

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DEWEY J. JONES, Petitioner v. UNITED STATES.

CASE NO: 99-5739 *c.2*

PLACE: Washington, D.C.

DATE: Tuesday, March 21, 2000

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CAPTION: DEWEY J. HOPES, JR. v. UNITED STATES
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1 P R O C E E D I N G S

2 (10:16 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 99-5739, Dewey Jones v. the
5 United States.

6 Mr. Falk.

7 ORAL ARGUMENT OF DONALD M. FALK

8 ON BEHALF OF THE PETITIONER

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

11 18 U.S.C. 844(i) makes arson a Federal crime if
12 it damages property used in interstate commerce or
13 property used in any activity affecting interstate
14 commerce.

15 The question here is whether petitioner's arson
16 of a private residence comes within the statute because
17 that home received natural gas and was mortgaged and
18 insured by out-of-state firms, and if so, whether that
19 application of the statute to that crime is
20 constitutional.

21 In the Government's view, the power to regulate
22 interstate commerce enables Congress to make a Federal
23 crime out of any act that threatens or damages property
24 having connections to interstate commerce or that
25 interrupts or disrupts an ongoing commercial relationship

1 with out-of-state parties. That view of the Commerce
2 Clause would enable Congress to enact general Federal
3 protections for virtually all property, including real
4 property, although the general protection of property is
5 one of the most basic core elements of an area of
6 traditional state concern and competence.

7 In the Government's view of the Federal
8 protection of property, the -- Congress can make Federal
9 crimes out of things like scrawling graffiti or breaking a
10 window, and Congress has in -- in the Government's view
11 made Federal crimes out of setting fire to a gas barbecue
12 grill or perhaps a television. And here, of course, the
13 Government has prosecuted as a Federal crime, the arson of
14 a private residence.

15 The Government has not identified any limit on
16 the Federal power to prohibit arson, although arson is a
17 quintessentially local crime.

18 QUESTION: Mr. Falk, are you conceding in your
19 argument that the statute does apply? You seem to be
20 arguing the constitutional issue first.

21 MR. FALK: No, we do not concede that the
22 statute applies. We do not believe it -- it applies. We
23 believe, however, that in reading the statute in this
24 case, it is important to look at the constitutional
25 considerations that would ensue from applying the statute

1 in this case, and that in light of those considerations,
2 the statute should be construed to avoid what we view as
3 difficult, indeed, doubtful at best, constitutional
4 issues.

5 QUESTION: Do you think if -- if we did not have
6 the constitutional concerns in the background, do you
7 think the statutory language is clearly with you or
8 against you?

9 MR. FALK: We believe the statutory language is
10 with us even without the constitutional considerations in
11 the background. When you look at the plain language of
12 the statute and the understanding of -- of the statute,
13 when you look at the normal sense of what it means for
14 property to be used in an activity affecting commerce,
15 which is the subset that was applied in this case, we
16 believe that it requires an active use of the physical
17 property, which after all, it is the damage to the
18 physical property that's supposed to provide the link to
19 interstate commerce here. And we think, in fact, it's
20 quite telling that there was some concern among some
21 Members of Congress that this statute did not reach
22 private residences.

23 QUESTION: Would it torture the words of the
24 statute to say that the home was used to obtain a
25 mortgage?

1 MR. FALK: Well, I don't know if I'd go so far
2 as to say that it tortures the words of the statute,
3 Justice Kennedy, but it certainly twists them a bit. It
4 is not -- it may be used in a -- in an abstract sense, but
5 it is not a use of the physical property and it is the
6 physical property that is really at issue here.

7 And it's not a use in an activity. Getting a
8 mortgage is a -- is a single transaction rather than an
9 activity. And this is -- this Court has a long history
10 and Congress has a long history of using the word activity
11 affecting interstate commerce to mean an enterprise --

12 QUESTION: I -- I acknowledge that in the
13 ordinary sense you use the mortgage to get the house. You
14 don't use the house to get the mortgage. I can understand
15 that. But I'm not sure the statute necessarily requires
16 us to reach that result.

17 MR. FALK: Well, we believe that -- that in the
18 normal diction, in the normal, ordinary understanding of
19 those words, when they're read entirely in context,
20 property used in an activity affecting interstate
21 commerce, that is required, and we think that's reinforced
22 by the -- by the -- the sense that the Congress that
23 passed this statute apparently had. As I said, there were
24 people that were concerned that this statute should reach
25 residences, but no one --

1 QUESTION: How do you distinguish -- excuse me.
2 How do you distinguish this case from the Russell case,
3 Mr. Falk?

4 MR. FALK: Well, we think this case is -- is
5 quite clearly distinct from the Russell case because in
6 that case, the landlord was using the property -- was
7 bartering the occupancy of the property for a generation
8 of income, very much like -- like what was going on in --
9 in the Smith case where you were trading something to get
10 income, allowing people to come in and occupy the
11 property. And those people were paying for the privilege.
12 We think that -- that is -- is a difference and it's a
13 recognized difference in common speech.

14 QUESTION: Well, what if the house is used --
15 the property is put up to get a mortgage to get money to
16 go into an interstate trucking business? He needs money.

17 MR. FALK: Even so --

18 QUESTION: The homeowner does. So, has he used
19 the house in -- in the sense contemplated by the statute?

20 MR. FALK: We do not believe so, Justice
21 O'Connor, because the -- subjecting the house to a
22 security interest is not the kind of activity affecting
23 interstate commerce, the continuous sort of activity
24 affecting interstate commerce, that this Court and -- and
25 Congress in its other statutes has -- has repeatedly taken

1 those words to mean.

2 And no one -- we would point out no one in -- in
3 these debates where people said let's apply this to
4 residences, how can we do it. No one said, oh, the
5 statute already applies. Of course, any house with a
6 mortgage is being used in an activity affecting interstate
7 commerce. Any house that is insured is being used in an
8 activity affecting interstate commerce, and any house that
9 receives utilities is being used in such an activity.
10 Nobody -- nobody in the Congress thought that, not even
11 the most -- most fervent believers in applying this
12 statute to residences, they could find a way.

13 QUESTION: So, with respect to the mortgage, are
14 you conceding that it is used but simply saying that use
15 is irrelevant because it's not used in an activity? Is
16 that your argument?

17 MR. FALK: Well, we are conceding that -- that
18 it is not torturing the language, in Justice Kennedy's
19 words, to say that it is used in some sense. You are
20 using the house to get a mortgage. That is --

21 QUESTION: Well, in -- in answer to Justice
22 O'Connor's question, do you concede that it is used within
23 the meaning of the statute, but that the use is not a use
24 in an activity within the meaning of the statute? I
25 thought that was the argument that you were making, but I

1 want to get clear on it.

2 MR. FALK: No. Let me -- I don't believe you
3 can parse word by word in a statute without taking the
4 word -- the words in context together. I don't think
5 there is meaning to say it is used but not used in an
6 activity. It is either used in an activity affecting
7 interstate commerce or not. It can't be used or not in
8 that -- used but not used in an activity. It's -- only a
9 use in an activity counts here. So that we don't think it
10 -- it is not the kind of use that the statute covers, and
11 that is our argument.

12 QUESTION: -- have to admit it's a very peculiar
13 statute if it -- it reaches someone who sets fire to a
14 private residence that is owned by the occupant -- I'm
15 sorry. It does not, as you would say, apply in that case,
16 but it does apply if -- if you set fire to a -- a building
17 that is rented by the occupant. That's just a very
18 strange -- strange distinction. I don't know why Congress
19 would draw that kind of a line. And we're talking here
20 about the statutory construction, never mind the
21 constitutional limitation. Doesn't that strike you as
22 rather peculiar?

23 MR. FALK: I agree it -- it is not --

24 QUESTION: You can imagine the two criminals
25 saying, gee, is this -- is this building leased or -- or

1 is it owned by the occupant? If it's, you know --

2 MR. FALK: Well, Justice Scalia --

3 QUESTION: If it's owned by the occupant, we
4 don't have to worry. It's not a Federal crime.

5 MR. FALK: Well, Justice Scalia, when you get
6 back to the attempt to draw some nexus between this very
7 basic State common law crime in interstate commerce, when
8 a building is being rented out, it is being used in what
9 is recognized as a commercial activity. As in Russell,
10 you could take a commercial tax deduction for it. It is a
11 difference.

12 QUESTION: But the home ownership market,
13 private home ownership market, is a -- is one of the
14 foundations of the American economy I suppose.

15 MR. FALK: It is a foundation of the American
16 economy. That may be. However, the home ownership itself
17 is not -- is about as local an activity as you can get and
18 has -- has never been considered to be an activity
19 affecting interstate commerce. Now, the market, the
20 transactions, of course, could be -- can be considered
21 activities affecting interstate commerce. But the mere
22 ownership itself has -- has not been that way.

23 And that -- it seems to us that -- that even
24 though concededly the line is -- is not the -- is not the
25 line that we would have drawn, were we enacting the

1 statute, that because, at least in this case, which is an
2 easy case in our view, you can avoid substantial
3 constitutional issues, substantial constitutional concerns
4 when Congress appears -- at least Congress and the
5 executive and the lower -- some of the lower courts
6 together appear to be asserting what amounts to pretty
7 much plenary jurisdiction over one of the most basic
8 common law crimes that drawing a line that is permitted by
9 the words of the statute and that at least accords with
10 this Court's Commerce Clause jurisprudence to some extent
11 as a first step --

12 QUESTION: Let me ask you if you're talking
13 about drawing these lines. Supposing this was an 18-
14 story apartment building and every apartment is rented
15 out, would you agree the statute applies and also there's
16 congressional power to prevent that arson?

17 MR. FALK: I agree that the statute applies. I
18 mean, Russell -- Russell says it. Yes. I do not
19 necessarily agree that there is congressional power to
20 prevent that arson.

21 QUESTION: Well, why wouldn't Russell control
22 that case?

23 MR. FALK: Well, because Russell was a statutory
24 decision, Your Honor.

25 QUESTION: I see.

1 MR. FALK: The constitutionality of the statute
2 was not challenged in there. Now, certainly --
3 certainly --

4 QUESTION: But you would think -- you would
5 think Congress would not have the power to -- to prohibit
6 the arson of, say, skyscrapers.

7 MR. FALK: Well, certainly not under the current
8 -- under the current articulation of this Court's Commerce
9 Clause jurisprudence.

10 Now, skyscrapers -- I mean, it depends what's
11 going on in the skyscraper. It seems to us --

12 QUESTION: They -- they have mortgages. They
13 rent offices out, and they -- and they buy utilities
14 through interstate commerce. Just -- say, there are just
15 the three activities, but it's in an 18-story skyscraper
16 that you have here.

17 MR. FALK: Well, that would be a stretch beyond
18 the current -- this Court's current Commerce Clause
19 decisions. This Court has recognized congressional power
20 to protect property pursuant to the Commerce Clause only
21 in the case of instrumentalities of interstate commerce
22 and in the case of persons or things -- things, for
23 property moving in interstate commerce.

24 It would be a stretch to say that Congress also
25 can protect property because it is commercially used.

1 That, we believe, goes beyond the current state of
2 Commerce Clause jurisprudence. However, to say that
3 commercial property can be protected, if it's actively in
4 commercial use and -- and residential or inactively used
5 or non-used property cannot, would be at least the line
6 that is coherent in -- in a -- that -- that corresponds to
7 the line between commercial and noncommercial activity
8 that this Court has reemphasized based on the text of the
9 Commerce Clause.

10 QUESTION: Mr. Falk --

11 QUESTION: How about churches then? They
12 wouldn't be protected, I guess. They could burn down
13 churches without a Federal offense.

14 MR. FALK: Without a Federal offense in most
15 instances based on the Commerce Clause.

16 QUESTION: Yes.

17 QUESTION: They could probably kill clergymen
18 without its being a Federal offense, couldn't they?

19 MR. FALK: Probably could, Your Honor.

20 QUESTION: It doesn't shock me, does it?

21 MR. FALK: Without a -- without a -- it being a
22 Federal offense, yes. There are some churches that might
23 -- without getting into the details --

24 QUESTION: It isn't a Federal offense to kill a
25 clergyman, is it?

1 MR. FALK: I -- I don't know the answer to that
2 question. I -- I know there used to be a -- it used to be
3 a Federal offense to import clergymen, but I don't know if
4 it's a Federal offense to kill them.

5 (Laughter.)

6 QUESTION: Mr. Falk, it is a Federal offense
7 under 924(c) that covers using a destructive device in
8 relation to a crime for which a defendant may be
9 prosecuted under Federal law. You or your predecessor did
10 not challenge the conviction under 924(c).

11 MR. FALK: Well, we believe that the 924(c)
12 conviction ceases to have foundation if the 844(i)
13 conviction, on which it was based, disappears. There is
14 no --

15 QUESTION: So, you're not conceding the validity
16 of that conviction? It's just you didn't challenge it?

17 MR. FALK: It was not directly challenged in the
18 court of appeals. That's correct. We are not conceding.
19 In fact, we -- we mentioned in our -- in both the petition
20 and our opening brief in this case that if the 844(i)
21 conviction is found to have been beyond the scope of the
22 statute or beyond Congress' power, then the 924(c)
23 conviction falls of its own weight. The only predicate
24 crime for the 924(c) conviction was the 844(i) conviction.

25 QUESTION: What about the 5861(f) crime? That

1 is making an illegal destructive device. That's pretty
2 local activity too, making a Molotov cocktail.

3 MR. FALK: That was not a challenge in the court
4 of appeals, nor is it dependent on the 844(i) conviction.
5 So, Mr. Jones --

6 QUESTION: What is your view of that?

7 MR. FALK: Well, my view of that is that it is
8 justified -- it -- it may be constitutional as a --
9 basically as a sort of channels -- channels regulation, as
10 part of a licensing scheme which ensures that explosives
11 that travel in interstate commerce are taken care of in a
12 particular way. And as part of that -- rational part of
13 that licensing scheme, the best argument for the
14 constitutionality of -- of this provision is that Congress
15 can require people who make these things to be licensed.
16 Mr. Jones was not licensed, and as a result, he would be
17 subject to a -- to a Federal punishment.

18 QUESTION: Are these devices excluded from --
19 from the channels of interstate commerce if they have been
20 not licensed, if they've been made by somebody who's not
21 licensed?

22 MR. FALK: Well --

23 QUESTION: I mean, what you've just said makes
24 sense if, in fact, Congress has said we don't want any
25 destructive devices traveling in interstate commerce, and

1 as a means of enforcing that prohibition, which Congress
2 undoubtedly has the -- has the power to enact, we're going
3 to punish anyone who makes one without having been
4 properly licensed to make one. But you have to start with
5 step one. Has it been excluded from interstate commerce?

6 MR. FALK: Well, not all -- I don't believe all
7 the items that are covered within the destructive devices
8 definition have been excluded from interstate commerce. I
9 don't believe that one can get a license to transport the
10 particular destructive device in this case, a Molotov
11 cocktail, and in that sense it -- it is rational. And it
12 can be -- and I believe it -- this could be justified
13 because even if the devices are not excluded from
14 interstate commerce, their transport is regulated and
15 their trade is regulated. And -- and as part of that,
16 Congress requires people who make them or transport them
17 to be licensed.

18 QUESTION: I don't know what you mean by saying
19 their transport is regulated. In -- in what respect?

20 MR. FALK: Well, within -- within the Federal
21 scheme, there are -- I believe -- I believe there is a
22 tracking mechanism. The people have to report certain
23 things. They have to tell authorities where things go and
24 -- and when they go. As I say, not with Molotov
25 cocktails. I don't think you can get a license to do

1 anything with them. And in fact, those are excluded from
2 interstate commerce, but there is -- there is a scheme
3 dealing with the transport of -- of some of these devices.
4 There is not a scheme dealing with their use.

5 QUESTION: Can you -- if we add up all the
6 residences that burn up each year, that has a pretty big
7 effect on interstate commerce, doesn't it?

8 MR. FALK: Yes, Justice Breyer --

9 QUESTION: All right. Now, if it --

10 MR. FALK: -- it has an effect, but it is not a
11 substantial effect --

12 QUESTION: Even if we add up all of them? I
13 mean, isn't it hundreds of millions of dollars of -- of
14 wood and bricks and whatever burns up and -- and you have
15 to have fire departments from all over the place. And I
16 mean, you know, whole cities can burn down, but I don't
17 know that they do. But nonetheless, there is a lot --
18 many, many residences in fires that -- you're saying you
19 add up all that across the board and that isn't
20 substantial?

21 MR. FALK: Well, two answers to that. First,
22 that is the exact cost of crime reasoning that the Court
23 rejected in Lopez. Yes, all crime -- all crime is
24 expensive.

25 QUESTION: I'm not thinking of -- I'm not

1 thinking of -- I want to know if you think it's
2 substantial or not substantial.

3 MR. FALK: I don't think it's a substantial
4 qualitative effect. It's not a -- substantially related
5 to interstate commerce in the way that this Court --

6 QUESTION: Even -- even though you burn up all
7 the wood that moved in interstate commerce? You burned up
8 all the -- the carpets that came from Persia. You burn up
9 all the whatever. And that's still not -- all that taken
10 together is not substantial?

11 MR. FALK: That is not substantial in the
12 qualitative sense that controls the constitutional issue
13 any more than the additive value of every theft in the
14 country is -- is substantial in that case. Yes, of
15 course, there are high economic costs of all crime.

16 QUESTION: I didn't -- I didn't -- all right.
17 Now, my -- now, my -- is it -- what I'm trying to drive at
18 is it -- are you claiming that it just in quantitative
19 amount is not substantial or that we shouldn't aggregate?

20 MR. FALK: Well, in quantitative amount, as it
21 happens, the -- the total value of residential arsons in
22 the country nationwide -- the last count I think was
23 around the \$200-250 million range, and I think there is an
24 argument that for a nationwide --

25 QUESTION: I'm really trying to get whether you

1 think we should -- my question --

2 MR. FALK: No.

3 QUESTION: I'm trying to drive at something, and
4 my question is --

5 MR. FALK: No, you cannot aggregate this.

6 QUESTION: Fine. And that's what I --

7 MR. FALK: And the reason you cannot --

8 QUESTION: I understand it. That's what leads
9 to what I'm really trying to get at.

10 MR. FALK: Okay. You --

11 QUESTION: And what I'm really trying to get at
12 is why should you not be able to aggregate with
13 residences, but can you then aggregate in respect to
14 businesses?

15 MR. FALK: No, I don't think --

16 QUESTION: No.

17 MR. FALK: I don't think aggregation works here.

18 QUESTION: So, in your -- in your view if you
19 win this case, it is also true that, since you could not
20 aggregate, business arsons are also out unless you prove a
21 substantial effect between this individual grocery store
22 and interstate commerce or this individual swimming pool
23 distributor. That's your view. And the same, I guess, is
24 true of apartment houses that are rented unless you prove
25 that this apartment was rented to a -- a person from --

1 you see my point. That's my question.

2 MR. FALK: Yes, I see your point, and -- and --

3
4 QUESTION: Yes, all right. That's what I'm
5 interested --

6 MR. FALK: Yes. I -- I -- basically yes because
7 these are not the kinds -- this is not an economic
8 regulation or regulation of economic activity. This is a
9 dispersed activity. There is no general either power or
10 existing scheme.

11 QUESTION: On that view -- by the way, how do
12 you -- I've got your answer, which I appreciate. And --
13 and on that view, too, how do you distinguish the Court's
14 earlier case about a house that happened to be on the
15 market for being rented with no evidence whatsoever that
16 any person who even looked at the house was from out of
17 State?

18 MR. FALK: Now, you're talking about Russell?

19 QUESTION: Yes.

20 MR. FALK: Which is a duplex.

21 QUESTION: Sorry. Duplex, all right. Same --
22 same --

23 MR. FALK: Yes, yes. Well, my understanding of
24 Russell is that it had been rented and that it -- that it
25 -- but -- but regardless, I don't think it -- I'm not

1 sure --

2 QUESTION: I didn't see anything in the opinion
3 that said anyone who rented the house was from out of
4 State --

5 MR. FALK: No, that's correct.

6 QUESTION: -- or that anyone who looked at the
7 house was from out of State. So, I just wonder how you
8 reconcile that with what you've told me that we have to
9 look at this particular building. We cannot aggregate and
10 that's true whether it's a business, whether it's a rental
11 house, duplex, whether it's owned.

12 MR. FALK: Well, with great deference, Your
13 Honor, I believe that the reference in Russell to
14 aggregation was neither necessary to the opinion nor
15 correct as a matter of constitutional law. It was a
16 statutory opinion. We believe that we have set out a
17 rationale under which it -- it can be fit within the
18 statutory language, as did the opinion, and the fact that
19 there's a reference to aggregation does not control the
20 constitutionality of that aggregation here.

21 QUESTION: Mr. Falk, if -- if you want to, you
22 know, argue this on -- on the textual basis, I don't --
23 don't you think it's hard to draw a line between a use for
24 mortgaging, a use for leasing, and -- and so forth?

25 I can understand it if you thought when -- when

1 the statute says used in an activity that substantially
2 affects interstate or foreign commerce, it means used in
3 the way that property is normally used, in considering the
4 primary purpose for the property, namely to provide
5 shelter, to provide heat, light for -- for any activity.
6 Then it would make some sense if -- if it's being used as
7 a building for some purpose affecting interstate commerce.
8 But you're apparently willing to say that it's enough if
9 it's used, you know, for a mortgage, which is certainly
10 not the -- the normal use of a building.

11 MR. FALK: Well, I -- if I suggested that it's
12 used for a mortgage within the meaning of the statute, I
13 certainly misspoke.

14 QUESTION: Oh, well, you're willing to accept
15 used as a lease -- used -- used for -- for rental. Right?

16 MR. FALK: I am willing to accept that under
17 Russell, and I think there is a difference between the
18 commercial use of the property --

19 QUESTION: You're willing to accept it or do you
20 have to accept it?

21 (Laughter.)

22 QUESTION: I mean, I -- I find it very difficult
23 to draw a line between using it for -- as rental property
24 and using it in order to get money through a mortgage.

25 MR. FALK: Well --

1 QUESTION: Either one is -- is the primary,
2 principal, ultimate use of the property.

3 MR. FALK: Justice Scalia, in a vacuum I would
4 certainly agree with you. However, I think there is a --
5 a principal distinction between this case and Russell so
6 that -- that Russell does not have to be overruled as a
7 statutory decision --

8 QUESTION: In Russell --

9 MR. FALK: -- in order to put this case outside
10 the line.

11 QUESTION: -- did anything turn on -- I think,
12 wasn't it -- wasn't the arsonist the landlord himself? It
13 was his -- for him it was property that he held for
14 commercial purposes, income producing purposes, and I
15 think that this wasn't an arsonist of the kind we had in
16 this case. Wasn't it the landlord?

17 MR. FALK: It was the landlord, Your Honor, and
18 I -- I -- although it is neither an element of the
19 statute, nor I think clearly in the opinion, if it's in
20 there at all, it -- it, you know, probably was an arson
21 for profit of some sort. But it was not -- the case did
22 not turn on that.

23 QUESTION: Because if you were dealing with
24 fraud on an insurance company then -- then one might see
25 that as more on the commercial side than if someone is --

1 is just your everyday arsonist.

2 MR. FALK: Oh, absolutely. As a constitutional
3 matter -- matter, Justice Ginsburg, it -- if Congress
4 enacted a statute that made arson, with the intent to
5 defraud an insurance company or an interstate insurance
6 company, a Federal crime, it would be much, much closer
7 and -- and probably could be drafted in such a way as --
8 as to come within the constitutional power. But that's
9 not what this statute -- that's not the nexus that this
10 statute draws. The nexus that this statute draws is not
11 related to intent.

12 QUESTION: Mr. Falk, if you're going to argue
13 statutory construction, you have to accept the holding in
14 Russell, don't you, that where the property is -- is
15 leased for production of revenue, then it is covered by
16 the statute?

17 MR. FALK: Right. That is the -- that is the
18 type of commercial activity that in -- in normal parlance
19 is understood as a -- as a commercial action, renting out
20 property for profit. Living in a house is not. It seems,
21 as I say, without a -- if Russell was not on the books and
22 -- and this case presented those issues, then -- then I
23 might argue something to the contrary. But Russell --

24 QUESTION: I mean, suppose -- suppose we -- we
25 can't find any -- any reasonable distinction between

1 burning leased property and burning property resided in by
2 the owner. And therefore, we proceed to the
3 constitutional question, and we find it's unconstitutional
4 to -- to provide for a Federal offense in either event.
5 Are we still stuck with interpreting this statute the way
6 Russell did? Do we have to say the statute is
7 unconstitutional, or could we say, in light of the
8 constitutional problem, the statute should be read more
9 narrowly?

10 Russell didn't -- didn't consider any
11 constitutional problem, did it?

12 MR. FALK: This is correct. And in fact, it
13 would be -- the Court would have to -- in the first
14 instance, to get to the constitutional issue, would have
15 to construe the statute in a way that is broader than --
16 than Russell construed it. And then it would -- of
17 course, as you suggested, it would get to the
18 constitutional issue, find this general property
19 protection power not to exist, and then construe the
20 statute more narrowly, in -- in a way backing out. The
21 Court could certainly follow that rationale.

22 But first it would have to say, well, it looks
23 to us that Russell is not only right, but it was -- that
24 it -- the statute reads more broadly than that. But that,
25 of course, would lead to the difficult constitutional

1 questions, and -- and the Government here is asserting a
2 power to protect property that would sweep far beyond
3 anything this Court has ever recognized. It would --

4 QUESTION: Let me just ask you on the
5 constitutionality of the statute as interpreted in
6 Russell. Would you not agree that if a person owns
7 property and leases it out, buys and sells and rents and
8 so forth, in the real estate market, that he's engaged in
9 an activity affecting interstate commerce?

10 MR. FALK: Yes. I --

11 QUESTION: So that the owner of the building in
12 Russell was engaged in an activity affecting commerce.

13 MR. FALK: The owner was engaged in an activity
14 affecting commerce.

15 QUESTION: And so that the property was,
16 therefore, being used in an activity affecting commerce.
17 Isn't that true?

18 MR. FALK: Justice Stevens, I have stood up here
19 to say that Russell is not bad statutory law. We still
20 believe that it goes beyond what this Court -- that if
21 you --

22 QUESTION: I understand. You think -- but why
23 would that be unconstitutional. If -- if Congress can
24 regulate the market for buying and selling and renting
25 real estate, why is the prohibition of the arson of a

1 building used in that market unconstitutional?

2 MR. FALK: Well, because this is not part of a
3 scheme of protecting or regulating a market. There is no
4 scheme for regulating the real estate market. And, in
5 fact, arson is simply the -- the destruction of property,
6 which property is everywhere. Property is used in every
7 business. Congress cannot possibly have the power to make
8 shoplifting a Federal crime because the -- the shopkeeper
9 is engaged in a business. And -- and with arson it's no
10 different. There has to be some more substantial,
11 qualitatively substantial, nexus than that.

12 If there are no more questions, I'd like to
13 reserve the balance of my time.

14 QUESTION: Very well, Mr. Falk.

15 Mr. Dreeben, we'll hear from you.

16 ORAL ARGUMENT OF MICHAEL R. DREEBEN

17 ON BEHALF OF THE RESPONDENT

18 MR. DREEBEN: Thank you, Mr. Chief Justice, and
19 may it please the Court:

20 This Court's decision in Russell forms the
21 background for both the statutory and the constitutional
22 issues in this case. As a matter of statutory
23 construction, Russell recognized that Congress intended to
24 go to the limits of its constitutional authority under the
25 Commerce Clause in enacting section 844(i).

1 QUESTION: Well, Mr. Dreeben, I wouldn't -- I
2 have read Russell to -- I -- I grant you it says that, but
3 I -- I wouldn't have read Russell to say that it meant to
4 push the word used in the statute to the limit of the word
5 use.

6 MR. DREEBEN: I don't think that the -- the
7 Court addressed the construction of use the way that it's
8 been discussed in this case. But the Court did recognize
9 that Congress sought to exert its constitutional authority
10 to protect real property and personal property from arson
11 because of the effects on the interstate economy. And
12 Congress guaranteed that there would be such an effect in
13 any case in which a prosecution was brought by providing a
14 specific jurisdictional element that the Government must
15 satisfy in every case.

16 QUESTION: But doesn't the -- doesn't your
17 argument, in effect, entail the conclusion that the
18 jurisdictional element will always be satisfied? In other
19 words, it seems to me that on your argument, if -- if the
20 jurisdictional element is sufficient to get the privately
21 owned house, then the jurisdictional element does not act
22 as a limitation. And -- and I don't, therefore, know why
23 it would be in there.

24 MR. DREEBEN: Well, I do think that the
25 jurisdictional element acts as a -- a limitation, Justice

1 Souter, although it may not act as a limitation that is
2 narrower than the constitutional power of Congress. But
3 it does require that in each case the United States
4 establish that there is an effect on interstate commerce.

5 QUESTION: Can you give us a hypothetical where
6 -- where that wouldn't exist? I mean, he mentioned
7 shoplifting. I assume you think the Federal Government
8 can make all shoplifting a Federal crime.

9 MR. DREEBEN: Well, I think that if the -- that
10 if the Federal Government made shoplifting from businesses
11 that do business in interstate commerce a Federal crime,
12 it could do so.

13 QUESTION: Oh, what about -- what about theft
14 from a private home? If you say that burning a private
15 home affects interstate commerce, why wouldn't, you know,
16 theft from a private homeowner affect interstate commerce?

17 MR. DREEBEN: Well, I think theft from a private
18 home is a more difficult case than this case because in
19 this case the crime of arson is extremely likely to
20 destroy the property itself, and where, as here, the
21 Government is able to show that there is an out-of-state
22 mortgage company, an out-of-state insurance company, and
23 out-of-state supplies of natural gas that are going to the
24 home, the destruction of the home will create a
25 potential --

1 QUESTION: So, theft from a home you're willing
2 to concede could not be made a Federal crime.

3 MR. DREEBEN: No, I wouldn't be willing to
4 concede.

5 QUESTION: Well, give me something you are
6 willing to concede.

7 (Laughter.)

8 QUESTION: Just something, one -- one little
9 thing. I mean, you're coming up with a principle that you
10 say, you know, I mean, the Constitution meant something
11 when it -- when it limited the Federal Government to
12 matters involving interstate commerce. And we know that
13 they did not intend the Federal Government to have general
14 criminal jurisdiction.

15 MR. DREEBEN: Well, I think, Justice Scalia --

16 QUESTION: So, what is it that's excluded?

17 MR. DREEBEN: My -- my starting point is the
18 same as the -- the point where the Court left off in
19 Lopez. The Court recognized in Lopez that there is power
20 under the Commerce Clause to reach intrastate activities
21 that affect interstate commerce, and that it will be a
22 matter of degree and a matter of characterization in each
23 case to determine whether the particular statute does
24 satisfy those requirements.

25 QUESTION: Give us an example of one that

1 doesn't.

2 QUESTION: How about an example like a gun-free
3 school district?

4 (Laughter.)

5 MR. DREEBEN: Since 1995, I'm happy with that
6 example. I do think --

7 (Laughter.)

8 QUESTION: One we haven't decided yet.

9 (Laughter.)

10 MR. DREEBEN: I think, Justice Scalia, a -- a
11 statute that sought to regulate all crime without a
12 jurisdictional element and without any particularized
13 reason by Congress --

14 QUESTION: I mean, they're going to put in a
15 jurisdictional element. You know, anyone who -- who
16 steals from a house that -- property that has -- that has
17 been transported in interstate commerce. Do you think
18 that would suffice?

19 MR. DREEBEN: I don't think that it necessarily
20 would suffice, Justice Scalia, because the nexus between
21 the interstate commercial activity and the crime is not as
22 close as it is in a case like this one.

23 QUESTION: Well, but in a burglary statute, if
24 there's a Federal burglary statute, you would come with
25 statistics as to how much insurance companies have to pay

1 every year in the aggregate for household burglaries, and
2 you'd make -- you'd make the submission that this is an
3 effect on interstate commerce that's measurable.

4 MR. DREEBEN: Well, I would probably lose that
5 case under Lopez because the Court made clear that merely
6 pointing to the -- the costs of crime is not sufficient.
7 And that is not what we have done in this case.

8 In this case, we have an out-of-state mortgage
9 company and the house was used in the activity of the
10 mortgage business. We have an out-of-state insurance
11 company which had to make a specific \$75,000 payment
12 across State lines as a result of this arson, and we have
13 pointed to the presence of interstate utility connections
14 which have out-of-state gas coming into the house.

15 QUESTION: But you -- in any -- any burglary
16 that's insured, other than the deductible, if it's a --
17 there's going to be payment from an interstate insurer.

18 MR. DREEBEN: Well, there may be payment from an
19 intrastate insurer or an interstate insurer, and the Court
20 may draw a distinction based on that. But I do have three
21 different theories that establish that there's an
22 interstate connection to the house in this case.

23 The mortgage theory relies on the fact that this
24 house was used to procure the mortgage loan and that the
25 mortgage company uses the house as security for that loan.

1 It is an out-of-state business, and it is a business that
2 suffers a direct foreseeable effect if the property that
3 secures the loan is destroyed by arson.

4 QUESTION: It was used to -- it was used to
5 cover the ground too, but when you say what is the house
6 used for, that is -- that is not the normal meaning that
7 one associates with what is it -- what is the house used
8 for.

9 MR. DREEBEN: Well, I --

10 QUESTION: No one would think, well, it was used
11 to get a mortgage. That's not what houses are used --

12 MR. DREEBEN: Well, I -- I think that somebody
13 would --

14 QUESTION: Is it used as a residence? Is it
15 used as a barber shop? Is it used -- you know. That --
16 that's what we're talking about normally.

17 MR. DREEBEN: Well, to back up on the statutory
18 construction question to this Court's decision in Russell,
19 Russell establishes that uses of a property are not
20 limited to those uses that the occupants engage in in the
21 course of daily living. It is also -- it also extends to
22 uses that other people make of the property that have some
23 commercial nexus. Now, in Russell it was the owner
24 renting it out. In this case, it's the mortgage company
25 supplying a mortgage and taking a security interest in the

1 home. The homeowner himself --

2 QUESTION: He didn't use his house. It wasn't
3 his house. I mean, the mortgage company didn't use the
4 house. It wasn't the mortgage company's house to use.

5 MR. DREEBEN: Well, I think that the mortgage
6 company has a significant interest in the house once it
7 grants the mortgage and it uses the house as security for
8 that mortgage. The homeowner --

9 QUESTION: Well, it may -- I mean, in the -- in
10 the brute sense, it uses the house when the moment for
11 foreclosure comes and it wants to realize its money.

12 But may I get back to my -- my original point?
13 And that is, what is being excluded under this statute in
14 the arson case? And it sounds to me, from what you've
15 said, that it would be consistent with your argument to
16 say that the statute would not cover arson of a house,
17 which was built by the owner without the use of borrowed
18 money and was not insured and was heated with wood cut on
19 the property --

20 (Laughter.)

21 QUESTION: -- but it wouldn't exclude much more
22 than that, would it?

23 MR. DREEBEN: Well, I will give away that case.

24 (Laughter.)

25 MR. DREEBEN: I -- I don't --

1 QUESTION: A wise concession, but --

2 (Laughter.)

3 QUESTION: But really, would it --

4 MR. DREEBEN: I do --

5 QUESTION: -- would it exclude much more?

6 MR. DREEBEN: Yes, I do acknowledge that under
7 our approach to the statute, its coverage is broad, and I
8 think that that was consistent with Congress' intent --

9 QUESTION: But -- I'm sorry.

10 MR. DREEBEN: -- to use its Commerce Clause
11 authority broadly.

12 QUESTION: The -- the problem I have, though, is
13 if the only thing that is excluded is something as trivial
14 as the example that I came up with, it just does not seem
15 plausible to me that Congress would have gone to the
16 trouble of putting in this jurisdictional prerequisite
17 simply to exclude something as -- almost as silly at that.
18 And, therefore, I -- I feel bound to try to give it as a
19 matter of -- of statutory construction, looking to
20 congressional intent, a broader meaning. Am I -- am I
21 wrong in -- in feeling that obligation?

22 MR. DREEBEN: Well, I think so, Justice Souter,
23 because the legislative history makes clear that Congress
24 selected the affecting commerce language that it used in
25 this jurisdictional element precisely so that it could

1 have a way of indicating to this Court that it wished to
2 go to the limits of its Commerce Clause authority.

3 It relied on a decision called Reliance Fuel,
4 which was an NLRB case, in which this Court had said that
5 the affecting commerce language goes to the limit of the
6 Commerce Clause authority.

7 QUESTION: Who relied on it? You -- you really
8 think that -- that a majority of the House and the Senate
9 and the President as well who signed the bill, knew about
10 this case, Reliance Fuel?

11 MR. DREEBEN: Well, but --

12 QUESTION: And they had this case in mind when
13 they voted for the statute?

14 (Laughter.)

15 MR. DREEBEN: What I do know, Justice Scalia, is
16 that Reliance Fuel was cited in the committee report on
17 the bill to indicate that --

18 QUESTION: It probably means the committee staff
19 knew about the case.

20 (Laughter.)

21 QUESTION: I don't know that it means that
22 anybody else knew about the case.

23 MR. DREEBEN: Well, I think that this Court has
24 recognized that it has given the words, affecting commerce
25 and in commerce, a term of art sense that Congress is

1 presumed to know. Congress is presumed to know the law,
2 and this Court operates --

3 QUESTION: I think it might. I mean, isn't
4 there a long line of antitrust cases where the words,
5 affecting commerce, are over and over said that that's an
6 indication that Congress wants to exert its full commerce
7 power? I mean, I thought there are lots of cases that say
8 that. I might be wrong.

9 MR. DREEBEN: No, there are.

10 QUESTION: It's fairly well-known. It might be
11 that Senators and Congressmen do know.

12 MR. DREEBEN: Yes, I think that it's a
13 reasonable presumption that they do know, but it's legally
14 irrelevant because this Court has said that when Congress
15 does use those words, it intends to go to the limits of
16 the Commerce Clause authority.

17 And in this case we have some corroboration that
18 the drafters of the bill intentionally did that.

19 QUESTION: Mr. Dreeben --

20 QUESTION: Do we have cases that say used in an
21 activity affecting commerce?

22 MR. DREEBEN: No. This Court's cases are -- are
23 not lucid on that issue. This case and the Russell case
24 are going to be the primary cases giving a construction to
25 that. But I --

1 QUESTION: But isn't -- no. I didn't mean to
2 cut you off.

3 MR. DREEBEN: Well, I think that it's reasonable
4 to think that if Congress went to the trouble of
5 attempting to cover as much as it possibly could, based on
6 uses of the property under the arson statute, that it did
7 not intend that this Court give an artificially narrow
8 meaning to the word use.

9 QUESTION: It could have said any -- any arson
10 affecting commerce. It didn't say any arson affecting
11 commerce. That would have been the broadest possible use
12 of the affecting commerce language. It said arson of a
13 building used in an activity affecting commerce.

14 MR. DREEBEN: Well, it could have also passed a
15 statute that had no jurisdictional element at all.

16 QUESTION: Mr. Dreeben, on that, the emphasis on
17 used in in -- in U.S. v. Mennuti -- Judge Friendly thought
18 that that was a significant distinction. The phrase, used
19 in an activity, was different from activity affecting
20 interstate commerce. At least he thought and so did his
21 fellow panel members that the used in made all the
22 difference.

23 MR. DREEBEN: Yes, but I think that this Court
24 ended up disagreeing with Justice Friendly's analysis of
25 the arson statute because the property that was at issue

1 in Mennuti was available for rental, and Judge Friendly
2 did not believe that that was a sufficient basis for
3 covering the -- the conduct. And this Court disagreed.

4 QUESTION: Well, it could be that -- that
5 decision certainly was limited pro tanto, but it doesn't,
6 it seemed to me, wipe out entirely the point that used in
7 an activity is different from an activity affecting
8 interstate commerce.

9 MR. DREEBEN: Well, I concede that much. What
10 -- what I am trying to do is -- is explain that this
11 Court's decision construing the statute in Russell made it
12 clear that it goes to the limits of the Commerce Clause
13 authority along --

14 QUESTION: But it coupled it -- it coupled it
15 with business property.

16 MR. DREEBEN: It did. But at the time that the
17 -- that the bill was introduced, it had a specific for
18 business purposes limitation in the statute. That was
19 deliberately deleted by the drafters of the bill before it
20 was enacted, and --

21 QUESTION: Maybe because they thought this --
22 this other language was an adequate substitute for it.

23 MR. DREEBEN: Well, I think what they -- what -

24 -

25 QUESTION: I mean, I'm not sure that helps your

1 case or hurts your case. I don't know which.

2 MR. DREEBEN: Well, what the record in the
3 legislative history shows is that there were -- were
4 hearings on the bill that brought to the attention of
5 Congressmen that there were burnings of churches and
6 police stations and other buildings that were not used for
7 business purposes, and that legislators objected to the
8 restriction of a bill that would deny the Federal
9 Government the ability to investigate and prosecute cases
10 involving those kinds --

11 QUESTION: You think it covers the burning of a
12 church?

13 MR. DREEBEN: Yes.

14 QUESTION: Even a church that isn't mortgaged.

15 MR. DREEBEN: Well, I think that we need to show
16 something that will connect it to interstate commerce.

17 QUESTION: But then -- but you're frustrating
18 this legislative history you've just talked about.

19 MR. DREEBEN: No. I think the --

20 QUESTION: You seem to think that it -- it
21 should have covered all churches.

22 MR. DREEBEN: The legislative history shows that
23 because churches were not covered under the restriction in
24 the bill that said it covers property used for business
25 purposes, Congress deleted the language that said for

1 business purposes. That is not part of the enacted bill,
2 and it was done deliberately in order to allow this bill
3 to reach to the limits of Federal power.

4 QUESTION: What is the connection with a church?
5 I mean, what if the hymnals cross State lines? Would that
6 be enough?

7 MR. DREEBEN: It could be, but that is not
8 typically the sort of connection that we have relied on in
9 prosecuting cases like that.

10 QUESTION: Well, you'd say the church got heat
11 from natural gas. You'd be back into the same kind of
12 argument you're making here --

13 MR. DREEBEN: We would have --

14 QUESTION: But, Mr. Dreeben, it does seem to me
15 that if you read used in an activity in the statute to
16 encompass these passive sorts of uses, the phrase is just
17 converted into something that means anything affecting
18 commerce, and the legislative branch didn't use that
19 language. And it sort of reads the phrase out of the
20 statute in a sense.

21 MR. DREEBEN: Well, I don't think that it does
22 read it out of the statute, Justice O'Connor. This is not
23 a statute like section 924(c) where this Court said use
24 has to mean active use in some manner of deployment. In
25 that statute, the Court was confronted with verbs that

1 said use or carry, and the Court had to do something to
2 give those two words independent, nonduplicative meaning.
3 Whereas, this statute is a statute where Congress
4 expressed its intention to go to the limits of the
5 Commerce Clause authority, and it did not couple --

6 QUESTION: Well, you don't really think Congress
7 intended to cover private residences I suppose. I mean,
8 if you want to play the congressional intent game, there
9 was substantial evidence that it didn't.

10 MR. DREEBEN: There were some legislators who
11 felt that it couldn't, and there were other legislators
12 who very much wanted to provide Federal authority to
13 investigate and prosecute those sorts of crimes. And the
14 compromise solution is a bill that places it in the hands
15 of the courts to determine whether the Government has
16 proved the kinds of jurisdictional connections that
17 satisfy the Constitution. If we can prove the kinds of
18 jurisdictional connections -- and we must do that -- to
19 satisfy the Constitution, we have also come within the
20 language of the bill.

21 QUESTION: Do you -- you think Congress can do
22 that in a criminal statute, not -- not say, look it, this
23 is what we're criminalizing, but rather say, we're
24 criminalizing as much as we can criminalize because, boy,
25 this is so hard to figure out, we're not going to try to

1 draw the line, we're going to let the courts figure it
2 out? Now, Congress is unable to draw the line itself with
3 its massive staff, and -- and the individual citizen who's
4 supposed to know whether he's violating a Federal law or
5 not has to what? He's going to have to figure out what
6 the courts are going to say is -- is far enough?

7 MR. DREEBEN: Well, I don't --

8 QUESTION: I mean, I question whether Congress
9 can do that and just say we're going to extend this
10 criminal statute as far as the courts will let us extend
11 it. Do you think -- don't you think that's vague?

12 MR. DREEBEN: No, I don't think that it's vague,
13 and I don't think that there's a requirement of precision
14 in the way that Your Honor has articulated it that's
15 applicable to a jurisdictional element. It's a Federal
16 crime if you assault an individual and it turns out that
17 that individual is an undercover Federal police officer
18 and you had no way of knowing that until you're prosecuted
19 in Federal court.

20 QUESTION: Well, you know what the crime was.
21 You knew that -- that it was a crime to assault a police
22 officer. When you assault somebody, you're taking a
23 chance that it's an undercover police officer.

24 MR. DREEBEN: Well, anyone who commits arson
25 knows that it's a crime.

1 QUESTION: Well, but are you saying that the
2 jurisdictional element is not subject to any sort of a
3 vagueness test?

4 MR. DREEBEN: I don't think the jurisdictional
5 element is subject to a vagueness test when -- when what
6 Congress does is express its intent to go to the limits of
7 the Constitution and use language that allows this Court
8 to enforce that limitation. No. There are many Federal
9 criminal statutes that contain jurisdictional elements
10 like this, and the Court has construed those elements in a
11 way to give them meaning, but not in a sense that requires
12 the actual individual to appreciate where this Court will
13 go on constitutional --

14 QUESTION: Well, you -- you have two problems
15 here really. You have the notion that if there's a
16 constitutional doubt, you try to interpret the statute
17 more narrowly to avoid any constitutional problem. And
18 you also, because it's a criminal statute, are concerned
19 presumably with the rule of lenity. And when you put all
20 those together, where do you go? It seems to me maybe a
21 narrower reading of this statute.

22 MR. DREEBEN: Well, the Court could adopt a
23 narrower reading of the statute, but I think that the
24 language of the statute as written covers the crime that's
25 prosecuted here, and Congress indicated an intention that

1 it be covered. Therefore, the question for the Court is
2 whether it can constitutionally do that.

3 QUESTION: Just before -- I'm perhaps asking you
4 to repeat something you've said, but I don't have it
5 precisely. Justice Scalia earlier asked -- and he
6 certainly had a point, and Justice O'Connor picked it up.
7 And when I look back at the statute, I realize this covers
8 arson of any property.

9 MR. DREEBEN: That's correct.

10 QUESTION: I mean, it's really everything.

11 So -- so, given that, what do those words
12 precisely used in, on your theory of pushing to the limit
13 -- because he's right in saying that it's the word
14 affecting commerce that has the tradition. It's not the
15 word used in. And -- and what do they mean on your
16 theory? Can you give them any meaning at all? I can't
17 think of any. And -- and you said there is, but I haven't
18 got precisely what it is.

19 MR. DREEBEN: Well, I think the Court has
20 recognized that the word use is a broad verb that intends
21 to connote the idea of to employ or to put to service.
22 And then it takes from its context more specific meanings
23 that it may have in a particular statute.

24 Now, in this statute, the -- the goal that
25 Congress had in mind was protect interstate economic

1 affairs from the effects of arson on buildings or real
2 property or personal property that are used in activities
3 affecting commerce. So, Congress wanted to -- the courts
4 to identify those properties that are used in activities
5 affecting commerce, and then it sought to exert its power
6 to protect them. And that is --

7 QUESTION: And you think that -- that drawing
8 down an infinitesimal overall amount of natural gas causes
9 the building, within the meaning that Congress had in
10 mind, to be used in an activity affecting commerce?

11 MR. DREEBEN: Yes, I do, Justice Scalia, but we
12 have three different theories on how this building is used
13 in an activity affecting commerce. The natural gas theory
14 is one of them.

15 QUESTION: Well, each one has to stand on its
16 own. I don't -- I -- I don't think if neither -- neither
17 one suffices, the three together suffice.

18 MR. DREEBEN: Correct, and my argument is not
19 that the three together suffice. I think that you have to
20 go step by step and look at each one.

21 Now, the natural gas theory is that because the
22 house consumes natural gas that is supplied by an
23 interstate natural gas company, it is used in the activity
24 of natural gas supply.

25 QUESTION: The same would go for electricity,

1 for coal?

2 MR. DREEBEN: Correct.

3 QUESTION: For anything?

4 MR. DREEBEN: Correct. That is why the utility
5 theory of an interstate commerce connection is clearly the
6 broadest of the three that we have relied on in this case.
7 And it would cover the most property, and it would have -
8 -

9 QUESTION: How about milk shipped in interstate
10 commerce and drunk by people who live in the house? Would
11 you say that the house -- that the house uses milk?

12 (Laughter.)

13 MR. DREEBEN: No. I think that the individuals
14 within the house would use milk.

15 QUESTION: Well, and the individuals in the
16 house use the heat, too.

17 MR. DREEBEN: Yes, they do. And I think that in
18 -- in focusing on the interstate gas connection, there are
19 two ways of looking at it. One is that the gas company
20 uses the property in its interstate business by shipping
21 gas to the house and collecting revenue from the residents
22 or owners. The other way of looking at it is that the
23 activities of the individuals within the house result in
24 the consumption of the natural gas.

25 QUESTION: Well, I suppose your theory would

1 encompass also the notion that mail is delivered to
2 houses, and therefore, mail comes interstate and every
3 house --

4 QUESTION: Uses mail.

5 QUESTION: -- uses mail, receives mail.

6 MR. DREEBEN: If that -- if that were the basis
7 for jurisdiction, then there would be a serious question
8 whether there's a logical and adequate nexus between the
9 fact that the house receives mail and protection of the
10 house against arson.

11 Here there is no discontinuity or no sense of
12 disproportionality in the connection because --

13 QUESTION: May I -- may I suggest that if we
14 looked at the word vehicle, we might get some
15 enlightenment on this issue? Because you would -- you
16 would argue a vehicle is used in interstate commerce if it
17 drives across the State line and so forth. But you
18 wouldn't argue that it's a vehicle used in an activity
19 affecting commerce because it burns gas, would you?

20 MR. DREEBEN: Well, I think I would, Justice
21 Stevens.

22 QUESTION: Oh, you would. That's the analogy to
23 the -- to your utility --

24 MR. DREEBEN: That -- that's right.

25 QUESTION: Okay.

1 MR. DREEBEN: And that is why that theory, as is
2 evident, does have the broadest reach to it.

3 Now, the other two --

4 QUESTION: Is there -- on any theory, is there
5 any car that would be excluded on your definition? You
6 gave the -- the remote example of a building that might,
7 but is there any vehicle?

8 MR. DREEBEN: I think that the gas theory would
9 cover all -- all vehicles. If the Court disagreed with
10 the gas theory, then cars that aren't subject to
11 outstanding liens or interstate insurance would not be
12 covered. Cars that -- that are subject to outstanding
13 liens and interstate --

14 QUESTION: What about --

15 QUESTION: Fall back to bicycles.

16 QUESTION: -- that they were certainly
17 constructed and manufactured -- you could have a home that
18 was built locally, but for most automobiles that would not
19 be the case.

20 MR. DREEBEN: That's true, but this statute
21 doesn't base jurisdiction on the fact that the home was
22 manufactured with out-of-state parts or out-of-state
23 materials, and it doesn't depend on the fact that the car
24 was manufactured with out-of-state parts or materials. It
25 does look to the uses of the property in question.

1 QUESTION: If your gas theory is right, the
2 statute was written wrong. It should have read whoever
3 maliciously damages, destroys, blah, blah, by means of
4 fire and explosive, any vehicle or any building or other
5 real or personal property used in interstate or foreign
6 commerce because, as you acknowledge, every vehicle on
7 your theory would be covered. And it's really redundant,
8 attaching to the word vehicle, used in -- you know, in any
9 activity affecting interstate or foreign commerce.

10 MR. DREEBEN: It would have meaning as to the
11 other two segments of the statute, but I think that you're
12 right, Justice Scalia, that it would apply to all vehicles
13 because of the gas and the movement of the gas in
14 interstate commerce.

15 Again, this Court's decision in Russell makes
16 clear that it's not simply the activities of the occupants
17 of the house that are relevant to determining whether it's
18 used in an activity affecting interstate commerce. And
19 the economic distinction between renting property and
20 mortgaging property is not likely one that would have
21 prompted Congress to exclude the coverage of houses that
22 are mortgaged while covering houses that are subject to
23 rental agreements.

24 QUESTION: Does it seem to you that the
25 categories we've been discussing are really somewhat

1 remote from what the Framers sought to accomplish when
2 they set up the Federal system, which is to allow people
3 to realize that there's a Government that's not remote
4 from them that they can control?

5 Here the sentence was for 30 years. It's not
6 clear in the record why this -- this crime happened, but
7 the homeowner himself argued before the sentencing court,
8 as I understand it, that the sentence was too -- too
9 strong. And yet, this very remote Federal sentencing
10 scheme comes into play in what is ordinarily a common law
11 crime. And none of the responses you've given, perhaps
12 none of the questions we have asked, seemed to recognize
13 that there is a strong, local interest here that's just
14 simply being ignored.

15 MR. DREEBEN: Well, I don't think that they're
16 in any sense being ignored, Justice Kennedy. In fact, the
17 local authorities called upon the ATF to investigate this
18 crime and actually requested that we take it over for
19 prosecution because it involved a destructive device, a
20 Molotov cocktail, in which the Federal resources and
21 Federal experience was far greater and, therefore, was
22 resolved in that manner.

23 This is typically the way that prosecution
24 decisions are made under statutes like the arson statute
25 that deliberately provide overlapping jurisdiction between

1 Federal authorities and State authorities. There is
2 collaboration. There's cooperation, and in the norm,
3 there's agreement upon which body is the better to
4 prosecute.

5 And the fundamental issue I think here in
6 Federal law enforcement and criminal law enforcement is
7 not one of usurping the States or taking away from them
8 prerogatives that they wanted, but in reinforcing the
9 States' desire to punish and prosecute crime with the
10 resources of the Federal Government.

11 QUESTION: I'm not concerned about the States.
12 I'm concerned about the citizens. I think that's what
13 Justice Kennedy was concerned about too. If there's some
14 agreement among State law enforcement officers and the
15 Federal Government, the Federal Government can do whatever
16 it wants, that doesn't make it any the less obnoxious with
17 regard to the citizens of that State.

18 MR. DREEBEN: I think under anybody's view of
19 Commerce Clause authority, Justice Scalia, there is a
20 substantial ability of the Federal Government to regulate
21 what would have been viewed in 1789 as local criminal
22 activity. If an individual uses a telephone to make a
23 threat to destroy a residence by fire because of some
24 personal, private debt, wholly intrastate, that is clearly
25 and indisputably covered under the Federal arson statute

1 because he has used an instrumentality of interstate
2 commerce, the telephone.

3 Now, these jurisdictional links are not
4 artificial in the sense that they are neither genuine,
5 specific, or concrete. They are all of those things. But
6 they do clearly allow the Federal Government and the
7 States to exercise overlapping jurisdiction on a wide
8 range of crimes. And that will be true whether this Court
9 resolves this case against the Government or in favor of
10 the Government.

11 Now, what I think that the Court should do is
12 recognize that when Congress has put a jurisdictional
13 element in it like this one and the Government can satisfy
14 it both linguistically, practically, and economically,
15 that the Federal authority to prosecute should be upheld.

16 Thank you.

17 QUESTION: Thank you, Mr. Dreeben.

18 Mr. Falk, you have 3 minutes remaining.

19 REBUTTAL ARGUMENT OF DONALD M. FALK

20 ON BEHALF OF THE PETITIONER

21 MR. FALK: There are deep and significant
22 concerns about our Federal system that are posed by this
23 case. They are not solved by the fact that the State
24 authorities asked the Federal authorities to participate
25 because we are talking about what kind of power may be

1 exercised and how.

2 The Federal authorities under the Spending
3 Clause certainly could have assisted the States in the
4 investigation of this crime. There was, of course, an eye
5 witness who knew the -- the perpetrator, but that -- that
6 could be done under the Spending Clause, and I don't think
7 there would be any real serious debate that the Federal
8 authorities could not assist in these investigations.

9 But when it is asserted that the Federal
10 Government has power to protect property, not
11 instrumentalities or items in interstate commerce, but all
12 property, based on a conception that was developed for
13 ways of regulating ways of doing business that have
14 intermingled effects on interstate commerce, and then it
15 is justified because there is a jurisdictional element,
16 which serves as a sort of logic puzzle that if the Federal
17 Government and the prosecutors can figure out a way to get
18 past a compliant lower court, it's just a way of putting
19 the pieces together on everything in the most basic State
20 crime -- areas of the State crime and the State power come
21 under Federal power, then it's okay. These I think raise
22 significant problems that don't need to be addressed here.

23 Under Russell, even under Russell, which I think
24 gives us a good working starting place in this -- on this
25 -- on this issue, the statutory issue -- Russell, by the

1 way, Justice Breyer, when the early sentence says that Mr.
2 Russell did earn rental income. So, in fact, the -- the
3 it's not clear whether he earned at that minute, but the
4 building was -- had been actually rented. It was not
5 merely on the market.

6 But this Court said, yes, there's this
7 legislative history that suggests they're going all the
8 way, but it also says substantially all business property.
9 And in any event, let's look at the words of the statute
10 and what do those mean.

11 And here the Court has to look at the words
12 first. The Government says that this business purposes
13 amendment means that Congress meant to cover everything.
14 Well, one thing it could not have meant to get by drafting
15 that language is the sort of idea that the mortgage
16 company is using the house, because if the mortgage
17 company or the insurer or the utility company or any of
18 those people are using structures, then they are certainly
19 using them for business purposes, and there would have
20 been absolutely no need to draft this -- draft this
21 language at all. It would have been already covered.
22 Everything would have been covered. It makes no sense.

23 Instead, the -- the people on -- on whom -- the
24 members on whom the Government relies kept coming back
25 saying, let's find a way to get residences, and others are

1 saying, well, it's constitutionally doubtful. And
2 Representative Hungate proposes at the last minute, here's
3 another way. It's constitutionally doubtful in a
4 different way because of the presumption. But it will get
5 residences. It will get the -- it will get these within
6 the scope of the statute. And Congress said no.

7 Congress chose these words not because it was
8 going -- trying to exercise the absolute, utmost
9 possibility of the commerce power, but because it thought
10 if we choose this -- these words carefully, if we
11 structure this statute carefully, we will exercise as much
12 of the power as we can get but stay within constitutional
13 limits. And those limits do not reach this case. It --
14 it -- thank you.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Falk.

16 The case is submitted.

17 (Whereupon, at 11:15 a.m., the case in the
18 above-entitled matter was submitted.)

CERTIFICATION

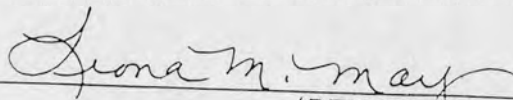
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DEWEY J. JONES, Petitioner v. UNITED STATES.

CASE NO: 99-5739

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