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## OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1144

TITLE UNITED STATES, Petitioner V. JOHN VON NEUMANN

PLACE Washington, D. C.

DATE November 4, 1985

PAGES 1 thru 60



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1	IN THE SUPREME COURT OF THE UNITED STATES
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3	UNITED STATES, x
4	Petitioner x No. 84-1144
5	v. x
6	JOHN VON NEUMANN x
7	х
8	Washington, D.C.
9	Monday, November 4, 1985
10	The above-entitled matter came on for oral
11	argument before the Supreme Court of the United States
12	at 10:45 o'clock, a.m.
13	APPEARANCES:
14	ALAN I. HOROWITZ, ESQ., Assistant to the Solicitor
15	General, Department of Justice, Washington, D.C.; on
16	behalf of the Petitioner.
17	CHARLES L. BIRKE, ESQ., Los Angeles, California; on
18	behalf of the Respondent.
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## PROCEEDINGS

THE CHIEF JUSTICE: Mr. Horowitz, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.

ON BEHALF OF THE PETITIONER

MR. HOROWITZ: Thank you, Mr. Chief Justice, and may it please the court:

The question in this case, in essence, is whether the Customs Services routine administration of its civil forfeiture responsibilities violates the constitutional rights of persons whose property has been lawfully seized for violating the customs laws.

Specifically, the issue concerns the effects, if any, of the due process clause of the Fifth Amendment on the administrative consideration of a petition for remission or mitigation that is filed in connection with a seizure for civil forfeiture. Here, for failure to declare an automobile to customs upon entry into the United States.

Pursuant to 19 U.S.C. 1618, an individual who has an item seized for forfeiture, even if the item is unquestionably bought, may file petition for remission or mitigation with the Secretary of the Treasury, seeking to have all of part of the forfeiture remitted.

The Secretary has set up certain internal

procedures for processing these petitions. In the ordinary course the Agency will consider and rule on the petition, giving its ruling to the Claimant. If the Secretary determines that remission is appropriate and the claimant agrees to the terms of the proposed remission, the matter is settled without a judicial proceeding.

Ninety-five percent of remission petitions filed in car seizure cases are settled in this fashion. If there is no agreement on remission, either because the Secretary determines that remission is not appropriate or because the claimant is unsatisfied with the terms upon which remission is offered, then the case proceeds to a judicial, or for small cases, an administrative proceeding in which the forfeitability of the item is determined.

QUESTION: Mr. Horowitz, is the remission proceeding bas.cally used as a statutory authorization to customs people to just settle these cases? Is that what it boils down to, they have settlement authority, in effect?

MR. HOROWITZ: Well, they have settlement authority. I guess in some ways it's used that way, although they're not the prosecuting authority. It's an agency thing. They're not the prosecutor.

But, settlement is part of it.

QUESTION: I mean, it just seems to operate as a practical matter --

MR. HOROWITZ: Sure.

QUESTION: As agency settlement of a potential forfeiture?

MR. HOROWITZ: Yes, I would agree as a practical matter, that's basically how it operates. The reason I hesitate to agree completely is, it is possible to get remission even after the forfeiture proceeding has occurred, in which case there would no longer be a settlement. It would surely be a matter of executive grace there. But, naturally the government is more reluctant to grant remission under those circumstances and therefore it's to the advantage of claimants to have their remission petitions decided on by the Agency before there's been a judicial proceeding.

The background facts may be briefly stated is follows: On January 20th, 1975, Respondent attempted to bring across the Canadian border into the United States a new Jaguar that he had purchased in Europe. When asked at the U.S. Customs station whether he had anything to declare, he failed to declare the car and it was then seized as forfeitable under 19 U.S.C. 1497.

Respondent then completed, with the assistance

of the Customs agent on duty there, a brief handwritten petition for remission in which he stated that he had no intention to avoid customs duty. The Customs agent then helped Respondent arrange transportation to a local hotel where he stayed overnight, and from there he arranged to get home in his private plane that was waiting for him in Seattle.

Two weeks later Customs returned Respondent's car upon his posting of a bond for the value of the car, assessed at \$24,500. On February 12th, 1975, approximately two weeks later, Respondent's counsel filed a more detailed supplement to his remission petition. This was prepared by an attorney for the Respondent.

Thirteen days after the filing of that supplemental petition, now 36 days from the date of the original seizure, Customs acted on the remission petition. It informed Respondent that -- excuse me.

QUESTION: Is there a difference between litigation and remission?

MR. HOROWITZ: I would say no. I'm using the term "remission" to cover both. Generally remission, I think, may refer to remission of the entire forfeiture. Mitigation is a partial --

QUESTION: Or less than?

MR. HCROWITZ: Or less than.

QUESTION: So, mitigation is not less than?

MR. HOROWITZ: I think mitigation can also

mean less than.

QUESTION: At that stage, on these facts, in your view could the government have justified forfeiting the Jaguar completely?

MR. HOROWITZ: After it had acted on the remission petition?

QUESTION: No, no, before there had been any effort to mitigate or remit, on these facts could the government have taken and kept this Jaguar?

MR. HCROWITZ: There's no question that the government could have forfeited the Jaguar, and in fact the Ninth Circuit itself held that the Jaguar was forfeitable. So, the only reason that Respondent is not asking for the entire \$24,500 is because Customs had agreed to remit some of the money to him as a matter of executive grace.

QUESTION: I'm interested in the same sort of question. Is there any explanation on the facts of this case why anything would be remitted? Can you imagine a worse violation of the customs law than --

MR. HCROWITZ: Well, possibly. I can imagine a worse violation of the customs law. In general,

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Customs -- in most cases Customs does grant some remission. Now, whether that's a reflection of their overriding princy to try to avoid as much litigation as they can or just the recognition that the penalty set forth in the statute can be a rather harsh one --

OUESTION: It seems to me this is a stupid act of generosity, but it's irrelevant to the legal issue.

QUESTION: Well, this is the predicate --MR. HOROWITZ: Let me just say, it's not a typical act of generosity on behalf of the Customs

OUESTION: Is the predicate for a petition for remission that there's been a fine or a penalty imposed,

MR. HOROWITZ: Well, the assumption of the remission petition is that the property was forfeitable.

QUESTION: Isn't that what 1618 says?

MR. HCROWITZ: Yes, 1618 --

QUESTION: You have to --

MR. HCROWITZ: -- provides for that. The claimant doesn't have to concede forfeitability in filing this remission petition. In other words, if remission petition is ultimately denied and the case goes to a judicial hearing, the claimant is still entitled to raise this defense, that it's not

forfeitable. He hasn't conceded that away.

But, for purposes of the remission petition, the assumption is that the property is forfeitable, because if it wasn't there would be no need for remission petition. He would be entitled to have his car back altogether.

QUESTION: Once you decide that it's forfeitable, then it isn't his property at all, is it?

MR. HCROWITZ: Once it's decided in a judicial proceeding that it's forfeitable, it's the government's car, and under United States against Stowell --

QUESTION: You concede that if he puts the forfeitability at issue, it has to be decided?

M?. HOROWITZ: If he puts the forfeitability at issue in the remission proceedings? Well, I think he's entitled -- the due process clause, I think does guarantee him a --

QUESTION: How can ne put forfeitability at issue?

MR. HCROWITZ: How can he put forfeitability at issue? He can do it by asking the government to bring its judicial forfeiture proceeding.

QUESTION: Well, may he do it in the remission proceeding?

MR. HOROWITZ: As part of his remission

petition he may be claiming that he had no culpability at all and --

QUESTION: Well, I know he may, but may he put forfeitability at issue in the remission proceeding?

MR. HOROWITZ: I'm sorry, Justice. I guess

I'm not sure what you're asking. He can raise the claim
that --

QUESTION: He files a petition for remission, or whatever you want to call it, and he says, please remit because my car wasn't forfeitable?

MR. HOROWITZ: Yes. But in raising that claim, he is entitled to due process, which I think entitles him to some sore of a judicial hearing.

QUESTION: So, he may raise it?

MR. HOROWITZ: He may raise it, but wher Customs acts on a remission petition it usually is not with a full panoply of due process protections that are associated with a judicial hearing.

So, I would say if customs rejects remission petition because it has rejected his claim that the car is not forfeitable, that is not dispositive. He is still entitled to a judicial hearing.

QUESTION: Are you saying that he is entitled to some sort of a due process protection if he raises the issue of forfeitability in the remission proceeding,

or are you saying he is entitled to due process protection if he seeks a judicial determination?

MR. HCROWITZ: What I am saying is that at the time his property is seized he is entitled to a judicial determination of forfeitability at some point, if the government is going to forfeit it. And I don't believe that by filing remission petition, or even if as part of his remission petition he claims that it was not forfeitable at all but he has waived the right —

QUESTION: Well, anyway, Mr. Horowitz, there is no forfeitability procedure except in the District Court, is there? Is that right?

MR. HOROWITZ: For smaller seizures it can be done administratively.

QUESTION: But let's take a larger one, like this one.

MR. HOROWITZ: Yes.

QUESTION: A \$24,000 Jaguar.

MR. HOROWITZ: Well, this was \$24,500, and --

QUESTION: Well, \$24,000 --

MR. HCROWITZ: Well, today, actually the limit is \$100,000, so this could be administratively --

QUESTION: Whatever it may be, if there is to be a judicial proceeding, doesn't the government have to initiate it?

QUESTION: So, if there is a remission proceeding, it's denied, then the government has to go in if the government says it's forfeitable, and go in and initiate a proceeding in some court, doesn't it?

MR. HOROWITZ: That's correct. The Claimant can file an equitable action to get the government to initiate the forfeiture proceeding, but that's right. In order to ultimately forfeit the property the government must initiate a judicial proceeding.

QUESTION: And this is in response to due process considerations?

MR. HOROWITZ: I believe so. It satisfies due process.

QUESTION: It's in response to a statute, isn't it, that the government initiates a procedure, is that just kind of a constitutional --

MR. HOROWITZ: No, there's a statute that does it. I understood Justice Brennan to be suggesting that if there were no such steps that there might be due process problems, and I would agree with that, that if the government's going to take property that at one time belonged to a private citizen and take it for itself and forfeit it at some point, he has a right to be heard.

QUESTION: Does this record show what facts were alleged to lead the Customs Service to exercise this compassionate authority?

MR. HOROWITZ: As far as I know, there's nothing in the administrative file that -- in the record that reflects why the administrative decision was made.

QUESTION: Isn't it pretty clear that this record shows that from the outset, he's embarked on a scheme to defraud the government?

MR. HOROWITZ: Well, it's not clear whether he had an intention to defraud it. Well --

QUESTION: Well, isn't there a statement from him in writing that he was about to give this to his girlfriend?

MR. HOROWITZ: Well, he says that he bought it for his girlfriend.

QUESTION: Well, there was a statement by him.

MR. HOROWITZ: I don't know what that has to do with why he was bringing it into the country without paying customs duty.

QUESTION: Well, I thought the question was, did he make any statement at all, and you said none.

MR. HCROWITZ: No, he made a statement in his remission petition that he did not intend to violate customs duty. He had some story about how he had got

lost looking for the Canadian customs station, and stumbled onto the U.S. customs station and had no idea what was happening.

I guess I should say that -- finally, in his supplemental petition, that he first made the claim that he hadn't really been given an opportunity to declare.

QUESTION: Well, it seems to me if a person makes a return and has a number of purchases and he forgets to list or declare a scarf or some such thing, but a \$24,000 Jaguar is a little hard to forget, isn't it?

MR. HOROWITZ: Well, Mr. Chief Justice, I understand you to be asking a question along the same lines as Justice Powell, that you don't understand why the Agency would send him a check for \$21,000, and I understand why you are asking that.

I will just say that they do have guidelines on these things and this is not completely beyond the normal reach of the guidelines. They tend to be pretty liberal about -- or generous, I suppose is the way to put it, with these cases.

The Respondent in this case wasn't satisfied with the Customs Service generosity. He was a little bit greedy.

QUESTION: Wasn't the problem that he thought

he had to report at the Canadian customs rather than American, he allegedly got all mixed up, and I don't know if it's true or not, but he did have some kind of an explanation?

MR. HCROWITZ: I'm not -- I don't -QUESTION: -- or he wouldn't have given them
\$24,000 --

MR. HOROWITZ: Well, the guidelines tend to go to first offense and things like that. Generally in the case of a first offense they — the penalty is somewhat less than — the duty in this case, I'm not sure exactly what the amount is, but it would have been something less than \$1,000, so I think Customs has the view that for somebody to pay 25 times the duty is perhaps a little bit harsh.

QUESTION: And what they got was about three times the normal?

MR. HOROWITZ: About, yes, maybe four or five. Well, so Customs did grant remission whether they should have or not, and they decided the penalty would be \$3,600. They sent Respondent a check for \$20,900 after he filed an unsuccessful administrative appeal challenging the institution of the \$3,600 penalty.

He said, thank you very much. He deposited his remission of \$21,000, and then he filed this lawsuit

in District Court seeking to recover from the government the \$3,600 that he had not been repaid.

Now, on the first appeal in this case, the Court of Appeals held that he was entitled to recover. The basis for that decision was that the passage of time of 36 days from the time of his initial remission petition until the time the Customs Service acted on it violated his due process rights, and the Court added that the Constitution ordinarily required such petitions be ruled upon within 24 hours.

That decision was subsequently vacated by this Court and remanded for reconsideration in light of 8850. On remand the Court of Appeals adhered to its prior decision that the delay here raised serious due process problems, although it retreated somewhat from its 24-hour rule and agreed that each case must be considered on its own facts.

It is our contention that the Court of Appeals erred in several respects. First and foremost, we submit that there is no constitutionally protected property interests at stake in the remission stage, and hence there to which due process rights can attach.

Second, even if there is such a right, we submit that the course of events here could not conceivably have violated due process, and third, even

if it did violate due process, we would contend that the remedy here, which is returning the \$3,600 to him, basically eliminating the forfeiture, is quite inappropriate.

The primary question here, the one on which I will focus, is do the protections of the due process clause which apply to deprivations of life, liberty or property attach to the remission procedure. Another way of putting the question is, does the remission procedure here — that is, does an adverse decision to the Claimant in the remission proceeding deprive him of any property interest.

We submit that the answer is clearly no. Of course, there is no question that the Respondent does have a property interest in this car at the time it was seized. That property interest cannot be taken away without a judicial hearing. A judicial hearing is what gives him due process with respect to that property interest.

But, the property interest in his car simply has nothing to do with the remission proceeding here.

The remission proceeding is collateral. It assumes that the property was lawfully seized. It assumes that the property is forfeitable, and the question of the remission proceeding is whether the government will give

to the Claimant either executive clemency or, as an act of settling, to avoid litigation whether it will give back some of this property, property that really belongs to the government, whether it will give some of it back to him.

That decision does not deprive the Respondent or the Claimant of any property interest.

QUESTION: Well, Mr. Horowitz, it seems as though you reach exactly the same result if you acknowledge that there is a property interest in the car and it is subject to due process protections, but the forfeiture proceeding itself provides all the process that's due.

MR. HOROWITZ: Well, that is our position, Justice O'Connor.

Our position is that there is no due process right in the remission proceeding itself. Congress could repeal the remission procedure tomorrow and there would be no question that the forfeiture, general forfeiture procedure would still satisfy due process.

I think maybe the best way to look at this problem is to assume that Customs had set up the remission procedure a little bit differently. As we've explained, the remission proceedings come first the way it is set up now, and that is done to avoid litigation,

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but Customs could just as easily have said that the forfeiture proceeding will be held first, and let's assume that the held a forfeiture hearing the day after Respondent's car was seized and the car was held to be forfeitable, and then Customs said, now that your car has been held forfeitable you can file a remission petition and we'll decide whether we're going to remit some of the forefeiture.

In that situation there can't be any conceivable argument that there's a property interest, or that any due process right would attach to the remission petition. It is the government's property. It's been adjudicated to be the government's property in a judicial proceeding.

QUESTION: Then the only question is, that's the very point, that that's not what the government does, that they haven't set up something where they have this procedure after the legal determination has been made.

At the time this takes place, he still does have a property interest in either the bond or the car, dcesn't he?

MR. HOROWITZ: He has a property interest in the car, but it's not implicated at all in the remission proceeding.

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QUESTION: The remission proceeding -- 95
percent of these cases are really settlement proceedings
to determine who gets the car and how much he pays?

MR. HOROWITZ: Yes, and just like any other settlement proceeding, we would submit that the litigant has no due process right in whether the government decides to agree to a settement or not.

QUESTION: Your argument is, if they had a different procedure it would be obvious, but my point is, they don't have that different procedure?

MR. HOROWITZ: I think the question -- what he is claiming is that he has an independent right to due process in the remission proceeding, quite separate from the forfeiture proceeding. The position of the Ninth Circuit, the position of the Respondent --

QUESTION: Can we really separate them
entirely, if 95 percent of them actually end up settling
the forfeiture proceeding? Why isn't it appropriate, as
Congress did, by putting separate, you know, statutes,
why isn't it appropriate to look at it as all part of
one statutory procedure for disposing of these
controversies?

MR. HOROWITZ: Because the question is whether the government's decision in the remission proceeding involves a deprivation of property in any sense, and the

QUESTION: -- a decision in a proceeding which leads either to a deprivation of property or refusal to deprive of a property, and it's a proceeding that takes place before the deprivation has taken place, and it's part of the overall procedure.

MR. HOROWITZ: That's true, but there are all kinds of intermediate steps in the course of a proceeding. There's the assigning of a particular person in the Customs Service who is going to act on the remission petition.

I wouldn't suggest that he has a due process right to be heard on who should be assigned to it.

QUESTION: That of course is a very separate question, whether there's anything unfair about it. I'm not suggesting that, but your position is, they could be totally arbitrary and they could give -- every fourth person would get a remission and every sixth one not or something like that, it would be perfectly all right.

MR. HCROWITZ: Well, it wouldn't be perfectly all right but it would be perfectly constitutional.

QUESTION: It would be perfectly constitutional?

MR. HOROWITZ: Yes, that is our position, and

QUESTION: Mr. Horowitz, doesn't the government have to go forward with a forfeiture proceeding if it wants to keep the \$3,600 that it kept?

MR. HOROWITZ: No, it does not. This is in the nature of a settlement of the litigation.

QUESTION: Well, then it seems to me that he has been deprived of \$3,600 as a result of the remission proceeding.

MR. HOROWITZ: But he doesn't have to agree to the remission. He's been deprived of it in the same way that a person is deprived of his liberty.

QUESTION: You mean, what he's really done is given up at the forfeiture proceeding his right to due process in a forfeiture proceeding by taking the \$21,000?

MR. HOROWITZ: Well, he's given up his right --

QUESTION: Well, isn't that right, or not?

MR. HOROWITZ: He's given up his right to a hearing on the forfeiture.

QUESTION: Well, he's given up any right to have a due process hearing, with respect to the government's right to \$3,600?

MR. HOROWITZ: He's chosen to do that. It's the same as if there were civil litigation against the government and it never comes to trial.

QUESTION: So, he does waive his right to a forfeiture proceeding by taking the money?

MR. HOROWITZ: By taking the money, yes, not by filing a petition. He has the choice of refusing the remission, but once he -- at least until this litigation we would have thought that once he agreed to settle on those grounds he was giving up his right to the money.

QUESTION: And was he notified -- when you sent him the check did you tell him all these things?

It looks to me --

MR. HOROWITZ: In light of this case -QUESTION: -- it seems to me that should have
been your answer to his suit.

MR. HOROWITZ: That was part of the answer to his suit.

QUESTION: Well, why aren't you claiming that up here?

MR. HOROWITZ: Well, the District Court never reached that, thought it was a simple case, and --

QUESTION: Well, I know, but you could defend this judgment. You could say the judgment -- that the Court should have ruled that there was a waiver, which is what you're supposed to --

MR. HOROWITZ: -- defend the judgment on that ground, but we're not that interested in the \$3,600.

QUESTION: But the waiver, if that were the Government's position, it would be a waiver of the right to have the Government conduct a forfeiture proceeding, wouldn't it? I mean, that does initially answer the question, is there a separate right to due process in the remission proceedings?

MR. HCROWITZ: No, I agree, Justice, that there is no separate right to due process in the remission procedure. He has a right to have a judicial proceeding before the property is taken away from him. He can give up that right.

QUESTION: All I am saying is, perhaps there are two separate questions. One is the right to due process in the forfeiture proceeding which the Government would institute, and second a separate right to due process in the remission proceeding, and the fact that the remission proceeding is ultimately settled by a waiver of the due process rights in the forfeiture proceeding doesn't necessarily answer the second question, was there a separate right to due process in the remission proceeding.

QUESTION: If the District Court had responded to your claim that he had waived, the case would have been over, wouldn't it?

MR. HOROWITZ: Yes, the case would have been over -- well, no, I'll take that back. His claim is that in taking 36 days to decide on his remission petition, they had already by that time violated his due process rights.

So, whether or not he would have agreed to the settlement or not, he would have --

QUESTION: He took the money. He took the money despite the delay, and I would suppose that's what you're claiming, by taking the money he waived whatever due process rights he might otherwise have had.

MR. HOROWITZ: Well, the question is, by taking the money he certainly gives up the right to have a forfeiture proceeding. He ought to have probably stated at the time that he was also waiving any right to raise any other -- bring any other sort of lawsuit in connection with this, but we didn't do that because I don't think it occurred to anyone he could bring this claim.

The due process -- what you're suggesting

would not solve the problem that is raised by the Ninth Circuit's decision because under the Ninth Circuit's decision he could have turned down the remission at the time and brought the same lawsuit and won, on the theory that the 36-day delay violated his due process rights.

QUESTION: That may be so. That may be so, but --

MR. HOROWITZ: That's what happened -QUESTION: But if you won here on waiver, the
Court of Appeals decision would never stand, the opinion
would never stand. It would be vacated or reversed.

QUESTION: But you'd get the same --

MR. HOROWITZ: We'd get the same decision next time. We'd have the same --

QUESTION: Any time a fellow takes the money he's out of court?

MR. HOROWITZ: Well, but in Johns against
McKinley, the Second Circuit case where they suggested
this business liability, the man didn't take the money.
Instead he filed a lawsuit, and so we don't have this
defense available. And he said that it was --

QUESTION: Well, your answer would be that any right that he's got to due process is satisfied in the forfeiture proceeding?

MR. HOROWITZ: Well, that's what our answer is

in this case, and I think that's what the Court should hold. I think I should reserve the remainder of my time.

CHIEF JUSTICE BURGER: Very well.

Mr. Birke.

ORAL ARGUMENT OF CHARLES L. BIRKE, ESQ.

CN BEHALF OF THE RESPONDENT

MR. BIRKE: Mr. Chief Justice, and may it please the court:

I think the first question you asked, Mr.

Chief Justice, puts the case in the proper framework,

when you asked counsel whether or not the government has

to justify forfeiture, the government can make its

forfeiture simply by administrative fiat or having

seized the vehicle. That does not constitute a

forfeiture.

There is no forfeiture merely because there has been a seizure. There is no finding of guilty and there is no finding of fault.

The only way that there is a forfeiture is not by the government unilaterally, but by a judicial proceeding which the government is required to bring, the government must initiate that proceeding. And I would respectfully submit to the Court that as terrible as the facts may be, and my law professor said argue the law if the facts are against you, they really are not

your concern.

The question posed by the Ninth Circuit, and at issue before the Court, are the procedural safeguards that are involved when there is a seizure of property with no hearing. Not only is there no pre-seizure hearing, there is no immediate probable cause post-seizure hearing.

QUESTION: Well, Mr. Birke, there eventually is a hearing in connection with the forfeiture proceeding, and this Court has determined that that proceeding has to be provided within a reasonable time to meet due process concerns. Now, why isn't that all that someone in the Respondent's position is entitled to?

MR. BIRKE: The reason is, Your Honor, that there is by code, by regulation and by costom one integrated procedure here which I think you pointed out or referred in your comments.

As a matter of fact, the petition for remission is the very first step in one process, and the government has a vital interest in that because 90 percent of the cases are taken off their docket and off their calendar. What is the expenditure of resources --

QUESTION: It's just like a settlement
authorization, as used before forfeiture, isn't that -MR. BIRKE: Your Honor, there's a difference

and I'll tell you, it is and it isn't, and the "isn't" is the key point. And that is, even though the person might not be entitled to a particular result from the administrative consideration of his petition, he is entitled to a prompt result. He is entitled to know where he stands because he has lost the vehicle without a hearing.

QUESTION: Well, in the normal civil litigation setting, why would there be some right to force the government to settle a lawsuit early?

MR. BIRKE: The reason, Your Honor, is that in the normal -- whether it be government or private litigation, there is no seizure of property without a hearing. As a matter of fact, this Court in the 8850 case and going back to the Pearson Yacht Leasing case. said, we know this is an extraordinary situation.

QUESTION: Well, suppose it is a matter of -a dispute over property which the government has taken,
and there's a civil suit that arises. Is there some
obligation for early settlement?

MR. BIRKE: I think there's an obligation for this reason. It is established that there will not be a judicial foreclosure -- excuse me, judicial forfeiture proceeding in 90 percent of the cases instituted until they have looked at the petition for remission.

Now, if you have a due process right to a reasonably prompt hearing on the judicial forfeiture proceeding, and a precondition to the judicial forfeiture proceeding is the consideration of petition for remission, you have to have a constitutional right to a reasonably prompt consideration of the petition for remission.

Otherwise --

QUESTION: Is the consideration of the petition for remission a precondition to the institution of a judicial forfeiture proceeding? Supposing that your client, when this property was seized at the Customs station, wanted to bring about the fastest possible determination of his rights in the car.

MR. BIRKE: He is led to believe, Your Honor -QUESTION: Well, I'm not interested in what
he's led to believe. What would he have done if he knew
everything there was to know?

MR. BIRKE: I suppose it would have been possible to -- on the basis of what this Court said in 8850, although I don't think it was particularly clear at the time, that he could have brought some motion under Rule 41-E. I'm not sure about that, but certainly the Court has strongly implied that.

But I don't know that that would have been

anything prompt. I think the issue, Your Honor, is promptness and I do not know, and certainly --

QUESTION: But what you're talking about -- all you're really claiming is the prompt right to a determination of the forfeiture, isn't it?

MR. BIRKE: Yes.

QUESTION: If you can't prove that the remission proceeding is a necessary precondition to that, I think your due process argument is awfully weak.

MR. BIRKE: Well, Your Honor, I would say that I prove it, or strengthen it, by the point that the Government encourages this. In fact, it's even in the record. The Government encourages the petition for remission as a means to the benefit of the Government of getting rid of 90 percent of the cases.

Now, if the Government says to you, here is a structure -- and as a matter of fact, Your Honor, it's been --

QUESTION: If the Government sets up a structure and says, we encourage this kind of settlement, why don't you go through with it, and you say, it's just too darn slow for me, why don't you go the way you want to?

MR. BIRKE: Well, Your Honor, that's, with all due respect, totally unrealistic, to expect -- excuse me.

In a condemnation proceeding the Government takes the land without a hearing.

MR. BIRKE: Your Honor, I don't think it's exactly the same because there is a whole panoply of different interests. It's not a question of an accused violation of law.

This Court -- for this Court to say that a man whose property is seized is supposed to make a determination of weighing what is the quickest procedure, whether the petition for remission is the quickest of Rule 41-E, which of course he's never heard of, is the quickest, I submit where his property has been taking, and again we're talking about a taking upon an accusation only of a law inforcement officer, is not the kind of standard of conduct of the Government versus an individual which is commensurate with a rule of law that should be operating in the country.

I mean, Your Honor, it's obviously a question where people can disagree. At least, I would hope that you think so.

QUESTION: What did your client consider the

\$21,000, a gift?

MR. BIRKE: I don't know what he considered it, but I think he never, I will say, never considered nor was he told that he was making a waiver.

I think when he filed the petition for remission he was advised --

QUESTION: Did he think the Government was just handing him \$21,000, of my money?

MR. BIRKE: Your Honor, again, what his state of mind was this, I would say -- it's fiction. What I would say is, it's as much my guess as it is yours.

QUESTION: Well, fiction, I think, is probably

MR. BIRKE: But if you're getting to settlement, Your Honor, I think the implication of your question if I can get the direction of the point, it's the same as Justice White made, is that somehow this should be regarded as a settlement.

However, what is the most fundamental principle of waiver of constitutional rights? It has to be knowingly. You have to have advice. You have to have some notice being given to you that if you do this, there are consequences to it, and nobody in this record can point to anything that says that.

QUESTION: I beg your pardon?

QUESTION: Maybe we have to get a new lawyer?

MR. BIRKE: But, Your Honor, no lawyer could have said that it's a waiver because no case is ever decided at -- if this Court decides that that's a waiver, it will be decided on an issue which was not pled, and which has not been briefed, and which, I respectfully submit, is not what the Government took the case up about at all.

There is no evidence of a waiver. A waiver is a knowing giving up of rights based --

QUESTION: Well, then the Government may claim, in effect, a waiver in the District Court?

MR. BIRKE: In effect, what they claimed was a counterclaim in the District Court.

QUESTION: Was it based on, that there was a waiver?

MR. BIRKE: I think the based it upon a claim that there was a settlement, and it was not -- the issue was never reached and never was taken up by the Ninth Circuit Court of Appeals.

QUESTION: That may be so, but do you think the Government, either you or the Government can force us to make a constitutional decision when there's a non-constitutional basis for disposing of it?

MR. BIRKE: I know I can't, Your Honor.

MR. BIRKE: Well, I believe, Your Honor, and I don't know again what's in the Government's mind, is that they were hoping -- I think that both parties here think the principle of law involved is more important than the \$3,000, and so I suppose --

QUESTION: Well, that may be so. That may be so. But still, the District Court has said, well, the case is over. This is a settlement. Now, you may have appealed, but it still would have been on a nonconstitutional ground.

MR. BIRKE: Well, Your Honor, I would say it raises a -- if you were to find in this case that there was a waiver, that would raise a serious constitutional question and I believe that it would be a violation of due process, if you were to decide in this case that there was a waiver on the basis of, it is an encouraged procedure pursuant to a statute.

Nothing in the statute says that there is a waiver. Nothing was told to this man when he filed a petition on a government form, that there was a waiver involved. Nothing was told to him when they sent him a letter saying, we're remitting, that if you take the money there's a waiver.

It is not contained anywhere, and the back of the check doesn't say, in full settlement of all claims. Now, that is four things that the Government could and should have done, that they're now going to come in and say, there's a waiver.

And, for this Court to rule as a matter of constitutional law that a party is bound or estopped by a principle of waiver when there has been no notice statutorily, administratively, or correspondence-wise or on the check, that there is a release of constitutional rights, I believe is --

QUESTION: I don't understand the Government to be arguing with you. They don't want to argue with you.

MR. BIRKE: They don't, but I understood you were suggesting that the case could be decided on that basis.

QUESTION: No, not here.

MR. BIRKE: Oh, all right. Well, then I misperceived the direction of your comment.

QUESTION: Let me try to clear up a procedural question. Suppose instead of a \$24,000 Jaguar for his girlfriend, he had concealed a \$24,000 diamond necklace in his suitcase, and in searching the suitcase they found it, and he has made a declaration that he had

nothing to declare.

Now, would they let him take the necklace along home with him, or would they take possession of the necklace right then and there?

MR. BIRKE: Your Honor, if they took

possession of it, it wouldn't make any difference,

because he had — they wouldn't. I would assume they

would have taken the necklace the same way that they

took the car, and they would have had a right to take it

because under the customs procedures that was cause, in

the law enforcement officers' mind, that there had been

a violation.

QUESTION: But they didn't start the forfeiture proceedings in 36 days. You would say that was a denial of due process, would you?

MR. BIRKE: I would say it would depend upon the factors that this Court enunciated in 8850, and the relative guilt or clearness of the guilt, the Second Circuit in Johns-McKinley pointed out, is an argument for having less time than the 30 days, because they go through this in their petition for certiorari. They went through all these factors which they don't say they did consider but they say they might have considered.

And the Second Circuit pointed out, if guilt is so clear, why do they have to take so long? It is

the limbo, if I may, Your Honor, it is conceding that there is no right to a particular determination. It is the fact that the man whose property is seized with no hearing, that is the basic, fundamental stretching of the Constitution to the limit.

The property is gone because a law enforcement officer thinks that there's grounds for a violation, but there's been no hearing, no probable cause, no determination. So, the worse the defense is, makes no difference. The fact is, the person is kept in limbo. He doesn't know, do I hire a lawyer, do I put up the bond for the full value, do I go buy another vehicle.

And, what the Ninth Circuit and the Second Circuit did in their decisions in Jonns and in the Von Neumann case was, they said, we have to look at this from the general standpoint of prejudice, and this, I submit, or hope is a point that deserves careful attention, and that is, the facts of this particular case are not the most significant thing before the Court, and as a matter of fact the Government hasn't treated it that way.

The Government's petition for certicrari contained the declaration of the customs official that wasn't part of the record. It's hearsay. It's like he was testifying before a Congressional committee to make

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a rule of general applicability, and the rule of general applicability which the Ninth Circuit and the Second Circuit decided was, what is likely to be the case in the most general type circumstance, and that is what this Court is going to pronounce here.

QUESTION: Well, when the Government has seized, whether it's diamonds or Jaquar automobiles, is not the -- they have seized it and are holding possession of it, does not the individual have a right to bring a Klevin action?

MR. BIRKE: Well, as I indicated in response to a previous question, he is -- he may have a right, if he consults a lawyer who looks at 8850 -- of course it wasn't clear then, that was ten years ago, but he might be able to bring a Klevin action.

But the point, respectfully, Your Honor, is that it is the Government's duty and obligation to bring the for eiture proceeding. And now, as a matter of fact, it's codified that they have to act with reasonable promptness and as a matter of fact, 1603 provides that the customs people have to refer with reasonable promptness to the U.S. Attorney, and once the judicial proceeding is instituted there cannot be any administrative consideration of the petition for remission.

So, I submit to Your Honor that the emphasis, or the key point here is the fact that you are dealing with what I call the tipping of the scale or the stretching of the seizure right to the very limit of the Constitution, that it is -- I believe Justice Brennan pointed this out to counsel, it is the Government's duty to go forward.

We have already said to the Government, we are going to give you the greatest rights you can possibly have. It's an extraordinary situation here. You are at the very end of the spectrum of constitutional -- you can take the property because it's a customs law.

QUESTION: Well, Mr. Birke, wasn't the test
and assumption of the Court in the 8850 case that
regardless of what happened with any remission, these
are the limits that the Government will employ in going
ahead with a forfeiture, and we recognize in 8850 that
there is a property interest to be protected, and I just
have difficulty understanding how there should be an
additional concern about timeliness of the remission.

We were assuming, I think, in 8850 that there would, regardless of a remission proceeding, these are the outer limits that are to be dealt with in a forfeiture.

MR. BIRKE: Your Honor, in 8850, by the way,

at page 566 and 67, the Court did say, unreasonable delay in processing the petition for remission could not justify prolonged keeping of the property without a hearing, and I think it's going to turn -- whether or not you essentially accept the proposition that it's one procedure and that -- you just can't ignore reality

QUESTION: Mr. Birke, may the Government initiate the forfeiture proceeding without having decided the petition for remission?

MR. BIRKE: Well, if they do that I think they have --

QUESTION: But, may they?

MR. BIRKE: I believe that they may.

QUESTION: Do you know whether the practice has ever been to do that?

MR. BIRKE: No, but Your Honor, I'd like to ask the Court to probably feel that it's not that practice, because they say in their petition for cert that they decide 85 to 95 percent of vehicle seizure cases on the basis of the remission.

I mean, that's the applicable procedure that takes care of this. I mean, whether or not theoretically it is, the judicial forfeiture proceeding is the aberration.

The way that these cases get decided is on the

consideration of the petition for remission, and at least when they're holding the person's property without a hearing -- and again there can't be a judicial forfeiture proceeding in 90 percent of the cases without the consideration of petition for remission, and if you have a due process plank in this requirement, that the -- we've got to have intermediate steps. Otherwise it disappears.

If the Government did not as a matter of practice consider petitions for remission, and it was the aberration or unique situation, perhaps the point that you raise that, well, all we have to do is look at the timeliness of the judicial forfeiture proceeding, is important but that just isn't the fact. It's not the case.

QUESTION: There's no requirement in the law that a claimant first go through the remission proceeding before he can enforce a judicial forfeiture proceeding?

MR. BIRKE: No. That is right, and of course the question is, is he -- again, we're almost in some sort of passive waiver situation. He is not inviting a waiver, and I think that when Congress set up a statute that even the Agency has complete discretion as to what it will do, says he's supposed to act reasonably.

There's a statute on the books, and I would think this, Your Honor. I would say that, because you didn't reach this in 8850, but were there not a remission practice, and I think that there might very well be imposed a constitutional standard of a prompt probable cause hearing. I frankly believe that. I mean, you have never had to address that point but if you are sitting in a situation where the man's property is seized without hearing, I don't think that the same standards which you laid down in 8850, you would perhaps lay down in the absence of a remission because that was one of the prime factors, or a factor that you discussed in 8850, was that the government had to have time to process the petition for remission.

That is one of the factors. If you did not have a petition for remission, I believe there would be a very serious question as to whether or not the Government wouldn't be required within 24 hours or 36 hours or a very, very brief time to give a hearing.

Certainly, that's a requirement in any other situation, and why should the fact that --

QUESTION: But only in probable cause -QUESTION: Not a determination.

MR. BIRKE: No, but a probable -- essentially a probable -- but something, something other than the

fact that a law enforcement agency has said, I think there's a violation here.

I mean, it's still fundamental in this country.

QUESTION: Well, what about the time when he's

given the check. Could he have then raised all these

points before taking the check? What does this mean, by

me taking that?

MR. BIRKE: As a matter of fact, no, Your Honor, because -

QUESTION: Would he have then filed? Could he have filed in fact --

MR. BIRKE: We filed in this case. This case does not come from the Government forfeiture proceeding. It comes from District Court action initiated by Mr. Von Neumann, because he felt at least that he had been innocent and wanted to get his \$3,600 back because he didn't want to be branded as a person who had violated the customs laws, and that was to him much more important than --

QUESTION: He accepted the money?

MR. BIRKE: Yes, Your Honor, but --

QUESTION: And couldn't he have raised all these things you've been arguing about?

MR. BIRKE: No, because by that time the due process had been violated.

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QUESTION: Was somebody with his hand over his mouth or something?

MR. BIKKE: Your Honor, by that time the due process right had been violated. What we have --

QUESTION: Did he have a lawyer then?

MR. BIRKE: He got a lawyer, Your Honor, after he filed the petition for remission. He got the lawyer, I think --

QUESTION: So, he had a lawyer when he accepted the check?

MR. BIRKE: That's right, but by that time there had not been a determination. The question, Your Honor, about accepting the check and raising due process, I think would perhaps have been, perhaps controlling or more influential to what your decision should be if they had acted promptly and they had said, as the Ninth Circuit and the Second Circuit said, in automobile cases, decided in 24 hours or 36 hours because the loss of an automobile is a very important thing to most people.

Now, it wasn't to Mr. Von Neumann, but if you decide this case --

QUESTION: He had airplanes too, didn't he? MR. BIRKE: Your Honor, if you decide this case on the basis of the fact that Mr. Von Neumann

wasn't as prejudiced as someone who was poor, then you are injecting a principle which is anathema to the Constitution.

QUESTION: You are injecting it. I didn't.

MR. BIRKE: No, the point --

QUESTION: Well, why don't you withdraw it?

MR. BIRKE: Your Honor, I think I'm probably confused as to the point that you have said that I have said, because I don't know exactly what point -- if it's the time element --

QUESTION: I understand you. You are arguing that we have an obligation to do equal justice to the rich and the poor alike?

MR. BIRKE: That's right, and it isn't often,
I suppose, that --

QUESTION: We took an oath to that.

MR. BIRKE: I beg your pardon?

QUESTION: We took an oath to that effect.

Didn't you?

MR. BIRKE: I only took an oath, I think, to do the best I can within the law, and I hope I'm doing that and I hope that nothing I've said raises any inference that I'm doubting at all what you're going to be doing and arguing. But, I think the point deserves reiteration.

That is that we've heard, perhaps jocularly, from the Justices about the private jet and the girlfriend and i was \$25,000, it was \$36,000. It doesn't make any difference. It doesn't make any difference if this was his truck and he was behind in his payment and he had to feed his family on it.

That's why this case is before you, because the Ninth Circuit thought that way and the Second Circuit thought that way, and that is how I am asking you to think, to be -- to say, what is the general, probable result of a situation where 95 percent of the time the Government decides cases this way and it's a precondition according to their own procedure to getting into the judicial forfeiture proceeding.

QUESTION: When you say a precondition according to their own procedure, you're not changing your answer, that it's not a requirement?

MR. BIRVE: That's correct, I am not.

QUESTION: Why do you call it a precondition?

MR. BIRKE: Because as a practical matter, I think we cannot ignore the way things actually function as a matter of practice, and they are the ones who have raised that and have brought this before you.

In fact, the whole justification for the petition for cert is, the whole system's going to fall

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I don't think you can let the Government say, we do this 95 percent of the time but if you tell us that we have to act with reasonable promptness and that's all we're talking about here, in the procedure that determines 95 percent of these cases, we're going to take the ball and go home.

I don't think that Congress when they enacted 1618 and told them that they have discretion to act reasonably, allowed them to do that, and I think the fact that they can decide the case however they want, which I'm conceding, of course, because it's true, without judicial review makes no difference at all as to the time.

It makes it easier for them, and they didn't make any showing or attempt to make a showing in this case that they did any of the things that they said would take so much time, and I think that's important for you when you are deciding this very case.

In the petition they said, well, if we got this we would have to look and check whether he was a Swiss resident, and the use of the car, and did he register it in California. They didn't do any of that,

They said this is a matter of executive grace, and I don't think it is. And they said, he's the same as a prisoner, and they cite those prison cases. He's not the same as a prisoner because nobody's found him guilty. Nobody has -- no court has said that he's liable. No probable cause hearing has been held. And I believe that this court wants to equate a procedure that is based upon a seizure of property without a hearing to a man as if he were a convicted felon. It's just not the reality, and that is the main point.

And, when you are talking about an estoppel to enforce the laws, there was -- the property was gone and it was lost. I'm submitting to you that on a consideration of the issue of waiver, not here because the Government would have had to put him on some kind of notice and it never did by any means, and that as a practical matter he had a property interest.

The Government concedes it, and if you're conceding there's a property interest and that there's a practice which as a matter of practicality decides 90 percent of these cases, and then there is -- which comes before the judicial forfeiture proceeding which is mandated and is the only thing that can justify the

seizure and there is no justification of the seizure and no loss of property interest, until then, then in the intermediate step, the person is entitled to --

QUESTION: Is the due process issue here a "tough time" factor, is that it?

MR. BIRKE: That is totally what it is.

QUESTION: And what did the Court of Appeals
hold?

MR. BIRKE: The Court of Appeals held, Your Honor, that the test of the Court in the 8850 case, the four factors which evolved from Barker v. Wingo, this is what should be applied here, the prejudice, the delay, assertion of right, and the excuse for the delay. And it's not --

QUESTION: Doesn't it give some advice about how much time would ever be permitted?

MR. BIRKE: It was a step back, Your Honor.

In the first Von Neumann case they said 24 hours was enough, and the Second Circuit had decided that in Lee v. Thornton. They said a vehicle is so important --

QUESTION: Do you defend that?

MR. BIRKE: I don't know, because I don't have to. I'm not here to defend that.

QUESTION: Now what do you defend?

MR. BIRKE: I say this, Your Honor. I say

 first of all, the Court must establish that there is no loss of property interest upon seizure, which the Government concedes.

Second, given the fact that the person has an existing cognizable property interest and that his property has been seized without a hearing, he is entitled to reasonable promptness --

QUESTION: What is that?

MR. BIRKE: I am sorry?

QUESTION: What is that? Did the Court of Appeals have some specific period in mind?

MR. BIRKE: No, they left it to the -- I think that there should be a 30-day rule for this reason, it's kind of -- one thing, it wins the case for me which is of course the most important, but whether it took 30 or 45 or 60, there ought to be something because we're talking about conduct of the administrative agency, how they're going to act in the future, and the lack of certainty has been raised and some questions about whether the Government officials know.

So, I think they should be told by this Court
-- you should have, that there is a presumption that 30
days is enough and then --

QUESTION: When did the Court of Appeals think a presumption arose?

MR. BIRKE: No, they did not say anything specific. The Court of Appeals said, when the District Court decides whether the length of delay is prejudicial, they should take into account that vehicles are very, very important in the general case to a person, his mobility, his livelihood.

And they said, when you're dealing with a vehicle -- this was at the conclusion of the opinion -- you have to recognize that a 30-day delay -- I think they were inferring, and I think they should have just decided as a matter of law instead of referring it to the District Court because I think as counsel does, they practically told the District Court what to do here and I think they should have done it.

I think that they're saying that this Court should say something like 30 days is sufficient where you have a vehicle which can be in the general sense an extremely important thing, and unless you can justify more. And that's the third point which is your own test. The Government should have to justify if they're going to take longer than 30 days, especially when they go on the assumption that he's guilty anyway, which is not the assumption that the claimant makes.

And in this case, the reason I think this case should be resolved without remand is that they never purported to act with any constitutional standard at all. They admit that they said it was executive grace and, we were not acting with any idea that the man has a constitutional right.

I think this Court should tell the customs agents in the future, there is a constitutional right here, act within a standard. And the particular case involved here --

QUESTION: But you are arguing somebody else's case in a way. Your client had his automobile.

MR. BIRKE: My client posted the bond for the \$24,000 --

QUESTION: Well, yes, so it's really -- you're talking about being deprived of his money?

MR. BIRKE: That's --

QUESTION: For more than 30 days?

MR. BIRKE: That's right, Your Honor. But then that just has to bring me back to the argument, you're making a rule of general applicability. You don't look at the man's bankbook and see how important was that \$24,000. Maybe I could have presented a record, I wouldn't try to do it, that this was the man's last \$24,000, he had to have that car to make -- you

know, for his living.

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It's not the case, but you can't involve the administrative agency in that kind of proceeding, as to how --

QUESTION: You are talking about a car.

That's somebody -- that's some other case.

MR. BIRKE: No, it isn't, Your Honor, for this reason -- well, I will answer the question. It isn't, Your Honor, because you're getting into an implied waiver again. If you say you're not entitled to all the protections that you have when you lose your automobile because you post a bond, then what you're saying is, if you post the bond you're losing your due process.

QUESTION: I know, but Barker aginst Wingo goes on a case to case basis, and the question for the District Court wouldn't be, how long should the Customs Service be able to hold a car, but how long should the Customs Service in this case be allowed to keep this money.

MR. BIRKE: I'm not certain if I agree, because again you're saying he lost some rights by putting up the bond.

QUESTION: No, no. It's just --

MR. BIRKE: Unless they told him in advance that there's a different standard.

QUESTION: It's just a question of applying Barker against Wingo to the money.

MR. BIRKE: In that case, Your Honor, that might be the case. The Court might be instructed as one of the factors to take into account that the man posted the bond, and at least people --

CHIEF JUSTICE BURGER: You have responded to the question now.

MR. BIRKE: Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Horowitz?

MR. HOROWITZ: I would like to make a couple of points, Mr. Chief Justice.

ORAL ARGUMENT OF ALAN I. HOROWITZ

ON BEHALF OF PETITIONER - REBUTTAL

MR.HOROWITZ: As I said at the outset, there is a property interest here but that property interest is totally taken care of by the judicial proceeding, 8850 is what applies to that. If there is some probable cause question for the seizure, in 8850 the Court said he could file a Rule 41-E motion.

But the remission proceeding itself has nothing to do with that property interest. There is no deprivation of property involved in a decision on remission.

QUESTION: May I ask, in that connection, just because of a suggestion your opponent made, supposing you did away with the remission proceeding, if Congress hadn't provided for it. Would you agree, in that circumstance there would be some kind of a constitutional requirement for a probable cause hearing at an early date, I ion't know, probably not 24 hours but sometime soon?

MR. HOROWITZ: Well, it would go to -QUESTION: Assuming --

MR. HOROWITZ: It would go to the probable cause for the seizure, I think, as to whether --

QUESTION: Well, but even then --

MR. HCROWITZ: I'm inclined to think that there probably would be some.

QUESTION: But anyway, the rule takes care of it, doesn't it?

MR. HCROWITZ: Yes, I think Rule 41-E covers that.

QUESTION: Well, either Rule 41 or presumably the remission proceeding may take care of it too.

MR. HCROWITZ: Well, our position is that there's no prompt disposition requirement in the remission proceeding, so I don't think the remission proceeding takes care of it, and the remission

proceeding doesn't go to whether the property was unconstitutionally seized.

He doesn't have any right to any disposition of the remission proceeding, and when he gets a letter from the Secretary of the Treasury telling him what the outcome of the remission proceeding is, whether it's denial, or an offer of a certain settlement, a certain figure, he's got exactly the same property interest that he had before he filed the remission petition.

QUESTION: But the statute says that the remission proceeding, it was not willful, that is a factor that should be considered. I assume they consider that, don't they?

MR. HOROWITZ: That's a factor that may be considered.

QUESTION: But don't they consider that?

MR. HOROWITZ: Yes. Well, in practice they do

consider ic, but --

QUESTION: Is he entitled to have them consider it?

MR. HOROWITZ: No. He has no right to judicial review. He has the right to petition for appeal within the agency, but if he's not satisfied -- if he can come forward and show that someone in the exact same position as him got a better deal out of the

Department of Treasury, he's out of luck.

QUESTION: But could the Department adopt a rule saying, we realize Congress has said that the willfulness is an element, but we've decided it takes too much time to consider willfulness. We simply will disregard it and just consider forfeitability?

Would that be permissible?

MR. HOROWITZ: Well, I don't know if it would be permissible under the statute or not, but the question will be purely a statutory one. He wouldn't have any constitutional right for them to consider willfulness.

QUESTION: Earlier I thought you said that the statute imposed no obligation to consider willfulness.

Then they could have the regulation saying, we just won't consider it.

MR. HOROWITZ: Well, I say the statute imposes noi obligation for them to reach any particular decision. I'm not sure it even imposes an obligation to consider willfulness. I'd have to look at it again.

It just says, if it was incurred without willful negligence he may remit. If it's incurred without willful negligence he may also decide not to remit. So, I'm not sure that --

QUESTION: The rule is saying, we won't

consider whether it was willfully negligent or not?

They could have such a rule, though?

MR. HCROWITZ: I think they could. I'm not sure, but I think that doesn't have anything to do really with the due process question here, Justice Stevens.

There's just no independent right in remission proceedings to due process.

I'd like to talk if I have a minute about this rich versus poor thing, because it's not only a rich person like Mr. Von Neumann who could bring this really ridiculous lawsuit, it's the poor people who have their items seized who really don't have an interest in the Ninth Circuit's decisions here because those are the people who need for Customs to decide these remission petitions and to give them back the property, most of the property they've had seized, and it's just not in their interest to have people at the Customs Service looking over their shoulder at what is likely to be an invalidation of the forfeiture by the Ninth Circuit sometime down the road and acting on these petitions hastily.

Now, we don't say in our brief that we'll give these petitions short shrift or that we'll deny them all if we lose this case. We do say that the due process

clause -- the Constitution doesn't prevent us from doing that and certainly in borderline cases, in cases where the Customs Service doesn't have the opportunity to investigate, they're going to be put in a position where they act on these things more quickly and less favorably to the claimants if they're concerned about 36 days being too long for them to hold on to one of these things.

So, I do think there is an interest the claimants have in this case, but it's not the interest that is taken into account by the Ninth Circuit.

Thank you.

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

(Whereupon, at 11:41 p.m., the case in the above-entitled matter was submitted.]

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## CERTIFICATION.

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

#84-1144 - UNITED STATES, Petitioner V. JOHN VON NEUMANN

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BY Paul A. Ruhandson

(REPORTER)

## WARSHAL'S OFFICE SUPREME COURT, U.S.

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