

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1047

TITLE UNITED STATES, Petitioner v. ONE ASSORTMENT OF 89 FIREARMS

PLACE Washington, D. C.

DATE November 30, 1983

PAGES 1 thru 31



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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, :

4 Petitioner :

5 v. : No. 82-1047

6 ONE ASSORTMENT OF 89 FIREARMS :

7 - - - - - X

8 Washington, D.C.

9 Wednesday, November 30, 1983

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 2:01 p.m.

13 APPEARANCES:

14 RICHARD G. WILKINS, ESQ., Office of the Solicitor

15 General, Department of Justice, Washington, D.C.; on
16 behalf of the Petitioner.

17 HERBERT W. LOUTHIAN, ESQ., Columbia, S.C.; on behalf of
18 the Respondent.

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C O N T E N T S

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on behalf of the Petitioner	3
HERBERT W. LOUTHIAN, ESQ.	
on behalf of the Respondent	
RICHARD G. WILKINS, ESQ.	
on behalf of the Petitioner -- rebuttal	
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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Wilkins, I think
you may proceed whenever you are ready.

ORAL ARGUMENT OF RICHARD G. WILKINS, ESQ.,

ON BEHALF OF PETITIONER

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

On March 31, 1977 the United States commenced
a civil in rem forfeiture action in the United States
District Court for the District of South Carolina
seeking forfeiture to the United States of an assortment
of firearms seized on January 20, 1977 by special agents
by the Bureau of Alcohol, Tobacco and Firearms. The
forfeiture complaint alleged that Patrick Mulcahey had
used and intended to use the firearms in violation of
the laws of the United States while engaged as a dealer
in firearms without a license.

The forfeiture was sought pursuant to the
provisions of 18 U.S.C. Section 924(d). Mr. Mulcahey
filed a claim for the return of the firearms and also
sought to raise his prior acquittal on a related
criminal firearms charge to bar the civil forfeiture
action.

The District Court on motion of the government
dismissed Mr. Mulcahey's collateral estoppel and res

1 judicata defenses noting that the criminal acquittal did
2 not preclude a subsequent civil action. The parties
3 thereafter submitted by stipulation the transcript of
4 the criminal trial to the court, and the court thereupon
5 found that the government had shown by preponderance of
6 the evidence that the firearms were indeed subject to
7 forfeiture.

8 That evidence which is not in dispute here
9 show that during the period when Mr. Mulcahey was not
10 indeed licensed he nevertheless bought and sold numerous
11 firearms including making 16 offers to sell various
12 firearms. On appeal a divided panel of the Fourth
13 Circuit reversed finding that this Court's decision in
14 Coffey v. United States precluded the section action.

15 Chief Judge Winter of that court dissented
16 reasoning that while a criminal penalty following a
17 criminal acquittal was barred by the Coffey case that
18 case did not preclude the imposition of subsequent civil
19 penalties. On rehearing en banc the Court of Appeals
20 adhered to the panel decision by a 5-4 vote.

21 The majority again relied on Coffey and
22 rejected the government's argument that it was not
23 applicable on the facts of this case. The court also
24 noted that even if the government's interpretation in
25 Coffey were correct this forfeiture action would

1 nevertheless be precluded because "there is nothing
2 remedial about forfeiture under Section 924(d)."

3 Judge Winter joined by three others again
4 dissented relying principally upon his dissent at the
5 panel stage although he also added that while the
6 criminal provisions of the Firearms Act reach only
7 completed violations, the forfeiture provision at issue
8 here reaches firearms that are merely intended to be
9 used in violation of the law. This he said evidences
10 Congress' intent to provide a broad remedial sanction.

11 The question in this case, therefore, is
12 whether an acquittal on criminal gun control charges
13 precludes a subsequent civil in rem forfeiture action
14 against those weapons. This question can best be
15 analyzed by dividing it up into two interrelated
16 inquiries.

17 First, assuming for the moment that forfeiture
18 is indeed civil is there any basis for the Court of
19 Appeals' conclusion that the penalty action is
20 precluded. This question is readily answered by
21 established decisions of this Court in the negative.

22 Therefore, the second question necessarily
23 becomes whether or not Section 924(d) is properly
24 classified as a civil sanction. This question is one of
25 statutory construction and is also easily answered

1 because Congress has clearly indicated its intent to
2 provide a civil sanction.

3 The Court of Appeals concluded that this
4 Court's decision in Coffey mandated preclusion here
5 because the civil action arose out of the same facts
6 that were involved in a prior criminal prosecution.
7 While there is indeed some language in Coffey which would
8 lend support to this broad rule of preclusion the
9 subsequent decisions of this Court have given Coffey a
10 significantly narrower reading.

11 In Helvering v. Mitchell the government
12 brought a civil penalty action to recover a \$364,000
13 fine for the fraudulent avoidance of income tax
14 following the taxpayer's acquittal on criminal charges
15 of willfully evading the income tax. The taxpayer, of
16 course, faced with this large fine raised his prior
17 criminal acquittal to bar the civil penalty action.

18 The Court of Appeals relying on Coffey
19 reversed, but this Court in an opinion by Justice
20 Brandeis reversed. The Helvering court first dispatched
21 the argument that res judicata barred the subsequent
22 penalty action.

23 The Court noted reversing the position taken
24 in the Coffey court that the difference in the burden of
25 proof in criminal and civil cases precludes application

1 of the doctrine of res judicata. This Court quite
2 recently in the One Lot Emerald Cut Stones case used the
3 exact same rationale to dispense with the argument that
4 a criminal acquittal collaterally estopped a subsequent
5 civil forfeiture action.

6 The Helvering court also dismissed the
7 contention that double jeopardy barred the subsequent
8 action noting that Congress has the authority to impose
9 both civil and criminal penalties for the same conduct.
10 Finally, it dispensed with the Coffey objection noting
11 simply that the rule in the Coffey case does not apply
12 when there has been a criminal acquittal followed by a
13 subsequent civil action requiring a different degree of
14 proof.

15 Therefore, the crucial question here is not
16 --

17 QUESTION: In the Coffey case, Mr. Wilkins,
18 was the proceeding civil or criminal?

19 MR. WILKINS: The forfeiture action? It was
20 an in rem civil forfeiture action, and the Court said
21 that this was nominally a civil in rem forfeiture
22 action.

23 The crucial question here, therefore, is not
24 whether Coffey mandates preclusion but rather whether
25 Section 924(d) is properly classified as a civil

1 sanction. This Court's decisions clearly indicate that
2 this is a question of statutory construction that
3 proceeds on two levels.

4 First, the Court seeks to determine whether
5 Congress either expressly or impliedly has indicated its
6 intent to apply one label or the other; and second, when
7 Congress has indicated its intent to apply a civil label
8 the court examines the particular sanction involved to
9 see whether that sanction is so punitive in purpose or
10 effect as to negate that intention. That analysis shows
11 that this sanction here is civil.

12 Perhaps the clearest indication that this
13 sanction is indeed civil is the fact that Congress
14 provided civil procedures for its enforcement. Section
15 924(d) incorporates the provisions of the Internal
16 Revenue Code which among other things provide for notice
17 by publication and administrative forfeiture if the
18 goods seized are valued at less than \$2500.

19 QUESTION: Was that necessarily a very
20 persuasive argument, Mr. Wilkins? Supposing that the
21 forfeiture provision were extremely stringent, say, you
22 forfeiture \$100,000 to the government if you are found
23 with these sort of weapons on you and the government
24 says "Well, to show it is civil we will simply have all
25 civil procedures. There will be no right to counsel and

1 nothing else that would go with a criminal trial."

2 That would not really move the ball much would
3 it?

4 MR. WILKINS: Well, Justice Brandeis in
5 Helvering said that Congress may not provide civil
6 procedures for the enforcement of punitive sanctions.
7 In a case that you posit where it was rather clearly
8 quite a confiscatory sort of forfeiture and for rather
9 obviously punitive motives perhaps the court would say,
10 no you could not provide that sort of --

11 QUESTION: The fact that civil procedures had
12 been provided would not advance the argument that it was
13 a civil rather than a criminal penalty.

14 MR. WILKINS: Well, it does to the extent the
15 question here is congressional intent if you are looking
16 at what Congress thought they were doing when they
17 provided this forfeiture statute. The fact that they
18 provided civil procedures they certainly thought they
19 were providing a civil --

20 QUESTION: What exactly is the intent of
21 Congress that we are talking about?

22 MR. WILKINS: The intent to call a particular
23 sanction. Is this a civil sanction or is this a
24 criminal sanction?

25 QUESTION: You mean Congress simply by

1 intending to make this civil can make civil what
2 otherwise would not be?

3 MR. WILKINS: Well, no. Of course, as we said
4 in the opinion in Ward there is a two step inquiry.
5 First you look to see whether Congress has intended it
6 to be civil or criminal and second you ask, well, is it
7 so punitive in purpose or effect as to negate that
8 intention. So there is a second level of inquiry, of
9 course.

10 The remedial structure of the Act also
11 indicates that this is a broadly -- that this is a civil
12 sanction. Forfeiture cannot be ordered as part of the
13 criminal punishment for a criminal violation of the gun
14 control law.

15 Forfeiture can be obtained if at all only by
16 bringing a subsequent civil forfeiture action against
17 the firearms. Therefore, if this Court were to conclude
18 that forfeiture is somehow criminal it would do quite a
19 bit of violence to the remedial structure of the Act.
20 The government would be forced to choose between
21 forfeiture or criminal prosecution. It couldn't have
22 both.

23 QUESTION: Sometimes, Mr. Wilkins, we see the
24 term "quasi-criminal" apply to these forfeiture
25 proceedings. Does that have any relevance?

1 MR. WILKINS: That term has had some limited
2 relevance as it applies to certain discrete
3 constitutional rights.

4 QUESTION: For instance, would the Fourth and
5 Fifth Amendments apply perhaps in this situation?

6 MR. WILKINS: Yes. The Court's rather
7 established with Boyd and continuing threw Coin and
8 Currency quite recently would establish that, but --

9 QUESTION: This statute is one of those that
10 might be characterized as quasi?

11 MR. WILKINS: Exactly.

12 QUESTION: But not double jeopardy?

13 MR. WILKINS: Right. In fact in other
14 decisions this Court has refused to apply the
15 quasi-criminal sort of analysis to apply Sixth Amendment
16 confrontation rights, the Fifth Amendment double
17 jeopardy clause, for example, any due process
18 requirement of proof beyond a reasonable doubt. All of
19 these sorts of constitutional rights have been denied.

20 QUESTION: If the statute in a given
21 forfeiture statute were characterized as criminal as
22 being punitive in nature and not remedial would double
23 jeopardy apply to all elements even though some of the
24 elements of the civil offense -- the forfeiture offense
25 were different from the criminal?

1 MR. WILKINS: If the Court were to conclude
2 that it was so punitive in nature and effect as to be
3 properly called a criminal sanction I would assume that
4 it would apply to the entire action, but you noted one
5 very important point here. There is a difference in the
6 elements between the forfeiture actions here and the
7 criminal action, and we believe that that is another
8 strong indication that Congress intended this as a civil
9 sanction because it reaches weapons that are merely
10 intended to be used in violation of the law whereas the
11 criminal sanction only applies to completed actions.

12 Finally, although the court below said there
13 was nothing remedial about forfeiture we believe that
14 this simply ignores that broad prophylactic goals of the
15 gun control legislation that this Court has repeatedly
16 noted. This legislation was enacted to enable the
17 states to control firearms traffic within their borders,
18 and elimination of unregulated firearms that have been
19 set apart or intended for use in unregulated commerce
20 furthers that remedial purpose.

21 Therefore, six Courts of Appeals have taken
22 the position that forfeiture under this provision is
23 civil and remedial in nature, and the court below stands
24 alone in its characterization. Therefore, the Court is
25 required to take the second step adverted to by Justice

1 Rehnquist, that is, to determine whether or not this
2 sanction is so punitive in purpose or effect as to
3 negate that clear intention that Congress indicated to
4 provide a civil sanction here.

5 This question is rather difficult because the
6 standards to be applied in making it are somewhat vague
7 an ambiguous. The fact that a statute has a severe
8 subjective impact upon an individual cannot by itself
9 suffice to make a statute punitive and criminal.

10 The taxpayer in Helvering faced with a
11 \$364,000 fine certainly felt punished, yet that was not
12 enough to label that statute criminal nor is it enough
13 that the particular sanction depends on criminally
14 proscribed conduct because this Court has repeatedly
15 noted that Congress has the authority to impose civil
16 and criminal sanctions for the same conduct. Therefore,
17 the Court has properly noted the government believes
18 that only the clearest of proof would suffice to
19 establish the unconstitutionality of a statute on this
20 second ground.

21 There is no clear proof here. To show that we
22 would use some of the factors that the Court indicated
23 in the Mendoza-Martinez case.

24 Initially the declaration of a forfeiture
25 poses no affirmative disability or restraint upon a

1 property owner. The declaration of the forfeiture does
2 not render him criminal. Indeed Mr. Mulcahey could go
3 out and purchase more firearms. He is not subject to
4 the ownership restrictions.

5 QUESTION: Well, he is restrained from using
6 his property.

7 MR. WILKINS: Well, he is restrained from
8 using his property, but he is not stigmatized as a
9 criminal. He is not thrown in jail. His liberty in
10 many traditional senses is --

11 QUESTION: His property is being taken from
12 him only because he's been using it to transport drugs.

13 MR. WILKINS: This case does not involve
14 drugs. There are other --

15 QUESTION: Well, I know but others do.

16 MR. WILKINS: Yes.

17 QUESTION: And you would be making the same
18 argument.

19 MR. WILKINS: Yes.

20 Also the second Mendoza-Martinez factor
21 unquestionably indicates the civil nature of this
22 sanction. In rem forfeiture is a traditional civil
23 sanction.

24 Indeed the Helvering court noted that
25 forfeiture has been considered civil since the original

1 revenue law of 1789 and has been upheld repeatedly
2 against the contention that it is essentially criminal.
3 The other factors I do not know whether it is necessary
4 to go into them at any great length but they all
5 indicate to some degree or other that this is a civil
6 sanction. It has a remedial purpose. It does not
7 require a showing of scienter.

8 Indeed the only factor that indicates at all
9 that this is a criminal sanction is the fact that it is
10 based on some conduct that is criminalized or that is
11 already a crime, but as the Court noted in Ward just
12 three years ago this indication does not carry
13 substantial weight because Congress can indeed
14 criminalize conduct and also impose a civil penalty for
15 the same conduct. In any event in this case forfeiture
16 can be ordered for conduct that is not indeed in
17 violation of any criminal provision.

18 The United States believes that the --

19 QUESTION: May I ask just one question?

20 MR. WILKINS: Yes.

21 QUESTION: Supposing we agree with everything
22 you say, but we are still troubled by the fact that we
23 may find ourselves confronting Coffey and feel we have
24 to overrule Coffey explicitly to decide in your favor
25 how strong are the stare decisis interests in this

1 particular case?

2 MR. WILKINS: We do not think you have to do
3 anything to Coffey that has not already been done to
4 it?

5 QUESTION: You take the position it has
6 already been overruled?

7 MR. WILKINS: It has already been done.

8 QUESTION: We should just say so.

9 MR. WILKINS: We should just say so. Justice
10 Brandeis did it in Helvering.

11 Thank you.

12 CHIEF JUSTICE BURGER: Mr. Louthain.

13 ORAL ARGUMENT OF HERBERT W. LOUTHIAN, ESQ.,
14 ON BEHALF OF REPONDENT

15 MR. LOUTHIAN: Mr. Chief Justice, and may it
16 please the Court:

17 I think it is important to note that the
18 criminal action alleged in the indictment the identical
19 elements which were alleged in the forfeiture case,
20 hence, the same issues were raised in both cases. The
21 same facts were present.

22 The government had its day in court.

23 QUESTION: The same burden of proof present?

24 MR. LOUTHIAN: No, sir, and different burden
25 of proof, and I will get to that a little later. Put

1 Coffey says and I content that Coffey has not been
2 overruled that where the same facts, the same acts, the
3 same elements have been put at issue and resolved
4 against the government in a criminal case the government
5 cannot later adopt a label, call it a civil case, put
6 the same facts in evidence and issue and have its second
7 bite at the apple.

8 I think that is the clear cut issue here.
9 Coffey I say I believe has a very narrow preclusion
10 doctrine. I do not think it is a broad doctrine at
11 all. I do not think it encompasses Helvering. I do not
12 think it encompasses Ward. I do not think it is
13 included in the One Lot Emerald Cut Stones case, and I
14 think each of these can be distinguished.

15 A careful analysis of Coffey I believe
16 establishes the reasoning of that Court being not res
17 judicata and not even double jeopardy but collateral
18 estoppel. The same issues cannot be determined twice
19 after having been determined once.

20 It does not apply to a civil action after a
21 conviction. Of course, that is an entirely different
22 case.

23 Certainly after conviction of a violation of
24 the Firearms Act in this case the government could have
25 forfeited the firearms. It does not -- Coffey does not

1 apply to a subsequent civil action where the issues are
2 different.

3 But Mulcahey was charged with engaging in the
4 business of dealing in firearms without a license in the
5 criminal case. He was put to trial and acquitted.

6 In the forfeiture case the firearms were
7 charged with being used or having been intended for use
8 by Mulcahey because he did not have a license to deal in
9 firearms, identical issues. The government has in its
10 brief relied a great deal on Stone as saying that this
11 can be allowed because in Stone there was a criminal
12 acquittal and a later civil action, but in Stone the
13 civil action was brought by the government as the owner
14 of the properties.

15 Some timber was cut by Stone on government
16 land. He was charged with feloniously cutting the
17 timber, and he was acquitted.

18 In the criminal case -- Excuse me, in the
19 civil case then the government as owner of the property
20 brought an action to recover the value of the timber.
21 Hence, there is a vast difference between the status of
22 the government in both cases.

23 The Helvering case on which the government
24 relies is vastly different from Coffey. Helvering did
25 not involve a forfeiture. Helvering involved a civil

1 penalty, a 50 percent tax penalty, and the Court was
2 very careful to say -- It distinguished Coffey -- it was
3 very careful to say this is a civil administrative
4 remedial sanction.

5 Now we contend that there is nothing civil or
6 administrative and certainly not remedial about taking
7 firearms. In the One Lot Emerald Cut Stones case the
8 individual on trial in the criminal case was charged
9 with willfully, intentionally, knowingly smuggling into
10 the United States certain contraband items, stones and a
11 ring.

12 Later forfeiture of the contraband smuggled
13 goods was allowed after the individual was acquitted,
14 but the reason for it and the Court was very careful in
15 discussing Coffey and Boyd and all of the other cases
16 that went on and which had not been overruled. The
17 reason was that intent was not an element in the
18 forfeiture of the contraband items. Intent was an
19 element in the criminal case.

20 I think we need to pause here for a moment and
21 think about the nature of the goods forfeited in
22 Mulcahey's case, in this case. None of these firearms
23 were contraband. None of these firearms were illegal pe
24 se.

25 There was not an illegal automatic weapon.

1 There was not a sawed off shotgun. There was nothing
2 illegal about the guns.

3 The only contention that the government had in
4 either case was that they were being used by an
5 individual who they claim was engaged in the business of
6 dealing in firearms without a license in both cases.

7 QUESTION: Well, accused in the criminal case
8 selling firearms without a license.

9 MR. LOUTHIAN: Yes, ma'am.

10 QUESTION: He was not found guilty of that.

11 MR. LOUTHIAN: That's correct.

12 QUESTION: But the evidence apparently
13 according to the government is sufficient to establish
14 that he intended to do it. His defense in the criminal
15 case was entrapment, right?

16 MR. LOUTHIAN: Yes. That was one of the
17 defenses.

18 QUESTION: So what came out was he intended to
19 sell them all right without a license. Why is it not
20 remedial to say that the guns can be forfeited?

21 MR. LOUTHIAN: I think that can be answered on
22 two grounds. One is in United States v. United States
23 Coin and Currency which is cited in the amicus brief.
24 That issue was addressed, and if you recall in that case
25 some gambling proceeds were taken and the Court said

1 that you cannot take things simply because they are
2 intended or there is some suggestion that they are
3 intended to be used in violation of the law.

4 Now the statute does allow that here. But I
5 contend that that furthers our argument that this 924(d)
6 is punitive. It expands the punitive nature of the
7 statute.

8 For example, a firearm used in a criminal act
9 -- 924(d) refers to the Gun Control Act or any other
10 criminal sanction, criminal law of the United States. A
11 typical case would be a person committing a felony with
12 a firearm. Certainly the firearm can be forfeited, but
13 you expand the punitive aspect of it when you say that
14 any gun intended to be used.

15 That weakens the government's argument that
16 this is not punitive. If you sell one gun without a
17 license it is forfeited. If you sell one gun without a
18 license and you have 50 guns in your garage or your
19 basement or your shop then the government can say since
20 these guns were here they were intended to be used so
21 we'll take all of them.

22 QUESTION: But they would have to prove intent
23 to the satisfaction of the trier of fact.

24 MR. LOUTHIAN: No, sir. In either case they
25 do not have to approve intent. Intent is not an element

1 of the criminal case in this particular statute either.

2 QUESTION: Well, then why did you refer to the
3 requirement that they be intended to be used?

4 MR. LOUTHIAN: It was in response to Justice
5 O'Connor's question.

6 The Court affirmed Coffey in One Lot case and
7 it discussed Coffey explicitly. It said that collateral
8 estoppel in One Lot Emerald Cut Stones would bar a
9 forfeiture if in the earlier criminal proceeding the
10 elements of the forfeiture had been resolved against the
11 government.

12 That is exactly what happened in Mulcahey's
13 case. The elements were resolved against the
14 government.

15 Coffey did address the burden of proof issue
16 specifically and answered it. It says that the
17 government urges that the difference in the burden of
18 proof in civil versus criminal cases should be something
19 to distinguish the two cases, and the Court went on to
20 say nevertheless the fact or act has been at issue and
21 determined against the United States and all that is
22 imposed by the statute as a consequence of guilt is a
23 punishment. There could be no new trial of the criminal
24 prosecution after the acquittal.

25 That is what the Fourth Circuit held in this

1 case. The Fourth Circuit said in the majority opinion
2 that everything in 924(d) is punitive.

3 It provides for imprisonment of up to five
4 years, a fine of up to \$5000 or both, and a forfeiture
5 of firearms used in violation of that law or any other
6 law of the United States. So I believe what you have is
7 the government making a choice. Trying the criminal
8 case, if they win it the defendant goes to jail. He
9 pays a fine. He loses his firearms.

10 If they lose it under the position of the
11 government he does not go to jail. He does not pay a
12 fine, but in a separate case they can still take his
13 firearms for the same reason, the same acts, the same
14 elements that they failed to prove the first time.

15 QUESTION: May I just ask if there is a
16 criminal case and a conviction is there then a separate
17 forfeiture proceeding?

18 MR. LOUTHIAN: The mechanics are separate, but
19 it is automatic. It says that upon --

20 QUESTION: They have to file a separate
21 complaint?

22 MR. LOUTHIAN: Yes, sir.

23 QUESTION: Well, why could you not if you take
24 the position that that is also a criminal proceeding why
25 could you not say that he had been punished once for the

1 crime and it is the same crime so you do not have to
2 forfeit?

3 MR. LOUTHIAN: Because I think the careful
4 reading of the statute specifically allows the
5 government to do that. I do not think there is any
6 question --

7 QUESTION: Is that statute constitutional if
8 they are both criminal proceedings? Could you have a
9 statute saying if you commit a murder you should be
10 tried and convicted and should be sentenced to so many
11 years in jail and if the government elects to come back
12 in and try you all over again and have a second
13 sentence?

14 MR. LOUTHIAN: No, sir. I do not think they
15 can do that?

16 QUESTION: Well, is that not what you are
17 saying this is?

18 MR. LOUTHIAN: No, sir. I am saying that
19 under 924(d) the government can take the firearms after
20 a conviction. I am saying that under 924(d) conceivably
21 the government could bring a civil forfeiture with no
22 preceding criminal case, but once having elected in the
23 beginning to assert the criminal statute -- Now remember
24 this is a little different criminal statute. This is
25 not the ordinary statute of smuggling or dealing in

1 drugs or carrying contraband around.

2 This statute just charges a man with no intent
3 requirement of dealing in firearms without a license.

4 That is all. They have done it twice.

5 As a second part of our argument we contend
6 that if the Court decides that Coffey is overruled then
7 we urge the Court to consider that 924(d) is definitely
8 punitive for the following reasons. Boyd stated that
9 even though a case may be civil in form it may be
10 criminal in effect or punitive in effect, and the nature
11 of it could be criminal.

12 Now much has been said by the government about
13 the fact that the Internal Revenue Service procedures
14 are set up for the mechanics of the forfeiture. Well,
15 Boyd says that does not make any difference. The
16 mechanics are not important. It is the result. It is
17 the effect.

18 The effect is that a person is having his
19 property taken from him, and then the question is is
20 that punishment.

21 QUESTION: Do you put any reliance on the fact
22 that the forfeiture is in a criminal statute?

23 MR. LOUTHIAN: Yes, sir. Yes, sir. All of it
24 is in Section 924.

25 QUESTION: It is in the criminal statute?

1 MR. LOUTHIAN: Yes, sir. I think that is very
2 important to show congressional intent that it is
3 labeled penalty. This particular section is labeled
4 penalty.

5 That can to me only mean punitives, what it
6 says. It was all enacted at one time. It was not added
7 later as the case was in Ward where some 70 years later
8 the civil sanction --

9 QUESTION: Had the government originally gone
10 after the forfeiture and not the criminal you would not
11 be here?

12 MR. LOUTHIAN: Exactly.

13 We think that this case insofar as a measure
14 of the punitive aspects of a forfeiture does fit the
15 requirements of Kennedy v. Mendoza-Martinez. We think
16 that it is an effective affirmative disability or
17 restraint.

18 The individual who owned these guns will not
19 have them any longer. It is a taking of his property.
20 We think it does stigmatize his reputation.

21 He went to trial in criminal court and came
22 out acquitted. He goes back and the government takes
23 his firearms. We think that is a stigma.

24 We believe that this sanction has been
25 historically regarded as punishment, another one of the

1 tests of Mendoza-Martinez. It is clearly to further the
2 deterrent and punitive purposes and to impose an
3 economic penalty.

4 When you take a man's lifelong gun collection
5 from him -- This man had been collecting these firearms
6 since he was, I think, 14 years old --

7 QUESTION: Does the record show the value of
8 these firearms?

9 MR. LOUTHIAN: The value is in dispute. The
10 government alleged in the forfeiture complaint a little
11 over \$5000. Our answer alleged approximately \$15,000.
12 I do not think that became terribly important if they
13 took all of them, but we contend that at the time --
14 That was back in 1977 -- they were worth \$15,000 and
15 assuming they have been taken care of would be worth
16 substantially more today.

17 We think that the sanction does further
18 retribution and deterrence and certainly this forfeiture
19 arose out of an underlying criminal act so the act
20 alleged was already a crime. Can an alternative purpose
21 be assigned to this sanction? I have answered that.

22 The firearms were a collection of a lifetime.
23 The congressional findings and intent I think is
24 important, too, and is recited in our brief. It states
25 that the purpose of all the Gun Control Act was not to

1 interfere with the right of law abiding citizens to use
2 and enjoy firearms. It was very clear to enunciate
3 that, and we believe that taking a person who has been
4 adjudged in effect a law abiding citizen by a jury of 12
5 people, take his firearms certainly takes care of that
6 requirement.

7 Then the excessiveness of the sanction. I
8 think we have already answered that by asking about the
9 value. The maximum fine he could have been assessed had
10 he been found guilty would have been \$5000.

11 Having failed in that he now faces a
12 forfeiture of even by the government's own allegation of
13 a value of more than \$5000.

14 QUESTION: He might have had both, of course,
15 is that not so?

16 MR. LOUTHIAN: Yes, sir.

17 I think the case has serious public policy
18 ramifications. The case of Partman Corporation v.
19 Paramount Pictures talked about collateral estoppel by
20 by a judgment and said this doctrine was established as
21 a procedure for carrying out the public policy of
22 avoiding a repetitious litigation.

23 Well, if the government prevails here I think
24 we are going to open the door to repetitious litigation
25 by having happen to other citizens what has happened to

1 Mulcahey, having been tried, acquitted and then having
2 to face the civil forfeiture based on the same charge.
3 We contend that the holding in Coffey is still good law;
4 that 924(d) is punitive; that the government had its one
5 bite at the apple; they should be precluded from
6 bringing this action and that the Court of Appeals
7 should be affirmed.

8 CHIEF JUSTICE BURGER: Do you have anything
9 further, Mr. Wilkins?

10 MR. WILKINS: Just one or two responses,
11 Justice Burger.

12 ORAL ARGUMENT OF RICHARD G. WILLIAMS, ESQ.,

13 ON BEHALF OF PETITIONER

14 MR. WILKINS: To respond to any contention
15 that perhaps we are doing something wrong in having two
16 bites at the apple or taking an undue choice, any choice
17 that was given the government was given by Congress. As
18 Justice Frankfurter in his concurring opinion in United
19 States ex rel. Marcus v. Hess case stated the short of
20 it is that when two such proceedings merely carry out
21 remedies which Congress has provided in advance for a
22 wrong they do not twice put a man in jeopardy for the
23 same offense.

24 Congress thereby merely allows the
25 comprehensive penalties which it has imposed to be

1 enforced in separate suits instead of in a single
2 proceeding. Moreover, responding to Justice Marshall's
3 inquiry as whether or not the fact that this was in
4 Title XVIII had any significance.

5 The gun control law in 1968 --

6 QUESTION: I did not say Title XVIII. I said
7 the act of Congress.

8 MR. WILKINS: The act of Congress --

9 QUESTION: Thank you.

10 MR. WILKINS: the fact that this act was
11 codified in Title XVIII which is the criminal title of
12 the United States Code. The Gun Control Act of 1968
13 replaced an act that had been previously codified in
14 Title XV.

15 The Act itself has many regulatory procedures
16 such as 923 which is purely a regulatory licensing sort
17 of a provision. The fact that there are also criminal
18 segments of this statute we do not feel has any
19 particular relevance, and as to the fact that why did we
20 not seek forfeiture first and would that not solve the
21 problem, there are significant reasons why we should not
22 and we could not seek forfeiture first.

23 For example, we might indeed unduly impinge
24 upon a property owner's Fifth Amendment rights. If he
25 took the stand to defend his right to keep his property

1 in the prior forfeiture action, that evidence could be
2 used against him in the criminal proceeding.

3 Those sorts of reasons are why we do not seek
4 the forfeiture action first.

5 CHIEF JUSTICE BURGER: Thank you, gentlemen.

6 The case is submitted.

7 (Whereupon, at 2:38 p.m., the case in the
8 above-entitled matter was submitted.)

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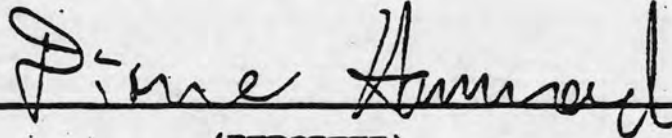
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#82-1047 - UNITED STATES, Petitioner v. ONE ASSORTMENT OF 89 FIREARMS

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "Pierre Amund", written over a horizontal line.

(REPORTER)

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