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In the  
**Supreme Court of the United States**

Pearl Barrett,  
Petitioner

V.

The United States Of America,  
Respondent.

No. 74-5566

Washington, D. C.  
November 4, 1975

Pages 1 thru 45

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IN THE SUPREME COURT OF THE UNITED STATES

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PEARL BARRETT,	:
	:
Petitioner	:
v.	: No. 74-5566
	:
THE UNITED STATES OF AMERICA,	:
	:
Respondent.	:
	:
-----X	

Washington, D. C.

Tuesday, November 4, 1975

The above-entitled matter came on for argument at  
10:04 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
- LEWIS F. POWELL, JR., Associate Justice
- WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

- THOMAS A. SCHAFER, ESQ., 3409 Michigan Avenue,  
Cincinnati, Ohio 45208, for the Petitioner.
- ROBERT B. REICH, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D. C.  
20530, for the Respondent.

I N D E X

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ROBERT B. REICH, ESQ., for the Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 74-5566, Barrett against the United States.

Mr. Schaffer, you may proceed.

ORAL ARGUMENT OF THOMAS A. SCHAFER

ON BEHALF OF THE PETITIONER

MR. SCHAFER: Mr. Chief Justice, and may it please the Court: My name is Thomas A. Schaffer. I'm from Cincinnati, Ohio, and I'm the attorney for petitioner, Mr. Pearl Barrett in this action.

The question that is presented before the Court this morning is a simple one and a single one, and it involves whether or not title 18 of the United States Code, section 922(h) applies to the petitioner, Mr. Barrett, who purchased a firearm in a purely intrastate transaction and was not himself personally involved in any manner with the interstate transportation of that weapon.

The facts are basically undisputed, and they are as follows:

On April 1, 1972, Mr. Barrett purchased a Smith and Wesson .38 caliber pistol from one Larry D. Bates, the owner and operator of the Western Auto Store in Bonneville, Kentucky. Petitioner later that day was stopped for a traffic offense in Owsley County, Kentucky, the surrounding county.



The police at the time they apprehended Mr. Barrett searched his vehicle and discovered the weapon lying on the floor on the passenger side.

Sometime prior to this occurrence Mr. Barrett had been convicted of the crime of housebreaking in the Commonwealth of Kentucky, so he was a convicted felon, as described by section 922(h), and as that section prohibits, he was allegedly forbidden to possess that weapon, being under the disability of a prior felony. He was subsequently charged under section 922(h) and he was convicted -- pardon me. He was tried in the United States District Court for the Eastern District of Kentucky at Jackson, was convicted on May 24, 1973. He then appealed to the United States Court of Appeals for the Sixth Circuit sitting in Cincinnati, Ohio, and that court affirmed the conviction on October 18, 1974.

The Government, at page 27 of their brief, in referring to the differences between the statute that we have here today, 922(h), Part Title IV of the Gun Control Act of 1968, and Title VII which was passed subsequent to Title IV state in their brief that "there is no reason to believe that Congress intended to produce this topsy-turvy result when it enacted these related provisions as different titles of the same Act."

Petitioner contends today that indeed Congress did intend to produce different results with Title IV and Title VII.

Title IV, or section 922(h), that section with which we are concerned today, covers in part the receiving of any firearm which has been shipped or transported in interstate or foreign commerce, while Title VII, which was passed subsequent to Title IV, states that it is prohibited to receive, possess, or transport in commerce or affecting commerce any firearm.

We would ask the Court to note the difference in position of the word "firearm" in those phrases. We feel that this is an important distinction between the Acts, and as we go further into the argument and bring out the legislative history, I would hope that the Court would recognize that Congress in placing that word behind the modifying words is the difference in the statutes, and it is this difference that we feel controls the question that is before the Court this morning.

QUESTION: Would you say that Congress has no power to forbid the possession of a firearm shipped at any time in the past in those terms in interstate commerce, the prohibition being limited to certain categories, including convicted felons?

MR. SCHAFER: No, sir, that is not our contention at all.

QUESTION: You say that Congress could do it, but they didn't do it here.

MR. SCHAFER: Yes, sir, that's exactly what we are saying.

QUESTION: You concede that Congress could make it an offense to buy a pistol that had been in the State of Kentucky for 10 years, that 10 years previously it had been shipped in interstate commerce?

MR. SCHAFFER: Your Honor, that is not part of my argument, but I contend that that is most likely what title VII of the Gun Control Act has done.

QUESTION: You don't think there is any problem as to Congress' authority to do something like I described?

MR. SCHAFFER: I would say that Congress has certain limitations as case history has developed, but in this instance, if a gun can be determined to have affected commerce, as the cases have cited, or the cases have reported in title VII situations, I feel the Congress does have that power. But we don't have that question here and we are not raising a question as to the power of Congress to govern such activity. We are merely stating that in this Act or this statute under which petitioner has been charged, the Government, through Congress, did not prohibit intrastate sales. It merely spoke of interstate sales. And we feel that because we have a purely intrastate transaction, that Congress did not intend that to be covered under title IV.

QUESTION: Incidentally, Mr. Schaffer, is Mr. Barrett still -- is he incarcerated still?

MR. SCHAFFER: No, sir, he is not. He is out on

parole.

QUESTION: Has he ever been incarcerated on this charge?

MR. SCHAFFER: Yes, sir, he spent, to the best of my knowledge, approximately a year and 8 months in the Federal penitentiary in Texarkana.

QUESTION: But his sentence technically has not been served yet.

MR. SCHAFFER: No, sir, the full extent of his sentence has not been served, that's correct.

QUESTION: Going to the language, you have said that Congress has the power to prohibit a felon from possessing or receiving a firearm that has at any time in the past been shipped in interstate commerce. You conceded the power to do that.

MR. SCHAFFER: Yes, sir, I do.

QUESTION: You say this statute doesn't do it.

MR. SCHAFFER: Yes, sir, that is our contention.

QUESTION: What words would you think would have to be in that last paragraph of section (h) "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." Would the words "which has ever before," would that do it?

MR. SCHAFFER: I would think that would make it a bit more clear. But I feel the Congress has adequately



covered the situation with title VII when it placed the word "firearm" after the modifying words of "receiving, possessing or transporting in commerce or affecting commerce any firearm." I feel that that phraseology does cover any firearm which at any time in the past has been transported in interstate commerce, and I feel that Congress must have determined there was a deficiency in title IV, otherwise they would not have passed title VII. The Government would have us believe that there would be a redundancy in the statutes, but I don't feel that's the case. I feel that Congress recognized that there was a loophole in title IV and sometime after the passage of title IV they passed title VII to amend that loophole.

As a matter of fact, Senator Long who was one of the sponsors of title VII proposed an amendment on the floor trying to close the problem that they had had with title IV, and it was his contention that he wanted to tie up title IV in such a way that no felon at any time might possess a weapon. In response to a question from Senator Dodge from the floor, that question being: "Senator Long, is this amendment a substitute for title IV," Senator Long answered, indeed it was not a substitute for title IV, rather it was an addition thereto.

It appears to me that the existing legislation was obviously not strong enough at that time, otherwise Senator Long would not have proposed this amendment to cover any felon possessing any weapon. There must have been something that

Congress saw, and indeed we contend that there is something, a loophole here. But there must have been something that Congress saw that would have encouraged them to pass title VII to cover up the problems that they had been having with title IV.

Indeed, in House report 1577, on section 922(h) prior to its passage, the House report stated that the principal purpose of title IV, the Gun Control Act, was "to strengthen Federal controls over interstate and foreign commerce in firearms."

Now, the history of that bill provided that what the Government was attempting to establish was a more effective licensing system with respect to those people who deal in firearms. The Act was intended to limit lawful transactions to those between Federal licensees, those people whom the Government had given permission to sell firearms, or, and this is a quote from the Congressional Record, at page 14773, "The Act", that is, section 922, "would limit those lawful transactions to those between Federal licensees or to those persons who reside in the same State."

So here it is from the people who were passing the bill, words from their own mouth saying, "We are not attempting to legislate intrastate sales between people who live in the same State. Rather we are trying to establish Government regulation over the firearms dealers, those persons to whom we will grant licenses."

Title IV was passed as a responsive measure to the national concern over the sale and the transportation of firearms across State lines. The people of this country had spoken to Congress, had told them of the need to curtail this activity where one person could live in the State of Michigan, go into the State of Ohio, purchase a weapon, and then go back into the State of Michigan. The purpose for this is obviously because the State of Michigan is going to have tougher gun laws than the State of Ohio. It's easier for a person to go from one State which has tough laws into another State.

In addition, Congress was attempting to cut off the mail order supply of guns, which I am sure the Court is aware has become a very grievous problem. But again we are talking with dealing in guns and persons buying guns out of State. Gun trafficking is what section 922 attempted to curtail, not gun possession.

House bill 17735, or section 922(h) as we have here, was passed and was put into effect by Congress to eliminate this interstate or across State line trafficking in guns. It appears to me that the key in this situation where we don't have an interstate transaction, also quoted from House Report 1577, at page 4415, the Congressman stated that so long as the last step in the transaction is intrastate, the shipment would not -- I repeat, would not -- be prohibited by Federal law. We feel this is the crux of the case before the Court

this morning. Congress did not intend, the House of Representatives did not intend, that section 922(h) would cover intra-state sales. Indeed, the Senate concurred in that. Senator Tydings, who was one of the major sponsors of the bill, felt that the people who were to be affected by 922(h) were, and I quote, "juveniles, felons, and fugitives who today can with total anonymity and impunity obtain guns by mail or by crossing over State lines into neighboring States which have lax or no gun laws at all, purchase a weapon and then return to their own State."

Here we are talking about what I have been speaking of really what the House was concerned with, that is the felon who may cross the State line, purchase a weapon and return to his own State. That's a different situation than what is before the Court this morning.

Any over-the-counter sale, according to Senator Tydings, was to be prohibited except, as Senator Tydings said, in the buyer's home State. It's important, I feel, to define the word "buyer" and what Senator Tydings had in mind. A reading of the legislative history does not indicate that there is any restriction or qualification as to definition of buyer.

Now, in other parts of the Act they have defined the terms, they have spoken of felons and fugitives and juveniles. But as to the word "buyer" there has been no distinctional qualification as used in this meaning.



So we contend that if Senator Tydings felt that a citizen could buy a gun in his home State, qualify under the definition of buyer, that citizen must also have included those persons under disability, that being felons, fugitives, and juveniles.

QUESTION: If the colloquy among Senators or Representatives explaining or undertaking to explain a bill is in conflict with the plain language of the statute, which is to prevail?

MR. SCHAFER: Your Honor, it has been my experience that if there is confusion, then we should look behind the plain meanings of the word and into the legislative history.

QUESTION: I will try my question again. If the language of the statute is plain and clear and unambiguous but some Senators and Congressmen expressed a different view of what they thought it mean, which then controls, the language or the views of two or three Senators?

MR. SCHAFER: Excuse me for misunderstanding your question. I would agree with you, then, that the plain meaning of the statute would control.

QUESTION: Then this statute says "to receive any firearm which has been shipped in interstate commerce." Now, this was shipped at some time in interstate commerce and you have indicated, at least tentatively, I thought, that if the statute had inserted the word "which has ever before been

shipped," or "which was previously shipped," then you wouldn't be here. That's what I thought you had conceded.

MR. SCHAFFER: Yes, sir. I did agree with you that had those words been placed in the statute, it would have made it more clear to me, anyway.

QUESTION: More clear.

MR. SCHAFFER: More clear. And I cannot take it upon myself to say that that would be entirely determinative as to the meaning of the statute, but for myself, having been involved in the case for over 2 years now, I would have to say that that would make it more clear to me.

QUESTION: What do you think the word "receive" in the statute means?

MR. SCHAFFER: I believe that "receive" indicates receiving in an interstate commerce transaction.

QUESTION: It is a broader term than "buy" isn't it? I mean, I receive something from you if you hand it to me.

MR. SCHAFFER: Yes, sir, that's true. I think what Congress was attempting to do was to regulate those persons who will order a substantial amount of guns from a mail order house, say, in New York, sell in Ohio.

Now, indeed, they are buying the guns, but they are also receiving the guns in a shipment so that they may sell them themselves in their home State. And as I see it, that's gun trafficking, and that's what I believe the Act was intended to

prohibit or at least regulate to a certain extent.

QUESTION: Why couldn't Congress be as much concerned with these local purchases as it is with mail order purchases?

MR. SCHAFFER: I believe that Congress is concerned with the local purchases, and I feel that Congress once they passed title IV realized that they were not effectively prohibiting or controlling local purchases, so they then passed title VII which does control local purchases.

I would agree with your Honor that Congress should and has stepped into the area of purely intrastate sales, but it is our contention they did not do so in this Act, and I feel that the legislative history, the words of the Senators and the Congressmen, as to why they were passing this bill indicates that it was their purpose to control the trafficking first and sometime subsequent to controlling the trafficking, they then sought to control the possessions of intrastate sales or possessions that occurred from intrastate sales.

QUESTION: Wasn't the ultimate objective of Congress to keep firearms out of the hands of individuals, just a given person who fell within this statute, that is, had a prior criminal conviction, or other categories?

MR. SCHAFFER: Yes, sir. I believe that the ultimate purpose was to do exactly that. My reading of the history of 922 indicates, or Title IV in its entirety, indicates that even though that was the ultimate purpose, that was not the

spoken purpose of this Act. Time after time the Senators and the Congressmen spoke in concerning this Act with gun trafficking. And I don't feel that intrastate sales fits within the definition of gun trafficking. I think this is the problem that occurred, and again I would state this is what they realized after they passed the Act, that even though their ultimate purpose was to keep guns out of the hands of felons, fugitives or juveniles, they had not accomplished that with Title IV, and I would simply state that had they done so or had they felt that they had done so, there would have been no reason to pass Title VII. And even though I would personally agree with everything that they did in Title VII and what the ultimate consideration was in Title IV, I respectfully contend that they did not accomplish what they intended to do with Title IV and they found soon after that they had to add to Title IV and control purely possessory crimes within State borders.

QUESTION: Do you have in mind the case of United States v. Sullivan involving misbranded drugs?

MR. SCHAFFER: Yes, sir, I do.

QUESTION: Justice Black, writing that opinion, said it really didn't make any difference that these drugs had come to rest in the State and had been on the shelf for 6 months before. Does that have some implication in this case?

MR. SCHAFFER: Sir, I think it's distinguishable in



that the identity of the drugs is what Congress was intending to protect in the Sullivan case and with the legislation passed to cover misbranding of drugs.

In a Sullivan set of facts we have a package of drugs which passes across State lines and is labeled Brand X, if you will. If, then, a pharmacist were to take that package and label it Brand Y, the consumer is purchasing something which he has been misinformed on.

I would agree that Congress certainly has the power to protect the consumer at that point. But I also feel that in a gun situation we don't have quite that same set of facts. There is no misinformation. When a person buys a gun, the act of buying the gun itself, although he may end up shooting himself with it, is not personally harmful to him. He knows what he is purchasing when he buys it. The Government does not have to protect his intelligence or his awareness at that point.

With misbranding of drugs they do. They have taken it upon themselves to protect the ultimate consumer for misinformation. And I don't feel that's what we have in our case.

QUESTION: My question that what seemed to be your argument that the interstate's relationship was too tenuous here.

MR. SCHAFER: No, sir, that's not specifically what

my argument is. I first thought that that might be what I would attack, but looking into the history of the law, that's not the intention that we have this morning. I don't feel that what the Government has done is in and of itself a tenuous or an arbitrary decision to regulate the sale of guns. I just feel that the statute under which Mr. Barrett was charged is not exactly what Congress intended to do. It's not worded specifically enough. It does not cover the transaction that's involved today.

I would say that were I to argue against Title VII, I might take that position that you have just indicated, that the interstate commerce nexus is too tenuous. But that's not my point here this morning, and I don't really feel that -- quite honestly, I feel that Title VII is worded in such a way, and according to the case law I feel that it would withstand prosecutorial attack, and I'm not here to do that. I'm not here to attack the commerce clause's extension into the interstate sale of guns.

So I feel that even though Sullivan talks about that, I would agree with what was said in Sullivan, but I would distinguish it in that we are talking about a different type of product which is being shipped interstate, we are talking about a different reason for regulation by the Federal Government.

There have been, as I am sure the Court is aware, a

a number of cases which have come from the circuits regarding the interpretation of Title IV and I've cited these in my brief, I've cited there appears to be a split as to what the circuits feel and there has not been up until this point a great deal of law from the Supreme Court because the cases have not come before it.

QUESTION: Mr. Schaffer, if your client had wanted to avoid violating this statute as the Government construes it, what steps could he have taken to advise himself as to whether or not the gun he sought to purchase was prohibited?

MR. SCHAFFER: I believe that if we accept the Government's position, the only thing that Mr. Barrett could have done would have been to buy a gun purchased in the State of Kentucky.

QUESTION: But how could he know? He would have to buy a gun manufactured in Kentucky.

MR. SCHAFFER: Yes, sir. If we accept the Govern-  
is  
ment's position, I feel that/the only thing he could have done to protect himself. And the question you raise is a good one, how would a purchaser know where a gun is manufactured, and is that raising too much of a burden on a citizen to ask not only may I purchase the gun, but from where did it come. I don't feel that --

QUESTION: Suppose the gun were stamped "Colt Manufacturing Company, New Haven, Connecticut."

MR. SCHAFFER: I would say that if we were to accept the Government's position, then, person purchasing the weapon would be on notice that he is committing, or violating a Federal law.

QUESTION: Because it had been manufactured in Connecticut.

MR. SCHAFFER: Yes, sir. I think that under those circumstances, again if we accept the Government's position, that is in essence the crime or the act which is being prohibited by this statute as they see it.

QUESTION: Does this record show whether he filled out a Form 4473 when he purchased it?

MR. SCHAFFER: Sir, the record indicates that the seller of the gun never presented that form to him. He never had the form in front of him, he never made any statement as to whether he was a convicted felon. However, he did state on cross-examination had he been asked that, had he been asked if he were a convicted felon, he would have answered yes. But he was never given the opportunity.

QUESTION: He buys it at a Western Auto store and he received no form.

MR. SCHAFFER: Yes, sir. I think what happened was that he knew the seller of the gun. It was his hometown and he had known the person for some time. And I believe that what happened was he went in and he placed half of the money



down for the gun, picked up the gun, and said, "I'll be back on Monday to pay you the rest of the money."

Now, I think what the seller might have been thinking, although it's not indicated in the record, it might have occurred to him over the weekend that he failed to give him the form, that when he returned on Monday he might have asked him at that time to fill it out. But we don't have any problem here as we have in some of the cases from the circuit where he made a false statement.

QUESTION: What was his explanation for having a loaded gun in the automobile so soon after purchase?

MR. SCHAFER: He didn't say. I did not represent him at the trial court, and he didn't say. I might say, though, that the cases that I've handled from the State of Kentucky people have come out and said on the stand that everyone owns a gun in Kentucky, something like that.

This Court has spoken, as I am sure the bench is aware, in the case of United States v. Bass, the opinion written by Mr. Justice Marshall, that is, to the best of my knowledge, the only case law that has come down. And I will admit that that was in the form of dicta, it was not the holding of the case. That case concerned, as I am sure the bench is aware, with Title VII, it was concerned with section 1202, and in that opinion Mr. Justice Marshall stated that he felt that section 1202, or Title VII, was significantly broader

in reach than Title IV, and he felt that by reading section 1202 in such a way as to give it a broader interpretation, he felt that that preserved the significant difference between the receipt offenses of Title IV and Title VII, and that's precisely what we contend today, that there is a difference between the receipt offenses. One concerns intrastate receipt, that is Title VII, whereas Title IV concerns itself only with interstate receipt.

Mr. Justice Blackmun in the case of Huddleston v. United States, which is cited by respondent, stated that he felt that from the outset it was apparent to him, anyway, that the focus of the Federal law, that being section 922, was the federally licensed firearms dealer, the trafficker, the seller. That is the person, those are the people, to whom section 922 was to apply.

Mr. Justice Blackmun went on to say that he felt the intent of the Act was to force the dealers in certain circumstances not to sell, to prohibit them from selling to certain individuals. So again the focus is here on the dealer and not the buyer. That's section 922.

Petitioner were he charged under Title VII, I contend this quite strongly, would not have the argument that we have made today. I feel that Title VII does cover intrastate sales. Title IV, as I hope we have pointed out to the Court this morning, Title IV was enacted to control the business of selling

guns. Title IV went into great detail about licensing provisions, regulations as to licensees or sellers of guns. They went into strict rules as to whom the licensee might sell these guns. It dealt specifically with interstate transactions. It talked about mail order guns, it talked about going across a State line to purchase a weapon.

QUESTION: Which section of 922 are you talking about now?

MR. SCHAFER: I believe 922(a), although -- I believe that's the section, your Honor. That concerns itself with dealers. And the section subsequent to (a), I believe (b), (c), and (d) deal specifically with regulations on the licensed seller.

Petitioner would contend this morning there was indeed a loophole in Title IV that, although Congress intended ultimately to control intrastate transactions, it did not do so with Title IV. And we would point out that had there not been a loophole, there would not have been a reason for Title VII, which was passed some time after Title IV.

We contend that the petitioner's conviction should be reversed on this basis. He purchased the gun in his home State of Kentucky, purchased it in his hometown. He did not leave the State of Kentucky. He was caught within the State of Kentucky with that weapon. And other than the fact that the gun itself was manufactured outside of the State of Kentucky,

there is no other connection with interstate commerce.

Thank you very much for your attention this morning.

MR. CHIEF JUSTICE BURGER: Mr. Reich.

ORAL ARGUMENT OF ROBERT B. REICH ON

BEHALF OF RESPONDENT

MR. REICH: Mr. Chief Justice, and may it please the Court: The sole question before this Court this morning concerns the scope of section 922(h) of the Gun Control Act. Section 922(h) is set out at page 11a of our appendix. It provides in pertinent part that it shall be unlawful for any person -- and then there are four categories. The first category is "who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year," that latter category of person whom I shall refer to as a convicted felon;

"who is a fugitive from justice;

"who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug...or narcotic drug;

"who has been adjudicated as a mental defective or who has been committed to any mental institution;"

It shall be unlawful for someone falling within any of these categories to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The meaning of that provision, we submit, is clear.



Once it is established that the firearm is a firearm that has been shipped or transported in interstate commerce, then Federal jurisdiction is established. There is no indication from the language that Congress intended to limit its scope to those instances where the interstate shipment or transportation immediately precedes the receipt. Indeed --

QUESTION: Don't you perceive any constitutional difficulties at all with reading the statute that way?

MR. REICH: No, Mr. Justice Brennan, we do not.

QUESTION: Maybe Mr. Justice Brennan doesn't either.

MR. REICH: I apologize. We not perceive any difficulties with it that way. Indeed, in Huddleston v. United States, this Court in construing section 922(a)(6) held that that provision does apply to an intrastate, wholly intrastate, redemption at a pawnbroker's shop where there had been absolutely no contention that the firearm had ever been shipped in interstate commerce.

QUESTION: Mr. Reich.

MR. REICH: Yes, Mr. Justice Powell.

QUESTION: Could the Government have prosecuted this defendant under Title VII?

MR. REICH: The Government could indeed have prosecuted under Title VII.

QUESTION: Any explanation why it didn't, in light of a previous interpretation of that section in Bass?

MR. REICH: None that I know of, your Honor. I think -- in fact, I have absolutely no idea. The U.S. Attorney, Assistant U.S. Attorney obviously assumed that the prosecution could be brought under either provision.

But had the Government --

QUESTION: He obviously, then, hadn't read the Bass opinion, had he?

MR. REICH: The Bass opinion, we would contend, Mr. Justice Stewart, did not authoritatively construe Title IV, which was to become section 922(h) as being limited to direct interstate receipts. And if you enable me to get to the Bass opinion in just one moment, I would like to state that had the Government intended to limit the scope of section 922(h) to direct interstate receipts, as petitioner urges, it presumably in the Gun Control Act would have used language to that effect, such as section 922(j) which you will find on page 12a of our appendix which states that "It shall be unlawful...to receive... any stolen firearm...which is moving as, which is a part of, or which constitutes, interstate...commerce," or section 922(k) which is also on page 12a of our appendix which states that "It shall be unlaw...to receive, in ...commerce, any firearm which has had the importer's or manufacturer's serial number removed."

I think it's very indicative that Congress, rather than employ these standard phrases, "which is a part of" or "which

constitutes" or "which is moving as," or a firearm in commerce, chose instead to provide that it shall be unlawful for any convicted felon or other category of potentially irresponsible person to receive a firearm which has been shipped or transported in interstate commerce. The structure of the Gun Control Act confirms our reading of the plain language. The Gun Control Act is a comprehensive scheme whose provisions reveal a common design to keep firearms from coming into a State and falling into the hands of convicted felons or other categories of potentially irresponsible persons.

Now, to this end, licensees, all interstate shipments of firearms must be channeled through licensees. Once a firearm has reached a State, come into a State, the licensee is prohibited in an intrastate transaction from selling or otherwise transferring a firearm to a convicted felon or an indicttee, a fugitive, or any other category of potentially irresponsible person. That's in an intrastate transaction.

Also in an intrastate transaction a purchaser must attest truthfully that he is not a convicted felon and that he is not also an indicttee, a fugitive, or other category of potentially irresponsible person.

QUESTION: Well, the man who sold this weapon, is he under indictment?

MR. REICH: I am sorry, your Honor?

QUESTION: The man who sold this gun, did he violate

any law by not getting --

MR. REICH: The man who sold this gun should have found out. Now, section 922 --

QUESTION: My question was, was he guilty of any crime in doing that?

MR. REICH: He was not guilty of knowingly selling a firearm to a convicted felon as 922(d) provides, because he did not follow the required procedure and have the purchaser fill out a Treasury Form 4477. So he is perhaps guilty, in fact he is guilty of violating the Treasury regulations requiring a dealer to have a purchaser fill out this form so that the dealer can know whether --

QUESTION: What has been done to him?

MR. REICH: He was warned. He was not indicted, nor was he prosecuted. He was warned that if this happened again, however, he would be.

But the dealer also in an intrastate transaction, according to the Gun Control Act, has to keep careful records of all the people to whom he sells.

QUESTION: My point is you point all these things you do and you are not enforcing them. What good is that?

MR. REICH: Well, Mr. Justice Marshall, as far as I am aware, all these provisions are being enforced.

Now, the one instance in this case where the dealer had violated the regulation in terms of not finding out



specifically whether this man was a convicted felon in that intrastate transaction --

QUESTION: A man comes in and says, "I've got half the price of a gun, you give me the gun and I will go out and get the other half and bring it back in to you Monday," that's all right.

MR. REICH: I would say that it's not all right. Were I the Assistant U.S. Attorney in charge of this case, I think there would be a possibility of an indictment of this dealer. Unfortunately, in terms of prosecutory discretion, the Assistant U.S. Attorney or the U.S. Attorney did not follow through on that, but did give the dealer a warning.

QUESTION: Is it a criminal offense to violate the Treasury regulation?

MR. REICH: I simply am not aware or not sure of that, sir, Mr. Justice Rehnquist.

QUESTION: What would he have been prosecuted for if it's not a criminal offense to violate the Treasury regulation?

MR. REICH: If it is not a criminal offense to violate this Treasury regulation, he would not have been prosecuted. I am assuming from Mr. Justice Marshall's question for the sake of the question that it would be a criminal offense.

QUESTION: What difference does that make? We are

talking about the felon anyway, aren't we?

MR. REICH: Yes, Mr. Justice Blackmun. My point is that all of these provisions, including a provision that requires that a purchaser attest truthfully, certify truthfully in an intrastate transaction that he is not a convicted felon, all of them have the common purpose of keeping firearms out of the hands of the convicted felon, even in an intrastate transaction. And it is the Government's submission that section 922(h), our reading of section 922(h) makes that an integral part of this comprehensive scheme because it deters directly that which the rest of those provisions I indicated seek to deter indirectly.

Now, petitioner's construction of section 922(h) would create a major gap in this comprehensive regulatory scheme because it would enable a convicted felon to receive a firearm as in the instant case through the inadvertence or negligence on the part of the dealer who simply neglected to find out whether he was a convicted felon, or to the simple expedient of getting a friend or a relative or somebody else to get it for him.

QUESTION: What in the record says this is neglect? There is nothing in the record as to why he did it. Am I right?

MR. REICH: Well, Mr. Justice Marshall, the dealer was questioned on the stand. He indicated that he had known

the buyer, petitioner, for 5 years, had absolutely no idea that he was a convicted felon, and because it was Saturday night, he was going to have petitioner come back and fill out the forms Monday morning, he just simply didn't feel that it was important. He thought it was a mere formality because he had known the guy.

But this is an example of how through this kind of carelessness the entire comprehensive regulatory scheme of the Gun Control Act can be undermined.

QUESTION: If he had filled it out, we wouldn't have this case, would we?

MR. REICH: If he had filled it out and if the dealer had looked at it, we would not have this case, that's absolutely correct.

QUESTION: Both of them, then, violated the Act by selling it notwithstanding the disclosure of the conviction.

MR. REICH: That's conceivable, Mr. Justice.

What is also possible, in fact, even more conceivable, is that a convicted felon or a fugitive or a narcotics addict who wants to obtain a firearm but who wants to avoid all these prophylactic rules need only under petitioner's construction get his friend or relative or somebody on the street to go in and get it for him.

Now, it seems to us very unlikely that Congress in enacting the Gun Control Act with all these measures designed

to keep firearms out of the hands of convicted felons, even within an intrastate transaction, would have created such a major gap in the scheme.

QUESTION: Mr. Reich.

MR. REICH: Mr. Justice Blackmun.

QUESTION: Let me suggest this to you: Suppose he went in to see his old friend the dealer and said, "I want a particular model," but the dealer didn't have it. He said, "Order it for me." So he ordered it from South Carolina. Then would he be subject to prosecution clearly?

MR. REICH: Under section 922(g), which I believe is set out at page 10a of our appendix, under 922(g) a convicted felon or other category of potentially irresponsible person is barred from shipping or transporting a gun in interstate commerce. Now, read in conjunction with section 2(b) of title 18, which makes one punishable as a principal, if he causes an act to be committed, section 922(g) would indeed bar a convicted felon or other category of potentially irresponsible person from ordering or soliciting a gun across a State line.

QUESTION: What I am trying to bring out is the fact that just the accident of having the gun on the shelf or not having it on the shelf on your opposition's theory, it would make a difference as to whether he is prosecuted -- capable of prosecution or not.

MR. REICH: Absolutely right, Mr. Justice Blackmun.



The prosecution, if the gun happened to be on the shelf, in fact in the instant case, the firearm just happened to be the last one in the dealer's stock. If it happens to be on the shelf, under petitioner's construction, there is no violation of the Act. If the dealer has to order it for him, under 922(g), as I already indicated, there is indeed a violation of the Act. And it's improbable that Congress intended that an offense under the Gun Control Act would turn upon the vagaries of a dealer's inventory in such a way.

QUESTION: Well, if it had that in mind, the statute might well have been written with an insert "known to him to have been shipped in interstate commerce," or "knowingly receiving."

MR. REICH: That's correct.

QUESTION: The scienter factor was left out of the statute, was it not?

MR. REICH: The scienter is left out of the statute, 922(h) it's left out of. Scienter enters into one or two other provisions where convicted felons or other individuals are prohibited, for instance, from knowingly receiving a stolen firearm. But you are correct that scienter does not enter into section 922(h) at all.

puts

QUESTION: It / the burden on the purchaser to, if he wants to be careful, I suppose, on your theory of the case, to inquire whether it was manufactured in Kentucky or

elsewhere.

MR. REICH: That's correct. Section 922(h) puts the burden directly on the convicted felon, puts him on notice, that if he receives a firearm that has been shipped or transported in interstate commerce, he is liable.

QUESTION: It would mean that to take Justice Brennan's illustration a while ago, if a man in Hartford bought a Colt pistol manufactured at New Haven, Connecticut, he would not be violating the statute. Is that it?

MR. REICH: He could be fairly well sure that he would not be violating the statute. However, there is always the possibility that although manufactured in Connecticut, the firearm had traveled outside the State at some point in its history.

QUESTION: What if it moved on an interstate train from Hartford to New Haven?

MR. REICH: I don't believe that that would violate the statute, because the plain words of the statute indicate only that it's illegal to receive a firearm which has been shipped or transported in interstate commerce, and presumably that means across a State boundary. I think it would make the Act somewhat unworkable to extend interstate commerce to mean ... any orderer of interstate commerce.

What about on page 13a, Mr. Reich, of your brief where you set out 18 U.S.C. appendix 1201, which I believe is

the introductory section of Title VII which Congress passed later.

MR. REICH: That's right.

QUESTION: And there you have a kind of finding that you have in many recent Acts of Congress, that Congress finds and declares that the receipt, possession, et cetera, is a burden on commerce. In other words, a finding for the purposes of that legislation in its entirety that these particular intrastate acts do burden interstate commerce.

And then you have section 1202 which does clearly regardless of immediate shipment in interstate commerce make it unlawful for a felon to purchase a gun.

Then you go back to the Act this man was prosecuted under and there isn't any sort of generalized finding, such as there was in 1201, that Congress uses when it wants to embrace a lot of intrastate transactions.

MR. REICH: Well, Mr. Justice Rehnquist, there was a finding in the Senate report, in fact at the beginning of the Senate report there was a series of findings, that did not make their way into the final draft, for reasons I don't quite understand. Often findings in final reports of the Senate or Congress simply don't find their way into final drafts. But that Senate finding is, I think, quite indicative. It states --

QUESTION: Is that entitled to the same degree of

weight as if it had made its way, as you put it, into the legislation?

MR. REICH: No, but it is indicative, I think, of Congressional intent as to whether Congress --

QUESTION: Not if it wasn't enacted, is it?

MR. REICH: As a matter of legislative history --

QUESTION: Just the opposite. It's indicative of what Congress did not intend to do if they had it before them and did not enact it.

MR. REICH: Well, that may be. As a matter of legislative history, however, Mr. Justice Stewart, I think it might be indicative that the Senate did find and declare that the ease with which any person can acquire firearms, including criminals, narcotics addicts, mental defectives, is a significant factor in the prevalence of lawlessness.

My point with Mr. Justice Rehnquist was not that there was a specific finding that Congress intended to encompass intrastate transactions, perhaps because Congress felt that it was very clear from the structure of the Act, and as this Court held in Huddleston, many provisions of the Act already pertain to intrastate transactions. The finding to which I was referring is merely a general broad finding that Congress was concerned with keeping firearms out of the hands of convicted felons and not limiting itself only to interstate transactions.



QUESTION: Mr. Reich, the wording of Title IV with which we are concerned in this case is precisely the words ... in hyperbola that were in Title IV when Tot was decided. Is that so?

MR. REICH: That's correct.

QUESTION: And certainly the Court in Tot, apparently the agreement, the Government has said, reciting what had happened in the lower courts, at both courts, it held that the offense created by the Act is confined to receipt of firearms or ammunition as a part of interstate transportation does not extend to the receipt which is your argument here .. in an intrastate transaction of such articles which at some prior time have been transported interstate. What are you going to do with that?

MR. REICH: Well, --

QUESTION: What should we do with it?

MR. REICH: Mr. Justice Brennan, to be sure when Congress enacted the Gun Control Act of 1968, as you point out, it must have been aware to some extent of the Court's holding in Tot striking down the presumption that was struck down from section 2(f) of the Federal Firearms Act, which is the predecessor --

QUESTION: Congress was not aware of or ignored?

MR. REICH: We would contend that given (a) the plain meaning of the phrase "to receive any firearm which has

been shipped or transported in interstate commerce," plus  
(b) the fact that in 1943 in the Tot case this Court did not  
really focus upon the question of the scope of section 2(f)  
but merely --

QUESTION: Apparently your predecessors in the  
Solicitor General's Office did, because according to the Court  
in that opinion -- I wasn't here then -- it says that the  
Government agrees this construction is correct.

MR. REICH: I wasn't alive then.

QUESTION: Yes, but you say in your present brief  
that the Government at that time argued for several pages.--

MR. REICH: It did, Mr. Justice White.

QUESTION: -- in the Tot brief, which I have here,  
that those words do not have the reach that you now urge.  
And furthermore, both courts -- Tot reviewed two courts of  
appeals' judgments -- both courts below held exactly what the  
Tot language says. Is that right?

MR. REICH: Indeed.

QUESTION: So you are saying that Congress wouldn't  
have been aware of two courts of appeals' holdings, the language  
in Tot, plus the opinions of the chief law enforcement agency  
of the United States.

MR. REICH: We are saying that Congress, given the  
fact that --

QUESTION: We know that Congress isn't aware of a lot

of things that happen around here. That's quite obvious.

MR. REICH: There is absolutely no --

QUESTION: But that isn't usually the way we treat these things, is it?

MR. REICH: Well, there is absolutely no indication in any of the legislation --

QUESTION: I know, but don't we presume that Congress keeps itself familiar with the things that we say around here?

QUESTION: The Department of Justice usually is not ignorant of what is going on on the Hill. Do you know if the Department of Justice participated in any write-up sections on Title IV?

MR. REICH: The Department of Justice, I assume, participated in the write-up sessions. However, your Honor, I would point out as this Court has held repeatedly, it would require very persuasive circumstances enveloping Congressional silence, including a re-enactment of a statute, to bar the Court from re-examining its own doctrines.

Now, the Department of Justice, the Government, has reassessed --

QUESTION: This is an issue of statutory construction, isn't it?

MR. REICH: It is.

QUESTION: And how frequently do we review when

it is a statutory construction?

MR. REICH: Well, let me give you an example, if I may.

.. QUESTION: I can give you one, Boys Market, but --- that's a famous case if you haven't heard of it.

MR. REICH: Yes, I have, Mr. Justice White. But I would like to point out --

QUESTION: How often outside of situations like Boys have we ever done it?

MR. REICH: Well, let me give you an example of Girouard v. United States in which this Court construed the Naturalization Act --

QUESTION: What's the name of that?

MR. REICH: Girouard v. United States, it's at 328 U.S. 61, in which this Court reconstrued the Naturalization Act which had been recently re-enacted by Congress. And that's after the Court had construed the same language three times before. Nevertheless, the Court held that Congress when it re-enacted the naturalization oath provision in the Naturalization Act simply could not have paid much attention to the Court's three prior holdings.

We don't have the situation here where the Court merely assumed or relied upon the two lower courts or relied upon the Government's representation. In Girouard we had --

QUESTION: You can suggest that Justice Brennan



(inaudible).

(Laughter.)

MR. REICH: I don't think I would --

QUESTION: I don't think I would --

MR. REICH: I wouldn't either, your Honor. I think I will stick with the Girouard, Zuber v. Allen, and other instances in which it's clear that this Court has looked upon a past pronouncement, a past construction, as being simply implausible, and because of its implausibility, particularly here, because Congress may never have focused upon a relatively implausible construction, granted one that the Government is in part responsible for. I may add that the Government has, of course, reassessed its position with regard to the scope of the language in section 2(f) and it decided that it was simply wrong, that Congress would not have used the broad statement, the broad language "to receive any firearm which has been shipped or transported," even in 1938, had it not meant to encompass any transaction in a firearm.

QUESTION: Could they have legislated in this area if they didn't have the interstate aspect in the statute? If they had simply said that it was unlawful for a felon to receive any firearm or ammunition, period, would there be --

MR. REICH: After Perez, after this Court's opinion in Perez, that is I think an open question. I would say that as this Court noted in Huddleston, Mr. Justice, there are

many parts of the Act, the Gun Control Act, where the gun itself has never necessarily been involved in interstate commerce where the Act was held to be completely constitutional, as that provision I pointed out before, the 922(a)(6) governing a redemption from a pawnshop. The question is not before the Court right now because we do have a statute in which Congress has clearly stated that what is unlawful is the receipt of any firearm which has been shipped or transported in interstate commerce.

QUESTION: Mr. Reich.

MR. REICH: Yes, Mr. Justice Powell.

QUESTION: You said there would be a gap, serious gap, in the legislation regulating gun control if we accepted the interpretation of 922 suggested by the defendant. The statutes do cover different situations to some extent -- fugitives from justice, drug addicts are covered by 922 and not by Title VII. But I understood you to say there was some other gap. Would you mind clarifying that or repeat it?

MR. REICH: Yes. The gap to which I referred was the ease with which a convicted felon or any other category could simply receive a gun through either the inadvertence of a dealer or by the simple expedient of getting a third party, a friend or relative, to get it for him.

Now, Mr. Justice Powell --

QUESTION: Is that unique to 922, or would that not

also apply under Title VII.

MR. REICH: Under 1202(a) for categories that are not included within 922, where there is not an overlap between those two provisions, all those individuals, according to the construction that a plurality of this Court gave to section 1202(a) in Bass, there would be no gap because they would be prohibited from receiving a firearm which has been shipped or transported.

QUESTION: Or possessing.

MR. REICH: Or possessing, that's right.

But as to fugitives or indicts or addicts, or even as to ammunition, I think an important area where the statutes did not overlap has to do with ammunition. Ammunition is covered in Title IV which became the Gun Control Act, 922(h), but is not included within 1202(a). So therefore even under petitioner's construction, any adjudicated -- narcotics addict or fugitive or indicts can with impunity get somebody to get a gun for him, get ammunition for him, even a convicted felon can with impunity get someone to get ammunition for him.

We think Congress simply did not intend to create this gap, especially when it used such plain language.

I might also say that whatever Congress intended in 1938 with regard to that language, given the structure of the Gun Control Act in 1968, given all the prophylactic measures which I have mentioned that are geared toward keeping firearms

out of the hands of convicted felons or other categories of potentially irresponsible persons, and also given that Congress must have been aware in '68 of its authority under the Commerce Clause to enact legislation that govern intrastate transactions, it is not at all unlikely that Congress used this language and gave it its common sense meaning, that is, that it covers the receipt of any firearm which has been shipped or transported in interstate commerce.

One more thing. Petitioner's construction of 922(h) would also relegate section 922(h) to mere redundancy with that provision I mentioned before, section 922(g), which already prohibits the convicted felon or other category of potentially irresponsible person from shipping, transporting, or causing to be shipped or transported in an interstate transaction a firearm. So that under petitioner's construction, 922(h) would have an independent force and effect only in those very unique circumstances where the interstate shipment has not been solicited in any way by the convicted felon.

QUESTION: I'm reading what I think is 922(g) on page 10a and 11a of the appendix to your brief, to the Government's brief, and it just says to ship or transport any firearm.

MR. REICH: I mentioned before, Mr. Justice Stewart, that read in conjunction with section 2(b) of Title 18 which makes one punishable --



QUESTION: For causing to be done.

MR. REICH: Who causes it to be done, 922(g) would have a scope --

QUESTION: Well, I guess read in conjunction with the General Accomplice Act, whatever that is, 18 U.S.C. section 2, or whatever it is.

MR. REICH: 2(b).

So therefore section 922(h) under petitioner's construction, as I said, would be limited to the very rare circumstance where the interstate shipment had not been solicited. We think it very implausible that Congress intended to assign section 922(h) such an absurdly insignificant role in this comprehensive scheme.

QUESTION: In one of the congressional reports, perhaps it wasn't on this statute, and maybe you can enlighten me, Congress, or a committee of Congress, made the finding that the possession of handguns have increased in the last 25 or 30 years seven or eight times the rate of increase of population. Is that anywhere in any of those reports cited in this --

MR. REICH: Yes. The legislative history, as we --

QUESTION: You recall it. I am speaking to this specific point. There is an enormous increase in the proliferation of --

MR. REICH: I remember, your Honor, that one of the

Senate reports did cite those studies indicating the increase in handguns, but I just don't remember which report it was.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:05 a.m., oral argument in the above-entitled matter was concluded.]