

**“Hell No, We Won’t Go”  
The Vietnam Anti-draft Movement  
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**Summary**

During the Vietnam War, there was substantial resistance to the draft. This lesson examines primary source materials from the anti-war and anti-draft movements to gain insight into the opposition to the War in Vietnam.

**Objectives**

Students will:

- 1.) Identify reasons the individuals burned their draft cards.
- 2.) Identify reasons why individuals opposed the burning of draft cards.
- 3.) Write an essay in support of or opposition to burning draft cards as symbolic speech.

**U.S. History Event or Era**

The Vietnam War era of the 1960s

**Grade Level**

This lesson is designed for a high school level class in American History.

**Materials**

- [www.oyez.org/cases/1960-1969/1967/1967.232](http://www.oyez.org/cases/1960-1969/1967/1967.232)  
[www.supreme.justice.com/US/391/367/case.html](http://www.supreme.justice.com/US/391/367/case.html)

**Lesson Time**

This lesson will take one to two class periods of 45 minutes to complete.

**Lesson Procedures**

- 1.) Part A: Students will read and analyze the primary source materials and answer the questions that accompany the readings.
- 2.) Part B: Students will write an essay to support or oppose the position that burning a draft card should be protected as symbolic speech.



## **Hell No, We Won't Go**

### **Part A:**

The draft was an important part in raising enough troops to fight in Vietnam. Opposition to the war included opposition to the draft. Some draft opponents protested the draft by publicly burning their draft card. Read the following primary sources dealing with opposition the War in Vietnam.

The contention that the burning of a draft card was symbolic speech and therefore, protected by the First Amendment was brought before the Supreme Court in 1968. On March 31, 1966, David Paul O'Brien and three other men burned their draft cards outside the south Boston Courthouse. There were some FBI agents in the crowd and O'Brien was arrested and charged with violation of the 1965 amendment to the Universal Military Training and Service Act which made destruction of a draft card a crime.

The case reached the U.S. Supreme Court in 1968. Read the following excerpts from *United States v O'Brien* 391 U.S. 367 (1968) to determine if burning of a draft card is protected as symbolic speech. After reading the documents, answer the following questions about each document and picture.

## **Is Burning a Draft Card Protected by the First Amendment?**

### **Document 1 Chief Justice Earl Warren presents the majority opinion**

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court. (7-to-1)

On the morning of March 31, 1966, David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse. ...

For this act, O'Brien was indicted, tried, convicted, and sentenced ... he burned the certificate publicly to influence others to adopt his antiwar beliefs, as he put it, "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position."

In the District Court, O'Brien argued that the 1965 Amendment prohibiting the knowing destruction or mutilation of certificates was unconstitutional because it was enacted to abridge free speech, and because it served no legitimate legislative purpose...

By the 1965 Amendment, Congress added to 12 (b) (3) of the 1948 Act the provision here at issue, subjecting to criminal liability not only one who "forges, alters, or in any manner changes" but also one who "knowingly destroys, [or] knowingly mutilates" a certificate. ... It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views.

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

We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. ...

This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. ... we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to 12 (b) (3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.

The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. ... The power of Congress to classify and conscript manpower for military service is "beyond question." ... Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to cooperate in the registration system. The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.

The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and willfully destroy or mutilate them.

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

It is equally clear that the 1965 Amendment specifically protects this substantial governmental interest. ... The 1965 Amendment prohibits such conduct and does nothing more. In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative [391 U.S. 367, 382] aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he willfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.

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

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

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in [391 U.S. 367, 384] this circumstance

is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what less than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

### **Burning Draft Cards and Symbolic Speech: United States v. O'Brien**

1. David O'Brien readily admitted that he burned his draft card. What did he hope to achieve by burning his draft card?
2. O'Brien claimed the 1965 law prohibiting the burning of draft cards was unconstitutional. List his reasons.
3. What did the Chief Justice mean when he wrote, "We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea"?
4. The Chief Justice writes, "This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms..." Essentially, the government can limit symbolic speech if under four conditions. What are the four conditions?
5. What was the outcome of the court case?

**Document 2          Justice John M. Harlan agreed with the majority of the court, but wrote a separate opinion to explain his view.**

MR. JUSTICE HARLAN, concurring.

The crux of the Court's opinion, which I join, is of course its general statement, ante, at 377, that: "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

I wish to make explicit my understanding that this passage does not foreclose consideration of First Amendment claims in those rare instances when an "incidental" restriction upon expression, imposed by a regulation which furthers an "important or substantial" governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a "speaker" [391 U.S. 367, 389] from reaching a significant audience with whom he could not otherwise lawfully communicate. This is not such a case, since O'Brien manifestly could have conveyed his message in many ways other than by burning his draft card.

5. Why did Justice Harlan agree with the majority decision?

6. What does Justice Harlan mean by his statement "O'Brien manifestly could have conveyed his message in many ways other than by burning his draft card"?

7. What other method of would have been available to Mr. O'Brien?

8. Do you believe that the possibilities of other method of protest may have been available is relevant to the question before the court?

**Document 3            Justice William O. Douglas disagreed with the majority of the court. In his dissenting opinion he explains his opposition to courts decision.**

MR.JUSTICE DOUGLAS, dissenting.

The Court states that the constitutional power of Congress to raise and support armies is "broad and sweeping" and that Congress' power "to classify and conscript manpower for military service is `beyond question.'" This is undoubtedly true in times when, by declaration of Congress, the Nation is in a state of war. The underlying and basic problem in this case, however, is whether conscription is permissible in the absence of a declaration of war.

9. Why did Justice Douglas dissent?

10. Justice Douglas thinks that the court is arguing the wrong question. What question does he think the court should be deciding?

11. Does Justice Douglas respond to the question before the court?

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**Part B:            Essay**

In the case of *The United States v O'Brien* 391 U.S. 367 (1968), the Supreme Court upheld the conviction of David Paul O'Brien for burning his draft card in violation the Selective Service Act. Write an essay to support or oppose the position that burning a draft card should be protected as symbolic speech.