

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

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CAPTION: MEIRL GILBERT NEAL, Petitioner v. UNITED STATES

CASE NO: No. 94-9088

PLACE: Washington, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

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MEIRL GILBERT NEAL, :  
Petitioner :  
v. : No. 94-9088  
UNITED STATES :  
- - - - -X

Washington, D.C.  
Monday, December 4, 1995

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:00 a.m.

APPEARANCES:

DONALD T. BERGERSON, ESQ., San Francisco, California; on  
behalf of the Petitioner.  
PAUL R. Q. WOLFSON, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; on  
behalf of the Respondent.

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

2 (11:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 94-9088, Meirl Gilbert Neal v. The United  
5 States.

6 Mr. Bergerson, you may proceed.

7 ORAL ARGUMENT OF DONALD T. BERGERSON

8 ON BEHALF OF THE PETITIONER

9 MR. BERGERSON: Thank you. Mr. Chief Justice,  
10 and may it please the Court:

11 In 1984, after 10 years of careful study,  
12 Congress responded to growing criticism of Federal  
13 criminal justice systems by creating the United States  
14 Sentencing Commission. The task of the commission was to  
15 eliminate unpredictable, unequal, and unfair sentences  
16 which had marred Federal criminal law for decades.

17 To achieve this goal, the commission was vested  
18 with broad factfinding resources, staffed with jurists and  
19 leading experts in the sentencing field, and structured to  
20 interact symbiotically with the courts and other branches  
21 of Government so as to evolve predictable and  
22 proportionate sentencing practices throughout the Federal  
23 courts.

24 This case offers this Court an opportunity to  
25 define the role of the commission in such a way as to

1 fulfill the express intentions of the Congress which  
2 created it.

3 Meirl Neal was convicted of trafficking in LSD  
4 in 1989. Section 841(b) of title 21 requires a mandatory  
5 10-year penalty for trafficking in 10 or more grams of a  
6 mixture of LSD. At the time Mr. Neal was sentenced,  
7 neither the sentencing guideline nor the code contained a  
8 definition of the term, mixture.

9 In this case, and under the rule later announced  
10 by this Court in Chapman v. United States, the relevant  
11 mixture was held to consist of the blotter paper onto  
12 which the LSD was placed for purposes of sale and  
13 distribution. Under this definition, Mr. Neal received a  
14 sentence of 16 years imprisonment.

15 Four years after Mr. Neal was sentenced, the  
16 Sentencing Commission conducted hearings on whether the  
17 sentencing practice used in his case could be reconciled  
18 with section 841. The hearing was required under the  
19 commission's 1984 enabling legislation which chartered it  
20 and made numerous reference to its absolute and abiding  
21 duty to eliminate unwarranted sentencing disparities in  
22 Federal criminal cases.

23 Congress equipped the commission with numerous  
24 tools to achieve this result.

25 QUESTION: Mr. Bergerson --

1 MR. BERGERSON: Yes.

2 QUESTION: -- if all we had before us were the  
3 facts in this case and this Court's Chapman interpretation  
4 of the statute, would we consider the weight of the  
5 blotter paper?

6 MR. BERGERSON: If all -- Justice O'Connor, if  
7 all the Court had before it were simply Mr. Neal coming up  
8 and asking the Court simply to reconsider Chapman in the  
9 absence of commission action --

10 QUESTION: Right.

11 MR. BERGERSON: Would you reconsider? No.

12 QUESTION: Well, you didn't -- are you asking  
13 that we now overturn Chapman to reach the result, or are  
14 you arguing that you can leave Chapman where it is but the  
15 sentencing guidelines changes means the statute should be  
16 interpreted differently?

17 MR. BERGERSON: First of all, I am --

18 QUESTION: It's not clear to me.

19 MR. BERGERSON: Okay. I'm arguing the latter,  
20 but I also believe a modification of the former is the  
21 appropriate statement of my principle in this case.

22 QUESTION: Well --

23 QUESTION: Modification of the former, to  
24 what --

25 MR. BERGERSON: Of the former proposition, which

1 is revisiting Chapman.

2 There is no stare decisis problem in this --

3 QUESTION: But do you think that the commission  
4 has power to redefine statutory terms that this Court has  
5 already defined?

6 MR. BERGERSON: I think that the commission  
7 has --

8 QUESTION: And that we should defer to that?

9 MR. BERGERSON: I believe that this Court should  
10 defer to the --

11 QUESTION: Is the answer yes?

12 MR. BERGERSON: The answer is yes, Justice  
13 O'Connor. I believe that this Court should look to the  
14 act of Congress in 1984 which vested the commission with  
15 the duty and the power to interpret terms and penalty  
16 statutes so as to establish --

17 QUESTION: And you think that vested the  
18 Sentencing Commission with the authority to define a term  
19 of the -- a statutory term differently than this Court  
20 defined it?

21 MR. BERGERSON: I don't believe that the  
22 Sentencing --

23 QUESTION: Can't you answer the question yes or  
24 no?

25 MR. BERGERSON: No, I do not believe that the

1 Sentencing Commission has the power to define a statute in  
2 a way different from the way this Court --

3 QUESTION: When we have already defined the  
4 meaning of a statutory term in Chapman.

5 MR. BERGERSON: This Court in Chapman held that  
6 in answer to the question of whether to include blotter  
7 paper in the weighing of LSD, in answer to the specific  
8 question, does mixture or substance refer to pure LSD,  
9 this Court held that one must include the blotter paper  
10 because Congress adopted a market-oriented approach for  
11 purposes of sentencing under 841.

12 The commission has, after thorough exploration,  
13 factfinding and hearings, reinterpreted the term mixture  
14 in light of the realities of the market.

15 QUESTION: Contrary to what this Court  
16 interpreted it as in Chapman?

17 MR. BERGERSON: Your Honor, words like --

18 QUESTION: Well, but can you answer yes or no?  
19 You're describing the commission's interpretation of the  
20 term mixture, and I'm asking, is that contrary to the way  
21 this Court defined it in Chapman.

22 Now, certainly you can explain, but you can  
23 answer it yes or no.

24 MR. BERGERSON: No. It is an expansion. This  
25 is a second generation case.



1           This Court in Chapman held that mixture or  
2 substance containing LSD requires that the paper be  
3 weighed in terms of sentencing, because the meaning of the  
4 statute was to punish drugs as they are sold in the  
5 market.

6           QUESTION: What was the judgment that the  
7 Court -- was it a judgment that the Court affirmed? The  
8 Court affirmed the Seventh Circuit, wasn't it, in Chapman?

9           MR. BERGERSON: In both cases the Court affirmed  
10 the Seventh Circuit.

11          QUESTION: Yes, and what was the judgment? Was  
12 it set according to just some weight to the blotter paper,  
13 or full weight?

14          MR. BERGERSON: There was language in Chapman  
15 which was not necessary to the resolution or solution of  
16 the case which said that all the blotter paper should be  
17 weighed.

18          QUESTION: Wasn't this a question of a  
19 conviction and a sentence that had been entered in  
20 Chapman?

21          MR. BERGERSON: Yes.

22          QUESTION: And if the position that you are now  
23 taking, that all the Court said was that you give some  
24 weight, not necessarily full weight, to the blotter paper,  
25 then wouldn't the judgment have to have been vacated so

1 that it could be modified to reflect something less than  
2 full weight?

3 MR. BERGERSON: No. In Chapman, the issue  
4 before the Court was whether the phrase, mixture or  
5 substance, referred to pure LSD. The commission had not  
6 yet spoken to the issue, nor had any other agency, nor had  
7 Congress spoken, and the term had no fixed common law  
8 meaning. Accordingly, the Court was obligated to use the  
9 plain meaning of the word.

10 What we are arguing in this case is that the  
11 plain meaning of the word has changed in light of the  
12 commission's thorough factual exploration into what that  
13 plain meaning --

14 QUESTION: And the meaning couldn't be plain.  
15 If the meaning was plain, it wouldn't have changed.

16 MR. BERGERSON: Well, but the meaning can change  
17 in the context of the statute, because the statute refers  
18 to the drug market.

19 QUESTION: Well --

20 MR. BERGERSON: And that's what the commission  
21 studied, was the drug market.

22 QUESTION: Well, what if in a totally different  
23 context this Court had said we take the plain meaning of  
24 the word employee, in a case that Justice Breyer wrote for  
25 the Court a few weeks ago, and then a great convention of

1     lexicographers came along and said, well, we really want  
2     to get to the bottom of this thing, and we now think that  
3     employee means something different, could the next party  
4     come along and say, well, this case should be modified  
5     because you are wrong in deciding what employee meant?

6             MR. BERGERSON: No, because there is no  
7     congressionally delegated convention of lexicographers  
8     tasked with precisely the task that you've outlined in  
9     your hypothetical.

10            QUESTION: But Congress could do that. That's  
11     the only thing lacking, really, right? Congress can have  
12     this Court second-guessed all the time. All it has to do  
13     is designate a particular convention of lexicographers,  
14     just as here it designated a certain aggregation of judges  
15     and scholars who could be commissioners.

16            MR. BERGERSON: If Congress designated a  
17     convention of lexicographers with the same thoroughness as  
18     it did --

19            QUESTION: Right.

20            MR. BERGERSON: -- the Sentencing Commission,  
21     then the answer would be yes.

22            QUESTION: Gee, I feel a lot less important than  
23     I did before.

24            (Laughter.)

25            QUESTION: Well, that's contrary to some of our

1 decided cases, isn't it, that another body could in effect  
2 overrule our decisions? In fact, it's contrary to that  
3 case back in 1790, the pension case.

4 MR. BERGERSON: Your Honor, this is not a case  
5 of stare decisis, and those cases all deal with stare  
6 decisis, and it's not a case of stare decisis for two  
7 reasons. First, the language in Chapman which is  
8 problematic here, the language which talks about weighing  
9 all the blotter paper, was not necessary for the  
10 resolution of the Chapman case because the question  
11 presented in Chapman was simply answered by saying that  
12 the mixture includes blotter paper.

13 QUESTION: Did the length of the sentence in  
14 Chapman depend on the actual weight, including the weight  
15 of the blotter paper?

16 MR. BERGERSON: What was at issue in Chapman --

17 QUESTION: Yes or no.

18 MR. BERGERSON: The length of the sentence under  
19 the statute did. The guideline sentence in Chapman was  
20 not directly challenged. It was simply tracking along  
21 with the mandatory --

22 QUESTION: So that the answer is yes, the  
23 sentence depended on the actual weight of the mixture or  
24 substance.

25 MR. BERGERSON: The sentence in Chapman --

1 QUESTION: Well --

2 MR. BERGERSON: -- given the two alternatives --

3 QUESTION: -- the answer is yes; isn't it?

4 MR. BERGERSON: Yes. The answer is yes,  
5 Justice Souter.

6 The sentence did depend on the weight of the  
7 blotter paper entirely because no other alternative was  
8 presented. Either one had to give Mr. Chapman a  
9 sentence --

10 QUESTION: Well then, that was the holding of  
11 the case. Whether another argument or another alternative  
12 might have been presented is beside the point. That's  
13 what the case held. The entire weight will be considered  
14 and the sentence will be set accordingly. Right?

15 MR. BERGERSON: Right at the time, but now the  
16 term, mixture or substance, has been revisited by the  
17 Sentencing Commission which was tasked with the task of --

18 QUESTION: Which means, on your view, the  
19 Sentencing Commission can, in fact, modify the holding of  
20 the case.

21 MR. BERGERSON: That is not my position, Justice  
22 Souter. My position is that the Sentencing Commission  
23 can, given the delegation that Congress has given to it,  
24 explore reality by means of the hearings that Congress has  
25 tasked it to do under section --

1 QUESTION: And when reality has been explored,  
2 what is left of the holding in Chapman?

3 MR. BERGERSON: What is left of the holding in  
4 Chapman is the essentials of section 841, to wit that  
5 there is a market-oriented approach to drug sentencing,  
6 that the --

7 QUESTION: But not the rule that the actual  
8 weight will be considered. That's gone.

9 MR. BERGERSON: That would be --

10 QUESTION: That has yielded to reality.

11 MR. BERGERSON: That has yielded --

12 QUESTION: Right?

13 MR. BERGERSON: -- to the new plain meaning --

14 QUESTION: Yes.

15 MR. BERGERSON: -- of the term, and the reason  
16 that it yields to the new plain meaning of the term is  
17 because mixture or substance, as defined as gross weight  
18 blotter paper, with no input from the Sentencing  
19 Commission's expert study of the issue, is inconsistent  
20 with section 841(b) as framed by Congress.

21 QUESTION: I'm not sure that it matters, but  
22 when we're talking about reality, is it correct to say, as  
23 I think the Government has pointed out, that the putative  
24 weight adopted by the commission is approximately 1/20th  
25 of the characteristic average weight?

1 MR. BERGERSON: It is in fact.

2 QUESTION: Mr. Bergerson, not only do I have  
3 some doubt whether we have to follow the Sentencing  
4 Commission, I have some doubt whether the Sentencing  
5 Commission doesn't have to follow us.

6 Is there any way in which the Government can  
7 challenge the Sentencing Commission guidelines as in  
8 effect creating a skewed system in which you get a 10-  
9 year minimum on the basis of our holding, and then  
10 everything from there is computed on a very different  
11 basis?

12 Apparently the commission thought that was okay,  
13 but it seems to me a crazy system. Is there any way in  
14 which what the commission says is challengeable as not  
15 being in accordance with the statutory law?

16 MR. BERGERSON: Not under the delegation that's  
17 been given to the commission, Justice Scalia, to establish  
18 sentencing guidelines. The Government concedes and we  
19 agree that it --

20 QUESTION: No matter how irrational those  
21 sentencing guidelines are? That is, you have a 10-year  
22 minimum based on our holding, and then they use a totally  
23 different basis for deciding the increments of punishment  
24 above 10 years, which seems to me quite irrational.

25 MR. BERGERSON: However, the totally different

1 basis is entirely in keeping with the language of the  
2 statute because it punishes LSD in a --

3 QUESTION: Theirs is and ours is, but you have  
4 the two of them working, and you say the commission's  
5 ought to prevail over ours. If I think that ours ought to  
6 prevail over the commission's, I wonder -- but you say  
7 there's no way to set the commission right.

8 QUESTION: Well, the Government can always go to  
9 Congress and ask that it not approve the Sentencing  
10 Commission's recommendations, can't it, the way it did  
11 with this crack cocaine thing?

12 MR. BERGERSON: That's correct, Mr. Chief  
13 Justice, and the Government can go to Congress and ask  
14 Congress to change the Sentencing Reform Act for 1984.

15 QUESTION: Congress doesn't change things just  
16 because they're illogical.

17 (Laughter.)

18 QUESTION: I mean, that's -- Congress doesn't  
19 care about that sort of thing.

20 MR. BERGERSON: Nonetheless.

21 QUESTION: I mean, we do.

22 (Laughter.)

23 MR. BERGERSON: Congress has given to the  
24 Sentencing Commission the power to do what it did and  
25 reserve for itself the power to do what the Chief Justice



1 is suggesting.

2 QUESTION: Did it exercise that power, assuming  
3 it had it?

4 I mean, what's stopping me in this at the moment  
5 is it says, nonetheless this approach does not override  
6 the applicability of mixture or substance for the purpose  
7 of applying any mandatory minimum sentence, and then it  
8 cites Chapman, and then it cites 5G1.1(b), and in 5G1.1(b)  
9 it says, when a statutory minimum sentence is greater than  
10 the maximum guideline, apply the statutory minimum.

11 Now, I know you could find some ambiguity in  
12 that, but it's hard to find more than ambiguity, and what  
13 it sounds as if they're saying is, we're changing it for  
14 purposes of the guideline, but the mandatory minimum in  
15 the statute of course trumps the guideline, and there's  
16 nothing here that suggests we're changing that in any way.  
17 That -- I mean, that's what I'm concerned about from your  
18 point of view.

19 MR. BERGERSON: I would respectfully disagree  
20 with that interpretation. Of course the statute trumps  
21 the guideline, and of course the commission is powerless  
22 to rewrite the statute. However, what I read the  
23 commission as saying in that passage is two things.

24 First of all, it is proclaiming that the  
25 guideline is consistent with the statute. It does not

1     override the statute for purposes of setting a mandatory  
2     minimum.

3             Second, in light of the history, as I've  
4     outlined in my reply brief, of this amendment, the  
5     commission is simply proclaiming the process by which it  
6     reached its result.

7             QUESTION: But if I were on the commission and  
8     were doing this thing, which is pretty radical, trying to  
9     change a case of the Supreme Court, interpreting a statute  
10    of Congress, which I can't remember an instance where the  
11    commission would try to do that, wouldn't the commission  
12    at least tell people what they were trying to do and  
13    explain it, rather than putting a sentence in the  
14    guideline that implies to an ordinary reading the  
15    contrary?

16            MR. BERGERSON: Well, the sentence is in the  
17    commentary to the guideline, and to the degree that it's  
18    inconsistent with the guideline it's not binding on this  
19    Court under this Court's Stinson decision, but my  
20    submission would be that the guideline is plain enough and  
21    the delegation to the commission to do what it did is  
22    plain enough that the commission need not have said  
23    anything, and simply proclaiming that it is trying to be  
24    consistent with section 841 and this Court's reasoning in  
25    Chapman is nothing more than the commission's own

1 statement of its own limitations.

2 QUESTION: There's another question that you may  
3 have. I'm going to ask them the same question, but this  
4 is the great mystery here, which is a vacuum to me, and  
5 I'd like to try to find out about it.

6 I, of course, think that these things make more  
7 sense than people sometimes think --

8 (Laughter.)

9 QUESTION: -- and one of the efforts here and in  
10 Congress is, they don't make these numbers up. What they  
11 do is, they go to experts, particularly DEA, and they say  
12 to DEA, what should we do here to get our intent, so there  
13 was at some point some representation from DEA to Congress  
14 that would have told them how technically to write a  
15 statute that's going to achieve a particular objective.

16 But the particular objective was to put big guys  
17 and big deal gangs in jail for 5 years or 10 years, 5  
18 years medium, and less than 5 years, itty-bitty, all  
19 right.

20 Now, what is the definition of this? Did  
21 Congress have in mind that a fairly big-sized expert, or  
22 drug guy, or LSD guy was a person with 125 doses, or a  
23 person that was trying to sell 2,500? Now, that's a huge  
24 difference, and somebody on the staff there would have  
25 found out from DEA and there would have been pamphlets,

1 and there would have been writings about whether the  
2 dangerous people were 125-dose people, or 2,500-dose  
3 people.

4 So you've looked into this. I haven't been able  
5 to find anything.

6 MR. BERGERSON: In the Chapman dissent there is  
7 a footnote, footnote 12, which indicates that if you strip  
8 away the paper, then the doses become equivalent for all  
9 the drugs listed in section 841(b). That led the arguers  
10 in Chapman to believe that it was likely that Congress  
11 simply did not take into account the paper, but that issue  
12 has been decided.

13 What we're saying now is that the DEA had equal  
14 input into the commission's definition, and that the  
15 commission's definition was done with reference to all the  
16 provisions of the statute.

17 QUESTION: Yes, but this is quite later. At the  
18 time that this statute was passed, the DEA was going and  
19 telling the commission and Congress about the same thing  
20 as to how to write it, and so what I'm trying to figure  
21 out is, there must be a manual or something somewhere that  
22 refers us to whether it's 125 doses that looks -- defines  
23 a fairly big guy, or 2,500 doses. That's the key to this,  
24 and what is it?

25 MR. BERGERSON: The DEA's pre-1986 and post 1986

1 statements all weigh LSD in terms of pure LSD. That's the  
2 reference to which they make --

3 QUESTION: It doesn't matter how you weigh it.  
4 What matters is whether you're trying to put the 125-dose  
5 guy in jail for 5 years, or whether you're trying to put  
6 the 2,500-dose guy in jail for 5 years.

7 You can have any kind of weighing system you  
8 want, do it in a thousand different ways, but what's the  
9 objective?

10 MR. BERGERSON: In answer to Your Honor's  
11 question, the DEA did not provide input to Congress on the  
12 question that Your Honor has asked. The DEA provided data  
13 to Congress on the precise weight of pure LSD.

14 However, if one looks at the statute and  
15 construes it as a whole in accordance with the  
16 jurisprudence of this Court, it is clear that Congress  
17 intended to punish these drugs in pari materia.

18 The relevant language of the statute is not  
19 simply mixture or substance, but all the other references,  
20 to 10 years, different doses, different quantities,  
21 absolute quantities of drugs that yield roughly equivalent  
22 doses, and one assumes that the commission was correct in  
23 interpreting the statute to mean that what Congress wanted  
24 was to go and have LSD punished at roughly the same level  
25 as the other drugs.

1 QUESTION: Mr. Bergerson --

2 MR. BERGERSON: Yes.

3 QUESTION: -- are you making at least as a  
4 fallback argument the suggestion that the Court has ruled  
5 one way in Chapman, it should be enlightened but not bound  
6 by what the Sentencing Commission has done, and therefore  
7 reconsider and modify Chapman?

8 Instead of trying to make two inconsistent  
9 things consistent, which seems to be the thrust of your  
10 argument up to now, to say the Sentencing Commission  
11 thought about this, the Court ought to reconsider?

12 MR. BERGERSON: That is one position, Your  
13 Honor. I would clarify it to say the Sentencing  
14 Commission did not merely think about it but studied the  
15 market to such a degree as to give the words used in the  
16 statute a new plain meaning in the real world and  
17 therefore this Court --

18 QUESTION: I find it powerfully hard to take the  
19 term plain meaning, which should mean the word means  
20 something plain, and then say because there was an expert  
21 commission that gave this a lot of study, then the plain  
22 meaning, the meaning that people, ordinary people would  
23 understand, changes.

24 MR. BERGERSON: Yes, Your Honor. I will point  
25 out, however, that the commission studied the drug market

1 to which the statute directly pertains according to the  
2 legislative history of the statute and according to the  
3 finding of this Court in Chapman and, studying that drug  
4 market, came up with the definition it has here.

5 QUESTION: We couldn't possibly have interpreted  
6 the statute to mean anything resembling what the  
7 commission says it's going to use for purposes of  
8 sentencing, could we? How could you possibly get that out  
9 of the language of the statute?

10 MR. BERGERSON: On the record presented to you  
11 in Chapman, you could not, Your Honor, because Chapman  
12 involved no comment from the Sentencing Commission, having  
13 undertaken expert study.

14 QUESTION: Even with a comment or without a  
15 comment, we can't read, you know, the word mixture to  
16 mean, you know, so many doses. That's just -- that's  
17 legislating, it's not interpreting a text at all.

18 MR. BERGERSON: Your Honor, we submit that it is  
19 not legislating. We submit that what the commission did  
20 was study the weights of drug mixtures in the actual --

21 QUESTION: How would you have us interpret the  
22 language in Chapman? What is it you think we should have  
23 said in Chapman the relevant language means?

24 MR. BERGERSON: What we would submit is that --

25

1 QUESTION: The language in question is what,  
2 mixture?

3 MR. BERGERSON: Well, the language in question  
4 is the statute as a whole, but turning to mixture in the  
5 context of the statute --

6 QUESTION: Mm-hmm.

7 MR. BERGERSON: -- I would submit that a mixture  
8 or substance containing LSD means that quantum of LSD  
9 which yield sentences consistent with the obvious intent  
10 of Congress to regulate street drugs in like quantities  
11 with like mandatory penalties in the form they're sold on  
12 the market.

13 QUESTION: You deduce that just from the  
14 language, a mixture or substance containing a detectable  
15 amount of LSD?

16 MR. BERGERSON: I deduce that from the market-  
17 oriented approach of the statute --

18 QUESTION: Well, but --

19 MR. BERGERSON: -- which is where this Court  
20 achieved its deduction in Chapman as well.

21 QUESTION: That the Court described Congress'  
22 approach as a market-oriented one, that may be helpful in  
23 deciding what a word means, but it doesn't enable one to  
24 simply apply the language that Congress has used and say  
25 well, anything market-oriented will do.



1 MR. BERGERSON: What Congress intended to do,  
2 Your Honor, was to --

3 QUESTION: Well, we know best what Congress  
4 intended to do from the language it chose, and it chose  
5 the language, a mixture or substance containing a  
6 detectable amount of LSD.

7 MR. BERGERSON: That's correct, but what  
8 Congress intended to do with that language was to plug it  
9 into the remainder of the statute, and the remainder of  
10 the statute provides like penalties for different amounts  
11 of drugs which, if interpreted in the manner done by the  
12 commission, yields results consistent within the statute  
13 with other drugs --

14 QUESTION: I understand -- all I want to know is  
15 what you think we should have said. Just tell me how the  
16 opinion would have read in Chapman had you written it, in  
17 light of, you know, later developments at the commission.

18 MR. BERGERSON: Your Honor, this is an  
19 evolutionary process. The commission hadn't spoken at the  
20 time of Chapman, although in Chapman this Court looked to  
21 the commission for guidance on the issue. Had the  
22 commission --

23 QUESTION: You're not listening to my question.  
24 I just want to know what you think Chapman should have --  
25 suppose we were rewriting Chapman today. What should it

1 say? Mixture or substance means what?

2 MR. BERGERSON: Chapman posed a different issue.  
3 Réconsidering the issue of what mixture or substance means  
4 in light of the reality found by the commission in its  
5 exploration, mixture or substance means what it says in  
6 amendment 488. It means .4 milligrams per dosage unit of  
7 LSD, so as to cohere the statute amongst itself --

8 QUESTION: Wow.

9 MR. BERGERSON: -- and to cure penalties with  
10 other penalties for like drugs.

11 QUESTION: You think a court can interpret  
12 mixture or substance to mean .4 milligram dosage of LSD?

13 MR. BERGERSON: Not in a vacuum, Your Honor, but  
14 Congress established the Sentencing Commission to do  
15 precisely what it did here.

16 QUESTION: But it didn't establish the  
17 Sentencing Commission to amend the provisions of the  
18 Criminal Code.

19 MR. BERGERSON: Nor did it.

20 QUESTION: The Criminal Code remains what it is.

21 MR. BERGERSON: Absolutely, and that's why the  
22 Sentencing Commission proclaimed that its findings were  
23 consistent with Chapman and with the statute. The  
24 commission didn't amend the Criminal Code. It kept  
25 mandatory minimum sentencing in the form that it was

1 intended by Congress to be.

2 QUESTION: But if the Criminal Code is not  
3 amended, then you still have the language to deal with,  
4 mixture or substance, and to say, well, now we see that  
5 mixture or substance means .04 grams of something when the  
6 statute doesn't say anything like that, is just a  
7 tremendous leap.

8 MR. BERGERSON: It has always been in the  
9 tradition of this Court's jurisprudence to defer to expert  
10 agencies in defining the realities of the --

11 QUESTION: Well, you mean we must defer to the  
12 Sentencing Commission in defining the terms of the  
13 Criminal Code? I thought we defined those.

14 MR. BERGERSON: No. The Sentencing Commission  
15 did not define the terms in the Criminal Code.

16 QUESTION: But you're saying it did.

17 MR. BERGERSON: I'm saying that the Sentencing  
18 Commission has come up with an interpretation of mixture  
19 or substance as it exists in the real drug markets. That,  
20 in turn, references back to the Criminal Code.

21 QUESTION: That sounds all very well, but just  
22 what exactly does it do? The Criminal Code says one  
23 thing. It was enacted by Congress, and it uses some  
24 words. The Sentencing Commission now meets and says that  
25 for guidelines purposes this means .04 something, and then

1 we simply go back and say, well, now we see that the term  
2 mixture or substance as Congress -- means .04?

3 MR. BERGERSON: Your Honor, the Sentencing  
4 Commission did not define the words mixture or substance.

5 QUESTION: You simply don't answer the  
6 questions, Mr. Bergerson.

7 Are you through?

8 MR. BERGERSON: My answer is that the Sentencing  
9 Commission did not do what -- it did not define the terms  
10 in the statute. It gave an explanation of those terms in  
11 the drug market as it was chartered by Congress to study  
12 the drug market, and it is to the commission that courts  
13 must look in terms of seeing what those words mean in the  
14 drug market Congress sought to regulate under section 841.

15 I would reserve the balance of my time.

16 QUESTION: Very well.

17 Mr. Wolfson, we'll hear from you.

18 ORAL ARGUMENT OF PAUL R. Q. WOLFSON

19 ON BEHALF OF THE RESPONDENT

20 MR. WOLFSON: Mr. Chief Justice, and may it  
21 please the Court:

22 In Chapman v. United States this Court held that  
23 the actual weight of the entire carrier medium must be  
24 used to determine whether the defendant is subject to the  
25 mandatory minimum sentencing statute for trafficking in

1 LSD, and the question in this case is whether that rule  
2 was changed by the Sentencing Commission's new LSD  
3 guideline, which does not use the actual weight of the  
4 drug and the carrier, but instead uses a constructive  
5 weight for each dose of LSD and calibrates the defendant's  
6 sentence essentially to doses of LSD.

7 QUESTION: Can they do that? Can they just  
8 ignore our interpretation of what the statute means in  
9 determining what the penalties are going to be under the  
10 statute?

11 MR. WOLFSON: Not for the purpose of determining  
12 what the penalties mean, are under the statute, no. The  
13 Sentencing Commission does not have the authority to  
14 construe terms in the mandatory minimum sentencing  
15 statute.

16 QUESTION: It seems to me we're in a very  
17 strange position here, where the minimum is determined,  
18 now determined on the basis of one theory and the length  
19 of time in prison, unless the minimum interferes, is being  
20 determined on a totally different theory.

21 Doesn't the commission, in drawing up its  
22 proposals, have to adhere to the meaning of the law as  
23 we've determined it?

24 MR. WOLFSON: Justice Scalia, we don't argue  
25 that -- leaving aside how the minimum applies, the

1 Sentencing Commission does retain authority except for  
2 that point. In other words, for sentences that fall below  
3 the 1-gram threshold, the Sentencing Commission has its  
4 plenary authority, and --

5 QUESTION: It's not plenary. I mean, it's not  
6 arbitrary either. There's no such thing as an arbitrary  
7 decision by the commission?

8 MR. WOLFSON: There is such a thing as an  
9 arbitrary decision by the commission if it were  
10 inconsistent with the Sentencing Reform Act of 1984, but  
11 we're not taking the position --

12 QUESTION: But not -- inconsistency with the  
13 criminal law whose penalties they're prescribing doesn't  
14 count. There's --

15 MR. WOLFSON: Well, for sentences that are less  
16 than 1 gram, the penalty statute doesn't apply, so it  
17 doesn't -- the statute only applies for 1 gram or more, or  
18 10 grams or more. It's a two-step threshold.

19 QUESTION: I understand, but once the minimum  
20 applies, you agree that the minimum bears no relationship  
21 to the rest of the sentencing scheme.

22 MR. WOLFSON: Once the minimum applies -- well,  
23 this Court construed -- construed Chapman, construed the  
24 minimum statute in Chapman, and the Sentencing Commission  
25 cannot -- the Sentencing Commission does not have the

1 authority to determine when the statute comes into play,  
2 but other than that --

3 QUESTION: Other than that --

4 MR. WOLFSON: Other than that, yes --

5 QUESTION: It doesn't have to construct the  
6 sentences based upon the meaning of the criminal law as  
7 this Court has interpreted the criminal law?

8 MR. WOLFSON: Congress did not require the  
9 Sentencing Commission to use the mixture or substance  
10 approach with respect to its own guidelines. Now, it did  
11 that -- it did that at the time that Chapman was decided  
12 by this Court.

13 QUESTION: I mean, Congress didn't say that  
14 explicitly, but with other agencies we certainly can say  
15 that a particular rule made by the agency produces such an  
16 illogical result that it's arbitrary, and therefore -- is  
17 there any way the commission's decision on these matters  
18 can be reversed as being arbitrary, as being contrary to  
19 law, or whatever it says is law automatically?

20 MR. WOLFSON: If it's inconsistent with the  
21 fundamental statute, which is the Sentencing Reform Act,  
22 then a guideline could be invalid, but it cannot be --

23 QUESTION: That's the only thing it can  
24 contradict --

25 MR. WOLFSON: It cannot be challenged -- it

1 cannot be challenged on the basis that it is -- on this  
2 basis that it's inconsistent with the mandatory minimum  
3 statute, and --

4 QUESTION: But it could if it worked against --

5 QUESTION: The defendant.

6 QUESTION: -- the defendant.

7 MR. WOLFSON: If it were -- yes. If it were  
8 wholly arbitrary enough to deny the defendant due process,  
9 but I -- that simply is not the case -- that is not the  
10 case here.

11 QUESTION: Well then, if that's the law --  
12 you're saying whatever the commission does is the law,  
13 then I assume that the defendant who gets hit with a  
14 mandatory minimum in a scheme that's totally different  
15 from the scheme that the commission is using for the rest  
16 of the statute, he has that claim.

17 It seems to me either the guidelines or our  
18 interpretation of Chapman denies -- it puts somebody in a  
19 very weird position. Somebody must have a claim here, and  
20 you're saying you can't challenge what the commission  
21 does.

22 MR. WOLFSON: What the commission did within its  
23 own bounds, the guideline is certainly valid, and it has  
24 the effect of considerably lowering the sentences for LSD  
25 trafficking both below the 1-gram threshold and between --



1 between the 1 and 10-gram threshold it brings most of them  
2 down to 5 years, and then above the 10-gram threshold it  
3 brings many sentences down.

4 Now, within the confines of its authority, we  
5 believe that the guideline is valid, but the commission  
6 does not have the authority to determine or to  
7 redetermine, because it would require a reexamination of  
8 this Court's decision in Chapman, when those statutes are  
9 triggered, and Congress did not delegate to the commission  
10 the authority to determine when the mandatory minimum  
11 sentencing statute applies.

12 And even if it were otherwise, the -- our  
13 position is there's no way that you can -- that the  
14 commission -- the commission's new LSD guideline, the  
15 approach that it takes to sentences for trafficking in LSD  
16 is not consistent with the Court's definitive construction  
17 of the statute in Chapman.

18 In Chapman, the Court construed the terms that  
19 were in the statute, mixture or substance, and it used  
20 traditional tools of statutory interpretation to arrive at  
21 its construction. It looked at the ordinary meaning of  
22 the words that were in the statute. It invoked the canon  
23 of interpretation that every word in the statute has to be  
24 given effect wherever possible, and as a result it  
25 concluded that so long as it contains a detectable amount,

1 the entire mixture or substance is to be weighed when  
2 determining whether a defendant is subject to those  
3 statutory penalties.

4 Now, the new guideline really is not consistent  
5 with that approach. The two approaches are not the same  
6 at all, because the new guideline --

7 QUESTION: You'd think that the more mixture you  
8 got, the more punishment you'd get, and what the  
9 commissioner has said is, no, that's not true, even though  
10 we have said the statute is based on what the mixture  
11 weighs.

12 MR. WOLFSON: That is correct. The statute is  
13 based on --

14 QUESTION: The commissioner said the punishment  
15 isn't going to be based on what the mixture weighs.

16 MR. WOLFSON: I guess --

17 QUESTION: The -- I mean, you answer it as you  
18 wish. I would have thought there are lots of statutes  
19 that govern the commission, and sometimes it's not  
20 possible to be literally consistent with the policy  
21 underlying each of them, but that's primarily a judgment  
22 for the commission, isn't it, and if it decided here that  
23 this was too tough, the mandatory minimum, because of  
24 policies involving in other statutes, maybe it has the  
25 statutory authority to do that, and then leave the statute

1 in place, because, of course, it can't trump a statute.

2 I mean, if that's -- what I'm sort of interested  
3 in here, though, is -- look, does the commission have some  
4 authority to interpret a statute in the following sense.

5 You have a piece of blotter paper. There isn't  
6 chemical binding between every molecule on the blotter  
7 paper. Suppose they throw LSD into the Atlantic Ocean.  
8 You don't weigh the entire Atlantic Ocean, so there must  
9 be some -- some technical matter where the commission  
10 might, because of its knowledge, let us know how much of  
11 the binding that takes place in a matter of degree is that  
12 portion of the paper that should count, because they would  
13 go talk to the technical experts on that.

14 Now, I guess in that sense the commission, while  
15 it couldn't legally bind the courts, could tell the courts  
16 some information that might be relevant to them in  
17 deciding how much to weigh, how much of this piece of  
18 blotter paper is actually part of the mixture or substance  
19 connected with the LSD. It could do that, couldn't it?

20 MR. WOLFSON: Justice Breyer, I -- the  
21 commission's information could be useful to the court, but  
22 the task at the end of the day is a pure one of statutory  
23 interpretation.

24 QUESTION: Oh, but -- yes.

25 MR. WOLFSON: Is this -- in the indication -- in

1 an unusual situation where there is doubt as to whether  
2 something is a mixture or substance, that fundamentally is  
3 a question of --

4 QUESTION: It's not so unusual. I take it that  
5 the molecules of the LSD thrown into the Atlantic Ocean  
6 might be dispersed among yards and yards or miles and  
7 miles of water, and so there will have to be a point where  
8 people will talk about the concentration of the LSD  
9 interspersed with the other molecules that bring it within  
10 the range, mixture or substance, and when it makes that  
11 kind of a decision, shouldn't the courts and the  
12 commission also take into account the policy that  
13 underlies this statute, namely, how big a guy Congress  
14 wants to put in jail for 5 years.

15 MR. WOLFSON: The courts take into account the  
16 objective the Congress was seeking to accomplish when it  
17 enacted the statute when it gives content to the terms,  
18 and whether it considers whether a result in a particular  
19 case is demonstrably at odds with what Congress intended,  
20 and comment by the commission can be useful to the court.

21 It can help the court understand whether it is  
22 reasonable to conclude that something was or was not an  
23 intent that Congress intended, but it is not deference in  
24 the sense that this Court conventionally uses that term as  
25 a presumptively binding interpretation of a statute in the

1 absence of a showing that it is unreasonable.

2 QUESTION: So I agree with that, but then  
3 that -- this is my -- what I'm trying to lead up to  
4 basically is the Government must have in its file  
5 somewhere the information that Congress had in its mind,  
6 whether staff or Congressmen, at the time this statute was  
7 passed, and did Congress believe that they were putting in  
8 prison for 5 years people who distributed 125 doses of  
9 LSD, or did they think they were putting in prison for  
10 5 years people who distributed 2,500 doses of LSD?

11 They could have read it in pamphlets, they could  
12 have talked to LSD people, maybe it's in hearings, maybe  
13 it was in memos, what's the answer to that question?

14 MR. WOLFSON: Justice Breyer, I have to say I do  
15 not know of the pamphlet that you are looking for. I will  
16 say that in the legislative history to the Anti-Drug Abuse  
17 Act of 1986, there is a comment that the 5-year penalty is  
18 intended for the people who keep the street market going.

19 The 10-year is intended for the people higher up  
20 the chain, the 5-year in general is for the people who  
21 keep the street market going, the people who fill the  
22 vials, who pass out the baggies, that sort of thing.

23 I do not think that it is implausible that 120,  
24 even 125 doses of LSD could answer to that description.  
25 That's a -- that is certainly somebody who is keeping the

1 street market going, and that is -- Congress could  
2 definitely conclude that that was somebody who would  
3 warrant 5 years.

4 QUESTION: But does 125-dose test apply to other  
5 drugs in the same way?

6 MR. WOLFSON: Justice Stevens, I have to  
7 acknowledge that the doses for LSD that bring into play  
8 the 5 and 10-year penalties are less than -- are lesser,  
9 fewer, rather, than they are for other drugs, but of  
10 course, that was before the Court in Chapman --

11 QUESTION: That was the argument the Court  
12 rejected in Chapman.

13 MR. WOLFSON: That was before the Court in  
14 Chapman, and essentially I think the petitioner is left  
15 with urging the same arguments and asking the Court to  
16 reconsider Chapman.

17 QUESTION: In the light -- in that light of  
18 reconsideration, would the 4 -- .4 solution that the  
19 commission has come to, would that have been a permissible  
20 interpretation of the statute for the Court?

21 Let's assume that the guideline interpretation  
22 came first. The Seventh Circuit had dealt with the  
23 Chapman issue, but this Court had not. Enlightened by the  
24 guideline, would it have been impermissible interpretation  
25 of the mixture or substance statute?

1 MR. WOLFSON: No. Justice Ginsburg, I do not  
2 think that it is -- even if the question were still open  
3 in Chapman, or if the Court were reconsidering the matter,  
4 this is not a permissible interpretation of the statute  
5 because the only reasonable reading of the statute I think  
6 is an actual -- the actual weight of an actual mixture or  
7 substance.

8 The statute says 1 gram or more of a mixture or  
9 substance. It does not refer to hypothetical abstract or  
10 constructive weight, constructive --

11 QUESTION: May I give you -- I hope it's not too  
12 hypothetical. Supposing that you have a blotter on which  
13 you normally drop a spot of ink, and you can have a  
14 blotter that's about 4 inches long, and you see the spot  
15 of ink on it. A lot of the blotter is white, and then  
16 there's a dark blue -- you can also have a blotter such  
17 as we have here, about 3 feet by 5 feet, same drop of ink  
18 on it.

19 Would it be permissible to say that the mixture  
20 or substance merely includes the discolored portion of the  
21 blotter, because the rest of it isn't mixed with the ink  
22 at all?

23 MR. WOLFSON: I think there are situations in  
24 which, because mixture means a situation in which the  
25 molecules are interspersed or distributed --

1 QUESTION: Correct.

2 MR. WOLFSON: -- among another, and that's how  
3 the Court interpreted mixture in Chapman.

4 There could be very extreme situations in which  
5 an infinitesimal amount of a substance is mixed, but  
6 that's certainly not this case --

7 QUESTION: No, it's a clearly detectable amount  
8 in order to qualify, and you can see -- with an ink  
9 blotter, it's easy. You can see how far it is. But  
10 supposing it's LSD, and you'd have a huge blotter on the  
11 one hand and a tiny blotter on the other. Do you think  
12 it's irrational to treat them the same, even though the  
13 amount of the mixture, the geographical scope of the  
14 mixture is precisely the same?

15 MR. WOLFSON: I think there are situations where  
16 you could exclude the 99 percent of unmixed blotter paper,  
17 but that is not, I must emphasize, what the commission was  
18 doing, and I have to say I think it is -- I do not think  
19 it is correct to say that the commission was really  
20 defining or considering what is a mixture, or what is a  
21 mixture or substance. I don't think that is really what  
22 the commission was doing.

23 It's true that they used the -- they kept in  
24 place the drug quantity table for purposes of convenience,  
25 and they used language referring to mixture or substance



1 except as otherwise provided, but really what they were  
2 doing was putting -- setting aside, departing from a  
3 system of sentencing based on the weight of the substance  
4 and relying, and adopting a scheme based on sentencing  
5 calibrated to the number of doses distributed.

6 Now, it's true that for purposes of convenience  
7 they assigned to each dose a particular weight, and that I  
8 think was just so they wouldn't have to write a new drug  
9 quantity table solely for LSD, because they had in place  
10 this useful system.

11 But I think it's wrong even to say that the  
12 Sentencing Commission was reconsidering what is a mixture.  
13 they really were just adopting a new --

14 QUESTION: Just saying how much of the mixture  
15 shall we count.

16 MR. WOLFSON: No, I -- not how much of any  
17 actual mixture. They were -- in other words, they weren't  
18 saying, take a piece of blotter paper and arrive at some  
19 reasonable judgment of how much is soaked with LSD. They  
20 didn't even do that, and that --

21 QUESTION: Really what they tried to do is take  
22 this market approach to it, but they still left this  
23 substance still much more heavily punished in terms of  
24 number of doses, even under the commission's formula.

25 MR. WOLFSON: Well, the commission believed that

1 it was bringing the penalties roughly in line with other  
2 substances, including PCP, making it punished slightly  
3 less than PCP because it believed that ought to be the  
4 case, but --

5 QUESTION: Well, that depends on whether you  
6 think the statute was punishing the sale of mixtures or  
7 substances or whether it was punishing the sale of hits --

8 MR. WOLFSON: Well, the statute was --

9 QUESTION: -- and the statute says mixture or  
10 substance, and that's how we interpreted it, and I don't  
11 know why the commission can conclude that really Congress  
12 was looking at -- you know, it's like the prohibition law  
13 that somehow it's -- as far as I was aware, it applied to  
14 whether the liquor was 40 proof or 100 proof. It didn't  
15 matter.

16 MR. WOLFSON: That is correct, and that was the  
17 original approach under the 1970 Controlled Substances  
18 Act, that substances were punished. It was any mixture or  
19 substance containing whatever --

20 QUESTION: Well, any mixture, and that's how we  
21 interpreted subsection 5 here, and I don't know where the  
22 commission gets off interpreting it differently for  
23 purposes of deciding what the incremental penalties are.

24 Our holding clearly is that section 5, as it  
25 says, applies to mixture or substance, and then the

1 commission comes in with a sentencing scheme that uses a  
2 totally different criteria quite inconsistent with our  
3 holding in Chapman.

4 MR. WOLFSON: Justice Scalia, I don't think that  
5 the commission was purporting to say when did the statute  
6 apply. They were drawing up their own system, but they --  
7 I do not think -- there's been a lot of discussion about  
8 what does the background commentary mean, where it says  
9 this approach does not override the applicability of  
10 mixture or substance, see Chapman and 5G1.1(b).

11 I think what that indicates is the commission  
12 recognized that Chapman and the binding force of section  
13 841 were controlling. It could not overturn that, and  
14 5G1.1(b) clearly indicates that where there is a conflict  
15 between the statute and the guideline sentencing range,  
16 the statute controls in every case.

17 However, when you read what the commission did,  
18 they were not deciding when did the 5-year and when did  
19 the 10-year mandatory minimum sentence come into play.  
20 They were setting -- and so I don't think you even get  
21 past the threshold, which is, they were not purporting to  
22 overrule Chapman or decide when the statute applies. They  
23 were setting up their own --

24 QUESTION: That may well be, Mr. Wolfson, but I  
25 have the distinct impression that if any other agency that

1 I know of interpreted a statute this way, that the minimum  
2 applies to the mixture or substance, but the incremental  
3 penalty does not apply to the mixture or substance but to  
4 the number of grams in the mixture or substance, we would  
5 say, you can't have it both ways.

6 MR. WOLFSON: Well, of course --

7 QUESTION: The statute simply is -- you must be  
8 consistent. This is irrational. It is arbitrary and  
9 capricious, and therefore the rule you've adopted is  
10 invalid. Now --

11 MR. WOLFSON: Well, of course, had there been no  
12 Sentencing Commission at all, had this just been left to  
13 the discretion of the district judges, as it was before --  
14 of course, there wasn't any mandatory minimum sentence,  
15 but had there just been mandatory minimum statutes and  
16 pure discretion of the district judges, the district  
17 judges could have sentenced all offenders who came within  
18 the reach of the statute at the low end --

19 QUESTION: There would have been nothing  
20 inconsistent with any law, however.

21 QUESTION: And why concede that it's irrational,  
22 because after all, the commission operates under a  
23 mandate, which is to make sense of a crazy quilt of  
24 criminal punishment sentences statutes which create a  
25 crazy quilt of policies that one cannot live up to each

1 policy in every area that the statute doesn't cover,  
2 right? That's their basic mandate.

3 MR. WOLFSON: I certainly --

4 QUESTION: So in fact there is no way to follow  
5 the mandatory minimum drug penalties into areas where they  
6 don't -- I mean, all right. Anyway, we --

7 MR. WOLFSON: I certainly don't believe that  
8 there was an irrational result, and the petitioner had --

9 QUESTION: Mr. Wolfson, is this discussion  
10 academic to the extent that there's nobody qualified to  
11 challenge what the commission has done for the purpose of  
12 computing the guideline sentence?

13 That is, you could have said to Congress, don't  
14 let this one go through because we disagree with it, but  
15 you are not equipped now, you have no way of asking this  
16 Court, and you're not asking this Court to change the  
17 commission's interpretation.

18 MR. WOLFSON: We are certainly not asking this  
19 Court to hold that the guidelines are invalid, the  
20 guideline sentencing range are invalid, even after --

21 QUESTION: And that's what this -- what I -- the  
22 interesting problem to me, which I don't have the answer  
23 to, is this is a statute that if you take it literally it  
24 seems as irrational as any that we've come across, because  
25 it seems as if somebody threw LSD into the Atlantic Ocean,

1 you would weigh the entire Atlantic Ocean, and so what is  
2 it -- what way is there to interpret this statute that  
3 does not produce in some instance absurd results? How do  
4 you define mixture and substance to avoid that very odd  
5 result?

6 MR. WOLFSON: Well, first, this is clearly not a  
7 case where -- a case like that.

8 QUESTION: If he sells the Atlantic Ocean you'd  
9 get him, wouldn't you, for the minimum?

10 (Laughter.)

11 MR. WOLFSON: I --

12 QUESTION: Would you get him for the minimum or  
13 not?

14 MR. WOLFSON: I would have to --

15 QUESTION: You would pursue for the minimum,  
16 would you not?

17 MR. WOLFSON: But I would expect to be rebuffed.

18 QUESTION: Worried about that happening?

19 (Laughter.)

20 MR. WOLFSON: I don't think -- I think that  
21 Congress can certainly write a statute for the majority of  
22 the cases, and that's what Congress has done here.

23 QUESTION: Mr. Wolfson, my line of inquiry is  
24 not academic. I seriously do not know whether I can go  
25 along with the Government if I think that the result of

1 going along with the Government is endorsing a system that  
2 has such incompatible sentences. It is irrational, to my  
3 mind, and you are telling me that there is nothing that  
4 the Government can do about the guidelines, is that right,  
5 so that my only choice is to reinterpret the statute.

6 MR. WOLFSON: No, the Government has -- in other  
7 cases, the Government -- there are cases currently going  
8 on in the Federal system where the Government is  
9 challenging the validity of a guideline, not as  
10 inconsistent with -- not as inconsistent with a separate  
11 penalty statute --

12 QUESTION: Yes.

13 MR. WOLFSON: -- that the Sentencing Commission  
14 does not have authority to construe, but as inconsistent  
15 with provisions of the Sentencing Reform Act.

16 QUESTION: But it is the Government's position  
17 that the guidelines can be as inconsistent as you like  
18 with the substantive criminal statutes, including  
19 minimums. Is that the Government's position?

20 MR. WOLFSON: If they are inconsistent in the  
21 sense -- if they are inconsistent in the sense that they  
22 interfere with the ability of the minimums to apply,  
23 obviously not, but if they are within the Sentencing  
24 Commission's own sphere, own domain, as is the case with  
25 less than 1 gram here, that that -- the Sentencing

1 Commission is not --

2 QUESTION: Why can they not be unlawful because  
3 they are incompatible with the substantive criminal  
4 statute?

5 MR. WOLFSON: Because the Sentencing Commission  
6 is not under a statutory obligation to bring those  
7 guidelines into conformity with the -- with 841(b) for  
8 offenses that don't meet the threshold for that statute to  
9 apply. The Sentencing Commission is following its general  
10 authority under --

11 QUESTION: Well, then you have a problem with  
12 me. If they don't have to follow us, maybe we should  
13 revise our law to follow them, because otherwise the  
14 system in place seems to me quite irrational.

15 MR. WOLFSON: Well, now, Justice Scalia, let me  
16 point out that, of course, Congress could have  
17 decriminalized LSD altogether under 1 gram. There could  
18 be no penalty, and -- or Congress could have said, for  
19 1 gram or less, we simply don't think it's a matter of  
20 Federal concern, and we'll leave it up to the States to  
21 punish. Now, there would be nothing --

22 QUESTION: Congress could be irrational. They  
23 are entitled to be irrational. Agencies cannot. We have  
24 doctrines about arbitrary and capricious agency action.

25 MR. WOLFSON: Well, on its own terms, of course,



1 there's -- what the Sentencing Commission has done, the  
2 scheme that they have set up is not arbitrary. It's  
3 appropriate to base -- we would agree that it would be  
4 appropriate to base a sentencing scheme on doses of LSD,  
5 but it's not arbitrary and capricious, but neither is it  
6 contrary to law, because it does not run up against any  
7 limit on the Sentencing Commission's authority to set --

8 QUESTION: Nothing in the submission of this  
9 case raises any question about the rationality of the  
10 guidelines, does it? The petitioner was sentenced under  
11 the provisions of Chapman.

12 MR. WOLFSON: That is correct.

13 QUESTION: He said he should have been sentenced  
14 under the guidelines and the district court refused to do  
15 so, and the court of appeals upheld it.

16 MR. WOLFSON: That is correct, so --

17 QUESTION: Well, the guidelines did have an  
18 impact to this extent. He ended up with less --

19 MR. WOLFSON: Yes.

20 QUESTION: -- than he did when the commission  
21 was interpreting the guideline in sync with the way this  
22 Court has interpreted the statute.

23 MR. WOLFSON: Yes, and we agreed --

24 QUESTION: There was a lot of months difference,  
25 wasn't there?

1 MR. WOLFSON: Yes. It was I think almost 5  
2 years, 5 or 6 years difference in his sentence, and we  
3 agreed to that extent, that he was entitled to a reduction  
4 in his sentence down to 120 months.

5 QUESTION: Mr. --

6 QUESTION: He points to somebody else who has  
7 sold a whole lot more of grams of the substance, and this  
8 other person who's sold a whole lot more still only gets  
9 10 years.

10 MR. WOLFSON: Well, of course, Congress could  
11 have adopted a determinate sentence approach as well.  
12 This again was before the Court in Chapman, and had  
13 Congress said, if you sell 10 grams or more of a mixture  
14 or substance for LSD, you get 10 years, no -- you know,  
15 no -- nothing higher, nothing lower. That's a -- it's a  
16 completely determinate sentence. That would be rational,  
17 and that was a system in sentencing that was common in  
18 this country until a generation or so ago.

19 QUESTION: Mr. Wolfson, if the Government did  
20 think that what the guidelines -- what the Sentencing  
21 Commission did in adopting a particular guideline was  
22 irrational in light of the statutory language and the  
23 scheme that's in place, exactly what is it that the  
24 Government can do to challenge it?

25 You can tell Congress when they're looking at

1 the guidelines that you don't think it should be allowed  
2 to go into effect?

3 MR. WOLFSON: Two things. Certainly during the  
4 180-day period we could go to Congress and ask Congress --

5 QUESTION: And failing that, if that is not  
6 done, you just were asleep at the switch over there in  
7 looking at it, what later could you do?

8 MR. WOLFSON: In another -- in a case involving  
9 a different issue, we -- the Attorney General has  
10 instructed the U.S. attorneys to oppose application of a  
11 guideline in particular cases and to appeal sentences if  
12 they're based on the guidelines, because in that case we  
13 believe they're inconsistent with the Sentencing Reform  
14 Act.

15 QUESTION: With the statute, and therefore  
16 irrational and arbitrary and invalid.

17 MR. WOLFSON: I would say contrary to law, is  
18 how I would describe it.

19 QUESTION: And then if you prevail in that, what  
20 happens if the guideline is simply obliterated? I mean,  
21 what's left?

22 MR. WOLFSON: Well, in that case --

23 QUESTION: In this other case you're --

24 MR. WOLFSON: Right. In another case we -- it's  
25 our position that there's a statute that requires -- it

1 requires the Sentencing Commission to base guidelines on  
2 a -- the highest available sentence under a statute, and  
3 the question is whether that -- if I have it correctly,  
4 whether that involves -- the calculation has to be made  
5 with --

6 QUESTION: Then sentencing --

7 MR. WOLFSON: -- counting prior convictions or  
8 not.

9 QUESTION: And sentencing is just held in  
10 abeyance until there's some new guideline.

11 MR. WOLFSON: In that case we think there's only  
12 one possible interpretation of the statute.

13 QUESTION: I see.

14 MR. WOLFSON: In sum, as earlier, we argued that  
15 the Chapman rule remains the controlling interpretation of  
16 section 841, and we would request the judgment of the  
17 court of appeals be affirmed.

18 QUESTION: Thank you, Mr. Wolfson.

19 Mr. Bergerson, you have 4 minutes remaining.

20 REBUTTAL ARGUMENT OF DONALD T. BERGERSON

21 ON BEHALF OF THE PETITIONER

22 MR. BERGERSON: Thank you.

23 Congress created the Sentencing Commission with  
24 the idea of reconciling and eliminating precisely the  
25 irrationalities we have now been talking about for an

1 hour, and which we've been talking about since the Chapman  
2 case.

3 The place is to inform the courts of the  
4 realities of criminal sentencing, and that's why this case  
5 is before this Court now.

6 The commission recognized in this case by a  
7 factual finding of great quality and depth that the  
8 sentencing in LSD cases was irrational and not consistent  
9 with the statute as it interpreted as a whole, but more  
10 than that, it defined the reality of what mixture or  
11 substance containing LSD means in accordance with the  
12 market realities of 841. It didn't purport to overrule  
13 this Court, and it said it wasn't doing so, but it did  
14 give a new plain meaning to the word.

15 This Court recognized that the commission had  
16 precisely this place in the scheme of things. What we're  
17 asking the Court to do is to allow the commission to do  
18 here what the commission does all the time, which is to  
19 establish binding guidelines for sentencing in criminal  
20 cases.

21 Our position is that .4 milligrams of LSD is a  
22 mixture or substance containing LSD within the meaning of  
23 section 841(b) in light of the realities, and that under  
24 this Court's jurisprudence, deference should be paid to  
25 what the commission has done.

1                   If there are no further questions, we would  
2 submit.

3                   CHIEF JUSTICE REHNQUIST: Thank you,  
4 Mr. Bergerson. The case is submitted.

5                   (Whereupon, at 11:57 a.m., the case in the  
6 above-entitled matter was submitted.)

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## 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:*

MEIRL GILBERT NEAL, Petitioner v. UNITED STATES

CASE NO.: 94-9088

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

BY Ann Marie Federico

(REPORTER)