

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:16-cr-00196-SVW-1	Date	November 30, 2016
Title	<i>United States of America vs. Nerses Nick Bronsozian</i>		

Present: The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz

N/A

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

N/A

N/A

Proceedings: IN CHAMBERS ORDER DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT FOR LACK OF JURISDICTION [63].

I. Introduction

Defendant Nerses Nick Bronsozian was charged with possession of an unregistered firearm in violation of 26 U.S.C. § 5861(d), based on his sale of a MAC 10 fully automatic machinegun to an undercover law enforcement officer. On November 16, 2016, a jury found the Defendant guilty of the charged offense. After the jury was empaneled but before the start of trial, the Defendant submitted a motion to dismiss the indictment against him, arguing that the statute under which the Defendant was charged was unconstitutional because it exceeded Congress's taxing power and forced the Defendant to register a machine gun when it was impossible for him to do so. For the following reasons, the Defendant's Motion is DENIED.

II. Factual and Procedural Background

The specific facts of the case are not relevant to the present motion, as the jury found the Defendant guilty of the charged crime based on the evidence presented at trial. Instead, this motion is a facial attack on the constitutionality of the statute under which the Defendant was charged, 26 U.S.C. § 5861(d). The Defendant argues that the statute is no longer constitutional as the result of subsequent laws passed by Congress and recent Supreme Court precedent. If the statute is not constitutional, then the

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Defendant's conviction must be overturned. Therefore, this motion requires the Court to analyze the constitutionality of 26 U.S.C. § 5861(d) in order to determine the validity of the Defendant's conviction.

III. Discussion

A. History of 26 U.S.C. § 5861(d)

The National Firearms Act ("NFA") was enacted by Congress in 1934 in an effort to tax the making and possession of certain firearms, including machine guns. The NFA imposed a tax of \$200 on the making and transferring of firearms as well as a special occupational tax on anyone engaging in the business of importing, manufacturing, or dealing in firearms as defined by the NFA. *National Firearms Act Handbook*, Chapter 1, 1, U.S. Dept. of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives, Office of Enforcement Program Services, ATF E-Publication 5320.8, <http://www.atf.gov/publications/firearms/nfa-handbook/> (Revised April 2009). In order to facilitate this tax, the NFA required that any person transferring NFA firearms or possessing an unregistered firearm must register them with the Secretary of the Treasury, who would collect the duty. *Id.* The term "firearms" was defined to include machine guns. When the NFA's constitutionality was originally challenged, the Supreme Court held that the law was a valid use of Congress's power to tax and raise revenue. *See Sonzinsky v. United States*, 300 U.S. 506, 512 (1937); *Haynes v. United States*, 390 U.S. 85, 88 (1968).

To address the flaws of the NFA identified by the Supreme Court in *Haynes*, the law was amended by Title II of the Gun Control Act ("GCA"). Gun Control Act of 1968, Pub. L. 90-618 (October 22, 1968). The amendments removed the requirement that gun owners register their unregistered firearms, yet it maintained the illegality of possessing an unregistered firearm. 26 U.S.C. § 5861. There was no mechanism to register a previously unregistered NFA firearm already possessed by the person. *See National Firearms Act Handbook, supra* at 24. Finally, the NFA was expanded once more by the Firearm Owner's Protection Act ("FOPA") in 1986. *Id.* FOPA amended the Gun Control Act so that under 18 U.S.C. § 922(o), the GCA prohibited the transfer or possession of any machine gun that was not registered as of May 19, 1986. *Id.* Since the passage of that amendment, the Bureau of Alcohol, Tobacco and Firearms does not accept applications to transfer, register, or pay the \$200 tax on any machine gun that was not previously registered as of May 19, 1986. 27 C.F.R. § 479.105. As a result, it is impossible to either register or pay the applicable tax on any machine gun

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that was not registered at the time FOPA was passed.

B. Analysis

The Defendant now argues that, considering the history of the National Firearms Act, § 5861(d) is unconstitutional because it was premised on Congress's power to tax under Article I, Section 8, of the United States Constitution, but the statute no longer functions as a tax because of the subsequent amendments to the law. The law therefore exceeds the power of Congress to legislate under Article I, Section 8, especially in the context of recent Supreme Court precedent regarding the power and limitations of Congress's power to tax and raise revenue. Additionally, the Defendant argues that enforcing § 5861(d) against him would be fundamentally unfair because it would require him to register his machine gun, which is impossible for him to do under the current law. For these two reasons, the Defendant argues that the indictment against him should be dismissed for a lack of jurisdiction.

Although several courts have upheld the arguments put forward by the Defendant and found that § 5861(d) cannot be enforced with respect to machine guns possessed after 1986,¹ the Fourth Circuit rejected those same arguments. *United States v. Jones*, 976 F.2d 176 (4th Cir. 1992). The defendant in *Jones* was charged with violations of the NFA relating to manufacturing a machine gun without permission under 26 U.S.C. § 5822, possessing a firearm that was manufactured in violation of the act under 26 U.S.C. § 5861(c), transportation of unregistered firearms under 26 U.S.C. § 5861(j), and transferring a firearm in violation of the act under 26 U.S.C. § 5861(e). The defendant in *Jones* was not charged with mere possession of a machine gun under § 5861(d). The defendant argued that it was unfair to punish him for failing to attain the proper authorizations because it was impossible for him to receive the authorizations required under the NFA because of the amendments to the act. *Id.* at 182. He also argued that the law had lost its constitutional basis under the taxing power because the government refused to register machine guns after 1986 and therefore could not collect a tax. The Fourth Circuit characterized both arguments as due process challenges, and rejected them both. The Court held that even though registration of a machine gun was impossible, it was not fundamentally unfair to punish a defendant for possession of an unregistered machine gun because a person "can comply with both acts by refusing to deal in newly-made machine guns." *Id.* at 183. Further, the Court held that the statute was valid as a tax measure because the making of illegal machine guns continued to be taxed after FOPA. *Id.*

¹ See, e.g., *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992).

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The Ninth Circuit has adopted the reasoning in *Jones* as applied to the constitutionality of § 5861(d), in a *per curiam* decision. *Hunter v. United States*, 73 F.3d 260 (9th Cir. 1996). The Ninth Circuit agreed with the Fourth Circuit that it was not fundamentally unfair to punish the defendant for possession of an unregistered machine gun because “individuals can comply with both acts by refusing to deal in newly-made machine guns.” *Id.* at 262 (quoting *Jones*, 976 F.2d at 183). It also repeated the reasoning in *Jones* that § 5861(d) was within Congress’s power to tax because “[t]he manufacture of machine guns continues to be taxed, and knowing the chain of possession of a firearm would help the government determine who made it; thus, requiring registration for possession still facilitates taxation.” *Hunter*, 73 F.3d at 262 (citing *Jones*, 976 F.2d at 184).

The decision in *Hunter* is directly on point to the Defendant’s Motion in this case, as it rejects precisely the two arguments made by the Defendant to dismiss the indictment. The Ninth Circuit has not revisited the issue since the *Hunter* decision, and therefore the decision is still binding on this Court. While the Defendant argues that the Ninth Circuit’s adoption of the reasoning of *Jones* was fundamentally flawed,² a district court is not normally able to entertain such an argument. *Hart v. Massanri*, 266 F.3d 1155, 1170 (9th Cir. 2001) (holding that if “a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect.”) In support of his contention that this Court should depart from the holding in *Hunter*, the Defendant argues that a subsequent Supreme Court decision in 2012 has further interpreted Congress’s power to tax under Article I in a way that undermines and supersedes the *Hunter* decision from 1996. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). As such, this Court should be bound by the decision in *Sebelius*, and therefore must depart from *Hunter*. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (stating that where Supreme Court precedent “undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable”

² The Defendant argues that the Ninth Circuit adopted the reasoning in *Jones* without meaningful analysis. It failed to consider that *Jones* dealt with subsections of the NFA involving the manufacturing and transferring of machine guns, while the defendant in *Hunter* was charged only with simple possession, as was the Defendant in this case. Dkt. 63, 9. While the making of machine guns and transfer of previously registered machine guns can continue to generate revenue, the mere possession of a previously unregistered machine gun cannot because it cannot be registered under the current law. Furthermore, a tax on the making of a machine gun cannot aid in determining the chain of possession for machine guns that were not previously registered because the government will no longer accept applications to register them. For these reasons, the Defendant contends that the reasoning in *Hunter* was flawed and should be revisited.

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district courts “should consider themselves bound by the intervening higher authority and reject the opinion of [the circuit court] as having been effectively overruled.”).

In *Sebelius*, the Supreme Court evaluated the constitutionality of two subsections of the Affordable Care Act (“ACA”). *Sebelius*, 132 S. Ct. 2566. The Court held that although the individual mandate of the ACA was not justified by Congress’s power to regulate interstate commerce, the provision was justified by Congress’s power to tax. In so deciding, the Court examined and interpreted its precedent to identify the essential features that a law must include in order to be justified under the taxing power. First, the held that a valid tax must actually raise some revenue. *Id.* at 2594. Second, the Court held that a tax cannot be a penalty, meaning that it cannot function as a punishment for an unlawful act or omission. *Id.* at 2595-96. In deciding the difference between a “tax” and a “penalty,” the Court held that: (1) a tax must not impose an “exceedingly heavy” burden; (2) penalties are only imposed on knowing violators of the statute; and (3) taxes are usually enforced by the Internal Revenue Service, while penalties are enforced by other agencies. *Id.* at 2595 (citing *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922)). Based on these criteria, the Court held that the individual mandate of the ACA qualified as a tax, not a penalty, and was a valid use by Congress of its taxing power. *Sebelius*, 132 S. Ct. at 2595.

The Defendant argues that the Supreme Court’s clarification of the limitations of the taxing power in *Sebelius* cannot be reconciled with the holdings in *Hunter* and *Jones*. He contends that § 5861(d) cannot be justified under the taxing power, given the holding in *Sebelius*, and therefore § 5861(d) should be invalidated as unconstitutional. In defense of this position, the Defendant argues that § 5861(d) does not satisfy any of the three requirements identified in *Sebelius* as necessary for laws passed under Congress’s taxing power. Dkt. 63, 12. First, § 5861(d) does not currently generate any revenue, as it is no longer possible to register machine guns and therefore it is no longer possible to pay any taxes on such guns. Second, § 5861(d) is a penalty rather than a tax because: (1) there is a heavy burden placed on violators of the statute, as the only possible consequence is a criminal prosecution; (2) there is a heightened scienter requirement for establishing liability under § 5861(d), which is an indication of a penalty. Finally, § 5861(d) should not be justified as a tax because it is administered by the Bureau of Alcohol, Tobacco, and Firearms, which is a branch of the Department of Justice and responsible for enforcing and punishing criminal laws, not collecting revenues. As § 5861(d) cannot be justified as a tax after the *Sebelius* holding, the Defendant contends that it should be invalidated as unconstitutional.

While this Court notes that the *Sebelius* decision may have altered the proper analysis of the taxing

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power in a way that is relevant to the constitutional justification of § 5861(d), the Court now finds that the Supreme Court's decision in *Sebelius* and the Ninth Circuit's decision in *Hunter* are not irreconcilable. It is not enough "for there to be 'some tension' between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to 'cast doubt' on the prior circuit precedent." *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012). *Sebelius* examined the individual mandate provision of the ACA, and found that the mandate was justified because it looked like a tax in many respects. *Sebelius*, 132 S. Ct. at 2594. It did not touch on whether other laws justified under the taxing power must now be reexamined, and it did not decide whether a statute passed under the taxing power that once generated revenue must be invalidated when other legislative acts preclude that statute from generating tax revenue. Certainly *Sebelius* did not address the constitutionality of § 5861(d) specifically. As a result, the Court finds that although *Sebelius* may have cast doubt on the holding of *Hunter*, they are not irreconcilable.

Because *Hunter* is not irreconcilable with the recent Supreme Court decision in *Sebelius*, this Court cannot deviate from the clear and binding authority of the Ninth Circuit in *Hunter*. In *Hunter*, the Ninth Circuit rejected precisely the two constitutional arguments put forward by the Defendant in his present Motion. While the Ninth Circuit may ultimately decide to overturn its holding in *Hunter*, either because it wishes to reconsider its previous adoption of the Fourth Circuit's reasoning in *Jones* or because it finds that the *Sebelius* holding has invalidated the constitutional justification of § 5861(d) under the taxing power, such a decision is not properly within the domain of this Court. This Court is bound by the decision in *Hunter*, and therefore must find that § 5861(d) is not unconstitutional as applied to the Defendant. The Defendant is free to pursue his arguments for why the decision in *Hunter* should be overturned in the Ninth Circuit. As a result, the Defendant's Motion to Dismiss the Indictment is DENIED.

IV. Order

For the aforementioned reasons, the Defendant's Motion to Dismiss the Indictment for a Lack of Jurisdiction is DENIED.

IT IS SO ORDERED.

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