In the

Supreme Court of the United States

UNITED STATES,

PETITIONER,

V.

CHARLES W. RAMSEY AND JAMES W. KELLY,

RESPONDENTS.

No. 76-167

Washington, D. C.
March 28, 1977

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UNITED STATES, Petitioner,	:	
v.	:	No. 76-167
CHARLES W. RAMSEY AND JAMES W. KELLY, Respondents.	:	

Washington, D. C.

Monday, March 28, 1977

The above-entitled matter came on for argument at 2:03 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

KENNETH S. GELLER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C., 20530, for the Petitioner.

ALLAN M. PALMER, ESQ., 1707 N Street, N. W., Washington, D. C., 20036, for Respondent Ramsey.

IRVING R. M. PANZER, ESQ., 1735 DeSales Street, N.W., Washington, D. C., 20036, for Respondent Kelly.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in 76-167, United States against Ramsey and Kelly.

Mr. Geller, I think you may proceed now.

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GELLER: Mr. Chief Justice, and may it please the Court:

The issue in this case is whether probable cause and a search warrant are required before customs officials may open an envelope mailed into the United States from abroad, when they have reason to suspect that the envelope may contain contraband or dutiable goods.

In our view, such custom searches of international mail at the border of our country are reasonable in the absence of probable cause or a warrant, and we submit that this position is supported by the background of the Fourth Amendment, by nearly 200 years of American history and by the repeated and consistent pronouncements of this Court and of every other court to have considered the question, save one.

The one exception is the court below, the United States Court of Appeals for the District of Columbia Circuit, which held by a vote of two to one that the Fourth Amendment prohibits customs inspections of what it termed "letter mail" entering this country from overseas, unless the Government

first obtains a search warrant issued upon probable cause.

The facts are these: On February 4, 1974, George Kallnischkies, a customs inspector at the General Post Office in New York, came across eight envelopes that had been mailed from Thailand to four different places in the Washington, D.C., area.

QUESTION: Were these fairly sizable envelopes?

MR. GELLER: The envelopes, Mr. Justice Blackmun, were eight and one-half by four and a quarter inches, and six and three-quarters by four and three-quarter inches. They are normal size envelopes used in domestic and international mail.

QUESTION: That's the size of the envelope. I suppose it would depend, in fact, on what was in them to determine how big the package was. I took the question to be: How big was the package? Did it have one sheet of paper in it or did it have something more than that?

MR. GELLER: No. It had more than that, Mr. Chief Justice. The envelopes immediately attracted Officer Kallnischkies' attention not because --

QUESTION: Can you answer the question in terms of ounces or grams or --

MR. GELLER: Yes. Officer Kallnischkies weighed the envelopes because they seemed rather unusually bulky and large, and he determined that they weighed 42 grams, which is about

an ounce and a half, although an ordinary airmail envelope of that size generally weighs about seven to fourteen grams. So they were substantially heavier than a normal size envelope, a normal envelope of that size.

Now, other things attracted Officer Kallnischkies' attention and gave him reason to suspect these envelopes. First, they were from Thailand which is a notorious source of narcotics, and second, as I mentioned moments earlier, they were rather bulky in appearance and when he felt them they clearly felt as if they contained something other than, or in addition to, correspondence inside of them.

QUESTION: Then, are you asking us to infer that that was probable cause?

MR. GELLER: Well, Mr. Justice Stewart, the Court of Appeals, in an obscure footnote hinted that there might well have been probable cause here.

QUESTION: What's your position?

MR. GELLER: Well, we hesitate to --

QUESTION: I thought your position was that there was no probable cause.

MR. GELLER: Our position is that probable cause is not necessary and our position, in addition, is that using the standards of probable cause --

QUESTION: If there was probable cause here, we don't need to deal with whether or not probable cause is

necessary. Because if there was probable cause, then there was probable cause.

MR. GELLER: Well, if Your Honors determine that a warrant requirement should not be imposed on border searches but that a probable cause requirement may or may not be necessary, I think you would have to reverse the judgment of the Court of Appeals, based on the Court of Appeals' apparent conclusion that there was probable cause here.

QUESTION: And you agree? Are you submitting there was?

MR. GELLER: Well, we hesitate, as I say, to take issue with that because it is favorable to the Government, but we think, using the standards developed for probable cause in domestic searches, that it is hard to say that Officer Kallnischkies had probable cause here. All that he knew is that this envelope had come in from overseas and that it was bulky, it seemed to contain something other than or in addition to correspondence.

Now, I don't know if that would give a reasonable person --

QUESTION: I am just inquiring whether your position is that there was probable cause or whether your position is that there was not probable cause.

MR. GELLER: Our position is that it is difficult to conclude that there was probable cause here as that standard

has been determined for domestic searches, because I don't think that a reasonable person could have concluded, merely from the fact that a bulky envelope was coming in from overseas, that a law was being violated, that something was in there that was evidence of a crime.

QUESTION: When you get off the airplane at Kennedy International Airport, or when you are about to get off, does the Government need probable cause to support the search of your suitcase and your briefcase and your pockets?

MR. GELLER: It does not, Mr. Chief Justice.

The statutory authority for custom searches, which is 19 USC 482, requires only that the Government have reason to suspect that your luggage or you or an automobile, if you are driving an automobile, or a chattel that you are carrying may contain contraband or dutiable articles.

QUESTION: But there is no statute that covers the airport and the ships coming in. They just do that.

MR. GELLER: I think 19 USC, Section 482, is one statute and there are other --

QUESTION: Does it cover airports?

MR. GELLER: It covers every entry into our country, either at airports or at ports or at the land borders with Canada and Mexico.

QUESTION: Mr. Geller, does it cover mail?

MR. GELLER: We believe that it does.

QUESTION: What language covers mail in 482?

MR. GELLER: Section 482, I believe, says envelopes --

QUESTION: But that's envelopes carried by a person coming in, isn't it?

MR. GELLER: Well, I think would could assume that the envelopes are being carried by somebody. It may be a postal clerk as he brings it off the airplane. The envelopes have not gotten into this country on their own.

Our position is that Section 482 of Title 19 covers chattels of every description, and I don't believe there is any case law that's ever suggested otherwise, Mr. Justice Stevens.

A number of the circuit courts have had occasion to consider border searches of envelopes and they have construed Section 482 to cover that without any dissent.

QUESTION: The statute says, "search any trunk or evelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law."

That's the language you are talking about.

MR. GELLER: That's the statutory --

QUESTION: The statutory authority is to inspect envelopes in which there is a reasonable cause to believe there is merchandise imported contrary to law.

MR. GELLER: That is one --

QUESTION: Is that a differe t standard than a

probable cause standard?

MR. GELLER: I believe it is. I believe it is a much lower standard.

QUESTION: Do you think after the Carroll case the Government needs statutory authority to stop people entering crossing a border?

MR. GELLER: I think the standard would be one of reasonableness under the Fourth Amendment. Now --

QUESTION: At the airport when you get off the plane they have to have any statute, any standard of reasonableness to open your briefcase and your suitcase and go through it?

MR. GELLER: I think federal agents have to have statutory authority to operate.

QUESTION: Well, the United States Government can stop and inspect anything crossing its borders, can it not?

MR. GELLER: That's correct.

QUESTION: That's an inherent power of sovereignty.

MR. GELLER: That's correct, and we believe that the statutes merely allocate the responsibility among the DEA or the Customs Service, which agency of the Government will exercise that constitutionally based authority, which we believe every sovereign has, to inspect articles coming into its country.

QUESTION: At the Mexican border, for example, they can virtually take a car apart to inspect it. Now, we have

held that after it gets away from the border you need something more, and in some cases it has been indicated when the car is riding six inches lower than it would normally ride that affords some grounds to believe that maybe it has some people or some substances in the car.

But at the border, is anything required at all?

MR. GELLER: We believe that the standard is reasonableness, and that's the constitutional standard. Now, there are also statutory standards which we believe the Government has to comply with. The statutory standard is reason to suspect that contraband or dutiable goods may be being brought into this country.

QUESTION: Don't they have a rule now about spot-checking two or three bags? There is no more reasonableness any more.

MR. GELLER: Mr. Justice Marshall, I think it is reasonable to spot-check bags.

QUESTION: Oh, I see. I see.

QUESTION: They spot-check them because they haven't got the manpower and the time to check every one but do they not have the sovereign power to open every bag, every briefcase and go into every pocket of every person that's coming across the borders into this country, without any statute?

MR. GELLER: Yes, Mr. Chief Justice. We believe that the fact that something --

QUESTION: Why are we worrying about these statutes except as it allocates the functions among different people?

MR. GELLER: I think that after Congress has passed statutes that may limit the constitutional authority of Executive Branch officials to carry out searches.

So there is no question in this case, I might add that the statute was violated. The question here is solely one of constitutional law.

QUESTION: And your position is that the statute may reflect Congress' intent that the full constitutional authority of the Government shouldn't be exercised, that they adhere to a standard of reasonableness, whereas, they would not have to in the absence of the statute.

MR. GELLER: Well, the Fourth Amendment, Mr. Justice Rehnquist, imposes a requirement of reasonableness.

Now, in our view, Section 482 is coterminous with the Fourth Amendment.

QUESTION: Does the Fourth Amendment impose any requirement, at all, as to border searches, after the Carroll case?

MR. GELLER: I believe that the reasonableness requirement of the Fourth Amendment would apply at the border, but it is hard to imagine a border search that would not be reasonable, except in the way it's carried out, such as very

intrusive search or, perhaps, a body cavity search.

QUESTION: Well, certainly, Chief Justice Taft's language in that case doesn't give you any impression that there is any limitation on the authority of the Government to search at the border.

MR. GELLER: Well, I think that there is a requirement of reasonableness imposed in the Fourth Amendment, but I think I would agree with the thrust of Your Honor's question, that it is hard to imagine a border search that would not be reasonable.

QUESTION: Except in the manner in which it is conducted. They might tie somebody up by his toes and take him.

(laughter)

MR. GELLER: That's correct, but that goes to the manner in which it is conducted and not to the power to make the search.

QUESTION: Well, what are called the, so-called, stripper skin searches which are performed at the borders sometimes. Those have required a higher standard than mere caprice and spot-check, have they not?

MR. GELLER: Some circuits have held that, Mr. Chief Justice.

Now, Officer Kallnischkies opened the envelope and found in it, sandwiched between two pieces of cardboard, a

plastic bag containing a white powdery substance. He removed a sample, field tested it and determined that it was heroin. The envelope from which the heroin was taken contained no correspondence.

QUESTION: No writing of any kind?

MR. GELLER: Not of any kind. The only thing that was in the envelope, Mr. Justice Blackmun, was some cardboard and some heroin.

Kallnischkies then opened the other seven envelopes which also appeared to be bulky and to contain merchandise and which appeared to have been typed on the same typewriter as the first envelope he opened, and these seven envelopes also contained only heroin and cardboard, no correspondence.

QUESTION: All from the same post office address in Thailand or from --

MR. GELLER: They all came from Thailand. I am not certain of the way in which the postal authorities in Thailand stamp their mail so it could be determined whether it came from the same post office address. And I am also not certain whether it had the same return address, Mr. Justice, but it clearly all came from Thailand and they were all addressed to --

QUESTION: That's all we know that they all came from Thailand?

MR. GELLER: That's correct, I believe.

The envelopes were then resealed in a locked pouch

and were sent to Washington, where they were opened by agents of the Drug Enforcement Administration. A controlled delivery was then arranged for six of the envelopes. DEA agents observed Respondent Kelly collect the envelopes, meet with Respondent Ramsey and give Ramsey a brown paper bag. Respondents were then arrested, and evidence seized incident to these arrests eventually led to their conviction on a variety of narcotics offenses.

A divided panel of the Court of Appeals reversed these convictions. The court held that Officer Kallnischkies' opening of the envelopes in the absence of a warrant issued upon probable cause violated the Fourth Amendment.

Although the court acknowledged that border searches have traditionally been recognized as an exception to the warrant requirement of the Fourth Amendment, and although the court conceded that the customs agent here had reason to suspect that the envelopes may have contained merchandise subject to duty or prohibited from entering the country, it nonetheless concluded that the border search exception should apply only to packages mailed into the United States from foreign countries and should not be extended to so-called letter mail, such it believed was involved in this case.

Now, we believe that the decision below is wrong and that it threatens a substantial inroad in the Government's ability to detect and to prevent smuggling. There is, as the

Court of Appeals acknowledged, an established border search power. This Court has referred many times to the legitimacy of that power as an essential means of protecting our nation's security and revenue and is an inherent right of any sovereign to control the introduction of prohibited or dutiable articles into its territory.

Such searches, in the absence of probable cause or a warrant, repeatedly have been held to be reasonable within the meaning of the Fourth Amendment because of the paramount need of the Government to know what is being brought into this country and because the minimal intrusion which the search entails invades areas in which persons have, at best, only a minimal expectation of privacy.

Indeed, as we noted in our brief, the very Congress that adopted the Fourth Amendment also enacted a statute allowing customs officers to carry out warrantless border searches whenever they had reason to suspect that goods, wares or merchandise, subject to duty, were being concealed.

Now, this border search power, as the Court of Appeals agreed and as we do not understand Respondents to contest, allows customs officials to search people, luggage, automobiles, chattels of every description, and mailed packages without probable cause or a search warrant, as they seek to enter the United States.

This being so, we can perceive no reason justification

to carve out an exception for so-called letter mail entering this country.

This Court --

QUESTION: Mr. Geller, will you somewhere comment on what prompted the change in administrative policy in 1971? You don't have to do it now.

MR. GELLER: Certainly, Mr. Justice Blackmun.

Almost a century ago in Cotzhausen v. Nazro in 107 US, this Court observed that our customs laws and border search powers would be meaningless if -- and I am quoting now -- "the mail is to be left unwatched and all its sealed contents are to be exempt from seizure."

And, as this case, graphically illustrates, small sealed envelopes, equally as well as a suitcase or package, may conceal merchandise which Congress has decided may not be brought into the United States and may enter only upon payment of a duty.

Now, the Court of Appeals concluded that, while it was reasonable to make a border search of mailed packages without a warrant or probable cause, it was unreasonable to make a similar search of envelopes sent as letter-class mail. And it provided a number of reasons for its attempt to distinguish between envelopes and packages in the mail. We think that none of these reasons can withstand analysis and some of them can be disposed of rather quickly.

The Court of Appeals thought first that the border search exception was grounded in the notion of exigent circumstances. It would, said the court, be too difficult to obtain a warrant when the subject of the border search is mobile, such as a car or a person, but the court thought this rationale was somehow inapplicable to letter mail which it said can easily be detained while a warrant is sought.

As I have already noted, however, border searches do not depend for their reasonableness upon any notion of exigent circumstances. They have their own practical and historical footing. This is shown by the fact that while the presence of exigent circumstances has traditionally been held only to excuse the failure to obtain a warrant, the border search is an exception not only to the warrant requirement of the Fourth Amendment, but also to the probable cause requirement of the Fourth Amendment.

I would also add that the Court of Appeals' opinion is even internally inconsistent on this point, since it would allow the opening of mailed packages, under the border search exception, even though such packages, just like envelopes, could be detained while a warrant was sought.

Now, the Court of Appeals also thought that there was no great need to allow routine border searches of letter-sized envelopes because, unlike packages or suitcases, there are limited kinds of materials that can be concealed inside such

envelopes.

Again, we think the court's objection totally misses the mark. While it is, of course, true that envelopes cannot be used to transport certain types of merchandise because, by law, letter-class mail can't be larger than 24 by 36 inches and can't weigh more than four pounds, or sixty pounds if it is from Canada, these envelopes are an extremely effective means of transporting other types of merchandise, especially drugs and pornography, which need only be brought into the United States, a small quantity at a time, to be of substantial value.

The statistics we have reproduced at Appendix B of our brief bear this out because they show that the number of seizures of these prohibited articles from letter-class mail dwarfs the amount found in package mail coming from overseas.

QUESTION: Mr. Geller, do you think there is any question about our right to consider the statistical material you've submitted?

MR. GELLER: We don't, Mr. Justice Stevens. This was the subject, if the Court will recall, of a motion to strike that the Respondents made. We filed a memorandum in opposition to that motion to strike in January and the Court denied the motion. I would refer the Court to our memorandum in that regard, if it has any qualms, but we think that the reasonableness of the border search power in this case does not

depend in any way upon the reliability of those statistics. But I would add that we think that those statistics --

QUESTION: Then we probably don't need to look at them, if that's --

MR. GELLER: Well, that's correct, and we only provided them because the Court of Appeals for the first time made certain, what we thought unfounded, assertions about how easy it would be for the Government to comply with the requirements that they were setting up in their opinion. And it was only to combat that assertion that we provided the statistics. We think the statistics are reliable. We've explained in our brief and in our memorandum how they were arrived at, and I would add, in addition to that, this is not an unusual procedure. We frequently supply this Court with the best available statistics that the Executive Branch has when we think it might be helpful to this Court's resolution.

But, as I said at the outset, Mr. Justice Stevens, we think that the border search power that was exercised in this case was reasonable under the historic and traditional footings, regardless of whether you accept the reliability of our statistics.

Now, the single factor that most influenced the Court of Appeals' decision was the notion that letter mail may contain correspondence, whereas package mail does not.

The court thought, and I am quoting now from page

11A of the Appendix to our petition, "The mere knowledge on the part of individuals of the practice of routinely opening letter mail inhibits the exercise of free speech."

We submit that there is nothing to this concern on the part of the Court of Appeals. First -- and I cannot emphasize this point too strongly -- customs officers are prohibited from reading correspondence.

Although the Court of Appeals sprinkled its opinion with references to the practice of routinely opening letters, there is absolutely no routine practice by the Customs Service of opening envelopes containing written matter. The authority of customs officials to open international mail is strictly limited, by law, to envelopes that they have reason to believe may contain merchandise. Beyond that, if an envelope that appears to contain merchandise is opened for a customs inspection, and it is found to contain not only goods but also correspondence, customs officials, similarly, are prohibited by law from reading the correspondence. There is a specific customs regulation that covers this situation.

19 CFR 145.3, which is reprinted at page 2A of our brief, states that, "No customs officer or employee shall read or authorize or allow any other person to read any correspondence contained in sealed letter mail of foreign origin, unless a warrant is obtained."

QUESTION: What do they do with the letter?

MR. GELLER: They do not read it, Mr. Justice Marshall.

QUESTION: Well, what happens to it?

MR. GELLER: Any envelope that is opened is stamped as having been opened and then it is sent on its way --

QUESTION: It has to be stamped?

MR. GELLER: It is stamped under the customs procedures.

QUESTION: Sometimes you see something you would wonder what happened to the letter.

MR. GELLER: Well, the current customs procedure, after an envelope is opened, is to stamp the envelope. If there is nothing subject to seizure in the envelope, the envelope is resealed and sent on its way. If a letter is found in there, it is left untouched. It is certainly not read.

QUESTION: What is it stamped? Opened?

MR. GELLER: It is stamped that it has been opened, that is correct, and I think they put the date and time on it, in addition.

Now, in light of the provisions I've just outlined, we contend that there is no justifiable reason to promulgate a broad rule prohibiting warrantless customs inspections of letter-class envelopes for fear of a chilling effect on freedom of expression.

The customs statutes are not intended to restrict or

inhibit freedom of expression, and people who desire not to have their international mail opened at the border can easily avoid that result simply by not sending their letters in envelopes so bulky that they appear to contain something other than correspondence.

For example, they may use an airgram, which is frequently used in international mail. It is a thin piece of onion-skin type paper, folder into the form of an envelope. It is clear that those airgrams contain nothing but correspondence, in the normal case, and they are not opened, because customs officials have no reason to open them. They cannot possibly have reason to suspect they contain prohibited articles or contraband.

Now, there is nothing in the record in this case to suggest that such mail is opened by customs officials.

Now, there may, in fact, be legitimate privacy interests involved whenever an envelope is opened, even one coming from overseas, but we believe that these concerns would, at most, justify a rule that correspondence seized without a warrant or probable cause or fruits derived from the reading of such correspondence may not be admitted into evidence.

A rule such as this would fully satisfy the possible invasions of privacy that troubled the Court of Appeals. But we fail to understand how those interests are protected or

furthered by excluding from evidence merchandise, such as the heroin taken from the envelopes in this case.

QUESTION: So far as my right of privacy, I don't think it has anything to do with whether you read it in court or not. I don't think you have any right to read it.

MR. GELLER: Well, I agree, Mr. Justice Marshall, and current customs procedures prevent the reading of correspondence without a warrant.

Now, if you are positing the situation of a lawless customs officer who is willing to violate the statutes and regulations, I don't think that person would be deterred by an exclusion of the rule, since he is not reading it in order to uncover evidence that would later be introduced in court.

In fact, it is especially difficult to fathom why an exclusionary rule, designed to protect the free flow of information, should be imposed here. Respondents have not argued that their correspondence was read, nor could they.

The eight envelopes opened by Officer Kallnischkies contained no correspondence. They contained nothing but cardboard and heroin.

Whatever inhibitory effect border searches of international mail may have on others, Respondents were not exposed to it.

By the way, I should at this point clear up a misconception that arises several times throughout Respondents'

briefs.

We stated in our brief that available statistics indicate that customs officers discover contraband or dutiable goods in 20% of the international letter-class mail that they open.

Now, Respondents conclude from this statistic that nothing but correspondence is found in the other 80%. This is totally incorrect. Most of the 80% of the letter-class envelopes that are opened and do not contain articles subject to seizure are found to contain merchandise that, for one reason or another is not subject to a duty. For example, a gift under $10 makes up a large percentage of these letter-class envelopes that are opened. In very few of the letter-class envelopes that are opened is nothing but correspondence found.

This is, of course, what we would expect since customs officials are empowered to open envelopes only if they have reason to believe that the envelope may contain merchandise subject to duty or imported contrary to law.

Now, I want to discuss --

QUESTION: What if a customs official sees an envelope that contains nothing thicker than a normal guy's letter but his experience tells him it might be currency that would be subject to duty or would be subject to some sort of prohibition. Is he, under regulation, free to open that?

MR. GELLER: He is, under statute and regulations, free to open any envelope if he has reason to suspect it may contain contraband or dutiable goods.

In the case you posit, Mr. Justice Rehnquist, I assume he could open that envelope but, unless they have a specific tip or reason to suspect that something like currency or microfilm might be included in a very thin envelope, under current customs practice, those envelopes are not opened.

QUESTION: There is some risk then, I suppose, that a customs inspector might think an envelope contained currency and, in fact, when he opened it up it would contain a letter.

MR. GELLER: There is some risk, but under current regulations he doesn't read that letter and he merely stamps the envelope as having been opened, reseals it and sends it on its way.

Now, in response to the question by Mr. Justice Blackmun, a moment ago, it is true that in 1971 the customs service, after a consultation with the postal service, changed its procedures for inspecting international letter class mail.

But these changes represent, we believe, only a modification of prior practices rather than a drastic break with the past. The important fact to be noted is that at no time in our nation's history, not before 1971 and not after 1971, has a sender or addressee of international letter-class mail sent into this country, ever had any expectation that that

envelope would be delivered to its destination without being opened in the presence of the customs service.

Now, from 1924, when the Universal Postal Convention first allowed dutiable articles to be inserted into letter-class mail, until 1971, the practice of the Customs Service and the Postal Service when they received a letter-class envelope apparently containing merchandise was as follows: They would send it on, notify the addressee to come to the post office and they would not turn over that envelope unless the addressee consented to having it opened by the customs agent standing there.

Now, what this effectively did was to give a free reign to smugglers, since, if their envelopes came through unopened then they had succeeded. If, on the other hand, their envelope was stopped and they were notified to come to the Postal Service and pick it up, they would simply refuse delivery. And, under the Universal Postal Convention, at that point, the letter had to be sent back to the country of origin unopened, presumably, where the sender could try to send it again and, hopefully, it would get through a second time.

Mr. Chief Justice, I would like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Very well.

QUESTION: Mr. Geller, do you think the drive against narcotics was in part responsible for the '71 change?

MR. GELLER: Yes, it was.

QUESTION: This is what I asked, and I am wondering why the '71 change.

MR. GELLER: Obviously, the amount of contraband coming into this country began to grow and grow each year from 1924 to 1971. In addition, in the late 1960's there was a drive to cut off other sources of smuggling. We intensified our efforts, for example, at the Mexican border, and this all contributed to making the use of envelopes a much more attractive way of getting contraband into this country.

MR. CHIEF JUSTICE BURGER: Mr. Palmer.

ORAL ARGUMENT OF ALLAN M. PALMER, ESQ.,

FOR THE RESPONDENTS

MR. PALMER: Mr. Chief Justice, and may it please the Court:

As we see it, the border search statute concerned, 19 USC 42, the progenitor of which was considered in the Carroll case, does not, when looked at in historical prospective, allow for the opening of international letter mail.

When you read the statute, in light of its history and genesis, especially when it was enacted in 1856 was the first time that the statute allowed for the opening of trunks or envelopes wherever found, it is patently clear from a reading of that statute in its entirety that the statute only was concerned with trunks or envelopes,

wherever found, on vehicle, beasts or persons at the border.

And, indeed, in 1970, when Senator Ervin objected to these changes that came about in 1971, that were just discussed, the then General Counsel of the Post Office, and it is reported at Footnote Number 5 of our brief, indicated that there are not, and I am quoting from the Congressional Record, "There are not statutory provisions dealing specifically with the customs treatment of any type of incoming foreign mail," thereby rejecting the notion that 19 USC 482 allows for such inspection, at least in the view of the General Counsel of that department.

QUESTION: Maybe he didn't know about the statute that appears in the Appendix of the Government's petition for cert, reciting: "And to search any trunk or envelope, wherever found, in which he may have reasonable cause to suspect," and so forth. Maybe he didn't know about that.

MR. PALMER: I find that hard to believe, Mr. Chief Justice, that the General Counsel of the Post Office, concerned with customs day to day, would not know or be apprised of this statute.

QUESTION: If he didn't know about it, then he was disagreeing with this statute, wasn't he?

MR. PALMER: Well, assuming he didn't know about that, but --

QUESTION: Is there any other alternative, either that he didn't know about it or that he didn't agree with it?

MR. PALMER: The only alternative I can say is he knew about it and did not think it applied to the circumstances at hand.

QUESTION: He didn't think envelope meant envelope in the mail?

MR. PALMER: Well, I think, like I did, he viewed the history of that statute, the progenitor of it, in 1866. It is clear that it is only concerned with envelopes or trunks on persons, vehicles, etcetera, and that the present statute is merely a shorthand version of it.

I think a reading of it, when the Court gets to that, will see that is abundantly clear.

Furthermore, the Carroll case alluded to by Justice Rehnquist, makes another point, insofar as this border search is concerned. It spoke of the border search, it was extrapolating that to the whiskey in the car that they sought to stop without a warrant, and in viewing the border search statutes which they said were enacted contemporaneous with the Fourth Amendment and this nation's history, that even there, when dealing with the border search, the foundation statutes enacted at the beginning of this nation, made a distinction even where dutiable goods were concerned, were items that were subject to disappear into the country. When

a man and his trunk can disappear into the country, the statutes indicated and the court held reasonable exception to the abhorrent requirement that there was no warrant required because of the exigency of the situation. The individual and his wares would disappear into a still rugged country and for that reason the warrant was not required.

QUESTION: Let me read you this lanaguage from page 154, the Carroll case, and ask if you think it is consistent with the explanation that you just gave. This is at page 154 of 267 US: "Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in and his belongings as effects which may lawfully be brought in."

I, myself, don't get any sense of disappearance out of that language.

MR. PALMER: Reading the appeal in its entirety, it is clear that the court in Carroll, in that language, was speaking about the traveler at the border as he entered and the danger of him disappearing without the opportunity to get a search warrant for him or his wares.

And the court in Carroll, itself, as we read it, drew the distinction when these items, dutiable, that have come across the border were in a position to be searched, via a search warrant, the statutes themselves, these foundation

statues, required the customs people to, in fact, get a search warrant, regardless of the fact that these were dutiable goods that had come across the border and the like.

And I think for that reason the court in Carroll which was, possibly, one of the only cases that got into this matter in some detail, clearly makes the distinction between a movable situation, an ambulatory situation, and a permanent situation. And, in fact, that was the basis for its ruling under the Volstedt Act, in saying that the car, because it could disappear, there was no warrant required.

QUESTION: My point is that it seems to me that justification offered for the border search in Carroll is quite different than the justification offered for the search of the automobile.

MR. PALMER: Well, I think, the two coincide, as I read the opinion.

In any event --

QUESTION: If you know, at the moment, in the sequence of the passage of these various provisions, at what stage did this lanaguage come in: "Customs employees have the responsibility for resealing or repacking mail of foreign origin following customs examinations"?

MR. PALMER: That would be a regulation, I would think, Your Honor.

QUESTION: You don't know at what stage that came in

in terms of the sequence? You were speaking of the 1866 statute and --

MR. PALMER: I am not sure of the exact date, Your Honor, but we have it laid out in our brief.

QUESTION: What happens if the Government has just held the letters?

MR. PALMER: That's one of our points, Your Honor.

Under the VanLeeuwen doctrine, nothing would have happened. They had the right to hold it for up to twenty-one hours --

QUESTION: No, no. I said hold it forever. Just hold it forever. Who could complain?

MR. PALMER: I think the addressee.

QUESTION: What about the addressor?

MR. PALMER: Of course. I think he could complain that his mail was not being delivered.

QUESTION: You mean people come over from Thailand and object?

MR. PALMER: Well, in a particular circumstance, in this case, possibly, they wouldn't. But we are talking about mail, as such.

QUESTION: So if they just held it, you know and I know that people wouldn't have come for it.

MR. PALMER: Probably not.

QUESTION: So everything would have been fine.

MR. PALMER: Excuse me?

QUESTION: Everything would have been all right.

MR. PALMER: Under that set of facts. However, under the facts, as we have them, the opening, we believe, violated the --

QUESTION: You don't agree that inherent in any government of any country is the right to protect its borders?

MR. PALMER: Of course, that's true.

QUESTION: In any way it sees fit.

MR. PALMER: Well, Your Honor, I think --

QUESTION: In any way it sees fit.

MR. PALMER: I don't believe that's true, blanketly, no, sir. And I don't believe --

QUESTION: The limitation comes from where?

MR. PALMER: Excuse me?

QUESTION: Where does the limitation come from?

MR. PALMER: I think the limitation comes from, as far as we can gather, the historical factors concerning the border searches and the question of exigence or whether or not there was time to obtain a warrant.

The Carroll case, as we alluded to, clearly makes that distinction.

QUESTION: Well, I suppose, Congress can limit its own power of the Government, can it not?

MR. PALMER: Of course.

QUESTION: Has it?

MR. PALMER: Well, in this situation, with these statutes -- the Government is relying on these statutes and, as counsel indicated, in getting, allowing for the opening of the mail. So if that is true, there would be that limitation that was extant.

Now, historically, for the first one hundred and ninety-five years of this nation's history, never did the customs people, acting alone, seek to open this kind of mail, letter mail. They delivered it, required the addressee to get there. If he refused it was sent back, or they could get a search warrant, if they sought to enter the privacy thereof. But, never, in this nation's history, until 1971, did the customs people ever exercise the power that was exercised in this case, to enter the mail.

QUESTION: Where do you get that from?

MR. PALMER: The Government's brief, Your Honor.

QUESTION: I didn't see it. I'll get it.

QUESTION: Mr. Palmer, may I just be sure I understand your position. You say that the statute quoted at the top of Appendix A, the 1866 statute, cannot properly be construed to authorize opening of mail.

MR. PALMER: That is true.

QUESTION: And is it your submission, therefore, that there is no statutory authority for the Government opening

letter class mail?

MR. PALMER: I believe there is no statutory authority. There were some regulations passed. The Treasury Department and Customs got together and proposed some regulations but --

QUESTION: But there is no statutory authority?

MR. PALMER: That is our position.

QUESTION: That is your position.

MR. PALMER: Yes, sir.

QUESTION: In addition, your position would have to be that it takes -- for that position to have any meaning -- would be that statutory authority is required before the Government may open letter class mail, I take it.

MR. PALMER: Under the present situation, it would appear that would be true, if that power existed, and we are not conceding it does exist, Your Honor.

Now, insofar as the Court of Appeals below, Judge McGowan joined by Judge Tamm --

QUESTION: Mr. Palmer, I am sorry to interrupt again, but on the statutory point, your argument is, as I understand it, the word "envelope" means an envelope brought in by the traveler as he returns to the country.

MR. PALMER: That is correct.

QUESTION: If that's correct, what about statutory authority for parcels sent through the mail?

Is there any statutory authority for that? You seem to concede, as I remember your brief, that that may be open. There is a long practice of doing it. Is that within this statute or on some other statutory basis?

MR. PALMER: I don't think it probably comes within this statute. There are probably some regulations that allow for the opening of that, Your Honor.

QUESTION: Regulations didn't allow for the opening of this, of letter class mail.

MR. PALMER: But the regulation really doesn't limit or confine or upset the opening of these packages, as we see it, but they cannot expand the right to open the first-class letter type mail.

QUESTION: I understand. We all understand. It is a constitutional argument, but I just want to be sure that your claim is there is no statutory authority for this.

MR. PALMER: I just want to point out that the letters -- If you want to see the letters that were involved here, there are color photographs taken by the FBI, exhibits on appeal which can be clearly seen in this case.

Now, the Government and the court below were concerned about the invasion of privacy, the right of free expression. Now, the Government, by its own figures, indicates that 85% of the time, or approximately thereto, this mail is opened, nothing dutiable or prohibited is found. The customs

agent is in error 85% of the time. He finds nothing of a prohibited or dutiable nature. And then the envelope is stamped, it's sent to the individuals.

Now, we suggest that that severely limits, inhibits, the freedom of expression. It tends to chill expression.

Now, the Government said, well, they really don't read it. There is a regulation to that effect. I think the short answer to that can be found in this Court's opinion in Wolf v. McDonald, 418 US, at page 539. In that case, attorney-client letters were sent into the jail. It was claimed this violated First Amendment rights, chilled the expression thereof.

This Court held that that regulation was all right, because the inmate was required to be present at the time. This Court said: "Neither could it chill such communications since the inmates' presence insures that prison officials will not read the mail."

By inference, we can assume that if the inmate was not there to insure that, serious questions of chilling that communication would exist.

Now, that is in the context of a totalitarian environment. Individuals locked up.

Now, in a free society, we can expect no less, that when its mail is opened there are some safeguards to insure that the petty officials, these customs officers, we are not

left to their whim and discretion to open this mail.

QUESTION: Don't you think there is some difference between domestic mail, between a lawyer and his client who is in prison and mail that is coming in from a foreign country that must pass through the customs inspection?

MR. PALMER: No, Your Honor, I think if I am receiving mail from overseas -- I received a letter not too long ago from England, from a friend who wrote to me -- I think I have the same right of privacy that inheres in that communication to me, and a petty customs official, I don't believe, should have the right to open that mail as his discretion and whim. He's wrong 85% of the time. No one is there to see, to insure that he doesn't read it, as this Court required in Wolf.

I think that is the chilling effect on the opening of our correspondence. This case concerns --

QUESTION: It is a good deal easier for us to say that the mail going to a prison can have the prisoner on hand within a few minutes to be present, whereas, you can't do that with all the incoming foreign mail, can you?

MR. PALMER: I respectfully dissent from Your Honor's suggestion, for this reason --

QUESTION: Which part of my suggestion? You can't get them there in a few minutes?

MR. PALMER: The second part.

For the first 195 years, or thereabouts, until 1971, if incoming mail was suspect, it was delivered to the post office closest to the addressee and then the postal people notified the addressee to come there. The very same presence that we have in the jail situation, so I find no difficulty, we find no undue burden, because until 1971 that practice was uniformly followed in this country. Until, in 1971, the Post Office and customs people got together and formulated a regulation changing that.

For what it's worth, of course, your client's "correspondence" -- that's in quotations -- was nonexistent, as I understand it. There was no writing in the envelopes.

MR. PALMER: That is quite true, Your Honor, but, as you know, as the Government indicates, they open it when they think it concerns something in addition to correspondence. A search, as we know, cannot be made lawful by what it turns up. The fact that it contained the items --

QUESTION: I said, for what it is worth. It leaves a little hollow sound when you talk about First Amendment rights with your particular client.

MR. PALMER: Well, in a particular case, but speaking of the nation and the mail as a whole, I think, the hollowness recedes to some extent.

QUESTION: -- concede that both Mr. Ramsey and Mr. Kelly's rights have been chilled -- agree to that, too.

MR. PALMER: Well, I think, in the, perhaps, their particular rights in the particular context of this case might not have been unduly chilled. There was no extreme frost, then, as we see it, but in any event I think their rights under the Fourth Amendment were violated and that is the gravamen of the complaint that we have in this Court.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Palmer.

Mr. Panzer.

ORAL ARGUMENT OF IRVING R. M. PANZER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. PANZER: Mr. Chief Justice, and may it please the Court:

I think it is important to realize, first, that this is the first time in this Court's history that not only this question but, apparently, any question of the search and seizure power at the border, with regard to goods or letters, has ever come before this Court.

Much has been said about Carroll v. United States. That was a 1924 case. That case, that quotation, is pure dictum.

You may recall that in that case, it was a prohibition case, a moving automobile, apparently carrying liquor moving between Detroit and Grand Rapids. The only question in the case -- it had nothing to do with the border,

it had nothing to do with customs, it had nothing to do with letters. The only question in that case was whether there was probable cause for the search and seizure. But in the context of the opinion, it is true, that the quotation read by Mr. Justice Rehnquist was made.

And I'll also concede that that quotation has been much adverted to by this Court. I don't want to deny that. But this Court has never held that there is a border search exception, as it has been described here today. Not once in its history.

I find no basis in this Court's opinions for saying that the Fourth Amendment does not operate at the border. I think some of the language that we've heard here this afternoon suggests that.

I don't believe that the Fourth Amendment does not operate at a certain place in this country. I do think that the way this Court has approached other search and seizure cases and particularly the border patrol cases, tells us that when we look at a case like this, we use a discriminating standard.

If there is a, so-called, border search exception, it cannot be a blunderbuss exception for everything that crosses the border, whether there is a need for it or not. I do not believe that this Court would sustain a position like that.

QUESTION: How about the cases where the opening of the envelope disclosed pornographic pictures? We had that two or three years ago. Do you say there is a probable cause standard at the border, itself?

MR. PANZER: Well, I think we look at this as a number of different situations at the border, rather than say that everything that crosses the border, whether it moves or not, is detainable or not, is subject to an exception from the entire Fourth Amendment.

For example, persons crossing the border -- the Carroll statement. Persons are mobile, things they carry with them are mobile, and I think it is fair to say, despite what counsel for the Government has said, that the very basis of that doctrine is that, here is something which may evade capture if you do not search it at the moment.

QUESTION: Well, at the border -- Question is whether the person, or the thing, is going to be admitted into the country, is it not? Isn't that the whole enterprise of having border guards, and all that sort of thing? They are not yet admitted when they are being examined, is that not so?

MR. PANZER: That's correct. And I will say that in border patrol cases, one has the right to make a stop, to ask a person for his identity papers, or something of that sort.

QUESTION: Open his briefcase, his trunk.

MR. PANZER: Yes, because that may evade capture, if not done at the time, yes.

QUESTION: But don't you also have the alternative there, Mr. Panzer, of being able to simply detain them at the border and not open their stuff, if the rationale is simply escape of capture. Can't you simply tell them, "You come over here and stay 24 hours and we are going to go get a warrant."

MR. PANZER: No, but that is too intrusive, too offensive. If one were to stop and detain any number of people on that ground, I think that would be considered offensive. It would be inconvenient, and I don't believe the Court would sustain that.

QUESTION: Suppose somebody comes in with eight envelopes in his suitcase and the customs agent opens it up, could he open those envelopes?

MR. PANZER: It is my view that he could. It is my -

QUESTION: All right. Now, he has them in his pocket. Could he open them up?

MR. PANZER: Yes, it is my view that he could.

QUESTION: He has them in his hand. Could he open them up?

MR. PANZER: Yes, my view that he could.

QUESTION: He sent them ahead. Could they open them up?

MR. PANZER: They could not.

QUESTION: The difference is?

MR. PANZER: In the mail. I think --

QUESTION: Mail. The package in the mail.

MR. PANZER: Yes. I make a distinction between mail and all the others.

QUESTION: Suppose he sent them by airplane.

MR. PANZER: In the form of a letter?

QUESTION: Yes. He puts eight letters on an airplane and they agree to deliver them in New York. Could they take those off?

MR. PANZER: No, they could not; if that is regular letter mail, they could not, not without a search warrant.

QUESTION: It wasn't mail. They just gave TWA eight letters and said deliver them to Kennedy Airport.

MR. PANZER: I see. It's personal delivery.

QUESTION: If you don't think customs would take them off, I've got news for you. They would. But, I mean, why is mail so magic?

MR. PANZER: Well, I think mail is different.

QUESTION: Isn't privacy what you are talking about?

MR. PANZER: Yes.

QUESTION: It is the expectation of privacy --

MR. PANZER: Well, if it is in his possession, it is in his mail.

MR. PANZER: I don't think we have an expectation of privacy if we carry that same letter with us, no. If we send it by mail, I think we do. I have no doubt that we do. There is the same expectation --

QUESTION: Well, right now, if you were walking around the street with the envelope in your pocket, don't you have the right to think that that will be private?

MR. PANZER: Yes, just as anything else I have.

QUESTION: And it only changes when you cross the border.

MR. PANZER: At the border, I don't have that expectation, no.

QUESTION: It is the same with mail, isn't it?

MR. PANZER: No, I think mail, when sent in from abroad, rises to a wholly different level. We do expect that that will be private. We do put in our most familiar and our most intimate thoughts. I think there is a gulf between carrying that letter with you and sending it in by mail. I think there is a constitutional gulf.

QUESTION: I might go along with you that you have a constitutional right to write a nice letter, but I get into trouble with the constitutional right to mail cocaine.

MR. PANZER: Let's turn to another point, though.

Surely this Court would not sweep aside an entire constitutional provision unless a need was shown. Now, I will

concede the need for the traveler, for his luggage. I'll concede it even for a package because there are no First Amendment rights inhering in a package.

But, there is no need that can be shown for doing such with a letter. A letter is not mobile. A letter will lie there until you have time to go and get a warrant if you can show probable cause. A letter is in the parameter of the First Amendment --

QUESTION: What about a package of books?

MR. PANZER: A letter rises to First Amendment levels that a package or a book does not, in my opinion.

QUESTION: A letter, then, in your view, has a superior First Amendment claim to a book?

MR. PANZER: Absolutely. And that makes the difference because --

QUESTION: How about a book of poems to my wife? No protection?

MR. PANZER: That doesn't rise --

QUESTION: How many pages does it have to be before it loses its protection?

MR. PANZER: Pardon?

QUESTION: How many pages does it have to be before it loses its protection?

MR. PANZER: Well, I think the distinction --

QUESTION: Well, suppose the letter weighed five

ounces, would that still be protected?

MR. PANZER: Yes, it would.

That brings me to something else.

The Government says if you want to be sure that we don't open your mail, don't send anything bulky. I think that turns the Fourth Amendment on its head. I think, as the Court of Appeals said: "If the Government wants to be sure it isn't invading your privacy, let them go and get a search warrant."

There is no law that everybody is presumed to be violating the law. Quite the contrary. And in response to questions that were put here before: Is there a constitutional right to receive? Is it only the sender? Is it the addressee?

We know that this Court decided in Lamont v. Postmaster General, that there is a constitutional right to receive international mail, and that wasn't even sealed mail. That was unsealed mail.

There is a constitutional right to receive it. That right inheres in the addressee and not in the sender, although the sender may have rights, too. But it inheres in the Respondents before the Court this morning.

QUESTION: Mr. Panzer, while you have paused, if I might ask another question. We've all sort of assumed there is a distinction between packages and smaller letters. The Court of Appeals does, too. In your view, in the footnote that

Judge McGowan has, Footnote 8, where he describes what he might suggest that would establish probable cause to open a letter or an envelope, in your view, would the envelopes that were involved in this case and were opened, the ones which were 42 grams in weight, and so forth, would there have been probable cause to open those, under Judge McGowan's Footnote 8, in your view?

MR. PANZER: I recognize that he comes very close to suggesting that there is probable cause, but I must disagree with that. The mere fact that a letter is bulky and comes from a suspected country it not, in my opinion, probable cause, no.

QUESTION: So, you say no.

MR. PANZER: I say no.

Incidentally, if the Court would like to see the size, the very size of the letters we are talking about, I have prepared these. Five of the six letters were this size, which is just an ordinary common-sized envelope, and the sixth was this size, which is something like a Christmas card, large Christmas card. And it is important to realize that the inspector said that these were letters. He didn't think these were packages. He didn't think they contained anything but letter type mail.

QUESTION: Wasn't there at least one of them that he thought there was something like sugar, powdered sugar, or

something?

MR. PANZER: Well, that's true. He said there was something else in there. But, in response to a question --

QUESTION: Didn't it respond to the law of gravity when he tipped it to one end and the material went to the far end, something along that line?

MR. PANZER: No, he didn't say that, Your Honor. He said that he often makes that test, but could not recall whether he had done it in this case. All that the record reveals for his cause in this case was that the letters came from Thailand and were bulky, nothing else. I don't think that rises to probable cause, Your Honor.

Counsel for the Government told you that they do not rely upon the statistics in their brief. That's interesting because they attempted, in effect, to intimidate the Court by telling you that a billion envelopes come in every year, they only have a handful of inspectors, they can only do so much work a day, and if you don't give them this power, if you do not exempt an entire category, a stupendous category, namely, all international mail -- If you do not exempt this from the Fourth Amendment, we are going to be overwhelmed.

Now, they told you this in Almeida-Sanchez about illegal aliens. They told you this in United States District Court about the national security, and they have told you this in case after case.

The Court of Appeals suggested that the problem was not at all that difficult, and I agree with the Court of Appeals. I think the burden is upon the Government to say to this Court that there is no other way to do this.

Now, if they could tell you that, perhaps I would reconsider, but I think if we can think of some other way to protect our Government's interests, then you ought not to exempt a stupendous category of mail, entirely, from the Fourth Amendment.

Are there other ways to do it? Probably there are. Judge McGowan, in the Court of Appeals, suggested a number of different ways. One was the oral testimony of the agent to the magistrate, which if made upon a record, I take it, if recorded, would satisfy constitutional requirements. He said if the problem was large enough you could station a magistrate at Kennedy Airport or wherever else the problem existed.

And there are other solutions, perhaps. We recall that in Almeida-Sanchez --

QUESTION: Do you know how far Kennedy Airport is from Foley Square, where the Federal Court is?

MR. PANZER: It is a distance.

QUESTION: About $10 in taxi fare.

MR. PANZER: Well, the Government has a deep pocket, but if they wanted to station a magistrate at Kennedy Airport that would solve the problem.

Another possible solution, akin to the one in Camara v. Superior Court, and like the one Mr. Justice Powell suggested when he concurred in Almeida-Sanchez, a type of area warrant. Now, in Camara, it was an area warrant for certain houses. In Almeida-Sanchez, it was suggested that perhaps if certain roads were well traveled and well suspected to be used by illegal aliens, that a warrant would lie for those.

Well, I suggest that here if the Government can show that a certain country or a certain place in a country, certain types of letters, certain handwriting, certain typewriting, whatever it may be -- If the Government can show that, that perhaps a type of warrant would lie for that.

QUESTION: To whom should that showing be made? It sounds like a Legislative determination to me, that you are describing.

MR. PANZER: No, I think it could be made to a magistrate. If the area warrant could lie in Camara and if the alien warrant could lie in Almeida-Sanchez, I don't see why this wouldn't lie. If you can't make that, then you can't prove probable cause, and I don't think you should have the right to open envelopes.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Geller, you have two minutes left.

REBUTTAL ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GELLER: Mr. Chief Justice, and may it please the Court:

QUESTION: Mr. Geller, will you summarize, once more, what the Government did prior to 1971?

MR. GELLER: Yes, Mr. Justice Powell.

From 1924 -- 1924 was the first time, under the Universal Postal Convention, that dutiable articles were allowed to be inserted into letter class mail. Before that, you couldn't do that.

From 1924 until 1971, when a piece of letter class mail came into the United States and it appeared bulky enough to contain something other than correspondence, there was reason to suspect it contained merchandise, and it didn't have a green label on it. If it had a green label, that would have been a consent to search from the sender. If, under all those circumstances, the letter came in, the addressee was notified that a piece of mail addressed to him had been received and that there was reason to suspect it contained merchandise, subject to duty or contraband. He came to the post office and the envelope would not be surrendered to him unless he consented to have the customs service open it. And that was the practice before 1971. There has never been a practice of delivering these letter

class, these bulky letter class envelopes without opening them.

The only difference now is that we open them at the border rather than giving smugglers the opportunity to receive delivery and escape detection.

Now, in response to Mr. Justice Stevens' question about the statutory authority, I don't know if there really is a serious question here. It is hard to understand why Congress would intend to exempt envelopes or packages -- no one disputes that packages can be opened -- from customs inspection. Certainly the Postal Service and the Customs Service have considered for the last 100 years that they have had this authority. This Court considered in Cotshausen in, I think, 1882, that they had that authority. And in none of the Court of Appeals cases, has anyone ever questioned the statutory authority to open envelopes, letter class envelopes or packages.

QUESTION: But, isn't the reason nobody question it that the Government didn't do it?

MR. GELLER: The Government has been opening packages --

QUESTION: Well, they took it to the man and said, "Will you give me your consent?" If he said no, they wouldn't open it, so they didn't have the problem.

MR. GELLER: Packages have always been opened at the

border without the addressee being present --

QUESTION: I am talking about envelopes, though.

Nobody has ever questioned the authority to open packages.

MR. GELLER: That's correct.

In fact, I believe, Cotshausen was a -- might have been considered a package, rather than an envelope under the Court of Appeals standard.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 3:03 o'clock, p.m., the case in the above-entitled matter was submitted.)