

Supreme Court of the United States

OCTOBER TERM, 1969

Supreme Court, U. S.

OCT 21 1969

In the Matter of:

Docket No. 271

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 MICHAEL BUIE,
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 Petitioner,
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 vs,
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 :
 UNITED STATES,
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 :
 Respondent.
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 SUPREME COURT, U.S.
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Place Washington, D. C.

Date October 15, 1969

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C O N T E N T S

	<u>ORAL ARGUMENT OF:</u>	<u>P A G E</u>
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2	David A. Diamond, Esq., on behalf of Petitioner	2
3	Joseph J. Connolly, Esq., on behalf of Respondent	20
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6	David A. Diamond, Esq., on behalf of Petitioner	34
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 4 MICHAEL BUIE, :
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 5 Petitioner; :
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 6 vs. : No. 271
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 7 UNITED STATES, :
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 8 Respondent. :
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 9 -----x

Washington, D. C.
October 15, 1969

The above-entitled matter came on for argument at
12:43 p.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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Counsel for Respondent

1 count of not selling pursuant to an order form.

2 The case was affirmed by the Second Circuit, relying
3 solely on United States against Minor. The Second Circuit
4 held that the marijuana tax statute was, for practical pur-
5 poses, the same as the Narcotic Drug Act involved in Minor; that
6 there was no risk of self-incrimination to a transferor; and
7 that the transferor of marijuana was not a person inherently
8 suspect of criminal activities; and that the profession of trans-
9 ferring marijuana or being involved in marijuana transactions
10 was not an inherently suspect illegal business.

11 This was not a statute designed to close down criminal
12 activity but, rather, to regulate a legitimate activity.

13 Briefly, the Marijuana Tax Act statutory scheme con-
14 sists of an occupational tax provision, series of provisions,
15 requiring any transferor of marijuana, anyone who deals in
16 marijuana, which is defined very broadly and includes selling
17 it and giving it away, to register as a dealer, to pay an occu-
18 pational tax, and to keep a record of his transactions.

19 There is also a transfer tax provision which requires
20 a transferee, a purchaser or acquirer of marijuana, to obtain
21 an order form from the Treasurer of the United States. He must
22 pay in advance the tax on the material to be acquired. The tax
23 is either at the rate of \$1 an ounce or \$1.00 an ounce, depending
24 on whether the transferee is himself registered. He pays the
25 tax based upon the amount he intends to acquire.

1 In order for him to acquire that order form, he must
2 place on file with the Government, prior to obtaining the form,
3 and prior to consummating the transaction, his own name and
4 address and the name and address of his proposed transferor, as
5 well as the amount of the drug he proposes to transfer.

6 There are numerous exemptions from the order form re-
7 quirement and, as the Court noted in Leary, they are essentially
8 all of the legitimate transactions that are involved in marijuana,
9 transfers by doctors to patients, by pharmacists to customers
10 pursuant to doctors' orders, by officials of the Government,
11 and transactions for export, so there is left subject to the
12 order form requirement a residual class essentially illegal
13 transactions.

14 The information obtained by the order form, copies of
15 the order form, are made available to any State or local offi-
16 cial who is concerned officially with the enforcement of local
17 narcotics laws.

18 Possession of marijuana is illegal in every State of
19 the Union with certain very limited exceptions corresponding
20 largely to the exemptions of the order form requirements under
21 4742.

22 Q You can't get an order form from the Secretary
23 unless you show that you are legal under State law, can you?

24 A No. Any person may obtain an order form. Mari-
25 juana statutes differ radically, and narcotics statutes, in this

1 regard. Any person desiring to acquire an order form may
2 acquire it. If he is a so-called legitimate purchaser, one who
3 is registered under the occupational tax sections, he pays \$1
4 per ounce. If he is an illegitimate purchaser, one who is not
5 registered, he pays \$100 an ounce. But any person off the
6 street who wants to acquire marijuana for smoking or any other
7 purpose may acquire an order form.

8 Q And pay \$100 an ounce.

9 A And pay \$100 an ounce; yes, sir.

10 The Leary case involved such a purchaser. The Leary
11 case held that the marijuana statute, the transfer provisions,
12 as applied to an unregistered transferee, who was Leary, applied
13 to a person inherently suspect of criminal activities and
14 existed in an area permeated with criminal statutes, particu-
15 larly by virtue of the exposure of the information contained on
16 the order form to the State authorities.

17 It held, therefore, that the privilege against self-
18 incrimination applied. The Court in Leary also refused to sever
19 the statute so as to make the order form applicable but with-
20 draw the information from the perusal of the State.

21 It also applied the privilege against self-incrimi-
22 nation to prospective acts, since in the Leary case the pur-
23 chaser acquired the order form prior to the time that any trans-
24 action was consummated.

25 Petitioner here contends that the Leary reasoning

1 applies fully to the position of a transferor of marijuana.
2 Under the same order form procedure, the acts required of the
3 transferor, in order to comply with the provisions of 4742,
4 yield an even greater danger than they did to the transferee of
5 marijuana.

6 I reviewed briefly the acts which we consider con-
7 stitute the self-incrimination aspects of this thing in terms of
8 the transferor. There are four acts, some or all of which may
9 be present with respect to any particular transaction in rela-
10 tion to marijuana on the part of the transferor.

11 I may note again that the name and address of the
12 transferor must be on file with the Government prior to the
13 consummation of the transaction. The mechanism provided by the
14 statute is the use of the transferee. The transferee must pro-
15 cure the order form and give the information directly to the
16 Government.

17 We maintain, however, that the statutory scheme envi-
18 sions the transferee as a conduit for the transfer of the re-
19 quired information to the Government, which information demands
20 acts on the part of the transferor incriminating to himself. He
21 must, knowing that the information is going to the Government,
22 and that it is incriminating to him, provide information.

23 Q The form is Appendix B in your brief.

24 A That is correct.

25 Q As you point out, this is a form quite different

1 from the one in the last case, in that the seller's name is on
2 it when it comes from the Government, isn't it?

3 A That is correct. In addition, the general struc-
4 ture of the form is a directive to the transferor --

5 Q To the seller.

6 A -- to the seller, from the Government, authorizing
7 him, so far as the Federal act is concerned, to transfer a cer-
8 tain quantity of marijuana to a specified transferee. Again, the
9 transferee is the Government's conduit for sending this form to
10 the transferor.

11 Q I suppose, though, if the buyer goes to a fellow
12 he thinks is selling marijuana and says, "Give me your name,"
13 and the seller says, "Sorry, I won't do it," and then the putu-
14 tive buyer finds the seller's name out from someone else and
15 puts it on the order form, the seller may be incriminated, but
16 he hasn't incriminated himself, has he?

17 A He hasn't at that point.

18 Q But when does he ever, as far as his name is
19 concerned?

20 A The information goes to the Government through
21 the hand of the transferee.

22 Q Through his hands, but the seller hasn't incrim-
23 inated himself. I don't suppose there is anything that is
24 illegally incriminating as far as the seller is concerned if a
25 buyer furnishes information to the Government.

1 A No. There is no privilege against self-incrimi-
2 nation on behalf of the transferee in relation to the transferor's
3 name. However, there are other acts required.

4 Assuming that the transferee finds the name, indepen-
5 dent of the transferor, and delivers it independently to the
6 Government, I may note in passing that the name was not re-
7 vealed so far as this record is concerned, to the transferee
8 by the transferor.

9 Q That was my next question. There is no evidence
10 in this case that the seller ever gave his name to anybody.

11 A That is correct. The seller and the buyers were
12 strangers. They were introduced by a third party solely on the
13 basis of first names. That is in the record. However, once
14 the transferee has obtained an order form, the transferor must
15 accept that order form.

16 We contend that the act of acceptance is an acknowl-
17 edgement and an adaptation of the information contained on the
18 order form. The order form is an inherently incriminating de-
19 vice when it contains the information that the transferor has
20 sold certain drugs illegally to a transferee. When the trans-
21 feror accepts that piece of paper, even if he refused to accept
22 it, if he were to ask about its existence, if he were to learn
23 of the existence of this piece of paper, and then transfer drugs
24 pursuant to it, he would be adopting the information on that
25 paper as his own as being true and valid.

1 The statute requires him to participate to a great
2 extent in the incriminatory act involved in the order form pro-
3 cess. In our mind, it is the same thing as signing a confession
4 that someone else has typed. The information may already be in
5 the possession of somebody else, but when you take it as your
6 own, you are acknowledging it as true.

7 It is possible, although for practical reasons very
8 unlikely, that a transferee might obtain an order form without
9 speaking to anyone. Obviously at that point nothing has been
10 done by the transferor to incriminate himself. When he accepts
11 the piece of paper, he has enabled the transferee to say, when
12 asked, "I gave this piece of paper to the buyer and he accepted
13 it," assuming that the buyer would tell the truth. We cannot
14 postulate that the statute will be maintained on the basis of
15 the seller's perjury.

16 Assuming the seller would tell the truth when asked,
17 he would be required to say that he accepted this piece of paper.
18 In addition, he is required by the statute to retain the piece
19 of paper, which constitutes an additional piece of evidence of
20 his criminal act, for two years, and to make it available to
21 all law enforcement officials who might come to ask for it in
22 that two years.

23 Q Which precise statutory provision, of the ones
24 contained in your appendix, has this man been convicted of
25 violating?

1 A 4742.

2 Q 4742.

3 A That is right. 4742(a) is the general require-
4 ment that you may not transfer marijuana except pursuant to an
5 order form.

6 Q Do you assert that there is anything wrong with
7 that just as a provision in the statute?

8 A Insofar as the mechanism for obtaining the order
9 form is provision (c) and (d) of 4742, and insofar as the order
10 form requires that information be on file which is incriminating
11 at the time --

12 Q Do you say the Fifth Amendment bars the Govern-
13 ment from prohibiting sales except on order forms, just as such?

14 A The use of the order form by itself, no. If this
15 were to be an order form of the sort contained in the Narcotic
16 Drug statutes, then we would not feel that the seller would be
17 incriminated by requiring that such an order form exist. The
18 theory of it in the narcotic drug case is, I believe, that the
19 order form requirement is to see to it that unlawful people do
20 not obtain narcotic drugs. That result is perfected by requir-
21 ing the name and address of the buyer, of the transferee, to be
22 in the hands of the Government prior to the sale, or issuing
23 order forms only to legitimate people.

24 But in this case the order form does require that the
25 name and address of the transferor be in the hands of the

1 Government prior to the sale.

2 Q Suppose he gets the order form and fills it out.
3 Has he incriminated himself if he does nothing more than that?

4 A The transferor does not obtain the order form
5 and does not fill it out. The transferee obtains the order
6 form and fills it out.

7 Q Right, and if he takes the order form and fills
8 it out and does nothing more --

9 A Has the transferor incriminated himself?

10 Q Have either been incriminated? The incrimination
11 is when you sell the drugs, isn't that right?

12 A The information in the hands of the Government
13 directs the attention of the Government to a group of people
14 who are suspect, and very strongly suspect, of criminal activity.
15 Even the focus of their attention --

16 Q If they don't engage in this criminal activity,
17 are they injured?

18 A They would presumably then be able to refute the
19 implication that arises from the existence of the order form.

20 Q How is the filling out of the blank, in and of
21 itself, without more, incriminating?

22 A I think there is a very heavy presumption that
23 that blank would not be filled out were the transaction not
24 going to be completed. Among other things, the tax must be
25 paid prior to filling out of the form; that is, you cannot

1 obtain the form without paying the tax.

2 Q To use a phrase we sometimes use, what "triggers"
3 all of it is the buying or selling of the marijuana.

4 A Yes. If one were not interested in buying or
5 selling marijuana, one would not deal with these forms at all.
6 However, the danger, the suspicion engendered by the existence
7 of the form, is such that the existence of the form, I think,
8 would cause the attention of the authorities to be focused very
9 closely on these people.

10 Q Isn't it the paper, the form, the filling out of
11 the form, plus an overt act that makes the criminal offense here?

12 A The offense is the overt act, or the overt act
13 in the absence of the piece of paper.

14 Q But as Justice Marshall just suggested, the piece
15 of paper alone, filled out and signed, doesn't incriminate the
16 man at all, does it?

17 A If the transaction were to have gone no further
18 than that, then I believe it would be incriminating in that the
19 statute provides that the piece of paper may be used as evidence
20 and the existence of the piece of paper may serve to bring into
21 initiation the process of prosecution in relation to a drug.

22 Presumably the transferor who did not transfer, but
23 is simply named as a transferor, would be able to testify that
24 he did not, in fact, ever commit any acts of this sort, and were
25 he to be believed, then --

1 Q Would there be any occasion for him to testify
2 about it at all if all he did was fill out the form?

3 A The transferor does not fill out the form in
4 this case. The transferee only fills out the form.

5 Q I am talking about the transferee now. If the
6 transferee just fills out the form, on Justice Marshall's
7 hypothetical, and puts it in the drawer of his desk, he has
8 committed no offense, has he?

9 A This Court, in Leary, considered that the cor-
10 relation between the act of filling out the form and the act of
11 selling or buying the drug was so close that it viewed the
12 existence of the form as being evidence of being a recent
13 transferee of marijuana, even though the existence of the form
14 did not necessarily imply that any transaction had been com-
15 pleted at all.

16 Q What we have in Appendix B is what is issued by
17 the Treasury Department.

18 A That is correct.

19 Q In order to get that issued to him, a prospective
20 would-be transferee has to make an application for it, I assume.

21 A That is correct.

22 Q In the application, does he give the name of the
23 prospective vendor?

24 A Yes, he does.

25 Q What is to prevent him from just putting George

1 Washington or Abraham Lincoln or Charles Evans Hughes in there?

2 A Nothing, except that I believe one has to assume
3 that the process, if it is to be followed, is going to be fol-
4 lowed as required by the statute. As a matter of fact, there
5 is nothing to prevent him from skipping the order form com-
6 pletely, but one would assume that, in obeying the law, he is
7 going to do what the statute says.

8 Q Who is eligible to make an application for these?

9 A Any person.

10 Q Any person.

11 A That is right.

12 Q Does he give the name, or any registration num-
13 ber, or anything else, of the prospective vendor?

14 A He gives the name and address of the vendor, of
15 the proposed vendor.

16 Q What in the world is to prevent him from putting
17 down there Earl Warren, or Richard M. Nixon, or Edmund Muskie?

18 A Nothing.

19 Q And that is not self-incrimination, is it; if he
20 is incriminating anybody, it is Edmund Muskie, as a potential,
21 prospective, possible vendor.

22 A That is correct, but I think we have to assume
23 that this is a process that people will follow, if they are
24 going to follow it at all, in the way that it is required.

25 Q Why is it required? The requirement there is

1 that you put down nothing except a name and address of somebody.

2 A That is right. Now, if the proposed transferor
3 accepted this order form, he is acknowledging the truth of the
4 information contained on the order form, that is, that he, the
5 prospective, the proposed transferor, has transferred to this
6 transferee the specified quantities of marijuana. At that time
7 he has committed a self-incriminatory act.

8 In addition, he must retain that form for two years
9 to serve as further evidence.

10 In connection with obtaining the order form, the Leary
11 case held that an unregistered transferee is protected against
12 obtaining the order form because it is self-incriminatory for
13 him to do so. This makes it very unlikely that an illegal
14 transferee will obtain the order form to give to the transferor
15 unless the transferor insists upon it.

16 We maintain that if this statute is to be taken as
17 written, and interpreted by this Court, that a major part of the
18 motivating power for getting the information into the hands of
19 the Government, who will use it to the detriment of the trans-
20 feror, must come from the transferor himself. A transferee,
21 under the present state of the law, is very, very unlikely to
22 procure an order form unless the transferor simply insists upon
23 it.

24 You cannot, under these circumstances, say that the
25 transferor is a passive party who need only inquire whether the

1 order form exists. If the order form is to exist, it must be
2 that the transferor brings it about that it exists, even though
3 he himself does not ever go to the Treasury Department and sign
4 his name on a piece of paper.

5 Q That is the part I don't understand, and that is
6 what prompted my question of a moment ago.

7 What has the transferor got to do with this?

8 A He must see to it that the piece of paper exists
9 when the transaction is completed. If he does not see to it,
10 it is very unlikely, either because the transferee will be in-
11 capable of doing it because he does not know the information,
12 that is, the transferor has not given him his name and address,
13 or because he does not desire to do it, it is very unlikely for
14 either of those reasons that a transferee will obtain the order
15 form.

16 If an order form is to come into existence, it must be
17 because the transferor has provided the primary motivation for
18 its coming into existence. He must affirmatively act to his
19 own detriment.

20 We maintain that the self-incrimination comes about
21 through a conduit that the statute has provided. The transferee
22 is, in effect, the Government itself, for purposes of dealing
23 with the transferor and procuring the order form. The trans-
24 feree would not himself procure the order form if the transferor
25 did not insist upon it.

1 In that way, the transferor must see to his own in-
2 crimination with the Government.

3 Q Could I ask you: The conviction here is for
4 selling without an order, without receiving an order form.

5 A That is correct.

6 Q That is all.

7 A That is correct.

8 Q He could not be convicted for this offense at
9 all if he had received the order form.

10 A That is correct, although we maintain that --

11 Q If that is so, there couldn't be any self-incrimi-
12 nation under this statute because he could never be convicted
13 under this statute.

14 A The order form would not have been obtained unless
15 he saw to it that it was obtained. If he had insisted --

16 Q That isn't really quite so, is it? A lot of
17 buyers know the names of their sellers independently.

18 A In this particular case he did not, and it is --

19 Q I know, but the seller didn't furnish the name;
20 a third party furnished the name.

21 A The name was never furnished.

22 Q All right, so the seller never incriminated him-
23 self at all.

24 A The seller never incriminated the buyer because
25 the buyer did not --

1 Q The seller never incriminated himself, on the
2 facts of this case. But if he had received an order form with
3 his name on it, he automatically insulates himself from con-
4 viction under this statute.

5 A But he exposes himself to conviction under all
6 the State statutes, whatever State statute is relevant, and to
7 another provision of the statute which makes it illegal for him
8 to be a transferor of marijuana without being registered. The
9 petitioner here was an unregistered transferor and he is an
10 inherently suspect person. If his name appeared on a piece of
11 paper in the hands of the Government as a transferor, he would
12 be immediately suspect.

13 If he saw to it that the transferee procured such a
14 piece of paper, he would be seeing to his own incrimination in
15 the eyes of the Government.

16 Q Why should he be able to say this when there was
17 never an order form in this case?

18 A If there had been an order form, the incriminatory
19 act would have been completed as soon as he received the order
20 form or learned of its existence, and then transferred mari-
21 juana pursuant to it.

22 There was no order form in the Leary case either, and
23 there were no registration forms in the Marchetti, Grosso and
24 Haynes cases. The point is that filling out the order form, or
25 acting pursuant to the order form in this case is in itself the

1 incriminatory act.

2 In Leary, the incrimination, the dangerous incrimi-
3 nation, was at the hands of the State, not at the hands of the
4 Federal Government, and information came to the State authori-
5 ties not from Leary himself, but from the Federal Government.
6 Leary provided the information only to the Federal Government,
7 who then provided it to other people who would indict and con-
8 vict Leary. This was felt to be too dangerous.

9 I would like to make a distinction between the Narcotic
10 Drug Act and the Marijuana Act.

11 Under the Marijuana Act there are virtually no legiti-
12 mate users of marijuana. There were in the last published re-
13 ports 80 registered people, people who could deal legitimately
14 with marijuana. I am informed by counsel for the Government
15 that the number is now approximately 160. But it compares in-
16 significantly to the approximately 200,000 registered people
17 involved in the narcotic drug trade.

18 This is an illegal activity and this is a set of
19 statutes intended to cause people to expose themselves as dealers
20 in illegal activities.

21 I will save the remainder of my time for rebuttal.

22 MR. CHIEF JUSTICE BURGER: Mr. Connolly?

23

24

25

1 ARGUMENT OF JOSEPH J. CONNOLLY, ESQ.

2 ON BEHALF OF RESPONDENT

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

5 In the light of the preceding discussion of the prin-
6 ciples applicable here and in Minor, our brief submission will
7 focus on the Government's view of the statute in this case, and
8 our response to the central features of petitioner's argument.

9 Petitioner contends that Section 4742(a), which simply
10 requires that he receive from his transferee an order form
11 which the transferee shall obtain, in some way compels him to
12 make incriminating disclosures to the Government. We believe
13 that his contention seeks to establish much more than the
14 words of the statute or its operation in fact can support.

15 The offense defined by Section 4742(a) does not make
16 criminal petitioner's failure to report any previous misconduct
17 to the Government, nor does the order form provision require
18 him to make incriminating disclosures to the Government in order
19 to legalize his subsequent conduct.

20 The transferor is neither required nor entitled to
21 apply for an order form from the District Director. The only
22 duty which this statute imposes on the petitioner is to trans-
23 fer marijuana only to those persons who have made their acqui-
24 sition lawful by paying the tax and receiving an order form.

25 The statute punishes not a failure to disclose

1 information but a transfer, a transfer to someone who does not
2 demonstrate that he has complied with Federal law. It is our
3 position that the statute on its face and in practice can be
4 complied with without the transferor's disclosing any informa-
5 tion at all.

6 Petitioner's argument to the contrary is found in that
7 he asserts to be the practical consequences of the statute. He
8 notes that the transferee must provide the name and address of
9 the transferor in his application for an order form. He then
10 assumes that the transferee can obtain that information only
11 from the transferor himself.

12 This assumption is essential to the success of
13 petitioner's argument for it provides the aspect of self-incrimi-
14 nation which is lacking on the fact of the statute. Unless it
15 can be said that the transferee necessarily must obtain that
16 information from the transferor, it cannot be said that compli-
17 ance with the statute infringes the transferor's right to refrain
18 from making incriminating disclosures.

19 The petitioner offers no support for this assumption
20 on which his argument rests. If he is relying on common experi-
21 ence to justify the assumption, such experience in our view
22 refutes the assumption as evidenced by the many cases like this
23 one in which a purchaser who may be previously unknown to a
24 seller of marihuana is introduced to him by a friendly inter-
25 mediary who can supply the name of the transferor.

1 We also think it is appropriate to point out that this
2 case seems to be a most unlikely vehicle to establish as a
3 Constitutional principle a doctrine that a transferee of mari-
4 huana can learn the name and address of the seller only from
5 the seller himself.

6 The facts in this case show that some 10 days before
7 the transaction on which he was convicted petitioner sold a
8 quantity of marihuana to narcotics agents in the kitchen of
9 his apartment.

10 Petitioner would have the Court conclude that there
11 was no way except from the petitioner himself that the agents
12 could have learned his name prior to the second transaction.
13 But we think it needs no argument that persons who sell mari-
14 huana in the kitchens of their homes are poorly situated to
15 conceal their names and addresses.

16 By basing his argument on assumptions as to the practi-
17 cal effect of the statute, petitioner emphasizes the critical
18 difference between this case and Leary and its antecedents. In
19 each of those cases, the statute on its face imposed on the
20 petitioner himself an obligation to supply certain information.
21 There was only one way the petitioner in those cases could
22 comply with the statute -- by supplying the information himself.

23 In the present case, it is clear that the transferor
24 can comply fully and literally with the statute where he receives
25 an order form for which he gave no information at all.

1 In his oral argument, petitioner makes the additional
2 contention that even if he did not supply any information to
3 the transferee to enable the transferee to obtain the form that
4 the mere fact that he receives an order form thus obtained by
5 the transferee is an incriminatory act; that is, I think the
6 language that he uses, that he adopts the language on the form.

7 We submit in response to that contention that there
8 is no increimination, htere is no disclosure upon receipt of
9 the form at all. The petitioner is ---

10 Q Would it be an offense under 4742(a) for a man
11 named John Smith to see marihuana to somebody pursuant to an
12 order form in which the top name was Robert Jones?

13 A I inquired with lawyers more knowledgeable with
14 the operation of the statute concerning that question, and the
15 answer is not entirely clear.

16 If you will look at Section 4742(d) in the statute,
17 the third sentence says, "The original shall in turn be given
18 by the transferee to any person who shall in pursuance thereof
19 transfer marihuana to him."

20 Thus the statute on its face does not prohibit a
21 transferor from making a transfer pursuant to a form in which
22 his own name is not listed as the transferor. As far as I know,
23 and I asked, there has never been any prosecution brought assert-
24 ing that that is a violation of the order form requirements.

25 Q That is a highly unlikely factual situation.

1 except that it does go I think to the petitioner's argument a
2 little bit.

3 A That is right. In the real world, in the lawful
4 world of marihuana order forms, it is unlikely that a transferee
5 applying for a lawful order form will change his mind and submit
6 it to some other supplier of marihuana. So we don't often see
7 that.

8 But I think that the Government can confidently assert
9 that the statute on its face would not preclude a transferor
10 from transferring if the order form was not addressed directly
11 to him. This I take it would exclude the situation in which
12 the transferor was a prior party to a misstatement on the appli-
13 cation for an order form, but I think that is far afield of what
14 you were asking.

15 Q The duty to put the seller's name on is placed
16 on the Secretary, isn't it?

17 A That is right. The District Director puts the
18 name on the form and he learns the name because it appears on
19 the transferee's application.

20 Q So if a seller sells marihuana pursuant to an
21 order form with someone else's name on it, you say he can or
22 cannot be prosecuted under this Section?

23 A It is doubtful whether he can be prosecuted under
24 this Section. The statute appears to contemplate that a trans-
25 feror may make a lawful transfer on the basis of an order form

1 not addressed to him.

2 Q Is that what the statute says, that it would be
3 unlawful for any person to transfer marijuana except in pur-
4 suance of a written order? If that order is not directed to
5 him, but actually it is directed to somebody by the name of
6 Smith, that is not in pursuance, really, of a written order,
7 giving the words their ordinary meaning, I suppose? It is an
8 order to somebody else; therefore, it is not in pursuance of a
9 written order, just as I say, implicitly in the statute.

10 A It is not clear on either side.

11 Q Let's say he can be prosecuted for that. What
12 do you say to the general proposition forbidding him to sell
13 unless he acknowledges who he is, that that violates the Fifth
14 Amendment? Does it violate the Fifth Amendment to be required
15 to say what your name is?

16 A No, I don't believe it does, not to his trans-
17 feree in all events. He makes no disclosure to the Government
18 incident to accepting the form.

19 Q Doesn't he acknowledge who he is? If he sells,
20 and the law says you can only sell if your name is on the order
21 form, and he sells, hasn't he admitted who he is? "I am John
22 Smith," not Brown, or somebody else.

23 A Yes, he admits it.

24 Q What is your response, then? Does that violate
25 the Fifth Amendment or not?

1 A No, it does not violate the Fifth Amendment.

2 Q Why not?

3 A He is not compelled to disclose information to
4 the Government at that point.

5 Q He is if he wants to sell marijuana, because the
6 Federal law says if you sell without the form, with your name
7 on it, you will go to jail.

8 A Yes, but he can comply with 4742 by doing no
9 more than receiving a form on which the transferee has instructed
10 the Secretary to put John Smith's name on it. Would there
11 be a violation of the Fifth Amendment if Mr. Strauss came to me
12 and said, "I hear that I can purchase marijuana from Joe Con-
13 nolly. Are you Joe Connolly?" and I say "Yes," I can't see
14 where there is any compelled self-incrimination in that instance.

15 Q What if the buyer doesn't say anything to him.
16 He just comes in and hands him a piece of paper which is an
17 order for a certain amount of marijuana, and the man takes it
18 says, "Okay," and gives him the marijuana?

19 A Is there anything in your question which sug-
20 gests that the transferor, upon being presented with that form,
21 may feel himself compelled to make a transfer of marijuana?

22 Q No. I am just saying that inherent in his living
23 up to this statute is disclosing that his name is John Jones, or
24 admitting that his name is John Jones. The information may not
25 have originated from him. He may never have said his name is

1 John Jones, but selling the marijuana pursuant to this order
2 form, under the law, is an admission by him that he is really
3 Jones, and not somebody else, isn't it?

4 A Yes.

5 Q Does that violate the Fifth Amendment?

6 A No, it does not, because there is no compulsion
7 to disclose his name to the Government incident to that trans-
8 action.

9 Q Well, there shouldn't have been in Leary then.

10 A In our view of the practical consequences of the
11 illicit dealings with marijuana, in any case in which an order
12 form may be tendered to an illicit transferor, like petitioner,
13 the most reasonable assumption, contrary to petitioner's assump-
14 tion, is that none of the information was supplied for that
15 purpose by the transferor.

16 It is, to be sure, difficult to assess assumptions on
17 either side of the case in this area because it is so very
18 unlikely that an illicit transferor will ever be presented with
19 an order form. The 160 registered handlers of marijuana have
20 no reason, so far as we know, to acquire marijuana on the illicit
21 market.

22 The far more numerous unregistered consumers are
23 hardly likely to secure order forms. The cost of incriminating
24 themselves and paying \$100 tax, when their failure to pay the
25 tax and to acquire marijuana pursuant to an order form, is not

1 punishable under Leary, so it is quite easy to say suppose there
2 is a transferee who wants to acquire marijuana from an illicit
3 seller, and who is willing to acquire an order form for that
4 purpose, but it is very difficult to translate that supposition
5 into a factual hypothetical which makes sense in the real world.

6 Even if we were willing to accept that supposition,
7 however, and to accept the further doubtful precise that a
8 transferee of marijuana could acquire an order form -- that is,
9 whether the District Director could lawfully issue an order
10 form addressed to an illicit transferor --

11 Q Is \$100 an ounce your idea of a tax?

12 A Yes, it is a tax.

13 Q For marijuana?

14 A It is a tax on the transfer of marijuana.

15 Q For one ounce?

16 A One ounce. It is a prohibitive tax.

17 Q Thanks for the "prohibitive".

18 Q Is anybody eligible to apply for an order form?

19 I understood the answer to be yes.

20 A Yes. That is, under Leary.

21 Q Forget about Leary; just talking about the
22 statute.

23 A Leary interpreted the statute as contemplating
24 that anyone could pay the tax and get an order form.

25 Q Construed the statute as so providing.

1 A That is right.

2 Q So a person need not be registered in any way to
3 be a purchaser, but a person needs to be registered to be a
4 lawful seller.

5 A That is right. On that basis, we suggest in our
6 brief that there is a serious question whether the District
7 Director will or could issue an order form to Peter Strauss to
8 acquire marijuana from Joseph Connolly, when Joseph Connolly's
9 transfer would be unlawful under another provision of the
10 statute.

11 Q What, in fact, happens when an application comes
12 in? Does the Treasury check the name of the proposed transferor,
13 the proposed seller, to see if that is one of the 160 registered
14 sellers in the country?

15 A I believe that inquiry is made, but there is not
16 a great volume of marijuana order forms. It might be a very
17 difficult thing to do under the narcotics statutes where there
18 would be 400,000, but under the marijuana laws, some check is
19 made.

20 Q So only some 160 legal sellers are in the country,
21 who are qualified and eligible to sell marijuana legally under
22 any conditions. It wouldn't be much of a trick to check the
23 name on the application of the proposed buyer, the name that he
24 gives of the seller, against that list of 160. Is that done or
25 isn't that done?

1 A That is done. The question as to what the Dis-
2 trict Director is to do in a situation in which he finds that
3 the proposed seller is not registered apparently has not come
4 up because there hasn't been an application for an order form
5 to acquire marijuana from --

6 Q What accounts for the fact that there are as
7 many as 160 lawful sellers, registered sellers, in the United
8 States? Does it have medicinal uses?

9 A Present thinking is that it does not have medi-
10 cinal uses, but there is still a great deal of experimentation
11 being conducted in it. About 140 of the 160 registrants are
12 doctors in private practice and doctors in research facilities
13 who are seeking to determine conclusively whether it does have.

14 Q I can understand how those people, research
15 physicians, might be purchasers, but I don't see how they could
16 be sellers, or why they would want to be sellers of it.

17 A They might not be sellers except among research
18 institutions. They might be transferors in its broadest sense.

19 Q It isn't really selling, is it? It is selling,
20 transferring, and several other terms.

21 A The statute which prohibits unregistered traffick-
22 ing in marijuana has a list of various activities, dealing in,
23 selling, giving away. Section 4742 and 4741, which imposes the
24 tax, speaks of a transfer which the statute defines as any ex-
25 change of possession except --

1 Q Would that include a physician giving it to a
2 patient or a research center? That would be a transfer?

3 A That is right. That is a transfer under the
4 statute, exempted from the order form and the transfer tax re-
5 quired.

6 To continue on with the question whether the transferor
7 is likely to supply any information to the transferee in order
8 to enable the transferee to get an order form, we think that
9 any assumption along those lines contradicts the seller's basic
10 instinct to avoid having this transaction come to the attention
11 of the Government at all.

12 It is virtually impossible for us to conceive of a
13 situation in which a transferor would cooperate with a trans-
14 feree who had expressed an intention to get an order form. We
15 would not expect Mr. Diamond to deny that for an illicit trans-
16 feror in petitioner's position an order is just about the last
17 thing that he wants, and if a transferee does produce an order
18 form which he can and might have obtained without the knowledge
19 of the transferor, we believe that the transferor would undoubt-
20 edly would refuse to complete the transaction pursuant to that
21 form because it would be subject to intense scrutiny.

22 If that is true, then we see no reason to believe
23 that an illicit transferor would, as a means of complying with
24 this statute, provide any information to his transferee. In
25 short, we conclude that this statute does not impose upon the

1 transferor of marijuana any duty to make an incriminating dis-
2 closure which, then, is transmitted to the Government.

3 I think that is the significant difference between
4 this case and Leary; that whatever characterization you might
5 want to give to the transferor's consummating the transaction
6 pursuant to this document, that act involves no matter communi-
7 cated by him or by the transferee to the Government.

8 Q I understood that the law said that no seller
9 shall sell on an order form unless he writes his name on the
10 order form. Would that make any difference? I guess it would
11 not under your argument, because he still has the choice of
12 just not selling.

13 A Well, that is one choice. We would like to pre-
14 serve whatever is left of that argument.

15 Q There isn't much after Leary, is there.

16 A But the more important matter is that it is not
17 communicated; that he may comply with this statute, he may have
18 full and literal compliance with this statute without any com-
19 munication.

20 Q But if the law said "Don't sell without an order
21 form unless you write your name on it before you sell it, and
22 give a copy to the buyer," you would still say no violation of
23 the Fifth Amendment?

24 A That is a bit harder case.

25 Q Oh, you think it is harder? You think there is

1 a difference between that case and just receiving the form and
2 symbolically saying, "Yes, I am so-and-so"?

3 A My position stands. I don't think that involves
4 a Fifth Amendment violation. I think the more you get me in-
5 volved in communications directly to the buyer, then I am
6 worried about the next step, but I don't believe there is any
7 Fifth Amendment violation because in that situation I can't see
8 any communication, and I can't see any communication in this
9 case.

10 What incriminates the transferor in this case is not
11 anything that he says, but what he does by selling marijuana.
12 That is what subjects him to possible prosecution under the law,
13 and it is not on the basis of any disclosure which is made inci-
14 dent to this transaction.

15 Q You have probably already covered this, but I
16 want to be sure I get a distinction. In this case, it is not
17 an obligation of the transferor to send in a copy of the order
18 form to the Government. It is only his obligation to keep it
19 in his possession subject to inspection for a period of two years.

20 A That is the only statutory obligation. You point
21 out that there is a difference between what the regulations
22 contemplate under the narcotics laws and what the statute con-
23 templates here. For the reasons which we set forth in our
24 brief, we believe that --

25 Q It doesn't make any difference anyway because

1 that is a separate regulation or statute, but there is that
2 difference between the two.

3 A Yes, sir.

4 Thank you, Mr. Chief Justice.

5 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Connolly.

6 Mr. Diamond, you have about three minutes left.

7 REBUTTAL ARGUMENT OF DAVID A. DIAMOND, ESQ.

8 ON BEHALF OF PETITIONER

9 MR. DIAMOND: May it please the Court, with respect to
10 Mr. Justice White's question, I believe acceptance of the order
11 form does more than acknowledge the man's name. It acknowledges
12 the fact that he has transferred a stated quantity of marijuana,
13 and if he is an illegal transferor, as was petitioner here, as
14 would be virtually anyone prosecuted under this Act, he would
15 be acknowledging that he has broken the law.

16 Q How would he acknowledge it?

17 A He must acknowledge it to any person who comes to
18 inquire, any official who comes to inquire about this matter.
19 I believe that he acknowledges it --

20 Q When he receives the order form. Under your sub-
21 mission, he acknowledges that he has then sold the quantity of
22 marijuana.

23 A That is correct.

24 Q But he has acknowledged it, at best, only to the
25 buyer, only to the transferee, who is not the Government.

1 A He has put himself in the position of being re-
2 quired to acknowledge it to the various State officials who come
3 around as a result of that order form.

4 Q Because that is a separate obligation, to keep
5 the order form in his possession, on file.

6 A I believe it is the obligation to which this
7 statute looks; that is, the purpose of the buyer's name on the
8 order form is to deal with the second purpose stated in the
9 legislative history of this Act, that is, to expose all details
10 of marijuana transactions to the scrutiny of both Federal and
11 State officers.

12 If the purpose of this transfer provision was only to
13 prevent transfers to unlawful people, the buyer's name would be
14 irrelevant. The purpose is to expose the seller as well as the
15 buyer to all scrutiny which may follow the coming into existence
16 of the order form.

17 I believe that there cannot be any segregation of this
18 statute --

19 Q Would the statute require him to disclose this
20 information to anybody who comes around?

21 A To any official, State, local, or Federal official
22 who comes around. He must produce his copy of the order form.

23 It would be frivolous, I think, to say something like
24 at that point he need not expose it. There would be no purpose
25 in his having to take it in the first place if he didn't have to

1 display it when the officials come around, since this serves
2 more than the possibly valid purpose of seeing to it that these
3 drugs go only to legitimate purchasers. They see to it that
4 the seller is also exposed to official scrutiny, and that is
5 done by seeing to it that he maintains a copy which he reveals
6 to appropriate --

7 Q You say the law says to him, "If you want to sell
8 any narcotics which may be legal under Federal law, but illegal
9 under State law, the Federal law tells you that you must make a
10 record of this sale, illegal under State law, preserve it, and
11 than if a State official asks you for the record, you have to
12 disclose it"?

13 A That is correct. We feel that is the fruition
14 of the entire seller information of the transfer order pro-
15 visions of the Marijuana Act.

16 Q Let's clip that in pieces, now. Suppose he had
17 the record, but when the State officer called on him and asked
18 for its exhibition, he simply stood on his claim of the Fifth
19 Amendment and declined to do it and proceeded to test it out?

20 A I think that that would be rendering the entire
21 transfer provisions pointless. There is no point to him taking
22 the order form at all, since the buyer part of it is already
23 taken care of by the buyer's name. If the seller's point is to
24 have any purpose, it is to expose and reveal the seller.

25 If the seller were to decline to disclose the order

1 form and he were sustained on that, there would be no point in
2 making him take the order form in the first place.

3 Q Aren't you suggesting that the Federal Government
4 has no legitimate interest in knowing the sources independent
5 of the prosecutorial aspect, but simply knowing the flow of the
6 material?

7 A They perhaps do, but they may not make the man
8 incriminate himself in relation to that legitimate interest.
9 They require him to register and maintain records of a different
10 sort and under different provisions of this law, and those pro-
11 visions are perhaps valid, but they cannot then require that he,
12 in effect, commit another crime by refusing to reveal that he
13 has violated the first provisions.

14 We feel this case comes directly under the Albertson,
15 Marchetti, Leary line.

16 In addition, the order forms are all used as evidence.
17 The statute describes them as such.

18 Thank you, Your Honor.

19 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Diamond and
20 Mr. Connolly. We thank you for your submissions. The case is
21 submitted.

22 (Whereupon, at 1:40 p.m. the argument in the above-
23 entitled matter was concluded.)

24

25