

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: REPUBLIC NATIONAL BANK OF MIAMI, Petitioner

v. UNITED STATES

CASE NO: 91-767

PLACE: Washington, D.C.

DATE: October 5, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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REPUBLIC NATIONAL BANK OF :
MIAMI, :
Petitioner :
v. : No. 91-767
UNITED STATES :
- - - - - X

Washington, D.C.

Monday, October 5, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:55 a.m.

APPEARANCES:

STANLEY A. BEILEY, ESQ., Miami, Florida; on behalf of the Petitioner.

ROBERT A. LONG, JR., ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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1 PROCEEDINGS

2 (10:55 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 91-767, Republic National Bank of Miami v.
5 United States.

6 Mr. Beiley, you may proceed whenever you're
7 ready.

8 ORAL ARGUMENT OF STANLEY A. BEILEY
9 ON BEHALF OF THE PETITIONER

10 MR. BEILEY: Mr. Chief Justice, and may it
11 please the Court:

12 This case concerns Federal appellate
13 jurisdiction. The issue is can the United States, by
14 executing on a favorable currency forfeiture judgment,
15 divest a Federal appellate court of appellate jurisdiction
16 to decide the merits of a timely filed appeal. The
17 Eleventh Circuit below held that the Government had this
18 power, which holding is contrary to the majority of the
19 circuit courts of appeals which have addressed this very
20 issue.

21 It is the Government's position in this case
22 that the Government can bring a civil forfeiture lawsuit,
23 win the case at trial, and then prevent an appellate court
24 from deciding the merits of that appeal by transferring
25 the funds in dispute from the territorial jurisdiction of

1 the trial.

2 QUESTION: I suppose, would its position also be
3 that if pending the, pending the decision of the district
4 court the property was sold and the proceeds were
5 transferred to some other place the district court would
6 lose jurisdiction too, I suppose?

7 MR. BEILEY: I believe that would follow from
8 the Government's position. That's certainly not the
9 position that we advocate before this Court.

10 The late Judge Vance in his dissent in the
11 Eleventh Circuit's One Lear Jet case, which dissent is now
12 the basis for the rule in the majority of the circuits,
13 referred to the majority opinion which adopted the
14 Government's arguments being made before this Court as
15 follows, and I quote. It offends fundamental principles
16 of fairness, it represents a departure from common sense,
17 and it is analytically flawed. We believe Judge Vance's
18 comments are correct.

19 It is the bank's position in this case that the
20 Government should not have the power to defeat a Federal
21 court's appellate jurisdiction by its unilateral act of
22 levying on a forfeiture judgment. We believe that when
23 the Government or any party brings a lawsuit in Federal
24 court that party, as the plaintiff, submits itself to the
25 court's in personam jurisdiction regardless of the nature

1 of the underlying action.

2 The bank further submits that the nature of the
3 trial court proceeding, whether you call that proceeding
4 in rem, quasi in rem, or in personam, should have no
5 bearing on the issue of Federal appellate jurisdiction.

6 QUESTION: Well, this would be your view even in
7 a classical admiralty action, Mr. Beiley, where everybody
8 agrees it is a prototypical in rem action, nonetheless the
9 Government there would submit itself to the personal
10 jurisdiction of the court?

11 MR. BEILEY: It's not only my position, Your
12 Honor, but it has been adopted by this Court in several of
13 the cases cited in our brief in a pure admiralty case, the
14 Feckler case, the British transport case, and several
15 prize cases where the Government has intervened in
16 admiralty in rem cases and then objected to cross claims
17 being filed against it. And this Court had held that when
18 the United States intervenes it takes the position of a
19 private suitor for all purposes for which justice may be
20 done.

21 QUESTION: Well, is that the same thing though
22 as an admiralty action say initiated by the Government?

23 MR. BEILEY: Our position would be it would be
24 the same, Your Honor, that the Government by initiating an
25 action, as well as any plaintiff that initiates an action,

1 submits itself to the court's in personam jurisdiction.

2 QUESTION: Notwithstanding sovereign immunity?

3 MR. BEILEY: That is correct, Your Honor.

4 Sovereign immunity we believe would apply to suits against
5 the Government, not to suits by the Government. In your
6 hypothetical, and Mr. Chief Justice, you asked about the
7 Government initiating a lawsuit. So that our position
8 is --

9 QUESTION: Well, Mr. Beiley, what about cases
10 like the Brig Ann where the court has stated that the
11 release of the res ends jurisdiction?

12 MR. BEILEY: Justice O'Connor, first, we don't
13 believe that ancient admiralty cases should be relevant to
14 an issue of Federal appellate jurisdiction in a currency
15 forfeiture suit. But even under those old admiralty
16 cases, our reading of the cases, I recognize the
17 Government has a contrary interpretation. Our reading of
18 the traditional old admiralty cases, which we don't
19 believe to be relevant, is that jurisdiction vests upon
20 the initial seizure and that the continuous seizure or the
21 continuous court control of the res, even in the old
22 admiralty cases, is only required in two circumstances,
23 none of which apply here.

24 QUESTION: Well, for example if a third party
25 absconds with the res, what happens then?

1 MR. BEILEY: In a traditional admiralty case if
2 the only way that the court can fashion meaningful relief
3 to the litigants is to have custody of the res and it's
4 essential that that res be before the court to make a
5 meaningful award, then you have this useless judgment
6 exception, as we referred to it in the rules, and the
7 court will not entertain a suit where it can't fashion any
8 meaningful relief. But that's not the case here. The
9 Government has the money. The Government has had
10 possession of the money from the time this lawsuit
11 started. So we don't believe --

12 QUESTION: Mr. Beiley, you would say that even
13 in the old admiralty cases, I think you would say this,
14 that if the case had already been decided by the district
15 court and was on appeal, as it is here, and at that point
16 somebody absconded with the ship, the appeal would have
17 proceeded, even in old admiralty cases. Wouldn't you say
18 that? Do we have a case where that was the situation?

19 MR. BEILEY: Our position would be if the
20 absence of the ship in the ancient admiralty cases would
21 make any judgment rendered by the appellate court, or on
22 remand the trial court, meaningless, then the court under
23 concepts of mootness or case in controversy could decline
24 jurisdiction and dismiss the case. But again that's not
25 the situation in this case, when the Government has had

1 the money from the inception of the suit, and even under
2 their position has the money today in the Treasury.
3 Certainly meaningful relief can be fashioned in this case.

4 QUESTION: So you're saying the old admiralty
5 cases are no different from what you would say should
6 apply here?

7 MR. BEILEY: I'm saying the old admiralty cases,
8 Justice Scalia, should not have any relevance to currency
9 cases. To the extent they do I think the principles are
10 the same.

11 QUESTION: Well, I'm not sure I agree with you
12 that they shouldn't have any relevance. Why shouldn't
13 they have any relevance? Doesn't Congress, isn't our
14 normal rule that Congress enacts against the background of
15 the common law and we interpret their statutes against
16 that background?

17 MR. BEILEY: Congress in this case said that the
18 procedure of forfeiture cases shall as far as practicable
19 conform to admiralty. We interpret that as a position
20 that procedurally you follow admiralty practice in
21 forfeiture cases, but we do not read that as a declaration
22 by Congress that every rule of substantive law that has
23 ever been developed in admiralty cases ipso facto apply in
24 forfeiture cases. Nor do I know of any court that has so
25 held.

1 QUESTION: I suppose if the money in this case
2 wasn't in the bank or in some place but it was in a bag
3 and somebody stole it, I suppose then that would be, the
4 court of appeals could dismiss the case?

5 MR. BEILEY: Does Your Honor's hypothetical mean
6 stole it during the course of the trial court proceeding
7 or after the judgment?

8 QUESTION: After the judgment.

9 MR. BEILEY: Your Honor, that again gets to the
10 issue, as the Government suggests, about the necessity for
11 posting of bond. That is a financial risk any litigant
12 takes. That shouldn't be a jurisdictional issue. For
13 example, if you wish to preserve the res put a bond to
14 protect and insure the continuance of the presence. And
15 you have the right to do that if you wish to put up a
16 bond. Our point though that that's a financial risk. It
17 shouldn't be converted into a jurisdictional risk as the
18 Government would seek to do in this case.

19 QUESTION: Under your view the language in the
20 Rio Grande was really quite unnecessary in which the court
21 indicated that jurisdiction remained if the res was
22 removed by some improper action or by accident or by
23 fraud? That was just quite unnecessary under your view of
24 the case?

25 MR. BEILEY: No, Your Honor. I think that case

1 held that initially, that initial seizure vested
2 jurisdiction, and that certainly an accidental or an
3 improper removal of the res would not divest jurisdiction.

4 QUESTION: Well, why would the court have
5 qualified its language then to say that accidental or
6 improper removal? It would just say that any transfer of
7 the res, any relinquishment or any disappearance of the
8 res suffices.

9 MR. BEILEY: Your Honor, if the res were an
10 immutable rule of jurisdiction, if a court lacked power to
11 proceed to adjudicate a case without that res before it,
12 then I would submit that any removal of the res for any
13 reason, accidental, improper, act of God, or otherwise,
14 should divest the court of jurisdiction. I think the
15 exception in essence highlights the original rule as we
16 interpret the admiralty cases, which is that jurisdiction
17 is complete upon initial seizure unless the removal would
18 make the court's judgment meaningless and worthless
19 because there's no basis to afford the parties relief.

20 QUESTION: Well, but I'm still not quite sure
21 what your explanation is for the accidental, fraudulent,
22 or improper removal language. It seems to me those are
23 quite unnecessary qualifications. Under your view the Rio
24 Grande court should have said and any subsequent removal
25 by the res is insufficient to destroy jurisdiction.

1 MR. BEILEY: With the two exceptions that I read
2 out of the admiralty cases, Justice Kennedy --

3 QUESTION: All right.

4 MR. BEILEY: -- the useless judgment and the
5 voluntary abandonment situation which came up in one of
6 the other old admiralty cases.

7 QUESTION: All right.

8 QUESTION: Didn't the Government make some
9 agreement with the bank early on --

10 MR. BEILEY: Yes, Justice White, they did.

11 QUESTION: -- that they would not, that they
12 could foreclose but they wouldn't, they would hold the
13 proceeds subject to the bank's lien?

14 MR. BEILEY: Justice White, the agreement was
15 that, the case started out as a forfeiture against a
16 luxury home.

17 QUESTION: Yes.

18 MR. BEILEY: During the course of the
19 proceedings the Government got a sales offer and, on joint
20 motion with my clients consent, asked the trial court to
21 sell the property and take the proceeds from the property
22 and put those proceeds in the court registry as a
23 substitute for the realty.

24 QUESTION: And did they do that?

25 MR. BEILEY: Yes, they did, Your Honor.

1 QUESTION: Well, how did they ever get the
2 proceeds out of the court registry?

3 MR. BEILEY: After the judgment became final
4 they asked the marshall to wire transfer the funds by
5 bookkeeping entries to the Treasury.

6 QUESTION: I see. So you think whatever they,
7 you don't think there was an agreement then with the bank
8 that they would hold the proceeds?

9 MR. BEILEY: Well, we think the Eleventh Circuit
10 misinterpreted the stipulation. That is not a focal point
11 of our argument here because we --

12 QUESTION: So you don't rely on any agreement
13 whatsoever?

14 MR. BEILEY: That's correct.

15 QUESTION: Okay.

16 MR. BEILEY: We don't think this Court took
17 jurisdiction, certiorari jurisdiction to interpret a
18 stipulation.

19 QUESTION: I would think you would, if it was
20 sort of a breach of faith by the Government you would
21 certainly be relying on it.

22 MR. BEILEY: The stipulation indicated that our
23 rights would be without prejudice. By wire transferring
24 the funds we think we have been prejudiced but we are not
25 relying on that as the basis for the relief that we seek

1 before this Court.

2 QUESTION: Are you going to deal in your oral
3 argument, Mr. Beiley, with the Government's appropriations
4 clause argument?

5 MR. BEILEY: Yes, Mr. Chief Justice. In fact I
6 will address that now. The Government takes the position
7 that now the funds somehow are in the Treasury, and that
8 being in the Treasury the appropriations clause precludes
9 the relief that we seek. I think their argument fails for
10 at least two reasons. One, the issue of whether these
11 funds are Government funds, it's my position, is only when
12 this case is over, when the appeal is over. We say it's
13 our funds. The Government says it's their funds. That's
14 the issue for a court on the merits to decide.

15 QUESTION: But the money that you're talking
16 about basically was remitted to the Treasury, was it not?

17 MR. BEILEY: Well, we don't concede that, Your
18 Honor. Money we believe to be a fungible asset. We
19 believe that all that happens when money moves from one
20 account to the other are bookkeeping entries. I think
21 either the First or the Third Circuit or perhaps both
22 expressed it best when they said to predicate jurisdiction
23 on what Government pocket holds the money is seemingly an
24 artful way to determine Federal or public jurisdiction.

25 QUESTION: It would seem arguable at least that

1 Congress drew a distinction, that there are different
2 funds that Government deposits are housed in and once it
3 goes into the Treasury it's subject to this appropriations
4 clause limitation that it wouldn't be subject to if it
5 simply remained in a different account.

6 MR. BEILEY: Mr. Chief Justice, if the
7 Government's position on that point is correct, the
8 Government in the classic in personam case, take a case, a
9 student loan hypothetical where the Government sues,
10 collects. The defendant chooses not to supercede and the
11 Government collects money from the defendant while the
12 appeal is pending and sends the money to the Treasury,
13 which they would have a right to do where you have an
14 unsuperseeded judgment. Is the Government going to take
15 the position in that case that the appropriations clause
16 bars relief because in an in personam case the loser of a
17 student loan claim did not supercede?

18 QUESTION: Well, I suppose you have to look at
19 the statute. But it seems to me your argument that money
20 is fungible, that it's an intangible, cuts against your
21 appropriation arguments. You were the, you began by
22 saying that oh, this is not, I assume you meant this is
23 not public money. The title is contested to this. But
24 the minute you say that it's simply an accounting entry
25 that is fungible then it seems to me that that weakens

1 your argument under the appropriations clause.

2 MR. BEILEY: Your Honor, I don't think so. I
3 think that what happens when money is in a bank account,
4 you have a debtor-creditor relationship, the bank and the
5 depositor. You have a situation here where the Treasury
6 owes money to the Government which has not yet been
7 resolved until this appeal is resolved on the merits. As
8 the First or the Third Circuit or perhaps both have said,
9 the Government is everywhere so the obligation is owed
10 everywhere.

11 But more importantly, and I didn't quite finish
12 my answer to the appropriations clause question posed by
13 the Chief Justice, to the extent we need statutory
14 authority to get these funds we have two sets of statutes.
15 We have 28 U.S. Code 2465 which says quite plainly that
16 forfeited property shall be returned to a successful
17 claimant, and we have 28 U.S. Code 524 (c)(1)(d) which is
18 the Department of Justice asset forfeiture funds which
19 says one purpose for which forfeited funds should be used
20 is to be paid to claimants. So to the extent --

21 QUESTION: What do you do with 1301(d) that says
22 a law may be construed to make an appropriation only if
23 the law specifically states that an appropriation is made?

24 MR. BEILEY: Your Honor, we think both of those
25 statutes set forth appropriations out of forfeited funds

1 to be paid to claimants to those funds, such as the bank
2 in this case. There is nothing in those statutes that say
3 that the statutes don't apply if the money is in the
4 Treasury. It says that forfeited funds shall be returned
5 to the successful claimant.

6 QUESTION: And you say that is language of
7 specific appropriation?

8 MR. BEILEY: I believe it is, Your Honor.
9 Specific appropriation for use of forfeited funds. If
10 forfeited, if Congress says forfeited funds shall be paid
11 to a successful claimant the fact that the Government has
12 levied and put the funds in the Treasury doesn't change
13 that those funds can serve that purpose.

14 QUESTION: I suppose if this hadn't been treated
15 as a jurisdictional matter and the court of appeals had
16 decided the case against the Government it wouldn't make
17 any difference whether the funds were then in the Treasury
18 or not. The Government would have to pay a judgment.

19 MR. BEILEY: That's certainly our position, Your
20 Honor.

21 QUESTION: So it, it really doesn't make -- even
22 if they had transferred the money they might have to pay a
23 judgment, just like the Government has to pay judgments a
24 lot of times.

25 MR. BEILEY: That is our position.

1 QUESTION: When they lose a tax case sometimes
2 they have to --

3 (Laughter.)

4 QUESTION: Mr. Beiley, can I ask you kind of,
5 well just a question? Do you understand the Government
6 and the court of appeals to be taking the position the
7 case is moot?

8 MR. BEILEY: They, in their brief they take the
9 position that there are mootness concerns. They don't
10 quite come out and say that the case is moot but they
11 suggest mootness concerns. We don't think the case is
12 moot.

13 QUESTION: It seems to me it either, if it were
14 moot we ought to vacate the judgment below, would be the
15 normal disposition, and then you'd get your money back.
16 That's our normal disposition with moot cases, and I'm not
17 quite clear what your understanding is or what their
18 understanding is of the mootness case.

19 MR. BEILEY: I'm not particularly certain as to
20 what the Government means why the case is moot. If their
21 position is that the appropriations clause makes it moot,
22 I believe I answered that contention a moment ago.

23 QUESTION: I thought, thinking that their theory
24 was taking the res out of the territorial jurisdiction of
25 the district rendered the case non-justiciable or moot,

1 which would be true if the plaintiff were still trying to
2 get the money out of the res, but this is the opposite
3 here.

4 MR. BEILEY: That is correct.

5 QUESTION: And if you vacate it you, it seems to
6 me -- I suppose I should ask Government counsel this
7 question.

8 MR. BEILEY: The Government's suggestion in this
9 case that the solution to this jurisdictional problem is
10 the posting of a bond or the attention of a stay, and with
11 all respect to the Government, we believe simply makes no
12 sense. The sole purpose of a supersedeas bond
13 historically and otherwise is to assure a successful trial
14 litigant that its judgment will be paid if the execution
15 on that judgment is delayed while an appeal goes forward.

16 There's never any risk of non payment to the
17 Government in a civil forfeiture case because the
18 Government has possession of the property. They had it at
19 the inception of the suit and they had it after the suit
20 was over. A bond would serve no useful purpose
21 whatsoever. Nor is a stay, which is a discretionary
22 ruling by a trial court, a very sensible prerequisite to
23 Federal appellate jurisdiction because Federal appellate
24 jurisdiction should not depend upon trial courts
25 discretionary rulings.

1 QUESTION: Well, doesn't a bond, doesn't the
2 supersedeas bond ordinarily provide not just to secure the
3 principal but interest as well for damages for a delay,
4 whatever you want to call it?

5 MR. BEILEY: Traditionally the amount of a
6 supersedeas bond would cover future interest on the
7 principal sum of money and perhaps appellate costs. That
8 is correct, Mr. Chief Justice.

9 QUESTION: Well, so just holding the property as
10 the Government does would not allow it necessarily to
11 recover those elements.

12 MR. BEILEY: There's nothing that prohibited the
13 Government from putting those funds in an interest bearing
14 account. We would have no objection to the Government
15 levying on those funds and investing it in anyway they saw
16 fit. Our position is that that shouldn't preclude us from
17 taking an appeal to a Federal appellate court. If the
18 Government wished to invest those funds and earn interest
19 they are perfectly free to do so.

20 QUESTION: And you don't really care whether
21 they move it to the Treasury or not as long as you get
22 your appeal.

23 MR. BEILEY: That is correct.

24 QUESTION: And if you win the case you would
25 think the Government would pay you.

1 MR. BEILEY: We would think so.

2 (Laughter.)

3 MR. BEILEY: The position that we assert, that
4 the plaintiff, any plaintiff, when it brings a case in
5 court submits itself to the in personam jurisdiction of
6 the court, we believe applies here.

7 Very early on this Court in two old cases, Adam
8 v. Saenger and Nations v. Johnson, held, and I don't think
9 I can state it any better, that no rule can be a sound one
10 which will deprive a party of his right to have his case
11 submitted to an appellate court. No rule. Adam/Saenger,
12 Nations/Johnson, hold that when the plaintiff seeks relief
13 that that party is subject to the court's jurisdiction for
14 all purposes for which justice is required.

15 QUESTION: You don't say the Constitution
16 guarantees you the right to appeal, do you?

17 MR. BEILEY: No, Justice White. The right to
18 appeal is not a constitutional right, but I certainly
19 believe it to be a very fundamental right of a Federal
20 litigant.

21 QUESTION: Well, you've got it by statute, I
22 guess.

23 MR. BEILEY: That is correct. Congress, in
24 prescribing the appellate jurisdiction of Federal courts,
25 in 28 U.S. Code 1291 states that Federal courts of appeal

1 have appellate jurisdiction over trial court final
2 judgments. What we believe the Government is doing here
3 is attempting by its unilateral act of levying on a
4 judgment to interfere with that congressional appellate
5 jurisdiction mandate, which we believe to be improper.

6 QUESTION: Well, but you certainly don't have a
7 right to appeal where some event occurs that simply causes
8 there no longer to be a case or controversy, right?

9 MR. BEILEY: That is correct, Justice Scalia,
10 but that is not the case here.

11 QUESTION: Well, but why wouldn't the same, why
12 wouldn't the same answer be given if indeed the problem
13 here is that the lower court can no longer enforce its
14 judgment? Why --

15 MR. BEILEY: We believe, Your Honor, that the
16 lower court can indeed, if this case were decided on the
17 merits in favor of my bank, decide this case on the merits
18 and enter --

19 QUESTION: Enter what? A judgment against the
20 United States?

21 MR. BEILEY: Yeah. Direct the Government under
22 restitution principles in the two statutes cited before to
23 give us those forfeited, those portions of the forfeited
24 funds to which my bank is --

25 QUESTION: What are the two statutes that you're

1 relying on for that?

2 MR. BEILEY: I'm relying on 28 U.S. Code 2465
3 which holds that upon a successful judgment in favor of a
4 claimant forfeited funds shall be returned to the
5 claimant, and 28 U.S. Code 524(c)(1)(d).

6 QUESTION: That's of course not an
7 appropriation, that provision?

8 MR. BEILEY: We believe it is an appropriation
9 with respect to forfeited funds. It directs the
10 allocation of forfeited funds to a successful claimant.
11 What the Government has possession of in this case is
12 forfeited funds. We are seeking to get the portion back
13 that we claim we're entitled to.

14 QUESTION: What was the issue between you and
15 the Government about the right to have your lien
16 recognized?

17 MR. BEILEY: Under civil forfeiture law, Justice
18 White, the burden of proof is on a claimant to property,
19 such as a mortgagee, to prove by a preponderance of the
20 evidence that that party had no actual knowledge of the
21 underlying transactions.

22 QUESTION: So you are claiming to be an innocent
23 owner?

24 MR. BEILEY: That's correct. We were claiming
25 innocent ownership, and that was the dispute of the

1 Government.

2 QUESTION: And the district court found against
3 you?

4 MR. BEILEY: The district court found against
5 us.

6 QUESTION: And you wanted to litigate that in
7 the court of appeals?

8 MR. BEILEY: We took that issue up. We felt
9 there were clearly erroneous factual findings of the trial
10 court and that the trial court applied the wrong legal
11 standard.

12 QUESTION: Let's assume that the two statutes
13 you rely on are not appropriations. Do you lose?

14 MR. BEILEY: I don't believe so, Justice Souter.

15 QUESTION: Why not?

16 MR. BEILEY: Those statutes direct how forfeited
17 funds shall be paid. I don't think the Government can
18 avoid the impact of that case by bringing a suit to
19 acquire forfeited funds and put it into the Treasury.

20 QUESTION: So you're saying in effect that the
21 statute assume, or those statutes on my assumption, those
22 statutes presuppose that the Government will not have put
23 the money in the Treasury and therefore the deposit in the
24 Treasury would be a mistake and therefore legally they
25 would not be subject to the appropriations clause. Is

1 that what you're saying?

2 MR. BEILEY: I believe those statutes would
3 apply whether the funds remained in district court in the
4 marshall's account or were levied upon as they were done
5 in this case and wire transferred or by bookkeeping
6 entries put into the Treasury account.

7 QUESTION: Well, if they're in the Treasury why
8 aren't the statutes unconstitutional as violative of the
9 appropriations clause?

10 MR. BEILEY: Because Congress --

11 QUESTION: If they are properly in the Treasury,
12 strike that. If they are properly in the Treasury why
13 aren't the statutes in excess of congressional power and
14 in violation of the appropriations clause?

15 MR. BEILEY: We believe them to be, the statutes
16 to be an appropriation as to what use can be made of
17 forfeited --

18 QUESTION: But that's contrary to my assumption.
19 I said if we assume they are not appropriations, Justice
20 Scalia's question, then do you lose? And you're telling
21 me why you don't. But I think what you're, as I
22 understand it what you're telling me is that they could
23 not be regarded as appropriations -- I'm sorry, that they,
24 that the funds could not be regarded as properly in the
25 Treasury because their transfer to the Treasury was

1 mistaken.

2 MR. BEILEY: Justice Souter, if the import of
3 Your Honor's question is if these two statutes were
4 unconstitutional would I be making a different argument,
5 we would not be making, we would be making an argument
6 that would lead to the same result, and the argument we
7 would be urging, in addition to the one we urge with the
8 statutes, is that the plaintiff is subject to the court's
9 in personam jurisdiction.

10 QUESTION: You contend that if you get a
11 judgment on appeal permitting the entry by the district
12 court of an order for return of a property that this would
13 constitute within the meaning of this statute the
14 compromise of a valid lien or mortgage against property
15 that has been forfeited? That's a very strange way to --

16 MR. BEILEY: I don't believe so. The very
17 rulings or interpretations of that statute, which we cite
18 in our brief, by the Government show that one of those
19 purposes is to pay valid mortgages against the property.
20 24 --

21 QUESTION: This is not a mortgage against the
22 property. You're saying you want a judgment for return,
23 you want a judgment for money out of the Treasury.

24 MR. BEILEY: We want our mortgage on property
25 recognized, and the fact that that money has been turned

1 over to the Treasury we don't think in anyway changes the
2 result.

3 If I may, Mr. Chief Justice, reserve the
4 remaining time for rebuttal.

5 QUESTION: Very well, Mr. Beiley.

6 Mr. Long, we'll hear from you.

7 ORAL ARGUMENT OF ROBERT A. LONG, JR.

8 ON BEHALF OF THE RESPONDENT

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

11 The question in this case is whether the court
12 of appeals has jurisdiction over an appeal when the
13 district court has entered a final judgment of forfeiture
14 in an in rem proceeding, the final judgment has not been
15 stayed and the res has been released from the district
16 court's control and deposited in the United States
17 Treasury.

18 QUESTION: Mr. Long, can I ask you right at that
19 point what was the, was there jurisdiction at the time the
20 notice of appeal was taken, which as I understand it was
21 prior to the transfer of the res?

22 MR. LONG: Yes. We would say yes, at that point
23 the res was still --

24 QUESTION: The jurisdiction was in the court of
25 appeals then. And supposing the transfer had been made

1 after the opinion was announced but before the mandate
2 went down?

3 MR. LONG: I'm sorry. If the --

4 QUESTION: Suppose the transfer were not made
5 when it was in this case but after the case had been
6 argued and the court had deliberated on the case and
7 announced from the bench they were going to rule in favor
8 of the other side, but the mandate had not gone down, and
9 then you transferred?

10 MR. LONG: I think the mandate would be the
11 court's opinion in that case --

12 QUESTION: No, a mandate is not the court's
13 opinion.

14 MR. LONG: Well, the mandate would be the
15 court's decision. I think if the res left the court's
16 jurisdiction before the court decided that would deprive
17 the court of jurisdiction to control the disposition of
18 the res. You catch me -- I'm not exactly sure what the
19 effect of a mandate is when we run into it in our work.

20 QUESTION: See, I was always under the
21 impression that the jurisdictional act for vesting
22 jurisdiction in the court of appeals was filing the notice
23 of appeal. I thought as long as there was a controversy
24 between the parties the court of appeals would retain
25 jurisdiction.

1 MR. LONG: That is generally true, but --

2 QUESTION: What is your strongest case to the
3 contrary of that proposition?

4 MR. LONG: I think the Brig Ann, the Rio Grande,
5 and a number of cases cited in footnote 3 of our brief are
6 all strong cases for the proposition that in an in rem
7 proceeding, which is a different animal, different from
8 the normal in personam proceeding, the court's
9 jurisdiction, the court's --

10 QUESTION: The appellate court's jurisdiction
11 was defeated by a transfer after the appellate court had
12 acquired jurisdiction.

13 MR. LONG: Well, that was what was at issue in
14 the Rio Grande case. The court recognized an exception,
15 we view it as a rather narrow exception where the res is
16 improperly or fraudulently removed from the court's
17 control.

18 QUESTION: Why does that make a difference?

19 MR. LONG: Well, I think that the court was
20 unwilling to allow an injustice to be, an injustice to be
21 done in that case so it was willing to modify the rule to
22 that extent.

23 QUESTION: Why is that any greater injustice
24 than this, if they are right on the merits?

25 MR. LONG: Well, we feel that there was no

1 injustice in this case --

2 QUESTION: I understand.

3 MR. LONG: -- and I'd like to address that point
4 at some length.

5 QUESTION: But if they were right on the merits
6 there was an injustice.

7 MR. LONG: No, because we feel that they had
8 reasonable steps that they could have taken to preserve
9 the court's jurisdiction on appeal. They didn't take
10 those steps, and since they didn't take simple steps that
11 were available to them it is not unjust to end the case at
12 this stage. And I would like to address that as one of
13 the --

14 QUESTION: Could I ask you --

15 MR. LONG: Yes.

16 QUESTION: What did the, did the district court
17 do something affirmatively to release the funds other than
18 just enter the judgment for the United States?

19 MR. LONG: Yes, it did, Your Honor.

20 QUESTION: What did it say?

21 MR. LONG: It entered an order requiring the
22 marshall to dispose of the res in accordance with law, and
23 that's precisely what the Government did. It disposed of
24 the res in accordance with law by depositing it in the
25 Treasury.

1 QUESTION: Mr. Long, if contrary to the facts in
2 this case the Government had had custody of the funds
3 during the proceedings in the trial court, say by
4 agreement of the parties or something you put it in an
5 interest bearing account and during the pendency of those
6 proceedings the Government improperly transferred the
7 funds to the Treasury, your position would be the same,
8 wouldn't it? The Government lawyer would be in hot water,
9 we'll accept that, but your position would be the same on
10 the, on mooting, in effect mooting the case by loss of the
11 res, wouldn't it?

12 MR. LONG: Our position would be the same under
13 the appropriations clause.

14 QUESTION: Yeah.

15 MR. LONG: Once money is in the Treasury, even
16 if it gets in there by mistake --

17 QUESTION: And that would be dispositive of the
18 case for you.

19 MR. LONG: That would be dispositive of the case
20 under the Rio Grande, this old decision that there is an
21 exception to the normal rules of in rem jurisdiction for
22 improper removals, but that can't trump the appropriations
23 clause.

24 QUESTION: Well, then whenever the
25 appropriations clause is involved the so-called injustice

1 exception is simply unavailable?

2 MR. LONG: That's our position. The
3 appropriations clause is a very clear, simple
4 constitutional command. There must be an appropriation.

5 QUESTION: Is there no cause of action, I mean
6 there are appropriations for the payments of judgments
7 rendered by the court of claims under the Tucker Act and
8 under other legislation. Is there such a big hole in our
9 judicial system that the Government skips off with this
10 money and there's no cause of action?

11 MR. LONG: Well, again we don't regard it as a
12 big hole because we think there were fairly simple steps
13 that the petitioner could have taken here and the law was
14 clear in the Eleventh Circuit. They didn't take those
15 steps so we don't feel that there is a gap that needs
16 filling.

17 QUESTION: Well, I think it's a gap if the
18 Government is sitting on money that it really shouldn't
19 have. You would acknowledge -- let's assume that the
20 judgment below was wrong, should have been reversed on
21 appeal, the Government has money that it shouldn't have.

22 MR. LONG: Well, it is often the case, Justice
23 Scalia, in the case involving an injunction, for example.
24 If the losing party fails to get a stay of the judgment a
25 final judgment can be executed and there may be

1 irreversible consequences of that.

2 QUESTION: Let's assume that I consider this an
3 unjust enrichment of the Government.

4 MR. LONG: All right.

5 QUESTION: If we reversed the district court
6 order by Munsingware the case, just set it aside, take you
7 at your word and say there's no longer any jurisdiction in
8 the courts, since there isn't the case is moot, would
9 there be a cause of action for return of the money under
10 any Federal statute?

11 MR. LONG: It is possible --

12 QUESTION: A separate cause of action.

13 MR. LONG: There might be a cause of action
14 against a Government official. We don't think there would
15 be any action against the United States. The Tucker Act
16 that you mentioned in the claims court, this Court has
17 said there has to be a substantive right to recover money
18 damages against the United States.

19 QUESTION: Yes, but I think you have to sustain
20 the fact that the court of appeals doesn't have any
21 jurisdiction before you even get to the appropriations
22 clause because if the court of appeals had retained
23 jurisdiction rightly in this case and yet the money was
24 gone, and the court of appeals decided that you lost the
25 case and they entered judgment against the United States.

1 I suppose the United States is always getting judgments
2 entered against it which they have to pay.

3 MR. LONG: That's true, but the answer to that
4 question depends on the basic distinction again between a
5 true in rem proceeding, which this is, Congress has said
6 it is a true in rem proceeding.

7 QUESTION: So you agree then that you must, the
8 appropriations clause cannot, cannot finish this case
9 without your winning the jurisdictional point?

10 MR. LONG: No, I don't. I think the
11 appropriations clause --

12 QUESTION: Well, I can't imagine -- if the court
13 of appeals had jurisdiction and could decide against you,
14 you're going to pay the judgment, no matter where the
15 money is.

16 MR. LONG: Well, as a practical matter, yes, of
17 course. If this Court --

18 QUESTION: All right, so you have to convince us
19 first that the court of appeals didn't have jurisdiction.

20 MR. LONG: Well, but you may not want to put it
21 in terms of jurisdiction, but the court does not have
22 power to enter an order requiring a payment from the
23 Treasury that has not been authorized by Congress in an
24 appropriations act.

25 QUESTION: And contrary-wise Congress passes a

1 bill appropriating money to pay judgments rendered against
2 the United States.

3 MR. LONG: Well, that's right. There is the
4 judgment fund, but again that has to, as the court said in
5 OPM against Richmond, there has to be a statute that gives
6 you a substantive right to damages money recovery against
7 the United States.

8 But again let me make the basic point, it is a
9 fundamental feature of a true in rem action that the
10 defendant is the res. That has been established since
11 before the time of the Constitution. A judgment, an in
12 rem judgment must be satisfied, if at all, out of the res.
13 That's why once the res has left the court's control it
14 really doesn't do to say well, it can simply enter a
15 judgment, you can get it from some place.

16 QUESTION: Why is that the case? In an in
17 personam jurisdiction the court acquires jurisdiction
18 because it has the body of the defendant, right, and it
19 can exercise control over them. If he leaves the
20 jurisdiction we don't say oh, God, he's gone now, the
21 court can't do anything so the case is over. Why should
22 it be any different for in rem jurisdiction?

23 MR. LONG: That is a distinction, Justice
24 Scalia. I think the reason for it, it's a long
25 established historical distinction. The reason is that an

1 in rem judgment has to be satisfied out of a particular
2 piece of property. An in personam judgment could be
3 satisfied out of any property or person located anywhere.

4 QUESTION: By a particular --

5 MR. LONG: So the risk of having an
6 unenforceable judgment is much higher. I mean, the
7 classic case is the ship that sails, the court releases --

8 QUESTION: Yes, but you've got your parties
9 reversed. The plaintiff has to satisfy the judgment out
10 of the res. The Government is the plaintiff here. It
11 couldn't of course satisfy a judgment if the res went
12 elsewhere. But the defendant doesn't have to satisfy any
13 judgment out of the res, he's just to keep what he owns.

14 MR. LONG: Well, it is true that the Government
15 has taken the property and has put it in the Treasury, but
16 it is no longer in the court's control.

17 QUESTION: What should the amount of the bond
18 have been in this case?

19 MR. LONG: We think the amount of the bond
20 should have been sufficient to insure that the Government
21 was compensated for the costs of an appeal.

22 QUESTION: And would that have preserved
23 jurisdiction in the court?

24 MR. LONG: Oh yes, certainly.

25 QUESTION: Even if the bond was less than the

1 amount of the forfeited proceeds, suddenly you have solved
2 what you consider to be the jurisdictional defect?

3 MR. LONG: Well, I mean, I haven't solved it.
4 That's what the Federal Rules of Civil Procedure Rule 62
5 provides for. The amount of the bond is --

6 QUESTION: So the amount, the amount of the bond
7 need not be the amount of the res, and yet the res is now
8 constructively, I take it, before the court simply because
9 a bond for costs has been posted?

10 MR. LONG: Well, that is the requirement of the
11 rule. The amount of the bond could be greater. We would
12 think in some cases, probably in most cases the court,
13 recognizing that the Government held the property, would
14 require a lesser bond.

15 QUESTION: Well how would that satisfy your
16 concerns under the appropriations clause?

17 MR. LONG: Well, we would not be entitled to
18 remove the property. The purpose of the bond results in a
19 stay, and then the Government is not allowed to execute
20 the judgment and the property stays within the control of
21 the court.

22 QUESTION: But you also agree if by some hook or
23 crook you had your hands on the property and the court did
24 not in my hypo and you were investing it by agreement, a
25 bond could have been filed and if you then improperly

1 transferred it to the Treasury you're going to be making
2 the same argument you're making today.

3 MR. LONG: Then there is an appropriations
4 clause problem. If that case were to arise the attorney
5 general would exercise his discretion to return the
6 property to the claimant or return it to the control of
7 the court. But yes, there is an appropriations clause
8 problem and it arises whether or not the money gets into
9 the Treasury accidentally or improperly.

10 QUESTION: How could the attorney general
11 exercise his discretion? You mean in violation of the
12 appropriations clause?

13 MR. LONG: No, under, the asset forfeiture fund
14 is a fund in the Treasury and Congress has provided that
15 money may be paid out for certain purposes.

16 QUESTION: For you, but not for the other side,
17 you say. I mean, you say that they can't use it but the
18 attorney general can use it.

19 MR. LONG: Well, one of the purposes provided by
20 Congress is that the attorney general in his discretion
21 may use the money to compromise valid liens and mortgages.
22 And if a mistake had been made we would certainly consider
23 correcting it.

24 QUESTION: You would acknowledge then that if
25 this case came out against the Government that he'd be

1 able to use that same fund to find the money to pay the
2 claimants here, isn't that right?

3 MR. LONG: Well, no, because there is no statute
4 that authorizes an appropriation for that purpose. A
5 statute, as you said yourself a moment ago, a statute
6 giving the attorney general discretion to do something is
7 not the same as an appropriation paying judgments.

8 QUESTION: So you're saying that it is the
9 discretionary character of the attorney general's act that
10 defeats it?

11 MR. LONG: Yes, it is not, it does not meet the
12 requirement of the appropriations clause because it does
13 not clearly provide for the payment of a judgment in this
14 case.

15 QUESTION: Does the appropriations clause apply
16 simply to public monies? Why are these public monies if
17 the title to them is contested?

18 MR. LONG: Because Congress has provided that
19 this is a fund in the Treasury and has provided that
20 payments from the fund have to be made pursuant to an
21 appropriation by Congress.

22 QUESTION: But you were identifying the funds in
23 an almost quasi physical sense. You were saying once
24 something is in the Treasury it is entirely beside the
25 point of the appropriations clause whether it was proper

1 to transfer it there or not, and the point, I think the
2 point of Justice Kennedy's question is isn't there some
3 concept of what ought or ought not to be in the Treasury
4 that should be applied before the appropriations clause
5 argument would be appropriate.

6 MR. LONG: Well, our position is that if money
7 is in the Treasury then it can only be gotten out with an
8 appropriation, and I think that's --

9 QUESTION: So that if Government officials steal
10 money, if Government officials overcharge taxpayers and so
11 on, knowingly and fraudulently, and the money gets in the
12 Treasury that's it, subject to the appropriations clause?

13 MR. LONG: The money can be paid out only
14 pursuant to an appropriation, that's right, even in an
15 extreme case. It's a clear and simple constitutional
16 command.

17 Let me back up, if I could, and take just a
18 minute to summarize our argument. I intended to do this
19 at the beginning and I think I can give our entire
20 position in a nutshell. We have basically just four
21 points that we think establish our case. First, the first
22 point is that under a long established rule applicable to
23 true in rem proceedings the court's jurisdiction depends
24 on its control of the res. An in rem judgment must be
25 satisfied if at all from the res --

1 QUESTION: May I just ask right there, on the
2 Rio Grande case that was jurisdiction to grant a judgment
3 to the libellant, not to the libelee. Are there any cases
4 where the jurisdiction, where you have the same status of
5 the parties that you have in this case, where it's the
6 defendant who is claiming there is still power to correct
7 an erroneous judgment?

8 MR. LONG: Well, I'm not aware of any admiralty
9 case, but the Shaw case is an in rem proceeding. That was
10 United States against Shaw, it's cited in our brief, 309
11 US 495. That was an in rem proceeding and there the
12 United States was the plaintiff, or it came in and made a
13 claim, and the question was well, did it therefore submit
14 to the court's jurisdiction and the answer was no, that --

15 QUESTION: For what purpose? Jurisdiction for
16 purpose of --

17 MR. LONG: For purposes of a counter claim.

18 QUESTION: But not for the purpose of deciding
19 the merits of the dispute that the Government had
20 initiated.

21 MR. LONG: Well, it was its counter claim and
22 set off, but again in order to get money out of the
23 Treasury or to get a judgment against the United States
24 there would have to be a right of action in personam.
25 Then we move out of the specialized world of the in rem

1 proceeding, and that's really a different claim. A claim
2 against the United States for money is not the same as a
3 claim for the return of this property.

4 QUESTION: Well, I understand, but what I'm
5 suggesting is you don't have a single United States
6 Supreme Court case that supports the first proposition you
7 are advancing here. There's no case that's on all fours
8 with the position here.

9 MR. LONG: We do not have a case that's on all
10 fours, but respectfully I think the Brig Ann and the Rio
11 Grande are quite strong support for us.

12 QUESTION: The Rio Grande would support you if
13 they had taken the money away from the district court
14 before you got your judgment, and you would be absolutely
15 right.

16 MR. LONG: Well, I can't imagine that if the
17 other side had happened to get control of the ship and go
18 off with it that the result would have been any different.
19 What the court was concerned about in that case was that
20 there was a clear violation of statute. The bond, appeal
21 bond was posted in that case and the court made a great
22 deal of that and said it was clearly contrary to law for
23 the property to be carried off. It didn't matter which
24 party carried it off in that case.

25 So our first point again is that an in rem

1 proceeding, the judgment must be satisfied out of the res.
2 If the court can't control the res it cannot enforce a
3 judgment in rem.

4 Our second point is that the United States did
5 not consent to the entry of a judgment in personam when
6 its agents filed an in rem forfeiture proceeding.
7 Congress has not authorized the entry of a judgment in
8 personam in petitioner's favor, and there is no in rem
9 exception to sovereign immunity.

10 Third, petitioner's appeal is barred by the
11 appropriations clause. Proceeds of the sale of the res
12 have been deposited in the Treasury and Congress has not
13 appropriated funds to pay a judgment for petitioner.

14 And finally, there is nothing unfair or unjust
15 about requiring petitioner to take reasonable steps to
16 preserve the court's jurisdiction on appeal. Appellants
17 are often required to take such steps. Losing claimants
18 can obtain an automatic stay by posting a bond which
19 protects the Government against the costs of an appeal,
20 including the costs of storing the property, and if a
21 losing claimant cannot afford to post a bond the court has
22 discretion to stay the judgment without requiring a bond.

23 QUESTION: Mr. Long, are you simply saying that
24 the court of appeals was without jurisdiction period, or
25 are you saying that this case is actually moot?

1 MR. LONG: Well, the case is over. We think
2 it's not, there has been a final judgment, it has been
3 executed, there is nothing left for the court to do.

4 QUESTION: Supposing in this case that the bank
5 had simply failed to file a timely notice of appeal to the
6 court of appeals. Now, the court of appeals would have
7 been without jurisdiction, the case would have been over,
8 yet no one would have suggested the case was moot.

9 MR. LONG: We think this case is exactly
10 parallel. In Munsingware for example, if I recall it
11 correctly, the court refused to enter a Munsingware order
12 for the Government because it said we had failed to take
13 simple steps we could have taken to preserve our rights.
14 That's precisely the situation we have here and so --

15 QUESTION: So you say, you do not say the case
16 is moot?

17 MR. LONG: No. The case is simply over. There
18 has been a final judgment, we have executed it. There is
19 nothing left that a court of appeals can do. But the
20 original judgment is not moot. And of course this Court
21 has jurisdiction to decide the jurisdictional question,
22 that's properly before the Court.

23 Petitioner really doesn't content that it comes
24 within a recognized exception to the jurisdictional rule,
25 but instead argues that this Court should basically

1 jettison the rule that in rem jurisdiction requires the
2 court to control the res. We urge the Court to reject
3 that suggestion, which is a radical one.

4 The rule that the court must control the res in
5 an in rem proceeding serves the important purpose of
6 preventing Federal courts from issuing unenforceable
7 judgments. The rule is regularly applied by the courts of
8 appeals, cases cited in our brief including the cases with
9 the, circuits with the greatest familiarity with admiralty
10 such as the Fifth Circuit, the Ninth Circuit, and the
11 Eleventh Circuit.

12 Moreover, and this is a central point of our
13 position, Congress has legislated in this area on the
14 assumption that the traditional rules of in rem
15 jurisdiction apply in this area unless modified by
16 statute. Congress has provided in 28 USC 2461(b) that
17 forfeiture proceedings shall conform as near as may be to
18 in rem proceedings in admiralty unless otherwise provided
19 by act of Congress. Thus the courts are not at liberty to
20 develop one set of jurisdictional rules for forfeiture
21 proceedings and a different set of rules for admiralty
22 cases.

23 And in addition Congress clearly understands the
24 rules of in rem jurisdiction and has shown that it
25 modifies them when it chooses to do so. For example, it

1 modified the traditional rule in a customs statute, 19 USC
2 1605. That's discussed in our brief. The purpose of that
3 modification was to alter the traditional rule that
4 Congress understood would otherwise apply, that the res
5 must remain in the judicial district while the in rem
6 procedure was pending.

7 QUESTION: So you would then, you would come out
8 the same way if a ship sitting in port were the subject of
9 the action and the Government wins and it just, it's a
10 hotly contested case and then the Government just sails
11 the ship away. The former owner of the ship can't do a
12 thing about it?

13 MR. LONG: Well, whether it's the Government or
14 another party, if there is a final order that allows the
15 party to do that, allows the Government to do it in your
16 hypothetical, any final judgment can be executed. And
17 once the ship has sailed to South America or wherever the
18 long standing rule in admiralty cases is that the court
19 cannot do anything because it can't control the
20 disposition of a ship in South America.

21 Now if it were done improperly or fraudulently
22 the court could continue to exercise jurisdiction under
23 the Rio Grande as long as the, because the appropriations
24 clause problem wouldn't arise in that case.

25 QUESTION: Why do you think it can do that if

1 the ship is gone?

2 MR. LONG: Well, the court made an exception to
3 its rule. There is a risk of unenforceable judgments,
4 certainly. The court, it doesn't discuss this in the Rio
5 Grande, it's an old decision, but the court --

6 QUESTION: Let's assume the ship has gone to
7 South America but the court, the court of appeals says the
8 removal was absolutely fraudulent. Now, what's it going
9 to do?

10 MR. LONG: Well, under the Rio Grande the court,
11 the appeals court would decide the appeal and would, it
12 might issue a judgment. A judgment might be --

13 QUESTION: Against whom? Against whom?

14 MR. LONG: It could be against the ship or it
15 could be --

16 QUESTION: Could it be against the person who
17 illegally removed it?

18 MR. LONG: Well, I was assuming that the owner
19 of the ship took it away. Yes, it could be, it could
20 require the return --

21 QUESTION: The owner of the ship only because
22 the district court ruled that it was forfeitable.

23 MR. LONG: Well, again there's a question. An
24 in rem judgment would have to be a judgment against the
25 ship. The court might also enter, I suppose, an in

1 personam judgment against the plaintiff on the theory that
2 the plaintiff, now not the Government so not subject to
3 sovereign immunity, had consented to the, had consented to
4 the jurisdiction of the court --

5 QUESTION: Was the United States in this case?

6 MR. LONG: Well, the United States is the
7 plaintiff in this case, but again the United States is
8 subject to sovereign immunity and can only be sued --

9 QUESTION: Well, what would you say if it were,
10 if the court of appeals had said we have judgment, we have
11 jurisdiction here because we think the Government
12 illegally removed the funds? Let's assume there had been
13 a stay which the Government did not observe. But the
14 money is in the Treasury. So what does the court of
15 appeals do?

16 MR. LONG: Well, in the exact hypothetical you
17 give the court of appeals cannot issue a judgment that
18 requires payment out of the Treasury without an
19 appropriation by Congress.

20 QUESTION: I agree with that, but what does it
21 do against the -- can the court of appeals then issue a
22 judgment against the United States which would be
23 satisfied in the normal course?

24 MR. LONG: No, because there is no statute
25 that --

1 QUESTION: So there is no exception for illegal
2 Government action in removing the res?

3 MR. LONG: Well, if it's a res that's not in the
4 Treasury, yes, there would be again because then the
5 appropriations clause wouldn't apply.

6 QUESTION: So even putting up a stay in a
7 supersedeas bond would not have guaranteed the bank a
8 right to have its appeal heard here if the Government
9 chose to disregard the stay?

10 MR. LONG: Well, in that case the Government
11 would have been acting illegally and --

12 QUESTION: But I thought you told Justice White
13 it didn't make any difference, that the court of appeals
14 still had no jurisdiction.

15 MR. LONG: Well, as we read the appropriations
16 clause there is no exception for money that gets --

17 QUESTION: But your first point is that the
18 court of appeals had no jurisdiction. If the court of
19 appeals could enter judgment against the Government on the
20 merits, very likely a judgment like that could have been
21 satisfied out of the judgments fund, might it not, without
22 having to violate the appropriations clause?

23 MR. LONG: Well, again, this Court has said in
24 cases such as OPM against Richmond that the judgment fund
25 is not an all purpose fund that allows a court to enter

1 judgment against the United States. There has to be
2 another statute that gives a substantive right to
3 recovery.

4 Now, if there was something illegal or
5 fraudulent, that is not the case we have here, I think
6 it's quite likely there would be some sort of way to sue
7 an official of the Government. There may be ways that
8 that could be done, and certainly the attorney general has
9 discretion to correct an error. But that's not the case
10 here.

11 And let me close, if I could, by emphasizing, we
12 have tried to convince you that there would be great
13 difficulty in making this case come out for petitioner,
14 that it would require changing subtle principles of in rem
15 jurisdiction --

16 QUESTION: Well, wait --

17 QUESTION: There's no, you admitted there's --
18 no case like this has ever come up before in this Court.
19 We don't have to overrule a single case to disagree with
20 you.

21 MR. LONG: With respect, Justice Stevens, I
22 don't think I admitted that. I think the Brig Ann and the
23 Rio Grande --

24 QUESTION: Well, what case is like this one that
25 you can cite?

1 MR. LONG: I think the Rio Grande is quite
2 similar.

3 QUESTION: That's the closest, and that's where
4 they could not have recovered, not -- it's the exact
5 opposite of this case.

6 MR. LONG: Well, again, I think it wouldn't have
7 made any difference if the other party had taken the
8 property away.

9 But there's a sovereign immunity problem,
10 there's an appropriations clause problem. If there were a
11 grave injustice in this case perhaps the Court should
12 strain to change the rule, but Congress has demonstrated
13 that it knows about these rules and will change them if it
14 wants to. In fact Congress is considering legislation
15 right now that's supported by the administration that
16 would change this rule. We think that the decision should
17 be left to Congress. This is, after all, a rule that
18 would have the effect of expanding the limited
19 jurisdiction of Federal courts.

20 And finally, what happened here was not
21 particularly unfair to the bank. They could have obtained
22 an automatic stay by posting a bond. They didn't do that.
23 They have not offered any excuse for doing that. They are
24 wrong in contending that the bond serves no purpose. It
25 serves to compensate the Government for the costs of the

1 appeal and the costs of maintaining property. A lot of
2 these cases involve boats and airplanes. The costs are
3 quite significant. And it also deters frivolous appeals.

4 There is actually, Congress expressly requires a
5 bond, by the way, when an administrative forfeiture
6 proceeding is converted into a judicial forfeiture
7 proceeding. So Congress doesn't think that a bond is
8 useless when the Government has the property.

9 There is no merit to petitioner's contention
10 that it didn't have enough time to decide whether to
11 appeal. It had as much time as any criminal defendant
12 has, and in injunction cases there is no automatic stay at
13 all. So some parties are in a worse position than this
14 and have to act immediately to obtain a stay. The
15 Government finds itself in that position in FOIA cases,
16 for example.

17 And there is no basis for the speculation that
18 there will be an avalanche of emergency stay applications
19 if the ordinary established rules in in rem proceedings
20 are allowed to continue in effect. These are the rules
21 that apply in the Fifth, Seventh, Ninth, and Eleventh
22 Circuits, the circuits that have the most experience with
23 admiralty proceedings, and there has been no avalanche of
24 emergency stays or no problem with courts not ruling on
25 the stays in a timely fashion.

1 As this Court said in Halstrom against Hillimuck
2 County, the equities do not weigh in favor of petitioners
3 whose procedural default is caused by their failure to
4 take the minimal steps necessary to preserve their claims.

5 Thank you.

6 QUESTION: Thank you, Mr. Long.

7 Mr. Beiley, you have 3 minutes remaining.

8 REBUTTAL ARGUMENT OF STANLEY A. BEILEY

9 ON BEHALF OF THE PETITIONER

10 MR. BEILEY: I would like to conclude with a
11 very brief statement. We believe that appellate review,
12 though not a constitutional right, is certainly a very
13 basic, fundamental, and important right to Federal
14 litigants. We believe it is a right that is worth
15 preserving. We respectfully ask this honorable Court to
16 preserve it here.

17 The Eleventh Circuit's decision should be
18 reversed and the case sent back to the Eleventh Circuit to
19 reinstate the appeal and decide my client's case on the
20 merits.

21 QUESTION: What is supposed to happen then?

22 MR. BEILEY: We would ask the Eleventh Circuit
23 to order the Government out of the forfeited funds to pay
24 us those funds to which we are entitled on our mortgage,
25 Your Honor.

1 QUESTION: You wouldn't care whether you were
2 asking for the return of the specific funds or not, I
3 suppose.

4 MR. BEILEY: Any Government money is fine with
5 us.

6 (Laughter.)

7 QUESTION: And you don't think you need the
8 consent of the Government to have a judgment like that
9 entered?

10 MR. BEILEY: We do not, Justice White. I thank
11 the Court very much for its consideration.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Beiley.
13 The case is submitted.

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

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CERTIFICATION

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

Republic National Bank of Miami, Petitioner v. United States

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

BY Ann-Marie Federico

(REPORTER)