

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

DKT/CASE NO. 84-435

TITLE ROBERT RUSSELL, Petitioner V. UNITED STATES

PLACE Washington, D. C.

DATE April 24, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT RUSSELL,

Petitioner

V.

UNITED STATES

:

: No. 84-435

:

:

Washington, D.C.

Wednesday, April 24, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 o'clock p.m.

APPEARANCES:

JULIUS LUCIUS ECHELES, ESQ., Chicago, Illinois; on behalf of the Petitioner.

CHRISTOPHER J. WRIGHT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C., pro hac vice.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Echeles, I think
3 you may proceed whenever you are ready.

4 ORAL ARGUMENT OF JULIUS LUCIUS ECHELES, ESQ.

5 ON BEHALF OF THE PETITIONER

6 MR. ECHELES: Mr. Chief Justice, and may it
7 please the Court:

8 The issue in this case is a simple issue, but
9 the resolution is a little more complex. The issue is
10 whether or not under Section 844, Subparagraph (i) of
11 Title 18, United States Code, a building which was a
12 two-flat residential building which the defendant,
13 Petitioner here, attempted to commit arson, is covered
14 by the language of the statute that states that anyone
15 who attempts to destroy a building -- I'm sorry, anybody
16 who attempts to destroy any building used in interstate
17 or foreign commerce or in an activity affecting
18 interstate or foreign commerce commits the crime.

19 To determine legislative intent, this Court
20 frequently does look at the congressional hearings to
21 determine what the proponents of the bill or the law
22 stated.

23 Briefly, the acts are that in February of
24 1983, the petitioner here owned a two-flat residential
25 building, one of which was occupied. The flat was

1 rented by a family paying \$235 a month. It was a
2 two-flat building not used for any commercial activity
3 or business enterprise. The language of the
4 Representatives in passing the legislation stated that
5 they are passing this legislation to prevent generally
6 organized crime because it was legislation during the
7 organized crime legislation of a general nature, and
8 they prohibited the destruction of any property used for
9 business purposes. That is not in the statute, but that
10 is in the congressional discussion by the
11 Representatives.

12 And so the question here is whether this
13 two-flat building, which is not used for a business
14 purpose, was covered under the statute.

15 The government has pointed out in its brief
16 that there were further hearings in which the language
17 was deleted when they said only business purposes, and
18 then they said only any building because they wanted to
19 include churches, schools and police stations within the
20 protection from being bombed or -- from being bombed.

21 Well, when the Congress, then, when the
22 legislators stated that we will just say any building
23 and that should cover churches, schools and police
24 stations, it did not cover, it did not state, they did
25 not state that it also covers residential buildings.

1 QUESTION: Counsel, you stated that the
2 building was not used for any commercial or business
3 purpose.

4 Is it a fact that business insurance was
5 carried on the building?

6 MR. ECHELES: The petitioner had insurance
7 covering a fire loss. It wasn't identified as -- it
8 wasn't stated in the policy business fire loss, it was
9 just fire loss to a building.

10 QUESTION: But the same type of insurance you
11 would have on your own, own residence?

12 MR. ECHELES: Yes.

13 QUESTION: What about the deduction of
14 expenses for tax purpose?

15 MR. ECHELES: This defendant owned three other
16 two-flat buildings separate and distinct, not conjoined,
17 at separate places in Chicago, Illinois. He received
18 rents from them. He put it on his -- he put the income
19 on his income tax, he deducted depreciation, he deducted
20 interest, he did that.

21 QUESTION: On this building.

22 MR. ECHELES: On this building also.

23 And it is still not a property for business
24 purposes, it is our contention.

25 The government suggests to Your Honor that

1 later, in 1982, the act was amended to include the word
2 "fire." That is, the initial act passed in 1970 merely
3 precluded a building from being destroyed by means of
4 explosive. Three Courts of Appeals held that the
5 commission of an ordinary fire on a building was not
6 included within the concept of the term "explosive." So
7 they had further hearings to get around or to overrule
8 the three separate circuit courts that had ruled that
9 committing a fire, putting gasoline, putting a torch to
10 the gasoline and burning a building, was not included in
11 the concept of explosive. So they wanted to make more
12 certain that the law would encompass a fire.

13 So in 1982, they held hearings, and as the
14 Solicitor General so helpfully -- helpful to the
15 petitioner, sets out in his brief on page 18, Footnote
16 20, it calls to the attention of this Court that the
17 Congress included the only -- the only amendment to the
18 Section 844 subparagraph (i) is the inclusion of the
19 word "fire," which was not in the previous statute, and
20 they held hearings about the inclusion, and its purpose,
21 as the government points out to Your Honors, is to
22 overcome the three Circuit Court holdings that fire was
23 not an explosive. So they put in the word "fire." So
24 there is no question that fire is included in the concept
25 of the criminal statutes.

1 Well, they knew, that is, the Congress knew at
2 that time that the case of United States v. Mennuti, on
3 which we largely or in large part rely, was decided in
4 1981 by the Second Circuit, Judge Friendly writing the
5 opinion, and Judge Friendly writing for the Second
6 Circuit held, under circumstances analogous to this one,
7 that the burning of a building, or the explosion of a
8 building, on a buiding, owned by Mr. Mennuti, which was
9 used for residential purposes where he received rents
10 from it, where he presumably reported that on income
11 tax, deducted depreciation, if he paid interest, that
12 that would be a deduction, was not included in the
13 concept of building because, said Mr. Justice Friendly,
14 Judge Friendly, that the Congress intended in 1970 to
15 include only buildings used for business purposes.

16 QUESTION: But his opinion was based on the
17 plain language of the statute, wasn't it?

18 MR. ECHELES: I'm sorry, sir?

19 QUESTION: Wasn't his opinion based on the
20 plain language of the statute?

21 MR. ECHELES: No, Your Honor, Mr. Justice
22 Marshall, it was based because the legislators had
23 stated in their discussions about passing the law that
24 the buildings were considered to be only for business
25 purposes. The government points out that really, thegre

1 was more discussion, and the legislators in 1970
2 discussed including churches --

3 QUESTION: I thought he used "used in
4 commerce," in quotes, from the statute.

5 MR. ECHELES: Well, Mr. -- Judge Friendly
6 stated that the fact that the government intended to use
7 as a nexus for federal jurisdiction the fact that the
8 building in Mennuti used electricity or gas was an
9 insufficient, improper and impermissible nexus upon
10 which to apply federal jurisdiction.

11 He said that the word "building" means only
12 business property. It does not mean rental or
13 residential property. That's how he interpreted the
14 word building, because of the legislative hearings
15 stating that the building here considered in 1970 was to
16 be only business purposes.

17 And that is why, Mr. Justice Marshall and
18 Justices, when they -- when the Congress amended the
19 statute to include the word "fire" where it was not in
20 the statute before, and when they specifically passed
21 that law to overcome three separate Circuit Court
22 opinions that fire was not included within the concept
23 of explosive, knowing what the law was then -- I assume
24 the staff of the Congressmen advise them what the law
25 is -- they knew that Mennuti existed. They knew that

1 the Second Circuit, at least, had decided that --

2 QUESTION: When did this revision that you are
3 talking about take place, Mr. Echeles?

4 MR. ECHELES: 1982. I don't know the specific
5 month.

6 QUESTION: But the year after Mennuti was
7 decided.

8 MR. ECHELES: Yes, sir. Mennuti was decided
9 in 1981. Again, I don't have the specific month. I
10 would assume that the researchers advising the
11 legislators with respect to the three circuits about
12 fire, fire not being included in explosive, would have
13 advised the Congress about the Mennuti decision. So
14 they had that knowledge, and, says the government in its
15 helpful Footnote 20, the House report provided that, I
16 quote, "jurisdictional circumstances enumerated" in that
17 section, 844(i), "shall otherwise remain unchanged."
18 That is, it is my respectful presentation to Your Honors
19 that with the legislators knowing -- they had to know of
20 the Mennuti decision -- they didn't change any
21 circumstance of 844(i) except to add the word "fire."

22 Wel,, the government argues that even if
23 residential property is excluded -- they don't say that
24 it is excluded, but even if it is excluded, that this is
25 not residential property, it is business property

1 because of the fact that he received income, reported it
2 on his income tax, made deductions for depreciation and
3 deductions for interest, that therefore this is a
4 business property.

5 But that doesn't end the question. There has
6 to be a federal nexus. There has to be federal,
7 interstate activity because the statute --

8 QUESTION: So would you say that a 40-unit
9 apartment building would give jurisdiction under this
10 statute?

11 MR. ECHELES: Yes. As a matter of fact, there
12 is a case discussed in both of our briefs, the Zabic
13 case, out of my home circuit, the Seventh Circuit.

14 QUESTION: Well, what number of leased
15 apartments do you think essential before there is
16 jurisdiction, that there be?

17 MR. ECHELES: Don't know and can't answer, but
18 at least a two-flat building is a residential building,
19 and even though he gets income from it, it is a
20 residential building and not a commercial property of 44
21 apartments where the Seventh Circuit said that there
22 were other characteristics of interstate character, the
23 supplies contributed to the building had to come from
24 out of state, and there is a 13- or 14-apartment
25 building in the very recently decided cases coming out

1 of Nebraska.

2 QUESTION: Well, I guess it is hard for me to
3 see why not a two-unit building.

4 MR. ECHELES: Well, Your Honor has to decide
5 it eventually, and if you cannot see it, then I cannot
6 give you the vision with which to see, but a two, a
7 two-flat residential building is not generally
8 considered, I don't consider it commercial business
9 property even though he derived --

10 QUESTION: Both of the flats -- both of the
11 flats were rentedS?

12 MR. ECHELES: No, well --

13 QUESTION: Did he live in one?

14 MR. ECHELES: He did not live in that one. He
15 lived someplace else with his family in a home in
16 another part of the city. The second floor flat was
17 rented at \$235 a month. The first floor flat was
18 unrented at the time.

19 Whether both were rented at the time or both
20 were empty at the time I don't think changes the legal
21 posture.

22 QUESTION: Well, you would have the argument
23 to make in response to the government's claim that the
24 use of natural gas from interstate commerce fulfills
25 the -- that no natural gas heating was perhaps being

1 used while they were unoccupied.

2 MR. ECHELES: Well, I thank Your Honor for
3 that question because that gives me an added argument
4 for Your Honors. I am glad for the help.

5 Does it make any difference, then, whether the
6 two-flat is vacant temporarily or whether both flats are
7 occupied? Does that take it out of or into the federal
8 concept?

9 QUESTION: It is not difficult to make a
10 conundrum out of this case. I don't know how far that
11 gets us along to the road to deciding.

12 MR. ECHELES: In any event, every circuit that
13 has had this question, that is, the question whether or
14 not the use of gas or the use of electricity takes it
15 into the federal jurisdiction, has ruled against it. In
16 the very recent case decided just two months ago, United
17 States v. Hansen and Terlecky, two separate defendants,
18 I think the apartments, there were 14 apartments. The
19 apartments were in North Dakota on the border of
20 Nebraska. But that building, said the Court, the Eighth
21 Circuit, had transients. The building was used clearly
22 for interstate purposes. It had interstate transients
23 going to and from the building from Nebraska. They were
24 day -- they were day tenants, and the Eighth Circuit
25 said, we will not go as far as the Seventh Circuit in

1 using the concept that the 14-apartment building had
2 electricity that was generated from out of North Dakota
3 as a basis for federal jurisdiction. They said
4 specifically, we will not go as far as Russell.

5 Russell by that time had been decided.
6 Russell was decided last July, 1984. Hansen and
7 Terlecky was decided last -- decided in February, about
8 ten days or two weeks before I submitted the brief to
9 this Court. They said we are not going to buy that
10 concept that the use of electricity takes it into the
11 federal concept, and other cases have similarly held.
12 The Mennuti case held in the face of the government
13 argument that even though it is a residential property,
14 and even though there is income derived from it, a
15 benefit derived from this, it is not business property.
16 And we won't permit, said Mennuti, that the use of
17 electricity to that building -- it had to get
18 electricity, generated by -- power generated by gas
19 coming in from out of state as, in this case, they
20 proved that the gas used on the second floor started in
21 Oklahoma or Texas, met its terminus in Joliet, Illinois,
22 mixed with other gas, and finally got into the building
23 through the pipeline. Mennuti said we are not going to
24 use that concept. That is not a proper federal nexus.

25 Barton case from the Second Circuit, which

1 held the defendant guilty of torching a gambling
2 establishment, said that that gambling establishment --
3 it discussed Mennuti. It said we don't hold that
4 because the gambling establishment which is a business
5 related building, a business purpose related building,
6 we don't hold that because that got electricity, that
7 that takes it in. In that aspect, Barton in the second
8 circuit agreed with Mennuti in the Second Circuit. It
9 said that supplies were delivered to the gambling
10 establishment for the benefit of the gambling customers
11 such as orange juice or drinks, and that had as its
12 genesis an out of New York beginning, so that the courts
13 have rejected it.

14 There is another interesting case, interesting
15 to judges, of course, because there, in United States v.
16 Monholland, Eighth Circuit, a truck being driven by a
17 sitting circuit judge, a state judge, was being driven,
18 and there was an attempt to bomb the truck. The fellow
19 was convicted because the 844(i) statute has within it
20 not only the protection of buildings, but also
21 vehicles.

22 Well, the pick-up truck that was driven by a
23 person, judge or no judge, is a vehicle. The bomb was
24 attempting to destroy it. The gas used in the car had
25 its genesis, its origin, out of state. Monholland,

1 Eighth Circuit, said no, no, we are not going to permit
2 you to expand federal jurisdiction here even though they
3 acknowledge that the gas used in the truck had as its
4 origin an out-of-state place.

5 So Monholland, Barton, Mennuti, and the latest
6 of the cases, Hansen and Terlecky from the Eighth
7 Circuit, decided two months ago, in February, rejected
8 the concept that the use of electricity or gas in a
9 building is sufficient for the federal nexus.

10 Well, what else do I have?

11 In the two cases that I cite, the Lewis Casek
12 and the Bass case where we state that where a statute is
13 confusing, and it is certainly not clear if Monholland
14 rejected the government's concept that the statute
15 covers the acts in Monholland, if Mennuti rejected the
16 concept of the government that the use of interstate --
17 that the use of gas coming from interstate brings it
18 into the federal concept, and if Hansen and Terlecky by,
19 I suppose, obiter dicta because it wasn't an issue then,
20 but it simply stated it wouldn't go so far as the
21 Seventh Circuit in Russell in holding an interstate
22 nexus, if those courts said that, then there is
23 certainly an ambiguity in the statute, and two cases
24 from this Court, Rewis and Bass, suggest that under
25 those circumstances, the concept of validity should be

1 applicable, and Your Honors should hold that because the
2 statute isn't clear with respect to applying to the
3 facts in this case, there should then be a reversal in
4 this case.

5 Another factor. In its reply brief, in its
6 excellent reply brief -- I say excellent because I
7 respectfully submit that it is helpful to the petitioner
8 in this case -- the government points out that in the
9 second set of hearings, in the 1982 hearings where the
10 Congress was putting in the word "fire" where it was not
11 in the statute before, that agents of the Alcohol,
12 Tobacco and -- Alcohol, Tobacco --

13 QUESTION: Firearms.

14 MR. ECHELES: And Firearms unit -- I am happy
15 to get them straight -- Firearms unit, testified. They
16 testified that they need the word "fire" in there
17 because it permits them to go against organized crime
18 units, people with organized crime want to torch places
19 for whatever reasons, whatever multiple reasons people
20 do that kind of thing, and they said we want this
21 legislation, and we are not preempting the states. The
22 states still have the power to prosecute.

23 Well, that may be true, that the state has the
24 power to prosecute, and in Illinois we have arson
25 statutes, effective, used all the time, and in a case

1 such as this, the punishment, if guilt were to be found,
2 would be a minimum mandatory punishment of six to a
3 maximum of 30 years, even more severe than the fellow
4 has got now. So I don't know if I may be doing him any
5 good, if I am able to persuade Your Honors to reverse,
6 because here he has a ten year sentence, since he was
7 convicted by the District Judge in Chicago.

8 So it is not true that they are only
9 interested in organized crime roots in having the
10 legislation passed, but that is what they said. This is
11 an individual having no organization, having no
12 connection with anybody, who simply decided to torch a
13 building that he owned. I suppose it is the proper
14 inference to say for profit because he did have
15 insurance on it, although that was not shown by any
16 evidence in the record. The government said that one of
17 the motives, one of the motives he had in burning it was
18 to get the proceeds from an insurance policy, and that
19 therefore, because he had the motive, that takes it into
20 the federal nexus because that is fraud against an
21 insurance company.

22 So far as the facts of this case -- so far as
23 the facts of this case are concerned, so what? There is
24 not a word of evidence that a claim was put in because
25 the building was not burned. There was an attempted

1 burning, that fact is not in dispute at this level. He
2 would have had to use the mails. Well, sometimes in
3 mail fraud cases where insurance companies are the
4 victims, the claimant goes to the insurance company --
5 that has happened many times in Chicago -- I have
6 participated in cases where that has occurred -- where
7 the claim is physically presented to the insurance
8 company, and the person benefitted goes to pick up the
9 check, the mails are not even used, it is fraud, but it
10 is not mail fraud. And so there is a guess, a future
11 guess about future contemplation that the government
12 argues that Your Honors should consider in accepting the
13 federal nexus that the statute is complied with when the
14 statute states that it must not only be a building, but
15 it must be in an activity affecting interstate or
16 foreign commerce.

17 At trial level, this was a bench trial, much
18 of the evidence was not in dispute, most of the evidence
19 was not in dispute. It was a law question. There were
20 insurance policies put into the evidence, over my
21 objections, and nonetheless, the judge accepted a
22 stipulation that was not stipulated to, but I make no
23 argument before this Court. I was the trial lawyer,
24 though I was the losing trial lawyer, I was the losing
25 lawyer in the Seventh Circuit, and I hope not in this

1 case, but there was no presentation in those policies
2 that he did anything yet except that there was a
3 contemplation that he would do something.

4 I have asked the marshal to flash me so that I
5 can keep some time for rebuttal.

6 Thank you very much.

7 CHIEF JUSTICE BURGER: Mr. Wright?

8 ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT, ESQ.

9 PRO HAC VICE

10 MR. WRIGHT: Mr. Chief Justice, and may it
11 please the Court:

12 The essential difference between the
13 government and petitioner concerns Congress's intent.
14 Petitioner contends that Congress, in adopting Section
15 844(i), intended to prohibit the destruction of business
16 property only. Further, petitioner defines business
17 property narrowly.

18 The government, in contrast, contends that
19 Congress intended to prohibit the destruction of any
20 building, including business property, as long as a
21 minimal connection is established between the use of the
22 building and commerce. The language, structure and
23 legislative history all support the government's
24 reading.

25 Section 844(i) states that it prohibits the

1 destruction of any building used in any activity
2 affecting commerce. If Congress had intended to limit
3 the section's coverage in the manner petitioner
4 suggests, it could have prohibited the destruction of
5 any business property, but it did not.

6 QUESTION: Mr. Wright, is it the government's
7 contention here that it is the second part of that
8 descriptive language, "or in any activity affecting
9 interstate or foreign commerce" that covers the property
10 here in question?

11 MR. WRIGHT: Excuse me, Justice Rehnquist?

12 QUESTION: Well, as I read the statute, it
13 says whoever burns real or personal property used in
14 interstate or foreign commerce or in any activity
15 affecting interstate or foreign commerce. Does the
16 government claim it comes under the second of those
17 two?

18 MR. WRIGHT: Yes. We rely on the affecting
19 commerce phrase --

20 QUESTION: Yes, and what does the government
21 say is the activity that this building was used in which
22 affected commerce?

23 MR. WRIGHT: Well, we suggest three activities
24 that the building was used in that affect commerce: the
25 gas that was used to heat the building, the building was

1 used for rental purposes, and it was insured.

2 QUESTION: Well what -- would you say that --
3 what activity does the building become used in by reason
4 of the fact that it heats with gas that comes from out
5 of state? Does that put it in a separate activity?

6 MR. WRIGHT: The activity is simply the use of
7 heat, and it affects commerce in that if the building is
8 destroyed, the shipment of gas interstate would be
9 reduced. That, of course, is our broadest argument, and
10 it is clear that in this case, had the one two-unit
11 apartment been destroyed, the effect on commerce would
12 have been slight in this case.

13 But arson is not uncommon, as the evidence
14 before Congress in 1982 clearly shows, so that the
15 effect on commerce would be substantial in the aggregate
16 over the class of cases of arsons.

17 QUESTION: There's certainly a lot of
18 traditional law that says a piece of real property that
19 is simply sitting in Chicago or somewhere else is not in
20 interstate commerce.

21 MR. WRIGHT: The building is not in commerce,
22 and that is why we are under the second phrase, as you
23 noted, the affecting commerce phrase. We believe it was
24 used not in commerce but in an -- in three activities
25 affecting commerce.

1 QUESTION: Why -- it was a piece of rental
2 property, wasn't it?

3 MR. WRIGHT: Yes, it was.

4 QUESTION: Used for a business purpose.

5 MR. WRIGHT: That is one of our three
6 contentions. that is why we believe that petitioner --

7 QUESTION: Why isn't that the activity, and
8 then the activity affects commerce because the activity
9 needs to be -- the building that is being used in this
10 activity needs to be heated?

11 MR. WRIGHT: You do not need to go to our gas
12 ground. You could simply decide this case on the fact
13 that the building was rented and hold that that is
14 enough to bring the building into an activity affecting
15 commerce, and if that is enough, you do not need to go
16 farther, Justice White.

17 QUESTION: How much do you rely, Mr. Wright,
18 on the fact that it was insured by an insurer in another
19 state, and that the whole transaction of making the
20 claim, the false claim, had an impact on interstate
21 commerce?

22 MR. WRIGHT: Well, that of course does make
23 the interstate nexus more clear. However, we would
24 contend that especially with an insurance company like
25 Allstate, that even if he had -- even if Allstate didn't

1 have multiple offices in many states, that its
2 activities affect commerce.

3 QUESTION: This just buttresses your case,
4 then.

5 MR. WRIGHT: Yes.

6 And I might note in that connection, Justice
7 Powell asked whether the building was insured with a
8 homeowner's policy or a business policy. As examination
9 of Footnote 3 in our brief indicates, the Court of
10 Appeals found as to the District Court that it was a
11 business insurance policy, not a homeowner's policy.

12 QUESTION: Mr. Wright, it would be hard to
13 imagine any building that would not fall under the
14 coverage of this section under the government's test.

15 MR. WRIGHT: Certainly under our broadest
16 reading.

17 Let me suggest that that fits Congress'
18 intent. When Congress deleted the business purposes
19 phrase from the statute, it did so in response to
20 testimony from a number of Congressmen that churches,
21 schools and private dwellings, I might add, as we note
22 in our brief -- Congressman Wiley and I believe
23 Congressman Goldwater, as well, mentioned private
24 dwellings -- would not necessarily be considered
25 business property, and Congress wanted to cover those.

1 It is -- imagine a case that involved a band of
2 terrorists who were burning churches and perhaps the
3 homes of church officials and schools run by the
4 church. Evidence gathered by the FBI or the Bureau of
5 Alcohol, Tobacco and Firearms might only link the
6 terrorists to a particular Building, evidence might only
7 be firm in the one case, and if that building did not
8 happen to be rented or did not happen to be used for
9 rental purposes, we maintain it would still be used in
10 an activity affecting commerce if gas or electricity is
11 used in the building because we believe Congress deleted
12 the business purposes phrase in order to cover such a
13 case.

14 We don't expect such a case would arise with
15 great frequency, but it is possible, and that's why we
16 think Congress broadened the phrase to cover other kinds
17 of buildings.

18 Congress knew that by using the "affecting
19 commerce" language, that it was sweeping broadly. This
20 Court recognized that in Scarborough where it said that
21 Congress knows that when it uses that language, it is
22 exerting its power to the full extent of its commerce
23 power. In fact, Congress made quite clear that it was
24 exerting its power to the full extent of the commerce
25 power. It said that in 1970 House report, it said we

1 intend to exercise "the fullest jurisdictional breadth
2 constitutionally permissible under the Commerce
3 Clause."

4 The Representative who introduced the bill
5 containing Section 844(i) stated that it was broadened
6 "to extend to the full extent of our constitutional
7 power. Petitioners conceded that under the commerce
8 power, Congress may prohibit the destruction of a
9 building like this. Congress rarely states its
10 intention so clearly to go to the full extent of a power
11 like the commerce power.

12 Section 844(e) also supports the government's
13 contention here. Examination of that statute, which
14 covers threats to destroy property, makes it illegal to
15 threaten "through the use of the mail, telephone,
16 telegraph or other instrument of commerce," to threaten
17 to destroy any building. It is clear there is no use in
18 an activity affecting commerce language in that
19 section.

20 QUESTION: Is that set forth somewhere in your
21 brief, Mr. Wright, 844(e)?

22 MR. WRIGHT: Yes. I am not sure whether the
23 entire section is set forth in our brief. It is very
24 similar to the language. It prohibits the destruction
25 of any building, vehicle or other real or personal

1 property, and it uses the nexus to commerce phrase that
2 I just quoted.

3 United States v. Fears is the only case that I
4 know of decided under that statute which held that it
5 covered threats to destroy a private residence, not even
6 one used for rental purpose, as far as the case
7 indicates.

8 The logical conclusion to be drawn from
9 examination of the structure of the statute is that as
10 in the firearms statute at issue in Scarborough,
11 Congress intended that any minimal nexus between a
12 building and commerce should satisfy the jurisdictional
13 requirement. It used the instrument of commerce
14 requirement --

15 QUESTION: Mr. Wright, I just read Section,
16 Subsection (e) which I hadn't read before, and I notice
17 it doesn't qualify the word "building" by the building
18 being used in commerce or in an activity. It just says
19 any building.

20 MR. WRIGHT: That is correct.

21 QUESTION: It is perfectly clear that that
22 would be covered.

23 MR. WRIGHT: That's correct, and the --

24 QUESTION: Doesn't that sort of cut against
25 you when you contrast that language with the qualifying

1 language that describes the kind of building in
2 Subsection (i)?

3 MR. WRIGHT: No. We believe that that
4 language, as the Court recognized in Scarborough, is
5 really a jurisdictional statement, a statement that a
6 nexus to commerce is required, and a very minimal nexus,
7 and that the instrument of commerce language is used in
8 844(e) simply to indicate that, and that an affecting
9 commerce language is used in 844(i). To the contrary,
10 it seems to us that it would make no sense to hold that
11 Congress is more interested in threats than it was in
12 actual destruction, and since a threat to build down
13 this building, if made from the telephone, would have
14 been covered by 844(e), we think an actual attempt to
15 destroy it should be covered by 844(i).

16 QUESTION: Of course, the threats they are
17 talking about in (e) involve the threat of killing,
18 injuring and intimidating individuals whereas this one
19 just deals with the property offense. So the threats in
20 (e) are a little more serious.

21 MR. WRIGHT: That may --

22 QUESTION: Well, anyway, (e), I guess we don't
23 decide on the -- may I just ask you this question?
24 Which of your three theories that you have do you think
25 would apply to the Mennuti case? Would you apply them

1 all to acquire a different result in Mennuti?

2 MR. WRIGHT: Certainly application of the
3 gas.

4 QUESTION: That clearly would.

5 MR. WRIGHT: I would.

6 The rental property is frankly much less
7 clear. There was some indication in Mennuti that there
8 was an intention to rent that residence at some time in
9 the future. Frankly, a fair reading of the case
10 indicates that Justice -- or Judge Friendly would not
11 have found the requisite tie, I think, but he wasn't
12 really faced with that case there.

13 QUESTION: I suppose what I may be asking is
14 whether, at the cert stage very properly you suggested
15 there was really no conflict with Mennuti, the cases
16 were distinguishable.

17 Are you now asking us in effect to disapprove
18 of Mennuti?

19 MR. WRIGHT: Yes, we are. We presume that in
20 granting certiorari, you decided that the cases are not
21 fairly indistinguishable, a broad reading of that
22 case --

23 QUESTION: And four justices so decided, yes.

24 MR. WRIGHT: At least four Justices.

25 QUESTION: Mr Wright, you don't contend that

1 this particular conviction is sustainable under 844(e),
2 do you?

3 MR. WRIGHT: No, we do not.

4 And petitioner relies heavily on a phrase in
5 the House report that describes Section 844(i) in
6 arguing that Congress intended to reach business
7 property only. The report, right after the statement
8 that Section 844(i) represents Congress' full exercise
9 of its commerce power, describes the provision as "a
10 very broad provision covering substantially all business
11 property."

12 The government, of course, does not quarrel
13 with that, the accuracy of that statement. And the
14 section is a very broad provision, and substantially all
15 business property is covered by it. But the government
16 does not believe that the phrase was intended to limit
17 Section 844(i)'s coverage.

18 Of course, a phrase in a committee report
19 cannot rewrite the statute. That is especially true
20 where here Congress specifically considered the exact
21 limitation proposed by petitioner and rejected it in
22 order to broaden the statute's coverage, and stated that
23 it so intended by doing that.

24 QUESTION: Are you saying that having rental
25 property with four or five tenants is, for purposes of

1 this statute, essentially the same as the operation of
2 the Drake Hotel, for example, or the Palmer House in
3 Chicago?

4 MR. WRIGHT: We contend that both, the
5 destruction of both would be covered by the statute. In
6 the case of a large hotel, the effect on interstate
7 commerce from such a destruction would be greater,
8 although I might add that the destruction of any one
9 building has to have a slight effect on commerce, given
10 the magnitude of interstate commerce. But arson is
11 common. Petitioner concedes that a 43-unit apartment
12 building affects commerce. Twenty two-unit apartment
13 buildings, the destruction of 20 two-unit apartment
14 buildings would logically also affect commerce.

15 Our argument is an aggregation argument that
16 in the aggregate, destruction of rental property, of
17 buildings, affects commerce.

18 Of the three ties we suggested between this
19 building and interstate commerce, the evidence considered
20 by Congress most clearly shows the impact that insurance
21 fraud arson has on interstate commerce. At the 1982
22 hearings leading to the amendment of Section 844,
23 Congress heard testimony of insurance industry officials
24 who estimated that fires caused \$1.3 billion in damage
25 in 1979 alone, and that a substantial portion of all

1 fires are set to defraud insurance companies.

2 Congress noted that the Bureau of Alcohol,
3 Tobacco and firearms had saved over \$54 million in false
4 claims in 1980 by detecting arson schemes.

5 In this case, petitioner would have obtained
6 \$40,000 in insurance proceeds by destroying his
7 building. That by itself is not trivial. In the
8 aggregate, it is clear that this sort of arson,
9 insurance fraud arson, has a major impact on interstate
10 commerce.

11 QUESTION: May I just ask on your insurance,
12 is it your position that the statute, just confining
13 myself to that theory, covers every insured building or
14 only every insured building in which the arson is
15 committed by the holder of the insurance, the owner of
16 the insurance policy?

17 MR. WRIGHT: We would favor the broader
18 theory. You could confine yourself to a narrower
19 motivation theory which would cover, then, of course
20 not --

21 QUESTION: So your position, basically your
22 view is every insured building is covered by the
23 statute.

24 MR. WRIGHT: That the building is used in an
25 activity affecting commerce both when it is insured --

1 QUESTION: Well, practically every
2 building --

3 MR. WRIGHT: -- and when it is burned.

4 The other uses --

5 QUESTION: Well, what activity is it being
6 used in when it is insured that distinguishes it from
7 activities that uninsured buildings are used in?

8 MR. WRIGHT: Simply the activity of going out
9 and purchasing the insurance policy on the building.
10 That we believe is an activity --

11 QUESTION: So you would import an extremely
12 flexible meaning to the word "activity" to say the
13 least.

14 MR. WRIGHT: Yes, we do. We believe that
15 Congress meant that phrase "used in any activity
16 affecting commerce" to signify that it was going to the
17 full extent of its commerce power, and we believe that
18 Scarborough and other decisions of this case -- of this
19 Court, rather, including the Reliance Fuel Company case,
20 which was cited in the House report right after it
21 stated that Congress intended to exercise its full
22 jurisdictional reach, showed that that phrase has the
23 broadest reach.

24 QUESTION: So you don't go to the extent of
25 the third theory that Judge Friendly talked about of a

1 class of activities. If a member of the -- a specific
2 example might not affect interstate commerce, but the
3 entire class does, it is also covered under the Perrera
4 case, is it?

5 You don't say they went that far. They didn't
6 use the full extent that time.

7 MR. WRIGHT: Well, Congress could have drafted
8 this statute, I believe you are suggesting, in another
9 way.

10 QUESTION: Right.

11 MR. WRIGHT: It could have left off what I
12 call the jurisdictional nexus phrase and probably,
13 perhaps under Perez would have had to beef up the
14 findings required to show the nexus. But we believe
15 that that phrase was added simply to require the showing
16 of a slight effect on Congress so that --

17 CHIEF JUSTICE BURGER: But all I am suggesting
18 is you do not really contend that Congress went as far
19 as it could have gone had it redrafted the statute to
20 make it clear it intended to cover classes of activities
21 that might have -- every member of every class of
22 activity that might have an impact on commerce as in
23 Perez.

24 MR. WRIGHT: I suppose that even under our
25 broadest reading of the statute, there are buildings

1 that would not be covered, and I suppose that if
2 Congress really sat down and wanted to cover every one
3 under Perez, it may well be able to draft such a
4 statute, but I believe that in this case it intended to
5 go to its full extent. Whether it only went 99 percent
6 that far may be correct.

7 Many of this court's decisions have
8 established that an activity having a slight effect on
9 commerce may still be reached under the commerce power
10 if the aggregate effect is substantial.

11 QUESTION: Mr. Wright, are you always saying
12 that merely collecting income and deducting expenses
13 constitutes an activity affecting commerce?

14 MR. WRIGHT: Yes, yes, we maintain that under
15 our theory that the building is --

16 QUESTION: You said that in your brief, the
17 statute. That sweeps very broadly, doesn't it?

18 MR. WRIGHT: We certainly admit that we are
19 giving a broad reading to this statute. We maintain
20 that that is what Congress intended, and that is why it
21 used the phrase "affecting commerce."

22 QUESTION: If you rented out one room in your
23 residence, you would be engaged in an activity affecting
24 commerce?

25 MR. WRIGHT: The activity would be slight. In

1 the aggregate, would renting out one room, in
2 apartments, it would be substantial, probably. If you
3 viewed it as the activity of renting, it certainly would
4 be.

5 The wheat fed to Mr. Filburn's livestock never
6 left the farm on which it was grown, the meat at Iley's
7 Barbecue had moved in commerce, but by itself, racial
8 discrimination at the restaurant hardly affected
9 commerce in a substantial way. The --

10 QUESTION: I suppose that would cover
11 installing a telephone or a television set, too. That
12 would be enough.

13 MR. WRIGHT: The destruction of a building
14 that used electricity, to use those sorts of
15 instruments, would affect commerce, at least under our
16 gas theory.

17 QUESTION: You haven't mentioned now, although
18 you have in your brief, that when it is commercial or
19 rental property, depreciation is taken on it in a way
20 that you couldn't on your own residence if you were
21 occupying it.

22 MR. WRIGHT: That's right, and again, with a
23 two-unit building, if that is slight --

24 QUESTION: Well, I have never heard the IRS
25 express the view that it covers only people who are

1 affecting commerce. I don't see what the taxation
2 consequences have to do with interstate commerce since
3 the Internal Revenue Code affects people regardless of
4 their connection with commerce.

5 MR. WRIGHT: Well, we believe that renting
6 property contributes to the flow of money in commerce
7 the way selling candy and gum does.

8 QUESTION: Well, that may be an argument,
9 albeit some might say a rather thin one, but I don't see
10 that even that the Internal Revenue involvement is even
11 a thin argument in support of the case.

12 MR. WRIGHT: We -- adopting petitioner's view
13 that this statute is limited to business purposes, we
14 think that renting property is a business purpose, and
15 we believe that it is an activity affecting commerce.

16 We certainly don't think that by deleting
17 business purposes from the statute and broadening its
18 coverage, Congress would have meant to decrease its
19 coverage.

20 QUESTION: No, but surely the petitioner ought
21 to be in no better shape in this case if he had failed
22 to file an income tax return deducting it, showing it.

23 MR. WRIGHT: No.

24 QUESTION: But is it not, by taking a
25 depreciation, he is labeling his enterprise as a

1 business enterprise, which is a first step, a threshold
2 step to having an answer to whether it affects
3 commerce.

4 MR. WRIGHT: Yes, and the flow of money in
5 commerce is affected by depreciation, by deductions, by
6 reporting to the IRS.

7 QUESTION: Commerce may not be affected if you
8 just have a summer cottage where you go fishing unless
9 other factors come in. But this is the threshold that
10 starts the connection with commerce, does it not?

11 MR. WRIGHT: Under our -- the theory we have
12 put forward second in our brief, the rental tie
13 connection to interstate commerce, that's right.

14 It is clear that the rule must be that
15 Congress may regulate activities that individually have
16 slight effects on interstate commerce. If Congress
17 couldn't regulate activities if in the aggregate there
18 was a substantial effect on commerce, its power would be
19 limited severely under the commerce clause, and as has
20 been suggested today, line drawing problems would
21 abound, not only in this case, but in criminal and all
22 sorts of other cases.

23 I would like to note that this Court has
24 applied a broad reading of the affecting commerce
25 language in criminal cases. The loan shark in Perez was

1 shown to have no connection to interstate commerce other
2 than those connections presumed typical of loan sharks.
3 The gun possessed by the felon in Scarborough had once
4 moved in interstate commerce, but it moved in interstate
5 commerce before the felon was convicted of a felony.

6 Petitioner admits that activities having
7 slight effects on commerce but nevertheless substantial
8 effects in the aggregate affect commerce. Petitioner
9 does not quarrel with the numerous Courts of Appeals
10 decisions holding, for example, that buildings are used
11 in commerce if any sort of sales activity goes on in the
12 building or if in the case from the Eighth Circuit,
13 transient beekeepers happen to stay in the rental
14 property. The effect on commerce resulting from the
15 destruction of any one building, even a large hotel, is
16 bound to be slight, looked at individually, but
17 substantial in the aggregate, and therefore Congress has
18 the power to regulate.

19 Concerning the amendment of Section 844 in
20 1982, I would like to note briefly first that it was
21 only one circuit, the Ninth Circuit in Gere, that had
22 actually held that gasoline was not an explosive, which
23 was the motivation for deciding -- for adding "fire or"
24 to the statute. Congress did not mention Mennuti.
25 There is nothing in the hearings to indicate that

1 Congress knew about Mennuti. To the extent that
2 Congress did know about Mennuti, it would have also
3 known about the Second Circuit's almost simultaneous
4 decision in Barton which approved a jury instruction
5 that gas flowing in interstate commerce tied a building
6 to commerce. While it is true that that building was
7 used for gambling purposes, we do not see how the effect
8 on gas would have varied depending on whether the
9 building was use for gambling or for rental purposes.

10
11 Petitioner also suggests that under United
12 States v. Bass, this section should be construed
13 narrowly. In the first place, as we have shown, it is
14 not reasonable to construe the statute as petitioner
15 proposes because Congress specifically rejected that
16 result in 1970 by deleting the business purposes
17 phrase. In addition, neither of the reasons petitioner
18 cites in support of his argument that Section 844(i)
19 ought to be construed narrowly actually applies.

20 This Court is reluctant to conclude that
21 Congress does not federalize criminal law in the absence
22 of clear congressional intent to do so. Here there is
23 that sort of intent. When Congress enacted Section 844
24 in 1970, it simultaneously enacted Section 844(8) --
25 848, rather, which states that Congress did not preempt
the states. the discussions clearly show that Congress

1 wanted the FBI, the Bureau of Alcohol, Tobacco and
2 Firearms, and the Justice Department, to prosecute
3 bombings and arsons and to investigate them where
4 appropriate, and counted on the judgment of federal
5 officials and cooperation among state and local
6 officials. We have quoted the National Association of
7 Attorneys General in our brief which supported the
8 amendment of the Section in 1982 to cover arson cases.

9 In short, the states have welcomed federal
10 involvement. Congress has recognized that it was
11 changing the federal-state balance somewhat so that this
12 case is different than Bass. Nor is there any reason to
13 construe Section 844(i) narrowly under the rule. There
14 is no grievous ambiguity here. Two courts out of dozens
15 that have construed the statute may have erred. As we
16 have shown in the Mennuti case, the judge was unaware of
17 the full legislative history that the business purposes
18 phrase had been deleted, and of course, was unaware of
19 the interest and insurance fraud that Congress showed in
20 1982 after the decision had come down. And there was no
21 need to give petitioner fair warning here. He surely
22 knew that burning down an apartment building was
23 unlawful.

24 QUESTION: Was it unlawful under Illinois
25 State law also?

1 MR. WRIGHT: Petitioner has told us that arson
2 has a six to thirty year statute penalty. I would be
3 very surprised if attempted arson did not as well.

4 QUESTION: Do you think attempted arson is not
5 a crime under state law?

6 MR. WRIGHT: No, I believe attempted arson
7 most certainly -- I would expect that to be the case.

8 The Seventh Circuit's decision upholding
9 petitioner's conviction should be affirmed.

10 Thank you.

11 ORAL ARGUMENT OF JULIUS LUCIUS ECHELES, ESQ.

12 ON BEHALF OF PETITIONER -- REBUTTAL

13 MR. ECHELES: I will be brief, as much because
14 it is five minutes of 12:00 as anything else.

15 Mr. Wright was wrong when he suggested to Your
16 Honors that there are three standards by which this
17 court can affirm the case. There are three concepts:
18 one, that gas was used to heat the house; two, it was a
19 rental building; and three, it had insurance.

20 Well, supposing gas were not used to heat the
21 house? And there are many houses in Chicago. There are
22 probably a number that don't have gas or electricity and
23 they are using kerosene. So that knocks out number
24 one.

25 Supposing it were not rented at the time, in

1 this two-unit apartment, two-unit flat, one was not
2 rented, one was rented. Supposing there was an interim
3 nonrental. So two would be knocked out.

4 And what would they be left with? Insurance.
5 But that is a false argument, Your Honor. There was
6 insurance. No indication in the government's brief, as
7 it states on page 3 of its brief, in the footnote that
8 the building had property insurance. In their brief it
9 states, there was a stipulation which was not a
10 stipulation. I will show it before 12:00 o'clock. The
11 government's brief says that the building on South Union
12 was insured by Allstate. That's all. It doesn't say it
13 was insured in a business manner. It was a fire
14 insurance policy on the building.

15 And Allstate, I may advise Your Honors,
16 although it is outside the record, has its headquarters
17 in a Chicago suburb. It is an Allstate subsidiary that
18 has its headquarters. But even if Allstate had its
19 headquarters in another state, Indiana or Michigan or
20 someplace, in order for them to come under the insurance
21 concept, something had to be done. They had to use the
22 mails in order to come under the federal jurisdiction.
23 Merely defrauding an insurance company doesn't make it a
24 federal offense. There are many cases where insurance
25 companies are defrauded and the person is charged with

1 mail fraud. So the element that must be proved by the
2 government is use of the mails. Failure to do that
3 takes it out of federal jurisdiction.

4 Well, two more minutes, this Court should not
5 expand Congress' legislative concepts to encompass every
6 activity, every potential criminal act into the federal
7 law. As a matter of fact, there is a problem with the
8 federal courts. Some of Your Honors have expressed it.
9 And there should be a limitation on the federal
10 jurisdiction and not expanding the federal
11 jurisdiction.

12 And where Your Honors have a case, as this one
13 is, where the -- there is ambiguity in the passage of
14 the enactment, where the congressional discussions leave
15 room for doubt whether this kind of building was
16 encompassed, Your Honors should the more readily deny
17 the government its expansive concept and hold that there
18 was no federal jurisdiction in this case.

19 Thank you very much.

20 CHIEF JUSTICE BURGER: Thank you, gentlemen.

21 The case is submitted.

22 (Whereupon, at 1:00 o'clock p.m., the case in
23 the above-entitled matter was submitted.)
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-435 - ROBERT RUSSELL, Petitioner V. UNITED STATES

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