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SELECTIVE SERVICE

Welsh v. United States, 398 U.S. 333 (1970)

In *Welsh v. United States*,[1] the Court reversed the conviction of Elliott Ashton Welsh II for failure to submit to induction,[2] holding that he was entitled to an exemption as a conscientious objector. In so holding, however, the Court further added to the confused state of the law created by its prior decision in *United States v. Seeger*.[3] Moreover, it failed to decide the constitutionality of granting conscientious objector exemptions only to those who are opposed to participation in war in any form on the basis of "religious training and belief" and not to those who may be opposed on other grounds.

As in *Seeger*, the Court had to interpret § 6(j) of the Universal Military Training and Service Act,[4] which at the time of Welsh's conviction provided:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

In *Seeger* the Court held that Congress, in referring to a Supreme Being, "was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views," [5] and therefore did not intend to distinguish between theistic and nontheistic religious beliefs. It also established a two-fold test for conscientious objection: the given belief had to be sincerely held and it had to occupy "a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." [6] In thus interpreting the statute, the Court avoided Seeger's contention that it was unconstitutional to differentiate between those who object on grounds that are traditionally considered to be religious and those who object on secular grounds.

In *Welsh* four members of the Court again avoided the issue. Justice Black, joined by Justices Douglas, Brennan, and Marshall, did not reach the constitutional question but reversed the conviction because of its "fundamental inconsistency" [7] with *Seeger*. Justice Harlan, concurring in the result, believed the constitutional issue was squarely presented[8] and concluded that to draw a line between religious beliefs and secular beliefs would be a violation of the establishment clause of the first amendment.[9] Justice White, joined by the Chief Justice and Justice Stewart, contended that Welsh should not be exempted since his beliefs were not religious[10] and concluded that the judgment of Congress should not be "frustrated" since the exemption had an "arguable basis" in the free exercise clause.[11]

The Selective Service application form used for conscientious objector exemptions required the registrant to sign the statement, "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form." [12] Welsh signed the form only after crossing out the words "my religious training and".[13] He characterized his beliefs as having been formed by reading in the fields of history and sociology[14] and in a letter to his local board he said:

> I can only act according to what I am and what I see. And I see that the military complex wastes

[1] 398 U.S. 333 (1970).
[2] 50 U.S.C. App., § 462 (a) (1964) provides:

> Any member of the Selective Service System ... who otherwise evades or refuses registration or service in the armed forces ... shall, upon conviction ... be punished by imprisonment for not more than five years or a fine of not more than $10,000 or by both such fine and imprisonment. ...

[3] 380 U.S. 163 (1965).
[4] Universal Military Training and Service Act, 50 U.S.C. App., § 456 (j) (1964), *as amended*, (Supp. V, 1970).
[5] 380 U.S. at 165.
[6] *Id.* at 166.
[7] 398 U.S. at 335.
[8] *Id.* at 345.
[9] *Id.* at 356.
[10] *Id.* at 367.
[11] *Id.* at 371–72.
[12] *Id.* at 336–37.
[13] *Id.* at 337.
[14] This characterization was reported by the Depart-

> both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to 'defend' our 'way of life' profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we, *as a nation*, fail our responsibility *as a nation*.[15]

It was not until after the Court handed down the *Seeger* decision that Welsh characterized his beliefs in religious terms.[16] In a letter to his appeal board[17] he said:

> This, I suppose, is the crux of my problem of explaining my beliefs in religious terms. Perhaps I erred in taking such pains to point out that I [do] not believe in the 'standard notion' of God. I think my beliefs could be considered religious, in the sense I have just explained [that 'both ethical and religious values usually arise from the same source: the individual's concern for other individuals']. I do not *call* myself religious, simply because most people then assume that I believe in God, in the conventional sense.[18]

The court of appeals, presumably following language used by the Supreme Court in *Seeger*,[19] affirmed the conviction and held that since Welsh had "constantly declared" that his beliefs stemmed from sociological, economic, historical, and philosophical considerations, the appeal board was "entitled to take him at his word" in denying his request to be classified as a conscientious objector.[20]

Since the exemption is created by statute, a court, in construing its scope, should inquire into the intent of Congress in enacting the statute. Unfortunately, however, an examination of the legislative history does not yield a clear-cut answer to that issue. The Draft Act of 1917 exempted from combat service any person "found to be a member of any well-recognized religious sect or organization . . . whose existing creed or principles forbid its members to participate in war in any form. . . ." [21] Thus, only members of the traditional peace churches were exempted. The Selective Training and Service Act of 1940 broadened the scope by exempting any person who "by reason of religious training and belief, is conscientiously opposed to participation in war in any form." [22]

Under the 1940 provision, two opposing interpretations developed. In a line of three cases the Court of Appeals for the Second Circuit broadly interpreted the exemption. In *United States v. Kauten*,[23] while affirming a conviction for neglecting to appear for induction,[24] the court characterized conscientious objection as

> a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.[25]

The court in *United States ex rel. Phillips v.*

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ment of Justice hearing officer who interviewed Welsh. Welsh v. United States, 404 F.2d 1078, 1090 (9th Cir. 1968).

[15] 398 U.S. at 342. Seeger characterized his objection as based on a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." 380 U.S. at 166.

[16] In his original application he stated he did not believe in a Supreme Being, but in a letter sent to his local board three months after *Seeger* was decided, he asked that his original answer be striken and the question left open. 398 U.S. at 337 n.3.

[17] His local board classified him I-A-O, available for noncombatant military service [32 C.F.R. § 1622.11 (1970)] and he appealed their refusal to classify him I-O, available for civilian work "contributing to the maintenance of the national health, safety, or interest," [32 C.F.R. § 1622.14 (1970)]. The appeal board classified him I-A and his local board ordered him to report for induction. Welsh v. United States, 404 F.2d 1078, 1080–81 (9th Cir. 1968).

[18] Welsh v. United States, 404 F.2d 1078, 1091 (9th Cir. 1968).

[19] The Court there held that "[i]n such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight." 380 U.S. at 184.

[20] Welsh v. United States, 404 F.2d 1078, 1081–82 (9th Cir. 1968). Judge Hamley dissented, arguing that Welsh's disclaimer of a religious motivation was "predicated upon a misunderstanding of the statutory meaning of the term . . ." and that when he realized the broad reading that *Seeger* gave to the word, he "made it clear that he did have a religious motivation." *Id.* at 1091.

[21] Act of May 18, 1917, ch. 15, § 4, 40 Stat. 76. The constitutionality of the act was upheld in Selective Draft Law Cases, 245 U.S. 366 (1918). The Court gave no discussion to the argument that the exemptions violated either the establishment or free exercise clauses, since the argument's "unsoundness is too apparent to require us to do more." *Id.* at 390.

During the Civil War members of religions that prohibited the "bearing of arms" were to be given noncombatant work or could be relieved of all duty by paying $300. Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 6.

[22] Act of Sept. 16, 1940, ch. 720, § 5(g), 54 Stat. 885.

[23] 133 F.2d 703 (2d Cir. 1943).

[24] The hearing officer found Kauten's opposition to be based in large part on his dislike of the Roosevelt administration; the court held his beliefs were based on "philosophical and political considerations" applicable to World War II. *Id.* at 707 n.2.

[25] *Id.* at 708.

Downer,[26] in holding that an exemption should have been granted, noted that although the registrant did not then belong to an organized religion, he had early religious training in the Presbyterian Church and "remembered" the Lord's Prayer, the Ten Commandments, and the Sermon on the Mount. He had also read philosophers, historians, and poets from Plato to Shaw, but he was not sure from whom he derived his opposition to killing.[27] The scope of the exemption was further broadened in *United States ex rel. Reel v. Badt*,[28] where the court held that one who was opposed to war and killing as a result of study of European and American history and the teachings of his father but who did not believe in a god should have been granted an exemption if it was found that he objected to "participation in any war under any circumstances because of the compelling voice of his conscience. . . ."[29]

The Ninth Circuit refused to follow that trend, denying in *Berman v. United States*[30] an exemption to one who was opposed to war "for the sake of humanity and out of deep loyalty" to his fellow citizens.[31] In the court's opinion,

> the expression 'by reason of religious training and belief' is plain language, and was written into the statute for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one.[32]

In 1948 Congress amended the provision by adding that religious training and belief meant

> an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include any essentially political, sociological, or philosophical views or a merely personal moral code.[33]

The only real evidence of the intent of the amendment is found in the report of the Senate Armed Services Committee:

> This section reenacts substantially the same provisions as were found in subsection 5 (g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relation to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service. (See *United States v. Berman* [sic], 156 F.2d 377, certiorari denied, 329 U.S. 795).[34]

Thus the question whether Congress intended to adopt the interpretation of the Second or the Ninth Circuit was squarely presented. In *Welsh* Justice Black virtually ignored the statute, relying on the Court's interpretation of it in *Seeger*[35] and applying the conscientious objection test established in that decision.[36] Justice Harlan re-examined the provision and concluded not only that Congress did not intend that those with beliefs such as Welsh's be exempted, but also that his joining in the *Seeger* opinion was error.[37] Justice

[26] 135 F.2d 521 (2d Cir. 1943).
[27] *Id.* at 523.
[28] 141 F.2d 845 (2d Cir. 1944).
[29] *Id.* at 849.
[30] 156 F.2d 377 (9th Cir. 1946).
[31] *Id.* at 379.
[32] *Id.* at 380.
[33] Universal Military Training and Service Act, 50 U.S.C. App., § 456(j) (1964), *as amended*, (Supp. V, 1970).
[34] S. REP. No. 1268, 80th Cong., 2d Sess. 14 (1948): The language appears to be derived in part from the *Berman* decision, which quoted from the dissent of Chief Justice Hughes in United States v. Macintosh, 283 U.S. 605, 633–34 (1931), that the "essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." Berman v. United States, 156 F.2d 377, 381 (9th Cir. 1946).
[35] There the Court placed emphasis on the language of the Senate report that the amendment was intended to "substantially" reenact the 1940 provision and the statement of Senator Gurney that the provision followed the 1940 act with "very few technical amendments" and concluded that the amendment continued "the congressional policy of providing exemption from military service for those whose opposition is based on grounds that can fairly be said to be 'religious.'" 380 U.S. at 178–80.
[36] *See* note 6 *supra* and accompanying text.
[37] 398 U.S. at 344. While he joined in *Seeger*, Justice Harlan changed his opinion as to the intent of the 1948 amendment, concluding that Congress intended to "annoint" the Ninth Circuit's interpretation. *Id.* at 349.

The legislative history of the amendment is so scant that it lends little support to either the *Seeger* interpretation or that of Justice Harlan. Aside from the history cited in *Seeger*, there is no evidence that Congress even considered what characteristics it intended conscientious objectors to have or that it was aware of the conflict between the second and ninth circuits. The only characterization of conscientious objectors was made by Senator Morse during debate on his amendment to establish a National Commission on Conscientious Objectors, which was not at all related to the amendment in question:

> We have never shared their religious experience, we have never shared the spiritual drive which has conditioned them to form the conviction which causes them to say as a matter of religious scruple, 'Loving my country as I do, I love my God more, and I believe that, as a matter of religious faith, I

White left open the question whether he was wrong in *Seeger*,[38] but concluded that Welsh belonged to a class of persons to whom Congress "has expressly denied an exemption." [39]

The government argued that *Welsh* could be distinguished in that the second requirement of the *Seeger* test was not met for two reasons:[40] 1) because Welsh was more insistent than Seeger in denying his views were religious,[41] and 2) because Welsh's views were "essentially political, sociological, or philosophical views or a merely personal moral code." [42] As to the first contention Justice Black agreed with the dissenting judge below[43] and held that

> very few registrants are fully aware of the broad scope of the word 'religious' as used in § 6 (j), and accordingly a registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption.[44]

The expanding effect of *Welsh* is difficult to particularize but can be seen from comparing language used by Justice Black in answering the government's second contention with the language of *Seeger*. In the latter case the Court said:

> We have concluded that Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and *to exclude essentially political, sociological, or philosophical views.*[45]
>
> * * *
>
> The use by Congress of the words 'merely personal' seems to us to restrict the exception to a moral code which is not only personal but which is the sole basis for the registrant's belief and is in no way related to a Supreme Being.[46]

In *Welsh* Justice Black, while maintaining a "fundamental" consistency with *Seeger*, abandoned the 'religious'—moral code distinction:

> We certainly do not think § 6 (j)'s exclusion of those persons with 'essentially political, sociological, or philosophical views or a merely personal moral code should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy.[47]
>
> * * *
>
> That section exempts from military service all those whose consciences, spurred by deeply held *moral, ethical,* or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.[48]

The effect of *Welsh* thus appears to be that now a registrant can qualify for an exemption even if his beliefs are based solely on a moral code. The two groups which Justice Black held "obviously" not exempted were those whose beliefs were not deeply held (a requirement previously established in *Seeger*) and "those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency." [49] The problem is that Justice Black did not define "moral code," which now qualifies one for an exemption, nor "policy, pragmatism, or expediency," which, if the sole basis for the objection, may not qualify one for the exemption. Thus it is difficult to state how far the exemption has been broadened. The only requirement which is clear from the opinion is that the registrant must be opposed to all wars.[50]

The opinion of Justice Black must be criticized for at least two reasons: it stretched the meaning of the statute beyond the reasonable intent of Congress, and it has again erected standards that are confusing and difficult to apply Granting that

would not be true to my God if I fought my fellow men in war.'

94 CONG. REC. 7304 (1948) (remarks of Senator Morse).

[38] 398 U.S. at 367.

[39] *Id.* at 368.

[40] The first requirement—that the beliefs be sincerely held—was not at issue since the government conceded that Welsh's beliefs were held "with the strength of more traditional religious convictions." Welsh v. United States, 404 F.2d 1078, 1081 (9th Cir. 1968).

[41] 398 U.S. at 341.

[42] *Id.* at 342.

[43] *See* note 20 *supra.*

[44] 398 U.S. at 341.

[45] 380 U.S. at 165 (emphasis added).

[46] *Id.* at 186.

[47] 398 U.S. at 342.

[48] *Id.* at 344 (emphasis added).

[49] *Id.* at 342–43.

[50] In stating the requirement, Justice Black twice referred to "all wars" and once to "any war at any time." 398 U.S. at 340, 342. The issue of objection to a particular war was directly presented in United States v. Sisson, 297 F. Supp 902 (D. Mass. 1969), *appeal dismissed,* 399 U.S. 267 (1970), where the district court held that granting exemptions to those opposed to war on religious grounds but not to one opposed to the Vietnam War was unconstitutional. The Supreme Court dismissed the appeal for lack of jurisdiction. 51

it may be reasonable to interpret the 1948 amendment as not really altering the prior "religious training and belief" provision of the 1940 act, as the Court in *Seeger* and implicitly Justice Black in *Welsh* did, it is even more reasonable to assume that Congress, in using the term "religious," did not intend to include the fields of sociology and history, upon which Welsh said he based his beliefs.[51] Had Congress intended such bases to fall within the exemption, surely in 1940 it would have been more explicit than merely broadening the exemption from those belonging to the peace churches to all those with objections based on "religious training and belief." As Justice Harlan characterized it, the prevailing opinion performed a "lobotomy" [52] on the statute in order to avoid reaching the consitituional issue and in so doing took an analytically unsound approach.[53]

The failure to define the outer limits of the exemption—policy, pragmatism, or expediency—leaves local boards and lower courts with no more than vague guidelines for granting exemptions.[54] The effect of the decision is further confused since there was no indication what retroactive effect it was intended to have.[55] The decision, moreover, may well result in discrimination in favor of the college educated, who can point to study of history, sociology, and the like, as Welsh did, to justify their beliefs.[56]

[51] Such a contention finds some support in the reaction of Congress to the *Seeger* decision. In 1967, two years after *Seeger*, Congress amended the provision by deleting the reference to a 'Supreme Being.' Universal Military Training and Service Act, 50 U.S.C. App., § 456 (j) (Supp. V, 1970), *amending* 50 U.S.C. App., § 456 (j) (1964). *Seeger* was characterized as a "significant broadening" of the exemption [H. R. REP. No. 267, 90th Cong., 1st Sess. 31 (1967)] and most congressmen believed the amendment was intended to restrict that interpretation. See, *e.g.*, 113 CONG. REC. 15426 (1967) (remarks of Senator Russell); 113 CONG. REC. 15429 (1967) (remarks of Senator Kennedy); 113 CONG. REC. 15778 (1967) (remarks of Senator McCarthy); 113 CONG. REC. 16436 (1967) (remarks of Representative Reid); 113 CONG. REC. 16436 (1967) (remarks of Representative Curtis).

[52] 398 U.S. at 351.

[53] *Id.* at 355.

[54] The Selective Service System has not attempted to define the terms used by Justice Black, but has directed that the belief upon which the objection is based must be the "primary controlling force" in the registrant's life. He must also be able to demonstrate that his convictions were "gained through training, study, contemplation, or other activity, comparable in rigor and dedication to the processes by which traditional religious convictions are formulated." Selective Service System, Local Board Memo. No. 107, July 6, 1970.

One Chicago newspaper reported that all five members of a local board resigned after *Welsh* because that decision made draft policies "unworkable." Chicago Daily News, July 28, 1970, at 24, col. 2.

[55] The problem is further complicated in that the more recent cases will involve the 1967 amendment, which was not in question in *Welsh*. *See* note 51 *supra*.

[56] The Selective Service System has recognized this possibility and has directed that local boards should examine the sincerity of the registrant and not give "particular advantage" to one who is "learned or glib." Selective Service System, Local Board Memo. No. 107, July 6, 1970.

Gutnecht v. United States, 396 U.S. 295 (1970); Breen v. Selective Service, Local Board No. 16, 396 U.S. 460 (1970)

Last term the Supreme Court handed down two decisions adjudicating the validity of the delinquency regulations[1] of the Selective Service System as promulgated under 32 C.F.R. Part 1642 (Supp. 1967). The two cases, *Gutknect v. United States*[2] and *Breen v. Selective Service Local Bd. No. 16*[3] are related to the 1968 case of *Oestereich v. Selective Service System Local Bd. No. 11*.[4] Together, these three cases have invalidated delinquency regulations insofar as they have been employed as a basis for the reclassification of exempt or deferred registrants, or for the acceleration of their induction.

Cases challenging reclassification and accelerated induction under these delinquency regulations represent a recent phenomenon.[5] As early as *United States v. Hertlein*,[6] however, a lower federal court dealt with the question of the accelerated induction of a defendant who had failed to report

[1] 32 C.F.R. § 1602.4 (Supp. 1967) defines a delinquent as

> ...a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law.

[2] 396 U.S. 295 (1970).

[3] 396 U.S. 460 (1970).

[4] 393 U.S. 233 (1968).

[5] The majority of the cases concerned with these aspects of the Selective Service laws have occurred in conjunction with the increase in vocal opposition to the involvement of the United States in Viet Nam.

[6] 143 F. Supp. 742 (E.D. Wis. 1956).

for an Armed Forces physical examination.[7] There the government argued that the Selective Service System was authorized under the Universal Military Training and Service Act of 1948 "to prescribe the necessary rules and regulations to carry out the provisions of this title. . . ." [8] Regulations so promulgated state that

> [w]henever a registrant has failed to perform any duty or duties required of him under the selective service law . . . the local board may declare him to be delinquent.[9]

The district court accepted the position of the government—since the defendant had failed to report for his physical examination, he became a "delinquent" and was subject to immediate induction.[10]

Hertlein had been reclassified I-A (available for military service) from class I-A-O (conscientious objector available for noncombatant military service only) once his local draft board declared him "delinquent." [11] The import of delinquent status is established in a regulation which deals with the order of call of registrants available for military service.[12] This section stipulates that

> [e]ach local board, upon receiving a Notice of Call . . . from the State Director of Selective Service (1) for a specified number of men to be delivered for induction . . . shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I-A and Class I-A-O and have been found acceptable for service in the Armed Forces and to whom the local board has mailed a Statement of Acceptability . . . *Provided*, that a registrant classified in Class I-A or Class I-A-O who is delinquent may be selected and ordered to report for induction to fill an induction call not-withstanding the fact that he has not been found acceptable for service . . . and has not been mailed a Statement of Acceptability. . . . Such registrants . . . shall be selected and ordered to report for induction in the following order:
>
> (1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.
>
> (2) Volunteers. . . .[13]

The district court never examined the Universal Military Training and Service Act of 1948 nor questioned the statutory authority of the delinquency regulations which it affirmed. The authority of the local board to declare a registrant delinquent and to accelerate his induction remained undisturbed.

Ten years later, a significant challenge to the delinquency regulations was raised in *Wills v. United States*.[14] The appellant was reclassified from II-S (student deferment) to I-A upon the declaration that he was "delinquent." [15] He was ordered to report for induction but refused. Convicted for failure to submit to induction, he appealed. Appellant challenged his induction order on the basis that it was the result of a delinquency declaration designed to punish him for the destruction of his registration card. The court of appeals dismissed his claim stating that the "destruction is, in fact, no more than a willful and defiant refusal to possess" in violation of the regulations.[16] Conviction for refusal to submit to induction was thus affirmed.

The defendant in *United States v. Comstock*[17] also alleged that his reclassification from II-S to I-A in accordance with delinquency regulations was punitive in nature. The district court answered the claim of the defendant stating that,

> [i]n the only cases in which this question has been squarely presented, it has been consistently held that the classification or reclassification of a registrant for military service in no way can be considered punitive in nature.[18]

[7] Hertlein also returned his registration certificate and five classification notices to his local draft board. 32 C.F.R. § 1617.1 and 1623.5 (Supp. 1967) respectively require a registrant to have in his personal possession at all times a registration card and a valid notice of classification.

[8] 50 U.S.C. App., § 460(b) (1) (1968).

[9] 32 C.F.R. § 1642.4(a) (Supp. 1967).

[10] 143 F. Supp. at 745. 32 C.F.R. § 1642.13 (Supp. 1967) authorizes the local board to ". . . order each delinquent registrant . . . who is classified in or reclassified into class I-A or class I-A-O to report for induction in the manner provided in section 1631.7 of this chapter. . . ."

[11] 32 C.F.R. § 1642.4 (Supp. 1967) also provides that a ". . . delinquent may be removed from that status by the local board at any time."

[12] 32 C.F.R. § 1631.7(a) (Supp. 1967).

[13] The four final categories of registrants available for military service are ranked according to the age and marital status of the registrant. Defendant Hertlein might have been classified in one of these four remaining categories, but was accelerated into the first category in light of his delinquency status.

[14] 384 F.2d 943 (9th Cir. 1967).

[15] The defendant was declared delinquent for willfully destroying his registration certificate and for informing the local draft board of his refusal to carry another. *Id.* at 943.

[16] 384 F.2d at 947. 32 C.F.R. § 1617.1 (Supp. 1967).

[17] 296 F. Supp. 480 (D. Conn. 1969).

[18] *Id.* at 484. The case upon which the court relied

The lower federal courts in cases through *Comstock*, dismissed claims that the delinquency regulations were being invoked in a punitive manner.[19] These decisions assumed that those regulations were congressionally authorized under the Universal Military Training and Service Act of 1948[20] and were therefore properly invoked.

Even as lower federal courts continued to uphold the application of delinquency regulations, the Supreme Court considered the issue in *Oestereich v. Selective Service System Local Bd. No. 11*.[21] The case dealt with the reclassification of a theological student from IV-D to I-A after a declaration of delinquency for his failure to retain possession of his registration certificate.[22] The Court reversed the conviction of the defendant stating that the exemption of the student was mandatory by statute.[23]

> Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption.[24]

Nor, asserted the Court, had Congress defined "delinquent status" in the Universal Military Training and Service Act of 1948[25] or laid down guidelines for placing a registrant in that category for his failure to adhere to the rules and regulations of the Selective Service System.[26] The local board had exceeded its authority.

The Court did not confront delinquency issues again until *Gutknecht v. United States*.[27] This case involved a registrant who returned his registration and classification cards to his draft board while his I-A classification was being appealed to the state appeal board. His classification as I-A was subsequently affirmed. The local board then declared him delinquent for failure to retain possession of his certificates.[28] Delinquency status advanced the petitioner in the order of call.[29] Six days later he was told to report for induction, but he ignored the call which led to his indictment for "willful and knowing failure to perform a duty."[30] He was convicted and the decision was affirmed in the Court of Appeals[31] for the Eighth Circuit which distinguished *Oestereich* by stating that it was not confronted with an illegal reclassification which revoked a statutory exemption. Nor was the reclassification punitive since the

was Nicherson v. United States, 391 F.2d 760 (10th Cir. 1968). The court stated that the record of the defendant showed a flagrant disregard for the orders of the local board for a period of over two years. The defendant was reclassified and ordered for induction. The judgment was affirmed.

[19] In United States v. Branigan, 299 F. Supp. 225 (S.D. N.Y. 1969), the delinquency regulations, under which one defendant was reclassified and another was accelerated into induction, were attacked as being employed in a punitive manner. The district court stated, however, that a determination of the legality of the delinquency regulations would have to await a full presentation upon a trial of factual context.

[20] 50 U.S.C. App., §§ 451–473 (1964).

[21] 393 U.S. 233 (1968).

[22] 32 C.F.R. § 1617.1 requires that every registrant have in his personal possession at all times his registration certificate.

[23] 50 U.S.C. App., § 456(g) (1964) provides that "... students preparing for the ministry under the direction of recognized churches ... who are satisfactorily pursuing full-time courses of instruction in recognized theological schools ... shall be exempt from training and service...."

[24] 393 U.S. at 237.

[25] 50 U.S.C. App., §§ 451–473 (1964).

[26] 393 U.S. at 236–237. In the wake of Oestereich, the Court of Appeals for the Sixth Circuit heard Anderson v. Hershey, 410 F.2d 492 (6th Cir. 1969), dealing with "deferred" II-S registrants who were reclassified I-A after being declared "delinquents." The court distinguished the case from Oestereich: Congress had provided that exempt registrants would remain outside the available manpower pool for military service, whereas deferred registrants were not immune from the possibility of serving. The reclassification of the defendants upon a declaration of delinquency was construed to be within the authority and power of the local board when dealing with a deferred registrant as compared with an exempted registrant. The judgment was affirmed.

Kolden v. Selective Service Bd. No. 4, 406 F.2d 631 (8th Cir. 1969) also dealt with the same problems. The defendant turned in his registration card to his local draft board and was reclassified I-A and ordered to report for induction. He contended that his reclassification was illegal because the declaration of delinquency and subsequent reclassification were punitive in nature. *Id.* at 632. The court dismissed these allegations, stating that because the defendant did not fall within a statutorily exempted class similar to that in Oestereich, the reclassification and induction order were not illegal.

[27] 396 U.S. 295 (1970).

[28] 32 C.F.R. § 1617.1 (Supp. 1967) states that "[e]very person required to present himself for and submit to registration must, after he is registered, have in his personal possession at all times his Registration Certificate...."

[29] In accordance with 32 C.F.R. § 1631.7 (Supp. 1967) which establishes the order of call as follows: (1) delinquents, (2) volunteers, (3) unmarried registrants between the ages of nineteen and twenty-six.

[30] 50 U.S.C. App., § 462(a) (1964) states that

> [a]ny member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title ... or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty ... shall upon conviction in any district court of the United States ... be punished by imprisonment for not more than five years....

[31] 406 F.2d 494 (8th Cir. 1969).

defendant had not been deprived of a right granted to him by statute.[32] The court of appeals concluded that Congress had properly authorized the delinquency regulations under 50 U.S.C. App. § 456(h) (1) (1964) which stated that

> the term 'prime age group' means the age group which has been designated by the President or the age group from which selection for induction into the Armed Forces are first to be made *after delinquents and volunteers*, (emphasis added).

This decision of the Eighth Circuit was reversed by the Supreme Court on a number of grounds. Primarily concerned with the finding of the lower court of statutory authority for operation of the delinquency regulations, Mr. Justice Douglas, in writing for the majority, stated that he had searched the Universal Military Training and Service Act[33] in vain for any clues that Congress intended the Act to provide punitive sanctions for "delinquents." [34]

> There is nothing to indicate that Congress authorized the Selective Service System to reclassify exempt or deferred registrants for punitive purposes and to provide for accelerated induction of delinquents. Rather, the Congress reaffirmed its intentions under § 12 (50 U.S.C App. § 462 (1964 ed., Supp. IV)) to punish delinquents through the criminal law.[35]

In addition, the delinquency regulations had been created in the absence of any statutory standard or guideline. The power to declare a registrant delinquent, then, was being exercised solely at the discretion of the local board.[36]

If the Supreme Court was concerned with the lack of congressional authority for delinquency regulations, it was likewise troubled by the manner in which the local boards applied them. Whereas similar allegations had been raised without attention in the past,[37] the Court here implicitly recognized that those regulations might be utilized by local boards to punish anti-war demonstrators.[38] Indeed, Justice Douglas emphasized that "[d]eferment of the order of call may be the bestowal of great benefits; and its acceleration may be extremely punitive." [39]

Congress had not authorized the delinquency regulations or sanctioned punitive measures other than criminal prosecutions;[40] nor did the regulations have any prescribed system of standards.[41] The Court concluded that if punitive induction was to be substituted for prosecution, then a vast rewriting of the Act would be necessary.[42]

The decision in *Breen v. Selective Service Local*

[32] *Id.* at 497.

[33] 50 U.S.C. App. (1964).

[34] In United States v. Branigan 299 F. Supp. 225 (S.D. N.Y. 1969), the court confronted the same problems, but leaned toward a different conclusion.

> As for the statutory claim, it is true there is no express congressional authorization for the delinquency regulations, but Congress did authorize the promulgation of 'the necessary rules and regulations' to carry out the provisions of the Act. And in 1967 Congress, in amending the Act, recognized the existence of the delinquency regulations. *Id.* at 236.

[35] 396 U.S. at 302. 50 U.S.C. App., § 462(a) (1964) states that

> [a]ny member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . shall upon conviction in any district court of the United States . . . be punished by imprisonment for not more than five years. . . .

[36] The court stated that

> [t]he power under the regulation to declare a registrant 'delinquent' has no statutory standard or even guidelines. The power is exercised entirely at the discretion of the local board. It is a broad roving authority, a type of administrative absolutism not congenial to our law-making traditions. 396 U.S. at 306.

[37] Wills v. United States, 384 F.2d 943 (9th Cir. 1967); United States v. Branigan, 299 F. Supp. 225 (S.D. N.Y. 1969); and United States v. Comstock, 296 F. Supp. 480 (D. Conn. 1969).

[38] The majority of the cases cited in this note concerned registrants who protested American involvement in Viet Nam by voluntarily dispossessing themselves of their registration and/or classification cards. *See, e.g.*, Wills v. United States, 384 F.2d 943 (9th Cir. 1967), Oestereich v. Selective Service System Local Bd. No. 11, 393 U.S. 233 (1968).

[39] 396 U.S. at 304.

[40] The Supreme Court did not interpret 50 U.S.C. App., § 456(h) (1) (1964) as authorizing the delinquency regulations or allowing local boards to punish violators of the Act. The Court stated that the ". . . casual mention of the term 'delinquents' . . . must be measured against the explicit congressional provision for criminal punishment of those who violate the selective service laws." 396 U.S. at 302.

[41] Without any standards or guidelines to follow, a local board could act arbitrarily in declaring registrants delinquents; and it was just such action to which the Court objected most strongly. *See* Gutknecht v. United States 396 U.S. 295, 306 (1970).

[42] Mr. Justice Stewart, in writing a concurring opinion, stated that he felt a determination of the validity of the delinquency regulations was unnecessary. He concluded that the local board had denied petitioner the right to appeal his delinquency declaration and that he would have reversed the decision on that basis. Gutknecht v. United States 396 U.S. 295, 319 (1970).

Bd. No. 16[43] was announced within a week of *Gutknecht*. Breen had been reclassified from II-S to I-A under delinquency regulations for failure to retain personal possession of his registration card.[44] He filed suit in district court seeking to enjoin possible induction on the grounds that his reclassification was invalid. That court granted a motion by the local board to dismiss the case for want of jurisdiction.[45] A court of appeals affirmed the decision,[46] stating that they were not faced with a statutory exemption as in *Oestereich*. Rather, the case involved a deferment granted at the discretion of the local board.[47] The Supreme Court reversed that ruling.

Mr. Justice Black, speaking for the majority, stated that the court of appeals had improperly concluded that Congress authorized the revocation of deferments for violators of the delinquency regulations, for 50 U.S.C. App. § 456(h)(1) (1964) provided that

> [e]xcept as otherwise provided in this paragraph, the President shall ... provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college....

The Court went on to state that

> [t]he legislative history of § 6(h)(1) clearly indicates that Congress intended only the conditions specified in that section need be met to warrant a student deferment.... Congress did not specifically provide or in any way indicate that such deferred status could be denied because the registrant failed to possess his registration certificate.[48]

The Court reached the same conclusion as it had in *Oestereich*—the local board had illegally revoked a deferment and ordered the registrant for induction.[49] The Attorney General argued, however, that this case was different from *Oestereich* since the former dealt with a deferment and the latter with an exemption, stating that "...a rational distinction exists in the statutory scheme between deferments which merely postpone the time when a registrant will serve and exemptions which place the registrant 'outside the manpower pool.'"[50] The Court did not find this argument persuasive since 50 U.S.C. App. § 456(k) states that "[n]o ... exemption or deferment ... shall continue after the cause therefor ceases to exist." The effect of an exemption or a deferment is the same—the registrant is not presently subject to induction. Therefore, the Court was unable to find any congressional intent to permanently exempt certain registrants from military service while only deferring such service for others.[51]

For these reasons the Court was unable to distinguish the case of *Breen* from that of *Oestereich*.

> In both situations a draft registrant who was required by the relevant law not to be inducted was in fact ordered to report for military service. In both cases the order for induction involved a clear departure by the Board from its statutory mandate....[52]

Gutknecht and *Breen* thus held that local draft boards could not themselves punish violators of the Selective Service Regulations.[53] The Court in effect barred the arbitrary use of administrative authority by local boards not delegated to them by Congress. Interestingly enough, the Court in *Gutknecht* quoted from the Brief of the Solicitor General in *Oestereich*.

> It is difficult to believe that Congress intended

[43] 396 U.S. 460 (1970).

[44] 32 C.F.R. § 1617.1 (Supp. 1967) requires every registrant to have in his personal possession his registration certificate at all times.

[45] The local board based its motion upon the Military Selective Service Act of 1967, 81 Stat. 104 § 10(b)(3), which states that

> [n]o judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction....

The Supreme Court had faced this provision in Oestereich. Justice Douglas stated that preinduction judicial review was not precluded in cases involving a plain and unequivocal exemption, 383 U.S. at 238–239.

[46] 406 F.2d 636 (2d Cir. 1969).

[47] 50 U.S.C. App., § 456(g) (1964) states that students preparing for the ministry "...shall be *exempt* from training and service..." (emphasis added), whereas § 456(h)(1) provides "...for the *deferment* from training and service...of persons...at a college..." (emphasis added). The Attorney General argued that "...a rational distinction exists in the statutory scheme between deferments which merely postpone the time when a registrant will serve and exemptions which place the registrant 'outside the manpower pool.'" 396 U.S. at 466. The Court dismissed this argument.

[48] 396 U.S. at 465.

[49] *Id.* at 467.

[50] *Id.* at 466.

[51] *Id.* at 467.

[52] 396 U.S. at 467.

[53] As a result of *Breen*, the decision in Anderson v. Hershey, 410 F.2d 492 (6th Cir. 1969) and Kolden v. Selective Service Bd. No. 4, 406 F.2d 631 (8th Cir. 1969) were vacated and remanded.

> the local boards to have the unfettered direction to decide that any violation of the Act or regulations warrants a declaration of delinquency, reclassification and induction. . . .[54]

In light of *Gutknecht* and *Breen*, one may conclude with some certainty that federal court treatment of the subsequent cases involving delinquency and reclassification matters will entail scrutiny of the authority of the local boards to undertake any administrative steps in issue. The exercise by a local board of its powers to direct the Selective Service System in an arbitrary fashion is obviously weakened by reason of these decisions.

[54] 396 U.S. at 302–303.

Toussie v. United States, 397 U.S. 112 (1970)

In *Toussie v. United States*[1] the Court held that a failure to register for the draft at the proclaimed time[2] is a crime of single instance which immediately tolls the statute of limitations.[3] In so ruling, the Court reversed an earlier line of decision and offered a much needed definition for the doctrine of "continuing offense"—a principle by which the limitations period as applied to a crime is extended by deferring its initiation.

Toussie was convicted[4] under authority of section 12a of the Universal Military Training and Service Act,[5] which makes it a crime to "neglect or refuse to perform any duty" required by the Selective Service laws. Section 3 of that Act states that:

> . . . it shall be the duty of every male citizen . . . who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.[6]

Registration day was proclaimed by the President to be "the eighteenth anniversary of the day of . . . birth, or within five days thereafter."[7] Toussie, born on June 23, 1941, was required to register between June 23 and June 28, 1959. He refused to comply. An indictment, however, was barred by the five year statute of limitations.[8] The government asserted that the failure to register was an offense which continued until age twenty-six. In its view, the five-year statute of limitations would not have run until five days after Toussie's thirty-first birthday in 1970. The prosecution buttressed its argument with reference to a Presidential order that read:

> The duty of every person subject to registration to present himself for and submit to registration shall *continue* at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration. (emphasis added)[9]

A 1967 indictment was, in the government's view, wholly proper. The determinative issue was, therefore, whether or not failure to register for the draft was a "continuing offense."

Speaking for the majority in *Toussie*,[10] Mr. Justice Black pointed out that there is a tension between the "continuing offense" doctrine[11] and

[1] 397 U.S. 112 (1970).

[2] Proclamation #2942, 65 Stat. 35 (1951), states that

> "[p]ersons who were born on or after September 19, 1930, shall be registered on the day they attain the eighteenth aniversary of the day of their birth, or within five days thereafter."

[3] 18 U.S.C. § 3282 (1964) states:

> Except as otherwise expressly provided by law no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found . . . within five years after such offense shall have been committed.

[4] United States v. Toussie, 280 F. Supp. 473 (E.D. N.Y. 1967), *aff'd*, 410 F.2d 1156 (2d Cir. 1969), *cert. granted*, 396 U.S. 875 (1969).

[5] 50 U.S.C. App., § 462a (1964).

[6] 50 U.S.C. App., § 453 (1964).

[7] Proclamation #2942, 65 Stat. 35 (1951).

[8] 18 U.S.C. § 3282 (1964).

[9] 32 C.F.R. § 1611.7c (1970).

[10] 397 U.S. 112 (1970).

[11] A "continuing offense" denotes not only a crime which has been consumated in the past and could then have been prosecuted, but also a continuing course of criminal *conduct* necessary to further one complete design. The "continuing offense" must be distinguished from that of the instantaneous crime, the single event, which may be continuing only in result or effect. For example, the crime of conspiracy to defraud may have been consummated at the time of the original agreement, but because of the execution of a series of fraudulent letters necessary to further the plot, the offense is continuous. Contrast however the crime of theft which is complete upon the taking of another's property with the necessary intent; the retention of the property con-

the purpose of the statute of limitations. The latter is a matter of legislative grace,[12] and stands for the proposition that it is necessary to limit an individual's exposure to criminal prosecution. The standard purpose for a limit on the time when criminal actions may be commenced is certain—an accused should not be compelled to defend against charges after evidence necessary to refute them has been forgotten, lost or obscured.[13] The period of limitation begins to run when an offense is committed. Usually this occurs when all the elements of the crime appear.[14] However, the "continuing offense" doctrine provides that the statute of limitations does not commence its run until any continuity in the commission of otherwise complete offenses has ceased.

For example, assume a five-year statute of limitations and an indictment for a conspiracy to defraud. Assume also that all the elements of the crime have been completed by 1960. If an indictment is brought in 1967 based upon acts done in 1966 that were necessary to effectuate the fraudulent end, courts have held that the 1966 acts are part of a continuing conspiracy. Thus the defendants involved will be forced to refute evidence of their 1960 conduct.[15] As to evidence of the earliest acts, the purpose of the statute of limitations has been circumvented. The "continuing offense" doctrine for all practical purposes extends the statute beyond its stated term."[16]

However, the fact that the purpose of the statute of limitations may be thwarted does not mean that the "continuing offense" doctrine is unacceptable or that an "offense should never be construed as a continuing one."[17] A problem arises, however, in the demarcation of those offenses that are "continuing" for purpose of the statute of limitations. The Court's opinion in *Toussie v. United States* stands for the proposition that since the statute of limitations is entirely a creature of legislators, the "continuing offense" doctrine, at odds with the purposes of the statute, should not be invoked without explicit support of the legislature with regard to specific crimes.[18]

Speaking for the majority, Mr. Justice Black insisted that an offense will be held to be continuous only if: 1) "the nature of the crime involved is such that Congress must assuredly have intended it be treated as a continuing one," or 2) "the explicit language of the substantive criminal statute compels such a conclusion."[19] For purposes of the statute of limitations, if a crime does not meet the criteria of either category, then courts are powerless to declare that offense continuous.[20]

Indeed, certain offenses are by their very nature "continuous." In *United States v. Kissel*,[21] for instance, the defendants were indicted for conspiracy to restrain trade in violation of the Sherman Act. They argued that their offense was complete in December, 1903, the date of the unlawful agreement, and that later acts did not change the nature of the offense. Thus, they argued that an indictment filed in 1909 was barred by the

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tinues the result but not the offense. *See* United States v. Kissel, 218 U.S. 601 (1910).

[12] *See* Commonwealth v. Foster, 111 Pa. Super. 451, 170 A. 691 (1934), where defendant was indicted on September 20, 1932, for aiding and abetting the embezzlement of funds from a trust company on September 28, 1928. Defendant claimed that since his was a crime separate from that of the principal offender and was defined as a misdemeanor, the indictment was barred by the two-year period of limitation. The court cited two separate statutes and argued that the abettor was liable to be proceeded against in the same manner as the principal offender against whom a four-year period of limitations was applicable. On a rather narrow point, the court held for the defendant, stating:

> An act of limitation is an act of grace, and, ... in order for the commonwealth to include certain offenders within a limitation covering a specific class both as to individuals and offenses, it must point to some legislative authority clearly showing its intent to enlarge and broaden the scope of the original act. 111 Pa. Super. at 456; 170 A. at 692.

[13] *See generally* Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630 (1954); Callahan, *Statutes of Limitation—Background*, 16 OHIO ST. L.J. 130 (1955).

[14] For example, the elements of a crime under § 12(a) of the Universal Military Training and Service Act, 50 U.S.C. App., § 462(a) (1968), are: 1) a determination that there is a duty (i.e., to register, to report, etc.) and 2) a criminal intent. *See* PUBLIC LAW EDUCATION INSTITUTE, SELECTIVE SERVICE LAW REPORTER § 2527 (1968).

[15] *See* United States v. Graham, 102 F.2d 436 (2d Cir. 1939), where defendants were indicted for conspiring to use the U.S. mail in furtherance of an ingenious confidence racket by which different individuals were defrauded. The indictment was based upon three letters that were delivered within the period of limitation. The Court held that these letters were part of a continuing conspiracy, and thus the defendants were forced to refute evidence of earlier acts that would have been barred except for the declaration that the conspiracy was continuous. As to these acts the purpose of the statute of limitations appears to have been circumvented.

[16] Toussie v. United States, 397 U.S. 112, 115 (1970).

[17] *Id.* at 115.

[18] *Id.* at 120–122.

[19] *Id.* at 115.

[20] *Id.* at 121.

[21] 218 U.S. 601 (1910).

three-year statute of limitations. Mr. Justice Holmes rejected their claim and held that the conspiracy in question was designed as an ongoing attempt to drive competitors out of business. Criminal conduct, then, continued until that purpose was achieved or abandoned.

> It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime.... But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one.[22]

In *Toussie v. United States*, the Court cited *Kissel* with approval and noted that it is in the nature of a conspiracy that each day's conspiratorial acts renew the evil which the appropriate criminal statute seeks to prevent. However, after noting that the first Selective Service provisions of World War I treated draft registration as an instantaneous event,[23] the Court concluded that "there is nothing inherent in the nature of failing to register that makes it a continuing offense." [24]

Other crimes as well are not by their very nature continuous but may, in light of statutory definition of the crime, be construed as continuing.[25] The clearest illustration of this category rests with the offense of bigamy. In *Pitts v. State*,[26] the Supreme Court of Georgia held that its penal code[27] defined bigamy as a marriage by one who knows of the existence of an initial spouse. Thus, under Georgia law, the crime of bigamy was complete upon the consummation of such a marriage. Elsewhere, however, bigamy might well be termed a continuous offense. Indeed, statutes in other jurisdictions define the crime as "continuous cohabitation" under an illegal second marriage.[28]

Likewise, in *United States v. Cores*,[29] the Supreme Court considered whether an alien crew member

[22] *Id.* at 607. In State v. Thang, 188 Minn. 224, 246 N.W. 891 (1933), a guardian originally acted to embezzle funds in 1926, but in order to prevent detection he continued his crime by a series of fraudulent reports and letters. The court held the embezzlement was a continuing offense not barred by the statute of limitations. *See also* Richardson v. State, 7 Boyce 534, 109 A. 124 (Del. 1920), where the court considered the nature of the offense of failure to provide support. The defendant father claimed that since he had never provided for the support of his illegitimate child, the statute of limitations had run two years after the child's birth. The court held that, whereas the defendant's contention would have barred a prosecution under the bastardy act, the father had a continuing duty to provide support. His was a crime of continuous omission.

But see United States v. Irvine, 98 U.S. 450 (1878), where an attorney had withheld a certain sum which he had collected, on behalf of his client, from a United States pension fund. The pensioner requested her money in December, 1870, and was refused. It was not until five years later that the attorney was indicted. With the two-year statute of limitations pleaded as a bar to the indictment, the state argued that each day funds were withheld constituted a continuing offense. The Court rejected prosecution's argument and asserted:

> It is unreasonable to hold that twenty years after this he could be indicted for wrongfully withholding the money, and be put to prove his innocence after his receipt is lost, and when perhaps the pensioner is dead ... Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that day the Statute of Limitations begins to run against the prosecution. 98 U.S. at 452.

[23] The Court took notice that historically a single day was proclaimed as the time when all men who were subject to duty must register. Thus, on June 5, 1917, 10,000,000 men registered. The following year August 24, 1918, was proclaimed registration day for all those who had become subject to the duty to register since the previous year. In like manner, the Court argued, the proclamation in 1942—that all men must register upon their eighteenth birthday—was simply an automatic scheme for an annual registration day. Toussie v. United States, 397 U.S. 112, 116–17 (1970).

[24] *Id.* at 122.

[25] *Cf.* Pendergast v. United States, 317 U.S. 412 (1943), in which the obverse of this situation occurred. The defendants had by fraud induced the Court to issue a corrupt settlement of litigation. The prosecution contended that the success of the scheme depended upon continuous acts necessary for the concealment of the plan. The same argument was forwarded in United States v. Kissel, *supra* note 21. However, the Court held that the action was barred by the statute of limitations because the statute upon which the prosecution based its case punished only misbehavior in the "presence of the Court." If it were not for the wording of the statute, Acts of Apr. 13, 1876, ch. 56, 19 Stat. 32; Nov. 17, 1921, ch. 124, § 1, 42 Stat. 220; Dec. 27, 1927, ch. 6, 45 Stat. 51 (now 18 U.S.C. § 3282 (1964)), the fraudulent scheme would have been a continuous crime.

[26] 147 Ga. 801, 95 S.E. 706 (1918).

[27] GA. CODE ANN. ch. 26, § 5601 (1933), defines bigamy as "knowingly having a plurality of husbands or wives at the same time."

[28] State v. Sloan, 55 Iowa 217, 7 N.W. 516 (1880), which held that bigamy was a continuing offense and thus not barred by the statute of limitations, concerned a statute which read:

> if any person who has a former husband or wife living marry another person, or continue to cohabit with such second husband ... [he] is guilty of bigamy.

See also Cox v. State, 117 Ala. 103, 23 So. 806 (1898).

[29] 356 U.S. 405 (1958).

who remained in the United States in excess of allotted time[30] was guilty of a continuing offense. It reasoned that the conduct proscribed by § 252(c) of the Immigration and Nationality Act[31] "is the affirmative act of willfully remaining, and the crucial word 'remains' permits no connotation other than continuing presence." [32]

The Court in *Toussie* undertook a similiar examination of the statutory language invoked against the petitioner. The majority[33] insisted that the Universal Military and Training Act[34] contained "no language ... that clearly contemplated a prolonged course of conduct." [35]

[30] The government filed an information in the Untied States District Court for the District of Connecticut charging that the appellee alien crewman landed at Philadelphia on April 27, 1955 and that twenty-nine days later, at the expiration of his conditional landing permit, he "did wilfully and knowingly remain in the United States, to wit: Bethel, Connecticut." The facts showed however that appellee came to Connecticut only after spending a year in New York and indicated that the information was brought in an improper district since appellee was not in Connecticut at the time his permit expired. The Constitution (U.S. CONST. art. III, § 2) makes it clear that proper venue "shall be in the state where the said crime shall have been committed." The Court, holding that the offense was continuing, stated that the locality of the crime extended over the whole area through which the appellee moved. Thus the information was properly filed. *Id.* at 406–07, 410.

[31] 8 U.S.C. § 1282(c) (1964).

[32] United States v. Cores, 356 U.S. 405, 408 (1959). *But see* United States v. Franklin, 188 F.2d 182, 186–187 (7th Cir. 1951), where an alien failed to register in violation of Act of June 28, 1940, ch. 439, title III, §31, 54 Stat. 673 (now covered by 8 U.S.C. § 1302 (1964)), which reads:

> (a) It shall be the duty of every alien now or hereafter in the United States, who ... (3) remains in the United States for thirty days or longer, to apply for registration ... before the expiration of such thirty days.

It would appear that the crime is complete after the expiration of the thirty days, but the court held that the defendant's failure to register was a continuing violation which was not barred by a three-year statute of limitations.

[33] The majority opinion was written by Mr. Justice Black, with whom were Justices Douglas, Marshall, Brennan, and Stewart. Mr. Justice White, with whom were the Chief Justice and Mr. Justice Harlan, dissented.

[34] 50 U.S.C. App., §543 (1964). The statute reads:

> [I]t shall be the duty of every male citizen ... who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

[35] 397 U.S. at 120.

Even though the statutory language established no continuing offense, the government argued that the language of a Presidential order[36] in question designated registration as a continuing duty, rendering the crime of failure to register a continuing one. Justice Black, speaking for the Court, insisted that

> [w]hile it is true that the regulation does in explicit terms refer to registration as a continuing duty, we cannot give it the effect of making this criminal offense a continuing one. Since such offenses are not to be implied except in limited circumstances, and since questions of limitations are fundamentally matters of legislative not administrative decision, we think this regulation should not be relied upon effectively to stretch a five-year statute of limitations into a thirteen year one, ... [37]

unless either: 1) the statute itself, apart from the regulation, or 2) the nature of the crime involved justifies that conclusion.[38]

[36] 32 C.F.R. § 1611.7(c) (1970). The Presidential order reads:

> The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration.

[37] 397 U.S. at 120–21.

[38] Justice Black also thought it significant that the cases which have concluded, on facts practically identical to those in Toussie, that failure to register for the draft was a continuing offense have done so by relying on the regulation. *See* McGregor v. United States, 206 F.2d 583, 584 (4th Cir. 1953); Fogel v. United States, 162 F.2d 54, 55 (5th Cir. 1947). However, in United States v. Salberg, 287 F. 208 (N.D. Ohio) (1923), a case which differed from *Toussie* only in that there was no regulation defining a "continuing duty," the Court tersely ruled that the offense was complete five days after the eighteenth birthday.

Cf. United States v. Guertler, 147 F.2d 796 (2d Cir. 1945), where the Court held that an indictment filed in 1944 charging a failure to keep the draft board advised during the period between 1941 and 1942 of an address where mail would reach him was a continuing offense not barred by a three-year period of limitation. The offense was described in an executive order, 3 C.F.R. 727 (1940), made pursuant to §11 of the Selective Service Training Act of 1940, 54 Stat. 894 (now covered by 50 U.S.C. §462 (1964)). That order read: "it shall be the duty of each registrant *to keep* his local board advised *at all times* of the address where mail will reach him." (emphasis added) Query: For purposes of the statute of limitation, would a violation of this executive order still be construed as a "continuing offense?" In view of *Toussie*, it would appear that the words "at all times" would have no effect; but since the crime is in nature continuing, failure to keep the