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In the

Supreme Court of the United States

RICHARD A. SCARBOROUGH,)

Petitioner)

v.)

UNITED STATES OF AMERICA,)

Respondent.)

No. 75-1344

March 2, 1977

Pages 1 thru 44

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IN THE SUPREME COURT OF THE UNITED STATES

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RICHARD A. SCARBOROUGH, :
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 Petitioner :
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 v. : No. 75-1344
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 UNITED STATES OF AMERICA, :
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 Respondent. :
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Washington, D. C.,

Thursday, March 2, 1977

The above-entitled matter came on for argument at
2:13 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

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Virginia 22313; on behalf of the Petitioner.

RICHARD A. ALLEN, ESQ., Office of the Solicitor
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D. C. 20530; on behalf of 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 next in 75-1344, Scarborough against the United States.

Mr. Hirschkop, you may proceed whenever you're ready, I think.

ORAL ARGUMENT OF PHILIP J. HIRSCHKOP, ESQ.,

ON BEHALF OF THE PETITIONER

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

The issue before the Court is a rather narrow one here. There is very little history or case law to really draw upon.

The Court had the issue before it somewhat in the Bass case, United States v. Bass, but not precisely the question raised here, which is an extension of Bass.

In Bass, however, the Court reviewed the legislative history, as much as there is of it, and concluded the legislative history is of no great force and effect in this case. I think we have to start again at that touchstone, accepting Bass, what it stands for, although it was four members of the Court that went as far as I would ask the Court to go in this case, and five who went as far as the interpretation that you have to have an interstate commerce nexus that is current for a possession offense -- I'm sorry, five who said you have to have an interstate commerce nexus for possession, whether

it be current or not wasn't reached by the fifth member.

In the legislative history we only have, really, the comments of the Senator who proposed this amendment, Senator Long. In fact, three other Senators spoke on the legislative debate, Senator Dominick, Senator Dodd and Senator McClellan.

Each of those three expressed reservations as to the amendment itself. Senator Dominick said, perhaps it has gone too far; we can try and work it out in conference.

Senator Dodd, who drafted Title IV, Section 922, corresponding statute, said he was uneasy about it, but that they would study it.

Senator McClellan said it requires further thought, said he would try to understand it. But he agreed with Senator Dominick, it may go too far.

It's hard to say what they were talking about. Looking at Senator Long, it's very clear what he had in mind. He wanted to stop felons -- and I'll deal only with the felon section of the statute, since that's what this case covered -- he wanted to stop felons from having guns where they could engage in further crime having previously demonstrated that propensity.

And Justice Black, in the dissent in Bass, goes to that language, in very plain language.

But the majority in the Bass case points out that

all through there is interstate commerce; in 922, they require interstate commerce in both the receiving and transporting sections, (g) and (h); in 1202 they cite clearly interstate commerce.

And the Court, pursuing that, held in Bass that there had to be an interstate commerce nexus.

It's interesting, though, in Senator Long's comment, in the legislative history, he says you could own but not possess a weapon. And then in discussing the possession of a weapon, he goes on further, and says very clearly, you shouldn't possess it. He doesn't want criminals to have guns.

But he uses interchangeably a number of times the words, acquire, with possess, and taking with possess. He says this amendment does not seek to do anything about who owns a firearm. He was concerned with the complaints about Title IV, the Dodd bill, at the time.

In Bass, the Court quotes the statements of Congressman Pollack. There's very, very small debate in the House of Representatives on it. And Congressman Pollack says, one who takes, possesses, or receives a firearm across state lines -- and then has a number of other statements cited in the brief for the respondent.

What we're left with is a statute with literally no legislative history. Only the comments of Senator

Long, which are contradictory in places, although his intent is clear. But it's only his intent.

He never, however, expresses clearly the intent, whether there must, in fact, be that interstate nexus required in the Bass case.

And so the Court then has to look where to go with the matter.

I suggest to the Court the place we have to go is to the Barrett decision of this Court in 1976, which is very interesting in its scope. In Barrett, it's a 922 case, and it does go to a case concerning receiving a firearm that has travelled in interstate commerce.

Justice Blackmun in the majority opinion in Barrett points out that you must look to the specific language of the statute. Now, Barrett is a case on 922 where there is a good deal of legislative history, where there were reports from the Congress, there were extensive debates from the Congress, there was much that could be looked at.

But Barrett was -- quoting Justice Blackmun -- was couched in the present perfect tense. It cited a gun that has travelled in interstate commerce, or has been shipped or transported in interstate or foreign commerce, is the exact language.

And Justice Blackmun, looking at it there, writing for the majority, said you must look at exactly what they

meant by the tense itself.

Now there was discussion between the majority and dissenting views in Bass as to where commas were placed. I suggest to the Court that given the legislative history, or lack of it, in the Bass case, you can draw no inferences for any commas or lack of them.

But in Barrett, very precisely the Court says, we must look at the tense used; we must look at what the legislature ended up saying. That's particularly pertinent in 1202, with no legislative history to draw upon. You must look at what they said, and deal with what they said, or take upon yourselves the chore of legislating.

And he points out in the Barrett case, Section 922(k), Justice Blackmun points out, it uses the word, in commerce. And that's the same language that's used in Section 1202, the Section before the Court now. Justice Blackmun points out there's no lenity required in examining Section 922 because there are no ambiguities as there were in Section 1202, as pointed out in Bass.

He further points out, there was, of course, a great deal of legislative history; but he points out, interestingly enough, that the legislative history pointed, in Section 922, similar to that small amount of history on Section 1202, they want to prevent possession by criminals of handguns.

Now the scope of who has them is different between the two statutes. People under indictment are included in 922; in 1202, it has to be people convicted of a felony, aside from other classes of people.

But what is clear between the two is Congress in both had an interstate commerce requirement. It is in both statutes. And it is a question of how the Court will apply that. The sole question, as I see it in this case, is what is the degree of nexus? Can it be current? Or must it be current? Can it be past? Or must it be any nexus?

You approached this in the Rewis case. Now Rewis was not a gun case, it was an interstate gambling case under the Travel Act. But there you approached the problem of what is the degree of nexus required? How much interstate commerce must there be, or what degree of interstate commerce must there be, for it to be a violation of law?

When you look at the two Acts, the 1202 Act is very precisely in current and present tense. One who receives, possesses, or transports in commerce or affecting commerce. There's nothing past in it. As opposed to 922, as I read a moment ago, receive any firearm or ammunition which has been shipped or transported through interstate or foreign commerce.

Now 922 does not have a proscription against possession. But the language on interstate commerce between the two is very instructive.

And I suggest to the Court, the only place you can look for an interpretation of 1202 is to the language itself. And as you pointed out in Barrett, you must look clearly at the tense used, and take that for what Congress meant in the absence of anything else.

In the Bass case, the Court pointed out that Title VII was not carefully molded to complement Title IV. In fact, Title VII may be one of the worst examples of legislation in terms of careful consideration on the Congress' behalf.

It was brought to the floor and read; a week later it was brought to the floor and read again. During the first week, the only comments were made by Senator Long. During the second week, Senator Long made comments again. He had a couple of questions from the three other Senators. And then it was supposed to go to conference, but for some reason not clear in the record, not clear in the Congressional record, it was immediately voted up, and passed.

In Bass, the majority opinion by four Justices goes farther than just saying there must be a nexus. It suggests there is a difference between possession and receipt offenses. And it goes on to state very clearly that more is required for possession offenses.

Now, this has been treated by the government in their brief as pure dictum. I don't know if there's such a thing as pure dictum in an opinion of the United States

Supreme Court.

In the Second Circuit, the Bell decision -- that's United States v. Bell -- which came down this past year -- late 1975, I'm sorry -- they treated that. They folled the particular position we asked the Court to follow in this case. They took the totally opposite view of the Fourth Circuit.

But there they cited the difference between what they call obiter dictum and judicial dictum. They pointed out that the language in Bass was not just judges speculating about something, but a specific problem. And it was a problem that was present in Bass. While not directly considered by the Court in the opinion, not expressly considered, the Court had to inherently consider it. Because the Court dismisses Bass, dismisses the indictment eventually, saying there's no interstate nexus demonstrated in the record.

The Court recognizes inherently in there there would have to be an interstate nexus shown to reach a conviction. And the question of whether it need be a current or past nexus would be inherent in that.

QUESTION: Has the appellate court, that is, the Court of Appeals for the Second Circuit, expressed the view that the possession had to be by a person who contemporaneously was himself travelling in interstate commerce?

MR. HIRSCHKOP: It didn't go that far, your Honor,

saying he had to be in interstate commerce. But they went as far as this Court went in Bass, or as the majority went in Bass, that it had to be a current nexus of interstate commerce.

QUESTION: Now what do you understand that to be? What are you contending in this case that possession in commerce means within the meaning of this statute, 1202(a)?

MR. HIRSCHKOP: That the person himself is in commerce, or the person himself is engaged in --

QUESTION: Now if the person himself is in commerce and possesses a firearm, then the word transport is redundant, isn't it?

MR. HIRSCHKOP: It may not be, your Honor. If the person is at an interstate facility, not actually going interstate, but somehow affecting commerce--

QUESTION: If he's waiting at an airport or a railroad station?

MR. HIRSCHKOP: If he's there, your Honor, or conducting an act, say a robbery of an interstate facility, the possession there would obtain, where transporting might not.

At any rate, the Bell --

QUESTION: What else do you contend? Is that call, that you think the person can be convicted of possession under this statute only under those circumstances that you've just described, where the person himself is -- the possessor then is in, somehow or another, interstate commerce?

MR. HIRSCHKOP: No, sir, if the gun itself is in interstate, if there is a clear showing, perhaps, that the gun was passing through his possession. It was a temporary possession of a gun that had not come to rest out of interstate commerce; that also would pertain.

QUESTION: Well, what sort of a case would that be? That would be a receipt case, wouldn't it?

MR. HIRSCHKOP: Well, the receipt could well be, prior to the time of his conviction, as we had in this case, the Scarborough case. But there could be a contract to sell the gun, or a pledge, or some kind of adequate legal showing to move the gun again into interstate commerce.

QUESTION: That is, possession for the purpose of sending it in interstate commerce?

MR. HIRSCHKOP: Yes, sir, yes, sir.

QUESTION: Constructive movement?

MR. HIRSCHKOP: Yes, sir, I think that would cover it. I think there are probably a whole slew of things.

QUESTION: I understand your position in this case is that, read as extremely as the government suggests the language should be read, that the moment he was convicted of another felony -- of a felony -- the moment any person is convicted of a felony, if he has at home a firearm, he's automatically, then and there, guilty of the offense of possession post conviction.

MR. HIRSCHKOP: If the government's construction --

QUESTION: If the firearm has ever moved in interstate commerce?

MR. HIRSCHKOP: Ever previously, yes, sir.

QUESTION: And that's basically what the government says, although the government says, as a matter of grace, we would give a little leeway for him to get rid of the gun.

But how about if after his conviction, he possesses a gun that he didn't possess before or at the time of his conviction, if after his conviction he comes into possession of a gun that has moved in interstate commerce, you wouldn't concede that the statute covers that situation?

MR. HIRSCHKOP: I'm not sure of that, your Honor, in all honesty. The problem there is the same thing I have in differentiating between receipt and possession. Any receipt, even intrastate, shows a further movement of the weapon. Any receipt would show that. Any coming into possession after the conviction of a felony would show a further movement of the weapon; there has to be an inherent receipt there. And so interstate commerce, albeit transferred to intrastate, will not have come to rest.

But once that gun comes to rest in the possession of somebody -- in this case, it was under a man's bed --

QUESTION: I know.

MR. HIRSCHKOP: -- for some period of time --

QUESTION: My question -- the purpose of my questions is to find out what you think the statute does mean. You've told us what you think it doesn't mean. It doesn't apply to this case in your submission.

MR. HIRSCHKOP: I strongly feel that, yes, sir.

QUESTION: All right. But what does it mean?

MR. HIRSCHKOP: Well --

QUESTION: It certainly covers a person in possession who is himself then travelling in interstate commerce.

MR. HIRSCHKOP: Yes, sir.

QUESTION: But that is also covered by the word, transports. Now, if possession has some kind of independent meaning, what does it mean in your submission?

MR. HIRSCHKOP: Well, I believe among the things it could mean, your Honor, is, if a person receives the gun -- the instance you gave -- after being convicted of a felony, and the government can't make a case on receipt, because they can't show where he received --

QUESTION: Where and when it was received.

MR. HIRSCHKOP: -- they could charge the possession. As long as they could show --

QUESTION: Of a gun that's ever travelled in interstate commerce?

MR. HIRSCHKOP: No, that has travelled and come

into his possession after the time of his felony conviction. That would be one of the reasons possession would be there, to cover that particular loophole.

QUESTION: You think the statute would cover that?

MR. HIRSCHKOP: Yes, sir.

QUESTION: Possession acquired after the conviction?

MR. HIRSCHKOP: Yes, sir.

QUESTION: I don't understand: why wouldn't that be a receipt?

MR. HIRSCHKOP: It would be a receipt, your Honor, but the government may have difficulty making a case based on venue problems --

QUESTION: Oh, I see, because you couldn't prove where and when it was received. I see.

MR. HIRSCHKOP: Yes, sir.

QUESTION: Every possession is presumably preceded by a receipt.

MR. HIRSCHKOP: Preceded by it, yes, sir, but not necessarily the same thing. There are a couple of -- one circuit, at least, the Sixth Circuit, held it was identical, with which we take exception.

QUESTION: Well, receipt inevitably precedes possession, doesn't it?

MR. HIRSCHKOP: Yes, sir. I assume no one is born with a gun. It's the only way I could see it happening.

QUESTION: Well, what about if a felon goes out to the airport and picks up from air express six guns wrapped up in a package?

MR. HIRSCHKOP: At that moment, he's guilty of the offense of possession within an interstate commerce nexus, yes, sir.

QUESTION: Well, suppose it's delivered to him outside of the gate of the airport?

MR. HIRSCHKOP: As long -- our -- my position would be, your Honor, as long as he receives that gun, after he's convicted of a felony, and the gun has previously travelled in interstate commerce, he was violating the statute.

QUESTION: The possession?

MR. HIRSCHKOP: Yes, sir.

QUESTION: Regardless of when?

MR. HIRSCHKOP: As long as it's after the conviction of the felony, yes, sir.

QUESTION: But he's got -- a man is convicted of a felony in March 2nd. And he gets a gun which travels in interstate commerce 13 years ago. Is he guilty?

MR. HIRSCHKOP: I think that would end up being a factual determination that I can't broach at this time.

QUESTION: These facts in my hypothetical are agreed upon and in affidavit form.

MR. HIRSCHKOP: If the gun came to him through any

contact with interstate, he would be guilty. If the gun came to him through commercial means, I assume interstate will not have ended, and he would be guilty of a possession offense.

QUESTION: In other words, in answer to my brother Marshall's question, you do not contend that the statute means that the interstate commerce has to occur after the conviction in order to support the conviction for possession?

MR. HIRSCHKOP: That's correct, I do not take that position, your Honor.

QUESTION: Just the possession has to occur, for the first time, after the conviction?

MR. HIRSCHKOP: Yes, sir.

QUESTION: In your submission?

MR. HIRSCHKOP: Yes, sir.

QUESTION: Of a gun that's ever moved in interstate commerce?

MR. HIRSCHKOP: As long as it still moves in commerce, whether intrastate or interstate, having previously moved in interstate, the view I've taken is that the intrastate is a continuation or extension of the interstate movement, regardless of time, I guess.

I know only --

QUESTION: May I just pause again?

MR. HIRSCHKOP: Yes.

QUESTION: I want to be sure I get this in mind.

Your point is that first possession after the conviction for the felony, must -- if you can prove that, that proves the possession offense, if you get the previous -- previously having been in another state.

MR. HIRSCHKOP: I believe it would, your Honor, yes.

QUESTION: Well, then, why is that any easier to prove than the receipt offense? Because if you could prove when it was first received, couldn't you presumably prove where it was first received?

MR. HIRSCHKOP: Not necessarily, your Honor.

QUESTION: I see. It's just the difference between proving both when and where and proving when.

MR. HIRSCHKOP: Yes, sir. Yes, sir. It's pointed out in a footnote; the respondents recognize that difficulty.

QUESTION: A Smith & Wesson revolver purchased in Virginia has been in interstate commerce?

MR. HIRSCHKOP: Yes, sir, it has.

QUESTION: Need I prove any more than that?

MR. HIRSCHKOP: Well, for possession, you'd have to prove, as we take the position in this case, that he received it prior -- I'm sorry, subsequent to the time of his conviction for a felony. And the possession offense would then occur at the moment he received it, or continuously thereafter.

QUESTION: Now, how in the world could you prove that?

MR. HIRSCHKOP: The government's very hard pressed to make that kind of proof, no question, your Honor. There may be people with him at the time --

QUESTION: You don't stand out on the corner selling handguns.

MR. HIRSCHKOP: No, it's true of many criminal statutes, your Honor. There is that difficulty in proof.

But on the other taken, there is this question of lenity and a strict construction of criminal statutes. And I don't think the Court can make any great inferences, given the legislative history of this particular statute. I think the Court was eminently correct in the Bass case, in the part three of the Bass case, and that -- that's the position the Court has to follow. And that's exactly what the Court did in the Barrett case.

QUESTION: In the Barrett case, said, but that was dicta.

MR. HIRSCHKOP: Well, Barrett treated it as dicta. But even dicta --

QUESTION: Well, that was a later case, wasn't it?

MR. HIRSCHKOP: Barrett's a '76 case, yes, sir.

QUESTION: Under a different statute?

MR. HIRSCHKOP: Yes, sir, 922. It does cite Bass

for some propositions.

The only other thing I'd bring to the Court's attention is the fact that the Courts of Appeals, in variously considering the Bass case, have, some of them, taken independent views in support of the Bass case.

The Bell case in the 2nd Circuit is such a case. Walker in the 7th Circuit gives some support to it also. In fact, in the Walker case, in a footnote there, the Court points out that a federal prosecution of a state offense historically must be expressly authorized.

That's one of the underlying major problems in the case, is that the -- it is an offense that many, many states specifically deal with. To disregard an interstate commerce nexus would intrude much on the province of the states.

As the courts point out -- several of the Courts of Appeals, the Walker Court, the Bell Court -- and as this Court pointed out in Bass and Barrett, before such an intrusion is made by the federal judiciary and the federal legislature, there should be a very specific intent expressed, by the federal legislature, to make such an intrusion.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Hirschkop.

Mr. Allen.

ORAL ARGUMENT OF RICHARD A. ALLEN, ESO.,

ON BEHALF OF THE RESPONDENT

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

I must confess that, from Mr. Hirschkop's comments, I am a little confused myself as to exactly what his position is with respect to the elements necessary for the possession offense. I assume that his position remains that from what appears in his brief.

QUESTION: Certainly, it's clear that his position is that the statute doesn't apply to this case.

MR. ALLEN: That is clear, your Honor.

The issue in this case is whether Section 1202(a) of the Appendix at Title 18 prohibits a convicted felon from possessing a firearm that has previously travelled in interstate commerce, as we contend, or whether it only prohibits a convicted felon from possessing a firearm when that firearm is moving in or is a part of interstate commerce, as I understand the petitioner to contend.

That issue is extremely important to federal law enforcement and the enforcement of the comprehensive gun control legislation that Congress enacted in 1968, for the following reasons.

QUESTIONS: Would it also be just as important if the statute excluded -- didn't cover cases like this?

MR. ALLEN: It would -- that is the issue here, your Honor. It would be extremely important. It would create, in our view --

QUESTION: Well, I know, but your -- what you've stated is a much more broader -- is a broader exclusion than your colleague seems to --

MR. ALLEN: Well, as I understand his position, your Honor, the petitioner's construction in this case would, in our view, create a substantial gap in the federal gun control legislation that was enacted in 1968. It is contrary --

QUESTION: Namely those who had possession prior to his conviction for the felony?

MR. ALLEN: Those among others, your Honor.

QUESTION: Well, he wouldn't exclude any others, would he?

MR. ALLEN: Well, I believe his construction would tend, at least as a practical effect, to exclude a large category of other individuals that Congress intended to cover.

QUESTION: You mean the one he stated here orally?

MR. ALLEN: Petitioner's construction, at least as I understand it from his brief. I'm not entirely clear on his statement here orally.

QUESTION: Okay. Well, go ahead.

MR. ALLEN: As this Court recognized in United States

v. Bass, the principal purpose of the entire gun control statute that was enacted in 1968 was to keep firearms out of the hands of convicted felons and other persons that Congress classified as potentially dangerous or irresponsible.

QUESTION: Of course, these firearms were in the hands of the petitioner when he was not a convicted felon.

MR. ALLEN: At least, according to his testimony, your Honor.

QUESTION: Well, that's the proof in this case, isn't it?

MR. ALLEN: That is a fact, your Honor, that he --

QUESTION: That he possessed these firearms before he'd been convicted of anything.

MR. ALLEN: He also possessed them after he was convicted of a felony, your Honor.

QUESTION: It was a continuous possession then, I see.

MR. ALLEN: That is right. But as this Court recognized in Barrett, the principal purpose was to keep firearms out of the hands of convicted felons, whether before or -- that is, out of the hands of felons who had been previously convicted, as petitioner was in this case.

Petitioner's construction --

QUESTION: Maybe we're engaging in -- or could engage if we continue the colloquy -- in doubletalk. But

your view is that once there is a conviction, then automatically he's guilty of this federal offense if he has in his house a firearm.

MR. ALLEN: Well, your Honor, I think that the rule of reason would permit a construction of the statute which gave him reasonable time to relinquish possession without being automatically in violation of the statute. I think that would be --

QUESTION: You don't think that would be the rule of reason in criminal cases, do you?

QUESTION: Not when you're talking about statutory language. It either covers or doesn't.

QUESTION: Ordinarily --

MR. ALLEN: Well --

QUESTION: -- after a verdict comes in, there is some lapse of time before an accused is sentenced. And he isn't -- he certainly has at least that grace period to dispose of the weapons, doesn't he?

MR. ALLEN: Well, I'm not sure, your Honor. If you took a literal construction of the statute, he would become, it seems to me, a convicted felon at the moment --

QUESTION: On the verdict?

MR. ALLEN: -- of the verdict.

QUESTION: And before it was final?

MR. ALLEN: And before he was sentenced.

It does seem to me that the statute would be subject certainly to prosecutorial discretion. I'm sure that the government would never prosecute a person who was attempting to exorcise possession, so that he could relinquish his possession.

But in any event --

QUESTION: Well, we don't ordinarily apply that kind of an approach to the construction of criminal statutes, do we?

MR. ALLEN: What kind of approach is that, your Honor.

QUESTION: The approach that the government will not enforce, literally, the terms of the statute.

MR. ALLEN: Well, the --

QUESTION: Given the government's position on what the statute literally means. In some situations have there not been holdings that until a criminal conviction is final there -- impact does not fall for certain statutory purposes?

MR. ALLEN: Well, in some circumstances, I'm sure that is true, your Honor. I'm afraid I can't --

QUESTION: I suppose you wouldn't want to concede this until a man spends two or three years litigating his appeals that he wouldn't be in violation of this statute if he had some firearms?

MR. ALLEN: We would not want to concede that. We

would contend that if he were in violation -- all I am addressing is the technical point of whether, at the instant he became a convicted felon, he would be in violation of the possession offense. I suppose as a technical matter that may be true. I am not sure that that would render -- would militate in favor of the construction that petitioner contends for, particularly in view of the considerations that militate against it.

Because in our -- it does seem to me that petitioner's construction of this case would exclude very large categories of the very persons that Congress wanted to dispossess or keep firearms away from, to possess -- to have those very firearms. And the reason for that is, Section 922, which is part of Title 4 of the Omnibus Crime Control and Safe Streets Act of 1968, which this Court construed in Barrett, only prohibits a convicted felon from receiving a firearm that has previously travelled in interstate commerce, and only then if he receives it after his felony conviction, or after the effective date of the statute.

QUESTION: Mr. Allen, just so I have it clear, under your construction of the statute, the words, receipt and transport, are totally redundant, are they not?

MR. ALLEN: I would have to concede, your Honor, that they would be encompassed with our construction of the word, possesses.

QUESTION: My second question is, why do you suppose that Congress wanted federal courts to try all these cases instead of state courts? Because these are all offenses as a matter of state law, aren't they?

MR. ALLEN: Not all, as I understand, your Honor, but in most states --

QUESTION: The possession by a felon of a firearm? Isn't it in most states --

MR. ALLEN: I am advised that most states have such statutes.

QUESTION: You think the purpose of this statute was to take care of those few states that don't have such a -- they weren't doing their job.

MR. ALLEN: I think the purpose of the statute --

QUESTION: Why should federal courts do all this work?

MR. ALLEN: I believe that Congress, as the legislative history indicates, was extremely concerned with the impact of convicted felons and other dangerous people possessing firearms on a number of federal interests, including interstate commerce. I think that's revealed at every page of the legislative history.

QUESTION: In other words, you think the connection with interstate commerce is what concerned them most?

MR. ALLEN: Frankly, I doubt if the connection to

interstate commerce concerned them most. I suspect that what concerned them most was the assassination of major political figures, including federal officials. But I'm sure --

QUESTION: But should there be some requirement of a substantial connection with interstate commerce if that's the point?

MR. ALLEN: That is a judgment for Congress, your Honor. And I don't believe that they --

QUESTION: Well, I'm trying to decide what judgment they really made, that the federal court should take over all these possession trials, or did they just want the federal courts to take over the possession trials where there was some substantial interstate connection?

MR. ALLEN: I believe, your Honor, that they wanted to give the federal prosecutors and the federal courts, power to take over such possessions -- such prosecutions of possessions by convicted felons as in their discretion they thought appropriate.

QUESTION: What percentage of federal law enforcement, in terms of number of cases, is devoted to these? Do you have any idea? There are an awful lot of them, I have the impression.

MR. ALLEN: There are an awful lot. I inquired of that just yesterday, and I was unable to get any precise

statistics. But I do know that there are a good number.

QUESTIONS: There are hundreds and hundreds of these cases?

MR. ALLEN: That is true.

As I was saying, the petitioner's construction of this statute would necessarily permit --

QUESTION: Don't you think the interstate commerce nexus is incidental, because if you want to get rid of guns, why not just say guns? The only reason the Interstate Commerce Commission was put in there was to get federal jurisdiction, isn't that correct?

MR. ALLEN: That is correct, your Honor. And we contend that in the Bass case that that was precisely Congress' intention, and that the proof of interstate commerce nexus in each individual case was unnecessary because of those very interests. That construction was rejected, not unreasonably, by this Court, in view of the express statutory language making reference to interstate commerce.

QUESTION: If you hadn't of made it, you wouldn't have had jurisdiction.

MR. ALLEN: Well, I'm not sure that this Court -- I'm not sure that this Court in Bass would have held that.

QUESTION: Can the state -- can the federal government make a crime of the possession of a gun, period?

MR. ALLEN: Congress -- if Congress makes findings that the possession of firearms has a substantial effect on interstate commerce, then I believe under decisions of this Court that Congress could constitutionally, within its power under the Commerce Clause, punish the possession of a --

QUESTION: And not use interstate commerce in the statute?

MR. ALLEN: Not use interstate commerce in the statute.

QUESTION: The Court held that in an extortionate loan case.

550 MR. ALLEN: That's right, in Perez. And it held it in Wicker v. Filbourn. And I believe there's an unbroken line of cases to that effect. The power of Congress under the commerce clause is extremely broad.

QUESTION: There's no power challenge in this case?

MR. ALLEN: Petitioner does not contend that our construction would lead to an unconstitutional result.

QUESTION: Strictly a statutory construction?

MR. ALLEN: Strictly a question of statutory construction. And an important one, because not only would petitioner's construction permit felons who had received their firearms before their felony convictions or before the effective date of the statute to retain possession of those

firearms, it would also, in a number of cases, permit felons as a practical matter to possess firearms -- to receive firearms after their felony convictions and escape prosecution.

And let me give you the following example, which occurs not infrequently in prosecution cases. For instance, suppose a fellow committed a felony and was convicted for a felony in 1970. And in 1975 he was found in possession of a firearm. And suppose further that the government was able to prove, quite conclusively, that that firearm was manufactured in, say, Connecticut. And let us say that he was found in possession in Virginia. That it was manufactured in Connecticut, was shipped to Maryland in 1973, and was sold to some other individual who subsequently lost it or it was stolen from him.

Although those facts would demonstrate conclusively that the individual had received the firearm after his felony conviction, and after the statute, and therefore was clearly in violation of Section 922 of Title 4, the government may often not be able to prove where he received -- when he -- where he received that weapon. And since venue is a fact to be proved, the individual could not be prosecuted for that case.

In other words, petitioner's construction would, as a practical matter, permit felons to retain possession of firearms whenever they managed to acquire the firearms in a

way that the place or time of acquiring them escaped detection.

QUESTION: Well, I suppose the federal government could tell the state authorities about the man they'd found.

MR. ALLEN: They could, your Honor, if the state -- and the state authorities had a statute that prohibited that conduct, and if the state authorities, for some reason or other, wanted to prosecute him, they could do so.

But I think that Congress, in this case, perceived that this statute was extremely important for federal interests.

QUESTION: You think the federal government has a greater interest in the problem of possession of guns within the cities and the like than the state governments do? I mean, just in terms of general allocation of how we normally run -- how we answer problems like this, isn't this normally the kind of question that states address before the federal government does?

MR. ALLEN: Normally it is, your Honor, and I suppose the states have at least as great an interest in this type of problem as the federal government does. But that doesn't --

QUESTION: I suppose that would be equally true of the loansharking case that we --

MR. ALLEN: That is true.

QUESTION: -- decided.

MR. ALLEN: And in many federal statutes, drug

control statutes --

QUESTION: Doesn't the law go back to criminals running across state lines? That's where it goes back to. And the federal government had to find some way to pick them up; otherwise they'd run from state to state. That was back in the 20's or 30's, wasn't it?

MR. ALLEN: That's right, that is one of the interests that certain underlies this statute.

QUESTION: I believe it's in some case.

MR. ALLEN: But I believe the Congress did not want to have to demonstrate in each case that a person who -- a dangerous person who was in possession of a firearm was actually moving across a state line. That, it seems to me, is a wholly unnecessary matter of proof, and certainly one that is not required by the constitution.

Our construction of the scope of Section 1202 is based primarily on three considerations: first of all, the language of the statute; second of all, the relationship of Section 1202 with the entire scheme of federal gun control legislation; and third, the legislative history of Section 1202, which, notwithstanding Mr. Hirschkop's contention, we submit unmistakably demonstrates that Congress intended the broadest possible scope to this Section.

Section 1202 by its terms prohibits any convicted felon and other -- certain categories of dangerous individuals

from, quote, punishes anyone who receives, possesses or transports in commerce or affecting commerce, any firearm.

Now, the phrase, in commerce or affecting commerce, is admittedly not as clear as the statutory language in Section 922, which this Court construed in United States v. Barrett, which makes it unlawful for convicted felons and certain other persons, quote, to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Nevertheless, to the extent that the statutory language of Section 2120(a) is a guide, we submit that it points clearly to our construction.

"First, the phrase, affecting commerce, which Mr. Hirschkop has largely ignored, but which is also in Section 1202, is essentially a statutory term of art. As we pointed out in our brief, this Court has recognized the distinction between legislation limited to activities in commerce, and an assertion of Congress' full commerce power so as to cover all activity substantially affecting interstate commerce.

Congress has used the phrase, affect commerce or affecting commerce, in a number of statutes, which have been interpreted to reach transactions involving products after they have come to rest within a state.

In the Civil Rights Act -- is one example that is particularly constructive to this case. In Section 42 U.S.C.

-- in 42 U.S.C. Section 2000(a)(c), the Civil Rights Act defines, quote, operations affecting commerce, to include establishments a substantial portion of whose products, quote, has moved in commerce .

The particular significance of that statute for this case lies in the fact that Senator Long, the sponsor of Section 1202, made specific reference in the legislative history of Section 1202 to the Civil Rights Act and this Court's decisions upholding the power of Congress, in Senator Long's words, quote, to regulate matters affecting commerce, not just to regulate interstate commerce itself.

Furthermore, if Congress had wanted to limit the offenses set forth in Section 1202 to conduct contemporaneous with movement in interstate commerce, it clearly could have and would have used language employed elsewhere in both the gun control statute and other federal statutes which indicates such a limitation.

For example, Section 922(j) of Title 4 of the Gun Control Act makes it unlawful knowingly to receive, conceal or sell a stolen firearm, quote, which is moving as, which is a part of, or which constitutes interstate or foreign commerce.

The language in Section 1202, we submit, is quite more broad. It relates not only to firearms that are in commerce, but those that are affecting commerce as well.

And in fact to construe section 1202(a) as petitioner would construe it would be to read the term, affecting commerce, out of the statute altogether.

Apart from the statutory language, the relationship of Section 1202 to the entire scheme of federal gun control legislation indicates that the possession offense includes possession of firearms that have previously traveled in interstate commerce, and it is not limited to possession of firearms contemporaneous with interstate commerce movement.

As I mentioned at the outset, this Court, in Barrett, recognized that the entire structure of the Gun Control Act demonstrates that Congress sought broadly to keep firearms away from the persons Congress classified as potentially dangerous and irresponsible.

Section 922(h) of Title 4 prohibits a convicted felon of receiving a firearm after his felony conviction, and after the date of the statute. And as this Court indicated in United States v. Bass, the receipt offense in Section 1202 has the same scope.

The only effect of adopting petitioner's construction of this statute would be that convicted felons would continue to be prohibited, under Section 922, from acquiring firearms -- new firearms -- after their felony conviction, but would permit convicted felons to keep old firearms that they had acquired before their felony convictions.

Furthermore, as I mentioned, even felons -- even convicted felons who received firearms after their felony convictions, could not be prosecuted under petitioner's construction if there was no way of proving when or where they had acquired those firearms.

Not only would that create an enormous loophole in the scheme of the federal gun control statute, but there is no conceivable reason why Congress would have intended such a result.

There is no -- the act of receiving a firearm has no inherently greater connection to interstate commerce than the act of possessing a firearm. A convicted felon may receive a firearm long after that firearm has come to rest in the state where he receives it. And he would still be guilty under petitioner's construction of violating both Section 922 and Section 1202(a).

The act of receiving the weapon has no closer nexus to interstate commerce than the act of possessing the weapon which necessarily follows immediately after the receipt.

Furthermore, receipt is a term which encompasses conduct that goes far beyond any commercial transaction. You can receive a weapon by gift or by stealing it. It has nothing to do with commerce.

QUESTION: Or by just temporary possession.

MR. ALLEN: Or by just temporary possession, that is

true.

In short, there is no basis for concluding that Congress would have intended to make a distinction between the proof required to show a nexus between the firearm and interstate commerce for purposes of the receipt offense and the proof that was necessary for the possession offense.

And certainly there's no basis in the language of the statute for such a distinction, since the phrase, in commerce, or affecting commerce, modifies both the offense of receiving and possession in the statute.

Perhaps the most important consideration in terms of the statutory scheme is that petitioner's construction would, in effect, read the term, possession, completely out of the statute.

QUESTION: And your interpretation would read the terms, receipt and transportation, completely out of the statute?

MR. ALLEN: That is correct, your Honor. Either interpretation requires some redundancy.

QUESTION: Right.

MR. ALLEN: The function of the Court, it seems to me, is to strive to give effect, as fully as possible, to all of the terms of the statute in light of the statute's primary purpose.

QUESTION: Petitioner's say it's two, and yours

say it's only one.

MR. ALLEN: Well, as a matter of arithmetic, your Honor, that is correct. But in terms of the primary purpose of the statute, which is to keep firearms out of the hands of dangerous people, it's completely inappropriate, it seems to me, to construe the more inclusive term, possession, largely to nullify it, in order to preserve some independent force to the less inclusive term, receives.

It seems to me that that approach is completely inappropriate in view of the legislative history of the statute.

QUESTION: Mr. Allen?

MR. ALLEN: Yes, sir.

QUESTION: I believe the record shows that this petitioner did order some parts for one of the weapons subsequent to his conviction. Do you attach any significance to that?

MR. ALLEN: Well, your Honor, there is a possible significance to that fact. It is our primary contention that the offense here is -- that the term, in commerce or affecting commerce, encompasses a possession of any firearm that has had some previous movement in interstate commerce.

QUESTION: I understand that. But --

MR. ALLEN: Were that contention rejected --

QUESTION: Yes.

MR. ALLEN: -- and were the interpretation adopted that there must be some contemporaneous nexus with interstate commerce, it would not be entirely unreasonable, I suppose, to conclude that his -- that his purchase in the course of his possession of replacement parts for his gun in interstate commerce would be a contemporaneous effect on interstate commerce. That, of course, is somewhat inconsistent with our primary position, which is broader.

QUESTION: That might even satisfy the test of the Bell case, you're suggesting.

MR. ALLEN: It might, your Honor, it might well. I don't think there is -- but I would emphasize that in our view there's just simply no rational basis for concluding that the offense of possession in this statute does not include possession of firearms that have previously moved in interstate commerce.

The legislative history of this statute, it seems to me, more than anything, perhaps, demonstrates that Congress was intending to prohibit the possession of firearms by felons as broadly as possible.

Now, this Court in Bass concluded, not unreasonably, that that history was not so clear as to demonstrate that there was no necessity for any showing in each case of any nexus whatsoever between a firearm and interstate commerce, particularly in view of this fact that the statute had language that

was -- that specifically made reference to interstate commerce. But beyond that, since these firearms here were -- have been proven to have had a nexus with interstate commerce, it seems to me the legislative history is quite clear that Congress wanted to prohibit conduct as broad -- prohibit possession as broadly as possible.

Indeed, every word of the legislative history, or every sentence, reflects a concern with possession, not simply, as Mr. Hirschkop as suggested, ownership or acquisition. Possession was obviously what Congress was after.

In summary, your Honor, petitioner's construction is completely at odds with the language of Section 1202, the purpose of Section 1202 as reflected in the entire statutory scheme, and the legislative history of Section 1202.

His construction would create an enormous loophole in the statute, a loophole which would frustrate Congress' primary purpose in enacting this entire gun control legislation.

Thank you very much, your Honors, if there are no further questions.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Allen.

Mr. Hirschkop, do you have anything further?

MR. HIRSCHKOP: Very briefly, your Honor.

REBUTTAL ARGUMENT OF PHILIP J. HIRSCHKOP, ESQ.,
ON BEHALF OF THE PETITIONER.

MR. HIRSCHKOP: Your Honor, on the question of petitioner's construction with regard to a weapon that has not yet come to rest, I suggest to the Court, it is the only way you can harmonize the Bass and Barrett decisions with any present position.

It was raised -- and the reason I took the position -- by the position taken by then-Judge Stevens in the Walker case, we expressed surprise on the scope of receipt. If you limit the interstate commerce nexus to a present nexus on possession, he says there, well, receipt may be too broad.

What's inherent, I think, in Justice Marshall's opinion in Bass is that if a gun is still moving, once having started in interstate commerce, interstate commerce will flow until the gun comes to rest. And so receipt goes farther than possession does, is the only way I think you could differentiate the two, and I believe he did that.

I have to point out, in this case, my client was convicted of four revolvers -- four weapons, one of which had an 1880 date of interstate commerce. There must be a break. It was a de minimus interstate commerce contact after some 90 years.

QUESTION: But the more recent ones solve that

problem, at least on that issue, for this case, do they not, the more recent weapons?

MR. HIRSCHKOP: They would if we knew that the jury convicted for the more recent -- no one knows what the jury did. They had four weapons before them. And that's the problem with the stock that Justice Power raises. In fact, the evidence in the case was, that that weapon had been given to his father to sell prior to the time of this conviction, and he had gotten that part just for his father.

But you get a de minimus connection, because if someone buys bullets, does that make the weapon in interstate commerce, or a scope or a sight or cleaning oil, or what have you.

I can only suggest in closing that in Bass, Justice Marshall quotes Justice Holmes in a case in which he cites, at footnote 15, that when people go out to buy guns, there's a difference between people going out to commit murder. They look for guidance very often in the statute.

The evidence in this case was that this petitioner looked for guidance. He spoke to the police and he spoke to counsel about the ability to keep those guns in his house, and was advised he could do so. It's precisely what Justice Holmes suggested, that people will look for guidance.

The guidance was there in the Bass case; it is not petitioner's construction with which the government takes

issue. It's the construction of four Justices of this Court.

Thank you.

QUESTION: Mr. Hirschkop, perhaps the moral to be drawn from this dilemma that's posed is, that when a man is indicted for a felony, he perhaps better divest himself of firearms that come under the statute.

MR. HIRSCHKOP: That might be a harsh moral, your Honor, because conviction of a felony carries with it a number of proscriptions of rights of citizenship. And if we full credence to your innocent until proven guilty, you have the right to maintain your rights of citizenship until such time as the court says, your guilty.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:06 o'clock, p.m., the case in the above-entitled matter was submitted.]