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Constitutional Law - Free Speech - Draft Card Burning - U.S. v. Miller, 367 F.2d 72 (2nd Cir. 1966)

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The Circuit Court reasoned that even though there would have been no probable cause to arrest, or even suspect, Jacobs without Kelly's "involuntary" confession, Jacobs did not suffer any deprivation of his constitutional rights through the use of the confession.[22] His own confession given so soon after his arrest lends support to this view. Yet Jacobs would not have confessed, at that time at least, had not it been for the involuntary confession. By the present decision the Circuit Court of Appeals has indicated that a narrow standard[23] will be applied in deciding just where the point of attenuation falls in the connection between the primary illegality and the independent source. In effect this raises the presumption that notwithstanding the new thrust in the area of the "poisonous fruits" doctrine continued leeway will be allowed law enforcement officials and prosecutors in the acquisition and introduction of evidence within the Fourth Circuit.

Gilbert A. Bartlett

Constitutional Law — Free Speech — Draft Card Burning. In *United States v. Miller*,[1] David J. Miller appealed from a judgment of the U.S. District Court for the Southern District of New York,[2] convicting him of knowingly destroying his draft card in violation of Section 12(b)(3) of the Universal Military Service and Training Act as amended in August, 1965.[3]

Appellant, a 24-year-old member of the New England Committee

indication that he had reason to object to the substance of the allegations. At the time of his arrest he failed to deny the information and within a short time of his arrest he made a complete confession in his own right.

22. *Supra*, note 3 at 323.

23. California favors the liberal approach to the exclusionary rule on the grounds that to limit immunity to the person actually wronged is to condone, if not encourage, police illegality by permitting the authorities to trade the release of the person who confesses under duress for the conviction of those implicated by the confession. People v. Martin 290 P 2d 855 (1955). The Supreme Court's position on this approach may be indicated by the fact that Martin was cited by the dissent in Wong Sun but on an entirely unrelated point. For a discussion of the problem presented by implication in Wong Sun see Broeder, Wong Sun v. United States, *A Study in Faith and Hope* 42 Neb. L. Rev. 483 (1963), Kamisar, *Illegal Searches and Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure* 1961 Ill. L. For. 78 (1961). For an opposing view, and one which was favorably cited in Kelly, see Prescoe v. State 231 Md. 486, 191 A2d 226 (1963).

1. 367 F.2d 72 (2nd Cir. 1966), *cert. denied*, Miller v. U.S., 87 S.Ct. 855.

2. U.S. v. Miller, 249 F. Supp. 59.

3. Universal Military Service and Training Act, 62 Stat. 622, 50 U.S.C. App. § 462(b)(3); amended by 79 Stat. 586.

for Non Violent Action, burned his draft card[4] at an anti-war rally in New York City on October 15, 1965. Miller thus became the first person arrested in this country for burning a draft card,[5] and the first person convicted under the amended statute.[6]

On appeal, appellant's first argument was that the 1965 Amendment to the Universal Military Service and Training Act is unconstitutional because it was enacted deliberately to suppress dissent. Section 12 (b) (3) as amended[7] reads: "(3) who forges, alters, knowingly destroys, know-

4. In a District Court opinion disposing of pre-trial motions, 249 F.Supp. 59 (S.D.N.Y. 1965), the court dismissed defendant's contention that the Notice of Classification (SSS Form No. 110) which he burned was not a "certificate," the destruction of which constitutes a violation of Section 462(b)(3). "Although it may be argued that neither the provisions of Title 50 Appendix nor the regulations thereunder categorically define the Notice (SSS Form No. 110) to be a 'certificate', it is plain enough from the face of Section 462(b) as a whole that Congress certainly there used the word 'certificate' with intention to embrace, among other Selective Service documents, the Notice in question."

5. New York Times, Oct. 16, 1965, page 14, col. 1.

6. New York Times, Feb. 14, 1967, page 1, col. 6. "Miller, the first of 16 persons who have been prosecuted under the law, was given a three-year suspended sentence and placed on probation for two years. . . . A Justice Department spokesman said today that all eleven cases tried so far under the law had resulted in convictions. One case is still awaiting trial. The four other cases have been dismissed by the Government—two because the defendants were found mentally unfit to stand trial, and two because the men were convicted of other draft violations."

7. 79 Stat. 586. Sec. 12(b), as amended, provides:

Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title, 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 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

ingly mutilates, . . .". The amendment was added in August, 1965, at the end of a summer of highly publicized draft card burnings occurring in anti-war demonstrations.

The courts will not, as a general rule, look behind the terms of a statute to devine the hidden legislative motive for the enactment of the statute. If Congress is constitutionally empowered to act in a field, an act must on its face infringe upon an individual's constitutional right before it can properly be subjected to judicial inquiry.[8] Congress is constitutionally empowered to raise and support armies,[9] and regulation under the Selective Service Act is a valid exercise of that power.[10] On its face, the amended statute attacked in the instant case concerns administration of the draft; it is not regulation of ideas or the communication of ideas.[11]

The court conceded to appellant that the amendment to the Act was prompted by publicized burnings of draft cards, and that remarks by some legislators might be interpreted as a desire to suppress political dissent.[12] However, the more authoritative committee report shows a concern that destruction of draft cards represents a potential threat to the exercise of Congress' power to raise and support armies.[13] Even though the amendment was clearly intended to stop draft card burning,

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or representation, unless the defendant explains such possession to the satisfaction of the jury. (Emphasis added.)

8. 367 F.2d 72, 76. In Sonzinsky v. United States, 300 U.S. 506, 513-514, the Supreme Court stated that "(i)nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts."

9. U.S. CONST. art. I, § 8. "The Congress shall have Power . . . To raise and support Armies . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . ."

10. Selected Draft Law Cases, 245 U.S. 366; U.S. v. Herling, 120 F.2d 236; U.S. v. Lambert, 123 F.2d 395.

11. *Supra*, note 7.

12. 111 Cong. Rec. 19135 (daily ed. Aug. 10, 1965). Congressman Rivers explaining the bill stated, ". . . It is a straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards . . . But if it can be proved that a person knowingly destroyed or mutilated his draft card . . . he can be sent to prison where he belongs. This is the least we can do for our men in South Vietnam fighting to preserve freedom, while a vocal minority in this country thumb their noses at their own government."

13. *Supra*, note 9. H.R. Rep. No. 747, 89th Cong., 1st Sess. 2 (1965) states: ". . . the committee feels that in the present critical situation of the country, the acts of destroying or mutilating these cards are offenses which pose such a grave threat to the security of the nation that no question whatsoever should be left as to the intention of this Congress that such wanton and irresponsible acts should be punished."

"on its face the statute is narrowly drawn and does not discriminate between card-burning as protest or as something unrelated to symbolic communication." [14]

Furthermore, the requirement to be in possession of one's draft card has existed for several years, and anyone in willful non-possession could have been prosecuted under the Act before the amendment. The amendment "only strengthened what was already a valid obligation of existing law." [15]

Miller's second contention was that the amended Act is an unconstitutional suppression of his freedom of speech, that peaceful symbolic speech is protected by the First Amendment, and that burning one's draft card is peaceful symbolic speech.[16] Miller argued that the Act prohibiting his symbolic speech must be evaluated under the standard of the clear and present danger test,[17] and burning a draft card, he urged, presents no clear and present danger.

The court declined to decide whether burning a draft card can be characterized as an exercise of speech, but was willing to assume *arguendo* that it can. Assuming that such action is symbolic speech, the clear and present danger test is not the appropriate standard to apply, but rather the balancing approach stated in *American Communications Assn., C.I.O. v. Doud*[18] is the proper standard to be used to test the constitutionality of legislation indirectly restricting speech. ". . . [M]ost recent Supreme Court decisions[19] seem to require its use, at least where a narrowly drawn statute on its face regulates conduct, not the communication of ideas." [20]

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14. 367 F.2d 72, 77.

15. *Ibid.*

16. *Supra,* note 14, at 78.

17. Schenck v. United States, 249 U.S. 47, 52. ". . . whether the words used are in such circumstances and are of such a nature as to create a clear and present danger that will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

18. 339 U.S. 382. Rejecting the argument that a statute requiring union officials to file a non-Communist affidavit as a condition of using the services of the NLRB the court said: "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented."

19. See Konigsberg v. State Bar, 366 U.S. 36, 49-51 (1961); and Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 91 (1961).

20. *Supra,* note 14, at 80.

The court explained that proper functioning of the Selective Service System is a public interest to be protected, and the amended Act serves a legitimate purpose in administering the System. Selective Service Certificates serve as proof of registration and assist in detecting evaders. In an emergency, persons can be ordered by radio to report to the nearest board, and with the Certificate in their possession, the board reported to does not have to be the board holding a person's record. The Certificate serves as a reminder to a registrant of his obligation to keep his local board advised of changes in his status, it guarantees a registrant prompt receipt of information, and personal inquiries are facilitated. Furthermore, the Certificate serves as a backup for official records should they be destroyed in a disaster.[21]

Against these reasons the court weighed the effect of the Act on appellant's freedom of expression. "Except to prohibit destruction of certificates, the statute does not prevent political dissent or criticism in any way. It is narrowly drawn to regulate a limited form of action. Under the statute, aside from destroying certificates, appellant and others can protest against the draft, the military action in Vietnam and the statute itself in any terms they wish . . ." [22] Thus balancing the efficient functioning of the Selective Service System against Miller's minimal abridgement of speech, the conclusion was reached that the amended Act is in the interest of public order and demands the greater protection.

The issue presented in this case was uncomplicated. Appellant's contentions appear to be an unabashed attempt to stretch First Amendment protection to an absurd degree. It seems curious therefore, that the court would discourse so thoroughly on such a clear and simple issue. It has been said that a court must attempt to decide not only the case before it, but also a great many similar cases not in court.[23] The court apparently felt compelled to placate the minority groups represented by Miller, and others "not in court." But the well-reasoned opinion seems also to indicate that the courts are becoming less tolerant with those who flagrantly disregard civil authority under the purview of constitutional rights.[24]

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21. *Supra,* note 14, at 81.

22. *Supra,* note 14, at 81.

23. Karst, Legislative Facts in Constitutional Litigation, 1960, THE SUPREME COURT REVIEW 75, at 77.

24. After Supreme Court denial of certiorari (*supra,* note 1), "one of the attorneys of the Civil Liberties Union representing the convicted draft card burners, was reported

Miller, and those who agree with him, remain free to criticize national policy by the written and spoken word, but "they are simply not free to destroy Selective Service Certificates." [25]

Glenn J. Sedam Jr.

Constitutional Law—Restrictive Racial Covenants—The Inference of Proposition 14. In *Mulkey v. Reitman*,[1] plaintiff was denied the opportunity to rent an available apartment due solely to his race, being a Negro. From plaintiff's appeal on summary judgment entered upon the pleadings, the California Supreme Court held that article I, section 26,[2] of the California Constitution, prohibiting the state from denying the right of any person to decline to sell, lease, or rent his real property to such persons as he in his own discretion chooses, consti-

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to say that future appeals would concentrate on what he termed prejudicial statements by trial judges and other alleged trial errors, rather than on further constitutional challenges to the law." N.Y. Times, Feb. 14, 1967, page 1, col. 6.

25. *Supra*, note 14, at 82. On April 10, 1967, the First Circuit Court of Appeals held in O'Brien v. U.S., 376 F.2d 538 (1st Cir. 1967), that the 1965 Amendment did constitute an unnecessary regulation of speech, although conviction was affirmed on other grounds. The Supreme Court has granted certiorari to resolve the conflict.

1. 50 Cal.Rptr.881, 413 P.2d 825 (1966).

2. Proposition 14 after its incorporation by the people of California at the polls in 1964.

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person who is willing or desires to sell, lease or rent any part or all of his real property, to such person or persons as he, in his absolute discretion, chooses.
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> "Person" includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.
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> "Real property" consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.
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> This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or providing of any accommodations for lodging purpose by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.
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> If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in force and effect. To this end the provisions of this Article are severable.