

Supreme Court of the United States

October Term, 1968

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FILED

DEC 17 1968

JOHN F. DAVIS, CLERK

In the Matter of:

Docket No. 65

MOTHY F. LEARY,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

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Place Washington, D. C.

Date December 11, 1968

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Part I

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Concluded on
Dec. 12

C O N T E N T S

ORAL ARGUMENT OF:

P A G E

Robert J. Haft, Esq, on behalf of Petitioner

2

John S. Martin, Jr., on behalf of Respondent

18

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October

Term, 1968

3 - - - - -x
4 TIMOTHY F. LEARY,

5 Petitioner,

6 vs.

No. 65

7 UNITED STATES OF AMERICA,

8 Respondent.
9 - - - - -x

10 Washington, D. C.

11 Wednesday, December 11, 1968

12 The above-entitled matter came on for argument at
13 2:00 o'clock p.m.

14 BEFORE:

15 EARL WARREN, Chief Justice
16 HUGO L. BLACK, Associate Justice
17 WILLIAM O. DOUGLAS, Associate Justice
18 JOHN M. HARLAN, Associate Justice
19 WILLIAM J. BRENNAN, JR., Associate Justice
20 POTTER STEWART, Associate Justice
21 BYRON R. WHITE, Associate Justice
22 ABE FORTAS, Associate Justice
23 THURGOOD MARSHALL, Associate Justice

24 APPEARANCES:

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

2 MR. CHIEF JUSTICE WARREN: Number 65, Timothy F.
3 Leary, petitioner, versus United States.

4 THE CLERK: Counsel are present.

5 MR. CHIEF JUSTICE WARREN: Mr. Haft.

6 ORAL ARGUMENT OF ROBERT J. HAFT, ESQ.

7 ON BEHALF OF PETITIONER

8 MR. HAFT: Mr. Chief Justice, may it please the Court,
9 this matter is before the Court on a writ of certiorari to the
10 Court of Appeals for the Fifth Circuit. It involves two
11 offenses on the possession of one-half ounce of marihuana. The
12 first offense was a conviction under the Marihuana Tax Act; the
13 second was a conviction under the Importation Statute
14 Section 176(a) of Title 21.

15 The two questions presented to the Court are, first,
16 whether the Fifth Amendment privilege is a defense for a prose-
17 cution under the Marihuana Tax Act, and the second question is
18 the constitutionality under the due-process clause of the pre-
19 sumption in the importation statute which presumes importation
20 in fact of marihuana and knowledge in fact by the defendant of
21 such illegal importation, both inferences flowing from mere
22 possession alone.

23 The facts in the case are simple. The petitioner had
24 an automobile trip from New York to Laredo, Texas, he tried to
25 enter Mexico, was denied entry, came back to Laredo and was

1 searched thoroughly at Customs and the less than half ounce was
2 found.

3 At the trial petitioner took the stand and admitted
4 acquisition of the marihuana in New York.

5 On the first issue -- that is, whether the Fifth
6 Amendment privilege is available as a defense to a Marihuana
7 Tax Act prosecution -- I think the Court's language in the
8 Grosso case is particularly appropriate; that is, the hazards
9 of incrimination ought to be measured by literal and full com-
10 pliance with all the statutory requirements.

11 The Government has no argument on that. They simply
12 say that literal and full compliance with the statute is quite
13 simple. A proposed illegal possessor of marihuana cannot pay,
14 prepay the marihuana tax, cannot obtain a form from the Secre-
15 tary of the Treasury, and therefore is absolutely prohibited
16 from obtaining marihuana. And hence, argues the Government,
17 there are no hazards of incrimination under this statute; you
18 just cannot acquire marihuana.

19 The petitioner's position is, the plain meaning of the
20 Act, the legislative history of the Act, and, in fact, the Gov-
21 ernment's position in a case before this court, are completely
22 clear.

23 A brief review of the statutory scheme will be helpful.
24 The order-form requirement under the Marihuana Tax Act states:
25 A written order form must be obtained prior to any transfer of

1 marihuana. There are no significant exceptions. The tax is
2 imposed on all transfers required to be accompanied by a
3 written order form. And all must be accompanied by such an
4 order form. The tax is a very interesting one. It is a dollar
5 an ounce on registered transferees -- that is, persons whose
6 activities in relation to marihuana are lawful, and they have
7 registered and pay special occupational tax.

8 In the case of all others -- to wit, unregistered per-
9 sons whose possession is likely to be unlawful -- the tax is
10 \$100 per ounce.

11 There are very clear schemes for statutory disclosure
12 under the Marihuana Tax Act. The written order form, a dupli-
13 cate must be preserved in the Internal Revenue District for two
14 years. It is available to Federal, State, and local prose-
15 cutors and admissible in evidence.

16 Against this very clear statutory requirement impel-
17 ling incrimination, it seems to me we have to deal with the
18 Government's position. The Government's position is that they
19 have had a policy since the passage of the Marihuana Tax Act in
20 1937 of construing that Act in pari materia with the 1914
21 Harrison Antinarcotic Act.

22 Under the Harrison Act, it expressly states that only
23 registered persons, persons who have paid the occupational tax,
24 can obtain an order form. It is expressly in the statute.

25 The Marihuana Tax Act, on the other hand, clearly

1 states the contrary; it says that every person, whether or not
2 registered and whether or not he has paid the special tax, must
3 obtain an order form prior to the acquisition of marihuana.

4 Q Under the Harrison Act, assume you transfer with-
5 out an order form.

6 A Under the Harrison Act, it is a crime as well.

7 Q Is there a special tax there on illegal transfer?

8 A No, but I think the pattern is very clear here
9 under the Harrison Act. Since it permits only lawful transfers,
10 the tax is very low. It is one cent per ounce, because it con-
11 templates only legal transfers.

12 Q Is there a tax for illegal transfers?

13 A No. It is one cent because everything under that
14 Act is only legal. Under the Marihuana Tax Act, there is a very
15 clear distinction: a dollar an ounce for a legal transaction
16 and \$100 an ounce for illegal ones, but transfer permitted in
17 \$100-an-ounce case.

18 Q Has anybody ever paid the \$100 --

19 A Nobody has every paid the \$100, nor has it ever
20 been claimed from anybody. It has been civilly.

21 Q Do people who are convicted under this Act for
22 illegal transfers then have to pay the tax?

23 A They have a civil liability to pay it. There
24 have been civil proceedings independent of criminal proceedings;
25 the United States against Sanchez before this court raised that

1 question.

2 The legislative history of the Marihuana Tax Act
3 clears this point up very clearly, that everybody was intended
4 clearly under that Act to be able to receive marihuana under a
5 transfer order form.

6 Clinton M. Hester, Assistant General Counsel to the
7 Treasury, testified before both the House and Senate committees
8 in 1937 with reference to the Tax Act; he said that this Act is
9 different than the Harrison Act. Under the Harrison Act, only
10 legal persons in licit transactions can obtain Harrison nar-
11 cotics, but under this Act, the Marihuana Tax Act, anyone can
12 get marihuana, just as under the National Firearms Act -- the
13 analogy was brought out by the Treasury sponsor -- just like the
14 National Firearms Act, this Act, Marihuana Tax Act, would per-
15 mit transfer of marihuana to anyone but, of course, upon the
16 payment of a heavy tax; as in the National Firearms Act, anybody
17 could get a submachine gun.

18 And in that very same legislative history, Clinton
19 Hester stated and spelled it out exactly, a person who wants
20 marihuana would go to the Collector, pay his hundred dollars,
21 fill out the order form and give that to the transfer order;
22 that is, the transferee would do that.

23 The document itself, totally inconsistent with this
24 new argument, I think highly imaginative one, in order to meet
25 the Haynes, Grosso, Marchetti cases, completely inconsistent

1 with this, the United States against Sanchez before this court,
2 in their brief, the Government said that the Marihuana Tax Act
3 does not constitute a complete prohibition upon acquisition of
4 marihuana by unregistered persons; that instead of doing that,
5 Congress chose to levy a hundred-dollar-per-ounce tax.

6 I submit that the regulations under the statute do not
7 change the result. The regulations specifically provide, in
8 the case of the order form, that if the transferee is regi-
9 stered -- if registered -- put down your registration number,
10 thereby clearly contemplating that persons not registered could
11 obtain the order form.

12 I think that the hazards of incrimination under my
13 interpretation, which, I think, is the clear statutory, plain
14 meaning of the Act, plus the legislative history -- I think the
15 hazards are very clear; Congress has created a special category,
16 a clear red light, \$100 an ounce, we specially reserve that for
17 illicit transaction, and the legislative history makes that
18 clear. The Senate and House reports say the \$100 is for
19 illicit transactions.

20 Now you are going to have a possessor whose possession
21 is unlawful under virtually the laws of every State, go to the
22 Secretary of the Treasury, tender \$100-an-ounce tax, fill out an
23 order form with his name, address, quantities he proposes to
24 get, and who is going to transfer to him.

25 That, I submit, is submitting the jail key at the time,

1 and I think it is clear that the hazards are blatant.

2 Now, the Government, I think, also in recognition of
3 the clear force of this argument, has said in many places in
4 their brief, "Well, the petitioner is some sort of fellow who
5 is on Psychedelic Cloud Number 9 who does not care about his
6 Fifth Amendment privilege. He knew about our policy, he knew
7 about this complete prohibition, and he never cared in this
8 matter nor gave any concern to the Fifth Amendment privilege in
9 connection with his failure to apply for the tax, to pay the
10 tax."

11 Now, in the testimony, in the appendix, pages 86, 87,
12 and 89, I think the testimony contradicts that position:

13 "Question: Why didn't you pay the transfer tax in
14 this instance on the marihuana which you had?

15 "Answer: Well, I knew I could not get such a permis-
16 sion. I also knew that if I had applied for such a stamp, I
17 would probably subject myself to investigation."

18 Now, as I read the next excerpt, I think it is clear
19 that "permission" in this context, the petitioner meant "apply-
20 ing for registration," which is very clear is applicable only to
21 lawful possessors; there is no difference between the Government
22 and petitioner on that.

23 "Question: Do you know the tax on marihuana, this
24 special tax on marihuana?

25 "Answer: It is my understanding that for \$1 or \$3 you

1 can buy some sort of permit."

2 That is, by the way, amount of occupational tax --
3 \$1 in one case and \$3 in an another.

4 "And if you have marihuana and do not have a permit,
5 it is a dollar an ounce.

6 "Question: Why didn't you pay that?

7 "Answer: I was very certain that I would not be
8 able to pay the tax on the marihuana, and not only would it be
9 taken away from me, but I would be subjected to action.

10 "Question: Did you or did you not have an honest
11 belief you could not obtain the permit for marihuana?

12 "Answer: Yes, I had a strong and honest belief that
13 I could not get it and it would cause a lot of publicity and
14 trouble for both the Government and myself."

15 Q Was this case tried after Marchetti and Grosso
16 were decided?

17 A No; the case was tried before. The verdict was
18 handed down by the jury before Marchetti, Haynes, and Grosso
19 and about 10 days before the court granted certiorari in the
20 Costello case, which first gave a hint that this issue would
21 come before the court.

22 The last point on the self-incrimination issue: We
23 believe that if we are right on this point, that you must
24 reverse on the importation count as well; whether we are cor-
25 rect or not on the presumption point, but that count has to be

1 reversed also because of the trial judge's instructions in this
2 case.

3 On the presumption issue, he charges the statutory
4 presumption, that the jury may convict, unless the defendant
5 explains his possession to the satisfaction of the jury. The
6 judge added to that; he said: By that, I mean unless the
7 defendant explains that his possession was a lawful and legiti-
8 mate possession.

9 Immediately thereafter, the trial judge charged that
10 a failure to pay the tax, marihuana tax, the failure to produce
11 the order form on demand, rendered the transaction illegitimate;
12 so the jury was in a clear position, in fact it was suggested,
13 that they find the possession illegitimate on the importation
14 count based on the failure to pay the tax or produce the order
15 form.

16 The second issue before the Court is the validity of
17 the statutory presumption, in 176(a) under the due-process
18 clause. Now, the statute itself, 176(a), is very narrow. It is
19 that anyone who ever, knowingly, with intent to defraud the
20 United States, in any manner facilitates the transportation of
21 marihuana, after the same has been imported, and knowing that
22 the marihuana has been imported, is guilty of a crime.

23 Q Would that fraud be referring to defrauding him
24 from tax?

25 A Yes, sir, I believe that is what "intent to

1 defraud the United States" means, because another part of the
2 statute says marihuana which should have been invoiced -- mean-
3 ing it should have import duty or levy placed on it at the time
4 of importation.

5 Now, these narrow statutory elements are swept away
6 by the presumption which just says that mere possession is
7 presumptive evidence of guilt, unless the defendant explains
8 his possession to the satisfaction of the jury.

9 Now, it is our position that that presumption is not
10 rational, it does not comport with common experience. The
11 issue was raised at the trial by evidence which was introduced
12 showing that marihuana grew in the United States, grew in
13 places in the United States. An offer was made to show the
14 amount of marihuana grown domestically and the proportions of
15 marihuana grown domestically as against imported. That offer
16 was rejected by the trial court.

17 Now, my position is that whether marihuana is imported
18 in fact, is an arguable proposition, but that whether the
19 defendant in fact knew of the illegal importation, the presump-
20 tion he in fact knew in any particular case, is an irrational
21 presumption; and that in either event, applying the standard of
22 reasonable doubt, as is required in a criminal case, is, at
23 best, an arguably rational proposition and is one that ought to
24 be condemned by this court.

25 In the reply brief in this matter, (a) I cite a case

1 of the United States against Adams, which was decided subse-
2 quent to the submission of the Government's brief in this case.
3 In United States against Adams, the United States District
4 Court for the Southern District of New York made various find-
5 ings which I think are important here. I think that the legal
6 rationale of that case is something that crosses before this
7 court and there is no use citing another precedent on that. But
8 I think the findings are important.

9 The court held an evidentiary hearing and made the
10 following findings: (1) that marihuana is a plant which grows
11 extensively on a wild basis without fertilization. It is also
12 a plant that is easily cultivated and it is very hardy in its
13 growth; that it is impossible to determine whether any quantities
14 of marihuana is imported or is domestic, and that a scientific
15 investigation is impossible.

16 Most importantly, the judge found that common experi-
17 ence, if anything, tends to suggest that most people, if not
18 all, are under the belief that marihuana is grown domestically
19 and that that explains its widespread domestic use.

20 In this regard, the judge relied upon what he con-
21 sidered the stuff of common experience, everyday newspaper plus
22 what Federal and State enforcement officials themselves were
23 saying about this problem.

24 And the strongest argument, it seems to me, on the
25 extensiveness of the domestic growth -- the judge found it was

1 very, very substantial -- was: year after year the enforcement
2 officials point out that this is a vital problem, a prevalent
3 problem, and they proudly report the vast acreages destroyed in
4 the United States, and the next year the Bureau of Narcotics
5 reports another vast amount of acreage that they found that
6 next year, leading to the inference that there is a substantial
7 amount that is not discovered each year and which does form a
8 source of supply for domestically used marihuana.

9 The judge referred to his reading of the everyday
10 newspaper, and he said in one unsensational newspaper, he
11 found five accounts in three months. That unsensational news-
12 paper was The New York Times, and one of the articles that he
13 cited was on page 1 of The New York Times on August 21, 1968.
14 It is cited in his opinion.

15 In that case, in Jersey, near Newark, Hoboken and
16 Jersey City, the State officials found an area of meadowland
17 with 20,000 marihuana plants, which they proceeded to destroy
18 That one growth was enough to supply one cigarette to every one
19 of the 17 million school students in the country, in that one
20 area.

21 In some areas, marihuana is so thick that a truckload
22 can be gathered very quickly. Plants, some as high as 10 feet,
23 grow along the Susquehanna railroad tracks that parallel Route 1
24 along the North Bergen segment of the meadow.

25 Now, this is a problem which was not really before

1 Congress at the time in 1966 that they cast the presumption.
2 At that time, they had Commissioner Anslinger's testimony that
3 90 percent of seizures in the United States came from Mexico.
4 The other testimony was of Texas and border enforcement officials
5 which is by no means representative of the country.

6 Taking just the acreage destroyed by the Bureau of
7 Narcotics in 1965, the last figures that the Bureau itself
8 recorded, which is on page 17 of their annual report for that
9 year, were 1900 acres destroyed. Using the Bureau's own esti-
10 mate of yield and the estimate of the number of cigarettes per
11 pound from the article I read to you, 1965 seizures alone,
12 destruction of acreage, if it had been permitted to yield,
13 would have produced 2 billion marihuana cigarettes, or 10 for
14 every person in the United States.

15 Marihuana does pass through many hands from the source
16 to the smoker, and I think that is important, too, in the test-
17 ing whether or not a defendant should be held to know or could
18 know the basic source. This is the kind of thing which is just
19 transferred often.

20 Q I missed the statement you just made.

21 A I said that marihuana, in the traffic, passes
22 through many hands from the original source, from the grower to
23 the smoker. There may be 20 or 30 middlemen in the transaction,
24 and telling the defendant, or the one who is caught in posses-
25 sion, "Now, it is up to you to explain this" or that "You should

1 know; it is rational to assume that you should know whether it
2 is imported or domestic," I say, is irrational; I say, because
3 this is a criminal presumption we are talking about, applicable
4 to a criminal case, the stand or reasonable doubt ought to apply
5 here; and that you are telling a jury, when you permit this kind
6 of presumption that this probability that a defendant knew that
7 a given quantity of marihuana was imported, we are telling the
8 jury, when we use that presumption, that the probability is far
9 in excess of 50-50.

10 Q As I read the Opinion, he does not say this is
11 completely invalid. He just says it has to be supplemented and
12 it may be the subject of appropriate discussion.

13 A That is correct. I do agree. I do agree also
14 with the point he makes that this kind of presumption creates a
15 very unfair situation bevause the defendant is in a position
16 where it is impossible for him to defend because he cannot
17 defend on lack of knowledge of importation. He cannot go back
18 and try and prove the source of this through this long change
19 of title.

20 It is quite different from the illegal-still case
21 where a defendant ought to be in a position to explain why he is
22 20 feet way out some place where it is dark, why is he there
23 that night; that he can explain, but he does not have the
24 ability to prove whether that marihuana was, in fact, imported.

25 Q Of course, the difficulty in this case, if I

1 understand the record, is that, according to the defendant's
2 own testimony, he did import this marihuana from Mexico to the
3 United States. He had it in his pocket, so he said, when he
4 went to Mexico, and it stayed there when he came back; so, in
5 this case, there is no question of it being imported, is there?

6 A Yes, sir, there is, because the trial judge with-
7 drew the first count, which was a smuggling count, on the theory
8 that there could not be a smuggling into or importation into
9 the United States on these facts, because he had admitted acqui-
10 sition of it in New York, had practically not crossed into
11 Mexico.

12 Q Practically not, but he had gone to Mexico.

13 A You also had the entire issues of fact on whether
14 he knew on the way back over the bridge whether the marihuana
15 had been thrown out of the car or not.

16 Q But it was not, and according to his own testi-
17 mony, as I understand it, the marihuana that was found was taken
18 on this trip across the bridge and then back across the bridge,
19 first to Mexico and then back into the State of Texas in the
20 United States.

21 A That is correct. But there were issues raised,
22 because his daughter had had the marihuana, he told her to get
23 rid of it; as they were over the bridge practically at Customs
24 station, she told him she had it. The whole question of the
25 opportunity to stop when was raised.

1 Q Maybe there was not smuggling, but the facts,
2 according to his own testimony, did show importation, did they
3 not?

4 A Yes.

5 Q Wasn't it really left to the jury, the question
6 of the transportation from New York down? You can't tell
7 whether the jury decided on that basis or coming-across-the-
8 bridge basis?

9 A Exactly. The Government, in their brief, says
10 there is this alternative theory. Now, there is no question
11 that the evidence of guilt is overwhelming on the trip --
12 Mexico, back to Texas -- if the jury so believed. But, because
13 of the use of the unconstitutional presumption here on the other
14 side -- that is, New York down to Texas as coupled with the
15 statutory presumption -- we rely on the Romano case in which
16 this court said: Despite all the evidence of guilt, if an
17 unconstitutional presumption is in a case and we cannot specu-
18 late how the jury found, whether they used it or not, we are
19 going to reverse the case.

20 Thank you.

21 MR. CHIEF JUSTICE WARREN: Mr. Martin.

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25

1 ORAL ARGUMENT OF JOHN S. MARTIN, JR.

2 ON BEHALF OF RESPONDENT

3 MR. MARTIN: Mr. Chief Justice, may it please the
4 Court, I would like to address myself first to the question con-
5 cerning the validity of presumption to which counsel has just
6 addressed himself, since that is a question peculiar to this
7 case and is not related to the immediately following case,
8 United States versus Covington, which also raises the second
9 issue in this case, as to the validity of the Marihuana Tax Act.

10 Section 176(a) of Title 21 provides, basically, anyone
11 who imports or receives, conceals, or facilitates the transporta-
12 tion, consumption, or sale of illegally imported marihuana,
13 knowing it is illegally imported, shall be guilty of a Federal
14 crime.

15 That statute also contains a presumption written into
16 the statute by Congress, and that presumption in the statute
17 appears at page 44(a) of the appendix. It provides that when-
18 ever on trial for a violation of this subsection, the defendant
19 is shown to have or to have had the marihuana in his possession,
20 such possession shall be deemed sufficient evidence to authorize
21 conviction, unless the defendant explains his possession to the
22 satisfaction of the jury.

23 It is the Government's position in this case that that
24 statutory presumption is valid.

25 At the outset, I think I should make clear there does

1 not appear to be a dispute between counsel as to the proper
2 standard to be applied in determining whether or not a statu-
3 tory presumption is valid. All counsel rely on are articula-
4 tions of that stand which are found in Tot versus United States,
5 where the court said the validity of the statutory presumption
6 depends on the rationality of the connection between the facts
7 proved and the ultimate facts presumed.

8 Q You said at the outset you were going to address
9 yourself to the presumptions. Does that statute bear directly
10 on presumption or on guilt of possession?

11 A What the statute does, Mr. Chief Justice, is: It
12 provides that possession alone will give rise to the inference
13 that the defendant knew that marihuana was imported, (1); and
14 (2) that the defendant knew that. So that the actual possession
15 gives rise to all of the other elements necessary to convict
16 under the statute if you show he either received it or concealed
17 it, which is the normal case.

18 Q The thing that I did not get: What language in
19 that statute that you read says it is a presumption that it was
20 illegally imported?

21 A Well, it says it by saying: "The possession
22 shall be deemed sufficient evidence to authorize conviction."

23 Q Conviction of what?

24 A Of the crime stated in that subsection, which is
25 the importation or the receipt.

1 Q That is the section --

2 A It is all within the one section; that is

3 correct, Mr. Chief Justice. The presumption really carries with
4 it all the elements contained in that subsection once you find
5 the possession.

6 Q Do you think that the Tot rule is really the
7 equivalent to a no-evidence rule, that one fact just is not
8 evidence of another, sort of a "shuffling Sam" rule?

9 A No, I think it is not that. I think the Tot rule
10 is that there are certain facts that give rise to legitimate
11 inferences.

12 Q And other facts that don't?

13 A Will not support certain inferences. Clearly
14 this is the ruling in Tot itself; the fact that a man had been
15 convicted of a crime and he had in his possession a gun, could
16 not support an inference that the gun had been transported in
17 interstate commerce.

18 I think there are two types of presumptions. For
19 example, the presumption that a man found in a stolen car in
20 other than the State of theft knew that the car was stolen and
21 had transported it under interstate commerce. That is a pre-
22 sumption. However, there are other types of presumptions.

23 Q But this marihuana might not have been imported?

24 A That is a possibility, Mr. Justice Marshall.

25 That possibility existed with regard to the opium that he had,

1 where the court sustained the validity of a similar statute in
2 regard to opium.

3 Q Is there any evidence that the opium grew in the
4 United States?

5 A I admit a distinction, but I point out it is pos-
6 sible that opium that someone might have was not illegally
7 imported and diverted from a legal market sometime after. The
8 question is: Is the inference a reasonable one?

9 I think with regard to your question, Mr. Justice
10 Marshall, counsel himself has conceded the validity of the find-
11 ing in the Adam's case. In that case, Judge Frankel determined
12 that the inference that marihuana is illegally imported was a
13 valid inference. The inference contained in the statute was
14 that he was shown to have been in possession of marihuana. The
15 jury can infer that the marihuana was illegally imported. He
16 found that to be a valid statutory inference. Counsel here has
17 accepted that decision by Judge Frankel.

18 Q How about the disposition?

19 A The disposition went to the question of whether
20 or not from possession you could infer that the marihuana was
21 illegally imported but also that the person in possession knew
22 of the illegal importation of marihuana.

23 Q Is there any official study to which we could
24 refer estimating the amount of marihuana that is imported here
25 as compared with the amount of domestic quantity grown? Is

1 there any study by any agency?

2 A The President's Crime Commission, Mr. Justice
3 Fortas, came to the conclusion that the marihuana, most mari-
4 huana in illicit market in the United States is imported into
5 the country. They would not give a statistical breakdown of
6 this.

7 At the time this bill was before Congress, Commis-
8 sioner Anslinger testified that approximately 90 percent of the
9 marihuana seized in illicit market in this country had come in
10 from Mexico. I think it is significant.

11 Q Was there any basis for that other than his own
12 wisdom?

13 A He would not give a statistical breakdown. He
14 did give an explanation of that fact, which relates to the
15 nature of Mexican marihuana as opposed to that which can be
16 grown domestically. He said because of the longer growing
17 season in Mexico, the Mexican marihuana has a higher alcoholic
18 content, and this is what produces the "high." This is what
19 the marihuana smoker is looking for in marihuana.

20 Q That is contrary to what we just heard. Your
21 adversary said you could not tell by analysis of the marihuana
22 whether it was domestic or imported, unless I misunderstood him.

23 A Well, I think it is probably true, Mr. Justice,
24 that if you were to take marihuana and carefully cultivate it
25 here, perhaps in a hothouse or by some artificial means you

1 could produce from domestic marihuana a strain that would be
2 as potent as that which normally comes in from Mexico. But I
3 think the fact of experience is that marihuana which is just
4 growing wild does not have anywhere near that potency. It is
5 for that reason, that the marihuana smoker seeks out and
6 attempts to get imported marihuana.

7 If the Court please, it is for this reason, it is
8 because the Mexican marihuana is a better form of marihuana,
9 that we submit it is reasonable to assume that people in posses-
10 sion of marihuana will know its source.

11 I think that if there is a weakness in Judge Frankel's
12 opinion -- with all due respect, I say there is -- it is that
13 Judge Frankel, in determining whether or not the presumption of
14 knowledge is valid, looks not to the relevant segment of the
15 population referred to in the statutes but looks to the popula-
16 tion in general, and he says: In general, people reading the
17 papers will say that marihuana can grow wildly in the United
18 States.

19 Q As I understand this record, the trial judge in
20 the present case would not permit expert evidence on this
21 subject.

22 A There was some question raised as to the presump-
23 tion. There was a question asked a witness and it was excluded.
24 I would say the dialogue set forth in the record is not very
25 clear on the entire issue. There was no motion made pretrial

1 as there was in Adams to dismiss the indictment because of the
2 invalidity of presumption.

3 So the record, while it does somewhat support that,
4 is far from clear; but I do think this presumption of knowledge
5 is valid. When you look at it in terms of the people to whom
6 this statute is directed, the statute is directed to those in
7 possession of the marihuana.

8 And in view of Commissioner Anslinger's testimony and
9 other authorities cited at page 39, those people who use mari-
10 huana want Mexican marihuana because it produces the better
11 "high." It seems to me these people are going to know where
12 that marihuana came from. Because I would assume -- I think it
13 is obvious -- that the price they pay for marihuana is going to
14 depend on the quality of the marihuana they receive.

15 Q You said 90 percent of the marihuana comes from
16 Mexico. How do you know?

17 A I certainly don't know. The only statistics that
18 I think are somewhat persuasive, Mr. Justice Marshall, are
19 those which appear on page 40 of our brief, in the footnote,
20 which has to do with the amount of seizures of marihuana that
21 are taking place on our borders over the last eight years.

22 What I am trying to emphasize here is: If you look
23 at those statistics, you will see that in 1962 we seized at the
24 borders approximately 1,000 kilograms of marihuana; in 1967 we
25 seized at the borders 23,426 kilograms of marihuana. I think

1 that escalating amount of importation -- all this reflects is:
2 the importation of marihuana is increasing in this country.
3 And I think this fact supports the view that there is continuing
4 in this country the desire for Mexican marihuana.

5 Q There are other explanations of those figures;
6 that is, this may be not an increase in importation but an
7 increase in seizures. It may also indicate an enormous increase
8 in total consumption, in terms of percentage, which is what we
9 are talking about here, what the percentage of marihuana is
10 that is possessed in this country and how it is broken down,
11 what percentage is attributable to imported or domestically
12 grown marihuana.

13 A I think it could relate to other factors. But I
14 don't think there has been any significant increase in the
15 amount of Customs investigators located at the borders. It is
16 possible that it is just reflecting a general, over-all demand
17 for marihuana, but I do think they are so significant that they
18 show the desire for Mexican marihuana, that is the stuff with
19 which the illicit marihuana market operates.

20 Q Under this statute, a person who has in his
21 possession marihuana, can he be convicted for that?

22 A There is a difference in that, I think, Congress
23 had before it evidence which justified and concluded, and this
24 court said this is the type of thing which comes within the
25 fact-finding powers.

1 Q What is the difference?

2 A There is some basis of what Congress knew.

3 I think it came in terms of defining a crime, among
4 other things. It would have been possible for Congress to have
5 adopted a statute to permit possession of marihuana.

6 I think the question is within those limits of "What
7 can Congress do?" All I can do is say again the Court sus-
8 tained the power of Congress to act even in presumptions.

9 Q Which has the right to determine that the evi-
10 dence is sufficient to support the condition -- the jury or
11 the legislature?

12 A I think what that court has said is: That is a
13 mixed question.

14 Q I have said it.

15 A I understand what your position has been, but I
16 do think that the court case is sustained on the presumption
17 here.

18 Q Suppose the man was arrested in his own field
19 for possession of marihuana.

20 A If he was arrested, I think the Government's own
21 proof that he was in his own field would clearly overcome pre-
22 sumption.

23 Q Suppose it was a half-mile away.

24 A If you are being charged with possession of
25 marihuana in the field --

1 Q He was charged in practically all the cases.

2 They charged him with the presumption also. Would he have to
3 take the stand there and disprove?

4 A He could do what the defendant did in Adams,
5 among other things, challenging the trial. There is also pos-
6 sibility of other evidence to be presented on that. I think
7 what we are dealing with is not a peculiar case but generality
8 case where Congress determined this presumption should apply.

9 It may be the man just wandered onto the site of the
10 still, but the court said it was rational to allow the presump-
11 tion; or maybe the man found the car over the border, he did
12 not steal the car, maybe he was just tired and sat down in it;
13 but here, it is the rationale of the presumption.

14 Q Would it make any difference?

15 A I think that has some bearing.

16 Q The question is: Can the Government, in just
17 proving that he has possession, not proving the relationship to
18 any growth in this country of marihuana, can that prove it was
19 not imported?

20 A It is our submission that the statute, in view
21 of the fact we know about the illicit marihuana traffic, makes
22 that a reasonable presumption.

23 THE CLERK: The Court now adjourns until tomorrow at
24 10 o'clock.

25 (Whereupon, at 2:30 o'clock p.m. the Court adjourned,
to reconvene at 10 o'clock a.m. Thursday, December 12, 1968.)

- 27 -
This argument was concluded on sec. 12. See pages 29 etc (separate).