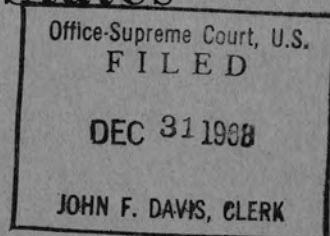


(1-4-69)

Supreme Court of the United States

OCTOBER TERM, 1968



In the Matter of:

TIMOTHY F. LEARY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

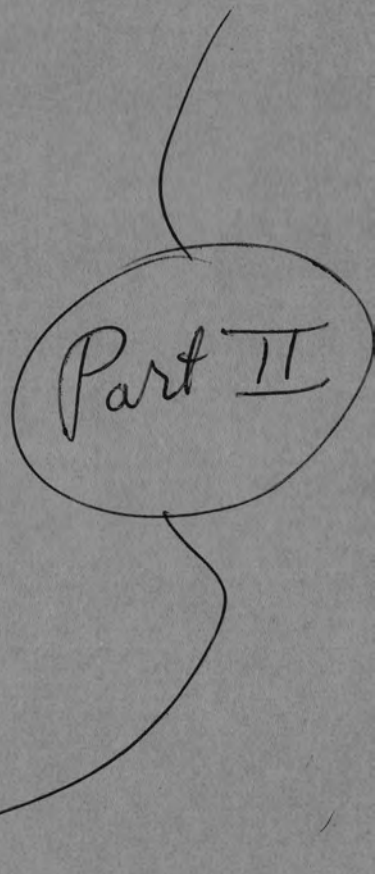
Respondent

Docket No. 65

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Place Washington, D. C.

Date December 12, 1968



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1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM, 1968

3 ----- X
4 TIMOTHY F. LEARY,

5 Petitioner,

6 vs.

No. 65

7 UNITED STATES OF AMERICA,

8 Respondent.
9 ----- X

10 Washington, D. C.

11 Thursday, December 12, 1968

12 The above-entitled matter came on for argument at

13 10:15 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:

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BOOK

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 65, Timothy F. Leary,
petitioner, versus The United States.

Mr. Martin, you may proceed with your argument.

ORAL ARGUMENT OF JOHN S. MARTIN, JR.

ON BEHALF OF THE RESPONDENT

MR. MARTIN: Mr. Chief Justice and may it please the
Court, I would like this morning to turn and address myself to
petitioner's contention that his conviction on the charge of trans-
porting and concealing marijuana on which the tax hasn't been paid
in violation of Section 4752 of Title XXVI is unconstitutional
because the conviction on that account violated his privilege
against self-incrimination.

To a certain extent the claim raised here is identical
to that presented in the case to follow, United States versus
Covington. There is a significant difference, however, because
in this case we do have a factual record against which petition-
er's assertion of this claim can be judged.

I would like to turn to that record, if I might. Prior
to trial petitioner's counsel moved for a continuance to allow
him to prepare his defenses. In the motion for continuance peti-
tioner's counsel stated -- this appears at page 34 of the record
and I am quoting: "Defenses will be raised which will show that
this defendant is an authority on psychedelic drugs which this
defendant maintains includes marijuana, and that he should have

1 the right of experimentation with such drug, including marijuana
2 and that although there are provisions in the law which would
3 seem to allow a person to experiment with marijuana, such provi-
4 sions are in actuality nonexistent because it is not possible to
5 obtain an order form and legally pay the tax on marijuana and
6 any uses without such order form is held to be illegal."

7 Similarly at the close of the case in arguing for a
8 judgment ---

9 Q Mr. Martin, that is not in the printed appendix?

10 A It is not in the printed appendix. It is in the record
11 before the Court.

12 At the close of the case petitioner moved for judgment
13 of acquittal. At that time his counsel stated, and this is at
14 page 493 of the record: "Under the tax count doctors or scien-
15 tists working in a laboratory can obtain marijuana, but not
16 those who are using it for religious beliefs."

17 Again at the close after the verdict had come in and the
18 motion for new trial was filed, counsel argued that -- this is
19 the written motion for new trial submitted after the judgment,
20 it appears at page 649 of the record -- "The Court erred in deny-
21 ing the defendant's motion for a judgment of acquittal on counts
22 2 and 3 of the indictment for the reason that the evidence demon-
23 strated the defendant transported marijuana in pursuit of his
24 free exercise of religion, in pursuit of experimentation out of
25 the lab, and in pursuit of his right to bring up his family in

1 accord with his honest belief."

2 Since the \$100 an ounce tax is a prohibitive tax, con-
3 viction on count 3 as well as 2 violates the First and Fifth
4 Amendments of the Constitution of America. It is the Government's
5 position in this case that petitioner from the outset recognized
6 that his failure to comply with the Marijuana Tax Act was not
7 the result of any fear that he would tend to incriminate himself,
8 but rather on his recognition that the act acted, as to him, as
9 a total bar on his right to possess marijuana.

10 We submit that the petitioner incorrectly construed the
11 act, that it is our contention that the Marijuana Tax Act, as
12 construed and applied, does not compel self-incrimination because
13 it prohibits those who could not legally deal in marijuana from
14 handling marijuana.

15 Q Do we test a man's Fifth Amendment rights by what hap-
16 pens at preliminaries in the proceeding or by what happens at the
17 trial?

18 A I think, Mr. Chief Justice, what we have to do is to
19 examine the validity of the claim. I think it has to be examined
20 against a factual basis of what he believed, as counsel mentioned
21 yesterday. Petitioner testified at the trial he knew he could
22 not obtain marijuana under the act. So you have that also.

23 It is our position that the Tax Act in question was
24 designed by Congress to prohibit, and that is clearly stated in
25 each of the reports accompanying the legislation, that the bill

1 was designed to prohibit those who could not legally handle mari-
2 juana from doing so. Congress did this by imposing a prohibitive
3 tax.

4 Q Perhaps unfortunately Congress did not set the statute
5 up that way. They set it up as if it were serious and as if a
6 person who wanted the product for certain uses could get a permit
7 and pay a hundred dollar tax. You are asking us to say that Con-
8 gress is just fooling and what this really is, is a statute that
9 prohibits the use of marijuana except for the dollar an ounce
10 purposes.

11 A I think, Mr. Justice, what we are asking the Court to
12 do is to look at the statute in terms of the realities. I think
13 if you look at the record before Congress, which included testi-
14 mony from Mr. Hester, who has been referred to previously, and
15 others, that the time this tax was enacted, marijuana was selling
16 in the illicit market at \$1 an ounce. Congress imposed a \$100 an
17 ounce tax, clearly prohibitive.

18 Q Do you use this as a distinction between Marchetti and
19 Grosso?

20 A Yes, we do.

21 Q In other words, you say because the tax here is such a
22 great amount on the \$100 uses that we ought to look at it as if
23 Congress instead of going through the ritual of the taxing
24 machinery, prohibited the transfer, possession or transportation
25 of marijuana except for the dollar an ounce purposes?

1 A That is correct. That is the way the act ---

2 Q And that so construed, you say, that this is different
3 from Marchetti and Grosso, because in Marchetti and Grosso any-
4 body could apply and there was no distinction in the amount of
5 the tax?

6 A That's right. I think it is important to note also,
7 Mr. Justice Fortas, that what you have here, what you didn't have
8 in Grosso and Marchetti, is an industry in which marijuana had
9 illegitimate and illegal uses. Congress is attempting to dis-
10 tinguish those.

11 Q Doesn't that cut against your point?

12 A No, it doesn't.

13 Q Marchetti and Grosso, the entire industry so-called
14 was an illegitimate one?

15 A That is correct.

16 Q So it would have been prohibitive. What they wanted to
17 do in Marchetti and Grosso was to prohibit everybody from using,
18 possessing or transferring or whatever it was, that kind of fire-
19 arm. Here they wanted to prohibit only some.

20 A In Marchetti and Grosso particularly ---

21 Q I beg your pardon. I was talking about Haynes.

22 A In Haynes there was a \$200 tax. In Haynes we were deal-
23 ing with only one particular requirement of the act which clearly
24 required people to register if they had a firearm of the type
25 described in that statute. Here, however, I think it is important

1 to note that all the disclosure requirements are directed basi-
2 cally at the legal industry, the legal marijuana industry, so
3 that legal use of marijuana would be made public and that the
4 law enforcement officials could see that the legal marijuana was
5 not diverted into illegal channels.

6 Q Is there any reason why Congress did not enact a pro-
7 hibitory statute other than tradition and bureaucratic claims on
8 this particular activity?

9 A I think the only reason they didn't enact a totally
10 prohibitory statute insofar as the illegal transaction was con-
11 cerned -- there was a legal market, so they could not totally
12 prohibit it -- insofar as the illegal market is concerned, the
13 reason they chose to use the prohibitive tax form was because at
14 the time Congress was concerned with the five-four decision of
15 this case and the six-three decision in Nigro-Doremus.

16 They were afraid unless the prohibitive section was
17 put in terms of a prohibitive tax, there might be some constitu-
18 tional problems with that.

19 Q Also they were acting, they thought, under their power
20 to tax, under their taxing power?

21 A That is correct.

22 Q That is the power under which the earlier narcotics
23 legislation, Federal legislation, had been upheld. So they were
24 not purporting to prohibit anything. They were purporting simply
25 to be exercising their power to tax. Isn't that right?

1 A They did, Mr. Justice, in the Harrison Act, which pro-
2 hibited all but legitimate forms of dealing in narcotics involved
3 there. I think there was some concern because of the close deci-
4 sion of this Court in those cases that the fact that there was
5 a general prohibition not formed in terms of the tax created some
6 problems.

7 Q You are asking us to construe this, to look at this as
8 if it were something that Congress avoided. You say Congress
9 avoided it because of constitutional doubts as well as because
10 Treasury's claim as of that time for this highly prized jurisdic-
11 tion, I suppose premised upon its exercise of its taxing power?

12 A I think what we are asking the Court to do is to look
13 at the reality of the situation, to look at the fact that since
14 this act was enacted providing this \$100 tax on one ounce of
15 marijuana, that was selling in the illicit market for a dollar,
16 no person has ever applied to pay for this tax, that the effect
17 of it was to make it a prohibitive tax. Therefore, this Court
18 taught in Gross and Marchetti that the fact of the Fifth Amend-
19 ment has to be real.

20 We submit here the Court has to look at the whole statu-
21 tory scheme in this framework. I think from that examination it
22 appears here the claim of the Fifth Amendment privilege is not
23 real and substantial, but is rather a fanciful and imaginary
24 claim which the petitioner came up with after the fact in an
25 attempt to excuse his clear violation of Federal law.

1 It is for that reason that we feel the contention of
2 the Fifth Amendment privilege here should be rejected by this
3 Court.

4 Q Mr. Martin, if this man had not taken the stand, would
5 your argument be the same concerning those excerpts from the
6 record you just read us?

7 A I think it would be the same except that we would not
8 have his testimony. I think we do have a lawyer's construction
9 of the act. Counsel yesterday said that the Government's con-
10 struction here was an imaginative one and suggested it was some-
11 thing novel.

12 Here is a lawyer looking at the act and construes it
13 in the same way we did before the issue was ever raised. I think
14 it is somewhat persuasive from that standpoint. I think, too,
15 it goes to the reality of the situation, the fact that this act,
16 everybody recognized, prohibits people, who could not handle
17 marijuana legally, from doing so, that the practical effect of
18 it is the total bar and for that reason the claim of Fifth Amend-
19 ment privilege is really a fanciful one, which we submit was
20 constructed after the fact and not the true motivating reason
21 that the petitioner did not attempt to comply with the act.

22 MR. CHIEF JUSTICE WARREN: Mr. Haft.

23 REBUTTAL ARGUMENT OF ROBERT J. HAFT

24 ON BEHALF OF PETITIONER

25 MR. HAFT: Mr. Chief Justice, may it please the Court.

1 I think that persons have not sought to apply for writ-
2 ten order forms or to pay the tax because the statute is so
3 blatantly self-incriminatory that it would only be a mad man who
4 would come to the Government and seek to fill out this order
5 form.

6 I read during the course of my argument the testimony
7 of petitioner during the trial, at pages 86, 87 and 89, where
8 he specifically said that he feared incrimination. In part of
9 the motion which the Government has read, I think that they have
10 left out the very point that was raised on page 651 of the tran-
11 script:

12 "The court erred in not dismissing or granting a judg-
13 ment of acquittal as to the tax count because such tax requirement
14 violates the Fifth Amendment privilege against self-incrimination."

15 It was raised at the District Court level. The peti-
16 tioner specifically testified as to his very real fear of incrimi-
17 nation in the portions I read yesterday.

18 Q I beg your pardon. How many cigarettes, or whatever
19 they are called, of marijuana would be made out of an ounce?

20 A I don't know, Mr. Justice Fortas. The figure that I
21 used yesterday was one pound yields 1700 cigarettes. So that is
22 roughly a hundred cigarettes an ounce.

23 Q That would mean the tax is just a cent on a cigarette?

24 A Yes. That is the legal tax. It would be a dollar on
25 the hundred dollars an ounce.

1 I think what the Government is, in essence, asking here
2 is because Congress perhaps having doubts about the constitution-
3 ality of an outright prohibition and because they wrote an
4 express tax measure rather than a prohibitory measure, if this
5 Court feels that a prohibitory measure is constitutional, this
6 Court ought to go ahead and rewrite the legislation. That is
7 completely the wrong position.

8 Going back to the presumption point of yesterday, in
9 answer to Mr. Justice Stewart's question as to the other adequate
10 evidence of guilt which there clearly was, I pointed out that
11 under the Court's decision in United States against Romano my
12 position would be sustained.

13 In addition, I would like to point out to the Court
14 that on pages 102 to 104 of the record in the charge to the jury,
15 the District Judge in practical effect limited the entire case
16 to the trip from New York to Texas on the admission of acquisi-
17 tion by the defendant plus the statutory presumption and left
18 little of the case on the return back.

19 I think the charge is very clear, points almost exclu-
20 sively to that one theory. In the last minute I would like to
21 make application, Mr. Chief Justice, and may it please the Court
22 the next case, the Covington Case, raises just the tax issue.

23 We do feel, and the Government does not object if the
24 Court pleases, we do feel that the bulk of the argument on the
25 taxing statute will come during the Covington argument. Counsel

1 for Covington is agreeable to permitting counsel for Leary to
2 have some part of his time in arguing the further parts of the
3 Marijuana Tax Act.

4 If it would please the Court, we would like to split
5 the argument to some extent on the Covington Case.

6 MR. CHIEF JUSTICE WARREN: You may share his time if
7 he is willing.

8 MR. HAFT: Thank you.

9 (Whereupon, at 10:30 a.m. the oral argument was con-
10 cluded.)