In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

DENNETH BASS,

Respondent.

Docket No. 70-71

Washington D.C.
October 18, 1971

Pages 1 thru 38

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Petitioner,	:	
v.	:	No. 70-71
DENNETH BASS, Respondent.	:	

Washington, D. C.,

Monday, October 18, 1971.

The above-entitled matter came on for argument at 11:21 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, 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:

ROGER A. PAULEY, ESQ., Criminal Division, Department of Justice, Washington, D. C., for the Petitioner.

WILLIAM E. HELLERSTEIN, ESQ., The Legal Aid Society, 119 Fifth Avenue, New York, New York 10003, for the Respondent.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71, United States against Bass.

Mr. Pauley, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROGER A. PAULEY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. PAULEY: Thank you, Mr. Chief Justice; and may it please the Court:

This is a criminal case involving the construction and constitutionality of a federal gun control statute, enacted in June of 1968. The case is here on writ of certiorari to the Court of Appeals for the Second Circuit, which reversed a judgment of conviction under the pertinent statutes, which are codified in Title 18, United States Code Appendix, Sections 1201 and 1202.

In view of the issues, I would like to briefly sketch the provisions of these statutes before stating the underlying facts.

They appear at pages 2 to 3 of our brief. In Section 1201, the Congress makes various formal bindings, to the effect that the receipt, possession, or transportation of a firearm by enumerated classes of persons, including convicted felons, constitutes "a burden on commerce or threat affecting the free flow of commerce; a threat to the safety of the President and Vice President of the United States; an impediment

or threat to the exercise of free speech or religion; and a threat to the continued and effective operation of the Government of the United States and of the States."

Section 1202(a) then defines certain crimes, including the one of which respondent here was convicted. It provides, and I quote in pertinent part:

"Any person who has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm" shall be guilty of a federal crime.

The facts of this case are as follows:

A federal undercover agent went to respondent's apartment in the Bronx, in the latter part of July 1969, to buy narcotics. Respondent let him in and directed him downstairs, where he made a narcotics purchase from an unknown individual.

The next day the same agent returned with a radio to exchange for narcotics, and, once again, respondent opened the door. This time respondent was holding an automatic pistol in his hand, which he explained he did as a precaution because of the large number of burglaries in the area.

The two men then consummated a transaction in which the agent purchased seven bags of heroin from respondent in

exchange for the radio, and the agent left.

He obtained an arrest warrant for respondent and a search warrant for his apartment and went back on the next day. Shortly after he was admitted on this occasion other agents, who had remained outside, entered the premises, arrested respondent and searched the apartment pursuant to the warrant.

They found the automatic pistol hidden under a bathtub, and a sawed-off shotgun lying near respondent's bed.

Respondent was charged as a previously convicted felon, under Section 1202(a), in two counts: with possession of the automatic pistol and of the sawed-off shotgun; and he was further charged in a count with carrying a firearm during the commission of a federal felony.

The jury acquitted respondent of that count, which thus is not here now; but found him guilty under the two Section 1202(a) counts.

It was stipulated at trial that respondent had been convicted in the courts of the State of New York of the felony of attempted grand larceny in the second degree.

Respondent interposed no factual defense before the jury to the Section 1202(a) charges. But following the verdict he made a motion for judgment of acquittal, contending that the government had failed to either prove or to allege what he

contended was an essential element of the offense, namely, that his possession of the firearm shown to have been in or to have affected interstate commerce.

The district judge denied this motion in an opinion set forth at pages 55 to 59 of the Appendix, holding that the statute properly construed did not require proof of any such element and that, as so construed, it was constitutional both under the commerce clause and as a rational exercise of Congress' power to safeguard the security of the President and Vice President.

On appeal, the Court of Appeals reversed, essentially adopting respondent's contention as to how the statute should be construed.

Four Courts of Appeals, the Fourth, Sixth, Eighth, and Ninth Circuits, have held to the contrary and in accordance with the views of the district court in this case, that the statute does not require proof of an interstate commerce element with respect to a convicted felon's possession of a firearm.

Because of that conflict, we sought review by this Court, and this Court granted certiorari last term.

There are essentially two problems: the first is whether the statute should be construed to eliminate the necessity for the government to prove in an individual case that a convicted felon's possesion of firearm had been in or

affected interstate commerce; and, secondly, if so construed, is the statute a permissible exercise of Congress' powers.

The problem in construing the statute arises from the inclusion of the words -- and I once again invite the Court's attention to pages 2 to 3 of our brief, where the statute is set forth -- inclusion of the words "in commerce or affecting commerce" following the verb "transports" in Section 1202(a).

The court below, looking at this --

Q You mean is this an issue that whatever Congress constitutionally might have done in this area, its statute requires as an element of the offense proof of something in commerce or affecting commerce; and your argument is, all that it requires in that regard is proof in cases of indictment for transporting but not for receiving or possessing? Is that it?

MR. PAULEY: Yes, Your Honor. Essentially we think that that --

Q Well, what I'm trying to get at is: Is there any constitutional question here?

MR. PAULEY: There is a constitutional question, assuming that you were to hold that the Court of Appeals was wrong, as we contend it was, in applying the "in commerce or affecting commerce" language to the receipt and possession branches of the statute, you would then have to reach, as four

Courts of Appeals have done, the constitutional question of whether a statute which eliminates the necessity for proof, in the individual case of any such affect, is within Congress' powers under the Constitution.

Q Well, didn't we deal with something like this in the Perez case last term?

MR. PAULEY: That is correct, Your Honor. And the decision below came before this Court's Perez decision, and it was written by the judge who had dissented in the Court of Appeals from the affirmance of the conviction in Perez, Judge Hays.

But I would first like to address myself to the threshold issue of what the proper construction of the statute should be.

Q Just further in the pursuance of my brother Brennan's question, you are in agreement here that after the Perez case last term there was no serious constitutional question?

MR. PAULEY: That is correct, Your Honor.

Q Certainly in the Court of Appeals for the Second Circuit, their construction of the statute was reflected as to any doubt that the constitutionality was of different construction; didn't it? Or the constitutionality of --

MR. PAULEY: Yes, it did, Your Honor. This was -- they did not hold that the statute would be unconstitutional,

if construed in the manner we urged, but they did say that it would raise a serious constitutional question, and that --

Q No doubt that was part of the motivation for them to construe the statute as they did.

MR. PAULEY: That is --

Q As I understand, they are explicit right there.

MR. PAULEY: That is correct. We will argue at the appropriate time that not even serious constitutional doubts in our view were raised by this statute, because, as the Perez opinion indicated --

Q You don't think one dissent is enough to raise substantial constitutional doubt, do you?

MR. PAULEY: I realize you dissented in that case, Your Honor; but --

[Laughter.]

-- but as the opinion indicated, the court purported, at least, the Eighth, to be following a long line of cases emanating from United States v. Darby, 312 U.S., and with respect to statutes constructed in similar fashion as this one, where Congress makes findings, and then he eliminates on the basis of them the necessity for proof in an individual case, that a particular transaction has affected commerce.

So we think that on the basis of the prior precedents, the Second Circuit erred in this case, even in holding that a serious constitutional doubt was --

Q Well, what I'm talking about, that brings us back to what I asked you earlier. You are arguing, then, that there are no constitutional doubts that "in commerce or affecting commerce" does not modify "receives" and "possesses"?

MR. PAULEY: That is correct. We're arguing that the statute is --

Q That's right.

MR. PAULEY: -- constitutional.

Q And that the Second Circuit was wrong in suggesting that without that modification it would be constitutional?

MR. PAULEY: That's correct, and in addition I should say we think there are limits to the doctrine that statutes should be construed to avoid constitutional doubts, and that the legislative history and other features of this statute make application of that doctrine by the Court of Appeals inappropriate here, even were there constitutional doubts.

The Second Circuit reasoned, looking at the text of Section 1202(a) alone, that since the words "in commerce or affecting commerce" should be given some substantive content, that since it seemed to be clear that they applied to the transportation sense, that logic compelled their application also to the receipt and possession branches of the statute, since it would have made no sense for Congress to distinguish, in terms of elements of the crime between receipt and possession

of a firearm by a convicted felon on the one hand, and transportation of a firearm on the other, particularly since transportation would seem, of necessity, to encompass a convicted felon's possession of a firearm.

Now, this argument has a certain plausibility, although it does not accord with the grammar of the section, when only the words of 1202(a) are looked at. But we submit that by confining its attention to the words of Section 1202(a) alone the court below neglected to consider several other indicia of congressional intent, which far outweigh the force of this argument.

In the first place, the court below neglected to take into account the implication to be drawn from Congress' inclusion of the formal findings in Section 1201. There the Congress found that the receipt, possession, or transportation of a firearm by felons constituted a burden on interstate and foreign commerce. It would have been an irrational act for Congress so to find were its intent merely to follow such a finding by the enactment of the statute which included, as an element, in the individual prosecution --

Q Well, why is it -- that raises the question, than, why did they put in the modifier at all?

MR. PAULEY: In 1202(a), you mean, Your Honor?

Q Yes.

MR. PAULEY: This --

Q Why do they say "in commerce or affecting commerce", if they meant the findings in 1201?

MR. PAULEY: I don't think there's any sound answer to that, Your Honor, other than the legislative history of the statute, which I was going to come to in a moment, indicates that it may have been put in there as an inadvertence. This --

Q In any event, you think it's surplus?

MR. PAULEY: In any event, we think it should be confined, notwithstanding the possible illogic of this position, solely to the transportation branch of the statute.

The explanation may in part rest on the fact that this statute received no scrutiny by any committee in either house of the Congress; it was introduced in May of 1968 by Senator Long on the Floor of the Senate as an amendment to what was enacted in the following month as the Omnibus Crime Control and Safe Streets Act of 1968.

Senator Long, on two occasions, explained the purpose of his amendment in such a manner as to make it totally clear that what was intended was a blanket prohibition on the possession or receipt of firearms by convicted felons; indeed, on one occasion, in a colloquy with Senator McClellan, which is set forth at pages 12 to 13 of our brief, Senator Long was asked by Senator McClellan: Under your bill could a convicted felon have a firearm in his own home?

The very case which, on these facts, is now before

the Court.

Senator Long's response was: No, he could not.

In addition, the Court of Appeals below failed to take into account that since 1961 it has been a federal crime for a convicted felon to receive or transport a firearm in interstate or foreign commerce. Those sections which formerly were codified in Title 15 of the United States Code were carried forward as Title 4 of the very same Omnibus Crime Control and Safe Streets Act to which Senator Long's bill was an amendment. And Title 4 was sponsored by Senator Dodd, who pertinently inquired of Senator Long on the Floor whether his bill was intended to replace Title 4; and Senator Long responded, No, rather that it was intended to add to or to complement that title.

Now, it is true that even if Section 1202(a) were to be construed in the fashion that the court below did, so as to require proof of an interstate commerce element as to a possession charge, it and Title 4 would not cover exactly the same grounds, since they apply to certain different categories of persons.

But the principal provision, both in Section 1202(a) and in Title 4, is its prohibition on the class of persons who are convicted felons from possessing firearms. And so we submit that Senator Long's answer to Senator Dodd, taken in conjunction with the rest of the legislative history and the

inclusion of the formal findings in 1201, and the grammar of Section 1202(a), make it abundantly clear that, at least as to the crime of possession of a firearm, Congress intended not to require proof of an affect on interstate commerce in the individual prosecution, but, rather, to rely on the formal findings.

Turning then to the constitutional question, if there are no --

Q Mr. Pauley, let me ask one question about the construction aspect. The statute speaks in terms of felon; how is felon defined? Is it --

MR. PAULEY: Felon is defined -- the provision is Section 1202(c) and is set forth at page 3 of our brief --

Q Yes. In other words, it takes us to the several variant definitions of State statutes as well as to the definition under federal law.

MR. PAULEY: That is correct, Your Honor. Just as --

Q And, hence, what may be a felony in Missouri might well not be in California.

MR. PAULEY: That is certainly true, Your Honor.

Q Does this disturb you at all?

MR. PAULEY: I don't think -- this is a point which respondent has raised in his answering brief, and which both sides agree was not reached by the court below and thus need not be considered here. But, were it to be considered, we do

not think it raises a significant constitutional question, since Congress' power to incorporate State definitions of felonies has been exercised many times. For example, in the assimilative Crimes Act, and would seem to be a rational means for Congress to legislate.

Q You don't seem to cite the Tot case decided, [463] I think, around 319 U.S. 320, Justice Roberts' opinion for the Court. Where there was a presumption that a person who possessed a firearm has departed interstate commerce. This would seem to be but another way of creating a conclusive presumption now, isn't it?

MR. PAULEY: No, I don't think so, Your Honor. The power which Congress sought to exercise in Tot was limited to cases in which it could be shown that a firearm had been in commerce, and it then sought to reach that result, or at least to authorize a jury to find that fact by means of a presumption flowing from the fact of possession itself.

And what this Court held was that the presumption was invalid because there was no rational nexus between mere possession and a finding of -- that a firearm had moved in interstate commerce in an individual case.

What Congress has done here, on the contrary, is to find that a class of activities, namely the possession of firearms by convicted felons, in the aggregate affects interestate commerce, and therefore it is not necessary for

the government in any individual case to prove the existence of a significant impact on commerce from a felon's possession.

Turning to the constitutional question, then, we do rely on this Court's decision in Perez last term, which involved a statute making it an offense to engage in extortion credit activities, where the Congress first made formal findings to the effect that this class of transactions as a whole had a detrimental impact on commerce, and then enacted crime-defining sections which eliminated the necessity for proof in the individual case.

Q Well, there, Mr. Pauley, however, were specific congressional findings, tying it in with organized crime as such, were there not?

MR. PAULEY: That is correct, Your Honor, but --

Q Had there been such findings here, would your posture be a little stronger in the light of Perez?

MR. PAULEY: It would be closer to the facts of Perez were that true. But the essential feature of Perez on which we rely is the test for assessing the constitutionality of statutes of this species, which the Court in Perez re-affirmed; and that test is simply whether the findings made by Congress have a rational basis.

We have set forth in our brief certain of the facts before Congress, at the time of enactment of this statute, on which we submit that Congress could reasonably conclude

that possession of firearms by convicted felons did have a detrimental impact on commerce.

In essence, they are that the national cost, in terms of moneys taken alone from certain crimes, such as burglary, robbery,and larceny, was, in 1967, much the better part of $1 billion, and now exceeds that figure, that further statistics showed that a high percentage of such crimes was committed with firearms, and that other statistics showed that a similarly high percentage was committed by recidivists, by persons with previous criminal records.

And based on the aggregate national cost, the impact to our economy from the commission of crimes by this class of persons, we think Congress could rationally conclude that to put firearms in the hands of convicted felons or not to attempt to punish that, would result in a serious detrimental affect upon interstate commerce. And we rely not only on the amounts taken as a result of such criminal conduct, but on the further fact, as Senator Long noted to his colleagues in the Senate, that the possession of firearms by convicted felons would deter large numbers of people from doing business, which in turn would seriously affect commerce.

In addition to the commerce clause basis of the statute, we also think the statute may be sustained, as the district judge did, on the basis of Congress' undoubted powers to safeguard the life of the President of the United

States.

The Court of Appeals below did not discuss this alternative finding by the district court, which has been adopted by the Court of Appeals for the Ninth Circuit. This Court only recently, in the Watts case, had occasion to note that the safety of the President is of course a matter of overwhelming national concern. In view of the overriding nature of that interest and in view of the unfortunate history in this country of assaults and assassinations by firearms upon former Presidents and other high public officials, we submit that it was not unreasonable for Congress to conclude that,even though an indirect means, it would significantly further the safety of the President and Vice President to make it a crime for a convicted felon to possess a firearm.

For these reasons we submit that the judgment of the court below should be reversed, and the cause remanded with directions to reinstate the judgment and sentence of the district court.

Q Is the Second Circuit the only one that held as they did?

MR. PAULEY: Yes, it is, Your Honor.

Q And you have four, at least, the other way?

MR. PAULEY: Yes. And for the Court's convenience I would point out that the Sixth Circuit's opinion, which is one of the more extensive, is now reported; it was not at the

time of the writing of these briefs, and it's in 440 Fed 2d 140.

Q Four what?

MR. PAULEY: 440 Fed 2d 144.

Q Thank you.

Q Is the Eighth Circuit one reported as yet? That's an essential one.

MR. PAULEY: Yes, it is, Your Honor. It is set forth at 438 Fed 2d 764.

MR. JUSTICE DOUGLAS: Mr. Hellerstein.

ORAL ARGUMENT OF WILLIAM E. HELLERSTEIN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. HELLERSTEIN: Mr. Justice Douglas, may it please the Court:

It is our position that the Court of Appeals interpretation is sound for many, many reasons.

Let me first fire one arrow in my bow, that the Court of Appeals did not find necessary to even discuss, but which this Court, in similar situations, has discussed. Namely, this is a criminal statute. Its ambiguity is conceded; in fact, it is so evident by the differences of opinion among the district courts and the circuit courts and the government concedes not only is it ambiguous, you must, if we and the government are right, weed out an entire section of the provision.

That where there is an ambiguity of this degree, this being a penal statute, it should be narrowly construed in favor of a criminal defendant.

Turning now to the reasons which I think support the Court of Appeals decision is, one, the Court of Appeals was here dealing with a statute as again the government concedes was drafted and passed with the greatest of haste, with an absence of legislative consultation, an absence of findings and hearings.

The government, on oral argument, has just made a further concession which is not in its brief and, in fact, which my brief does not avert to, is, namely, the government no longer, as I understand their argument, views the redundancy argument which it makes at pages 16 and 17 of its brief as strong as it does in its brief. Namely, the argument against the Second Circuit opinion was that if its interpretation is adopted, then Senator Long's statute, in essence the entire section of 1202, on page 17 of the government's brief they say it's better to cut out just the commerce transport section than it is to make the entire section superfluous.

As I understand the government, they now say it won't be superfluous and enters a very good reason. And I apologize to the Court for not really getting into it in my brief, because the answer is so obvious.

And it is tied to an error in the government's brief,

at page 16, footnote 4 -- footnote 10, excuse me, on page 16.

Footnote 10 of the government's brief says that "Title IV expanded the class of persons who may not possess weapons -- may not ship or transport weapons in interstate commerce.

That is not so. That expansion takes place in Title I of the Gun Control Act of 1968, which was passed four months after the Long amendment.

What you had at the time the Long amendment was passed was old 18, 19, 22, (f) and (e) then transformed into (g) and (h) of Title IV by Title I of the 1968 Act.

At the time of Senator Long's amendment all you had was a prohibition against the shipment or receipt in interstate commerce by a prior felon. What Senator Long's amendment does vastly increase the numbers of persons who may not have weapons, namely, persons discharged from the armed forces under dishonorable conditions, mental incompetents, persons who have renounced citizenship, and unlawful aliens.

Also Title IV had an exclusion for white-collar phonies (?), Title VII, Senator Long's amendment, does not.

Also, Senator Long's amendment adds the offense of possession, which Title IV deals only with receipt and shipment. And I say that Title VII, Senator Long's amendment, does include the terms "transports in commerce" or "affecting commerce."

So, in essence, what the Court of Appeals has done is; on the legislative record before it, taken a statute which has terms of art that are key constitutional terms; namely, "affecting commerce". And has interpreted the statute without further guidance from Congress that (a) avoids the reaching of a constitutional determination as to Congress' power to legislate against the mere receipt and possession without proof of a commerce nexus.

It is to that question that the government's position would force this Court.

Now, as I have understood the doctrine concerning constitutional adjudication, it was applicable not whether or not the constitutional question was decided favorably for one party or the other, but whether or not it need be decided at all.

Now, certainly, this case does not present the wherewithal for this Court, I think, to approach that question.

I think there are two decisions of this Court which are so similar in my mind that they form sort of a litigation model for how I, as respondent's counsel, suggest resolution of this case.

I will briefly call Your Honors' attention to, first, the case of United States vs. Denmark, which really should be captioned "United States vs. five gambling devices"; opinion by Justice Jackson. And then the case last term of Rewis vs.

The United States.

In both of those cases, all the elements that we seek this Court to appreciate here for our side were present. You had two statutes dealing with Congress' power to affect intrastate terminations. In Denmark, it was whether mere registration of gambling devices that had no connection with interstate transactions was to be required.

The statute, as the Court wrote, could have been interpreted either way. But the legislative history in Denmark was silent, offered the Court no guidance as to what the intendment of Congress was, and the Court said: (a) this is a penal statute; (b) we don't have enough from Congress to make this determination; and (c) there were other elements, namely, that when we're dealing with intrastate matters you also are dealing with the sensitivity of federal and State relations, and also, indeed, with the consequences to federal police enforcement powers, materiel for expanded congressional involvement, federal involvement in the ordinary concepts of the criminal law normally associated with State police powers.

And in Rewis again, opinion by Mr. Justice Marshall, without help from Congress, clearly designating what its intent was, although the statute was susceptible to two constructions the Court, given the nature of the case as a criminal case, took the narrow construction.

We think that the constitutional issue in the case is

not as simple as the govexnment would have it.

I believe in the prior argument, Mr. Solicitor General used the phrase that principals have a tendency to expand the limits of illogic.

I'd like to borrow that phrase, because it does describe what I've tried to communicate to the Court in Point II of our brief.

As I understand the vast powers of Congress under the commerce clause, as this Court has decreed it in recent years, it is very vast, but it is not unlimited, it is a question of degree.

The Polish National Alliance vs. NLRB case, which we cite in our brief, talks in those terms.

Now, a question of degree means that you have to look on a spectrum of conduct in activity, as I see it, to say when is that question of degree beyond Congress' powers? And here we think the regulation, based on the haste of the amendment, absence of findings, although I recognize that the Court does not require findings on the question of constitutional powers of Congress, requires us to look at what conduct, if the government's interpretation is right, Congress was really thinking of: the mere receipt or possession of a weapon in a man's own home, without more; no requirement that the weapon was transported in interstate commerce, or came interstate commerce.

Which leads me back again to another interesting question, the Casey Amendment, which was debated in Congress at length after this statute was enacted, talked -- the subject of that amendment was to make it a crime to commit a crime with any kind, or the weapon that had traveled in interstate commerce.

So, after you had Congress talking, as the government would have it, about not requiring a commerce nexus, it achieved the very result which the government says this statute achieves, there still was lengthy debate on the amendment that was defeated.

But, returning to the spectrum of criminal conduct: What you have, essentially, is a passive act -- and the word "act" is even possibly a misnomer -- a passive state of affairs, a weapon in a man's home, lying dormant and not affecting anything.

MR. JUSTICE DOUGLAS: We will recess at this time.

[Whereupon, at 12:01 p.m., the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. JUSTICE DOUGLAS: The Chief Justice intends to sit in the cases argued this afternoon, although he's necessarily absent.

Mr. Hellerstein.

MR. HELLERSTEIN: Mr. Justice Douglas, may it please the Court:

To pick up where I left off, I'd like to go back to the redundancy question, the redundancy of Title VII with Title IV, and just add a thought about why I think that even if there is a slight redundancy in language with respect to leaving in Title VII the interpretation the circuit put on it, that essentially it is giving what Congress really would like to have in Title VII.

I think if you read the legislative history of Title VII and the provisions in Section 1202(a)(1) dealing with aliens, with mental incompetents, with dishonorably discharged persons, you will see that the conceptual nature of Title VII, and I think what Senator Long wanted to have enacted and what Congress, I think, believed it was enacting, albeit hastily, was essentially an assassin bill. That up to the time the Congress had concerned itself merely with felons and weapons; but, giving the assassination of President Kennedy, the assassination of Dr. Martin Luther King, you can

tell from the legislative record, brief as it is, that this is what was at issue when this bill was passed. That there was a feeling by Senator Long of getting to the question of assassins and people who are irresponsible and proscribing them from having weapons.

With that in mind, I think, of course I must pass to the constitutional issue to convince Your Honors that it is serious enough to at least forestall decision on it until the case presents the necessity for it. This is not that case.

As I stated earlier, the question is one of degree of the Congress' power, and I think the degree must of course be very far removed for me to convince you that Congress does not have the power.

But I think, as I said on the spectrum of criminal conduct, the mere possession of a weapons goes to the utmost of that degree, wherein Congress may not reach, because this is essentially a passive act, regulated by most of the laws of the State, even when committed by a man with a prior felony.

Perez of course is a tough case, but I do not believe it is indistinguishable; I believe, if anything, it points the way to resolution in our favor of the issue here, if that issue must be decided.

As Mr. Justice Blackmun pointed out, with respect to Mr. Pauley's argument, I think the thrust of his question was that: doesn't have Perez have within it a replete -- replete

with interstate commerce nexus?

The statute in Consumer Title II of the Consumer Credit Protection Act found that organized crime itself was interstate and international in character, and that a substantial part of the income of organized crime was generated by extortion of credit transactions.

Subdivision 3 of that section found that extortion in credit transactions are tied on, to a substantial extent, to interestate and foreign commerce, and through the means and instrumentalities of such commerce. And then it talked about the ancillary group of intrastate loan-sharking activities.

I read Perez as a traditional commerce clause case in the sense that Congress has opted to regulate, in bulk, conduct that was commercial but, in essence, was interstate in character. It was no different than Wickard vs. Filburn, where, simply because it was local wheat raising, the entire scheme of regulation that was interstate in nature could not include the affect of that intrastate wheat raising. The same as I read Perez.

The thrust of the entire Title II of the Consumer Credit Protection Act was to regulate organized crime, was to regulate interstate transactions, and to bring into that regulation those intrastate activities that were ancillary; and of course would affect the efficiency and effectiveness of the total attempt at regulation.

There is no such class of activities here, in terms of gun possession, mere gun possession, or receipt by felons. That is the same, or has a corollary to the Consumer Credit Protection Act, because there is only one class of activity; and I think that's the key phrase in commerce clause litigation.

Here the class of activity is simply the unit of local possession and receipt. There is no larger unit of interstate regulation in terms of the affect on commerce.

So that Congress, if the government is correct, has opted to regulate something that is not part of the interstate regulation scheme, but starts out as intrastate and ends being intrastate.

And I think that the language Justice Stewart employed in dissent in Perez, although not shared by the other members of the Court, is the kind of language that commends itself to resolution here; because if this statute would be sustained as a proper exercise of the commerce power, namely, mere possession, on the theory that mere possession would then prompt an act and the act itself would affect commerce, namely, the robbery or the larceny. That Congress can therefore regulate the possession.

With that as your common denominator, mere possession, what you have is the ability of Congress to regulate any type of crime, really any type of crime, so long as the logical extension is that somewhere beyond the crime commerce will be

affected.

Now, once again talking about the expanded logic to an ultimate, yes, I could not, on a syllogistic basis, deny that some man with a gun might then opt to use that gun to commit a crime which then might bring itself within the realm of statistical material that the government offers to you as a rational basis.

But that, I think, really extends the commerce power quite a bit too far. And it's interesting that the Congress has not yet attempted to regulate the acts of crime which would directly affect interestate commerce, or even indirectly affect interstate commerce: a robbery; a larceny. And yet it has, if the government is correct, opted to jump over those acts and go right to the mere possession, which may or may not have any effect at all on interstate commerce.

I think in that context the Perez decision does not point the way towards an easy resolution of the constitutional issue in this case, unless it is to say, especially in a case where there are no findings, there are no hearings, that Congress may simply designate passive criminal conduct, and again I use the word "conduct" cautiously; may simply designate that, posit that since crimes are committed with weapons, albeit local crimes, that then therefore there is federal power to so regulate.

And I would submit that before Congress goes that far,

it ought to at least take the intermediate step and have the question presented, whether the regulation of a mere act of robbery could be properly within the federal scope.

In this case it does not. The government's position, in short, I submit, is really a conjectural one: that, absent findings or hearings -- well, findings there are -- but absent hearings, the statistics which the government posits really are of no help to the Court, as I see it. Because they, in a way, prove too much. And I just say that in the sense that they don't prove anything at all. To say that commerce is affected by large amounts of robberies and larcenies does not get you to the point where you can simply resolve the constitutional question of the possession of the weapon as being that connected to commerce.

Absent any kind of explication by Congress of the relevancy of mere weapon possession by a very narrow, limited group of personnel, prior felons, and its connection to commerce, I see very little basis on the record before this Court, both in this case and the legislative record, for taking that serious step of expansion under the commerce clause.

Again I say that I don't think I have to convince you that the step ought not be taken, but that -- and I do believe that it is unconstitutional for Congress to do this this far. But I only seek to convince you that there is a serious issue, which the construction given the statute by the

Court of Appeals can help you avoid deciding that question on this particular record in this particular case.

Now, the government, in its oral argument but not in its brief, chose, for the first time, to rely on the power of Congress to protect the Vice President and the President as a means for sustaining this statute. This was a position taken by Judge Frankel, although rather cursorily, and the government did not take it in its brief, it simply referred the Court to this prong of the findings as merely indicative of Congress' intent but not of its powers.

I submit that reading the congressional history, whatever there is, I think the court below was correct still in viewing it as really enacted under the commerce power. But even if that were not the case, there were two other prongs, namely, the power to protect a republican form of government, the power to protect rights under the First Amendment, and the third being that of protecting the life of the President and the Vice President.

I think those three really are in the same category, namely that they are far removed from what Congress' power really is in the premises; namely, the Watts case, which dealt with the statute enacted to prohibit threats against the life of the President, was a considered Act of Congress on a very narrow issue to take direct action; to say that the mere possession of a weapon in one's home is a threat to the

President or the Vice President, once again, I think, on a syllogistic scheme of abstract logic, might be defensible. But in terms of constitutional power, again, I think it falls short.

Mr. Justice Blackmun touched on the third point in our brief, which was raised in the courts below but not decided by the circuit, in light of their resolution of the issue. That is that Section 1202(c) in defining "felony" for the predicate conviction in this case violates the equal protection clause.

That is because, in defining "felony" to be a crime other than a misdemeanor, punishable by less than two years in prison, Mr. Justice Blackmun is entirely correct in referring to vagaries and the differentials between the statutes of the various States on crime.

For instance, Mr. Bass, convicted of attempted grand larceny in the second degree in New York, would have only been guilty of a misdemeanor in California and a number of other States. And yet, in California, that person, committing the same act in this case as Mr. Bass, could not have been punished or prosecuted under this statute.

The issue is not raised; I raise it before this Court because it is my understanding, under United States vs. Spector, that this Court can, if it wants to, decide the equal protection issue, if it feels there is no necessity for sending it back

to the court of appeals, if it affirms on all the other issues -- if it reverses, I should say, on the other issues in the case.

I would submit that, in the interest of my client, if this Court were to reverse, I would then ask for remand back to the circuit for getting its wisdom on the equal protection issue, since it did not rule on that issue.

However, just to recapitulate what I think this case involves is a statute carelessly drawn, quickly drawn, whatever motivation for drawing there may be, I think it is not very frequent that the Congress acts with such haste in drafting a statute or enacting a statute which affects matters never before affected under any federal statute.

Given that, and that is a criminal case where you normally apply a rule of narrow construction, and an ambiguous statute which avoids the constitutional issue, I think that the approach taken by the Second Circuit is far superior to that taken by the other circuits, because the other circuits put the cart before the horse.

The Eighth and Sixth Circuits said: we don't have any problem with the constitutional question at all, therefore, we'll decide it and then decide the statute along those lines.

The Eighth Circuit accepted the government's argument of redundancy. I think the government no longer tenders it to you in the same form it made in the Eighth Circuit or in its

brief.

I think what the Second Circuit does is to take the view that all the elements, and even one that I did not -- that I mentioned, but which the circuit didn't rely on: the narrow construction rule. Given what is before us in this case on this legislative record, that the hanging of a criminal conviction, which involves termination of constitutionality on this particular defendant, makes little sense.

And the commerce clause issue which I would point out was decidedly avoided by the circuit in this case was the same court, albeit different members of the panel, that did decide the Perez case affirmatively, and was affirmed by this Court. So the Second Circuit felt that Perez is a valid exercise of constitutional power, but seems to have greater doubts with respect to this case.

For these reasons, I would respectfully submit that the judgment of the court below be affirmed.

Q Mr. Hellerstein, may I ask one question on that: As I recall, the First Circuit had a case called White --

MR. HELLERSTEIN: Yes, Your Honor.

Q -- concerning depressant drugs, and if my memory serves me, the Eighth Circuit also had a case called White that was involved with the same statute. Do you have any comment about those decisions, which, as I recall again,

were both to the same effect, and each upheld the statute.

MR. HELLERSTEIN: Yes, in the White case, which is cited in the Second Circuit's opinion -- because the government heavily relied on it below -- at page 15 of my brief, Mr. Justice Blackmun, I cite to White, and I view the White case as the Second Circuit did; that the circuit harmonized White with this case by noting that, in sustaining Congress' power to regulate possession of depressant and stimulant drugs, "itself recognized the distinct problems inherent in the field of drug regulation," the First Circuit wrote:

"Unlike many other objects of federal regulation, depressant and stimulant drugs are not an inert, passive substance, which, after use, pass into the realm of consumption. They exert influence on the consumer."

I think what the circuit there, with respect to drugs, was concerned with is that drugs affect people who get on highways, who take all kinds of action which directly keeps the interest of regulation going, even though it's an intrastate matter.

Q You would draw a distinction, then, with firearms, from drugs; they get on highways too once in a while, don't they?

MR. HELLERSTEIN: Yes, but they are not ingested by the petitioner or the defendant. They are, in a sense, more inactive than even drugs, in the sense that they are totally

inactive until something else activates them.

And I think that White is a tough case. I think that Your Honor's question is well put. I think that the line of distinction is quite narrow.

I would only note, also, that this Court has not, except for a denial of certain White, made any ruling on that issue. But I think again the question in White with drugs is the complete flexibility and movement of drugs. I would submit even more flexible and more hard to regulate than the movement in weapons, which this statute already does provide for; namely, the receipts and shipment in interstate commerce of firearms.

I don't think that the drug regulation carries that. Also that the drug statute is part of a general scheme of regulations that has interstate qualities to begin with. And I would suggest that, again, it is more along the model of Perez and the Consumer Credit Protection Act than it is with respect to this statute.

Q Well, the cases as a group come together, and somewhere there is a watershed, isn't there?

MR. HELLERSTEIN: Yes, sir. I think in this case, however, all things being equal, the litigation posture of this case, the record before the Court, the Circuit Court of Appeals who certainly, I think, had the better of it in avoiding the entanglement of those constitutional questions.

MR. JUSTICE DOUGLAS: Mr. Pauley, you have, I think, three minutes left.

MR. PAULEY: I have nothing further, Your Honor, unless there are questions.

MR. JUSTICE DOUGLAS: Thank you.

The case will be submitted.

Mr. Hellerstein, we named you -- the Court designated you as attorney for the respondent, and we want to thank you for the fine public service you've rendered.

MR. HELLERSTEIN: Thank you, sir.

[Whereupon, at 1:19 p.m., the case was submitted.]