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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 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 --

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 a relation.

17 GENERAL MUKASEY: In that instance, that
18 would be correct. On the other hand, when Congress in
19 -- in 924(c) said "during and in relation to," it meant
20 something more than a temporal relationship. It did not
21 say the same thing in 844, and it failed to say the same
22 thing in 844(f) or the amended 924(c).

23 JUSTICE SCALIA: General, could -- could
24 Congress pass a law that said if you wear a wristwatch
25 during the commission of any crime, you get another 10

1 years?

2 GENERAL MUKASEY: A statute like that would
3 be entirely unreasonable. It was not entirely
4 unreasonable for Congress to have said if you carry an
5 explosive during the commission of a felony, you've
6 added something enormously volatile.

7 JUSTICE SCALIA: Surely it depends on what
8 the felony is. If the felony is the filing of a
9 dishonest tax return and -- and you have a can of
10 gasoline with you when you mail the letter, it seems to
11 me quite as absurd as saying wearing a wristwatch in the
12 course of a felony. That's what troubles me about this.

13 I'm -- I'm tempted to -- I think everybody
14 is tempted to distort the "during" to -- to mean
15 something else, simply because the consequences of
16 performing a completely lawful act wearing a wristwatch,
17 carrying explosives -- given the broad definition of
18 explosives, I guess it would include having -- having
19 some cartridges, explosive cartridges?

20 GENERAL MUKASEY: It would. But the
21 temptation --

22 JUSTICE SCALIA: That's perfectly lawful,
23 and you get another 10 years for it just because you're
24 -- you're mailing a letter to the IRS at the same time.

25 GENERAL MUKASEY: It is perfectly lawful.

1 Congress was aware that Title 18, not to mention all the
2 other titles, are chockablock with felonies. There are
3 thousands of them out there. But nonetheless, it wanted
4 to make sure that the mainstream that it was concerned
5 with, which is nicely illustrated by the facts of this
6 case, were taken care of; and so it passed a very broad
7 statute. We concede that it was a very broad statute.
8 "Any felony" couldn't be broader.

9 But that was Congress's choice. And if
10 Congress chooses to amend the statute, respectfully, it
11 ought to be Congress that amends it.

12 JUSTICE GINSBURG: General Mukasey, is there
13 any indication why this prosecutor chose to hook the
14 carrying an explosive onto a false-statement charge,
15 instead of some charges with which it would have been
16 more logically linked, like the one -- the first one,
17 conspiracy to commit an act of terror -- terrorism?

18 GENERAL MUKASEY: There is. At the time the
19 case was brought, there was evidence to charge the first
20 count, conspiracy to commit a terrorist act. There were
21 some evidentiary problems; a great deal of the evidence
22 to support that count did not, in fact, come until
23 almost literally the eve of trial. A lot of it came
24 from overseas.

25 The count to which the -- the 844 -- the

1 crime to which 844 was, in fact, passed, the making of a
2 false statement, was, to use a colloquialism, a
3 lead-pipe cinch. He had clearly made a false statement.
4 He had clearly carried an explosive while doing it.

5 That prosecutor's decision, in fact, was a
6 very responsible one, because what was shown when they
7 opened his trunk was that this was a very dangerous
8 person; and they wanted to bring a charge on which they
9 were sure to convict him, so that his carrying of the
10 explosive would get him ten years in addition to that
11 charge.

12 JUSTICE KENNEDY: I guess what's troubling
13 me, Mr. Attorney General, is that it -- it does seem to
14 me fair enough to make that charge in this case; but
15 then we -- but then we have the tremendous number of
16 cases where the prosecutor is going to be in the
17 position in a plea-bargain context, say, to threaten to
18 charge this offense with a heavy mandatory minimum.

19 My understanding is that district judges do
20 not and cannot be involved in plea bargain negotiations;
21 they can look at a plea before it is entered.

22 What can you tell us about the safeguards
23 that might exist in the system generally against --
24 against overcharging, against charging for something
25 where the result is close to absurd, as in some of these

1 hypotheticals about the income tax return and the
2 gasoline and so forth?

3 GENERAL MUKASEY: The safeguard -- the
4 safeguard that is in the system, in part, involves the
5 history of the system. Rosenberg was decided, I
6 believe, in 1986. That's 22 years ago. There's been
7 no, as far as I know, recorded outbreak of this sort of
8 thing any place, in the Third Circuit or any place else.
9 And it seems to me that a defendant would be able to
10 challenge that kind of threat, that kind of application,
11 or at least make it known.

12 We haven't received any notification that
13 that's -- that that's going on, although there have been
14 charges of -- under 844(h), relating to ammunition. But
15 that's scarcely -- that's scarcely a marginal case.

16 The hypothetical of the fellow with the --
17 with the firecracker in his back pocket who is
18 simultaneously in possession of a \$20 counterfeit
19 bill has no --

20 JUSTICE BREYER: General, that is -- my
21 question would be the converse. Suppose I agreed with
22 you to this point hypothetically that, of course,
23 there's a relationship here. In this case, there's a
24 relationship. He wouldn't have lied if he -- if he
25 hadn't had the explosives. Suppose I accept that.

1 Now, if I interpret the statute that way --
2 there has to be a relationship, but including that --
3 then what are the other cases you want to prosecute?

4 In the other briefs they list every funny or
5 comical or absurd example they can find; and so I don't
6 believe you want to prosecute those, but tell me if you
7 do. And if there are some other ones, what are they?

8 GENERAL MUKASEY: We don't, but,
9 respectfully, "relationship" doesn't mean in a statute
10 what "relationship" means in conversation. It means
11 facilitation under a knife. It means that --

12 JUSTICE BREYER: Fine. So suppose, in other
13 words, if we -- if, hypothetically, I were to say, well,
14 here there's a relationship; after all, it is a
15 necessary condition for the lying that he was carrying
16 explosives; and it is foreseeable that he would lie on
17 his passport, because he was carrying explosives
18 illegally. So that's all you need.

19 In other words, if that were the decision,
20 you would say fine, that's the end of it.

21 GENERAL MUKASEY: It was -- his carrying of
22 explosives did not facilitate his lying in this case.

23 JUSTICE BREYER: No, it didn't facilitate
24 it, but it caused it.

25 GENERAL MUKASEY: Maybe it caused it, and

1 maybe it didn't.

2 JUSTICE BREYER: Well, if it didn't -- all
3 right. Would you be satisfied with a result that says,
4 look, if this carrying of explosives is related to the
5 felony in the sense that it is a necessary condition and
6 foreseeable that a person would do such a thing, that's
7 sufficient?

8 GENERAL MUKASEY: No, Your Honor, we would
9 not. Because there are cases in which it may become
10 necessary to prosecute somebody -- for example, where we
11 have a situation in which we can charge another crime,
12 but the charge of that crime would involve disclosure of
13 classified information; it would disclose methods and
14 sources -- we believe that it was Congress's choice to
15 leave to the judgment of prosecutors the decision of
16 what crimes the charge in conjunction with possession of
17 explosives, and we think that's where the authority
18 should remain.

19 CHIEF JUSTICE ROBERTS: Why is there in the
20 statutes a difference between possession of explosives
21 in this circumstance and possession of firearms?

22 GENERAL MUKASEY: Possession of explosives
23 inherently involves volatility. You asked for a policy
24 explanation. Possession of explosives inherently
25 involves a degree of volatility. Explosives cause

1 indiscriminate and potentially vast harm.

2 Firearms, for all the harm they cause, cause
3 discriminate harm. And there's every reason for
4 Congress to have treated explosives differently from the
5 way it treated firearms.

6 JUSTICE SOUTER: Was -- was the further
7 explanation that what they were doing in amending the
8 firearms statute was tailoring it more precisely to the
9 possible felony by a police officer situation, and they
10 simply did not face that possibility in the explosives
11 statute?

12 GENERAL MUKASEY: I think the history of the
13 amendments to 924(c) reflects that.

14 JUSTICE SOUTER: Yes.

15 JUSTICE GINSBURG: So it's a difference in
16 two respects. One is 924(c) has the "in relationship"
17 requirement, and it also has a shorter term. It's only
18 -- in one it is five years, and the other is ten years.
19 Is that right?

20 GENERAL MUKASEY: Yes, that's correct,
21 Justice Ginsburg; and that underlines, I think, the
22 dangerousness, or Congress's perception of the
23 dangerousness, and the volatility of explosives. And
24 certainly --

25 CHIEF JUSTICE ROBERTS: Is there any ---

1 GENERAL MUKASEY: -- this case bears that
2 out.

3 CHIEF JUSTICE ROBERTS: Is there any policy
4 limitation within the department not to charge under
5 this provision unless there is a relationship between
6 the underlying felony and the use of -- the carrying of
7 explosives?

8 GENERAL MUKASEY: There is no policy
9 limitation that I'm aware of.

10 JUSTICE STEVENS: And you do have policy
11 guidelines with money laundering.

12 GENERAL MUKASEY: We do.

13 JUSTICE KENNEDY: And I suppose if you
14 thought there was a problem, you could promulgate them
15 out of your department.

16 GENERAL MUKASEY: I think I'd be ideally
17 suited to do that.

18 (Laughter.)

19 CHIEF JUSTICE ROBERTS: The ten years,
20 though, is mandatory, correct?

21 GENERAL MUKASEY: The ten years is
22 mandatory.

23 CHIEF JUSTICE ROBERTS: So if a prosecutor
24 asks for it and there is an underlying felony and there
25 is an explosive, that's an additional ten years, no

1 matter what.

2 GENERAL MUKASEY: That's an additional ten
3 years, no matter what.

4 CHIEF JUSTICE ROBERTS: So if you get -- the
5 underlying felony is of the sort Justice Scalia was
6 talking about, and let's say the person gets probation
7 on that because, you know, it is the first offense, no
8 harm, he still gets ten years.

9 GENERAL MUKASEY: He still gets ten years.
10 It is possible, again, to imagine many, many marginal
11 situations; but I think Congress was willing to
12 contemplate that because it wanted to make sure that it
13 swept in the cases that had to be swept in.

14 And to add a relational element would leave
15 us unprotected against the cases that Congress wanted to
16 include, and protected only against the marginal ones.

17 CHIEF JUSTICE ROBERTS: Well, but how many
18 cases are there likely to be -- this isn't one of them
19 -- where you have no "in relation to" connection
20 whatsoever?

21 GENERAL MUKASEY: How many cases as a matter
22 of common sense?

23 CHIEF JUSTICE ROBERTS: Or any historical
24 record that you're familiar with.

25 GENERAL MUKASEY: No historical record that

1 I'm familiar with, but I don't have complete knowledge
2 of the historical record.

3 CHIEF JUSTICE ROBERTS: I mean, in this
4 case, as you point out, there was, of course, a
5 connection. And I would have thought in most cases
6 where the prosecutor is interested in charging --
7 because, as you have indicated, this case is -- there
8 would be an actual connection. Now, you may have, as
9 you suggest, problems with proof or -- or evidence; but,
10 as a practical matter, I'm just wondering how often the
11 question we're concerned about arises.

12 GENERAL MUKASEY: I don't think -- I'm not
13 aware of any other situation in which it has arisen.
14 But I don't -- I think Congress didn't wanted to rule
15 out anything when it wrote "any felony."

16 JUSTICE SCALIA: This isn't a very good
17 case. If you wanted to bring a really absurd case, you
18 could have picked a better one than this, because there
19 really is something of a connection.

20 GENERAL MUKASEY: I think -- I think the
21 lessons we learned, particularly about the history, is
22 that we don't want to bring absurd cases, and -- and we
23 don't.

24 CHIEF JUSTICE ROBERTS: But I mean the
25 interesting thing is that you're -- the cases where this

1 is going to arise is not where you're really worried
2 about the explosives; it's going to -- because in that
3 case, presumably there is going to be a relation, and
4 you can use it as you used it in this case.

5 The cases where this is going to be
6 problematic is when you are really interested in the
7 underlying felony.

8 GENERAL MUKASEY: That --

9 CHIEF JUSTICE ROBERTS: You know, the guy
10 who's driving in his car and calls his broker and is
11 guilty of insider trading and has some firecrackers in
12 the trunk, you're not worried about the firecrackers,
13 but you want to crack down on the insider trading.

14 GENERAL MUKASEY: That has to do more with
15 the breadth of the definition of "explosives" than it
16 has to do with the question of a relationship, because
17 we may very well be concerned with the person who is
18 committing what sounds like an innocuous felony but
19 carrying a load of explosives in his trunk. So
20 weaving in a relational requirement isn't going to solve
21 the problem that's posed in what I think is Your Honor's
22 hypothetical, which is the fact that firecrackers are as
23 much explosives as bombs under the "explosives"
24 definition contained in the statute.

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

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

3 CHIEF JUSTICE ROBERTS: Thank you,
4 Mr. Attorney General.

5 Mr. Hillier.

6 ORAL ARGUMENT OF THOMAS W. HILLIER, II

7 ON BEHALF OF THE RESPONDENT

8 MR. HILLIER: Mr. Chief Justice, and may it
9 please the Court:

10 General Mukasey put his finger on the point
11 here when he said we wanted to charge a lead-pipe cinch
12 case. But in doing so, what we now have is what was a
13 terrorism prosecution and a choice to link the
14 underlying felony -- or to link the carrying explosives
15 charges exclusively to count 5 of the indictment, which
16 charged a false statement, an argument which requests
17 that this Court apply this statute to all sorts of
18 situations theoretically that might even involve
19 explosives that were lawfully carried during a
20 completely unrelated felony. And I would disagree that
21 that's what Congress thought, that's what Congress
22 thought when it was creating this statute.

23 The words -- in applying this Court's
24 statutory construction regime, what we do first of all,
25 of course, is look to the words of the text to see if it

1 means what the government suggests it does in this case.
2 And as, Chief Justice Roberts, you have already
3 indicated, the word "during" has meanings beyond just
4 that in 401 used here. But also other words in the text
5 have significance to describing what the meaning of this
6 particular statute is, and important among those are the
7 terms "in which," which is found in the concluding
8 sentence of the statute. And, of course, that's -- the
9 companion word, the largest word in this particular
10 statute, "explosives," and its very broad definition
11 under 844(j).

12 Taking first the term "in which," which is
13 at the conclusion of 844(h) -- and I'll quote. And what
14 it says is that the penalty that's going to attach to
15 this prosecution shall run consecutively to, quote, "the
16 felony in which the explosive was used or carried."

17 JUSTICE SCALIA: You're saying it should
18 have said "during which"?

19 MR. HILLIER: Well, I --

20 JUSTICE SCALIA: "During the commission of
21 which the explosive was used or carried"?

22 MR. HILLIER: I just think that the words --
23 the words that were used, Your Honor, establish the
24 notion of a relationship between the felony and the
25 explosive. The word "in" is, as this Court indicated in

1 Dunn v. Commodity Futures Trading Commission, 519 U.S.
2 465, is synonymous with the words "in regard to" or
3 "with respect to."

4 CHIEF JUSTICE ROBERTS: Well, but just --
5 just as "during" has more than temporal -- can have more
6 than temporal significance, I think "in" can have
7 temporal significance.

8 MR. HILLIER: It does, Your Honor.

9 CHIEF JUSTICE ROBERTS: We write "in the
10 holiday season."

11 MR. HILLIER: That's very true. And it
12 fact, it has a, quote, "locational" sort of significance
13 also. But as noted in Dunn, its primary definition, its
14 first definition, is this relational one. And, while it
15 might have --

16 CHIEF JUSTICE ROBERTS: I assume -- I
17 haven't looked at the dictionary -- but "during's" first
18 relationship -- first definition, I suspect, is
19 temporal.

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

22 JUSTICE ALITO: Could you give an example of
23 where it's not temporal, an example of use of "during"
24 that is not temporal?

25 MR. HILLIER: I think the example posed by

1 the Chief Justice to General Mukasey is an example of
2 that, Your Honor.

3 JUSTICE ALITO: But hanging up lights
4 "during" the -- the holiday season doesn't -- that's not
5 a temporal relationship?

6 MR. HILLIER: It's a -- it is a temporal
7 relationship, but it's a relationship between the act
8 that's occurring also, that's the underlying act.

9 But to get to the point of the -- Chief
10 Justice Robert's question, the fact that the word may
11 have more than one meaning, particularly in this case,
12 does not exclude the fact that the meaning of "in which"
13 includes a relationship. And the most naturally
14 suggested reading of these words in this case, "in
15 which" and "explosives" together, is that there is a
16 relationship, but there is --

17 JUSTICE SOUTER: Mr. Hillier, I -- you know,
18 I will accept maybe more than just for the sake of
19 argument that if you stick to the text alone you've got
20 an argument here for some uncertainty, for some
21 ambiguity.

22 The trouble that I have with your argument
23 is that we're here to consider not only text but
24 statutory history, And the statutory history seems to me
25 pretty tough for you to get over. The statute was

1 amended. The word "unlawfully" was dropped from it, and
2 there was no amendment made, with respect to its
3 cognates, to conform it to the cognate section on
4 carrying a gun that specified "in relation to." And it
5 seems to me that the most reasonable inference to draw
6 from that statutory history is that when Congress
7 amended and technically re-enacted the statute, when it
8 dropped "unlawfully," that it did not want "during" to
9 be read, as it was in the handgun statute, "in relation
10 to."

11 And I -- that's seems to me the tough point
12 of the argument. What is your response to that?

13 MR. HILLIER: Yes, Your Honor. Two points:
14 First, the idea -- the idea of in pari materia, which
15 would suggest that what's happening in 924(c) ought to
16 be occurring in 844 is -- has not the force that it
17 would if we were talking about amendments to and
18 constructions of the same statute, but rather what we
19 have here are two statutes that are being interpreted by
20 two legislators at different times to achieve different
21 objects. And there's no reason to believe that the --
22 well, the force of that --

23 JUSTICE SOUTER: The different object -- I
24 mean, the trouble with the different object argument is,
25 as the Attorney General said, there was an evident

1 concern in amending the handgun statute not to sweep in
2 the rogue police officer who happens to have a gun on
3 him when he does something that in fact is unlawful.

4 MR. HILLIER: Right.

5 JUSTICE SOUTER: The negative inference from
6 that is that there was an intent in the cognate
7 explosives statute to sweep in people, whether in fact
8 it was in relation to or not in relation to.

9 MR. HILLIER: Your Honor, I think that --

10 JUSTICE SCALIA: Including the policeman who
11 had cartridges in his gun, presumably, right?

12 MR. HILLIER: Well, Your Honor, I think
13 the -- when you're looking at what happened to 844, when
14 "unlawfully" was taken out the words "in which" were
15 added, which I think indicates that Congress had an
16 appreciation of the relationship that's involved in that
17 statute. While the legislative history doesn't say why
18 "unlawfully" was taken out, it seems reasonable to
19 believe that what they were trying to do was conform the
20 statute to the purpose of -- its purpose. And its
21 purpose did include, when you look at the "explosives"
22 definition, the use of lawful explosives to further
23 crimes.

24 So if somebody has a can of gasoline and
25 they want to use that to threaten somebody and create a

1 Federal crime or to accomplish a Federal crime, before
2 that amendment occurred that -- that would have been a
3 lawful possession of the explosives, so 844(h)(2) would
4 not apply.

5 JUSTICE SOUTER: Okay, fair enough so far as
6 the argument goes. But that still leaves Congress
7 taking the -- sort of making it as difficult as possible
8 for you to take the position that you're taking, rather
9 than as easy as possible.

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

11 MR. HILLIER: Well, the -- I think we go to
12 yet another statutory construction tool, or at least
13 observation by this Court that said the Congress can use
14 different words in different statutes to accomplish the
15 same thing.

16 JUSTICE SOUTER: It can do it, but why would
17 it have done so? You've the -- you've got the gun
18 example sitting there. And why would it not have done
19 so if, in fact -- so obvious a thing to do if that's
20 what -- if it intended to come out your way?

21 MR. HILLIER: Well, Your Honor, we don't
22 know it didn't do that because the legislative history
23 doesn't inform us. But to draw an analogy from your
24 question with respect to changes done in these two exact
25 statutes, as you read from the government's reply brief,

1 it is trying to establish through the words "during the
2 commission of" the fact that it is the defendant that
3 committed that crime, in other words it was he that did
4 so. And we don't take any issue with that; in fact, it
5 makes complete sense.

6 But it's interesting to note that 924(c) in
7 1971 was amended to put these -- to substitute the words
8 "for which he may be prosecuted" instead of "which may
9 be prosecuted." So one might ask why didn't they put
10 the word "he" into 844 at the same time if there was any
11 question about who the perpetrator of the crime was.

12 JUSTICE GINSBURG: And maybe they said --
13 maybe because they're trying to draft legislation
14 without using pronouns.

15 (Laughter.)

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

17 JUSTICE KENNEDY: I take it that one of the
18 reasons you make your argument is so that if you prevail
19 and you go back to trial, you would argue that this is
20 not in relation to? Is that correct?

21 MR. HILLIER: Your Honor, perhaps I didn't
22 understand your question. If you could rephrase it.

23 JUSTICE KENNEDY: If you prevail in this
24 case and we say "in relation to" is part of the statute
25 --

1 MR. HILLIER: Yes.

2 JUSTICE KENNEDY: -- and then you go back to
3 the trial court, I assume you will argue to the jury
4 that the government can't show that it's in relation to.

5 MR. HILLIER: Well, Your Honor, if you agree
6 that there's a -- if you agree with the Ninth Circuit in
7 this case, then the case is over.

8 JUSTICE KENNEDY: That's right.

9 MR. HILLIER: The government --

10 JUSTICE BREYER: Why should we agree with
11 that?

12 JUSTICE KENNEDY: But it seems to me that in
13 a prosecution, in this prosecution, it might be somewhat
14 difficult to establish in relation to.

15 MR. HILLIER: It would be difficult --

16 JUSTICE KENNEDY: And that would be -- even
17 assuming the jury was properly instructed, et cetera, et
18 cetera.

19 MR. HILLIER: Right. Right. It's as poison
20 here. They don't have a relationship. The explosives
21 were not used to --

22 JUSTICE KENNEDY: All right, but doesn't
23 that show the necessity for the very interpretation the
24 attorney general has argued for here? It is just too
25 difficult to establish and very dangerous?

1 MR. HILLIER: Your Honor, if we can look at
2 the facts of this case, I would respectfully disagree.
3 What was done here was a charging decision which made
4 that task impossible. The government could have simply
5 charged this count with count 1, and we wouldn't be here
6 today because surely the explosives were carried for the
7 purpose of accomplishing the act of terrorism that was
8 charged count 1.

9 JUSTICE ALITO: Well, if there's an "in
10 relationship" requirement, why would it be necessary for
11 the explosives to facilitate the false statement? Why
12 wouldn't it be sufficient if the false statement
13 facilitated the unlawful use of the explosives?

14 MR. HILLIER: We have a reverse sort of
15 relationship.

16 Your Honor, two answers to that: First, it
17 would be at odds with the structure of the statute. If
18 you look at the whole of 844(h), you see in (h)(1), the
19 crime of using an explosive to -- an explosive to commit
20 an underlying felony. And that is that sort of direct
21 relationship that is carried forward in the language of
22 (h)(2).

23 But, secondly, that language -- that sort of
24 relationship has been interpreted by this Court in Smith
25 as acknowledged by the government in its briefing to

1 mean the relationship that we're talking about.

2 JUSTICE BREYER: That's exactly what's
3 bothering me. The issue in this case doesn't seem to me
4 to be these weird hypotheticals. Of course it requires
5 a relationship, in my mind.

6 But I don't see why the relationship
7 couldn't be exactly the one Justice Alito was talking
8 about. I mean, imagine a person has a packed car filled
9 with explosives. He's going to blow something up. A
10 policeman comes up; he shoots the policeman. The reason
11 he shot the policeman was because he had his car packed
12 with explosives.

13 And if this -- if this provision -- I mean,
14 I can't understand why this provision wouldn't be aimed
15 directly at that kind of thing.

16 MR. HILLIER: Your Honor, I can't say too
17 much more than what I have. When you look at the
18 statute --

19 JUSTICE BREYER: All right. Suppose I don't
20 agree with you about that --

21 JUSTICE SCALIA: You could say it is not a
22 question on which we grant certiorari.

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

24 (Laughter.)

25 JUSTICE BREYER: That may be, but I don't

1 know -- but you could say that. You could say that.
2 But the problem is I have to answer the question -- I
3 have to reach an answer that I believe should be
4 sensible.

5 MR. HILLIER: Yes, sir.

6 JUSTICE BREYER: So what should I do --

7 MR. HILLIER: Well, Your Honor --

8 JUSTICE BREYER: -- if I think that shooting
9 the policeman because he's going to catch the criminal
10 filled with explosives is within this statute? And
11 similarly, lying to a customs officer so he won't catch
12 me when my car is filled with explosives is within the
13 statute?

14 Suppose I believe that, but I also think the
15 statute is not meant to govern those odd hypotheticals
16 that you come up with? There has to be a relationship,
17 but the one I described falls within the word
18 "relationship."

19 Now what do I do?

20 MR. HILLIER: Well, Your Honor, the
21 relationship -- if you look at the structure of the
22 statute, surely (h)(1) does not describe that sort of
23 relationship; (h)(2) is the next statute or the next
24 subsection of that statute, and its purpose is simply to
25 capture the same criminal objective here, that is to

1 say, the marriage of explosives and a felony.

2 JUSTICE BREYER: I understand that argument.

3 But suppose I don't accept the argument? Then what do I
4 do in this case? That's what I'm asking.

5 MR. HILLIER: I would ask the Court -- well,
6 I would think the Court would draw some -- an answer
7 from Smith which did describe a relationship contrary to
8 the way Your Honor is doing with respect to this case
9 that goes back to -- goes -- wasn't instructed that way;
10 and so it can't be -- this case still has to go back.

11 JUSTICE KENNEDY: You think on this
12 evidence, on this record, that a jury, if it were
13 instructed to -- that it had to find "in relation to"
14 could return a conviction of guilty including the "in
15 relation to"?

16 MR. HILLIER: If this case had been
17 instructed correctly?

18 JUSTICE KENNEDY: If this case had been
19 instructed according to your theory of the statute and
20 on this record and on this evidence, could a jury find
21 your client guilty?

22 MR. HILLIER: No, Your Honor.

23 JUSTICE KENNEDY: That's exactly why the
24 attorney general says he needs it.

25 JUSTICE SCALIA: Yes, you got it anyway.

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

2 JUSTICE SCALIA: Could I ask you about the
3 "in which," the "in which" thing? It has just occurred
4 to me that "in which" is in a very sloppy clause anyway,
5 because it says "shall run concurrently with any other
6 term of imprisonment, including that imposed for the
7 felony in which the explosive was used or carried."

8 What about the fire? It omits fire entirely
9 -- in which fire or the explosive. Fire or the
10 explosive was used or the explosive was carried. It's a
11 pretty sloppy job down at the end of (h), isn't it?

12 So I wouldn't put a whole lot of weight on
13 the "in which" given that the rest of it is so sloppy.

14 MR. HILLIER: Well, Your Honor, the "in
15 which" -- the point obviously was that it strengthens
16 and informs the relationship here to be more than the
17 coincidental or temporal one the government --

18 JUSTICE SCALIA: If you are being very
19 precise, but whoever wrote that was, obviously, not
20 being very precise because he left out "fire" entirely.

21 MR. HILLIER: I suppose that goes to the
22 idea that we shouldn't draw a lot of information from
23 the amendments that were occurring on 924 when they
24 weren't even looking at this statute and considering it
25 and its consequences to the changes in 844 -- or having

1 effect in 844.

2 Your Honor, I would just simply conclude by
3 indicating that the terms, which I think we agree,
4 naturally suggest that there must be a relationship, and
5 the breadth of the term "explosives" includes a lot of
6 lawful items that can be carried, if they were carried
7 in a felony, must be related to that felony if you're
8 going to have 844's effect and its purpose, because when
9 you look at the purpose of the act and the way that they
10 constructed it so carefully and thoughtfully in terms of
11 the crimes that were -- or the -- the use of explosives,
12 it applies only to that portion of the statute that
13 involves illegal use of criminal -- of explosives. And
14 the combination of all of these elements certainly gives
15 force to our argument and tends to rub -- tends to do
16 the opposite to the government.

17 At the end of the day, if there's anything
18 to be said for the government's argument, then there is
19 an ambiguity, and it should be construed in favor of the
20 defendant.

21 And I -- just a concluding point to answer
22 Justice Kennedy's questions, the government could have
23 avoided all of this by simply charging this case, as it
24 should have, by linking count 9 with count 1, where the
25 proof problem wouldn't have been a -- the only

1 difference in the proof would have been -- there would
2 have been no difference in the proof. The only
3 difference in the case would have been they would have
4 admitted a different instruction.

5 CHIEF JUSTICE ROBERTS: Your friend
6 indicated that this issue doesn't come up very often as
7 a practical matter. Do you disagree with that?

8 MR. HILLIER: Well, Your Honor -- no, I
9 don't disagree with that, and I'm not sure why that is.
10 But I think it's been alluded to by the Court already in
11 its questioning. It could be that prosecutors simply
12 recognized this to be a good plea bargaining chip and
13 maybe the other prosecutors understand that there's a
14 relationship required.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Attorney General, you have 14 minutes
17 remaining.

18 REBUTTAL ARGUMENT OF GEN. MICHAEL B. MUKASEY

19 ON BEHALF OF THE PETITIONER

20 GENERAL MUKASEY: I just wanted to make two
21 brief points on rebuttal. First, Justice Breyer's
22 question and position appears to read in a relational
23 element that's also not in this statute. And our view
24 is that that is something that should be done, if
25 anybody, by Congress.

1 And secondly, that the Respondent's
2 reference to gasoline as an explosive I think is a bit
3 of -- is a bit of a reach. I don't think gasoline is
4 generally regarded as an explosive unless it is prepared
5 and processed and presented in a certain way with -- in
6 ways that are not present simply by carrying a can of
7 gasoline to help a -- to help out a friend who's run out
8 of gas.

9 JUSTICE SCALIA: And maybe gunpowder doesn't
10 include the little bit that's in a cartridge either.
11 You think it does?

12 GENERAL MUKASEY: I think it does.

13 CHIEF JUSTICE ROBERTS: Counsel, could I ask
14 you, do you have an answer to your friend's point about
15 the "in which" language?

16 GENERAL MUKASEY: The "in which" simply
17 includes both, number one, the use -- the actual use
18 and, number two, the carrying.

19 I agree that it's not a model of elegant
20 construction, but "in which" does include the two, both
21 the actual use and the mere carrying.

22 CHIEF JUSTICE ROBERTS: I understood his
23 point to be that it's surprising that they refer to use
24 of the explosives or carrying of the explosives with
25 reference to the underlying felony, "in which" the --

1 suggests that the explosive was used or carried with
2 respect to the underlying felony.

3 And I understood your position to be that it
4 doesn't have to be.

5 GENERAL MUKASEY: No, I think it suggests
6 simply that the underlying felony was, in fact,
7 committed.

8 JUSTICE SCALIA: Well, it was going to be --
9 it was going to be inaccurate as to one or the other of
10 one or two. If you said "during," that would be -- that
11 would be inaccurate as to one.

12 And "in" is accurate as to one but
13 inaccurate as to two. I guess they should have said "in
14 or during" or "in which."

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

16 (Laughter.)

17 GENERAL MUKASEY: If there are no further
18 questions --

19 CHIEF JUSTICE ROBERTS: Thank you,
20 Mr. Attorney General.

21 Thank you, counsel. The case is submitted.

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

24

25

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