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United States v. O'Brien

Supreme Court of the United States

January 24, 1968, Argued ; May 27, 1968, Decided *

No. 232

* Together with No. 233, O'Brien v. United States, also on certiorari to the same court.

Reporter
391 U.S. 367 *; 88 S. Ct. 1673 **; 20 L. Ed. 2d 672 ***; 1968 U.S. LEXIS 2910 ****

UNITED STATES v. O'BRIEN

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Disposition: *376 F.2d 538*, vacated; judgment and sentence of District Court reinstated.

Core Terms

certificates, registrant, destruction, regulation, classification, mutilation, registration certificate, local board, governmental interest, burned, knowingly, Military, destroy, cards, cases, motive, draft card, nonpossession, Training, individuals, punishable, reargument, decisions, sentence, abridge, Notice, alters, armies, legislative purpose, personal possession

Case Summary

Procedural Posture
Petitioner government and defendant anti-war protester sought review of a judgment of the United States Court of Appeals for the First Circuit, holding in part that the 1965 amendment to the Universal Military Training and Service Act of 1948, which prohibited the knowing destruction or mutilation of Selective Service registration certificates, ran afoul of *U.S. Const. amend. I* by singling out persons engaged in protests for special treatment.

Overview
The 1965 amendment to the Universal Military Training and Service Act of 1948 prohibited the knowing destruction of Selective Service registration certificates. Defendant was convicted and sentenced after he publicly burned his registration certificate in an attempt to influence others to adopt his antiwar beliefs. Defendant argued that the amendment was unconstitutional in its application and as enacted because of Congress' alleged purpose to suppress freedom of speech. The Court held that a sufficient governmental interest justified the conviction because of the government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because the amendment condemned only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of defendant's act frustrated the government's interest. Further, an otherwise constitutional statute would not have been struck down on the basis of an alleged illicit legislative motive.

Outcome
The Court vacated the judgment.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Expressive Conduct

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN1[] **Freedom of Speech, Expressive Conduct**

When "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on *First Amendment* freedoms.

Constitutional Law > Congressional Duties & Powers > Necessary & Proper Clause

Governments > Federal Government > US Congress

Constitutional Law > Congressional Duties & Powers > War Powers Clause

Military & Veterans Law > US Selective Service System

HN2[] Congressional Duties & Powers, Necessary & Proper Clause

The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. The power of Congress to classify and conscript manpower for military service is beyond question. Pursuant to this power, Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to cooperate in the registration system.

Constitutional Law > Congressional Duties & Powers > Necessary & Proper Clause

HN3[] Congressional Duties & Powers, Necessary & Proper Clause

In the absence of a question as to multiple punishment, there is nothing improper in Congress providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest.

Constitutional Law > Congressional Duties & Powers > Necessary & Proper Clause

HN4[] Congressional Duties & Powers, Necessary & Proper Clause

Regulations may be modified or revoked from time to time by administrative discretion. The Congress may change or supplement a regulation.

Governments > Legislation > Interpretation

HN5[] Legislation, Interpretation

It is a familiar principle of constitutional law that the Supreme Court of the United States will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.

Lawyers' Edition Display

Summary

Defendant was convicted in the United States District Court for the District of Massachusetts for violating, by burning his selective service registration certificate publicly to influence others to adopt his antiwar beliefs, a federal statute making the knowing destruction or mutilation of such certificate a criminal offense. On appeal, the Court of Appeals for the First Circuit reversed on the ground that the statute was unconstitutional as a law abridging freedom of speech. (376 F2d 538.)

On certiorari, the Supreme Court of the United States vacated the judgment of the Court of Appeals, and reinstated the judgment and sentence of the District Court. In an opinion by Warren, Ch. J., expressing the view of seven members of the court, it was held that the statute was constitutional both on its face and as applied, and could not properly be attacked on the ground that the purpose or motive of Congress was to suppress freedom of speech.

Harlan, J., joined the opinion of the court, expressing his understanding that consideration of *First Amendment* claims was not foreclosed in those rare instances in which an "incidental" restriction upon expression in practice has the effect of entirely preventing a "speaker" from reaching a significant audience with whom he could not otherwise lawfully communicate.

Douglas, J., dissented, expressing the view that the case should be restored to the calendar for reargument on the question of the constitutionality of a peacetime draft.

Marshall, J., did not participate.

Headnotes

CONSTITUTIONAL LAW §926 > free speech -- destruction of draft card -- > Headnote:
LEdHN[1][] [1]

The 1965 amendment (79 Stat 586) of the Universal Military Training and Service Act of 1948 (50 USC Appx 462(b)(3)), making it a criminal offense knowingly to destroy or mutilate a certificate issued by the Selective Service System, does not abridge free speech on its face, any more than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records.

CONSTITUTIONAL LAW §925.7 > free speech -- object -- > Headnote:
LEdHN[2][] [2]

For the purpose of the constitutional guaranty of freedom of speech, not every kind of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.

CONSTITUTIONAL LAW §925 > free speech -- government regulations -- > Headnote:
LEdHN[3][] [3]

When "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on *First Amendment* freedoms; a government regulation is sufficiently justified if (1) it is within the constitutional power of the government, (2) it furthers an important or substantial governmental interest, (3) the governmental interest is unrelated to the suppression of free expression, and (4) the incidental restriction on alleged *First Amendment* freedoms is no greater than is essential to the furtherance of that interest.

CONSTITUTIONAL LAW §926 > free speech -- burning draft card -- > Headnote:
LEdHN[4][] [4]

The *First Amendment* guaranty of freedom of speech is not violated by the conviction, for violating a federal statute (*50 USC Appx 462(b) (3)*) making it a criminal offense to destroy a certificate issued by the Selective Service System, of a defendant who burned his draft card publicly to influence others to adopt his antiwar beliefs.

ARMED FORCES §1 > power of Congress -- > Headnote:
LEdHN[5][] [5]

The constitutional power of Congress to raise and support armies and make all laws necessary and proper to that end is broad and sweeping.

ARMED FORCES §7 > compulsory draft -- power of Congress -- > Headnote:
LEdHN[6][] [6]

Pursuant to the unquestionable power of Congress to classify and conscript manpower for military service, Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to co-operate in the registration system; the issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system, and legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.

ARMED FORCES §7 > selective service certificates -- > Headnote:
LEdHN[7][] [7]

Congress has a legitimate and substantial interest in preventing the wanton and unrestrained destruction of certificates issued by the Selective Service System, and assuring their continuing availability by punishing people who knowingly and wilfully destroy or mutilate them; the pre-existence of regulations requiring a registrant to have his registration and classification certificates in his personal possession at all times in no way negates this interest.

CRIMINAL LAW §9 > power of Congress -- > Headnote:
LEdHN[8][] [8]

In the absence of a question as to multiple punishment, there is nothing improper in Congress' providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest.

ADMINISTRATIVE LAW §89 > regulations -- change -- > Headnote:
LEdHN[9] [9]

Administrative regulations may be modified or revoked from time to time by administrative discretion; Congress may change or supplement a federal regulation.

ARMED FORCES §7 > nonpossession of certificates -- mutilation -- > Headnote:
LEdHN[10] [10]

Selective service regulations requiring personal possession of registration (CFR 1617.1) and classification (CFR 1623.5) certificates, and the federal statute penalizing the knowingly mutilating or destroying of such certificates (50 USC Appx 462 (b)(3)), protect overlapping but not identical governmental interests, and reach somewhat different classes of wrongdoers, the gravamen of the offense defined by the statute being the deliberate rendering of certificates unavailable for the various purposes which they may serve, and its concern being abuses involving any issued certificates, and not only the registrant's own certificate; hence the knowing destruction or mutilation of someone else's certificates would violate the statute but not the nonpossession regulations.

ARMED FORCES §7 > mutilation of draft cards -- > Headnote:
LEdHN[11] [11]

The governmental interest protected by, and the operation of, the 1965 amendment (79 Stat 586) of the Universal Military Training and Service Act of 1948 (50 USC Appx 462 (b)(3)), making the knowing destruction or mutilation of a certificate issued by the Selective Service System a criminal offense, are limited to the noncommunicative aspect of the conduct of one who burns his draft card publicly.

COURTS §151 > draft cards -- mutilation -- inquiry into motives of Congress -- > Headnote:
LEdHN[12] [12]

The 1965 amendment (79 Stat 586) of the Universal Military Training and Service Act of 1948 (50 USC Appx 462(b)(3)), making the knowing destruction or mutilation of a certificate issued by the Selective Service System a criminal offense, is not subject to the attack that it is unconstitutional on the ground that the purpose or motive of Congress was to suppress freedom of speech.

COURTS §102 > inquiry into motive of legislature -- > Headnote:
LEdHN[13] [13]

The United States Supreme Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive; the judiciary may not restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.

STATUTES §146 > construction -- statements of legislators -- > Headnote:
LEdHN[14] [14]

When the issue is simply the interpretation of legislation, the Supreme Court of the United States will look to statements by legislators for guidance as to the purpose of the legislature.

OUTLAWRY §2 > nature -- > Headnote:
LEdHN[15] [15]

A bill of attainder is a legislative act which inflicts punishment on named individuals or members of an easily ascertainable group without a judicial trial.

ATTAINDER AND OUTLAWRY §4 > what constitutes -- > Headnote:
LEdHN[16] [16]

In determining whether a particular statute is a bill of attainder, the analysis necessarily requires an inquiry into whether the three definitional elements--specificity in identification of the individuals affected, punishment, and lack of a judicial trial--are contained in the statute.

COURTS §102 > motive of legislature -- > Headnote: LEdHN[17] [17]

A court's inquiry into legislative purpose or motive is proper for the limited purpose of determining whether the statute under review is punitive in nature.

COURTS §102 > validity of statute -- purpose of legislature -- > Headnote: LEdHN[18] [18]

The principle that a court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive is inapplicable, and the purpose of the legislation is irrelevant, where its inevitable effect--its necessary scope and operation--abridges constitutional rights.

APPEAL §1084 > question not raised in petition for certiorari -- > Headnote: LEdHN[19] [19]

As a general rule, the Supreme Court of the United States will not consider issues not raised in a petition or cross petition for certiorari.

Syllabus

O'Brien burned his Selective Service registration certificate before a sizable crowd in order to influence others to adopt his antiwar beliefs. He was indicted, tried, and convicted for violating 50 U. S. C. App. § 462 (b), a part of the Universal Military Training and Service Act, subdivision (3) of which applies to any person "who forges, alters, *knowingly destroys, knowingly mutilates*, or in any manner changes any such certificate . . . ," the words italicized herein having been added by amendment in 1965. The District Court rejected O'Brien's argument that the amendment was unconstitutional because it was enacted to abridge free speech and served no legitimate legislative purpose. The Court of Appeals held the 1965 Amendment unconstitutional under the *First Amendment* as singling out for special treatment persons engaged in protests, **[****2]** on the ground that conduct under the 1965 Amendment was already punishable since a Selective Service System regulation required registrants to keep their registration certificates in their "personal possession at all times," 32 CFR § 1617.1, and wilful violation of regulations promulgated under the Act was made criminal by 50 U. S. C. App. § 462 (b)(6). The court, however, upheld O'Brien's conviction under § 462 (b)(6), which in its view made violation of the nonpossession regulation a lesser included offense of the crime defined by the 1965 Amendment. *Held*:

1. The 1965 Amendment to 50 U. S. C. App. § 462 (b)(3) is constitutional as applied in this case. Pp. 375, 376-382.

(a) The 1965 Amendment plainly does not abridge free speech on its face. P. 375.

(b) When "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on *First Amendment* freedoms. P. 376.

(c) A governmental regulation is sufficiently justified if it is within the constitutional power of the Government **[****3]** and furthers an important or substantial governmental interest unrelated to the suppression of free expression, and if the incidental restriction on alleged *First Amendment* freedom is no greater than is essential to that interest. The 1965 Amendment meets all these requirements. P. 377.

(d) The 1965 Amendment came within Congress' "broad and sweeping" power to raise and support armies and make all laws necessary to that end. P. 377.

(e) The registration certificate serves purposes in addition to initial notification, *e. g.*, it proves that the described individual has registered for the draft; facilitates communication between registrants and local boards; and provides a reminder that the registrant must notify his local board of changes in address or status. The regulatory scheme involving the certificates includes clearly valid prohibitions against alteration, forgery, or similar deceptive misuse. Pp. 378-380.

(f) The pre-existence of the nonpossession regulation does not negate Congress' clear interest in providing alternative statutory avenues of prosecution to assure its interest in preventing destruction of the Selective Service certificates. P. 380.

(g) The governmental **[****4]** interests protected by the 1965 Amendment and the nonpossession regulation, though overlapping, are not identical. Pp. 380-381.

(h) The 1965 Amendment is a narrow and precisely drawn provision which specifically protects the Government's substantial interest in an efficient and easily administered system for raising armies. Pp. 381-382.

(i) O'Brien was convicted only for the wilful frustration of that governmental interest. The noncommunicative impact of his conduct for which he was convicted makes his case readily distinguishable from *Stromberg v. California, 283 U.S. 359 (1931)*. P. 382.

2. The 1965 Amendment is constitutional as enacted. Pp. 382-385.

(a) Congress' purpose in enacting the law affords no basis for declaring an otherwise constitutional statute invalid. *McCray v. United States, 195 U.S. 27 (1904)*. Pp. 383-384.

(b) *Grosjean v. American Press Co., 297 U.S. 233 (1936)* and *Gomillion v. Lightfoot, 364 U.S. 339 (1960)*, distinguished. Pp. 384-385.

Counsel: Solicitor General Griswold argued the cause for the United States. With him on the brief were Assistant Attorney General Vinson, **[****5]** Francis X. Beytagh, Jr., Beatrice Rosenberg, and Jerome M. Feit.

Marvin M. Karpatkin argued the cause for respondent in No. 232 and petitioner in No. 233. With him on the brief were Howard S. Whiteside, Melvin L. Wulf, and Rhoda H. Karpatkin.

Judges: Warren, Black, Douglas, Harlan, Brennan, Stewart, White, Fortas; Marshall took no part in the consideration or decision of these cases

Opinion by: WARREN

Opinion

[*369] [*675] [**1675]** MR. CHIEF JUSTICE **WARREN** delivered the opinion of the Court.

On the morning of March 31, 1966, David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse. A sizable crowd, including several agents of the Federal **[***676]** Bureau of Investigation, witnessed the event. [1] Immediately after the burning, members of the crowd began attacking O'Brien and his companions. An FBI agent ushered O'Brien to safety inside the courthouse. After he was advised of his right to counsel and to silence, O'Brien stated to FBI agents that he had burned his registration certificate because of his beliefs, knowing that he was violating federal law. He produced the charred remains **[****6]** of the certificate, which, with his consent, were photographed.

For this act, O'Brien was indicted, tried, convicted, and sentenced in the United States District Court for the District of Massachusetts. [2] He did not contest the fact **[*370]** that he had burned the certificate. He stated in argument to the jury that he burned the certificate publicly to influence others to adopt his antiwar beliefs, as he put it, "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position."

[**7]** The indictment upon which he was tried charged that he "willfully and knowingly did mutilate, destroy, and change by burning . . . [his] Registration Certificate (Selective Service System Form No. 2); in violation of Title *50, App., United States Code, Section 462 (b)*." Section 462 (b) is part of the Universal Military Training and Service Act of 1948. Section 462 (b)(3), one of six numbered subdivisions of § 462 (b), was amended by Congress in 1965, 79 Stat. 586 (adding the words italicized below), so that at the time O'Brien burned his certificate an offense was committed by any person,

"who forges, alters, *knowingly destroys, knowingly mutilates*, or in any manner changes any such certificate . . . ." (Italics supplied.)

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[1] At the time of the burning, the agents knew only that O'Brien and his three companions had burned small white cards. They later discovered that the card O'Brien burned was his registration certificate, and the undisputed assumption is that the same is true of his companions.

[2] He was sentenced under the Youth Corrections Act, *18 U. S. C. § 5010 (b)*, to the custody of the Attorney General for a maximum period of six years for supervision and treatment.

In the District Court, O'Brien argued that the 1965 Amendment prohibiting the knowing destruction or mutilation of certificates was unconstitutional because it was enacted to abridge free speech, and because it served no legitimate legislative purpose. [3] The District Court rejected these arguments, holding that the statute on its face did not abridge *First Amendment* rights, that the court was not competent to inquire into the **[**1676]** **[****8]** motives of Congress in enacting the 1965 Amendment, and that the **[*371]** Amendment was a reasonable exercise of the power of Congress to raise armies.

On appeal, the Court of Appeals for the First Circuit held the 1965 Amendment unconstitutional as a law abridging freedom of speech. [4] At the time the Amendment was enacted, a regulation of the Selective Service System required registrants to keep their registration certificates in their "personal **[***677]** possession at all times." 32 CFR § 1617.1 (1962). [5] **[****10]** Wilful violations of regulations promulgated pursuant to the Universal Military Training and Service Act were made criminal by statute. *50 U. S. C. App. § 462 (b)(6)*. **[****9]** The Court of Appeals, therefore, was of the opinion that conduct punishable under the 1965 Amendment was already punishable under the nonpossession regulation, and consequently that the Amendment served no valid purpose; further, that in light of the prior regulation, the Amendment must have been "directed at public as distinguished from private destruction." On this basis, the court concluded that the 1965 Amendment ran afoul of the *First Amendment* by singling out persons engaged in protests for special treatment. The court ruled, however, that O'Brien's conviction should be affirmed under the statutory provision, *50 U. S. C. App. § 462 (b)(6)*, which in its view made violation of the nonpossession regulation a crime, because it regarded such violation to be a lesser included offense of the crime defined by the 1965 Amendment. [6]

[*372] The Government petitioned for certiorari in No. 232, arguing that the Court of Appeals erred in holding the statute unconstitutional, and that its decision conflicted with decisions by the Courts of Appeals for the Second [7] and Eighth Circuits [8] upholding the 1965 Amendment against identical constitutional challenges. O'Brien cross-petitioned for certiorari in No. 233, arguing that the Court of Appeals erred in sustaining his conviction on the basis of a crime of which he **[****11]** was neither charged nor tried. We granted the Government's petition to resolve the conflict in the circuits, and we also granted O'Brien's cross-petition. We hold that the 1965 Amendment is constitutional both as enacted and as applied. We therefore vacate the judgment of the Court of Appeals and reinstate the judgment and sentence of the District Court without reaching the issue raised by O'Brien in No. 233.

I.

When a male reaches the age of 18, he is required by the Universal Military Training and Service Act to register with a local draft board. [9] He is assigned a Selective Service number, [10] and within **[**1677]** five days he is issued a **[*373]** registration certificate (SSS Form No. 2). [11] Subsequently, and based on a questionnaire completed by the registrant, [12] he is assigned **[****12]** a classification denoting his eligibility

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[3] The issue of the constitutionality of the 1965 Amendment was raised by counsel representing O'Brien in a pretrial motion to dismiss the indictment. At trial and upon sentencing, O'Brien chose to represent himself. He was represented by counsel on his appeal to the Court of Appeals.

[4] *O'Brien v. United States, 376 F.2d 538 (C. A. 1st Cir. 1967)*.

[5] The portion of 32 CFR relevant to the instant case was revised as of January 1, 1967. Citations in this opinion are to the 1962 edition which was in effect when O'Brien committed the crime, and when Congress enacted the 1965 Amendment.

[6] The Court of Appeals nevertheless remanded the case to the District Court to vacate the sentence and resentence O'Brien. In the court's view, the district judge might have considered the violation of the 1965 Amendment as an aggravating circumstance in imposing sentence. The Court of Appeals subsequently denied O'Brien's petition for a rehearing, in which he argued that he had not been charged, tried, or convicted for nonpossession, and that nonpossession was not a lesser included offense of mutilation or destruction. *O'Brien v. United States, 376 F.2d 538, 542 (C. A. 1st Cir. 1967)*.

[7] *United States v. Miller, 367 F.2d 72 (C. A. 2d Cir. 1966)*, cert. denied, ***386 U.S. 911 (1967)***.

[8] *Smith v. United States, 368 F.2d 529 (C. A. 8th Cir. 1966)*.

[9] See 62 Stat. 605, as amended, 65 Stat. 76, *50 U. S. C. App. § 453*; 32 CFR § 1613.1 (1962).

[10] *32 CFR § 1621.2 (1962)*.

[11] 32 CFR § 1613.43a (1962).

[12] 32 CFR §§ 1621.9, 1623.1 (1962).

for induction, [13] **[***678]** and "as soon as practicable" thereafter he is issued a Notice of Classification (SSS Form No. 110). [14] This initial classification is not necessarily permanent, [15] and if in the interim before induction the registrant's status changes in some relevant way, he may be reclassified. [16] **[****13]** After such a reclassification, the local board "as soon as practicable" issues to the registrant a new Notice of Classification. [17]

Both the registration and classification certificates are small white cards, approximately 2 by 3 inches. The registration certificate specifies the name of the registrant, the date of registration, and the number and address of the local board with which he is registered. Also inscribed upon it are the date and place of the registrant's birth, his residence at registration, his physical description, his signature, and his Selective Service number. The Selective Service number itself indicates his State of registration, his local board, his year of birth, and his chronological position in the local board's classification record. [18]

The classification certificate shows the registrant's name, Selective Service number, signature, and eligibility classification. It specifies whether he was so classified by his **[****14]** local board, an appeal board, or the President. It **[*374]** contains the address of his local board and the date the certificate was mailed.

Both the registration and classification certificates bear notices that the registrant must notify his local board in writing of every change in address, physical condition, and occupational, marital, family, dependency, and military status, and of any other fact which might change his classification. Both also contain a notice that the registrant's Selective Service number should appear on all communications to his local board.

Congress demonstrated its concern that certificates issued by the Selective Service System might be abused well before the 1965 Amendment here challenged. The 1948 Act, 62 Stat. 604, itself prohibited many different abuses involving "any registration certificate, . . . or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder . . . ." 62 Stat. 622. Under §§ 12 (b)(1)-(5) of the 1948 Act, it was unlawful (1) to transfer a certificate to aid a person in making false identification; (2) to possess a certificate not duly issued with the **[****15]** intent of using it for false identification; (3) to forge, alter, "or in any manner" change a certificate or any notation validly inscribed thereon; (4) to photograph or make an imitation of a certificate for the purpose of false identification; and (5) to possess a counterfeited or altered certificate. 62 Stat. 622. In addition, as previously mentioned, regulations of the Selective Service System required registrants to keep both their registration and classification certificates in their personal possession at all times. 32 CFR § 1617.1 (1962) (Registration **[**1678]** Certificates); [19] **[****16]** 32 CFR § 1623.5 **[*375]** (1962) (Classification **[***679]** Certificates). [20] And § 12 (b)(6) of the Act, 62 Stat. 622, made knowing violation of any provision of the Act or rules and regulations promulgated pursuant thereto a felony.

LEdHN[1][1] [1]By the 1965 Amendment, Congress added to § 12 (b)(3) of the 1948 Act the provision here at issue, subjecting to criminal liability not only one who "forges, alters, or in any manner changes" but also one who "knowingly destroys, [or] knowingly mutilates" a certificate. We note at the outset that the 1965 Amendment plainly does not abridge free speech on its face, and we do not understand O'Brien to argue otherwise. Amended § 12 (b)(3) on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the

[13] 32 CFR §§ 1623.1, 1623.2 (1962).

[14] 32 CFR § 1623.4 (1962).

[15] 32 CFR § 1625.1 (1962).

[16] 32 CFR §§ 1625.1, 1625.2, 1625.3, 1625.4, and 1625.11 (1962).

[17] 32 CFR § 1625.12 (1962).

[18] *32 CFR § 1621.2 (1962)*.

[19] 32 CFR § 1617.1 (1962), provides, in relevant part:

"Every person required to present himself for and submit to registration must, after he is registered, have in his personal possession at all times his Registration Certificate (SSS Form No. 2) prepared by his local board which has not been altered and on which no notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. The failure of any person to have his Registration Certificate (SSS Form No. 2) in his personal possession shall be prima facie evidence of his failure to register."

[20] 32 CFR § 1623.5 (1962), provides, in relevant part:

"Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate (SSS Form No. 2), a valid Notice of Classification (SSS Form No. 110) issued to him showing his current classification."

Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment **[****17]** does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views. Compare *Stromberg v. California, 283 U.S. 359 (1931)*. [21] A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records.

[*376] O'Brien nonetheless argues that the 1965 Amendment is unconstitutional in its application to him, and is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We consider these arguments separately.

II.

O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the *First Amendment*. His argument is that the freedom of expression **[****18]** which the *First Amendment* guarantees includes all modes of "communication of ideas by conduct," and that his conduct is within this definition because he did it in "demonstration against the war and against the draft."

LEdHN[2][↑] [2]*LEdHN[3]*[↑] [3]*LEdHN[4]*[↑] [4]We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the *First Amendment*, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that *HN1*[↑] when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in **[***680]** regulating the nonspeech element can **[****19]** justify **[**1679]** incidental limitations on *First Amendment* freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; [22] **[****20]** substantial; [23] subordinating; [24] **[*377]** paramount; [25] cogent; [26] strong. [27] Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged *First Amendment* freedoms is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to § 12 (b)(3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.

LEdHN[5][↑] [5]*LEdHN[6]*[↑] [6]*HN2*[↑] The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. *Lichter v. United States, 334 U.S. 742, 755-758 (1948)*; *Selective Draft Law Cases, 245 U.S. 366 (1918)*; see also *Ex parte Quirin, 317 U.S. 1, 25-26 (1942)*. **[****21]** The power of Congress to classify and conscript manpower for military service is "beyond question." *Lichter v. United States, supra, at 756*; *Selective Draft Law Cases, supra.*Pursuant to this power, Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to cooperate in the registration system. The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation **[*378]** to insure the continuing availability of issued certificates serves a legitimate and

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[21] See text, *infra*, at 382.

[22] *NAACP v. Button, 371 U.S. 415, 438 (1963)*; see also *Sherbert v. Verner, 374 U.S. 398, 403 (1963)*.

[23] *NAACP v. Button, 371 U.S. 415, 444 (1963)*; *NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 464 (1958)*.

[24] *Bates v. Little Rock, 361 U.S. 516, 524 (1960)*.

[25] *Thomas v. Collins, 323 U.S. 516, 530 (1945)*; see also *Sherbert v. Verner, 374 U.S. 398, 406 (1963)*.

[26] *Bates v. Little Rock, 361 U.S. 516, 524 (1960)*.

[27] *Sherbert v. Verner, 374 U.S. 398, 408 (1963)*.

substantial purpose in the system's administration.

O'Brien's argument to the contrary is necessarily premised upon his unrealistic characterization of Selective Service certificates. He essentially adopts the position that such certificates are so many pieces of paper designed to notify registrants of their registration or classification, to be retained or tossed in the wastebasket according to the convenience or taste of the registrant. Once the registrant has received **[****22]** notification, according to this view, there is no reason for him to retain the certificates. O'Brien notes that most of the information on a registration certificate serves no notification purpose at all; the registrant hardly needs to be told **[***681]** his address and physical characteristics. We agree that the registration certificate contains much information of which the registrant needs no notification. This **[**1680]** circumstance, however, does not lead to the conclusion that the certificate serves no purpose, but that, like the classification certificate, it serves purposes in addition to initial notification. Many of these purposes would be defeated by the certificates' destruction or mutilation. Among these are:

1. The registration certificate serves as proof that the individual described thereon has registered for the draft. The classification certificate shows the eligibility classification of a named but undescribed individual. Voluntarily displaying the two certificates is an easy and painless way for a young man to dispel a question as to whether he might be delinquent in his Selective Service obligations. Correspondingly, the availability of the certificates **[****23]** for such display relieves the Selective Service System of the administrative burden it would otherwise have in verifying the registration and classification of all suspected delinquents. Further, since both certificates are in the nature of "receipts" attesting that the registrant **[*379]** has done what the law requires, it is in the interest of the just and efficient administration of the system that they be continually available, in the event, for example, of a mix-up in the registrant's file. Additionally, in a time of national crisis, reasonable availability to each registrant of the two small cards assures a rapid and uncomplicated means for determining his fitness for immediate induction, no matter how distant in our mobile society he may be from his local board.

2. The information supplied on the certificates facilitates communication between registrants and local boards, simplifying the system and benefiting all concerned. To begin with, each certificate bears the address of the registrant's local board, an item unlikely to be committed to memory. Further, each card bears the registrant's Selective Service number, and a registrant who has his number readily available **[****24]** so that he can communicate it to his local board when he supplies or requests information can make simpler the board's task in locating his file. Finally, a registrant's inquiry, particularly through a local board other than his own, concerning his eligibility status is frequently answerable simply on the basis of his classification certificate; whereas, if the certificate were not reasonably available and the registrant were uncertain of his classification, the task of answering his questions would be considerably complicated.

3. Both certificates carry continual reminders that the registrant must notify his local board of any change of address, and other specified changes in his status. The smooth functioning of the system requires that local boards be continually aware of the status and whereabouts of registrants, and the destruction of certificates deprives the system of a potentially useful notice device.

4. The regulatory scheme involving Selective Service certificates includes clearly valid prohibitions against the alteration, forgery, or similar deceptive misuse of certificates. **[*380]** The destruction or mutilation of certificates obviously increases the difficulty **[****25]** of detecting and tracing abuses such as these. Further, a mutilated certificate might itself be used for deceptive purposes.

[*682]** LEdHN[7][↑] [7]The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and wilfully destroy or mutilate them. And we are unpersuaded that the pre-existence of the nonpossession regulations in any way negates this interest.

LEdHN[8][↑] [8]LEdHN[9][↑] [9]HN3[↑] In the absence of a question as to multiple punishment, it has never **[**1681]** been suggested that there is anything improper in Congress' providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest. Compare the

majority and dissenting opinions **[****26]** in *Gore v. United States, 357 U.S. 386 (1958)*.[28] Here, the pre-existing avenue of prosecution was not even statutory. ***HN4***[↑] Regulations may be modified or revoked from time to time by administrative discretion. Certainly, the Congress may change or supplement a regulation.

LEdHN[10][↑] [10]Equally important, a comparison of the regulations with the 1965 Amendment indicates that they protect overlapping but not identical governmental interests, and that they reach somewhat different classes of wrongdoers. [29] The gravamen of the offense defined by the statute is the deliberate rendering of certificates unavailable for the **[****27]** various purposes which they may serve. Whether registrants keep their certificates in their personal **[*381]** possession at all times, as required by the regulations, is of no particular concern under the 1965 Amendment, as long as they do not mutilate or destroy the certificates so as to render them unavailable. Although as we note below we are not concerned here with the nonpossession regulations, it is not inappropriate to observe that the essential elements of nonpossession are not identical with those of mutilation or destruction. Finally, the 1965 Amendment, like § 12 (b) which it amended, is concerned with abuses involving *any* issued Selective Service certificates, not only with the registrant's own certificates. The knowing destruction or mutilation of someone else's certificates would therefore violate the statute but not the nonpossession regulations.

[**28]** We think it apparent that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies. We think it also apparent that the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances. For these reasons, the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.

LEdHN[11][↑] [11]It is equally clear that the 1965 Amendment specifically protects this substantial governmental **[***683]** interest. We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction. Compare *Sherbert v. Verner, 374 U.S. 398, 407-408 (1963)*, and the cases cited therein. The 1965 Amendment prohibits such conduct and does nothing more. In other **[****29]** words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative **[*382]** aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental **[**1682]** interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.

The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In *Stromberg v. California, 283 U.S. 359 (1931)*, for example, this Court struck down a statutory phrase which punished people who expressed their "opposition to organized government" by displaying "any flag, badge, banner, or device." Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct. See also, *NLRB v. Fruit & Vegetable Packers Union, 377 U.S. 58, 79 (1964)* **[****30]** (concurring opinion).

In conclusion, we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because amended § 462 (b) is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction.

III.

[28] Cf. *Milanovich v. United States, 365 U.S. 551 (1961)*; *Heflin v. United States, 358 U.S. 415 (1959)*; *Prince v. United States, 352 U.S. 322 (1957)*.

[29] Cf. *Milanovich v. United States, 365 U.S. 551 (1961)*; *Heflin v. United States, 358 U.S. 415 (1959)*; *Prince v. United States, 352 U.S. 322 (1957)*.

LEdHN[12][↑] [12]O'Brien finally argues that the 1965 Amendment is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of **[*383]** speech." We reject this argument because under settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation unconstitutional.

LEdHN[13][↑] [13]HN5[↑] It is a **[****31]** familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated:

"The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *McCray v. United States, 195 U.S. 27, 56 (1904)*.

This fundamental principle of constitutional **[***684]** adjudication was reaffirmed and the many cases were collected by Mr. Justice Brandeis for the Court in *Arizona v. California, 283 U.S. 423, 455 (1931)*.

LEdHN[14][↑] [14]LEdHN[15][↑] [15]LEdHN[16][↑] [16]LEdHN[17][↑] [17]Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, **[****32]** the Court will look to statements by legislators for guidance as to the purpose of the legislature, [30] because the benefit to sound **[**1683]** decision-making in **[*384]** this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

[**33]** LEdHN[18][↑] [18]O'Brien's position, and to some extent that of the court below, rest upon a misunderstanding of *Grosjean v. American Press Co., 297 U.S. 233 (1936)*, and *Gomillion v. Lightfoot, 364 U.S. 339 (1960)*.These cases stand, not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional. Thus, in *Grosjean* the Court, having concluded that the right of publications to be free from certain kinds of taxes was a freedom of the press protected by the *First Amendment*, struck down a statute which on its face did nothing other than impose **[*385]** just such a tax. Similarly, in *Gomillion*, the Court sustained a complaint which, if true, established that the "inevitable effect," *364 U.S., at 341*, of the redrawing of municipal **[***685]** boundaries was to deprive the petitioners of their right to vote for no reason other than that they were Negro. In these cases, the purpose of the legislation was irrelevant, because **[****34]** the inevitable effect -- the "necessary scope and operation," *McCray v. United States, 195 U.S. 27, 59 (1904)* -- abridged constitutional rights. The statute attacked in the instant case has no such inevitable unconstitutional effect, since the destruction

[30] The Court may make the same assumption in a very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose. The principal class of cases is readily apparent -- those in which statutes have been challenged as bills of attainder. This Court's decisions have defined a bill of attainder as a legislative Act which inflicts punishment on named individuals or members of an easily ascertainable group without a judicial trial. In determining whether a particular statute is a bill of attainder, the analysis necessarily requires an inquiry into whether the three definitional elements -- specificity in identification, punishment, and lack of a judicial trial -- are contained in the statute. The inquiry into whether the challenged statute contains the necessary element of punishment has on occasion led the Court to examine the legislative motive in enacting the statute. See, *e. g.*, *United States v. Lovett, 328 U.S. 303 (1946)*. Two other decisions not involving a bill of attainder analysis contain an inquiry into legislative purpose or motive of the type that O'Brien suggests we engage in in this case. *Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169-184 (1963)*; *Trop v. Dulles, 356 U.S. 86, 95-97 (1958)*. The inquiry into legislative purpose or motive in *Kennedy* and *Trop*, however, was for the same limited purpose as in the bill of attainder decisions -- *i. e.*, to determine whether the statutes under review were punitive in nature. We face no such inquiry in this case. The 1965 Amendment to § 462 (b) was clearly penal in nature, designed to impose criminal punishment for designated acts.

of Selective Service certificates is in no respect inevitably or necessarily expressive. Accordingly, the statute itself is constitutional.

We think it not amiss, in passing, to comment upon O'Brien's legislative-purpose argument. There was little floor debate on this legislation in either House. Only Senator Thurmond commented on its substantive features in the Senate. 111 Cong. Rec. 19746, 20433. After his brief statement, and without any additional substantive comments, the bill, H. R. 10306, passed the Senate. 111 Cong. Rec. 20434. In the House debate only two Congressmen addressed themselves to the Amendment -- Congressmen Rivers and Bray. 111 Cong. Rec. 19871, 19872. The bill was passed after their statements without any further debate by a vote of 393 to 1. It is principally on the basis of the statements by these three Congressmen that O'Brien makes his congressional-"purpose" argument. We **[****35]** note that if we were to examine legislative **[**1684]** purpose in the instant case, we would be obliged to consider not only these statements but also the more authoritative reports of the Senate and House Armed Services Committees. The portions of those reports explaining the purpose of the Amendment are reproduced in the Appendix in their entirety. While both reports make clear a concern with the "defiant" **[*386]** destruction of so-called "draft cards" and with "open" encouragement to others to destroy their cards, both reports also indicate that this concern stemmed from an apprehension that unrestrained destruction of cards would disrupt the smooth functioning of the Selective Service System.

IV.

LEdHN[19][↑] [19]Since the 1965 Amendment to § 12 (b)(3) of the Universal Military Training and Service Act is constitutional as enacted and as applied, the Court of Appeals should have affirmed the judgment of conviction entered by the District Court. Accordingly, we vacate the judgment of the Court of Appeals, and reinstate the judgment and sentence of the District Court. This disposition makes unnecessary **[****36]** consideration of O'Brien's claim that the Court of Appeals erred in affirming his conviction on the basis of the nonpossession regulation. [31]

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

APPENDIX TO OPINION OF THE COURT.

PORTIONS OF THE REPORTS OF THE COMMITTEES ON

ARMED SERVICES OF THE SENATE AND HOUSE

EXPLAINING THE 1965 AMENDMENT.

The "Explanation of the Bill" in the Senate Report is as follows:

[*686]** "Section 12 (b)(3) of the Universal Military Training and Service Act of 1951, as amended, provides, among other things, that a person who forges, alters, or changes **[*387]** a draft registration certificate is subject to a fine of not more than $ 10,000 or imprisonment of not more than 5 years, or both. There is no explicit prohibition in this section **[****37]** against the knowing destruction or mutilation of such cards.

"The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies.

"For a person to be subject to fine or imprisonment the destruction or mutilation of the draft card must be 'knowingly' done. This qualification is intended to protect persons who lose or mutilate draft cards accidentally." S. Rep. No. 589, 89th Cong., 1st Sess. (1965). And the House Report explained:

"Section 12 (b)(3) of the Universal Military Training and Service Act of 1951, as amended, provides that a person who forges, alters, or in any manner changes his draft registration card, or any notation duly and validly inscribed thereon, will be subject to a fine of $ 10,000 or imprisonment of not more than 5 years. H. R. 10306 would amend this provision to make it apply also to those persons who knowingly destroy or knowingly mutilate a draft registration card.

"The House Committee on Armed Services is fully aware of, and shares **[****38]** in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards.

[31] The other issues briefed by O'Brien were not raised in the petition for certiorari in No. 232 or in the cross-petition in No. 233. Accordingly, those issues are not before the Court.

[1685]** "While the present provisions of the Criminal Code with respect to the destruction of Government property **[*388]** may appear broad enough to cover all acts having to do with the mistreatment of draft cards in the possession of individuals, the committee feels that in the present critical situation of the country, the acts of destroying or mutilating these cards are offenses which pose such a grave threat to the security of the Nation that no question whatsoever should be left as to the intention of the Congress that such wanton and irresponsible acts should be punished.

"To this end, H. R. 10306 makes specific that knowingly mutilating or knowingly destroying a draft card constitutes a violation of the Universal Military Training and Service Act and is punishable thereunder; and that a person who does so destroy or mutilate a draft card will be subject to a fine of not more than $ 10,000 or imprisonment of not **[****39]** more than 5 years." H. R. Rep. No. 747, 89th Cong., 1st Sess. (1965).

Concur by: HARLAN

Concur

MR. JUSTICE HARLAN, concurring.

The crux of the Court's opinion, which I join, is of course its general statement, *ante*, at 377, that:

"a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial **[***687]** governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged *First Amendment* freedoms is no greater than is essential to the furtherance of that interest."

I wish to make explicit my understanding that this passage does not foreclose consideration of *First Amendment* claims in those rare instances when an "incidental" restriction upon expression, imposed by a regulation which furthers an "important or substantial" governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a "speaker" **[*389]** from reaching a significant audience with whom he could not otherwise lawfully communicate. This is not such a case, since O'Brien manifestly could **[****40]** have conveyed his message in many ways other than by burning his draft card.

Dissent by: DOUGLAS

Dissent

MR. JUSTICE DOUGLAS, dissenting.

The Court states that the constitutional power of Congress to raise and support armies is "broad and sweeping" and that Congress' power "to classify and conscript manpower for military service is 'beyond question.'" This is undoubtedly true in times when, by declaration of Congress, the Nation is in a state of war. The underlying and basic problem in this case, however, is whether conscription is permissible in the absence of a declaration of war. [1] **[****42]** That question has not been **[**1686]** briefed nor was it presented in oral argument; but it is, I submit, a question upon which the litigants and the country are entitled to a ruling. I have discussed in *Holmes* v. *United States, post*, p. 936, the nature of the legal issue and it will be seen from my dissenting opinion in that case that this Court has never ruled on **[*390]** the question. It is time that we made a ruling. This case should be put down for reargument and heard with *Holmes* v. *United States* and with *Hart* v. *United States, post*, p. 956, in which the Court today **[****41]** denies certiorari. [2]

The rule that this Court will not consider issues not raised by the parties is not inflexible and yields in "exceptional cases" (*Duignan v. United States, 274*

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[1] Neither of the decisions cited by the majority for the proposition that Congress' power to conscript men into the armed services is "'beyond question'" concerns peacetime conscription. As I have shown in my dissenting opinion in *Holmes* v. *United States, post*, p. 936, the *Selective Draft Law Cases, 245 U.S. 366*, decided in 1918, upheld the constitutionality of a conscription act passed by Congress more than a month after war had been declared on the German Empire and which was then being enforced in time of war. *Lichter v. United States, 334 U.S. 742*, concerned the constitutionality of the Renegotiation Act, another wartime measure, enacted by Congress over the period of 1942-1945 (*id., at 745, n. 1*) and applied in that case to excessive war profits made in 1942-1943 (*id., at 753*). War had been declared, of course, in 1941 (55 Stat. 795). The Court referred to Congress' power to raise armies in discussing the "background" (*334 U.S., at 753*) of the Renegotiation Act, which it upheld as a valid exercise of the War Power.

[2] Today the Court also denies stays in *Shiffman* v. *Selective Service Board No. 5*, and *Zigmond* v. *Selective Service Board No. 16, post*, p. 930, where punitive delinquency regulations are invoked against registrants, decisions that present a related question.

U.S. 195, 200) to the need correctly to decide the case before the court. *E. g., Erie R. Co*. v. Tompkins, 304 U.S. 64; **[***688]** Terminiello v. Chicago, 337 U.S. 1.

In such a case it is not unusual to ask for reargument (Sherman v. United States, 356 U.S. 369, 379, n. 2, Frankfurter, J., concurring) even on a constitutional question not raised by the parties. In Abel v. United States, 362 U.S. 217, the petitioner had conceded that an administrative deportation arrest warrant would be valid for its limited purpose even though not supported by a sworn affidavit **[****43]** stating probable cause; but the Court ordered reargument on the question whether the warrant had been validly issued in petitioner's case. 362 U.S., at 219, n., par. 1; *359 U.S. 940*. In Lustig v. United States, 338 U.S. 74, the petitioner argued that an exclusionary rule should apply to the fruit of an unreasonable search by state officials solely because they acted in concert with federal officers (see Weeks v. United States, 232 U.S. 383; Byars v. United States, 273 U.S. 28). The Court ordered reargument on the question raised in a then pending case, Wolf v. Colorado, 338 U.S. 25: applicability of the *Fourth Amendment* to the States. U.S. Sup. Ct. Journal, October Term, 1947, p. 298. In Donaldson v. Read Magazine, 333 U.S. 178, the only issue presented, **[*391]** according to both parties, was whether the record contained sufficient evidence of fraud to uphold an order of the Postmaster General. Reargument was ordered on the constitutional issue of abridgment of *First Amendment* freedoms. 333 U.S., at 181-182; Journal, October **[****44]** Term, 1947, p. 70. Finally, in Musser v. Utah, 333 U.S. 95, 96, reargument was ordered on the question of unconstitutional vagueness of a criminal statute, an issue not raised by the parties but suggested at oral argument by Justice Jackson. Journal, October Term, 1947, p. 87.

These precedents demonstrate the appropriateness of restoring the instant case to the calendar for reargument on the question of the constitutionality of a peacetime draft and having it heard with *Holmes* v. *United States* and *Hart* v. *United States*.

References

Validity, construction, and application of federal statute (50 USC Appx 462(b)) pertaining to possession, misuse, forgery, alteration, destruction, or mutilation of draft cards

16 Am Jur 2d, Constitutional Law 169, 342; Am Jur 2d, Military, and Civil Defense (1st ed, Military 124)

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L Ed Index To Anno, Armed Forces; Constitutional Law; Courts

ALR Quick Index, Armed Forces; Freedom of Speech and Press; Motive

[**45]** Annotation References:

Selective Training and Service Acts. 3 129 ALR 1171, 147 ALR 1313, 148 ALR 1388, 149 ALR 1457, 150 ALR 1420, 151 ALR 1456, 152 ALR 1452, 153 ALR 1422, 154 ALR 1448, 155 ALR 1452, 156 ALR 1450, 157 ALR 1450, 158 ALR 1450.

Validity, construction, and application of federal statute (50 USC Appx 462(b)) pertaining to possession, misuse, forgery, alteration, destruction, or mutilation of draft cards. *20 L Ed 2d 1576*.

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