1   IN THE SUPREME COURT OF THE UNITED STATES

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3   UNITED STATES,   :

4   Petitioner   :

5   v.   : No. 07-455

6   AHMED RESSAM.   :

7   - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Tuesday, March 25, 2008

10

11   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 11:25 a.m.

14   APPEARANCES:

15   GEN. MICHAEL B. MUKASEY, ESQ., Attorney General,

16   Department of Justice, Washington, D.C.; on behalf of

17   the Petitioner.

18   THOMAS W. HILLIER, II, ESQ., Federal Public Defender,

19   Seattle, Wash.; on behalf of the Respondent.

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C O N T E N T S

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

2   (11:25 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   next in Case 07-455, United States versus Ressam.

5   General Mukasey.

6   ORAL ARGUMENT OF GEN. MICHAEL B. MUKASEY

7   ON BEHALF OF THE PETITIONER

8   GENERAL MUKASEY: Mr. Chief Justice, and may

9   it please the Court:

10   The question in this case is whether a panel

11   of the Ninth Circuit was correct when it added the words

12   "in relation to," and thereby added an element to

13   section 844 of Title 18, and we think for at least four

14   reasons the answer to that question is no.

15   First, and principally, those words are not

16   in the statute that Congress wrote, and this Court has

17   said many times that courts should not add words or

18   elements to criminal statutes.

19   Second, Congress knows how to include a

20   relational element when it wants to, and in fact, did

21   that in section 924(c) after which section 844 is

22   otherwise patterned. And that shows that when Congress

23   chose to leave "in relation to" out of section 844 it

24   did that intentionally.

25   Third, when section 844 was amended in 1988,

1   one court of appeals, the only court of appeals to rule

2   directly on the question of whether there was to be a

3   relationship between the carrying of explosives in the

4   commission of a felony, had held that there was no

5   relational element. Congress was on notice of that

6   fact, and if it wanted to include --

7   CHIEF JUSTICE ROBERTS: Your argument relies

8   on the notion that the word "during" in the statute is

9   solely temporal. In other words, it just refers to the

10   time?

11   GENERAL MUKASEY: Correct.

12   CHIEF JUSTICE ROBERTS: So -- that's not

13   always the case. If I say, you know, I hung lights

14   during the holiday season, you wouldn't think that I

15   hung a chandelier, right? There'd be not simply a

16   temporal connection, but also -- I don't know -- a

17   relation.

18   GENERAL MUKASEY: In that instance, that

19   would be correct. On the other hand, when Congress in

20   -- in 924(c) said "during and in relation to," it meant

21   something more than a temporal relationship. It did not

22   say the same thing in 844, and it failed to say the same

23   thing in 844 after it amended 924(c).

24   JUSTICE SCALIA: General, could -- could

25   Congress pass a law that said if you wear a wristwatch

1   during the commission of any crime, you get another 10

2   years?

3   GENERAL MUKASEY: A statute like that would

4   be entirely unreasonable. It was not entirely

5   unreasonable for Congress to have said if you carry an

6   explosive during the commission of a felony, you've

7   added something enormously volatile.

8   JUSTICE SCALIA: Surely it depends on what

9   the felony is. If the felony is the filing of a

10   dishonest tax return and -- and you have a can of

11   gasoline with you when you mail the letter, it seems to

12   me quite as absurd as saying wearing a wristwatch in the

13   course of a felony. That's what troubles me about this.

14   I'm -- I'm tempted to -- I think everybody

15   is tempted to distort the "during" to -- to mean

16   something else, simply because the consequences of

17   performing a completely lawful act wearing a wristwatch,

18   carrying explosives -- given the broad definition of

19   explosives, I guess it would include having -- having

20   some cartridges, explosive cartridges?

21   GENERAL MUKASEY: It would. But the

22   temptation --

23   JUSTICE SCALIA: That's perfectly lawful,

24   and you get another 10 years for it just because you're

25   -- you're mailing the letter to the IRS at the same time.

1   GENERAL MUKASEY: It is perfectly lawful.

2 Congress was aware that Title 18, not to mention all the

3 other titles, are chockablock with felonies. There are

4 thousands of them out there. But nonetheless, it wanted

5 to make sure that the mainstream that it was concerned

6 with, which is nicely illustrated by the facts of this

7 case, were taken care of; and so it passed a very broad

8 statute. We concede that it was a very broad statute.

9 "Any felony" couldn't be broader.

10   But that was Congress's choice. And if

11 Congress chooses to amend the statute, respectfully, it

12 ought to be Congress that amends it.

13   JUSTICE GINSBURG: General Mukasey, is there

14 any indication why this prosecutor chose to hook the

15 carrying an explosive onto a false-statement charge,

16 instead of some charges with which it would have been

17 more logically linked, like the one -- the first one,

18 conspiracy to commit an act of terror -- terrorism?

19   GENERAL MUKASEY: There is. At the time the

20 case was brought, there was evidence to charge the first

21 count, conspiracy to commit a terrorist act. There were

22 some evidentiary problems; a great deal of the evidence

23 to support that count did not, in fact, come until

24 almost literally the eve of trial. A lot of it came

25 from overseas.

1   The count to which the -- the 844 -- the

2   crime to which 844 was, in fact, attached, the making of

3   a false statement, was, to use a colloquialism, a

4   lead-pipe cinch. He had clearly made a false statement.

5   He had clearly carried an explosive while doing it.

6   That prosecutor's decision, in fact, was a

7   very responsible one, because what was shown when they

8   opened his trunk was that this was a very dangerous

9   person; and they wanted to bring a charge on which they

10   were sure to convict him, so that his carrying of the

11   explosive would get him ten years in addition to that

12   charge.

13   JUSTICE KENNEDY: I guess what's troubling

14   me, Mr. Attorney General, is that it -- it does seem to

15   me fair enough to make that charge in this case; but

16   then we -- but then we have the tremendous number of

17   cases where the prosecutor is going to be in the

18   position in a plea-bargain context, say, to threaten to

19   charge this offense with a heavy mandatory minimum.

20   My understanding is that district judges do

21   not and cannot be involved in plea-bargain negotiations;

22   they can look at a plea before it is entered.

23   What can you tell us about the safeguards

24   that might exist in the system generally against --

25   against overcharging, against charging where the result

1   is close to absurd, as in some of these hypotheticals

2   about the income tax return and the gasoline and so

3   forth?

4   GENERAL MUKASEY: The safeguard -- the

5   safeguard that is in the system, in part, involves the

6   history of the system. Rosenberg was decided, I

7   believe, in 1986. That's 22 years ago. There's been

8   no, as far as I know, recorded outbreak of this sort of

9   thing any place, in the Third Circuit or any place else.

10   And it seems to me that a defendant would be able to

11   challenge that kind of threat, that kind of application,

12   or at least make it known.

13   We haven't received any notification that

14   that's -- that that's going on, although there have been

15   charges of -- under 844(h), relating to ammunition. But

16   that's scarcely -- that's scarcely a marginal case.

17   The hypothetical of the fellow with the --

18   with the firecracker in his back pocket who is

19   simultaneously in possession of a $20 counterfeit

20   bill has no --

21   JUSTICE BREYER: General, that is -- my

22   question would be the converse. Suppose I agreed with

23   you to this point hypothetically that, of course,

24   there's a relationship here. In this case, there's a

25   relationship. He wouldn't have lied if he -- if he

1   hadn't had the explosives. Suppose I accept that.

2   Now, if I interpret the statute that way --

3   there has to be a relationship, but including that --

4   then what are the other cases you want to prosecute?

5   In the other briefs they list every funny or

6   comical or absurd example they can find; and so I don't

7   believe you want to prosecute those, but tell me if you

8   do. And if there are some other ones, what are they?

9   GENERAL MUKASEY: We don't, but,

10   respectfully, "relationship" doesn't mean in a statute

11   what "relationship" means in conversation. It means

12   facilitation under -- it means that --

13   JUSTICE BREYER: Fine. So suppose, in other

14   words, if we -- if, hypothetically, I were to say, well,

15   here there's a relationship; after all, it is a

16   necessary condition for the lying that he was carrying

17   explosives; and it is foreseeable that he would lie on

18   his passport, because he was carrying explosives

19   illegally. So that's all you need.

20   In other words, if that were the decision,

21   you would say fine, that's the end of it.

22   GENERAL MUKASEY: It was -- his carrying of

23   explosives did not facilitate his lying in this case.

24   JUSTICE BREYER: No, it didn't facilitate

25   it, but it caused it.

1   GENERAL MUKASEY: Maybe it caused it, and

2   maybe it didn't. There are --

3   JUSTICE BREYER: Well, if it didn't -- all

4   right. Would you be satisfied with a result that says,

5   look, if the carrying of explosives is related to the

6   felony in the sense that it is a necessary condition and

7   foreseeable that a person would do such a thing, that's

8   sufficient?

9   GENERAL MUKASEY: No, Your Honor, we would

10   not. Because there are cases in which it may become

11   necessary to prosecute somebody -- for example, where we

12   have a situation in which we can charge another crime,

13   but to charge that crime would involve disclosure of

14   classified information; it would disclose methods and

15   sources -- we believe that it was Congress's choice to

16   leave to the judgment of prosecutors the decision of

17   what crimes the charge in conjunction with possession of

18   explosives, and we think that's where the authority

19   should remain.

20   CHIEF JUSTICE ROBERTS: Why is there in the

21   statutes a difference between possession of explosives

22   in this circumstance and possession of firearms?

23   GENERAL MUKASEY: Possession of explosives

24   inherently involves volatility. You are asking for a

25   policy explanation. Possession of explosives inherently

1   involves a degree of volatility. Explosives cause

2   indiscriminate and potentially vast harm.

3   Firearms, for all the harm they cause, cause

4   discriminate harm. And there's every reason for

5   Congress to have treated explosives differently from the

6   way it treated firearms.

7   JUSTICE SOUTER: Was -- was the further

8   explanation that what they were doing in amending the

9   firearms statute was tailoring it more precisely to the

10   possible felony by a police officer situation, and they

11   simply did not face that possibility in the explosives

12   statute?

13   GENERAL MUKASEY: I think the history of the

14   amendment to 924(c) reflects that.

15   JUSTICE SOUTER: Yes.

16   JUSTICE GINSBURG: So it's a difference in

17   two respects. One is 924(c) has the "in relationship"

18   requirement, and it also has a shorter term. It's only

19   -- in one it is five years, and the other is ten years.

20   Is that right?

21   GENERAL MUKASEY: Yes, that's correct,

22   Justice Ginsburg; and that underlines, I think, the

23   dangerousness, or Congress's perception of the

24   dangerousness, and the volatility of explosives. And

25   certainly --

1   CHIEF JUSTICE ROBERTS: Is there any ---

2   GENERAL MUKASEY: -- this case bears that

3   out.

4   CHIEF JUSTICE ROBERTS: Is there any policy

5   limitation within the department not to charge under

6   this provision unless there is a relationship between

7   the underlying felony and the use of -- the carrying of

8   explosives?

9   GENERAL MUKASEY: There is no policy

10   limitation that I'm aware of.

11   JUSTICE KENNEDY: You do have policy

12   guidelines with money laundering.

13   GENERAL MUKASEY: We do.

14   JUSTICE KENNEDY: And I suppose if you

15   thought there was a problem, you could promulgate them

16   out of your department.

17   GENERAL MUKASEY: I think I'd be ideally

18   suited to do that.

19   (Laughter.)

20   CHIEF JUSTICE ROBERTS: The ten years,

21   though, is mandatory, correct?

22   GENERAL MUKASEY: The ten years is

23   mandatory.

24   CHIEF JUSTICE ROBERTS: So if the prosecutor

25   asked for it and there is an underlying felony and there

1   is an explosive, that's an additional ten years, no

2   matter what.

3   GENERAL MUKASEY: That's an additional ten

4   years, no matter what.

5   CHIEF JUSTICE ROBERTS: So if you get -- the

6   underlying felony is of the sort Justice Scalia was

7   talking about, and let's say the person gets probation

8   on that because, you know, it is the first offense, no

9   harm, he still gets ten years?

10   GENERAL MUKASEY: He still gets ten years.

11   It is possible, again, to imagine many, many marginal

12   situations; but I think Congress was willing to

13   contemplate that because it wanted to make sure that it

14   swept in the cases that had to be swept in.

15   And to add a relational element would leave

16   us unprotected against the cases that Congress wanted to

17   include, and protected only against the marginal ones.

18   CHIEF JUSTICE ROBERTS: Well, but how many

19   cases are there likely to be -- this isn't one of them

20   -- where you have no "in relation to" connection

21   whatsoever?

22   GENERAL MUKASEY: How many cases as a matter

23   of common sense?

24   CHIEF JUSTICE ROBERTS: Or any historical

25   record that you're familiar with.

1   GENERAL MUKASEY: No historical record that

2   I'm familiar with, but I don't have complete knowledge

3   of the historical record.

4   CHIEF JUSTICE ROBERTS: I mean, in this

5   case, as you point out, there was, of course, a

6   connection. And I would have thought in most cases

7   where the prosecutor is interested in charging --

8   because, as you have indicated, this case is -- there

9   would be an actual connection. Now, you may have, as

10   you suggest, problems with proof or -- or evidence; but,

11   as a practical matter, I'm just wondering how often the

12   question we're concerned about arises.

13   GENERAL MUKASEY: I don't think -- I'm not

14   aware of any other situation in which it has arisen.

15   But I don't -- I think Congress didn't wanted to rule

16   out anything when it wrote "any felony."

17   JUSTICE SCALIA: This isn't a very good

18   case. If you wanted to bring a really absurd case, you

19   could have picked a better one than this, because there

20   really is something of a connection.

21   GENERAL MUKASEY: I think -- I think the

22   lesson to be learned, particularly by the history, is

23   that we don't want to bring absurd cases, and -- and we

24   don't.

25   CHIEF JUSTICE ROBERTS: But I mean the

14

1   interesting thing is that you're -- the cases where this

2   is going to arise is not where you're really worried

3   about the explosives; it's going to -- because in that

4   case, presumably there is going to be a relation, and

5   you can use it as you used in this case.

6   The cases where this is going to be

7   problematic is when you are really interested in the

8   underlying felony.

9   GENERAL MUKASEY: That --

10   CHIEF JUSTICE ROBERTS: You know, the guy

11   who's driving in his car and calls his broker and is

12   guilty of insider trading and has some firecrackers in

13   the trunk, you're not worried about the firecrackers,

14   but you want to really crack down on the insider trading.

15   GENERAL MUKASEY: That has to do more with

16   the breadth of the definition of "explosives" than it

17   has to do with the question of a relationship, because

18   we may very well be concerned with the person who is

19   committing what sounds like an innocuous felony but

20   carrying a load of explosives in his trunk. So

21   reading in a relational requirement isn't going to solve

22   the problem that's posed in what I think is Your Honor's

23   hypothetical, which is the fact that firecrackers are as

24   much explosives as bombs under the "explosives"

25   definition contained in the statute.

1   If there are no further questions, I'd like,

2   Mr. Chief Justice, to reserve the remainder of my time

3   for rebuttal.

4   CHIEF JUSTICE ROBERTS: Thank you,

5   Mr. Attorney General.

6   Mr. Hillier.

7   ORAL ARGUMENT OF THOMAS W. HILLIER, II

8   ON BEHALF OF THE RESPONDENT

9   MR. HILLIER: Mr. Chief Justice, and may it

10   please the Court:

11   General Mukasey put his finger on the point

12   here when he said we wanted to charge a lead-pipe cinch

13   case. But in doing so, what we now have is what was a

14   terrorism prosecution and a choice to link the

15   underlying felony -- or to link the carrying explosives

16   charge exclusively to count 5 of the indictment, which

17   charged a false statement, an argument which requests

18   that this Court apply this statute to all sorts of

19   situations theoretically that might even involve

20   explosives that were lawfully carried during a

21   completely unrelated felony. And I would disagree that

22   that's what Congress thought, that's what Congress

23   thought when it was creating this statute.

24   The words -- in applying this Court's

25   statutory construction regime, what we do first of all,

1   of course, is look to the words of the text to see if it

2   means what the government suggests it does in this case.

3   And as, Chief Justice Roberts, you have already

4   indicated, the word "during" has meanings beyond just

5   that temporal one used here. But also other words in the

6   text have significance to describing what the meaning of

7   this particular statute is, and important among those are

8   the terms "in which," which is found in the concluding

9   sentence of the statute. And, of course, that -- the

10   companion word, the largest word in this particular

11   statute, "explosives," and its very broad definition

12   under 844(j).

13   Taking first the term "in which," which is

14   at the conclusion of 844(h) -- and I'll quote. And what

15   it says is that the penalty that's going to attach to

16   this prosecution shall run consecutively to, quote, "the

17   felony in which the explosive was used or carried."

18   JUSTICE SCALIA: And you say it should

19   have said "during which"?

20   MR. HILLIER: Well, I --

21   JUSTICE SCALIA: "During the commission of

22   which the explosive was used or carried"?

23   MR. HILLIER: I just think that the words --

24   the words that were used, Your Honor, establish the

25   notion of a relationship between the felony and the

1   explosive. The word "in" is, as this Court indicated in

2   Dunn v. Commodity Futures Trading Commission, 519 U.S.

3   465, is synonymous with the words "in regard to" or

4   "with respect to."

5   CHIEF JUSTICE ROBERTS: Well, but just --

6   just as "during" has more than temporal -- can have more

7   than temporal significance, I think "in" can have

8   temporal significance.

9   MR. HILLIER: It does, Your Honor.

10   CHIEF JUSTICE ROBERTS: I hung lights "in"

11   the holiday season.

12   MR. HILLIER: That's very true. And, in

13   fact, it has a -- "locational" sort of significance

14   also. But as noted in Dunn, its primary definition, its

15   first definition, is this relational one. And, while it

16   might have --

17   CHIEF JUSTICE ROBERTS: I assume -- I

18   haven't looked at the dictionary -- but "during's" first

19   relationship -- first definition, I suspect, is

20   temporal.

21   MR. HILLIER: It's temporal. That's

22   correct.

23   JUSTICE ALITO: Could you give an example of

24   where it's not temporal, an example of the use of

25   "during" that is not temporal?

1   MR. HILLIER: I think the example posed by

2   the Chief Justice to General Mukasey is an example of

3   that, Your Honor.

4   JUSTICE ALITO: Hanging up lights

5   "during" the -- the holiday season doesn't -- that's not

6   a temporal relationship?

7   MR. HILLIER: It's a -- it is a temporal

8   relationship, but it's a relationship between the act

9   that's occurring also, that the underlying act.

10   But to get to the point of the -- Chief

11   Justice Robert's question, the fact that a word may

12   have more than one meaning, particularly in this case,

13   does not exclude the fact that the meaning of "in which"

14   includes a relationship. And the most naturally

15   suggested reading of these words in this case, "in

16   which" and "explosives" together, is that there is a

17   relationship, that there is --

18   JUSTICE SOUTER: Mr. Hillier, I -- you know,

19   I will accept maybe more than just for the sake of

20   argument that if you stick to the text alone you've got

21   an argument here for some uncertainty, for some

22   ambiguity.

23   The trouble that I have with your argument

24   is that we're here to consider not only text but

25   statutory history, and the statutory history seems to me

1   pretty tough for you to get over. The statute was

2   amended. The word "unlawfully" was dropped from it, and

3   there was no amendment made, with respect to its

4   cognates, to conform it to the cognate section on

5   carrying a gun that specified "in relation to." And it

6   seems to me that the most reasonable inference to draw

7   from that statutory history is that when Congress

8   amended and technically reenacted the statute, when it

9   dropped "unlawfully," that it did not want "during" to

10   be read, as it was in the handgun statute, "in relation

11   to."

12   And I -- that seems to me the tough point

13   of the argument. What is your response to that?

14   MR. HILLIER: Yes, Your Honor. Two points:

15   First, the idea -- the idea of in pari materia, which

16   would suggest that what's happening in 924(c) ought to

17   be occurring in 844 is -- has not the force that it

18   would if we were talking about amendments to and

19   constructions of the same statute, but rather what we

20   have here are two statutes that are being interpreted by

21   two legislators at different times to achieve different

22   objects. And there's no reason to believe that the --

23   well, the force of that --

24   JUSTICE SOUTER: The different object -- I

25   mean, the trouble with the different object argument is,

1   as the Attorney General said, there was an evident

2   concern in amending the handgun statute not to sweep in

3   the rogue police officer who happens to have a gun on

4   him when he does something that in fact is unlawful.

5   MR. HILLIER: Right.

6   JUSTICE SOUTER: The negative inference from

7   that is that there was an intent in the cognate

8   explosives statute to sweep in people, whether in fact

9   it was in relation to or not in relation to.

10   MR. HILLIER: Your Honor, I think it's --

11   JUSTICE SCALIA: Including the policeman who

12   had cartridges in his gun, presumably, right?

13   MR. HILLIER: Well, Your Honor, I think

14   the -- when you're looking at what happened to 844, when

15   "unlawfully" was taken out the words "in which" were

16   added, which I think indicates that Congress had an

17   appreciation of the relationship that's involved in that

18   statute. While the legislative history doesn't say why

19   "unlawfully" was taken out, it seems reasonable to

20   believe that what they were trying to do was conform the

21   statute to the purpose of -- its purpose. And its

22   purpose did include, when you look at the "explosives"

23   definition, the use of lawful explosives to further

24   crimes.

25   So if somebody has a can of gasoline and

1   they want to use that to threaten somebody and create a

2   Federal crime or to accomplish a Federal crime, before

3   that amendment occurred that -- that would have been a

4   lawful possession of the explosives, so 844(h)(2) would

5   not have applied.

6   JUSTICE SOUTER: Okay, fair enough so far as

7   the argument goes. But that still leaves Congress

8   taking the -- sort of making it as difficult as possible

9   for you to take the position that you're taking, rather

10 than as easy as possible.

11   Why didn't it put in "in relation to"?

12   MR. HILLIER: Well, the -- I think we go to

13 yet another statutory construction tool, or at least

14 observation by this Court that the Congress can use

15 different words in different statutes to accomplish the

16 same thing.

17   JUSTICE SOUTER: It can do it, but why would

18 it have done so? You've got the -- you've got the gun

19 example sitting there. And why would it not have done

20 so if, in fact -- so obvious a thing to do if that's

21 what -- if it intended to come out your way?

22   MR. HILLIER: Well, Your Honor, we don't

23 know why it didn't do that because the legislative

24 history doesn't inform us. But to draw an analogy from

25 your question with respect to changes done in these two

1 exact statutes, as you read from the government's reply

2 brief, it is trying to establish through the words

3 "during the commission of" the fact that it is the

4 defendant that committed that crime, in other words

5 it was he that did so. And we don't take any issue with

6 that; in fact, it makes complete sense.

7   But it's interesting to note that 924(c) in

8 1971 was amended to put these -- to substitute the words

9 "for which he may be prosecuted" instead of "which may

10 be prosecuted." So one might ask why didn't they put

11 the word "he" into 844 at the same time if there was any

12 question about who the perpetrator of the crime was.

13   JUSTICE GINSBURG: Maybe because --

14 maybe because they're trying to draft legislation

15 without using pronouns.

16   (Laughter.)

17   MR. HILLIER: Touché, Your Honor. Yes.

18   JUSTICE KENNEDY: I take it that one of the

19 reasons you make your argument is so that if you prevail

20 and you go back to trial, you would argue that this is

21 not in relation to? Is that correct?

22   MR. HILLIER: Your Honor, perhaps I didn't

23 understand your question. If you could rephrase it.

24   JUSTICE KENNEDY: If you prevail in this

25 case and we say "in relation to" is part of the statute

1   --

2   MR. HILLIER: Yes.

3   JUSTICE KENNEDY: -- and then you go back to

4   the trial court, I assume you will argue to the jury

5   that the government can't show that it's in relation to.

6   MR. HILLIER: Well, Your Honor, if you agree

7   that there's a -- if you agree with the Ninth Circuit in

8   this case, then the case is over.

9   JUSTICE KENNEDY: That's right. Of course,

10   you're the Respondent.

11   MR. HILLIER: The government --

12   JUSTICE BREYER: Why should we agree with

13   that?

14   JUSTICE KENNEDY: But it seems to me that in

15   a prosecution, in this prosecution, it might be somewhat

16   difficult to establish "in relation to."

17   MR. HILLIER: It would be difficult --

18   JUSTICE KENNEDY: And that's just speaking --

19   even assuming the jury was properly instructed, et cetera,

20   et cetera.

21   MR. HILLIER: Right. Right. It picked its

22   poison here. They don't have a relationship. The

23   explosives were not used to --

24   JUSTICE KENNEDY: All right, but doesn't

25   that show the necessity for the very interpretation the

1   Attorney General is arguing for here? It is just too

2   difficult to establish and it's very dangerous.

3   MR. HILLIER: Your Honor, if we can look at

4   the facts of this case, I would respectfully disagree.

5   What was done here was a charging decision which made

6   that task impossible. The government could have simply

7   charged this count with count 1, and we wouldn't be here

8   today because surely the explosives were carried for the

9   purpose of accomplishing the act of terrorism that was

10   charged in count 1.

11   JUSTICE ALITO: Well, if there's an "in

12   relationship" requirement, why would it be necessary for

13   the explosives to facilitate the false statement? Why

14   wouldn't it be sufficient if the false statement

15   facilitated the unlawful use of the explosives?

16   MR. HILLIER: So if we had a reverse sort of

17   relationship.

18   Your Honor, two answers to that: First, it

19   would be at odds with the structure of the statute. If

20   you look at the whole of 844(h), you see in (h)(1), the

21   crime of using an explosive to -- an explosive to commit

22   an underlying felony. And that is that sort of direct

23   relationship that is carried forward in the language of

24   (h)(2).

25   But, secondly, that language -- that sort of

1   relationship has been interpreted by this Court in Smith

2   as acknowledged by the government in its briefing to

3   mean the relationship that we're talking about.

4   JUSTICE BREYER: That's exactly what's

5   bothering me. The issue in this case doesn't seem to me

6   to be these weird hypotheticals. Of course it requires

7   a relationship, in my mind.

8   But I don't see why the relationship

9   couldn't be exactly the one Justice Alito was talking

10   about. I mean, imagine a person has packed a car filled

11   with explosives. He's going to blow something up. A

12   policemen comes up; he shoots the policeman. The reason

13   he shot the policeman was because he had his car packed

14   with explosives.

15   And if this -- if this provision -- I mean,

16   I can't understand why this provision wouldn't be aimed

17   directly at that kind of thing.

18   MR. HILLIER: Your Honor, I can't say too

19   much more than what I have. When you look at the

20   statute --

21   JUSTICE BREYER: All right. Suppose I don't

22   --

23   JUSTICE SCALIA: You can say that it is not

24   the question on which we granted certiorari.

25   MR. HILLIER: Well, that's --

1   (Laughter.)

2   JUSTICE BREYER: Well, that may be, but I

3   don't know -- but you could say that. You could say

4   that. But the problem is I have to answer the question --

5   I have to reach an answer that I believe should be

6   sensible.

7   MR. HILLIER: Yes, sir.

8   JUSTICE BREYER: So what should I do --

9   MR. HILLIER: Well, Your Honor --

10   JUSTICE BREYER: -- if I think that shooting

11   the policeman because he's going to catch the criminal

12   filled with explosives is within this statute? And

13   similarly, lying to a customs officer so he won't catch

14   me when my car is filled with explosives is within the

15   statute?

16   Suppose I believe that, but I also think the

17   statute is not meant to govern those odd hypotheticals

18   that you come up with? There has to be a relationship,

19   but the one I described falls within the word

20   "relationship."

21   Now what do I do?

22   MR. HILLIER: Well, Your Honor, the

23   relationship -- if you look at the structure of the

24   statute, surely (h)(1) does not describe that sort of

25   relationship; (h)(2) is the next statute or the next

27

1   subsection of that statute, and its purpose is simply to

2   capture the same criminal objective here, that is to

3   say, the marriage of explosives and a felony.

4   JUSTICE BREYER: I understand that argument.

5   But suppose I don't accept the argument? Then what do I

6   do in this case? That's what I'm asking.

7   MR. HILLIER: I would ask the Court -- well,

8   I would think the Court would draw some -- an answer

9   from Smith which did describe the relationship contrary

10 to the way Your Honor is doing with respect to this case

11 that goes back to -- goes -- wasn't instructed that way;

12 and so it can't be -- this case still has to go back.

13   JUSTICE KENNEDY: You think on this

14 evidence, on this record, that a jury, if it were

15 instructed to -- that it had to find "in relation to"

16 could return a conviction of guilty including the "in

17 relation to"?

18   MR. HILLIER: If this case had been

19 instructed correctly?

20   JUSTICE KENNEDY: If this case had been

21 instructed according to your theory of the statute and

22 on this record and on this evidence, could a jury have

23 found your client guilty?

24   MR. HILLIER: No, Your Honor.

25   JUSTICE KENNEDY: Well, that's exactly why

1   the Attorney General says he needs it.

2   JUSTICE SCALIA: You should have said yes,

3   you got it anyway.

4   MR. HILLIER: Beg your pardon, Your Honor?

5   JUSTICE SCALIA: Could I ask you about the

6   "in which," the "in which" thing? It has just occurred

7   to me that "in which" is in a very sloppy clause anyway,

8   because it says "shall run concurrently with any other

9   term of imprisonment, including that imposed for the

10   felony in which the explosive was used or carried."

11   What about the fire? It omits fire entirely

12   -- in which fire or the explosive. Fire or the

13   explosive was used or the explosive was carried. It's a

14   pretty sloppy job down at the end of (h), isn't it?

15   So I wouldn't put a whole lot of weight on

16   the "in which" given that the rest of it is so sloppy.

17   MR. HILLIER: Well, Your Honor, the "in

18   which" -- the point obviously was that it strengthens

19   and informs the relationship here to be more than the

20   coincidental or temporal one the government --

21   JUSTICE SCALIA: If you are being very

22   precise, but whoever wrote that was, obviously, not

23   being very precise because he left out "fire" entirely.

24   MR. HILLIER: I suppose that goes to the

25   idea that we shouldn't draw a lot of information from

1   the amendments that were occurring on 924 when they

2   weren't even looking at this statute and considering it

3   and its consequences to the changes in 844 -- or as

4   having effect in 844.

5   Your Honor, I would just simply conclude by

6   indicating that the terms, as I think we agree,

7   naturally suggest that there must be a relationship, and

8   the breadth of the term "explosives" includes a lot of

9   lawful items that can be carried, if they were carried

10 in a felony, must be related to that felony if you're

11 going to have -- give 844 its effect and its purpose,

12 because when you look at the purpose of the Act and the

13 way that they constructed it so carefully and

14 thoughtfully in terms of the crimes that were -- or the

15 -- the use of explosives, it applies only to that portion

16 of the statute that involves illegal use of criminal --

17 of explosives. And the combination of all of these

18 elements certainly gives force to our argument and tends

19 to rub -- tends to do the opposite to the government.

20   At the end of the day, if there's anything

21 to be said for the government's argument, then there is

22 an ambiguity, and it should be construed in favor of the

23 defendant.

24   And -- just a concluding point to answer

25 Justice Kennedy's question, the government could have

1   avoided all of this by simply charging this case, as it

2   should have, by linking count 9 with count 1, where the

3   proof problem wouldn't have been a -- the only

4   difference in the proof would have been -- there would

5   have been no difference in the proof. The only

6   difference in the case would have been they would have

7   submitted a different instruction.

8   CHIEF JUSTICE ROBERTS: Your friend

9   indicated that this issue doesn't come up very often as

10   a practical matter. Do you disagree with that?

11   MR. HILLIER: Well, Your Honor -- no, I

12   don't disagree with that, and I'm not sure why that is.

13   But I think it's been alluded to by the Court already in

14   its questioning. It could be that prosecutors simply

15   recognized this to be a good plea-bargaining chip and

16   maybe the other prosecutors understand that there's a

17   relationship required.

18   CHIEF JUSTICE ROBERTS: Thank you, counsel.

19   Mr. Attorney General, you have 14 minutes

20   remaining.

21   REBUTTAL ARGUMENT OF GEN. MICHAEL B. MUKASEY

22   ON BEHALF OF THE PETITIONER

23   GENERAL MUKASEY: I just wanted to make two

24   brief points on rebuttal. First, Justice Breyer's

25   question and position appears to read in a relational

1   element that's also not in this statute. And our view

2   is that that is something that should be done, if

3   anybody, by Congress.

4   And secondly, that the Respondent's

5   reference to gasoline as an explosive I think is a bit

6   of -- is a bit of a reach. I don't think gasoline is

7   generally regarded as an explosive unless it is prepared

8   and processed and presented in a certain way with -- in

9   ways that are not present simply by carrying a can of

10   gasoline to help a -- to help out a friend who's run out

11   of gas.

12   JUSTICE SCALIA: And maybe gunpowder doesn't

13   include the little bit that's in a cartridge either.

14   You think it does?

15   GENERAL MUKASEY: I think it does.

16   CHIEF JUSTICE ROBERTS: Counsel, could I ask

17   you, do you have an answer to your friend's point about

18   the "in which" language?

19   GENERAL MUKASEY: The "in which" simply

20   includes both, number one, the use -- the actual use

21   and, number two, the carrying.

22   I agree that it's not a model of elegant

23   construction, but "in which" does include the two, both

24   the actual use and the mere carrying.

25   CHIEF JUSTICE ROBERTS: I understood his

1   point to be that it's surprising that they refer to use

2   of the explosives or carrying of the explosives with

3   reference to the underlying felony, "in which" the --

4   suggests that the explosive was used or carried with

5   respect to the underlying felony.

6   And I understood your position to be that it

7   doesn't have to be.

8   GENERAL MUKASEY: No, I think it suggests

9   simply that the underlying felony was, in fact,

10   committed.

11   JUSTICE SCALIA: Well, it was going to be --

12   it was going to be inaccurate as to one or the other of

13   one or two. If you said "during," that would be -- that

14   would be inaccurate as to one.

15   And "in" is accurate as to one but

16   inaccurate as to two. I guess they should have said "in

17   or during" or "in which."

18   They should have added "fire," too, right?

19   (Laughter.)

20   GENERAL MUKASEY: If there are no further

21   questions --

22   CHIEF JUSTICE ROBERTS: Thank you,

23   Mr. Attorney General.

24   Thank you, counsel. The case is submitted.

25   (Whereupon, at 12:01 p.m., the case in the

1   above-entitled matter was submitted.)

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