

Supreme Court of the United States

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OCTOBER TERM, 1969

In the Matter of:

Docket No. 189

JAMES MINOR

Petitioner,

vs.

UNITED STATES,

Respondent.

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Place Washington, D. C.
Date October 15, 1969

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

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 JAMES MINOR, :
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 Petitioner; :
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 vs. : No. 189
 :
 UNITED STATES, :
 :
 Respondent. :
 :
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Washington, D. C.
October 15, 1969

The above-entitled matter came on for argument at
11:10 a.m.

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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- PETER L. STRAUSS, Esq.
Assistant to the Solicitor General
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Washington, D. C.
Counsel for Respondent

1 narcotics agent. The narcotics agent did not supply an order
2 form to the petitioner for the sale and the defendant was
3 sentenced to the minimum mandatory term of five years on each
4 count, to run concurrently.

5 I think before a discussion of the legal question
6 comes up that we should discuss the scheme of the statute as
7 it specifically relates to the order form provision.

8 A person who is registered to deal in narcotics and
9 has paid an occupation tax can apply to the Treasury Department
10 for order forms. These order forms, a copy of which is printed
11 as Appendix C to the petitioner's brief, comes in a book of 10,
12 in a book which looks like this (indicating).

13 The order form is what is called "executed" by the
14 potential buyer of narcotics; that is, he puts his name and
15 address on the order form and he lists the narcotics items that
16 he would like to buy. The form is issued in triplicate. He
17 then submits the original and the triplicate to the potential
18 buyer.

19 The buyer must supply the order, and on this order
20 form he must indicate the amount of drugs that he has supplied
21 and the date on which he supplied them.

22 Prior to the time that this order form is given to
23 the buyer, or at least at the time of the sale, the seller's
24 name and address must be entered on the front of the order form.
25 No provision makes clear who has the responsibility of filling

1 in the seller's name and address, but it is clear from Regula-
2 tion 151.185 that the seller does have the obligation of supply-
3 ing on the order form the amount of narcotics that he sells and
4 the date on which the sale is made.

5 The original and triplicate of the form are retained
6 by the seller. The duplicate is retained by the buyer of the
7 narcotics. One of the copies retained by the seller is sent
8 to the Treasury Department. He must keep the other copy in his
9 possession for two years, and during that time the order form
10 is available for inspection by any Federal or State law enforce-
11 ment official.

12 The self-incrimination aspect of the order form ob-
13 viously is that the seller himself must write on the order form
14 the amount of narcotics that he supplied and the date upon which
15 he supplied it. That would give law enforcement officials
16 information concerning violation of 21 U.S.C. Section 173, 174,
17 which is the illegal importation of drugs, the Section 4704(a),
18 which is the transfer of drugs outside of the original stamped
19 package.

20 Of course, there are violations of State statutes
21 as well, and since this transaction took place in New York, it
22 is important to note that the New York narcotics statute makes
23 it a felony to deal in heroin of more than an eighth of an
24 ounce.

25 So the order form provision would reveal to State

1 officials that the petitioner in this case committed a felony
2 as well as a crime.

3 Q The order form is here in Appendix C to your
4 brief.

5 A That is correct.

6 Q And the purchaser fills out, presumably, his
7 name and all that information which is to be filled in by pur-
8 chaser.

9 A That is right.

10 Q You say the vendor must fill in what?

11 A The last two columns in the middle section of
12 the order form --

13 Q To be filled in by the consignor.

14 A By the consignor, which is the vendor under the
15 scheme. He would have to fill in the number of packages first,
16 and the date on which the packages were supplied. Of course, by
17 reference it would indicate that he did supply narcotics on
18 the date and in the amount that he supplied them.

19 Q He fills in the number of packages furnished and
20 the date filled, it says.

21 A Right.

22 Q And then does that show the amount, because it
23 doesn't say "packages"?

24 A Well, the number of packages would indicate the
25 amount of the packages, or by weight.

1 Q A catalogue number over there on the left.

2 A Right.

3 Q Who signs it down there, "Name of Person or Firm
4 If Not An Individual"?

5 A The buyer would sign it, but the vendor's name
6 appears on it.

7 If I may direct Your Honor's attention to the two lines
8 just above the spaces for the drugs involved in the transaction,
9 it says "To" and "Street".

10 Q That is addressed to, by the purchaser; right?

11 A That is addressed to the seller. It is unclear
12 who has to fill that information in. There is no regulation
13 or statute which indicates who fills that in or when it has to
14 be filled in.

15 Q But the preposition "To" means it is directed
16 to. It is objective, not subjective.

17 A That is true, Your Honor, but even if it were to
18 be filled in by the buyer of the narcotics it wouldn't make
19 any difference, because it would be the seller himself who
20 would have to reveal the fact that he sold the narcotics and
21 the date on which he sold it, the number of packages that he
22 furnished.

23 Regulation 151.185 specifically states that it is the
24 vendor of the narcotics that must fill in that information. So
25 the form, even assuming that the buyer of narcotics would be

1 the person to fill in the seller's name, the seller's name would
2 be revealed by the order form and the seller himself would have
3 to supply information concerning the sale, and that is suf-
4 ficient, in my understanding of the prior cases of this Court,
5 to reveal incriminatory information which could be used or
6 could supply a sufficient link in a criminal prosecution.

7 Q Still, Mrs. Bamberger, it is true that the iden-
8 tity of the seller who has to fill in the quantity of the stuff
9 that is sold is supplied by the purchaser, and not by the seller,
10 isn't it? Isn't that the crucial thing from the standpoint of
11 the cases you are relying on?

12 A I don't think so, Your Honor, because if only
13 the seller's name were to appear on the form, without any indi-
14 cation that a sale had actually taken place, there would be no
15 incriminating information. The incriminating information is the
16 information that deals with the sale itself.

17 Q Right, but if the form reached the authorities'
18 possession in some way with the information only that the form
19 calls on the seller's supply, there would be a lot of informa-
20 tion without indicating any identity of the seller, wouldn't
21 there? That would be the only thing on it, wouldn't it?

22 A We have to assume, Your Honor, that the order
23 form has been properly filled out.

24 Q This is filed by the purchaser?

25 A Filed by the seller of the narcotics.

1 Q That is an independent requirement, isn't it?

2 A Yes, it is.

3 Q That he has to file it?

4 A Yes. He has to keep a copy and he has to file
5 the second copy with the Treasury Department.

6 Q He isn't being prosecuted for that, is he, for
7 failing to file?

8 A In this case he is not being prosecuted for fail-
9 ing to file.

10 Q He is being prosecuted for selling without re-
11 ceiving an order form.

12 A That is correct, Your Honor. As the Government
13 concedes, once the idea is established -- and that is the thrust
14 of our brief, a point which is not disputed by the Government --
15 that receiving the order form puts the obligation upon the buyer
16 in the sale to give the required information that the risk of
17 self-incrimination comes into play.

18 One of the Government's arguments in its brief is that

19 Q It seems to me he couldn't be prosecuted for
20 failing to fill it out and file, but does it mean he can't be
21 prosecuted for not getting an order form at all?

22 A I don't know if I am misunderstanding Your Honor.

23 Q The law requires him not to sell without receiving
24 an order form.

25 A That is correct.

1 Q And after he receives it, he is supposed to fill
2 it out.

3 A That is correct.

4 Q He is prosecuted for not receiving the order form
5 at all.

6 A That is correct, because once he receives the
7 order form, he is under --

8 Q Receiving the order form doesn't incriminate him
9 at all.

10 A No, but receiving the order form requires, or
11 puts the obligation on him to give the required information.
12 Once he has given that required information, he has violated --

13 Q He hasn't incriminated himself at all until he
14 files.

15 A The information concerning the goods that are
16 sold is also on the duplicate held by the buyer of the narcotics.

17 Q The buyer doesn't have to file it.

18 A No, but the buyer has to hold it for two years
19 and it is subject to the inspection of any Federal or State law
20 enforcement agent, so even if a copy is not filed, the infor-
21 mation would be available.

22 Q The charge is selling without filing. The charge
23 is selling.

24 A He is charged with selling without an order form.
25 That is correct.

1 Q And his only defense is that if he files the
2 order form, he will incriminate somebody.

3 A No, his defense is that because the receiving of
4 the order form and the record-keeping requirement associated
5 with the order form must be treated as a unified scheme in order
6 to carry out the purpose of Congress in enacting the statute;
7 that by receiving the order form he is compelled to give the
8 information and, therefore, he would be incriminating himself.

9 Under the Leary decision, defendant does not have to
10 initiate the action that will ultimately result in self-incrimi-
11 nation.

12 Q He didn't initiate. He initiated the selling of
13 the drugs. That is what he was doing.

14 A Let me change the language of that statement.
15 Under the language of Leary, the defendant does not have to begin
16 the legal process; that is, obtaining the order form which would
17 ultimately result, if he followed the scheme, as intended by
18 Congress.

19 Q Do I understand you that to obtain it would
20 incriminate him?

21 A Yes, because then he would be obliged to give the
22 information under the statutory scheme.

23 Maybe an explanation as to the scheme and the purpose
24 of the scheme might be helpful here, and that is point C of our
25 brief.

1 The Harrison Act was originally enacted as a taxing
2 scheme in order to control the flow of narcotics and to assist
3 the States in enforcing their narcotics statutes. The scheme
4 was enacted in 1914.

5 The order form provision was enacted as part of the
6 scheme in order to assist the Government in collecting the taxes
7 which it had imposed on narcotics transactions, and to avoid,
8 or to assist in determining who was involved in a narcotics
9 transaction attempting to avoid payment of these taxes.

10 So the order form provision is an integral part of
11 the total scheme of the taxation and, treated merely as a means
12 for physically transferring the narcotics from the seller to
13 the buyer, does not satisfy the statutory scheme.

14 The record-keeping aspects of the order form provision
15 are crucial in carrying out the scheme in order to help the
16 Government collect its taxes and in order to determine who is
17 evading the tax provisions.

18 Q Assuming he applied for the order form, period.

19 A Assuming he asked the Government agent for the
20 order form?

21 Q Period. That is all. Could he be convicted of
22 anything?

23 A Without making any sale?

24 Q That is right. No.

25 A No.

1 Q But if he applies for the order form and makes
2 the sale, then what happens?

3 A If he applies for the order form and doesn't
4 get it, and makes the sale, then he is prosecuted under Section
5 4705.

6 Q What right has been violated there?

7 A The same right; that if he got the order form he
8 would be compelled to give the information which would incriminate him under --
9

10 Q Would he be charged with not filling out the form
11 or charged with selling without it? What would he be charged
12 with?

13 A He would most likely be charged with making the
14 sale without the form. It seems to me that failure to fill out
15 the form, the statute would come into play only if he asked for
16 and received the order form and failed in some way to supply the
17 information.

18 Under our theory of the case, it doesn't make any dif-
19 ference, because under either section he would be prosecuted for
20 not giving the information and, therefore, being forced, if he
21 did give the information, to incriminate himself.

22 Q If he were not in the business, and was contem-
23 plating going in business, and got the form, how could he be
24 incriminated, because he might change his mind and not go into
25 business?

1 A This Court, I think, has already answered that
2 question in the Marchetti series of cases. In the Marchetti
3 case, the Government argument was that a person who registers
4 under the gambling tax statute can always choose not to become
5 a gambler and, therefore, he would not be incriminating himself.
6 This Court rejected that theory on the grounds that that didn't
7 have to be his choice. His choice was not to incriminate him-
8 self or not to violate the law.

9 Q I think maybe I didn't make myself clear.

10 He is thinking about changing his business from gambling
11 to selling dope, so he applies for the blank. After he applies
12 for the blank, people who have learned their lesson say, "Man,
13 that is not the business to get into," and he decides not to
14 buy any dope and not to sell any dope. Has he been injured?
15 Has he committed any crime?

16 A As a matter of the scheme, he would not be apply-
17 ing for the order form. His buyer, or the person who would buy
18 from him, would be applying for the order form.

19 Q They both don't decide not to go into business.
20 The buyer decides to quit and the seller decides not to sell.
21 He is not incriminated, is he?

22 A One difficulty with the question is that --

23 Q My whole point is, just the picking up of the
24 order blank -- that is the part I have trouble with -- is that
25 in and of itself self-incriminating? That is the only point.

1 A That, in and of itself, is self-incriminatory
2 because he is then obliged to reveal the information concerning
3 a sale. If he commits no sale -- I think that was the thrust
4 of Your Honor's question -- he would not, under those circum-
5 stances, be obliged to give any information, because he made no
6 sale, and I think in that case he would not incriminate himself.

7 Q Now the difference between that and this case.

8 A In this case, he made a sale.

9 Q But he didn't order a blank, either.

10 A The blank was not offered to him, nor did he re-
11 quest it, but it is our position that he did not have to request
12 it in the first instance, because had he done so, and had he
13 received it, he would have been obliged to fill it out and he
14 would have incriminated himself.

15 Since that obligation would have been thrust on him
16 had he received it, our argument is that he does not have to
17 take that risk, as this Court has stated in Leary, by even ask-
18 ing for it in the first place. In the Leary case, this Court
19 held that Leary did not even have to go to try to register be-
20 cause the Government's position in Leary was that if Leary had
21 gone to try to register so that he could buy marijuana, nobody
22 would have known that he was revealing information because he
23 wouldn't have been permitted to register and nobody would have
24 seen the form.

25 But this Court stated in Leary that Leary didn't even

1 have to go through the steps of beginning his registration be-
2 cause that might have subjected him, under the statutory scheme,
3 as it was intended by Congress to function, to the risk of
4 having to supply that information.

5 I think the Leary case directly covers the question
6 that Your Honor has asked here. He does not have to begin the
7 process, because to begin it would thrust the obligation on him
8 to supply that information.

9 I might also add that the decisions of this Court
10 treat the order form provision as an inherent part of the taxing
11 scheme, in addition to the legislative history treating it that
12 way.

13 Another problem in this case is whether the statute
14 was directed to those inherently suspect of criminal activities.
15 This was a question which was raised by the Circuit in its
16 opinion. Once again, I believe that the Leary decision, the
17 reasoning in the Leary decision, covers that problem in this
18 case, too.

19 The Court held in Leary that those who could register
20 to deal in marijuana would do so because if they didn't do so
21 they would be acting illegally and the penalties were quite
22 severe. Therefore, this Court was willing to assume that every-
23 body who could register would register, and that the only people
24 who would be faced with the self-incrimination problem would be
25 the people who could not register and, therefore, you would have

1 a distinct class of people involved in criminal activities
2 that the self-incrimination problem would be directed to.

3 This point is apparently not disputed by the Govern-
4 ment because on page 11 in its brief, the Government states that
5 anybody who could register under State law -- well, nobody could
6 register under Federal law unless they were permitted to register
7 under State law. Thus, we have the assumption that everybody
8 who could register would register and falls within the Leary
9 reasoning.

10 Of course, this case deals with heroin. Since under
11 the statutes relating to narcotics as they are presently con-
12 stituted there is no legal dealing in heroin, therefore the
13 application of this statute to any heroin transaction automatic-
14 ally results in the application of it to a class of individuals
15 that is suspect of criminal activity.

16 The Government, in its brief, indicates that to avoid
17 violation -- and I think this goes back to Mr. Justice Marshall's
18 question -- the defendant need not act. I think that reasoning
19 was put to rest by this Court in Marchetti, where the Government
20 argued that the defendant need not gamble once he has registered.
21 The Court said that is not true where, if he complies with the
22 statute, he would reveal information which would subject him to
23 criminal penalties under sections. I think the same reasoning
24 applies to this case.

25 Q That reasoning would apply to this case only if

1 there were a Federal statute that required a seller who sold
2 somebody narcotics without receiving an order form to report
3 that fact. That is the missing link in this case, isn't it?

4 A I don't think so, Your Honor, because then con-
5 ceivably if the Government could find out that he made such a
6 sale, which they often do by the use of undercover narcotics
7 agents, they could prosecute him under Section 21 U.S.C., Sec-
8 tion 173-174.

9 Q What is that one?

10 A That is the illegal importation -- well, conceal-
11 ment, facilitation and possession of narcotics that have been
12 imported with the knowledge that they have been imported, and
13 possession gives rise to the presumption of knowledge and impor-
14 tation.

15 Of course, the defendant could also have been prosecuted
16 under the State statutes.

17 Q We cannot get into that until we have such a
18 case, can we?

19 A No, but it is in answer to the question.

20 Q You are speculating on a future possibility
21 which isn't before us today.

22 A I would like to reserve the remainder of my time
23 for rebuttal.

24 MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Bamberger.

25 Mr. Strauss?

XXXX

1 ARGUMENT OF PETER L. STRAUSS, ESQ.

2 ON BEHALF OF RESPONDENT

3 MR. STRAUSS: Mr. Chief Justice, and may it please
4 the Court:

5 I think petitioner's arguments rest on an assumption
6 which is demonstrably false and which, it seems to me, has in-
7 formed the questioning during that time of her argument; that
8 is to say, the assumption that petitioner had an opportunity to
9 provide the Government with incriminating information and then
10 declined to do so in order to protect his Fifth Amendment rights.

11 Such arguments could be entertained only where the
12 order forms, for which Section 4705 provides, are actually re-
13 ceived by the seller of narcotic drugs. It is clear from the
14 Government's proof in this case, proof entirely independent of
15 anything that petitioner said, or any information that he may
16 have provided to the Government, that petitioner received no
17 order form from the purchaser, or Government agent, as a matter
18 of fact.

19 It is clear from the statutory scheme, as a matter of
20 law, that neither petitioner, nor anyone willing to purchase
21 narcotics from him, could lawfully have obtained order forms
22 for that purpose.

23 In these circumstances, it is entirely premature to
24 ask what Fifth Amendment questions might be raised in a case
25 where an order form is actually presented and an obligation to

1 disclose then arises.

2 Q Is that the general sanction behind it? If there
3 is a sale, on the presentation of an order form, then there is
4 an obligation upon the seller to keep one copy of the form for
5 a period of time and to send another one in.

6 A Yes, sir.

7 Q Is that enforceable through a criminal sanction?

8 A It is, through the criminal sanction, among
9 others, of 26 U.S.C., Section 7203, which punishes generally
10 any failure to conform to the reporting requirements of Federal
11 tax law.

12 It is not punishable under Section 4705(a) and never
13 has been punished under that section. Of course, the penalties,
14 as this Court recognizes, are widely disparate. Section 4705(a)
15 is the most severe of Federal narcotics violations. Section 7203
16 states a misdemeanor.

17 We are dealing with entirely separate types of things
18 and what I hope to do is to persuade the Court that these two
19 different forms, if you like, putting of a two-step procedure,
20 first receive an order form and second provide some information
21 on that form, each step serves an important function in the
22 course of Federal narcotics regulation.

23 In these circumstances, as we say, it is entirely
24 premature to ask what Fifth Amendment questions might be raised
25 if an order form is actually presented. The requirement that

1 in the first instance an order form be received is independent,
2 and neither that requirement, nor petitioner's prosecution for
3 its violation, raises any question of self-incrimination.

4 That, in brief, is the Government's case. The Fifth
5 Amendment provides, and I quote, that "No person shall be com-
6 pelled in any criminal case to be a witness against himself."

7 Until petitioner receives an order form, he is under
8 no pressure whatever to give any information of any kind to the
9 Government. The only pressure is the statutory command enforced
10 by criminal prosecution in this case that he not sell.

11 Thus, the Government has not, as petitioner has sug-
12 gested it had, abandoned its contention that the obligation to
13 receive an order form is distinct from the obligation to report
14 and retain certain types of information and, for that matter,
15 to refrain from fraudulent use of order forms, obligations which
16 are imposed by other parts of Section 4705 and by Federal income
17 tax law generally.

18 Of course obligations don't stop with receipt of the
19 form. Once an individual in a narcotics sale has received the
20 form, then the further obligation does arise to report. That is
21 a different case. That is the case that isn't here.

22 Q What exactly is the form he receives?

23 A The form is the form set out in the appendix to
24 petitioner's brief as Appendix C, which provides for a statement
25 by the purchaser as to what kind of drugs he wants, and how much.

1 It has a place for the purchaser's name and his signature. It
2 is to be addressed to a particular seller. It has a place for
3 the seller to fill in what drugs he has sold, and on what date.

4 I may say, simply to fill in some questions that were
5 raised during petitioner's statement, two factors concerning the
6 form.

7 The form is not issued in blank. By statute, Section
8 4705(f), before the Secretary may issue the form he must cause
9 to be stamped on it the name of the purchaser, and again by
10 statute, Section 4705(g), it is a felony --

11 Q He sends that form to someone.

12 A To the purchaser, Your Honor.

13 Q Which requires him to tell whether he has pur-
14 chased something. Is that what you are saying?

15 A No, Your Honor. Someone wishing to purchase
16 narcotics, someone who must be a lawful registrant by statute,
17 applies to the Secretary of the Treasury to get a book of these
18 forms. They come in a book of 10. When the Secretary of the
19 Treasury issues the forms, before issuing them he stamps the
20 name of the purchaser on the forms, so it is not a book of blank
21 forms. It is a book of forms which only, let's say, the Dart
22 Drug Company can use. The Dart Drug Company may have legiti-
23 mate need to purchase narcotics for medical use. It applies for
24 a book of these forms. It will receive 10 forms and they will
25 be stamped "Dart Drug Company" and it is then a felony for any

1 other person to use those forms.

2 They are available only to a specific purchaser. When
3 the purchaser wishes to make a purchase of narcotics, he fills
4 out this form in triplicate indicating what he wishes to pur-
5 chase, and he may or may not fill in the name of the seller, as
6 I understand. That is entirely voluntary with him. Obviously,
7 he will put the name of the seller someplace, on an envelope,
8 for example, in which he may send the order, or he may write a
9 covering letter, but there is no obligation that he fill in the
10 name of the seller.

11 It is sent to the seller, and if the seller's name is
12 not filled in, then the seller must, among other things, pro-
13 vide his name as well as the confirming information about what
14 drugs have been sold.

15 Q And the quantity?

16 A And the quantity, the confirming information;
17 that is right; that drugs have been sold in a quantity.

18 Q I take it there are some buyers who can really
19 get order forms and present them to the seller.

20 A That is right; 400,000 of them.

21 Q And there are some situations in which the seller
22 could, legally, without incriminating himself, fill out the
23 form and file it.

24 A Approximately 200,000 executed triplicates are
25 received by the Secretary of the Treasury each month. In the

1 fiscal year 1967, only four persons entitled to use order forms
2 were convicted of narcotics offenses.

3 Q So there are people who can get order forms.

4 A The very overwhelming majority of transactions
5 where order forms are used are legal, and that, indeed, is our
6 point.

7 Q I misunderstood the situation, then, factually.
8 I thought that there was absolutely no legal traffic in heroin
9 whatsoever.

10 A I am speaking of narcotics generally. I am sorry.

11 Q We are talking about heroin in this case, I
12 thought.

13 A I am sorry. I was treating it as the Harrison
14 Narcotics Act. There is no one who could obtain an order form
15 for heroin.

16 Q It is strictly outlawed, no legal dealings in it
17 whatever in the United States of America. That is what I thought.

18 A Not quite. The Secretary of the Treasury is in
19 a position to authorize --

20 Q Well, for experimental purposes by the Food and
21 Drug Administration, or something.

22 A That is right. There are no legal purchases.
23 All experimental uses at this time are carried on with the
24 stocks that the Secretary has through seizures.

25 Q Right.

1 A You are correct so far as heroin is concerned.
2 But this is part of a larger statutory scheme.

3 Q This is a heroin case.

4 A And this statute does not distinguish as to heroin.

5 Q But it requires him to make the report with refer-
6 ence to heroin, doesn't it?

7 A No, Your Honor, it does not, because under the
8 statute, it is impossible to secure an order form for the pur-
9 chase of heroin. It is a felony to use an order form to purchase
10 heroin, for the purchaser. The order forms may only be used to
11 purchase a lawful drug for a lawful purpose. Heroin is an un-
12 lawful drug for which there is no lawful purpose.

13 So it is a felony to use an order form for the purpose
14 of purchasing heroin. Now, it may be that in some obscure
15 situation this could somehow happen. Forty of the roughly
16 2,400,000 order forms that were used in 1967 were stolen, approxi-
17 mately, and it is conceivable that somewhere, someone, having
18 stolen an order form which was not issued to his name and which
19 was, therefore, a felony for him to use, filled in something
20 with respect to heroin and handed it to someone who sold him
21 some heroin.

22 The Government's point in that situation is that
23 whatever violations of Federal statutes may have been involved,
24 there was no violation of the statute here at issue. The statute
25 here at issue, Section 4705(a), only punishes the situation where

1 someone makes a sale without receiving an order form,

2 Q For the sale of heroin?

3 A Or any other narcotic drug. The statute does not
4 limit to heroin.

5 Q I know, but it does include heroin.

6 A It includes heroin; that is right.

7 Q Even though, in fact, if an order form had been
8 used, in keeping with everything else, the subject being heroin,
9 he might have been prosecuted under what?

10 A The purchaser could have been prosecuted under
11 Section 4705(g) for fraudulent use of an order form. The seller
12 could certainly be prosecuted under the various statutes that
13 make possession of heroin an offense, Section 174, Title 21,
14 Section 4704 of Title 26, and quite clearly there would be no
15 tax stamps on that package of heroin which had been sold.

16 But there could be no prosecution under Section 4705(a).

17 I do think it is important to indicate what the
18 separate function of this requirement that you receive an order
19 form is.

20 Q Is it the Government's practice to prosecute
21 these heroin sales where no order form is used under 4705(a)?

22 A Since 1956, when the penalty provisions of the
23 Harrison Narcotics Act were amended, to differentiate among the
24 various offenses, and the penalty for violation of Section
25 4705(a) was made more severe than the others, the practice has

1 has been to use Section 4705(a) for all illegal trafficking,
2 peddling, of all narcotic drugs, including heroin.

3 Q You already told us that even if they had used
4 the order form, nevertheless, both purchaser and seller could
5 have been prosecuted for other offenses.

6 A For other offenses.

7 Q What do they add? What is the practice of adding
8 in the way of counts when they prosecute a heroin sale without
9 an order form under 4705(a)? What others do they add?

10 A I think it varies from case to case. They do
11 add, on occasion, counts under Section 4704 --

12 Q They added something here, as I recall it. There
13 was another count in this case.

14 A Which was, I think, dismissed. There is no
15 conviction.

16 Q But there is a practice of adding others, is
17 there not?

18 A Very often, and I may say that is another issue.
19 It may be an issue the Court wishes to examine. It is not an
20 issue, I think, presented by the petition in this case.

21 Q If a seller received an order form and then
22 failed to fill it out, but made the sale, could he be prosecuted
23 under 4705?

24 A No, not under 4705. The purchaser could be
25 prosecuted under 4705(g), but not the seller.

1 Q But not the section that is used here against
2 the seller.

3 A No. The seller could only be prosecuted for
4 failure to file the requisite forms under 7203 of the Internal
5 Revenue Code, and that really brings out the two different func-
6 tions that this statute serves, and I do have to talk about the
7 Harrison Act generally in this situation.

8 We have on the one side the channel of legitimate
9 trade in narcotic drugs. Narcotic drugs, while they are very
10 dangerous to individuals, addictive, still have important medi-
11 cal uses and hundreds of thousands of pounds of opium are im-
12 ported into this country legally every year for manufacture into
13 various drugs, not including heroin, and used in medical trade.

14 Those legally imported drugs are supervised from the
15 moment of entry into the United States to the moment of their
16 consumption by use of the reports made on triplicates by the
17 hundreds of thousands of legal users of narcotic drugs every
18 month. That is the function, if you like, of the reporting
19 aspect of the order form requirement.

20 The function of the receipt aspect of the order form
21 requirement which we are talking about here is quite different.
22 By requiring that you receive an order form, the Government is,
23 in effect, there shall be no sales but legal sales. You can only
24 obtain an order form lawfully to use in a narcotics transaction
25 and you can only use the order form lawfully if the sale is a

1 legal one under Federal law.

2 That being the case, the absence of an order form,
3 the failure to receive an order form, if the Government can
4 prove it in any narcotics case, is immediate proof that the
5 sale was an illegal one, and it is that separate function which
6 petitioner seeks to affiliate with the question of information
7 gathering, and thus draw a conjurer's circle around himself,
8 if I may repeat that phrase that Justice Holmes used so long
9 ago.

10 I think that it should then be quite clear that this
11 case is not in the line of cases which began in this Court
12 with Albertson versus Subversive Activities Control Board. Those
13 cases held, in effect, that the Fifth Amendment forbids statutes
14 whose usual impact is to make a separate crime out of an indivi-
15 dual's failure to report his criminal acts to the Government.

16 Here the violation of the statute consists not in
17 failure to report, but in the positive act of selling narcotics
18 to a person who has not proved his eligibility as a legal pur-
19 chaser by presentation of an official order form for the
20 narcotics bought.

21 The question of reporting, as I have just said, never
22 arises in that context because order forms cannot be obtained.
23 It is only after an order form has been presented, in circum-
24 stances not present here, and in which the overwhelming majority
25 of transactions are entirely legal, that any such question arises.

1 I may say, Justice Stewart, in response to the remarks
2 that you made before about this being heroin, and to that ex-
3 tent a heroin statute, in the processing of these forms there
4 is no particular distinction made as to what drug is reported
5 on them. There is no different color for an order form that
6 might be used for one drug than for another. There is no dif-
7 ferent filing system. The form is part, and I think the Govern-
8 ment is entitled to insist that it be treated as part, of the
9 overall Federal scheme of regulating traffic in narcotic drugs.

10 Q Who fills in, on the form, the items there by
11 number, catalogue number, and so on.

12 A It varies, as I stated before.

13 Q Does the applicant?

14 A The applicant fills in the left-hand four columns.
15 The consignor fills in the right two columns.

16 Q I am talking about those on the left hand. The
17 consignor is the vendor, the seller.

18 A Right.

19 Q Did you say earlier that all traffic in heroin
20 is illegal to anybody?

21 A That is essentially true. There are circum-
22 stances where the Secretary of the Treasury authorizes the re-
23 lease for experimental purposes, but with that exception --

24 Q It is not included in narcotic drugs as defined
25 in Section 4731?

1 A It is subject to regulation under the Act, but
2 while subject to regulation under the Act, through other Acts
3 it is made a drug which cannot be legally obtained. I think
4 one of the principal acts, for example, is the Narcotics Manu-
5 facturing Act of 1960, which established a Federal system of
6 licensing narcotics manufacturers. I am afraid it is not set
7 out in the brief.

8 Q No, it is not.

9 A It would be found at 21 United States Code, Sec-
10 tion 500 and following, and the licensing provisions are Section
11 505 and 506.

12 In Section 502 you will find a list of legally manu-
13 facturable drugs, which does not include heroin, so there can
14 be no Federal license for manufacturing heroin in the United
15 States as the law presently stands. Under the Harrison Act,
16 Section 173 of Title 21, it is unlawful to import crude opium
17 for the purpose of manufacturing heroin.

18 Q I think you perhaps didn't have an opportunity
19 to fully answer my question.

20 When the applicant sends this in, as I understood it,
21 you said that the applicant fills --

22 A Sends it to the seller.

23 Q No, no. When the applicant sends in and applies
24 for an order form to the Treasury Department.

25 A Oh, excuse me. This is not this form. To apply

1 for an order form is not this form at all.

2 Q I see. This is what he gets back.

3 A It is an entirely different form. Counsel has a
4 copy of it here. It is a regular printed application form for
5 a number of order forms.

6 Q Does he indicate on that what drugs he wants to
7 purchase?

8 A No, there is no indication. All that is neces-
9 sary to indicate is his name and registration number. There are
10 limitations under the regulations. Unless he is a manufacturer
11 or a wholesaler he cannot obtain more than ten, one book, at a
12 time.

13 Q You told me there would be no order form for
14 heroin because all sales would be prohibited unless licensed
15 by the Secretary.

16 A No. Under Section 4705(g), Your Honor, order
17 forms can be used only for a lawful purpose. It is a felony to
18 use an order form for an unlawful purpose. You don't have to
19 tell the Secretary what you want the order form for. If you
20 were the Dart Drug Company you would have a stock of order forms
21 in your office, or you could obtain order forms. You wouldn't
22 commit the felony until you wrote down on the order form that
23 you wished to buy five envelopes of heroin, and attempted to
24 use the order form for that purpose, which is an unlawful pur-
25 pose.

1 Q Then the order form is irrelevant, in your
2 analysis, to this whole problem.

3 A Yes. What is relevant is whether or not the
4 order form was received or not. In Nigro, this Court talked
5 about this order form as a kind of certificate of legality of
6 the transaction.

7 Q If the whole thing is illegal, I don't see how
8 the order form has anything to do with it.

9 A I agree that it is perhaps more cumbersome than
10 Congress need have done. It is simply a means of identifying
11 the illegal transactions. Since there will be no order forms
12 used for heroin, any traffic in heroin necessarily will have an
13 order form missing.

14 Q If there were an order form, it would be a vio-
15 lation of the law on the part of the purchaser.

16 A That is correct; if there were an order form
17 that was filled out for heroin, that would be a violation of
18 law. That is correct.

19 Q That would be a violation of what?

20 A Section 4705(g), which is not at issue in this
21 case.

22 I think some notion of the distance between this
23 statute and the statutes that were involved in Albertson,
24 Marchetti, Grosso, Haynes and Leary can be obtained by a closer
25 view of the classes subject to the provisions involved in those

1 cases.

2 In Albertson, the statute involved made it an offense
3 for administratively identified members of the Communist Party
4 not to register as such.

5 Marchetti and Grosso involved the obligation of per-
6 sons to identify themselves as professional gamblers, outlawed
7 in 49 States.

8 As this Court interpreted the statute at issue in
9 Haynes, that case required registration in circumstances which
10 would almost always establish prior criminal conduct.

11 In Leary and Covington last term, the petitioners
12 were obliged, by payment of an extraordinary tax, \$100 per
13 ounce, to identify themselves as members of an entirely criminal
14 class.

15 In each of these cases, it was not only the petitioner,
16 but all or virtually all the persons subject to the requirement
17 in issue who had engaged in criminal conduct, and thus ran the
18 risk of incriminating themselves if they did what the Government
19 commanded.

20 Q I understood you to say that the order from the
21 Secretary is irrelevant.

22 A For the purpose of prosecuting this case, and
23 for the purpose of Section 4705(a) cases generally, the only
24 thing which is relevant about the order form is whether it is
25 received or not. Any information it may have on it, any

1 information that may later be put on it, is irrelevant.

2 Q The indictment charges that defendant unlawfully,
3 willfully and knowingly did sell, barter, exchange and give away
4 to Guzman approximately 19,500 grams of heroin hydrochloride,
5 a narcotic drug, in that the said sale, barter, exchange and
6 giving away was not in pursuance of a written order of the said
7 Francisco H. Guzman on a form issued in blank for that purpose
8 by the Secretary of the Treasury of the United States or his
9 delegate.

10 What does that mean?

11 A I think that is entirely consistent with what
12 I just said, Your Honor. These forms are issued in blank for
13 the purpose of engaging in lawful transactions --

14 Q But not for the purpose of engaging in the pur-
15 chase of heroin.

16 A Your Honor, the Secretary of the Treasury does
17 not know what purpose they will be used for.

18 Q But I understood you to tell Justice Douglas
19 that that was wholly irrelevant because he couldn't issue one
20 for the purchase of heroin.

21 A I think I have been misunderstood. The form
22 could not legally be used for the purchase of heroin.

23 Q Could not legally be used?

24 A That is correct.

25 Q Then if used them, he would show that he was

1 violating the law, wouldn't he?

2 A The purchaser would.

3 Q You are prosecuting here the seller, aren't you?

4 A I am prosecuting the seller.

5 Q You say, however, that only the purchaser could
6 be prosecuted, but you are prosecuting the seller.

7 A No, Your Honor.

8 Q Only the man who did it without this order of
9 the Secretary of the Treasury, or whatever he is.

10 A If someone attempted to use an order form to
11 purchase heroin, a situation which, to my knowledge, has never
12 occurred, if someone attempted to do that, he would be guilty
13 of misuse of an order form, which is a felony under Section
14 4705(g) of the statute.

15 It is an entirely separate thing to say that if some-
16 one sells a narcotic drug, including heroin, without receiving
17 any order form at all, he is guilty of a felony under another
18 section of the statute, Section 4705(a), and that case is what
19 we have in issue here today.

20 (Whereupon, at 12:00 Noon the argument in the above-
21 entitled case was recessed, to reconvene at 12:30 p.m. the
22 same day.)

1 (The argument in the above-entitled matter resumed
2 at 12:30 p.m.)

3 MR. CHIEF JUSTICE BURGER: Mr. Strauss, you may pro-
4 ceed.

5 FURTHER ARGUMENT OF PETER L. STRAUSS, ESQ.

6 ON BEHALF OF RESPONDENT

7 MR. STRAUSS: Thank you, Mr. Chief Justice.

8 I thought all I would do in the few minutes that re-
9 main, and since there had possibly been some confusion on the
10 subject, and I think I may have contributed to it, to go through
11 again the procedures by which persons may lawfully obtain nar-
12 cotic drugs.

13 I think the appropriate place to start --

14 Q Are you distinguishing between narcotic drugs
15 and heroin?

16 A The statute does not do so.

17 Q I understand it doesn't, but this case is heroin.

18 A That is right, one of the narcotic drugs under
19 the statute, and I think the Government is entitled to treat it
20 as such. It shares all relevant characteristics with those other
21 drugs. A determination has been made that it has no lawful
22 medical use.

23 On the basis of that determination under the Federal
24 statutes for licensing the manufacture of narcotic drugs, there
25 is no license for the manufacture of heroin. Under the Federal

1 Statute regulating the importation of the raw materials of
2 narcotic drugs, you may not import materials for the purpose
3 of making heroin. But aside from those particular restrictions
4 based on that particular Congressional finding, the drug is
5 treated as all other drugs under the scheme.

6 Section 4721 and 22 impose the obligation to register.
7 In the particular circumstances we are talking about, probably
8 the relevant obligation is to register as a wholesaler or as
9 a retailer of narcotic drugs. Those sections make quite clear
10 that the only persons who may register are persons lawfully
11 entitled to sell narcotic drugs; that is, persons who would
12 violate no law of the state if they sold narcotic drugs.

13 Generally, once a person has registered and only in
14 that circumstance as provided in Section 4705(f), he may apply
15 to the Secretary of the Treasury to obtain blank order forms,
16 ten to a book, with which to purchase narcotic drugs from the
17 licensed manufacturers of those drugs.

18 The order forms are issued to him entirely in blank
19 with one exception: His name and address is stamped on it by
20 the Secretary. There is no requirement that he identify what
21 drugs he means to purchase or how many. Obviously that would be
22 impractical. As I mentioned before, there are 400,000 regis-
23 trants under this Act. There are well over 2 million transac-
24 tions annually using order forms. Obviously to ask someone to
25 sit down and pass on and record each effort to obtain permission

1 to make a purchase of such and such a narcotic drug would be an
2 impractical and unnecessary thing, which Congress has chosen not
3 to do.

4 The lawful purchaser then receives these order forms
5 in blank. When he has occasion to make a purchase of any drug,
6 he fills it out in the manner you can see in Appendix C of
7 petitioner's brief and sends it to the seller. He may or may
8 not put the seller's name in. That is not important. If he
9 does not do so, then the lawful seller will do so.

10 It is, I think, worthy of note that if he uses that
11 order form for an unlawful purpose, which would include the
12 purchase of a drug he is not lawfully entitled to purchase,
13 heroin, he would be committing a felony under Section 4705(g)
14 which is not a provision in issue, again, in this case.

15 When the seller receives that form, it is, I would
16 say in all cases, if you were to put to me a hypothetical in
17 which the seller received the form calling for the purchase of
18 heroin, which is physically possible, a purchaser could write
19 in heroin on the form, I would have to respond, yes, that is
20 conceivable, although we don't know it has ever happened.

21 I can say at least in all but the very remotest of
22 situations, when he receives that order form, it is a certifi-
23 cate that the transaction that is about to take place is a
24 legal transaction. It serves that important function. In its
25 absence, one knows that the transaction that has taken place is

1 an illegal transaction and without need for any information on
2 the part of the seller of any type. That is the Government's
3 case. I believe the judgment below should be affirmed. Thank
4 you.

5 MR. CHIEF JUSTICE BURGER: Mrs. Bamberger?

6 REBUTTAL ARGUMENT OF PHYLIS SKLOOT BAMBERGER, ESQ.

7 MRS. BAMBERGER: Thank you, Your Honor.

8 I will address myself briefly to three questions which
9 were raised in the argument.

10 First, Mr. Justice Stewart spoke of a missing link.
11 I would suggest that in this case, while the statute is not
12 identical to those of the prior cases in this area, the differ-
13 ence is not material and should not be dispositive because Leary
14 assumes that the statute will function as it was intended to do
15 by Congress.

16 To do that, or to interpret the statute in any other
17 way, or to apply it in any other way undermines the rules that
18 were established with respect to the Fifth Amendment in the
19 series of cases prior to this.

20 So, we come to determine how that missing link effects
21 these rights. It is our position that the Fifth Amendment right
22 is the same here as it has been in prior cases. Although, the
23 very words of the section which provide criminal penalty do not
24 include the provisions requiring the information. The rest of
25 the statute requires the incriminatory information and under the

1 Congressional scheme, it must be interpreted as a whole.

2 Thus, if the defendant receives the order form as has
3 been stated by the Government, he must give the information.
4 His position then is no different if he does not ask for it with
5 the knowledge that if he receives it he will have to supply the
6 incriminating information. He merely can stop, as this Court
7 has said previously, at the initial stages of the proceeding
8 rather than waiting until other statutes come into play in a
9 different factual context.

10 The Government has indicated, in its argument that
11 the application of the order form procedure to the heroin trans-
12 action, the order form procedure has as its purpose the disclo-
13 sure of information as applied to the heroin transaction. This
14 must always result in the disclosure of incriminating informa-
15 tion as to the seller. We are not concerned here with the
16 purchaser.

17 The effect of Section 4705 is to give the transaction
18 an appearance of legality since it says that a sale can be made
19 with an order form while the sale may be illegal under other
20 sections. That is precisely the problem raised. By falling
21 into 4705(a), the transaction appears to be legal and complying
22 with it appears to make it justifiable and legal. At the same
23 time, complying with it reveals the violations of the other
24 statutes which would be violated by heroin transaction.

25 Again, I can only indicate that the missing link is

1 not substantial because compliance in the receipt of the order
2 form cannot be separated because of the Congressional intent
3 with the statute from the information giving aspects of the
4 statute. Even though another statute may come into play in a
5 different factual context, and that other statute may also
6 violate the Fifth Amendment, this statute does too if we look
7 at the full implications of compliance with it.

8 Q Mrs. Bamberger, suppose a state decided to
9 simplify its procedures, and perhaps this hypothetical is too
10 simplistic but let us try it, for admission of lawyers from
11 other states who moved into the state in question and said that
12 admission to the Bar could be obtained upon filing a certificate
13 by the applicant that he was admitted to the Bar in some other
14 state, giving the date of his admission and other details. He
15 plans to practice in this state, but he has not had time to go
16 to law school and does not want to take the trouble. And, so
17 he just is determined to back this law there. He says he is
18 confronted with the choice of either committing perjury by
19 filing a false certificate that he is admitted in Florida or
20 Georgis while not engaging in the practice of law at all, would
21 you think that that kind of a statute poses these problems?

22 A No, I don't, Your Honor, because that statute
23 does not give his act an appearance of legality by indicating
24 that he has violated some other statute.

25 If he were to file such an affidavit, he would be

1 practicing law illegally because he had not been properly
2 admitted. But it would not, the Statute itself, compel him
3 to reveal information which would violate another statute, which
4 would indicate a violation of another statute.

5 Q It confronts him with the choice of either not
6 being able to practice law in that state or committing perjury
7 in order to get this simplified, overnight admission.

8 A Yes, but that is not this case where it permits
9 him to make the sale if he reveals information which would
10 indicate a violation of other statutes.

11 MR. CHIEF JUSTICE BURGER: Thank you. The case is
12 submitted.

13 Mrs. Bamberger, you acted at the appointment of the
14 Court. We thank you for your submission.

15 We thank you for your submission, Mr. Strauss.

16 Whereupon, at 12:43 p.m. the argument in the above-
17 entitled matter was concluded.