

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, Petitioner v. JAMES DANIEL
GOOD REAL PROPERTY, ET AL.

CASE NO: 92-1180

PLACE: Washington, D.C.

DATE: Wednesday, October 6, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 92-1180

JAMES DANIEL GOOD REAL PROPERTY, :

ET AL. :

- - - - -X

Washington, D.C.

Wednesday, October 6, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 a.m.

APPEARANCES:

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the Petitioner.

CHRISTOPHER J. YUEN, ESQ., Hilo, Hawaii; on behalf of the
Respondents.

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
EDWIN S. KNEEDLER, ESQ.	
On behalf of the Petitioner	3
CHRISTOPHER J. YUEN ESQ.	
On behalf of the Respondents	27
REBUTTAL ARGUMENT OF	
EDWIN S. KNEEDLER, ESQ.	
On behalf of the Petitioner	50

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

2 (11:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 920-1180, the United States v. James Daniel
5 Good Real Property.

6 The spectators are admonished to be quiet until
7 you get out of the courtroom. The court is still in
8 session.

9 Mr. Kneedler.

10 ORAL ARGUMENT OF EDWIN KNEEDLER

11 ON BEHALF OF THE PETITIONER

12 MR. KNEEDLER: Thank you, Mr. Chief Justice, and
13 may it please the Court:

14 This is a civil forfeiture case brought by the
15 United States against the respondent real property which
16 was used in the commission of a felony violation of the
17 Federal drug laws.

18 The United States seeks review here of two
19 distinct holdings by the Ninth Circuit. First, the Ninth
20 Circuit held that the seizure of the real property for
21 forfeiture, even though it was undertaken pursuant to a
22 warrant issued by a magistrate based on a finding of
23 probable cause, violated the Due Process Clause of the
24 Fifth Amendment because the owner of the property,
25 claimant Good, was not given notice and an opportunity for

1 a hearing before the seizure was executed.

2 That ruling, we submit, was erroneous. The
3 seizure, based on a warrant, fully complied with Fourth
4 Amendment procedures and the Fourth Amendment standard of
5 reasonableness. It is through the Fourth Amendment, not
6 the Fifth, that the framers of the Bill of Rights
7 furnished an explicit textual source to judge the
8 reasonableness of seizures. And it is through the Fourth
9 Amendment, not the Fifth, that the Bill of Rights balances
10 private interests against the public interest in law
11 enforcement in this setting. Put another way, compliance
12 with Fourth Amendment requirements furnishes the process
13 that is due in circumstances such as these.

14 The second holding by the court of appeals --

15 QUESTION: Excuse me, Mr. Kneedler.

16 MR. KNEEDLER: Yes.

17 QUESTION: I have found it hard to understand
18 where that gets you. The Fourth Amendment contains a
19 reasonableness requirement anyway. Couldn't that
20 reasonableness requirement be the same thing as the Due
21 Process Clause.

22 MR. KNEEDLER: It could. But our point -- I
23 mean, one -- as an analytical matter, one could look at it
24 either way, that the Fourth Amendment occupies the field
25 and the Due Process Clause simply doesn't address the

1 question, or that the Fourth Amendment supplies the
2 standard. But the important point either way, for these
3 purposes, is that the issuance of a warrant is the
4 procedural protection that the Fourth Amendment
5 specifically identifies for protecting the interests in
6 property, and particularly in a house, as this Court has
7 stated.

8 And in *Gerstein v. Pugh*, for example, where the
9 Court considered the determination of probable cause with
10 respect to the detention of an individual, the Court said
11 that no adversarial hearing was required for the
12 determination of probable cause. And we think, under the
13 Fourth Amendment, that that would follow a fortiori with
14 respect to the arrest and detention of real property where
15 a liberty interest is not at stake.

16 QUESTION: You think the Fourth Amendment says
17 that a warrant always satisfies the requirement of
18 reasonableness.

19 MR. KNEEDLER: I think that's the logic and
20 general thrust of this Court's case is the Court has
21 assumed -- particularly in the context of a seizure of a
22 house, the Court has regarded the warrant protection as an
23 important bulwark in protection for the liberty and
24 property of individuals. The warrant issued by a neutral
25 and detached magistrate, that is what the framers of the

1 Fourth Amendment placed between individuals and the State.

2 But the general terms of the Due Process Clause,
3 which don't specifically address the question of seizures,
4 don't suggest that a seizure that the Fourth Amendment
5 itself deems reasonable by virtue of the issuance of the
6 warrant, and that is undertaken pursuant to the authority
7 that is constitutionally vested in the seizing officers
8 pursuant to that warrant, is nevertheless in violation of
9 the Constitution itself.

10 QUESTION: Why did Fuentes go on a different
11 analysis? Is it because there was no seizure?

12 MR. KNEEDLER: Well, Fuentes didn't address the
13 problem in exactly this way, but since Fuentes there have
14 been a number of cases decided by this Court in which the
15 Court has made the very point that I'm making here, that
16 the explicit -- the phrase used in *Graham v. Connor*, the
17 explicit textual source governing the physical
18 intrusion -- against the person in that case, but the same
19 point is true with respect to the property here -- comes
20 from the Fourth Amendment, and that --

21 QUESTION: Well, why -- I guess -- I'm not sure
22 why that is self-evident. I mean we -- the Court said in
23 *Soldal* that there's no sort of field occupation theory as
24 between the Fourth and the Fifth Amendments. And it seems
25 odd to me that Fuentes, which -- and I didn't check this

1 before coming in, may simply have been concerned with
2 the -- with an -- no, Fuentes involved the seizure of
3 property, didn't it?

4 MR. KNEEDLER: Yes.

5 QUESTION: Because that was replevin. That
6 Fuentes would have imposed the higher requirement. Are
7 the later cases, in your judgment, in effect inconsistent
8 with Fuentes?

9 MR. KNEEDLER: No. I think that can all be
10 reconciled in the following respect. First of all, what
11 we have here is something that was not present in Fuentes
12 and wasn't present in most of the case -- or in the cases
13 dealing with debtor-creditor relations. We have law
14 enforcement activity undertaken by the United States
15 Government, and the same would be true, of course, of a
16 State government. And this is a point that Fuentes itself
17 made in distinguishing a seizure under writ of replevin
18 from a seizure under a search warrant, pointing out that
19 among --

20 QUESTION: Does it matter that the so-called law
21 enforcement activity in this case is one that, as a
22 practical matter, was unknown at the time the Fourth
23 Amendment was adopted? I mean, we're dealing here with a
24 forfeiture statute of a breadth which historically, I
25 guess, was unknown.

1 MR. KNEEDLER: Well, certainly seizures of
2 property for forfeiture was not unknown.

3 QUESTION: Right.

4 MR. KNEEDLER: And it was a -- in fact, it was a
5 major source of revenue for the Federal Government at the
6 beginning of the Nation.

7 QUESTION: Well, it was, but the concept of
8 forfeiture embodied in the present statute is far broader
9 than anything the eighteenth century knew, isn't it?

10 MR. KNEEDLER: Well, it -- in one respect I
11 think in this case that's not really true conceptually.
12 Because, for example, at the time the Constitution was
13 adopted, ships used in the transportation of goods brought
14 into the United States in violation of customs laws were
15 subject to seizure. So the -- excuse me -- subject to
16 seizure, so that the ship was used for a violation of the
17 customs laws and therefore subject to forfeiture. And we
18 have a direct analogue here.

19 QUESTION: Were warehouses subject to seizure if
20 uncustomed goods were found?

21 MR. KNEEDLER: No, not that I'm aware of. My
22 point is simply --

23 QUESTION: That would be the analogy here,
24 wouldn't it?

25 MR. KNEEDLER: Well, my point is simply that

1 whenever the item of property is used in the commission of
2 the offense, be it a ship or a house, that the same result
3 follows. And Dobbins' Distillery, for example, involved
4 forfeiture of real property used in the production of
5 illegal liquor, and illegal drugs is the direct analogue
6 of that as well, and there was no prior notice or hearing
7 in Dobbins.

8 QUESTION: Mr. Kneedler, let me test your
9 contention that the -- not only does the Fourth Amendment
10 constitute the sole restriction here, but also that a
11 prior warrant automatically makes it reasonable under the
12 Fourth Amendment.

13 Suppose Congress passes a law that says anyone
14 convicted of a certain crime shall forfeit a million
15 dollars, shall be liable for a million dollars fine for
16 that crime. Moreover, if there is probable cause to
17 believe that a person has committed that crime, his assets
18 up to the amount of a million dollars shall immediately be
19 seized by the Government to be sure that he will be able
20 to pay the fine.

21 Okay, and you have a probable cause hearing and
22 a warrant issues to seize that million dollars of this
23 individual who has not yet been convicted of a crime, but
24 you have probable cause to believe that he committed the
25 crime. Is it your contention that that automatically

1 complies with the Fourth Amendment and automatically --
2 and you don't have to comply with any other requirement of
3 the Constitution?

4 MR. KNEEDLER: I think that goes one step beyond
5 this, for the following reason. As the Court pointed out
6 in Connecticut v. Doeher, that one of the distinctions in
7 that case was that the plaintiff seeking to attach the
8 property in question had no interest, preexisting interest
9 in the property, and the dispute did not concern the
10 particular property. And the Court pointed out those
11 distinctions, which would also be true in your case, where
12 the Government was really trying to attach, in effect,
13 property to secure a fine.

14 QUESTION: Oh, the particular property. So I
15 would have to modify my hypothetical to say anyone guilty
16 of that crime shall forfeit his -- all real estate that he
17 owns up to a value of a million dollars.

18 MR. KNEEDLER: No, I'm sorry, I meant the
19 property used in the commission of the offense, which is
20 what we have here. The Government -- at the time of the
21 commission of the offense, the Government has an interest
22 in the property because the statute declares it forfeited
23 to the United States by virtue of the commission of the
24 offense. So the Government has, in that sense, a direct
25 interest in the property itself, not simply as a security

1 but in property itself.

2 QUESTION: Okay. So a prior warrant doesn't
3 make everything okay. There are other requirements even
4 under the Fourth Amendment.

5 MR. KNEEDLER: Well, I'm not saying that the
6 warrant would not be sufficient in that case. All I'm
7 saying is that there is a distinction there. But the --

8 QUESTION: Oh, I understand. Oh, I see.

9 MR. KNEEDLER: But -- but -- but --

10 QUESTION: You're saying that that might be
11 okay, in your view.

12 MR. KNEEDLER: Well --

13 QUESTION: My original hypothetical, that so
14 long as you have a warrant, even though the individual
15 hasn't been convicted of the crime, you have probable
16 cause to believe he's guilty of the crime, you can seize a
17 million dollars of his assets.

18 MR. KNEEDLER: Well you --

19 QUESTION: So long as you have a warrant.

20 MR. KNEEDLER: You might be able to restrain
21 them. You couldn't finally subject them to forfeiture.
22 But that's very much like what -- the case in Monsanto
23 where the --

24 QUESTION: You just seize them. You seize them.
25 You don't spend them but you say, you know, we'll hold it

1 until you're tried. Meanwhile, you don't have all your
2 money.

3 MR. KNEEDLER: Well, in Monsanto the Court held
4 that the defendant's property there could be restrained on
5 the basis of a finding of probable cause.

6 QUESTION: So your answer is yes, that it's
7 okay.

8 MR. KNEEDLER: I think yes.

9 QUESTION: I thought it was.

10 MR. KNEEDLER: Yes. And let me --

11 QUESTION: And I don't agree with it.

12 MR. KNEEDLER: Let me add a further point to
13 that, that even in the debtor-creditor situation in which
14 the Court has applied the more general balancing test of
15 Mathews v. Eldridge, the Court has not held that a finding
16 of probable cause on the basis of detailed affidavits is
17 insufficient to satisfy the Due Process Clause.

18 In fact, in Mitchell v. W.T. Grant the Court
19 placed heavy reliance on the fact that this was not just a
20 perfunctory review of the submission by the judge. There
21 was a determination by the judge on the basis of a
22 detailed affidavit that there was a basis to believe that
23 the plaintiff's claim was valid.

24 And also in W.T. Grant as well, the Court made
25 the point that I made about Connecticut v. Doeher. In that

1 case, the seller of the goods had an interest in the
2 property and an interest in insuring that they not be
3 wasted.

4 QUESTION: Mr. Kneedler --

5 QUESTION: As a matter of curiosity, the
6 Government waited 4-1/2 years here, didn't it? Why?

7 MR. KNEEDLER: After the commission of the
8 offense.

9 QUESTION: Yes, why?

10 MR. KNEEDLER: The record does not disclose why.
11 The claimant Good asked the Government to answer an
12 interrogatories when the Government -- when the DEA agents
13 and other officers learned of the violation. And the
14 Government declined to answer those on the grounds that
15 they weren't relevant, that that internal reporting was
16 not germane to whether the suit was timely. I understand
17 that the -- that this is -- that the U.S. Attorneys Office
18 was informed or inquired about whether the property was
19 subject to forfeiture.

20 QUESTION: That's kind of a weak excuse, isn't
21 it? Does the Government always wait this long to move in?

22 MR. KNEEDLER: No. Ordinarily the Government
23 would not wait this long. And, in fact -- let me retract
24 that. There's no evidence that the Government waited in
25 the sense that the responsible individuals in DEA knew of

1 the violation of the drug laws but nonetheless sat on
2 their hands. For all that appears, once the information
3 came to the attention of the DEA and the U.S. Attorney,
4 forfeiture proceedings were promptly filed. So there's
5 not any finding here of delay.

6 But our point, and this goes to the second issue
7 in the case, is that the Ninth Circuit held that if the
8 court -- district court should find on remand that
9 Government agents failed to comply with what the court of
10 appeals itself called internal requirements for the prompt
11 reporting and filing of suits, that the case must be
12 dismissed even though it was filed within the 5-year
13 statute of limitations.

14 QUESTION: Mr. Kneedler, before you proceed to
15 that second issue in the case, there's one point I'd like
16 you to address. It's related to the question Justice
17 Scalia asked. You gave the example of the ship and you
18 gave the example of the distillery, but isn't one of the
19 problems with this new extension of the forfeiture that
20 much more is taken than the very house where the drugs
21 were kept? How much property was subject to forfeiture?

22 MR. KNEEDLER: In this case?

23 QUESTION: Yes.

24 MR. KNEEDLER: There was a house, a garage, and
25 a 4-acre parcel on which there --

1 QUESTION: So it's a 4-acre parcel. And wasn't
2 one of the trouble spots that even in prohibition what was
3 taken was not all of the property but just the distillery
4 where the liquor was manufactured?

5 MR. KNEEDLER: That was -- and the parcel on
6 which it was situated. I think that raises -- I mean,
7 there are separate concerns or separate protections
8 against that possibility, either under the Eighth
9 Amendment as the Court discussed last term, or due process
10 limitations, or perhaps even statutory limitations --

11 QUESTION: But I thought that was the due
12 process -- that was what was sought to be used here.

13 MR. KNEEDLER: Right. But there's not --

14 QUESTION: And what the Ninth Circuit relied on.

15 MR. KNEEDLER: There's been no -- there's no
16 claim before the Court here that too much was taken, as it
17 were.

18 QUESTION: You mean the only claim is the
19 procedural due process.

20 MR. KNEEDLER: Is the procedural due process
21 claim.

22 QUESTION: Well, I doubt the distillery in
23 Dobbins was located in a 4-acre park too.

24 MR. KNEEDLER: Well, yes, I don't recall exactly
25 where it was.

1 QUESTION: What is it that distinguishes the due
2 process obligations of the Government and the due process
3 obligation in a case like this? In a civil forfeiture
4 suit, in the due process obligations of private creditors
5 who use Government mechanisms, could a private creditor
6 seize property simply by making an ex parte showing that
7 there's probable cause?

8 MR. KNEEDLER: Well, in --

9 QUESTION: But why is it? I assume that the
10 answer to that is no.

11 MR. KNEEDLER: Well, in Mitchell v. W.T. Grant
12 that's essentially what the Court sustained. There was a
13 showing by the creditor, based on detailed affidavits, and
14 the judge made a determination of the likelihood of
15 success. I don't think it was put precisely in terms of
16 probable cause.

17 QUESTION: Likelihood of success and did W.T.
18 Grant ratify an ex parte hearing without notice?

19 MR. KNEEDLER: Yes. That's -- and then -- but
20 there was also a posting of a bond, and then a postseizure
21 hearing. But I think the --

22 QUESTION: Well, does there have to be a
23 postseizure hearing? Do you agree that there should be a
24 postseizure hearing in this case?

25 MR. KNEEDLER: If the claimant requested one

1 there could be. Claimant Good never requested a
2 postseizure hearing. And I think with -- I think the
3 reasons are fairly obvious. He pleaded guilty in State
4 court to promoting a harmful drug, and the evidence that
5 was seized in connection with the State proceedings were
6 87 pounds of marijuana worth many thousands of dollars and
7 other evidence of a drug operation there. I don't think
8 he could have realistically claimed -- affirmatively
9 claimed either that the property wasn't used for that
10 purpose or that he was an innocent owner.

11 So he did not request one. But once the in rem
12 forfeiture proceeding is filed in court, it would be -- if
13 the claimant desired to have a hearing, it would be easy
14 enough to ask the Court to exercise its jurisdiction over
15 the pending case and deliver one.

16 QUESTION: In W.T. Grant, was the standard
17 higher than probable cause?

18 MR. KNEEDLER: It was not higher than probable
19 cause, no. And also, let me also point out in --

20 QUESTION: Does probable cause mean likelihood
21 of success or something?

22 MR. KNEEDLER: It means -- in the law
23 enforcement or in the Fourth Amendment context, it means
24 reasonable belief that a violation has occurred. And --
25 but the more fundamental answer to your --

1 QUESTION: But in the forfeiture context that
2 should mean a reasonable belief that the asset is
3 forfeitable, wouldn't you think?

4 MR. KNEEDLER: Right. And I do believe that's
5 right. And it's forfeitable if there's a reasonable
6 belief to -- reasonably, that the property was used for a
7 violation of the drug laws, as there clearly was here.

8 But the more fundamental point, I think, in
9 response to your question, Justice Kennedy, is that there
10 is a basic distinction between Federal law enforcement
11 activities -- and this was a distinction identified in
12 Fuentes itself and in Calero-Toledo -- between law
13 enforcement activities on the part of the Government where
14 the Government has taken action against someone who has
15 independently violated standards, and private
16 debtor-creditor relations or even termination of
17 Government benefits.

18 And, again, the Court made this point in
19 Gerstein v. Pugh, where the -- in saying why a due process
20 type hearing wasn't required, adversarial hearing. The
21 Court said that the Fourth Amendment probable cause issue
22 is quite different from the variable due process analysis
23 that the Court had applied in more recent cases.

24 QUESTION: But this is a civil forfeiture
25 proceeding. You began your argument with --

1 MR. KNEEDLER: It is a --

2 QUESTION: By saying that in the very first
3 sentence.

4 MR. KNEEDLER: Right. Well, it is a civil
5 forfeiture proceeding, but the Court has made clear as
6 recently as last term in Soldal that the Fourth Amendment
7 also governs seizures of property for -- in the civil
8 context as well as in the criminal context.

9 QUESTION: Well, is there anything in Soldal
10 that indicates that the Fourth Amendment is anything more
11 than a minimum requirement?

12 MR. KNEEDLER: Well, the Court did recite the
13 discussion in Graham v. Connor that I mentioned earlier,
14 that the Fourth Amendment furnishes the explicit textual
15 source for evaluating the intrusion in that case. And, of
16 course, Soldal involved the seizure of a house.

17 So it seems to us instructive that the Court
18 made that point in that very context. Now, it did not
19 reach the due process question. But, again, all that was
20 at issue in Soldal was whether there was a seizure at all.
21 What would be necessary to render that seizure reasonable
22 was not before the Court. And our submission here is that
23 the -- that at least where there's a warrant issued on the
24 basis of a finding of probable cause, the tradition -- the
25 traditional way in which seizures are authorized,

1 especially in connection with a house, that Fourth
2 Amendment and therefore Fifth Amendment standards are
3 satisfied.

4 QUESTION: Well, Graham certainly stands for the
5 proposition, does it not, that if the Fourth Amendment
6 covers a subject we don't go to the Due Process Clause to
7 look for it?

8 MR. KNEEDLER: It does. And that's the point I
9 was making, and so did Gerstein v. Pugh make that point,
10 so did Baker v. McCollan, so did the GM Leasing case.

11 QUESTION: But that still doesn't answer the
12 question of what's reasonable under the Fourth Amendment.
13 You can get to the same destination under either the
14 Fourth Amendment or the Due Process Clause --

15 MR. KNEEDLER: But -- but --

16 QUESTION: -- Depending on what you think
17 reasonable in the Fourth Amendment means.

18 MR. KNEEDLER: But we think it's instructive
19 to -- when one starts with the Fourth Amendment, that a
20 seizure pursuant to a warrant is the standard -- is the
21 standard procedure used in this setting.

22 QUESTION: It's the standard used in some
23 settings. It's not used in the setting, traditionally,
24 that I gave you in the earlier hypothetical. And I gather
25 that you would support even a further hypothetical when

1 you say it applies to civil settings as well.

2 If there is a statute that provides for
3 forfeiture of all property that is the product of criminal
4 activity, even if it wasn't used in the criminal activity
5 and even if it's held by someone who had no part in the
6 criminal activity, you would assert that before the
7 malefactor who perpetrated the criminal activity has even
8 been tried, you can move against an innocent third party,
9 seize his house on the basis that there is probable cause
10 that there was a crime and probable cause that this
11 property is the product of that crime, right? That --
12 you would assert that.

13 MR. KNEEDLER: Well, that not -- that's not --

14 QUESTION: And you say this is the traditional
15 Fourth Amendment reasonable --

16 MR. KNEEDLER: Well, no. I think seizing
17 property to secure a judgment, for example, is not the
18 traditional use of a warrant in the Fourth Amendment. But
19 here we have action that is verily -- very closely aligned
20 with the enforcement of the criminal laws.

21 QUESTION: But, Mr. Kneedler, in the context of
22 warrants that are issued for building inspectors under See
23 and Camara, refresh my recollection, are those warrants
24 always ex parte?

25 MR. KNEEDLER: Yes, as far as I'm aware they

1 are. And, in fact, the seizure --

2 QUESTION: And there's no right for a notice and
3 a hearing.

4 MR. KNEEDLER: No. And this is -- and for
5 reasons that are common throughout -- a common thread
6 throughout law enforcement, and that is that in law
7 enforcement activities, and seizures and searches are at
8 the core of it, the Government doesn't usually tip its
9 hand. It's not like a --

10 QUESTION: Those are cases where there's --
11 there may be hot evidence that the police are in pursuit
12 of. Here it's 4-1/2 years later. There was -- you're not
13 contending that in this setting there was any urgency at
14 all?

15 MR. KNEEDLER: No, and -- but in the Fourth
16 Amendment context where there is no exigency requiring an
17 immediate seizure, the protection then is to get the
18 warrant, which was done here. So that this Court's Fourth
19 Amendment jurisprudence takes care of the distinction
20 between situations requiring immediate action and those
21 that should be submitted to a magistrate to determine
22 whether there is probable cause for the seizure.

23 In response to Justice Souter's earlier question
24 about what would have been contemplated by the Fourth --

25 QUESTION: But a magistrate is still quicker

1 than notice and opportunity to be heard in advance.

2 MR. KNEEDLER: Absolutely. But also guards
3 against the possibility that notice to the owner would
4 result in destruction of evidence or even destruction of
5 the house.

6 QUESTION: Mr. Kneedler, does it make any
7 difference here that the Government did not oust the
8 tenants or the homeowner? Is that factor?

9 MR. KNEEDLER: We think it makes a very
10 substantial difference, and --

11 QUESTION: Now, what if the Government had come
12 in and it had its warrant on probable cause and
13 immediately ousted the homeowner?

14 MR. KNEEDLER: Well, as we mention in our brief,
15 the Justice Department's policy is not to do that unless
16 there would be an immediate danger to the premises or
17 officers or neighbors. The Government will -- if the
18 occupants do not enter into an occupancy agreement and the
19 Government believes there's a reason to remove them, it
20 will always go back to the court for a further court
21 order.

22 QUESTION: Well, we know that sometimes policies
23 aren't followed and what happens in those circumstances?
24 Would the Due Process Clause perhaps require something
25 more?

1 MR. KNEEDLER: It may. And, also, I think that
2 just as a matter of course in the pending case something
3 more would surely happen, because once there's a pending
4 lawsuit and if the Government went back in for a further
5 order in the pending lawsuit for eviction, I think the
6 Government would probably routinely serve the individual
7 with notice of that. Again, unless there was some special
8 exigency not to give the person notice.

9 But here we're talking at the very threshold of
10 the case. And at that point, for the search and the
11 initial seizure, that's at the very point where
12 traditional Fourth Amendment practice does not normally
13 require advanced notice.

14 And going back to what --

15 QUESTION: If it's exigent enough it doesn't
16 require a warrant either.

17 MR. KNEEDLER: Right. That's exactly right.

18 QUESTION: Why require it here?

19 MR. KNEEDLER: But --

20 QUESTION: Why put all your eggs in the warrant
21 basket?

22 MR. KNEEDLER: Well --

23 QUESTION: Why don't you -- you're claiming
24 exigency. Why not just dispense with the warrant too?

25 MR. KNEEDLER: Well, the Government, recognizing

1 what this Court has said about the importance of warrants
2 in connection with entries into houses, has a uniform
3 policy of seeking warrants. And also it gives the public
4 confidence that there has been an independent look and
5 finding of probable cause in the case.

6 QUESTION: But no reason in principle.

7 MR. KNEEDLER: Well, again, that would be a
8 Fourth Amendment question, whether the Fourth Amendment
9 requires the warrant. We're not suggesting that the
10 Government doesn't have to comply with Fourth Amendment
11 standards. And we -- there's obviously a very strong
12 argument that the Fourth Amendment would mandate a
13 warrant.

14 QUESTION: But all I -- I'm sorry.

15 QUESTION: No, finish what you're doing.

16 QUESTION: I'd feel a lot more comfortable if I
17 thought the Fourth Amendment and warrant procedures had
18 been used in circumstances like this, and in the further
19 circumstances where you're willing to extend it, such as
20 where there hasn't even yet been a conviction of a crime.

21 MR. KNEEDLER: Well, as I say, it may be that
22 the Fourth Amendment -- that our Fourth Amendment argument
23 would not extend this far. But in this case the text of
24 the Fourth Amendment itself includes this situation. The
25 Fourth Amendment, the first clause provides for the --

1 provides that the people shall be secure in their persons,
2 houses, papers, and effects.

3 QUESTION: That's right.

4 MR. KNEEDLER: And therefore the Fourth --
5 against unreasonable searches and seizures.

6 QUESTION: Against unreasonable searches and
7 seizures. And we're talking here about what's
8 unreasonable. And I assume that's determined by what has
9 been traditional in our jurisprudence. And I'm not aware
10 that a seizure of this sort has been traditional, and not
11 being traditional, is not established to be reasonable.

12 MR. KNEEDLER: But the Fourth -- at the very
13 least we think the Fourth Amendment furnishes a strong
14 guide because this is so closely analogous to what has
15 been traditionally done.

16 And unlike in Calero-Toledo, for example, where
17 the Court held that even in that setting there was not a
18 need for a prior hearing, as Justice O'Connor pointed out,
19 the property here, the owner was not even dispossessed.
20 And unlike Calero-Toledo, there was the added protection
21 of the warrant.

22 I'd like to reserve the balance of my time for
23 rebuttal, please.

24 QUESTION: Very well, Mr. Kneedler.

25 Mr. Yuen, we'll hear from you.

1 ORAL ARGUMENT OF CHRISTOPHER J. YUEN

2 ON BEHALF OF THE RESPONDENTS

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

5 When the United States marshals arrived at the
6 home of Mr. Jim Good to seize the property, they bore with
7 them a warrant of arrest which directed them to arrest,
8 attach, and detain in custody his home and 4 acres of
9 land. After they executed the warrant, the marshals
10 remained in actual control of the property. The home was
11 being leased to tenants, but the marshals allowed them to
12 remain, at their sufferance, subject to the signing of an
13 occupancy agreement by those tenants. The marshals
14 directed the tenants to pay the rents to the United States
15 Government rather than to Mr. Good.

16 Mr. Good's ability to move back to the home --
17 the lease was up 2 months after the seizure -- would have
18 been conditioned upon his willingness to sign an occupancy
19 agreement with the Government. Any ability that Mr. Good
20 had to use the property after the initial seizure was at
21 the discretion and control of the U.S. marshals.

22 Today the Government asks this Court to hold for
23 the first time that when the Government seizes private
24 property for as yet undefined and unlimited law
25 enforcement purposes, that it need never provide the owner

1 with prior notice or a hearing.

2 QUESTION: Well, how does this case differ from
3 Dobbins, in your judgment, Mr. Yuen?

4 MR. YUEN: Dobbins does not discuss the
5 procedural requirements at all. If -- Dobbins does not,
6 it does not have any holding about the procedural
7 requirements. What was at issue at Dobbins was whether
8 the property could be taken even though the owner
9 apparently had no knowledge or consent -- knowledge of or
10 consent to the illegal activities. The issue simply -- of
11 what process was due the owner before the seizure simply
12 does not arise in Dobbins.

13 QUESTION: So you're not questioning Dobbins.

14 MR. YUEN: No, Your Honor. Dobbins has no
15 holding on the predeprivation issue whatsoever.

16 The Government has not provided any sense of
17 what the limits to the rule that it would ask you to enact
18 today are. If you enact this rule that only the Fourth
19 Amendment controls and that only an ex parte warrant is
20 needed when the Government wishes to seize private
21 property, there is no reason why the Government cannot
22 oust the occupant of a property, why they can't send the
23 public housing tenant out into the streets, why they can't
24 close and shut the doors of an ongoing business, all
25 without prior notice.

1 QUESTION: Well, there is. If we interpret the
2 reasonableness requirement of the Fourth Amendment is
3 something that must be complied with and if we think this
4 is unreasonable.

5 MR. YUEN: Yes, Your Honor.

6 QUESTION: It doesn't necessarily follow that if
7 we adopt a Fourth Amendment analysis that everything you
8 say follows.

9 MR. YUEN: It necessarily follows if you adopt
10 the Fourth Amendment analysis set forth by the Government,
11 which --

12 QUESTION: And if we say that the issuance of a
13 warrant is both necessary and sufficient to establish
14 reasonableness.

15 MR. YUEN: Yes, Your Honor. A possible holding
16 of the Court is that the Fourth Amendment reasonableness
17 standard applies but that under certain circumstances more
18 than an ex parte warrant is necessary in order to make
19 that reasonable. I can argue, certainly, that in this
20 case more than such a warrant would be necessary.

21 I don't know how much that changes things, and I
22 don't know that the Court should depart from the analysis
23 set forth either in Calero-Toledo or in Mathews v.
24 Eldridge to cover the situation. I don't know that a
25 reasonableness analysis under the Fourth Amendment would

1 be much different from the analysis that's set forth in
2 either of those two cases.

3 QUESTION: How about the case, Mr. Yuen, of a
4 warrantless arrest and then the obligation of the
5 Government to have a probable cause determination within
6 48 hours? Now, my understanding is -- well, the Court has
7 said that is ex parte. Do you feel that, too, should be
8 subject to notice in hearing?

9 MR. YUEN: You're speaking of the arrest of an
10 individual.

11 QUESTION: Yes.

12 MR. YUEN: No, Your Honor. That issue, I
13 believe, is -- a person is different. The arrest is --

14 QUESTION: Well, I would think a person,
15 perhaps, would be entitled to more process than a piece of
16 property.

17 MR. YUEN: The difference -- the distinction
18 between a person and a piece of real property, which is
19 one of the key issues here, is a person can flee.

20 QUESTION: But by hypothesis, when the person
21 has been arrested he is detained. I mean you're not
22 trying to seize him, you're simply trying to determine
23 whether his seizure was accompanied by probable cause.

24 MR. YUEN: And the question is whether a hearing
25 should be promptly held? Yes. Yes, Your Honor.

1 QUESTION: Well, but the question is ought there
2 to be notice and hearing rather than just an ex parte
3 determination by a magistrate?

4 MR. YUEN: We're -- Your Honor, I'm not familiar
5 enough with criminal procedure to know if you're asking
6 something that's already a settled issue. If you're
7 asking me as a matter of personal opinion, I would say
8 yes.

9 QUESTION: Well I didn't mean, you know, how you
10 thought in the best of all possible worlds.

11 MR. YUEN: Yes.

12 QUESTION: But consistently with your argument,
13 it seems to me that we -- that traditionally, and under
14 Gerstein, these sort of determinations are made ex parte.
15 And would your analysis, applying due process or some
16 amplified rule of reason under the Fourth Amendment,
17 require in the future that they be -- that the defendant
18 be present and have an opportunity to challenge whether or
19 not he was detained without probable -- with probable
20 cause.

21 MR. YUEN: Mr. Chief Justice, the case I'm
22 arguing has to do with a forfeiture of real property and
23 the seizure of real property. The arguments and the
24 rationale for this -- for the arguments that I'm making
25 are limited to the factual circumstances before us. I

1 also should mention --

2 QUESTION: Mr. Yuen, don't those factual
3 circumstances include notice, at least as of the time of
4 the conviction, that this property, all this real estate
5 will be subject to forfeiture. And, indeed, doesn't the
6 Federal statute provide that the title to that property
7 vests in the United States on the commission of the act,
8 the storage of drugs there? Not even the conviction, but
9 on the commission of the act that gives rise to the
10 forfeiture.

11 So isn't there the requirement of notice
12 satisfied from the -- at least from the conviction, if not
13 from the charge, that this property is going to be
14 forfeit?

15 MR. YUEN: Your Honor is asking whether the
16 owner should infer from the fact that he has been
17 convicted that his property is subject to forfeiture.

18 QUESTION: From the statute that says that
19 property belongs to the United States. That property now
20 belongs to the United States from the time that you
21 committed the unlawful act.

22 MR. YUEN: In the last term in 92 Buena Vista,
23 this Court held that relation back only serves to vest
24 title in the United States after the final decree of
25 forfeiture. So the fact that the statute says that does

1 not truly operate to make it -- make the property belong
2 to the United States as of the act of the -- as of the
3 moment of the commission of the crime.

4 QUESTION: I'm sorry. You're telling me that
5 the statute is a nullity, the one that says title vests in
6 the United States upon the commission of the act?

7 MR. YUEN: The holding in 92 Buena Vista was
8 that that has the effect of vesting title in the United
9 States only after there is a final decree of forfeiture.
10 When that title vests, it is retroactively vested as of
11 the date of the commission of the criminal act.

12 QUESTION: So if it's completed then, say, the
13 rent in between would belong to the United States.

14 MR. YUEN: Yes. One of the other -- if -- when
15 the decree of forfeiture is finally entered, then the
16 United States would have -- would be declared to have a
17 title to the property.

18 QUESTION: So then to that extent, at least, the
19 Ninth Circuit was wrong when it said the remedy is --
20 assuming that the 5-year statute of limitations was the
21 only timeliness limitation, the Ninth Circuit said the
22 remedy would be interim rent. But that can't be right in
23 accordance -- according to this statute, would it be?
24 Because once you have the decree of forfeiture --

25 MR. YUEN: Before --

1 QUESTION: -- Then it's treated as though the
2 tattle were in the United States from the time of the
3 commission of the illegal act.

4 MR. YUEN: Before I answer that question
5 substantively, let me just say a word about the remedy of
6 the back rent that was awarded by the Ninth Circuit.

7 The Government has never challenged that portion
8 of the judgment. If the Government wishes to say that
9 even if they -- if they lose on the due process issue and
10 that they should have given us a hearing, even in that
11 event the Ninth Circuit should not have awarded the back
12 rent as a remedy.

13 The Government was obliged to bring that up as a
14 separate question on its petition for certiorari, which
15 they have never done. They have never made that claim on
16 any of their briefs. I pointed this out in my answering
17 brief, that they have never made a claim that the Ninth
18 Circuit was in error in awarding us this remedy, and they
19 said nothing about it in their reply brief. Clearly it
20 would have been an inappropriate time even to bring it up
21 at the time of the briefs, because it had never been
22 raised.

23 QUESTION: As far as the notice and opportunity
24 to be heard is concerned, you didn't have any defense of
25 innocent ownership. Was there anything other than

1 timeliness, the statutory argument that you made? What
2 defense would -- suppose you had had notice and
3 opportunity to be heard. What was there other than the
4 timeliness question?

5 MR. YUEN: In both the district court and the
6 Ninth Circuit, we raised double jeopardy arguments and
7 objection to the admissability of evidence based on the
8 original search warrant of the property. So besides the
9 timeliness argument, we did have other substantive
10 defenses which were rejected by the courts below.

11 QUESTION: Did you have any defense factually on
12 the merits other than the double jeopardy and the
13 evidentiary objections?

14 MR. YUEN: No, we do not.

15 QUESTION: Did you ask for a postseizure
16 hearing?

17 MR. YUEN: No, we did not. And the rules give
18 us no provision for a postseizure hearing. The only
19 provision that I can think of that allows you to have a
20 postseizure hearing in civil forfeiture, aside from a
21 motion for summary judgment, a motion to dismiss, up to
22 the trial on the merits, is a due process claim. Which
23 would be -- there's another standard for a postseizure due
24 process claim.

25 But the Rules of Admiralty, which are at issue

1 in -- which are -- govern these proceedings, specifically
2 state that when property is seized under the Admiralty
3 Rules, there has to be post -- prompt postseizure hearing
4 unless it's seized for forfeiture by the United States
5 Government.

6 Now, I take it that any district court would
7 interpret that to mean that a postseizure hearing is not
8 available once any actions by the United States Government
9 for forfeiture.

10 QUESTION: If that -- if a prompt postseizure
11 hearing were available, would that substantially alleviate
12 your due process concern?

13 MR. YUEN: It would be an element in the
14 equation. However, under Mathews v. Eldridge there -- the
15 Government, we would still need to go through the
16 analysis. And in this case the Government has no
17 defensible justification for not giving us a preseizure
18 hearing, and has taken away a very significant property
19 interest from Mr. Good. I think that if -- even if we had
20 a prompt postseizure hearing under Mathews v. Eldridge, we
21 would still be entitled to a preseizure hearing if a court
22 goes through the factors in Mathews v. Eldridge.

23 Real property really is unique in a situation
24 like this, and it's unique for reasons that are very
25 germane to forfeiture. The underlying rationale behind

1 the immediate seizure in cases like Calero-Toledo and
2 United States v. \$8850 is the concept that control of the
3 property is necessary for an in rem forfeiture. If you
4 don't seize the property, you might lose the whole cause
5 of action.

6 In real property cases the property is always
7 going to be there. It's always available to get in rem
8 jurisdiction. In fact, the court can obtain in rem
9 jurisdiction without taking any actions that prejudice the
10 rights of the owner or significantly infringe upon those
11 rights. There was simply no reason whatsoever to seize
12 this property.

13 The Government makes the argument that this
14 seizure was for law enforcement purposes, never specified.
15 I do not grasp what the law enforcement purposes were to
16 seize this property 4-1/2 years after the discovery of a
17 crime and 4 years after the conviction of its owner.

18 QUESTION: Well, isn't it a law enforcement
19 purpose to penalize someone in accordance with the law for
20 some crime they've committed?

21 MR. YUEN: I would agree that this has -- this
22 serves the penal functions. This does serve a penal
23 function of law enforcement.

24 QUESTION: But penal functions are not law
25 enforcement functions?

1 MR. YUEN: Aside from the penal function -- and
2 let me expand on this a little bit. The Government
3 repeatedly -- the Government in its brief talks about law
4 enforcement purposes. They don't talk about this being a
5 criminal case, although the cases that they cite for the
6 Fourth Amendment controlling use the term "criminal case."
7 And I think this is for a real reason.

8 When we were arguing this case below, when I was
9 arguing this case below, for purposes of double jeopardy
10 argument we were claiming that this was a criminal and a
11 penal action against Mr. Good. The Government was
12 claiming that it was civil and remedial. In fact, the
13 Government -- to look at this in a broader context -- has
14 argued for at least 107 years that civil actions
15 denominated as such by -- civil forfeitures denominated as
16 such by Congress were civil and not criminal for the many
17 provisions --

18 QUESTION: Assuming that this is a civil
19 proceeding, as certainly I'm quite willing to do, that
20 doesn't make it any less a law enforcement proceeding,
21 does it, if the Government is trying to carry out a
22 forfeiture authorized by statute?

23 MR. YUEN: In that sense, yes, Your Honor, it's
24 a law enforcement proceeding. However --

25 QUESTION: Well, then that surely is -- if one

1 is to resort to the Mathews against Eldridge, that surely
2 is a governmental interest here.

3 MR. YUEN: There is a governmental interest
4 involved. There -- we do not dispute that. What we
5 dispute is that there is a governmental interest involved
6 in taking the property without giving a prior hearing.

7 This is a -- this is simply not a Fourth
8 Amendment search and seizure type warrant where the
9 purpose is to obtain evidence or to seize contraband or to
10 seize the instrumentalities of crime before they can be
11 used any further. This is a seizure of a home and 4 acres
12 of land. The purpose of this seizure is to take property
13 away from one person and to give it to the United States
14 Government. This is a pure -- as pure a property rights
15 case as could be, and it is a case that has always been
16 analyzed under the Fifth Amendment rather than the Fourth
17 Amendment.

18 QUESTION: But, Mr. Yuen, Mr. Kneedler
19 emphasized that you were not making a substantive
20 challenge. So this is treated in the same way as
21 contraband, the ship that carried the contraband. This is
22 the house in which the drugs were kept. You're not making
23 any substantive challenge. That's an underlying --
24 underlies much of your presentation. But you're only
25 claim -- you're claiming is notice and opportunity to be

1 heard, but you haven't challenged in this case that
2 they're taking 4 acres instead of just the house.

3 MR. YUEN: No, that's true. But the
4 distinction -- we emphasize that to show the difference
5 between what is being done in this particular case and
6 what has been done in the past under the rubric of Fourth
7 Amendment search and seizure warrants. We're talking
8 about an entirely different kind of animal in this case.

9 QUESTION: Well, I'm sorry, are you sure that --
10 you're acknowledging that the 4 acres are out of the case,
11 that it makes no difference? I mean I --

12 MR. YUEN: No.

13 QUESTION: I thought you could maintain the
14 position that there might be -- this might be a reasonable
15 search and seizure in accordance with traditional usage if
16 all that had been seized was the instrumentality of the
17 crime, which would be only the house, but it does not
18 accord with traditional usage when you seize the house and
19 4 acres along with it. You're not making that argument?

20 MR. YUEN: Oh, I'm making -- I would disagree
21 that it would be reasonable under the Fourth Amendment to
22 seize the entire -- to seize even the house as
23 instrumentality.

24 QUESTION: Even the house. So you're not making
25 the argument that the fact that it's a house plus 4 acres

1 sets this apart?

2 MR. YUEN: I am making that argument. It
3 does -- it sets it apart from what has been authorized
4 under Fourth Amendment cases, certainly.

5 QUESTION: I thought you said you're not -- if
6 it were -- just -- suppose it were just the house.
7 Suppose the notice of forfeiture just included the
8 property on which the house was located and not the
9 surrounding property, then you have no case?

10 MR. YUEN: Oh, we would have the same -- we
11 would have the same objections.

12 QUESTION: Well, you wouldn't have the same
13 objections. You would have objections. I thought you
14 were making an additional argument that even if we should
15 mistakenly hold that that's okay, we surely wouldn't hold
16 that you can take the 4 acres in addition.

17 MR. YUEN: No.

18 QUESTION: No.

19 MR. YUEN: No.

20 QUESTION: Okay.

21 MR. YUEN: We're -- I'm making the -- the
22 argument over the extent of what is taken relates to the
23 legal principles at issue here. And it's trying to
24 distinguish between what the Government is taking in this
25 case from the owner with the incidental effects upon

1 property interests which are typically accompanied --
2 which typically accompany a search and seizure warrant
3 under the Fourth Amendment, under a traditional Fourth
4 Amendment warrant.

5 QUESTION: Well, isn't it possible that the
6 scope of the seizure might to some extent depend on the
7 facts? In other words, if some of the marijuana was in
8 the garage then it's more justifiable to seize the garage,
9 and if some of the marijuana seeds were out in the back
10 yard then you're -- you can go into the open fields.
11 Isn't there perhaps a factual issue that would be
12 addressed in -- if you challenged the scope of the
13 seizure, as to how -- you know, as to whether it was
14 reasonable to take the entire parcel or not?

15 I don't know what the facts are. I don't think
16 we know, as of yet. Do we just know that there was so
17 much discovered somewhere on this parcel?

18 MR. YUEN: All of -- all of where the -- all of
19 where the drugs were discovered is in the record. But
20 that has nothing to do, in my view, with the
21 reasonableness of this particular seizure, because --
22 under the Fourth Amendment. Because if we're looking at
23 this under the Fourth Amendment, is there probable cause
24 to seize this property because there was marijuana there 4
25 years earlier and the marijuana was in the trunk or it was

1 in the car or whatever?

2 There's no probable cause to seize under the
3 Fourth Amendment anymore. The evidence is much too stale.
4 The property is not being used for a crime anymore and
5 hasn't been used, as far as the Government knows, for
6 4-1/2 years.

7 QUESTION: Well, but that's the question of
8 whether the 5-year statute of limitations is the only
9 timeliness requirement or if there's another one here, and
10 your opponent never got to talk about that subject. But
11 that's kind of a timeliness issue, I think.

12 MR. YUEN: If this case were judged under a
13 Fourth Amendment warrant analysis, you would have to say
14 there's no probable cause that --

15 QUESTION: You're saying the Fourth Amendment
16 includes a timeliness requirement. So you're not just
17 relying on the statute for saying that this is an untimely
18 seizure. I think that's a new argument that I hadn't
19 heard of in the case before.

20 MR. YUEN: Well, it's really in response to your
21 question about can this seizure -- can the seizure of only
22 a certain area of the house be considered reasonable under
23 the Fourth Amendment because the marijuana was in one area
24 of the house. If you look at -- I emphasized the
25 timeliness to just show the distinction between this.

1 This is not a case where this home is being seized to
2 either investigate a crime or to -- to --

3 QUESTION: It's being seized because of the --
4 according to the Government, a violation of the drug laws
5 was committed on the property, and that's all you need to
6 show.

7 QUESTION: And the house is therefore subject to
8 forfeiture by reason of that.

9 MR. YUEN: The laws do make the house subject to
10 forfeiture. To return, though, our issue is whether the
11 Constitution requires prior notice and hearing before the
12 Government seizes it. And this is --

13 QUESTION: Well, at that -- if we were to grant
14 your -- accept your position, that there should be some
15 prior hearing, what is the standard? Is the standard
16 probable cause?

17 MR. YUEN: No. The Government should have to
18 prove a reasonable likelihood of success. And the reason
19 for this is that the purpose of a predeprivation hearing
20 under Mathews v. Eldridge is to reduce the risk of an
21 erroneous deprivation of property. And in a real property
22 forfeiture case there are very significant affirmative
23 defenses which the claimant must be allowed to show in
24 order to reduce the risk of an erroneous deprivation.

25 It's not enough just for the Government to say

1 there's probable cause to forfeit this property. There
2 may be -- the person who's owning it may be a innocent
3 owner. The person -- the owner may have the
4 proportionality defense that was recognized by the Court
5 this last term in the Austin case.

6 The U.S. Attorneys Office is not going to
7 present those defenses for the claimant at a hearing. The
8 claimant's got to be able to present those defenses or
9 else there is a very substantial risk that there's going
10 to be an erroneous deprivation, and a deprivation that can
11 last for a very long time because there's no other
12 chance -- there's no chance given in the procedures for a
13 hearing before a trial on the merits, aside from
14 dispositive motions.

15 And that may take a very long time, to have a
16 trial on the merits, because these cases are often stayed.
17 We're talking about a very -- possibly a very lengthy and
18 significant infringement upon the owner's rights.

19 QUESTION: Mr. Yuen, were you making the
20 argument in response to Justice Stevens' question that a
21 Fourth Amendment -- that the Fourth Amendment authorizes
22 nothing more than search and seizure for purposes of
23 gathering evidence and bringing defendants to trial?

24 MR. YUEN: No. That would be an incomplete
25 statement. Traditionally under the Fourth Amendment there

1 also have been searches for and seizures of contraband,
2 instrumentalities of trime -- of crime. Certainly it goes
3 beyond that.

4 But counsel for the -- to continue with that,
5 the Government's counsel made an interesting statement
6 which was that a seizure to secure a judgment was not a
7 Fourth Amendment -- was not the subject of a search --
8 Fourth Amendment seizure. I don't know what this seizure
9 is other than a seizure to secure the Government -- to
10 secure a judgment for the Government.

11 When you look at their justifications for
12 seizing the home, they say things like the owner -- if we
13 give them prior notice, the owner might torch the property
14 himself or the property might become dissipated or damaged
15 if we don't seize it. Those are exactly --

16 QUESTION: No, it's not the -- it's not to
17 secure the judgment. It is the decision of Congress,
18 wrongly or rightly, that that's part of the penalty, you
19 forfeit the home where the drugs were kept. This is
20 not -- it's not temporary security while you pay a money
21 judgment. The Government is taking this property from
22 you. I don't see that analogy.

23 I wanted to ask you about the character of the
24 hearing that you say is constitutionally required.
25 Suppose as part of this probable cause hearing the

1 magistrate says okay, I'll call the owner and see what he
2 has to say. Would that satisfy the process that's due, if
3 we turned the probable cause hearing into a two-party
4 affair?

5 MR. YUEN: I would say the owner needs to be
6 represented by counsel because of the complexity of some
7 of the issues that can be involved in this situation.

8 QUESTION: And I thought you said the standard
9 has to be greater than probable cause.

10 MR. YUEN: I would also say that the standard
11 has to be some reasonable likelihood of success.

12 Remember, the Government has no need to seize
13 the property. And in response to your first comment, the
14 reason that the Government is seizing -- the ultimate
15 forfeiture is to punish the owner, certainly, and to take
16 his property. But we are talking about the initial act of
17 seizure, and apparently from the Government's briefs the
18 justification for that is to secure the ultimate
19 satisfaction of the Government--

20 QUESTION: What about preventing?

21 MR. YUEN: -- Or the judgment.

22 QUESTION: I mean you make light of it, but what
23 about preventing somebody who's a criminal -- he's been
24 convicted of a crime. He knows his property is forfeit
25 for that. Why is it not a worry that he'll torch the

1 place?

2 MR. YUEN: The owner can torch it anyway. The
3 Government typically lets the owner stay on the property.

4 QUESTION: Well, then the Government's silly but
5 that doesn't go to whether the statute makes sense or not.
6 The Government is sillier than Congress thought it would
7 be, but it still is a very sensible provision. You're
8 dealing -- you know you're dealing with a criminal and you
9 know that this property -- you know, it seems to me he has
10 nothing to lose. Why doesn't that justify?

11 MR. YUEN: Well, Justice Scalia, I believe the
12 fact that the Government lets the owner typically remain
13 on the property shows that this justification is nothing
14 but a rationalization. It's not the real reason and it
15 does not justify the actions taken here.

16 QUESTION: Well, you know, rationalization --
17 rational basis is ordinarily enough.

18 QUESTION: Well, it's one thing to let a -- let
19 the owner remain and another to let the tenant remain.
20 The tenant might not have the same incentive to waste the
21 property that the owner would.

22 MR. YUEN: Yes, Your Honor.

23 QUESTION: But what if in the criminal trial the
24 whole issue was whether or not the transaction took place
25 in this particular house, and it was litigated and

1 determined beyond a reasonable doubt that this house was
2 the instrumentality used in the crime? What purpose would
3 a preponder hearing do in that -- serve in that case?

4 MR. YUEN: The owner --

5 QUESTION: Or why -- isn't it just a like a levy
6 on execution?

7 MR. YUEN: The owner might still have a number
8 of defenses, including proportionality, double jeopardy,
9 and other defenses of a legal nature that exist in a
10 forfeiture proceeding. Also, between the time when this
11 conviction took place and the forfeiture, there might be
12 intervening innocent owners that the Government doesn't
13 even know about.

14 I'd like to spend just a moment on the second
15 issue in the case which is the timeliness issue. The
16 difference between the case we have here and the cases
17 that the Government cites on this issue is that we're
18 dealing with a forfeiture here which is an extraordinarily
19 harsh, punitive, and arbitrary sanction. And because
20 forfeitures are extremely punitive, the courts have held,
21 including this Court, that all statutes governing
22 forfeiture must be strictly construed in favor of the
23 claimant and in favor of the owner of the property.

24 So we cited State law cases which hold that when
25 the statute says that you must promptly move to forfeit

1 the property, that that gives the claimant the right to
2 have the forfeiture dismissed if the Government does not,
3 in fact, promptly move. And all we're asking for is that
4 this Court uphold the remand back to the district court to
5 find out when it was that the DEA and the FBI found out
6 about the grounds for --

7 QUESTION: So in every case we'll have this
8 factual determination and dispute as to when someone in
9 the DEA found out and when the Attorney General found out.

10 MR. YUEN: Well, many cases, if they are timely
11 commenced, will not have this dispute. If they're --
12 certainly if they're commenced at the same time as the
13 criminal action, which is very often the case, there will
14 not be this issue arise.

15 QUESTION: Thank you, Mr. Yuen.

16 Mr. Kneedler, you have 4 minutes remaining.

17 REBUTTAL ARGUMENT OF EDWIN KNEEDLER

18 ON BEHALF OF THE PETITIONER

19 MR. KNEEDLER: Thank you, Mr. Chief Justice.

20 I'd like to pick up on the point counsel
21 mentioned about what the -- in response to a question from
22 Justice Kennedy as to what the showing would be of such a
23 determination. He says it would have to be more than
24 probable cause, it would have to be a showing of
25 likelihood of success in the merits.

1 This point I think strongly underscores the
2 correctness of our position. In a civil forfeiture
3 proceeding the Government prevails by showing probable
4 cause to believe that the property is subject to
5 forfeiture unless the claimant responds by the
6 preponderance of the evidence, of showing that the
7 property was not used for illegal purposes or that he or
8 she was an innocent owner. So the nature of the relevant
9 inquiry in here we think strongly underscores the
10 following of the standard Fourth Amendment requirements.

11 QUESTION: Mr. Kneedler, that may be true in
12 this case, but supposing there was a proportionality
13 argument, supposing it was a \$10 million home and 2 ounces
14 of marijuana, that arguably the owner would want to
15 argue -- to make the point that you shouldn't seize the
16 whole house?

17 MR. KNEEDLER: Well, almost everything that I
18 recall counsel mentioned he put in terms of affirmative
19 defenses. It seems to us strange that for the Government
20 to carry the probable cause requirement, it has to
21 anticipate and be prepared to rebut possible affirmative
22 defenses before it can even take the threshold step of
23 seizing the property at the outset.

24 The property is subject to forfeiture --

25 QUESTION: Well, even in this case you have 4

1 acres of land and a house on it. And so supposing the
2 evidence was that it was a smaller amount of marijuana in
3 a very discreet location, couldn't there be an argument
4 about whether that justified -- it was probable cause to
5 seize the entire tract?

6 MR. KNEEDLER: Well, there might ultimately be
7 an argument on the merits. But, for example in this case,
8 this goes to whether the acreage surrounding the houses
9 would be subject to forfeiture. I don't understand the
10 respondent to be claiming --

11 QUESTION: No, I understand.

12 MR. KNEEDLER: -- That the seizure of the
13 additional acreage was the sort of thing that required
14 notice and a hearing. He's focusing on the house and the
15 garage, and there really can be no question as to that.
16 Also, the statute at issue in this case provides for the
17 forfeiture of real property including the whole of any lot
18 used for this purpose, and he hasn't suggested that this
19 is not a lot within the meaning of the forfeiture laws.

20 I'd like to go back to Gerstein v. Pugh again
21 where the Court specifically rejected, in the Fourth
22 Amendment context, the argument that an adversary hearing
23 was required for the detention of an individual pending
24 trial. The Court held that the probable cause
25 determination has traditionally been made without an

1 adversary hearing and that the nature of the probable
2 cause inquiry, which does not require fine considerations
3 and resolving of conflicting evidence but rather whether
4 there's reasonable belief that a crime was committed, does
5 not require an adversary hearing.

6 We think, as the Chief Justice pointed out, that
7 that would follow a fortiori for the seizure of property.
8 And particularly that's so where the -- that would carry
9 the burden of proof on the merits.

10 QUESTION: Mr. Kneedler, I want to be sure
11 you've said whatever you want to say about the timeliness
12 issue. Is it the Government's position that the -- that
13 there was no duty to act promptly, or merely that the
14 failure to act promptly does not justify dismissal of the
15 action?

16 MR. KNEEDLER: We say there was no duty. But
17 our principal submission, and the one we would urge the
18 Court to focus on, is that even if there was, that is
19 doesn't lead to dismissal of the suit. We -- on this
20 point we think the case is governed by the principle this
21 Court has recognized back beginning with French v. Edwards
22 and as recently as Brock v. Pierce County and
23 Montalvo-Murillo.

24 And that is when statutes impose duties on
25 Government agents, the failure or the negligence of a

1 Government agent in performing that duty does not deprive
2 them of the power to act on behalf of the Government
3 unless the statute in question goes on to say that if the
4 person -- identify the consequences if the person fails to
5 perform, in this case within that period of time, that
6 he's deprived of the power and the suit can't go forward.

7 In this case there's nothing in the statutory
8 provisions on which respondent relies, which simply are
9 internal reporting and suit filing requirements, to go on
10 to say that the suit can't be brought if it's -- if those
11 duties aren't --

12 QUESTION: You describe them as internal but, of
13 course, they're set forth in a Federal statute.

14 MR. KNEEDLER: They're set forth in a Federal
15 statute, but they're written very much in terms -- in
16 internal terms. They say it shall be the duty of this
17 customs officer and that officer and the Attorney General,
18 which sounds -- in terms of the Government giving
19 instructions to its agents about how the agents are to
20 perform their duties. But the central point is the
21 statute of limitations. It poses the outer limit, not
22 these statutes.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
24 Kneedler. The case is submitted.

25 (Whereupon, at 12:01 p.m., the case in the

1 above-entitled matter was submitted.)

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UNITED STATES, v: JAMES DANIEL GOOD REAL PROPERTY, ET AL.

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BY Ann Marie Federico

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