

**THE SUPREME COURT  
OF THE  
UNITED STATES**

CAPTION: BRIAN J. DEGEN, Petitioner v. UNITED STATES

CASE NO: 95-173

PLACE: Washington, D.C.

DATE: Monday, April 22, 1996

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BRIAN J. DEGEN, :

4 Petitioner :

5 v. : No. 95-173

6 UNITED STATES :

7 - - - - -X

8 Washington, D.C.

9 Monday, April 22, 1996

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 10:02 a.m.

13 APPEARANCES:

14 LAWRENCE S. ROBBINS, ESQ., Washington, D.C.; on behalf of  
15 the Petitioner.

16 MIGUEL A. ESTRADA, ESQ., Assistant to the Solicitor  
17 General, Department of Justice, Washington, D.C.; on  
18 behalf of the Respondent.

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1 PROCEEDINGS

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 85-173, Brian Degen v. United States.

5 Is that the correct pronunciation of your  
6 client's name, Mr. Robbins?

7 MR. ROBBINS: Mr. Chief Justice, it's actually  
8 Mr. Degen.

9 CHIEF JUSTICE REHNQUIST: Degen. Very well.  
10 Proceed.

11 ORAL ARGUMENT OF LAWRENCE S. ROBBINS

12 ON BEHALF OF THE PETITIONER

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

15 On October 24, 1989, Federal prosecutors in  
16 Reno, Nevada commenced a civil forfeiture action against  
17 some \$5-1/2 million in real and personal property owned by  
18 petitioner Brian Degen and his wife, Karen.

19 As the forfeiture statutes permit, Mr. Degen  
20 filed a claim for the property. In it, he denied that the  
21 property was either the proceeds or instrumentalities of  
22 narcotics violations. He also asserted a range of legal  
23 defenses, including that the forfeiture action was time-  
24 barred and that it rested on an ex post facto application  
25 of the forfeiture laws.

1           On the Government's motion, however, the  
2   district court struck Mr. Degen's claim for the property.  
3   The court ruled that because Mr. Degen, a dual Swiss and  
4   American citizen, had not traveled to the United States to  
5   stand trial in a criminal case that had been brought  
6   against him, he was a fugitive, and as a fugitive from the  
7   criminal case, he was therefore disentitled, in the  
8   vernacular, from contesting the civil forfeiture of his  
9   property.

10           The district court therefore entered a judgment  
11   against Mr. Degen for the full amount of the Government's  
12   claim, some \$5-1/2 million of property, and the Court of  
13   Appeals for the Ninth Circuit affirmed.

14           Our central submission this morning is that  
15   Federal courts and Federal judges do not have the  
16   authority to do this. To the contrary, this extraordinary  
17   application of the fugitive disentitlement doctrine cannot  
18   be squared with this Court's disentitlement cases, it  
19   cannot be squared with due process, and it cannot be  
20   squared, most importantly, with the limitations that this  
21   Court has always recognized on the scope of the inherent  
22   powers of the Federal courts.

23           QUESTION: When you say it cannot be squared  
24   with due process, Mr. Robbins, do you mean that if  
25   Congress had enacted such a provision it would be

1 unconstitutional?

2 MR. ROBBINS: I believe it would. I believe  
3 that Congress would not have authority to pass a statute  
4 that has done what the Federal courts in this case have  
5 done, although, Justice Scalia, if I might add, it is all  
6 the more unlawful when done by Federal courts.

7 QUESTION: What leads you to think that Congress  
8 wouldn't have that authority?

9 MR. ROBBINS: Well, I think the reason is  
10 that --

11 QUESTION: I mean, are you talking about a case?

12 MR. ROBBINS: I'm sorry, Your --

13 QUESTION: Are you talking about a decision of  
14 this Court that supports that proposition?

15 MR. ROBBINS: Well, I -- it's -- I think that  
16 the line of authority that supports the proposition is  
17 embodied, for example, in *McVeigh* and in *Hovey v. Elliott*,  
18 where the Court, in deciding that a Court lacked the  
19 power, said that not even a legislature could pass such a  
20 statute, and therefore it's all the more unconstitutional  
21 for Federal courts, or in those cases State courts, to  
22 exercise that kind of authority.

23 QUESTION: Where did your client reside before  
24 he went to Switzerland?

25 MR. ROBBINS: He lived in the United States.

1 QUESTION: And when did he go to Switzerland?

2 MR. ROBBINS: The record suggests, Mr. Chief  
3 Justice, that he went to Switzerland sometime in early  
4 1988.

5 QUESTION: And when was the indictment handed  
6 down?

7 MR. ROBBINS: It was unsealed in October 1989.

8 QUESTION: If -- supposing the district judge in  
9 this case had made a finding that he left the United  
10 States in order to avoid pleading to the indictment, would  
11 that make the outcome any different, in your view?

12 MR. ROBBINS: It would not. Our position would  
13 be that even if he were a fugitive in that sense, which  
14 he's not, but even had he been, our position would be  
15 exactly the same. That is to say that a Federal court in  
16 the civil forfeiture case would not have the authority to  
17 exercise the dispositive sanction of dismissal.

18 QUESTION: And that Congress wouldn't?

19 MR. ROBBINS: I think it would be -- I think it  
20 would be very difficult to say that Congress could pass a  
21 statute that says that the -- that you have no right to  
22 defend the forfeiture of property if you have become a  
23 fugitive in a criminal case. But again --

24 QUESTION: And that's so even if you make a  
25 general appearance in the action?



1 MR. ROBBINS: A general appearance in the  
2 forfeiture action?

3 QUESTION: Yes.

4 MR. ROBBINS: And the question would again be  
5 the power of Congress --

6 QUESTION: Again, the powers of Congress under  
7 the Due Process Clause.

8 Assume that there's a general appearance in the  
9 action but a refusal to make discovery or a refusal to  
10 appear because you're a fugitive from justice. Couldn't  
11 the Congress of the United States say, in that case we can  
12 take judgment against you?

13 MR. ROBBINS: Well, again -- my general answer  
14 is that when Congress does something, obviously they are  
15 not constrained by the limitations on inherent powers.  
16 The question that would be presented, Justice Kennedy, in  
17 that situation is whether the application of that sanction  
18 through the legislative process satisfies the conditions  
19 articulated in Hammond Packing on whether there's a  
20 sufficient nexus between the violation and the sanction  
21 that's been imposed, and it might be --

22 QUESTION: Mr. Robbins, I thought you were not  
23 contesting that as far as the forfeiture is concerned  
24 Mr. Degen would have to be treated like any other  
25 litigant, so if he didn't show up, say, for a deposition,

1 didn't comply with all the discovery requirements, out he  
2 goes.

3 I thought that you were saying as far as the  
4 forfeiture proceeding is concerned, he can't have any  
5 advantage because of his fugitive status, and if I'm wrong  
6 in that, please tell me.

7 MR. ROBBINS: Well, we are certainly not  
8 suggesting, Justice Ginsburg, that he has some special  
9 advantage by being -- by virtue of his nonappearance, and  
10 so, for example, if there were an appropriate sanction for  
11 nonappearance in the forfeiture action, I suppose that if  
12 that sanction otherwise comported with the two standards  
13 that this Court articulated in Insurance Corporation of  
14 Ireland, I suppose he could be appropriately sanctioned,  
15 and --

16 QUESTION: I thought your case was, he has a  
17 right, the right that any litigant would have, to defend  
18 the forfeiture proceeding.

19 MR. ROBBINS: Exactly.

20 QUESTION: He's not stripped of that right  
21 because there's a criminal prosecution against him.

22 MR. ROBBINS: Exactly.

23 QUESTION: But as to the forfeiture proceeding,  
24 he would have to comply with all the requirements the  
25 court would impose on anyone who's contesting a

1 forfeiture.

2 MR. ROBBINS: That's absolutely correct, and the  
3 only point of departure that I thought I tried to suggest  
4 to Your Honor's question is -- insofar as the predicate is  
5 that if he didn't show up for a deposition he would be  
6 automatically subject to have his claim dismissed, I'm not  
7 altogether sure that courts can dismiss claims whenever  
8 there's any particular violation of a discovery order.  
9 The question --

10 QUESTION: It's a civil matter, though. You  
11 wouldn't argue --

12 MR. ROBBINS: Exactly. You know, the question  
13 would be, you know, whether this comports with the due  
14 process restrictions on Rule 37 as this Court has  
15 articulated them in --

16 QUESTION: What -- assuming, even apart from any  
17 rule, that the failure to show up made it impossible for  
18 the Government to perfect its forfeiture case, perhaps  
19 because the material forfeited was in the possession of  
20 the defendant, in a case like that, rule or no rule, I  
21 take it you would agree that there would be no due process  
22 violation in disintitling the person to defend any  
23 further.

24 MR. ROBBINS: I think -- I think that's correct,  
25 if I understand the question. If, for example, his

1 nonappearance rendered it impossible for the district  
2 court in the forfeiture action to proceed, for example by  
3 rendering it impossible to have -- you know, to enforce  
4 the judgment, or to take control of the race, if you will,  
5 then, you know, there's nothing that should separate  
6 Mr. Degen from any other litigant. That --

7 QUESTION: If the district court were to order  
8 him to appear in Nevada for a deposition, could he then be  
9 served with criminal process in the criminal case?

10 MR. ROBBINS: Oh, I think if he were to appear  
11 in response to such an order, I have no doubt that he  
12 would be immediately served with process in the criminal  
13 case.

14 QUESTION: And would that be constitutionally  
15 objectionable, in your view?

16 MR. ROBBINS: Well, the -- it would raise a  
17 question in my mind, Mr. Chief Justice, if it was done for  
18 the purpose of securing his appearance, as a way of sort  
19 of going around the extradition case.

20 QUESTION: Well, suppose it wasn't. Suppose the  
21 district judge says, we do have these foreign claimants,  
22 and I always require them to come to Reno, or Las Vegas,  
23 and give their depositions.

24 MR. ROBBINS: Well, Your Honor, that -- I think  
25 the answer is this. If we were faced with that case,

1 which, of course, we're not -- he was not sanctioned for  
2 that reason. He was sanctioned for the quite different  
3 reason that he didn't come and make an appearance in his  
4 criminal case.

5 But had he been sanctioned for that, Mr. Chief  
6 Justice, I think it would raise two questions, one about  
7 the formulation of the rule, and one about the formulation  
8 of the sanction.

9 The formulation of the rule would be, can a  
10 district judge say that in all civil forfeiture actions  
11 every claimant must show up in person? I think that would  
12 raise a question, which I'm not prepared to sort of give a  
13 complete answer to, but I think it would raise a question  
14 as to whether a district court would be in effect  
15 announcing that the rules provided by Congress, including  
16 for foreign depositions and telephonic depositions, shall  
17 be just set aside, and that no discretion shall be  
18 exercised.

19 QUESTION: We've said that that's okay in civil  
20 matters, where the reason the person doesn't want to  
21 appear generally is that he will be served in other civil  
22 cases. We've said it's perfectly okay for a State to say,  
23 you make a general appearance or you do not appear at all.

24 MR. ROBBINS: I think that that --

25 QUESTION: I would think that it's a lot easier

1 to say it for the criminal case. The interest of the  
2 State is much greater.

3 MR. ROBBINS: I -- well, again, I think the  
4 interest of the State is greater, but the question that I  
5 was intending to answer is whether a court could say that  
6 notwithstanding Rules 28(b) on foreign depositions and  
7 Rule 30(b)(7) on telephonic depositions, I'm just not --  
8 the judge would be saying in all civil forfeiture actions  
9 I'm not going to consider those --

10 QUESTION: Well, supposing the district court  
11 said, I don't require all civil forfeiture defendants to  
12 come to Las Vegas, but I'm going to require you to come to  
13 Las Vegas, because I'm exercising my discretion and that's  
14 the way I choose to exercise it.

15 MR. ROBBINS: I think it is possible that if  
16 circumstances warranted that and the judge, you know, gave  
17 reasons that satisfy a reviewing court that this was an  
18 appropriate exercise of discretion that might be done, but  
19 then the further question, if I might, as to whether the  
20 violation of that order gives -- justifies the sanction,  
21 the dispositive sanction of dismissal --

22 QUESTION: You sound as though your client might  
23 be planning to violate such an order.

24 MR. ROBBINS: No.

25 (Laughter.)

1 MR. ROBBINS: And the question, of course, has  
2 not been presented, since he's obeyed every order in the  
3 civil case that's been pressed on him, and this district  
4 judge, unlike the hypothetical district judge that the  
5 question presupposes, has ordered foreign depositions in  
6 the case of Karen Degen, my client's wife.

7 QUESTION: In your -- I take it for pure  
8 purposes we could consider this as a case in which the  
9 defendant is happy to send his lawyers, he's happy to  
10 comply with every order. What he'd like to do is send in  
11 one piece of paper, which piece of paper would be  
12 absolutely conclusive in his favor, and the judge says,  
13 I'm sorry, I won't look at the paper. Since you're not  
14 here, you lose, period.

15 MR. ROBBINS: Since --

16 QUESTION: Is that right?

17 MR. ROBBINS: Since you're -- and actually, it's  
18 more than that, Justice Breyer. Since you're not here in  
19 this other case --

20 QUESTION: Yes. Since you're not here in the  
21 other case, you lose.

22 Now, we're used to doing that in an appeal  
23 where, after sentencing, for example, the defendant runs  
24 away, and you concede we can do that there.

25 MR. ROBBINS: No question.

1 QUESTION: You can say, we won't look at your  
2 paper, we won't look at the brief, you lose.

3 MR. ROBBINS: Yes, but that --

4 QUESTION: All right. Now, what line do you  
5 draw?

6 MR. ROBBINS: Well, I draw exactly the line that  
7 this Court has drawn in that exact -- in those very cases.  
8 The line -- and it cuts across several factors that  
9 distinguish the facts of this case from that line of  
10 cases.

11 In the first place, Justice Breyer, those are  
12 cases in which there is no underlying constitutional right  
13 that's been abrogated. There's no --

14 QUESTION: When I say, what line are you  
15 drawing, after all, there are a lot of intermediate cases.  
16 He runs away before sentencing. Can the judge then  
17 sentence him?

18 MR. ROBBINS: I believe that the answer to that  
19 is yes. That's exactly what --

20 QUESTION: If, in fact, the judge wants to levy  
21 a fine, and he wants to produce one piece of paper which  
22 will show he has no money, does the judge have to look at  
23 that piece of paper?

24 MR. ROBBINS: Well, again, these are cases in  
25 which the sanction is being imposed in the very proceeding



1 in which the --

2 QUESTION: No, I'm asking you for your -- I  
3 mean, you're absolutely right that's where I'm driving.  
4 What I want to see is what's your line.

5 You agree, I take it, the judge doesn't have to  
6 look at the piece of paper when he ran away before appeal.  
7 The judge doesn't have to look at the piece of paper when  
8 he runs away before he's being fined at sentencing. But  
9 you say the judge does have to look at the piece of paper  
10 when it's a forfeiture of property, and what's the  
11 distinction?

12 MR. ROBBINS: Well, one distinction is that it  
13 doesn't turn so much on the forfeiture of property as it  
14 does on the fact that there are two different proceedings,  
15 and in the forfeiture proceeding there is no showing that  
16 the fugitivity has any impact, has had any impact on the  
17 process of the forfeiture court, which is, of course,  
18 exactly the distinction that persuaded this court in  
19 Ortega-Rodriguez to draw the line where it did.

20 We're insisting on exactly the same line and,  
21 indeed, the use of the disentitlement doctrine in this  
22 setting in my view is vastly more dramatic.

23 QUESTION: Mr. Robbins, may I ask you a  
24 question? You may recall that there are some lawyers who  
25 argue that the Double Jeopardy Clause require the two

1 proceedings to be brought as one.

2 MR. ROBBINS: I've heard such an argument may be  
3 made.

4 QUESTION: You've heard such an argument.

5 (Laughter.)

6 QUESTION: Well, if the Constitution commands  
7 these proceedings be treated as one, how can you  
8 consistently argue in this case that we must treat them as  
9 totally separate --

10 MR. ROBBINS: Well --

11 QUESTION: -- which is the heart of your  
12 argument, that we should ignore the criminal case and just  
13 look at what can be done in the civil case?

14 MR. ROBBINS: Well, I contend that they are  
15 separate proceedings, of course.

16 QUESTION: And it's constitutionally permissible  
17 for us to treat them as separate proceedings.

18 MR. ROBBINS: Well, I think it is  
19 constitutionally permissible to treat them as separate  
20 proceedings and, indeed, they are separate proceedings,  
21 but even --

22 QUESTION: Even if not, you would say that if  
23 they are brought as separate proceedings they have to be  
24 treated as separate proceedings.

25 MR. ROBBINS: Exactly, and the --

1           QUESTION: That's not a very irrational  
2 position, is it?

3           MR. ROBBINS: And the inquiry would -- and the  
4 inquiry would still be, has the fugitivity in case one  
5 affected the proceedings in case two, and my general  
6 answer is that if the answer is no, it doesn't meet  
7 Ortega-Rodriguez, it is nothing like any disentanglement  
8 case this Court has ever approved, it serves none of the  
9 purposes -- none of the purposes -- that this Court  
10 identified in Ortega-Rodriguez.

11           What the Government wants in order to sustain  
12 this forfeiture is for the Court to completely reformulate  
13 the doctrine of fugitive disentanglement so that it no  
14 longer matters whether the claimant has a dispositive  
15 motion that doesn't even require his presence, or even his  
16 testimony, so that it doesn't even matter if the  
17 Government has probable cause, so that it doesn't even  
18 matter whether there's venue in this court, so that the  
19 only thing that matters is that he hasn't shown up to face  
20 parallel criminal charges.

21           QUESTION: Mr. Robbins, in answer to Justice  
22 Scalia's question about the special or general appearance,  
23 you indicated that that was right that a State could say,  
24 either you stay out and forfeit whatever we have, or you  
25 come in for all purposes, but my understanding is that on

1 the Federal side if the property is in the custody of the  
2 court, you could make a limited appearance and say, I'm  
3 coming in for purposes of defending my property, but  
4 nothing else that I own is going to be subject to the  
5 court's authority.

6 I thought that's -- on the Federal side, that  
7 has been the Federal practice, whatever the Texas rule may  
8 be.

9 MR. ROBBINS: Well, I'm actually not certain  
10 whether Mr. Degen could have entered a limited appearance.  
11 In this particular case, he hired a lawyer to contest the  
12 forfeiture --

13 QUESTION: Well, that's what a limited  
14 appearance is. I'm there, I'm fighting out the case, but  
15 the only thing that's going to be subject to the judgment  
16 is the property.

17 MR. ROBBINS: Correct, which is, of course, the  
18 only thing that can be subject to the forfeiture judgment.  
19 The forfeiture court has not seized jurisdiction over  
20 Mr. Degen for purposes of imposing, you know, a  
21 dispositive sanction on him other than in the course of  
22 the litigation were he to violate a court order.

23 QUESTION: And I guess the actual parallel in  
24 the State civil case anyway would not be whether you  
25 subject yourself to general counterclaims or whatnot that

1 are relevant to that suit, but rather, I guess the  
2 parallel would be a State that says if you make even a  
3 special appearance in one case you are liable to being  
4 sued in separate cases. I don't know any case that does  
5 that.

6 MR. ROBBINS: Well, exactly, and actually this  
7 is actually to me a more dramatic example of that for the  
8 following reason. Mr. Degen has been sanctioned, indeed  
9 dispositively sanctioned, not because of something he did  
10 in the criminal case, but for his failure to come to the  
11 United States, an act over which the court in the criminal  
12 case lacks jurisdiction.

13 In a sense, this is the use of an inherent power  
14 to sanction someone in case one because of something that  
15 he failed to do outside the courtroom in case two, and I'd  
16 like to suggest, with all due respect, that there is no  
17 authority certainly in any of this Court's cases for this  
18 kind of a use of an inherent power of a court.

19 QUESTION: Could the judge decline to give the  
20 usual weight and credit to the sworn affidavit because of  
21 the defendant's absence? He'd say, I have this paper in  
22 front of me, but number 1, this man's a fugitive. I'm  
23 going to discount this.

24 MR. ROBBINS: I think the answer, Justice  
25 Kennedy, is that there -- is that it's possible the court

1 could do that, saying, look, I didn't get to test his  
2 demeanor --

3 QUESTION: It's not only possible, is it  
4 permissible?

5 MR. ROBBINS: I think it is permissible, and  
6 after all, it's important to bear in mind Mr. Degen bears  
7 the burden of proof. His not showing up has consequences  
8 for him, too. Just as this Court pointed out in Societe  
9 Internationale, there are consequences for the litigant  
10 that doesn't appear, but one of them is not that you  
11 dispositively sanction him, take his property, give him no  
12 day in court, for the reason that in a separate case over  
13 which the judge has no jurisdiction in the first place, he  
14 hasn't shown up.

15 QUESTION: Maybe it isn't that separate a case.  
16 I mean, certainly that's what the Government is going to  
17 argue in these cases. It would be quite different if it  
18 were a totally unrelated piece of civil litigation that  
19 you're talking about, but this is, in fact, simply a piece  
20 of civil litigation that has a lot to do with the criminal  
21 case. Why can't we consider them effectively joined?

22 MR. ROBBINS: I don't think so, any more than  
23 the court was inclined to consider the two stages of  
24 Ortega-Rodriguez the same case. There, after all, you had  
25 a prosecution followed by an appeal, and yet the Court

1 concluded that because there was no impact on the  
2 appellate proceedings of the same exact case, you couldn't  
3 apply the disentanglement doctrine in that way.

4 QUESTION: Well, but that had to do with the  
5 fact that the appellate proceedings did not relate to the  
6 same court, that they didn't have to do with an offense to  
7 the dignity of the same court, and therefore couldn't be  
8 within the inherent powers of that court.

9 MR. ROBBINS: Well --

10 QUESTION: But here it is the same court.

11 MR. ROBBINS: Well, it is the same court, but  
12 it's the same court with respect to a different case, and  
13 the inquiry, I thought, in Ortega-Rodriguez is whether the  
14 appellate process -- that was certainly one of the  
15 factors. Has the appellate process been disturbed, or --  
16 and --

17 QUESTION: Because it was only the appellate  
18 process that was the business of that court.

19 MR. ROBBINS: I understand, but I think --

20 QUESTION: It had to do with the identity of  
21 courts rather than the absolute identity of lawsuits.

22 MR. ROBBINS: I understand, but I think it  
23 remains the case that Federal courts -- even if it happens  
24 to be the same judge, I do not understand any of this  
25 Court's cases to permit the sanctioning of a litigant who

1 happens to be before the same judge in another case, even  
2 if it's related cases. They have some facts in common.

3 Nevertheless, I understand no authority, and I'm  
4 aware of no authority, the Government cites no authority  
5 for the proposition that the judge, no matter how similar  
6 the underlying cause of action may be, that a sanction can  
7 be imposed in case one because of case two, particularly,  
8 let me add, for conduct that is not unlawful in any way.

9 It bears mention that although Mr. Degen's  
10 failure to come to the United States is doubtless  
11 frustrating to the United States Attorney in Reno, Nevada,  
12 to the Department of Justice, and to Judge Reed sitting in  
13 Reno, Nevada, neither of the political branches, neither  
14 Congress nor the executive branch, have chosen to  
15 proscribe it in any way.

16 It doesn't -- it isn't extraditable. It isn't  
17 punishable. It's not against the law. It violates no  
18 positive law, and yet there is a district judge in Reno,  
19 Nevada who, following circuit court precedent, and I must  
20 say, precedent in various other circuits as well, has  
21 dispositively sanctioned someone, taken all his property  
22 without giving him his day in court.

23 QUESTION: Well, could --

24 MR. ROBBINS: That strikes me as quite  
25 extraordinary.



1 QUESTION: Do those who are assisting him in  
2 remaining abroad, couldn't they be liable for harboring a  
3 fugitive?

4 MR. ROBBINS: I -- oh, I --

5 QUESTION: Forget the extraterritoriality aspect  
6 of it so far as the forum. Suppose he was in New York  
7 State, and he was being hidden out --

8 MR. ROBBINS: Well, I think if there were  
9 questions of concealment and harboring, if that were true,  
10 there might be criminal sanctions attached to the persons  
11 doing it, but Justice Kennedy, it must be said Mr. Degen  
12 is so far from being harbored that it was not difficult  
13 for the United States Government to prevail upon the Swiss  
14 to arrest him and toss him in jail, where he lingered for  
15 nearly 2 years.

16 QUESTION: But is that the case now? What is  
17 the status?

18 MR. ROBBINS: He is on --

19 QUESTION: That is, on that part of it, is it --  
20 is there a dispute with the Government over what happened?  
21 Is it the case that he could not come to this proceeding  
22 because, at the request of the United States, the Swiss  
23 had arrested him, tried him, and put him in prison?

24 MR. ROBBINS: I am --

25 QUESTION: Are we dealing with the case of a

1 person who could not show up because he was in prison  
2 because the Swiss authorities acted on American request,  
3 or not, or what is the status of that?

4 MR. ROBBINS: The status is that he is out on  
5 bail. I have no reason to challenge the proposition that  
6 he could come here without penalty from the Swiss, but I  
7 don't know that to be the case, but I'm not asserting the  
8 opposite, either, and my argument wouldn't --

9 QUESTION: He hasn't been tried yet in  
10 Switzerland?

11 MR. ROBBINS: No, he's not. He's still awaiting  
12 trial on charges that, on their face, embody the  
13 allegations of the American indictment as well.

14 QUESTION: Mr. Robbins, did the petitioner raise  
15 in district court the claim that the Swiss arrest ended  
16 his fugitive status?

17 MR. ROBBINS: Well, the Swiss arrest came in, I  
18 believe, November of 1992. He had already been  
19 disentitled at that point.

20 QUESTION: So it was not raised in the district  
21 court because it hadn't occurred.

22 MR. ROBBINS: That's correct. It had not yet  
23 occurred.

24 With the Court's permission, if there are no  
25 questions I'd like to reserve the balance of my time for

1 rebuttal.

2 QUESTION: Very well, Mr. Robbins.

3 Mr. Estrada, we'll hear from you.

4 ORAL ARGUMENT OF MIGUEL A. ESTRADA

5 ON BEHALF OF THE RESPONDENT

6 MR. ESTRADA: Thank you, Mr. Chief Justice, and  
7 may it please the Court:

8 It is undisputed that this civil forfeiture  
9 action is directly related to a criminal case that is  
10 pending in the same district courthouse against Degen, and  
11 that Degen refused to appear to stand trial on the  
12 criminal charges.

13 For two reasons, the court of appeals correctly  
14 held that a claimant in Degen's situation may be  
15 disentitled from contesting the civil forfeiture action.  
16 First and foremost a civil claimant's participation in the  
17 civil forfeiture action fundamentally threatens the  
18 integrity of the criminal case.

19 Second, the claimant's --

20 QUESTION: You say the defendant's participation  
21 in the civil forfeiture threatens the criminal case?

22 MR. ESTRADA: Yes, Mr. Chief Justice, and that  
23 is, in fact, our principal argument here.

24 Our argument starts from the premise that courts  
25 always have had the inherent authority to protect against

1 the abuse of their processes by a litigant, and that is  
2 precisely what the rule at issue here does.

3 If a civil claimant is allowed to participate in  
4 a civil forfeiture action while at the same time he  
5 refuses to stand trial on a criminal case that is based on  
6 the identical event, he may then use the very broad civil  
7 discovery rules that -- to circumvent the very well  
8 settled and strict restrictions on criminal discovery.

9 QUESTION: But couldn't that be dealt with by a  
10 judge administering the civil discovery rules?

11 MR. ESTRADA: That is not true, Mr. Chief  
12 Justice, with respect, and in order to understand why, it  
13 is useful to note why it is that we have limited criminal  
14 discovery in our society. Those rules limiting strictly  
15 criminal discovery exist because long experience has  
16 taught Congress and the courts that early disclosure of  
17 the Government's case in a criminal prosecution often  
18 leads to contrived defense testimony --

19 QUESTION: But Mr. Estrada, wouldn't that be  
20 possible even if he appeared in the criminal case, that he  
21 could use civil discovery in the forfeiture case to find  
22 out the same information?

23 MR. ESTRADA: That is not so, Mr. Justice  
24 Stevens, for the following reason. Congress has  
25 recognized precisely the danger that we're pointing to in

1 this case, and in section 20 -- and section 881(i) of  
2 title 21 has given the Government the right to go to the  
3 district court and get a stay of the civil forfeiture  
4 action pending the conclusion of the criminal case.

5 QUESTION: Well, why couldn't they have done  
6 that in this case?

7 MR. ESTRADA: Well, I take it that if we had  
8 done that in this case, Mr. Justice Stevens, the net --  
9 the result would have been that we couldn't get any  
10 judgment in the civil forfeiture action because the  
11 criminal case can't start while Mr. Degen is in  
12 Switzerland.

13 QUESTION: So it boils down to a question of  
14 money. It's not the dignity of the court, you want the  
15 money.

16 MR. ESTRADA: Well, no. We want our statutory  
17 rights under the forfeiture statute --

18 QUESTION: Which is to get the money.

19 MR. ESTRADA: Which is to get the money without  
20 having to compromise the integrity of the criminal  
21 process, and since we are not at fault for the fact that  
22 he's in Switzerland, we think that it is a reasonable  
23 exercise of the court's authority to have a very simple  
24 procedural rule in the civil case that says that if you  
25 want to file a claim in the civil case you should come and

1 face the related criminal charges.

2 QUESTION: That's --

3 QUESTION: But how long can a -- how long can  
4 the criminal indictment stand without dismissal if he  
5 fails to appear in response?

6 MR. ESTRADA: For as long as he lives, Mr. --  
7 Justice O'Connor.

8 QUESTION: All right, and presumably the  
9 Government could stay the civil forfeiture and put a hold,  
10 in effect, on any transfer of title the property. The  
11 property will be secure. So what has the Government lost?

12 MR. ESTRADA: Well, the Government has lost its  
13 right to the property. Under the forfeiture laws we have  
14 made a prima facie showing which on its face entitles us  
15 to the property outright.

16 QUESTION: Well, it seems to me that the -- it  
17 isn't as though the Congress hasn't addressed this  
18 problem. It has, and it has given you a remedy. The  
19 remedy is to stay the civil action until the criminal  
20 action is completed, and you say that remedy is  
21 inadequate. Well, maybe go back to Congress and get an  
22 additional remedy for this kind of a case.

23 MR. ESTRADA: There are two points in answer to  
24 that question, Justice Scalia. Congress has not addressed  
25 the problem that we are faced with here. It has not dealt

1 with how to deal with someone who is a fugitive in a  
2 foreign country, so that there's no negative implication  
3 that that is an exclusive remedy.

4 The second point, which I think is more  
5 important, is that the fact that Congress has dealt with  
6 an aspect of the issues that come up with cases when cases  
7 are related does not mean that the court ceases to have a  
8 very strong interest in keeping parties from abusing its  
9 processes, and that's what is at issue here.

10 QUESTION: Well, there's no finding here,  
11 Mr. Estrada, that the petitioner is a fugitive.

12 MR. ESTRADA: Well, yes, there is, Mr. Chief  
13 Justice. We have -- at page 18a of the petitioner's  
14 appendix there is a finding by the district judge that he  
15 is a fugitive, and at page 5a --

16 QUESTION: Whereabouts on page -- you're talking  
17 about the white --

18 MR. ESTRADA: Yes. It's page 18a, and it is the  
19 last full paragraph. It says, the Ninth Circuit has given  
20 us the following definition of who is a fugitive, and the  
21 court goes on to say, in this case Brian knows he is  
22 wanted by the police but refuses to submit to arrest, even  
23 though he professes his innocence. Thus, we conclude that  
24 Brian Degen is a fugitive.

25 QUESTION: In that sense of the word, I take it.

1 MR. ESTRADA: Right, in that sense of the word,  
2 and that is the sense of the word that is relevant to the  
3 application of the sanction at issue here.

4 I think it bears emphasis from our point of view  
5 that we are not here supporting the notion that the  
6 sanction being imposed is an exercise of the power of the  
7 court in the criminal case. We are not saying, for  
8 example, that he has a legal duty that is enforceable in  
9 the criminal case if the case were standing alone.

10 What we are saying is that it is a proper use of  
11 the court's authority to manage the civil case to guard  
12 against the possibility that he will use the processes in  
13 the civil case to undermine public policies that have been  
14 reflected --

15 QUESTION: If he does --

16 MR. ESTRADA: -- in the discovery rule.

17 QUESTION: If he does, why not handle it at that  
18 stage instead of saying you -- you're at total default.  
19 We are predicting what's going to happen if we were to  
20 allow you to come in and defend, and Mr. Estrada, one  
21 striking difference between this and Molinaro, where the  
22 fugitive entitlement doctrine started, there the defendant  
23 is away and he says, aha, if I'm vindicated on appeal,  
24 I'll come home, but if they're going to affirm my  
25 conviction -- so there was no way to enforce the court's



1 judgment.

2 Here, all the property is arrested. It's in the  
3 court's control, so he can't get his hands on any of that  
4 property.

5 MR. ESTRADA: Well, there are two different  
6 points being raised by your question, as I understand it,  
7 Justice Ginsburg. One is why can't we wait, and the other  
8 one is, we have control over the property, so there is no  
9 question as to the enforceability of the judgment.

10 Let me take the first one first, which is  
11 that -- and in answering that one, it is important to  
12 recognize that we are claiming two distinct interests in  
13 the civil forfeiture action for supporting this rule.

14 One, of course, is the fact that he has shown to  
15 the court that he intends to play games with the court and  
16 maybe their answer is let's wait and see if he does it  
17 some more, but even -- even accepting that that would be  
18 an acceptable answer, it is not an acceptable answer to  
19 the more fundamental problem that we are identifying,  
20 which is that by getting discovery and allowing -- and  
21 being allowed to litigate the civil forfeiture action, he  
22 is circumventing the criminal discovery rules.

23 Those rules reflect a very strong public policy  
24 that cannot be dealt with on a case-by-case basis.

25 QUESTION: But Mr. Estrada, suppose the

1 defendant says, I don't want to face a total forfeiture,  
2 and I realize this argument you're making. I would rather  
3 have some defense than none, so if the district court  
4 wants to issue any kind of protective orders so that I  
5 won't get premature -- a pre-vision of the criminal case,  
6 so be it, but at least give me some chance to defend.

7 The Government, in order to effect its interest  
8 in not having more disclosure than in the criminal case  
9 doesn't have to say, you can't come in at all. It can  
10 say --

11 MR. ESTRADA: I don't --

12 QUESTION: Yes.

13 MR. ESTRADA: I mean, let me make two points in  
14 response to that question. The first one is that I think  
15 that it is not right because it is possible that he could  
16 say that all he intends to do in the action is to call the  
17 following six witnesses who will testify that in fact all  
18 property came from an inheritance or from some other  
19 source of income, and we may well know that that is not  
20 true because all of our evidence in the criminal case  
21 shows where the property comes from.

22 So all that is doing is pushing the problem one  
23 step further, because he will then put us to the choice  
24 either of compromising the criminal case or --

25 QUESTION: Are you saying there are no

1 circumstances in which he could defend that would not  
2 involve disclosing the Government's case?

3 MR. ESTRADA: No, I am not saying that. What I  
4 am saying is there are enough circumstances in the class  
5 of cases to warrant the adoption of a general rule while  
6 recognizing that the rule can have exceptions for specific  
7 cases being, in its nature, discretionary.

8 QUESTION: Well, why in the example that you  
9 just gave does that example support you? Why, in the case  
10 in which the Government knows because of its criminal  
11 evidence the property came from some other source than  
12 inheritance, couldn't the Government simply go to the  
13 court and say, we have evidence to rebut? We will make a  
14 good faith offer of proof without disclosing the evidence  
15 itself, and therefore you in fact ought to stay the  
16 proceeding so that we don't have to disclose our case.

17 I suppose your answer is, well, we want the  
18 money, but --

19 MR. ESTRADA: And we have a legal right to it.

20 QUESTION: But the fact is, in each instance  
21 what it comes down to is not your incapacity to defend  
22 your own position, and not your incapacity, in effect, to  
23 meet the evidentiary position that you feel is unfairly  
24 being foisted upon you, but rather, it comes down in every  
25 instance to the fact that you want the property now rather

1 than the property at some later time when the two  
2 proceedings could be dealt with in an orderly fashion.

3 So it seems to me that it all boils down to kind  
4 of a time-money argument.

5 MR. ESTRADA: Well, it boils down to the fact  
6 that under the act of Congress that we have at issue here,  
7 we have a right to the money, and that there is no  
8 foreseeable time in the future at which the two  
9 proceedings can be dealt with in an orderly fashion.

10 QUESTION: But you don't hold the same in  
11 respect to misrepresentation cases, restitution cases,  
12 fraud cases, dozens of other cases in which the Government  
13 might have civil remedies. You're not going to say all  
14 those, also, are forfeited, are you?

15 MR. ESTRADA: What we would say is that courts  
16 would have authority to frame the rules that would keep  
17 the public interest from being harmed as a result of an  
18 early --

19 QUESTION: And the same, then, here.

20 QUESTION: Not --

21 QUESTION: The same, then, here.

22 MR. ESTRADA: Well, that's right, and this is  
23 such a rule, and that's our point.

24 QUESTION: But isn't there a difference between  
25 a rule that says, you can't present -- have certain

1 discovery, present certain defenses, that's what people  
2 are asking you, and a rule that says, you can't come into  
3 court at all. You can't present any claim, any defense,  
4 anything.

5 MR. ESTRADA: Well, the rule was used by the  
6 district court in this case, Justice Breyer, is the rule  
7 saying if you want to defend the civil forfeiture action,  
8 you have first to face the criminal charges, and the  
9 district court was quite clear -- and, in fact, I could  
10 point the Court to the top of page 26a of the pet app.

11 The court made it quite clear that he would be  
12 free to defend the civil forfeiture action to his heart's  
13 content if he would only appear in the criminal case,  
14 and --

15 QUESTION: Isn't one of the Government's  
16 possible losses if the petitioner's suggestion -- the same  
17 thing that a statute of limitations would provide,  
18 witnesses' recollections get stale --

19 MR. ESTRADA: That's right.

20 QUESTION: If the thing is brought to trial 8  
21 years from now, the Government may have had a good case  
22 now, but the witnesses may not be around, they may have  
23 died in the meantime.

24 MR. ESTRADA: And that is true both in the  
25 criminal case and in the civil case, and I think it leads

1 me to a further point that I wanted to make in response to  
2 Justice Souter, which is that we can readily concede for  
3 purposes of this case that there is no legally enforceable  
4 duty to show up in the criminal case that flows from the  
5 criminal case itself.

6 That does not mean that his failure to show up  
7 in the criminal case has a positive value to our society  
8 that we should strive to accommodate in framing rules for  
9 the orderly conduct of the civil litigation.

10 QUESTION: Well, if he has no obligation to show  
11 up, I suppose the societal value is even Steven. It's  
12 neither positive nor negative.

13 MR. ESTRADA: Well, that is not so, because we  
14 have a duly returned indictment, and we have a --

15 QUESTION: Then why don't we have a set of rules  
16 that obligates him to show up. You just conceded that he  
17 wasn't obligated to show up.

18 MR. ESTRADA: No, I said that it is not  
19 significant for our case in this case to show that he has  
20 a legal duty that flows from the criminal case, but what  
21 is at issue here is whether the court in the orderly  
22 process of the civil case may have a rule to protect the  
23 civil case processes from being misused in the criminal  
24 case, and it is equally true, for example, that there is  
25 no legal duty to -- let's say, for example --

1 QUESTION: Yes, but Mr. Estrada, by hypothesis  
2 you're assuming you can never compel him to come to the  
3 United States, is that correct?

4 MR. ESTRADA: Well --

5 QUESTION: Other than by this -- by using the  
6 civil procedure to do so. If you can't compel him to  
7 stand trial on the criminal case, you haven't lost  
8 anything by proving and winning your civil case.

9 You still get the same property, but you had to  
10 prove it instead of using this sanction to get it, and you  
11 end up with the property but no criminal judgment, and the  
12 reason you can't get a criminal judgment is you don't have  
13 authority to compel him to come from Switzerland to the  
14 United States.

15 MR. ESTRADA: But he doesn't --

16 QUESTION: You still end up with exactly the  
17 same result.

18 MR. ESTRADA: But he does not have the right to  
19 buy his way out of a criminal indictment either, and he  
20 has no right --

21 QUESTION: He's not buying his way out of it,  
22 he's just staying in Switzerland.

23 MR. ESTRADA: No, the difference is, Justice  
24 Stevens, that we're entitled to the expectation that if we  
25 ever get our hands on him we're going to put him in a U.S.

1 jail, where we think he belongs, and under your view of  
2 the facts what would really happen is that we would be  
3 entitled, as of now, to say \$5 million only if we're ready  
4 to give up for good the hope of ever bringing someone to  
5 justice who spent the better life of his --

6 QUESTION: You haven't given it up for good.  
7 The only thing you've given up is by putting in your proof  
8 you've disclosed to him the witnesses who will testify  
9 against him in the criminal case. That's the only thing  
10 you have to give up.

11 MR. ESTRADA: Right, and that is --

12 QUESTION: The tactical advantage in the  
13 criminal case may or may not be all that important.

14 MR. ESTRADA: It is not a tactical advantage,  
15 and I understand that it is possible to have different  
16 views on the value of criminal discovery, Justice Stevens,  
17 but --

18 QUESTION: He's not getting any discovery. I'm  
19 assuming that the trial judge in this case could say, you  
20 can have no discovery, but he's going to say to you, you  
21 can't get the property without proving you're entitled to  
22 it.

23 MR. ESTRADA: And we did that. I'm not saying  
24 that we are not required to make the prima facie showing  
25 that the statute requires us to make. All we ask --



1 QUESTION: Oh, but you are. Aren't you saying  
2 you're entitled to the property even without the prima  
3 facie showing?

4 MR. ESTRADA: No, we're not. We're not, and  
5 we're also saying --

6 QUESTION: Well, if you've made the prima facie  
7 showing, why haven't you already disclosed your case,  
8 then?

9 MR. ESTRADA: Because we can make a prima facie  
10 showing by a verified complaint in an affidavit that shows  
11 probable cause, which under the forfeiture laws then  
12 shifts to him the burden of proving a lawful source for  
13 the funds, but it is not our view that we can come into  
14 the court without making a prima facie showing under the  
15 forfeiture laws and get a judgment. All we're asking  
16 for --

17 QUESTION: So it boils down to your fear that  
18 you would open the door to criminal discovery, then.

19 MR. ESTRADA: Well --

20 QUESTION: That's your real fear here.

21 MR. ESTRADA: Yes.

22 QUESTION: You answered a question about that  
23 before, and I'm not sure that I understood your answer.  
24 Justice Stevens alluded to the problem a second ago.

25 Let's assume that he tries to get criminal

1 discovery. Why isn't it perfectly open to the Government  
2 in that event to say, don't give him the discovery,  
3 because if you do you will be providing discovery in fact  
4 in a criminal case to which he is not entitled, a case in  
5 which he will not appear, and for that reason, court, use  
6 your discretionary authority not to allow discovery. Why  
7 can the Government not be protected that way?

8 MR. ESTRADA: Because, as I think I indicated  
9 earlier, that only pushes the problem one further step.  
10 He will then come in and put whatever evidence he thinks  
11 he has, and in effect put us to the choice of disclosing  
12 our case to meet his evidence, or giving up on the  
13 forfeiture case, and as I was going to --

14 QUESTION: So it's not a discovery issue, then.  
15 As you say, it just pushes it further. You want to put in  
16 a minimal case. You want him to know as little as  
17 possible consistent with your capacity to -- in effect, to  
18 justify the forfeiture.

19 MR. ESTRADA: No --

20 QUESTION: It's not discovery. It's  
21 nondisclosure.

22 MR. ESTRADA: We are happy -- well, yes and no.  
23 We're happy for him to know as much as he wants so long as  
24 he knows it at a time when he no longer has the  
25 possibility of affecting --

1 QUESTION: No, no, we realize --

2 MR. ESTRADA: -- the criminal jurisdiction.

3 QUESTION: No, I realize you're happy in that  
4 case, but what it boils down to, though, it seems to me,  
5 though, is that as you say, it's not really that we can't  
6 protect -- we, the Government, cannot protect ourselves in  
7 discovery. We simply don't want to have to put on a  
8 comprehensive case, because in doing so we might provide  
9 some advantage to him for use in the later criminal case  
10 if it is later tried.

11 MR. ESTRADA: I don't think that that's an  
12 entirely fair recharacterization of what I said.

13 QUESTION: Well then, help me out again.

14 MR. ESTRADA: I think we're happy to make a  
15 prima facie showing, and we're happy to have a full-blown  
16 trial, if we are sure that we will not be endangering the  
17 criminal prosecution. It is not that we --

18 QUESTION: Well, you're not endangering it.  
19 You're endangering it in the sense that you would be  
20 disclosing more of your case than any rule of criminal  
21 discovery requires you to disclose. That's what you mean  
22 by endanger, isn't it?

23 MR. ESTRADA: Yes, but what I also mean is that  
24 the reason for the rules on criminal discovery is that  
25 what often happens when we have it is that we have

1 obstruction of justice and witness intimidation and  
2 contrived testimony, and that the judgment of the rules  
3 being as strict as they are, and they do reflect a public  
4 policy, is that the danger of that happening cannot  
5 effectively be controlled on a case-by-case basis.

6 I mean, we cannot take a wait-and-see attitude  
7 to see whether someone will attempt obstruction of justice  
8 because often the first indication that we will see is the  
9 contrived defense at trial followed immediately by an  
10 unwarranted acquittal.

11 QUESTION: So this doesn't sound like it's a  
12 rule of the trial court's discretion.

13 MR. ESTRADA: Well, it is in the sense, Justice  
14 Kennedy, that the district court retains discretion in  
15 every case. They also retain the extent of the dangers.  
16 I --

17 QUESTION: But from all you have said, I presume  
18 that it would have been an abuse of discretion for the  
19 trial judge not to entertain your motion --

20 MR. ESTRADA: In an ordinary case?

21 QUESTION: -- to disentitle him here.

22 MR. ESTRADA: In an ordinary case, that would  
23 probably be true, especially with charges -- with criminal  
24 charges of the nature that is at issue here.

25 QUESTION: If we have that rule, I suppose we're

1 telling all other countries in, at least countries with an  
2 open judicial system, that if there is a criminal charge  
3 filed against a United States national living in the  
4 United States that person's property can be forfeited if  
5 the person doesn't go to the foreign country to answer  
6 their charges.

7 MR. ESTRADA: I'm not sure that I understand  
8 your question, Justice Kennedy.

9 QUESTION: Well, you're asking us to adopt a  
10 rule that a foreign national must come here to defend  
11 against -- well, or a person with dual nationality must  
12 come here to defend a criminal charge or he's going to  
13 lose his property automatically.

14 MR. ESTRADA: I --

15 QUESTION: And I suppose it works the other way  
16 around.

17 MR. ESTRADA: I think that it would be fair to  
18 say that we do say that the interest of the court in the  
19 civil case to guard against the misuse of its processes  
20 are strong enough to warrant a rule telling somebody that  
21 he should come meet criminal charges.

22 QUESTION: Of course, that's no problem if we're  
23 worried about foreign countries copying us and thereby  
24 prejudicing American citizens. Many foreign countries  
25 already allow criminal prosecutions in absentia

1 MR. ESTRADA: In absentia, that's correct,  
2 Justice Scalia.

3 QUESTION: The situation is already worse than  
4 that.

5 MR. ESTRADA: Unfortunately, yes.

6 QUESTION: You would take the same position even  
7 if he were not an American citizen, wouldn't you?

8 MR. ESTRADA: Yes.

9 QUESTION: Yes.

10 MR. ESTRADA: In respect -- as that  
11 justification goes, that is true.

12 I will point out, as we did in our brief, that  
13 he is, in fact, an American citizen both by birth and by  
14 breeding, and --

15 QUESTION: Then with respect to that, don't you  
16 have authority, or couldn't an authority be exercised over  
17 him if Congress so chose that could not be exercised over  
18 someone who's not a citizen, and there is the old Blackmer  
19 case.

20 MR. ESTRADA: That's correct.

21 QUESTION: There is authority to call back our  
22 citizens to answer for charges here, but that kind of  
23 subpoena wasn't sent to him, was it?

24 MR. ESTRADA: It was not sent to him to be a  
25 witness in the criminal case, and I think that the

1 relevance of the Blackmer case here is that it shows that  
2 the United States as a sovereign has the right to have a  
3 rule that calls them back to this country to respond to  
4 court process. There's --

5 QUESTION: Mr. Estrada, tell us about fugitives  
6 from justice. Is it, indeed, not an obligation of a  
7 citizen to present himself when he knows that there's an  
8 arrest warrant out for him?

9 MR. ESTRADA: Well, I think it is a -- yes, but  
10 I think we think of it --

11 QUESTION: It's not a separate crime, though.

12 MR. ESTRADA: -- as a civic duty.

13 QUESTION: It's not a separate crime to be a  
14 fugitive from justice.

15 MR. ESTRADA: It is --

16 QUESTION: Perhaps because there's no use in it.  
17 The guy's already a fugitive from one crime.

18 MR. ESTRADA: Well, right. It's like piling  
19 on -- there's no point.

20 QUESTION: The only purpose of such a statute  
21 would make him a fugitive from two crimes.

22 MR. ESTRADA: Well, I mean, there's no point.

23 QUESTION: I guess you could have another  
24 statute making it a crime not to end your fugitive status.  
25 That would be three crimes that you can violate.

1 (Laughter.)

2 MR. ESTRADA: Well --

3 QUESTION: Well, m but also you'd say the  
4 Government could take -- Congress could pass a statute  
5 saying that anyone who's been indicted and who does not  
6 appear in due course without -- all his property may be  
7 forfeited, period.

8 MR. ESTRADA: Do I say that?

9 QUESTION: Yes.

10 MR. ESTRADA: Subject to the qualification that  
11 I think flows from some of these courts' due process cases  
12 that he be shown to have had notice and that it was  
13 possible in fact for him to come.

14 I mean, it may be that he is -- that we don't  
15 know where he is and we can't effectively give him notice,  
16 nor we may know whether, in fact, it is possible for him  
17 to apply, but subject to that --

18 QUESTION: Subject to notice and ability to  
19 appear.

20 MR. ESTRADA: Yes.

21 QUESTION: If you could prove that --

22 MR. ESTRADA: Yes.

23 QUESTION: Is there any international norm on  
24 that, did you find?

25 MR. ESTRADA: On what, Justice Breyer?



1           QUESTION: Any international norm about whether  
2 country anywhere in the world can say to all citizens of  
3 the world once we file a criminal indictment against you,  
4 you have to travel here, no matter how far, and if you  
5 don't, you lose all your property.

6           MR. ESTRADA: I don't --

7           QUESTION: Is that ever -- did you look that up  
8 at all?

9           MR. ESTRADA: No. I don't think so. From our  
10 point of view the case really does involve the very narrow  
11 question of the power of the civil court to make sure that  
12 someone will not misuse it to gain an unfair tactical  
13 advantage.

14           And it is, as the district court framed it, a  
15 limited rule, and as the court of appeals recognized, a  
16 rule that allows for the exercise of discretion in  
17 specific cases, this not being one of them, because  
18 Mr. Degen waived any right to discretionary claims in the  
19 court of appeals, but it is not in any sense the type of  
20 extreme rule that Mr. Robbins has indicated we have.

21           QUESTION: Would the same rule apply if a victim  
22 sued in the district of Nevada for harm caused by an  
23 absent defendant based on a crime in the indictment, an  
24 assault, say?

25           MR. ESTRADA: Based on a crime in the indictment

1 such that the same concern about the early disclosure of  
2 the Government's case would apply, yes.

3 QUESTION: And I take it on a long arm statute  
4 there'd be jurisdiction so that that judgment would be  
5 enforceable personally against the defendant, I suppose.

6 MR. ESTRADA: That's right.

7 QUESTION: Automatic liability. Well, not --

8 MR. ESTRADA: Well --

9 QUESTION: If there's a prima facie case.

10 MR. ESTRADA: It is not -- it is --

11 QUESTION: If there is a prima face case.

12 MR. ESTRADA: If there is a prima face case, and  
13 he wishes to dispute the case, there's a reasonable  
14 procedural rule to say we have such a strong interest in  
15 protecting the integrity of the related case that we will  
16 require you to come face the music in that case as a  
17 condition to maintaining your civil action, which is no  
18 different from having filing fees or timing requirements  
19 on when you file your brief, although which are predicated  
20 on the notion that these are simple rules with which a  
21 litigant can comply and that serve usefully the purpose of  
22 allowing the court in the civil case to conduct orderly,  
23 fair, and expeditious litigation.

24 QUESTION: Mr. Estrada, what is the  
25 difference -- what does the Government lose when it has

1 the funds in the court, what can't it do that it could do  
2 if the forfeiture had gone through as you're urging?

3 MR. ESTRADA: Well, under the view of the other  
4 side, we can't get the funds into the U.S. Treasury where  
5 we think they belong.

6 QUESTION: But you can put them in an interest-  
7 bearing account.

8 MR. ESTRADA: And to wait -- what, Justice  
9 Ginsburg? I mean, there is no reasonable indication that  
10 he will ever come to this country to face the criminal  
11 charges, so what we're saying is that we're going to put  
12 the money in a bank where the Government has no access to  
13 it, even though it has made a showing --

14 QUESTION: Well, he'll probably die before the  
15 Government does. You'll get it eventually.

16 (Laughter.)

17 MR. ESTRADA: Yes.

18 QUESTION: At that point you go ahead with the  
19 civil case. He's beyond your criminal punishment anyway.

20 MR. ESTRADA: But we're entitled to it now,  
21 and --

22 (Laughter.)

23 MR. ESTRADA: And --

24 QUESTION: My question is, that's -- is there  
25 something concrete, that's different about saying, we're

1 entitled to it now, and saying we've got the principal in  
2 the bank and we're getting interest on it, and so we're  
3 getting the time value, we're getting -- we're not getting  
4 the principal, but we're getting the interest?

5 MR. ESTRADA: I understand the point of your  
6 question, and I would say that I suppose that is a form of  
7 a compromise that has as much grounding in the court's  
8 inherent authority as the more easily manageable rule that  
9 we have here, and since we are not the people at fault,  
10 and since by statute we are also entitled to the  
11 principal, it seems to me that as between the choice of  
12 two reasonable rules that accomplish a purpose, we're  
13 entitled to that one that gives us our statutory rights.

14 QUESTION: Yes, but you're entitled to it if you  
15 can prove it, but you want to get it without proving it.

16 MR. ESTRADA: We have proven our entitlement to  
17 the money --

18 QUESTION: Well --

19 MR. ESTRADA: -- and all we're looking to see is  
20 that in disputing our showing the other party doesn't put  
21 us to the choice of giving up our statutory entitlement or  
22 giving up the very strong public interest in the integrity  
23 of a criminal prosecution.

24 Thank you, Mr. Chief Justice.

25 CHIEF JUSTICE REHNQUIST: Thank you,

1 Mr. Estrada.

2 Mr. Robbins, you have 5 minutes remaining.

3 REBUTTAL ARGUMENT OF LAWRENCE S. ROBBINS

4 ON BEHALF OF THE PETITIONER

5 MR. ROBBINS: Thank you, Mr. Chief Justice.

6 This case is a very good illustration for why  
7 what this Court called the blunderbuss of dismissal is  
8 inappropriate as way of solving the problem that the  
9 Government is concerned about.

10 If disentitlement is to be taken at the  
11 threshold in order to protect against the possibility that  
12 there may be discovery in the civil case that provides a  
13 window into the criminal case, district courts can do  
14 that, and they do it of every day of every week by  
15 applying Rule 26(c) of the Rules of Civil Procedure, and  
16 issue protective orders.

17 This case, however, is different, because in  
18 this case the Federal prosecutor said to the district  
19 judge in an argument, made and reproduced on page 6a of  
20 the appendix to our brief, that there was no need to stay  
21 the forfeiture proceedings one minute longer in deference  
22 to the criminal case precisely because the cat was out of  
23 the bag in the criminal case.

24 There was no need to protect against the  
25 disclosure of witnesses, no need to protect against the

1 disclosure of any evidence, and in response to the  
2 prosecutor's argument, the district court said, fine, you  
3 can go ahead and take all the depositions you want --  
4 Karen Degen, the petitioner's wife, and in an order that's  
5 reflected in the minutes of the February 1, 1993  
6 transcript.

7 In short, this district judge concluded that no  
8 protective order was appropriate precisely because there  
9 was nothing to protect against.

10 QUESTION: Is Karen Degen in the United States?

11 MR. ROBBINS: She is not. She is living with  
12 her husband and their children in Switzerland.

13 QUESTION: So a discovery order was entered  
14 against her but not against Brian?

15 MR. ROBBINS: Discovery was issued in her favor,  
16 but not in Mr. Degen's favor, that's correct, Your Honor.

17 The point here is the wonderful irony about this  
18 argument is it bears no -- you know, no coherent  
19 relationship to the facts of this case, and precisely to  
20 avoid a problem that the prosecutor said was not  
21 presented, Mr. Degen is to be disentitled, dispositively  
22 sanctioned for conduct that the court has no jurisdiction  
23 even in the action in which he is a putative fugitive, to  
24 sanction him for.

25 Let me also get rid of one other red herring.

1 QUESTION: In that same exchange, what is the  
2 argument when you said, I would point out, Your Honor,  
3 that Mr. Degen is no longer a claimant in this case, he's  
4 merely a witness?

5 MR. ROBBINS: Well, he'd already been  
6 disentitled, so what they were saying is, you know, don't  
7 pay any attention to the need to get his evidence because  
8 you've already knocked him out of the box, and to the  
9 extent that Karen is relying on his unavailability as a  
10 reason to extend the summary judgment proceedings, you  
11 shouldn't credit his -- the need for his testimony.

12 The other red herring I'd like to deal with is  
13 the argument that the Government has already established  
14 its right to this money. What it has established is its  
15 right to the seizure of this money and this property  
16 through a prima facie showing, to be sure, but if I can be  
17 indulged one other Latinism, it's also completely ex  
18 parte.

19 They went into court with a complaint and an  
20 affidavit that, you know, to my mind barely shows probable  
21 cause to believe any of the property was in fact used in  
22 violation of 881(a)(6) and (a)(7), and now they have the  
23 money, and now, as the law permits, it's our burden to  
24 come into court and overcome that prima facie showing.  
25 It's our day in court, the first and only one we get.

1 QUESTION: Mr. Robbins, what they did, what they  
2 showed is comparable to what a plaintiff would have to  
3 show in the case of an ordinary civil default judgment,  
4 right, make an ex parte showing of the entitlement to  
5 money damages.

6 MR. ROBBINS: Well, that's correct. They've  
7 gone in and shown that they have at least that much of a  
8 claim, but the law then permits Mr. Degen to come in and  
9 overcome it, and you know, if his unavailability  
10 prejudices his capacity to make that showing, then he's so  
11 much the worse for it.

12 We're not asking that he be treated any better.  
13 We're asking that he be given the rights and opportunities  
14 that the law prescribes, and he's being -- you know, he's  
15 been foreclosed those opportunities by virtue of conduct  
16 that is not against the law, period, and it seems to me  
17 that courts can't do it and we --

18 QUESTION: Not against the law, you mean not  
19 criminal?

20 MR. ROBBINS: It is not criminal. I mean --

21 QUESTION: I question whether it's not against  
22 the law, to fail to appear.

23 MR. ROBBINS: Well, Your Honor adverted to  
24 whether there isn't some other law inherent in the duty of  
25 citizenship. It may be, although Blackmer does not deal



1 with that issue, I would respectfully suggest, but rather  
2 a quite different issue.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
4 Robbins.

5 MR. ROBBINS: Thank you.

6 CHIEF JUSTICE REHNQUIST: The case is submitted.

7 (Whereupon, at 11:02 a.m., the case in the  
8 above-entitled matter was submitted.)

## 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:*

BRIAN J. DEGEN, Petitioner v. UNITED STATES  
CASE NO: 95-173

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

BY Ann Marie Federico

(REPORTER)