

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-472

TITLE JOSEPH C. RUSSELLO, Petitioner v. UNITED STATES

PLACE Washington, D. C.

DATE October 5, 1983

PAGES 1 thru 47



(202) 628-9300
440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 JOSEPH C. RUSSELLO, :
4 Petitioner :
5 v. :
6 UNITED STATES :
7 - - - - - x

8 Washington, D.C.
9 Wednesday, October 5, 1983

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United
12 States at 10:59 a.m..

13 APPEARANCES:

14 RONALD A. DION, ESQ., North Miami Beach, Florida;
15 on behalf of the Petitioner.

16 SAMUEL A. ALITO, JR., ESQ., Office of the Solicitor
17 General, Department of Justice, Washington, D.C.;
18 on behalf of the Respondent.

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

2 CHIEF JUSTICE BURGER: Mr. Dion, you may proceed
3 whenever you are ready.

4 ORAL ARGUMENT OF RONALD A. DION, ESQ.

5 ON BEHALF OF THE PETITIONER

6 MR. DION: Mr. Chief Justice, and may it please
7 the Court:

8 The sole issue that is being presented today
9 is the scope of the RICO forfeiture statute that was
10 passed by Congress in 1970, in particular, Section
11 1963(a)(1).

12 We will try, in the oral argument, to not
13 get into a bingo contest. Unfortunately, a lot of the
14 sections in 1962 and 1963 are interrelated. Most of
15 the argument is going to deal with the interrelationship
16 of those two statutes.

17 First of all, the simple question is whether
18 or not the term "interest" in 1963(a)(1) permits the
19 forfeiture of income proceeds and profits of illegal racket-
20 eering activity or whether it does not so include it.

21 The first thing we need to do, of course,
22 is go to the express wording of the statute. As in
23 many of these cases of statutory construction, both
24 the government and the defense have argued that the
25 express wording, as well as the intent of the legislature

1 and the legislative history supports their respective
2 positions.

3 If we take a look first at the express wording
4 of 1963(a)(1), it is important to note, as several courts
5 have held -- In particular, I would like to bring to
6 this Court's attention the case of United States versus
7 McManigall which was decided after the briefs were filed,
8 which is out of the 7th Circuit.

9 Each of those courts have held that it is
10 of interest that the actual words "income, profits and
11 proceeds" are not expressly included in 1963(a)(1).

12 It is important for two reasons. One of the
13 reasons that is relied upon that I think is secondary
14 is the inclusion of the words in the C.C.E. Statute
15 848 which was decided and passed within two weeks of
16 the passage of the RICO statute.

17 And, in fact, in that statute in the forfeiture
18 provisions, Congress did in fact specify the forfeiture
19 of proceeds. However, I believe that is secondary.

20 I think first we have to look at the actual
21 RICO statute itself. If we take a look at 1962(a) --

22 QUESTION: Where do we find that, Mr. Dion,
23 in the papers? Where do we find 1962(a)?

24 MR. DION: A copy of it is in our Appendix
25 at Appendix 1, Your Honor.

1 1962(a) is most illuminating in that in that
2 section Congress did in fact use the term "interest."
3 Did in fact use the term "income," and did in fact
4 independently use the word "proceeds."

5 Now, the government's argument, at least one
6 of the positions, was that when Congress includes language
7 in one section of the statute and doesn't include it
8 in another section, there must be a reason. We obviously
9 do not disagree with that at all in this context.

10 In 1962(a) Congress used the terms "income,
11 proceeds" and "interest" differently, knew that the
12 terms were different and, as exemplified in the C.C.E.
13 statute, when they wished to make it forfeitable, they
14 said it was forfeitable.

15 The question then comes up to what is the
16 interest included in 1963(a)(1)? What are we talking
17 about?

18 I would like to first take a shortcut. One
19 of the things that the government relies upon is a
20 dictionary definition of the term "interest." And,
21 one of the dictionary -- not the legal definition, but
22 the common Webster's Dictionary of American Heritage
23 Dictionary definition is that it includes the term
24 "profit."

25 I would like the Court to understand what

1 they mean by profit in that definition of the word
2 "interest." When you go to a bank and you take out
3 a loan and you pay money to the bank for that privilege,
4 the interest is the profit the bank has made. It is not the
5 same context as the dictionary definition in a legal
6 sense.

7 Black's Law Dictionary defines it differently.
8 That is the definition that was used by the Martino
9 dissent, by the Thevis court and by the McManigall court.
10 The most general term that can be employed to denote
11 a right, claim, title, or legal share in something.
12 This is where a lot of lower courts went out and said,
13 all right, if it is an interest in something, what
14 is the something that we are talking about.

15 In a number of the courts, including a new
16 case that was decided by the 10th Circuit since this
17 case was submitted, United States versus Zang, has said,
18 let's us look at the RICO statute in its entirety.
19 What is it that makes the RICO statute different from
20 other criminal statutes? What is that we are attempting
21 to punish since obviously this is a form of enhancement?
22 It is a form of we take the substantive crime and if
23 they done it more than one time and other elements are
24 there, we now have a new crime which we have construed
25 in 1970 called RICO. And, that something in addition

1 is, in fact, the enterprise concept.

2 So, these courts have gone to say that when
3 we talk about an interest in something, the something
4 we are talking about is the enterprise.

5 They then go back and take a look at the actual
6 wording of the statute. In 1962, and other than in
7 one place in 1963, which is the source of litigation
8 here today, whenever Congress used the term "interest,"
9 it said "interest in an enterprise."

10 Now, one of the questions the government has
11 raised is why then in 1963(a)(1) does Congress not say
12 interest in an enterprise when in 1963(a)(2) and elsewhere
13 throughout the statute, they say "interest in" and the
14 government conveniently says three or four dots "an
15 enterprise."

16 I would submit that the reason that it is
17 included in (a)(2) and not in (2)(1) is what is missing,
18 what those dots represent.

19 We would submit that what Congress has already
20 stated throughout the substantive events, that it is
21 an "interest in an enterprise," that there was no need
22 to put the words "interest in an enterprise" in 1963(a)
23 at all, but that the reason they did it in (a)(2) was
24 to make very clear, not that the interest which is for-
25 feitable is the interest in the enterprise, but rather

1 that the security of, claim against, or property or
2 contractual right of any kind affording the source of
3 influence over is modified by the term "any enterprise,"
4 since those terms are not used elsewhere in the statute
5 with the said modification.

6 A lot of the courts and some of the Law Review
7 articles condemn the courts for this, then go into a
8 question of legislative history. And, as with many
9 of these cases, both the government and the defense
10 submit that the legislative history supports their
11 respective positions.

12 There is a slight difference, however. If
13 the Court would take a look at the references that the
14 government has made to support their concept of legislative
15 history, they are statements, speeches, and parts of
16 the record, Congressional Record, that reflect the
17 opinions of individual senators and members of the
18 House. It is not the position of the entire Congress
19 that passed the statute and that is the intent we are
20 going for if we are going to look at legislative history.

21 We, on the other hand, rely upon primarily
22 the Preamble to Senate Bill 30, which was 1963, became
23 1963, which expressly limits the forfeiture of interest
24 in an enterprise.

25 Also, the Senate reports and House reports

1 which were the synopses and the explanations that were
2 given to the senators and the congressmen when they,
3 in fact, were required to vote on the statute. When
4 they said, what is this all about, that is what they
5 were looking at.

6 QUESTION: Mr. Dion, you say that the govern-
7 ment relies on speeches by individual senators and House
8 members and you rely on synopses and a preamble. Neither
9 of you rely on the words of the statute itself?

10 MR. DION: Well, both of us rely initially
11 on the wording of the statute and both submit that the
12 express wording supports their respective positions.
13 Needless to say, unfortunately, it can't, so obviously
14 there is a conflict and the question of what the
15 expression is.

16 QUESTION: At that point you go to the secondary
17 theory.

18 MR. DION: That is when both sides go to the
19 secondary. Obviously, the express wording is of primary
20 concern and the legislative history is really a secondary
21 source of interpretation.

22 QUESTION: Mr. Dion, with respect to Congress'
23 stated purpose which, as I understand it, was to eradicate
24 organized crime, why in the world would Congress have
25 wanted to exempt from forfeiture cash profits that are

1 the primary product of an illegal enterprise? I think
2 your argument is a little strange in that regard.

3 MR. DION: Well, there are primarily two reasons,
4 Your Honor. The first question is a policy determination
5 that really needs to be addressed by Congress and I
6 believe has been addressed. And, that is a question
7 of we have now punished the racketeer by throwing him
8 in jail. We have punished the racketeer by separating
9 him from his office in the enterprise and separating
10 him from his interest in the enterprise. We have now
11 fined the individual.

12 Now, we get to the question of the forfeiture
13 aspect. Who is it that we wish to protect? Who should
14 be the benefactor of the forfeiture?

15 QUESTION: Wasn't it Congress' whole purpose
16 to make a crime unprofitable?

17 MR. DION: Of course, it was.

18 QUESTION: And, if you don't forfeit the profits,
19 how do you do that?

20 MR. DION: Well, again, there are two answers.
21 The first one is that it still is forfeitable. Not
22 only is it forfeitable under civil law, it is subject
23 to treble damages.

24 I believe it was a question of policy of if
25 we are going to take the criminal out of the enterprise,

1 who should get the benefit of the forfeiture? Should
2 it be the government or the victim? That is one answer.

3 The other one is a little bit more technical
4 and, unfortunately, it is supposition since no one can
5 really tell.

6 I would respectfully submit that one of the
7 problems that Congress had was that when they passed
8 the first United States in personam forfeiture action,
9 they were most concerned with the constitutionality
10 of the act.

11 And, I believe that when they sent -- particularly
12 Senator McClellan requested Attorney General Kleindienst
13 to answer the question of the constitutionality. Now
14 we are getting into the Kleindeinst letter. I believe
15 this is one of the true reasons and importances of the
16 Kleindienst letter.

17 QUESTION: Well, that letter referred to a
18 different version of the bill that was eventually enacted.

19 MR. DION: It was a predecessor of the 1963,
20 however, the importance of the statute -- of the letter
21 at this juncture is that when Congress said, is it
22 constitutional, Kleindeinst responded, yes, it is con-
23 stitutional as limited, as limited to interest in the
24 enterprise, and as limited so that no other property
25 is subject to forfeiture.

1 I think it really came down to a very simply
2 question. Congress was afraid that if they extended
3 the forfeiture beyond the limitations which were imposed
4 by that letter that they would be getting into an area
5 of constitutional dimension. And, in order to avoid
6 it, they went into the civil remedies and the civil
7 treble damage forfeitures that were provided.

8 There is another aspect of the Kleindeinst
9 letter that I believe is important. The importance
10 of the Kleindeinst letter is not the opinion of the
11 Attorney General that it is limited, forfeitures are
12 limited to an interest in an enterprise, because as
13 Your Honor correctly pointed out, that applied to a
14 prior forfeiture proceeding. The importance of it is
15 that it was included in Senate Bill 30 in the Preamble
16 to show the intent of the Senate in passing the Bill,
17 the intent of the limitation being there.

18 So, it is Congress' intent by using the letter
19 in their Preamble and referring to it that is important,
20 not the Attorney General's personal opinion.

21 QUESTION: Mr. Dion, looking again at the
22 language of 1963(a) as it appears in your brief at,
23 I guess, the second page of the Appendix, what is the
24 difference in operation between Subsection -- What does
25 Subsection (2) have that Subsection (1) doesn't and

1 and vice versa?

2 The Defendant would respectfully submit that
3 what (a)(1) hits are -- What are referred to in a couple
4 of the cases as passive investments while (a)(2) hits
5 active investments. (a)(2) in particular goes to
6 those things which afford a source of control over an
7 enterprise.

8 QUESTION: Does that modify all of the terms,
9 interest and security of claim against? Are all of
10 those modified by the language, affording a source of
11 control or influence over?

12 MR. DION: Unfortunately, I am not a grammarian,
13 however, several of the lower courts have so indicated
14 that that limitation does apply across-the-board, if
15 not expressly as an indication of the intent of the
16 entire section.

17 QUESTION: Well, is the reach of (1) somehow
18 narrower than (2)?

19 MR. DION: It is not a question of being narrower
20 or not. I believe that the government's interpretation
21 would make one narrower than the other. I believe they
22 actually go to different things.

23 For example, let's assume that you have a
24 situation where an individual is involved in a racketeer-
25 ing situation and he has interest in an enterprise that

1 is less than of substantial source of influence over
2 the enterprise. That would not be subject to forfeiture
3 under (a)(2), yet that certainly is not the intend of
4 Congress. The intent of Congress is to totally separate
5 them from the legitimate enterprise entirely. That
6 would be subject to forfeiture under (a)(1).

7 There are other things that would be subject
8 to forfeiture under (a)(1) that would not be subject
9 under (a)(2). For example, in the Godoy case out of
10 the 9th Circuit, the profits and proceeds were then
11 reinvested as part of the enterprise into investment
12 property. That was subject to forfeiture under (a)(1).

13 QUESTION: What then does (a)(2) reach that
14 (a)(1) doesn't?

15 MR. DION: (a)(2) primarily would reach not
16 only interest in the enterprise which give a source
17 of influence, which would also be arguably be covered
18 under (a)(1), but it also allows the forfeiture of the
19 securities, the claims, property contractual rights,
20 all of which are a form of influence that arguably is
21 not subject to forfeiture under (a)(1).

22 I think it is not really a question of is
23 (a)(1) and (a)(2) -- let's categorize them separately.
24 It is a question of why are they there? In the --

25 QUESTION: But, surely, when Congress is writing

1 in one single paragraph that someone shall forfeit to
2 the United States, (1), and then a sentence, and then,
3 (2), a sentence, we assume that Congress has two dif-
4 ferent -- It was striking at two different things or
5 it would have put it all in one sentence.

6 MR. DION: Of course, Your Honor.

7 Initially they did have it all in one sentence
8 as a matter of fact. (a)(1) was the initial sentence.
9 Congress then ran into a problem, I would submit, in
10 thereafter they passed the modification of 1962(a) where
11 they included the one percent exception. And, I agree
12 with the government. That does not make it not for-
13 feitable. However, Congress was afraid that someone
14 might so interpret it and to avoid that possibility
15 they more fully set forth the different categories that
16 now make up (a)(1) and (a)(2) of 1963 which was not
17 there before.

18 Actually though it attempted to make it a
19 little bit more difficult to understand. I think their
20 intent really was to try to simplify it and they just
21 didn't succeed unfortunately.

22 QUESTION: I wonder if you misspoke or if
23 I was incorrectly advised, but was it not (a)(2) that
24 was originally in the statute and (a)(1) that was added
25 later?

1 MR. DION: I do not believe so. I believe
2 (a)(1) was the original, the original --
3 QUESTION: Because the original draft, I thought,
4 was expressly limited to interest in an enterprise.
5 MR. DION: That is correct. That is (a)(1).
6 QUESTION: No, it is (a)(2).
7 QUESTION: No, it is (a)(2).
8 MR. DION: Excuse me, let me rephrase that.
9 The original was actually -- I apologize. There was
10 a modification of (a)(1) and (a)(2). The original was
11 interest in an enterprise.
12 QUESTION: Right.
13 MR. DION: Which they did not then separate
14 in any way, shape, or form. Then they broke it down
15 into (a)(1) and (a)(2).
16 QUESTION: Now, the words "in an enterprise"
17 appear in (a)(2), but not in (a)(1).
18 MR. DION: And, I would submit that they are
19 in (a)(2) for the express purpose of modifying the other
20 sections of (a)(2) which were not in the predecessor
21 proposed statute.
22 QUESTION: Is it correct that under your read-
23 ing, and I am not suggesting it is not tenable, but
24 you in effect read in the words "in an enterprise" in
25 (a)(1) and you also treat the violation of Section 1962

1 language as though it said violation of Section 1962(a)
2 or (b). You don't really, as I understand your argument,
3 deal with the possibility that (a)(1) may cover -- may
4 refer to 1962(c)?

5 MR. DION: This is where I disagree with some
6 of the lower courts that have ruled in my favor. I
7 absolutely believe that 1963(a)(1) will reach an enter-
8 prising fact under 1962(c).

9 Godoy, I think, is a perfect example of that
10 or actually, to be most honest, this case, but for the
11 judgment of acquittal, would have been a perfect example
12 of that.

13 In this case, the individual was charged pri-
14 marily with being involved in a racketeering situation
15 where he, along with others, purchased property -- in
16 his case, he already had the property -- donated the
17 property to the enterprise, got it insured, burned it,
18 took the proceeds.

19 What would be forfeitable in this case, but
20 for the judgment of acquittal that was granted below,
21 would be the property, because the property was donated
22 to the purpose, to serve the purpose of the enterprise.
23 This is an example of a 1962(c) violation or something
24 that would be forfeitable under 1963(a)(1).

25 So, no, I do not agree with the lower courts,

1 even the ones that decided in my favor, limitation,
2 that 1962(c) does not apply to the forfeiture of (a)(1).

3 QUESTION: You are saying that if the govern-
4 ment -- If you lose that the entire property would have
5 been forfeitable?

6 MR. DION: That is correct.

7 QUESTION: Not just the profit from the illegal
8 activity?

9 MR. DION: The property would have been for-
10 feitable because it was donated and used by the enterprise,
11 yes, sir.

12 I think one of the important things to take
13 into consideration here is the fact we are going into
14 the area of policy determination. Should it or should
15 it not be forfeitable? I would agree with the govern-
16 ment wholeheartedly --

17 QUESTION: You say, Mr. Dion, that here we
18 are going into the area of policy formulation. Does
19 that mean in effect that we throw up our hands and say
20 we have no idea what Congress wanted as between these
21 two choices so we just have to pick what seems to us
22 the better one?

23 MR. DION: Exactly the opposite. My next
24 sentence was going to be that policy determination should
25 not be made here; that what we are doing here is

1 interpreting the words of the statute and that is what
2 we are limited to.

3 The only thing that I am trying to bring to
4 the Court's attention from a policy standpoint is the
5 fact that even Congress across the street doesn't know
6 really what it wants to do.

7 The purpose of including in the brief a number
8 of House bills and Senate bills that have come up for
9 consideration after the passage of 1963 is to not to
10 show what Congress' intent was back in 1970. Obviously,
11 that is impossible. What it is to show is the importance
12 of the policy decision which Congress should be making
13 and even they at this point don't know which way they
14 want to go.

15 The reason they don't know is, number one,
16 the question of the constitutionality; and, number two,
17 the question of who should benefit from the forfeiture.
18 Are society's need sufficiently met by throwing the
19 racketeer in jail, giving him a fine, and separating
20 him from the enterprise, and giving treble damages
21 to the victims, or do we also need additional forfeiture?

22 QUESTION: Well, what is the constitutional
23 problem?

24 MR. DION: Personally I don't see one.

25 QUESTION: I don't either.

1 MR. DION: Personally I think they have every
2 right to do it, Your Honor.

3 QUESTION: Well, were you raising that as
4 the policy question? Is that what you meant by policy?

5 MR. DION: No. What I basically meant is --
6 Going back to 1970 I think it was a policy determination,
7 because they didn't know being the first type statute
8 that went in personam. They didn't know whether it
9 was going to be declared constitutional or not and they
10 were trying to limit their actions by the limitations
11 that the Attorney General had given them.

12 I think the policy determination now, which
13 Congress ultimately is going to have to make, is
14 strictly a question of which way are we going to go
15 or both ways? Is it going to be a forfeiture to the
16 government? Is there going to be treble damages to
17 the victim so that his business, his enterprise, can
18 get back on its feet once the racketeer has been removed
19 or it is best served by doing both?

20 QUESTION: Why does that concern the judicial
21 process?

22 MR. DION: It absolutely should not concern
23 this Court, Your Honor, absolutely should not. It is
24 a decision that should be made across the street.

25 CHIEF JUSTICE BURGER: Mr. Alito?

1 ORAL ARGUMENT OF SAMUEL A. ALITO, JR.

2 ON BEHALF OF THE RESPONDENT

3 MR. ALITO: Mr. Chief Justice, and may it
4 please the Court:

5 As Justice O'Connor observed, Congress' stated
6 objective in enacting the RICO statute was nothing less than
7 "eradication of organized crime" by, among other things,
8 providing enhanced sanctions and new remedies.

9 It is worth noting that in the preface to
10 the RICO statute Congress, the entire Congress stated
11 that its objective was to do this and found "that
12 organized crime in the United States is a highly
13 sophisticated, diversified, and widespread activity
14 that annually drains billions of dollars of America's
15 economy by unlawful conduct and the illegal use of
16 force, fraud, and corruption."

17 Organized crime derives a major portion of
18 its power through money obtained through such illegal
19 endeavors as syndicated gambling, loansharking, the
20 theft and fencing of property, the importation and dis-
21 tribution of narcotics and other dangerous drugs, and
22 other forms of social exploitation.

23 Given Congress' objective and its finding,
24 it would have been surprising is Congress had enacted
25 a racketeering forfeiture statute, but had held back

1 from authorizing the forfeiture of the illegal profits
2 that constitute organized crime's life blood and the
3 source of its wealth and power.

4 Neither petitioner nor the dissent in the court
5 below nor any court or commentator has been able to
6 identify any convincing reason why Congress might not
7 have wanted to authorize the forfeiture of racketeering
8 profits. Certainly there is nothing harsh or unfair
9 about doing so, about requiring a convicted criminal
10 to give up his illegal gain.

11 In this case, for example, petitioner obtained
12 some \$340,000 in insurance proceeds by taking out fire
13 insurance on his property and arranging for an arsonist
14 to burn it down. There is no reason why he should be
15 permitted to keep that money.

16 What reasons as petitioner suggested this
17 morning --

18 QUESTION: May I ask a question right there?
19 What exactly is it that you contend should be forfeited
20 to the United States as opposed to what the insurance
21 company might get back? I take it that the insurance
22 company might have a claim to this money too.

23 MR. ALITO: That is right, Justice, Stevens,
24 but there is no contradiction there. Under 1963(c)
25 the Attorney General is directed to dispose of forfeited

1 property, making due provision for the rights of innocent
2 persons. And, under the procedures that are incorporated
3 into RICO, a victim of racketeering can apply to the
4 Attorney General to receive the forfeited property and
5 can receive that property. So there is no contradiction.

6 QUESTION: So the end result would be the
7 same? The government would, in effect, collect the
8 forfeited property and turn it back to the insurance
9 company.

10 MR. ALITO: That is correct and that is of
11 considerable benefit to the victims. It spares them
12 the trouble and expense of bringing suit and it also
13 spares them the unpleasant prospect of having to square
14 off in court against the defendant who may be a notorious
15 racketeer.

16 QUESTION: Actually the money ends up -- I
17 understand what you are saying about undesirability
18 about bringing litigation, but assuming that the rights
19 were enforced by civil litigation, the net result would
20 really be pretty much the same anyway, wouldn't it?

21 MR. ALITO: Well, Congress intended --

22 QUESTION: At least in this case.

23 MR. ALITO: That is correct, Justice Stevens.
24 Congress intended for both of those remedies to be available
25 and they both serve --

1 QUESTION: If the government brings the suit,
2 Mr. Alito, are treble damages available though?

3 MR. ALITO: No, the government simply gets
4 the forfeiture.

5 QUESTION: And, if the victim did, the victim
6 would get treble damages?

7 MR. ALITO: That is correct. I think they
8 are independent procedures.

9 QUESTION: Could the victim bring a suit for
10 treble damages even after the government had imposed
11 a civil forfeiture?

12 MR. ALITO: Well, that is not settled, Justice
13 O'Connor. I would think perhaps the money received
14 from the government would be taken into account in
15 computing the victim's damages.

16 QUESTION: But that is not resolved?

17 MR. ALITO: That is not resolved and certainly
18 isn't the question.

19 QUESTION: While I have you interrupted, would
20 you be good enough to give me examples of what you think
21 would be covered under (a)(2) in your interpretation
22 that wouldn't already be covered in (a)(1)? It is just
23 hard to make perfectly clear what those two subsections
24 were intended to cover under your view.

25 MR. ALITO: Well, one critical difference

1 between the two provisions is that under (a)(1), as
2 we read that statute, the interest must be illegally
3 obtained. It is an interest acquired or maintained
4 in violation of Section 1962.

5 Under 1963(a)(2), the interest may not --
6 It need not be illegally obtained. It may be a lawfully
7 acquired interest in an enterprise that the defendant
8 has established, conducted, controlled, or participated
9 in in violation of the RICO statute.

10 1963(a)(1) is really the less controversial
11 provision of the forfeiture statute, because it talks
12 about illegally obtained interest. 1963(a)(2) goes
13 further and takes interest that may be lawfully obtained
14 but have been associated with an enterprise that has
15 been found to be unlawful.

16 And, that goes to -

17 QUESTION: Mr. Alito, that really isn't quite
18 right, is it, because in (a)(2), if you maintain an
19 interest of that kind, it is in violation of Section
20 1962. And, (a)(1) covers not only acquisition but also
21 maintaining an interest. I think you just forgot
22 about the word "maintained" in (a)(1). Any interest
23 maintained in violation of 1962 is forfeitable under (a)(1).

24 MR. ALITO: Well --

25 QUESTION: And, it seems to me all of your

1 examples under (a)(2) are interests that would be main-
2 tained unlawfully.

3 MR. ALITO: Justice Stevens, if maintained
4 is read in that broad way, I am not aware of judicial
5 authority for that proposition. Then they may overlap
6 to a substantial extent, but it is not at all obvious
7 to me that maintained means exactly that. Maintained
8 means any interest in enterprise that has found to be
9 unlawful. It could be read much more narrowly to talk
10 about an interest that has been sustained by racketeering
11 activity in the sense that only through that racketeering
12 activity was the interest permitted to survive.

13 Your reading is certainly a possible one,
14 but I don't know -- It certainly isn't settled if that
15 is what Congress intended.

16 QUESTION: Could you give a concrete example
17 then of what you think would be covered by (a)(2) that
18 is not covered by (a)(1)?

19 MR. ALITO: I think that if someone had a
20 lawful business and fell upon financial hard times and
21 turned to racketeering to keep the business going or,
22 as a sideline, to make extra profit, that would clearly
23 be an interest that is forfeitable under (a)(2). It
24 is much less clear that that would be reached by (a)(1).

25 QUESTION: You think it wouldn't be maintained

1 in the language of (a)(1), the business maintained --

2 MR. ALITO: I don't know that that is a
3 necessary reading of (a)(1).

4 I think it is important to point out that
5 in (a)(1) and (a)(2) Congress was not crafting pieces
6 of a puzzle that fit together neatly. I think Congress
7 was attempting to cover the field as it was in many
8 of the provisions of the RICO statute. So, there is
9 a considerable overlap in these provisions. I don't
10 think anyone, although they have tried mightily, has
11 succeeded in construing the two provisions in such a
12 way that they interlock with no overlap. I think there
13 is a considerable amount of overlap.

14 QUESTION: But, are you satisfied that in
15 your view (a)(1) covers some things that (a)(2) doesn't
16 and (a)(2) covers some things that (a)(1) doesn't?

17 MR. ALITO: Certainly (a)(2) covers -- Yes,
18 Justice Rehnquist, that is certainly true. (a)(1)
19 covers --

20 QUESTION: What else? I mean you suggested
21 one example. I still am not clear on what else you
22 have in mind.

23 MR. ALITO: Well, under our interpretation,
24 (a)(1) covers any interest whether or not in an enter-
25 prise and (a)(2) is limited to interest in an enterprise

1 and I think that is what Congress clearly intended.

2 QUESTION: Well -- But, (a)(1) would pick
3 up that, wouldn't it?

4 MR. ALITO: (a)(1), as I have said, covers
5 any interest as that term has been defined in common
6 use.

7 QUESTION: So you don't need (a)(2)?

8 MR. ALITO: No, (a) --

9 QUESTION: You can pick up everything under
10 (a)(1) if I am understanding you correctly.

11 MR. ALITO: I don't think that is true unless
12 you mean -- unless you read into the word "maintained,"
13 everything that is included in (a)(2) and I don't think
14 it is clear that Congress intended that.

15 QUESTION: I supposed maintained in (a)(1)
16 could mean the situation where the thing was begun law-
17 fully so that you couldn't say it was acquired in
18 violation of 1962. But, then it gets unlawful in the
19 course of operating it.

20 MR. ALITO: I think that is right, Justice
21 Rehnquist. One may have an interest in a lawful enter-
22 prise and they use that enterprise to facilitate
23 racketeering activity. And, it may be that the racket-
24 eering activity does not further the enterprise, but
25 the enterprise furthers the racketeering activity.

1 That results in a forfeiture under (a)(2) and would
2 not fall within the meaning of the word "maintained"
3 under (a)(1).

4 Petitioner suggested this morning that one
5 of the reasons that Congress held back from authorizing
6 the forfeiture of racketeering profits was because they
7 entertained some constitutional doubts about their
8 ability to do so. He quickly concedes that he doesn't
9 see any constitutional problem and it is noteworthy that
10 this provision of a continuing criminal enterprise statute,
11 upon which he relied and which was enacted during the
12 same term of Congress, authorized the forfeiture of
13 illegal income derived from a continuing criminal enter-
14 prise engaged in drug activities.

15 In passing that statute, Congress had no
16 constitutional doubts, so it is farfetched, I would
17 suggest, to argue that Congress had unexpressed con-
18 stitutional doubts of very dubious validity about
19 authorizing the forfeiture of the RICO statute.

20 He argued that Congress may have held back
21 in authorizing the forfeiture of racketeering profits
22 because they thought that the civil remedies were enough,
23 but this is unconvincing for a number of reasons.

24 First, in many case, narcotics, gambling,
25 prostitution, there may be no identifiable victims to

1 come forward and bring civil suit and the result is
2 that the racketeer gets to keep his illegal gain even
3 though he has been convicted of participating in a
4 criminal offense.

5 The only argument he raised in his brief and
6 the only argument that was raised by the dissent below
7 for why Congress might not have wanted to authorize
8 the forfeiture of racketeering profits is that our
9 society, he says, is traditionally abhorred in personam
10 forfeitures.

11 But, this argument is not good for at least
12 two reasons. First of all, as I said, whatever attitudes
13 were in the past, there is little doubt that the Con-
14 gress that passed the RICO statute did not abhor in
15 personam forfeiture because it enacted an in personam
16 statute, both in RICO and in the continuing criminal
17 enterprise statute.

18 The RICO provision that is not challenged
19 here, 1963(a)(2), authorizes the forfeiture of interests
20 that may have been lawfully obtained and, therefore,
21 that is a far more extreme position than the forfeiture
22 of illegally obtained gains. It is not disputed that
23 Congress wanted to do that.

24 The second reason why this argument is not
25 convincing is that it simply is not true in personam

1 have been historically disfavored. What was outlawed by
2 the Constitution and by the first Congress was a parti-
3 cular harsh type of in personam forfeiture, what was
4 known in common law as forfeiture by attainder under
5 which the convicted felon was pronounced legally dead
6 and he lost all of his property and he lost the right
7 to transmit property to his heirs.

8 Now, just because that was felt to be too
9 harsh, it certainly doesn't follow that the same is
10 true of all in personam forfeiture.

11 On the contrary, in personam forfeiture is
12 really less harsh than in rem forfeiture because it
13 is a criminal proceeding. The government must satisfy
14 the reasonable doubt standard. In rem forfeiture --

15 QUESTION: Well, do you have some dicta in,
16 for instance, the contract law of remedies that equity
17 abhors a forfeiture. They will read something as --
18 They will try to avoid reading it as a condition that
19 will result in a forfeiture, say, by failure to complete
20 a building?

21 MR. ALITO: Well, I think that is right, Justice
22 Rehnquist. But, I understand petitioner to be drawing
23 a much more subtle distinction between in personam and
24 in rem forfeitures. And, I think the argument that
25 our society has traditionally view in personam forfeitures

1 as harsher and, therefore, has disfavored them as simply
2 not valid.

3 QUESTION: Is there a bright distinction
4 between what you refer to as in rem forfeitures and
5 in personam forfeitures?

6 MR. ALITO: There may not be a bright line,
7 but taking the extreme cases, there certainly is a
8 distinction. In rem is a proceeding against the for-
9 feited object itself and it doesn't require proof of
10 the owner's fault. It may result in the forfeiture
11 in some cases of lawfully obtained property that was
12 used on a particular occasion for an illegal purpose,
13 even without the owner's knowledge or consent, a boat
14 that was used to import drugs or smuggle goods.

15 QUESTION: But, if I own a boat and it is
16 forfeited in an in rem proceeding and admiralty, I am
17 still without the boat at the end of the proceeding,
18 you know, even if you call it in rem.

19 MR. ALITO: That is exactly my point. I think
20 it is at least as harsh, in many ways much harsher,
21 than the in personam forfeiture that is involved here
22 and simply results in a personal judgment against the
23 defendant.

24 My point is that is not to venture into the
25 area of policy whether it is socially desirable to

1 forfeit racketeering profits. My point is that no one
2 has been able to suggest why Congress might not have
3 wanted to do this and with that in mind I would like
4 to turn to the language in the legislative history of
5 RICO, both of which demonstrate that Congress did quite
6 clearly intend to authorize forfeiture of interest such
7 as those involved in this case.

8 Now, of course, the starting point, as
9 petitioner observed, is the language of 1963(a)(1) itself
10 which calls for the forfeiture of any interest in an
11 enterprise. Excuse me, of any interest acquired or
12 maintained in violation of 1962, not an interest in
13 enterprise, any interest. And, profits obtained from
14 racketeering fall squarely within the plain meaning
15 of this statute.

16 Petitioner contests this on the grounds that
17 an interest means an interest in something. But, that
18 usage is only employed to draw distinction between the
19 interest which is a bundle of rights, and the thing
20 to which the interest applies, so that racketeering
21 profits are clearly an interest in something. They
22 are in interest in cash, in a bank account, in CD's
23 or the like.

24 If the language of 1963(a)(1) is not clear
25 enough, then the contrast with 1963(a)(2) is really

1 dispositive. 1963(a)(1) talks about any interest.

2 1963(a)(2) talks about an interest in an enterprise.

3 When Congress places a limitation like that
4 in one subsection and omits it from another, the in-
5 ference is virtually inescapable that they did so for
6 a purpose. And, I don't think it is a convincing
7 explanation to suggest, as petitioner did here, that
8 Congress simply wanted to say "inc." and did not want
9 to have to include the modifying terms, in an enter-
10 prise, in 1963(a)(1).

11 Our interpretation is also supported by the
12 RICO statute's definition of the term "enterprise,"
13 which is not limited to legal entities, but also extends
14 to wholly illegitimate ones as this Court held in
15 Turkette.

16 Since Congress wanted to attack these enterprises,
17 it would not make sense for it to limit its forfeiture
18 provision in such a way as to make it ineffectual in
19 doing so. Yet, in a case of an illegitimate enterprise,
20 there were usually no interest in the enterprise that
21 can be forfeited. They usually don't issue stock.
22 So, it would not have made sense for Congress to provide
23 solely for the forfeiture of interest in an enterprise
24 and not income which is the source of organized crime's
25 power.

1 Petitioner relies on the use of the term
2 "income" in 1962(a), one of the prohibitory provisions,
3 and states that if Congress intended to require the
4 forfeiture of income in 1963(a)(1), it would have used
5 the term "income" there.

6 Well, I hardly think there is a dispute about
7 whether the term "income" was in Congress' vocabulary.
8 It knew the term, but it had a good reason for using
9 a different term in 1963(a)(1), because while that pro-
10 visions reaches income, it is not limited to income.
11 It includes many other types of real and personal
12 property and other things that afford sources of wealth
13 and control.

14 The alternative to using the broad less specific
15 term "interest" in 1963(a)(1) would have been an enumeration
16 of all the things subject to forfeiture.

17 QUESTION: Your contention then really is
18 that interest in the term (a)(1) means any real or per-
19 sonal property, tangible or intangible?

20 MR. ALITO: That is correct, Justice Rehnquist.
21 The issue here, of course, is just the proceeds, but
22 we would contend that it reaches any type of real or
23 personal property.

24 And, as petitioner himself suggested, the
25 lower courts have held that it reaches other things

1 such as offices and companies and labor unions and
2 positions that permit a racketeer to control a business
3 or another organization.

4 QUESTION: Now, what specifically is the
5 property that is being forfeited by the District Court
6 order here?

7 MR. ALITO: The proceeds that petitioner re-
8 ceived from insurance companies when he submitted a
9 fraudulent claim on the property that he himself arranged
10 to have burned down.

11 QUESTION: Cash?

12 MR. ALITO: It is cash, \$140,000.

13 In a somewhat related argument, petitioner
14 relies on the contemporaneously enacted provision of
15 continuing criminal enterprise statute which, as I said,
16 authorizes the forfeiture of illegal income derived
17 from the kinds of enterprises with which that statute
18 is concerned.

19 But, although it is true that these two pro-
20 visions were contemporaneously enacted, they are really
21 the handiwork of different congressional committees,
22 and, thus, it is not clear their language was placed
23 under a microscope and compared.

24 Moreover, the language is fully consistent.
25 In the C.C.E. statute, Congress was concerned with a

1 single, narrow type of enterprise, an enterprise that
2 is engaged in drug activities. These enterprises
3 usually generate large cash profits and there usually
4 is not an interest in the enterprise that can be for-
5 feited. So, Congress used the narrow term "income."

6 In RICO, Congress was concerned with a dif-
7 ferent problem with a vast variety of enterprises and
8 with more than 30 specific kinds of enumerated criminal
9 conduct. So, it used the broader term "interest."

10 Moreover, if it is true, as petitioner suggests,
11 that Congress carefully compared these two provisions,
12 that supports our argument and not his.

13 As I said, no one has suggested any reason
14 why Congress might not have wanted to authorize the
15 forfeiture of racketeering profits. The only possible
16 explanation is mere oversight. And, alerted by the
17 C.C.E. provision to the availability of this potent
18 weapon, it doesn't make sense to suggest that Congress
19 would have omitted it from the RICO statute without
20 at least some discussion or debate if that is what
21 petitioner's position must be.

22 QUESTION: But, the other side of the coin,
23 if I might interrupt, is I gather they included or they
24 added Subsection (1) without any particular explanation
25 or debate focusing on that subsection, isn't that true?

1 That is one of our problems, in fact.

2 MR. ALITO: That is certainly true, Justice
3 Stevens, but where Congress does something that is
4 fully consistent with its intent, I think that is less
5 in need of an explanation than when Congress is charged
6 with doing something that runs directly counter to its
7 broad intent and that is what petitioner --

8 QUESTION: Well, except for the fact -- This
9 is a very tricky case. I must confess to be very puzzled
10 by it. But, except for the fact, as Justice Rehnquist
11 has suggested, if you are talking about any property
12 of any kind in the way of profits, it would seem to
13 me that Congress would have been more apt to use the
14 kind of language it used in Section 848. Whereas this
15 does have at least -- There is a tenable explanation
16 for this, namely, the difference between passive and
17 active investments. This would pick up, which (a)(2)
18 wouldn't, using proceeds to buy two percent of some
19 publicly -- to buy an interest in a publicly held
20 legitimate business. That would be forfeitable, as
21 I understand it, under (a)(1), but would not be for-
22 feitable under (a)(2).

23 MR. ALITO: That is correct, Justice Stevens.

24 QUESTION: So there is some sensible explana-
25 tion for his reading that does not make the two just

1 redundant really.

2 MR. ALITO: Well, we don't argue that his
3 reading renders them completely redundant. I think
4 it is clear that our reading doesn't render them com-
5 pletely redundant.

6 As I said, these things were intended to occupy
7 the field and not really to interlock.

8 QUESTION: The problem with his reading is
9 you have got to stick some extra words in the statute.

10 MR. ALITO: That is one of the problems with
11 his reading and another major problem with his reading,
12 beyond the plain language of RICO, is the legislative
13 history.

14 There are three points I would make about
15 the legislative history very quickly. First, there
16 are numerous places in the legislative history where
17 sponsors and principal advocates of RICO, not just any
18 congressman, but the congressmen who were responsible
19 for drafting this bill and getting it enacted, stated
20 that one of the purposes of the forfeiture provision
21 was to take away racketeers' illegal gain.

22 In the Senate, Senator McClellan, who was
23 probably the chief sponsor of the bill, stated that
24 RICO "would forfeit the ill-gotten gain of criminals
25 where the enter or operate an organization through a

1 pattern of racketeering activity."

2 QUESTION: Well, Mr. Alito, do you think you
3 could take a senator's statement on the floor that we
4 want ill-gotten gains forfeited and say he must have
5 meant profits as opposed to other kinds of interests?

6 MR. ALITO: I think that is what ill-gotten
7 gains means. It means illegal profit. It certainly
8 doesn't mean -- That certainly is a much more reasonable
9 reading than to say that it means a lawfully acquired
10 interest in an enterprise that has been used to further
11 a criminal purpose.

12 QUESTION: But, my query was whether Senator
13 McClellan was really focusing on the fine distinctions
14 that perhaps the statute might have drawn when he said
15 ill-gotten gain.

16 MR. ALITO: Well, it is less specific than
17 we might have hoped, but I think it is a reasonable
18 approximation of our argument. And, this is not a single,
19 isolated statement. There are many statements in the
20 debate to that effect and they illicit no opposition
21 or inquiries from other members of Congress suggesting
22 that maybe they shouldn't go that far.

23 Representative Poth, to give just one more
24 example, who was perhaps the statute's chief advocate
25 in the House, said after conviction the ill-gotten gains

1 must be forfeited to the government. And, the House
2 Report stated that the forfeiture provision extends
3 "to all property and interests as broadly defined which
4 are related to the violation." And, as I said, there
5 are other statements to this effect.

6 The second point is, as I have pointed out,
7 that forfeiting racketeering profits is entirely con-
8 sistent with Congress' broad intent. And, there are
9 many specific problems that Congress was concerned with
10 during the congressional debates that virtually cry
11 out for the forfeiture of racketeering profits.

12 One example are illegal businesses that
13 organized crime has dominated like narcotics and gambling
14 where there are no interests in the enterprise that
15 can be taken in forfeiture, but striking at the illegal
16 profits really gets at the heart of the matter.

17 And, another was the practice of taking over
18 a legitimate business, skimming off profits and leaving
19 it bankrupt. Forfeiting and interest in the bankrupt
20 shell would not do any good, but taking the illegal
21 profits that are drained off the business would be an
22 effective remedy.

23 The third point that emerges from the legis-
24 lative history is it is certainly true, as petitioner
25 points out, that there are statements in the legislative

1 history that the forfeiture provision results in the
2 forfeiture of interests in an enterprise. But, none
3 of the statements, addressed to the finally enacted
4 version of RICO, states that the forfeiture provision
5 is limited to these interests. These are merely
6 illustrative and not exhaustive.

7 And, as to the letter from Deputy Attorney
8 General Kleindeinst upon which petitioner relies, this
9 addressed an earlier version of the RIOC statute that
10 was limited to interest in an enterprise, so it really
11 sheds no light on what the finally enacted and amended
12 version means.

13 This letter was quoted and cited in the Senate
14 Report because of its bearing on the question of the
15 constitutionality of the forfeiture of interest in an
16 enterprise. And, the point that Mr. Kleindeinst was
17 making was there isn't a constitutional problem when
18 the forfeited interest is one in an enterprise that
19 was involved in the violation and not simply an enter-
20 prise that the convicted person happened to have.

21 In conclusion, the forfeiture of racketeering
22 profits is an extremely important weapon in the on-going
23 battle against organized crime. The plain language
24 of RICO and the legislative history show with some
25 certainty that Congress intended to acquire the

1 forfeiture of such proceeds and we, therefore, urge
2 that the judgment of the court below be affirmed.

3 CHIEF JUSTICE BURGER: Do you have anything
4 further, Mr. Dion.

5 ORAL ARGUMENT OF RONALD A. DION, ESQ. -- Rebuttal
6 ON BEHALF OF THE PETITIONER

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

9 I would like to respond to two things in
10 particular that possibly were not discussed in the
11 affirmative argument.

12 One question is what exactly is the difference
13 and the purpose of in personam jurisdiction versus in
14 rem forfeiture jurisdiction?

15 The reason that they went over to in personam
16 jurisdiction is twofold. Number one, unlike in rem
17 jurisdiction, it allows for the immediate and mandatory
18 forfeiture, totally non-discretionary. In rem, you
19 have independent lawsuits, independent parties involved.

20 More importantly, the reason that it was in
21 personam is so that the 1963 forfeiture could serve
22 its purpose and go to things that were normally not
23 forfeitable, that are not in rem.

24 I think the case of United States versus Rubin
25 is the perfect example of this. The government wanted

1 the racketeer out the union, out of the enterprise.
2 To do this, the 5th Circuit said, all right, it is
3 subject -- the office is subject to forfeiture. That
4 is not in rem. It has to be in personam. That is the
5 reason for the in personam jurisdiction.

6 It is all well and good for the government
7 to say that we think profits should be forfeitable.
8 We believe that it is an effective weapon. That is
9 not what we are here to discuss. What we are here to
10 discuss is whether it does or does not fall under the
11 statute as written.

12 For example, the government has gone down
13 and listed a number of things that they believe are
14 subject to forfeiture under RICO which only has as its
15 fruits, if you will --

16 QUESTION: Of course, if the language was
17 all that clear, probably this case wouldn't be here.
18 I thought you said earlier in your argument, your
19 argument in chief, the statute is a little confusing --

20 MR. DION: It is.

21 QUESTION: -- and hard to parse. So you must
22 turn to secondary sources like the government does,
23 is that right?

24 MR. DION: The secondary sources certainly
25 are illustrative. There is no question about it.

1 QUESTION: So the government is entitled to
2 turn to its secondary sources like you are.

3 MR. DION: Well, there is a question of what
4 level. I believe that the statements of congressmen
5 and senators on the floor really isn't secondary, it
6 is almost in the third position. What we are relying
7 upon is the exact wording of the bills -- of the Preamble
8 of the Bill and the reports which is what the congressmen
9 had in front of them as their understanding of the
10 statute when they were voting on the issue.

11 QUESTION: Of course, you are not in the
12 position of a civil litigant either where it is kind
13 of evenly divided. It goes perhaps to the person without
14 the burden of proof. You have the presumption of lenity
15 in a criminal action in your favor.

16 MR. DION: We would submit that we do.

17 One of the things that is interesting is the
18 government talks about the history of the last 15 years,
19 how now, because forfeitures are so run-of-the-mill,
20 we can interpret them as broadly as we possibly want.
21 However, none of those were on the books in 1970 when
22 the issue of the intent of Congress actually came into
23 being, the kind of after-the-fact.

24 I think one of the important things though
25 is what really was the purpose of the racketeering

1 statute? The purpose of the statute -- and I don't
2 think there is really any argument on this -- is to
3 get the racketeer out of the enterprise, to allow the
4 enterprise to live independent of the racketeering
5 and to survive.

6 Very simply stated, unless the profits and
7 proceeds are put back into an enterprise, it falls out-
8 side the scope of the statute. That is one of the reasons
9 we have 1962(a). That is what provides for the sub-
10 stantive crime and ultimately the forfeiture when there
11 is a plowing back into an enterprise of illegally
12 obtained interest and proceeds. If the interest and
13 proceeds are not put back into the enterprise --
14 though it may very well be that Congress would love
15 to get those profits and proceeds -- it goes outside
16 the purpose and scope of the racketeering statute.

17 QUESTION: Well, Mr. Dion, you do concede
18 that Congress, in its stated purpose, intended to
19 eradicate organized crime, do you not?

20 MR. DION: There is no question that was their
21 stated purpose.

22 However, at the same time, we take a look
23 at what are the underlying crimes. The government
24 basically says we have got to go after profits and
25 proceeds as a forfeiture of all the underlying crimes.

1 If we look at the list of underlying crimes, Congress
2 has not provided for forfeiture of the underlying
3 substantive crimes in many cases. Gambling, prosti-
4 tution and murder, for example, have no forfeiture
5 provisions attached to them.

6 That is one of the reasons I would suggest
7 that the scope and purpose of RICO is getting the
8 criminal out of the enterprise and that under that
9 interpretation the statute can be read as expressly
10 worded without a provision for the forfeiture of income,
11 profits, and proceeds.

12 CHIEF JUSTICE BURGER: Thank you, gentlemen.
13 The case is submitted.

14 We will resume at 1:00.

15 (Whereupon, at 11:54 a.m., the case in the
16 above-entitled matter was submitted.)

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CERTIFICATION

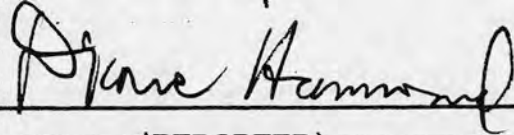
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JOSEPH C. RUSSELLO, Petitioner v. UNITED STATES

82-472

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