In the

Supreme Court of the United States

UNITED STATES OF AMERICA, Petitioner,	)	
v.	)	No. 78-776
MILTON DEAN BATCHELDER, Respondent.	)	

Washington, D. C.
April 18, 1979

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MILTON DEAN BATCHELDER,	:	
Respondent.	:	

Washington, D. C.
Wednesday, April 18, 1979

The above-entitled matter came on for argument at 10:17 o'clock a.m. before:

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

APPEARANCES:

ANDREW J. LEVANDER, Esq., Office of the Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the petitioner.

CHARLES A. BELLOWS, Esq., One IBM Plaza, Suite 1414, Chicago, Illinois 60611; on behalf of the respondent.

C O N T E N T S

As this Court concluded in Barrett v. United States, that statute unambiguously prohibits felons such as respondent from receiving a firearm that has travelled in interstate commerce.

The evidence supporting respondent's conviction may be summarized briefly.

On July 31st, 1975, respondent sold a .38 caliber pistol to a Federal undercover agent for $70. At this time respondent stated to the agent that he had received the gun following a burglary in St. Louis, and that in the recent past he had had and transferred other firearms.

Respondent stipulated to the fact at trial that the pistol had travelled in interstate commerce, and also to the fact that he had been previously convicted of a felony in 1960.

The District Court sentenced respondent to five years imprisonment in accordance with Section 924(a) of Title XVIII. That statute makes clear that a violation of Section 922(h) is punishable by up to five years imprisonment, and/or a $5,000 fine.

On appeal, the Seventh Circuit affirmed respondent's conviction. A divided panel, however, concluded that despite the express provisions of section 924(a), respondent could only be sentenced up to two years in prison.

The court's conclusion was based on the fact that

respondent's receipt of a firearm also violated Section 1202(a) of Title XVIII. And that provision carried only a two-year maximum penalty, although it also carried a larger fine, that is $10,000.

The Court of Appeals felt this overlap raised a serious constitutional question. Its decision, however, purported to rest on statutory grounds.

Judge McMillan dissented from the Court of Appeals' decision, noting that the overlap between a five-year statute and a two-year statute were very common among criminal statutes in Title XVIII, and that the government has traditionally had the discretion to pursue a defendant under any of the applicable statutes.

QUESTION: Do you think that's analogous to the discretion of the prosecutor whether he should charge first degree murder, for example, or second degree murder or manslaughter?

MR. LEVANDER: I think it's very analogous, Your Honor, and this Court in Gray against Georgia found that that discretion to actually charge with first degree murder or not to charge didn't violate the constitution or raise constitutional difficulties, is also similar to the discretion that this Court upheld in Bordenkircher v. Hayes,.that is, the discretion of the prosecutor to--in plea bargaining, to add various counts or not add various counts.

QUESTION: Of course, here the difference is, unless I misunderstand it, that the elements of the defense, at least with respect to this defendant, were exactly the same.

MR. LEVANDER: Well, Your Honor, I don't think that's-- I think that's the Court of Appeals conclusion; I don't think that's true if one looks at the statute carefully.

QUESTION: Well, I know, with respect to other defendants there might not have been--

MR. LEVANDER: No, even in respect to a convicted felon, there is a difference in the commerce clause element between the two statutes. Following this Court's decisions in Barrett, Bass and Scarborough, there's a difference between 1202(a), which allows a defendant to be convicted if the firearm has either travelled in interstate commerce or affected interstate commerce, whereas Section 922(h), the five-year statute, the firearm must have travelled in interstate commerce.

QUESTION: Well, again, in this case it was stipulated that the firearm had travelled in interstate commerce.

MR. LEVANDER: That's correct--

QUESTION: So with respect to this defendant, the elements are precisely the same, aren't they?

Unlike a first and second degree murder, or unlike the Bordenkircher against Hayes situation? Where it was a recidivist statute, as I remember.

MR. LEVANDER: Well, it--right. And that is Oyler--

QUESTION: Right.

MR. LEVANDER: -- as well. There is--there are several decisions of this Court in which if one looks at what the proof of the government is in terms of non-contested elements of the crime, this Court has up the convictions under one statute or another or found that no lesser included offense was necessary; in Spies and in Bishop and a series of tax cases, the Court noted that even if Congress had drafted exactly identical statutes, that might be unusual, but they didn't indicate in the least that those kinds of identical statutes would be unconstitutional.

And in those cases, the defendant claimed that it was unfair, or that he was entitled to a lesser included offense, in a situation in which there was a felony--he was prosecuted for a felony, but his exacty conduct and his exact elements would also prove a misdemeanor.

QUESTION: Mr. Levander, as we all know, there's been kicking around the Congress for quite awhile now a proposed basic wholesale revision of the Federal criminal code. Would that bill, if it's ever enacted, eliminate all these overlaps and duplications, or many of them?

MR. LEVANDER: Well, it may eliminate some. However, Section 1322 of S. 1437--that's the current designation of the major revision of Title XVIII--contains both the equivalent

of 922(h), the five-year statute, and 1202, and also continues to have a five-year penalty with a one- and a two-year penalty for the other, although the fines are changed, because under the revision, is my understanding, Mr. Justice Stewart, is that all felonies are punishable by certain standard fines.

QUESTION: I would assume that in any comprehensive criminal code, an astute defendant could find some set of facts which would violate more than one provisions.

MR. LEVANDER: There are many in Title XVIII, as we indicate in the brief in a long footnote. There are just numerous sections which violate--which are overlapping to either some or 100 percent.

For instance, 18 U.S.C. 1001, which is the false statements statute, overlaps with several other provisions both in Title XVIII and other titles concerning false statements to various government agencies.

QUESTION: An astute prosecutor could do it at least as well; and that's the point.

MR. LEVANDER: That's correct; that traditionally the prosecutors had that discretion, and their discretion to choose one statute or another is no greater discretion in the government's view than the discretion not to charge at all or--

The court's statutory decision, which is basically that where a defendant's conduct violates both a two-year--the two-year provision and the five-year provision, he may only

get the two-year sentence, was based on three maxims of statutory construction: the principle implied repeal, lenity, and avoidance of constitutional questions.

The--it is well established in the cases of this Court that implied repeals are disfavored in the law, and only where the two statutes in question will be clearly repugnant to one another will this Court hold that one statute has impliedly repealed another.

However, here, we clearly do not have repugnant statutes. The statutes viewed as a whole cover very different grounds. As the Court noted in Bass, the two statutes cover very different kinds of people.

For instance, in the five-year statute, fugitives from justice and addicts are covered; and in the two-year statute you have illegal aliens, ex-citizens, and other groups which are not covered in the five-year statute.

Moreover, as I pointed out in response to Mr. Justice Stewart's question a moment ago, the commerce clause element of the two statutes are quite different, and there are also differences in the conduct which is prohibited. The five-year statute only goes to receipt of a firearm, whereas the two-year statute goes to receipt, transportation and possession.

And in Scarborough--

QUESTION: Do you think the differences between the two statutes would be sufficient to justify consecutive

sentences on these facts?

MR. LEVANDER: On these facts? I think that the answer would probably be not, Mr. Justice Stevens. I think that for instance in the Eighth Circuit recently there was a decision called Wright in which certiorari was denied recently in which the defendant was convicted on both receiving under 922(h) and he was also convicted of transportation under 1202.

And in that sort of circumstance, I think the government would argue, and did argue, that consecutive punishment would be possible.

Not only are implied repeals disfavored, but normally one would think that an implied repeal involves two statutes, one which is enacted after another. Here, however, the two statutes--the five-year statute and the two-year statute--were enacted at the same time. One is Title IV and the other is Title VII of the Omnibus Crime Control Act and Safe Streets Act of 1968.

And it is very difficult to understand how it is possible that two statutes which are enacted at the same time could possibly be an implied repeal of one or the other. And indeed, the same Congress which enacted both statutes shortly thereafter re-enacted both statutes with differing penalties in the Gun Control Act of 1968.

And at that time the Senate specifically considered raising the five-year statute to be a ten-year

maximum penalty, although this provision was later deleted in conference.

But Congress is clearly aware of the two statutes, treated them as separate statutes, and enacted and re-enacted them, and obviously understand them to be self-effectuating and separate gun titles.

The second principle of statutory interpretation on which the Court of Appeals relied is the principle of lenity. And it is true that were a criminal statute is ambiguous, this Court has often stated that it will be construed to benefit the defendant.

Here, however, we submit there is no ambiguity whatsoever. There's certainly no ambiguity as to the conduct prohibited. The Court so stated in Barrett.

And as to the penalty, 924(a), without exception, provides whoever violates a provision of this Chapter--and Section 922(h), the five-year statute, is part of that chapter--may be punishable by up to five years imprisonment and a $5,000 fine.

There is no cross-reference or any indication of an exception in that statute.

Section 1202, the two-year statute, on the other hand, both sets our prohibited conduct and immediately after says, anyone who does this conduct shall be punished by up to two years imprisonment and a maximum $10,000 fine.

And it also is very unambiguous, and it--from its structure and its language it appears to be just a self contained statute; the penalty just applies to those violations that are set forth in the two-year statute. And there's no cross-reference in that statute to the five-year statute.

Moreover, the legislative history indicates that there is no ambiguity here, and that Congress clearly intended that the five-year statute and the two-year statutes be prosecuted and enforced separately.

The two-year statute was added as an amendment in the legislative process to the Omnibus Crime Control Act, and Senator Long was the sponsor of the two-year statute.

He stated that this statute is not intended to take anything from, but rather to add to, quote, the existing penalties and provisions of Title IV, that is the five-year statute.

And again, the legislative history of the Gun Control Act, which was the second act that was passed by Congress in 1968 concerning these matters, shows that Congress treated the two statutes separately, in separate titles of the Gun Control Act.

It viewed them as separate parts; the language suggests separate parts.

Finally, I would note that the Court of Appeals suggested that allowing a defendant to be sentenced to five

years when his conduct also violated a two-year statute would be an absurd result or an unfair result.

But I think that this Court of Appeals decision and analysis may create the difficult results. For example, the Court of Appeals, in footnote five of its decision, refused to address the question: Which fine provision of the two statutes would apply.

Now, the five-year penalty statute carries a $5,000 fine; the two-year statute carries a $10,000 fine. If it is the doctrine of implied repeal that is applicable, well then seemingly the $10,000 greater fine that's found in the two-year statute would be the applicable one.

If it's the doctrine of lenity that's controlling, then seemingly it would be the $5,000 fine that's found in the five-year statute.

QUESTION: What was the sentence actually imposed, the punishment actually imposed, by the district court in this case?

MR. LEVANDER: It was a five-year penalty; the maximum.

QUESTION: And no fine?

MR. LEVANDER: And no fine. That's why the court said it didn't have to reach the--

QUESTION: And you agree it didn't?

MR. LEVANDER: That's correct.

But that--the fact that it didn't indicates--I mean that question raises some serious problems.

I think another absurd result that might result from this decision is that Section 922(h)(1), under which the respondent was prosecuted and convicted, applies not only to those who have been convicted of a felony, but those who were under indictment for a felony.

There is no such equivalent provision in the two-year statute. Therefore, a defendant who was under indictment at the time he received the firearm could still get the five year penalty, but a day later, when he was convicted, the penalty, maximum penalty, would be limited to two years under the Court of Appeals analysis.

A third maxim that the Court relied on is the maxim that where possible the court should construe a statute to avoid a serious constitutional question. In the government's view, there are no serious constitutional questions here.

But in any event, the avoidance of a constitutional question is only possible where the statutes in question may be fairly read in alternative fashions.

Here, there just, as I said with regard to the maxim of lenity, there's no ambiguity, there's only one reading that's fairly possible. And as this Court held in Swain V. Pressley, in that sort of a situation, the Court cannot avoid the constitutional question; they must face it.

Turning to the question of constitutional--the underlying constitutional questions, as I've indicated, the two statutes, although in application in this case have similar proof involved, they are very different.

The scope of the two statutes, the person's activities, and the commerce clause element are very different. And indeed, as this Court recognized both in Bass and in Scarborough, it may well have been that Congress thought it was enacting, in the two-year statute, a statute along the lines of Perez, that is, a statute not requiring individualized proof of commerce clause jurisdiction in each and every case.

And insofar as the Congress thought that it was doing that, it--the two statutes were very much different as to their Commerce clause nexus.

After the decisions in Bass, Barrett and Scarborough, they're still different, although the gap is not quite as great.

We mentioned before that the government has always suggested, and this Court has always followed, that the prosecutor has large discretion in charging and choosing a statute under which to prosecute or not prosecute a defendant.

In part that discretion is based on the constitution itself, Article II, Section 3 of the constitution, and the doctrine of the separation of powers.

The only limitation on that prosecutorial discretion

indicated in Bordenkircher and Oyler is where the prosecutor exercises his discretion on the basis of arbitrary or unconstitutional factors, such as race or religion or gender or something of that nature.

There's no assertion in this case that there are--that prosecution was based on any of those factors.

But indeed, looking at the record, one can well imagine why the prosecutor chose to pursue respondent under the five-year statute. He had been convicted of murder in 1960; he had a very long record before then, some 20 other prior convictions of some sort or other, including, I think, a felony conviction for rioting in 1962. And shortly after he had been released from prison following his murder conviction, he was proceeding to apparently sell guns, trade in guns; not only the gun in question, but apparently he mentioned that he had had other guns in the recent past and had transferred those as well.

So the question becomes where could possibly statutes which have different elements be unconstitutional, where they are clear. And here the conduct prohibited is clear; and the penalty provided for each of the two statutes is quite clear, and there is no exception made under either statute.

The Court of Appeals and respondent suggest that the two statutes are identical. And we would submit that

even where the statutes are identical, there would be no unconstitutional violation, as long as it was clear that Congress intended there to be separate statutes.

This Court has indicated in Bell and in other cases that the major limitation on--constitutional limitation on Congress' power to enact separate statutes with different penalties or set penalties for a criminal violation is Eighth Amendment. And there's certainly no claim here that these statutes violate the Eighth Amendment.

It is arguable, I suppose, that if you had identical statutes that there might be some sort of due process violation in terms of notice. However, the due process notice line of cases seems to focus mainly on the conduct prohibited. And here, the conduct prohibited is very clearly prohibited; it's prohibited by two statutes, not just one, with regards to respondent.

And there is less reason for the criminal law to be so precise in the penalty provision in the sense that, for instance, the kidnapping statute provides that a defendant who is convicted of kidnapping may be--may be punished from anywhere from zero to life imprisonment.

So it's clear that that kind of--and that's statute has not been held as unconstitutional. The breadth of the statutory provisions.

Here, it's a much--even narrower one, it's from zero

to five, or if it's under the two-year statute, from zero to two.

Lastly, I would point out that there's no unfairness to defendants if they're prosecuted under one statute or the other. If a defendant's conduct constitutes some horrible acts or is in need of strict punishment, he can get more than two years under the five-year statute. If he is lucky enough to have been charged under the two-year statute, that's fortuitous, and he only gets the maximum two years.

And that kind of fortuitous mercy this Court in Gregg against Georgia said did not violate the constitution.

And those defendants whose conduct is punishable by less than two years will receive less than two years under both statutes.

I would like to reserve the remainder of my time if there are no further questions.

MR. CHIEF JUSTICE BURGER: Mr. Bellows.

ORAL ARGUMENT OF CHARLES A. BELLOWS, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BELLOWS: Mr. Chief Justice, and Justices of the Supreme Court:

Section 922(h) is a very severe and strict statute. It doesn't make any difference how long the interstate commerce took place, as in our case, it took place 30 years ago prior to the time he was charged with a crime.

It doesn't make any difference whether or not he had been previously convicted of an offense in which he got probation Once he'd been convicted of a felony, then he comes within that statute.

922 has a history way back to 1933 where practically the same statute was involved in the Federal Arms Act. Later on in 1968 it was included in the Omnibus Crime bill. And it covers situations where a defendant is under indictment as well as being convicted.

Now, this may create a problem. It's remarkable none of these problems have surfaced, and I think they're going to begin.

Supposing you had a case where a man was convicted under this 1922(h), and later on the other case in which he was under indictment he was acquitted, what do you do?

It refers to fugitives. It says fugitives from crime. What crime are we talking about? Parking tickets may be a crime. Abandoning a wife may be a crime. You have another provision referring to those adjudicated as mental defectives, now I can't imagine charging a mental defective of receiving a gun. I've never heard of a case such as this.

But this was intended, the statute of this omnibus bill was intended to prevent crime. It could have been a very simple thing to have said, among other things, no one under

the age of 21 or 24 years of age shall receive a gun, or sell a gun .

I think that kind of provision would have really brought down the incidence of crime in America, but Congress didn't want to go that far.

Now then we have the amendment of 1202. This was a last minute--last minute amendment. Senator Long came along with an amendment, and he was asked if it was a substitute for the bill. And all he said was, they did a good job, meaning the committee did a good job, but my amendment takes nothing from the bill.

He could very well have said, this is or is not an amendment. And so he offers it. And there's no--there's no conversation, there's no debate about it. And there are changes.

It includes those convicted of crime. It refers to those discharged from the Armed Services under dishonorable condition; some day that will surface if this remains on the books. And it refers to those who have renounced United States citizenship.

QUESTION: Well, are you suggesting there's something constitutionally infirm about the provision about someone discharged from the Armed Forces under dishonorable conditions?

MR. BELLOWS: I say these provisions are so ambiguous that serious consideration ought to be given by this Court as

to whether or not both of them are constitutional .

In addition to the problem we have here of two statutes, wherein the same crime subjects the offender to one sentance of two years and the other of ifive years.

QUESTION: Was your client--is there any claim that your client was discharged under dishonorable conditions?

MR. BELLOWS: No. I'm just pointing out--I'm just pointing out some of the problems.

QUESTION: Just running through the statute.

MR. BELLOWS: In both of these statutes, Your Honor.

Now the Court of Appeals said that the statutes may be void for vagueness, and that they violated due process of law and equal protection of law, and applied the rule of lenity.

Now the Solicitor General talks about my client having been previously convicted of the offense of murder. The same thing would apply if he hadn't been convicted of murder. The young Assistant United States Attorney would have indicted him too under the 922(h). They rarely ever use the 1202 when they bring in the file on a man who sold a gun or bought a gun. The natural inclination of the prosecutor is, I will draft an indictment charging him under the more severe statute.

There's a recent case that the Solicitor General called my attention to when I was out of town which was decided

March 28th by the United States Court of Appeals for the District of Columbia, where the defendant was found guilty of two statutes, one--the five-year sentence, carrying a five-year sentence, and one of two years; and they applied the rule of lenity.

Now the government argues there's no ambiguousness about the statutes. And they use an extraordinary example. He says, what's ambiguous about five years? What's ambiguous about two years?

Of course, if you had only one section, one statute, all by itself, it isn't ambiguous. And I don't say that the words have an ambiguous meaning all by themselves.

But when you put the two of them together, you have an ambiguous situation. Who has a right to tchoose, where it's the same offense, not two different offenses, or one included in the other; but we have two same offenses.

Should the prosecutor have the right to choose the one that carries the harsher sentence?

QUESTION: Well, I suppose the prosecutor has some discretion in choosing whether to prosecute or not?

MR. BELLOWS: Yes, Your HOnor.

QUESTION: And is this any worse in degree?

MR. BELLOWS: Yes. As an old-time prosecutor, I did it many times. I would choose a particular section, or decide to prosecute or not to prosecute.

But where you have two sections, both relating to the same crime, and the prosecutor says, You, Mr. A, I'm going to charge you with the section that calls for a five-year sentence; and you, Mr. B, another defendant, I'll charge you under the section which carries a two-year sentence; I say there's something wrong with it.

QUESTION: Well, he could say, I'll charge you, Mr. A, but I'm not going to charge Mr. B.

MR. BELLOWS: He could say that.

QUESTION: Is there anything wrong with that?

MR. BELLOWS: No, he could do that. He could say, I won't charge you.

But if he's going to use that section, he's got to apply it equally to all persons charge with the offense; if he's going to use it. Now one charged with a five-year sentence, and one with a two-year sentence, has he the right to do it? Should he do that?

QUESTION: Let me go back to your District of Columbia case. I think you said that he was convicted under both?

MR. BELLOWS: Under both.

QUESTION: And was he then, of course, sentenced under both?

MR. BELLOWS: Yes.

QUESTION: Were the sentences concurrent, or--

MR. BELLOWS: They were concurrent.

QUESTION: Concurrent. But the Court of Appeals applied the rule of lenity and held it to two years?

MR. BELLOWS: Yes, Your Honor.

QUESTION: All right.

MR. BELLOWS: Now, the Solicitor General argues that Congress intended that Section 922 govern the range of penalty. There's nothing in the Act to show that at all.

The Solicitor General argues that the court in the--the Court of Appeals re-wrote the gun laws. They didn't do that. What they did was, they took two sections, two statutes, carrying different sentences, and tried to give meaning to them; rather than declare them unconstitutional, they tried to give meaning to them by applying the rule of lenity.

QUESTION: A prosecutor faced with the decision, before any charge is made, would be--or I'll put it to you as a question--would he be entitled to take into account that the particular individual had a prior murder conviction and therefore to select the higher of the two penalty statutes on that ground?

MR. BELLOWS: No, when you have the same offense with two different punishments; where you have the same--

QUESTION: You don't think that's within the range of discretion at all?

MR. BELLOWS: I would say, no, Your Honor; that

where you have the same offense carrying two different penalties, two different sections, one allowing for a five-year sentence and one a two-year sentence--

QUESTION: The higher is just surplusage, then, it is a nullity?

MR. BELLOWS: Well, it's--it could be described as that.

QUESTION: That would--that's the consequence of the decision of the Court of Appeals here, is it not?

MR. BELLOWS: Well, the Court said--the Court of Appeals said that you have two statutes here that are ambiguous. And apparently void, under the Fifth Amendment, for being vague.

And rather than declare them unconstitutional, they said, "We'll give meaning to it by applying the rule of lenity and ordering the lower court to resentence the defendant to two years."

QUESTION: Mr. Bellows, could you explain precisely why these two statutes are, quote, void for vagueness, under the Fifth Amendment?

MR. BELLOWS: Well, they because--how do you know what to apply?

QUESTION: Well, five years is perfectly clear to me.

MR. BELLOWS: Yes.

QUESTION: Ten years is perfectly clear to me. Two

years is perfectly clear to me.

There may be considerable overlap, but I can't imagine how anyone would say it was vague.

MR. BELLOWS: Well, but when you have two statutes that cover the same offense of the purchase or receipt of a gun, one says the defendant may receive up to five years, and the one receives two years.

The vagueness is, in this, where is the prosecutor allowed to choose when you have the two different sections?

QUESTION: Well, you're arguing maybe that the prosecutor ought not to be entitled to be given that discretion by Congress. But I don't see anything vague about the discretion he's given.

MR. BELLOWS: It's my point, and buttressed by the Court of Appeals, that that makes it--that makes it vague. Because there's no--there are no guidelines.

Had Section 922 provided that where a man had been previously convicted of murder or rape or burglarly, he shall then be--if on conviction, the sentence may run up to five years, I can see that it would be a good section.

But there's no such showing--there's nothing in the statute that says that. All it says is, if you bought the gun, the punishment may be five years.

So it is vague. Where--who's to choose between a section for applying the five years and two years?

QUESTION: Really, what you're talking about is vague penalties, to use the language of the Court of Appeals.

MR. BELLOWS: Yes, Your Honor.

QUESTION: Not vague language--

MR. BELLOWS: No, language alone, if he had just 922 alone, or 1202 alone, it's perfectly clear; but when you put together two of them that conflict with each other, then I say there's a vagueness.

QUESTION: Has there ever been a case from this Court that held unconstitutional a statute which was perfectly clear as to its proscription but had the vagueness problem that you perceive as to penalties?

MR. BELLOWS: Not that I'm aware of.

I raise the question before this Court that inasmuch as the Court of Appeals said there is serious question about the constitutionality about both of these sections, that perhaps they ought to be declared unconstitutional.

I see no great harm, if both of these sections were declared unconstitutional and Congress rewrote them. I see so many problems that could arise eventually from all these--from prosecutions under both statutes.

And as the Solicitor General pointed out, the anomalies that are here prove my point, that there are real problems with both.

They were passed in a hurry. These statutes were

passed fast because they wanted--Congress wants to show the public they're doing something to prevent crime. But they didn't go far enough.

QUESTION: Mr. Bellows, is this really fundamentally much different from the inconsistent verdicts that juries sometimes render, in which we--the courts have said that inconsistent verdicts are an inherent part of the system?

MR. BELLOWS: Juries are entitled to that.

QUESTION: Well, only because the courts have said they're entitled to it, though.

MR. BELLOWS: Yes.

In our present case, for instance, upon a voir dire by the Court of the jurors after the verdict, they wanted to know what the defendant was convicted of. You know, it gets to that.

This is a tough case to fight in the courts, where the indictment reads, he's been previously convicted of a felony. Sometimes it creeps out what kind of a felony. And jurors, they can talk about anything.

For instance, in this case, as the record will show, they wanted to know why did Mr. Bellows come down to Peoria to try the case. So they can talk about anything they want.

And the vagaries of the jury are well known. They can do whatever they please.

So I suggest--

QUESTION: And do.

MR. BELLOWS: Yes.

Now, then, as I stated, we submit to the Court to consider the question as to whether or not both sections could be declared to be unconstitutional. And it would be no great loss, really. Because it could be rewritten, and a better job could be done.

Finally, we suggest that the amendment by Senator Long was really a repeal of 922(h). When he was asked, is this a substitute, he didn't talk. He didn't answer it. Maybe he didn't want to start a rumpus.

But he just said, they did a fine job, and it'll help. And anyway, it's not--they weren't simultaneously passed. 922 came before the 1202(a). 922(h) came way back in 1973; so it wasn't something new. It's been on the books for many years.

And there is an established rule that if there exists a conflict in the same act, the last provision must control. And I would submit to the Court that the 1202(a) could be considered as a repeal of 922(h).

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you Mr. Bellows.

Do you have anything further, Mr. Levander?

MR. LEVANDER: Just a couple of quick points if I might, Mr. Chief Justice.

REBUTTAL ARGUMENT OF ANDREW J. LEVANDER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. LEVANDER: First, I would mention that, although Section 922(h) has its origins in a 1938 statute, the Federal Firearm Act, the statutes are very different. The penalties were changed; the presumption was eliminated, that was from one statute to another. And the statutes were radically different in their scope.

Secondly, respondent suggests that Senator Long was not clear as to what he said when he introduced the bill. However, Senator Dodd asked him, "Do I correctly understand that this amendment is not a substitute for Title IV?"

Answer: "This amendment will take nothing from the bill. I applaud what the Committee did. This would add to the fine work the Committee did in this area."

And lastly, respondent suggests that prosecutors across the country, Federal prosecutors, are always using 922(h), the five-year statute, as opposed to the two-year statute.

However, statistics for 1977 and 1978 show that firearm prosecutions brought under one statute or the other are--about 40 percent were brought under the two-year statute.

Now, I don't know exactly how many of those cases could have only been brought under the two-year statute, because of the commerce clause element, but I suggest that

the statistics indicate that prosecutors are exercising their discretion in accordance with factors this Court approved in a footnote in Levasco, and which we cite in our brief.

If there are no further questions---

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:58 o'clock a.m., the case in the above-entitled matter was submitted.]