

Supreme Court of the United States

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FILED

DEC 16 1968

JOHN F. DAVIS, CLERK

OCTOBER TERM, 1968

In the Matter of:

Docket No. 366

----- X
UNITED STATES OF AMERICA, :
Appellant, :
VS., :
HENRY PRESTON COVINGTON, :
Appellee :
----- X

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Place Washington, D. C.

Date December 12, 1968

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Philip A. Lacovara, Esq., on
behalf of Appellant

William J. Davis, Esq., on
behalf of Appellee

Robert J. Haft, Esq., on
behalf of Appellee

REBUTTAL OF:

Philip A. Lacovara, Esq.

P A G E

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 -----X
4 UNITED STATES OF AMERICA, :

5 Appellant, :

6 vs. :

No. 366

7 HENRY PRESTON COVINGTON, :

8 Apellee. :

9 -----X
10 Washington, D. C.

11 Thursday, December 12, 1968

12 The above-entitled matter came on for argument at
13 10:30 a.m.

14 BEFORE:

15 EARL WARREN, Chief Justice
16 HUGO L. BLACK, Associate Justice
17 WILLIAM O. DOUGLAS, Associate Justice
18 JOHN M. HARLAN, Associate Justice
19 WILLIAM J. BRENNAN, JR., Associate Justice
20 POTTER STEWART, Associate Justice
21 BYRON R. WHITE, Associate Justice
22 ABE FORTAS, Associate Justice
23 THURGOOD MARSHALL, Associate Justice

24 APPEARANCES:

25 PHILIP A. LACOVARA, Esq.
Assistant to the Solicitor General
Department of Justice
Counsel for appellant

WILLIAM J. DAVIS, Esq., and
ROBERT J. HAFT, Esq.
855 East Long Street
Columbus, Ohio
Counsel for appellee

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

2 MR. CHIEF JUSTICE WARREN: Now 366, United States of
3 America, appellant, versus Henry Preston Covington.

4 THE CLERK: Counsel are present.

5 MR. CHIEF JUSTICE WARREN: Mr. Martin.

6 MR. MARTIN: Mr. Chief Justice, may it please the
7 court, I would like to move the admission for the presentation
8 of this case, Mr. Philip A. Lacovara, from the office of the
9 staff of the Solicitor General and member of the bar of the
10 State of New York.

11 MR. CHIEF JUSTICE WARREN: The motion is granted.

12 Mr. Lacovara.

13 ORAL ARGUMENT OF PHILIP A. LACOVARA, ESQ.,

14 ON BEHALF OF APPELLANT

15 MR. LACOVARA: Mr. Chief Justice, and may it please
16 the Court before I begin the statement of the Covington case,
17 which is now being considered, I would like to clear up a
18 misapprehension which may be left with the Court.

19 The tax imposed on the transfer of marihuana to a
20 non-registrant is \$100 per ounce or fraction thereof. So
21 while it is possible, according to the Bureau of Narcotics
22 Statistics, to obtain between 85 and 100 cigarettes from each
23 ounce of marihuana, the transfer of even a cigarette which
24 would have perhaps one hundredth of an ounce would still be
25 subject to a \$100 tax, because any transfer of marihuana, no

1 matter how slight, if to a non-registrant is subject to the
2 \$100 tax.

3 MR. CHIEF JUSTICE WARREN: Is there anything in the
4 record to indicate how much the Government did obtain in taxes
5 from this law?

6 MR. LACOVARA: Yes. That is a matter of public
7 record. In the fiscal year 1967, that would be July 1, 1966,
8 through June 30, 1967, \$177,000 was collected under the
9 Marihuana Tax Act for calendar year 1967. The figure is about
10 \$270,000.

11 Q That is the hundred dollar and one dollar?

12 A This is all revenue collected under the tax. It
13 includes the special occupation tax and transfer taxes in the
14 amounts of one dollar and \$100.

15 Q Doesn't the Government content that the \$100
16 has never been collected?

17 A Absolutely not.

18 Q You mean that if I want to transfer marihuana
19 illegally, illegally under state law, that is, that I would
20 pay the \$100 tax to the Government?

21 A If you are not eligible to comply with state
22 law, you cannot register with the Director of Internal
23 Revenue under the Marihuana Tax Act.

24 It is our contention if you are not eligible for
25 Federal registration, you cannot prepay the tax or obtain

1 Federal order forms.

2 Q When do you pay the tax? After conviction?

3 A Not always after conviction. After the illegal
4 transfer has taken place.

5 Q Then the Government will accept the \$100?

6 A The tax is levied by an assessment.

7 Q You mean levied by assessment?

8 A In a civil suit, yes.

9 Q So there is liability for the \$100 tax?

10 A There absolutely is.

11 Q If a person is delinquent, is there a penalty
12 involved?

13 A I am not sure whether the 50-percent surcharge---

14 Q There is interest, anyway?

15 A Yes, there would be 6-percent interest.

16 Q How do you really distinguish this from Grosso,
17 the payment of the tax itself?

18 A I think there is a very critical distinction.
19 In Grosso the individual was required to come forward and pay
20 the tax on his own initiative. If he failed to do so, he was
21 subject to criminal prosecution.

22 Q You needn't pay the tax yourself, but we can
23 collect it from you?

24 A If the Government bears the burden of proof,
25 there is nothing.

1 Q There is no pressure on the person. It is just
2 if he doesn't pay the tax, he doesn't break the law. But if
3 the---

4 A There is no additional criminal violation.
5 Mr. Justice, there is no additional criminal violation in not
6 paying the tax after the transaction has occurred.

7 Q That is not the point. The point is that
8 paying the tax and liabilities for the tax indicates he has
9 already broken the law. He gets an order form. He has
10 illegally transferred marihuana.

11 A Yes, and the Government is not punishing him
12 for failure to waive the Fifth Amendment right. The Government
13 is saying that we have information you illegally obtained
14 marihuana.

15 In practical effect we suggest that there really is
16 no Fifth Amendment difference in this situation. The penalty
17 that is being imposed in the civil assessment is something that
18 the court expressly in Grosso and Marchetti and Haynes said
19 was allowable. The court expressly said the tax is not
20 invalid in these situations and the Government can take steps
21 to collect it.

22 Q The only thing that the Government may not do
23 is prosecute the man criminally for not having come forward
24 to pay the tax. This act is different from the Firearms and
25 the Wagering Tax Act.

1 Q Don't you think the Government would get some
2 clue that I transferred narcotics illegally if I have to come
3 forward and pay a tax?

4 A I don't.

5 Q Because the only reason I have to pay \$100 is
6 that I transferred it illegally.

7 A You obtained it illegally. What we are saying
8 is---

9 Q And it may be the first thing that the Government
10 heard of it, that I transferred it illegally, if I come for-
11 ward and pay the tax.

12 A Mr. Justice, I have to reiterate that the way
13 the statute was drafted and the way it has been interpreted
14 under the regulations for the past 30 years, an illegal
15 acquisition, a person acquires marihuana illegally, that is,
16 in most situations, someone who is not a non-registrant is not
17 expected to come forward and pay the tax.

18 Q He is expected to pay it---

19 A If the Government brings suit against him and
20 a judgment is rendered establishing his civil liability, then
21 the tax is collected as any assessment is. But it was never
22 contemplated by Congress, and the administrative agencies have
23 never expected it.

24 Q On the face of the law is there some criminal
25 liability for not paying the tax?

1 A Yes.

2 What we contend the statute says and what it means
3 is that any transfer, any receipt of marihuana by an individual
4 who cannot obtain Federal authority for it is a criminal
5 offense because the tax is set up in a way to make it a crime
6 for a person in the course of a taxable transaction to obtain
7 marihuana without the authority to obtain it.

8 Q There is nothing in the tax law that prohibits
9 it. You are saying on the one hand the tax law is sort of a
10 joke. On the other hand you are saying that a man who
11 violates it commits a criminal offence. Is there anything
12 else other than the violation of the tax law that is involved
13 here?

14 If we say this tax law doesn't exist, if we look at
15 it as if it didn't exist or didn't mean what it says, wasn't
16 counsel in the preceding case correct, that what you are
17 really doing is asking us to write a criminal statute?

18 A No. Congress wrote the criminal statute. We
19 have cited in our brief, both briefs, the clear legislative
20 history indicating that Congress did intend to achieve an
21 absolute prohibition upon any transfers of marihuana kept in
22 what this court in Sanchez called "legitimate medicinal
23 scientific and industrial channels," because there had been
24 four dissents in Doremus and three dissents in Nigro about the
25 ability of Congress to enact complete prohibition by illicit

1 transfer without using the tax power. I think it is important
2 to note there is no transfer tax under the Harrison Act and
3 that is why the dissents in those two cases said there is no
4 legitimate relation between an attempt to distinguish lawful
5 from unlawful transactions.

6 Q We are not talking about the Harrison law in
7 this case, and it is different.

8 A That is right. That is why Congress is
9 demonstrably trying to achieve the same result making it a
10 crime to transfer marihuana.

11 Q Why didn't they just do it like the Harrison
12 Act?

13 A Because of doubts about the constitutional
14 power.

15 Q Aren't there the same doubts in here about the
16 Harrison law?

17 A No, sir. In this situation Congress imposed
18 taxes on the transfer of marihuana. There were no taxes on
19 the transfer of narcotics. There still are not.

20 Q Is this a tax or fine?

21 A I would call it a prohibitory tax as the
22 constitutional doctrine has developed on that. It is a tax
23 which is designed to end a certain sort of conduct like the
24 selling of state bank notes or the sale of yellow
25 oleomargarine.

1 Q It would have the same effect as a fine.

2 A Not a fine. It is a deterrent rather than a
3 fine, principally.

4 Q Aren't fines for the purpose of deterrence?

5 A Well, all criminal statutes we can say are both
6 deterrent and punitive.

7 Q This never comes up until after you have
8 violated. Then they file a civil suit to collect the fine.

9 A No, to collect the tax.

10 It is a civil suit rather than a forfeiture
11 proceeding in form. When we say it comes up only after you
12 have violated the law, we are talking only about transfers
13 that by definition are illegal. The tax is due and payable and
14 is paid at the time of the transfer or at the time of acquiring
15 order forms for lawful transactions.

16 I think that we should not lose sight of the fact,
17 either, that the regulations which the court has frequently
18 held, especially when dating from the time of enactment and
19 when promulgated by the agencies which are to give life to a
20 statute as in this case, have from within two months after
21 the passage of the Marihuana Act clearly indicated this is
22 exactly what Congress was intending. The regulations that were
23 promulgated on this point under the Marihuana Tax Act are
24 identical to the regulations under the Harrison Act. They
25 provide that only people who are lawfully registered can

1 obtain the order forms for the lawful acquisition of
2 marihuana.

3 Under the Marihuana Act that is the time that the
4 tax is to be paid by those who are lawfully entitled to
5 obtain marihuana.

6 Counsel in the previous case suggested that this
7 was an ingenious and novel construction that the Government
8 invented only after Grosso and Marchetti and Haynes suggested
9 there were constitutional difficulties with this statute.
10 These regulations date from 1937, long before there was any
11 suggestion that statutes, which operated even differently as
12 the wagering and firearms statutes, did involve Fifth Amendment
13 problems. This is by no means a novel inventive rejoinder to
14 resent constitutional development.

15 The administrative agencies had ample foundation in
16 the legislative record, including statement on the floor of
17 the Congress and in the committee reports, that this bill is
18 designed to stamp out illicit marihuana transfers. Yet it is
19 designed to prevent marihuana from coming into the hands of
20 those who would use it for smoking or for addiction.

21 With this type of legislative background the
22 Secretary of the Treasury promulgated regulations to effectuate
23 that objective so that the only transfers of marihuana that
24 can be made are transfers that are lawful or to lawful
25 registrants who are complying with state law. These are the

1 only people who are expected to register. They are the only
2 people who are allowed to register. They are the only people
3 who file information returns. They are the only people whose
4 names are listed in forms that will be made available to state
5 and local investigating services.

6 People who would be in violation of state law if they
7 handled marihuana are not allowed to get Federal sanction for
8 the transfer of marihuana. They are not expected to register.
9 This act as to that class of people stands as an absolute
10 prohibition.

11 That is what Congress understood, That is what the
12 regulations make clear. The standard for whether the
13 privilege against self-incrimination prevents prosecution for
14 violation of a statute focuses on whether compliance with the
15 statute would have presented real and substantial rather than
16 imaginary hazards of incrimination.

17 Q If that were so, then you would have to defend
18 this statute, would you not, on some constitutional power of
19 Congress other than the taxing power?

20 A No, sir.

21 Q In other words, what you are saying is that this
22 taxing statute here is not in reality a tax statute. It is a
23 prohibitory state, but that we should regard the taxing power
24 as a constitutional basis for the Congressional prohibition.

25 A No, sir. Let me say that this case follows

1 a fortiori from the case that this court has already decided,
2 in Doremus, Wong Sing. This court upheld as a legitimate
3 exercise of the tax power the absolute ban provided in the
4 Harrison Act for transfers to non-registrants, even though
5 there is no tax even on the transfer of narcotics under the
6 Harrison Act.

7 They said it was enough to say that these prohibi-
8 tions were designed to keep the transfers aboveboard where the
9 commodity tax was subject to collection.

10 Q A little while ago you told us that Congress
11 didn't follow the Harrison Act model here in order to avoid
12 the frightful prospect presented by the fact that there were
13 dissents in Doremus.

14 A To make it clearer that this was a legitimate
15 exercise of the tax power they imposed the transfer tax.
16 The legislative history is clear on this. This is why they
17 thought there would be absolutely no constitutional problem
18 under the tax power because these transactions are subject to
19 the taxing power. They are subject to a tax.

20 It was thought obvious that Congress in its exercise
21 of the tax power can legitimately distinguish between types of
22 taxable transactions and make determinations as to how the
23 transactions must be carried on, if at all.

24 But I would like to say that, as the legislative
25 history does relate in the House committee report, this

1 naturally being a revenue bill originated in the House, it
2 was expressly stated that insofar as the tax power might be
3 argued not to support a complete prohibition such as was
4 being enacted, the report states it is clear that the
5 commerce power and the other powers of Congress, for instance,
6 power over the District of Columbia and the territories, would
7 also support this.

8 I might point out that we have today even a further
9 support for a complete prohibition such as this. I think it is
10 standard constitutional doctrine that even if Congress
11 misapprehends the power that it is relying on, the statute is
12 not ultra vires, if there is some constitutional support, even
13 if it is not the clause that Congress relied on to sustain the
14 statute, the U. S. is now a party to an international
15 convention in force with some 67 other states, nation states,
16 which expressly obliges the United States to impose maximum
17 controls on heroin, opium and marihuana.

18 We think that the interplay of all these
19 constitutional clauses is more than adequate authority to
20 sustain the absolute prohibition on illicit transfers that
21 Congress has enacted and the administrators have implemented.

22 There was also a claim made that this is a novel
23 contention because it is inconsistent with what the Government
24 has advised the Court or Congress in the past. The petitioner
25 in the Leary case cited our Sanchez brief, which was the case

1 in which the court sustained the constitutionality of the
2 \$100-per-ounce transfer tax in a civil assessment proceeding.
3 Nothing we said in Sanchez is in any way inconsistent with
4 what we say here.

5 The two sentences quoted in the reply brief by
6 petitioner in Leary are in the course of a discussion in which
7 we said Congress went beyond what it had done in the Harrison
8 Act. In the Harrison Act it simply enacted a direct prohibi-
9 tion unrelated to the tax power. In this act, the Marihuana
10 Act, we said in Sanchez, and the court ultimately agreed, it
11 was constitutional to do it this way. Congress didn't fashion
12 a direct prohibition without doing more. It went beyond this.

13 In addition to achieving that same effect, it also
14 provided that there would be revenue raised through the course
15 of transferring marihuana. For that reason, as I suggested
16 before, the controls that were imposed on the transfer of
17 marihuana were thought to be valid a fortiori from those that
18 had been sustained, albeit by divided courts in Doremus,
19 Alston, Webb, Song Sing, and Nigro.

20 The same thing is true with respect to the memo-
21 randum by the Treasury relating to the Guam Organic Act. I
22 think that is quoted in the amicus brief filed on behalf of the
23 American Civil Liberties Union. That memorandum reflects that
24 the Marihuana Tax Act is not a complete prohibition on the
25 transfer of marihuana, as it is not because there are still

1 lawful uses for marihuana at least in the United States. It is
2 still possible to deal in marihuana lawfully.

3 The Treasury memorandum said there are no lawful
4 uses for marihuana in Guam. There is no research being
5 conducted. It is not grown for hemp purposes. Rather than
6 preserve the possibility for some legitimate dealings in
7 marihuana in Guam, where it is necessary we will substitute for
8 it a direct categorical prohibition, so that no one in Guam
9 can lawfully deal in marihuana.

10 In the U. S. that is not true. There are 90 Federal
11 registrants, who, having complied with state requirements for
12 handling marihuana, are eligible to register under the Federal
13 act and can lawfully transfer marihuana upon payment of the
14 one-dollar-an-ounce transfer tax.

15 The essence of all this is that as the act was
16 drafted with the clear objective of stamping out the transfer
17 to illegitimate addicts and as the administrative agencies
18 have consistently administered the act, there is no real
19 problem of incrimination because those whose obtaining of
20 marihuana would violate state law are not expected to come
21 forward to register. They are not allowed to register. They
22 are not expected to come forward to obtain order forms or to
23 prepay the tax. They will not be allowed to do this because
24 Congress was not, unlike the Firearms Case and unlike the
25 Wagering Case, Congress was not willing to provide Federal

1 sactions for this type of conduct with the intent of exposing
2 it to prosecution under state law.

3 The Federal and state provisions in this area are in
4 complete tandem. Only lawful dealers under state law can
5 comply with the Federal act. Anyone who can't comply with state
6 law cannot comply with the Federal act.

7 So we have Federal enforcement power to reinforce as
8 a matter of Federal law the ban on the transfer of marihuana
9 for smoking or addiction. We suggest this is radically
10 different from the Wagering and the Firearms Cases and that the
11 reason that people don't comply with this statute is not that
12 there is any fear of incrimination. It is because they are not
13 eligible to comply because there is a prohibitive tax that is
14 imposed and a tax which Congress did not contemplate could be
15 paid before the transaction took place.

16 I would like to save any remaining time for rebuttal.

17 MR. CHIEF JUSTICE WARREN: Mr. Davis.

18 ORAL ARGUMENT OF WILLIAM J. DAVIS, ESQ.,

19 ON BEHALF OF APPELLEE

20 MR. DAVIS: Mr. Chief Justice and Honorable Members
21 of the Court, I have not been admitted to the Supreme Court
22 Bar, and I would request that I be admitted for the purpose of
23 this suit, since I have been appointed by the Court to
24 represent the indigent. I hope to perfect my membership
25 later.

1 MR. CHIEF JUSTICE WARREN: You may proceed with the
2 argument in this case, Mr. Davis.

3 MR. DAVIS: Thank you.

4 First, I want to apologize to the Clerk's Office
5 and the Court for any problems arising in my presentation of
6 this case, probably because I was notified in October of 1968.
7 I was at that time notified that because the Leary case was
8 coming up at the same time, it was desirable that this case be
9 argued at the same time. And I was asked if I could meet the
10 deadlines.

11 I was reluctant to try to meet the deadlines because
12 I am somewhat of an anachronism. I run a one-man law office.
13 I however realized the importance of this case, and I almost
14 took on more than I could chew.

15 We did manage to get in a brief, and it is a brief
16 brief. I do not apologize for the brevity of the brief, but I
17 do apologize for the small print. Just like my Texas colleague
18 yesterday, I would like to say the brief only cost \$1.10 a
19 copy, so we did save some money, but it might have to be used
20 for a microscope in order to read the print, it is so small.

21 It is my hope that I can amend for this in my oral
22 presentation of this case.

23 Now, the Covington Case, which is before you,
24 delineates very sharply the question of the tax because, as the
25 Government admits, and I was, of course, counsel below, as the

1 Government admits we interposed our objection to the statute
2 in a timely manner.

3 My client was indicted on or about September 1967 or
4 sometime thereafter. The indictment reads as follows:

5 "U. S. of America versus Henry Preston Covington.

6 That on or about August 11, 1967, within the Eastern
7 District of the Southern District of Ohio, Henry Preston
8 Covinton, being a transferee of marihuana required to pay the
9 tax imposed by Title 26, U. S. Code, Section 4741(A), did
10 acquire and obtain approximately 737.1 grams of marihuana
11 without having paid such tax in violation of 26 U. S. Code
12 47444(A)(1)."

13 To this indictment I interposed a motion to dismiss
14 the indictment on the grounds that the statute would compel
15 the defendant to incriminate himself. This was not accidental
16 that we raised this. We had been following the Costello Case
17 and the Gambling Case in the advance sheets, and we were wait-
18 ing for the decisions to be reached.

19 Fortunately for us, the decisions were reached before
20 we had to answer the indictment.

21 When the cases came out, Haynes, Marchetti, and
22 Grosso, in the same volume of the law decisions, we relied on
23 these cases to meet this.

24 So to answer Mr. Justice Stewart's question of
25 yesterday as to the time of the case, our case did come after

1 Haynes, Marchetti, and Grosso. So there would be no problem
2 of retroactivity if the court desired to follow its decisions
3 in those cases.

4 Of course, one of the things that impelled us to make
5 the objection to the statute, and I think one of the things
6 that influenced the Federal Judge, Judge Joseph P. Coneri, in
7 sustaining our motion was the dissent of the Chief Justice in
8 the Grosso case, in which he said that:

9 "... is opening a door to a new wave of a tax on a
10 number of Federal registration statutes wherever the registra-
11 tion requirement touches upon allegedly illegal activity."

12 Of course, 4722, those engaged in dealing with
13 narcotics; 4753, those who deal in marihuana, were included in
14 the Chief Justice's enumeration of the statutes which might be
15 affected by this decision. We realize, of course, that the
16 Chief Justice was concerned about the effect that these
17 decisions had on the power to tax. We, of course, share that
18 concern.

19 However, there is no question about it. These
20 decisions did open the door. We are trying to get in it.

21 Might I say that insofar as civil liability is
22 concerned, and I may say this in reference to the questions that
23 have been asked by Mr. Justice Fortas and Mr. Justice White,
24 this law is no joke to my client. My client was served a
25 notice by a narcotics agent, and the notice was directed to

1 him, to Henry Preston Covington, and it says -- this is from
2 a narcotics agent, Jack L. Lloyd, in Ohio, in Case No. Ohio
3 782, which is either his narcotics case file number or the
4 Internal Revenue file number:

5 "It has been reported to the undersigned officially
6 that on or about the 11th day of August 1967 in Columbus, Ohio,
7 in the Eastern Division, Southern District of Ohio, you were
8 found with a quantity of marihuana in your possession and under
9 your control. Accordingly and in pursuance of the provisions
10 of Section 4744 of the Internal Revenue Code of 1954, I hereby
11 demand that within eight days from the service hereupon you,
12 you produce at my office in room 1045 in the Federal Office
13 Building, Cleveland, Ohio, a copy of the official order
14 form" -- that is in caps -- "required by Section 4742 of the
15 Internal Revenue Code of 1954 to be retained by you under and
16 by virtue of which said marihuana was transferred to and
17 acquired by you.

18 "You are further notified that your failure to comply
19 herewith within the period specified will render you liable for
20 the transfer taxes imposed by Section 4741 of the Internal
21 Revenue Code of 1954 and will establish presumptively that you
22 acquired and obtained said marihuana unlawfully without having
23 paid such taxes."

24 So, contrary to the Government's argument that this
25 is a lot of malarkey, these people are following this statute.

1 It is a tax statute, and they observing it as such.

2 Q Mr. Davis, is what you have just read to us in
3 the record before us?

4 A No, sir. I referred to it in my brief brief,
5 but I don't believe I attached a copy of this. I might have
6 attached a copy in the record.

7 Q You are reading from an official notice?

8 A Yes, sir.

9 Q Is a copy of that available?

10 A I will leave the original. It appears to be a
11 copy of an original. I can leave it with the Court. I think
12 perhaps since the Government's argument is taking the turn that
13 it is, that this should be a part of the record if it is not
14 already. I refer to it in my brief. I did not realize we
15 would get into the argument of civil liability.

16 MR. CHIEF JUSTICE WARREN: You may leave it with the
17 Clerk, if you please, and if counsel has a response to it, you
18 may make it.

19 A Thank you, sir.

20 In addition, my client has been served with a Form 17
21 from the Internal Revenue Office at Cincinnati, Ohio, dated
22 October 11, 1967, notifying him that he has been taxed for
23 Marihuana, that the assessment is \$2,900 and there is \$2.75
24 special tax, and there is 28 cents interest, and the total tax
25 due is \$2,903.03. So this is no joke to my client.

1 MR. CHIEF JUSTICE WARREN: Is that in the record?

2 A No, sir, that is not in the record at all. I
3 didn't even mention it in the record.

4 Q What is in the record? It is rather difficult
5 to take account of things not in the record. What is in the
6 record?

7 A Just the fact that this order was served on him,
8 the order from the Internal Revenue, from the narcotics agent,
9 notifying him that he should comply with the statute.

10 Q It might be possible to take judicial knowledge
11 of it.

12 A Yes, this is an official notice.

13 MR. CHIEF JUSTICE WARREN: Did the Government argue
14 below the same point of civil liability that it argued before
15 this court?

16 A The case below was decided on memorandums. I do
17 not recall the civil liability being raised in the
18 memorandum. The memorandum below of the Government was
19 primarily on the question of the administrative construction of
20 this act to the effect that no person who was illegally
21 engaged in the transfer of marihuana could obtain an order
22 form, but there was no question of civil liability.

23 In addition, my client's car was impounded, a 1965
24 Buick, so it is very real. This matter is very real to him.
25 Of course, the impounding of the car was done under the

1 statute. So it is very real to him.

2 Now we feel, therefore, that we are strictly follow-
3 ing judicial precedent, and we feel the lower court, District
4 Court, took a forthright stand. We feel that Haynes, Grosso,
5 and Marchetti required the striking down of this statute such
6 as this, which construes it is a Federal crime upon failure to
7 make a compelled disclosure of activity clearly criminal, even
8 though it is in a tax oriented statute.

9 We note that the Haynes, Grosso, and Marchetti
10 decisions merely extended the Albertson decision, which struck
11 down a registration-oriented criminal statute whose true
12 purpose was directed to a selected group inherently suspect of
13 criminal activity.

14 Our case came after the Haynes, Grosso, and Marchetti
15 cases. I might also indicate one of the statements that was
16 made by our Federal Judge below. After the Judge had struck
17 down the statute and construed this statute to be unconsti-
18 tional as applied to this defendant, Covington, the Government
19 again asked for reconsideration.

20 On reconsideration it emphasizes the argument that
21 this man couldn't obtain the narcotics and, therefore, the tax
22 doesn't apply to him.

23 The court below made an alternative ruling. In
24 addition to ruling that the statute compelled self-incrimination,
25 the court answered the Government's argument in the following

1 manner, and he said:

2 "The memorandum filed in support of this motion
3 submits that a person who is a transferee of marihuana in
4 violation of state laws will not be issued an order form for
5 marihuana. It is asserted this rids the statute of any trace
6 of unconstitutionality. This court did not decide that the
7 marihuana tax provisions are in themselves constitutional. It
8 merely determined that as applied to this defendant they would
9 be unconstitutional.

10 "If the defendant had no obligation to pay the tax
11 and obtain an order form, the United States has no basis on
12 which to seek an indictment. The court does not agree that
13 Section 4744 of the statute under which this defendant was
14 indicted is now an absolute prohibition. Section 4744 is
15 based explicitly on Section 4741(A). If 4741(A) is not
16 applicable to the defendant, then there is no basis for the
17 indictment.

18 "Therefore, in any event, the indictment should be
19 dismissed."

20 We feel this is a commendable construction of the
21 answer to the Government's argument, and we feel that it is too
22 late now for laws to be changed by administrative fiat.
23 Normally, the administrator is trying to read more things into
24 the law. Here in this case the Government is trying to read
25 something out of the law.

1 This law says all persons. We feel, therefore, that
2 this law compels incrimination insofar as Covington was
3 concerned and that as to him it was an unconstitutional attempt
4 to compel him to incriminate himself.

5 Thank you. I will defer -- I think I have some time
6 left -- to my colleague, Mr. Haft.

7 MR. CHIEF JUSTICE WARREN: Mr. Haft.

8 ORAL ARGUMENT OF ROBERT J. HAFT, ESQ.,

9 ON BEHALF OF APPELLEE

10 MR. HAFT: Thank you, Mr. Chief Justice.

11 May it please the Court, counsel for the Government
12 has relied upon the regulations as something that is in support
13 of the consistent administrative construction since 1937 that
14 the Government does not accept the \$100 tax. Now the regula-
15 tions are part of the Government's brief in the Leary matter,
16 and I believe in Covington as well, start on page 58.

17 These regulations state, starting with the first one,
18 the tax applies to every transfer. That has been in the
19 regulations since 1937. "The amount of tax, whether transferred
20 to a taxable person who is duly registered to pay the special
21 tax, the transfer tax, is at a rate of a dollar per ounce or
22 fraction thereof. If the transfer is to be to a person not
23 registered and payment of the special tax under this act, tax
24 at the rate of \$100 per ounce or fraction thereof is due."

25 That has been in the regulations since 1937.

1 On page 59 of the Government's Appendix -- this is 59
2 of their brief -- again the regulations it states:

3 "On the order form the application shall show the
4 transferee's name, address, and, if registered, the
5 registration number."

6 So the order form regulations since 1937 have contem-
7 plated a non-registrant applying for an order form.

8 Now, what is there in the regulations that the
9 Government does rely on? They rely on signature and comparison
10 regulations. The only thing in either the statute or the
11 legislative history or anyplace that says anything about regis-
12 tration is tied in with the order form.

13 Now, in the signature and comparison regulations it
14 does state that the Internal Revenue District is to take an
15 application for an order form and compare the signature on that
16 application with the list of registrant signatures which are on
17 file, that is, those that have paid their occupational tax.
18 That is all the Government can hang their hat on. I think
19 that it is easily explained, that is, if you want to come in
20 with an application for an order form and pay a dollar-an-
21 ounce tax, the way that all you have to pay is a dollar an
22 ounce is by signing and showing that you are a registrant, to
23 wit, comparing it to your signature on file. And that is
24 consistent, those regulations with the dollar-an-ounce tax
25 claim.

1 If the comparison does not show up in the Internal
2 Revenue District, you have to pay the \$100-an-ounce tax. That
3 is all there is in this so-called 1937 to date, consistent
4 construction by the Government -- and plenty against it.

5 In connection with this rather subtle point that you
6 can't prepay the tax and that all that an unlawful possessor
7 can do is postpay the tax and go to jail, that is really what
8 the Government is saying. The statutes themselves expressly
9 provide to the contrary.

10 The 4741 which imposes the tax in subdivison "B" and
11 "A" imposes the rate of one dollar and \$100 and, (B), by whom
12 paid, such tax, now without any distinction between a dollar and
13 a hundred, such tax shall be paid by the transferee at the time
14 of securing each order form and shall be in addition to the
15 price of the form.

16 It is very clear that tax payment, both the dollar
17 and hundred, is contemplated at the time you go to the Secretary
18 of the Treasury and get your order form. The order form
19 again -- it sometimes pays to look at the plain statute and
20 what it says in light of the sophisticated argument -- the
21 order form requirement, 4742, says it shall be unlawful for any
22 person, whether or not required to pay a special tax and to
23 register, to transfer marihuana, and the \$100 tax is upon each
24 transfer to any person who has not paid the special tax and
25 registered, is all embracing. The statute says it is to be

1 paid at the time you get your order form.

2 The order form speaks prospectively. In subsection
3 (C) of the order form requirement, 4742, it talks about the
4 name and address of the proposed vendor and the proposed
5 vendee, so that you are supposed to legitimize your transaction
6 beforehand by apying your tax and securing your order form.
7 This is on the face of the statute. The regulations reiterate
8 this position.

9 The crime, it is interesting, is in 4744 and it says
10 it is unlawful for any person who is a transferee required to
11 pay the transfer tax imposed by 4741 to acquire marihuana
12 without having paid such tax.

13 Again, it is very clear that the tax is to be paid
14 prior to the transaction and as expressly contemplated by the
15 statute.

16 I thank the Court.

17 MR. CHIEF JUSTICE WARREN: Mr. Lacovara.
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1 REBUTTAL ORAL ARGUMENT OF PHILIP A. LACOVARA, ESQ.,

2 ON BEHALF OF APPELLANT

3 MR. LACOVARA: Mr. Chief Justice, in answer to the
4 question that you asked Mr. Davis, the Government did argue and
5 assert that illicit transfers of marihuana are taxable
6 cially.

7 On page 17 of the buff-colored appendix, where a
8 motion for reconsideration in the District Court is set forth,
9 footnote 3 says, after saying it is impossible to pre-pay the
10 tax and to obtain an order form, if the prospective transferee
11 is a non-registrant, of course, the Government is not fore-
12 closed from collecting the \$100 tax after it has been estab-
13 lished that a transfer was made to an unregistered person.

14 Q How did the tax to the rater dizzy heights that
15 are given to us by counsel, something like \$2,900---

16 A There are 737 grams, which is approximately
17 29 ounces of marihuana. I am not sure what the \$2.75---

18 Q There was only 28 cents interest.

19 A That is because it was just a matter of days. I
20 think the indictment says the transaction took place on
21 August 11 and the indictment was returned in November. So it
22 is a matter of a few days.

23 Q Mr. Lacovara, do you have any objection to the
24 two documents that counsel pointed out to us?

25 A As far as I know, your Honor, I do not. I

1 believe the demand form he is referring to is the standard
2 demand for production which triggers the penalty provisions of
3 Section 4744. It is provided for in the statute.

4 Q Then you may provide both of them to the Court,
5 Mr. Davis.

6 A I think it is important to contend that the
7 regulations and the statute themselves belie the Government's
8 contention. Counsel for Mr. Leary has just said that the
9 only thing we have is the statement in the regulations that the
10 signatures on the application for registration and signature on
11 the application for order forms will be compared, but that is
12 only designed to make sure that people aren't evading the
13 \$100 tax and trying to bring themselves under the one-dollar-
14 per-ounce tax.

15 I think if the Court looks to the regulation, it will
16 see that it is much more expressed. Regulation 26(C) of
17 R. 152.68, which is set forth on page 60 of the Leary brief,
18 after saying that upon receipt of the application for an order
19 from the District Director will compare it with the signature
20 appearing on the application for registration, it then says:

21 "Unless the District Director is satisfied that the
22 application is authentic, it will not be honored."

23 Now, we can see no other reasonable construction of
24 this regulation, that the signature is the authentic signature
25 of a resitrant. The application for an order form will not be

1 honored unless it has been submitted by someone who is duly
2 registered. Counsel also points to the provision dealing with
3 the application for order forms. He, I think, misspoke
4 inadvertently when he said the order form is to contain the
5 name of the transferee, if registered. It is the application
6 for the order form. This is 26(C) of R. 152.66.

7 Q Can somebody come in and pay the \$100 tax and
8 file for a permit with the assurance that the information would
9 not be used either to institute a criminal investigation or as
10 evidence in a criminal prosecution?

11 A No, he cannot come in and pay the \$100 transfer
12 tax at all. The District Director would be behaving in
13 contravention of the Treasury regulations if he accepted the
14 tax and issued the order forms. The regulations expressly for-
15 bid him to issue that.

16 Q Apart from that, somebody could issue a permit
17 upon payment of \$100 tax in the proper case?

18 A No, sir. It is our contention that order forms
19 are not available to any non-registrant. Only non-registrants
20 are subject to the \$100 tax. So in operation since 1937 no one
21 has pre-paid and no one can pre-pay the \$100 tax.

22 Q So the money which has been collected on the
23 \$100 tax has been collected in the absence of the issues of
24 an order form?

25 A That is right, after the illicit transfer has

1 taken place.

2 Q What you are asking us to do is to go along with
3 this, what shall I call it -- well, I won't -- go along with
4 this strange statutory scheme that you say should be read as
5 saying "Thou shalt not."

6 A That is essentially our argument. We say it
7 has been interpreted that way for years. It also has the
8 incidental value of avoiding not insubstantial constitutional
9 doubts. Normally, the court will interpret statutes to avoid
10 constitutional doubts. The novel doctrine---

11 Q It is difficult to think of something where the
12 Court has departed quite as far as you are suggesting from the
13 language of the statute.

14 A We are dealing in a novel area, Mr. Justice.

15 In Marchetti and Grosso we talked about substantial
16 hazards of incrimination. We say under this statute there are
17 no substantial hazards of incrimination. Whether the
18 regulations are ultra vires -- we contend they are not, but even
19 if they are, for 30 years there has been no substantial hazard
20 of incrimination because no one is expected to come forward and
21 make a disclosure which could be incriminatory.

22 Q What if the defendant, who has been refused an
23 order form, sues the Government for an injunction?

24 A I think that would raise the question whether the
25 regulations are ultra vires, but no one has ever done that.

1 Q How would the question be answered, though?

2 A We would be prepared----

3 Q How is it possible to refuse somebody an order
4 from who comes in and says: "I want the order form. I want
5 to transfer the narcotics, The agent says I can get it."

6 A Our contention is that the act does not say that.

7 Q You mean the fellow may not waive his privilege
8 against self-incrimination?

9 A That is right. Congress has provided a direct
10 prohibition upon his acquisition of marihuana. A man can't
11 commit murder by coming into the Government saying: "I am going
12 to tell you about it, but I want to commit murder."

13 Congress has outlawed the acquisition of marihuana,
14 and even if the individual wanted to come forward and waive this
15 privilege, Congress has said he is just not eligible to engage
16 in marihuana transactions without more.

17 MR. CHIEF JUSTICE WARREN: Very well.

18 Is there any further, Mr. Davis?

19 MR. DAVIS: No, your Honor.

20 MR. CHIEF JUSTICE WARREN: Mr. Davis, you were
21 appointed by this court to represent this indigent defendant. :
22 want you to know that the Court appreciates your willingness to
23 do this. We know that it is a hardship on the many lawyers to
24 do it. When they undertake the assignment, we feel that they
25 are performing a real public service, as we believe you have in

1 this case. So we express our appreciation to you.

2 Mr. Lacovara, of course, we also appreciate the
3 diligent manner in which you have represented the Government in
4 this matter.

5 (Whereupon, 11:25 a.m. the argument was concluded.)
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