OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1904

TITLE UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, Appellant V. ANTHONY J. GALIOTO

PLACE Washington, D. C.

DATE March 26, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES DEPARTMENT OF :

THE TREASURY, BUREAU OF :

ALCOHOL, TOBACCO AND FIREARMS, :

Appellant :

v. : No. 84-1904

ANTHONY J. GALIOTO :

- -x

Washington, D.C.

Wednesday, March 26, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 o'clock a.m.

APPEARANCES:

CHARLES A. ROTHFELD, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Appellant.

MICHAEL A. CASALE, ESQ., Nutley, N.J.; on behalf of Appellee.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in United States against Galioto. Mr. Rothfeld, you may proceed whenever you're ready.

ORAL ARGUMENT OF

CHARLES A. ROTHFELD, ESQ.

ON BEHALF OF APPELLANT

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

This case concerns the constitutionality of a central provision of the federal gun control laws, the provision that keeps firearms out of the hands of people with a demonstrated history of mental illness. In those laws, particularly in Title IV, the Omnibus Crime Control and Safe Street Act of 1968, and Title VII of the Gun Control Act of 1968, Congress chose to attack the problem of violent crime by prohibiting certain categories of what this Court has termed presumptively dangerous or especially risky people from acquiring guns.

For the people in some of these categories, such as fugitives from justice and aliens illegally present in the United States, this firearms disqualification remains in effect for as long as the person remains in the presumptively dangerous category.

For the other groups of risky people identified by Titles IV and VII, the firearms disqualification is permanent. The only exception to this blanket rule involves a presumptively less dangerous sub-category of felons whose crimes did not involve the use of a firearm or other weapon. Someone in that group can obtain relief from the firearm disqualification if he is able to establish that he would not be likely to act in a manner dangerous to public safety.

The events giving rise to this case that ultimately implicated these firearms disqualifications began in 1971, when the Appellee voluntarily entered a psychiatric hospital. Shortly thereafter, he was involuntarily committed, after suffering what was described as an acute mental breakdown, a condition that was diagnosed as an acute schizophrenic episode with paranoid features.

He ultimately was released from the hospital, after a stay of a little more than three weeks. At the time he was given a course of anti-psychotic drugs and advised to continue outpatient therapy.

In 1982, Appellee tried to buy a gun from a federally licensed firearms dealer. The dealer refused to complete the sale after Appellee acknowledged on a

standard Bureau of Alcohol, Tobacco and Firearms form that he had once been committed to a mental institution.

When Appellee then sought relief from BATF, he was informed that his prior commitment subjected him to a permanent federal firearms disqualification that could not be waived by the agency. The Appellee responded by bringing this suit in district court, claiming that the firearm disqualification as created by the gun control statutes violated his Fifth Amendment rights to equal protection and due process.

The district court agreed with the Appellee on both grounds. The court concluded, in a lengthy dictum, that former mental patients are a quasi-suspect class for equal protection analysis. The court went on to hold that Title IV is entirely irrational because it makes relief available to some felons, but not to people with a history of mental illness.

The court also went on in an alternative holding to conclude that Title IV makes use of an unconstitutional irrebuttable presumption because it does not make provision for people who have been committed in the past to prove that they are no longer dangerous.

As a result of these conclusions, the court

invalidated all of the provisions of Title IV that create firearms disqualifications on the basis of mental disorder, a conclusion that apparently permits current as well as past psychiatric patients to obtain firearms.

This Court has addressed these firearms disqualifications on a number of occasions, and each time it has emphasized that Congress legislated as broadly as possible because it believed that only sweeping disqualification would be effective in keeping guns away from dangerous people.

The district court ignored that Congressional understanding in holding essentially that Title IV is unconstitutional because it is insufficiently precise. Whether this holding was correct requires the consideration of two questions.

The first is whether Congress acted irrationally as an initial matter in listing people with a history of mental illness among the presumptively dangerous categories of people who are affected by the firearms disqualification.

Assuming that Congress acted properly in doing that, the second question is whether it was nonetheless under some kind of constitutional obligation to create an exception to this prophylactic rule for people who

claim that they can establish that they are no longer dangerous.

In our view, the answer to both of these questions is plainly no. As to the first question, it is not really disputed here that Congress acted rationally in prohibiting people with a history of commitment from acquiring firearms. At least since this Court's decisions in O'Connor versus Donaldson and Addington versus Texas, a history of commitment has involved a commitment decision based on clear and convincing evidence that the committee posed a danger of some sort to himself or others.

Even Appellee's commitment here in 1971, which predated those decisions, required a conclusion both by his attending physician and by the staff of the medical institution that he posed a potential danger to himself, to others, or to property, as well, apparently, as a judicial finding that he was a threat to himself or to society.

QUESTION: Well, isn't the core issue here whether the statute is infirm because it didn't provide any kind of alternative for persons previously adjudged mentally deficient?

MR. ROTHFELD: I think that's correct, Your Honor. The district court itself acknowledged that

Congress acted rationally in using the history of mental illness as a trigger for Title IV's prophylactic rules, and it, as you suggested, went off entirely on the proposition that no relief provision had been added to the statute.

The Appellee has suggested in his brief that it may have been irrational as an initial matter for Congress to have listed people in this category as a presumptive matter in Title IV. And I'm suggesting now I think that that is easily disposed of and in fact, as we suggest, was not taken seriously by the district court.

Certainly it is true that, in light of the meaning of the commitment decision, Congress acts rationally in prohbiting people who have been committed or who are currently under an order of commitment from getting guns. And given the relatively low rates of cure of mental illness and the fallibility and uncertainty of psychiatric diagnosis and treatment, which this Court has repeatedly recognized, Congress could act justifiably in concluding that someone whose mental disorder rose to a level requiring commitment should, at least as a presumptive matter as we suggest, not be entitled to acquire firearms.

And that leads to the second, and for the

district court more troubling, question is this case, whether, having created and permissibly created this broad prophylactic rule, Congress was constitutionally obligated to carve out exceptions for people who believe that the rule is unfair as applied to them. Appellee falls into that category.

And that is what the district court concluded. It felt that there was such a constitutional obligation on Congress. Now, in reaching that conclusion the court focused on 18 U.S.C. Section 925(c), which is the provision that makes relief for the permanent firearms disqualification available to the less dangerous group of felons.

The court decided that it was entirely irrational for Congress to make relief available to any subcategory of felons while withholding it from people that had a history of mental illness.

QUESTION: Suppose the process by which he had been declared mentally disturbed had been modified and repudiated. Would he be able to get a license under this statute?

MR. ROTHFELD: Well, I think not, Your Honor. In fact, the commitment procedure in New Jersey has changed since the time of Appellee's commitment, and this Court has recognized additional constitutional

requirements since then.

But I think Congress could justifiably rely on the type of commitment procedure that, for example, was applied to the Appellee here in determining that it gave some presumption of dangerousness to the person who was committed. It necessarily involved -- even a flawed commitment proceeding involved a finding by a judicial officer that the person who had been committed posed a danger to himself and to others, and that is the type of factor that Congress certainly is entitled to take into account in deciding who should have access to firearms.

The district court's focus here was not really on the nature of the commitment decision or the procedures that were used by New Jersey, but on the fact that the federal statute provides relief to one subgroup of people affected by the disqualification and not to others, not to people with a history of mental illness. And the court decided that that must have been based on a stereotypical and inaccurate notion that mental illness is always incurable in every case.

But this sort of analysis by the district court simply ignored the actual Congressional intent in creating the firearms disqualifications, as well as the unique factual characteristics of the mentally ill that set them apart from the other groups of presumptively

dangerous people listed in Titles IV and VII.

The court failed to recognize that this Section 925(c), the relief provision, is a very narrow provision. It withholds relief entirely from more dangerous felons who had used weapons during the commission of their crime.

It also makes relief completely unavailable to all of the other specially risky categories affected by the gun control, not only committees and former committees such as the Appellee here, but people who have been dishonorably discharged from the armed services, people who have renounced their American citizenship.

The Congress obviously recognized that everyone in each of these categories would not misuse a firearm were he able to obtain one, but --

QUESTION: Mr. Rothfeld, is legislation pending presently in Congress to change this scheme somewhat?

MR. ROTHFELD: There are now three bills pending in Congress, Justice O'Connor, one of which has passed the Senate and another one of which has been reported out by the House Judiciary Committee, which would modify Section 925(c).

QUESTION: With respect to former mental

patients?

MR. ROTHFELD: Yes, it would make relief available, not only to former mental patients, but to all of the people subject to firearms disqualification. And the Congress has not as yet taken final action on that, and the bills differ as to their retroactive effect as well. But we will inform the Court if there are further developments legislatively.

In fact, the point that you bring up, that Section 925(c) is being considered now by Congress, suggests one of the flaws in what the district court did. Congress -- 925(c) was originally enacted as a narrow response to a very specific problem faced by corporate firearms manufacturers, who would be forced out of business altogether if they had been convicted of a felony, even one unrelated to their firearms operations.

After several years of experience with that narrow provision, Congress expanded it to benefit a larger, but still very small, subcategory of felons. And that is the sort of legislation, one step at a time, that this Court has repeatedly upheld against equal protection challenges.

The fact that Congress stopped, at least at this point, after fixing a defect that it saw in the

felony disqualification doesn't render the rest of Titles IV and VII unconstitutional, any more than Congress' failure to list every imaginable group of presumptively dangerous people in Titles IV and VII when it initially passed them renders invalid the very reasonable restrictions that it did create.

And again, the fact that Congress is currently considering additional modifications to 925(c) that would provide the Appellee with all of the relief that he is currently seeking in court confirms that this sort of line-drawing is a quintessentially legislative process, that the district court should not have involved itself in.

QUESTION: But the statute is a permanent bar to the acquisition of guns by anybody who's been hospitalized for mental illness?

MR. ROTHFELD: That's correct, at the moment anyone who's been involuntarily committed, that's correct.

QUESTION: And the district court I take it invalidated that entire disqualification?

MR. ROTHFELD: The district court's -- the relief that was provided by the district court is a little bit ambiguous. The court concluded that it didn't have the authority to simply order BATF to create

some sort of administrative mechanism that would allow someone such as Appellee to prove he is no longer dangerous.

The court decided it simply had to invalidate the provisions that regulate -- in fact create the disqualifications on the basis of mental disorder, and it therefore in terms struck down all of the provisions in the district court's order that prevent the Appellee from purchasing firearms.

QUESTION: Do you think some narrower relief could have been provided?

MR. ROTHFELD: We suggest in our brief, Justice White, that of course the Court doesn't have to reach the question unless it concludes that there was a constitutional violation. But if it does, our view is that the relief that was granted was grossly out of proportion to the constitutional violation that the court found.

As a matter of equal protection, I think this Court's cases show clearly that the proper remedy would have been either to extend the relief provision to people in Appellee's category or to foreclose relief altogether for all people who are subject to firearms disqualification.

And even as a matter of due process -- the

court also found a due process violation -- it clearly would have been the Congressional intent that the presumptions, the disqualifications, created by Title IV not invalidate it altogether. And I think in that sort of situation that the remedy chosen by the district court was inappropriate.

The court should have --

QUESTION: What, attempted to impose a hearing requirement or something, with the burden of proof on the person who wanted a gun to show that he was no longer dangerous, or that he never was?

MR. ROTHFELD: Well, there is currently such a provision in Section 925(c) for, as I say, this less dangerous category of felons. They must establish to the satisfaction of the Secretary of the Treasury that they would be capable of handling a gun in a manner not dangerous to the public and that it would otherwise be in the public interest to waive the firearm disqualification.

Since Congress has signaled its intent there, the type of procedure that it would have in mind, and since Congress felt so strongly that people who are, certainly who are currently and as a general matter anyone who has been found dangerous --

QUESTION: Did the Government make this

argument in the lower court, that that would have been a more proper remedy?

MR. ROTHFELD: The Government did not argue this in the district court, Justice White.

QUESTION: So the court found it didn't have authority to do anything but what it did.

MR. ROTHFELD: That was the court's stated reasoning. The court recognized that what it was doing was completely inconsistent with the Congressional intent and the basic permissible statutory scheme. And since in our view the court was clearly wrong in that judgment about its power, if the Court, if this Court ever reaches the question, I think it's clear that the chosen remedy is an inappropriate one.

To return briefly to the other, equally fundamental flaw in the court's equal protection analysis which we hope convinces this Court not to reach the remedy question, the court, even apart from the legislative background, the evolution of Section 925(c), ignored the significant reasons for withholding administrative relief from people with a history of mental illness that are simply not applicable to felons.

People who have been committed by definition at some point have been found as a factual matter to

have posed some sort of threat to themselves or others, to have been incapable of acting in an entirely rational way. That is not true of all felons, and particularly not of the sub-category who benefited by Section 925(c).

And mental illness is an involuntary condition whose causes and course are not well understood. While many mental patients undoubtedly are cured, determining that any given patient will not have a recurrence of mental disorder requires an exercise of fallible psychiatric diagnosis and notoriously unreliable psychiatric predictions about an individual's long-term future dangercusness.

And this problem is compounded by the fact, as this case illustrates, that cures often involve continuation of drug or other types of therapy which are voluntary. Given these factors, Congress could prudently conclude, as it did, that the state of psychiatry simply does not permit prediction with anything near certainty that a person who has been committed in the past will not again prove dangerous to himself or others in the future.

And for what it is worth, I should add that the empirical data available supports this judgment. The suicide rates of people with a history of mental

illness appear to be disproportionately high, and it is generally acknowledged that the arrest rates of people who have been committed and released from mental institutions are significantly higher than those of the general population.

While the briefs explain that there is currently a controversy raging in the psychiatric community about the causes of these phenomenon, the very existence of these differential rates and the conclusion of some researchers that mental illness correlates directly with a propensity for greater violence gives Congress all the support it needed to support its judgment that people with a history of mental illness are a presumptively risky group.

In this situation, where the category of people affected by the classifications presents an identifiably risk to the public, where the success of the Congressional purpose requires the use of broad prophylactic relief, where any single mistake would have catastrophic consequences for the public, Congress was entitled to act with all the caution it deemed necessary in lifting firearms disqualifications.

QUESTION: Does the -- I take it when you want to buy a firearm you fill out a form?

MR. ROTHFELD: That's correct, Justice White.

QUESTION: And do you inquire whether, from the person whether he's currently suffering from a mental illness?

MR. ROTHFELD: I believe the form only inquires whether he has in the past been committed to a mental institution on adjudicated incompetent.

QUESTION: So he could be very mentally ill and still get a gun.

MR. ROTHFELD: That's true.

QUESTION: They never ask him whether he's now under medical care for mental illness?

MR. ROTHFELD: I believe that's correct. I think the type of prophylactic rule that Congress created here, similar to the felony provisions the Court interpreted in New Banner most recently, Congress was looking for something that was easily applied and that would be probative.

And I think it concluded reasonably that anyone whose mental disorder was serious enough to affect his ability to use firearms would likely have been committed in the past, or that that would at least be a valid indicator.

I think the Congress as a matter of administrative convenience probably would have found it extremely difficult to require people to self-evaluate

to determine whether or not they are currently mentally ill and the various levels of mental illness that might require treatment. And commitment is sufficiently serious that it requires a finding of dangerous to himself, to others, to society.

QUESTION: I suppose there are a lot of examples of people voluntarily committing themselves that may be just as ill as those who were involuntarily committed.

MR. ROTHFELD: Well, it's certainly true that the disqualifications in Titles IV and VII don't reach everyone in society who's dangerous and shouldn't be able to obtain a gun. But Congress was creating, I think, prophylactic rules that focused on the most dangerous groups who were easily identifiable, that included felons and the others that I've mentioned, and that includes people who have been actually adjudicated incompetent or requiring commitment.

I think the fact that Congress could have gone further certainly doesn't invalidate the most serious restrictions that it did create, in response to the most serious problem faced by the public. In fact, these same factors also answer the district court's due process analysis. The district court found the Title IV irrational because it imposes a firearm disqualification

in response to a commitment, while refusing to lift the disqualification in response to psychiatric testimony that the individual who had been committed will not be dangerous in the future.

But those two forms of psychiatric judgment are quite distinct. The commitment decision is not a simple predictive matter. Commitment is ordered by a judicial officer as an immediate response to the patient's demonstrated inability to function in society.

In contrast, the sort of evidence that the Appellee would rely on, the district court relied on, to raise the disqualification is the unreviewed testimony of a psychiatrist involving a much more subjective and unreliable opinion about long-term future dangerousness.

That's the sort of thing Congress wanted to avoid by focusing with particularity on whether or not the commitment had been ordered, that there was a reliable judicial determination. There was certainly nothing irrational in Congress deciding that, of those two forms of psychiatric judgment, commitment was by far the most reliable.

QUESTION: I'm not sure whether you covered it or not. Does the legislative history show anything

about the consideration by Congress of the fact that psychiatric predictions about future dangerousness are considered, in the profession at least, inherently unreliable, or at least very dubious?

Did Congress spend at time focusing on that?

MR. ROTHFELD: Not to my knowledge. There is nothing in the legislative history directly touching on that. There are comments in the legislative history expressing the concern of legislators about possible future instability of people who have been found mentally ill in the past.

But as you say, there is a considerable amount of psychiatric literature at the moment, which has been acknowledged by the Court in a number of opinions, suggesting that predictions about long-term dangerousness, at least as to any given individual, are extremely unreliable.

And I think the Court can take notice of that, and certainly that provides Congress with all the factual support that it needed to rationally create the disqualifications that it did based on commitment.

Before I conclude, I should add one final point --

QUESTION: I have just one question. It's perhaps rather theoretical, but on the one step at a

time analysis, it's always got an interesting problem. Supposing Congress thought that it would be generally desirable to cut down the use of guns throughout the society, which of course would not be terribly unreasonable, and decided to do it gradually, and said that for the first year people whose names begin with A through D may not buy guns, and if this seems to progress next year we'll take a look at another segment of the alphabet.

Do you suppose that would be constitutional?

MR. ROTHFELD: I should emphasize, of course, that that's not what we have here.

QUESTION: But it might be this case if one thought the classes were really indistinguishable. That's why I asked the question. And you've argued to the contrary on that.

MR. ROTHFELD: Well, I think if Congress -- the question, of course, would be whether there's a rational basis for the distinction that's drawn by Congress. And I think it might well be justifiable if Congress is intending to extend this to the general society and simply for administrative reasons attempts to do it gradually, if there were no suspect classes involved, no fundamental rights, as there certainly isn't here, that Congress might justifiably use such an

administrative scheme to accomplish its purpose.

And again, we should recognize, I should emphasize, that here of course Congress focused on groups that it had a particular reason to withhold guns from, to impose disqualification.

QUESTION: But if you're right on that argument, it doesn't seem to me you need the one step at a time argument. That's what's running through my mind. Whereas, if you need the one step at a time argument, it seems to me your classes could be virtually identical, or your subcategories could.

MR. ROTHFELD: I think that that's correct, Justice Stevens. I think that the unique nature of people with a history of mental illness is enough to support the Congressional judgment.

The reason I bring up the one step at a time argument is really in direct response to the district court's analysis that, having waived the disqualification for one of the list of groups, Congress was under a direct constitutional obligation to raise it for everyone who is mentioned in the --

QUESTION: But really your argument is that they don't ever have to get to the second step. You're really making that argument?

MR. ROTHFELD: That's right. They are

independent flaws in the district court's approach.

To mention one final point briefly concerning the district court's opinion, on its lengthy dictum whether people with a history of mental illness are a quasi-suspect class, that conclusion was reached prior to this Court's decision last term in City of Cleburne versus Cleburne Living Center.

I think it is clear that it cannot survive the Court's decision there.

With that, I will reserve the remainder of my time.

CHIEF JUSTICE BURGER: Mr. Casale.

ORAL ARGUMENT OF

MICHAEL A. CASALE, ESQ.,

ON BEHALF OF APPELLEE

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

Let me begin by supplementing the factual history that Appellant has given the Court. It is correct, Mr. Galioto did voluntarily admit himself to Fair Oaks Hospital on May 11th, 1971. After a very brief stay, he indicated he desired to leave and gave the hospital 72 hours notice of his intention.

The hospital then proceeded to obtain an order of commitment, which simply found that he was mentally

ill and a person who could properly be confined. There was no specific judicial finding of dangerousness.

Just six days after the order of commitment, on June 5th, 1971, he was discharged as improved. In the discharge summary -- and I refer the Court to --

QUESTION: You say discharged as improved, not discharged as recovered.

MR. CASALE: No, I don't believe that finding would be made. It would be discharged as improved or discharged guarded. It would be a separate determination if the discharge were subject to follow-up care outside the hospital, as I understand it.

In any event, certain findings were made by the physician upon his discharge, Mr. Justice, and they were contained in the appendix at page 11. The doctor found: "At the present time, the patient is not acutely psychotic or suicidal and he is considered not dangerous to himself or others."

Now, notwithstanding that specific finding, he was then deprived of obtaining a firearm some eleven years later, notwithstanding the very short duration of his confinement, notwithstanding the fact that he had no prior or subsequent commitments, he had no criminal record of any kind, and that the fact of his disability had been removed by the State of New Jersey in 1981

based upon an additional certification that he was not suffering from mental illness and that he would be a proper person to handle a firearm safely.

This certification, coincidentally, came from the very same physician who had committed him some eleven years earlier.

We submit to the Court that the decision of the district court is sound and should be upheld. At the outset, let me emphasize that we are not seeking here to invalidate all gun control restraints by any means. We are not seeking to place firearms in the hands of those who are currently mentally ill or disordered.

Appellee is simply seeking the same protections afforded to convicted felons under Section 925(c).

Although this case does in fact involve gun control, the issue before the Court is not really gun control. The issue is the procedural due process rights of an individual when he is discriminated against statutorily.

We recognize that Congress has a right and even an obligation to proceed cautiously in an area such as this. But caution should not escalate to fear, and fear should not be the basis of legislation. I submit

that if we review the legislative history, we see that is exactly what happened here.

The Appellant has referred to numerous justifications for the findings that Congress could have made about the reason for using a commitment. I ask the Court to look at the legislative history, for there is nothing there to establish that link.

QUESTION: Well, does Congress have to make express findings in order to support something against a rational basis challenge on equal protection grounds?

MR. CASALE: Justice Rehnquist, the Congress does not have to make express findings per se. However, there should be something in the legislative history from which this Court can draw some inferences that that was the basis for the legislation.

QUESTION: In other words, a statute then with no legislative history you can almost attack at will on equal protection grounds?

MR. CASALE: I'm not saying that you can attack the statute at will. I am saying that it becomes much more difficult to divine the legislative intent when that legislative intent is not expressed.

QUESTION: Well, but when you're talking about a rational basis equal protection attack, you're talking about any conceivable basis for sustaining the statute,

aren't you? You don't have to find Congress in fact had this in mind, although it might help if you could. But even if you can't tell what Congress had in mind, if it appears rational that's good enough.

MR. CASALE: Well, we do have to find that, and I am suggesting to the Court that a review of the history does not establish that. And we have some post hoc rationalizations offered by the Appellant, and I submit that they're not sufficient to sustain the statute.

QUESTION: Well, that's what courts accept in equal protection rational basis attacks, are post hoc rationalizations.

MR. CASALE: Unfortunately that's all we have, and all I'm saying is that the legislative history is devoid of any actual showing on which this Court can refer to infer the intent of Congress when it was passed.

There were concerns expressed, undoubtedly, about those who were mentally ill from handling guns, but the --

QUESTION: Well, the concern was expressed in the statute itself, wasn't it?

MR. CASALE: Yes, it was. But the concerns that I'm referring to are those expressed by the

legislators in discussions of the Act, and the discussions refer to guns falling into the hands of lunatics, madmen, deranged killers. That's the type of references that we have in the statute.

I submit that the Court can draw an inference that what Congress was intending to legislate towards was those who are under a current mental disability.

QUESTION: Well, in other words, you're saying that you win as a matter of statutory construction?

MR. CASALE: No, Justice Rehnquist, I'm not saying that we win as a matter of statutory construction. I am saying that that statutory construction does not give this Court any basis to find the rational basis that Appellant is arguing is there; that we have to divine it from something else. And I submit that the background for that is simply not available.

And a fair analysis of even the post hoc rationalizations shows that it should not -- it does not sustain the rational basis test.

Now, it appears again, just referring back to the legislative history, that Congress was attempting to get at those individuals who might present a current danger. There was a great deal of discussion about criminals obtaining guns.

QUESTION: But what Congress said was that it was going to debar from getting guns anyone who had ever been committed involuntarily for mental illness.

MR. CASALE: Correct.

QUESTION: And so I really don't see how what some Congressman may have said he was intending to get at could possibly supercede the enacted language of Congress.

MR. CASALE: It doesn't supercede it, but I think it aids this Court in interpreting what the intent of Congress was at that time.

QUESTION: What if Congress had made no exception for relief for anyone, including former convicted felons? Could Congress have made a blanket prohibition for all former convicted felons and all formerly adjudicated mental patients?

MR. CASALE: Justice O'Connor, that would obviously eliminate the equal protection argument. We then would simply be facing the substantive due process problem. If that decision were made by Congress on the basis of foreseeable dangerousness, as I think the intent was here, then I submit that a challenge could be mounted on a due process basis. However, obviously the equal protection --

QUESTION: Why would it eliminate the equal

protection problem?

MR. CASALE: It would eliminate it because --

QUESTION: It would just eliminate this particular equal protection argument. But then you would be arguing that there's really no difference between a former -- the person who had been committed, once committed, and a person who had never been committed, because you would argue that you should have a chance to show that you're no more dangerous than the person who's never been in the hospital.

MR. CASALE: You're right, Justice White. I was referring to the particular challenge mounted here in accordance with Section 925(c).

QUESTION: Yes, all right.

MR. CASALE: Again referring to that history, there is nothing that shows what rational was used by Congress in settling upon the commitment to an institution as the disqualifying factor. Now, we see in reviewing the history that there are only two categories where a past event acts as a total disqualification for firearms purchasing: convicted felons and those who were committed to institutions.

I think in recognition of the fallibility of their judgments, in recognition of the fact that a conviction or a commitment might not have very much

validity some 10 or 20 years later, Congress enacted 925(c) and expanded the scope of 925(c) in 1968 to include this hearing provision.

I submit further that the failure to grant that review procedure by Congress to those who were committed is due to Congress' reliance upon the stereotype of mental illness, and that is clearly demonstrated by the verbiage used by the Congressmen in discussing these individuals.

QUESTION: Mr. Casale, aren't there a couple of other categories of people who are disqualified?

MR. CASALE: Yes, there are, Justice O'Connor. However --

QUESTION: People who've been dishonorably discharged and people who've renounced citizenship, and so forth.

MR. CASALE: You're referring specifically to Title VII now, which is a separate statute, which has not been set aside by the court.

In Title IV there are also two other categories of people who are barred from obtaining firearms. However, they reflect a current condition. Those who are under indictment obviously will be resolved either by their acquittal or by their conviction, in which case they have some relief. Those

who are drug users can address that themselves. It is a temporary condition over which they have control. If you're a fugitive from justice, again another condition which is somewhat temporary.

I submit the only ones who have the permanent ban, absolute permanent ban, are those who were committed to an institution.

QUESTION: And those who've been dishonorably discharged and those who've renounced citizenship.

MR. CASALE: Correct, under Title VII. However, I think there are some different considerations.

QUESTION: And some types of felons.

MR. CASALE: Right, except that even with those individuals there is a relief in that a presidential pardon can be issued to specifically allow them to carry firearms. So again, it speaks in terms which are permanent; however, in practice there are other relief provisions.

QUESTION: How about someone who has been dishonorably discharged?

MR. CASALE: I believe that someone who has been dishonorably discharged also has the ability to obtain a pardon from the President to carry a firearm.

QUESTION: Well, of course, you could say --

you could say that those disqualifications really don't rest on any notion of dangerousness.

MR. CASALE: I raise that --

QUESTION: It's just a penalty.

MR. CASALE: Yes, I raised that in my brief, Justice White. I think there are other considerations that were addressed in Title VII with respect to renunciation of rights and privileges in this country, and I think those attend to those other categories.

QUESTION: Can't a dishonorably discharged man have that changed within the Army itself?

MR. CASALE: I am not --

QUESTION: There's a special section for that.

MR. CASALE: I believe he may be able to. In addition, if the discharge is because of a crime then he also has relief available under 925(c). So there are means by which even that gentleman can obtain a firearm.

We submit that the dichotomy which the statute creates in effect imposes an irrebuttable presumption that all former mental patients are dangerous, and Congress knew full well this was not the case. Title IV accepts on the one hand psychiatric opinion evidence to create the presumption, but then refuses to accept that

some evidence to rebut it, and refuses to accept any evidence, no matter how compelling.

In the particular case we have before us, Justice -- strike that -- Mr. Galioto had obtained certification from the very same psychiatrist who committed him in 1971, who certified to the State of New Jersey that he was capable of handling firearms in 1981. Unfortunately, Title IV totally bars him from submitting that evidence.

Now, I submit again that Congress' refusal, total blanket prohibition of accepting any type of evidence, simply says to the public that those who are former mental patients are simply too dangerous to be trusted to handle a firearm.

On the one hand, Congress creates an issue of dangerousness -- this is what we all must glean from the statute as the basis for it -- yet totally and permanently prohibits one group from even addressing that issue.

That is all that Appellee seeks in this case, is simply to address that issue. We are not looking to invalidate the initial disqualifier, simply to address that issue that Congress has created.

QUESTION: Mr. Casale, do you think it would be irrational for Congress to form a judgment that every

layman is dangerous when he possesses a firearm, that there is a danger associated with the possession of a firearm by everyone in society other than police officers and the like?

Would that be irrational? Isn't there some danger whenever you let anybody have a firearm?

MR. CASALE: There certainly is a danger when you have an instrument that can cause death in the hands of anyone, Justice Stevens, and be that a layman of a police officer. But I submit that --

QUESTION: And wouldn't it be adopted as an irrebuttable presumption and deny every citizen the right to come in and prove, well, I really would not misuse the gun.

MR. CASALE: I think that, again, if there were a total blanket prohibition for all groups, the only question that would be left would be perhaps the Second Amendment argument, which --

QUESTION: But then your argument, it seems to me, is not really an irrebuttable presumption argument, but rather a claim of differential treatment.

MR. CASALE: It is in a sense, though, because Congress did create these categories and, on the issue of dangerousness, simply prohibited one group from coming in and refuting that issue. And I think we

really can't escape the presumption.

Certainly, if there had been a blanket prohibition everyone could be presumed to be dangerous and everyone could come in and challenge it. I think that presents a totally different question, however, and not nearly as egregious as when you have categories of citizenry who are barred and then given different rights.

QUESTION: Yes, but then your claim of unfairness rests on the way the categories are defined, not in the fact that there is a presumption that there is some danger associated with the possession of firearms.

MR. CASALE: Essentially it does, Justice Stevens, correct.

This Court, by the way, has previously noted the sweeping provisions of Title IV and has spoken in Dickerson versus New Banner about those sweeping provisions. But it also noted that there in fact are review procedures to alleviate any potential harshness.

We submit to the Court that in choosing a group to grant those procedures to alleviate the harshness, Congress chose the wrong group. If anything, it would seem much more logical and rational to have former convicts to be totally and permanently barred

from obtaining a firearm. They have shown by their own actions beyond any reasonable doubt that they are capable of committing crime and becoming a threat to society.

Congress has recognized and this Court has recognized as well the correlation between past criminal acts and future ones. Yet Congress conveniently overlooks that correlation in this statute. And I submit that the reason that correlation is overlooked is because of the unreasoning stigmatizing fear of mental illness, nothing more.

We further submit to the Court that it should exercise scrutiny greater than the minimal rational basis test in this case because of the qualities that attend the class of former mental patients. There is but one characteristic which is common to the entire class, and that is that they all have been subject to an involuntary commitment to a mental institution.

Now, that broad group includes those individuals who indeed may be mentally ill, but it also includes many who were never mentally ill and were erroneously committed. It includes individuals who may have been ill when committed, but subsequently cured. It includes individuals with drug or alcohol problems or organic disorders, who may have been committed under

archaic state statutes which are no longer prevailing.

QUESTION: Mr. Casale, I would have thought that our holding of last term in the Cleburne case that the mentally retarded are not subject to anything but rational basis, it would follow a fortiori as to people who had been committed for mental illness. I take it you don't agree?

MR. CASALE: I do not, Justice Rehnquist. Most respectfully, I think there's a distinction between Cleburne and this case. In Cleburne you were addressing an ordinance that applied to those who are mentally retarded. The very definition of that category addressed a current condition.

I would not be here this morning if this statute addressed those who are mentally ill. Unfortunately, the classification in this particular case is not the mentally ill. It is those who have been committed to an institution. And the issue before the Court is are those two nomenclatures synonymous?

Appellant would like to have this Court find that they are synonymous: mental illness equals commitment; commitment equals mental illness.

QUESTION: But the question really is, if you're talking about, you know, whether this is rational basis, is whether people who have been committed to a

mental institution are any more deserving of so-called heightened scrutiny than the mentally retarded.

MR. CASALE: That's right, that's right. And again, the distinction that I feel is appropriate in this case is that in Cleburne, by actually addressing those who in fact were mentally retarded, this Court found that there were differences in the way those people adjusted to society.

However, I am submitting to the Court that there is no difference where someone has a commitment in their record. It does not say anything about their current condition. And that is why I submit that the class of former mental patients may be characterized as a suspect class, notwithstanding this Court's decision in Cleburne.

Now, Appellant argues that there is a reduced ability to function in society, and he points to the mentally ill. Well, no one can quarrel with that. But again, that's not the issue before this Court. The issue is whether Congress, instead of addressing the mentally ill, who perhaps it should have and perhaps it wanted to, could Congress have simply used the convenient label, those who have been committed to an institution?

And I submit by using that label we have in

fact created a quasi-suspect class. These individuals have a trait which cannot change, totally immutable. The condition that gave rise to their commitment may be long gone. They may be cured. It may have never been there.

QUESTION: Of course, under that analysis ex-convicts are a suspect classification.

MR. CASALE: They are, except they have relief. All I am asking is to put us in the same category as ex-convicts.

QUESTION: Well, you mean for purposes of this statute --

MR. CASALE: Right.

QUESTION: Not for purposes of equal protection analysis.

MR. CASALE: Right.

Again, there is a great similarity, and you're right that ex-convicts may indeed be a suspect class, classified by a prior act in their life. But in this context, Justice Rehnquist, I submit that we cannot draw the same conclusion, that those who are former mental patients have a reduced ability to function. That is not borne out by anything that Congress considered or by anything else in the record.

This assumption does nothing more than to

perpetuate the time-worn stereotypes of mental illness and distorts the true picture of the mentally ill and of former mental patients. As I said before, this is a trait and a characteristic which is immutable. Again, the underlying conditions may be gone or may not have been there. Yet, the commitment to an institution remains forever.

These individuals by and large over the past have been politically powerless. They have not been cohesive. There's no group that speaks out for them. Over the past number of years, there have been recent changes in the legislation, true. But by and large, when we look back over the spectrum of history, they've been discriminated against severely at both the state and federal level.

And I think that this Court should not be deterred by the most legislation we've had over the last several years, generally attempting to eliminate discrimination against those who have been committed and against the mentally ill.

As Justice Marshall observed last term in Cleburne, the Court should look on these changes as a source of guidance on evolving principles of equality. We have not become so enlightened that the Court should defer to Congress to rectify all inequities. It has

only been 18 years since Title IV was passed.

We submit that there are a number of other reasons why, just on a rational basis, this statute should not be upheld. The statute is only rational if we can in fact equate a commitment to an institution with future dangerousness. I submit that is not the case.

That is the fallacy that Congress seems to have relied upon and which Appellant has echoed before this Court. At the very outset, there is no proof at all that psychiatrists can predict dangerousness in the future beyond the level of chance. There is an inborne psychiatric tendency to overpredict and to be cautious and to find dangerousness when there is indeed none.

In the medical community, it is not unreasonable to suspect and to treat mental illness, and it's better to do that in ten people who are not ill rather than to fail to treat one individual who is. Again, with respect to the medical community, the ramifications on the medical side are not serious.

But when you convert that to the legal and social consequences, I submit that they are significant. They perpetuate the stigma which Mr. Galioto had carried with him since 1971 for voluntarily admitting himself in the hospital.

Secondly --

QUESTION: Well, the difficulty in prediction of future dangerousness sounds very much like an argument in support of Congress' bright line test.

MR. CASALE: Yes, it does, Justice O'Connor. But I submit that it cuts both ways. I think if you have that unreliability and that difficulty in making future predictions, that you can't then rely upon those predictions to implement a permanent and total ban against someone.

There's an inherent unfairness in that, and all I am saying is that what Congress has done here is accepted it for one purpose and rejected that same set of facts for another.

Their basis for their exception, I submit, is flawed because of the very fact that it is uncertain and for other reasons, I would add, as well. But because psychiatrists cannot make those predictions, Congress should never have used the commitment process as the initial disqualifier on a total and permanent basis.

For example, the additional questions with respect to the commitment process. Many states don't require that a finding of dangerousness be made at the time of commitment. This occurred in 1971 in New Jersey, and at that point in time our statute did not

require a judicial finding of dangerousness. It found -- or it required, rather, that the court determine that the individual was mentally ill and a proper person to be confined.

As our amici, the American Psychological Association, has pointed out in their brief, there are some 34 states that have a similar statutory framework, that do not require dangerousness. I submit that, based upon that, the reliability of those commitments for any legislative means is highly questionable.

And additionally, the scope of the commitment process is limited. We talk about what we are trying to determine when we have a commitment, and the scope, I submit, is a rather short-term focus as opposed to a long-term.

The psychiatrist at that time and the hospital administration must determine whether the individual is currently in need of treatment, perhaps currently a danger to himself or to others. But the psychiatrist and the judicial officer making the decision never get involved in questions of long-term dangerousness. It is simply not a subject even to be addressed.

Nonetheless, Congress has taken that finding and has stretched it, has made something more of it than there actually is.

In addition, the use of the commitment as again the permanent and total disqualifier that it is fails to acknowleige that people can even be cured of mental illness. In effect, they are saying to the country, to Appellee and members of his class that once you're mentally ill you're always mentally ill. We don't want to recognize the fact that indeed people do become cured. And the rates of cure are increasing daily.

QUESTION: But there are some that are incurable?

MR. CASALE: There's no question about that, Justice Marshall. But for that some, should the entire group be prejudiced? If that some amounts to one or two percent, my question is should we then create this presumption for that entire 98 percent? I submit we shoulin't.

QUESTION: Where do you get the figure 98 percent?

MR. CASALE: Well, I'm just, I said hypothetically that percentage. I don't know the actual percentage.

QUESTION: No one knows.

MR. CASALE: No one knows, no one knows. I think --

QUESTION: Well, given that no one knows, is it irrational for the state to pass, for the Congress or the state to enact legislation that will perhaps reach too far, but nevertheless will protect the public?

MR. CASALE: I suppose there's a policy question that has to be reached as to how far we want to go to protect the public. Certainly the very next step could be outlawing possession of firearms for wide, diverse groups of people, perhaps even everyone. And I think it's when we make the distinction --

QUESTION: Well, we don't have to worry about that. While the Court sits it can take care of these cases.

But do you say it's -- is a rational basis enough?

MR. CASALE: What I'm saying is that we --

QUESTION: Is it enough for Congress to have a rational basis for this kind of legislation?

MR. CASALE: Just the belief or just the fear or the fact that they do not know how many will be dangerous?

QUESTION: No, I'm speaking of the standards that the Court has traditionally applied. If there is a rational basis for it, is that enough?

MR. CASALE: Well, again assuming that we

don't find, that the Court does not find, that this is a quasi-suspect class, I submit that more than simply a rational basis test should be applied, because of those particular qualities and characteristicts that attain to former mental patients.

Barring that, if the Court were of the opinion that these individuals do not constitute such a class, and I submit it does not even meet the minimal rational basis test because there is no link. You cannot base a decision, a Congressional decision, simply on fear, and I think that is precisely what happened here, to answer your question, because they do not know. I do not think that that is a sufficient basis for a determination by Congress.

Now, if I may, just to finish up, the Appellant has submitted that Congress can take into account this history of commitment. I would just like to point out to the Court that nowhere in the legislative history is there a referral to a history of commitment. A single solitary commitment is what controls to effect a permanent and total ban.

In this particular case, in the facts of this case there is no history -- what that word connotes, perhaps a longer term, a series of commitments. Again, we have an individual who is hospitalized for 23 days,

has not since then -- has not been hospitalized since then, nor was he hospitalized prior to that.

And I think that that characterization somewhat has connotations of a longer, ongoing process. That is not the case here.

I submit to the Court that Mr. Galioto wants no more than the rights that are given to convicted felons under Section 925(c). He's simply seeking to overcome the second class citizenship imposed upon him by Title IV.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Rothfeld?

MR. ROTHFELD: Only if there are further question from the Court, Your Honor.

CHIEF JUSTICE BURGER: Apparently not.

Thank you, gentlemen. The case is submitted.

(Whereupon, at 10:57 a.m., the oral argument in the above-entitled case was submitted.)

CERTIFICATION

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TOBACCO AND FIREARMS, Appellant V. ANTHONY J. GALIOTO

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BY Paul A. Richardson

(REPORTER)