

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, Petitioner V.

THOMPSON/CENTER ARMS COMPANY

CASE NO: 91-164

PLACE: Washington, D.C.

DATE: January 13, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X

3 UNITED STATES, :

4 Petitioner :

5 v. : No. 91-164

6 THOMPSON/CENTER ARMS COMPANY :

7 -----X

8 Washington, D.C.

9 Monday, January 13, 1992

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

13 APPEARANCES:

14 JAMES A. FELDMAN, ESQ., Assistant to the Solicitor
15 General, Department of Justice, Washington, D.C.; on
16 behalf of

17 the Petitioner.

18 STEPHEN P. HALBROOK, ESQ., Fairfax, Virginia; on behalf of
19 the Respondent.

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

2 (11:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in 91-164, United States against Thompson/Center Arms
5 Company.

6 Mr. Feldman, you may proceed.

7 ORAL ARGUMENT OF JAMES A. FELDMAN

8 ON BEHALF OF THE PETITIONER

9 MR. FELDMAN: Thank you, Mr. Chief Justice and
10 may it please the Court:

11 This case arises from a suit for a refund of the
12 tax on the making of a firearm, in this case a short-
13 barrel rifle, by the respondent Thompson/Center Arms
14 Company. It raises the question whether manufacture of a
15 complete but partially unassembled short-barrel rifle
16 constitutes the making of a firearm under the National
17 Firearms Act.

18 Now, the facts of the case are not complex.
19 Respondent segregated as a unit -- those are the terms
20 that respondent used in its application to pay the tax --
21 segregated in a unit all of the parts that are necessary
22 to constitute a short-barrel rifle. In particular, that
23 included a pistol, which is not itself a firearm under the
24 act, and a shoulder stock that converts the pistol to one
25 that can be fired from the shoulder.

1 Now, the facts that were found by the claims
2 court and are undisputed are that the shoulder stock can
3 fit onto the pistol in less than 5 minutes. It's easily
4 attachable. Therefore, a short-barrel rifle can be
5 finally assembled merely by attaching the shoulder stock
6 in an operation that takes less than 5 minutes. Now, the
7 system --

8 QUESTION: So that you can make the short-
9 barreled rifle out of everything that comes in that kit?

10 MR. FELDMAN: Yes. The kit consists of a
11 pistol -- now, that itself is not a short-barrel rifle
12 because it's designed to be fired from the hand. But also
13 in the kit are essentially three additional pieces, a
14 shoulder stock, and that attaches by taking off the pistol
15 grip and attaching --

16 QUESTION: Which makes it into a potential
17 rifle.

18 MR. FELDMAN: That makes it into a weapon that
19 is designed to be fired from the shoulder, undoubtedly.

20 QUESTION: What are the other pieces?

21 MR. FELDMAN: The other pieces are a longer
22 barrel that can be substituted for the shorter barrel, and
23 a fore-end, a wooden piece that fits under the barrel.

24 QUESTION: And that wouldn't be covered, either.

25 MR. FELDMAN: Those pieces -- right. If you

1 attach all of the pieces in the kit you have a long-barrel
2 rifle, and a long-barrel rifle is not itself a firearm
3 under the act. That's correct.

4 QUESTION: What the other side says is yes,
5 somebody could attach the stock to the pistol, but that's
6 not what it's sold for. Nobody wants to shoot a pistol
7 with a shoulder piece. Somebody could saw off a rifle in
8 less than 5 minutes, too -- saw the barrel down -- so why
9 doesn't that come under the act?

10 MR. FELDMAN: That's correct, but as far as the
11 sawed-off rifle goes I think there's some important
12 distinctions between a readily attachable shoulder stock
13 that attaches right onto a pistol and a sawed-off rifle or
14 shot-gun. First, rifles themselves, a fully assembled
15 rifle or shot-gun is not a firearm under the act. Now,
16 for -- to take the position that that was a firearm
17 because you simply could saw off the barrel would be to
18 mean essentially that all rifles and all shot-guns are
19 firearms.

20 QUESTION: Well, what if you sold it together
21 with a saw?

22 MR. FELDMAN: Even if you sell it together with
23 a saw, a saw is not itself a part of a -- it's not a part
24 of a rifle. It's not something that's designed to be
25 assembled or added to a rifle. It's a tool that's used.

1 QUESTION: Well, what if the person manufactured
2 and sold an assembled rifle and an assembled pistol and
3 they were interchangeable in their parts so that it
4 could -- theoretically these things could be broken apart
5 and reassembled as a short-barreled rifle?

6 MR. FELDMAN: Well, I think that's actually the
7 hardest case here. I would say that the logic of our
8 argument suggests that the statute -- and I think the
9 statute could be interpreted such that that would be a
10 firearm. However, I also think that in that case there
11 would be an additional consideration, which is what you
12 have is a complete rifle and a complete pistol, and
13 neither of those are firearms under the act.

14 QUESTION: Well, so what's the answer?

15 MR. FELDMAN: The current position that ATF has
16 taken, partly as a matter of its enforcement discretion,
17 is that that is not a firearm if they're complete and
18 fully assembled.

19 QUESTION: But that's not perhaps logical in
20 light of your legal argument here today, is it?

21 MR. FELDMAN: No, I don't -- I wouldn't say
22 that. I think it is -- the logic of our argument could --
23 under the logical argument the statute could be extended
24 so far as to read that, but the problem is there's
25 conflicting lines of --

1 QUESTION: Is there an intent requirement under
2 this statute?

3 MR. FELDMAN: The intent is actually right in
4 the words of the statute. To be a rifle something has to
5 be designed, made, and intended to be fired from the
6 shoulder. I think it's undisputably --

7 QUESTION: You don't have to have an intent as
8 to barrel length, that it be a short-barreled --

9 MR. FELDMAN: No. I would say you have to have
10 knowledge as to barrel length. You certainly would have
11 to know, and it's unquestionable that in this case
12 respondent knew what the barrel length of its weapon was,
13 but I don't think -- and you would have to know in the
14 case of a parts kit that these other kits could be -- that
15 the shoulder stock could be added to the pistol.

16 You have to know that what you have is a short-
17 barrel rifle, but what you -- you don't have to intend
18 that it be a short-barrel rifle, and in particular if
19 you're a manufacturer I think the manufacturer --
20 Thompson, in this case -- manufacturer's intent is really
21 entirely irrelevant in the sense -- intent as to what the
22 consumer is going to do.

23 Thompson has designed and made a weapon with the
24 parts easily attachable. It may or may not intend for
25 consumers to do all sorts of things with that, but that

1 intent is -- it just doesn't -- it's not operative in this
2 case so long as the parts are easily -- can be easily
3 assembled and put together.

4 QUESTION: The record certainly doesn't indicate
5 that anybody -- any -- has anybody ever used this
6 contraption, if I may call it, as a short-barreled rifle?

7 MR. FELDMAN: There's no --

8 QUESTION: Has any sportsman ever used it that
9 way?

10 MR. FELDMAN: I'm not aware whether any
11 sportsman --

12 QUESTION: Has any criminal ever used it that
13 way?

14 MR. FELDMAN: There's nothing in the record
15 about a -- that a criminal has used it.

16 QUESTION: Why would you want a shoulder-fired
17 pistol? I can't understand that. I can understand why
18 you would want to saw off a powerful weapon like a rifle
19 so you can carry it more easily and commit a crime with
20 it, but why would you want to fit a shoulder piece to a
21 pistol?

22 MR. FELDMAN: I mean, essentially the
23 prohibition on short-barrel rifles is based on the idea
24 that a short-barrel rifle is more accurate than a rifle
25 and yet more concealable than -- I mean, more accurate --

1 QUESTION: Than a pistol, that's right.
2 MR. FELDMAN: -- than a pistol.
3 QUESTION: That's right.
4 MR. FELDMAN: And more concealable --
5 QUESTION: Right.
6 MR. FELDMAN: -- than a rifle.
7 QUESTION: So this one would be no more accurate
8 than a pistol, I assume -- the barrel is not any longer --
9 but less concealable than a pistol.
10 MR. FELDMAN: There's all -- I don't think
11 there's anything in the record as to precisely how
12 accurate this would be or whether someone would or would
13 not want to use this for criminal --
14 QUESTION: But Mr. Feldman, are there criminal
15 penalties for possessing -- I mean, this is -- as it comes
16 before us it's a tax case, but is it not the case that the
17 same provisions, the same definitions govern criminal
18 liability for possession of this thing?
19 MR. FELDMAN: Yes.
20 QUESTION: And don't we usually apply a rule of
21 lenity to criminal cases?
22 MR. FELDMAN: Well, let me actually -- let me
23 retract that yes and put it in two parts. The question as
24 to what is a firearm is identical under the tax provisions
25 or under the criminal prosecution provisions.

1 QUESTION: And do you concede it has to be
2 interpreted the same way for both?

3 MR. FELDMAN: The question of what is a firearm.
4 There may or may not be additional intent requirements
5 from the basis of proceeding under one of the criminal
6 prohibitions that may require some further intent when
7 there's a criminal prosecution.

8 QUESTION: May or may not? What's the position
9 of the Government? Is there an intent requirement?

10 MR. FELDMAN: The position of the Government is
11 that the only intent requirement is that you know that
12 it's a firearm, that that puts you on --

13 QUESTION: That's what I thought.

14 MR. FELDMAN: I mean, excuse me, you know that
15 it's a weapon.

16 QUESTION: Right. So that if we agree with the
17 Government we're going to be interpreting this provision,
18 which is at least ambiguous, in a manner that's going to
19 make a crime what persons might readily think is not a
20 crime.

21 MR. FELDMAN: Your Honor, I think that that
22 would prove entirely too much. Like any other tax
23 statute, like other regulatory matters where there's
24 regulations that are enforced by -- or a regulatory scheme
25 that's enforced by criminal penalties, the fact that there

1 are potential criminal penalties lurking in the background
2 doesn't mean that the regulatory scheme should always be
3 interpreted against the Government.

4 QUESTION: But haven't some of our cases held in
5 the field of taxation that even though we're dealing with
6 a tax case here, if there are criminal penalties then you
7 apply the rule of lenity?

8 MR. FELDMAN: I don't recall any that have
9 specifically dealt with tax cases and the rule of lenity.
10 There are cases that talk about where there's been no
11 consistent regulatory interpretation of a statute --
12 they're primarily older cases -- but that have discussed
13 the fact that you might then interpret a statute so as to
14 give fair notice to the taxpayer in favor of the taxpayer.

15 In this case, where you're talking about the
16 registration by a manufacturer of firearms, there's no
17 question that the manufacturer had sufficient fair notice,
18 and in any event, it's not the kind of criminal -- this is
19 not the kind of criminal prosecution where those fair
20 notice concerns are most prominent.

21 QUESTION: But don't -- aren't you going to have
22 to interpret it the same way in a criminal prosecution?

23 MR. FELDMAN: Again, you would have to -- you
24 certainly would have to interpret what is a firearm the
25 same way in a criminal prosecution.

1 QUESTION: So why do you say those concerns
2 aren't present here? They're not present in this
3 particular case, but we're giving meaning to language
4 which could ultimately be applied in a criminal case.

5 MR. FELDMAN: First of all, I think the argument
6 that we're making is something that would be appropriate
7 in a criminal case, but if -- where you're addressing
8 criminal cases, the criminal prohibitions -- for instance
9 there's a criminal prohibition against possessing an
10 unregistered -- an unregistered weapon that's required to
11 be registered. The term possessing there, for instance,
12 may carry some further intent requirement that's not
13 applicable where you're talking about whether you have to
14 pay the tax and register the firearm initially.

15 QUESTION: Although you deny that.

16 MR. FELDMAN: It is our position that there's
17 not --

18 QUESTION: It may. It may if you lose.

19 MR. FELDMAN: There's -- currently the courts of
20 appeals -- most courts of appeals have held that the --
21 for the criminal -- in a criminal prosecution the intent
22 requirement is that you know that it's a firearm, that
23 that puts people on sufficient notice to know that they
24 should check and see what the legal requirements are with
25 respect to that weapon before they possess a firearm.

1 That's in the general sense.

2 QUESTION: How do you deal with the Gould case?

3 MR. FELDMAN: The Gold -- excuse me.

4 QUESTION: Well, Gould or Gold, G-o-u-l-d v.

5 Gould, decided in 19 -- 1970, about -- saying that
6 statutes levying taxes establish a rule not to extend
7 their provisions by implication.

8 MR. FELDMAN: I think that -- two ways. First,
9 I think the language of this -- of the statute here
10 readily lends itself to the interpretation of that
11 proposal.

12 QUESTION: So you're not extending it by
13 implication.

14 MR. FELDMAN: That's right. But I'd also say
15 that Gould is a case, and as are the other cases cited by
16 respondent on this point, where there was no established
17 administrative construction of the statute. There have
18 been numerous cases where the Court has dealt with
19 established administrative construction of tax statutes
20 and has deferred to the Government's interpretation.

21 QUESTION: Well, has this always been the
22 Government's position --

23 MR. FELDMAN: Yes.

24 QUESTION: -- the one that you're now --

25 MR. FELDMAN: Yes. You can trace it back --

1 there was originally a revenue ruling in 1954 which
2 applied to any firearm under the National Firearms Act and
3 said that -- essentially that whether the parts are
4 attached or not, they still would constitute a firearm if
5 they're all that are necessary to make it.

6 There were two revenue rulings in 1961.

7 QUESTION: So you don't think this is any
8 different than if the only thing that was sold here was a
9 kit with a stock and a rifle barrel -- I mean, a short
10 rifle barrel? It wasn't assembled, but it was -- could be
11 readily assembled.

12 MR. FELDMAN: I'm not sure if I understand the
13 hypothetical. If it --

14 QUESTION: Let's assume that it had a stock and
15 it had a short barrel, and whatever else that it would --
16 necessary to make a short-barreled rifle.

17 MR. FELDMAN: That's right. It's our position
18 that that would be the same -- that that is the same case.

19 QUESTION: That is the same case, isn't it?

20 MR. FELDMAN: And indeed, if the Federal
21 circuit's interpretation of the statute were adopted, a
22 criminal or a gang of criminals, or anyone in fact, could
23 amass a cache of short-barrel rifles or other NFA weapons
24 simply by buying them in a partially unassembled state,
25 with one or two pieces missing, leaving them there in a

1 warehouse or storehouse until they're ready to be used and
2 then attaching the final piece and going out and using
3 them.

4 QUESTION: Well, except for the fact that in
5 that case there's only one thing they would do with them
6 if they did anything at all, whereas that is not true
7 here.

8 MR. FELDMAN: Well, that may or may not be true
9 in that case. In fact, if this were -- if the Federal
10 circuit's interpretation of the act were adopted,
11 manufacturers could easily make weapons that are far more
12 sinister than the particular weapon that we're talking
13 about here -- weapons that are semi-automatic. They're
14 have higher caliber, and so on, that have some utility and
15 could be fired as a pistol, and then they sell them with a
16 shoulder stock that you can just clip right on to the
17 handle. All of those cases would be governed by the
18 determination here, and any manufacturer could sell those
19 and people could stockpile them, and they wouldn't be
20 subject to the -- they wouldn't have to register them.

21 QUESTION: The same horrible exists as long as
22 the parts are interchangeable, whether they sell them that
23 way or not. Criminals who want to do that can do it even
24 under your interpretation. All they have to do is buy the
25 barrels and the stocks and the -- what do you call the

1 part in the middle, the receiver?

2 MR. FELDMAN: Receiver.

3 QUESTION: The receivers separately. I mean,
4 that horrible exists under any interpretation of this law.

5 MR. FELDMAN: Yes, but weapons could be
6 specifically designed and intended by the manufacturers to
7 be -- by a single manufacturer just precisely so they'd
8 have, for instance, the maximum criminal utility and so
9 that there's a piece or two that's missing when you
10 purchase them so that technically they're some other
11 weapon which someone may want to use for some other
12 purpose at that time.

13 So long as all these parts are segregated as a
14 unit, which is what the -- what respondent has said in his
15 application to pay the tax that was due in here, it is as
16 much a firearm as is a bicycle that you buy that has
17 handlebars that the ultimate consumer has to attach.

18 QUESTION: At what point does the manufacturer
19 pay the tax? When it puts the component -- or the parts
20 in a separate package, or when they come off the assembly
21 line?

22 MR. FELDMAN: I would certainly be willing to go
23 along with what respondent put in its application to pay
24 the tax, which is segregate as a unit.

25 QUESTION: Well, does that mean when it puts it

1 in its storehouse ready for shipment?

2 MR. FELDMAN: Yes. Well, whenever these parts
3 are put together as a unit so that you just need the final
4 part to be -- just need the final attachment and you have
5 a firearm. The statute itself, the statutory language,
6 talks about manufacturing --

7 QUESTION: So that when the barrel comes off one
8 assembly line and the stock off another assembly line,
9 there's no tax, but then they owe you the tax when they
10 put the two together in a box? Is that the way it works?

11 MR. FELDMAN: When they're associated together.
12 It's the same thing as if they were just making short-
13 barrel rifles. They wouldn't -- there's some point if you
14 go far back -- let's say they were specifically
15 manufacturing short-barrel rifles and nothing else.
16 There's some point far enough back in the manufacturing
17 process where you don't yet have a short-barrel rifle and
18 then at some point you do. I don't think it's --

19 QUESTION: Well, but under your theory if they
20 have an inventory with any number of stocks and any number
21 of barrels at some point I suppose that they've got the
22 potential of assembling a weapon --

23 MR. FELDMAN: That's right.

24 QUESTION: -- for which the tax is required.

25 MR. FELDMAN: That's right, and when those parts

1 are segregated as a unit -- let me suggest another case,
2 which is where what they're making is a full rifle and a
3 full -- and a pistol, and they're marketing them entirely
4 separately.

5 It happens that there are some interchangeable
6 parts. The shoulder stock is inter -- the shoulder stock
7 can fit onto the pistol but it's maybe not even their
8 intent to do so, or that anyone should even know that. If
9 they're making them in the same building they're making
10 two different weapons, and if neither weapon is a firearm,
11 then they're not making firearms.

12 QUESTION: Well, suppose this kit is shipped as
13 a complete rifle. There's a receiver. There's the stock
14 and the barrel and the receiver, but all disassembled.
15 What --

16 MR. FELDMAN: If it is a long barrel it's just a
17 long-barrel rifle and not a firearm.

18 QUESTION: So it's only the omission of the
19 receiver that is the incident that requires the payment of
20 the tax?

21 MR. FELDMAN: I'm not sure I understand. The --
22 once you have the pistol, or actually it's the receiver --

23 QUESTION: Well, you tax them now for having the
24 kit, and the kit has the barrel and the stock.

25 MR. FELDMAN: That's right. It has the barrel,

1 the stock, plus a completed pistol. Once you have -- let
2 me put it this way. Once you have the receiver from the
3 pistol and the barrel from the pistol and the shoulder
4 stock, which is everything you need for a short-barrel
5 rifle, regardless of whether those three units are --
6 happen to be attached to each other at a particular --

7 QUESTION: Well, what -- the kit now contains a
8 barrel and a stock, correct? A 16-inch barrel and a
9 stock, isn't that correct, or am I incorrect?

10 MR. FELDMAN: Yes, that's correct. No -- the
11 kit contains a pistol with, I think, a 10-inch barrel,
12 then in addition -- it has a pistol that has already a 10-
13 inch barrel attached to it. In addition, the pistol --
14 the kit contains a longer barrel and a shoulder stock.

15 QUESTION: Well, are the kit and the pistol sold
16 together?

17 MR. FELDMAN: Yes. That -- that's what raises
18 the issue. Had they just sold the kit they wouldn't have
19 a firearm because it couldn't be used as a weapon at that
20 point.

21 QUESTION: Well, what is the receiver --

22 QUESTION: Suppose it included -- excuse me.

23 QUESTION: Well, what is a receiver,
24 Mr. Feldman?

25 MR. FELDMAN: The receiver is the part of the

1 gun -- firearm that contains the mechanism of the gun.
2 It's the middle part, the part that contains the cartridge
3 and where the explosion occurs.

4 QUESTION: So you have three parts to a rifle, a
5 stock, a receiver, and a barrel?

6 MR. FELDMAN: I think -- yes. For purposes of
7 this case, that's all -- you really only have to look at
8 those three parts.

9 QUESTION: And suppose they sold those three
10 parts disassembled. What result?

11 MR. FELDMAN: Well, again, if the barrel were a
12 short barrel it would be a short --

13 QUESTION: No, no. No, it's a long barrel, it's
14 a 16-inch, and it's a stock, and it's a receiver, all
15 dissembled, but they're capable of being purchased by
16 someone who already owns one of these pistols and being
17 converted in a prohibited way.

18 MR. FELDMAN: That conversion kit -- the kit by
19 itself that just contains those parts wouldn't be a
20 firearm, because --

21 QUESTION: So it's only the absence of the
22 receiver that makes it an illegal kit.

23 MR. FELDMAN: No, it's the presence -- I don't
24 mean to be quarreling with you on the hypothetical, but
25 it's the presence of the pistol that makes it a complete

1 kit. As soon as you have all the parts in one kit that
2 are necessary to constitute a short-barrel rifle you have
3 a short-barrel rifle. As with any other consumer item --

4 QUESTION: All right, then let me ask a
5 different way, and I guess if you have the disassembled
6 pistol, all of the parts, and the disassembled rifle, all
7 of the parts, and you sell them as two weapons, that's a
8 violation in your view.

9 MR. FELDMAN: Yeah. If you sell -- if you have
10 a disassembled pistol and a disassembled rifle and you
11 sell them separately --

12 QUESTION: All of the parts for each and they're
13 sold together.

14 MR. FELDMAN: That would also be a violation.
15 That's right --

16 QUESTION: But if you had an assembled rifle and
17 an assembled pistol which could be disassembled and
18 reassembled into a short-barreled rifle, you say no
19 violation.

20 MR. FELDMAN: I think that fact without more --
21 again, I think that that's a hard case, because there are
22 two -- really two lines of reasoning there. One is that
23 once you have all the parts that are necessary to quickly
24 and easily constitute a short-barrel rifle you have a
25 short-barrel rifle.

1 Under -- that reasoning I think would suggest
2 that you would in that case, but on the other hand,
3 Congress did exclude long-barrel rifles as firearms under
4 the act. And I think, at least we've taken the position
5 thus far, that given that exclusion once you have the
6 weapon assembled in a complete rifle it is a long-barrel
7 rifle and you can't recharacterize it as something else.

8 QUESTION: Mr. Feldman, I didn't understand -- I
9 didn't understand the position you were taking to be in
10 accord with the answer you just gave. I had assumed that
11 if the retailer of a gun, if he should sell in one package
12 a pistol which is disassembled but it's in a box -- it's
13 in a separate box wrapped in ribbon and everything, and
14 then he sells in another box a disassembled rifle with the
15 interchangeable parts, but in a separate box and tied with
16 a ribbon, is that a violation because he's making the sale
17 of the two simultaneously?

18 MR. FELDMAN: If they're both disassembled and
19 he's making the simultaneous --

20 QUESTION: Yes, right.

21 MR. FELDMAN: -- sales to the same customer?

22 QUESTION: To the same customer.

23 MR. FELDMAN: I think if there's knowledge that
24 those parts can be reassembled as a short-barrel rifle --

25 QUESTION: I see. Okay, so he sells one -- he

1 sells the pistol, and then the customer says I'd also like
2 to buy a rifle, and he sells the rifle.

3 MR. FELDMAN: I think it would depend if there's
4 knowledge on everybody's part that those parts can be put
5 together quickly and readily as a short-barrel rifle.

6 QUESTION: Unless it's a full -- fully assembled
7 pistol and a fully assembled rifle, then it doesn't
8 matter. So the store owner could say well, let me put
9 this together for you, and he puts it together, and he
10 puts the gun together, and he says now you can buy both.
11 Is that -- that's what the law is.

12 MR. FELDMAN: I think if they're fully assembled
13 without more -- again, if the store owner suggests to the
14 customer I'm going to put them together for you but
15 these -- really it's the whole unit and this really should
16 be made -- you can go take this home, in fact you ought to
17 if you want to make a short-barrel rifle, I think that
18 that might raise a different issue. But at least without
19 more, the fact that you have two complete weapons, at
20 least up to now we've taken the position that that's not
21 an NFA firearm.

22 QUESTION: Well, you -- perhaps I misunderstood
23 you. I thought at the outset you said that intent is not
24 a requirement but that keeps creeping back into the
25 argument, or am I mistaken? Is intent a component of your

1 argument?

2 MR. FELDMAN: As a general matter it's not.
3 There may be cases like that.

4 QUESTION: Yes, except that with reference to
5 every example you insert the word intent.

6 QUESTION: Knowledge.

7 MR. FELDMAN: No, I -- first of all knowledge --
8 as Justice White just mentioned, knowledge is what I would
9 use, not intent. It's not the intent to manufacture the
10 short-barrel rifle. You do have to have knowledge. Both
11 Thompson would have to have it. I think a user would have
12 to have it in a prosecution. Knowledge that it can be
13 readily and quickly assembled as a short-barrel rifle in
14 order for it to be a short-barrel rifle, and I think that
15 is one of the requirements of the act.

16 QUESTION: Well, Mr. Feldman, we are -- this is
17 a question of statutory construction, which means what did
18 Congress mean by these words, and don't you think it's
19 relevant in inquiring about what Congress intended to
20 cover? Isn't it relevant that hardly anybody in his right
21 mind would ever anticipate that this kit would ever be
22 used to assemble and use a short-barreled rifle.

23 MR. FELDMAN: First of all, I'm not sure I would
24 agree with your characterization about anybody in their
25 right mind.

1 QUESTION: Well, I asked you awhile ago, the
2 record -- you have no record of anybody ever using this
3 kit to make a short-barreled rifle. That's because -- and
4 especially you would think it was such a dangerous thing
5 to do you would -- some -- even a dumb criminal would have
6 used it --

7 MR. FELDMAN: I think it --

8 QUESTION: -- for this purpose, but no one in
9 history has ever used it for that purpose.

10 MR. FELDMAN: We haven't attempted to put in
11 information in the record about this particular weapon,
12 because in our view it's nothing. The particular weapon
13 at issue --

14 QUESTION: Well, that may be so, but I just
15 asked you isn't it relevant to what Congress might have
16 intended to -- if hardly anybody in his right mind would
17 have thought this would ever be used as a short-barreled
18 rifle?

19 MR. FELDMAN: I think that what Congress thought
20 about this particular weapon actually is not important.
21 The important point is that the same principles would
22 apply to a weapon that was a semi-automatic weapon from
23 which you could -- with a much higher caliber that was
24 specifically designed to be operational -- most
25 operational as a short-barrel rifle, but that could be

1 used with a pistol grip attached instead of the shoulder
2 stock.

3 QUESTION: Well, Mr. Feldman, let me, if I may,
4 raise -- that raises a definitional question. You mention
5 in your brief that the definition of machine gun includes
6 a reference to the unassembled parts. Is my recollection
7 correct?

8 MR. FELDMAN: That's correct.

9 QUESTION: And you said it was not significant
10 that the definition of rifle did not have any reference to
11 unassembled parts simply because what Congress was doing
12 when it included the unassembled parts within the meaning
13 of machine gun was codifying prior judicial decisions and
14 that's all it was doing. Is that correct?

15 MR. FELDMAN: I think that's not quite right.
16 That's one of the things they were doing. They were
17 overhauling the definition to codify those prior judicial
18 decisions, also to expand the definition of machine gun.

19 QUESTION: Why, then, at least to the extent
20 that they were codifying, and to the extent that in your
21 view the definition of rifle should include the
22 unassembled possibilities anyway, why didn't they also
23 overhaul the definition of rifle to make it very clear
24 that your view was correct?

25 MR. FELDMAN: They -- well, actually I don't

1 know why they didn't. There's no indication in the
2 legislative history as to why they didn't.

3 QUESTION: But what we're left with are two
4 definitions, and I think one literally follows the other,
5 doesn't it, in which the machine gun definition does refer
6 to the unassembled parts and the rifle definition does
7 not.

8 MR. FELDMAN: That's correct, but --

9 QUESTION: Anyone looking at that would say
10 well, they can't mean that the unassembled components of a
11 rifle, including possibly a short barrel, would be a
12 rifle.

13 MR. FELDMAN: I think when Congress was --

14 QUESTION: But isn't that so? Wouldn't anyone
15 reasonably contrasting those two definitions find that
16 significance in the contrast?

17 MR. FELDMAN: I think that would be a misleading
18 way to look at it in this case. First -- in the first
19 place --

20 QUESTION: Well, it might be misleading, but
21 isn't that the way that probably a person hitting the
22 statute cold would read it?

23 MR. FELDMAN: I'm not sure that they would. For
24 one thing, the rifle definition is different from the
25 machine gun -- definition. The rifle definition itself

1 includes the word make, which is defined to mean
2 manufacture, put together, alter, or otherwise produce.
3 It's about as broad a definition as you can get.

4 That word doesn't occur in the machine gun
5 definition, and if you actually look at the statute
6 carefully, Congress may have thought that it wasn't
7 necessary to tinker with that. But I think equally
8 important, when Congress added those words to the machine
9 gun definition it was adding a receiver alone as an NFA
10 firearm, a receiver of a machine gun. It didn't intend to
11 do that with respect to short-barrel rifles. It was also
12 adding items that could be used to convert a rifle into a
13 machine gun. It didn't intend to do that with short-
14 barrel rifles.

15 In other words, it was overhauling the
16 definition of machine gun, something -- it did not intend
17 to tinker with the preexisting definition of rifles, which
18 by consistent administrative practice --

19 I'd like to make one other point which is I
20 think I might have been misleading before, which is I said
21 that our interpretation dates back to 1954. I intended to
22 continue that it goes to 1961, and actually that specific
23 '54 ruling that I referred to has since been declared
24 obsolete, but the '61 rulings are still fully in force.

25 I'd like to reserve the balance of my time.

1 QUESTION: Very well, Mr. Feldman.

2 Mr. Halbrook, we'll hear from you.

3 ORAL ARGUMENT OF STEPHEN P. HALBROOK

4 ON BEHALF OF THE RESPONDENT

5 MR. HALBROOK: Thank you, Mr. Chief Justice, and
6 may it please the Court:

7 It is ATF's position that a complete pistol and
8 a complete rifle -- that is, two receivers, a short
9 barrel, a long barrel, and a shoulder stock -- do not
10 constitute an NFA weapon unless actually assembled as
11 such. These are the words of the Deputy Assistant
12 Secretary of the Treasurer Edward Stevenson, which is in
13 the court of appeals appendix at 43.

14 QUESTION: May I ask you a question that I
15 intended to ask your opponent but just didn't get a chance
16 to get in? What is the caliber of this weapon?

17 MR. HALBROOK: It's a 22 rim fire caliber.

18 QUESTION: It's just a 22.

19 MR. HALBROOK: It's a minor caliber. However,
20 you can interchange these barrels -- that's a commercially
21 attractive feature of this firearm -- with other calibers
22 so that, for example, the company that's in the record
23 offers 30-30 rifle barrels for hunting deer, things like
24 that, so it is interchangeable. The unit here is a 22 rim
25 fire.

1 QUESTION: Do you have to change the receiver in
2 order to do that?

3 MR. HALBROOK: No, you don't, Your Honor.
4 That's the beauty of this particular kind of firearm.
5 It's only a single shot, so it doesn't have a different
6 mechanism for different calibers. You change the barrels.
7 You can use the same receiver to have -- for example, a
8 30-30 -- if you have it in the carbine version, you can
9 have 30-30 deer barrel, or you could use a 22 rim fire
10 barrel for like target shooting or squirrel hunting or
11 something minor like that.

12 QUESTION: What's rim fire? I'm not familiar
13 with that term. What is that?

14 MR. HALBROOK: Well, rim fire cartridge is the
15 smallest cartridge made, and it only means that the firing
16 pin hits the rim of the cartridge to make it go off,
17 whereas most bigger calibers have a center fire which hits
18 the primer --

19 QUESTION: I see. The pin goes through, yes.

20 MR. HALBROOK: -- in the middle.

21 But the only issue here is whether a consumer
22 has to have two receivers instead of just one receiver.
23 The receivers are identical. I'm not sure how well this
24 --

25 QUESTION: I want you to get to this part of the

1 argument, but I thought that if you had two receivers --
2 the Government responded to our questions that there would
3 still be liability if they were disassembled.

4 MR. HALBROOK: That's post hoc attorney talk in
5 this Court for the first time. The agency's position --

6 QUESTION: All right. That's what I want to
7 make very clear. Now, you said the agency took this
8 position --

9 MR. HALBROOK: The agency has never taken
10 that --

11 QUESTION: -- in 1943?

12 MR. HALBROOK: I'm sorry, Justice Kennedy.

13 QUESTION: When did the agency take this
14 position?

15 MR. HALBROOK: For the first time in 1985 the
16 agency took the position that you could have a complete
17 pistol and a complete carbine. And when you look at the
18 quotation from Mr. Stevenson that I read -- when my open,
19 he said that means two receivers, a short barrel, long
20 barrel, and a shoulder stock. The agency has never said
21 that a complete carbine and a complete pistol if they're
22 disassembled makes them into short-barrel rifles, because
23 you disassemble these to clean them or for a lot of
24 other -- to change barrels, for other purposes. That's an
25 argument that we've heard for the first time in this

1 Court, and that argument was never made in the *claims
2 court.

3 QUESTION: So your understanding of the case is
4 that it is the absence of the receiver that causes -- in
5 the kit that causes the problem here.

6 MR. HALBROOK: That's accurate, and that's
7 throughout the record in this case. All the
8 correspondence between ATF Director Higgins and
9 Thompson/Center Arms and between Mr. Stevenson, the
10 Treasury official, make that clear.

11 QUESTION: And it would create some problems if
12 they constitute an impermissible firearm assembled or
13 disassembled but do not constitute it assembled, because
14 as you say, there are possession laws as well, and every
15 time the owner who buys these things assembled, which
16 wouldn't be a violation, when he takes the two apart to
17 clean them he is suddenly in possession of an unlawful
18 firearm.

19 MR. HALBROOK: Not only that -- that's accurate,
20 Justice Scalia. Not only that, but ATF is well aware that
21 the attractive feature of the Contender system is that you
22 can change the barrel, so you're always changing barrels,
23 even with just a pistol. Just leave the carbine kit out
24 of the case, if you wish. The pistol is -- it's in the
25 record. We have a company catalogue here, and they sell

1 lots of different barrels for different target events and
2 different kinds of hunting.

3 QUESTION: May I ask you a question in that
4 regard? Supposing they sold a kit consisting of a
5 receiver, a short barrel, and a shoulder stock -- just
6 those three items -- disassembled, is that a firearm or
7 not?

8 MR. HALBROOK: That's getting a lot closer to
9 one, and the reason is that the definition of rifle does
10 include the term intended to be fired from the shoulder.
11 So that's getting in a very gray area, and I would think
12 that a manufacturer would not want to do something like
13 that.

14 QUESTION: Well, I understand a manufacturer
15 doesn't want to take a lot of chances. My question is,
16 would the statute define what I've described as a rifle?

17 MR. HALBROOK: Well, when we apply the rule
18 of -- let me distinguish two kinds of rifles.

19 QUESTION: Well --

20 MR. HALBROOK: Of course, the answer is yes for
21 a certain type -- yes.

22 QUESTION: You'd say that would be yes.

23 MR. HALBROOK: It would be --

24 QUESTION: Well, then, why --

25 MR. HALBROOK: If it's an instantly attachable

1 shoulder stock.

2 QUESTION: Why does it stop being a rifle
3 because they put a fourth item into the package?

4 MR. HALBROOK: My yes relates to the pistol and
5 instantly attachable shoulder stock that those revenue
6 rulings Mr. Feldman was talking about were talking about.
7 They were intended only to be short-barrel rifles. They
8 were made into short-barrel rifles. And in fact there's a
9 readily restorable definition here that would continue my
10 answer being yes, because once you put it together as a
11 short-barrel rifle, even though you --

12 QUESTION: Well, I assume it's never been put
13 together before. It's not been made before. They just
14 sell these three parts in one kit. How can the statute
15 cover that under your reading of the statute?

16 MR. HALBROOK: Well, if this --

17 QUESTION: I understand you're saying, well,
18 it's past practice and we're willing to go along with it
19 as sort of an administrative interpretation of the
20 statute, but if we just look at plain language, it seems
21 to me if we adopt your view of the plain language, that
22 kit is not a firearm.

23 MR. HALBROOK: When we apply the rule of lenity
24 to an ambiguous statute I agree that that would not be a
25 firearm, and when we looked at the contrasting

1 definitions, the three other NFA firearms that have
2 combinations of parts definitions and the absence of that
3 language here and the definition of make here as including
4 putting together. And if I was in a criminal case I would
5 definitely argue that that would not be a short-barrel
6 rifle, the hypothetical.

7 QUESTION: It seems to me your argument applies
8 equally to my hypothetical, that's what I'm saying to you.
9 And the fact that the -- in practice -- apparently this
10 company is not making criminal weapons. Nobody really has
11 that flavor of the case. The problem in the case is if we
12 adopt your view of the statute aren't we permitting
13 weapons of the kind I describe to be sold as not counted
14 -- covered by the statute?

15 MR. HALBROOK: Well, I don't think so. The
16 circumvention argument applies to the beautiful shotgun on
17 display downstairs that belonged to Chief Justice Earl
18 Warren that could be sawed off probably in 30 or 40
19 seconds.

20 QUESTION: Well, no, I'm not talking about
21 something that requires sawing off. I'm talking about
22 three parts that have to be assembled but have never
23 previously been assembled. Are they, quote, made,
24 unquote, within the meaning of the statute? Your view is
25 no.

1 MR. HALBROOK: My view would have to be no when
2 we construe the statute strictly.

3 QUESTION: If we decide the case the way you ask
4 us to, I think we'll have to say -- we'll have to say no
5 as to all those hypotheticals -- the Uzi gun and all the
6 other things the Government talks about.

7 MR. HALBROOK: But notice, though, that the
8 statute says, intended to be fired from the shoulder, and
9 if those parts are intended to be assembled and fired from
10 the shoulder with a barrel less than 16 inches, it is by
11 definition a short-barrel rifle.

12 QUESTION: Even though it's not yet been made.

13 MR. HALBROOK: It's a lot closer to being made,
14 and if that intent element is there then a prosecutor
15 would be over that hurdle. I think -- it's application of
16 law to facts, and it depends on the circumstances, and the
17 circumstances as far as this product go is that it's --

18 QUESTION: Well, suppose you put an instruction
19 in the assembly I describe and say don't fire this from
20 the shoulder, only fire it from the hip. This is just to
21 be intended to be fired from the hip, kind of Western
22 style.

23 MR. HALBROOK: Well, but the definition --

24 QUESTION: Like a (inaudible) rifle.

25 MR. HALBROOK: -- includes -- that's an

1 objective standard as to what a shoulder stock is, and
2 that's in the --

3 QUESTION: Well, but then that takes your intent
4 out of the case, it seems to me. Once you've got the
5 shoulder stock in there, that's enough to satisfy intended
6 to be fired from the shoulder, isn't it?

7 MR. HALBROOK: That's not what the statute said.
8 If the statute with criminal penalty says that to apply it
9 to a person, it -- this object has to be intended to be
10 fired from the shoulder, then it would depend on that
11 person's intent.

12 QUESTION: Well, but most of the courts of
13 appeals as I understand it have an intent requirement that
14 they must know there's a violation, that, you know, it's a
15 firearm (inaudible), which the tax statute doesn't have
16 the same intent requirement in it.

17 MR. HALBROOK: Well, not completely. Most of
18 the circuits -- not this Court, but most of the circuits
19 have held that you don't even have to know it's an NFA
20 firearm. All you have to know is it's any kind of gun and
21 you're guilty, and there's three circuits that have gone
22 away from that view now, but that's why this case is also
23 so important.

24 It's in the record that tens of thousands of
25 carbine kits were sold through 1985 with BATF approval,

1 and if this statute really means what the Government says,
2 all of those carbine kits that are possessed with those
3 pistols -- these were sold by other companies -- all these
4 tens of thousands of people are guilty of a felony
5 offense, because there's no knowledge requirement in most
6 circuits that you know that it's an NFA firearm, and if
7 the difference here is that you're supposed to know it's
8 an NFA firearm because only one receiver is present rather
9 than two receivers being present, all these distinctions
10 that really are not in the statute but the agency
11 invented, then we've got a real problem with notice and
12 due process and issues like that.

13 QUESTION: Well, it's not just the purchases of
14 the past kits, it's any purchasers in the future who
15 happened to purchase the rifle separately and then the
16 pistol separately and then disassembled them.

17 MR. HALBROOK: If what the Government has said
18 for the first time here today -- if that's accurate, then
19 that's a real problem, because Thompson/Center has been
20 marketing these kits -- not kits, but complete carbines
21 and complete pistols -- since 1985 when BATF Director
22 Steven Higgins ruled that that was not an NFA firearm,
23 that one person in possession of both complete guns does
24 not possess an NFA firearm.

25 I noticed in the Government briefs that they

1 start using terms like separate marketing of these items
2 as if they've got to go to different people, but the
3 administrative record, the record in this case, is clear
4 that the complete rifle and the complete pistol being
5 possessed by a person, that's not considered a violation.

6 QUESTION: Justice -- well, how would you
7 address Justice Stevens' problem, though? It really is a
8 cause of no concern with respect to this firearm, but I
9 can conceive of another firearm that indeed it is an easy
10 means of evading the statute to simply sell
11 interchangeable parts like this.

12 What would you say, that Congress should just
13 pass a law that would enable these to be addressed by the
14 regulating agency weapon by weapon?

15 MR. HALBROOK: I don't think Congress -- well,
16 it certainly hasn't passed such a law, but I would say
17 that that's why it's important, in applying law to facts
18 as we're doing here, to look at the facts of the specific
19 case, and if we interpret the statute narrowly to exclude
20 this item from the National Firearms Act, we don't do
21 anything about all these potential hypotheticals that the
22 Government has raised.

23 There may be some circumstances where something
24 is so on the verge of being a short-barrel rifle and so
25 intended to be a short-barrel rifle that it is one, and

1 the Court could easily say that this is not, and that
2 these other items would be.

3 QUESTION: Mr. Halbrook, may I go back to one of
4 the hypos that I think Justice Stevens referred to, and
5 I'm not sure that I understood your answer. If I recall
6 correctly, he said if we adopt your position here, don't
7 we have to hold that the unassembled parts of the Uzi are
8 also not covered by the statute? You didn't mean to
9 concede, did you, that they would not be covered by the
10 definition of machine gun --

11 MR. HALBROOK: That's accurate. That --

12 QUESTION: -- because machine gun includes --
13 specifically includes reference to unassembled parts.

14 MR. HALBROOK: Absolutely. Normally the term
15 Uzi means a machine gun. Machine gun is defined as a
16 combination of parts from which a machine gun can be
17 assembled when possessed by a person. And when we made
18 that clear in our brief that that's why all this would not
19 apply to an Uzi, the Government came back and said well,
20 just because it's more powerful that doesn't make any
21 difference, but our point is that it's normally a
22 different weapon.

23 Now, there is a --

24 QUESTION: No, but isn't the -- maybe I'm
25 missing something. Isn't the simple answer that machine

1 guns are defined in the statute to include unassembled
2 parts, and isn't that the most immediate answer to the
3 problem that Justice Stevens --

4 QUESTION: No, it's not, because my problem
5 didn't -- was talking about a single shot. Not asking
6 about my hypothetical --

7 QUESTION: Well, but the question --

8 QUESTION: -- my problem was talking about a
9 single shot weapon that was sold disassembled.

10 QUESTION: I think we would proceed better if we
11 all addressed our questions to counsel, let counsel
12 respond, and then take our turn.

13 Would you answer Justice Souter's question?

14 MR. HALBROOK: Well, Justice Souter's question
15 is -- the answer is yes, that the easy answer to that
16 question is that an Uzi machine gun is defined as a
17 combination of parts from which a machine gun can be
18 assembled. That doesn't apply here, and that's the easy
19 answer to the question about the distinction between rifle
20 and machine gun as defined in the NFA.

21 QUESTION: Now, that's not the answer to my
22 hypothetical. What is the answer to my hypothetical?

23 MR. HALBROOK: Your hypothetical, Justice
24 Stevens, as I understand it is if we had a rifle, we had a
25 shoulder stock not attached to the receiver, perhaps, and

1 a barrel not attached to the receiver, and it's a short
2 barrel, then that's getting a lot closer to being a short-
3 barrel rifle because of the intended-to-be-fired-from-
4 the-shoulder standard. And I might add that BATF agreed
5 with my position that this --

6 QUESTION: I really would be grateful to you,
7 and I just tried -- I don't want to use up everyone else's
8 time. Is the answer yes or no to my hypothetical?

9 MR. HALBROOK: If it's packaged and intended to
10 be sold together and --

11 QUESTION: Three parts sold separately, barrel
12 -- short barrel, a stock -- a shoulder stock, and a
13 receiver. Rifle or not?

14 MR. HALBROOK: Justice Stevens, that's one of
15 those questions that the answer --

16 QUESTION: Can it be yes or no?

17 MR. HALBROOK: -- is maybe, because the statute
18 doesn't clearly apply to that.

19 QUESTION: You said awhile ago that construction
20 of the statute would mean that this is not a rifle, short-
21 barreled rifle, until it's assembled. That's what you
22 answered before.

23 MR. HALBROOK: The term rifle does not include
24 combination of parts.

25 QUESTION: Okay.

1 MR. HALBROOK: That's a --

2 QUESTION: So it would not be a rifle as long as
3 it's sold in three parts; isn't that right? That's what
4 you said before.

5 MR. HALBROOK: If I was defending a criminal
6 case, that's what I'd argue. But that's one of those
7 cases about how hard facts make bad law. I realize the
8 dilemma you're in, but that just doesn't -- that reasoning
9 doesn't apply to this product.

10 QUESTION: (Inaudible).

11 (Laughter.)

12 QUESTION: You're supposed to help us out of our
13 dilemma by -- you know, if you're asked a question that
14 calls for a yes or no answer, it's surely preferable to
15 say yes or no and then qualify, rather than just say --
16 you know, shrug your shoulders, so to speak.

17 MR. HALBROOK: Well, Chief Justice Rehnquist, my
18 answer to that's going to be no, that that's not a rifle
19 under the statute.

20 QUESTION: Yes, that's what you -- exactly you
21 said before.

22 QUESTION: It's just what Justice White thinks
23 you should answer.

24 (Laughter.)

25 MR. HALBROOK: Well, it's just a question --

1 QUESTION: Our problems are your problems.

2 MR. HALBROOK: -- in the one in the case at bar.

3 I want to point out just a little bit has been
4 said about the rules of construction, about criminal
5 statutes, taxing statutes, and the term deference perhaps
6 might be addressed briefly.

7 We've argued two rules of construction, namely
8 that a taxing statute, if it's ambiguous, as we believe
9 the Government has manufactured ambiguity here, but then
10 it does -- it's interpreted in favor of the taxpayer and
11 against the Government, and the reasoning in the Gould
12 case and in the White v. Aaronson case and others decided
13 by this Court is that if Congress wants to tax something
14 it should say so explicitly, that the application of law
15 to fact should be clear enough so that people can obey the
16 law.

17 But the more important rule I believe is the
18 rule that this Court in the Crandon case last term
19 addressed, the rule that an ambiguous term in a criminal
20 statute has to be interpreted according to the rule of
21 lenity against the Government and in favor of the person
22 to whom it may apply.

23 An opinion written by Justice Stevens in which
24 there was a strong concurring opinion by Justice Scalia
25 talking about, in more detail, the fact that you never

1 defer to the Government in respect to a statute with
2 strong criminal penalties, which would, in Justice
3 Scalia's words, replace the rule of lenity with a rule of
4 severity.

5 But even if we get into the deference rule, then
6 let me say this. The Government always cites the second
7 part of the two-part test that Chevron USA discusses. The
8 first part of that test is that if the statute is clear
9 then there is to be no deference to agency opinion.
10 Congress has spoken, and no deference is appropriate.
11 It's only if a statute's ambiguous, and even then those
12 cases are decided in civil matters, in matters without
13 severe criminal consequences.

14 The example -- the actual case that I think
15 Mr. Chief Justice Rehnquist was referring to about a rule
16 of lenity being applied in a tax case was Commissioner v.
17 Acker, where that was not even a criminal penalty. It was
18 a strong civil penalty, however, and the rule of lenity
19 was held still to apply, because the conduct was being
20 punished even with the civil penalty.

21 But if -- even if we were to defer to the
22 Government's interpretation, when you look at how the
23 Government has interpreted this statute, how the agency
24 interpreted the statute, particularly just after passage
25 of the Gun Control Act of 1968 when the agency -- well,

1 when Congress determined what is a combination of part --
2 what is a combination of parts plus intent, and what is
3 not so defined, when Congress clarified how we interpret
4 these definitions, the agency began to issue letter
5 opinions where they held that the kinds of items we're
6 talking about here were not considered to be short-barrel
7 rifles. There is a consistent line of administrative
8 interpretation between 1971 and 1985 that we've got in the
9 record where the BATF said that a pistol and carbine kit
10 is not a short-barrel rifle.

11 QUESTION: Now, Mr. Feldman says that the
12 administrative constructions go back to 1961, I think,
13 that support the Government's view. How do you deal with
14 the administrative constructions that he's talking about?

15 MR. HALBROOK: Well, the 1961 revenue rulings
16 only say that a pistol with an instantly attachable
17 shoulder stock and no long barrel to give the combination
18 a non-NFA purpose, that that's a short-barrel rifle. And
19 those administrative interpretations are not very
20 detailed.

21 QUESTION: But you say that's wrong, don't you?

22 MR. HALBROOK: Well, I say --

23 QUESTION: You just said a minute ago --

24 MR. HALBROOK: That's tougher than Justice
25 Stevens' facts, because at least he's talking about three

1 parts being disassembled.

2 QUESTION: Here's two.

3 MR. HALBROOK: Here's two, and it's an instantly
4 attachable shoulder stock.

5 QUESTION: Exactly, but under your theory I
6 would suppose that is not a -- that is not covered by the
7 statute, because it isn't assembled.

8 MR. HALBROOK: Well --

9 QUESTION: Yes or no?

10 MR. HALBROOK: If they're right there
11 together --

12 QUESTION: Not assembled. They're in a kit, and
13 the kit's wrapped up in cellophane.

14 MR. HALBROOK: And if it goes together just like
15 that in an instant like the revenue rulings in 1961, the
16 answer is that I think that's getting really close to
17 being a short-barrel rifle, but again --

18 QUESTION: Well, close -- you know, in some
19 contexts close isn't enough.

20 MR. HALBROOK: That's correct, too. There's
21 only one case -- these are all really difficult issues,
22 but the Zeidman case that's out of the Seventh Circuit
23 gives a fairly ambiguous answer to that question.

24 QUESTION: Do you accept that -- those revenue
25 rulings or not?

1 MR. HALBROOK: I accept the --

2 QUESTION: As applied to exactly what they
3 applied to.

4 MR. HALBROOK: I would, except that a
5 shoulder -- yes. As far as the revenue rulings from 1961,
6 we don't quarrel with those. The answer's yes.

7 QUESTION: Mr. White -- Justice White keeps
8 pulling you back onto the wagon, you keep falling off
9 again.

10 (Laughter.)

11 QUESTION: I don't see how you can accept those
12 revenue rulings if you believe in your position.

13 MR. HALBROOK: Well, Justice Scalia, it's --

14 QUESTION: You mean you don't want to attack
15 them. You're not interested in knocking them down, but
16 you really disagree with them, don't you?

17 MR. HALBROOK: I would -- I have some
18 disagreements with them on due process notice questions
19 for those reasons, but they're very distinguishable from
20 this case. They're not even close to the case we're
21 dealing with here. Those are instantly attachable
22 shoulder stocks, and the only purpose of them is to make
23 short-barrel rifles, so at least you've got a little bit
24 more in the statute than you have here.

25 QUESTION: You'd have to have -- you'd have to

1 use a different theory than the one you're using. It
2 wouldn't be the unassembled theory, it would be
3 intended-to-be-fired-from-the-shoulder theory.

4 MR. HALBROOK: I would concur with that, that
5 the intended to be fired from the shoulder, the design
6 part of the definition -- the design is the manufacturer's
7 purpose, really, and --

8 QUESTION: What do you say is the intent
9 requirement under the statute?

10 MR. HALBROOK: The intended-to-be-fired-from-
11 the-shoulder part of rifle -- the definition of rifle, and
12 we say it's exactly what it says, a requirement that the
13 Government prove that the item is intended to be fired
14 from the shoulder, so that, for example, if here the only
15 thing that's ever being made is a long-barrel rifle,
16 21-inch barrel, and a pistol with a 10-inch -- I'm sorry,
17 the rifle has a 21-inch barrel, the pistol has a 10-inch
18 barrel -- that's the way those parts are intended to be
19 used.

20 As I see it, the Government has three hurdles in
21 the statutory definition: intended to be fired from the
22 shoulder, it's got to be a weapon, not a pile of parts --
23 it's got to be operable as a weapon -- and the make
24 requirement, or the made requirement. So we don't feel
25 like they have any of those here, and some of these really

1 hard examples that Justice Stevens and Justice White have
2 been mentioning, you're getting closer. You still really
3 don't have all of those elements met, I don't think, but
4 you've got the intended-to-be-fired-from-the-shoulder part
5 of the definition.

6 QUESTION: No, but you have -- the two out of
7 three are met in the hypotheticals. The intended-to-be-
8 fired-from-the-shoulder might not be, but if you have
9 either the two-part or the three-part short-barreled
10 rifle, assuming when you put them together it's a short-
11 barreled rifle, you have the same obstacle with the word
12 made, and the same obstacle with the word weapon.

13 MR. HALBROOK: Yes, you do.

14 QUESTION: So those arguments really don't carry
15 the day for you, it seems to me, unless you're willing to
16 say those revenue rulings are wrong, but you might well be
17 right on the intend-to-be-fired-from-the-shoulder because
18 this can be used either way, with the pistol handle or
19 with the shoulder stock.

20 MR. HALBROOK: And also the strong factual
21 difference, too, though. Here, to put the shoulder stock
22 on you've got to have the work space, you've got to have
23 several different tools, and it takes 5 to 10 minutes.

24 QUESTION: Yes, but when you buy a lot of
25 Christmas toys that you think you're -- readily assemble,

1 and it take longer than that.

2 (Laughter.)

3 MR. HALBROOK: Right. That applies to the
4 Contender --

5 QUESTION: I mean, you can't really rely on the
6 difference between 5 minutes and just plugging it in, I
7 don't think.

8 MR. HALBROOK: Well, I think the instant
9 attachability at least is a factor, the fact that it's
10 designed and intended to be done. And that's not the case
11 here, because here we're dealing with items that are
12 intended to be made only as a pistol or a long-barreled
13 rifle.

14 So there's a lot of metaphysical issues about
15 the application of law to facts, but I think that, as
16 applied to this product, it's clear enough that the
17 statute doesn't apply.

18 Just another comment about the deference rule,
19 because we were talking about the fact that during the
20 period 1971 through 1985 the Government said that the
21 products here are not -- the types of products here are
22 not encompassed in the National Firearms Act. This Court
23 has held numerous times that you would owe more deference
24 to a ruling that was set forth right after a statute
25 passes than you would one made up by an agency decades

1 later. And we feel like that's what happened here. In
2 1985, for the first time as we can determine, the agency
3 held that a pistol and carbine kit is a regulated NFA
4 firearm, even though it had held numerous times before
5 that those items do not constitute an NFA firearm.

6 I would also point out in my remaining time that
7 the statutory definitions -- we've talked a little bit
8 about the contrasting definition of machine gun, for
9 example, from a rifle. There are also two other terms in
10 the statute that are defined in terms of combinations of
11 parts, but only if intent is present, and again that goes
12 against the Government's theory here that there's some
13 kind of absolute liability combination of parts definition
14 with no intent that applies to every NFA firearm.

15 Specifically, the term destructive device, for
16 example, is defined as a combination of parts, as long as
17 those parts are designed or intended to be assembled into
18 a destructive device, and that's -- Congress recognizes
19 there's parts that can go together in legitimate ways, as
20 well as ways that would be, let's say, taxable under the
21 National Firearms Act.

22 With the Government's theory of this case about
23 a strict liability combination of parts, we would all have
24 destructive devices in our homes because destructive
25 device, for example, was defined to include a bomb, and

1 that includes a Molotov cocktail, which is made out of a
2 bottle, a rag, and gasoline. Those are parts that we all
3 have, or objects that we all have in our households.

4 So to avoid results like that Congress has
5 fashioned really three kinds of definitions in the
6 National Firearms Act. One of those definitions is the
7 one that the Government argues for here today as to all
8 NFA arms, but it really only applies to machine guns.
9 Capability is the only test in that definition, whether
10 the parts can be assembled to a machine gun.

11 Then there's the two NFA firearms that are
12 defined only in terms of combinations of parts as long as
13 intent and/or design are shown, and that's the destructive
14 device example, or the silencer.

15 And lastly would be, for example, a rifle, which
16 is not defined in terms of a combination of parts, with or
17 without intent. It's defined solely as a weapon that has
18 actually been made and that is intended to be fired from
19 the shoulder and that actually has to have a barrel of
20 less than 16 inches.

21 So, when you look at the particularized
22 definitions in each case here, Congress has not left these
23 definitions wide open. It's repeatedly amended the
24 National Firearms Act, probably a dozen times, and it's
25 consistently refrained from defining rifle in a very broad

1 way, consistently refrained from adopting combinations of
2 parts definitions. So it's clear enough that if it wanted
3 to adopt a definition that the Government contends for
4 here, that it could do so, but it hasn't.

5 QUESTION: May I ask just one question about the
6 typical practice in the industry when you sell long-
7 barreled rifles? Are they generally sold by the factory
8 to the dealer in a disassembled -- the shoulder stock in
9 one part and the rifle in another?

10 MR. HALBROOK: They would be sold assembled,
11 normally.

12 QUESTION: Assembled or disassembled?

13 MR. HALBROOK: Assembled.

14 QUESTION: They would be.

15 MR. HALBROOK: Yes, Justice Stevens.

16 There may be certain types of firearms that
17 would have a barrel off of it that goes on -- like a
18 shotgun perhaps might be sold that way, but normally
19 firearms are assembled, particularly when you consider
20 that there's lots of little parts and the consumer would
21 not be able to put those together.

22 QUESTION: No, I understand that, but I thought
23 sometimes the barrel might just be sold -- that there'd be
24 in two parts. I thought sales in two parts was fairly
25 common, but I'm wrong about that I --

1 MR. HALBROOK: Well, it's not in the record,
2 but --

3 QUESTION: I shouldn't ask you about it.

4 MR. HALBROOK: A -- perhaps I shouldn't answer.

5 QUESTION: Well, I'm glad to have the answer.

6 MR. HALBROOK: Oh, if I may answer, a shotgun
7 sometimes would be sold with the barrel disattached for
8 shipment because it -- to make it not so long.

9 But in any event, this issue boils down to
10 whether the consumer has to have two receivers or one
11 receiver. The Government concedes that the complete
12 pistol, the complete carbine, is not a short-barrel rifle.
13 Nothing in the statute says -- or makes this distinction
14 about one versus two receivers, but this presents a much
15 more serious problem by the fact that a hunter or target
16 shooter or any other person who may presently have a
17 pistol and carbine kit made by another company, whether
18 he's liable for 10 years' incarceration because he didn't
19 know that the Government insists on two receivers instead
20 of just one receiver.

21 So we feel like that's what this case boils down
22 to. We feel like the court of appeals' opinion followed
23 the statutory definitions carefully and correctly decided
24 this case, and we believe it should be affirmed.

25 If there are no further questions, thank you,

1 Your Honor.

2 QUESTION: Thank you, Mr. Halbrook.

3 Mr. Feldman, you have 3 minutes remaining.

4 REBUTTAL ARGUMENT OF JAMES A. FELDMAN

5 ON BEHALF OF THE PETITIONER

6 MR. FELDMAN: I'd like to just make a couple of
7 brief points. One is, there was a lot of discussion about
8 the administrative construction of the statute. We
9 address that in our reply brief at pages 7 to 13.
10 Respondent's point primarily rests on a bunch of
11 unpublished letters written by subordinate officials at
12 BATF.

13 Even among those, I fail to see any
14 inconsistency except for one letter that was written in
15 1973, which we informed him in 1985 was incorrect. In any
16 event, there's a statute that says those unpublished
17 letters are not to be relied on or cited as precedent.

18 What we are citing as precedent for the
19 established administrative construction that makes exactly
20 the kinds of distinctions that we've been making here, is
21 a series of revenue rulings. Again, we explain those in
22 our reply brief at 7 to 13. Those are published rulings,
23 and under the statute and regulations they are to be cited
24 as precedent and intended to be as -- a precedent.

25 As far as the existence of combination of parts

1 language in the statute with respect to machine guns and
2 some of the other devices, these -- every -- it is true
3 that what respondent has argued, which is that each of
4 these attempts to modify the National Firearms Act have
5 been -- involved hard-fought compromises.

6 The fact that Congress overhauled the machine
7 gun definition in 1968 and added an entirely new
8 definition of destructive devices which was not there
9 before and in the course of those two things specified
10 exactly what kinds of combinations of parts and in the
11 case of machine guns what other individual parts not in
12 combination were included and were not, I don't think it's
13 fair to read from that that they intended to restrict or
14 modify the -- what, from established administrative and
15 judicial construction, the meaning of the statute had been
16 prior to that time.

17 I just -- it's not a case -- it's really a case
18 of trying to infer something from congressional silence,
19 and I think that's an extremely perilous course, and I
20 wouldn't infer what respondent infers from it in this
21 case.

22 Finally, I think the ultimate question in this
23 case is -- does not have to do with respondent's specific
24 weapon, but the fact is that many -- that there are other
25 firearms that are sold, he has mentioned, with the barrel

1 detached, with the bolt detached, is very common in the
2 case of rifles.

3 The mere fact that a part or two is missing --
4 it has to be assembled by the ultimate consumer with
5 respect to a rifle, just as with respect to a bicycle or
6 some other form of consumer good, the fact that a single
7 piece has to -- or couple of pieces are missing that are
8 easily attachable doesn't mean that it's not the
9 manufacturer who has made that consumer good. It's the
10 manufacturer who makes the consumer goods and the consumer
11 who puts the final assembly together or adds the
12 additional piece or adds a battery to a radio or whatever
13 it may be.

14 If there are no further questions --

15 CHIEF JUSTICE REHNQUIST: Thank you,
16 Mr. Feldman.

17 The case is submitted.

18 (Whereupon, at 12:01 p.m., the case in the in
19 the above-entitled matter was submitted.)
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CERTIFICATION

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

NO. 91-164 - UNITED STATES, Petitioner V. THOMPSON/CENTER
ARMS COMPANY

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BY Michelle Sanders

(REPORTER)