

OFFICIAL TRANSCRIPT.
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DANIEL TOUBY, ET UX., Petitioners v.

UNITED STATES

CASE NO: 90-6282

PLACE: Washington, D.C.

DATE: April 17, 1991

PAGES: 1 - 48

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

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

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X
3 DANIEL TOUBY, ET UX., :
4 Petitioners :
5 v. : No. 90-6282
6 UNITED STATES :
7 - - - - -X

8 Washington, D.C.

9 Wednesday, April 17, 1991

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:08 a.m.

13 APPEARANCES:

14 JOEL I. KLEIN, ESQ., Washington, D.C.; on behalf of the
15 Petitioner.

16 JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor
17 General;

18 Department of Justice; Washington, D.C.; on behalf of
19 the Respondent.

C O N T E N T S

| | | |
|----|------------------------------|------|
| 1 | | |
| 2 | ORAL ARGUMENT OF | PAGE |
| 3 | JOEL I. KLEIN, ESQ. | |
| 4 | On behalf of the Petitioners | 3 |
| 5 | JEFFREY P. MINEAR, ESQ. | |
| 6 | On behalf of the Respondent | 27 |
| 7 | REBUTTAL ARGUMENT OF | |
| 8 | JOEL I. KLEIN, ESQ. | |
| 9 | On behalf of the Petitioners | 46 |
| 10 | | |
| 11 | | |
| 12 | | |
| 13 | | |
| 14 | | |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

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

2 (10:08 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 this morning first in No. 90-6282, Daniel Touby v. the
5 United States.

6 Mr. Klein.

7 ORAL ARGUMENT OF JOEL I. KLEIN

8 ON BEHALF OF THE PETITIONERS

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

11 The statute that we challenge -- the temporary
12 scheduling provision of the Controlled Substances Act
13 gives the Attorney General unchecked power to adopt and
14 then to enforce criminal prohibitions against previously
15 lawful behavior. We think the statute raises two
16 important structural issues concerning Congress' power to
17 delegate criminal rulemaking authority.

18 First, may Congress combined in one government
19 official two core separated functions -- the power to
20 create a crime and the power to prosecute individual
21 violators? And second, may Congress bar judicial review
22 of criminal rulemaking determinations, either completely
23 as we read the statute, or at least until after someone is
24 indicted, as the Government reads the statute? Our
25 argument is that neither practice -- neither practice,

1 much less both in the same statute is consistent with a
2 government of properly separated powers.

3 Now, before addressing each of these issues
4 individually, I'd like to emphasize at the outset how
5 unprecedented this statute truly is. This Court of course
6 has never approved either practice. And that's not
7 surprising, because for all intents and purposes Congress
8 has never adopted these kind of practices in any previous
9 statute. So far as we can tell no statute gives the
10 Attorney General or any other official the power to make
11 and enforce a criminal sanction against purely private
12 conduct.

13 The example that the Government gives -- the
14 only example I presume that they were able to find -- is
15 regulations controlling prison access. But we think
16 that's so entirely distinguishable, because the Government
17 there and the Attorney General is responsible for the
18 operation of that building much as any department would be
19 for the operation of its own buildings. But that's very
20 different from purely private conduct.

21 QUESTION: What about the President?

22 MR. KLEIN: The President? I'm not sure I
23 understand.

24 QUESTION: There are a lot of statutes that give
25 many Federal officials the right to define crimes -- the

1 Secretary of HHS, for example. And the President can tell
2 the Secretary of HHS, no, I don't want it defined this
3 way, I want it defined another way. Now, that crime would
4 be prosecuted after it's defined by HHS by the Attorney
5 General. But the President can also tell the Attorney
6 General, yes, I want it prosecuted, no, I don't want it
7 prosecuted.

8 MR. KLEIN: Yes, Justice Scalia, but I think --
9 I think there are two distinctions there. First of all,
10 in both instances, that is first as you say the President
11 has to tell them -- the HHS Secretary -- how he wants the
12 crime defined. Now, in that regard the HHS Secretary
13 doesn't have to follow the President. And if he doesn't
14 in that respect, of course he's removable by Congress. So
15 --

16 QUESTION: Did the Attorney General personally
17 prosecute this case?

18 MR. KLEIN: No, he didn't, but he got --

19 QUESTION: So it's the same situation, isn't it?

20 MR. KLEIN: I don't think so.

21 QUESTION: I mean it isn't that the Attorney
22 General both -- in fact did the Attorney General
23 personally do you think define the drug offense or do you
24 think -- he delegated that to DEA, didn't he?

25 MR. KLEIN: He did.

1 QUESTION: So you had two different Federal
2 officials, one making the determination of what's a crime,
3 and another one, a United States attorney presumably,
4 making the prosecution which is the same thing you have
5 with HHS.

6 MR. KLEIN: I don't think it is in a structural
7 sense, Justice Scalia. And I think the distinction is
8 important. I understand as the statute worked out there
9 were two judgments here. This statute, however, uniquely
10 I suggest, gives one department both functions. Now, I
11 think there were both practical as well as structural
12 considerations when you say HHS passes the statute, and
13 then the Government -- the Justice Department -- enforces
14 it.

15 And let me suggest to you that's not an argument
16 that's unique to me. That's an argument the Government
17 makes when it says that the Department of -- of EPA should
18 not have criminal enforcement powers. The Justice
19 Department opposes that same look. There should be two
20 separated judgments here. One is to define the crime and
21 the other is to prosecute the violator.

22 QUESTION: You know I expect the Justice
23 Department as a whole today is larger than the entire
24 Federal Government was oh, perhaps, certainly when -- in
25 the first century of -- of the republic. So that, you

1 know, the diversity of personnel that you have would be
2 DEA making the -- one decision, the United States attorney
3 making the other, is exactly the diversity you would have
4 had in the entire Federal Government had two different
5 departments done this -- the work.

6 MR. KLEIN: I -- with respect, I don't think
7 that's an accurate perception, and let me suggest I think
8 the legislative history suggests otherwise as well. And
9 that is to say I think the Justice Department, at least,
10 and the DEA -- its unique perspective is a law enforcement
11 perspective. And I think that's not true of other
12 regulatory agencies or departments. And I --

13 QUESTION: What is your constitutional point,
14 Mr. Klein? Is it that these two functions cannot both be
15 given within the executive branch?

16 MR. KLEIN: Not -- not to the same department.

17 QUESTION: Well, what authority is there for
18 that in our cases to say that there's some sort of
19 internal separation of powers' principle within the
20 executive branch? I never heard of that.

21 MR. KLEIN: Well, I think --

22 QUESTION: I mean, what authority is there in
23 our cases for that?

24 MR. KLEIN: Let me say the only authority that
25 I've uncovered I think are cases like Gagnon and Morrissey

1 which say the same person in the -- in the executive
2 cannot prosecute a parole violation as well as sit on it.
3 That is it separates the adjudicatory and the
4 prosecutorial function.

5 QUESTION: Yes, but we don't have any
6 adjudicatory function here.

7 MR. KLEIN: I agree, but, Chief Justice
8 Rehnquist, I think it's fair to say the reason there's no
9 authority -- there's no contrary authority either. And
10 that's because it -- Congress has never done this before.

11
12 Now, let me suggest to you why I think it's an
13 important part of the delegation doctrine. I think we
14 have to take a step back. I think we'd all agree defining
15 crimes and prosecuting crimes, those are core separated
16 functions. There's no dispute about that. That's why we
17 have a Congress to begin with and an executive. Now,
18 what's happened --

19 QUESTION: Except that Congress has always been
20 able to delegate some of those functions to the executive.

21 MR. KLEIN: Absolutely.

22 QUESTION: Including filling in the blanks in
23 criminal statutes.

24 MR. KLEIN: And -- and I agree. And the reason
25 as I think you've pointed out in the American Petroleum

1 cases as well as the Court, Chief Justice (inaudible),
2 that's a product of practical necessity. In other words,
3 look, we realize society is too complex and too technical
4 for Congress to be making every single decision. So it
5 delegates the power to fill in the blanks.

6 Now, having done that much as a product of
7 practical necessity, I don't see why it follows that
8 automatically the concern for two separated judgments is
9 eliminated. And up until now it's always been respected.
10 In other words --

11 QUESTION: But where in -- where in our cases or
12 in what provision of the Constitution do you find a
13 requirement of two separated judgments like you're talking
14 about?

15 MR. KLEIN: I believe that's inherent in
16 separation of powers. I think that that is -- I think
17 that is the understructure. That's why we have a
18 legislative department.

19 QUESTION: But you have no case supporting that.

20 MR. KLEIN: Well, the only case I say is Gagnon.
21 I mean, why must there be a separation of the
22 prosecutorial and adjudicatory functions? That's within
23 the executive branch. If --

24 QUESTION: Well, you don't -- you don't attack
25 the standard by which -- under which Congress delegated

1 this power, do you?

2 MR. KLEIN: No, sir, I don't. I think the
3 standard --

4 QUESTION: So, it's delegating executive powers,
5 not legislative powers?

6 MR. KLEIN: I think --

7 QUESTION: Is that right?

8 MR. KLEIN: I don't agree with that.

9 QUESTION: Well, you --

10 MR. KLEIN: It can't.

11 QUESTION: Well, then you must be saying --
12 challenge the standard. The delegation -- you think the
13 delegation is too vague or something.

14 MR. KLEIN: Justice White, if I can -- I don't
15 want to -- I don't want to debate words -- but I think by
16 definition Congress doesn't delegate executive functions.
17 If it delegates, it's delegates legislative functions.
18 That's its role. That's why I think the Court said, look,
19 we need an intelligible standard. You can't tell the
20 Attorney General go make criminal --

21 QUESTION: Well, if it's an intelligible
22 standard, what authority does -- what kind of a power does
23 the executive exercise when it -- when it responds to that
24 delegation?

25 MR. KLEIN: I believe the executive exercises

1 executive power. However, I think the question of whether
2 its executive power in the sense that it's not law-making
3 power is just not accurate. There's no question today
4 that the Attorney General --

5 QUESTION: That's true. Agencies and the
6 executive are constantly making regulations, the violation
7 of which are criminal.

8 MR. KLEIN: Absolutely. And this Court has said
9 time and again that's a product of practical necessity.
10 We can't expect Congress to do the fine details. But why
11 does it follow -- and the fact that there's no precedent I
12 suggest isn't instructive because the issue is one of
13 first impression -- why would it follow if you need
14 executive expertise to define a standard that therefore
15 you can merge would have to be two classically core-
16 separated functions?

17 I mean, I can't understand -- when we start out
18 we have a legislator and an executive. I would suggest if
19 you go back to -- to Locke and to Montesquieu and so
20 forth, the basic function in those two different
21 departments is on the one hand, one makes the criminal law
22 and the other enforces it. Now, we have said that --

23 QUESTION: And you say this is a separation of
24 powers case? I thought you -- it isn't a due process case
25 or something like that?

1 MR. KLEIN: I believe that -- I believe it's a
2 separation of powers, but I think -- I think a part of
3 separation of powers is due process. It's the process by
4 which we govern ourselves. And I think that's what
5 separation is. I don't think there's any substantive
6 difference. In Gagnon the Court found it to be a due
7 process violation.

8 QUESTION: You've cited, Mr. Klein, Gagnon a
9 couple of times. What's the full name of that case? I
10 haven't been able to run it down yet. Is it Gagnon
11 against Scarpelli?

12 MR. KLEIN: Gagnon v. Scarpelli and Morrissey v.
13 Brewer, Your Honor.

14 QUESTION: And is it cited in your brief?

15 MR. KLEIN: Yes, it is. It's cited in our reply
16 brief.

17 QUESTION: It's not cited in your opening brief
18 I guess.

19 MR. KLEIN: No, it's not. It's cited in our
20 reply brief.

21 QUESTION: Mr. Klein, the scheme adopted by
22 Congress also provides for some permanent regulations of
23 schedule 1 drugs; does it not?

24 MR. KLEIN: Yes, it does.

25 QUESTION: And the Attorney General plays a role

1 in that as well?

2 MR. KLEIN: Yes, he does.

3 QUESTION: And can also prosecute for those.
4 Now, are those -- do you make the same argument with
5 respect to the permanent --

6 MR. KLEIN: No, I don't --

7 QUESTION: -- regulations?

8 MR. KLEIN: -- and I think there's a critical
9 distinction.

10 QUESTION: And why not? It seems to me that
11 undercuts the position you take with regard to the
12 temporary regulations.

13 MR. KLEIN: I -- let me say what I think the
14 critical distinction is, Justice O'Connor. And that is in
15 the permanent statute, before the Attorney General can do
16 anything, the Secretary of Health and Human Services has
17 to approve the schedule. That is, the matter goes first
18 to HHS. HHS makes a determination on the scientific
19 factors and has absolute discretion to veto any proposed
20 schedule. So you have two clear, separated judgments
21 there.

22 QUESTION: And that gets back I suppose to the
23 problem Justice Scalia asked you about. Both of these are
24 executive functions, and normally I don't think we think
25 of separation of powers as distinguishing between

1 executive functions. It's all the executive branch
2 whether one, two, or three different officials are
3 involved.

4 MR. KLEIN: I agree that we normally don't think
5 of it that way, but that's because I don't think this
6 issue, which I think is unique in our history, has been
7 raised before. I don't think there's any problem. For
8 example, I wouldn't be here saying, you can give power to
9 OSHA but not to EPA or to any other agency.

10 What I'm suggesting is there's an underlying
11 core principle which I think we share, and that is
12 criminal laws should be made by Congress or, to the extent
13 that they have to be delegated as a matter of necessity,
14 we should make sure there are two separated judgments.
15 It's not a perfect separation.

16 QUESTION: But there aren't separate -- you
17 either have to make it depend upon the executive, in which
18 case the President has everything, or else your objection
19 is that it's the same person that's doing both. And it
20 isn't the same person doing both. It's the Administrator
21 of DEA in one case and the United States Attorney in the
22 other. Now, they both happen to be in the Justice
23 Department. But it's the same thing if it's the Secretary
24 of HHS and the Justice Department. They both happen to be
25 in the executive branch, but they're different people.

1 MR. KLEIN: But, Justice Scalia, with respect,
2 the statute says the Attorney General has the power. I'm
3 tackling the statute. I understand he subdelegated it.
4 We question that, too. The statute says the Attorney
5 General, he can make this drug a crime.

6 QUESTION: And the Constitution says that the
7 President can make the drug a crime, because any power
8 that's delegated to the Attorney General belongs to the
9 President. The President can tell the Attorney General to
10 change it. Even if it's given to HHS, you have it
11 technically in one person: the President of the United
12 States. So if the image of it -- if it's somehow not the
13 practicality of the matter, but the theory that troubles
14 you, that theoretical problem exists in every case. It is
15 theoretically the President of the United States who's
16 making both decisions.

17 MR. KLEIN: But I think -- I think the theory is
18 even -- is even questionable in the following sense. If
19 the attorney -- if the President tells the Attorney
20 General to make something a crime, I don't think the
21 Attorney General is required to do that. I think the --
22 that's happened before where the President has instructed
23 a Cabinet officer and the Cabinet officer has declined.
24 So I think it's a structural matter. It's not the same --

25 QUESTION: And the Cabinet -- in Jackson's

1 administration -- the Cabinet officer was removed by
2 Andrew Jackson for refusing to remove the funds from the
3 bank.

4 MR. KLEIN: That's still a different
5 consideration, Mr. Chief Justice, than making something a
6 crime. The President cannot make it a crime. The
7 President can fire the Attorney General, presumably. The
8 President can take other actions.

9 QUESTION: Well, and he can get a -- get a new
10 Attorney General, just like Andrew Jackson did, who will
11 make it a crime.

12 MR. KLEIN: Ultimately, I suppose, that's right,
13 but I think that's a significant check.

14 QUESTION: Well --

15 MR. KLEIN: But I think to say that that is some
16 -- somehow no different from having on the one hand Health
17 and Human Services promulgating a criminal enforcement
18 regulation, and on the other hand, the Attorney General
19 being in power to enforce it, that seems to me to be a
20 very big difference structurally.

21 QUESTION: Gagnon is not a separation of powers
22 case at all.

23 MR. KLEIN: It's a due process case.

24 QUESTION: It's a due process case.

25 MR. KLEIN: I agree with that. But I -- I think

1 that due process has an underlying core of separated
2 powers.

3 QUESTION: Well, that really just sounds very,
4 very mushy to me to say that due process has an underlying
5 core of separation of powers. That's not just your
6 melding together somehow about 200 years of constitutional
7 law.

8 MR. KLEIN: But I -- I don't mean it to be
9 mushy. I just think that both due process and separation
10 of powers go to the way in which we govern ourselves vis-
11 a-vis the individual and --

12 QUESTION: Well, so do all eight provisions of
13 the -- of the first eight amendments. So does every
14 provision in the Constitution.

15 MR. KLEIN: Okay. But I -- but I think from our
16 point of view if this were -- I don't think there's any
17 substantive difference if this were a due process
18 violation than if it's a separation of powers. I think
19 it's more properly categorized here as a separation of
20 powers, because of what I view as two separate judgments.

21 Now, the second point in this statute which is
22 equally novel, and I think equally troubling, is the
23 elimination or curtailment of judicial review. Now, I
24 want to say at this point we're starting from a provision
25 where there is no check. That is, the two checks, even if

1 they're not required, they're eliminated, and the Attorney
2 General now has the power to make a crime and to enforce
3 it. And the question is can Congress then eliminate or
4 severely restrict judicial review.

5 There's some dispute about the language which I
6 want to come to. But the Government agrees that this
7 statute says there could be no pre-enforcement review. In
8 other words, the Attorney General can take any drug and he
9 can make it a crime -- or the DEA administrator -- for 18
10 months, during which period -- no matter whether that
11 appears to be arbitrary, inconsistent with the
12 intelligible principle that Congress set down or what have
13 you.

14 During that 18 month period, no citizen can seek
15 judicial review unless he's willing to first of all
16 violate the statute. Second of all, subject himself to
17 investigation and prosecution. And then third of all,
18 take the risk that if his challenge turns out not to be
19 correct, he can be convicted for 10 or more years for
20 having violated it.

21 Now, we think that is a phenomenal amount of
22 power in and of itself, even if you couldn't back it up
23 with the enforcement power that the Attorney General can.
24

25 Let me give you an example. Suppose we had a

1 reg at the Department of Transportation, and that reg said
2 that the Secretary could determine for a period of 18
3 months which cars are unsafe and that should be done in
4 accordance with the kind of criteria here, dangerous to
5 the public and so forth. And if that statute said, for 18
6 months nobody could judicially challenge it except after
7 prosecution, I think we would see clearly that that is a
8 tremendous amount of power that's unwarranted, that
9 shouldn't be granted, and that the fundamental structural
10 check of judicial review should be preserved here.

11 QUESTION: Well, I don't understand why. I mean
12 that happens every time Congress passes a law certainly.
13 You -- you don't -- a criminal statute, you -- if you want
14 to challenge it, you violate it. It may be
15 unconstitutional, but you have to wait until you're
16 prosecuted, and then you challenge it at that point.

17 MR. KLEIN: I don't think that's correct. I
18 think there are two avenues that this Court has widely
19 recognized. And one of course Congress provides for
20 immediate judicial review of regulations in terms of the
21 courts of appeals. And that's a customary practice. And
22 second of all, this Court time and again has upheld
23 district court challenges, pre-enforcement challenges to
24 the constitutionality of a statute. You don't have to
25 wait until you violate it.

1 QUESTION: Oh, you certainly do unless you've
2 been -- unless you're affected by its mere existence --
3 unless your business is affected by its mere existence.

4 MR. KLEIN: Well, but that's the key
5 distinction. Here if you're affected -- if I -- if I take
6 -- if I am manufacturing this drug, and I am affected by
7 this regulation, according to the Government, the only
8 thing I can do is violate it and test it. If I am driving
9 an automobile, under the hypothetical I gave you, Justice
10 Scalia, and I'm driving that car and this regulation comes
11 into effect and says you can no longer drive it.
12 According to the Government, I've got to violate the law
13 and take the risk of penalty. That's not happened before.
14 In fact the only case that came close in the Abbott Labs
15 in the Toilet case, Justice Harlan for the court read it
16 exactly the opposite --

17 QUESTION: You're saying Abbott Labs is a
18 constitutional decision?

19 MR. KLEIN: I say the only time it happened the
20 statute was read the other way. That is Justice Harlan
21 read the statute not to bar preliminary review. And the
22 -- and the Justice Department -- I mean, the Attorney --
23 pardon me -- the Government gives no example --

24 QUESTION: I thought Abbott Labs was considered
25 quite a novelty when it was pronounced, that you're

1 entitled to pre-enforcement review of a regulation. I
2 never thought that it was regarded as a constitutional
3 decision, that you are absolutely entitled under the
4 Constitution to pre-enforcement review of a regulation.

5 MR. KLEIN: There is -- it's not a
6 constitutional decision, although I suggest that a year
7 later in Oestereich, Justice Harlan at least suggested
8 that pre-enforcement review is a constitutional necessity.
9 But Abbott Laboratories, I think its novelty is what is
10 the standard in terms of equitable discretion as to when a
11 court will hear it. That seems very different from a
12 congressional bar. Here Congress is saying, this is the
13 law of the land -- for 18 months nobody can go into court
14 and challenge it.

15 QUESTION: Well, Estep pretty much involved the
16 same thing under the Selective Services Regulations,
17 didn't it?

18 MR. KLEIN: But Estep the court read into the
19 Selective Service Regulations a post-induction -- you
20 don't have to be indicted. You go into the military --

21 QUESTION: Yes, but you couldn't challenge it
22 before you were inducted.

23 MR. KLEIN: You could challenge it if you went
24 into the military. In other words, you could --

25 QUESTION: Well, but --

1 MR. KLEIN: -- seek habeas corpus. But --

2 QUESTION: Being inducted means going into the
3 military, I think.

4 MR. KLEIN: Yes, oh, I'm sorry. I thought you
5 said indicted.

6 QUESTION: No, inducted.

7 (Laughter.)

8 MR. KLEIN: But you could there be -- you could
9 challenge it prior to any indictment.

10 And the other thing I would say is those are
11 adjudicatory determinations. They're not generic rules,
12 which is exactly the point the Court relied on in
13 interpreting Oestereich, or Justice Harlan relied on --
14 that in the one instance we're talking about thousands of
15 individual classification decisions. Even there you can
16 get judicial review. And in the other instance we're
17 talking about a generic criminal rule.

18 QUESTION: Well, you can get judicial review
19 here, too, of your -- of your -- you can get the thing
20 reviewed in your criminal prosecution.

21 MR. KLEIN: Well, I think that's
22 constitutionally inadequate for the reasons I've given.
23 But let me suggest I don't think that's clear from the
24 statute either, Mr. Chief Justice. That is, I think the
25 Government is making that concession for the first time in

1 this Court, because they can't defend the statute as it's
2 written.

3 The statute as it's written -- the words are
4 absolutely clear -- say that the scheduling order under
5 the temporary statute is not subject to judicial review,
6 period. It doesn't say anything about pre-enforcement or
7 post-enforcement or timing or anything. That's what the
8 statute says, and I think if you take those words for what
9 they must mean, they mean that even after you're indicted
10 and even after you're convicted, you cannot test whether
11 or not this regulation complies with the underlying
12 statute, with the standards. That's what it says and I
13 think that's a blanket prohibition. And I don't think the
14 Government should be allowed to re-write the statute to
15 say that.

16 QUESTION: Well, the court of appeals read it
17 that way, didn't it?

18 MR. KLEIN: The court of appeals even read it
19 more curiously, Justice White, that if it didn't --

20 QUESTION: Well, I thought it said that they
21 anticipated that they would allow -- they would allow
22 judicial review in the course of a prosecution.

23 MR. KLEIN: They said we don't foreclose that.
24 They didn't say they'd allow it. And second of all, I
25 think frankly they are misreading the statute, too.

1 QUESTION: Well, they obviously didn't read the
2 statute the way you did if they didn't foreclose it.

3 MR. KLEIN: Well, I -- I think they didn't read
4 it the way I did. The district court read it exactly the
5 way I did. The court of appeals --

6 QUESTION: Well, that's the judgment we're
7 reviewing.

8 MR. KLEIN: -- said -- that's correct. But I
9 think that the statute, Justice White, speaks for itself.
10 That is, I don't think there's a question of law. I don't
11 think the court of appeals reading is entitled to any
12 deference. And as I say, the words, it seems to me, are
13 absolutely clear on this issue. And then the Government
14 says, well, those words mean you can't have pre-
15 enforcement review, you can have post-prosecution review.

16
17 Well, do they get that? You know, up until now,
18 with Congress' limited judicial review, it virtually
19 always limits it to pre-prosecution review. And there's a
20 reason for that -- that is, cases like Yakus or Adamo
21 Wrecking or so forth. Congress says, look, you're not
22 going to be able to challenge this into prosecution
23 because we want to get the standards settled. There's a
24 sort of finality interest that Congress has.

25 For the first time in this statute, it's

1 basically saying, according to the Government without the
2 words, you can challenge it only in an -- after you're
3 indicted in a criminal prosecution. And we don't think
4 the words bear that.

5 The final point I'd like to make is simply with
6 respect to subdelegation and the issue of assigning this
7 to the DEA. Our argument is just a straightforward one,
8 and that is the power at issue here is certainly unique.
9 Even if the Court should find that unconstitutional, it's
10 unique.

11 And we think that relying on subdelegation
12 statutes that go back 10, 15 years before this power was
13 ever contemplated, that reliance on that is really
14 unwarranted here, that a contemporary expression with this
15 kind of power of the authority to subdelegate. After all,
16 a subdelegation clause provides the power to give this to
17 any, quote, "employee" of the Justice Department. And we
18 think, as the Tenth Circuit said in the Widdowson case,
19 the analogue for this one, that that's just too broad a
20 power to allow under a general delegation.

21 QUESTION: Mr. Klein, may I ask you to comment
22 on a problem that I haven't quite been able to figure out.
23 You've described this as a case in which the Attorney
24 General is given the power to define a new crime, in
25 effect.

1 MR. KLEIN: Yes, sir.

2 QUESTION: But as I understand the Food and Drug
3 Act, if this were a new drug, and it's not approved by the
4 Food and Drug Administration, it is already a crime to
5 distribute it. So that really what he's able to do is not
6 define a new crime but increase the penalties for an
7 existing crime.

8 MR. KLEIN: I think that's not accurate. Let me
9 explain why if I might, Justice Stevens. And that is to
10 say, under the Food and Drug Act, if I produce this drug
11 in my house, which is what my client was convicted of,
12 that's not a crime. He was convicted of manufacturing and
13 conspiracy to manufacture. Under the Food and Drug Act,
14 if I had sold this drug in interstate commerce, that would
15 be a crime. But the act for which my client was convicted
16 would not have been a crime, but for the Attorney
17 General's -- or the DEA's determination.

18 QUESTION: I see, because that only -- the Food
19 and Drug prohibition only attaches the act of selling --

20 MR. KLEIN: In interstate commerce.

21 QUESTION: -- introducing in the -- into
22 commerce.

23 MR. KLEIN: That's correct, sir. And that would
24 be true as well for possession, not just manufacture, but
25 possession as well.

1 I'd like to reserve the balance, Mr. Chief
2 Justice.

3 QUESTION: Very well, Mr. Klein.

4 Mr. Minear, we'll hear from you.

5 ORAL ARGUMENT OF JEFFREY P. MINEAR

6 ON BEHALF OF THE RESPONDENT

7 MR. MINEAR: Mr. Chief Justice, and may it
8 please the Court:

9 I'd like to begin with clarifying the point that
10 you just discussed with Mr. Klein, Justice Stevens. In
11 fact, this -- this activity would be illegal under section
12 360 for the Food, Drug and Cosmetic Act, because that
13 requires any manufacturer to register with the FDA before
14 engaging in any manufacture. So in fact, there would be a
15 violation. This would be a violation of the law in any
16 event.

17 QUESTION: Well, then if that's true, let me ask
18 you this further question. Part of the Government's
19 rationale for the whole program is the emergency that the
20 -- there must be prompt response to a new drug of this
21 kind. I'm a little puzzled as to what was the emergency
22 if it was already illegal?

23 MR. MINEAR: Well, part of the problem here --
24 it's perhaps best, Your Honor, to explain exactly how
25 these situations arise. What normally happens is a drug

1 enforcement investigation leads to the seizure of a drug
2 laboratory. Upon examination of the materials in the drug
3 laboratory, they find that the person is selling
4 particular drugs. That person might be selling these
5 drugs as amphetamines or speed or some other drugs that
6 are controlled. In fact, a further review reveals that
7 these drugs are in fact a -- they mimic the dangerous
8 effects of that drug, that they are not in fact
9 controlled.

10 At that point, the DEA makes a determination
11 whether they should seek to further control those drugs,
12 to place them on the list. And at that -- in that manner
13 be able to apply the full force of the criminal law
14 against this --

15 QUESTION: In other words, it's really a matter
16 of just increasing the penalties for what is already
17 illegal.

18 MR. MINEAR: Largely that is what the effect of
19 this is.

20 QUESTION: And that's the emergency, that you've
21 got to have the stiffer penalty immediately.

22 MR. MINEAR: Yes, because otherwise the
23 misdemeanor penalty is simply not sufficient material for
24 --

25 QUESTION: Well, you're in jail -- you can go

1 to jail for a year -- isn't it that 1 year in jail is the
2 punishment?

3 MR. MINEAR: Yes, that's right. That's simply
4 not enough to deter this type of activity, which can be
5 very, very remunerative in terms of the amount of money
6 that can be made on those types of sales.

7 Congress enacted section 201(h) of the
8 Controlled Substances Act to deal with the serious health
9 problem. Illicit drug dealers attempt to avoid laws
10 prohibiting the Controlled Substances Act or to attempt to
11 avoid laws prohibiting the sale of controlled substances
12 by producing and selling drugs such as euphoria involved
13 in this case. It mimics the dangerous effects of a
14 controlled substance, but is not listed as such.

15 Section 201(h) authorizes the Attorney General
16 to take prompt action to protect the public with the
17 dangers associated with the misdirected creativity of
18 these underground chemists. If the Attorney General finds
19 that the unlisted drug poses an imminent hazard to the
20 public safety, it has no approved medical use, he may list
21 that drug as a schedule 1 controlled substance for as long
22 as 18 months while he completes the permanent listing
23 process.

24 Now, petitioners acknowledge that Congress has
25 authority to protect the public health through some

1 mechanism allowing the executive branch to list eight
2 dangerous drugs on an emergency basis. They argue,
3 however, that Congress' use of the Attorney General to
4 effect that result is an unlawful delegation of
5 legislative power.

6 Petitioners concede that section 201(h) lays
7 down intelligible principles that guide the Attorney
8 General's exercise of emergency listing discretion. That
9 concession, we submit, should resolve the delegation
10 issue. This Court has repeatedly held that Congress does
11 not delegate legislative power as the Constitution uses
12 that term. Or it gives an executive branch official
13 discretion to define unlawful conduct and also lays down
14 guidelines that channel the executive branch officials
15 exercise of that discretion.

16 The reason for this is clear. Congress can
17 enact laws whose application depends on the satisfaction
18 of certain conditions, and then give the executive branch
19 official the task of determining whether those conditions
20 have been satisfied. The executive branch official does
21 not in that situation exercise legislative power. He's
22 not making law subject only to constitutional limits in
23 electoral accountability. Rather he's executing Congress'
24 will. The task of determining whether a law should apply
25 to particular facts is simply one aspect of executing that

1 law.

2 Congress must of course give the executive
3 branch intelligible direction to ensure the executive is
4 executing Congress' will rather than exercising de facto
5 legislative power.

6 QUESTION: You're saying there's no such thing
7 as a constitutional delegation?

8 MR. MINEAR: That is -- I think that is right.

9 QUESTION: The term delegation is really a -- a
10 misuse. There's either a delegation in which case it's
11 unconstitutional or there's no delegation.

12 MR. MINEAR: I believe that's absolutely right,
13 Your Honor.

14 QUESTION: Now, as you have heard, petitioners
15 concede that section 201(h) amply satisfies the
16 intelligible principle test. They nevertheless argue that
17 section 201(h) is unconstitutional delegation of
18 legislative power, because Congress has given the Attorney
19 General rather than some other executive branch official
20 the power to list dangerous drugs.

21 QUESTION: You would make that usage more common
22 if you wouldn't refer to it as an unconstitutional
23 delegation of legislative power. If you just said it's a
24 delegation of legislative power.

25 MR. MINEAR: Certainly.

1 QUESTION: And therefore unconstitutional. When
2 you say it the other way, people are inclined to refer to
3 constitutional delegations of legislative power.

4 MR. MINEAR: Yes, Your Honor.

5 QUESTION: Has the Court's opinions been as
6 pristine as Justice Scalia would like?

7 MR. MINEAR: I'm afraid that it's not.

8 QUESTION: So you have -- you're in good company
9 at least.

10 MR. MINEAR: As this Court has repeatedly
11 emphasized, the Constitution divides government power into
12 three co-equal branches of Government. It does not
13 dictate how Congress might assign responsibilities within
14 the executive branch. Rather Congress' broad authority
15 under the necessary and proper clause to select the
16 President or one of his subordinates to perform an
17 executive function. There's no constitutional requirement
18 that Congress vulcanize the executive branch's regulatory
19 and prosecutory functions. In this instance, Congress
20 gave the Attorney General responsibility for temporarily
21 listing dangerous drugs, because it determined that he's
22 best situated to respond promptly and effectively to the
23 public health threat.

24 Certainly Congress entitled -- is entitled to
25 make that determination. As I explained before, these

1 enforcement -- the listing is usually preceded by
2 enforcement action that leads to the discovery of these
3 drugs. Now, Congress' decision to give the Attorney
4 General both regulatory and prosecutive functions is not,
5 as petitioners suggested in their opening brief, entirely
6 unprecedented.

7 Congress has given the Attorney General criminal
8 enforcement power in all three of the basic areas where
9 the Attorney General has regulatory responsibilities. In
10 the case of controlled substances, the Attorney General
11 plays the principal role in the permanent listing decision
12 -- even in the case of drugs that have medical uses.

13 In the case of prisons, the Attorney General has
14 authority to regulate the introduction of anything
15 whatsoever into prison and to punish violations, including
16 violations by people who are not prisoners and not subject
17 to the Attorney General's custodial responsibilities.
18 Now, the Attorney General has exercised that authority
19 since at least 1948, and it has withstood repeated
20 delegation challenges.

21 In the case of immigration, it's a crime to
22 bring aliens into this country at locations other than
23 designated ports of entry. Now, the Attorney General has
24 authority to designate ports of entry under 8 U.S.C. 1229.
25 He has delegated that authority to the Commissioner of the

1 INS.

2 What we see here really is that in any case
3 where the Attorney General has regulatory
4 responsibilities, he also has prosecutorial
5 responsibilities as well. Indeed, what is impressed in
6 here is petitioners' extraordinary approach to what
7 constitutes an unlawful delegation. Under petitioners'
8 view, the question would turn not on the proper
9 relationship between the Congress and the executive
10 branch, but rather on whether a given executive branch
11 official, in this case the Attorney General, is the
12 appropriate person to administer prisons, to determine
13 lawful ports of entry for aliens, or to designate
14 dangerous drugs.

15 Petitioners also contend that section 201(h)
16 violates separation of powers, because the section does
17 not provide for judicial review of the Attorney General's
18 temporary listing decisions. That argument however is
19 incorrect. Section 507, the Controlled Substances Act,
20 contains special provisions for judicial review which may
21 be invoked upon permanent listing of the substance.
22 Section 201(h)(6) prevents an individual from invoking
23 those provisions until completion of the permanent listing
24 decision. But even then it does not prevent an individual
25 who is prosecuted in the interim from obtaining judicial

1 oversight of the Attorney General's action in the
2 enforcement proceeding.

3 In this case, petitioners challenged only the
4 constitutionality of section 201(h) --

5 QUESTION: May I ask about your theory of how
6 you read the statute? How would the defendant go about
7 challenging? Would he file a motion -- a pretrial motion,
8 or during the course of the trial --

9 MR. MINEAR: That is correct, Your Honor. You
10 would file a pretrial motion to dismiss the indictment.
11 In this case, they filed a pretrial motion to dismiss the
12 indictment on the ground that the section 201(h) was
13 unconstitutional.

14 QUESTION: And would they be entitled to put in
15 evidence in support of that motion? Is that your view?

16 MR. MINEAR: Yes, they would.

17 QUESTION: They could put the whole record in,
18 get into arguments about the procedures that were followed
19 in the -- by the Attorney General and the likely kind of
20 thing you might ** --

21 MR. MINEAR: Excuse me, I didn't mean to
22 interrupt.

23 QUESTION: It occurs to me that perhaps you're
24 inviting some protracted proceedings in advance of trial
25 in a lot of criminal cases in these things.

1 MR. MINEAR: I think not, Your Honor, because I
2 think what would happen in these cases is that we would
3 rely on the administrative record that was compiled for
4 the emergency listing. The review of that would be a
5 question of whether the listing of this drug was arbitrary
6 and capricious. We'd apply the same APA standard in that
7 case. We are quite confident that our record is such that
8 we would have little difficulty in winning this -- these --
9 - this --

10 QUESTION: And if the judge should dismiss an
11 indictment, I gather you can appeal that, can't you?

12 MR. MINEAR: Yes, we would appeal.

13 QUESTION: You can appeal an order dismissing
14 the indictment.

15 MR. MINEAR: Now, as I said in this case the
16 petitioners could have challenged the listing of euphoria
17 in this particular case, but they chose simply not to do
18 that. They say --

19 QUESTION: Why can they do that in light of the
20 words in the statute?

21 MR. MINEAR: Our construction of the statute is
22 as follows. It precludes -- section 201(h)(6) says --
23 states that there shall be no judicial review of any order
24 of the Attorney General. That reference to judicial
25 review we believe applies to the specific judicial review

1 provisions of the act containing section 507. In other
2 words, it prevents a party from seeking review under
3 section 507 of the Controlled Substances Act. But it does
4 not prevent a party from raising a challenge as a defense
5 to their prosecution.

6 Now, it might be -- you find in cases that
7 raising the challenge in the enforcement proceeding is
8 sometimes referred to as judicial review. But normally
9 judicial review is conceived of as an action that's
10 initiated to challenge agency action rather than a defense
11 to a prosecution.

12 QUESTION: You're saying it really means it's
13 not subject to judicial review under the provisions of
14 this statute.

15 MR. MINEAR: It says there shall be no judicial
16 review.

17 QUESTION: Is not subject to judicial review --
18 an order issued under paragraph 1 is not subject to
19 judicial review.

20 MR. MINEAR: That is correct, Your Honor.

21 QUESTION: And you say except in a criminal
22 proceeding.

23 MR. MINEAR: Yes, we would say that in a case of
24 criminal proceeding it's a different situation where
25 you're allowed to raise that as a defense.

1 QUESTION: Where is judicial review provided
2 for?

3 MR. MINEAR: It is section 507, which is --

4 QUESTION: What's that?

5 MR. MINEAR: -- 21 U.S.C. 877 is the statutory
6 --

7 QUESTION: That's not -- that's not in your
8 brief.

9 MR. MINEAR: No, I believe it is summarized in a
10 footnote in our brief, however.

11 QUESTION: 21 U.S.C.?

12 MR. MINEAR: 21 U.S.C. 877. I'm afraid I'm not
13 able to find it.

14 QUESTION: I'll get it. It's all right.

15 MR. MINEAR: Now, there's nothing unusual in
16 challenging agency action in a criminal enforcement
17 proceeding. And indeed, prior to the enactment of the
18 Administrative Procedure Act, one could often challenge
19 administrative determination only in the course of an
20 administrative -- or in the course of a criminal
21 prosecution. The bridge cases that we cite, cases like
22 Union Bridge and the Monongahela Bridge accompanied. Both
23 involve that situation where there's a administrative
24 determination that was challenged in the criminal
25 enforcement action.

1 QUESTION: Well, if somebody is prosecuted for
2 violating a regulation, the violation of which is made a
3 crime, I would suppose he could plainly defend the -- his
4 prosecution on the -- on the basis that regulation is
5 inconsistent with the statute.

6 MR. MINEAR: Yes, and in fact, the APA
7 recognizes that. And section 703 of the APA states that
8 unless the specific provision provided precludes that type
9 of challenge, it is permissible.

10 QUESTION: Yes, but of course the Yakus case
11 holds that if there is a provision that precludes judicial
12 review, he cannot do that.

13 MR. MINEAR: That's right. And if in fact this
14 was -- if section 201(h)(6) were interpreted to preclude
15 and it review -- even in an enforcement proceeding -- then
16 this case would be very much like Yakus.

17 Now, in Yakus --

18 QUESTION: The difference would be that there
19 they at least allow judicial review for a stated period of
20 time.

21 MR. MINEAR: Yes, at some point after the
22 criminal enforcement proceeding, as in here. If you look
23 to Yakus at -- I believe it would be at 321 U.S., page
24 436, there's a discussion of this. The same discussion is
25 made in Bowles v. Willingham, which is -- also appears in

1 that volume of U.S. reports.

2 QUESTION: Do you agree that this statute would
3 be unconstitutional if you read section 6 to preclude
4 judicial review entirely?

5 MR. MINEAR: No, no. This would not be
6 unconstitutional.

7 QUESTION: It wouldn't.

8 MR. MINEAR: It would not be unconstitutional in
9 this --

10 QUESTION: Well, then why should I read it that
11 way?

12 MR. MINEAR: We believe this is the best reading
13 of the statute in light of the guidance this Court has
14 given it in interpreting judicial review provisions. This
15 Court is hesitant to conclude that judicial review has
16 been completely precluded.

17 QUESTION: It doesn't say here under it. It
18 just says no judicial review.

19 MR. MINEAR: That's correct, and if the Court,
20 wished to read the statute like this --

21 QUESTION: I mean, if you told me -- you know --
22 --there's a real constitutional problem otherwise, I -- you
23 know -- I'd stretch a point. And I'd say in order to
24 avoid unconstitutionality, you interpret it that way. But
25 you're telling me it wouldn't be -- it would be perfectly

1 constitutional.

2 MR. MINEAR: We believe it would still be
3 constitutional, and for this reason. The activity that
4 these parties are engaged in is illegal already. There is
5 no real due process limitation, or no liberty interest
6 that's being -- that needs to be protected here under the
7 due process --

8 QUESTION: As applied you say at least it's
9 constitutional.

10 MR. MINEAR: Yes.

11 QUESTION: It won't always be the case that a
12 drug he defines is necessarily already a crime under the
13 Food and Drug Act.

14 MR. MINEAR: Well, I think we can presume that
15 it -- that we're entitled to that presumption in
16 determining the constitution -- constitutionality of the
17 statute that they -- that he would act properly under the
18 statute.

19 Now, in fact, in Yakus, I should point out --

20 QUESTION: Let me just go back for a second.

21 MR. MINEAR: Yes.

22 QUESTION: What is your authority for the
23 proposition that if you read the statute the way your
24 opponent does; it clearly would be constitutional?

25 MR. MINEAR: First would be the -- the Yakus.

1 QUESTION: The Yakus is the closest you get.

2 MR. MINEAR: The Yakus is the closest situation.

3 QUESTION: Right.

4 MR. MINEAR: It's worth pointing out though,
5 however, that in some cases there certainly can be
6 delegations of executive power for which there is no
7 judicial review. The APA recognizes that. Some cases
8 have in fact recognized that as well.

9 QUESTION: I understand, but your position is
10 just as novel as your opponents in this particular issue.

11 MR. MINEAR: No, I do -- with all respect, Your
12 Honor, I think it is -- I think that we have -- certainly
13 have much stronger case support than they do.

14 QUESTION: I'm not saying that, but you don't
15 have the case on the nose and neither does he.

16 MR. MINEAR: That is correct.

17 In sum, petitioners had more than ample
18 opportunity to obtain judicial review of the Government's
19 decision to list euphoria as a schedule 1 controlled
20 substance. Their failure to challenge the Government's
21 decision, either after completion of the administrative
22 proceeding or in the enforcement proceeding, simply
23 underscores the lawfulness of the Government's action.

24 I'd like to respond to a couple of the points
25 that were raised in the opening argument. One,

1 petitioners note that there have been suggestions in the
2 executive branch that there should be some division of
3 executive and prosecutive and regulatory powers. We've
4 made those suggestions as a policy matter and not as a
5 constitutional matter. This is a constitutional issue
6 that's posed here.

7 With respect to Gagnon v. Scarpelli, I think the
8 more -- the more compelling precedent would be Withrow v.
9 Larkin. In that case, this Court noted that, as a general
10 matter, there is not facially violative of due process to
11 combine both a prosecutorial and an adjudicative function.
12 It indicated it might be unconstitutional in certain
13 factual situations and explained cases like Gagnon on that
14 basis.

15 Here we do not have a combination of the
16 prosecution in adjudicatory function. Instead, it's
17 simply the regulatory and prosecutive function instead.

18 Also, I'd like to reemphasize the point that was
19 made in argument that the petitioners' reliance on the
20 Abbott Lab case is really misplaced here. That was a
21 statutory -- in case of statutory interpretation. The due
22 process principles that were applicable in this area were
23 set forth in the Ewing case that was decided before that
24 time.

25 And then finally I think it's -- I should

1 mention the subdelegation issue. Petitioners also contend
2 that the Attorney General lacks statutory authority to
3 delegate his section 201 responsibilities to the
4 Administrator of the Drug Enforcement Agency. Congress,
5 however, is authorized that subdelegation in two separate
6 statutes.

7 As we explain in our brief, there is no
8 indication in either of those statutes that Congress
9 intended to exempt section 201(h) from subdelegation. The
10 Attorney General accordingly has ample statutory authority
11 to delegate his temporary listing responsibilities to the
12 Administrator of DEA.

13 QUESTION: May I ask on that question, how far
14 down the line could he delegate? If you read the statute
15 literally, could he give the power to an assistant United
16 States attorney or to a secretary or to a research
17 assistant or somebody like that?

18 MR. MINEAR: We -- we think under Buckley v.
19 Valeo this would have to be exercised by an officer of the
20 United States. Now the Administrator of the DEA is
21 obviously an officer of the United States and that would
22 dispose of the --

23 QUESTION: You say it would have to be an
24 officer of the United States? The statute doesn't say
25 that.

1 MR. MINEAR: No, the statute does not say that.
2 But again the delegation provision here is a general
3 delegation provision covering the statute at large.

4 QUESTION: I understand.

5 MR. MINEAR: So there certainly could be
6 responsibilities that could be delegated to employees.

7 QUESTION: But you think there's an implied
8 limit on what the statute seems to say on its face?

9 MR. MINEAR: We think there might be a
10 constitutional limit on that, yes.

11 QUESTION: Is the theory of the Federal Enclaves
12 Act, in which the Federal Government for its properties
13 incorporates the existing criminal law of the State, has
14 that ever been challenged under delegation principles?

15 MR. MINEAR: I'm not aware of any challenge to
16 that. I would also point out that in -- for instance in
17 36 C.F.R., the Department of Interior has created an
18 entire criminal code for the national parks, where various
19 -- all sorts of infractions violate the law. And there's
20 never been any challenge to my knowledge to that.

21 QUESTION: Could the Congress delegate to the
22 Attorney General the authority to declare any common law
23 crime applicable on any Federal territory?

24 MR. MINEAR: I think that that would depend on a
25 question of whether there's an intelligible principle that

1 has been stated there.

2 QUESTION: If it's necessary for the public
3 safety?

4 MR. MINEAR: I think that we might -- well, the
5 broader the delegation I think the more insistent we are
6 that there be a clear -- a clear indication of an
7 intelligible principle. Here the intelligible principles
8 are very precise. There's no challenge to them whatsoever
9 in this case. However, in some -- in the extreme case I
10 think we can demand more from Congress in terms of
11 intelligible principles the broader the -- the delegation
12 authority might be.

13 If there are no further questions -- thank you.

14 QUESTION: Very well, Mr. Minear.

15 Mr. Klein, you have 4 minutes remaining.

16 REBUTTAL ARGUMENT OF JOEL I. KLEIN

17 ON BEHALF OF THE PETITIONERS

18 MR. KLEIN: Yes, very briefly, Mr. Chief
19 Justice. A couple of points. First of all, on this issue
20 of whether prior behavior was already criminal, Justice
21 Stevens, to begin with even under the Government's view,
22 if I've registered, which lots of people do, then it is no
23 crime for me to manufacture this drug in my home. But
24 once the Attorney General passes this regulation, it then
25 becomes a crime. So something that was noncriminal is now

1 a crime. By the same token, I could possess this drug.
2 There is no requirement there. And that becomes a crime
3 once it's scheduled.

4 The second point I want to make is on judicial
5 review. And the Justice Department says what the statute
6 really refers to is 877, which is the general judicial
7 review statute. That statute only says there shall be
8 judicial review in the courts of appeals. It doesn't say
9 anything at all about judicial review in district courts.
10 So the -- the Government's argument doesn't even fit its
11 own theory.

12 In other words, if all that Congress meant to do
13 was take out 877, which the words don't support. But if
14 that's all that it meant to do, there still could be pre-
15 enforcement actions, injunctive and declaratory, in the
16 district courts, because this statute doesn't mention it
17 and that is a common and typical way. So I suggest to you
18 that the Government's forcing the words doesn't even go
19 with its theory.

20 Finally, the issue of whether it would be
21 constitutional, Justice Scalia, to eliminate judicial
22 review here altogether seems to me at least the Court has
23 said twice that it would be impermissible. That is in
24 Skinner v. Mid-America, which is a delegation case. I
25 realize -- the terminology is the Court's not mine. In

1 that case, the Court said that a delegation of power was
2 valid so long as, quote, "a court could ascertain whether
3 the will of Congress has been obeyed." That point was
4 made as well in Chada.

5 So I suggest to you if this was a blanket
6 preclusion, that in fact it would not comport with these
7 -- with this Court's principles and that's exactly why the
8 Government is trying to fiddle with the language.

9 Thank you.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Klein.

11 The case is submitted.

12 (Whereupon, at 10:55 a.m., the case in the
13 above-entitled matter was submitted.)

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: 90-6282

Daniel Touby, et ux., Petitioner -v- United States

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

BY *Raymond H. Hartel*
(REPORTER)

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

'91 APR 25 AM 0:20