicates that there was a sincerity of belief on the



1 part of the Petitioner that he could not take part in the  
2 registration process itself, because his was a pristine re-  
3 ligious view that the registration process itself, was merely  
4 an extension of the war-making which he was against.

5 It should be recalled that in 1959 when the Petitioner  
6 willfully failed to register there was no war going on. The  
7 Korean War had been finished. There was no Vietnam War at the  
8 time.

9 As I say, he was arrested eight years after the event.  
10 The general statute of limitations, as we know, is a five-year  
11 statute, and in the words of that statute, "except as otherwise  
12 provided by law."

13 Adequate and proper motion was made to dismiss prior  
14 to the trial on the basis of the statute of limitations having  
15 run, which was denied. The trial was had and at the trial  
16 counsel for Petitioner requested a jury charge to the effect  
17 that if the jury believed in the sincerity of the religious  
18 beliefs of the Petitioner and that his failure to register was  
19 due to his religious conscience, that they should acquit. This  
20 request to charge was denied by the court and a conviction by  
21 the jury ensued.

22 In this Court, as we did below, we made three points:  
23 First, that the statute of limitations is a five-year statute  
24 and that any extension beyond it is beyond the legislative  
25 intention, the Congressional intention and, indeed, the

1 prerogative of the Executive Branch.

2 Secondly, we say that if the statute of limitations  
3 point is saved it is only saved as the court below indicated,  
4 by holding that a regulation and not a statute, created a  
5 continuing duty to register and that by juxtaposition of the  
6 words, "the continuing duty," even though Congress said nothing  
7 about a continuing event, ipso facto made a continuous offense,  
8 as if Congress had specifically mandated. And if that be the  
9 construction of the statute then it is violative of the Fifth  
10 Amendment privilege of the petitioner.

11 The last point, which I hope we shall have some time  
12 to discuss, is that we believe that under the First Amendment  
13 the minimum that we are asking here is covered by that amend-  
14 ment; and that is that when a religious principle's objector  
15 objects to registration as part of the process, while it is  
16 true he must subject himself to the criminal process, at the  
17 same time he has a right, when he is tried by the jury, to have  
18 an instruction that if the jury believes he is religiously  
19 sincere, that they should recognize, in the context of this  
20 whole problem, his religious conscience under the First Amend-  
21 ment.

22 Now, if I may turn first to the statute of limitations  
23 if Your Honors please. As a result of the decision below by  
24 the distinguished Second Circuit Court of Appeals, as well as  
25 other circuits, we are now in this state of the law that a

1 narcotics peddler is subject to a statute of limitations of  
2 five years. A man who sells defense secrets to a foreign  
3 government is subject to a statute of limitations of ten years.  
4 A boy of 18 who fails to register for Selective Service, is  
5 subject to a statute of limitations of 13 years.

6 And the question is: how did this come about and is  
7 this harsh result sound?

8 Q Are you raising the constitutional question  
9 on that fact?

10 A In this phase I am not raising a constitutional  
11 question, Your Honor.

12 Q Any question?

13 A Beg your pardon, Your Honor.

14 Q Are you raising any question about the Govern-  
15 ment's power to do that? To have different statutes of limita-  
16 tions?

17 A No; I'm raising the question (a) as to the  
18 intention of Congress, which has not expressed it; (b) that  
19 without the intention of Congress, if Your Honor please, if  
20 the regulation is construed as I have indicated it was below,  
21 it is an unconstitutional delegation of legislative power by  
22 the Congress to the President and that hence, under the Doctrine  
23 of Separation of Powers, it was unconstitutional; yes, Your  
24 Honor.

25 Q And the 13 years you got by adding five years

1 after his 26th birthday?

2 A That is correct.

3 Q After five days after --

4 A I didn't spell it out because I thought it was  
5 obvious, but what the court did below, in order to get around  
6 this problem, was to say -- although the regulation, which I  
7 shall read in a minute -- perhaps I ought to read it now.  
8 Although the regulation says that "The duty to register shall  
9 be continuous at all times," two circuits have construed "at  
10 all times" to mean for life, apparently, because there are two  
11 circuits that seem to have held that even if the man is over  
12 26, or rather if the statute goes beyond age 26 he could still  
13 be prosecuted, which would make a man of seventy subject to  
14 prosecution and this Court had a collateral problem like that  
15 in Garo, which was affirmed by a divided Court: 4 to 4 in 1950.  
16 It was a collateral case and we really don't know what the  
17 Court held.

18 Now, in the Second Circuit they held that the regula-  
19 tions merely limited to 26 and therefore, it's obvious that a  
20 boy of 18 must wait until 26, which is eight years, and then  
21 five years thereafter, is five, and that's where I got my  
22 13 years, which is exactly what was done below in this case.

23 Now, the regulation, I don't think, means -- I say  
24 this with most respectful submission, what it has been construed  
25 to mean. And I don't think it needs much of a gloss as to what



1 was intended. At page A-13 of our brief, in the appendix,  
2 the regulation says, "The duty of every person, subject to  
3 registration to present himself for, and submit to registration  
4 shall continue at all times, and if for any reason any such  
5 person is not registered on the day or one of the days fixed  
6 for his registration, he shall immediately present himself for  
7 and submit to registration before the local board in the area  
8 where he happens to be."

9           The word "immediately" is a very peculiar word if  
10 you are talking about a continuing duty. It seems to me that  
11 the fair inference of this is that in issuing the regulations  
12 under the statute which permitted the President to fix the time  
13 or times and place or places, of registration, which naturally  
14 Congress had to do. They couldn't watch every day of registra-  
15 tion. But all this means is that if a man was sick or absent  
16 from the country or out of town, or something else happened  
17 which was not willful, he should not believe that he was there-  
18 after, forever discharged from his duty because at age 18 he  
19 could not register.

20           In other words, the word "immediately" makes very  
21 little sense. And I say if we take it in this context, Your  
22 Honors, you have a very simple administrative regulation heree  
23 that does not, on its face, purport to create a real continuing  
24 duty           and certainly on its face, says nothing about a  
25 continuing offense.

1           Q       What would be the impact of that regulation  
2 if you omitted the word "immediately," in your view?

3           A       Well, I think "immediately" is just a gloss  
4 and I can't read the mind of the drafters of the regulation,  
5 Mr. Chief Justice.

6           Q       Suppose we took it out now; would it mean  
7 anything different?

8           A       Well, I think the purpose of it is not to  
9 catch willfull offenders who violate the law. They are beyond  
10 the pale. I think this is for the purpose of notifying people  
11 who are perfectly, ready, willing and able to register under  
12 the draft laws. It is a simple point, that if they are not  
13 available on the day when they are supposed to register, that  
14 they are supposed to register thereafter. Now, whether it  
15 says "immediately," or not, Mr. Chief Justice, I think the same  
16 results would follow. But, I think the word "immediately" does  
17 tend to help us in construing it merely, as an administrative  
18 regulation and not as the courts below did, as in effect, a  
19 substitution for a statute, extending the general statute of  
20 limitations beyond five years.

21           Now, the process by which the court below arrived at  
22 extending the statute was by acknowledging, very frankly, in the  
23 opinion of the Second Circuit, certainly is a distinguished  
24 opinion in terms of facing the problems that arose. And though  
25 they decided against us, we certainly cannot complain about the

1 fairness of the judicial reasoning / that led to the result. And they  
2 recognized all the problems there.

3 That court did not, as the government now contends,  
4 say that you can read anything into that statute. They  
5 honestly said, "we cannot read it into the statute; there isn't  
6 any such thing," because the statute of limitations, the  
7 general statute says "except as otherwise provided, according  
8 to law." Surely the Congress can make a 13-year  
9 statute of limitations in honor to your question, Mr. Justice  
10 Black, if it chose to. But the question is: did it choose to?  
11 What is there in this statute which simply says that the  
12 President may say when boys shall come in and register. What is  
13 there in that statute? It gives the Executive power to promul-  
14 gate what the Court of Appeals for the Second Circuit recognized  
15 as an impractical effect, an extension of the statute of limi-  
16 tations.

17 Now, we think that this court, over the years -- and  
18 this goes way back -- has always leaned over backwards, if I  
19 may use the colloquial phrase, with respect to statutes of  
20 limitation. It runs against the grain of lawyers and judges  
21 generally, the whole system of criminal justice, to permit by  
22 extensions, by back door methods and ambiguities the creation of  
23 extensions for statutes of limitations. And this Court has so  
24 held many times.

25 Now, the reason for it is perfectly obvious; and I go

1 beyond that. It seems to us that in the historical material  
2 that we put into the brief, Your Honors will see that going  
3 back to England and going back to the colonies and certainly to  
4 the beginning of the Republic, there has never been any ques-  
5 tion but that a statute of limitations must be created by the  
6 legislative and not by the executive. And it's one of those  
7 fundamental things in the separation of powers that it seems to  
8 me has gone through all the vicissitudes of various attempts to  
9 try to change by indirection, generally at the instance of the  
10 government, the normal rules applicable to the meaning of  
11 English words.

12 Q What do you say, Mr. Gurfein, to the Court of  
13 Appeals' view that this whole thing should be determined on the  
14 basis of the statute itself and applies only between ages 18 and  
15 26. The regulation can't do any more.

16 A Cannot do more.

17 Q Well, can't do any more, but at least it goes  
18 five years. I gather the Court of Appeals rejected the inter-  
19 pretation you suggested that someone might be prosecuted at age  
20 70 if they failed to register 52 years earlier.

21 A They did, and yet --

22 Q In fact, as to this fellow's brother, dismis-  
23 sing the indictment, the brother being freed; is that right?

24 A Yes, Your Honor, Mr. Justice Brennan. The  
25 point I am making is a very simple one: that there is ambiguity;



1 that you can have rulings of the other two circuits, which it  
2 said it goes for all time, as against the ruling of the Second  
3 Circuit --

4 Q Well, I think you got --

5 A They are both wrong.

6 Q No; but I was interested in your answer to what  
7 the Court of Appeals said in saying, "Oh, you have to read this  
8 really -- the statute applies only between ages 18 and 26.  
9 Then the terminal date for the beginning of the running of the  
10 statute of limitations, which we concede is five years, is age 26;  
11 and therefore it goes to age 31.

12 Now, that was, as I mentioned, was the gist of the  
13 view of the Court of Appeals; wasn't it?

14 A Yes, sir; and that is what I am addressing  
15 myself to now.

16 Q Oh, I'm sorry.

17 A I -- no, that's right in line with my thinking,  
18 if I may suggest.

19 Q Yes.

20 A When you have a "continuing duty statute," that  
21 does not mean that you have a continuing offense by legislative  
22 enactment. I go back to an old case in this Court, United  
23 States against Irvine, which goes back to 1870 or something like  
24 that. In that case the question came up of where somebody em-  
25 bezzled funds, when did the statute begin to run? It had been

1 held below that since he had a duty to return the funds, the  
2 statute had not run. This Court held that once an act is done  
3 which makes it a completed crime then the statute begins to run.

4 Now, Congress itself, knows how to create continuous  
5 offenses, as is evidenced, for example, by the bankruptcy  
6 statutes. The bankruptcy statute says very clearly, "The  
7 concealment of assets of the bankrupt or other debtor will be  
8 deemed to be" -- not a continuing duty -- "a continuing offense  
9 until the debtor shall have been finally discharged or dis-  
10 charge denied and the period of limitations shall not begin to  
11 run until such final discharge or denial of discharge.

12 You will find nothing, Your Honors, in the Selective  
13 Service Act which remotely relates to the statute of limitations  
14 or even to the creation of a continuous offense.

15 And so we say, analytically, as well as historically,  
16 what makes it necessary to say if we are to adopt a liberal  
17 construction of the statutes of limitations that just because  
18 we have a duty, that that necessarily means that we have a con-  
19 tinuous offense.

20 Q Well, you don't think, Mr. Gurfein, that the  
21 statute, being applicable from pages 18 to 26 -- the statute  
22 itself requires one to register at some time between 18 and 26?

23 A Oh, there may be a duty to register but we  
24 should not take it out of the normal concept of the statute of  
25 limitations.

1 Q Well, I know, but if the statute is to be read  
2 that way then why, up to age 26 isn't there a duty to register  
3 and not having registered, why wouldn't the five-year period  
4 begin to run at age 26?

5 A Because, under the normal rules of the statute  
6 of limitations, and of continuous offenses, I believe the rule  
7 is and should be, that once the crime is completed --

8 Q Well, when is that completed -- is it com-  
9 pleted on the 18th birthday?

10 A Let me put it to you this way: It is completed  
11 in this sense, that if the defendant were apprehended, let us  
12 say, on his 19th birthday he couldn't say to the Prosecutor,  
13 "Now, wait a minute, I still have time until I'm 26." He is  
14 in the toils; he has committed a completed crime.

15 And I say, Your Honors, if he has committed a com-  
16 pleted crime, what is there to say by virtue of legislative  
17 mandate, that that is to be treated differently from any other  
18 crime?

19 Q Well, is this -- this, then, is an argument,  
20 Mr. Gurfein, that -- your argument then is that the crime, for  
21 purposes of the statute of limitations, was completed on the  
22 18th birthday when he failed that day to register; is that it?

23 Q He was given five days.

24 A Give him five days; whatever that was.

25 Q And that's your statutory obligation, to

1 register within five days or you are guilty of an offense. On  
2 the sixth day you are guilty of an offense.

3 A And I can't defend myself by saying, "No, I  
4 have seven more years or five more years; I'm through. I'm a  
5 criminal.

6 And that brings right to the second point, because  
7 of the time --

8 Q Well, you would say, I gather, that when he  
9 came to be 23 he could not be prosecuted.

10 A I would say when he came to be 23 he could not  
11 be --

12 Q And furthermore, he had no duty to register  
13 between 23 and 25?

14 A No. I say he may have a duty to register, but  
15 it there doesn't have to be a criminal sanction. There are  
16 many duties in life in the statutes that we don't have criminal  
17 sanctions. It happens every day.

18 Now, if I steal your purse, I certainly have a duty  
19 to return it to you; I have a duty for life. But as far as the  
20 statute of limitations is concerned, you cannot apprehend me  
21 more than five days after I stole the purse, but I still owe you  
22 the purse. And that's all I say is that there has been a gloss  
23 upon a gloss here.

24 In the first place, Congress never said so and  
25 Congress is the only one to say so. In the second place, the



1 regulation is ambiguous and in the third place at every rule of  
2 liberal construction in criminal cases, the rules ought to be,  
3 and we think is, that the statute began to run when the crime  
4 is complete and the test of when the crime is complete, is:  
5 could the man have been apprehended at that time or would he  
6 still have an offense.

7 And that's our position on that.

8 Q Mr. Gurfein, are there any analogies with  
9 respect to registration of securities that shed any light on  
10 this?

11 A None that I know of, Your Honor. The only  
12 analogy is the Alien Registration Act, which raises the same  
13 problem, in a sense, and where there has been some differing  
14 view, I believe that they have also held there that it is a  
15 continuous offense; but I think the policy with respect to  
16 aliens is a separate policy that would take too long to go into  
17 here; but I think there are certain reserve power for aliens,  
18 which makes it different.

19 Q Is it not exactly parallel in terms of the  
20 government's resources to go and find the people who are directed  
21 by statute to register?

22 A You mean does it affect their resources?

23 Q Is there a difficulty?

24 A Oh, there is a difficulty, but so is there a  
25 difficulty in apprehending a thief or any common criminal. And

1 I don't think that these lads are in any different position  
2 from any other criminals. And that's why I use that analogy.  
3 It may have seemed startling, perhaps dramatic, but the fact  
4 that it does appeal to me as an anomaly that a narcotics  
5 peddler should be subject to a five-year term of limitations  
6 and a boy of 18 should be subject to 13 years.

7 But that I leave, because my time is running on that.

8 Q But there you have as in most statutes of  
9 limitation, you have the problem of the handicaps of defense  
10 after a long lapse of time; you don't have that here.

11 A That is true.

12 Q This is a mathematical equation you are dealing  
13 with here.

14 A That is true. I don't believe that the  
15 limitation is only for that reason, but also for reasons of  
16 repose, as the courts have often said.

17 Now, I'm up to the second point and I am sure I won't  
18 have time for the third and I'll mail it to Your Honors. I'm  
19 saving five minutes for the rebuttal.

20 The -- once you say that the only reason Toussie, the  
21 Petitioner here, is in trouble is because you extended the  
22 statute of limitations because he had a compulsory duty to  
23 register. Then it is if you were creating two statutes: you  
24 have first the statute which makes him the criminal because I  
25 think we all concede, he certainly could have been arrested

1 shortly after his 18th birthday, if he willfully failed to  
2 register. And then you say to him, "Now you are compelled to  
3 register, and by registering, identify yourself with your name  
4 and age and birthdate. And by that very identification you are  
5 submitting yourself to prosecution in the sense that -- while it  
6 it isn't on all fours with even Albertson and Marchetti, in  
7 spirit and theory it is an even more pristine violation of the  
8 statute of limitation; because here you do have an act which  
9 can't be equivocal really. The act itself, of registering and  
10 giving your name and birth is enough to convict you; so we  
11 don't have to talk here about chains and links in evidence and  
12 substantial danger of incrimination.

13 And we suggest that in that context, and I must say,  
14 the Third Circuit by the way, years ago in 1955, before this  
15 whole series of cases, indicated that there was a Fifth AMend-  
16 ment problem in alien registration cases and we cited them in  
17 our brief and they might be of some interest. They didn't have  
18 to decide it for other reasons.

19 And so we say that in this context the draft resisters,  
20 and they are a class. There is no denying the fact that there  
21 have been a number of willful resisters that these people are in  
22 a select class of the kind that this Court has spoken of, who  
23 are asked to come forward, give their names under compulsion,  
24 and hence, be subject to prosecution by the statute.

25 Q Mr. Gurfein, not that it's particularly

1 involved in this case, but suppose they just ask him: "Let me  
2 see your draft card." What would happen?

3 A If the police asked him? The question is if  
4 the police asked him or the draft board. If he was under a  
5 compulsory duty to register and he came in pursuant to that  
6 compulsion --

7 Q No, no. I mean, they stop him on the street  
8 and for some reason they ask him for identification and say,  
9 "and also your draft card." And he says, "I don't have one "  
10 He could be prosecuted; couldn't he?

11 A That's a violation of the law and if it's  
12 within the five years he'd be arrested.

13 Q He'd be prosecuted.

14 A He would be prosecuted.

15 Q Within five years?

16 A Well, at any time after he registered; yes.

17 Q But, it would be your argument that that would  
18 still be a five-year limit.

19 A That's right.

20 If Your Honor please, I think there is a difference  
21 between the registration and the registrant -- the nonregistrant  
22 that has already committed the crime.

23 Q Oh, certainly.

24 A Now, coming to the third point and I wish I had  
25 more time to expand this, a self-incrimination argument, but I



1 think it's obvious that it's either accepted or not, based on  
2 this conception, as I say, if Congress had passed a statute  
3 which said, "Let us call in all those who failed to register  
4 in the draft in the last couple of years. Now, please regis-  
5 ter." That, clearly would be against the Fifth Amendment,  
6 under the Amendment itself and under the cases, and we say this  
7 is analogous now.

8 In the First Amendment the court itself below, the  
9 Second Circuit, said that in theory it is true that a con-  
10 scientious objector to the process of registration ought to  
11 have a right to have a jury pass on the sincerity of his belief.  
12 But, unfortunately, they said -- I don't say "unfortunately,"

13 I added that, under present doctrine, we can't allow that to  
14 stand.

15 And we query what an present doctrine should  
16 support that result. We think that there is no doubt that  
17 Toussie stands convicted here because of his religious beliefs.  
18 I don't think the government says that he doesn't stand convic-  
19 ted because of religious beliefs. If so, he is convicted for  
20 the exercise of a First Amendment right directly.

21 Now, if he exercised that First Amendment right  
22 directly, should he not have the opportunity to have a jury pass  
23 on the sincerity of his beliefs?

24 In other words, in Sherbert against Verner and the way  
25 the Court has been determining these First Amendment questions

1 lately, it's no longer a question, as I see it, of whether  
2 there is a vague constitutional exemption for conscientious  
3 objectors, generally. That is not the issue. The issue is  
4 if a man in the exercise of his First Amendment rights,  
5 honestly and conscientiously believes that registration is part  
6 of the process of killing and will not register. Is he then to  
7 be sent to jail without any defense whatever.

8           And the question, of course, is one of balancing.  
9 In *Sherbert against Verner and Shapiro* and other case, the  
10 Court has now said that in the balancing of these interests we  
11 do not look to see whether it's a reasonable regulation, but  
12 whether there is a compelling reason as to why the government  
13 must have this.

14           And we venture to say, with the utmost respect, that  
15 in this context the government doesn't need to send people to  
16 jail. Not one more boy is going to be brought into the Army,  
17 no matter which way this goes. You and I --

18           Q           Is that really the issue, Mr. Gurfein? The  
19 compelling reason is that a country like ours, depending upon  
20 this kind of system of military organization, does have, does  
21 it not, a compelling reason to have everyone register?

22           A           There is no doubt it makes it easier, Mr.  
23 Chief Justice.

24           Q           And hasn't Congress also provided that the  
25 conscientious objector may have another avenue?

truly

1           A           But what does that do to the/conscientious  
2 objector who believes that the process of registration itself,  
3 is violative of his religious principles? That is not answered.  
4 And we're not saying that this Court should overthrow the  
5 constitutionality of the Selective Service System which you  
6 held valid in Nugent. We're not asking that this man be let  
7 out; we're not saying that he should be given a medal for not  
8 registering for religious reasons. We are saying that there  
9 are so few of these that they are not going to hurt the raising  
10 of any army, in the first place, and in the second place that  
11 the issue is an extremely narrow one here: Should a jury be  
12 allowed to pass on the sincerity of his beliefs?

13                   He's going to be subjected to the crucible of the  
14 criminal process in any event, and therefore when people say,  
15 "Well, this will open the floodgates; nobody will register;" I  
16 say, respectfully, that can't be true. Nobody is going to take  
17 on going to jail who isn't a dedicated and firm believer that,  
18 in his own conscience, the registration is part of this process of  
19 conscription, which is part of the process of war.

20                   If Your Honors please, I could expand on that, but I  
21 do want to save five minutes for rebuttal and I simply want to  
22 say at the end that the principal dissenter, as has often been  
23 said, should be the subject, and is, indeed, the subject of the  
24 great concern of this Court and there is no doubt that a  
25 principal dissenter in this field certainly subjects himself to

1 the direst of punishments as a felon and therefore, it is  
2 giving away not very much to permit a First Amendment right,  
3 either directly or because otherwise you are discriminating  
4 between two types of conscientious objectors: those who  
5 register and are processed and those who, by reason of  
6 religious beliefs, cannot even register.

7 Q Do you think there is a constitutional ob-  
8 ligation to have a conscientious objector exception in the  
9 statute? Supposing Congress hadn't passed one?

10 A I think that under the free exercise clause of  
11 the First Amendment, Mr. Justice Harlan, that there is very  
12 little history to support the idea that there is no con-  
13 scientious objection. I think Mr. Chief Justice Hughes, in his  
14 dissent in MacIntosh, spoke of the principles of the constitu-  
15 tion. He didn't mention any amendment, but it's obvious he  
16 meant the First Amendment.

17 We know, too, that there never was conscription until  
18 the Civil War in 1863. We know that at that time the first  
19 ten amendments were considered to be limiting the power only to  
20 the Federal Government. The Federal Government had no army.

21 So, that I think all the resort to history on both  
22 sides is inconclusive and I do believe that when we read the  
23 content of what is free exercise of religion we must do it in  
24 a negative way in order to avoid the constitutional right under  
25 the First Amendment, by saying "no." This is like bigamy or



1 polygamy. This is something inimical to society which, of  
2 course, the court can do.

3 But we submit that our balancing of the interests  
4 of the few that are involved, there is a constitutional right,  
5 and even if it's within the purview of the right, as distin-  
6 guished from it, merely a privilege, if you will, there still  
7 is a sort of due process within the First Amendment that we  
8 think discriminates, then, between two honest and principled  
9 religious people: one who registered and the other who does not.  
10 We don't ask you to let the second one off but we do say that  
11 if he is willing to test it in the crucible of the criminal  
12 court, a jury should be permitted to pass on the sincerity.

13 MR. CHIEF JUSTICE BURGER: Mr. Beytagh.

14 ORAL ARGUMENT BY FRANCIS X. BEYTAGH, JR.,

15 ASSISTANT SOLICITOR GENERAL, ON BEHALF OF

16 THE UNITED STATES

17 MR. BEYTAGH: Mr. Chief Justice, and may it please  
18 the Court: As counsel has indicated, Petitioner makes what is  
19 basically a three-pronged attack on the validity of the convic-  
20 tion for nonregistration with the Selective Service System.

21 He says first that the statute of limitations bars  
22 the instant prosecution; he says second, that if it did not,  
23 that the privilege against self-incrimination provides a defense  
24 complete defense to his conviction; and he says third,  
25 at all events, his religious beliefs provide a defense, since

1 they entail a conviction that he should not even submit to  
2 registration or that at the least, the Court should have com-  
3 mitted that issue to the jury.

4 I think the central fallacy of the statute of limita-  
5 tions argument was alluded to by Mr. Justice White. The result  
6 as we see it, if Petitioner is correct, is that at age 23 when  
7 he says the five-year statute of limitations would have run, he  
8 will no longer be subject to registration; and I don't see  
9 anything that makes him subject to registration, apart from our  
10 prosecution for failure to register at the time he should have.

11 Now, our view of the statute and the regulations  
12 that we think properly implements the statute, is simply this:  
13 When the District Court, I think, set it out perhaps as well as  
14 it could be. Basically the offense that Petitioner is charged  
15 with is one of failing to register with the Selective Service  
16 System, not simply upon reaching age 18 when he was required to,  
17 but failing to register at all during the period of time between  
18 age 18 and age 26, during which the regulations, and we think  
19 by fair application of the statutes that the regulations sought  
20 to implement effectually, required that perform his duty.

21 Q I don't get that. It seems to me if he hasn't  
22 committed an offense, when five days after his 18th birthday or  
23 -- he has committed an offense -- then you say it's a continuing  
24 offense, but only until age 26. I should think it would just  
25 continue until the day he dies. I don't understand the 26.

1 There is nothing in there saying that you have between the age  
2 of 18 and 26 to register.

3 A No, I think there is, Your Honor. The--

4 Q You have to register within five days after  
5 your 18th birthday, period.

6 A The registration statute itself, Section 453  
7 says that every male person now or hereafter in the United  
8 States --

9 Q Where is that?

10 A It's from page 2 of our brief. It sets out  
11 Section 3.

12 "Who, on the day or days fixed for the first or any  
13 subsequent registration, is between the ages of 18 and 26."  
14 And it goes on to say "shall register as set out by the pro-  
15 clamation and rules and regulations.

16 Q Well, that's for people who are over 18 at  
17 the time of the enactment of the law; isn't it?

18 A That is one of the purposes of the Act, Your  
19 Honor, but the way we read it is that reading it with Section 4  
20 which makes people between 18 and a half and 26 liable for  
21 training and service.

22 The purpose of Congress was to set out a group of  
23 people in this age group to be responsible for registration.  
24 There are certain people who are not required to register  
25 initially at age 18 and they become responsible for registration

1 upon the happening of certain events that no longer put them in  
2 this category.

3 Q I suppose the -- who, nonresident citizens;  
4 people who have an American mother who has never been in the  
5 United States, or something like that?

6 A There is a whole list that's provided by  
7 Section 454 and it's set out in the regulations there are  
8 people who are, essentially, in the Armed Forces at that time --

9 Q Well, aren't --

10 A -- or in reserve components serving in certain  
11 governmental capacities; things like that; and aliens in  
12 certain categories.

13 Q Well, registration applies to people other  
14 than citizens; doesn't it?

15 A Correct; yes.

16 Q So, why could he wait until he was 25 to  
17 register if he was here when he was 18?

18 Q Male citizens.

19 A No, I don't think it says male citizens.

20 Q It says "male citizen."

21 A It says "male person," now and hereafter in  
22 the United States.

23 Q Oh, yes, and every other male person.

24 A Yes.

25 And there's a rather intricate provision relating to



1 aliens, basically. My understanding is that most aliens are  
2 required to register. If they determine not to register and  
3 subject themselves to service, they still may be admitted in  
4 certain categories, but they -forfeit their right to become  
5 naturalized citizens.

6 Q Mr. Beytagh, if I could understand that this  
7 is a continuing duty I have great difficulty with it being a  
8 continuing offense, and I'm not playing semantics.

9 A Well, we think it's both a continuing duty --  
10 the regulations prescribes that quite clearly and --

11 Q Well, if it's a continuing offense does he  
12 commit it 365 times a year?

13 A No; it's one offense, Your Honor.

14 Q When was that?

15 A The offense continues --

16 Q The day he reached 18?

17 A Well, five days thereafter.

18 Q That's when the offense was committed.

19 A But the offense continues because the statute  
20 and regulations that implement that statute require --

21 Q Well, we have statutes saying "You shall not  
22 buy heroin."

23 A That's correct.

24 Q But you have to buy some in order to be guilty.  
25 And you are guilty each time you buy it.

1           A        That's correct.

2           Q        Well, what's the difference?

3           A        Well, the difference here is that this  
4 individual had a responsibility at age 18 or five days there-  
5 after to register. He did not do that and he has continued  
6 thereafter not to do that. The notion of the continuing offense,  
7 as this Court's decisions have spelled out, and as our brief  
8 develops, fits with this.

9                    Basically, the notion is that there is an ultimate  
10 objective that the individual's criminal activity seeks to  
11 achieve. The ultimate objective here is evasion of military  
12 service; there's no question about that. That cannot be  
13 achieved unless and until he reaches the point at age 26 when  
14 he no longer liable for training and service.

15           Q        Well, I would assume that at age 25 if he  
16 enlisted, he still could get convicted.

17           A        You mean if he came in and registered?

18           Q        No; enlisted.

19           A        If he enlisted in the Army --

20           Q        Could he still be convicted?

21           A        I think that's correct. I think that the  
22 chances of the Government --

23           Q        Actually, I suppose, if he came in and  
24 registered ten days after his 18th birthday he'd still be guilty  
25 of the offense of not coming in and registering five days after.

1           A           That's technically correct, Your Honor. But,  
2 as we point out in the brief, one element in this offense is  
3 willfulness and coming in at any time, seems to me, the more  
4 remote, obviously, the less significant this is, but coming in  
5 certainly ten days after would seem to me to raise a very  
6 serious doubt about the willfulness of his earlier violation  
7 and I doubt if he would be prosecuted. The only difficulty,  
8 as we point out in our brief, we would have, if somebody who had  
9 apparently pursued a deliberate course of nonregistration until  
10 he had reached a situation, marriage-wise or otherwise where  
11 he was eligible for a deferment or exemption, and then he came  
12 in and said, "Well, here I am. I just wanted to tell you I  
13 want to register and I didn't mean anything bad about what I  
14 did previously."

15                   Otherwise, the government's policy is basically, to  
16 get men to serve in the military, not put people in prison.  
17 Now, Petitioner refers to a Hawaiian case which, he says, demon-  
18 strates conclusively that it is not the government's policy  
19 and I simply stated as to that Hawaii case, the individual very  
20 carefully came in only after he had reached age 26.

21           Q           There have been other decisions on this in the  
22 lower courts?

23           A           Yes, that's correct.

24           Q           How are they split?

25           A           I don't think there is any split. The Courts

1 of Appeals have considered this have regarded the requirement as  
2 a continuing duty, and it regarded the offense as a continuous  
3 offense.

4 Now, it is true that several of these cases have  
5 intimated that the duty is an open-ended one, and does not  
6 terminate at age 26.

7 This question was raised, that Mr. Justice Brennan  
8 brought up, in this very case. The Petitioner's brother was  
9 charged along with him. His brother, at the time he was  
10 charged, was age 33 or two years, close to two years beyond the  
11 age of 31, when we say the statute of limitations and the courts  
12 below say the statute of limitations ran on his failure to  
13 register.

14 The -- Judge Duling determined that a reasonable  
15 construction of the statute and the regulations, putting them  
16 all together: Section 3, Section 4 and the regulations that  
17 seek to implement them, indicate that the intent of Congress was  
18 to make persons eligible for service in the Armed Forces,  
19 responsible to register until they reach that age, age 26,  
20 when they were no longer liable for training and service.

21 Now, we think that's a reasonable --

22 Q Well, that's not the answer to Justice Harlan's  
23 question. You said there was no split. I had understood that  
24 there was; that this is the view of this District Court and the  
25 Court of Appeals and other Courts of Appeals. But, I thought



1 that instead of there being in effect a 13-year statute of  
2 limitations, there was an unlimited period of time during which  
3 a person could be prosecuted; am I wrong about that?

4 A No, Your Honor; you are correct; and I thought  
5 that I included that --

6 Q Well, I would consider that a difference of  
7 opinion, or, in Mr. Justice Harlan's words, "a split."

8 A I thought his question went to whether there  
9 was a split on the continuing duty question.

10 Q Perhaps it did.

11 Q My question was ambiguous, just like the  
12 statute.

13 Q That was to be my question, but I thought that  
14 the questions were directed at the continuing duty concept,  
15 not whether there was a difference or a split on perpetual duty  
16 or limited eight-year duty.

17 A We don't -- Mr. Justice Stewart, we don't --  
18 and I thought I included it in my answer, we understand these  
19 cases to leave this, as I say, open-ended. We think that that's  
20 wrong. In this particular case the Solicitor General determined  
21 in the case of his brother not to pursue an appeal because we  
22 thought that was not an appropriate or proper or correct read-  
23 ing of the --

24 Q And this Court, am I correct in understanding,  
25 is alone; that is, this District Court and Court of Appeals.

1 This decision is alone in sort of creating a 13-year statute;  
2 am I correct on that?

3 A I think that is correct, except I don't agree  
4 and don't accept the notion of the 13-year statute of limita-  
5 tions. Our notion is that a five-year statute applies.

6 Q Well, there can be no prosecution after a  
7 person reaches five days after his 31st birthday.

8 A Yes, Your Honor. I think that's correct. I  
9 think that there are some reasons for this. It seems to me that  
10 these earlier decisions that we are deferring, were in the main  
11 decided ten or more years ago and since that time there has been  
12 a substantial development and evolution in the Fifth Amendment  
13 area, which is one of the issues in this case. It seems to me  
14 that all things considered this was a reasonable construction  
15 and application of the statute.

16 Q The Fifth Amendment point, it seems to me that  
17 on his, what is it, 26th birthday he has a choice of going in  
18 and asking to register and exposing himself to Fifth Amendment  
19 problems or the statute will -- the real statute of limitations --

20 A That's correct.

21 Q Well, doesn't that give you some Fifth Amend-  
22 ment problems? as of that date?

23 A Well, I think the Fifth Amendment problems we  
24 reach that date, but we think that there are answers to them.

25 Q Yes, I agree. Do you see any basis for

1 distinguishing between the obligation of an alien to register  
2 and the obligation to -- that's involved here?

3           A           You mean the annual obligation in January?  
4 I don't see any essential difference, Your Honor. It is more  
5 likely an annual income tax return or renewal of a driver's  
6 license, various analogies that we have suggested, it would  
7 seem to us, and this is anticipating a Fifth privilege argument.  
8 It seems to us that no matter how Petitioner seeks to charac-  
9 terize it, his argument ultimately leads to the conclusion that  
10 once a person violates a continuing or recurring obligation or  
11 duty imposed by the government, whether it be a regulatory  
12 scheme, tax scheme; whatever, he requires registration reporting.

13                   The thrust of his argument is that once he violates  
14 that, the statute of limitations on that offense starts to run  
15 and thereafter he is insulated from any further compliance  
16 because he could say that "Any further compliance would in-  
17 criminate me. under the Fifth Amendment and I can't be required  
18 to do that."

19                   We think that none of these cases, Marchetti, Grosso,  
20 or any of the others go to this extreme. Petitioner seeks to  
21 draw some distinctions and says he doesn't see a need to go that  
22 far, but it seems to me it is very difficult to say that he's  
23 not going that far. The central objective, it seems to us, is  
24 of the point that he seeks to make is, on the privilege ques-  
25 tion, is that he could not be compelled, required, whatever, to

1 register after the initial registration period. It seems to  
2 us that if that is so, neither could people be required to make  
3 reports, returns, whatever, after they have initially failed  
4 to.

5 Q Well, Mr. Beytagh, on the government's  
6 reasoning, though, if he does come in at age 19 or 21 or 22,  
7 he does incriminate himself; doesn't he?

8 A I think in ~~some~~ sense he incriminates himself,  
9 but it seems to me --

10 Q Well, I mean, the government never heard of  
11 him until then and they now discover that here he is and he  
12 didn't come in five days after his 18th birthday. Does the  
13 government then have a basis for prosecuting?

14 A It certainly does have a basis for prosecuting.

15 Q Well, how do we get over that?

16 A Well, it seems to me that there are several  
17 ways here. In the first place, as I indicated, his coming in  
18 voluntarily casts a question initially on the willfulness of the  
19 original offense and whether the prosecution will be successful.

20 It also seems to us, and this is, I think, the central  
21 point on which the Court of Appeals relied, is that there isn't  
22 any real compulsion that's working on him to force him to come  
23 in after he first failed to register. This is a continuing  
24 offense, if we accept that and we have to accept that in order  
25 to get to the privilege question.



1           Therefore, unlike the situations in Marchetti and  
2           Grosso, he risks no greater threat of punishment by continuing  
3           not to register during the --

4           Q           Well, the answer is then there is no violation  
5           of the privilege.

6           A           And I think there is no compulsion working on  
7           him and therefore no violation of the privilege. This is  
8           developed at considerable length in the Court of Appeals'  
9           opinion. It seems to us that there is a substantial difference  
10          between this kind of situation and the situation in Grosso and  
11          Marchetti. The situation there would have required people to  
12          continue to do things that would have --

13          Q           Now, why is it voluntary? Why is it volun-  
14          tary on your theory of continuing offense. Why, when he comes  
15          in at 19, 21; it's not compelled?

16          A           I didn't suggest -- in the first place, this  
17          individual didn't come in -- and he --

18          Q           No, but testing whether or not this is any  
19          merit in this privilege argument. As I understand you, the  
20          Court of Appeals, and I gather the government adopts the Court  
21          of Appeals' position. The Court of Appeals position is that  
22          there is nothing compulsory about his -- he doesn't register at  
23          19 or 21 under any compulsion and therefore the privilege is  
24          not violated; is that right?

25          A           Because he has already committed whatever

1 offense he's going to commit, since it is a continuing offense,  
2 continuing crime and that he doesn't incriminate himself to any  
3 greater extent than he has already incriminated himself.

4 Q It doesn't rest on the attribution of volun-  
5 tariness of coming in then and registering.

6 A No, it's a question --

7 Q It rests on that because it's a continuing  
8 offense.

9 A That there is no real compulsion working on  
10 him in the Fifth Amendment sense, because he doesn't risk any-  
11 thing greater by not coming in --

12 Q It's rather subtle isn't it? You're saying  
13 though that -- you do say that if he asks someone at age 21 and  
14 he not having registered before -- if he asks somebody, "Am I  
15 under a legal duty to register now?" They should tell him "yes."

16 A Yes.

17 Q And he answers them well, "But I can't be  
18 punished any more than I already could be by not registering  
19 now." They say "yes." But he says, "But I do have a legal  
20 duty." And you say that responding to a legal duty is not com-  
21 pulsion for Fifth Amendment purposes?

22 A Under the circumstances presented here I would --

23 Q Actually, Mr. Beytagh, this is a matter of  
24 detection and identification, rather than incrimination.

25 A Well, I --

1 Q He's already incriminated in the broad sense,  
2 by this violation of the statute. His coming in merely iden-  
3 tifies him, exposes him.

4 A Well, Mr. Justice Brennan's suggestion was  
5 that this was incrimination and I was accepting that for pur-  
6 poses of discretion.

7 Q Well, he, in truth, is already incriminated;  
8 is he not?

9 A Well, I think --

10 Q The fact that he has failed to register on the  
11 day when the law requires it?

12 A I think he's already committed a criminal  
13 offense and he continues to commit one by not coming inn.

14 Q Well, he's not self-incriminated by committing  
15 the offense.

16 A I agree with that.

17 Q Well, when we're talking about the privilege  
18 it's whether it's compulsory self-incrimination; that's what  
19 we're talking about.

20 A That's correct, and my submission was that the  
21 compulsion that was operating on him as the Court of Appeals  
22 suggests, is not the sort of compulsion that should be given  
23 sanction by this Court.

24 Q Well, when he comes in and registers at 21 he  
25 certainly has let the government know that he has failed in his

1 duty up to then.

2 A I think that's so, Your Honor.

3 Q But he's not then compelled to do it? Isn't  
4 that your point?

5 A I think that's essentially the point we're  
6 making. I don't think the situation -- we don't rest simply on  
7 that point and I don't think we need to rest on that point.  
8 We developed in our brief a variety of other suggestions that  
9 go to: (1) the question of willfulness and also the question of  
10 whether the government, in fact, is going to prosecute. And  
11 the position we're going to take, as I indicated earlier, and  
12 will take, is that if these people when they come in have not  
13 sought to take advantage of the fact of their not registering  
14 at some earlier point, although they may have committed a  
15 technical violation, the purpose is to get people eligible for  
16 military service and not in jail.

17 Q Are you suggesting that the statute should  
18 be construed to bar a criminal prosecution of the fellow  
19 voluntarily registers?

20 A No, Your Honor. And I don't suggest that and  
21 I don't think that an immunity statute, as Petitioner suggests,  
22 as the solution of this problem would really solve it. It seems  
23 to me that would simply invite people to fail to register  
24 until they reach the point in time when they were in a better  
25 position vis-a-vis the Selective Service System and then come in.



1 Q Suppose the statute of limitations does begin  
2 to run five days after his time when he failed to register.

3 What about this case?

4 A If the statute of limitations began to run --

5 Q Yes.

6 A -- at that point in time, then the statute has  
7 expired.

8 Q Then what?

9 A Then if the statute has run on this particular  
10 offense and can't be prosecuted and the courts below --

11 Q The fact that it was a continuing offense,  
12 wouldn't have anything to do with it, would it?

13 A No, but in order to get him within the period  
14 of the statute -- and as a matter of fact, the statute here,  
15 under our view, never started to run because he was indicted  
16 just prior to reaching age 26.

17 Q Why?

18 A The indictment here was found before his 26th  
19 birthday, so that under our view of the statute and the regula-  
20 tions --

21 Q Your view is, although he was guilty of the  
22 offense five days after he became 18, he could be indicted  
23 at any time thereafter.

24 A As in any continuing offense, I don't think  
25 there is anything anomalous about that. Counsel --

1 Q I didn't mean there was. I just wanted to --

2 A Yes. Counsel suggested that there was something  
3 strange about the notion that at age 19 or so the government  
4 can discover this and prosecute him. This is so with respect  
5 to conspiracy and any other continuing offense. If it con-  
6 tinues, the government can certainly interrupt its continuance  
7 when it discovers the offense and bring a prosecution against  
8 the individual at that time. It doesn't have to wait until  
9 the statute of limitations starts.

10 Q You agree that they couldn't prosecute him  
11 twice for failing to register.

12 A I think that's correct and I think any  
13 suggestion that there are any double jeopardy problems here  
14 is answered by our reference to the regulations. These people,  
15 if they are prosecuted, they are involuntarily registered with  
16 the Selective Service System and there is no question of their  
17 being subject twice to the jeopardy.

18 Q Does that amount to any great handicap to the  
19 Department of Justice, the prosecution?

20 A I'm not sure I understand your question.

21 Q Well, I mean the man has committed an offense  
22 and you say to continuously commit that offense, would it amount  
23 to any great handicap to the Department to require them to  
24 prosecute him within five years from the time that it was  
25 committed?

1           A           I think that the question is not simply  
2 whether it interferes with the operations of the Department of  
3 Justice --

4           Q           Oh, of course not.

5           A           The question is also whether it interferes  
6 with the operation of the Selective Service System.

7           Q           Of course.

8           A           Congress has made a judgment that people  
9 between ages 18 and a half and 26 are liable for training and  
10 service. Now, if, as Mr. Justice White suggested, counsel's  
11 submission is correct, Petitioner, on reaching age 23 and five  
12 days, would no longer be subject to criminal prosecution, and  
13 I can't understand why at that point he wouldn't simply be  
14 scot free.

15                    Although he would still be with --

16           Q           He wouldn't if he hadn't been prosecuted.  
17 But if you admit, and of course, the problem that the offense  
18 has been committed five days after has been deemed of age, then  
19 it has run five years and the government hasn't prosecuted.

20           A           That's correct.

21           Q           Mr. Beytagh, could he register on -- after  
22 his 22nd birthday?

23           A           I don't know whether he could or not.

24           Q           Well, how could he commit an offense after he  
25 is 26 if he couldn't register, if it's a continuing offense?

1           A           Well, under our submission the responsibility  
2 terminates at age 26; I have to agree, and therefore he could  
3 not commit an offense after that and the statute question would  
4 be whether the statute would run after that time.

5           Several other comments on the privilege defense that  
6 Petitioner asserts. As I sought to allude to -- there is some  
7 question of whether he even has standing to assert that defense.  
8 He's made it clear, indeed, in his point -- he has made it  
9 demonstrably plain that he never intended to register at all.  
10 Indeed, he said that his religious beliefs prevented him from  
11 doing so. So, it seems to us there is some real question  
12 about whether he's in a position <sup>to say</sup> that he was deterred from  
13 registering at some later point in time because of potential  
14 self-incrimination.

15           The Marchetti and Grosso line of decisions we sought  
16 in our brief to distinguish those, it seems to us that the  
17 distinctions are rather clear. First they relate to initial  
18 registration in an area permeated with criminal statutes  
19 relating to people inherently suspect to criminal activities.

20           Petitioner, as counsel suggested, he's in that same  
21 category once he has failed initially to register. We don't  
22 think that's so, as I indicated to Mr. Justice Stewart, there  
23 are a number of people who have the responsibility to register  
24 at a later point in time and there are also people who, for one  
25 reason or another, have excusably failed to register and they



1 come in at a later point in time.

2 As I indicated, Mr. Chief Justice, we view the  
3 position here suggested, whatever distinction might be sought  
4 to be made, is basically a far-reaching one if the Court  
5 accepts it on the privilege question it will take it beyond  
6 anything that it's done thus far in the Fifth Amendment area.  
7 And that, we think, will seriously impair the ability of the  
8 government to obtain necessary information. This is a big  
9 country, and as the Court has pointed out in several opinions  
10 that Grosso and Marchetti also, indeed, pointed this out, too.  
11 The government is in need for people to come forward with  
12 information as an essential prerequisite to effective and  
13 orderly operation of the variety of schemes.

14 We can suggest a number of analogies. I suggested  
15 some of them to the Chief Justice.

16 On the last point, it seems to us that it doesn't  
17 really require, despite the rather elaborate development by the  
18 Petitioner, very much comment. This Court has continually  
19 recognized that Congress proceeded in a reasonable and sensible  
20 fashion to establish procedures for determining conscientious  
21 objection and exemption from military service on the basis of  
22 that objection.

23 It seems to us that all of these cases, Nugent,  
24 Seegar, the cases that are presently before the Court, all  
25 indicate that this procedure that has been established was

1 a reasonable, sensible, sound one.

2 We don't know of any cases that stands for the propo-  
3 sition that Mr. Justice Harlan raised that the First Amendment,  
4 of itself, requires that conscientious objectors be taken into  
5 account. Fortunately, the Congress has not seen fit to force  
6 this Court to that issue, because Congress has taken into  
7 account conscientious objection. It goes back, as Petitioner  
8 indicated, historically, even to colonial times.

9 But the question comes down simply to the very  
10 narrow one here. Is the burden, assuming that some First  
11 Amendment rights exist, is the burden to come in and register  
12 and do nothing more, to come in and register and submit to a  
13 readily available, sensible and reasonable process of deter-  
14 mining conscientious objection; is that burden such a great one  
15 that it should be given constitutional protection? We submit  
16 that it's not; that it's a sensible scheme to have <sup>all</sup> people come  
17 in and identify themselves initially with the government so  
18 that the Selective Service System can have available to it  
19 records, including the entirety of a manpower pool available.  
20 And then there is a procedure, going on from there, to deter-  
21 mine conscientious objection.

22 Q How did the government learn that this man  
23 hadn't registered?

24 A My understanding, Your Honor, is that there was  
25 an anonymous tip, and that's all that the record shows.

1 Q What?

2 A A tip that this individual and his brother had  
3 not registered. Now, whether somebody got mad at them and  
4 called, I don't know; that's all that the record indicates.

5 Q And then it was presented to the grand jury?

6 A And then it was presented; an indictment was  
7 found and the prosecution proceeded. The prosecution as to  
8 his brother was dismissed, because of Judge Duling's reading  
9 of the statute, but the prosecution of the Petitioner continued.

10 For these reasons --

11 Q What sentence did he get?

12 A He has not been sentenced yet, it's under  
13 4208 procedure for referral and determination by the Department  
14 of Justice as to an appropriate sentence.

15 There are questions that were raised during the  
16 course of the trial relating to his mental capacity and I think  
17 that that is part of the problem here, that -- not that an  
18 insanity defense was presented as such, but the question of the  
19 appropriateness of the punishment is one that is suitable for  
20 determination under the procedure of making the investigation  
21 first, and then reporting to the District Judge.

22 Q He was tried before Judge Duling; was he?

23 A He was not, Your Honor. Judge Duling con-  
24 sidered the initial motion to dismiss. Judge Mischler was the  
25 judge that --

1 Q Yes.

2 A For these reasons we submit that the judgment  
3 of the Court of Appeals upholding the Petitioner's conviction  
4 should be affirmed.

5 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Beytagh.

6 Mr. Gurfein, the Marshal says you are out of time,  
7 but my records show you have about a minute-and-a-half.

8 REBUTTAL ARGUMENT BY MURRAY I. GURFEIN

9 ON BEHALF OF PETITIONER

10 MR. GURFEIN: Thank you, sir. I'd just like to make  
11 two points: On the statute of limitations, if you take the  
12 first age group that registered in 1951, 18 to 26, and try to  
13 apply the Court of Appeals' Second Circuit reasoning to them,  
14 the man who then was 19 years old had a statute of limitations  
15 of 11 years; the man who was 25 years old at that time had a  
16 statute of limitations of six years; and it makes no sense, it  
17 seems to us, to say that there is anything within the statute  
18 that makes 26 years the cut-off date.

19 Now, with respect to the compulsion, all I want to  
20 say is this: that the Petitioner in this case would not be  
21 here today; he'd be out if it were not for the fact that the  
22 government held that there was a continuing duty for him to  
23 register. And it is idle to say, I respectfully submit, that  
24 that makes no difference. The statute would definitely run  
25 against him, but the government cannot have its cake and eat it.



1 as we indicated in the brief.

2 If he's under a duty to register, then the Fifth  
3 Amendment problem becomes extremely acute. If he was not under  
4 a duty to register, the statute of limitations has expired.

5 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Gurfain;  
6 the case is submitted.

7 (Whereupon, at 3:45 o'clock p.m. the argument in the  
8 above-entitled matter was concluded)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25