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**JOINT APPENDIX**

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**Supreme Court of the United States**

**OCTOBER TERM, 1967**

**No. 232**

**UNITED STATES OF AMERICA, PETITIONER**

*v.*

**DAVID PAUL O'BRIEN**

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**No. 233**

**DAVID PAUL O'BRIEN, PETITIONER**

*v.*

**UNITED STATES OF AMERICA**

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ON WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE FIRST CIRCUIT

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THE PETITION FOR CERTIORARI IN NO. 232 FILED ON JUNE 8,  
1967 AND IN NO. 233 ON JUNE 9, 1967  
CERTIORARI GRANTED ON OCTOBER 9, 1967

Supreme Court of the United States

OCTOBER TERM, 1967

No. 232

UNITED STATES OF AMERICA, PETITIONER

*v.*

DAVID PAUL O'BRIEN

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No. 233

DAVID PAUL O'BRIEN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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ON WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE FIRST CIRCUIT

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[fol. 1]                   Criminal Docket No. 66-91-S

THE UNITED STATES

*v.*

DAVID PAUL O'BRIEN

VIOL. willfully and knowingly did mutilate, destroy and change by burning a certificate issued by Local Board No. 18, Selective Service System, Framingham, Mass. in viol. Title 50, App., U.S.C. Sec. 462(b)

DOCKET ENTRIES

1966

- Apr. 15 Indictment returned.
- 25 SWEENEY, D.J. Deft appeared with counsel for arraignment. Plea of not guilty Bail \$1,000 wos. William Randall files appearance for deft. 10 days for special pleas.
- May 4 Appearance of John Wall for pltff filed.  
Send special plea up to Judge Sweeney when filed
- 10 Deft's motion to dismiss indictment filed.
- 19 Government's memorandum in opposition to deft's motion to dismiss filed. c/s.
- 23 SWEENEY, D.J. On deft's motion to dismiss Indictment—ADVISEMENT. Deft's memo to support motion to dismiss filed.
- May 25 SWEENEY, D.J. MEMORANDUM filed . . . The deft is charged in a one count indictment with wilfully burning his Registration Certificate in viol. of Title 50 App. U.S.C. P462(b). His counsel has now moved to dismiss the indictment on the ground that it violates various of his constitutional rights . . . The motion to dismiss the indictment is denied. Cpls to John Wall, Asst US Atty. William Randall Esq.

[fol. 2]

1966

- June 1 SWEENEY, D.J. Criminal jury trial begins—jury impaneled and sworn—evidence. conclusion of evidence—arguments—charge—committed to jury—deliberation. Verdict—jury finds deft guilty.  
Disposition June 13, 1966 at 2:00 P.M.
- July 1 SWEENEY, D.J. Deft appeared without counsel for disposition. Continued to the) custody of the Attorney General under provisions of the Youth Corrections Act. for treatment and supervision. 18 U.S.C. 5010(b).
- 8 SWEENEY, D.J. JUDGMENT AND COMMITMENT ENTERED. Copies to U. S. Probation, U. S. Atty. and Deft. Original and attested copies to U. S. Marshal.
- 15 Appearance of Henry Paul Monaghan, Attorney for Defendant, filed.
- 15 Notice of Appeal filed, copy sent to John Wall Asst. U.S. atty
- 15 Statement of Docket Entries and copy of Notice of Appeal delivered to Court of Appeals.
- 20 Appearance of Melvin L. Wulff, Attorney for Defendant, filed.
- 20 Appearance of Marvin M. Karpotkin, Attorney for defendant, filed.
- 20 Appearance of Howard S. Whiteside, Attorney for Defendant, filed.
- 20 Marshal's return of Judgment and Commitment. Deft delivered on July 12, 1966 to Federal Reformatory at Petersburg, Virginia.

[fol. 3]

INDICTMENT

Criminal No. 66-91-S

The Grand Jury charges:

On or about the thirty-first day of March, 1966 at Boston in the District of Massachusetts, DAVID PAUL O'BRIEN of Boston, Massachusetts, willfully and knowingly did mutilate, destroy, and change by burning a certificate issued by Local Board No. 18, Selective Service System, Framingham, Massachusetts, pursuant to and prescribed by the provisions of the Universal Military Training and Service Act, as amended, and the rules and regulations promulgated thereunder, to wit, a Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App., United States Code, Section 462(b).

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DEFENDANT'S MEMORANDUM TO SUPPORT  
MOTION TO DISMISS INDICTMENT

*Constitutional, Statutory and Regulatory Provisions  
Involved*

*U. S. Constitution, Article 1, Section 8*

The Congress shall have power . . .  
To raise and support armies . . .

*U. S. Constitution, First Amendment*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*U. S. Constitution, Fifth Amendment*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment [fol. 4] or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public

danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*U. S. Constitution, Eighth Amendment*

Excessive bail shall not be required, nor excess fines imposed, nor cruel and unusual punishments inflicted.

*U. S. Constitution, Ninth Amendment*

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

*U. S. Constitution, Tenth Amendment*

The powers not delegated to the United States by the Constitution, or prohibited by it to the States, are reserved to the States respectively, or to the people.

*Title 50, Appendix, United States Code, Section 462 (b) (Language inserted by P. L. 89-152, 79 Stat. 586, amendment to Section 462(b) is underscored)*

(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 non-residence, 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) [fol. 5] 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.

POINT 1—AMENDED SECTION 462(b) (3) DEPRIVES DEFENDANT O'BRIEN OF THE RIGHTS GUARANTEED TO HIM BY THE FIRST, NINTH, AND TENTH AMENDMENTS

A. The First Amendment to the Constitution states “Congress shall make no law . . . abridging the freedom [fol. 6] of speech, or of the press . . .” Defendant O’Brien contends under the First Amendment that symbolic speech be entitled to the same degree of protection as verbal speech. This was the ground relied upon by defendant Miller in *United States v. Miller*, 249 FSupp. 59 (SDNY, Dec. 16, 1965). The First Amendment protects freedom of speech and this would stand to include speech by symbols as well as words. Had Defendant O’Brien torn up a piece of cardboard claiming that he hated his country, certainly no crime would have been committed. The fact that the piece of cardboard was in fact his draft card

does not change the guarantee or protection that Defendant O'Brien should be accorded under the First Amendment.

**POINT 2—AMENDED SECTION 462(b)(3) IS VOID UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT**

Defendant O'Brien contends that Title 50 Amended Section 462(b)(3) goes far beyond what is necessary or indeed whatever would be necessary to carry out or effect the military capabilities of the United States. To rely upon individuals having draft cards in their possession as a means of operative, the selective service system would seem to be impractical if not downright dangerous. The selective service boards maintain records, set up rules and regulations for the calling of men into the armed services, determine their general status and do all things necessary to provide manpower for the armed services. 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. On its records, O'Brien still stands and will, I assume, be called when his turn is reached. To enact legislation and specifically this statutory provision to treat a boy who burns, mutilates or destroys a draft card in the same manner [fol. 7] as a person who forges the same would seem to deprive any man of his rights under the provisions of the Fifth Amendment.

**POINT 3—AMENDED SECTION 462(b)(3) AS IMPOSING A CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT**

To treat O'Brien with the same punishment for burning, or mutilating a draft card as could be meted out to said O'Brien if he forged the same would appear to go too far. This exceeds any conceivable "standard of decency".

### CONCLUSION

Defendant O'Brien requests that his motion be granted and the indictment dismissed.

Respectfully submitted

WILLIAM I. RANDALL  
*Defendant's Attorney*

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### STENOGRAPHIC TRANSCRIPT OF TRIAL

SWEENEY, J. And a Jury

#### APPEARANCES.

John Wall, Esq., Asst. U.S. Atty., for the government  
David Paul O'Brien, Pro Se

Court Room No. One,  
Federal Bldg. Boston, Mass.  
Wednesday, June 1, 1966.

(Jury impanelled)

#### *Opening Statement by Mr. Wall*

Mr. Wall: May it please the Court, members of the jury, this is the case of United States v. David Paul O'Brien. Mr. O'Brien is charged in a one-count indictment [fol. 8] with, on March 31, 1966, destroying, mutilating and changing a registration certificate issued by Local Board Number 18 of Framingham.

He is charged with willfully and knowingly destroying this certificate by burning.

The evidence in this case, ladies and gentlemen, is simple. The evidence will show that on March 31st, some time in the morning, outside the South Boston courthouse, Mr. O'Brien was present, with others, and did by burning destroy a registration certificate issued by Local Board Number 18.

The evidence will show that he knew that to destroy that certificate by burning was in violation of Federal law.

After you have heard all the witnesses in this case and after you have seen whatever physical evidence may be introduced, I shall again talk to you and consider with you the significance of the testimony and the physical evidence.

After that I shall ask you to return an appropriate verdict.

Thank you.

The Court: Call your witnesses.

Mr. Wall: The government calls Special Agent Thomas McInerney.

THOMAS L. MCINERNEY Sworn

*Direct Examination by Mr. Wall*

Q. Agent McInerney, will you state your full name, please, and your occupation? A. Thomas L. McInerney, Special Agent of the Federal Bureau of Investigation.

Q. And how long have you been so employed? A. Sixteen years.

Q. And were you so employed on March 31st of 1966? A. I was.

[fol. 9] Q. And during the course of your duties on that day were you in the vicinity of the South Boston courthouse? A. I was.

Q. How did you happen to be there? A. I was sent there by my supervisor.

Q. Was there anyone with you at that time? A. Yes, Agent Don Bassett.

Q. And what time did you arrive in the vicinity of the courthouse that morning? A. Approximately 8:40 a.m.

Q. And your specific assignment was what? A. To observe a group that was supposed to arrive there for trial, and indications that there was going to be draft card burning.

Q. And what did you observe upon your arrival at the location at 8:40? A. I observed a group of spectators in front of the Boston Municipal Court, also news media, television and newspaper men.

I saw a large gathering of spectators along with several groups of young men who approached the courthouse and

went up on the steps of the courthouse, facing the street, and each produced a card out of their pockets, and one produced a lantern.

And one of the members whom I was assigned to, a Mr. O'Brien, was there, and I witnessed him burning a card.

Q. Now, who assigned you to observe any particular person? A. Special Agent James Canty.

Q. He is your superior? A. He was the senior agent at that particular time.

Q. And when you were assigned to observe this individual, did you know him by name at the time? A. No, not by name.

Q. When did you learn the name of the individual? A. I learned afterwards, when Mr. Canty came over to me afterwards and told me who he was.

Q. And from the time you first arrived and were given [fol. 10] the assignment to observe Mr. O'Brien, did you in fact observe him on the courthouse steps? A. Yes, I did.

Q. And do you see that man in the courtroom to-day that you observed? A. I do.

Q. Will you point to him and tell us what he is wearing to-day, please? A. He is sitting there on the bench, with a brown coat, glasses, wavy hair.

Q. And that is the only man seated at this table (indicating)? A. Yes.

Mr. Wall: May the record reflect that the witness has identified the defendant.

Your Honor, may these photographs be marked as Government's Exhibits 1 through 4 for Identification?

The Court: Show them to the defendant.

Mr. Wall: Yes, sir (handing to defendant).

(A pause)

Mr. Wall: May they now be so marked, Your Honor?

The Court: Yes.

(Four photographs marked Government's Exhibits 1-A through 1-D for Identification)

Q. Agent McInerney, I show you Government's Exhibits 1-A through 1-D for Identification, and I ask you to examine them. A. (Complying) Yes, sir.

Q. Did you observe the persons and acts depicted therein? A. Yes, I did.

Q. And on what date and at what time? A. March 31st, at approximately 8:40 to 8:45.

Q. And are those exhibits, those photographs, a fair representation of the persons there depicted, as well as the circumstances and conditions at the time? A. They are.

Q. And is the defendant O'Brien in each of those photographs?

The Court: The photographs will speak for themselves.

Mr. Wall: Yes, sir.

The Witness: Yes, sir.

[fol. 11] Q. Now, will you describe to the jury, please, in detail, exactly what you saw O'Brien do on the steps of the courthouse. A. While Mr. O'Brien was up on the steps, I observed him reaching into his pocket and obtaining a card, a white card, the approximate size about two and a half by three.

And he, along with three others on the steps, ignited the card with that lantern being held by another individual, and it ignited and burned. And he held it up in his hand to the spectators.

And then he put it back, he put it in his pocket—I believe he put it in an envelope and put it in his pocket.

Q. Agent McInerney, how far were you from Mr. O'Brien at the time you observed these acts? A. I was approximately about fifteen or twenty feet.

Q. What next occurred? A. Well, as I was watching them burn there, a crowd started to surge forward, young men, and I could see that one of them was starting to swing and hitting one of the boys.

And then I saw Mr. O'Brien moving away from the crowd towards the entrance of the courthouse.

I immediately followed him and kept in back of him, and as we reached the door, I opened the door and I kind of pushed him in, and I identified myself as an FBI agent and I said, "Come and follow me".

Q. Was it your intention to place him under arrest at this time? A. No.

Q. What was your intention? A. To protect him from the crowd that was surging forward and fighting. It

seemed to me that there was going to be a riot, and trouble.

And I followed him into the corridor of the court and I told him to follow me. And we went approximately about fifty to seventy-five feet and I located a janitor's room in the courthouse.

[fol. 12] I opened it, and found no one in it. And I told him to come and follow me and to stay here and he would be protected.

And he did. And he was rather nervous, and he asked me if it would be all right to smoke, and I said, "Certainly".

Then I stayed there with him for a few minutes, and I could hear the crowd in the corridor. And I looked out and I could see the crowd there, and I figured there might be some trouble starting out there.

So I waited a few more minutes, and then I went out and got hold of Special Agent Don Bassett to come in to talk to—so he could talk to Mr. O'Brien.

And at that time I told Mr. O'Brien that he didn't have to talk to me, that I was a Special Agent of the Federal Bureau of Investigation, that anything he said could be used against him, that he had a right to consult an attorney, and if he couldn't afford one the Court would appoint one for him.

Q. And did you in fact interview him regarding the incident that had just occurred? A. I did.

Q. And will you give us his comments with regard to the incident that had just occurred? A. I asked him what he had done, what he had burned. He told me that he had burned a Selective Service certificate, and that he knew it was a violation of Federal law, but that he had his own beliefs and his own philosophy why he did it.

And he produced the charred remains of the Selective Service certificate, which he showed me, and it was in an envelope.

I asked him if it was all right if I photographed it and he said it was perfectly all right. And I called in Special Agent Berndt, who was with me, and we photographed the remains.

I asked him if I could have them, and he said, "No, I [fol. 13] am going to return these back to the Selective Service Board, Local Board 18 in Framingham".

Mr. Wall: Your Honor, may these be marked as Government's Exhibits 2-A and 2-B for Identification.

(Two photographs marked Government's Exhibits 2-A and 2-B for Identification)

(Mr. Wall shows the exhibits to the defendant)

Q. Agent McInerney, I show you Government's Exhibits 2-A and 2-B for Identification and ask you to examine them. And I ask you if those photographs are a fair representation of the document produced by Mr. O'Brien for photographing on March 31st? A. They are.

Q. And I ask you whose initials those are (indicating). A. Those are my initials and the date, which I placed there.

Q. Were these photographs taken in Mr. O'Brien's presence? A. They were.

Q. With his permission? A. Yes.

Q. By whom? A. By Special Agent Dale Berndt.

Mr. Wall: I have nothing further of this witness.

The Court: Mr. O'Brien, do you care to ask the witness any questions?

Mr. O'Brien: I don't want to contest any of the facts that were produced by Mr. McInerney, except for one thing.

*Cross-examination by Mr. O'Brien*

XQ. You mentioned the going in from the steps, with the crowd surging around, into the courtroom itself. This had nothing to do with the burning itself, but I would just like to bring out that I don't feel that I just walked in and you were there, and I would like to thank you for what did happen, because I think, by and large, it may have been my life that was saved, at least my safety.

I presume I have to ask a question rather than make a statement, so I will try and phrase it that way.

But wasn't it the fact—I don't remember in these circumstances who it was, but it was one of the Agents from the FBI who actually pulled me out of the

crowd and into the courthouse, rather than my walking.

This was my recollection. Is this not true? A. I didn't observe that.

XQ. Well, at any rate I would just like to thank you, or whoever it was that did this.

Mr. O'Brien: No further questions.

Mr. Wall: That is all.

The Court: You may step down.

Mr. Wall: The government calls Special Agent Donald Bassett.

DONALD A. BASSETT Sworn

*Direct Examination by Mr. Wall*

Q. Mr. Bassett, will you state your full name and occupation, please? A. Donald A. Bassett, Special Agent of the Federal Bureau of Investigation.

Q. And you were so employed on March 31, 1966? A. That is correct.

Q. And in the course of your duties on that date, were you in the vicinity of the South Boston courthouse? A. I was.

Q. What time did you arrive there? A. It was approximately 8:40 a.m.

Q. And in whose company? A. In the company of Special Agent McInerney.

Q. And your assignment was what? A. Our assignment was to observe the gathering which had been anticipated would take place in front of the municipal court in South Boston on that morning, specifically on the basis of word that we had received that there might be a draft card burning transpiring that morning.

Q. And were you assigned to watch a specific individual? A. Not at that point, no, sir.

[fol. 15] Q. Did that occur, that you were assigned to watch a specific individual? A. Yes, it did, later on during the morning.

Q. At what time did that assignment take place? A. The assignment took place approximately four to five minutes later, after the crowd had gathered in front of the courthouse, and as four individuals had positioned

themselves on the stairs of the courthouse for the apparent purpose of burning Selective Service documents.

Q. And do you see in the courtroom to-day the person you were assigned to observe? A. Yes, I do.

Q. Would you point to him, please, and tell us what he is wearing to-day? A. (Complying) the gentleman sitting at the second table out from the bench, wearing a brown coat and gold rimmed glasses, with long, wavy hair.

Mr. Wall: May the record reflect that the defendant has been identified by this witness.

Q. Did you know the defendant's name at that time, Agent Bassett? A. No, I did not.

Q. When was the first time you learned his name? A. Well, the first that I learned his name was as he identified himself during the interview subsequent to the action which took place.

Q. Now, would you tell the Court and the ladies and gentlemen of the jury exactly what you observed the defendant do on the steps of the courthouse, and the time you observed him do it? A. At approximately 8:47 a.m. I observed, from a position approximately twenty feet from the gentlemen who later identified himself as David Paul O'Brien, and three other persons on the courthouse stairs, I observed these people to burn cards which they had—.

Q. I am interested in what you observed Mr. O'Brien specifically doing. A. Yes. I observed him to burn a small white card, approximately two inches by three and a half inches.

[fol. 16] Q. Could you otherwise identify it at that time? A. No, I could not.

The Court: How did he burn it?

The Witness: He burned it by using a lantern, sir, what appeared to be a carbide lantern, which was being held by one of the four individuals in the group.

Q. And he put the card to the flame? A. Yes.

Q. What next occurred? A. I tried to move around to the left at that point to position myself in closer, to get a better look at what was going on. And in doing so, I wound up behind the four people on the stairs of the courthouse.

I still wasn't close enough to get a good look at the card itself, and a short time later a melee erupted, and it was difficult at that point to get any closer.

Q. What next occurred in relation to Mr. O'Brien? A. The last I saw of Mr. O'Brien he was caught up in the melee. I was pushed to the side—I should say to the center of the stair area, and crawled under a railing at that point.

And at that point I had lost him; I didn't know what had happened to him then. Of course, things were still confused, and there were a good many people in different positions on the stairs.

A short time later Special Agent McInerney came out of the courthouse proper and motioned to me to come inside. And at that time he told me that he had Mr. O'Brien in an isolated room in the courthouse.

Q. And what next happened? A. I followed Special Agent McInerney to the room where Mr. O'Brien was waiting for us. We went into the room, which was a custodian's room approximately 75 feet from the main entrance to the courthouse.

Mr. O'Brien introduced himself as being David O'Brien, and at that time I advised him that he didn't have to talk to me if he didn't want to, that anything he did say could [fol. 17] be used against him in a court of law, and that he was free to call an attorney or anyone else whom he so desired.

I told him that if he couldn't afford an attorney, the Court would appoint one for him.

Q. Did you have some conversation at that time with Mr. O'Brien with regard to the incident which had just taken place on the steps? A. Yes, I did.

Q. Would you relate that conversation, please? A. Mr. O'Brien stated that he, in the company of three other individuals, had burned his Selective Service registration certificate on the stairs of the South Boston municipal courthouse on that particular morning.

He stated also that he was aware at the time he burned the card that it was a violation of Federal law.

Q. Did he produce any document for you? A. Yes, he did. He produced what appeared to be the charred remains of a Selective Service card.

He was asked at that time if he would release these documents to the FBI to be held as evidence, and he stated that he did not wish to do so inasmuch as he wanted to return them to his local Selective Service board.

He was then asked if he minded if we photographed the documents, and he stated that he did not, and photographs were then made of the charred remains by Dale Berndt.

Q. In your presence? A. That is correct.

Q. And in Mr. O'Brien's presence? A. Yes.

Q. Now I ask you, did you observe these charred remains of the document at close range, personally? A. Yes, I did.

And what did you observe? Were you able to make out any writing or printing on the documents—well, was it one document or more? A. No, it was one document.

Q. Would you tell us what you observed on that document, or the remains of that document? A. Well, on one side I observed what I had learned from previous experience [fol. 18] to be the CNBA symbol. It appeared to be in ink, on the back of the document itself.

Also on the same side could be seen the printing signature at the top, or what appeared to be the top, of the card.

On the otherside appeared a portion of what I know from previous experience to be part of a block stamp on a Selective Service document.

Q. And do you recall the printing that was legible, the block stamp printing that was legible on the card that remained? A. I believe the "Local" could be seen, and also "Framingham". I don't recall any other printing right at this point, sir.

Mr. Wall: I have no further questions, your Honor.

The Court: Do you have any questions, Mr. O'Brien?

Mr. O'Brien: Yes, sir.

*Cross-examination by Mr. O'Brien*

XQ. Hello, Don. Once again I would simply like to ask, because I was pulled into the courthouse by someone who identified themselves as members of the FBI, and apparently it wasn't yourself or Mr. McInerney, if you do find out who he is, I wish you would—well, this is a ques-

tion, would you please give him by deepest thanks? A. I shall.

Mr. O'Brien: That is all.

Mr. Wall: Special Agent Berndt, please.

DALE A. BERNDT, Sworn

*Direct Examination by Mr. Wall*

Q. Agent Brandt, will you state your full name and occupation, please? A. Dale A. Brandt, Speciel Agent, Federal Bureau of Investigation.

Q. Would you spell your last name, please? A. B-r-a-n-d-t.

[fol. 19] Q. And on March 31, 1966 you were so employed? A. Correct.

Q. In the course of your duties were you in the vicinity for the South Boston courthouse? A. Correct.

Q. I show you Government's Exhibits 1-A through 1-D and ask you to examine them. A. (Complying) Yes.

Q. Do you recognize those? A. I do.

Q. What are they? A. These are photographs of four individuals I observed burning white cards on the steps of the South Boston municipal courthouse on March 31st.

These are photographs taken by myself.

Q. You took those photographs? A. Yes.

Q. And are they a fair representation of the persons appearing therein, and the conditions and the locality at the time? A. They are.

Q. I now show you Government's Exhibits 2-A and 2-B and ask you to examine them, and I ask you if you recognize those? A. I do.

Q. What are they? A. These are photographs taken by myself on the same date, March 31, 1966, of a fragment of a card furnished by the defendant at that time.

Q. And do you see the man who furnished you those fragments in the courtroom to-day? A. Yes, he is sitting at the far desk, wearing a brown coat and steel rimmed glasses.

Q. And those photographs were taken in his presence and with his permission? A. They were.

Q. And is the matter reflected in those photographs a fair representation of what was produced by Mr. O'Brien for photographing? A. It is.

Mr. Wall: Your Honor, I ask that Government's Exhibits 1-A through 1-D and 2-A and 2-B for Identification be received in evidence.

The Court: Mr. O'Brien, you have a right to object [fol. 20] to their admission if you think there is anything about their authenticity that is in question.

Mr. O'Brien: No, they seem to be perfectly obvious.

The Court: All right, they may be received.

The Clerk: Government's Exhibits 1-A through 1-D marked for identification are now in evidence as Government's Exhibits 1-a through 1-D.

Government's Exhibits 2-A and 2-B for Identification are now in evidence as Government's Exhibits 2-a and 2-B.

(Government's Exhibits 1-A through 1-D and 2-A and 2-B for Identification received in evidence)

Mr. Wall: Your Honor, I have no further questions of this witness.

The Court: Do you have any questions, Mr. O'Brien?

Mr. O'Brien: No questions.

The Court: You may step down.

Mr. Wall: Your Honor, may this witness be excused permanently?

The Court: Yes.

Mr. Wall: The government calls Col. Paul Feeney.

PAUL F. FEENEY Sworn

*Direct Examination by Mr. Wall*

Q. Will you state your full name and occupation, please? A. Col. Paul F. Feeney, Deputy State Director of Selective Service.

Q. And at my request did you bring certain documents with you to-day? A. Yes, sir.

Q. And those are official records? A. Yes, sir.

Q. Regarding whom? A. David Paul O'Brien.

Q. And do you have legal custody of those records?  
A. Yes, I do, sir.

Q. And in addition to being official records, are they records that are kept in the regular and ordinary course of business? A. Yes, sir.

[fol. 21] Q. And is the regular course of business in keeping those records to make any memorandum in those records or any insertion of correspondence at the time that the acts reflected by the memorandum or correspondence is received or within a reasonable time thereafter?  
A. Yes, sir.

Q. And do those records reflect that Mr. O'Brien is in fact registered with the Selective Service System?

A. Yes, they do, sir.

Q. And how do you determine that? A. This (indicating) is the registration certificate Form 1-A and it shows that David Paul O'Brien presented himself and submitted to registration on December 11, 1964.

Q. And did Mr. O'Brien fill out a classification questionnaire? A. Yes, he did, sir.

Q. On what date was that filled out? A. Mr. O'Brien signed and dated this December 19, 1964.

Q. And what do the records reflect regarding Mr. O'Brien's classification at the time he initially reported to the Local Board? A. The original classification given to him in January of 1966 was Class 2-S.

Q. And the reason for that was? A. There is evidence in the file received from Boston University that he was pursuing a full-time course of instruction at that school.

Q. Did there come a time when that classification was changed? A. Yes, sir.

Q. And what was the reason for that? A. The classification was changed to 1-A on April 6, 1966 after the Local Board received a letter from State Headquarters —may I read the letter?

The Court: No.

Q. The letter was from you? A. Yes, sir.

Q. And the information contained was what? A. With regard to his no longer attending school.

Q. And as a result of his no longer attending school,

[fol. 22] or no longer being a student, what action was taken? A. He was no longer eligible for his student deferment.

Q. Do you have the original Selective Service file there?  
A. Yes, sir.

Q. And you also have a copy, a file copy; is that correct? A. A photostatic copy of the record, yes, sir.

Mr. Wall: Would your Honor indulge me for a moment, please?

The Court: Yes.

(A pause).

Q. Col. Feeney, may I have the Form 1-A, the registration card? (A pause). May I have the copy, please?  
A. Yes, sir (handing).

Mr. Wall: Your Honor, I would like a copy of the registration card marked as Government's Exhibit 3 for Identification.

The Court: Is there any objection to a copy instead of the original?

Mr. O'Brien: No objection.

The Court: All right.

(Copy of registration card of David Paul O'Brien marked Government's Exhibit 3 for Identification).

Q. Col. Feeney, I hand you Government's Exhibit 3 for Identification. And that is, is it not, the registration card Form 1-A that you just handed me? A. Yes, sir.

Q. And I ask you, is that the basic document in the Selective Service form—? A. This is the basic record for each registrant.

Mr. Wall: Your Honor, I ask that this be received in evidence.

The Court: Let me see it, please. Mr. O'Brien, would you step up here, please, with counsel?

(Conference at the bench at which the following was recorded:

The Court: This is a purported registration certificate made out by one David Paul O'Brien [fol. 23] and signed by him. Now, there may be seventy-five

David O'Brien's, and you have a right to object to the admission of this evidence—

Mr. O'Brien: May I see it for a moment, please (examining)?

The Court: —as not being proven to be your particular registration certificate.

Mr. O'Brien: This is not the 1-A card.

Mr. Wall: No.

Mr. O'Brien: I was under the impression you said it was the 1-A card.

Mr. Wall: No, this is Form No. 1-A.

Mr. O'Brien: Oh, I see.

Mr. Wall: Which is a registration card.

Mr. O'Brien: Okay, your Honor.

The Court: Now, again I say to you, Mr. O'Brien, you do not have to supply evidence against yourself. You don't have to admit that that is your signature on there or that anything of that nature pertains to you in particular, because there may be several men with your same name and this may be one of another David Paul O'Brien.

So that if you object to this at this time, I will not receive it in evidence.

Mr. O'Brien: No, I have no objection. It has the correct address on it, it has my place of birth. I have no objection.

The Court: I think you ought to object to it at this stage of the evidence, because the government has to prove that that card is not only a registration certificate of one David Paul O'Brien, but that it is yours. And so far, they haven't done that.

Mr. O'Brien: I still have no objection.

[fol. 24] Mr. Wall: If your Honor deems fit, I can prove that, your Honor.

The Court: Well, it is part of your case. Here is a man without defense counsel.

Mr. Wall: Very well, your Honor. I will call the Local Board Clerk who can prove that.

The Court: I don't care what you do. But, Mr. O'Brien, you say that with full knowledge of what I am talking about you still have no objection to that going into evidence?

Mr. O'Brien: No objection, your Honor.  
The Court: All right, I will receive it.

(Government's Exhibit 3 for Identification received in evidence).

Q. Col. Feeney, did you bring with you this morning at my request another document, not a part of the Selective Service record of Mr. O'Brien? I am referring to a blank registration certificate. A. Yes, sir (handing).

Mr. Wall: May I have this marked as Government's Exhibit 4 for Identification (showing to defendant).

(Blank registration certificate marked Government's Exhibit 4 for Identification).

Q. I hand you Government's Exhibit 4 for Identification, and that is the blank registration certificate that you just handed me, is it not? A. Yes.

Q. And that is Form No. 2? A. Right.

Q. And those certificates are used how within the Selective Service System? A. After the man registers, his card, his registration card, is sent to the Local Board having jurisdiction over his place of residence as furnished by him.

That Local Board will then, about the tenth of the following month, assign him a Selective Service number and enter him in their records.

They then prepare this registration certificate and mail [fol. 25] it to him as evidence that he has registered under the Universal Military Training and Service Act.

Q. Now, when you say that they prepare this registration certificate, what do they do to that blank certificate? A. They will insert in the appropriate items his name, his Selective Service number, date of birth, place of birth and other identifying information, and it will show that he was duly registered on such-and-such a date, and the signature of the Local Board clerk.

Q. Is there a place on that card for his signature?  
A. Yes, sir.

Q. The registrant's signature? A. At the end of the card.

Q. And on the other side of the blank card is there a place for the Local Board to stamp a self-identification

stamp? A. Yes, sir, there is a block for the Local Board's stamp.

Q. And it is standard operating procedure that the Local Board stamp its own identification on that block when it sends the card out? A. Yes, sir.

Mr. Wall: Your Honor, I offer Government's Exhibit No. 4 for Identification into evidence.

The Court: It may be received as a chalk.

The Clerk: Government's Exhibit 4 for Identification is received as Government's chalk.

Mr. Wall: I have no further questions, your Honor.

The Court: Do you have any questions, Mr. O'Brien?

Mr. O'Brien: Yes, your Honor.

*Cross-examination by Mr. O'Brien*

XQ. Mr. Feeney, do you have with you the complete file, my complete file from the Selective Service? A. Yes, sir.

XQ. Do you have in the file a letter sent from myself to the Local Board dated March 2nd?

[fol.26] Mr. Wall: Your Honor, may we approach the bench?

The Clerk: Surely.

(Conference at the bench at which the following was recorded:

Mr. Wall: Your Honor, the document to which the defendant now refers was not introduced by the government because the government feels it would prejudice his case. There is information in there, for instance, that he was doing—.

The Court: Prejudice what case?

Mr. Wall: Prejudice the defendant's case. There is prejudicial information in there.

The Court: What are the contents. Let me see the letter, please.

(The Court examines the document).

The Court: Well, if the defendant wants this, I will allow it.

Mr. Wall: Very well, your Honor).

XQ. Would you please describe the nature of this letter that is sent from myself to Local Board No. 18, Framingham, dated March 2nd? A. Do you want me to read it?

The Court: If you wish, Mr. O'Brien, you can first offer it in evidence and it will be marked. Then you may read it to the jury yourself, or you may have it read.

Mr. Wall: May I substitute a copy?

The Court: You may substitute a copy if there is no objection.

Mr. O'Brien: I have no objection.

(Letter from defendant to Local Board 18 marked Defendant's Exhibit A).

The Court: Now you may either read that to the jury or you may pass it around amongst them, or you may do both.

Mr. O'Brien: I shall read it to the jury. This is a letter dated March 2nd from myself to Local Board No. [fol. 27] 18, Selective Service System, Framingham, Mass. It reads as follows: (reading).

"Fellow partners in humanity: I live by the principle of love. Therefore, I must inform you that I am unable to comply from this point on with the laws concerning the Selective Service System.

I take this action because I feel that it is the only moral course I can follow. I could never serve in the armed forces in any capacity for I consider the existence of the war machine the furthest step taken toward the demise of mankind, not only physically but morally.

I cannot accept a position of civilian alternative service in place of the military requirement you want me to perform.

This would amount to my being placed in a special category, and I am not special. This would be saying that there is a right to draft others in the killing machine, hate and suffering, to draft those who don't have special religious training and belief. I feel this right does not exist; it is a wrong.

I feel that I must commit my life to a more positive force than one of destruction. I must work for

a non-violent world. Good and moral gain does not come from militarism, but from a struggle against hate itself.

I cannot accept any classification you may give me, nor can I fill out any of the required forms.

I can no longer in good conscience carry what is called a draft card, for this is a recognition of government superiority over my conscience. That superiority does not exist.

I am returning my draft card to you with this letter"—

[fol. 28] that was my 2-S classification card, (continuing) "I am sorry that the only communication that has taken place between us in the past has been official forms, and now we face one another in what might be thought of as a negative way. I am telling you that I cannot work with you in your official capacity.

But I think you will realize by my willingness to accept any consequences for this action that I do want to communicate with you. I hope that we can get to know and understand one another on a friendly basis some day.

I hope you will give me the opportunity to come in and talk with all of you in person in the near future.

With the hope that a communicative love shall prevail.

/s/ David O'Brien

March 2nd."

No further questions.

Mr. Wall: That is all your Honor.

The Court: You may step down.

Mr. Wall: I have nothing further, your Honor. The government rests.

The Court: We will take a short recess here. The jury is excused, and I would like to see Mr. Wall. and Mr. O'Brien at the bench.

(Jury excused).

(Conference at the bench at which the following was recorded:

The Court: Now, the government has presented its whole case, Mr. O'Brien, and I would like to find out from you what your desires are. You have the right to put on some evidence to contravert the government's claim that you burned your draft card. You have the right to take the stand under oath and [fol. 29] deny the charge, or to state anything else that you want to state that is in defense of your action.

Mr. O'Brien: Does this have to relate specifically to the facts, or can I put myself on the stand and make a statement as to why I committed that particular act?

The Court: You can do that if you want to, or you can refrain from taking the stand entirely and rest your case on the government's evidence.

Then later you will have two opportunities to speak and to state your reasons or anything else you want to say. One would come when you have the opportunity to argue to the jury, supposedly on the question of your guilt or innocence, but I will allow free range for you to expose your views on this matter. That would be one occasion.

The other occasion would be that in case you were found guilty, before I would impose any sentence you would then have an opportunity to address the Court on your reasons for so doing. But that would be in the absence of the jury.

Mr. O'Brien: I see.

The Court: So you think it over for a few minutes.

Mr. O'Brien: Well, I think it would probably be best, then, if at the time of making an argument, which I believe is term you used—I shall not have a defense; I don't contest the facts. There are one or two things which they presented which are not correct, but they are rather pedantic, and I don't wish to be pedantic about it.

I don't contest the fact that I did burn the card.

The Court: Then if you want to confine your remarks to your argument to the jury, then I would suggest that you talk it over with your friends and

[fol. 30] that you rest, now that the government has rested, and then, immediately thereafter, will come the arguments. And in that case, you will not be sworn.

Mr. O'Brien: That would be, then, right after the recess?

The Court: Right after the recess, a few minutes after.

Mr. O'Brien: When is the recess over?

The Court: Generally it would be ten to fifteen minutes, but I have to see other counsel. If you desire a longer time, I will give it to you.

Mr. O'Brien: Could I have until half past the hour?

The Court: Surely. We will recess until 11:30, or thereabouts.

Mr. O'Brien: Thank you very much.

The Court: Now, you understand the situation?

Mr. O'Brien: Yes, your Honor.

The Court: And after you talk it over with your friends, if you want to come up here I will be glad to talk to you about it and direct your strategy.

But you have those three opportunities, one, to take the stand and say under oath whatever you want to say; two, your argument to the jury, which will not be under oath, and in which I will give you some latitude, although strictly speaking your argument should be directed to the question of your guilt or non-guilt; then three would be in case you are found guilty you would have an opportunity to address the Court before sentence was pronounced. And that would be in the absence of the jury.

As I understand it, you would rather take number two.

Mr. O'Brien: Yes, sir.

[fol. 31] The Court: All right.

Mr. O'Brien: Thank you very much.

(Recess).

(Conference at the bench at which the following was recorded:

The Court: Just to check with you, do I understand that you are going to rest now?

Mr. O'Brien: Yes.

The Court: And immediately thereafter you will make your argument to the jury.

Mr. O'Brien: Yes. I have one question. Is the government going to also make a summation?

The Court: They can, or they can waive it if they see fit. The chances are that they will, but they will make it after you.

Mr. O'Brien: They would make it after mine? I see. Thank you very much.)

The Court: Now, members of the jury, I have ascertained that the government having rested the defendant is also going to rest, and will put on no evidence.

That is his right, as I shall explain to you later in my charge to you.

So now Mr. O'Brien will argue his case to you, and after that we will hear from the government and then I will charge you on the law.

All right, Mr. O'Brien.

Mr. O'Brien: Thank you. Ladies and gentlemen of the jury, we are now in part of what is called my trial, but I think there is something larger than that here; I think in a sense we are all on trial here to-day.

For I think that life is basically a series of confrontations, and there is necessity on every individual's part to make a choice in these confrontations.

Whether it is simply to choose between living in the cities or the suburbs, or one job or another, or the basic [fol. 32] moral choice of death or trying to sustain life, these are all choices that we have to make.

And I have gone through a much more difficult trial than to-day's, that I waged within myself, as to what position I would take on the confrontation between death and sustaining life.

It began when I was 18 and registered with the Selective Service System.

I had to make a choice of whether or not to register, and I registered.

I regretted it later that I did, but I did, I cooperated with what I considered to be intrinsically immoral, wrong, a system that sustains death rather than life.

I then thought that I would try to get a 1-O classification, a conscientious objector's classification from the government, so that I would do two years of alternative services rather than go into the armed forces.

And I went to see counselors and so on, to know the legal aspects of how to get a conscientious objector's rating, and I was all set to file, and still going through a great deal of inner turmoil, a very difficult thing to decide, and I decided that I could not accept a 1-O classification.

I could not go along with the system: I had to refuse to cooperate with what I considered to be evil.

So I returned, on March 2nd of this year, with the letter which I earlier read to you, my 2-S classification card, informing the Local Board that I was not going to cooperate with it, that I couldn't kill people.

I am a pacifist and as such I cannot kill, and I would not cooperate.

I later began to feel that there is necessity, not only to personally not kill, but to try to urge others to take this action, to urge other people to refuse to cooperate with murder.

[fol. 33] So I decided to publicly burn my draft card, hopefully so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of to-day, to hopefully consider my position.

And I don't contest the fact that I did burn my draft card, because I did.

It is something that I felt I had to do, because I think we are basically living in a culture to-day, a society that is basically violent, it is basically a plagued society, plagued not only by wars, but by the basic inability on the part of people to look at other people as human beings, the inability to feel that we can live and love one another, and I think we can.

We tend to look on other people as abstractions, masses, mass education, mass communication.

We look upon things in terms of masses of working men, masses of capitalists on Wall Street, masses of people in the factories.

These are all individual people, and I think this is something that has to be realized. So that when you are shooting at someone, he is not merely a person with another uniform on, he is a human being. This is something that has to be realized.

There are a lot of philosophers in the last twenty years who have expressed it by saying that something that has been killed in us is the ability to feel that if you talk to another person as a person you can elicit a human response.

Many people feel that you can no longer elicit that human response. I don't think that is true.

Sometimes I am pessimistic and feel that you can't talk to this human being, this abstraction. But I feel that basically you can get a human response from other people.

And it is upon this basis that I feel I am approaching [fol. 34] you now, feeling that you are not twelve people sitting here, and abstract jury that can decide one way or the other what happens to me, but you are human beings.

And the important thing is that I want to reach you as people and make you understand that people can be reached this way.

So in this sense I think we are all on trial to-day. We all have to decide one way or the other what we want to do, whether we are going to accept death or whether we will fight to sustain life.

I think it is highly unfortunate that we are having to reach one another with this bar between us, so that I am in one legal position and you are in another legal position.

No matter what the verdict reached by this jury, by this group of people, individuals, I sincerely hope that we can afterwards get to know one another as individuals, that we can get together at another time and sit down together and understand one another, and realize that I am not an abstraction that you saw on television or read about in the newspapers, or standing before you now in

court, but I am a human being and you are also. It is something I have to face.

Thank you.

Mr. Wall: Ladies and gentlemen, Mr. O'Brien presents your alternative, the issue of this trial apparently, as a choice between accepting death and sustaining life.

Well, I submit that is not the choice here. The choice is whether to burn a draft card, with knowledge that it was against the law, or not to.

And I submit that the evidence has been overwhelming. I won't go into the evidence, including the eye witness testimony, the photographs, the admission of Mr. O'Brien that he did in fact burn the draft card, and that he burned it with full knowledge that it was a violation of Federal law.

[fol. 35] Mr. O'Brien in his letter to the draft board says that the government has no superiority over his conscience. The government does not contend that it has superiority over his conscience.

Over his acts, however, some of his acts, a government can have and must have superiority.

The government would not tell Mr. O'Brien what to believe. The government would not seek to restrain Mr. O'Brien from influencing others to his way of thinking.

The government would and must, however, see that Mr. O'Brien as well as everyone else obeys the duly constituted laws that are passed by the legislature of this country, the members of which are elected—by whom? By the people.

He is charged, ladies and gentlemen, in violation of the statute, with knowingly burning his draft card. He submits—at least, that is my interpretation, and of course you are entitled to make your own interpretation—he submits that the military is morally wrong, or military activity is morally wrong, and therefore he cannot co-operate in any sense.

But if the government had no control over anyone's activities just because they said in conscience that is bad, I ask you to imagine the results of that.

The rich man says the graduate income tax is immoral and in good conscience he cannot subscribe to it. The poor

man says the sales tax is immoral and he will not obey it.

The jaywalker says, "That law is ridiculous, and I won't obey it."

The holdup man and murderer says, "The bank has plenty of money, they are covered by the insurance companies, I have a moral right, I am a poor man and my kids are starving, I have a moral right to go in there and if they won't give me what I have a right to have, to kill to get it".

[fol. 36] If we follow Mr. O'Brien's logic, those other conclusions must necessarily follow.

My point is, ladies and gentlemen, that you as jurors are bound by the law, as well as Mr. O'Brien. You are bound by the law as it will be presented to you by his Honor, and he will charge you to that effect.

You are bound by your oath as jurors to decide—.

The Court: Mr. Wall, I will instruct them on their duties.

Mr. Wall: Pardon, your Honor?

The Court: I will instruct them on their legal duties.

Mr. Wall: Yes, sir. I ask you, ladies and gentlemen, in considering the verdict to consider the facts. Of course, you judge the facts and they have been presented for your consideration. And to consider the law as his Honor presents it to you.

Then without passion against or sympathy for the defendant, to decide that issue, innocence or guilt of the crime charged.

Thank you.

#### *Charge to the Jury*

The Court: Mr. Foreman, and ladies and gentlemen of the jury, this is your first case, and it is a criminal case, in which this defendant is charged with violating a statute.

And that statute, in brief, says that any person who knowingly destroys, knowingly mutilates, or in any manner changes, any certificate of notation such as a draft card shall be found guilty of a crime.

That is the issue that we are trying, whether or not Mr. O'Brien knowingly burned his draft card.

Now, in a court of law, the jury functions best when it finds the facts from the evidence which has been submitted to it, and such logical inferences as are to be drawn from it and then follows the law as the Court gives the law. [fol. 37] While I have a right to comment on the facts, I do not intend to do so. I think they are clear.

And in return, I am going to ask you not to interpret the law in any manner other than as I give it to you.

If I make a mistake in the law as I give it to you, there is a court above that will correct me. If you make a mistake in the facts, there is nobody that can correct you.

The verdict that you reach must be unanimous, and you should arrive at it by conscientious consideration of the evidence that you have heard, to establish the facts in the case, and then reach your verdict in accordance with the law as I give it to you.

Now, Mr. O'Brien did not take the stand in his own defense, and that was, as I said to you, his perfect right. He has a right to stand mute, and to give no evidence whatsoever, and to stand or fall on the government's case.

The government is bound to prove their charge beyond a reasonable doubt. And I will now read something to you which has received the approbation of many, many courts:

(reading)

"In the first place, the law presumes that persons charged with crime are innocent"—

that is the presumption of innocence—

—"until they are proven by competent evidence to be guilty. To the benefit of this presumption of innocence the defendant is entitled, and this presumption stands as his sufficient protection unless it has been removed by evidence proving his guilt beyond a reasonable doubt.

The burden is on the government, before the defendant can be convicted, of establishing every essential element of the crime charged beyond a reasonable doubt.

A reasonable doubt of guilt is a doubt growing reasonably out of the evidence, or the lack of it.  
[fol. 38] It is not a captious doubt, not a doubt engendered merely by sympathy for the unfortunate position of the defendant, or a dislike on your part to accept the responsibility of convicting a fellow man.

If having weighed the evidence on both sides you reach the conclusion that the defendant is guilty, to that degree of certainty which would lead you to act on the faith of it in the most important and critical affairs of your life, you may properly convict him.

Proof beyond a reasonable doubt is not proof to a mathematical demonstration. It is not proof beyond the possibility of mistake."

Now, the crime charged is the burning of a draft card—that is in lay language—knowingly or intentionally. So that the elements of this crime which the government must prove beyond a reasonable doubt are, one, that the defendant O'Brien burned his draft card and two, that he did it intentionally knowing that it was a wrongful act.

You have heard the evidence which has been presented to you, and it is up to you to say whether the government has established their burden of proof.

We are not concerned here with anything other than this statute which prohibits the burning or mutilating of a draft card.

The rights of O'Brien or anyone else to hold beliefs which are contrary to our own is not in question. They have such rights.

The right of free speech or assembly in which to espouse those beliefs to the public are guaranteed by our Constitution. Those are not in issue here.

It makes no difference whether your philosophy of life is the same as O'Brien's or not; he has a right to his own thoughts in the matter.

But when the law says—and it is in aid of the war effort—that certain persons must register and carry draft [fol. 39] cards and not mutilate them, then that is the law. I have previously ruled upon some motions that raised that legal question in this case.

And when the Congress has spoken, and there seems to be good basis for what they write in as our statute law, then that is the law of the land.

So if the government has proven to your satisfaction beyond a reasonable doubt that O'Brien on March 31st burned his draft card knowingly and intentionally, then you would be justified in finding him guilty.

If on the other hand you are not satisfied with the burden of proof on the part of the government, then you would be entitled to say that he was not guilty.

The clerk has said to you that in reaching your verdict you will say whether the man is guilty, and if he is not guilty you will say and no more. That is a simple question of fact for you to decide. The question of the possible meting out of a sentence is not yours to consider.

I will now leave the case in your hands, and the Marshal will shortly take you to lunch, and when you are ready to report your verdict I will be ready to receive it.

Is there any suggestion of errors or omissions?

Mr. Wall: Not on the part of the government, your Honor.

The Court: Mr. O'Brien, is there anything you want me to say that I didn't say?

Mr. O'Brien: No, thank you, your Honor.

The Court: All right, the Court will recess.

[fol. 40] (The jury returned with a verdict of guilty)

(Conference at the bench at which the following was recorded:

The Court: Now I have to dispose of your case, Mr. O'Brien. Would you care to have your father up here to hear what I have to say?

Mr. O'Brien: Yes, your Honor.

(Mr. O'Brien, Sr. is brought to the bench)

The Court: It is the sad duty of the Court now to pass sentence in this case. You are 19 years of age, aren't you?

Mr. O'Brien: Yes, your Honor.

The Court: Well, the Court can sentence you under an Act which might be fore your benefit. It is known as the Youth Correction Act, under which I

sentence you to the custody of the Attorney General for no period of time.

And under the Youth Correction Act, they have a method of getting to these cases, and they have a wide power of releasing you whenever they feel that you are ready to be released.

The unfortunate part is this, that they can keep you for six years. The statute under which you have been convicted provides for a limit of five years.

So that I cannot sentence you under the Youth Correction Act without your permission because of the fact that it might be a longer term than the five years provided under the statute for burning the card.

I do want to point out to you, however, certain features of the Youth Correction Act. The Attorney General can release you as soon as he thinks you are ready to be released.

It might occur in thirty days; it might occur in [fol. 41] twenty-four hours. But it is all according to a formula they have set up pretty much for your benefit.

And if you are sentenced under that Act, one of the features is that if you go through with the period of whenever they release you—and I think there is another probationary period for a year—then the entire offense is wiped out.

So that in the long run this is pretty much a choice with you. The Act provides that where the youth offender has been placed on probation—there is a provision that after you have served some period of time they can put you out on probation—where the youth offender has been placed on probation, the Court may thereafter in its discretion unconditionally discharge said youth offender from probation prior to the expiration of the maximum period of probation, which discharge shall automatically set aside the conviction, and the Court shall issue to the youth offender a certificate to that effect.

Now, there are several other sections of the statute, but the statute that I refer to says that if the Court

shall find that the convicted person is a youth offender, and the offense is punishable by imprisonment under an applicable provision of law, the Court may, in lieu of the penalty of imprisonment—that is the five years provided by law—sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division—that is not discharged by me, but by the Division to which you will be sent.

I have given you the gist of the thing and now I want to show you what the alternatives are that I have. Under the statute I can sentence you to up to five years, to be served in a common ordinary cell-[fol. 42] block, or I can put you on probation, or I can do a little bit of both.

Probation, however, would not be effective to my way of thinking—and this is what has been collected from other courts in the country—unless you realized the offense which you had committed, and made amends, or took some steps to amend the matter.

In other words, specifically, you would have to apply for a new draft card, and upon its receipt carry it with you at all times.

And you would have to do certain other things that the ordinary probationer has to do, disassociate yourself from certain activities and otherwise lead a normal life.

In your own case I think it would be better if you accepted probation and went home to live with your parents and disassociated yourself from this movement.

However, I can't compel that and I am only suggesting, if you were to get probation, what would be the terms of it.

Now, your attitude has been very consistently a stubborn one, stubborn beyond your intelligence as I see it, and if none of these alternatives are going to appeal to you, that is, probation under certain proper terms, or commitment under the Youth Correction Act, where people who are trained to that end could

help you, if you are not interested in those things, then I can't do anything for you except to exercise my prerogative.

I am prepared to dispose of the case now, but I don't want you necessarily to make a rapid decision. Maybe if you discussed it with your father, or went to Mr. Randall and pointed out these sections to him, you could make up your mind what you would like to have me do.

[fol. 43] Mr. O'Brien: At this time I can only say that if there were stipulations that I would have to carry a new draft card, or submit to induction, or in any way cooperate with the Selective Service—.

The Court: I said nothing about submitting to induction. Have you been up for induction yet?

Mr. O'Brien: No. I was called up to go for my physical, which I didn't do. But if there were a stipulation, as stated, to carry a new draft card, I couldn't in good conscience do that.

The Court: I think you are making an awful mistake, because you can accomplish the purpose of your organization without defying the law or burning your draft card.

That seems to be such a silly gesture. What is to be gained by it? If you want to express your views on Vietnam, or war in general, no one wants to stop you from that.

But when you go beyond that, there is nothing I can do to help. And I want to be helpful. Do you feel that there is anyone you could talk to, whose counsel you would listen to?

Mr. O'Brien: Yes.

The Court: Who would that be?

Mr. O'Brien: Several friends I have, people I associate with generally.

The Court: Are they the people you are associated with in this youth movement, or whatever it is?

Mr. O'Brien: It is the Committee for Non-violent Action. It is not a youth movement.

The Court: Do you expect that they can give you good advice?

Mr. O'Brien: Well, in the final analysis I suppose it does come down to my decision, and I know that [fol. 44] my conscience simply would not allow me to carry a draft card.

The Court: Well, this committee probably were advising you not to sign the bail bond that time when you didn't want to sign it.

Mr. O'Brien: No, they didn't advise me to do that. They haven't advised me to do anything.

The Court: Why do you want to waste several years of your life in jail?

Mr. O'Brien: I don't want to go to jail.

The Court: You have no alternative. I have a sworn duty to perform. The jury says that you violated the statute, and you say you won't change, even to the extent of carrying a draft card.

Mr. O'Brien Senior: May I ask a question?

The Court: Yes.

Mr. O'Brien Senior: What was the understanding under the Youth Correction Act? Would he have any particular requirements in being sentenced under that?

The Court: Oh, yes. He has to consent to that.

Mr. O'Brien Senior: Yes, he consents to that, but other than that are there any stipulations as to what he must do?

The Court: He will be committed somewhere, but they will commit him, as it says, for treatment and supervision. I have handled several other cases where they have done good work for people.

There is another section that I could sentence him under. It says that if the Court desires additional information as to whether a youth offender would derive benefit from treatment under that section, then I can commit him to their custody for sixty days, and from past experience they will then ask for an extension of thirty days which would make it ninety days [fol. 45] until I would have their recommendation as to whether he would be subject to treatment.

But again, I can't sentence him under that provision unless he agrees to it.

(A pause)

You are at the threshold of what might be a horrible mistake. I am willing to help you consistent with my duty, but I can't go beyond it. But there will be a jail sentence unless there is a sentence under the Youth Correction Act, or unless you convince me that probation will do you some good. And that burden is on you.

Mr. O'Brien: Well, I can only state that I consider that I did what I considered to be a morally correct action.

The Court: It may have been moral, but it was illegal.

Mr. O'Brien Senior: How do you feel about the youth service alternative, where you are not bound by anything permanently as to counsel and approach?

The Court: What is it going to profit this youth organization to have you go to jail?

Mr. O'Brien: It won't profit the organization.

The Court: How is it going to help you to be a martyr to this thing?

Mr. O'Brien: I don't want to be a martyr.

The Court: Well, don't forget that there are a lot of situations where one man has to have his head cut off, and a lot of his good friends will push him forward to have it cut off.

Mr. O'Brien: Well, I am not being pushed.

The Court: Because you are a minor and without counsel, I am not going to press you on this. I will continue this matter for ten days if you want me to, and you may consult with your friends.

[fol. 46] But I would suggest that you consult with someone other than friends of this movement so as to get views that are not warped necessarily by their strong allegiance to a cause.

Consult the pastor of your church, consult Mr. Randall, and your father. I will be glad to have you do it.

On the other hand, if you have made up your mind to be a martyr, you might as well start being one today.

Mr. O'Brien: Well, I mean I really don't know that much about the Youth Correctional Act.

The Court: That is why I have been citing you Section 5010 of the Youth Correction Act. The whole thing is there.

I don't want to be advising you as to what it means. You can consult Mr. Randall or any other attorney and they can easily read it and see what it does mean.

But it simply means that it recognizes, where a youth commits an indiscretion which is a crime, that there is a provision whereby, if he has a willing heart to undo what he has done that is wrong, they will work along with him, and give him guidance and so forth.

It is a help to a great many young men.

Mr. O'Brien: I am perfectly willing to work with any one, but I simply don't consider that I did anything wrong.

The Court: Well, you just heard the jury say you did.

Mr. O'Brien: I suppose we are in disagreement, then.

Mr. O'Brien Senior: Do you feel the Youth Correctional Act would be a possibility?

Mr. O'Brien: I really don't know. I can only state that putting it in terms of making amends for wrong [fol. 47] deeds, I don't see how I can make amends for wrong deeds if I didn't commit the wrong deeds.

I burned my draft card, yes, but I don't consider that to be an incorrect act.

Mr. O'Brien Senior: I don't think that is in issue here. The issue here is, will you agree to work with these people, to share their viewpoints and counsel?

The Court: They can hold you up to six years. That is why it has to be a voluntary act. If you are convinced that you are going to get nothing from their guidance—

Mr. O'Brien: No, I am not convinced of that at all. Every experience is of great value. I have not yet had an experience that I didn't gain a great deal from it.

My only point is that if I have to come around to the point of saying what I did was incorrect, and I

am willing to make amends for having burned my draft card, or something of this nature, to be released within six years possibly, it becomes an impossible task because I don't consider that I did anything that was incorrect.

So I am really unfamiliar and unable to state one way or the other what I feel about it because I don't really know what it entails.

The Court: Much of its treatment, I imagine is psychiatric treatment. I don't know too much about it, but if you enter into it with a heart and a willingness to be helped by these people who are specialists in their line, you can't lose much by it.

You stand a danger of doing another year beyond the maximum five years imposed by the statute, but that is only providing you are such a hardened case that they can't do anything with you.

[fol. 48] Mr. O'Brien: Well, I certainly am not a hardened criminal.

The Court: I didn't say a hardened criminal. I said a hardened case.

They are not a probation system, although when they feel you are ready for discharge, it could occur early. I have nothing to say about it; I just hand you over to them.

Mr. O'Brien Senior: I think it is a possibility that the Court offers you a lot of options, David.

Mr. O'Brien: Basically I am not in favor of either one.

Mr. O'Brien Senior: Well, we are not in a position to settle that, but I think the options that have been presented, it seems to me it is a very flexible way to approach this and to approach the future. And it isn't forcing anything on you except to agree to work and talk with these people.

Mr. O'Brien: Well, that I certainly would agree to; that is no problem.

Mr. O'Brien Senior: In my position this seems a very favorable option, one in which you could only profit.

The Court: Maybe if you were removed from the influence of the friends of yours, as you are going to

be anyway one way or the other, you would be able to think this thing out more clearly as it stands in relation to your personal life from now into the future.

Self-examination of your own soul is what you need.

Mr. O'Brien: Well, I am doing that constantly.

The Court: But now you are facing what is sometimes called the dough dish; you have to go one way or the other.

[fol. 49] If you wish, I will give you a couple of weeks, until a week from Monday, to think this thing out, and seek what counsel you can.

And I will be glad to loan you this book so that you can read yourself what the Youth Correction Act is.

Mr. O'Brien: Fine.

The Court: It is the property of the United States Government, so we will both be indicted if you don't return it.

I think I will do that, I will continue your case until a week from Monday. Would you like to borrow this book?

Mr. O'Brien: Certainly.

The Court: All right.

Mr. Wall: Your Honor, I can see that he gets the appropriate statute without imposing on your Honor to give up your book.

The Court: Do you have it?

Mr. Wall: Yes, sir. I will see that he gets a copy of the entire statute. I will have it typed and mail it to him. Is that satisfactory?

The Court: You don't have a loose-leaf now?

Mr. Wall: I will check the office, but in any case he will have it within two days.

The Court: Oh, well, I will let him have this book. There may be some things—this is for legalistic thinking, and in case of any doubt don't come back to me. Go and see Mr. Randall. I don't want to interpret this for you.

I will let you take this book, and I will mark the section that it is in (marking). I see that this isn't the property of the United States; it is my own personal book. But I will still loan it to you.

Mr. O'Brien: Thank you.

[fol. 50] The Court: I am not giving you an autographed copy because I didn't write it.

I will continue this case on the same bail until a week from Monday.

Mr. Wall: Very well, your Honor.

Mr. O'Brien: What time would that be during the day.

The Court: That will be at 2:00 o'clock.

Mr. O'Brien: Thank you.

Mr. O'Brien Senior: Thank you very much, your Honor.

Friday, July 1, 1966.

The Clerk: Criminal No. 66-91, United States v. David Paul O'Brien.

Mr. Wall: May it please the Court, this matter comes before the Court for sentencing after a jury trial and a conviction of the defendant for violating the Selective Service laws.

The government, if your Honor desires, is prepared to make a recommendation.

Mr. Wall: Your Honor, this defendant has consistently violated the Selective Service laws, as illustrated not only by his burning of the draft card, but by his wilfull failure to report for physical examination, on May 26th of this year, also a felony violation.

He has repeatedly stated that if called up for induction he would refuse to comply with that order.

Should the defendant in this court express a desire to now comply with the law, of course the government would recommend a suspended sentence and probation.

All he has said up to this moment, however, indicates otherwise.

[fol. 51] Under the circumstances, your Honor, the government feels that the integrity of the Selective Service System, as well as the deterrent effect on others who

might be similarly disposed, requires in this instance a period of incarceration.

The government's recommendation is two years imprisonment.

The Court: Mr. O'Brien, you and I and your father had a talk, and I loaned you a book so that you might understand the possibilities of probation in your case, the possibilities of commitment under the Youth Correction Act, and the possibilities of commitment as a straight offender, as the United States has recommended.

Do I understand that your attitude is the same as you last expressed it, that you will not voluntarily seek to get a new card and carry it with you?

Mr. O'Brien: In good conscience I don't feel that I can do that, your Honor.

The Court: You don't feel that you can? You understand that you are now closing the door to my giving you probation?

Mr. O'Brien: Yes, sir.

The Court: All right. Have you anything to say further before sentence is pronounced?

Mr. O'Brien: Well, I met you outside and I gave you a copy—.

The Court: Yes, that is right.

Mr. O'Brien: (Reading)

"I am standing in court to-day to be sentenced for the destruction of my draft card. This in itself is a very insignificant act, but for me it symbolizes the choice in my life to work for a positive value rather than cooperating with the system that indiscriminately kills, maims and tortures.

I hope that this symbol will cause others to reevaluate their thoughts on the military, the draft, and other institutions, and to recognize and overcome the lack of human understanding and love that pervades the world to-day.

I feel that the draft card burning symbolizes my choice to work for the betterment of our society in a very radical way, radical in that all our motivations, all our actions, all our beliefs must be reexamined and those that are incompatible with the well-being

of the individual and those that deny love must be changed.

The horrors of a war are so great that I am mystified that so many people, even those who have fought in wars, seem unable to feel any compassion for those who are affected. The cry we have heard in the past to bomb Hanoi with its thousands of innocents has been acted upon, and now the same people cheer over the cries and screams of the victims. I cannot understand how the warriors fail to see in this the rape of their own sensitivity. There is no more true saying than that war makes us all victims. But must we all be executioners as well? My choice is to neither murder, nor plunder, nor torture, nor to support these evils. War in the name of freedom, or peace, or any humane philosophy, is a mockery of those values. There is no peace, there is no freedom, in a shattered body. The values of which America is proud are incompatible with the wars that some claim to protect them.

My choice is to work for these goals, to work for these values in a way that is consistent with them. My choice is to refuse to harm for humanity, to kill for peace, or to coerce for freedom. I hope that you will face this confrontation and choose between death and sustaining life".

[fol. 53] The Court: I have received many letters with regard to your case, asking me to reconsider my sentence.

Well, of course, I have uttered no sentence, but I think you know what it is going to be, because I have discussed this with you and your father, and I have given you every opportunity to recognize and try to correct your violation of the law.

I haven't asked you to give up your beliefs, and you have slammed the door in my face.

So I am going to sentence you to the custody of the Attorney General under Section 5010-B of the Youth Correction Act, and there you will receive all the attention that an intelligent government will give to a case like yours.

Your act is a defiance of the law, is a continuing defiance of the law, and whether we like it or not, this must be a government of law, and not individual opinions.

Mr. Marshal, the defendant is now in your custody. And Mr. O'Brien, will you hand my book to the deputy.

Mrs. Irene R. Johnson: I must rise to protest this terrible miscarriage of justice. You should be sentencing me—.

The Court: I can't hear you.

Mrs. Johnson: You should be sentencing me for this, for my failures, which have forced this wonderful young man—.

The Court: Wait a minute. I want the defendant here.

(The defendant is returned to the courtroom)

Mrs. Johnson: For you and me and for all mankind—  
The Court: Please. Who are you?

Mrs. Johnson: I am Irene Johnson.

The Court: And what is your complaint?

Mrs. Johnson: I have a statement to read.

The Court: Will you step up here, please? I have difficulty hearing you. (Mrs. Johnson goes to the bench)  
Now, what is it you want to say to me?

[fol. 54] Mrs. Johnson: Your Honor, I must rise to protest this terrible miscarriage of justice. You should be sentencing me for my failures, which have forced this wonderful young man, as others like him, to take this stand for me—.

The Court: I will not hear from you further. I will order you to sit down. You are not a party to this case.

Mr. O'Brien, under the rules of our court, particularly Rule 37 of the Rules of Criminal Procedure, you have ten days to appeal this sentence.

If you so request, the Court will prepare and file forthwith a notice of your appeal.

Mr. O'Brien: I have no desire to appeal.

The Court: All right. If you change your mind within ten days, you may apply again to this Court.

The Court will recess.

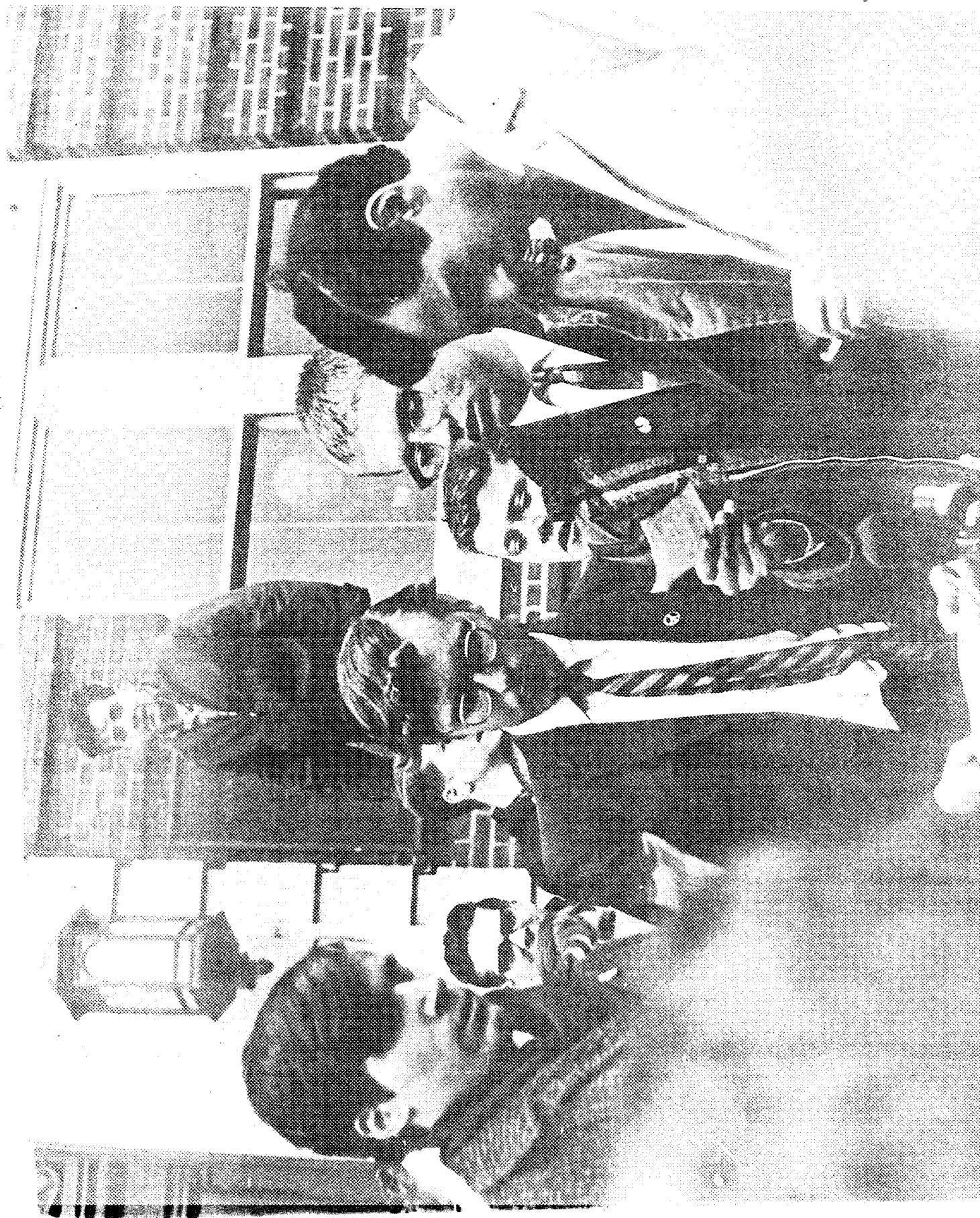


[fol. 55]

GOVERNMENT EXHIBIT NO. 1 A

[fol. 56]

GOVERNMENT EXHIBIT NO. 1 B





[fol. 59]  
GOVERNMENT EXHIBIT NO. 1 C

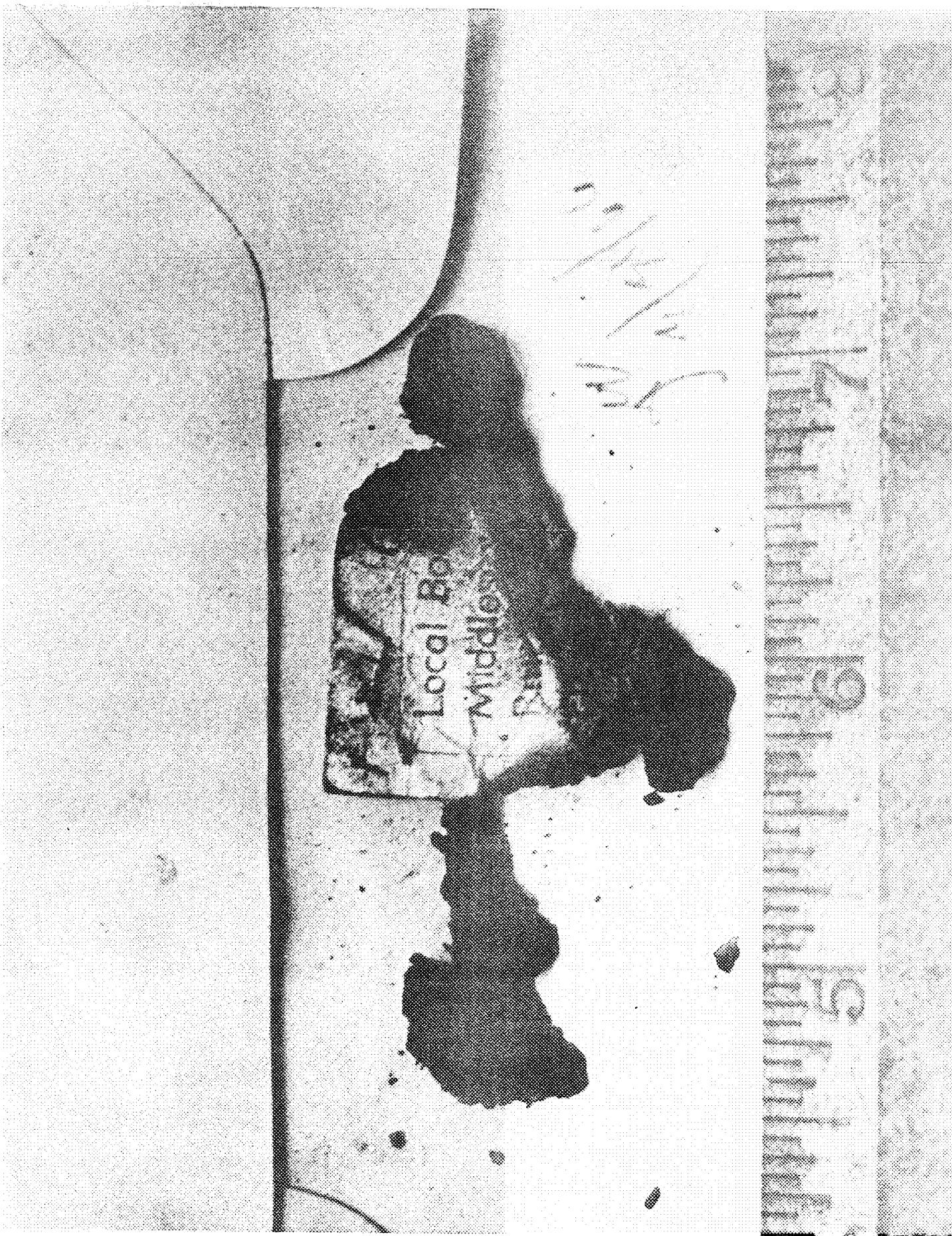
[fol. 60]

GOVERNMENT EXHIBIT NO. 1 D



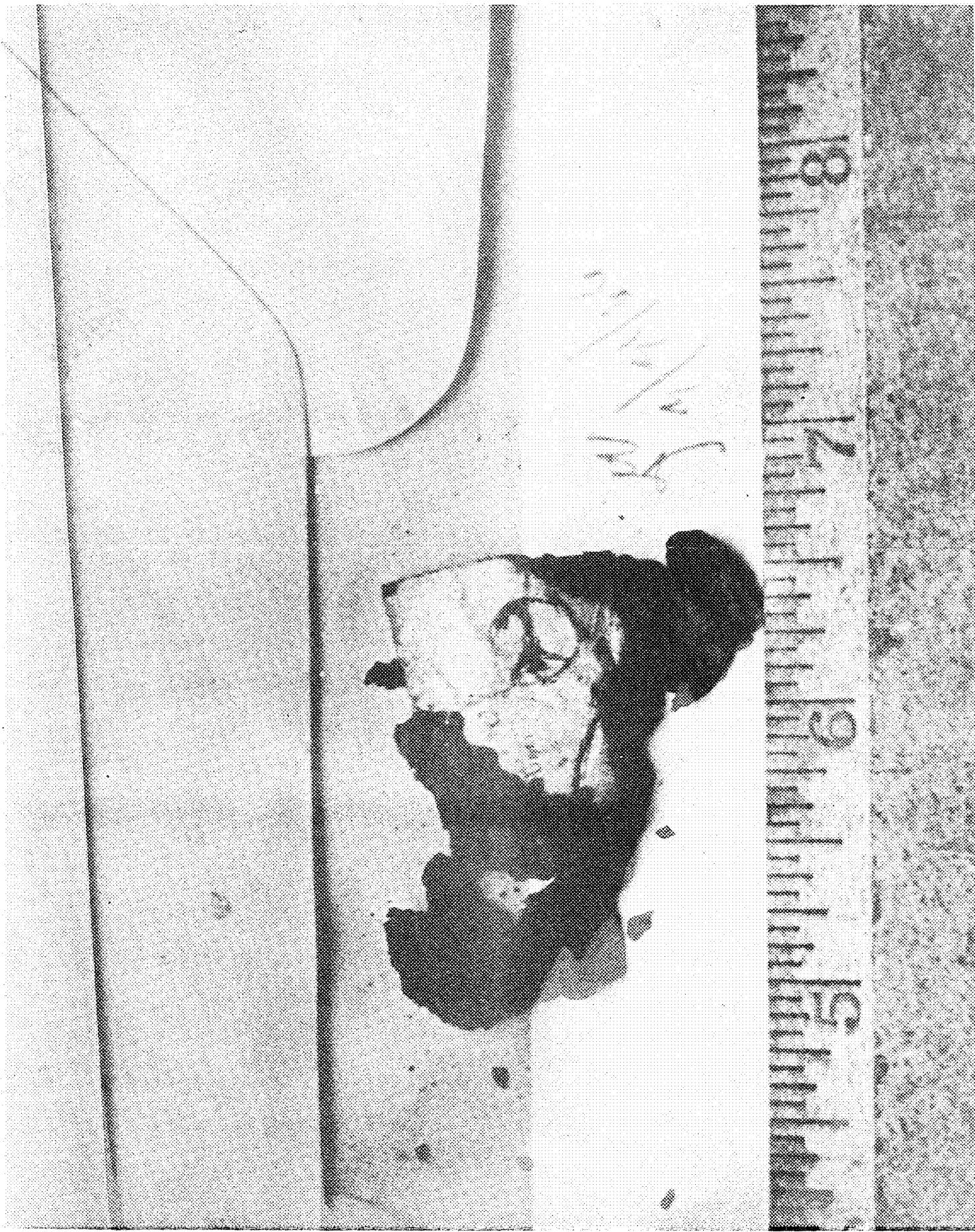
GOVERNMENT EXHIBIT NO. 2 A

[fol. 57]



[fol. 58]

GOVERNMENT EXHIBIT NO. 2 B



[fol. 61]

## GOVERNMENT EXHIBIT NO. 3

1. NAME IN FULL <i>O'BRIEN, David</i>	First Last	Middle Initial	2. PLACE OF RESIDENCE 34 Norman Drive	Street and Number or KFD Route	3. DATE OF BIRTH NOV. 30, 1946	4. PLACE OF BIRTH TROY, N.Y.	5. MAILING ADDRESS (if different than Item 2) Mrs. Anna O'Brien (grandmother) 335 Troy Garden Apartments, Hoosick Street, Troy, N.Y.	6. DATE OF REGISTRATION 12-11-1964
City, Town, or Village Prestonham,	County Lancs.	State Zip Code	City, Town, or Village Troy	County	State Zip Code	City, Town, or Village Troy, N.Y.		
7. Name and address of person other than a member of your household who will always know your address Mrs. Anna O'Brien (grandmother) 335 Troy Garden Apartments, Hoosick Street, Troy, N.Y.								
8. COLOR OF EYES Blue	9. COLOR OF HAIR Brown	10. HEIGHT (APPROX.) 6 ft. 1 in.	11. WEIGHT (APPROX.) 185	12. OTHER OBVIOUS PHYSICAL CHARACTERISTICS THAT WILL AID IN IDENTIFICATION. <i>Short hair, scars on right shoulder &amp; arms, eye glasses</i>				
<i>6' 1 1/2" short hair, scars on right shoulder &amp; arms, eye glasses</i>					Form Approved Budget Bureau No. 52-R9997 Selective Service System REGISTRATION CARD			
SSS Form No. 1-A (Original) (Revised 2-23-64)					(over)			

12. OCCUPATION <b>Student</b>	14. NATURE OF BUSINESS, SERVICE RENDERED, OR RESEARCH PRODUCT		
15. FIRM OR INDIVIDUAL BY WHOM EMPLOYED <b>BOSTON UNIVERSITY</b>			
16. PLACE OF EMPLOYMENT OR BUSINESS <b>BOSTON, MASS.</b>			
17. Active duty in the Armed Forces of the United States or a co-belligerant nation since Sept. 16, 1940:			
A. ARMED FORCE OR COUNTRY <b>U.S.A.</b>	B. SERVICE NO. <b>NONE</b>	C. DATE OF ENTRY	D. DATE OF SEPARATION
18. Present membership in a reserve component of the Armed Forces:			
A. ARMED FORCE <b>NONE</b>	B. SERVICE NO. <b>NONE</b>	C. DATE OF ENTRY <i>(Signature of registrant)</i>	D. GRADE <i>(Signature of registrant)</i>
I affirm that I have verified the foregoing and that they are true:  <i>(Signature of registrant)</i>			
I certify that the person registered has read or has had read to him his answers; that I have witnessed his signature or mark; and that all of his answers of which I have knowledge are true, except as follows:  <i>(Signature of registrant)</i>			
Registrar for Local Board..... <b>31</b> <i>(Number)</i>		(City or county) <b>BOSTON</b>	(State) <b>MASS.</b>
			* GPO: 1964-723-641

[fol. 63]

## GOVERNMENT EXHIBIT NO. 4



(6)

<b>SELECTIVE SERVICE SYSTEM REGISTRATION CERTIFICATE</b>			SSS Form 2 (Rev. 8-21-40)		
THIS IS TO CERTIFY THAT IN ACCORDANCE WITH THE SELECTIVE SERVICE LAW					
(FIRST NAME)		(MIDDLE NAME)		(LAST NAME)	
SELECTIVE SERVICE NO.					
(DATE OF BIRTH)		(PLACE OF BIRTH)			
COLOR EYES	COLOR HAIR	HEIGHT FT. .... IN.	WEIGHT		
Other obvious physical characteristics					
WAS DULY REGISTERED ON THE ..... DAY OF ..... IV.....					
_____ SIGNATURE OF LOCAL BOARD CLERK					

[fol. 65]

## 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.

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## JUDGMENT AND COMMITMENT

On this 1st day of July, 1966 came the attorney for the government and the defendant appeared in person and without counsel, the Court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the Court, and the defendant thereupon stated that he waived the right to the assistance of counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of wilfully burning his Registration Certificate (Selective Service System Form No. 2) in violation of Title 50, App., United States Code, Section 462(b), as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative as a youth offender, and that the offense is punishable by imprisonment under applicable provisions of law other than this subsection, and it is further adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for treatment and supervision under the provisions of the Federal Youth Corrections Act. 18 U.S.C. § 5010(b).

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States [fol. 67] Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ GEORGE C. SWEENEY  
*United States District Judge.*

The Court recommends commitment to:

A True Copy. Certified this 8th day of July, 1966.

/s/ RUSSELL H. PECK  
*Clerk*

(By) /s/ HOPE K. CONNELL  
*Deputy Clerk.*

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NOTICE OF APPEAL

Name and address of appellant: David Paul O'Brien,  
Federal Reformatory, Petersburg, Virginia.

Name and address of appellant's attorney: pro se.

Offense: Draft card burning, 50 App. USC, Section  
462(b).

Concise statement of judgment or order, giving date,  
and any sentence: Committed to the custody of the At-  
torney General July 8, 1966, under the Youth Correction  
Act, 18 USC, Section 5010(b).

Name of institution where now confined, if not on bail:  
Federal Reformatory, Petersburg, Virginia.

I, the above-named appellant, hereby appeal to the  
United States Court of Appeals for the First Circuit from  
the above-stated judgement.

Dated: July 14, 1966.

/s/ DAVID O'BRIEN  
*Appellant.*

/s/ DAVID PAUL O'BRIEN

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[fol. 69]

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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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

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

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*Marvin M. Karpatkin*, with whom *Howard S. White-side*, *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.

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April 10, 1967

ALDRICH, *Chief Judge*. The defendant was indicted on the charge that he "willfully and knowingly did mutilate, [fol. 70] 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, knowing mutilates*,<sup>[1]</sup> 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<sup>2</sup> he appeals. His position 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.

[fol. 71] 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.<sup>3</sup> The reaction in Congress was plain. De-

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<sup>1</sup> The italics are ours. See *infra*, fn. 4.

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

<sup>3</sup> 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.

spite 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 of possession was effected in a particular manner. The words "knowingly destroys, knowingly mutilates" were added to subsection (b) (3).<sup>4</sup>

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 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 [fol. 72] no proper purpose to be served by the additional provision prohibiting destruction or mutilation.<sup>5</sup> The legislative history suggests none,<sup>6</sup> and the Second Circuit suggested none in *Miller*. To repeat our metaphor adopted by the Court in *Jarecki v. G. D. Searle & Co.*, 1961,

<sup>4</sup> P.L. 89-152, 79 Stat. 586, Aug. 30, 1965.

<sup>5</sup> 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.

<sup>6</sup> 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.

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 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 [fol. 73] the amendment that it was precisely directed<sup>7</sup> 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.<sup>8</sup> 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.

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<sup>7</sup> 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.

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

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 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 memorialized. 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.

[fol. 75] 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.<sup>9</sup>

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.*

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<sup>9</sup> 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.

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[fol. 76]

JUDGMENT

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.

Enter:

/s/ ALDRICH, Ch. J.

[fol. 77]

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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No. 6813.

Office-Supreme Court, U.S., Filed, Jun. 8, 1967,  
John F. Davis, Clerk

DAVID PAUL O'BRIEN, DEFENDANT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

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PETITION FOR REHEARING

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Now comes David Paul O'Brien, defendant, appellant, and respectfully petitions this honorable Court for rehearing, for the following reasons:

On page 5 of its decision, this Court states that defendant stands convicted of non-possession of a draft card, in violation of the regulations promulgated under Title 50, U.S. Code, Section 462. The Court further holds that the crime of non-possession is an includable offense under the charge on which appellant was indicted, which was that he wilfully and knowingly mutilated, destroyed and changed by burning, a draft card. The Court goes on to say that the factual issue of non-possession has been fully presented and tried and found against defendant.

[fol. 78] Defendant, appellant submits:

1. The issue of non-possession was not fully tried and found against him. There was no dispute that he burned a draft card, but there was no evidence that he did not possess a duplicate. It should be pointed out also that de-

fendant had no attorney at his trial; that there was never a suggestion that the issue of non-possession was pertinent; and that the prosecution never offered any evidence of non-possession. The only suggestion of such evidence was a letter dated March 2, 1966, (introduced by defendant) almost a month before the incident for which defendant was indicted occurred, in which he wrote to his draft board that he was returning his draft card to the board. (R. p. 27) However, clearly he still had the card on March 31.

Furthermore, it is possible for a draft card to be mutilated by fire or otherwise, but still not destroyed to the extent where a person can be said no longer to possess it. Presumably, a person, as part of a symbolic protest, could cut the card in half, or in ten parts, or deface it with a political slogan, or burn a hole through the center of it, but he could still possess it. Consequently, the most that can be said is that under some circumstances, total destruction might encompass non-possession. But this can never be assumed as a matter of law, in the absence of proof, and since it involves a criminal conviction, proof beyond a reasonable doubt.

Moreover, there are two Selective Service documents which the regulations require each registrant to possess, the Registration Certificate, S.S. Form No. 2, and the most recently issued Notice of Classification, S.S. Form No. 110. Although the United States District Court for [fol. 79] the Southern District of New York held, in *U. S. v. Miller*, 249 F. Supp. 259 (S.D. N.Y. 1965) that the 1965 amendment encompassed a Notice of Classification as well as a Registration Certificate, this question was never passed on by the Second Circuit, or by any court in this Circuit. Certainly before a defendant can be convicted of a charge not included in his indictment, this issue must be clarified.

In waiving his right to counsel at his trial, defendant could not be held to have foreseen that other charges might be raised for which he might badly need counsel.

“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 on a charge that was never made."

*Cole v. Arkansas*, 333 U.S. 196, 201

2. Where the charge set forth in the indictment is held unconstitutional, a judgment of conviction is void and a nullity. It cannot therefore be held that any other offense may be included under such a conviction.

*Shafer v. United States*, 179 F.2d 929 (CCA 9) 21 Am. Jur. 2d § 533

This case is strikingly similar to that of *Cole v. Arkansas*, *supra*, in that defendant raised constitutional objections to the charge on which he was indicted, and a higher Court, in order to avoid the dilemma, proceeded to determine defendant to be guilty on another charge on which defendant had not been tried. The United States Supreme Court held that such a procedure denied to defendant in the *Cole* case safeguards guaranteed by due process of law.

[fol. 80] Defendant therefore requests this Court to reconsider, and to reverse the conviction for the reasons herein stated.

In view of the unusual nature of this case involving a holding of unconstitutionality of a statute, it is requested that opportunity for oral argument be granted.

Respectfully submitted,

MARVIN M. KARPATKIN  
660 Madison Avenue  
New York, N. Y. 10021

HOWARD S. WHITESIDE  
60 State Street  
Boston, Mass. 02109

April, 1967

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[fol. 81]

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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No. 6813

DAVID PAUL O'BRIEN, DEFENDANT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

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Appeal from the United States District Court  
For the District of Massachusetts

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

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ON PETITION FOR REHEARING

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

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April 28, 1967

ALDRICH, *Chief Judge*. Defendant's petition for re-hearing makes, essentially, five points.

[fol. 82] 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 photographed. 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.

[fol. 83] 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 confine-

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ment 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.*

ORDER OF COURT

April 28, 1967

It is ordered that the petition for rehearing filed April 24, 1967, be, and the same hereby is denied.

By the Court:

/s/ ROGER A. STINCHFIELD  
Clerk.

[fol. 84]

SUPREME COURT OF THE UNITED STATES  
No. 232, October Term, 1967

UNITED STATES, PETITIONER

v.

DAVID PAUL O'BRIEN

ORDER ALLOWING CERTIORARI—Filed October 9, 1967.

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is placed on the summary calendar with No. 233.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

[fol. 85]

SUPREME COURT OF THE UNITED STATES

No. 233, October Term, 1967

DAVID PAUL O'BRIEN, PETITIONER

v.

UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1967.

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is placed on the summary calendar with No. 232.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Marshall took no part in the consideration or decision of this petition.