IN THE

Supreme Court of the United States

October Term, 1966

No. 233

DAVID PAUL O'BRIEN,
Cross-Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above entitled case on April 10, 1967, after which petitioner filed a timely petition for rehearing, which was denied on April 28, 1967. The opinion of the Court of Appeals, and the opinion denying the petition for rehearing, are printed in the appendix hereto, and are not yet reported. The May 25, 1966 memorandum of the District Court denying petitioner's motion to dismiss, is also printed in the appendix hereto and is unreported.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

Questions Presented

Whether petitioner was denied due process of law under the Fifth Amendment to the United States Constitution when the Court of Appeals reversed his conviction of a violation of 50 U.S.C. App. §462(b)(3), on grounds of the statute's unconstitutionality, and held that he stood convicted of a violation of 50 U.S.C. App. §462(b)(6), an offense of which petitioner had not been charged and on which he was not tried.

Statute Involved

The statutory provision involved is Section 12(b) of the Universal Military Training and Service Act, 50 U. S. C. App., §462 (b) which reads as follows:

> "(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title (sections 451-454, 455-471 of this Appendix); or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges,

alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title (said sections), or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title (said sections) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury."

Statement

Petitioner was indicted on April 15, 1966 for willfully and knowingly mutilating, destroying and changing by burning his Selective Service Registration Certificate, in violation of 50 U. S. C. App., §462 (b). He pleaded not guilty and was released on bail. A motion to dismiss the indictment was timely filed and orally argued. It was de-

nied on May 25, 1966. The case was tried before a jury in the United States District Court for the District of Massachusetts on June 1, 1966. Petitioner was found guilty and the Court postponed for a month disposition of the case. On July 1, 1966, the District Court ordered petitioner committed to the custody of the Attorney General under the provisions of the Federal Youth Corrections Act, 18 U.S.C., §5010(b). In due course, petitioner's notice of appeal was timely filed and petitioner was later released on bail pending appeal. The Court of Appeals held unconstitutional that portion of 50 U.S.C. App., §462(b)(3) having to do with mutilation and destruction of Selective Service Certificate, of which petitioner had been charged, but held that he stood properly convicted of non-possession of a certificate, an offense under a regulation promulgated under the Act, a violation of which is a crime under 50 U.S.C. App., §462 (b)(6). The Court stated that this was an includable offense under the original charge, and that "the factual issue of non-possession" had been fully tried and found against petitioner.

Reasons for Granting the Writ

Certiorari should be granted in response to this cross-petition because the Court of Appeals has decided an important question of constitutional law which should be settled by this Court.

1. The issue of non-possession of a Selective Service certificate was not, contrary to the words of the Court of Appeals "fully presented and tried and been found against the defendant." Op., April 10, p. 5. Petitioner was not

charged with this offense; the prosecution never mentioned it; the jury was not instructed to consider it; and the petitioner had no reason to suppose that he was on trial for it. In these circumstances, due process of law was denied to defendant in convicting him of an offense on which he was not tried and on a charge that was never made. "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Cole* v. *Arkansas,* 333 U.S. 196, 201 (1948). See *Shuttlesworth* v. *City of Birmingham,* 382 U.S. 87, 91 (1965); *Ashton* v. *Kentucky,* 384 U.S. 195 (1966).

The denial of due process is aggravated by the fact that the petitioner was not represented by counsel in the trial court. It is true that he waived his right to counsel for the trial of the charge on which he was indicted. Had he had reason to suppose that other charges were lurking in the background, he might have realized his need for legal assistance. Consequently, petitioner contends that he never intentionally waived his right to counsel on the charge of which he is now held convicted.

2. The Court of Appeals, in its opinion of April 28 denying the petition for rehearing, points out that petitoner admitted that he burned his draft card. Op., p. 2. It is clear, however, that the symbolic burning, and the admission thereof, were acts of principle by petitioner. He admitted the facts and relied on his constitutional arguments. Op., April 10, pp. 2-4. But there is no indication that the same considerations would have motivated petitioner had he been charged with non-possession. His

grievance was with the anti-burning law, now declared unconstitutional and his admissions were limited to his defense of that charge. Perhaps if the government had proceeded against him for non-possession, he would not have felt impelled to raise the constitutional question, and would not have made any admissions. Perhaps the entire defense would have been otherwise, either by petitioner *pro se,* or by counsel whom he might have engaged had he known he stood in jeopardy of a conviction for non-possession under the existing law, as well as a conviction for burning under the new law.

3. Where a charge set forth in the indictment is held unconstitutional, a judgment of a conviction of that charge is void. *Shafer* v. *United States,* 179 F. 2d 929 (9th Cir. 1950). See also 21 Am. Jur. 2d, Section 533. If the conviction is void, it must follow that a holding that there can be an includable offense thereunder is erroneous.

Furthermore, the Court of Appeals relied on Federal Rule of Criminal Procedure 31 (c) in holding petitioner convicted of an includable offense. This rule applies only to lesser offenses and degrees of offense. *United States* v. *Martinez-Gonzales,* 89 F. Supp. 62, 65 (S.D. Cal. 1950); *United States* v. *Gerdel,* 103 F. Supp. 635, 639 (E.D. Mo. 1952). In the statute here involved, there are no degrees of offense, and the maximum punishment for non-possession is the same as that prescribed for the charge on which petitioner was indicted.

Conclusion

For the foregoing reasons, this cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6813

DAVID PAUL O'BRIEN,
Defendant-Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

April 10, 1967

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of conviction is affirmed and the case is remanded to the District Court to vacate the sentence, and to resentence as it may deem appropriate in the light of the opinion filed today.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

[cc. Messrs. Karpatkin and Wall.]

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6813

DAVID PAUL O'BRIEN,
Defendant-Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

Marvin M. Karpatkin, with whom *Howard S. Whiteside, Melvin L. Wulf, Henry P. Monaghan* and *Eleanor Holmes Norton* were on brief, for appellant.

John Wall, Assistant U. S. Attorney, with whom *Paul F. Markham,* United States Attorney, was on brief, for appellee.

April 10, 1967.

ALDRICH, *Chief Judge.* The defendant was indicted on the charge 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 composed of six numbered subsections, none of which was identified except as above. The following provisions are here pertinent.

> "(3) who forges, alters, *knowingly destroys, knowingly mutilates,*[1] or in any manner changes any such certificate . . ."
>
> "(6) who knowingly violates or evades any of the provisions of this title (said sections [451-454, 455-471 of this Appendix]) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer or possession of such certificate."

A regulation required that possession of a certificate be maintained at all times. 32 C.F.R. §1617.1. The penalty for violation of all sections listed was a fine, not to exceed $10,000, or imprisonment for not more than five years, or both.

The defendant moved to dismiss the indictment, asserting violation of the First and a number of other amendments. The motion was denied. Thereafter he was tried to a jury. At the trial he conceded that he had burned his certificate, and raised only his constitutional defenses. Upon conviction and sentence[2] he appeals. His position

1. The italics are ours. See *infra,* fn. 4.

2. Defendant was sentenced under the Youth Correction Act, 18 U.S.C. §5010(b) (six years).

here is that his conduct, publicly done to express his disapproval of the draft and all that it represented, was a lawful exercise of free speech.

Subsection (b)(3) was originally directed to forgery and fraud. In 1965 some young men of the same mind as the defendant engaged in the same conduct, to wit, the public burning of "draft cards," which he has now imitated.[3] The reaction in Congress was plain. Despite the fact that subsection (b)(6) already made it an offense to part with possession of a draft card, Congress made it a separate offense if loss or possession was effected in a particular manner. The words "knowingly destroys, knowingly mutilates" were added to subsection (b)(3).[4]

In upholding the validity of this amendment against the same constitutional attack that is presently made, the court in *United States* v. *Miller,* 2 Cir., 1966, 367 F.2d 72, *cert. den.* 2/13/67, said, at 77,

> "What Congress did in 1965 only strengthened what was already a valid obligation of existing law; *i.e.,* prohibiting destruction of a certificate implements the duty of possessing it at all times."

In support of this assertion the court demonstrated the reasonableness of requiring registrants to be in possession of their cards, and with this demonstration we do not

3. We are not in a position to say how widespread this behavior became. See Finman & Macaulay, Freedom to Dissent: The Vietnam Protests and the Words of Public Officials, 1966 Wis. L. Rev. 632, 644-53.

4. P. L. 89-152, 79 Stat. 586, Aug. 30, 1965.

quarrel. *United States* v. *Kime,* 7 Cir., 1951, 188 F.2d 677, *cert. den.* 342 U.S. 823. With all respect, however, the existence of prior law requiring registrants to possess their cards at all times does not support the amendment. On the contrary, given that law, we can see no proper purpose to be served by the additional provision prohibiting destruction or mutilation.[5] The legislative history suggests none,[6] and the Second Circuit suggested none in *Miller.* To repeat our metaphor adopted by the Court in *Jarecki* v. *G. D. Searle & Co.,* 1961, 367 U.S. 303, 307, "If there is a big hole in the fence for the big cat, need there be a small hole for the small one?" *Cf. Coakley* v. *Postmaster of Boston,* 1 Cir., 3/16/67, —— F.2d ——.

We see no possible interest, or reason, for passing a statute distinguishing between a registrant obligated to carry a card who mails it back to his draft board, *United States* v. *Kime, supra,* and one who puts it in his wastebasket. The significant fact in both of these instances is that he is not carrying it. The distinction appears when the destruction itself is an act of some consequence. It

5. During argument we inquired whether the pecuniary loss to the government by the destruction of a card might be a basis for the amendment. Defendant replied that the point had never been advanced. We find no statute in any other area making such negligible damage a felony. We cannot think that Congress believed the intrinsic value of a draft card to require this protection.

6. We do not rely in this connection on the fact that the legislative history suggests an improper purpose, see *infra,* but merely note the absence of any proper one. We note, also, that the House Committee on Armed Services conceded that the prior law might "appear broad enough to cover all acts having to do with the mistreatment of draft cards in the possession of individuals." H.Rep. No. 747, 89th Cong., 1st Sess.

requires but little analysis to see that this occurs when, and only when, the destruction is, as in the case at bar, a witnessed event. We would be closing our eyes in the light of the prior law if we did not see on the face of the amendment that it was precisely directed[7] at public as distinguished from private destruction. In other words, a special offense was committed by persons such as the defendant who made a spectacle of their disobedience.

In singling out persons engaging in protest for special treatment the amendment strikes at the very core of what the First Amendment protects. It has long been beyond doubt that symbolic action may be protected speech.[8] Speech is, of course, subject to necessary regulation in the legitimate interests of the community, *Kovacs* v. *Cooper, infra,* but statutes that go beyond the protection of those interests to suppress expressions of dissent are insupportable. *E.g., Cantwell* v. *Connecticut,* 1940, 310 U.S. 296, 307-11; *DeJonge* v. *Oregon,* 1937, 299 U.S. 353; *Terminiello* v. *Chicago,* 1949, 337 U.S. 1. We so find this one.

However, the defendant is not in the clear. In burning his certificate he not only contravened subsection (b)(3), but also subsection (b)(6). He knew this at the time of the

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7. While we make no attempt to divine the motive of any particular proponent of the legislation, we regard it as significant that the impact on certain expressions of dissent is no mere random accident, but quite obviously the product of design. *Cf. Grosjean* v. *American Press Co.,* 1936, 297 U.S. 233; *Gomillion* v. *Lightfoot,* 1960, 364 U.S. 339.

8. *E.g., West Virginia Board of Education* v. *Barnette,* 1943, 319 U.S. 624; *Stromberg* v. *California,* 1931, 283 U.S. 359.

burning, for his card summarized both provisions, and he knew it in a larger sense, as is revealed by the memorandum in support of his motion to dismiss, reproduced in his Record Appendix. The memorandum asserted,

> "To rely upon individuals having draft cards in their possession as a means of operative [sic] the selective service system would seem to be impractical if not downright dangerous. . . . Whether Defendant O'Brien has his draft card in his possession, whether he burned, mutilated or whatever, will have little or no effect upon the selective service system."

It is apparent that the factual issue of nonpossession has been fully presented and tried and been found against the defendant. F.R.Crim.P. 31(c) provides, "The defendant may be found guilty of an offense necessarily included in the offense charged . . . ." See *United States* v. *Ciongole,* 3 Cir., 1966, 358 F.2d 439. We see no procedural reason why defendant should not stand convicted of this violation of section (b).

Nor do we see any constitutional objection to conviction for nonpossession of a certificate. It is one thing to say that a requirement that has no reasonable basis may impinge upon free speech. Different considerations arise when the statute has a proper purpose and the defendant merely invokes free speech as a reason for breaking it. We would agree, for example, that a provision relating to injury to the Capitol ornaments could not make it a heightened offense if statuary was defaced for the announced purpose of disparaging the individual memorial-

ized. This, essentially, is what subsection (6) has done if its presence has influenced the court in the severity of the sentence, a matter we will come to shortly. However, it could hardly be suggested that free speech permitted defacement of a statue with impunity so long as disparagement was the declared motive. The First Amendment does not give the defendant carte blanche. *Cf. Kovacs* v. *Cooper,* 1949, 336 U.S. 77; *Giboney* v. *Empire Storage and Ice Co.,* 1949, 336 U.S. 490.

This leaves us with one reservation. Very possibly, in imposing sentence, the court took into consideration what the statute, by virtue of the amendment, indicated to be aggravating circumstances. Clearly it was an aggravated offense in the eyes of the proponents of the legislation. See remarks of Representative Rivers, Congressional Record, House, August 10, 1965, at 19135. Doubtless, too, the defendant chose his particular conduct precisely because of its "speaking" aspect. For the court to conclude, as was suggested in the legislative report, H.Rep. No. 747, 89th Cong., 1st Sess. 1-2, that the impact of such conduct would impede the war effort, and measure the sentence by the nature of his communication, would be to punish defendant, pro tanto, for exactly what the First Amendment protects. The only punishable conduct was the intentional failure to carry his card.[9]

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9. We do not, of course, suggest that if the defendant was urging others to burn their own cards this would have been protected speech. However, we do not understand the government to make this charge.

Appendix

While we do not have, and do not purport to exercise, jurisdiction to review a lawful sentence, we do hold that fairness to the defendant requires that he be resentenced upon considerations affirmatively divorced from impermissible factors. *Marano* v. *United States,* 1 Cir., 3/23/1967, —— F.2d ——. We remark, further, that any future indictments should be laid under subsection (b)(6) of the statute.

The judgment of conviction is affirmed and the case is remanded to the District Court to vacate the sentence, and to resentence as it may deem appropriate in the light of this opinion.

Opinion of the United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6813

DAVID PAUL O'BRIEN,
Defendant-Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

ON PETITION FOR REHEARING

Marvin M. Karpatkin and *Howard S. Whiteside* on petition for rehearing.

April 28, 1967.

ALDRICH, *Chief Judge.* Defendant's petition for rehearing makes, essentially, five points.

Appendix

1. If one designated offense is constitutionally protected, there cannot be an included offense. Defendant cites but one case to support this contention. If it is pertinent at all, it is contrary to his position.

2. The petition at least implies that different consideration should be given to the defendant because he refused counsel in the district court. The court was, properly, most solicitous of the defendant, but it is unheard of that different legal principles became applicable because he chose to represent himself.

3. A distinction should be made between S.S.S. Form 110 (Notice of Classification) and S.S.S. Form 2 (Registration Certificate). Defendant suggests no reason for drawing a distinction, and we can think of none.

4. The "burning" of a card might leave enough card extant so that one still "possessed" the card, and 5. Defendant might have possessed a duplicate card. We might agree with defendant that, for either of these reasons, a burning in some circumstances would not violate the possession requirement. In the present case defendant was convicted under a charge that he did wilfully "mutilate, destroy and change . . ." his card. The conviction was fully supported. The government witnesses described the "charred remains" of the card as a "fragment." Defendant, who was fully advised of his Fifth and Sixth Amendment rights, acknowledged to the witnesses that he had burned "his" card, and permitted the fragment to be pho-

tographed. At trial he conceded the photograph's admissibility and "obvious" authenticity. We note, but without approval, defendant's present argument that he would still "possess" a card if it was "cut . . . in ten pieces." The photograph reveals a substantially incomplete card. Manifestly defendant no longer "possessed" that card.

Nor did defendant's own position permit the suggestion that what was burned was a duplicate of a card still in his possession. Defendant himself introduced and read to the jury his statement to his draft board that he could not "in good conscience carry what is called a draft card." Afterwards the court offered him probation if he would apply for and carry a card but he replied, "I couldn't in good conscience do that," and chose confinement instead. We will not, on such a record, grant rehearing to consider whether defendant was carrying a proper draft card in his possession.

Petition denied.

Opinion of the District Court Denying Motion to Dismiss

MEMORANDUM

May 25, 1966

SWEENEY, D. J. The defendant is charged in a one count indictment with wilfully burning his Registration Certificate (Selective Service System Form No. 2) in violation of Title 50, App. U. S. C. §462(b). His counsel has now moved to dismiss the indictment on the ground that it violates various of his constitutional rights.

He argues, first, that because the purpose of the statute, section 462(b), is to abridge and silence the public expression of opposition to government policies, the indictment denies him his rights to freedom of speech and assembly and to the free exercise of political rights as guaranteed by the First, Ninth and Tenth Amendments to the U. S. Constitution. But at this stage of the case, there are no facts to support these allegations. The statute, on its face, does not deprive the defendant of any of these rights and the court is not, in any event, competent to inquire into the motives of Congress in passing this statute, *Sozinsky* v. *United States,* 300 U. S. 506 (1937).

The defendant next contends that the statute serves no legitimate legislative purpose and, therefore, violates his right to due process under the Fifth Amendment. In *United States* v. *Miller,* 249 F. Supp. 59 (S.D.N.Y. 1965), Judge Tyler overruled an identical objection and pointed

out that, on its face, this statute is an entirely reasonable exercise of the power of Congress to raise armies in the defense of the United States and that, on its face, it does meet the standards of substantive due process. I am not persuaded otherwise by the defendant's argument.

The last argument is that by comparison to other crimes, such as forging a draft card, the indictment subjects the defendant to cruel and unusual punishment. This argument, like the first, is premature. Until a sentence has been imposed, there can be no objection that it violates the Constitution.

The motion to dismiss the indictment is denied.