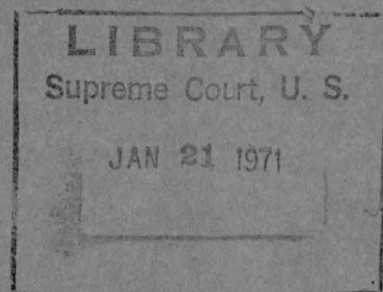


Supreme Court of the United States

OCTOBER TERM 1970



In the Matter of:

Docket No. 345

-----X
THE UNITED STATES,

Appellant,

vs,

DONALD FREED AND SHIRLEY
JEAN SUTHERLAND,

Appellees.
-----X

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Date January 11, 1971

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C O N T E N T S

ARGUMENT OF:

P A G E

Matthew J. Zinn, Esq., on behalf of Appellants.

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Luke Mc Kissack, Esq., on behalf of Appelles.

19

Matthew J. Zinn, Esq., on behalf of Petitioners.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

UTHE UNITED STATES,

Appellant

vs

No. 345

DONALD FREED AND SHIRLEY
JEAN SUTHERLAND,

Appellees

The above-entitled matter came on for argument at
11:10 o'clock a.m., on Monday, January 11, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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Office of the Solicitor General
Department of Justice
Washington, D. C.
On behalf of Appellant

LUKE MC KISSACK, ESQ.
Suite 521
6430 Sunset Boulevard
Hollywood, California
On behalf of Appellees

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in Number 345, the United States against Freed and Sutherland. Mr. Zinn, you may proceed.

ORAL ARGUMENT BY MATTHEW J. ZINN, ESQ.

ON BEHALF OF APPELLANTS

MR. ZINN: Mr. Chief Justice and may it please the Court:

This case is here on the Government's direct appeal from a decision of the District Court for the Central District of California, dismissing a two-count indictment against Appellees, the first for conspiracy to possess and the second for the completed substantive act of possession of unregistered hand grenades, in violation of 26 USC, Sec. 5861(d).

That provision, which appears on page 4 of our brief, makes it unlawful for any person, and I quote: "to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Records.

Q Does this involve only hand grenades?

A That's correct, Mr. Justice Harlan; only hand grenades, and I guess I ought to point out now, although I was going to do so later, that the provisions that we are concerned with here do not apply to all firearms, but generally to sawed-off rifles and shotguns, short-barreled rifles and

1 shotguns, silencers, machine guns, other automatic weapons and
2 destructive devices such as bombs, rockets and hand grenades."

3 The District Court dismissed the indictment on two
4 constitutional grounds. First it ruled that 5841(c) was that
5 certain information be furnished the government before a fire-
6 arm is transferred, and Section 5861(d) are unconstitutional
7 because Section 5841(c) requires Appellees to furnish evidence
8 incriminating to themselves under California law, making it
9 unlawful to possess hand grenades.

10 Second, the District Court ruled that Section 5861(d)
11 violates the Due Process Clause because it does not require the
12 Government to allege and prove that a transferee obtained
13 possession of the firearm with specific knowledge and intent
14 that the firearm be unregistered.

15 Section 5861(d) and 5841(c) were enacted as part of
16 the Gun Control Act of 1968, and that act was passed by
17 Congress in response to the violence occurring earlier in 1968
18 and to the fact that during 1967 more than 130,000 people in the
19 United States were victimized by gunmen.

20 Title II of the Gun Control Act of 1968 with which
21 we are concerned here, substantially amended the National
22 Firearms Act which this Court had dealt with in Haynes against
23 the United States, which was decided in January of 1968 to-
24 gether with Marchetti and Grosso. In Haynes this Court con-
25 cluded that the old registration and possession provisions of

1 the National Firearms Act compelled self-incrimination and
2 that the privilege was a complete defense to a prosecution
3 under either the possession or registration provisions.

4 In amending the National Firearms Act in October
5 of 1968, Congress set out to cure the constitutional infirmi-
6 ties which were pointed out by Mr. Justice Harlan in his
7 opinion as existing under the prior statutory scheme. The
8 pertinent legislative history is replete with Congressional
9 references to its purpose to overcome the fire infirmities
10 and in this respect the Congress was doing just what Mr.
11 Justice Harlan invited it to do in his opinion in Haynes. He
12 explained that a valid statute could be enacted which would
13 achieve substantially the same purposes as the statutory
14 scheme dealt with by the Court in Haynes and which would not
15 run afoul of constitutional limitations.

16 Our position here is that Congress has done just
17 this.

18 Q The bill that we've got now, was that a
19 product of the Department of Justice, the drafting of the
20 bill?

21 A Yes, sir; it is.

22 I think it would be helpful at the outset for me to
23 describe briefly how the new National Firearms Act works in
24 actual practice.

25 To illustrate the provisions of the new act, let us

1 assume that a manufacturer who is licensed to manufacture
2 hand grenades, in fact, does so. He is required to register
3 the hand grenades with the Alcohol, Tobacco and Firearms
4 Division of the Internal Revenue Service. That's the ATFD,
5 by giving notice of their manufacture and of the serial number
6 of each grenade. This is required by Section 5841(b) and (c),
7 which is set out on pages 3 and 4 of our brief.

8 Upon giving the notice to the ATFD the hand grenades
9 are then registered to the manufacturer. If he wishes to
10 transfer them to another he may do so lawfully and the trans-
11 feree may receive them lawfully only in accordance with the
12 provisions of the Section 5812 of Title XXVI, which appears on
13 pages 2 and 3 of our brief.

14 Under Section 5812 a grenade may not be transferred
15 unless the transferor has filed the requisite application in
16 duplicate with ATFD and has paid the transfer tax, which is
17 \$200 in the case of grenades. The transferor, the transferee
18 and the firearms to be transferred must be identified in the
19 application. In addition, there must be appended to the
20 application a set of fingerprints of the transferee, his
21 photograph and a statement from the local chief of police or
22 other civil official that receipt or possession of the firearm
23 would not place the transferee in violation of state or local
24 laws.

25 Q I'm curious, what use have the grenades got

1 except for war purposes, army purposes, or perhaps the law
2 enforcement authorities? Who buys these things?

3 A I am advised that there are collectors, Mr.
4 Justice Harlan, people who might have war trophies, and much to
5 my own surprise, some people just like to have rockets, live
6 rockets or live bombs in their basements and so long as it's
7 not prohibited by state law it's possible to do that.

8 Q Do they do that just to play with them, or
9 what?

10 A Well, I don't know what they do with them
11 but as we have pointed out in our brief, more than 180,000
12 firearms described in Title II are registered.

13 Q How many grenades?

14 A I beg your pardon?

15 Q How many grenades?

16 A I don't know.

17 Q And you say each one of these collectors has
18 to pay \$200 tax in order to indulge his --

19 A That's right, plus I assume, the cost of
20 buying the firearm.

21 Now, admittedly, Mr. Justice, most of the firearms
22 registered are registered to law enforcement officials, but
23 there are substantial numbers of --

24 Q Well, do law enforcement officials if they
25 want grenades, do they have to pay that tax?

1 A State -- they don't have to pay the tax, but
2 -- except in the case of a firearm in the possession or in the
3 control of the United States. The application must be filed
4 and notice must be given that it is being transferred to a
5 local official.

6 The fact remains that there actually people who
7 enjoy having these things.

8 As I have said, in addition to the transferor's
9 application, there is appended the set of the fingerprints of
10 the transferee, his photograph and statement from the local
11 chief of police that receipt or the possession of the firearm
12 would not place the transferee in violation of local law.

13 Now, this package is sent to the ATFD right here in
14 Washington. That body is empowered to approve an application
15 only if, and this is critical to our case -- receipt or possession
16 of the firearm would not place the transferee in violation of
17 state, local or Federal laws.

18 If ATFD rejects an application it returns the
19 original application and gives the reason for its action. If
20 it approves it so indicates on the original and returns it to
21 the transferor and places a duplicate in the National Firearms
22 Transfer Registration Record.

23 Only after the transferor has received the approved
24 application is he permitted to transfer the firearm to the
25 transferee; only then is the transferee permitted to take

1 possession of the firearm and only then when he takes
2 possession, together with the approved application which the
3 transferor delivers to him with the weapon.

4 Q Well, your position is that this is, in
5 effect, then a prohibition against transfers which violate
6 local law?

7 A Which violate local or Federal law, Mr.
8 Justice White.

9 Q And that the transferee is just faced with
10 simply a prohibition against his receiving the weapon as long
11 as it's a violation of the law.

12 A That's right; similar to what you suggested
13 in Minor and Buie. I should like, before turning to that
14 aspect of the case, if I may, to set out in some detail our
15 understanding of the old National Firearms Act which this Court
16 found in Haynes.

17 The old Section 5841 imposed on anyone possessing a
18 firearm the duty to register that firearm unless it had been
19 made or transferred in accordance with the provisions of the
20 old act. But, if a person possessing a firearm required to be
21 registered, came forward to register it under the old act, he
22 necessarily incriminated himself for possession of a firearm
23 that had been made or transferred in violation of the act,
24 which was proscribed by the old Section 5851.

25 In short, a person was required to come forward to

1 comply with one provision of the statutory scheme, but as
2 the risk of incriminating himself under another provision.

3 As Mr. Justice White pointed out subsequently in
4 the Minor and Buie case last term, the vice of the old
5 National Firearms Act was the same vice that this Court found
6 existed with respect to the occupational and excise taxes on
7 gambling in the Marchetti and Grosso cases. In those cases a
8 person was required to come forward and reveal information as
9 to the gambling activities to Federal authorities, even though
10 disclosure of those activities could be made to other Federal
11 authorities and to state authorities and even though such
12 activities were proscribed by both state and Federal law.

13 Moreover, Mr. Justice Harlan found in Haynes that
14 under the old statute, the only persons required to register
15 were those unlawfully in the possession of firearms. The
16 registration requirements thus applied only to those inherently
17 suspect of criminality as did the requirements held imper-
18 missible in the Albertson case.

19 In the new National Firearms Act, Congress has
20 eliminated any possibility of self-incrimination of a trans-
21 feree of a firearm, whereas the old statute requiring registra-
22 tion only by those unlawfully in possession of firearms, the
23 new statute requires registration by all possessors of fire-
24 arms with the single exception of the United States. Appellees
25 do not refute this.

1 Second, under the new statute the only persons
2 permitted to accept possession of firearms are those whose
3 possession would not place them in violation of law. Insofar
4 as relevant here, this limitation is spelled out in the last
5 sentence of Section 5812(a) which appears on page 3 of our
6 brief.

7 Thus, unlike the situation in Haynes, not only did
8 the person unlawfully in possession, not have a duty to come
9 forward and admit his unlawful possession, but he cannot
10 register a firearm. A person is not compelled as he was in
11 Haynes, to come forward under one provision, only to be in-
12 criminating himself under another.

13 Completion of the substantive crime under the new
14 act occurs when a person accepts possession before the AFTD
15 has approved the transfer to him. After that there is no
16 duty imposed upon the unlawful transferee as there was in
17 Haynes, and if he is convicted of unlawful possession it is not
18 because of any information he furnished, but simply because of
19 his unlawful possession.

20 The Appellees' position here is not that they are
21 whipsawed between one provision of the Federal statute and
22 another, as was the Petitioner in Haynes. They make no such
23 contention. They allege only that the self-incrimination
24 hazard for them arises because California law prohibits them
25 from possessing hand grenades. But, since the statute provides

1 that ATFD may approve a transfer only if it is lawful under
2 California law, Appellees would not risk self-incrimination
3 under that law by complying with the Federal requirements.

4 If possession by Appellees would be unlawful under
5 California law, the application for transfer would be denied by
6 the ATFD.

7 Q Mr. Zinn, what would happen if California
8 law were doubtful in its reading? Would permission be denied,
9 then, do you know?

10 A I think that ATFD would make a judgment as to
11 its opinion, Mr. Justice Blackmun. It has codified, or I
12 should say, corrected all the local laws and I don't think
13 there is any real dispute, however, about California laws in
14 this case.

15 Q I gather there isn't. And one last
16 question: was the argument you have presented today given to
17 Judge Ferguson, do you know?

18 A I say in substance it was, Mr. Justice.
19 There is a very short record appendix and I think that you will
20 see that the essence of the argument was made, if not in the
21 full detail which we are making here and which we have made in
22 our brief.

23 The position of the United States is that Appellees
24 are in the same position as was the seller of narcotics in the
25 Minor case, which was decided last term. If a person would be

1 an unlawful transferee it is extremely unlikely that he would
2 approach someone who is lawfully in possession in order to ob-
3 tain the firearm. It is far more likely that he would approach
4 a would-be transferor who is unlawfully in possession. And if
5 the transferor is unlawfully in possession there is no way that
6 he can transfer the firearm to the transferee under the pro-
7 visions of the new National Firearms Act. The act provides
8 that weapons may be transferred only by those lawfully in
9 possession.

10 In the unusual case where he does approach a lawful
11 transferee, it seems to us unlikely that such a transferee
12 would file an application for transfer, knowing that it would
13 be rejected because the possession of the firearm would place
14 the transferee in violation of local law.

15 Q I take it these transfers here were made
16 after the passage of these amendments?

17 A That's correct. The statute was passed for
18 enactment of the law on October 22, 1968.

19 Q What does the act do for people -- let's
20 assume these people had these grenades for five years.

21 A If they were in the records of the ATFD
22 before the new act --

23 Q They had never registered them.

24 A If they had never registered them the act
25 has a 30-day amnesty period, beginning on November --

1 Q Well, that means then that the fellow who is
2 then in possession must come in?

3 A That is correct. That's not this case, Your
4 Honor.

5 Q It has a -- that would be a different case?

6 A Well, I don't think -- well, it is a differ-
7 ent case, but our position is that even that situation would
8 not run afoul of constitutional limitations.

9 Q Because of the use limitations?

10 A The use limitations; that's correct.

11 Q What is the use -- you are going to get --

12 A I will in just one moment.

13 Even in the case where the would-be transferee
14 approaches a lawful transferor and the lawful transferor
15 agrees to file an application, our position is that the would-
16 be transferee is not required to incriminate himself. The
17 burden of filing the application is on the transferor under the
18 statute.

19 Now, while it's true that the transferee, the pro-
20 posed transferee must submit his fingerprints and a photograph,
21 these have never been thought to be protected by the Fifth
22 Amendment privilege.

23 Our provision is that the foregoing statutory
24 scheme would be sufficient without more to sustain the indict-
25 ment against Appellee's self-incrimination challenge. But, any

1 doubt as to the constitutionality of the new Federal National
2 Firearms Act is resolved legally by two other steps that
3 Congress took in 1968.

4 First, it appealed 23 USC 6107, which provided for
5 the sharing of firearms registration and transfer information,
6 with other law enforcement officials.

7 Secondly, it enacted Section 5848, which provides
8 that no information provided to the Government in connection
9 with the registration or transfer of firearms can be used
10 directly or indirectly, as evidence against the registrant or
11 applicant in a criminal proceeding involving prior or con-
12 current offenses.

13 While the immunity from use provision does not
14 apply to future crimes, there is no realistic possibility of
15 self-incrimination with respect to future acts.

16 This Court did not hold, as a general rule, in the
17 Marchetti case, that the possibility of future incrimination
18 is sufficient to justify present invocation of the privilege
19 in all circumstances.

20 On the contrary, the Court pointed out quite
21 clearly that in most instances the problem of future conduct
22 will not give rise to substantial risks of self-incrimination.

23 The Marchetti case was atypical, because anyone
24 who pays the occupational tax imposed on gamblers can be
25 expected to engage in gambling, an activity that is prohibited

1 or limited in 49 states. Here, on the other hand, possession
2 of type or another of the kind of firearms that are dealt with
3 in Title II, is permitted by state law, as evidenced by the
4 fact that more than 180,000 firearms have been registered.

5 More importantly, unlike the situation in Marchetti
6 an application to transfer will only be approved if the
7 application would not place the transferee in violation of law.
8 Had a similar provision been operative in the gambling tax
9 area, only gamblers in Nevada would have attempted to register.
10 The possibility that a person once having lawfully having
11 obtained possession of a firearm under these registration pro-
12 visions, would subsequently permit an unrelated, unlawful act
13 and that the prior registration will incriminate him in that
14 act, is in our view, too speculative to warrant protection of
15 the privilege.

16 I will turn briefly to the due process issue. This
17 breaks down into two sub-issues: first the question of whether
18 Congress intended that violations of this statute can be
19 punished without specific intent on the part of the transferee
20 to obtain an unregistered firearm and secondly, whether if
21 Congress so intended, as we submit it did, such a statute runs
22 afoul of due process limitations.

23 On the first aspect of this, well, we don't believe
24 there is any substantial problem; nothing in the statute
25 indicates that scienter is required. Moreover, every Court of

1 Appeals which passed on this question under the old National
2 Firearms Act, which insofar as pertinent here, was identical
3 to the new one, ever held anything but that scienter was not
4 required. Nor does anything in the legislative history hint
5 that Congress was going to change the ground rules in this
6 regard. There is not one word to this effect.

7 Under these circumstances, we believe it would be
8 wholly improper for this Court to read in a specific intent
9 requirement, particularly since another subsection of the same
10 provision of the act: Section 5861(1) expressly requires a
11 known violation for prosecution and particularly since, to
12 read in such a requirement would totally frustrate the Con-
13 gressional purpose in this case.

14 Finally, as to the due process claims, as we under-
15 stand Appellees' position it is based in large part on this
16 Court's 5 to 4 decision in Lambert against California, which
17 found repugnant under the due process clause the Los Angeles
18 ordinance requiring convicted felons who spent more than five
19 days in Los Angeles, to register with the chief of police.

20 We think that accepting Lambert as stating the
21 present view of this Court, that it is quite clearly distin-
22 guishable from the situation we have here. We're not concerned
23 with somebody passively remaining in Los Angeles for more than
24 five days; we're concerned here with people acquiring highly
25 dangerous weapons; hand grenades. And we believe that the

1 authorities of this Court as early as the Balint case in 258
2 US, which dealt with narcotics and in the Baender and Barnett
3 case in 255 US, dealing with possession of dies for the making
4 of government coins, established quite clearly that this kind
5 of conduct can be regulated without regard to a specific in-
6 tent requirement, no more than Congressional reasonableness in
7 this area, involving dangerous weapons, is necessary to
8 satisfy the constitutional requirements.

9 We urge, therefore, that the indictment be rein-
10 stated and that this case be returned to the District Court for
11 further proceedings.

12 Q May I ask you one question: under the statute
13 is receiving an unregistered firearm a crime?

14 A Receiving an unregistered firearm? I believe
15 it is.

16 Q Or also possessing one?

17 A Possession of an unregistered firearm; yes.

18 Q He can be convicted not only for receiving it
19 but for possessing it, or for both?

20 A Yes. To receive or possess, page 4 of our
21 brief, Mr. Justice; to receive or possess a firearm, which is
22 not registered to him by the National Firearms --

23 Q And let's assume that a person who receives an
24 unregistered firearm has committed a crime. Can he keep from
25 further violating the act by registering himself?

1 A There is no way he can register. The crime
2 is complete under this act when he receives the firearm.

3 Q He could not go in and --

4 A That's correct, except for the amnesty period
5 to which you referred earlier there is no way that a recipient
6 of an unregistered firearm can cure his failing.

7 Q Thank you.

8 Q With respect to this question of scienter
9 I understand your brief to concede that the possession under
10 the statute has to be knowing and intentional.

11 A We do concede that, Mr. Justice.

12 Q And yet Count 2 of the indictment doesn't
13 allege knowledge and intention.

14 A That's true. We think that use of the word
15 "possession" in Count 2 is self-sufficient to mean a conscious
16 possession, but I will remind this Court that this case is here
17 on direct appeal under 18 USC 3731, that if the Court resolves
18 the question of the constitutionality or construction of the
19 statute in our favor, the question of whether Count II
20 sufficiently states the offense is not one that can be reached
21 by this Court at this time.

22 Q That would be subject to --

23 A It goes only to the sufficiency of the in-
24 dictment, Mr. Justice Stewart and that clearly could not be
25 reached under the Criminal Appeals Act.

1 Q Would it deprive the Court of jurisdiction
2 on direct appeal?

3 A I'm not sure I understand the question.

4 Q Well, if the decision below rested on the
5 insufficiency of the indictment, rather than on the statute --

6 A Oh, yes; if it did we agree that we could
7 not be here. We think that the record is perfectly clear in
8 this regard as is the dismissal order itself, Mr. Justice,
9 which refers only to the constitutional aspects of the case.

10 MR. CHIEF JUSTICE BURGER: Mr. McKissack.

11 ORAL ARGUMENT BY LUKE MC KISSACK, ESQ.

12 ON BEHALF OF APPELLEES

13 MR. MC KISSACK: Thank you, Mr. Chief Justice and
14 may it please the Court:

15 I'd like to begin by referring just a few moments
16 to an issue that we raised when the Appellants sought the
17 jurisdiction of this Court and we suggested at that time that
18 perhaps this Court did not have jurisdiction under the Criminal
19 Appeals Act and I would just like to make a couple of comments
20 along that line.

21 We suggest that an examination of the appendix
22 which continues the colloquy in the trial court between the
23 judge and attorney, et cetera, will indicate that the judge's
24 decision was quite hybrid and was based upon a number of con-
25 siderations; that it's replete with notion that the judge

1 felt that inasmuch as the bill of particulars informed the
2 Court that what actually happened in this case is that the
3 Los Angeles Police Department officer, apparently in conjunc-
4 tion with the alcohol and tobacco people of the Federal
5 Government, had gone to the Long Beach Arsenal and picked up a
6 hand grenade and he himself, had sought no exemption which is
7 available to him and he deliberately flouted the law and did
8 not obey the law. And only by his action did he cause the
9 transferees to become criminals at all, he suggested that this
10 might amount to entrapment as a matter of the law. And we
11 would say that that's not to say that necessarily this is even
12 a correct decision, even though it would appear he was follow-
13 ing the line of thinking of the concurrent justices in the
14 Sorrels and Sherman thinking; basically that society has no
15 interest in trying to transform _____ criminals and
16 actual ones, but whether or not this is a correct interpreta-
17 tion and this Court would follow it today, I think it does
18 recognize the fact that the judge was thinking along that
19 line.

20 Q How would the possession or nonpossession of
21 this permit on the part of the police officer have anything to
22 do whatever, with the conduct of the purchaser? What's that got
23 to do with it?

24 A Well, because the conduct of the police
25 officer creates the crime; without which there would be no

1 crime.

2 Q If you had a piece of paper it would be
3 all right?

4 A If he complied with the law the transferee
5 would not have committed the crime; that is correct.

6 In other words, the police officer, by violating the
7 law, created the criminal; that is the transferee. Had the
8 police officer done what the law required the transferee would
9 not have been a criminal. Only because of the activities of the
10 police officer did the transferee become a criminal, and this
11 was the thinking expressed by the Court.

12 Q Wasn't it the purpose of Congress to put the
13 burden on the purchasers, the receivers to finding that out,
14 and did he make any effort to find out whether --

15 A Well, I know nothing in the statutory
16 history one way or the other. The Appellants concede, for
17 example, that it's entirely silent. But there doesn't seem to
18 be much discussion at all, other than the fact that they would
19 like to get around the Haynes decision and pass some new
20 legislation.

21 I don't know -- there is nothing in there suggesting
22 that transferee should have any affirmative burden. I know
23 nothing in the legislative hearings to say that and there is
24 no basis for really assuming that he has any kind of a burden.
25 As I say, the statute is entirely silent.

1 But, I'm saying in this case that we are not talking
2 about prosecution under a state charge; we're not talking about
3 using the commerce clause, as perhaps the Congress could, to
4 make just raw possession a crime. We are talking about some-
5 thing that's a crime only because the transferee takes posses-
6 sion of something which the transferor has failed to do. In
7 this case the transferor is an agent of the government.

8 And the judge did considerable thinking along that
9 line. I would suggest that an examination of his thinking
10 would show that perhaps it would put this case outside the
11 legitimacy of the appeal. And I will add to that that we are
12 not just talking about interpretation of Federal statutes here,
13 but for those dissenters in the Mersky decision we have in-
14 volved a number of integral Treasury regulations, some of them
15 which preexisted the Haynes decision and haven't even been
16 altered, and a couple of them which don't even make the change
17 between transferee and transferor.

18 And there is some interpretation of the Treasury
19 regulations. As a matter of fact, most of the self-incrimina-
20 tion material, which I will get to in a minute, is found in the
21 Treasury regulations, rather than in the official statutes,
22 because the statutes will say that the transferor must do cer-
23 tain things to have the weapon registered and the transferee
24 must do certain things that must be specified by the Secretary
25 of the Treasury's authorized delegate.

1 And then in certain of these sections: 178.98,
2 et cetera, it explains that there has to be -- there is an
3 affirmative obligation on the transferee to get a photograph
4 of himself that is no more than one year old and plaster that
5 on the application. He has to put his fingerprints on there.
6 There has to be an identification and a serial number of the
7 weapon, et cetera, and all of these things -- there even has to
8 be an approval by a sheriff or police official or someone who
9 the Secretary of the Treasury finds suitable, to verify that
10 this is his photograph and this is his identification and it's
11 going to be used lawfully.

12 Q I'm afraid you're losing me. How is this
13 different from what you have to do on passports and automobile
14 driver's licenses, and a great many other things?

15 A Well, I don't think there is a great deal of
16 difference, in terms of what you actually have to do, but if
17 you take the raw activity of something -- let's say we have no
18 Fifth Amendment. Nothing testimonial, let's say, about a fin-
19 gerprint or her handwriting exemplar for the majority of the
20 Court to dispose of that opinion.

21 But, if you take that material and you require the
22 person to lay that information on top of something which
23 amounts to manifestation, that he is seeking to take possession
24 of hand grenades, which would then amount to perhaps a con-
25 spiracy of violating California law or maybe even an attempt

1 and at the very, very minimum furnish a link in the chain that
2 his man may be a person who is desirous of buying hand
3 grenades and if the authorization didn't go through you go
4 ahead and purchase it anyhow so they can key on his house or
5 on his business.

6 I suggest this is highly incriminatory. I don't
7 think it can be simply headnoted by just calling it a finger-
8 print case or a photograph. I think it's the totality of the
9 context, and when these things appear -- in fact there has to
10 be a witness to it, which is a witness afforded the Government
11 who is standing ready to testify in a state proceeding against
12 the man who does these things.

13 I think when it's put in the context of saying: I'm
14 going to take possession of a hand grenade," that it certainly
15 has a testimonial character and this would be our position.

16 But, just to set up this point, because I want to
17 move on to the others, I think there is a serious question
18 on two grounds as to whether this Court should or can retain
19 jurisdiction. The problem of jurisdiction has been noted, but
20 there is a question of to what extent the judge relies on the
21 Treasury regulations as opposed to the statutes for those
22 justices who think that's important.

23 And secondly, there is a question as to whether or
24 not we had more than just a determination of self-incrimination
25 or scienter, but an investigation of the facts, and rightfully

1 or wrongfully, a determination by Judge Ferguson that this
2 entrapment is a matter of law.

3 Now, if I may, perhaps in reverse order, go to the
4 issue of scienter. And Mr. Justice Stewart asked a question
5 about whether or not there was an allegation of any kind of
6 knowledge here and the judge at the trial level found that, as
7 we see the indictment neither the statute nor the indictment
8 requires any kind of scienter, not even the most minimal kind;
9 not even the kind which says that the transferee knows that he
10 has something and knows what he has; that is his characteris-
11 tics that it's a hand grenade or whatever, much less does it
12 allege that he knows it is unregistered at the time of its
13 receipt. And none of these things were alleged.

14 Q But you are talking only about Count 2 of the
15 indictment --

16 A We're talking only about Count 2 of the
17 indictment at that point; yes.

18 Q Because Count 1 does contain those allega-
19 tions; doesn't it?

20 A Yes; it does. I would quarrel with Count 1
21 of the indictment on another -- but not on that point; no.

22 Count 2 we are talking about there is no kind of
23 scienter whatsoever. Now, the Government below conceded and the
24 Government here conceded that scienter had to be proved. So,
25 the question is: does the indictment have to obtain, have to

1 spell out some kind of scienter requirement? And although this
2 would not be perhaps the place to reinvestigate the whole
3 function of the grand jury system, et cetera, I assume that the
4 -- as the statute was laid out to the grand jury and even they,
5 in passing prima facie on some kind of responsibility that
6 would justify taking the man to trial, would not have had
7 knowledge apparently that the transferee was suppose to know
8 what they had and know the character of what he had; so we
9 don't know anything about the findings there.

10 Secondly, as I say, there is a string of cases
11 saying that the indictment has to allege this and it can't be
12 cured by a bill of particulars, as the old Caryll case,
13 C-a-r-y-l-l, which I refer to, were the failure of the indict-
14 ment to allege the necessary scienter requirement, renders it
15 fatal.

16 And I would suggest that on that ground that
17 indictment in this case is deficient. Moreover, I feel that
18 the statute is deficient because it, because it doesn't have
19 any allegation of even that kind of knowledge.

20 There is, in the Government's brief, footnote 9,
21 page 14, the suggestion that perhaps the statute without any
22 kind of scienter, could reach ridiculous results and they point
23 that out. The suggested remedy is that if you have a noble
24 prosecutor that he won't prosecute and this same question was
25 argued again before Judge Ferguson and he seemed to feel that

1 there should be a government of laws and not of men and this
2 was not an adequate answer and consequently at page 38 of the
3 appendix he insisted that the government must allege scienter.

4 Now, I also make the argument that regarding Count
5 1, if we take the reigning law in this country that when we
6 have a conspiracy to violate any particular statute, that it
7 requires more of an intent than in a substantive crime. And
8 definitely in law, knowledge of the law and an attempt to want
9 to follow the law. And there are a string of cases that are
10 cited: state cases and Federal cases, indicating that if that's
11 the case, at least insofar as malum prohibitum or public welfare
12 crimes are concerned.

13 I don't think that either one of those terms are
14 too helpful in trying to decide whether -- there has been much
15 dispute and many text writers have had an argument as to what
16 fits into that category. But, some of the cases that are
17 cited, for example, do refer to the Mann Act, white slavery,
18 allegations of fraud and things of that sort, but they are
19 not generically different than say, perhaps the possession of
20 firearms in this case in terms of perhaps the gravity of the
21 action.

22 But, nevertheless, the conspiracy must embrace an
23 intent to run afoul of the law and that is not alleged and
24 that was another one of the grounds which the trial court used
25 for dismissing the indictment.

1 Now, in the issue of the allegation of scienter,
2 insofar as the unregistered character of the firearm is con-
3 cerned, it is our contention that this is one of the elements
4 of the crime. Although we cite the Lambert decision, we do not
5 wish to be understood as having totally relied upon that.
6 There is no question that that, in simplest terms, is an
7 example of where the Court has decided that all things con-
8 sidered, that ignorance of the law must be an excuse and a
9 majority of the Court so held.

10 But, here we're not even talking about ignorance of
11 the law; we're talking, if anything, about one of the facts of
12 the case. Let me distinguish two situations.

13 The crime involved here -- in other words, the
14 defense is not that the defendants did not know that there was
15 a law saying that you could not possess a firearm unless it
16 was registered, what we are saying is that one of the elements
17 which should be pled and proved is that the defendants took
18 possession of a firearm knowing that the transferor had not
19 had it registered. There is a world of difference, because
20 in the one case we are talking about just not knowing what the
21 law is and the person is presumed to know the law. Here we are
22 talking about one of the elements of the crime that brings the
23 legal proposition into play and one of the elements of the
24 crime is the characterization of the weapon being taken. And
25 that characterization is that it is an unregistered character.

1 The question of whether or not the scienter re-
2 quirements reach this far and the question of analysis of what
3 kind of scienter this Court should decide the statute is
4 intended to contain or as a matter of due process, I have gone
5 through the various authorities and analyzed the whole notion
6 of mens rea, history et cetera. And I'm disposed to think
7 that perhaps the Court should reevaluate the whole area and I
8 sort of found that Sayre's test, when he talks about the fact
9 that when you get to a crime that is sufficiently grave, that
10 it's still not a regulatory measure, we're trying to single out
11 -- where is the criminal treatment, which was expressed in the
12 law before Haynes and has been reexpressed that they are trying
13 to do away with people who are engaged in wrongful acts and it
14 even expanded the number of weapons to cover rockets and
15 missiles and things like this which are not normally possessed
16 by people just for hobbies.

17 And secondly, where imprisonment is too grave to
18 allow the deletion(?) of mens rea, as he puts it, I think the
19 Court should at that point intercede and require a stronger
20 scienter requirement. Or, in the absence of any legislative
21 finding that is not required, the Court should assume that it
22 should be there, based upon the common law history and the
23 gravity of the crime.

24 This crime's count 2, for example, carries a penalty
25 of up to ten years or \$10,000. Formerly it was five years or

1 \$5,000. The Court might wish to borrow my analogy from its
2 decisions in the area of whether you have a right to a jury
3 trial evaluating the potential length of sentence or the actual
4 sentence or decisions on the question of right to counsel, as
5 to whether he may have a right to counsel for a traffic ticket,
6 as opposed to, say, a felony or major felony or major mis-
7 demeanors, and I think perhaps some of the same considerations
8 that go into making a decision as to whether it's significant
9 enough to attach the right to counsel and to insist on the
10 right to jury might also be implemented here in deciding
11 whether or not we could have a strict liability statute or
12 in effect, punish somebody for a crime that's meant not to be
13 a crime, unless we are possessing an unregistered firearm and
14 say that the person doesn't have to have knowledge of it.

15 Again, I repeat, I know nothing in the statutory
16 history that causes a person to have to seek out and find
17 whether or not the weapon had been registered. It has been
18 suggested by the Appellant in his brief that if you are dealing
19 with firearms or you are dealing with hand grenades, you must
20 know that there is some kind of requirement that they be
21 treated this way.

22 I suggest that this is just a matter of speculation.
23 If I were taking possession of a firearm or hand grenade, I
24 might think a number of things. One thing I might think is that
25 it is totally illegal and I'd better not get caught with it.

1 The second thing I might think is that perhaps it's
2 illegal, but it may not be illegal to possess, but I'd better
3 be careful what I do with it. If I throw it on the mantel
4 piece, it's okay.

5 Thirdly, I might think that perhaps you have to have
6 some kind of permit in order to get it. Fourthly, I might
7 think that it's all right for me to take possession of it, but
8 after I do so I'd better report it to someone and register it.

9 And if a person was guilty, for example, of quite
10 reasonable kind of thinking, the fourth type is certainly -- you
11 would have to have a statute which would allow a reasonable
12 period of time to register the weapon. And as the Appellant
13 candidly concedes: once the person takes possession of it, that
14 is a crime and there is nothing on earth that he can do to make
15 himself law abiding thereafter.

16 So, I just think the fact that we're dealing with
17 hand grenades should not cause the Court to feel like a strong
18 mens rea requirement should not be exacted when we're talking
19 about a very severe crime with a great deal of gravity.

20 Q Do you mean exacted by the constitution or by
21 statute?

22 A That's a tricky question and I have some
23 thoughts on it, but on either basis I think the Court might say
24 in the matter of constitutional law, but if it chooses not to
25 put it on that basis I think it would be a reasonable statement

1 to say that when we're talking about this kind of crime with
2 this kind of penalty that Congress should have the affirmative
3 obligation of making it quite express as to whether they feel
4 they want strict liability or whether they are going to
5 eliminate a mens rea requirement, rather than to rely upon the
6 position of the Appellant, because it's not spelled out in the
7 statute and Congress never intended it to be there.

8 I don't see anything inherently unfair or imprudent
9 in asking Congress to do that, given the -- each common law
10 background and given the gravity of the offense and all of the
11 statements to the effect that mens rea in grave times does
12 play a great role in our jurisprudence, and I see no imposition
13 on Congress. They can hold hearings; it would be very simple
14 to pass a statute and say, "We find, based upon information,
15 that the only way we can control these weapons or get them
16 properly taxed or -- is to do such and such and if we put the
17 mens rea requirement in there it cannot effectively be done
18 because of this or because of that and then the Court would have
19 a legislative basis for the elimination or the failure to put
20 a mens rea requirement in there.

21 Now, I see nothing in the statutory history along
22 this line --

23 Q Do you rely on the constitutional level?

24 A On the constitutional level? Well, frankly,
25 you know we have a dearth of authority, as this Court said in

1 the Powell case. The Court has not laid out a definitive
2 doctrine of mens rea and all we had is the old Morissetti case
3 to --

4 Q What about the Dodowich case(?) written by
5 Mr. Justice Frankfurter.

6 A Yes; well, the Dodowich case, of course,
7 involved only a misdemeanor, really. You are talking about
8 there the imposition of a penalty on a corporate officer and I
9 think there the decision is that the majority of the Court felt
10 that -- the Court might feel that -- I think it was Mr. Justice
11 Frankfurter's phrase about we are living in an age where the
12 consumer is made unwary of certain conditions of modern in-
13 dustrialism.

14 I can see why in certain regulatory statutes why
15 you might, or for instance in a business, let's say, dealing
16 with certain items, that you might have an affirmative duty to
17 seek out the law pertaining to them and know the rules and
18 regulations. I think that's the case there and again I think
19 the maximum penalty was one year in that case.

20 Q Well, would that make any difference con-
21 stitutionally-speaking?

22 A It could. I think it would be for this Court
23 to say one way or the other. As far as I know it's never been
24 ruled upon, but I think if we do not limit Morissetti to its
25 particular facts in saying that the crime there was of common

1 law origin or a composition of certain common law crimes, but
2 extract from it the basic proposition that we are talking
3 about a potentially serious crime and there should be a mens
4 rea requirement. I think that would lend itself to the con-
5 clusion that the gravity of the crime should perhaps play some
6 role.

7 I think we're always dealing with the balancing of
8 interests, and you might say that a person who parks overtime
9 in the zone that perhaps he was even unconscious of the time he
10 did it that he should have to pay a penalty and a fine. But

11 But, I think if we are talking about putting some-
12 body in prison for a period of time it's got to be some
13 affirmative obligation shown by Congress as to why there should
14 not be some kind of criminal culpability or corrupt mind or
15 some kind of mens rea that has historically been accepted and
16 is a part of this culture, because otherwise then we run into
17 the problem suggested by the tax writers that if the laws do
18 not reflect the general moral outlook of the society there is
19 an extent -- some extent they are going to crumble.

20 Q The implication of that argument would be
21 that Congress is incapable constitutionally of making the
22 possession alone, the mere possession, a felony?

23 A No; I wouldn't necessarily say that, even
24 though that's I think, a tenable proposition, but what I am
25 saying is I think they would have to justify it. I think they

1 would have to say that -- I think constitutionally they could,
2 but if you are talking about eliminating scienter I think that
3 Congress would have to make the finding or that the scienter
4 would be such a detriment to the enforcement of the statute.
5 I mean, thinking along that line would be permissible.

6 And if they said, "We've got more killings in the
7 streets and the weapons are going to do this and that and if
8 we had the scienter requirement they will be able to dodge here
9 and there." Then I can see that as an acceptable proposition,
10 but without that kind of finding, I think this Court should
11 require that mens rea be --

12 Q Constitutionally or construction of the
13 statute?

14 A Well, of course the easiest thing would be
15 to make it construction of the statute, because then Congress
16 has the option of making a change --

17 Q But, what power would the Court have to
18 hold it unconstitutional? They merely said that the possession
19 is a crime.

20 A Well, the Court would have to -- that par-
21 ticular proposition, Mr. Justice Black, I think adopts the
22 kind of thinking that's been reflected in some of the members
23 of the Court about using the due process clause in debate
24 contours. I don't think you could spring necessarily from the
25 kind of --

1 Q But --

2 A I wouldn't expect that we would get your
3 vote on that kind of analysis, reaching that kind of result.

4 If I may turn to the self-incrimination argument.
5 I think here that the Appellant ignores a number of things.
6 I think here we are talking really about potential self-
7 incrimination. I don't think this has been analyzed really in
8 the Buie case or Minor or any of them to the fullest extent.

9 We're talking here about the Appellant says that
10 there is no way in the world that the transferee in this case
11 can incriminate himself. We claim that the transferor is
12 being used as a conduit to do that. They say that he can't
13 incriminate himself because after the application is turned in
14 with all this germane material about name and address and
15 fingerprints and photograph, et cetera, that the Secretary of
16 the Treasury, who, I don't know if he has any legal background,
17 but would read California law, I presume and all of its
18 decisions, and tell him whether or not he is going to run afoul
19 of it. And if he does so he will receive a letter and there-
20 fore, knowing it's unlawful he won't do anything and therefore
21 the compliance with the statute will not require him to in-
22 criminate himself.

23 Now, my objection to that is that all of this that
24 he's had to do before he meets that stage is highly incrimina-
25 tory and attempting to comply with the statute, in filling out

1 all of this information and lodging it in the registry, in
2 making this information available he makes it quite clear that
3 he's a person who would very much like to possess a hand
4 grenade, perhaps illegally if not legally, and the person who
5 may well be in the possession of other hand grenades and I
6 would then borrow from the futuristic analysis of the Marchetti
7 case that there we have an assumption, really, that we're not
8 just talking about law-abiding people. We may have individuals
9 -- I see that my time is up. Thank you.

10 MR. CHIEF JUSTICE BURGER: No. We are just re-
11 cessing and we will come back after lunch.

12 (Whereupon, at 12:00 o'clock p.m. the argument in
13 the above-entitled matter was recessed to resume at 1:00 p.m.
14 o'clock this day)

1:00 o'clock p.m.

MR. CHIEF JUSTICE BURGER: Mr. McKissack, you have about eight minutes left, so if you will just time yourself.

ORAL ARGUMENT (CONTINUED) BY LUKE MC KISSACK, ESQ.

ON BEHALF OF APPELLEES

MR. MC KISSACK: Thank you, Your Honor.

I think I have reached the self-incrimination argument and I was saying that I think that much more is required of the transferee here than would be the party we would be concerned about in, say, the Minor case or some others.

I mentioned also the question of statutory regulations that were used to embroider the statute exacting insofar as the transferee is concerned. I'd like to refer to a couple of them.

I'm referring now to Title XXVI, the Code of Federal Regulations 179.99 and this is the one where the individual himself has to attach a copy of a photograph made within a year and affix his fingerprints to this application, where he is saying: "I want to take charge of hand grenades," indicating he is ready, willing and able. They have got to be cleared, et cetera, and then his application has to be authenticated by the local chief of police and the sheriff, the United States Attorney, United States Marshal, or anybody acceptable to the Director of Alcohol, Tobacco and Tax Division, saying that the fingerprints in the photograph are correct and

1 so forth.

2 Now, if you take this in conjunction with another
3 section, which is 178.98 which talks about a delivery or a
4 sale and is prohibited unless the person to receive such de-
5 vice furnishes the licensee a sworn statement in triplicate,
6 setting forth: "(a) the reasons why there is a reasonable
7 necessity for such person to purchase or otherwise acquire the
8 device or weapon, and (b) that such person's receipt for
9 possession of the device or weapon would be consistent with
10 public safety. Such sworn statement shall be attached to the
11 application to transfer and register the firearm acquired by
12 179 of this chapter. The sale or delivery of the device shall
13 not be made until after the application is approved," et
14 cetera.

15 Now, all of these things take place before the
16 director makes the ultimate determination as to whether he
17 thinks it's lawful and whether the transfer is going to be
18 approved.

19 So, I think then we have the kind of situation en-
20 visioned by much of the language in the Marchetti decision where
21 we're not just talking about confession of past crimes; I
22 think it was Mr. Justice Harlan who said something about the
23 fact that the person may confess before the act is evidenced,
24 or maybe before the act is done.

25 And then we're not talking about just totally in the

1 Fifth Amendment area: the protection of necessarily innocent
2 people, but we're talking about society making a judgment by
3 virtue of the Fifth Amendment to place off limits as a criminal
4 investigative team, a defendant, presumably his lawyer and in
5 some jurisdictions, perhaps his wife, and I don't think that's
6 unreasonable. I think by doing that we not only preserve
7 domestic tranquility, the legal process through the presence
8 of the attorney and also the sanctity of the individual. And
9 that's all we're talking about: not using the individual as
10 his own accuser.

11 And, in Marchetti the Court has mentioned that
12 we're protecting the imprudent as well as the innocent and the
13 foresighted.

14 I think, therefore, if we put all of this together
15 and you get all of the fingerprints, the photographs, the
16 affidavit as to why he should have it, et cetera, and all of
17 this stuff is transferred, then would it say that subsequently
18 someone makes a decision that it's unlawful for him to have it,
19 doesn't mean that there is no self-incrimination problem.

20 In fact, as the Government concedes on page 6 of
21 its jurisdictional statement of facts, something to the effect
22 that it's true that the regulations involve the potential
23 transferee more deeply in the application process than was the
24 case in Minor. And he's quite deeply involved.

25 And of course, we are concerned here with the

1 question of future acts. The Appellant suggests that there is
2 an immunity provision that they feel is sufficiently pervasive
3 to justify the legislation so that we would have no objections
4 to it. However, they were only talking about these items that
5 are in the registry, not being used to prove past crimes or
6 contemporaneous crimes, crimes contemporaneous with the filing,
7 I assume.

8 There were some other problems, too, but basically
9 I would assert that certainly the information, the immunity
10 provision does not prevent this information from being made
11 available to numerous people. That is to say: "Here is a
12 person who obviously wants to get hand grenades and may get
13 them illegally and tell other things about him, et cetera.
14 This is available.

15 And it also raises the problem which Mr. Justice
16 Harlan asserted in a couple of the -- the Grosso and Haynes
17 decisions or Marchetti, about we would already be embroiled in
18 the state team hearing. We're talking about a violation of
19 state law and summoning witnesses to decide whether or not this
20 information had been passed down by the officials and of course,
21 this is a difficult problem to wrestle with.

22 I think that all these things together mean nothing
23 more than the fact that the transferee is saying: I do -- I am
24 willing to receive hand grenades and does point the finger of
25 suspicion at himself in dealing with a highly dangerous object

1 that indeed he would like to possess, perhaps even illegally
2 if not legally.

3 This law, in summary, tends to make the transfer of
4 weapons lawful, but even if it's determined to be unlawful, as
5 I say, the transferee incriminates himself.

6 Now, the Appellant has suggested that where we have
7 a lawful procedure there has been the concession that a number
8 of people apparently have registered these items to put on their
9 mantels or whatever they do with them; maybe make war films.
10 I don't know. But, still I think it's quite clear from the
11 fact that we have all these destructive weapons added together
12 that it is basically still a criminal statute. It is an
13 attempt to try to isolate individuals that they think are
14 violating the law and use a tax statute for that kind of pur-
15 pose.

16 Q Well, would you make the same argument about
17 this if they wanted to possess fissionable material under the
18 Atomic Energy Act? You can't possess it lawfully except by
19 license. You can't manufacture it; you can't have a power
20 plant to be powered by nuclear energy without a license issued
21 by the Atomic Energy Commission.

22 Can you distinguish this from that situation?

23 A Well, if there are other statutes that would
24 make the possession of fissionable material unlawful per se,
25 then I would think that we would have a Marchetti-Grosso-Haynes

1 situation. I think that you can't have two coexisting statutes
2 whether on the state or Federal level where one punishes raw
3 possession and the other demands that the possessor
4 register or make it clear that he wants to possess it.

5 Q On your thesis the Atomic Energy Act has an
6 infirmity in it, then?

7 A Well, to be quite honest with you, I'm not
8 that familiar with the details of the act, but it's possible
9 that if it's constructed along those lines it would have an
10 infirmity; perhaps remedial, perhaps not, but I think that's
11 the guts of the whole case is that I don't know why Congress
12 can't simply, if we're talking about preserving the right of
13 Congress, it could probably pass a statute against possession,
14 as far as that's going and could set up certain exemptions
15 like states do, by the law enforcement people or people who
16 fight fires or whoever needs these various items can have them,
17 or if you are a collector and you come in and prove it that's
18 right.

19 But, I think to just require that they be registered
20 and make every individual who touches them in any way, lawful
21 or unlawful, come forth in the form of a written declaration or
22 in person, is the kind of evil that those cases are designed to
23 prevent. And I would also feel that

24 And I therefore feel that the Haynes problems have
25 not been overcome in this legislation and so the trial court

1 held.

2 If there are no further questions, I am finished.

3 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Mc Kissack.
4 Mr. Zinn.

5 REBUTTAL ARGUMENT BY MATTHEW J. ZINN, ESQ.

6 ON BEHALF OF PETITIONERS

7 MR. ZINN: Mr. Chief Justice and may it please the
8 Court:

9 It seems to us that the Appellees' position here
10 is internally inconsistent. In order to make their self-
11 incrimination argument they explain that the Appellees were
12 incriminated because these are dangerous weapons and even if
13 they just register them lawfully it's going to lead to their
14 exposure at some future crimes.

15 But, in making their due process argument they say
16 they need scienter. If the weapon is so dangerous that anybody
17 would be on notice that some regulation may be in order it
18 seems to us that they can't make the due process argument and
19 the self-incrimination argument at the same time.

20 As we go into the question of future --

21 Q Well, what are you suggesting, that either
22 one or the other of these arguments is perfectly good?

23 A I'm suggesting that they are both incorrect,
24 Mr. Justice.

25 Q Then they're not entirely inconsistent; are

1 they?

2 A I think they are entirely inconsistent, but
3 looking at --

4 Q You mean they both are bad?

5 A Yes. I think both are bad as far as due
6 process; I think they are sufficiently dangerous to put some-
7 body on notice that in order require that before they take
8 possession of such weapons as to what regulations may be
9 applicable to them.

10 And as far as the self-incrimination ~~about~~ t, the
11 only possible self-incrimination is for future incrimination.
12 I think we have to break it down between applications that are
13 accepted on the one hand, and those that are rejected on the
14 other.

15 As to applications that are accepted, I think it's
16 far-fetched to think that somebody who goes through this
17 registration procedure and is entitled to take possession of a
18 firearm, a hand grenade, is later going to commit an unlawful
19 act completely unrelated to the possession of the hand grenade,
20 such as blowing up a building. And that this registration
21 record will provide a link in the chain. That is far more
22 speculative than the kind of future incrimination the Court is
23 concerned with, in the Marchetti case.

24 Now, turning to applications that are rejected. I
25 think it is important for me to make clear to the Court just

1 what happens to those applications which, if they are accepted,
2 they have to become part of the National Firearms Transfer
3 and Registration records. If they are rejected they do not
4 become part of that record; they do not go into the permanent
5 file. We are advised by AFTD that they go into a correspon-
6 dence file, under correspondence with the proposed transferor;
7 that those files, unlike the permanent record of accepted
8 applications are cleared periodically, as are all government
9 files of general correspondence. And there is just no record
10 of a rejected application that could incriminate anybody.

11 Finally, I'd like to address myself to the juris-
12 dictional questions which Appellees continually press in this
13 Court. As far as the entrapment question, I refer the Court
14 to pages 26 and 38 of the record appendix where the trial
15 judge indicated unmistakably that he wasn't ruling on entrap-
16 ment grounds. And I will, of course, refer the Court to the
17 dismissal order itself, where he made it perfectly clear that
18 he was going off only on the constitutional grounds.

19 As for Appellees' argument and reliance on the
20 descending opinion in the Mersky case, our position here is that
21 even under the dissenter's view this Court properly has juris-
22 diction. There is no question here about the meaning of the
23 regulations as there was in Mersky. We're concerned with the
24 statute itself; the regulations merely elaborate the statute.
25 The requirements imposed upon proposed transferee are set out

1 in fairly good detail in Section 5812 and there is no basis
2 even under the dissenting opinion in Mersky for the conclusion
3 that this Court is without jurisdiction under 18 USC 3731.

4 Q If the judge had undertaken to pass on the
5 entrapment issue as suggested, perhaps, could that have
6 reached here? Could we decide that in any event?

7 A It seems to me --

8 Q That would be a case for the Court of
9 Appeals; wouldn't it?

10 A It usually would be, but it seems to me that
11 if the Court adhered to the views expressed by the majority in
12 the Sorrels and Sherman case that the question of entrapment
13 is one of going to the statutory interpretation -- going to
14 statutory interpretation rather than supervisory power of the
15 Court it is conceivable that some entrapment issues could be
16 brought directly to this Court. But, as this Court well knows,
17 the cCriminal Appeals Act has now been, is now being phased
18 out, unfortunately these kinds of questions won't be brought in
19 directly in any event.

20 To answer your question: I think in most cases
21 entrapment could be a question of fact, irrespective of which
22 the view of entrapment is adopted by this Court, even when it's
23 called upon to pass on it. It's not involved in this case at
24 this time.

25 MR. CHIEF JUSTICE BURGER: Thank you.

1 The case is submitted, and thank you gentlemen.

2 (Whereupon, at 1:14 o'clock p.m. the argument in
3 the above-entitled matter was concluded)
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