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# Supreme Court of the United States

October Term, 1968

In the Matter of:

----- Docket No. 477

UNITED STATES OF AMERICA,

Petitioner,

vs.

UNITED STATES COIN AND CURRENCY, et.

Claimant-Respondent.

-----

Office Supreme Court, U.S.  
**FILED**  
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Place Washington, D. C.

Date February 26, 1969

2<sup>d</sup> Arg't.

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C O N T E N T S

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ORAL ARGUMENT OF:

P A G E

Philip A. Lacovara, Esq.  
on behalf of Petitioner . . . . . 9

Anna R. Lavin on behalf of  
Claimant-Redpondent . . . . . 25

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 -----x  
 4 United States of America, :  
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Petitioner, :

v. : No. 477

United States Coin and Currency, et. :  
 Claimant-Respondent. :

10 Washington, D. C.  
11 Wednesday, February 26, 1969.

12 The above-entitled matter came on for argument at  
13 10:10 a.m.

14 BEFORE:

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

23 APPEARANCES:

24 PHILIP A. LACOVARA, Esq.  
 Office of the Solicitor General  
 Department of Justice  
 Washington, D. C.  
 (pro hac vice)

25 ANNA R. LAVIN  
 53 West Jackson Boulevard  
 Chicago, Illinois 60604  
 (Counsel for claimant-respondent)

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

2                   MR. CHIEF JUSTICE WARREN: No. 477, United States  
3 versus United States Coin and Currency.

4                   Mr. Lacovara.

5                   ORAL ARGUMENT OF PHILIP A. LACOVARA, ESQ.

6                   ON BEHALF OF PETITIONER

7                   MR. LACOVARA: Mr. Chief Justice, and may it please  
8 the court.

9                   I would like to resume this morning by restating  
10 briefly the Government's basic position in the Internal Revenue  
11 Forfeiture Case and it is that unlike Marchetti and Grosso  
12 which involved punishment for refusing to come forward to  
13 disclose information that would have been incriminatory.

14                   Internal Revenue forfeitures of the type involved in  
15 this case do not involve any punishment for anyone's invocation  
16 privilege against self-incrimination.

17                   Rather, we submit, unlike the common-law type of  
18 forfeiture which attached in personam upon the criminal con-  
19 viction of a felony. Internal Revenue forfeitures historically  
20 and legally are quite different, critically different we think,  
21 for these purposes in that liability or guilt if you choose to  
22 use that term attaches directly to the property and not to any  
23 person and the forfeiture is not punishment directed at anyone  
24 but is simply a remedial device for safeguarding the public fisc.

25                   Q     Of course, if the property belongs to somebody

1 A Normally the property belongs to someone, yes.

2 Q I mean the property belongs to somebody.

3 A The idea ---

4 Q Semantics.

5 A Yes.

6 Q The derivation of the word property.

7 A That is right.

8 The forfeiture statutes like the one in question  
9 declare that property rights shall not exist in property in  
10 physical items any longer after certain conditions are met so  
11 there is undoubtedly an item that was at one point someone's  
12 property which no longer is his.

13 Q And this was between \$8,000 and \$9,000?

14 A This was \$8,674 which belonged to someone we  
15 know not. Donald Angelini claimed property. It was in his  
16 pocket. It was seized when he was arrested at Sportsman's Park  
17 in August of 1964.

18 Q The same rule that you are contending for would  
19 have applied whether it had been 5 cents or a million dollars.

20 A That is right.

21 Q It has no relationship at all to any tax lia-  
22 bility he might have had?

23 A That is correct. We think that indicates ---

24 Q You mean the amount?

25 A Pardon me?

1 Q You mean the amount that has no relationship?

2 A Yes, the amount of the forfeiture, the value of  
3 the forfeiture is unrelated to the amount of tax liability that  
4 the individual has but I think it is important to point out  
5 that the items which were the property of an individual are  
6 not necessarily owned by the person who has the tax liability.

7 And that is the essence of our position in arguing  
8 that Internal Revenue forfeitures are not penal.

9 Q May I ask you one question?

10 Suppose the Congress had used the words, actual words,  
11 "This shall be considered as a punishment and the Government  
12 shall be allowed to get it as a punishment." Would Marchetti  
13 cover it?

14 A I think we would have a much more difficult case,  
15 your Honor. And I think Boyd ---

16 Q Do you think there would be any doubt about it?

17 A Boyd I think would then, would probably be  
18 controlling in that situation. We think of Boyd as explained  
19 by this Court in the case in which we principally rely,  
20 Helvering against Mitchell, 303 U.S.

21 Q Justice Brandeis'?

22 A Justice Brandeis' opinion over the sole of the  
23 Senate to Justice McReynolds.

24 Justice Brandeis explained that Boyd was careful to  
25 distinguish the penal and remedial forfeitures and, of course,

1 Justice Bradley's opinion does make that careful distinction  
2 and determines that the forfeiture in that case was one that  
3 was penal in the common-law sense in that it attached because  
4 of the particular individual's criminal liability and Justice  
5 Bradley said that the Government in that case could have pro-  
6 ceeded directly against the owner of the property for committing  
7 a crime and included in the judgment of criminal conviction  
8 could have been a decree forfeiting property.

9 That was the common-law method of forfeiting property.  
10 Justice Bradley carefully distinguished, however, the statutory  
11 forfeitures which are unconcerned with anyone's criminal con-  
12 viction or even with anyone's amenability to criminal prose-  
13 cution.

14 Q What are the remedial forfeitures for? You say  
15 they are remedial.

16 A There are two purposes.

17 Q What are they for?

18 A Two purposes I would say. One is to remove from  
19 circulation the physical means, the wherewithal by which an  
20 activity has been carried in violation of the Internal Revenue  
21 laws so that tax liability has not been paid.

22 This prevents a repetition of the same offense. It  
23 is easiest to visualize in the case of a truck ---

24 Q Was that the violation?

25 A Conducting a wagering business on which the

1 occupational and excise taxes have not been paid.

2 Q So it is a failure to pay the tax, you say is  
3 the legal violation, not the failing to register?

4 A That is correct.

5 The cases and the statute focus on the use of  
6 the property in a way that is inconsistent where in violation  
7 of the Revenue laws. It is carrying on an untaxed business.

8 Q Well, this will make it even less likely that he  
9 can pay the tax or that you can collect the tax?

10 A I am sorry, I don't see that.

11 Q Well, if he takes all his money away from him  
12 that he has earned gambling, how can he pay his tax if you say  
13 he hasn't paid?

14 A Well, this was the distinction I was trying to  
15 draw before. Money is not necessarily his. The money is owned

16 ---

17 Q Yes, but it is sometimes.

18 A It sometimes is.

19 Q Well, it is here.

20 A In the event the individual has no more funds  
21 than are actually seized from him because they have been used  
22 in violation of tax. I don't think that the public revenues  
23 are in any way harmed because by definition in that situation  
24 the Government could not have obtained any greater tax revenue  
25 at all.



1 Q But you don't credit his tax liability?

2 A No, for the simple reason the seizure is unre-  
3 lated to his tax law.

4 Q So what is the second purpose?

5 A The second purpose, again explained in the  
6 Helvering against Mitchell is that this type of forfeiture makes  
7 the Government whole for the cost of investigating a tax  
8 default and it reimburses for the additional amount of time  
9 and effort that it takes to investigate a tax liability which  
10 has not been satisfied by voluntary ---

11 Q You wouldn't say the remedial type of forfeiture  
12 is ever aimed at encouraging people to pay their taxes?

13 A Oh, I won't say it has no role or no effect in  
14 encouraging people to pay their taxes, but it is not primarily  
15 designed for that purpose and historically its focus is not  
16 upon the individual who has failed to pay the taxes.

17 Q Well, assuming that it was, let us suppose  
18 Congress said it was perfectly clear that Congress intended  
19 the forfeiture provisions to deter people from not paying or  
20 to encourage them to pay. Would you be in any worse shape than  
21 you are now?

22 A Oh, I think I would have to concede I would be  
23 in slightly worse shape but I think I would be prepared to  
24 defend that. Because as I was saying yesterday the lynch pin  
25 of our argument is the continuing validity of the wagering

1 tax.

2 Q You concede that Marchetti, where some pressure  
3 is utilized to force the person to come forward and pay his  
4 gambling tax?

5 A No, I won't concede that.

6 Q Why?

7 A And the reason is this: The Court as far as I  
8 know has not established a blanket rule that no sanction can  
9 attach to the invocation privilege.

10 We think that the case that is the closest to this  
11 conceptually is the decision in Campbell Painting Company  
12 versus Reid, last term, in which as the Court will well remember  
13 a New York statute which the Court itself termed, 1, it was  
14 intended to levy a penalty in order to deter people from  
15 invoking the privilege against self-incrimination provided  
16 that a corporation which had contracts, corporation/individual  
17 which had contracts with the State, to be ineligible for  
18 further contracts would have its present contracts cancelled.

19 If an officer, or the individual having the contract  
20 refused to testify before the Grand Jury and waives privilege  
21 in that decision over the dissent which pointed out that the  
22 financial consequences of this cancellation were going to fall  
23 directly upon the individual who had invoked the privilege,  
24 because he was both the President of the corporation and the  
25 principal shareholder.

1           The Court nevertheless held that the corporation was  
2 in no position to take advantage of the penalty imposed because  
3 of the President's invocation of the privilege.

4           We think this case is a fortiori because we reject  
5 the notion and the Sixth Circuit in Dean has held and this  
6 Court in Helvering and other forfeiture cases held that  
7 forfeitures are to penalize anyone.

8           Q     Well, if you had taken out the gambling stamp  
9 you couldn't have seized the money could you?

10          A     Well, if he had not paid the excise taxes, the  
11 operation still would have been conducted in violation of the  
12 Wagering Tax Act.

13          Q     Well if he bought the stamp and filled out all  
14 of this material and paid 10 cents in tax, you couldn't have  
15 seized the money, could you?

16          A     Now that is not true either because the record  
17 shows that at Sportsman's Park there were other individuals  
18 apparently working for or at least with Mr. Angelini in taking  
19 non-pari mutuel wagers.

20                If any of those individuals were not registered, had  
21 not paid the occupational tax the money that they collected  
22 would still have been collected and used as the statute says  
23 in violation of the Internal Revenue law.

24                So even though the money was then handed to Angelini  
25 who was lawfully registered ---

1 Q If all ---

2 A He was still subject to seizure.

3 Q If all of the bookies in Sportsman's Park bought  
4 stamps you wouldn't have been able to seize the money. Is  
5 that right?

6 A That is correct.

7 Q And paid the tax.

8 A Assuming they had all complied with the Internal  
9 Revenue statutes there would be no basis for seizure under the  
10 statute.

11 Q There would be no connection between the stamp  
12 and the seizure?

13 A The absence of the stamp is certainly the  
14 ingredient in this case as far as we endeavored to prove that  
15 made this money items used in violation of the Internal Revenue  
16 law.

17 Q I suppose you argue that the Government insti-  
18 tuting a forfeiture proceeding doesn't itself incriminate this  
19 man or just a fact of forfeiture. You first have to prove  
20 he has been gambling, independent evidence.

21 A We have to prove that someone was gambling and  
22 that this money was used in the course of an unregistered  
23 gambling operation. The Government, of course, bears the  
24 entire burden of proof and that is why it is quite different ---

25 Q But there is something incriminating in this

1 -- there something incriminating, it is just flows from the  
2 fact that you have proved he has been gambling?

3 A Well, that is true, but in Grosso and Marchetti  
4 the same thing was true.

5 Q Oh, yes.

6 A So we couldn't prosecute.

7 Q Why do you say unregistered gambling?

8 A Because the occupational tax in Section 4.4.1.1

9 Q I understand and the stamp.

10 A Yes, and the stamp ---

11 Q The stamp is the registering?

12 A No, the next section, Section 4412 says that  
13 people required to pay the occupational tax are also required  
14 to register. In fact, as the Court said in Marchetti---

15 Q Well, when you said unregistered gambling I was  
16 trying to be sure which registering you were talking about.

17 A Well, I ---

18 Q You were talking about the second one, not the  
19 stamp, the second one?

20 A The Court said quite directly in Marchetti that  
21 the two are interrelated and it is impossible to pay the  
22 occupational tax without registering. But I don't try to make  
23 any distinction on that point.

24 Q What if I violate the income tax law by paying  
25 a dollar less tax than I owe. Do you take everything I have

1 because all of it was involved?

2 A No. The cases are fairly clear. These statutes  
3 are not new and they have been construed on literally hundreds.  
4 It has to be some property which is integrally related to the  
5 violation of the statute.

6 Now, perhaps if your adding machine had been involved  
7 in your computation of your tax liability and if you had  
8 violated the Internal Revenue laws by deliberately failing to  
9 pay it ---

10 Q To my pen and pencil, I guess, too?

11 A Even your pen and pencil, that is true. But,  
12 your house wouldn't be seized or your car. It is only the  
13 property, as the statute says, that is used in violation of  
14 the statute.

15 In the cases, including the case relied on by the  
16 claimant for his Court of Appeals decisions say that the focus  
17 is on the use of the property and there doesn't have to be any  
18 specific intent to violate any particular Internal Revenue  
19 statute.

20 Q The type of a consent ---

21 A Well ---

22 Q Deodans.

23 A Exactly. It is fiction and no one contests that  
24 but it is one that we think has meaningful content to it and  
25 it is one that the Court in Goldsmith-Grant Case, 254 U.S.

1 said is so primely fixed in Anglo-American jurisprudence that  
2 in the absence of compelling circumstances that I don't think  
3 are presented in this case the Court should be reluctant to  
4 repudiate 600 years of our jurisprudence.

5           It is a fiction but because it does historically and  
6 legally operate irrespective of the criminal liability of the  
7 owner and because this Court has consistently sustained the  
8 Constitutionality of this type of forfeiture, we think it  
9 critical that these statutes do not focus on the criminal  
10 liability of the owner or the possibility that he might be able  
11 to resist prosecution as in Marchetti and Grosso by invoking  
12 the privilege against self-incrimination.

13           The focus in this case, this type of forfeiture is  
14 on the property's use and we think that since property clearly  
15 has no privilege against self-incrimination it is inherently  
16 a personal privilege.

17           We think the case follows rather logically from the  
18 Campbell Painting Case where the Court said there that the  
19 actual focus of the penalty in that case and I reiterate that  
20 we do not consider this type of forfeiture penalty and this  
21 Court has never treated it as such.

22           But in Campbell Painting the penalty focused on a  
23 corporation which has no privilege and the Court said the  
24 corporation, therefore, is in no position to complain that  
25 an individual that the occasion for the penalty has been the

1 invocation of the privilege by an individual.

2 Q What do you think even if you are right that the  
3 forfeiture wasn't motivated by any desire to encourage the  
4 payment of the tax or to encourage registration, what do you  
5 think the operative effect of the forfeiture provision is? Do  
6 you think ---

7 A I think as a factual matter we can say fairly  
8 confidently it does not provide any great impetus to an indi-  
9 vidual to come forward and register.

10 Q Or to pay the tax.

11 A Or to pay the tax. Because in fact, as this  
12 case illustrates the man is not terribly disadvantaged by the  
13 seizure of this property. This was the bank roll used in con-  
14 ducting the illicit business. It is just one of the risks of  
15 the game.

16 I think it could be fairly said that ---

17 Q He says to himself, "Well, I can't go to jail if  
18 I don't pay," under Marchetti "but I am liable to lose my  
19 winnings so maybe I had better ---"

20 A The worst that can happen is that money which  
21 has been used in violation of this act which may or may not  
22 belong to me in the Dean Case from the Sixth Circuit \$300,000  
23 was involved and the District Court said that even though it  
24 was seized from the home of the Deans it apparently did not all  
25 belong to them because they provided the banking clearing house



1 for the gambling operation.

2 I think that illustrates that the loss does not  
3 necessarily fall on the person who otherwise would be compelled  
4 to come forward to pay the tax and to register.

5 It is not a direct causa nexis prompting to give  
6 incriminatory information.

7 Q When you are offered, what does the Government  
8 do with it?

9 A It is paid to the Treasurer as part of Internal  
10 Revenue collections.

11 Q To use it.

12 A The Government, yes, it is covered into the  
13 General Treasury.

14 Q Is that true about automobiles?

15 A The Government can either use them if the agency  
16 so determines or it can auction them off.

17 Q How many different kinds of forfeitures does the  
18 Federal Government have?

19 Do you have any idea?

20 A Literally dozens. That is literally dozens of  
21 violations can result in certain types of forfeitures. They  
22 are not all, we concede, Internal Revenue forfeitures. Some  
23 I think you would have to contend or concede would be more of  
24 the penal kind than this type of case.

25 Q Do any of them result in forfeiture of people's

1 farms out in the country?

2 A The liquor laws, violation of laws regulating  
3 distilleries.

4 Q You take their home?

5 A Yes, sir.

6 I would like to say that we have argued that in the  
7 event the Court determines that Marchetti and Grosso could  
8 apply to forfeitures of this type the decision should not be  
9 made retroactive and should apply only to seizures made after  
10 the date of those decisions.

11 We think the Court's power to make new constitutional  
12 rules prospective only now is well settled and that each of  
13 the three factors to be considered cancels prospective appli-  
14 cation in this case.

15 We have discussed the effect and the reliance in our  
16 brief and I would like to say that the terms of the purpose  
17 of the new rule we suggest that the protection of the Fifth  
18 Amendment which would be the essential purpose of this rule  
19 would not be measurably advanced by applying it in this type  
20 of case retroactively when, by definition, the individual has  
21 not come forward to waive his privilege and has not given any  
22 information which would be incriminatory.

23 Q Well, that would result in an affirmative here,  
24 then?

25 A No, it would have to result in a reversal

1 because the seizure in this case ---

2 Q You want to make this retroactive in this case?

3 A No. We are the petitioner in this case,  
4 Mr. Justice Douglas. The Seventh Circuit has reversed the  
5 decree of forfeiture and our proposed judgment at least we say  
6 the forfeiture, the application of the Fifth Amendment does  
7 not bar seizures which took place as in this case 4-1/2 years  
8 before the Grosso and Marchetti so that the Seventh Circuit's  
9 judgment should be reversed.

10 Q I understand. But that is inconsistent with  
11 your philosophy that this rule should be made perspective.

12 A No, the rule I am saying, should be made  
13 perspective if the Court rejects our basic position, is that  
14 Grosso and Marchetti and the principles announced therein can  
15 constitute a substantive defense to an Internal Revenue  
16 forfeiture proceeding.

17 Q I see.

18 A In that situation that will not apply at this  
19 proceeding and the Government would be entitled ---

20 Q I misunderstood you.

21 A I would like to save the remaining time for  
22 rebuttal.

23 MR. CHIEF JUSTICE WARREN: All right.

24 Miss Lavin.

1 ORAL ARGUMENT OF ANNA R. LAVIN

2 ON BEHALF OF CLAIMANT-RESPONDENT

3 MISS LAVIN: Mr. Chief Justice, and may it please  
4 the Court.

5 The Assistant Solicitor General made the statement  
6 that the seizure of this money did not disadvantage Mr. Angelini.  
7 I must immediately reply that it did disadvantage Mr. Angelini.  
8 Mr. Angelini did go to jail and this money was the main evidence  
9 against him.

10 He also said "The money belongs to we know not whom."  
11 I submit that that is fairly well ignoring the record.

12 Mr. Angelini claimed this money under oath as owner  
13 and that was never put into contest and was ---

14 Q Is the fact of his going to jail in this record?

15 A Oh, yes.

16 Q What did he go to jail for?

17 A For this violation under 4411 and 4412, the 7302 for  
18 This particular operation, the Sportsman's Park operation,  
19 arising out of this arrest ---

20 Q What was he convicted for?

21 A He was convicted of willful failure to file  
22 under 4412 and willful failure to pay ---

23 Q But that conviction can't stand?

24 A That conviction has already been served.

25 Q Oh, it was already served. I see.

1 A Yes, sir.

2 I might say also that the Assistant Solicitor General  
3 yesterday overlooked that aside from the fine of \$2500 and  
4 the 60 days in jail he also was given a 3-year probationary  
5 period.

6 Q But since Marchetti and Grosso this would not  
7 happen to him?

8 A This would not.

9 Q No.

10 And the money would not have been used against him.

11 A That is true. Yes, sir.

12 Q It has nothing to do with the issue before the  
13 Court now.

14 A I don't think it has either

15 I just wanted to point out that there has been some  
16 disadvantage.

17 I might say in regard to the proof on this libel,  
18 there was a showing that he hadn't filed under 4411 and under  
19 the first decision of the Court of Appeals which affirmed the  
20 forfeiture they said this amount of cash justified that he  
21 was in the bookmaking business.

22 This they termed as the ready-cash theory, though  
23 he was not truant to have taken any of that money as wagers  
24 on the day that he was arrested. No wagers were seen being  
25 taken by him. He paid out no money in response to collection

1 wagers.

2 When this Court vacated the decision of the Seventh  
3 Circuit ---

4 Q If that would be true, using the money to prove  
5 that he was a gambler would be true whether there was a for-  
6 feiture proceeding or not.

7 A That is true.

8 I am talking about this particular track, this  
9 particular track. When this Court refers to and was remanded  
10 for reappraisal of this forfeiture in the light of Marchetti and  
11 Grosso that Court reversed finding that this forfeiture or  
12 what develops into a forfeiture, Mr. Angelino was given a  
13 choice between self-incrimination and forfeiture of property  
14 and the Seventh Circuit found that was impermissible.

15 It is, of course, clear that the obligation to  
16 register and pay the occupational tax under the Marchetti Case  
17 was recognized as creating real and appreciable attitudes of  
18 self-incrimination.

19 I assume that the question here is whether Mr. Angelino  
20 forfeits his property for failing to assume those hazards and  
21 for refusal, actually, to waive his constitutional privilege.  
22 The Government, of course, argues that it should on several  
23 grounds.

24 The Government in its brief ---

25 Q Well, I thought that the Government said that

1 the forfeiture was for refusing to pay the tax.

2           A     And for refusing to register. This Court  
3 recognized in the Marchetti case that you couldn't do one without  
4 the other if you offered to pay the tax, they wouldn't take it.  
5 The Internal Revenue wouldn't take it unless you registered and  
6 incriminated yourself or asked, what were obviously incriminatory  
7 questions, certainly under Illinois law, as well as most States  
8 in the United States.

9           Q     I think it is interesting that the Government in  
10 its argument actually resisted in the application void to this  
11 case. Yet almost from the inception of the argument here  
12 yesterday the Government relied on Boyd as authorizing seizure  
13 of these moneys.

14                   Now last night I went to Boyd and studied it very  
15 carefully. I wanted to determine what was the source of this  
16 argument that was made yesterday. I could only find a possible  
17 reference at page 623 of the Boyd opinion where the Court was  
18 detailing antecedent history.

19                   In considering the statute that made it mandatory  
20 upon order of Court for a man to deliver his private books and  
21 papers to determine whether or not he had paid the proper  
22 duties the Supreme Court in Boyd said even the obnoxious writs  
23 of assistance didn't go this far.

24                   They said there when they entered into warehouses  
25 onto ships they at least were looking for stolen property or

1 property on which no duty had been paid. This they said was  
2 not as bad as what the contested statute in Boyd did. However,  
3 that Court was not endorsing writs of assistance. It was  
4 merely saying that this statute was even worse. It was saying  
5 that writs of assistance, as obnoxious as they were not  
6 compelling a man's testimony against himself out of his own  
7 mouth.

8 At least according to the Boyd Case the writs of  
9 assistance allow search for what was actually contraband. And  
10 in that sense they weren't as bad as the compelling self-  
11 incrimination by a person's power to prior papers. Private  
12 papers.

13 But as I say, they were not endorsing searches in  
14 violation of the Fourth Amendment nor can the Government here  
15 convert the words from Boyd into an endorsement of violation of  
16 the Fifth.

17 The Government's invocation of Boyd yesterday on  
18 argument I submit is both timewise inappropriate and context-wise  
19 inappropriate.

20 It is clear, I think, from our argument that we rely  
21 on Boyd and submit to this court that the decision of the  
22 Seventh Circuit can only be reversed if Boyd is overruled and  
23 abandoned.

24 The Government proposes to this Court that this  
25 forfeiture is remedial and not punitive. I am not entirely,



1 sir, sure I understand this argument. I wasn't sure when I  
2 received the brief.

3 If, as I think it does, punitive means punishment for  
4 a wrong and remedial as used here, would seem to me to compen-  
5 sate for a wrong. If that is the argument I submit to this  
6 Court it must be rejected.

7 The occupational tax is, as the Court knows, \$50.  
8 The forfeiture here is \$8600. It would seem that the served  
9 discrepancy between the amounts would defeat the argument, but  
10 even if that does not happen, the practicalities of the matter  
11 should.

12 This \$50 tax and the penalties and the interest that  
13 accrue on it have already been accessed independently by the  
14 Government and they have been collected.

15 The Government's own actions in an independent  
16 accessment in collection reject the possibility that the  
17 seizure here is compensatory rather than impunitive. I submit  
18 they are clearly punitive and, therefore, they are quasi-  
19 criminal contrary to what the Government proposes.

20 Q I didn't understand the Government's argument  
21 that this was compensatory, but merely that this is a seizure  
22 of a thing in rem sort of proceeding to get out of circulation  
23 the instrumentality that is used in violation of the tax laws,  
24 like the seizure of a slot machine or dice or something like  
25 that. But I didn't understand the Government's argument to

1 mean that this is any way compensatory because as the Government  
2 has and thus has conceded and must concede this would be -- the  
3 same rule would apply whether this is 5 cents or \$50 million.

4 A Yes.

5 Q I was taking out of circulation as I say a slot  
6 machine or dice or roulette wheel or whatever.

7 A I understood that to be another of their argu-  
8 ments, Mr. Justice. I understood their argument to say that  
9 this is remedial and not punitive; this is the manner of  
10 taking offending articles out of circulation. I understand  
11 that their third argument is as in rem and you can't avail  
12 yourself of the personal privilege of the claimant.

13 Q I don't understand they were going to take it  
14 out of circulation.

15 A Well that is precisely ---

16 Q They were just going to circulate on their own  
17 part.

18 A That is precisely what our answer to it would  
19 be that removal of this offending property from circulation,  
20 money certainly isn't offending. Certainly it doesn't offend  
21 me and I cannot concede, as a matter of fact the Government has  
22 admitted they have no intention of taking it out of circula-  
23 tion. Slot machines, roulette wheels, those are taken out of  
24 circulation and destroyed. That is not going to happen to  
25 this money.

1 Q Miss Lavin, ---

2 A Yes.

3 Q You said something about the \$50 stamp. It is  
4 also, what is it, 10 percent, isn't that the excise tax?

5 A Yes, sir, that is the excise tax.

6 Q And what -- would there be at least 10 percent  
7 of \$8600 on the tax here or is it personal? It is measured,  
8 isn't it, by his gross income from Grant Carnley?

9 A You understand, Mr. Justice Brennan, that there  
10 was no proof that this money was paid as wagers.

11 Q I see. I follow.

12 A So that the 10 percent could not attach. Those  
13 instances where the happening at Sportsman's Park proof had been  
14 shown that wagers had been taken by these men. That 10 percent  
15 tax has been accessed.

16 Q Has been?

17 A Yes, sir.

18 Q Any recollection of what the amount was?

19 A No. I don't represent that money. Some of  
20 them I do.

21 Q But in any event this forfeiture was for not  
22 paying the \$50?

23 A Yes, sir.

24 Q Not for not paying the 10 percent?

25 A Oh no. That is right. It is strictly on 4411

1 and 4412; 4401 doesn't come into it.

2 Q Incidentally I notice in your brief you don't  
3 meet the Government's argument resting on Mitchell?

4 A I didn't see the Government's argument resting  
5 on Mitchell. I notice that Mitchell was cited three times in  
6 the brief. It was not expanded upon. I was somewhat surprised  
7 this morning that that was their principal area of reliance.

8 You are talking now of compensating the United States  
9 for the cost of its investigation. The Solicitor General  
10 argued that this morning. It was never argued in the brief.  
11 I was totally unprepared for it but I would submit that this  
12 is not a very learned argument, coming somewhat as a surprise.  
13 This reimbursement of the cost for investigation appears to  
14 have no equality.

15 The case that follows this you would have to say  
16 \$300,000 is compensatory for the cost of investigation. Here,  
17 for some reason \$8600 is compensatory for the cost of investi-  
18 gation under their argument.

19 Rather what surprises me that in criminal cases where  
20 cost of investigation of this type are made, they have never  
21 been assessed as valid cost and I don't see how validly. These  
22 moneys can be seized as they were compensating the Government  
23 for the use of their agents or whatever it might be.

24 Q How much did you say the fine was in the criminal  
25 case?

1 A \$2500.

2 Q That could help on the expenses?

3 A That could help.

4 As to the in rem argument, the Government has argued  
5 that subject, or property subject to forfeiture enjoys no  
6 privilege against self-incrimination which can be asserted to  
7 prevent that forfeiture.

8 They say that this is an in rem proceeding brought  
9 against the property itself and it may not avail itself of  
10 the owner's privilege against self-incrimination.

11 We submit to this court that this argument was refused  
12 long ago in the Boyd case which rejected any argument that the  
13 technical character of a forfeiture as an in rem proceeding  
14 against the property had any ill effect on the right of the  
15 owner of the property to assert as a defense violation of his  
16 constitutional rights.

17 The Court recognized this owner -- the Court in Boyd  
18 recognized the owner as a substantial party to the in rem suit  
19 and, therefore, in a position to raise violations of this kind,  
20 his constitutional rights.

21 I might say at this time that the case on which the  
22 United States urged was in conflict with this case. Their  
23 case differs substantially in this regard. Here we have a man  
24 who is recognized as an owner by the Trial Court.

25 The Boyd case says as an owner, recognized, he is a

1 substantial party and has right to raise his constitutional  
2 rights.

3 I think it is very important to recognize that in the  
4 Dean case the Trial Court found that the Dean's -- the  
5 claimants -- were not the owners of the property. Therefore,  
6 actually the Deans would have no standing in that lawsuit.

7 Their claim as owner was rejected by the findings of  
8 the Court. I think that is a substantial difference between  
9 that case and this and I thought I would like to bring it to  
10 the Court's attention.

11 There is one basic difference, I might say, why we  
12 rely on Boyd and we rely on Plymouth is the basic difference  
13 between those cases and this one are in those cases the  
14 pivotal point was the prohibition against using in a forfeiture  
15 case evidence illegally secured from the owner.

16 Here we have kind of the other side of the coin.  
17 They claim forfeiture of property because the owner refused  
18 or omitted to give evidence against himself in violation of  
19 his constitutional rights.

20 Because if he had waived his constitutional rights  
21 there would be no forfeiture here. The rationale of this  
22 forfeiture action is the forfeiture of property invoking the  
23 constitutional privilege and I submit to this Court in the  
24 truest sense of the word this makes the constitutional privilege  
25 what has been used so often, this makes it costly.

1           The Government makes a further argument that in the  
2 abstract that in order to be entirely innocent of any wrong-  
3 doing or illegality and the property would still be subject  
4 to forfeiture and in the abstract that can be true.

5           But here, necessary to forfeiture, is the illegal  
6 intent of the possessor. This Court in One 1958 Plymouth  
7 versus Pennsylvania made that eminently clear the difference  
8 between properties that are forfeited per se and properties  
9 that require proof of the use in order for them to come forth  
10 with it.

11           Now, and it pointed out, that when dealing with  
12 articles that are innocent in themselves as the money is here,  
13 the articles derive their contraband nature only from the acts  
14 or the intent of the possessor or user.

15           The act or the intent of Mr. Angelini, which is  
16 necessary to make this property subject to forfeiture, is first  
17 the operation of the wagering business, is not illegal under  
18 Federal law and secondly to failure to comply with the regis-  
19 tration provisions of 4412 and the payment of the \$50 under  
20 4411.

21           To have been that it would under Marchetti require  
22 that he incriminate himself.

23           It is our submission most basically that no illegal  
24 intent can be inferred from the exercise of or a refusal to  
25 waive constitutional rights. It is our position that property

7 arguments are going to suffice to forfeit these goods. I  
8 submit that the decision of the Circuit Court of Appeals should  
9 be affirmed.

10 We then come to the aspect of this case that was not  
11 presented to the Seventh Circuit. This is the urging, by the  
12 Government, of strict prospective application of the Marchetti-  
13 Grosso decisions in forfeiture cases if this Court should  
14 determine that they apply to forfeiture cases.

15 I would also submit to this court on that point that  
16 the Government has made no argument to encourage this court  
17 validly to employ strict prospect of the application.

18 Its own cases and I refer particularly to the case  
19 it mostly relies on, Linkletter, recognized that the general  
20 rule is retroactive application. It also recognized in excep-  
21 tion to that rule where a decision, an earlier decision, is  
22 overruled as this Court by Marchetti-Grosso overruled Kahriges  
23 and Lewis.

24 That rule is that intermediate cases finally decided  
25 should not be upset. This case, of course, is not finally



1 decided. This standard of limited applicability referred to by  
2 this court in Linkletter as being appropriate for circumstances  
3 such as we have here is not even considered by the Government  
4 in its argument.

5 It doesn't enlighten us what, if any, havoc would  
6 ensue were the Marchetti-Grosso provisions made applicable to  
7 forfeiture cases or how that would upset the administration  
8 of justice.

9 They give us no contravailing considerations which  
10 this Court recognized were necessary to strict application of  
11 prospective application that would take this case out of the  
12 limited retroactivity rule.

13 The Government's whole argument relates to the  
14 potentialities of a volume of litigation relating to property  
15 forfeited in the past, finally forfeited. And they say that  
16 provides a sound and practical reason for this Court to apply  
17 prospective application.

18 It pays no attention to cases not finally decided  
19 such as this. It gives no reason why this Court should not de-  
20 clare a limited retroactivity in accordance with the rule pro-  
21 nounced in Linkletter. We submit the rule should be employed  
22 to cases such as this that are finally decided and we further  
23 submit that no contravailing considerations have been suggested  
24 by the Government for not employing that rule.

25 And so, then, if the Court please we submit ---

1 Q How was it proved that your client was a gambler?

2 A There was a month-long surveillance at Sportsman's  
3 Park.

4 Q Yes.

5 A Early in the month of August of '63 he had been  
6 seen talking -- oh, there was one occasion where a man came up  
7 to him and said something like "Ten on Man of War." One  
8 occasion in the month.

9 He was seen receiving money from bookmakers who were  
10 convicted or who pleaded guilty and he was seen giving the  
11 money but not within a week of this particular date.

12 Q Was your client operating as an agency?

13 A Uh ---

14 Q According to the evidence?

15 A According to the evidence. Yes, sir.

16 Q Well, why would people bet with him at the race  
17 track instead of betting at the pari mutuel window?

18 A Well, I don't really know that but I would  
19 suggest that they were getting better odds.

20 Q Because he wouldn't have to pay any taxes?

21 A Of course not. And he didn't on the race track,  
22 either.

23 Oh, yes, there was evidence of that, too. They were  
24 able to give credit betting. You can't get credit betting  
25 at a pari mutuel window.

1 I have nothing further unless there is some questions.

2 Q Very good.

3 A Thank you.

4 Q Can you state briefly why you say Mitchell  
5 doesn't apply?

6 A I already stated to, your Honor, that ---

7 Q I didn't quite understand.

8 A I don't think Mitchell applies if the case stands  
9 for what I understood from the oral argument because it sets  
10 no standard. How could one person be -- well, hurt to the  
11 extent of maybe \$300,000 as you have in the Sixth Circuit case  
12 and \$8600 here moreover.

13 The purpose of agents is for the most part to investi-  
14 gate criminal activities. I have never seen and I don't believe  
15 there is any basis or any incidents for investigating process  
16 have been recognized as as assessible cost and I suggest on  
17 that account and I admit it is kind of off the top of my head  
18 that I can't see where it could logically be applied as a  
19 reason for forfeiting these moneys.

20 Q What about the argument that he made that you  
21 don't have to put all the punishment in one case or the  
22 sanction -- he referred to it as a sanction -- that you could  
23 divide it up. I guess something like Blockberg and you could  
24 have a civil sanction and a criminal sanction.

25 A Well, I have no problem with individual --

1 but I do say where it is inadmissible in a -- for the purposes  
2 of a criminal sanction it is certainly inadmissible for the  
3 purposes of the civil sanction.

4 Q Well might it not be thoroughly legal here to  
5 impose this, whatever it is, but yet be bad because of the way  
6 they make a man confess his crime?

7 A I think that is what makes it bad.

8 Q That is the difference, isn't it?

9 A I think this Court in Marchetti clearly asks  
10 the Congress to adjust this statute. I think if I interpret  
11 your decision correctly you are asking for immunity ---

12 Q Well, yes, but the statute is now criminal, the  
13 criminal part of the statute has been rendered unenforceable.

14 A That is right.

15 Q Well, it is no crime not to register or pay the  
16 tax and this, there never had been a criminal law to sanction  
17 registration or pay the tax just as though there was a special  
18 excise tax on gambling accompanied by a law which says that  
19 if you don't pay your tax you can have your winnings forfeited.  
20 And you must then say that the forfeiture proceeding itself  
21 was tantamount to a criminal proceeding.

22 A I think it is quasi criminal.

23 Q And you must depend on that?

24 A Yes.

25 Q That will get you back to the Boyd proof?

1           A     Yes, sir.

2                   (Whereupon, at 10:58 a.m. the oral argument in the  
3 above-entitled matter was concluded.)

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