

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: RICHARD L. CHAPMAN, JOHN M. SCHOENECKER

AND PATRICK BRUMM, Petitioners V. UNITED STATES

CASE NO: 90-5744

PLACE: Washington, D.C.

DATE: March 26, 1991

PAGES: 1 - 49

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 RICHARD L. CHAPMAN, JOHN M. :

4 SCHOENECKER AND PATRICK :

5 BRUMM, :

6 Petitioners :

7 v. : No. 90-5744

8 UNITED STATES :

9 - - - - -X

10 Washington, D.C.

11 Tuesday, March 26, 1991

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:09 a.m.

15 APPEARANCES:

16 T. CHRISTOPHER KELLY, ESQ., Madison, Wisconsin; appointed
17 by this Court on behalf of the Petitioners.

18 PAUL J. LARKIN, JR., ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.;
20 on behalf of the Respondent.

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
T. CHRISTOPHER KELLY, ESQ.	
On behalf of the Petitioners	3
PAUL J. LARKIN, JR., ESQ.	
On behalf of the Respondent	26
REBUTTAL ARGUMENT OF	
T. CHRISTOPHER KELLY, ESQ.	
On behalf of the Petitioners	47

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

2 (10:09 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 90-5744, Richard L. Chapman and
5 Others v. the United States.

6 Mr. Kelly.

7 ORAL ARGUMENT OF T. CHRISTOPHER KELLY

8 ON BEHALF OF THE PETITIONERS

9 MR. KELLY: Mr. Chief Justice, and may it please
10 the Court:

11 The petitioners asked this Court to restore
12 rationality to what Judge Posner termed the bizarre the
13 schedule of punishments in LSD cases that no one is able
14 to justify. The issues before this Court are whether an
15 LSD carrier, in this case blotter paper, is a mixture or
16 substance containing LSD within the meaning of 21 U.S.C.,
17 section 841. And if so, whether the sentencing scheme at
18 issue here violates a defendant's due process right to be
19 free from arbitrarily determined sentences.

20 The Government stipulated that LSD is sold by
21 the dose, not by weight. A dose of LSD is very small. In
22 fact, it's infinitesimal in size. It weighs about 50
23 millionths of a gram. Because it is so small, individual
24 dosages are generally distributed on a carrier.

25 The petitioners in this case distributed 1,000

1 dosages of LSD on blotter paper. The combined weight of
2 the blotter paper and the LSD was about 5.7 grams. The
3 Government stipulated that the actual weight of the LSD
4 apart from the blotter paper was less than 1 gram. In
5 fact, it was about 50 milligrams or less than 1 percent of
6 the combined weight of the LSD and the blotter paper.

7 QUESTION: What's the relation of a gram to an
8 ounce or a pound, Mr. Kelly?

9 MR. KELLY: There are 28 or about 28 grams in an
10 ounce.

11 QUESTION: 28 grams in an ounce.

12 MR. KELLY: Uh-huh.

13 QUESTION: Well, when the LSD is put on the
14 paper, does it remain a microdot or does it -- it spread
15 to the boundaries of the paper if the paper is big enough,
16 and how big is the paper?

17 MR. KELLY: There are actually two different
18 ways of placing LSD on blotter paper. One is to mix the
19 LSD with a solution of alcohol and spray it across the
20 paper. The other way is to place a dot of LSD onto the
21 center of a square of blotter paper with a pipette.
22 Blotter paper generally comes in sheets that are about 10
23 inches square and they're perforated into 100 squares.
24 Each square would represent one dose of LSD.

25 QUESTION: How -- how big is a square?

1 MR. KELLY: A square is about 1-inch square.

2 QUESTION: About an inch square.

3 MR. KELLY: Yes, Justice Kennedy.

4 QUESTION: I have one other technical question.

5 MR. KELLY: Sure.

6 QUESTION: When LSD is transported to this
7 person who is going to put it on the blotter paper, I take
8 it it's not pure, is it? Do you have a pure vial of LSD
9 that's commonly distributed or is it cut when it's
10 delivered to the dealer?

11 MR. KELLY: It's not cut in the sense that
12 cocaine, for instance, is cut by mixing it with mannitol.

13 QUESTION: Perhaps I should have said mixed.

14 MR. KELLY: Generally if LSD is being
15 distributed in liquid form in a vial, Justice Kennedy, it
16 would be done in a fairly high point in the distribution
17 chain. If it's being distributed to the average consumer,
18 it will be distributed on blotter paper or on another
19 carrier such as a sugar cube or gelatin capsules. Those
20 are the carriers most commonly used.

21 QUESTION: Well, as it goes to the person who's
22 going to put it on the blotter paper, what kind of
23 container is it in and is it mixed with anything else?

24 MR. KELLY: It's probably going to be in
25 something like a vial. And if it's mixed with anything

1 else, it would only be, again, if it had been in a
2 solution of alcohol to facilitate spraying it.

3 QUESTION: Before you end with the so-called
4 technical questions, I didn't understand your response to
5 Justice Kennedy to explain what happens when the substance
6 hits the blotter paper. Does it penetrate into the fibers
7 of the blotter paper?

8 MR. KELLY: It does penetrate into the fibers.
9 It, in essence, soaks through.

10 QUESTION: So, in a sense, one could say it is
11 mixed with the fibers of the blotter paper?

12 MR. KELLY: It depends, Justice O'Connor, in
13 what sense one is using the term mixture as to whether
14 that would constitute a mixture. If one --

15 QUESTION: Well, in some sense one could say
16 that.

17 MR. KELLY: In some sense one could say that.
18 It fair to say that the word can be interpreted broadly
19 enough to include that. I should also -- to clarify my
20 response to Justice Kennedy's question -- indicate that
21 when we're talking about the 1-inch square blotter paper,
22 I'm talking about what's probably an average size and that
23 in fact the size and thickness of blotter paper does vary
24 from case to case. In the cases that were cited in our
25 brief, individual squares of blotter paper, for instance,

1 ranged in weight from 5.5 micro -- or milligrams to 15.4
2 milligrams.

3 QUESTION: I still didn't understand that one
4 half of your answer -- one that's -- when is a dot is put
5 on a square, does the dot expand to the full area of the
6 square?

7 MR. KELLY: No, it will probably expand
8 somewhat, but it won't cover the entire square.

9 QUESTION: But it doesn't cover the entire
10 square, so the square would be partly just blotter paper
11 and then it would get increasingly concentrated as it gets
12 to the middle.

13 MR. KELLY: That's correct, Your Honor.

14 QUESTION: But if it's sprayed on, it extends to
15 the full extent of the square?

16 MR. KELLY: That's correct, because generally
17 it's going to be sprayed across the entire sheet.

18 QUESTION: It doesn't really matter whether it's
19 a mixture. I mean, when it penetrates the fiber, the
20 statute and the sentencing guidelines both say it has to
21 be either a mixture or a substance containing a detectable
22 amount of heroin. And it seems to me the blotter is
23 either a mixture or a substance. You've got to say the
24 blotter is a substance, isn't it?

25 MR. KELLY: Certainly there is a sense in which

1 blotter paper is a substance, as is any material thing.

2 QUESTION: Yes.

3 MR. KELLY: Interestingly the majority in the
4 case below suggested that blotter paper is probably not a
5 substance in that sense and found that it was a mixture.
6 The courts of appeals have been divided as to whether it's
7 a mixture or whether it's a substance.

8 I don't think that it's a substance in the sense
9 that Congress intended that term. Because if the term if
10 read that broadly, then anything that carries the LSD
11 could viewed as a substance. And whether that's a vial or
12 whether that's blotter paper or a syringe or a Boeing 747,
13 a suitcase -- sure, one can think of all kinds of example.
14 I don't think that that's the sense of substance in which
15 Congress intended the word to be used.

16 I think what Congress was getting at when it
17 used the phrase, mixture or substance, are those things
18 which multiply the value of the drug by weight which
19 multiply the amount of the product which can ultimately
20 distribute -- be distributed to the ultimate consumer.
21 And that's the sense in which it's used when we're talking
22 about a cutting agent. If one mixes cocaine with mannitol
23 for instance, one creates a larger amount of product which
24 can be distributed to the ultimate consumer.

25 And that's what Congress was getting at, because

1 Congress wanted to impose more severe punishments upon
2 distributors who are causing greater social harm by
3 multiplying the amount of the product that's available for
4 sale.

5 QUESTION: Well, why isn't that the case -- I
6 don't see why that's not the case with respect to the
7 blotter as well. I mean, every time you take a fixed
8 quantity and mix it with a larger -- with a larger
9 substance you dilute it more and more -- the greater the
10 substance you mix it with, right? And it's the same with
11 the blotter. The -- if you use a little blotter which is
12 of a light weight, you're not able to distribute it to as
13 many people. If you use a larger blotter, it will be more
14 diluted but you can distribute it more widely.

15 MR. KELLY: That's really not the case with LSD,
16 Justice Scalia. One dose of LSD is one dose of LSD. If
17 it's -- if one dose is placed on one square of blotter
18 paper, that can be distributed for the use of one
19 consumer. If it's -- if 100 doses are placed on 100 doses
20 of blotter paper, those can be distributed to 100
21 consumers. It's not diluting the LSD to place it on the
22 blotter paper.

23 Essentially what a -- what a consumer can do
24 after receiving a square of blotter paper with LSD on it
25 is either swallow the blotter paper whole or place the

1 blotter paper in his mouth. The saliva in his mouth will
2 create a wash which will separate out the LSD from the
3 blotter paper. After that's done, he can take the blotter
4 paper out and throw it away. The LSD is just as pure as
5 it was before it was placed on the blotter paper. It
6 hasn't been diluted at all.

7 QUESTION: Well, why is there a dose of LSD and
8 there is not a dose of cocaine?

9 MR. KELLY: LS --

10 QUESTION: I mean you speak as though it doesn't
11 matter how strong it is. Is that so?

12 MR. KELLY: LSD is distributed in relatively
13 standardized doses that tend to be, as I indicated, about
14 50 millionths of a gram. A --

15 QUESTION: It is or it must be?

16 MR. KELLY: It is. I don't think that there's
17 any reason other than practical reasons that it must be.

18 QUESTION: Well, but unless it must be, then I
19 am correct that the more blotter paper you use, the more
20 distribution you can make, just as the more -- whatever
21 you mix cocaine with -- you use the more distribution you
22 can make.

23 MR. KELLY: Well, the -- it's correct, Justice
24 Scalia, that if you have more LSD, you need more blotter
25 paper in order to distribute it to the market. But it's

1 also true that if you have more cocaine, you need more
2 bottles to put the cocaine in to distribute it in the
3 market -- to the marketplace. But nobody's weighing the
4 bottle. The bottle is just a carrier for the cocaine or
5 the envelope or paper bindles or whatever is being used to
6 carry cocaine. But nobody weighs those bindles or those
7 envelopes. It's no more logical to weigh the blotter
8 paper which is just being used as a carrier or a delivery
9 vehicle for the LSD.

10 QUESTION: Are you saying there's a standard
11 dose of LSD, but there's not a standard dose of cocaine?

12 MR. KELLY: Cocaine is sold in --

13 QUESTION: I mean so far as the person who is
14 going to ingest it?

15 MR. KELLY: Justice Kennedy, cocaine is sold by
16 weight. So the only standard dose is in terms of a user
17 going out and deciding for himself how much cocaine he's
18 going to buy.

19 QUESTION: But he can vary that. If he wants to
20 have a lot of cocaine or a small amount of cocaine, he has
21 a choice of a range of -- we might call doses. But that's
22 not true in LSD, or am I incorrect?

23 MR. KELLY: I guess the difference is that if a
24 user goes out and buys a quarter gram of cocaine, the user
25 has a choice of how much cocaine he's going to consume at

1 one time. A user of LSD generally is not going to take
2 more than one dose of LSD, because taking additional doses
3 isn't going to give any particular additional benefit to
4 that user.

5 QUESTION: Well, some people would say taking
6 the first dose didn't give him much benefit.

7 (Laughter.)

8 MR. KELLY: I would certainly agree with that,
9 Chief -- Mr. Chief Justice.

10 QUESTION: Isn't -- I guess I have two questions
11 about your argument. The first is, when the LSD is placed
12 on the blotter paper, it bears the same relationship to
13 the blotter paper that the cocaine does to the cutting
14 agent, doesn't it? Because it's no longer possible at
15 least without sophisticated chemical reductions to
16 distinguish between the drug and the substance that it is
17 associated with, whereas when you're dealing with bottles
18 or suitcases or automobiles, that is not true. So that in
19 that respect, the analogy between the blotter paper and
20 the cutting agent for cocaine is in fact a legitimate
21 analogy, isn't it?

22 MR. KELLY: It's not in the sense that the
23 purpose of the cutting agent or the diluent is to multiply
24 the amount of the drug that's available for sale.

25 QUESTION: Well, that -- I guess that gets to

1 the second question I wanted to ask, and it's something
2 that you came close to in responding to one of Justice
3 Scalia's questions. It is the -- it is true, isn't it,
4 that without the combination of the LSD and the blotter
5 paper or the sugar cube -- whatever it may be -- as a
6 practical matter you could not distribute the LSD in
7 commercial or at least in -- in consumable form, because
8 as I understand it, the amount of LSD that is necessary,
9 and indeed I guess even possible for the effect that the
10 users want to get out of it, is so tiny that if you sold
11 them tubes or jars of LSD, they simply could not use the
12 LSD in that form.

13 So that if you've got tubes and jars of it,
14 you've got something which in that form simply cannot be
15 commercially used. And the only way you can commercially
16 use it is to combine it with blotter paper or sugar cubes.
17 And in that sense, by making that combination, you do make
18 it more broadly distributable than it would be without the
19 combination. And that is exactly the same thing that goes
20 on when the cocaine is cut with whatever it's combined
21 with. Isn't that true?

22 MR. KELLY: It's true that as a practical
23 matter, it's generally necessary to have some sort of a
24 carrier in order to deliver the LSD conveniently to a
25 consumer.

1 QUESTION: Well, you -- as a practical matter
2 you couldn't sell it on the street without doing that,
3 could you?

4 MR. KELLY: Well, there have been cases and
5 there's one cited in my reply brief in which an individual
6 ingested liquid LSD directly into his eyeball, apparently
7 from a pipette or a -- something akin to an eye dropper,
8 but that's not --

9 QUESTION: But if that were the only way you
10 could sell LSD, the market for LSD would -- would be
11 considerably less, wouldn't it?

12 (Laughter.)

13 MR. KELLY: It would probably diminish greatly,
14 Your Honor, yes.

15 QUESTION: Okay.

16 MR. KELLY: I think my point is that it's
17 certainly a -- probably a unique property of LSD that it
18 is so infinitesimal in size that it requires a carrier.
19 But I don't think that Congress intended to weigh the
20 carrier simply because of the fact that a carrier is
21 needed to carry this drug. It's -- nobody carries cocaine
22 in their pocket. You have to have a carrier to transport
23 cocaine to the user as well, and that's generally a paper
24 bindle, an envelop.

25 QUESTION: Well, no -- no one is saying here

1 that if you put the blotter paper in a paper bindle or an
2 envelop that you're going to weigh the envelop. I mean
3 that's the analogy to the -- to the cocaine, isn't it?

4 MR. KELLY: I think the more apt analogy,
5 Justice Souter, is that if you took a piece of blotter
6 paper and folded it into a bindle and used it to carry
7 cocaine, nobody would weigh the blotter paper. But if you
8 used the same piece of blotter paper to carry LSD, courts
9 are weighing it. It's no less --

10 QUESTION: For the -- for the simple reason that
11 you can easily distinguish in your analogy -- in your
12 example you can easily distinguish between the cocaine and
13 the blotter paper. And you can't easily distinguish
14 between the LSD and the blotter paper. And by the same
15 token, the blotter paper is used as a means of ingestion
16 in the LSD case. It is not used as a means of ingestion
17 in your example.

18 MR. KELLY: I don't think that Congress had in
19 mind, Justice Souter, that the ingestability was the
20 factor that would count something as a mixture or
21 substance. Again, it appears from the legislative history
22 of section 841 that what Congress wanted to do was visit
23 more severe sentences upon high-volume dealers. The
24 ingestability of the carrier has nothing to do with the
25 volume of the LSD that can be distributed.

1 QUESTION: But -- but there is a correlation
2 between the means used to prepare something for ingestion
3 and the breadth of its potential distribution. And that
4 is what Congress was getting at. And that seems to me
5 just as true in the LSD in relation to the blotter paper
6 as it is of the cocaine in relation to whatever substance
7 it is mixed with.

8 MR. KELLY: Again, the fact that LSD requires a
9 carrier, Justice Souter, does not to me to suggest that
10 Congress intended to weigh that carrier when Congress
11 isn't weighing any other kinds of drug carriers.

12 Once we start weighing the carriers, we see the
13 absurd results that I've discussed in our briefs.

14 QUESTION: How do you -- are you using the term
15 carrier as a word of art?

16 MR. KELLY: I'm using carrier as a generic term
17 for something that transports a drug.

18 QUESTION: Some -- something that -- a suitcase
19 would likewise be a carrier?

20 MR. KELLY: I would say a suitcase would be a
21 carrier, Mr. Chief Justice.

22 QUESTION: Well, this is a fairly unique carrier
23 then, because it's -- the drug is actually mixed in with
24 it, isn't it?

25 MR. KELLY: Yes, the drug is -- the -- I don't

1 know if mixed in with it is a correct term (inaudible).

2 QUESTION: Well, I thought, in answering one of
3 the previous questions, you said that it did mix?

4 MR. KELLY: I think that the term can be read
5 that broadly, sure.

6 QUESTION: So that would distinguish this
7 carrier at any rate from carriers which are, you know,
8 like -- like a suitcase, a box, a bottle, something like
9 that, where there -- where there isn't any combination.

10 MR. KELLY: I think that's a distinguishing
11 feature, but again I don't see that as a feature that
12 would motivate Congress to want to weigh that carrier. I
13 don't know why Congress would want somebody to receive a
14 sentence that's almost 20 times longer if he uses a sugar
15 cube as a carrier than if he uses blotter paper as a
16 carrier.

17 QUESTION: Well, (inaudible) dealt particularly
18 with LSD, and it used those words, "mixture or substance,"
19 right -- with LSD? So --

20 MR. KELLY: Congress used --

21 QUESTION: What do you think it meant?

22 MR. KELLY: Congress used those words with
23 regard to every drug in section 841.

24 QUESTION: Yes, but it also did it with LSD.

25 MR. KELLY: Correct. What I --

1 QUESTION: Well, what did it mean -- what did it
2 mean then?
3 MR. KELLY: I think what Congress --
4 QUESTION: Suppose -- suppose the LSD was -- you
5 put a little drop of LSD in a -- in some orange juice,
6 would that be a mixture?
7 MR. KELLY: LS -- if -- a single --
8 QUESTION: Well, would it -- would it be a
9 mixture?
10 MR. KELLY: Again, I think that the word can be
11 certainly be read broadly enough that it could be.
12 QUESTION: Well --
13 MR. KELLY: But I don't think that Congress
14 intended it to be within the meaning of the statute.
15 QUESTION: Well, what did it mean with respect
16 to LSD?
17 MR. KELLY: I believe that --
18 QUESTION: They apparently believed that LSD
19 could be mixed with something.
20 MR. KELLY: Sure, it could be mixed for instance
21 --
22 QUESTION: And if it -- if it was mixed with
23 something, you weighed the mixture.
24 MR. KELLY: I think when it's mixed --
25 QUESTION: Is that right?

1 MR. KELLY: When it's mixed with alcohol in
2 order to -- which does to some degree increase the volume
3 when it's being sprayed -- I think it's very appropriate
4 to weigh that. I think when it's placed on another
5 controlled substance or mixed with another controlled
6 substance, it's very appropriate to weigh the entire
7 mixture. For instance when it's mixed with
8 methamphetamines. Those are cases that are clearly
9 covered by the statute.

10 But something that's simply being used to
11 facilitate transportation of the drug isn't what Congress
12 was getting at, because that's not something that adds to
13 the value of the drug by weight. There's no rational
14 relationship between --

15 QUESTION: I take it then you suggest that we
16 should just forget about the words mixture or substance,
17 when LSD is involved, because LSD is always -- when it's
18 sold, it's always being carried in something else.

19 MR. KELLY: No, as -- as I indicated I think
20 there are situations when these words are very meaningful
21 in the context of LSD. When --

22 QUESTION: Tell me again.

23 MR. KELLY: When it's being mixed with alcohol
24 in order to spray it. I think that's a mixture or
25 substance. When it's being mixed with another controlled

1 substance which is methamphetamines. That's certainly a
2 mixture or substance.

3 Possibly Congress was also attempting to get at
4 things like LSD tartrate or isomers or salts -- things
5 like that.

6 QUESTION: So at least you say that you ought to
7 weigh not just the LSD in a dose, but the alcohol it's
8 been mixed with?

9 MR. KELLY: Correct. That's --

10 QUESTION: So you're -- you -- you're saying
11 that for purposes of the statute that -- there cannot be a
12 mixture unless the medium of mixing can be varied in such
13 a way as to dilute the drug itself more or less. And
14 you're saying the blotter paper does not dilute it more or
15 less. There's the same amount on a given piece of blotter
16 paper. And the same amount on a given piece of sugar. Is
17 that the argument?

18 MR. KELLY: That's essentially true, Justice
19 Souter.

20 QUESTION: But your argument rests then I think
21 on the assumption that there cannot be a mixture within
22 congressional purpose unless the mixture gives a means of
23 varying concentration, whereas it seems to me that the
24 purpose of Congress was to deal with mixture as a means of
25 varying the ease of distribution. And if the latter is

1 the real characteristic of mixture, then you've got a
2 mixture when you combine the LSD with the blotter paper in
3 the same way that you have a mixture when you combine the
4 cocaine with its cutting agent.

5 MR. KELLY: I think we have to keep in mind that
6 section 841(b) is not a statute that prohibits the use of
7 blotter paper. There is a separate statute in the Federal
8 code that prohibits the use of any drug paraphernalia that
9 certainly encompasses blotter paper.

10 841(b) is a punishment statute. 841(a)
11 prohibits the distribution of LSD in any form. So in
12 construing a punishment statute and a punishment statute
13 that's based on weight, I think we have to wonder whether
14 Congress thought that there was some relationship between
15 the weight of blotter paper and the sentence that should
16 be imposed. And I can't imagine that Congress could have
17 contemplated such a relationship, because there isn't one.
18 The dealer who is selling LSD on a heavy blotter paper is
19 certainly no more culpable than the dealer who is selling
20 LSD on a lighter blotter paper.

21 QUESTION: When he's selling it on blotter paper
22 as opposed to selling in it a jar or a tube, he is selling
23 it in a way which makes it more likely to reach more
24 people. And therefore, it seems to me that implicates the
25 notion of mixture.

1 It's an entirely different argument to say --
2 and I realize that you -- that you're going to get onto
3 this -- it's a very different argument to say that the
4 various means of mixtures of LSD raise equal protection or
5 due process problems. But that's -- that's not it seems
6 to me the question for the statutory interpretation, which
7 is whether there's a mixture there at all.

8 MR. KELLY: I think, Justice Souter, that in
9 order to interpret the statute, one has to divine what
10 Congress meant by the term mixture or substance. And one
11 has to ask whether Congress would have intended these
12 dramatically varying results based on something that has
13 absolutely nothing to do with culpability.

14 Certainly that has implications for the due
15 process and equal protection argument as well.

16 QUESTION: Are you going to address your
17 constitutional argument, because assuming we disagree with
18 you on the statutory question, I suppose that's what
19 you're left with?

20 MR. KELLY: I would be happy to do that, Justice
21 O'Connor. It's a --

22 QUESTION: Before you do that, can I ask you one
23 more question?

24 MR. KELLY: Sure.

25 QUESTION: There have been an awful lot of

1 factual discussion in the opinion below and in the briefs
2 and in the argument. Nobody seems to disagree about the
3 facts, but are they verifiable for us if we didn't
4 understand how you -- you know, some of the factual -- is
5 anything in the record that tells us all this that you've
6 told us about drug distribution?

7 MR. KELLY: In the record in the Chapman case,
8 there is very little. In the record in the Marshall case,
9 which was joined with Chapman case at the Seventh Circuit,
10 there's a transcript that has testimony of a couple of
11 chemists. There are also a number of pharmacological
12 texts and --

13 QUESTION: Are they also experts on the methods
14 of distribution in the illegal drug trade and all? I mean
15 do they describe how it is in fact done when it's done
16 illegally?

17 MR. KELLY: There are a number cited in the
18 briefs. Licit and Illicit Drugs is one of the texts
19 that's available that does discuss LSD.

20 QUESTION: There doesn't seem to be any
21 controversy, but I'm just a little concerned about the --
22 okay.

23 MR. KELLY: With regard to the constitutional
24 question, if the Government's interpretation of the law is
25 correct, the question becomes whether basing sentences on

1 what amounts to a completely arbitrary factor violates the
2 right to due process of law.

3 QUESTION: Now, what line of cases are you
4 relying on for that proposition?

5 MR. KELLY: Essentially we're relying on a
6 number of cases that, in a variety of contexts, have held
7 that due process prohibits the Government from being
8 arbitrary.

9 QUESTION: What's -- what's your -- what do you
10 think is the best case you have going for you?

11 MR. KELLY: I guess it's hard to pick out which
12 one is the best. The evidentiary presumption cases such
13 as Tot, the Eastlake case that deals with zoning. There
14 are a number of cases that --

15 QUESTION: Well, those are really quite far
16 afield from this subject.

17 MR. KELLY: They're far afield, but the
18 principle, the underlying principle, is the same. And
19 that is that Government cannot be arbitrary.

20 QUESTION: But has this Court ever thrown out a
21 legislative sentence on the grounds that you're urging
22 here? Is there any case in which we've done that?

23 MR. KELLY: I'm not aware of one in which
24 sentencing scheme has been thrown out, but I'm not aware
25 of any sentencing scheme that has based sentences on a

1 factor that is completely -- as completely arbitrary as
2 the one that exists in this case.

3 QUESTION: What about Weems and Solem? We have
4 -- we have several cases that are thought by -- one that
5 clearly requires that sentences be proportionate.

6 MR. KELLY: I --

7 QUESTION: Isn't it a disproportion --
8 disproportionateness of sentencing that you're mainly
9 complaining about?

10 MR. KELLY: Disproportionateness of sentences is
11 one aspect of it, and that's an aspect that respondent
12 Marshall raised in his brief and that was the focus of his
13 argument. I certainly think that that's a valid criticism
14 of this sentencing law, yes.

15 QUESTION: Well, I thought it -- I thought it's
16 your only criticism. I mean I assume that --

17 MR. KELLY: It's -- disproportionality is
18 certainly part and parcel of our argument. It's actually
19 the arbitrariness of the factor that drives the sentence
20 that is what we've been focusing on. The fact that two
21 equally situated offenders who commit exactly the same
22 crime get radically different sentences based on whether
23 they use their sugar cube or whether they use their piece
24 of blotter paper -- piece of heavy blotter paper or piece
25 of light blotter paper -- or gelatin capsule or didn't use

1 anything at all to distribute the same amount of LSD.

2 QUESTION: They have it within their own power
3 to remedy those disparities, don't they? I mean, they can
4 adjust their means of distribution.

5 MR. KELLY: They could, although I think it's
6 doubtful that any LSD dealer who was ever aware that
7 something like this could happen, and in any event whether
8 they can choose their own poison or not, I think the
9 Constitution still requires that sentences not be meted
10 out in an entirely arbitrary way. And that's what's
11 happening here.

12 QUESTION: Why do you seize on the due process
13 clause? Didn't Judge Posner say equal protection was
14 involved?

15 MR. KELLY: I -- that's correct. And because
16 we're dealing with a Fifth Amendment phrase, I guess I'm
17 talking about due process because we have to talk about
18 equal protection as being incorporated into due process.
19 They're again part and parcel of the same argument.

20 If I may, Mr. Chief Justice, I'd like to reserve
21 the balance of my time.

22 QUESTION: Very well, Mr. Kelly.

23 We'll hear now from you, Mr. Larkin.

24 ORAL ARGUMENT OF PAUL J. LARKIN, JR.

25 ON BEHALF OF THE RESPONDENT

1 MR. LARKIN: Thank you, Mr. Chief Justice, and
2 may it please the Court:

3 LSD infused blotter paper is a mixture or
4 substance containing detectable amount of LSD. There are
5 certain matters in this regard that unfortunately were not
6 in the regard, because petitioners did not make this an
7 evidentiary matter in the district court. But the court
8 has shown some interest in the technical side of it, and
9 so let me explain some of the facts behind the conclusion
10 I just stated.

11 As petitioners --

12 QUESTION: Well, where are you getting these
13 facts?

14 MR. LARKIN: The facts that are not in the
15 record I will clearly identify to you as being told to me
16 by chemists at the DEA. There are other facts that are --
17 some of which are in the literature that has been cited in
18 the briefs.

19 And a goodly number of it is in the opinions of
20 the Sixth Circuit courts that have addressed this issue.

21 Those courts, for example, have looked at LSD
22 infused blotter paper and have treated them as a mixture
23 or a substance. For example, in this case the Seventh
24 Circuit said that LSD infused blotter paper is a mixture
25 and that is an accurate characterization, because what

1 happens when you make LSD is as follows. You can take the
2 blotter paper and use an atomizer and spray the LSD on it.
3 That, for example, is how respondent Marshall prepared the
4 blotter paper. And that fact is at paragraph 27 of the
5 presentence report in Marshall's case.

6 You can take the atomizer and spray the paper,
7 and that will distribute the LSD solution, that is, LSD in
8 alcohol or water over the paper.

9 QUESTION: Does that make it a -- which does it
10 make it -- a mixture or a substance?

11 MR. LARKIN: You can I think accurately describe
12 it either way. The Seventh Circuit in this case used the
13 term --

14 QUESTION: Well, supposing he -- he sprayed
15 furniture polish on the top of a table. Do you have a
16 mixture or substance composed of the table and the
17 furniture polish?

18 MR. LARKIN: I don't think so. The furniture
19 polish and the top of the table don't mix together in any
20 way. It's --

21 QUESTION: Well, they're stuck together --
22 aren't they stuck together in precisely the same way the
23 --

24 MR. LARKIN: Well, I mean if you polished them
25 in and -- so that the -- it becomes absorbed into the

1 wood, then what you have is a mixture of the wood with the
2 polish. The polish is now part of the wood. And
3 something similar happens in this case. For example, you
4 can take tongs and take blotter paper and dip the blotter
5 paper into the solution. And that is one easy way of
6 making sure the solution spreads out entirely over the
7 entire paper.

8 For example, the Tenth Circuit in one of the
9 cases we cited used the word "absorbs" to describe the
10 inner action between the solution and the paper. The
11 paper will absorb the solution. In that sense you can
12 have a mixture, and that satisfied both the dictionary and
13 even in fact the scientific definitions given to that
14 term. The two units are -- the two items are mixed
15 together. And in fact in the scientific definition,
16 they're mixed together because you can take them apart.
17 There is no chemical bond between the LSD solution and the
18 paper.

19 So the Seventh Circuit was correct in describing
20 it as a mixture.

21 QUESTION: And you think that that's all that's
22 needed to comply with it?

23 MR. LARKIN: Correct. Correct.

24 QUESTION: So suppose I'm a -- I'm not a
25 distributor of LSD at all. I buy one of these postage

1 stamp size squares of blotter paper, and I don't like
2 sucking on blotter paper so I drop it in a glass of orange
3 juice which I -- must weigh -- you know, must be more than
4 10 grams. And all of a sudden I get a 10-year minimum
5 sentence?

6 MR. LARKIN: Correct, if you distribute it. If
7 you only have it for personal use, the mandatory minimums
8 in 841 do not apply, because that is for the manufacture
9 or distribution.

10 QUESTION: Oh, okay, it does not apply to users?

11 MR. LARKIN: Users are punished under a
12 different statute if you only have it for personal use.
13 So --

14 QUESTION: Okay, so if I buy two squares,
15 however --

16 MR. LARKIN: And you distribute it, then yes.

17 QUESTION: And I make one orange juice for me
18 and one for my friend and hand the orange juice to -- for
19 my friend, I'm a big time distributor?

20 MR. LARKIN: You are, under the statute in that
21 case, eligible for a 10-year sentence and I might --

22 QUESTION: Because you could -- you could invite
23 ten friends to drink the orange juice, couldn't you?

24 MR. LARKIN: You could or as many as --

25 QUESTION: You couldn't do that with a little

1 piece of blotter paper?

2 MR. LARKIN: Correct. And it's not always a
3 postage stamp size. Just another little fact to clarify.
4 In the case of -- of petitioner Chapman, they were 1-inch
5 square, but they can vary anywhere from one-eighth of an
6 inch to a quarter of an inch on a sheet of paper, which
7 can be cut up into normally between 100 and -- or a
8 thousand squares.

9 QUESTION: You say one-eighth or one-quarter.
10 You mean one-eighth square?

11 MR. LARKIN: Yes.

12 QUESTION: Or one-eighth inch square -- a square
13 with -- with a size of one-eighth inch --

14 MR. LARKIN: Correct. That small -- I think --
15 as I've been told by the DEA the industry standard so to
16 speak is probably a quarter of an inch, the reason being
17 one-eighth of an inch is more difficult to break off if
18 you're trying to distribute it to someone in a small
19 quantity. So you can have it broken down into a sheet
20 that contains anywhere from a hundred to a thousand
21 different doses.

22 QUESTION: May I go back just to the orange
23 juice example for a minute? Is it correct that if one of
24 these doses -- whatever the normal dose is dumped in an 8-
25 ounce glass of orange juice and then 10 people drink it,

1 each of the ten would get the same effect as if blotter
2 paper had been swallowed?

3 MR. LARKIN: I think not, because what you would
4 have probably is a dilution factor.

5 QUESTION: Is -- can this stuff be diluted so
6 much that it's no longer effective?

7 MR. LARKIN: Yes, it can. The minimum dosage
8 that is likely to lead to hallucinogenic effect is 25
9 micrograms.

10 QUESTION: So if 25 micrograms were dumped in an
11 8-ounce glass of orange juice, it would not have -- it
12 really would only be useful to sell to one person?

13 MR. LARKIN: Effectively. If you had the
14 minimum amount I believe the rest would probably be
15 diluted.

16 QUESTION: Yes.

17 MR. LARKIN: But I think petitioner has pointed
18 out that there is some sort of uniform amount that is
19 distributed in this regard, and according to the DEA
20 they've told me that that's not necessarily the case. For
21 example, the sentence --

22 QUESTION: But it is true -- it is true if
23 whatever that normal minimum amount is is consumed on a
24 blotter paper in the one case, sugar cube in another, and
25 a glass of orange juice on the other, there will be

1 dramatic differences in the sentence to which the
2 distributor would be exposed?

3 MR. LARKIN: Correct. If you increase the total
4 quantity in that respect, you will increase the weight and
5 it can potentially affect the mandatory minimum
6 (inaudible) --

7 QUESTION: And even though it doesn't increase
8 the number of likely purchasers of the substance?

9 MR. LARKIN: Well, if you were only taking one
10 at a time --

11 QUESTION: That's right.

12 MR. LARKIN: -- then that might be true.

13 QUESTION: Yes.

14 MR. LARKIN: But respondent -- but petitioners
15 for example are accused also of being irrational, but they
16 themselves subject -- are subject to some of the same
17 irrationalities. For example, petitioner said he would
18 count LS -- he would count the 10 ounces of alcohol if LSD
19 was an alcohol, but he wouldn't count ounces of the orange
20 juice.

21 In our view, what Congress did in 1986 was pass
22 a statute that was designed to strike at drug trafficking
23 in whatever form it was found, whether a drug was found
24 pure or impure, cut or uncut, ready for distribution at
25 the wholesale level or the retail level, or ready for

1 consumption by the consumer.

2 Now, there is no doubt that adding different
3 cutting agents -- carrier mediums, if you will -- will
4 increase the exposure a person has under the statute, and
5 that's because Congress clearly picked a weight-based
6 approach. But the percentage --

7 QUESTION: Well, that would be true for cocaine
8 or something else, would it not? I mean, if it -- if as
9 you increase the cutting agent and decrease the strength
10 of the pure cocaine, you're increasing the range of
11 sentence that might be applied here.

12 MR. LARKIN: Precisely. And the figures in the
13 case of LSD don't differ by several orders of magnitude
14 from the figures that you can see in the case of heroin.
15 For example, in this case the LSD that was distributed by
16 Chapman had a percentage value of .877. That distributed
17 by Marshall was .59. That's less than 1 percent. But
18 that's not off by degrees of magnitude from the type of
19 heroin you can see on the street. We've cited in our
20 brief different cases and in those cases they have
21 identified the percentage amount of heroin in some of the
22 drugs that were seized. And that some of that percentage
23 amount of heroin was as small as 1.2 percent.

24 The DEA also engaged in what is called their
25 domestic monitor program to see what the purity of

1 different drugs is, and they purchase them on the street
2 as a result. And in the domestic monitor program that we
3 pointed -- cited to -- the study we cited to in our brief,
4 the purity in some cases was as low as .6 percent. And
5 then it varied dramatically, sometimes from city to city.

6 In Baltimore, for example, 3.1 percent was the
7 average amount of heroin found in some samples, whereas in
8 New York it can vary up to perhaps as much as 40 percent.
9 Plus some of the studies that were cited in the -- in the
10 books, in the amicus brief for example, said that the
11 average amount of THC which is the active ingredient in
12 marijuana in an average marijuana cigarette can be 1 to 5
13 percent. The average amount of THC which is the active
14 ingredient in hashish, found in street-level hashish, can
15 be 4 to 10 percent.

16 So the dilution factor that you see in the case
17 of LSD is not markedly different from the dilution factor
18 you see in the case of other drugs.

19 Now, it's also doubtless the case that there
20 will be people who deal in quantities of cocaine that are
21 much purer -- people who are further up the chain. And
22 the statute allows a court to take that into account.

23 After all, the phrase mixture or substance is
24 responsible for two things under 841(b). It can trigger a
25 mandatory minimum, and it can set a range. But it's

1 within that range that a district court can sentence.

2 It's not irrational, therefore, for Congress to legislate
3 in this manner, because what Congress decided to do was
4 change the drug sentencing system around.

5 In 1970, Congress took its first step at this
6 problem. It passed the Comprehensive Drug Abuse and
7 Prevention and Control Act. That act classified
8 controlled substances according to schedules and set
9 penalties based on the type of schedule involved.

10 Congress changed the system in 1984. As part of the
11 Comprehensive Crime Control Act, Congress introduced the
12 principle that the sentence should vary according to the
13 purity of the drug involved. And then in 1986, Congress
14 once again revised the system and adopted the one we now
15 have today. In the Anti-Drug Abuse Act of 1986, Congress
16 introduced the principle that the mixture or substance
17 containing a detectable amount of a drug should be used as
18 the basis for calculating the sentence. The statute is
19 quite clear in that regard. This was not a careless way
20 of drafting.

21 What's clear is that you cannot simply look to
22 the amount of pure drug. Certainly when you're dealing
23 with drugs like cocaine or heroin, and also when you're
24 dealing with the -- drugs like LSD. And the reason -- one
25 of the reasons you know that from the text of the statute

1 itself is that the pure quantity of methamphetamine or PCP
2 can sometimes serve as the basis for sentencing.

3 Congress, therefore, clearly knew how to
4 distinguish between the quantity of pure drug involved and
5 the quantity of the mixture or substance containing
6 detectable amount of the pure drug involved, and it is the
7 latter that we have here.

8 QUESTION: Mr. Larkin, how do you distinguish --
9 as I assume you do -- the blotter from the suitcase or the
10 glass or the bottle? Do you -- do you adopt Justice
11 Souter's line whether it is readily extricable from
12 whatever it is mixed or mixed with or contained in?

13 MR. LARKIN: Yes, that is a reasonable way of
14 looking at it. Keep in mind that this problem of unusual
15 hypotheticals only arises when you're looking to the word
16 "substance." No one would say that a Buick containing a
17 certain quantity of cocaine is mixed with the cocaine.

18 QUESTION: That's right.

19 MR. LARKIN: It's only when you're using the
20 word "substance." Now, Congress in the word "substance"
21 didn't use, we think, a technical term. A chemist would
22 probably have used the term "compound" to describe the
23 fact that there was some chemical bonding going on. But
24 Congress used a different term, "substance." And it may
25 be because what they had in mind was something like a

1 tablet, something that petitioners generally tend to
2 overlook.

3 LSD on blotter paper is not materially different
4 from LSD on a tablet. In each case, you have an active
5 ingredient and an inactive ingredient. And you have more
6 of the --

7 QUESTION: LSD on -- on a what? On a?

8 MR. LARKIN: Tablet. A pill.

9 QUESTION: Uh-huh.

10 MR. LARKIN: LSD can be distribute in pill form.
11 And according to the DEA, it is distributed in pill form
12 in roughly 9 percent of the cases. 90 percent of the
13 cases involved blotter paper, 9 percent with tablets, and
14 1 percent generally everything else. But you can
15 distribute LSD in a pill --

16 QUESTION: The tablets being originally some
17 other drug than LSA -- LSD I take it?

18 MR. LARKIN: Well, I wouldn't necessarily call
19 them a drug, Your Honor. What I've been told -- you can
20 make a tablet of --

21 QUESTION: Sugar or sucrose or --

22 MR. LARKIN: Matters like that. You can
23 actually make it from rather simple ingredients that don't
24 have a very complex composition. And that it can be done
25 with basically a pill press so that you can manufacture

1 LSD for distribution in tablet form as well as in blotter
2 paper form.

3 And if it's in a tablet form, we think that is a
4 mixture or a substance. You count the weight of the
5 entire tablet. In this respect we disagree with Judge
6 Cummings who wrote in the dissent. What Judge Cummings
7 cited for his contrary review -- view -- were two cases
8 that were decided under the Harrison Narcotics Act, was
9 the predecessor to the 1970 drug act, and which did not
10 take into account the weight of the mix -- of the entire
11 unit, because it didn't matter.

12 In fact, if you looked at a particular page
13 reference in the cases he cites, all that was cited and
14 mentioned at those pages was the fact that a capsule had a
15 certain weight with and without the heroin that was
16 inside. The courts in those cases didn't draw any legal
17 significance from that.

18 QUESTION: Just once again, Mr. Larkin, what
19 does the Government contend is the test for whether it's a
20 substance containing?

21 MR. LARKIN: I think the way Justice Souter put
22 it, and the way you tried to summarize it, is a -- is a
23 reasonable way of looking at it. Can you easily
24 distinguish between the two? But there's also I think
25 perhaps another way of looking at it that I could offer to

1 you at -- as another way of distinguishing among them.

2 There are four ways drugs can be taken into the
3 human body. And after all, unless these types of drugs
4 are taken into the human body, they are not going to have
5 the desired effect. You can take it orally. You can
6 inhale it, in which case it goes into the lungs. It can
7 pass through a mucus membrane in the nose or under the
8 tongue. Or it can be injected.

9 So, if you have a situation where you have
10 something that is going to be actually consumed, taken
11 into the body, it is a reasonable way of looking at that
12 as being a substance. Nobody therefore is going to have
13 any difficulty I think distinguishing an automobile and a
14 suitcase from a tablet or blotter paper. Like I say, a
15 tablet that you take that has LSD enters the body and the
16 body breaks it down, and the drug is then dispersed
17 throughout. That's a relatively easy way I think of
18 looking at it.

19 And that's the way in fact some -- several of
20 the courts of appeals have looked at it. The Sixth --
21 excuse me -- the Fourth, Sixth, and Eighth Circuits have
22 all said that the blotter paper becomes impregnated with
23 the LSD and is then ingested. And they have all said,
24 therefore, the question is whether this is a --

25 QUESTION: Would that definition of -- would

1 that definition apply if they put the blotter paper in
2 your mouth, say, and sucked it like a tablet, and then --
3 once you got the LSD off you spit out the blotter paper?

4 MR. LARKIN: It would, because that's taking a
5 substance in through a mucus membrane in the mouth. For
6 example, if you put it on gum, you would count the weight
7 of the gum. If --

8 QUESTION: Yes, but the blotter -- the blotter
9 paper isn't going through the mucus membrane.

10 MR. LARKIN: If -- the blotter --

11 QUESTION: I thought you were defining mixture
12 as that which could be ingested in any one of these four
13 ways in combination with the drug. If that's going to be
14 the definition, then it's not going to work for the
15 blotter paper.

16 MR. LARKIN: Well, I was -- I was focusing not
17 on mixture, Your Honor, but more on substance. The
18 blotter paper --

19 QUESTION: I misunderstood.

20 MR. LARKIN: -- can readily be said to be the
21 mixture.

22 QUESTION: Well, I don't think that's the
23 confusion. I think the confusion is you think it's enough
24 if you -- if the blotter paper is or is often, if not
25 ordinarily, placed within the body. You don't insist that

1 it be swallowed?

2 MR. LARKIN: No, I think if --

3 QUESTION: What -- what you mean by ingested is
4 place it within the body, even if you spit it out later.

5 MR. LARKIN: Yes, in a -- in a broad sense
6 right. Like that.

7 QUESTION: Right.

8 QUESTION: In a consumable form.

9 MR. LARKIN: Correct. So that -- and that I
10 think is a way of eliminating most of the absurd
11 hypotheticals that --

12 QUESTION: I just -- maybe this is another
13 absurd hypothetical, but if the blotter paper were dipped
14 in the glass of orange juice and left there long enough
15 for the stuff to -- I take it it would leave the blotter
16 paper and become associated with the orange juice. Then
17 -- I'm just suggesting that maybe the blotter paper is not
18 necessarily ingested in order to ingest the substance.

19 MR. LARKIN: Oh, it doesn't necessarily have to
20 be.

21 QUESTION: Yes.

22 MR. LARKIN: If you put the blotter paper in the
23 glass of orange that Justice White hypothesized, you would
24 count we think the weight of the orange juice. And in
25 that circumstance you would be exposed to a very stiff

1 penalty.

2 QUESTION: No, but at the time it's sold, it's
3 carried by the blotter paper. At the time it's ingested,
4 it's ingested in the orange juice form. And I take it
5 then -- I'm trying to get an example where the blotter
6 paper would not enter the human body the way you say it.
7 And I'm just suggesting it may not necessarily enter the
8 blotter -- the body if it's merely a carrier and it's used
9 in that rather perhaps unusual --

10 MR. LARKIN: Yes, if you went about it that way,
11 it would not necessarily enter the body.

12 QUESTION: It doesn't have to be necessarily. I
13 think it's -- it's enough to define what is a "substance
14 containing" if it is something that is commonly -- at
15 least commonly used that way. That will distinguish this
16 from the bottle and the suitcase I assume.

17 MR. LARKIN: I think so, and I think -- I think
18 that was the way you originally put it, which is why I
19 tried to answer it that way.

20 QUESTION: Do the briefs indicate the percentage
21 of times that blotter paper is used for distribution? Is
22 it used half the time?

23 MR. LARKIN: The briefs do not, Your Honor. And
24 the record in the Chapman case does not. And
25 unfortunately, nor does the record in the Marshall case.

1 In the Chapman case what happened -- the one that the
2 Court has now granted review -- is that Chapman and his
3 confederates filed a motion to have 841(b) declared
4 unconstitutional but did not attach any type of factual
5 material in support of it and didn't seek to my knowledge
6 an evidentiary hearing. So it wasn't presented as an
7 evidentiary hearing.

8 They were essentially taking the position that
9 the statute was irrational, unconstitutional on its face.

10 QUESTION: Does the literature or anything that
11 we can rely on tell us that blotter paper is used 40
12 percent of the time by distributors or 20 percent?

13 MR. LARKIN: I can't -- I do not know a
14 particular source, but what I can point to you is this.
15 If you take a look at the recent circuit court decisions,
16 and there are six of them including -- actually more than
17 six of them. There are several of them that are being
18 held pending this case. Those cases tend to involve
19 blotter paper. And I've been told by the DEA why that is
20 so, and can explain it to you if you'd like.

21 QUESTION: I think we'll leave it at that.

22 QUESTION: You say they tend to involve blotter
23 paper. Is what you mean if you were layman, would you say
24 they do involve blotter paper?

25 MR. LARKIN: Well, Your Honor, the reason I used

1 -- I used 10 is -- I made a mistake. They do -- these
2 cases do involve blotter paper. What I was trying to say
3 basically was an answer that gave me some information that
4 Justice Kennedy didn't want me to give.

5 QUESTION: Let me give you another absurd
6 hypothetical. What if the dealer labelled his product
7 with a warning label that said that blotter paper is not
8 to be swallowed. Instructions for use are dip it in a
9 glass of water and drink the water after -- after leaving
10 it there for a minute or whatever.

11 MR. LARKIN: I'm sure it would make it easier to
12 apprehend them. I hope they would do more of that. But
13 they don't see it that often.

14 QUESTION: Well, they don't sign these. They
15 just instruct the -- the customer to do it that way.

16 (Laughter.)

17 QUESTION: And they'd say -- they'd say,
18 warning: blotter paper is merely a carrier. Ingest in
19 the following way, and they give instructions that will
20 avoid the swallowing of the blotter paper. I take it
21 you'd still say it was a mixture?

22 MR. LARKIN: I think we'd say it's a nice try
23 but didn't work.

24 QUESTION: Okay.

25 QUESTION: Even if they say regard this blotter

1 paper like a suitcase.

2 (Laughter.)

3 MR. LARKIN: Petitioners have also leveled the
4 constitutional challenges to the statute, and we think the
5 challenges have to fail. What Congress did was try to
6 strike a drug trafficking, as I said, in whatever form it
7 was found. It used weight as the medium for trying to do
8 that. It could have used just the type of drug that was
9 involved, as it did in 1970. It could have used the
10 purity of the drug involved. And it could even have used
11 the dosage numbers, which is what petitioners say Congress
12 should have done in the case of LSD. But we don't think
13 Congress had to.

14 The dilution rate that shows up in these sorts
15 of cases is similar to the dilution rate that shows up in
16 the case of heroin. Therefore, it's not bizarre to see
17 these types of results. What you have here is a situation
18 also in which there's no First Amendment, no conceivable
19 First Amendment claim, that can be made. The result is
20 Congress is entitled to require people to stay a long way
21 from the line. And Congress is entitled to regulate with,
22 generally speaking, a very blunt instrument.

23 Congress doesn't have to make the types of
24 refinements that the petitioners would like. And the best
25 proof of that I guess is that this Court's decisions would

1 allow Congress to pass a flat determinant sentencing law.
2 Whether you distribute one dose of LSD or a thousand doses
3 of LSD, you get 20 years in prison. That, too, is a
4 rather blunt instrument for regulating the narcotics
5 traffick, but it is one that Congress has the power to
6 adopt.

7 As I said at the outset, LSD infused -- infused
8 blotter paper is a mixture or substance containing a
9 detectable amount of LSD. That is a reasonable
10 construction of the statute in light of the market-
11 oriented approach that Congress adopted, and the market-
12 oriented approach is a reasonable way of striking at the
13 drug trade.

14 Thank you very much.

15 QUESTION: Thank you, Mr. Larkin.

16 Mr. Kelly, do you have rebuttal? You have 2
17 minutes remaining.

18 REBUTTAL ARGUMENT OF T. CHRISTOPHER KELLY

19 ON BEHALF OF THE PETITIONERS

20 MR. KELLY: Thank you, Your Honor.

21 It's our position that basing sentences in LSD
22 cases in the weight of the carrier would be about as
23 sensible as deciding this case on the weight of the
24 briefs. There's simply no rational relationship between
25 that weight and the culpability of the offender.

1 The Government still has not explained why
2 Congress would want to impose longer sentences upon a
3 distributor who sells LSD on a heavier carrier than the
4 same offender who sells the same amount of LSD on a
5 lighter carrier. There's no reason Congress would want to
6 do that. And that can't be what Congress meant.

7 QUESTION: It's convenient. I mean, if you pass
8 a prohibition law, do you have to provide different
9 sentences for -- for bringing in a gallon of wine from
10 bringing in a gallon of -- of whiskey even though the
11 amount of alcohol is vastly different? It's convenient.

12 MR. KELLY: No, in those cases, you certainly
13 don't. And Judge Posner pointed that out in his dissent.
14 Buy the difference between that situation and this
15 situation is that it's not just a question of convenience.
16 It's a question of rationality. And there's no rational
17 relationship here between what the offender is doing when
18 he's selling it on a -- on a heavier paper and getting a
19 longer sentence for doing that, because it has nothing to
20 do with culpability.

21 I've been waiting throughout two arguments in
22 the -- in the Seventh Circuit and this argument for the
23 Government to suggest some rational reason for sentencing
24 two identically situated offenders differently when
25 they've committed exactly the same conduct. And the

1 Government has yet to do that.

2 I think that's why this Court is going to have
3 to find, first, that that can't be what Congress intended
4 by the phrase "mixture or substance." And secondly, that
5 if that's what Congress intended, the law has to be struck
6 down, because it violates the right to equal protection of
7 the law. It's drawing distinctions between identically
8 situated offenders. And that distinction that it's
9 drawing isn't based on a rational reason.

10 The Government's theory in this case just
11 doesn't make any sense. The law as interpreted by the
12 Government just doesn't make any sense. For that reason,
13 we ask this Court to reverse the convictions of these
14 defendants -- reverse the judgments of the court of
15 appeals --

16 QUESTION: Thank you, Mr. Kelly.

17 MR. KELLY: Thank you.

18 CHIEF JUSTICE REHNQUIST: The case is submitted.

19 (Whereupon, at 11:02 p.m., the case in the
20 above-entitled matter was submitted.)
21
22
23
24
25

CERTIFICATION

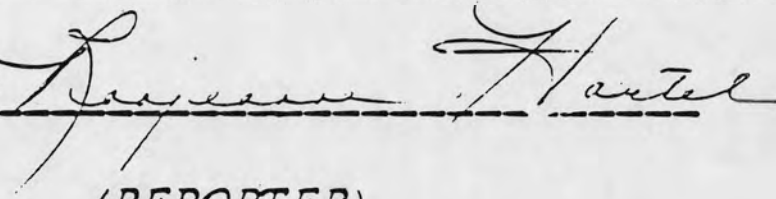
Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 90-5744 - RICHARD L. CHAPMAN, JOHN M. SCHOENECKER AND PATRICK BRUMM,

Petitioner V. UNITED STATES

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY



(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'91 APR -2 P 3:04