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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, ET AL. , :
Petitioners :
v. : No. 01-704
THOMAS LAMAR BEAN :

- - - - -X

Washington, D. C.

Wednesday, October 16, 2002

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:03 a. m.

APPEARANCES:

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D. C. ; on behalf of
the Petitioners.

THOMAS C. GOLDSTEIN, ESQ., Washington, D. C. ; on behalf of
the Respondent.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 01-704, United States v. Bean.

5 Mr. Kneedler.

6 ORAL ARGUMENT OF EDWIN S. KNEEDLER

7 ON BEHALF OF THE PETITIONERS

8 MR. KNEEDLER: Thank you, Mr. Chief Justice, and
9 may it please the Court:

10 In each year's annual Appropriations Act,
11 Congress has prohibited the Bureau of Alcohol, Tobacco,
12 and Firearms from investigating or acting upon
13 applications for discretionary relief from firearms
14 disabilities under 18 U.S.C. 925(c.) The court of appeals
15 held that, in the face of that statutory bar, a Federal
16 district court could itself grant respondent relief from
17 firearms disabilities. That holding is contrary to
18 fundamental principles of judicial review of agency action
19 under the Administrative Procedure Act. Under the APA --

20 QUESTION: Mr. Kneedler --

21 MR. KNEEDLER: Yes.

22 QUESTION: -- you call it a statutory bar. I
23 thought there was some difference in appropriations
24 statutes from ordinary, ordinary laws. Are the two
25 exactly the same? Could Congress create a substantive

1 obligation, for example, in an appropriations law, provide
2 that, oh, I don't know, nobody shall sell stock on
3 Tuesdays? Could they put that in an appropriations
4 measure?

5 MR. KNEEDLER: Yes. An appropriations law is,
6 for purposes of Congress's lawmaking authority, no
7 different from any other sort of law.

8 QUESTION: That's our holding in Roberts, isn't
9 it?

10 MR. KNEEDLER: Yes. Now, what the Court has
11 said is that if a subsequent appropriations statute is
12 said to repeal or suspend the application of a prior law,
13 that intention has to be made clear, but here we think
14 that there's no question that the annual Appropriations
15 Act is clear. There's nothing implied about what Congress
16 did here. There is an express prohibition against ATF
17 either investigating or acting upon applications for
18 relief.

19 QUESTION: You call this a suspension of the
20 law?

21 MR. KNEEDLER: Yes. I mean, effectively. It's
22 a suspension -- it's an annual -- a suspension for a
23 period of 1 year.

24 QUESTION: I suppose Congress -- well, maybe --
25 I mean, I suppose Congress could say, this law that we

1 enacted a year ago is suspended for 10 years. It will not
2 go into effect for 10 years. I suppose it could say that.

3 MR. KNEEDLER: Yes, absolutely. Congress could
4 certainly do that.

5 QUESTION: Well, that's the holding of
6 Dickerson, is it not?

7 MR. KNEEDLER: Yes. So what we have here is an
8 express prohibition against ATF exercising the power that
9 Congress conferred on it. Under the Administrative
10 Procedure Act, the only power a court has in judicial
11 review of agency action is to review what the agency did,
12 and it may only set aside the agency action if the agency
13 action is arbitrary or capricious or contrary to law.

14 QUESTION: I don't know if it really bears on
15 the case, but suppose Congress had a completely different
16 scheme, and it said that the firearms violator's license
17 could be restored if he applied to United States district
18 court, no agency at all, you just go to court. Would that
19 be a violation of Article III?

20 MR. KNEEDLER: Well, I think there would be a
21 question about that. As I recall, there was, and I think
22 it still may be true that courts may grant applications
23 for naturalization, but the court I believe concluded that
24 there was at least an implicit adversarial process in the
25 sense that the Government could appear on the other side

1 of the case and oppose it, but I think you raise a very
2 good point in terms of what would be the traditional way
3 that something like this would be accomplished, and that
4 is that it would be natural, and this is what Congress did
5 in 925(c), to confer this authority on the executive
6 branch, and it did it in very broad and general terms and
7 then provided that a person whose application is denied
8 may file a petition in district court for judicial review
9 of such denial.

10 In other words, under 925(c) it is the denial by
11 the ATF, not the application itself, that is the subject
12 of judicial review.

13 QUESTION: Is the refusal of the ATF to act on
14 an application pursuant to this provision in the
15 appropriation a de facto denial that's reviewable?

16 MR. KNEEDLER: We think it is not. As we
17 explained in our brief, we believe the word denial in that
18 context means a denial on the merits, and this is what a
19 number of the courts of appeals that have looked at the
20 question have held, and what Congress said in the
21 Appropriations Act is that ATF is barred from even acting
22 upon the application. In other words, it can't either
23 grant or deny the application for relief, and therefore
24 the predicate for judicial review under 925(c) is missing.

25 We're not saying that there is no judicial

1 review at all. The general provisions of the APA remain
2 available and, under 5 U.S.C. 703, the avenue for judicial
3 review, or the form of the judicial review is either the
4 special statutory review procedure, in this case 925(c),
5 or in the absence of that or its inadequacy, then another
6 appropriate form, in other words, the general provisions
7 of the APA.

8 But once again, the power of a court under the
9 general provisions of the APA is simply to review the
10 agency's action and to set it aside if contrary to law,
11 and here the action was not contrary to law, it was
12 compelled by law. The most direct avenue that respondent
13 could have challenged the agency's approach in this case,
14 its failure to act, was under section 706(1), which
15 provides for a court in reviewing agency action to set
16 aside agency action that is -- or excuse me, to compel
17 agency action that is unreasonably delayed or unlawfully
18 withheld; and, again, there was nothing unlawful about
19 ATF's withholding of a decision on respondent's
20 application for relief, because Congress compelled that
21 withholding.

22 QUESTION: Mr. Kneedler, there was an alternate
23 argument that a foreign conviction shouldn't count for
24 this purpose. Has the United States ever taken a position
25 on that?

1 MR. KNEEDLER: Yes. Yes, we have. It is the
2 position of the United States that foreign convictions are
3 covered by the act. Now, that is not before the Court.
4 The -- in fact, below respondent conceded that a foreign
5 conviction is a proper predicate under 922(g)(1), and the
6 Eleventh Circuit expressly declined to reach that
7 question. It wasn't presented in the petition and it's
8 not before this Court.

9 Indeed, the question of whether a foreign
10 conviction would be a proper predicate is something that
11 would be raised under 922(g) in a prosecution. As we
12 point out in our brief, there is a circuit conflict on
13 that question, but that conflict has arisen in cases,
14 criminal prosecutions brought under 922(g), and that would
15 be the proper place to begin to make that claim

16 Neither the general provisions of the APA nor
17 925(c) provides someone who is wondering whether he may or
18 may not be covered by a provision of the Federal criminal
19 laws to bring a declaratory judgment against the United
20 States to determine whether conduct he hopes to engage in
21 would be covered by a particular criminal statute. So
22 even though it -- it isn't before this Court, but we also
23 believe that this would not be the proper avenue in which
24 to raise such a claim in any event.

25 Respondent has argued that what is going on here

1 is an implied repeal of the judicial review provisions or
2 the jurisdiction of the Federal courts to act in a case
3 such as this and, as I've said, there's nothing implied.
4 What Congress did was expressly bar ATF, and it otherwise
5 left the court's authority unaffected. 925(c) remains in
6 effect. It's just that, by virtue of Congress's
7 prohibiting ATF from acting on applications for relief,
8 there is no denial which could be the predicate for review
9 under that, under that special statutory review procedure.

10 QUESTION: Well, do you think that that's 100
11 percent clear? I mean, in Robertson, the amendment of a
12 prior statute was affected not by the simple means of
13 withholding appropriations. I mean, it set forth
14 different language that was going to govern the matter.

15 Here, the only thing that has happened is
16 they're not given any appropriations, and you think it is
17 not a matter -- you think it's entirely clear that when
18 the Secretary receives an application and says, I cannot
19 act on this application because the appropriations rider
20 forbids me, do you think it's entirely clear that that
21 does not amount to a denial of the application?

22 MR. KNEEDLER: I think that's the better reading
23 of the statute.

24 QUESTION: Well, it may be the better one, but
25 is it clear? I mean, the law is that unless you make it

1 quite clear in the appropriations statute that you are
2 intending to amend the prior law, the prior law is not
3 amended.

4 MR. KNEEDLER: Again, the -- our position is not
5 that Congress amended the judicial review provision of
6 925(c). What it did was prohibit ATF from acting.
7 925(c)'s judicial review procedure is still in effect.
8 The question is whether the -- whether Congress's
9 directive to ATF not to even act upon applications for
10 relief constitutes a denial and, as I say, ATF is barred
11 from either granting or denying relief, and I would refer
12 the Court also to the general definition of agency action
13 under the APA, which we cite in our brief. This is 5
14 U. S. C. 551(13). It defines agency action as an agency
15 rule, order, license, sanction, relief, or the equivalent,
16 or the denial thereof, or a failure to act.

17 So under the APA, which is the general statute
18 governing traditional review of agency action, Congress
19 itself has defined a denial of relief as something
20 different from a failure to act, and I think there's every
21 reason to look at 925(c)'s reference to a denial as being
22 consistent, rather than inconsistent with the general
23 definitions that Congress has applied under the APA.

24 I would also add, though, that it doesn't
25 matter, that even if the ATF's decision were viewed as a

1 denial within the meaning of 925(c), the general APA
2 standards for reviewing that denial still apply. As we
3 point out in our brief, this Court's decision in Zurko and
4 the prior decision in the Brotherhood of Locomotive
5 Engineers both make clear that, even where you do have a
6 special statutory review procedure that establishes the
7 form for judicial review, the nature and character, as the
8 Court said in Brotherhood of Locomotive Engineers, of that
9 judicial review is defined by the general provisions of
10 the APA, section 706; and again, under those provisions
11 the court can only set aside agency action that is
12 contrary to law; and again, here, the ATF's action was
13 compelled by law, not contrary to it.

14 So whichever avenue this suit was thought to
15 have been brought under, there was no basis for the
16 district court to grant relief at all, and we also think
17 that that is entirely consistent with the Congress's
18 purposes in enacting the appropriations bar.

19 The legislative history which respondent has
20 produced as an appendix to his brief explains that
21 Congress had become concerned about the inherently
22 subjective nature of the inquiry that ATF was undertaking,
23 and the severe consequences that could result if ATF had
24 made a mistake, and also that Congress believed that the
25 money that was being spent for that purpose, \$4 million a

1 year for 40 positions at ATF, would be better served --

2 QUESTION: Why didn't it just repeal the thing,
3 then, because it didn't have the votes?

4 MR. KNEEDLER: Well, what it decided to do is to
5 proceed on an annual basis. It would -- which means it
6 could be subject to revision each year. It was a
7 practical compromise. The Third Circuit explained in
8 Pontarelli that the same people who were supporting a
9 permanent repeal in 1992 were also the movants for the
10 annual appropriations rider on the theory that it
11 accomplished essentially the same thing on an annual
12 basis.

13 QUESTION: This was in the appropriations law
14 just for the ATF, or for the whole Treasury Department?

15 MR. KNEEDLER: It's in the provision for ATF.

16 QUESTION: Suppose that the Secretary had some
17 other agency -- the Secret Service didn't have much to do
18 that month; could he direct them to process some of these
19 applications?

20 MR. KNEEDLER: I think not, for there is another
21 sentence in the appropriations provision for ATF which
22 says that no money may be spent to transfer functions from
23 ATF to another department or agency, and I think the
24 reference to agency in that provision would probably
25 include other provisions -- or excuse me, other agencies

1 within the Department of the Treasury, and the Secretary
2 of the Treasury personally couldn't be expected to act on
3 applications like this. The Secretary, as this Court
4 pointed out in the Dunne decision, has --

5 QUESTION: Well, would he abuse his discretion
6 if he took that function away from ATF? You say that
7 there's a provision in the statute that he -- that the
8 Secretary himself cannot transfer the function?

9 MR. KNEEDLER: It says, no funds shall be
10 spent -- I believe it says, under this act, to transfer
11 functions to another agency within ATF.

12 QUESTION: Well, how much money does the --
13 would the Secretary spend if he signed an order
14 transferring a function?

15 MR. KNEEDLER: Well, the clear import of what
16 Congress directed is, the function shall not be
17 transferred. That was clearly what Congress was driving
18 at.

19 QUESTION: It wouldn't be a transfer to another
20 agency if the Secretary did it himself.

21 MR. KNEEDLER: Right, but the Secretary -- first
22 of all, as Congress well knew when it passed this
23 appropriations rider, the Secretary has delegated the
24 authority for acting on these applications to ATF. That
25 is the legal framework against which --

1 QUESTION: What he gave he could withdraw.

2 QUESTION: He could revoke.

3 MR. KNEEDLER: Perhaps he -- I mean, he
4 presumably could, but the proper avenue for a respondent
5 to pursue in that situation would be to request ATF -- or
6 excuse me, the Secretary to revoke the regulation that
7 produced the delegation, and then if the Secretary
8 declined to do that, to seek review of that under the APA
9 on an arbitrary and capricious standard.

10 Respondent has not pursued that avenue, and we
11 think it would manifestly not be arbitrary and capricious
12 for the Secretary to withdraw that delegation and take on
13 that function himself with all the other functions that
14 are before the Secretary of the Treasury with respect to
15 the Nation's economy and banking and all those other
16 matters, and in particular it would not be arbitrary and
17 capricious for the Secretary to decline to do that in the
18 face of the appropriations bar that Congress has enacted,
19 with the -- again, with the clear understanding that it
20 didn't want these applications to be acted on
21 administratively, but in any event --

22 QUESTION: Mr. Kneedler --

23 MR. KNEEDLER: I'm sorry.

24 QUESTION: Mr. Kneedler, if we shift the focus
25 from the agency to the court, is it your essential

1 argument that Congress provided for an appellate,
2 essentially an appellate role for the district court and
3 not a first instance role?

4 MR. KNEEDLER: Yes, that --

5 QUESTION: So that the only authority the court
6 would have would be to review a decision made by an
7 executive official, but there is a provision in this law
8 for the district court to take additional evidence.
9 Usually when a court is performing a review function it
10 doesn't take any evidence.

11 MR. KNEEDLER: Excuse me. That's correct, but
12 it would -- but even the admission or acceptance of
13 additional evidence would be in aid of the APA review,
14 which is, again, of the agency's decision. A court
15 receiving evidence is not unheard of under the APA, even
16 under the arbitrary and capricious standard. As this
17 Court pointed out in Overton Park, occasionally there will
18 be situations in which additional evidence or an
19 explanation from the agency could be received in judicial
20 review, but that's only supplemental of the record that
21 was before the agency.

22 QUESTION: Well, but the agency doesn't always
23 have to make a record. I mean, suppose the agency just,
24 you know, just makes a decision. Why can't this Court
25 treat it as a matter of review? That is, the issue before

1 the Court will be whether the action here, assuming it's a
2 denial, was unreasonable?

3 MR. KNEEDLER: The question before the Court
4 would be whether it was arbitrary and capricious or
5 unlawful, and again, it wasn't unlawful because Congress
6 compelled it. Congress compelled the Secretary or ATF not
7 to act on the application. Now, whether or not that's
8 called a denial, the bottom line, the failure to afford
9 any relief, was compelled by Congress, so the agency could
10 not set -- or, excuse me, the court could not set that
11 aside.

12 Looked at another way, the only relevant
13 evidence that would be introduced in court would be
14 evidence of the fact that respondent had applied during a
15 time when the statutory bar on ATF's action was pending.
16 That is the only relevant evidence that --

17 QUESTION: Mr. Kneedler, can I ask you a
18 question? Supposing the Secretary or the head of the ATF,
19 either or both -- say they spent the weekend together
20 sometimes. They read through the papers on their own time
21 on a Sunday afternoon and said, gee, this is a case of
22 rank injustice, I think we're going to grant the petition,
23 and they entered some kind of an order granting it, would
24 that have violated any statutes?

25 MR. KNEEDLER: It would. It would violate this

1 statute. The order, whatever they might have read on
2 their own time the order would be taken in their official
3 capacity, and the -- and --

4 QUESTION: But suppose they drafted it on
5 Saturday and signed it on Saturday?

6 MR. KNEEDLER: It would still be a -- the
7 second --

8 QUESTION: It would be in their official
9 capacities but it wouldn't have cost the Government a
10 dime.

11 QUESTION: Doesn't -- the statute doesn't say,
12 official capacity. It says, expend funds.

13 MR. KNEEDLER: It says expend funds, but it
14 means to act -- but it says, to -- it is directed to the
15 actions of the ATF in its official capacity. Only an
16 official act of ATF could relieve someone from firearms
17 disabilities.

18 QUESTION: I suppose the argument is that the --
19 certainly the Secretary, and perhaps all Federal
20 officials, don't get paid by the hour, they get paid for
21 all the official actions that they take during the year,
22 so that even if they take it on a Saturday they're being
23 compensated for it.

24 MR. KNEEDLER: That's correct, and --

25 QUESTION: Minimally, but compensated.

1 (Laughter.)

2 MR. KNEEDLER: They are paid for the office, not
3 for the work that they are performing, nor could the
4 Secretary direct ATF to grant it, because again he would
5 be directing an unlawful act.

6 If there are no further questions, I'd like to
7 reserve the balance of my time for rebuttal.

8 QUESTION: Very well, Mr. Kneedler.

9 Mr. Goldstein, we'll hear from you.

10 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

11 ON BEHALF OF THE RESPONDENT

12 MR. GOLDSTEIN: Mr. Chief Justice, and may it
13 please the Court:

14 Congress, in section 925(c), provided
15 individuals like Respondent Tommy Bean two rights vis a
16 vis the Secretary of the Treasury of the United States of
17 America. Individuals may apply to, quote, unquote, "the
18 Secretary" for relief from firearms disabilities and, if
19 the Secretary denies that application, they may secure
20 judicial review. The obvious flaw in the Government's
21 position this morning, as several of the later questions
22 identified, is that Congress has never, expressly or
23 impliedly repealed those rights vis a vis the Secretary.
24 The appropriations statutes that are before you address
25 only the Bureau of Alcohol, Tobacco, and Firearms.

1 Congress has set aside a separate and special budget for
2 the Department of the Treasury generally, which is under
3 the control of the Secretary, it's for \$123 million, and
4 the right to proceed before the Secretary is unaffected.

5 QUESTION: Well, now, did your client seek to
6 proceed before the Secretary?

7 MR. GOLDSTEIN: Yes. Page 27 of the joint
8 appendix is the application. It's directed to the
9 Secretary of the Treasury, care of BATF. We went, as the
10 statute directs, to the Secretary of the Treasury. The
11 Secretary of the Treasury told Tommy Bean that he was not
12 going to restore firearms rights.

13 QUESTION: Well, this was not a personal
14 conversation between the two, I take it.

15 (Laughter.)

16 MR. GOLDSTEIN: We don't have his number.
17 That's right. We wrote him a letter, as the statute
18 requires.

19 QUESTION: Well, he didn't say, denied. He
20 said, I'm not going to act upon it.

21 MR. GOLDSTEIN: And that --

22 QUESTION: Whereupon, your remedy under the
23 Administrative Procedure Act would be to sue in district
24 court for agency action unreasonably withheld.

25 MR. GOLDSTEIN: With respect, the premise and

1 the conclusion are not -- of your question are not
2 correct. The ATF on behalf of the Secretary said, I'm not
3 going to grant you this relief. The definition of
4 denial -- the statute does not say, denial on the merits.
5 The definition of denial is a refusal to grant the
6 requested relief. That's --

7 QUESTION: Mr. Goldstein, may I back you up just
8 a bit, because I'm looking at the letter you cited. It is
9 addressed to the Secretary, but it's care of Director of
10 the Bureau of Alcohol, Tobacco and Firearms, and Congress
11 passes all kinds of laws giving the Secretary authority to
12 do this or that, which the Secretary invariably delegates,
13 and I can't think of an instance where a regime of this
14 order is taken over by the Secretary herself, rather than
15 by some delegatee, but this is the kind of thing that's
16 made to order for, not the top person, but for it to be
17 delegated.

18 MR. GOLDSTEIN: Can I address both the question
19 of whether there are other examples of the scheme we've
20 described, which is to say, the agency head does it, and
21 then the question of whether or not, if this were a novel
22 scheme, it would matter?

23 The premise that there aren't parallels for this
24 is not correct. I can give you three examples. The
25 Attorney General is required to personally certify any

1 person who's going to be subject to the Federal death
2 penalty. That's 42 U.S.C. -- 18 U.S.C. 3593. Under the
3 Civil Rights for Institutionalized Persons Act, which is
4 42 U.S.C. 1997(a), the Attorney General is required to
5 personally certify a prosecution, and there are various
6 Federal criminal prosecutions for civil rights violations,
7 which are at 18 U.S.C. 245.

8 QUESTION: How does the statute make it clear
9 that it's a personal obligation or a nondelegable
10 obligation? What are the words that it uses, or that
11 those statutes use?

12 MR. GOLDSTEIN: It's the two in combination.
13 925(c) says the Secretary. 921(a)(17) defines the
14 Secretary to mean that individual or the delegate. Then,
15 what Congress did is, it came along in the appropriations
16 action, act and said, we recognize -- well, I'll give --
17 the literal language is that the ATF may not investigate
18 or act upon --

19 QUESTION: No, no, I'm sorry, my question wasn't
20 clear. I want to go to the examples that you were giving
21 of personal obligation.

22 MR. GOLDSTEIN: I apologize.

23 QUESTION: And you used the adverb,
24 personally --

25 MR. GOLDSTEIN: Yes.

1 QUESTION: -- certify, et cetera. How do they
2 provide for that so-called personal action?

3 MR. GOLDSTEIN: They generally say, the Attorney
4 General shall certify, and the courts have interpreted
5 that -- I believe there is an example that says,
6 personally.

7 QUESTION: Which we don't have here.

8 MR. GOLDSTEIN: We definitely do not have here,
9 but we have the equivalent, and then I'll get to Justice,
10 the underlying question of Justice Ginsburg's, and that
11 is, does it matter if this is done in a different way.

12 We have here the parallel, because what happened
13 is that Congress defined the Secretary to be that
14 individual or the delegate, and in the appropriations laws
15 has told ATF, as the delegate, that they may not act on
16 anything else, and the parallel provision that Mr.
17 Kneedler pointed to, which is that the Secretary may not
18 transfer to any other division or agency.

19 What Congress did not say -- and this is
20 extraordinarily important. It's the key to the entire
21 case. Congress did not say that no funds in this or any
22 other act, or no funds in the subsection dealing with the
23 budget of the Secretary of the Treasury, may be used.
24 Now, it is that --

25 QUESTION: Well, maybe it didn't say that

1 because it thought it was perfectly clear that if it
2 didn't want public money used under -- by the delegate, it
3 presumably wouldn't want public funds used for the same
4 purpose by everybody else, which seems like a fairly
5 reasonable assumption.

6 MR. GOLDSTEIN: Maybe --

7 QUESTION: I mean, why isn't it a reasonable
8 assumption?

9 MR. GOLDSTEIN: It may be, but what --

10 QUESTION: Well, if it is a reasonable
11 assumption, haven't we got to take that into consideration
12 in interpreting the annual bar, and hold against you,
13 otherwise we'll be clearly -- we would clearly be going
14 against the intent of Congress?

15 MR. GOLDSTEIN: No, and that's the underlying
16 point to Justice Ginsburg's questions. This Court --

17 QUESTION: My first question started out, it
18 seems that you in the beginning of this process understood
19 that the Bureau of Alcohol, Tobacco, and Firearms was the
20 relevant actor, because you addressed the Secretary care
21 of that agency, not the Secretary --

22 MR. GOLDSTEIN: And let me explain why. The 27
23 C. F. R. 178144(a), which has never been repealed, required
24 us to send it to ATF. We had no choice. There's a
25 regulation on the books that says we have to submit it to

1 the Director. We didn't have a choice, but to make
2 perfectly clear that it was directed to the Secretary we
3 say, we send it to the Secretary care of ATF.

4 But I need to return to Justice Souter's
5 question, which is, is it good enough in this case, as in
6 many other instances of statutory construction, to say, we
7 get the general sense of what Congress was trying to do?
8 The answer is no. In this area of law uniquely, Congress
9 has to turn square corners. The relevant text of any
10 statute is section 925(c). It's never been repealed. It
11 says --

12 QUESTION: What you're saying is that Congress
13 was just wasting its time here. It was trying to do
14 something. It just didn't accomplish it.

15 MR. GOLDSTEIN: No, Mr. Chief Justice, and let
16 me get to that point, and that is, I agree with you that
17 it would be foolish to say that the appropriations acts
18 are completely ineffective, and if our interpretation were
19 to deprive them of any value, we agree it would be highly
20 questionable. It is not.

21 The scheme that results is clearly one under
22 which the Secretary will grant only those applications
23 where the right to relief is perfectly clear. Where, as
24 in this case, it is --

25 QUESTION: How do you know that? You say the

1 scheme that results, I don't see how you can see that from
2 the enactment in question.

3 MR. GOLDSTEIN: Because, Mr. Chief Justice, what
4 Congress did is, it created a system under which the
5 subdivisions underneath the Secretary may not investigate
6 or act. It's left to the Secretary, and now it is --

7 QUESTION: But the -- that just doesn't fit with
8 the real world. The idea that the Secretary on his way to
9 the International Monetary Fund meeting is going to
10 address an application like this just doesn't make sense.

11 MR. GOLDSTEIN: Mr. Chief Justice, with respect,
12 we -- well, first of all, the text of the statute we think
13 is enough on its face, but on the question of whether or
14 not it makes sense, we think it does, because -- and I
15 will point you to several other examples in Federal
16 firearms law where Congress has adopted categorical rules
17 allowing felons to have their rights restored.

18 We believe this is a safety valve. We're not
19 saying that the Secretary has to grant any particular
20 application. What we're saying is that Congress
21 recognized that there would be extraordinary cases. What
22 Congress was faced with was that ATF had spent \$20 million
23 granting 3,000 applications, and that's what the
24 legislative history shows that Congress was trying to cut
25 off. What we are describing is a very different animal.

1 It is an animal that's in the text of the statute, and
2 that is, the Secretary is still empowered to grant relief.

3 Now, Justice Ginsburg, one of the premises of
4 your question was that there's a delegation here. The
5 delegation here is not exclusive. The delegation here
6 provides that -- and this was in 19 -- when the BATF was
7 created, the Secretary provided that the Director shall
8 act under the general supervision of the Secretary and
9 under -- excuse me, and under the supervision of the
10 Assistant Secretary.

11 The parallel that's drawn by the Solicitor
12 General is to United States v. Nixon and to the Accardi
13 case, and those were exclusive delegations. In United
14 States v. Nixon this Court said -- and this is at page 695
15 of the opinion -- that the special prosecutor had plenary
16 authority, and the regulation provided that the Attorney
17 General shall not interfere with the special prosecutor's
18 decision, and in Accardi, and this is at page 266, the
19 Court said that -- the scheme in Accardi was that the
20 Attorney General would act only after the Bureau of
21 Immigration Affairs, and that clearly contemplated that
22 the AG would stay out of the process.

23 In any event, not only is this not an exclusive
24 delegation, but our fundamental point is that it's an
25 illegal delegation.

1 QUESTION: Mr. Goldstein, I would -- you are
2 concentrating on the agency end of it. Looking at it from
3 the perspective of a court, you seem to be making of the
4 district court an entity that doesn't exist in the U.S.
5 system. You're having the district court in effect being
6 an examining magistrate. There is no adverse party.
7 You're having the district court determine whether there's
8 sufficient evidence to warrant restoring the license.

9 We don't have district judges performing that
10 kind of mixed function, proceeding in that ex parte way.
11 It would be extraordinary for Congress to make such a
12 provision, and yet you want us to infer it.

13 MR. GOLDSTEIN: No, Justice Ginsburg. Here's
14 how it works. The statute contemplates when there's a
15 denial, and we will take up, probably, the question
16 further of whether or not there's a denial here, but to
17 focus only on the judicial review aspect, when there's a
18 denial, you file a petition with the Federal district
19 court.

20 What happens in all the cases would be what
21 happened here, and that is that the district judge orders
22 the United States and the Secretary made the party
23 defendant. They come into the case, and they have the
24 opportunity to put on evidence, to examine the
25 witnesses -- that happened here --

1 QUESTION: But the United States came in and
2 said, we are disabled. Congress doesn't want us to play a
3 part in that. It seems to me then the -- you fight that
4 out, and if the agency isn't disabled, the district court
5 orders the agency to act. But that's not what you asked
6 for. You asked the district court to restore this
7 person's license, and that's the relief you got.

8 MR. GOLDSTEIN: Justice Ginsburg, you are
9 correct what we asked for. You are, with respect, not
10 correct about what the Government said in this case. The
11 Government did not come in and say, our hands are tied.
12 The Government did press its argument that there wasn't
13 jurisdiction, but it absolutely did participate on the
14 factual side of the case. I can give you examples.

15 J. A. 51 is the examination of Tommy Bean, and
16 then the cross-examination by the Assistant United States
17 Attorney. J. A. 55 is the opportunity given to the United
18 States to cross-examine the chief of police. We --

19 QUESTION: Did the United States take the
20 position that this license shouldn't be restored?

21 MR. GOLDSTEIN: No. Precisely the opposite.
22 J. A. 37 is the United --

23 QUESTION: I don't understand how there was an
24 adversary proceeding, then.

25 MR. GOLDSTEIN: What happened is, they came

1 in -- I'm -- I've confused you with the timing. On
2 January 20, 199 -- on 2000, there was a hearing held
3 before the Federal district judge, Judge Fisher. The
4 United States participated.

5 It did not say, we are prohibited from
6 participating. They had been given the opportunity to
7 take witnesses, and let me detour very briefly, and that
8 is to say that while the appropriations statutes prohibit
9 ATF from acting on applications, we are now talking about,
10 as you've pointed us to, the petition, and there is
11 nothing -- and that's the distinction drawn in section
12 925(c). ATF is not disabled from participating in the
13 district court.

14 To return. There was this hearing on January
15 20. The United States was given the opportunity to put on
16 evidence and cross-examine witnesses, as I was just
17 describing. Immediately afterwards, the Respondent Bean
18 submitted proposed findings of fact and conclusions of law
19 after that adversary proceeding. At J. A. --

20 QUESTION: In what sense it was adversary?
21 Usually, if the bureau hadn't been disabled by Congress it
22 would say, deny an application, and then there would be a
23 determination on the merits, but here, apparently there
24 was no position taken on the merits.

25 MR. GOLDSTEIN: I'm almost there. There was.

1 J. A. 37 is the United States' response to our proposed
2 findings of fact, and they conclude at J. A. 37 that our
3 proposed findings of fact are supported by the evidence.
4 Finding of fact 27 is that petitioner -- that -- he -- we
5 were the petitioner there. Petitioner, based on the
6 circumstances of his disability and based on his record
7 and reputation, would not represent a threat to the public
8 safety, and finding of fact 28 that they conceded was that
9 granting petitioner the relief he requested would not be
10 contrary to the public interest. What happened here is
11 that the evidence was so overwhelming. We had six chiefs
12 of --

13 QUESTION: Well, why -- if the United States was
14 a party, as I suppose is the purport of what you're
15 saying, why isn't that a violation of the appropriations
16 rider, so that we must disregard it?

17 MR. GOLDSTEIN: Because, Justice Kennedy,
18 nothing in the appropriations rider prohibits either of
19 the two following things: First, the United States
20 Attorney showing up and representing the United States,
21 relatedly the Secretary of the Treasury showing up; or the
22 ATF participating at the petition stage, as opposed to the
23 application stage.

24 I think it's very important to recognize here
25 that this case has proceeded up until today on the

1 understanding of the parties that the evidence about Mr.
2 Bean's entitlement to relief was overwhelming. Six chiefs
3 of police, a priest, a local --

4 QUESTION: I don't know that that's an argument.
5 I mean, I concede that. I'm still left back at Justice
6 Scalia's question, because I thought in response to his
7 question you -- I had the impression you were suggesting
8 that the Secretary had somewhere written a piece of paper
9 that in effect denied the application, and I looked
10 through this appendix -- I've been doing that and
11 listening at the same time --

12 (Laughter.)

13 QUESTION: -- and I cannot find that letter.

14 MR. GOLDSTEIN: Right.

15 QUESTION: All I find in the appendix is
16 something written by Ms. Pamela Potaczek, who is from the
17 ATF, and what that says is, because of the restriction we
18 are returning Mr. Bean's application for restoration.
19 That's the end of that. He can apply again.

20 Now, is there some other piece of paper?

21 MR. GOLDSTEIN: No.

22 QUESTION: No.

23 MR. GOLDSTEIN: Our position is --

24 QUESTION: Well then, if there is no other piece
25 of paper, what is the response to Justice Scalia's

1 question, which was simply that there has been no denial?
2 They return the application, and if your client felt that
3 they should have acted on it, he should file a request in
4 the district court for -- of course, as soon as you do
5 that, the Secretary will come in and say, of course I
6 didn't act on it. That's what Congress meant. And then
7 the question will be whether that's a reasonable
8 interpretation of this statute, and then, of course, the
9 Government thinks of course it's a reasonable
10 interpretation, and even if it's an incorrect
11 interpretation, at least reasonable.

12 MR. GOLDSTEIN: Right.

13 QUESTION: Now, that's where I am, which is, I
14 think, what Justice Scalia was raising.

15 MR. GOLDSTEIN: Justice Breyer, you have several
16 questions. Let me deal with them in the following terms:
17 was there a denial here, second, does it matter whether
18 there was a denial here, and third, is it sufficient that
19 the Government's position and interpretation is
20 reasonable, as opposed to compelled by the statutory
21 language?

22 The plain meaning of the word denial is a
23 refusal to grant the relief requested. Our position is
24 that when ATF turns around and sends us a letter saying,
25 we're not going to act, that is -- it's not a failure to

1 act, it's a refusal to act. That is a denial, and I can
2 point to their own regulation that means it must be so.

3 Under subsection (i)(1)(3) of the governing
4 regulation, which unfortunately is not reproduced in any
5 of the documents -- we do cite it, I apologize, but it is
6 not quoted in any of the appendices. Under that
7 provision, ATF said that any person who is a firearms
8 licensee -- let me briefly draw the distinction here, and
9 that is, there are people who are allowed to have firearms
10 under State law, but there are federally licensed dealers,
11 importers, collectors.

12 In the latter class, any person who submits an
13 application to ATF is allowed to continue operating for 30
14 days, until 30 days after the denial. If the Government
15 is -- and that's a quote, of the denial of the
16 application.

17 If the Government is correct here, it would make
18 the profoundly -- have the profoundly illogical
19 consequence that no licensed collector has ever been
20 denied, and they all have the right to continue operating.

21 QUESTION: Well, that's true if we assume your
22 first premise, that a failure to act is a denial, and
23 that's the question.

24 MR. GOLDSTEIN: Oh, no, just the reverse,
25 Justice Souter. Let me be clear. The regulation says

1 that you get to keep operating under your license until 30
2 days after the denial. What I'm saying is, if you accept
3 Mr. Kneedler's premise that all these letters that ATF has
4 been sending out are not denials --

5 QUESTION: No, but the -- that provision assumes
6 that there is going to be action upon the request, that
7 the ATF or the Treasury will take it under advisement and
8 in effect say, yes, we'll tell you yes or no when we've
9 had time, and that's not what is happening here, and if
10 that, in fact, is a fair distinction, then the statute
11 you're just referring to doesn't even apply.

12 MR. GOLDSTEIN: Justice Souter, if the
13 Government is correct -- and I won't belabor this point.
14 If the Government is correct that the ATF letters don't
15 count as denials, then every licensed dealer in the United
16 States can continue operating indefinitely.

17 QUESTION: Well, once again, we're just going
18 around in a circle. If we accept your premise, sure. If
19 we don't accept your premise that a refusal to act and, in
20 fact, a very candid refusal to act is tantamount to a
21 denial, then your conclusion doesn't follow and the
22 statute that you refer to doesn't apply.

23 MR. GOLDSTEIN: I'll move on, then. I
24 respectfully disagree, but I -- and I think the language
25 will track in our direction, but let me move on, because

1 Justice Breyer had two subsidiary questions.

2 QUESTION: In respect to that, is there an
3 instance where they sent a letter back to a firearms
4 licensee saying, well, we aren't going to process this
5 because of the statute, and then the firearms licensee
6 said, well, you haven't denied it, I'll stay in business,
7 and then they went to the firearms licensee and said, no,
8 you can't stay in business?

9 MR. GOLDSTEIN: I don't know the answer to that
10 question.

11 QUESTION: All right. Well, if we don't know
12 the answer to that, we don't know, in other words, whether
13 or not this reg does or does not stand in the way.

14 MR. GOLDSTEIN: Well, my impression --

15 QUESTION: So I understand --

16 MR. GOLDSTEIN: My impression is that it's a
17 form letter that goes out to everyone.

18 QUESTION: Uh-huh.

19 MR. GOLDSTEIN: Now, you -- I had promised to
20 come back to the question of whether, in this case, it
21 matters that we didn't get what this Court would conclude
22 to be a technical denial letter, notwithstanding if you
23 accept the rest of our argument that we have the right to
24 compel the Secretary to give us one, So to play this out,
25 our position is that the Secretary had the duty to act.

1 The question back to us is, well, maybe the Secretary
2 didn't act here.

3 My point is, that doesn't matter. The question
4 presented by -- before this Court, if I could take you to
5 it, is that -- is fundamentally, and this is the text of
6 it, whether a Federal district court has the authority to
7 grant relief. The Government has never contended, again,
8 in the district court that there was an insufficient
9 premise for us to be in district court.

10 The question before this Court is whether or not
11 the right -- excuse me, the provision for judicial review
12 in section 925(c) has been repealed, and that takes us
13 back to your third question, Justice Breyer, or third
14 subsidiary one, and that is, is it enough -- and this is
15 Justice Souter's point. Isn't it enough for us to
16 recognize basically what Congress was after here, and I
17 will turn to the answer. It is no.

18 TVA v. Hill, Will, Robertson, many other,
19 Dickerson, of this Court's precedents make perfectly
20 clear, and this was the question that Justice Scalia
21 started out with, that an appropriations repeal has to be
22 categorical. The conflict between the two statutes,
23 section 925(c) and the appropriations law, have to be
24 irreconcilable, and that is not the case here.

25 QUESTION: I don't know that that was the

1 holding of Dickerson. I mean, they went into legislative
2 history -- you couldn't just say it jumped out at you.

3 MR. GOLDSTEIN: Well, Mr. Chief Justice, then I
4 will take you to TVA v. Hill, which does address this
5 issue. The Court has made perfectly clear that the kind
6 of legislative history here is the kind of legislative
7 history that would draw Justice Souter and possibly
8 Justice Breyer to the conclusion that we know basically
9 what Congress was trying to do. Those are Appropriations
10 Committee reports, and this Court could not have been more
11 clear that those are not an accurate indicia of
12 congressional intent. There are --

13 QUESTION: Mr. Goldstein, before we get into
14 legislative history and how it bears on this, I see
15 Congress having established traditional roles where the
16 executive was going to be the investigator, the court was
17 going to be the reviewer. The agency says, we have no
18 authority to act. When a court says, we don't have
19 authority to act, it's not granting or denying the relief
20 requested, so isn't that the proper way to look at what
21 the agency is doing? When it says, we have no authority
22 to act, it isn't granting or denying.

23 And then on the court, the court said, Congress
24 set us up to be a court of review, not first view. The
25 agency hasn't looked at it because it says it has no

1 authority to do it. Congress did not give us the
2 authority, ever, to take a first view of this.

3 MR. GOLDSTEIN: Justice Ginsburg, let me -- can
4 I start at the end of what I think is the consequence of
5 several of these questions, and then come back to the
6 difference between administrative review and judicial
7 review, and whether this would just be unknown to American
8 law?

9 The very best we think that the Government can
10 get out of this argument is a judgment of this Court that
11 says we were entitled to a remand to the Secretary. When
12 we came to Federal district court and asked for relief,
13 the best the Government could do was an order that says,
14 no, you should have acted.

15 What can't be the case, we believe, is that the
16 Secretary would be able to just let these things pile up
17 on his desk and say, I've never denied them, tough.

18 Now, the -- what we take --

19 QUESTION: He didn't deny them. He said the
20 agency has no authority to rule on these applications.

21 MR. GOLDSTEIN: Right, and if we conclude that's
22 not a denial, we can't get into court.

23 The Government's answer, I think, if we move
24 down the road, will be that we should file another
25 lawsuit, an APA lawsuit that says, to compel agency action

1 unreasonably withheld, and if you take that position, if
2 you conclude that this is agency inaction instead of an
3 agency refusal to act, the surreply to that, the answer is
4 that you should treat this as an APA action. The
5 provision that Mr. Kneedler is quoting to you, 5 U.S.C.
6 703, says that the form of an action under the APA shall
7 be the special review provision provided by statute, and
8 that's section 925(c).

9 If we were required to file under the APA we
10 did. That's --

11 QUESTION: The serious underlying question here
12 is, I agree with you that you found a literal way around
13 this, and so you're saying, well, if there's a literal way
14 around it, and you have a statute saying do it, that you
15 ought to do it, whatever the form of the action is to get
16 the case here, and I guess the underlying thing is, well,
17 my goodness, everyone knows what Congress wants here.
18 It's perfectly obvious.

19 And so a Secretary who said, I'm not going to
20 enforce this statute because Congress doesn't want me to
21 even though there's a literal way I could do it without
22 technically violating the actual language of the
23 prohibition, does the Secretary have the right to do that?
24 Well, I would think the answer to that question's yes.

25 MR. GOLDSTEIN: The answer --

1 QUESTION: Because otherwise Congress can't
2 work.

3 MR. GOLDSTEIN: Well, the answer to the question
4 is no, and let me explain why.

5 (Laughter.)

6 MR. GOLDSTEIN: Mr. Kneedler -- thankfully.

7 Mr. Kneedler framed the question as whether or
8 not the Secretary abused his discretion by not withdrawing
9 the delegation, by saying, I knew what Congress was up to,
10 this is my agency, I know how this thing works.

11 The answer is that this is not a question of
12 abuse of discretion. It is a question of a clear
13 statutory command. Section 925(c) says, we can apply to
14 the Secretary, and clearly contemplates that the Secretary
15 will act on these things. It's not an option.

16 QUESTION: Mr. Goldstein, let me just be sure
17 about one thing. Is your submission limited to cases that
18 you think are totally clear on their face, or does it
19 cover cases when there are marginal issues of fact?

20 MR. GOLDSTEIN: The right to apply to the
21 Secretary would remain. We think it's clear that the
22 Secretary, once his obligation to act is recognized, will
23 set up standards. He'll say things like, I'm only going
24 to grant relief if it's an -- the legislative history
25 refers to a technical or unintentional violation where

1 there are sworn statements in front of me that make
2 perfectly clear this person is no threat whatsoever.

3 That will be up to the Secretary. The Secretary
4 will get to decide, and if he's granting too many
5 applications, Congress will come along and say, no funding
6 under this or any other act shall be expended to
7 investigate or act on appropriation, on 925(c)
8 applications.

9 The critical thing, and the -- is that the
10 Government does not dispute that this appropriations rider
11 ever since 1993 is in the subdivision that applies only to
12 ATF. If you want to talk about Congress working, they
13 need clear instructions. We can't have the executive
14 branch out here saying, I don't really like this statute,
15 and so I'm going to infer that it's been repealed, and we
16 can't have the courts doing that, too. It will take no
17 effort whatsoever, if this is what Congress really
18 intends, to strip away the statute and to do it in
19 appropriations law.

20 QUESTION: So I'm still left with -- assuming
21 all that, I'm still left with the problem that you've
22 asked for the court to make the decision rather than
23 asking to have the Secretary make the decision.

24 MR. GOLDSTEIN: Okay. We have a, now, I think,
25 a different question of administrative law, and that is

1 the fundamental principle, in the APA context or a
2 parallel like 925(c), is it only the court that can enter
3 the order saying, you have a right to relief? Or does --
4 where's the proper order, send it to the Secretary and
5 saying, it would be an abuse of discretion, it's
6 absolutely clear under the statute you're entitled to it.

7 Now, the court here did the latter. If this
8 Court decided that was technically incorrect, it could
9 reverse on that ground and say, no, no, no, the correct
10 technical judgment is to put it back in the hands of the
11 Secretary.

12 QUESTION: But you didn't ask for it to be put
13 back in the hands of the Secretary.

14 MR. GOLDSTEIN: And neither did the Government.

15 QUESTION: You're saying that the court had an
16 obligation to give you something you didn't even ask for?

17 MR. GOLDSTEIN: Mr. Justice Scalia, they gave us
18 what we asked for. I apologize for that. If --

19 QUESTION: That was the wrong thing.

20 MR. GOLDSTEIN: If they should have --

21 (Laughter.)

22 MR. GOLDSTEIN: If they should have done
23 something else, then this Court can tell it so, but we --
24 I don't think it's fair to hold us to the position that
25 the Government did not object, that only the Secretary --

1 in this case, when you go through the district court
2 record, that the only proper remedy is an order to the
3 Secretary to grant us relief, as opposed to granting us
4 relief personally. Remember, as I quoted to you from the
5 findings of fact, the Government left the playing field
6 here. It admitted that with all of the evidence we had,
7 no one could reasonably dispute that Tommy Bean was
8 perfectly entitled and represented no threat. The only
9 question -- they participated on the fact side of the
10 case. Their only argument that they attempted to advance
11 was that the district court was powerless to do anything
12 at all.

13 With respect, we did what we were supposed to do
14 to get relief here, and if the Court decides that it only
15 should have gone to the Secretary, that's a minor change
16 in the judgment.

17 QUESTION: I still think participation by ATF in
18 the judicial proceeding is within 925(c), and Congress was
19 forbidden that, too.

20 MR. GOLDSTEIN: Justice Kennedy, let me be clear
21 on what money was spent, because there were technical
22 questions about this. The United States Attorney's Office
23 participated here, not --

24 QUESTION: There was an ATF agent who testified,
25 and that's within 925 -- the purview of 925(c), and

1 Congress says you can't do that.

2 MR. GOLDSTEIN: With respect, there was one
3 agent who was one witness. The appropriations statute
4 says you may not investigate, which was not what he was
5 doing, and you may not act upon, which was not what he was
6 doing, upon applications, which this was not. It was a
7 petition under section 925(c). There was no prohibition,
8 and the ATF agent did not object that I'm not allowed to
9 be there. We did -- we put the witnesses on that we were
10 supposed to.

11 QUESTION: Can I ask, under your view of things
12 can the Secretary use assistance, or would that constitute
13 a delegation?

14 MR. GOLDSTEIN: He can. What he can do is, he
15 can take and is required to take up into his own hands, as
16 the three examples I gave to Justice Ginsburg, the
17 responsibility. He can detail. He has a budget of \$123
18 million, \$141,000, and he can take them up into his hands
19 and say, look, I've got these sworn statements, and he
20 could require, I want 10 sworn statements. He could
21 require, I want 20, and he can have someone confirm that
22 that's the right person. But what we do think, and this
23 goes back to the Chief Justice's question, is that we do
24 not think that Congress contemplated that the Secretary
25 would spend \$20 million granting 3,000 applications. If

1 he decided --

2 QUESTION: Thank you, Mr. Goldstein.

3 MR. GOLDSTEIN: Thank you, Mr. Chief Justice.

4 QUESTION: Mr. Kneedler, you have 10 minutes
5 remaining.

6 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

7 ON BEHALF OF THE PETITIONERS

8 MR. KNEEDLER: Mr. Chief Justice, the argument
9 that the Secretary could have granted relief was never
10 raised below in this case. It was not raised in the court
11 of appeals, it wasn't raised in the brief in opp, it was
12 raised for the first time in respondent's brief, and again
13 if -- we think the proper avenue for that would be a suit
14 to the -- suing the Secretary under the APA or --

15 QUESTION: No, but his point, and actually
16 although he raised it late, is certainly a factor. That
17 seems to me the most powerful argument, that there's no
18 point sending it back to the Secretary, really, even
19 though that's the correct procedural route, if the
20 Secretary under the law has no choice, and what he's
21 saying is, the Secretary under the law has no choice, and
22 the reason is because literally this appropriations
23 measure doesn't cover the Secretary's action.

24 And given the absence of that, the Secretary's
25 under a statute that tells him, act, and moreover, he

1 adds, this is a very bad way to repeal a statute, that
2 really under normal legislative principles if they want to
3 repeal it, repeal it; and therefore it isn't wrong for us
4 to consider this literally in this circumstance. So that,
5 I think, is -- that's an argument that's worth hearing
6 what the reply is.

7 MR. KNEEDLER: Well, I -- first of all, I think
8 it is wrong. It would be a different disposition of the
9 judgment, but with respect --

10 QUESTION: Well, maybe we'd reach a different --

11 MR. KNEEDLER: Right.

12 QUESTION: The disposition would be one thing --

13 MR. KNEEDLER: Right.

14 QUESTION: -- but he's saying, that's really
15 what the heart of this is about.

16 MR. KNEEDLER: There's -- first of all, let me
17 make another point which I think goes very much to the
18 Secretary's authority. We point out on page 4 and 5 of
19 our reply brief general principles of appropriations law
20 that are really a particular application of the general
21 principle that the specific governs the general, and under
22 appropriations law, when Congress appropriates a pot of
23 money for a particular task, that's all that can be spent
24 for that task. Money can't be drawn from some other pot
25 to perform that task.

1 We think that principle should apply a fortiori,
2 or at least it's a reasonable interpretation for the
3 Secretary to make, that when Congress has prohibited the
4 expenditure of any funds by the agency to whom the
5 Secretary has delegated that authority, that Congress did
6 not expect money to be drawn from some other pot. That is
7 a general principle of appropriations law. At the very
8 least, the Secretary should be given the opportunity --

9 QUESTION: What is the authority for saying
10 that's a general principle of appropriations law?

11 MR. KNEEDLER: There are a number of Comptroller
12 General opinions that we cite at the bottom of page 4 of
13 our reply brief, and it's against principles like that
14 that agencies always act in deciding how they're going to
15 spend money. But if this argument was going to be made,
16 the right disposition would be to present it to the
17 Secretary, so the Secretary can construe this statute,
18 just like all the other statutes that need to be
19 administered, and the way to do that --

20 QUESTION: It's one thing to say that when
21 Congress says we give \$500,000 to subunit B to perform
22 this function, you cannot use \$2 million from somewhere
23 else to perform the same function. That's one thing.
24 It's something quite different, however, to say that when
25 you have forbidden one unit from doing something, and

1 there is a general statute which allows the Secretary to
2 do it, that that prohibition also applies to the
3 Secretary. I just don't think it's parallel.

4 MR. KNEEDLER: Well, at the very least it would
5 not be arbitrary and capricious for the Secretary to
6 decline to withdraw the delegation. That, we think, is
7 the question that would arise in that situation, because
8 the Secretary now may not act on these applications.
9 He -- the ATF acts under the general direction of the
10 Secretary, but if the Secretary directed ATF to grant one
11 of these applications, he would be directing an illegal
12 act. He would have to withdraw the delegation. He hasn't
13 been asked by respondent to do that, which would require a
14 petition for rulemaking.

15 The Secretary, in deciding whether to take this
16 power back to himself, could at the very least take into
17 account what Congress has said about not wanting these
18 applications to be acted upon by ATF, and also the reasons
19 the Congress gave, which is that this is a very subjective
20 undertaking, with high risk, and Congress decided, we
21 don't want this function being performed because of the
22 potential consequences. We want this money to be used for
23 other purposes in fighting crime. All of that would make
24 it entirely reasonable for the Secretary not to take on
25 this function himself.

1 The other important point to notice is that --

2 QUESTION: Well, he has a statutory obligation
3 to perform the function --

4 MR. KNEEDLER: I was just going to --

5 QUESTION: -- which has not been canceled by the
6 appropriations law.

7 MR. KNEEDLER: He does not -- nothing in the
8 statute says that the Secretary must act on applications.
9 It says the Secretary may grant relief. It does not
10 require him to grant relief, and the Secretary could very
11 easily withhold action, which is, after all, what Congress
12 required ATF to do.

13 QUESTION: What, on the ground that it's like
14 the pardon power, it's like a matter of grace, or
15 something like that?

16 MR. KNEEDLER: Yes, very much so. It's -- it's,
17 or, as the Court said four or five terms ago in the Yang
18 case that we cite in our brief with respect to relief from
19 deportation, it is exactly like the pardon power, and it's
20 written in very broad terms. It establishes several
21 preconditions, whether the person would be dangerous to
22 the public safety, and whether granting it would not be
23 contrary to the public interest, and even then the
24 Secretary is not required to grant relief.

25 This is a very broad discretionary power, and I

1 think it ties into what Justice Ginsburg was asking
2 earlier, wouldn't this be an extraordinary power to give
3 to the Federal district courts. Indeed it would, because
4 the question is not just whether the person might be
5 dangerous, but whether granting relief would be contrary
6 to the public interest. That's not the sort of
7 determination a court can make in the first instance.
8 It's something that Congress has assigned to the
9 Secretary.

10 In this case, even if respondent is correct that
11 he wouldn't be dangerous, it doesn't follow that
12 restoration of firearms abilities would be consistent with
13 the public interest. That's a judgment that Congress
14 invested in the Secretary, not in the courts, and as
15 Justice Kennedy pointed out, ATF could not investigate an
16 application for relief in connection with a judicial
17 proceeding any more than it could in an administrative
18 proceeding.

19 The ATF agent who testified in this case was one
20 of respondent's witnesses. He was not called by the
21 Government.

22 QUESTION: Is testifying investigation?

23 MR. KNEEDLER: Pardon me?

24 QUESTION: Is testifying investigation?

25 MR. KNEEDLER: Well, that would be -- we did not

1 object, the Government did not object in the district
2 court to his testifying. He was just testifying as to
3 what he had looked up in the records, but an investigation
4 involves far more than that.

5 In fact, the AUSA in this case cross-examined
6 Mr. Bean and a couple of other witnesses, but that's far
7 short of the investigation that Congress expected ATF to
8 undertake when it was performing these functions, and that
9 it did undertake, which involved an investigation of the
10 crime, neighbors, not just the people whom respondent has
11 put forward, but ATF would go out and develop its own
12 independent leads. None of that capability exists when
13 the Government is responding to an application filed in
14 court.

15 So for these reasons we think it is --

16 QUESTION: Mr. Kneedler --

17 MR. KNEEDLER: Yes.

18 QUESTION: -- if you've had a chance to complete
19 your rebuttal, I had one question. Do you think the
20 Secretary's authority under the statute is broad enough
21 so, even without any act of Congress or anything in the
22 appropriation, the Secretary could have adopted a policy,
23 we would rather use our money on other purposes and so
24 we're not going to process any applications?

25 MR. KNEEDLER: I do believe it's -- it is broad

1 enough. I think the Secretary -- all it says is, the
2 Secretary may grant relief. I think the Secretary could
3 decide, and in fact the regulations, 144(d) has some
4 categorical exclusions that the Secretary had adopted but
5 the district court in this case ignored. Even -- we think
6 the court couldn't act at all, but it even ignored the
7 standards that the Secretary had adopted in the public
8 interest to implement what would be a public interest
9 standard under the statute. The district court ignored
10 them, so we think that the Secretary could make a
11 categorical determination not to grant relief.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
13 Kneedler. The case is submitted.

14 (Whereupon, at 11:02 a.m., the case in the
15 above-entitled matter was submitted.)

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