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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: UNITED STATES, Petitioner v. HOSEP KRIKOR  
BAJAKAJIAN  
CASE NO: 96-1487 c. /  
PLACE: Washington, D.C.  
DATE: Tuesday, November 4, 1997  
PAGES: 1-57

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :  
Petitioner :  
v. : No. 96-1487  
HOSEP KRIKOR BAJAKAJIAN :  
- - - - -X

Washington, D.C.  
Tuesday, November 4, 1997

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
1:00 p.m.

APPEARANCES:

IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; on  
behalf of the Petitioner.  
JAMES E. BLATT, ESQ., Encino, California; on behalf of the  
Respondent.

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On behalf of the Respondent	29



1 PROCEEDINGS

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 96-1487, United States v. Hoses Krikor  
5 Bajakajian. Mr. Gornstein.

6 ORAL ARGUMENT OF IRVING L. GORNSTEIN

7 ON BEHALF OF THE PETITIONER

8 MR. GORNSTEIN: Mr. Chief Justice, and may it  
9 please the Court:

10 Respondent was about to board a flight to Syria  
11 when a Customs inspector informed him that he was required  
12 to file a currency report if he was taking more than  
13 \$10,000 with him. Respondent claimed that he was taking  
14 less than \$10,000 and he therefore did not file a currency  
15 report.

16 Customs inspectors searched respondent and his  
17 possessions and found more than \$350,000 in cash.  
18 Respondent subsequently pleaded guilty to wilfully failing  
19 to file a currency report as he was about to transport  
20 more than \$350,000 outside this country. For that  
21 offense, Congress has mandated forfeiture of the  
22 unreported currency. The Court of Appeals for the Ninth  
23 Circuit held, however, that the forfeiture of any of that  
24 currency would constitute an excessive fine.

25 We believe the court of appeals erred for two

1 reasons. First, the unreported currency is an  
2 instrumentality of a reporting offense and may be  
3 forfeited as such without violating the Excessive Fines  
4 Clause, and second, even if it is not an instrumentality,  
5 its forfeiture is a permissible punishment for what is a  
6 serious criminal offense.

7 QUESTION: On your first argument, if it's an  
8 instrumentality of the crime and we agree with you on  
9 that, does that mean the excessive fines analysis is just  
10 inapplicable, or that it is presumptively non -- not  
11 excessive?

12 MR. GORNSTEIN: It is satisfied. That is that  
13 it is not -- it is a way of showing that the fine is  
14 nonexcessive because the forfeiture of property that is  
15 involved in the offense is an inherently proportional --  
16 proportionate sanction.

17 QUESTION: In other words, the Excessive Fines  
18 Clause analysis applies in either event.

19 MR. GORNSTEIN: It does, but the manner of  
20 satisfying the Excessive Fines Clause is by showing that  
21 it is property that's seized -- one way of satisfying it,  
22 it is showing that the property that is seized is in fact  
23 an instrumentality of the offense, and there -- questions  
24 may arise about whether it has a sufficiently close  
25 connection to the offense to be classified properly as an

1 instrumentality, but once it is, then that would satisfy  
2 the Excessive Fines Clause.

3 QUESTION: Well, if we have to ask about  
4 excessiveness anyway, I'm just wondering why we have to go  
5 through the additional step of elaborating a big  
6 jurisprudence on what is an instrumentality and what  
7 isn't.

8 MR. GORNSTEIN: Well, historic --

9 QUESTION: If in any event we're going to talk  
10 about proportionality, maybe --

11 MR. GORNSTEIN: No. I --

12 QUESTION: -- we should just save ourselves a  
13 step.

14 MR. GORNSTEIN: Well, there are just two  
15 different ways of talking about proportionality, Justice  
16 Kennedy. Proportionality, it is inherently proportionate  
17 once it's an instrumentality. No further inquiry into  
18 culpability or to the value of the property is ever  
19 necessary once there is a showing that this is in fact an  
20 instrumentality of the --

21 QUESTION: Well, you said it's presumptively  
22 proportional.

23 MR. GORNSTEIN: No. I'm saying that it is --

24 QUESTION: I thought.

25 MR. GORNSTEIN: I'm sorry if I -- if we had a

1     misunderstanding on that, but generally speaking, if  
2     the -- if it is an instrumentality, then it is per se  
3     nonexcessive, and I would except from that one small  
4     category of cases where perhaps the property is involved  
5     in what might be a minor infraction such as a parking  
6     violation, but if it is the kind of violations that  
7     property have historically been forfeited for customs  
8     violations, for criminal offenses, then if it is an  
9     instrumentality in the offense, then it is per se a  
10    proportionate fine and not an excessive one.

11            QUESTION: It seems a little odd, though, to  
12    equate excessiveness with just instrumentality as opposed  
13    to some examination of gross proportionality, or lack  
14    thereof.

15            MR. GORNSTEIN: Well, I think --

16            QUESTION: I mean, the mere term excessiveness  
17    seems to import some notion of proportionality to me.

18            MR. GORNSTEIN: Well, I think the question is  
19    excessive in relation to what.

20            QUESTION: Yes.

21            MR. GORNSTEIN: That's right, and here I think  
22    that when some --

23            QUESTION: Maybe in relation to the criminal  
24    fine that could be imposed, or something like that. That  
25    might be easy to look at.

1 MR. GORNSTEIN: But I think that historically it  
2 was that if as long as it was in relationship to the  
3 offense, that the property was used in the offense, the  
4 seizure was not an excessive fine, because it has always  
5 been the case that this has been viewed as a reasonable  
6 way, seizure of property involved in the offense, a  
7 reasonable and effective way to encourage the owners of  
8 property to make sure that their property does not become  
9 involved in the offense. It is not excessive in that  
10 sense. It is perfectly commensurate with that goal,  
11 because it has always --

12 QUESTION: Well, I guess this Court has never  
13 really articulated the test.

14 MR. GORNSTEIN: It has not, and the two cases  
15 that this Court has had previously on the Excessive Fines  
16 Clause simply said that forfeiture was a fine, but in  
17 neither case did the Court set out the methodology for  
18 deciding whether the fine would be excessive.

19 Now, our view is that there are really two ways  
20 to do it. First, if it's an instrumentality then it's  
21 not excessive, without more. But second, if it isn't an  
22 instrumentality, then you would engage in the sort of  
23 inquiry that you would generally engage in if you had a  
24 monetary fine.

25 QUESTION: Well, what is the conclusion that you



1 seek to help us to by saying that it's an instrumentality?  
2 We have a purpose for these classifications. Why is it  
3 that we're asking about an instrumentality, in order to  
4 show the close connection of the property to the crime  
5 itself? I mean, is that the object of the inquiry?

6 MR. GORNSTEIN: Yes. The instrumentality is  
7 really just a shorthand expression for the kind of  
8 property that has historically been subject to forfeiture  
9 in rem because of the significant involvement of the  
10 property in the offense.

11 QUESTION: Ah, but --

12 QUESTION: This is not an in rem forfeiture  
13 here, is it?

14 QUESTION: This is not in rem.

15 MR. GORNSTEIN: It's not an in rem forfeiture,  
16 but the criminal provision here in addressing the kind of  
17 property that is subject to forfeiture singled out only  
18 property that is involved in the offense.

19 QUESTION: Right.

20 MR. GORNSTEIN: And that is the shorthand  
21 expression for the kind of property that has historically  
22 been subject to in rem forfeiture, and we think by using  
23 that language Congress manifested its intent to further  
24 the general remedial goals that have always been  
25 associated with in rem forfeitures.

1 QUESTION: Mr. Gornstein, in that connection I'm  
2 a little confused. What is the difference between  
3 criminal forfeiture and the civil in rem, because I had  
4 been I guess under the false impression that for civil  
5 forfeiture it could be an excessive fine to take the whole  
6 thing. I thought that was what Austin implied.

7 MR. GORNSTEIN: I think that the only thing that  
8 Austin held was that it was a fine, and then it did not  
9 decide how you would decide whether a fine was or was not  
10 excessive.

11 Now, the property that was seized in Austin  
12 itself may have been so incidentally involved in the  
13 offense that it couldn't properly be characterized as an  
14 instrumentality of the offense, and if not, it could not  
15 be forfeited on an instrumentality theory.

16 QUESTION: Can you explain the difference -- is  
17 there any significant difference between the in personam  
18 criminal and the in rem civil for this purpose of judging  
19 the proportionality or the -- how much can be forfeited  
20 without being too much?

21 MR. GORNSTEIN: For purposes of our first  
22 argument, that is, whether it is an instrumentality, there  
23 is no difference.

24 QUESTION: No difference.

25 MR. GORNSTEIN: But for the purpose of our

1 second argument, if you disagree with us on the first one,  
2 there is a difference, because the criminal forfeiture  
3 embodies the additional purpose of punishing the criminal  
4 defendant, whereas, to the extent that punishment is  
5 involved in civil in rem, it is punishment only of the  
6 owner.

7 Now, here the criminal defendant can be both the  
8 criminal defendant and the owner, and he can be punished  
9 in both ways in a criminal proceeding, but in a civil in  
10 rem proceeding the only person that is being punished, if  
11 anyone is being punished, is the owner of the property.

12 QUESTION: Mr. Gorn --

13 QUESTION: But as far as your instrumentality,  
14 it's identical.

15 MR. GORNSTEIN: It would be the same exact  
16 analysis.

17 QUESTION: Mr. Gornstein, do the old cases on  
18 forfeiture of undutied cargos refer to the forfeited goods  
19 as being instrumentalities, or have we simply applied that  
20 term as a term of art?

21 MR. GORNSTEIN: The latter.

22 QUESTION: The latter, okay. When did that  
23 develop? I mean, it's an odd usage, and I just like to --

24 MR. GORNSTEIN: Yeah.

25 QUESTION: -- understand why we use those.

1 MR. GORNSTEIN: And I wish I had a full  
2 explanation for this, but I would say one of the sources  
3 of it was Justice Scalia's concurring opinion in Austin,  
4 and I think a lot of the courts which use the phrase  
5 instrumentality to describe --

6 QUESTION: Quite recent law?

7 MR. GORNSTEIN: Quite recent, yeah, that used  
8 the phrase instrumentality to describe the kind of  
9 property that has a sufficiently close connection to the  
10 offense and that could historically be subject to  
11 forfeiture.

12 QUESTION: Your -- I'm sorry.

13 MR. GORNSTEIN: And a lot of the court of  
14 appeals that have struggled with this question since then  
15 have picked up on that phrase, and it's --

16 QUESTION: Going back to Justice Kennedy's  
17 question, we could simply stop using the word  
18 instrumentality here and consider the argument that the  
19 analogy is so close between the undisclosed currency here  
20 and the undutied property in the old in rem cases, that  
21 that would be the basis for your --

22 MR. GORNSTEIN: You absolutely could.

23 QUESTION: -- without getting into this  
24 metaphysics.

25 MR. GORNSTEIN: You do not have to get into an

1 elaborate discussion of what is and is not an  
2 instrumentality in this case. You can decide this case  
3 based on its relationship to the early customs cases, and  
4 in the early customs cases, property was brought into the  
5 country without declaration it was subject to forfeiture.

6 QUESTION: That isn't quite -- I mean, the  
7 underlying issue, I think, which is possibly a point of  
8 agreement or disagreement with Judge Wallace, is that your  
9 view is, if something is an instrumentality, no matter how  
10 valuable, it is forfeitable if it's involved in a crime,  
11 no matter how trivial, with the exception of parking  
12 offenses. All right.

13 So that means that the Constitution would  
14 permit, in your view, the Taj Mahal, for example, to be  
15 forfeited if it was once used to sell a teaspoonful of  
16 marijuana or something like that.

17 MR. GORNSTEIN: I think not, because again  
18 that's a -- that historically has not been a way in which  
19 forfeiture law has been used.

20 QUESTION: Ah. Well, now wait, then. That's  
21 interesting, because that's what I was trying to drive at.

22 I thought your initial view was what I said, and  
23 now you have a limitation on that initial view, and you  
24 say it only applies where?

25 MR. GORNSTEIN: Well, I think in your example



1 that -- the question would be whether that was an  
2 instrumentality of the offense.

3 QUESTION: Oh, no, no, I'm assuming it was.

4 MR. GORNSTEIN: No, but what I'm saying is,  
5 that's the inquiry, and what I would say is in that case  
6 the relationship of the property to the offense is so  
7 minor and incidental that it was never --

8 QUESTION: Let me make an example with the  
9 hypothetical where it is not minor and incidental. People  
10 are called to the Taj Mahal deliberately in order to sell  
11 them the teaspoon of marijuana. You know, it's easy to do  
12 that, and I'm trying to get at the underlying point.

13 Is the underlying point correct, without  
14 limitation, no matter how valuable the property, it is  
15 forfeitable if used to commit a crime, no matter how  
16 trivial, and my difficulty, of course, if it's without  
17 limitation, is how one would reconcile that with the  
18 excessive -- what seems to be a prohibition of excessive  
19 fine.

20 MR. GORNSTEIN: And I think that the -- you  
21 start with the history of the early customs statutes.

22 QUESTION: Do I have it right, what your  
23 position is?

24 MR. GORNSTEIN: Well, I -- with the provisos  
25 that I said, that there are two inquiries that have to be

1 made. The first is that it is sufficiently involved in  
2 the offense to be treated as an instrumentality, and if  
3 you're running a business out of the Taj Mahal, yes, that  
4 certainly could be forfeited.

5 If there's one transaction that takes place  
6 there, even on a single day, maybe or maybe not, but at  
7 some point yes, if you're running a business out of the  
8 Taj Mahal and selling drugs out of there, that would be an  
9 instrumentality and could be forfeited as such.

10 Now, the reason that -- there are two powerful  
11 reasons, it seems to us, why instrumentality forfeitures  
12 satisfy the Excessive Fines Clause, and the first is  
13 history. If you look at the early forfeiture laws, they  
14 require forfeiture of goods brought into this country  
15 without declaration regardless of how valuable those goods  
16 were. It could have been priceless jewelry or ordinary  
17 gems. If those goods were brought into the country  
18 without declaration, they were subject to forfeiture as  
19 such.

20 This is the very same First Congress that  
21 proposed the Excessive Fines Clause, so I think we have to  
22 start with the understanding that that Congress did not  
23 view that kind of forfeiture as excessive.

24 We know from Austin that the Congress viewed it  
25 as a fine, so the only thing that we can understand from

1 that Congress' action is that they must have thought that  
2 that kind of forfeiture was not excessive because of the  
3 relationship of the property in the offense.

4 QUESTION: The argument made against that is  
5 that in the case of goods brought into the country  
6 illegally in that manner it's not only an instrumentality  
7 of a crime, the goods themselves are contraband.

8 MR. GORNSTEIN: Well --

9 QUESTION: They have no business being in the  
10 country. They are unlawfully here. You could distinguish  
11 those cases on that basis, couldn't you?

12 MR. GORNSTEIN: Justice Scalia, I don't think  
13 that is a fair characterization, because contraband as we  
14 understand it is something that is unlawful to possess.  
15 The goods that were being brought into the country to sell  
16 were perfectly legal to sell as long as the appropriate  
17 duties were paid on them, and the fact that the --

18 QUESTION: Yes, but it's as long as, but if it's  
19 not --

20 MR. GORNSTEIN: Here it's perfectly legal to  
21 take money out of the country and transport it out of the  
22 country, but only as long as you make the report, and so  
23 it has the exact same relationship to the offense as the  
24 traditional -- the goods in a customs offense.

25 QUESTION: Well, why don't you use the term

1     contraband, rather than instrumentality, then.

2             MR. GORNSTEIN:   Justice Stevens, I would be  
3     happy --

4             QUESTION:   Then you'd be in --

5             MR. GORNSTEIN:   -- I would be happy to decide  
6     this case --

7             QUESTION:   You'll take an opinion written that  
8     way.

9             MR. GORNSTEIN:   If you want to use the word  
10    contraband to describe this kind of property, that is fine  
11    with us.

12            QUESTION:   No, but I'm just wondering why you  
13    didn't argue it in those terms.

14            MR. GORNSTEIN:   The reason that we did not argue  
15    it in those terms is that we understood the term  
16    contraband to mean property that is unlawful to possess,  
17    like --

18            QUESTION:   Like drugs, or --

19            MR. GORNSTEIN:   Like drugs, that's right, that  
20    are -- that sort of uniformly, with rare exceptions,  
21    unlawful to possess, not property that is legitimate to  
22    possess, but is used in the commission of the offense.

23            Now, I say -- having said that, this is a  
24    peculiar kind of property instrumentality that looks like  
25    contraband and could be called the corpus of the offense,

1 and if you want to decide the case on that basis by saying  
2 you can always forfeit the corpus of the offense because  
3 that --

4 QUESTION: I don't think we need another phrase.

5 (Laughter.)

6 QUESTION: But Mr. Gornstein, maybe we need two,  
7 because I take it on your theory nothing rides on whether  
8 these are ill-gotten gains, that is, not possessed  
9 lawfully, and are going to be devoted to an unlawful  
10 purpose, money laundering, and whether, as at least we  
11 must take this case, the possessor had a lawful right to  
12 possess and was going to use the money toward lawful ends.

13 So do I understand your position right that, for  
14 purposes of the amount of the forfeiture and the excessive  
15 fines, it doesn't make any difference whether the funds  
16 were possessed totally lawfully or they were, indeed, ill-  
17 gotten gains?

18 MR. GORNSTEIN: That's correct. As long as they  
19 were used in the commission of this offense, they are  
20 subject to forfeiture, and it is not excessive, in the  
21 same way that property imported into this country that is  
22 lawfully possessed and intended for a lawful purpose, to  
23 sell it, is also subject to forfeiture.

24 QUESTION: May I ask, then, in that line,  
25 that -- you've been candid about it, that it doesn't



1 matter that it's -- that the money is possessed legally,  
2 the crime is the failure to report.

3 The hypothetical that I think was given in one  
4 of the briefs is, suppose Congress decided to say that  
5 failure to report income, that the consequence of that  
6 will not be just the ordinary fines that they're -- that  
7 are now in place, but that for failure to report you  
8 forfeit whatever amount you fail to report.

9 MR. GORNSTEIN: Yes. We view that question as  
10 not being one of -- we view the earned income as not being  
11 an instrumentality of that offense. There has been no  
12 historical tradition of treating earned income as an  
13 instrumentality of a failure to file an income tax return,  
14 and the relationship is different.

15 QUESTION: Yes, but what's the historical  
16 precedent for treating undisclosed money in the same way  
17 that you're --

18 MR. GORNSTEIN: Well, it is the very property  
19 that moves across the border without proper declaration.

20 QUESTION: Yes, but your criterion in response  
21 to Justice Ginsburg was historical tradition, and there's  
22 no historical tradition drawing the analogy that you want  
23 us to draw.

24 MR. GORNSTEIN: Well, I -- in addition to there  
25 being no historical tradition, though, the relationship to

1 the offense in that case is different, because earning  
2 income is a condition of having a duty to report, but the  
3 money is not physically used in the commission of the  
4 offense as it is here.

5 QUESTION: But the Government's interest is even  
6 stronger, because the Government's interest is not only an  
7 interest in having reports, it's an interest in collecting  
8 the taxes.

9 MR. GORNSTEIN: And that's right, and that's why  
10 it may or may not be an excessive fine based on the value  
11 of the fine as against the gravity of the offense. You  
12 would turn to that analysis. We're not saying that if  
13 there's -- a property is not an instrumentality it can't  
14 be forfeited.

15 QUESTION: No, but if instrumentality is to be  
16 determined on the basis of some kind of sufficient  
17 relationship to the crime, then I would suppose there was  
18 a pretty good argument for treating the undisclosed income  
19 as an instrumentality.

20 You can't commit the crime unless you have the  
21 income, and therefore it's hard for me to understand why,  
22 if you're going to treat the undisclosed exported money as  
23 an instrumentality without the benefit of a historical  
24 example, and you're going to treat -- and you're going to  
25 define instrumentality as this close relationship, it's

1 hard to see why you don't fall, it seems to me, into  
2 exactly the position that Justice Ginsburg suggests, that  
3 if we take your position, then we are, in fact, opening  
4 the door to exactly the total forfeiture of any  
5 undisclosed income subject to tax. Why will that not be  
6 the conclusion?

7 MR. GORNSTEIN: Justice Souter, the historical  
8 analogy is much more complete in the case of currency, and  
9 the reason is that what the currency is doing, it is being  
10 physically transported across the border without  
11 declaration. It is actually physically -- the money is  
12 there, and it is being moved, and that is part of the  
13 offense of transporting money outside this country without  
14 proper declaration just like the traditional customs law.

15 QUESTION: But isn't it possible the report  
16 could be made the day after they arrived abroad?

17 MR. GORNSTEIN: It is, but the --

18 QUESTION: Then the offense --

19 MR. GORNSTEIN: The offense is still -- part of  
20 the offense is physically transporting the money across  
21 the --

22 QUESTION: What I'm saying is, every  
23 transportation of money across the border without  
24 reporting does not necessarily violate the statute if  
25 within 24 hours or so he files a report.

1 MR. GORNSTEIN: Actually, on the receiving end  
2 that would be true. On the export end --

3 QUESTION: So either way --

4 MR. GORNSTEIN: -- you have to file the  
5 report --

6 QUESTION: Either way, the -- if it --

7 MR. GORNSTEIN: But --

8 QUESTION: If it doesn't have to be absolutely  
9 simultaneous, I'm not sure your analogy follows.

10 MR. GORNSTEIN: I -- it seems to me that the  
11 analogy is still complete, because the money itself is --  
12 part of the offense is physically moving the money across  
13 the border, and the money is immediately and directly  
14 involved in the offense in the way that earned income is  
15 not, which it's just earned over a period of time, and  
16 then in a calendar year you report on your income and  
17 tax --

18 QUESTION: But under the income tax you've got  
19 to make your report on such-and-such a day, whenever the  
20 return is due. What if this statute said you've got to  
21 make your report on the same day you file your income tax  
22 return at a later --

23 MR. GORNSTEIN: I don't think that that makes a  
24 difference.

25 QUESTION: It wouldn't --

1 MR. GORNSTEIN: I don't think that that makes a  
2 difference, and part -- and one of -- to go back to a  
3 question about, that this does not apply even when it is  
4 legitimate, found to be legitimate and intended for a  
5 lawful purpose, the reason that Congress imposed very  
6 serious penalties despite that is that there are many,  
7 many cases in which it is impossible for the Government to  
8 know at the moment of seizure whether or not property is  
9 intended for particular unlawful purposes like tax  
10 evasion, for like, money laundering, like large-scale  
11 drug-dealing.

12 And if it were the case that persons bent on  
13 those purposes knew that unless the Government knew at the  
14 moment of seizure that they were planning to export that  
15 money for those purposes, they would -- that the money  
16 would be free and clear, they would have far less  
17 incentive to comply with the reporting requirements in the  
18 first place, and that would resurrect the very state of  
19 affairs that Congress faced when it enacted this law  
20 where --

21 QUESTION: Well, Mr. Gornstein, suppose we don't  
22 share your enthusiasm for the instrumentality approach,  
23 and suppose that we're more interested in proportionality,  
24 then what factors should guide us?

25 MR. GORNSTEIN: The -- this Court has set out in



1 two areas the kind of approach that it uses when -- to  
2 measure excessiveness in both the area of punitive damages  
3 and the area of cruel and unusual punishment, and the  
4 guiding factors, it seems to us, can be drawn from those  
5 opinions, but first of all you would have to say that the  
6 offense has to be, in terms of value -- I'm sorry, the  
7 penalty in terms of value has to be grossly  
8 disproportionate to the gravity of the offense.

9 Second, you would always have to give  
10 deference --

11 QUESTION: So here -- let's talk about it in  
12 terms of specifics. Here the maximum fine was what,  
13 250,000?

14 MR. GORNSTEIN: It was.

15 QUESTION: And the total amount seized was 300-  
16 some thousand.

17 MR. GORNSTEIN: 350-plus.

18 QUESTION: And you'd say that was proportional.

19 MR. GORNSTEIN: It certainly is proportional,  
20 but I think that, Justice O'Connor, it's certainly one  
21 barometer of proportionality to look to the fine that's  
22 imposed, but it's not the only one, or even the most  
23 important one.

24 We would suggest that in measuring the  
25 seriousness of an offense you look first to the measure

1 that this Court has always used as the best indicator of  
2 how seriously Congress regards an offense, and that's the  
3 maximum period of incarceration, which here is 5 years'  
4 imprisonment without any aggravating factors at all, and  
5 it's 10 years' imprisonment if the money is involved in  
6 other offenses, and from that you know that Congress  
7 regarded this as a very serious offense, and when you --

8 QUESTION: In a way it's delightfully  
9 proportional, isn't it? What is the minimum, 10,000? Is  
10 that where it starts?

11 MR. GORNSTEIN: It does.

12 QUESTION: So if you take out just 10,000,  
13 that's surely less of an offense than taking out 300,000,  
14 and if you take out only 10, it's a relatively small  
15 offense, you forfeit only 10. If you take out 300,000,  
16 you forfeit 300,000.

17 MR. GORNSTEIN: In that case, in that sense this  
18 law has a feature of almost perfect proportionality in  
19 that sense.

20 QUESTION: I am concerned about this, though.  
21 You're appealing in your argument on instrumentality to a  
22 doctrine which focuses on the use of the money in the  
23 offense, but in fact, what if this money didn't belong to  
24 this individual? What if it belonged to somebody else?

25 MR. GORNSTEIN: It could not be forfeited in a

1 criminal proceeding, but it could be forfeited in a civil  
2 in rem proceeding.

3 QUESTION: To go back to proportionality for a  
4 second --

5 QUESTION: Well, can I just finish? I mean,  
6 we're talking about the criminal one here, right?

7 MR. GORNSTEIN: It could not be forfeited -- you  
8 can only forfeit the defendant's property in a criminal  
9 proceeding.

10 QUESTION: But is it not possible that the  
11 Government has to be logical? If it is indeed imposing  
12 the kind of a penalty that it did in customs violations,  
13 if it's moving against the instrumentality, so to speak,  
14 it has to move against the instrumentality, no matter whom  
15 it belongs to.

16 But what it says in this statute is, if it  
17 belongs to the person who's taking it out of the country  
18 we're going to move against it, but if it doesn't belong  
19 to him, we're not going to move against it. Now, might  
20 there not be some requirement that it be using that mode  
21 of punishment, moving against the property? We're not  
22 really doing that.

23 MR. GORNSTEIN: Justice Scalia, I don't see what  
24 in the Constitution would require Congress to do that. It  
25 seems to me it makes no sense constitutionally to say, if

1 we had convicted this defendant and then filed an in rem  
2 proceeding it would be per se nonexcessive to take the  
3 property, but if we add it as a feature of a sentence in  
4 which the defendant is the property owner and we've taken  
5 it from him, that it's somehow possibly an excessive fine,  
6 that Congress can try to accomplish more than one aim at a  
7 time, it can try to punish a criminal defendant and at the  
8 same time serve the long -- the general goals of in rem  
9 forfeiture in that proceeding.

10 QUESTION: May I ask, does culpability have  
11 anything to do with it? There's two parts to that  
12 question. One, is it relevant at all that this fellow told  
13 a number of falsehoods. Secondly, is it relative at all,  
14 relevant at all that the money was acquired lawfully and  
15 not being laundered? Are those two facts relevant or not?

16 MR. GORNSTEIN: Those two facts are not  
17 relevant, because what you are --

18 QUESTION: But you stressed the falsehoods in  
19 your brief. You did put quite an emphasis on them.

20 MR. GORNSTEIN: Justice Stevens, there is always  
21 the possibility that you would disagree with us that the  
22 offense itself was what you looked at, which is what we  
23 think is the proper analysis, and that's --

24 QUESTION: Well, but -- sorry. Finish, please.

25 MR. GORNSTEIN: I'm -- and so it would -- we

1     went on, then, to address the particulars of this case on  
2     the theory that we've lost our first argument that you  
3     don't look at those things.

4             QUESTION:  On proportionality, just to follow up  
5     on this very question, the kinds of things that I used to  
6     look at on the Sentencing Commission and so forth, first  
7     you would look at the conduct, and for the worst conduct  
8     you'd get a higher sentence, and the second thing that  
9     you'd look at would be the harm done, and the more the  
10    harm done, the higher the sentence.

11            So \$10,000 to 350,000 is proportionate if, and  
12    only if, the \$350,000 means more harm than the 10,000, and  
13    the argument that it doesn't is, it doesn't here because  
14    what Congress is trying to stop is money laundering,  
15    drugs, a whole host of unlawful things, and here the judge  
16    agrees it's nothing to do with it.

17            MR. GORNSTEIN:  But --

18            QUESTION:  So there was no -- what his argument  
19    is that there's no harm in this case that's proportionate,  
20    and the culpability, of course, is the same whether you're  
21    taking the 10 or the 350.

22            Now, that, I think, is the argument this is  
23    disproportionate, so I'd like you to address it.

24            MR. GORNSTEIN:  Well, there's two points to  
25    that.  The first is that the money is still dangerous.



1     There is a dangerous --

2                 QUESTION: Yes, of course it is, but it's not --  
3     is it 30, 350 or 35 times as dangerous?

4                 MR. GORNSTEIN: I think that what --

5                 QUESTION: Why, if it's just going to somebody  
6     in Armenia who happened to lend him some money?

7                 MR. GORNSTEIN: No. What I'm saying is that at  
8     the moment of seizure Congress has said we realize that  
9     you're not going to know for sure where this money is  
10    headed for. We're going to treat it all as if it's  
11    dangerous.

12                And then the only place where Congress said,  
13    okay, if it's shown to involve in other offenses we're  
14    going to take account of that, is by increasing the  
15    maximum authorized sentence from 5 years to 10 years, so  
16    up to 5 years' imprisonment, a mandatory forfeiture,  
17    \$250,000 fine.

18                Congress said, all of this money that is  
19    unreported and is more than \$10,000, this is dangerous  
20    money. We have a dangerous situation on our hand, and we  
21    cannot be sure that at the moment of seizure anybody is  
22    going to know about that, and in order to get the right  
23    level of deterrence, we are going to have mandatory  
24    forfeiture. Everybody is going to have to report, and if  
25    you do not -- regardless of what your purposes are, and

1 if -- if you do not report, the money is going to be  
2 forfeited.

3 QUESTION: Mr. Gornstein, I had always thought  
4 that we approach this question of excessive fines on the  
5 basis of the statute and not the particulars of the  
6 individual case.

7 Let's say a statute that provides for a fine of  
8 anywhere from \$10 to \$500,000, is it your understanding  
9 that we would look at the individual case and the  
10 individual fine actually assessed and see how wicked was  
11 the person against whom the fine was assessed? Did he  
12 lie, did he do this, that or the other thing? Can it be  
13 adjudged just by looking at the statute?

14 MR. GORNSTEIN: Yes. Justice Scalia, our  
15 position is that you do just look at it by the statute,  
16 and that's the -- Harmeline basically stands for that  
17 proposition, that Congress does not have to individualize  
18 sentences in that way.

19 QUESTION: Thank you, Mr. Gornstein.

20 Mr. Blatt, we'll hear from you.

21 ORAL ARGUMENT OF JAMES E. BLATT

22 ON BEHALF OF THE RESPONDENT

23 MR. BLATT: Mr. Chief Justice, and may it please  
24 the Court:

25 This case, a criminal in personam matter, is

1 here because a district court determined that forfeiture  
2 of \$357,144 would be grossly disproportionate under the  
3 Eighth Amendment for a failure-to-declare offense.

4 The decision was based on the following factual  
5 findings by the district court: that the money involved  
6 was lawful money for a lawful purpose; that the crime was  
7 committed in reference to cultural differences, and that  
8 the lies that Mr. Bajakajian stated grew out of fear.  
9 Mr. Bajakajian was sentenced with these fact --

10 QUESTION: Could you explain -- I don't really  
11 understand the finding that the crime was committed  
12 because of cultural differences.

13 MR. BLATT: What happened in this matter,  
14 Mr. Chief Justice, is that my client, Mr. Bajakajian, is  
15 from Syria. He was a minority there, an Armenian, and  
16 where he grew up he was very frightened and afraid of the  
17 Government in reference to moneys taken in and out.

18 When he left this country to pay a lawful debt,  
19 and he was going to Cyprus, not to Syria, he thought that  
20 he would be harmed, or the money might be taken from him  
21 if he showed how much money he had.

22 We indicated that to the district court. The  
23 district court took that into consideration, and took also  
24 into consideration the lies that he made, which were  
25 primarily out of fear, when it came up with a grossly

1 disproportionate analysis.

2 QUESTION: So if one lies out of fear, it's not  
3 the same thing as lying for some other motive.

4 MR. BLATT: Yes, Your Honor. It's a factor  
5 that has to be considered in reference to whether the  
6 money was lawful, and for a lawful purpose, because it  
7 relates to the culpability. If one lies not -- if one  
8 lies because he or she is not involved in a criminal  
9 enterprise, but because they are frightened, and we're not  
10 trying to excuse the culpability of Mr. Bajakajian, but  
11 it's a factor for a court to consider in reference to  
12 punishment.

13 QUESTION: Do you think the Constitution  
14 Excessive Fines Clause has to be applied on a case-by-  
15 case basis, each individual case? No matter how the  
16 statute reads, and even if the statute has been approved  
17 in a prior case, it's only been approved as to that  
18 defendant under the facts of that case, and every single  
19 case involves, necessarily involves courts into the  
20 constitutional inquiry of whether, given this defendant's  
21 culture, given all the other circumstances of the offense,  
22 this is excessive?

23 MR. BLATT: Justice Scalia, I believe that.

24 QUESTION: It's a lot of trouble. I don't know  
25 if courts can handle that kind of a burden. I'd thought

1 it's just done on the face of the statute.

2 MR. BLATT: I think they can handle that burden,  
3 Justice Scalia, because when we're talking about the  
4 Eighth Amendment and punishment it's the district court's  
5 responsibility to weigh culpability and value.

6 QUESTION: So every different judge can come up  
7 with a different conclusion, I suppose, if each one just  
8 weigh, I think this is excessive, this isn't excessive.

9 MR. BLATT: Well, Justice Scalia, I think that's  
10 always a possibility, yes. District courts can come up  
11 with different determinations.

12 QUESTION: And is the standard abuse of  
13 discretion?

14 MR. BLATT: Yes, it is, Your Honor.

15 QUESTION: Abuse of discretion is to determine  
16 what the meaning of excessiveness is under the  
17 Constitution?

18 MR. BLATT: Yes.

19 QUESTION: That's a very strange doctrine, it  
20 seems to me.

21 MR. BLATT: Well, when we're -- Your Honor, when  
22 we're talking about --

23 QUESTION: Are there any other constitutional  
24 provisions that are entrusted to the interpretation of the  
25 district courts under an abuse of discretion standard that



1     you can think of?

2                 MR. BLATT: In reference to statutory and  
3     constitutionally, no, Your Honor, but in reference to when  
4     we're evaluating this on a proportionality analysis, under  
5     Austin and Alexander this Court made a determination that  
6     the Eighth Amendment applies in reference to forfeitures.

7                 By the nature of the word excessive, it implies  
8     a proportionality or a comparison analysis, Your Honor,  
9     and in order to do that type of comparison, a judge, a  
10    district court judge would have to make a determination  
11    about culpability. This was lawful money for a lawful  
12    purpose. There was no criminal enterprise involved here.

13                QUESTION: What about a statute that says anyone  
14    who uses an unlawfully possessed firearm in the commission  
15    of a crime shall forfeit the firearm? Is -- can you say  
16    in the abstract whether that's constitutional or not?

17                MR. BLATT: I believe that, Your Honor, that  
18    would be entirely constitutional for the following reason.  
19    That firearm is contraband. It's an illegal weapon. It's  
20    used in the furtherance of a crime. This money was not  
21    contraband.

22                QUESTION: You acknowledge the existence of that  
23    doctrine, then, that -- your quarrel here is just that it  
24    is not a contraband or instrumentality, whatever else you  
25    want to call it.

1 MR. BLATT: I acknowledge that, Your Honor, that  
2 contraband and proceeds of contraband are forfeitable, but  
3 this is an instrument, allegedly an instrumentality of a  
4 crime, a means by which a crime is committed.

5 QUESTION: Do you think failure to register a  
6 firearm is any different from failure to notify the  
7 Government that you're carrying currency?

8 MR. BLATT: Under the statute it is, Your Honor,  
9 because the statute indicates that it's not contraband to  
10 have the money and to transport the money outside of the  
11 country.

12 QUESTION: Okay, but if it is contraband, you  
13 acknowledge it doesn't matter how much it's worth.

14 MR. BLATT: Correct.

15 QUESTION: I should have used, you know, a 12th  
16 Century valuable firearm, if there were any in the 12th  
17 Century.

18 MR. BLATT: Correct, Your Honor. If this money  
19 was from -- laundered money, it was involved in some type  
20 of criminal enterprise.

21 QUESTION: Yes.

22 MR. BLATT: Or if it was money that was going  
23 out of the country not to pay taxes, to avoid payment of  
24 taxes, then it would be tainted money, an instrumentality,  
25 but --

1 QUESTION: What if, under Justice Scalia's  
2 hypothesis, the defendant in the firearm case took the  
3 stand and said, well, in my country it's perfectly legal  
4 to have a firearm, so I did it kind of for cultural  
5 reasons.

6 (Laughter.)

7 MR. BLATT: Well, it depends on whether it was  
8 lawful or not. I think that's one factor that has to be  
9 considered, Mr. Chief Justice, and you have to look at the  
10 total context or totality of the circumstances.

11 This was an unusual case. It is never easy at  
12 the district level to prove that in reference to a  
13 forfeiture that it's lawful money for a lawful purpose,  
14 and the way we did that, we showed the cultural aspects,  
15 the man's intent, and the district court made a factual  
16 determination in reference to this, that this was lawful  
17 money, and he made a factual determination as to reasons  
18 that he lied.

19 QUESTION: Did he make -- did he really make  
20 that determination, or did he decide he -- it had not been  
21 proved that it was unlawful?

22 MR. BLATT: No, Your Honor. He made a  
23 determination --

24 QUESTION: I thought there was some ambiguity  
25 about the whole story --

1 MR. BLATT: Well, the ambiguity lay with the  
2 Government's position that they couldn't really prove or  
3 disprove certain facts, but the district judge indicated  
4 that this was lawful money for a lawful person -- for a  
5 lawful purpose, and that much has been proven. That is in  
6 the record.

7 QUESTION: Did he prove that taxes had been paid  
8 on it?

9 MR. BLATT: The taxes had been paid on it, Your  
10 Honor, yes.

11 QUESTION: Can you go back for a second, because  
12 I'm now concerned -- Mr. Gornstein answered me and Justice  
13 Scalia picked up a point that I'd not focused on, which is  
14 that this is a mandatory forfeiture statute. It says the  
15 defendant shall forfeit.

16 Now, I can understand a statute that says the  
17 convicted person in a case of robbery must pay a penalty  
18 up to \$5 million as well as prison, and then a person take  
19 \$1, and the judge imposes \$5 million, and you say, well,  
20 that's way disproportionate, but the statute said may, and  
21 I think his point is here that the statute says shall, and  
22 so what Congress is saying here is, you shall. You have  
23 to.

24 The judge has no discretion, and where the judge  
25 has no discretion you would look to see whether Congress

1 is being reasonable in writing that statute, shall, and  
2 not looking to those factors.

3 Now, is there -- does that trigger anything in  
4 your mind, any instance where despite this kind of  
5 mandatory statutory provision the courts nonetheless  
6 looked into the way in which the provision applied to a  
7 particular case and said, it's unconstitutional because of  
8 the way it applies here? Does that trigger anything?

9 MR. BLATT: Yes, it does, Justice Breyer.

10 QUESTION: What is that?

11 MR. BLATT: Because under Austin and Alexander  
12 this Court indicated that the Eighth Amendment in  
13 reference to excessive fine does apply.

14 On the remand of Alexander --

15 QUESTION: Yes.

16 MR. BLATT: When that case was decided there was  
17 a breakdown by Alexander using the Busher Ninth Circuit  
18 standards of what proportionality should be, and they  
19 looked at the value of the crime --

20 QUESTION: Yes, but was that a case in which the  
21 fine that was imposed, or the for --

22 MR. BLATT: Forfeiture.

23 QUESTION: I don't know if it was a fine -- was  
24 mandatory under the statute.

25 MR. BLATT: Yes, it was.



1 QUESTION: It was. They had to impose, so --

2 MR. BLATT: One of the problems in the  
3 Government's position is that they indicate that the  
4 Eighth Amendment does apply. However, they go on to state  
5 that the particular liquidated damage forfeiture can never  
6 be grossly disproportionate. It doesn't matter whether  
7 it's \$10,001, or \$3 million. It's always going to be the  
8 same, no matter in reference to culpability and value.

9 QUESTION: Well, isn't that the case with  
10 respect to the importation of goods to the country without  
11 paying customs duties?

12 MR. BLATT: In One Lot Emerald, Your Honor --

13 QUESTION: You bring in the moonstone, don't you  
14 forfeit the moonstone?

15 MR. BLATT: You forfeit the moonstone --  
16 assuming you buy the moonstone legally, Your Honor, and  
17 you fail to report it and then fail to pay the duty,  
18 pursuant to the statute, once you fail to pay the duty it  
19 becomes contraband, and that property becomes tainted.

20 We don't have that situation here.

21 QUESTION: All right, but so long as you make  
22 that limitation upon your argument, there's nothing wrong  
23 about forfeiting something that's worth an enormous value  
24 so long as it's done within the historical context of  
25 something that is called contraband or instrumentality,

1       whatever --

2               MR. BLATT: That is correct, Your Honor. If  
3       it's contraband, or proceeds from contraband, or if it  
4       fits into the historical standard as --

5               QUESTION: But why is it that a metaphysical  
6       label then changes whether or not in fact it's excessive?

7               MR. BLATT: I would agree with you, Your Honor,  
8       in that, because the legal fiction --

9               QUESTION: Well then -- then I think you have to  
10      answer Justice Scalia that you cannot --

11              QUESTION: Right. Give me back the moonstone.

12              QUESTION: -- necessarily forfeit the moonstone.  
13      We get the moonstone back now.

14              MR. BLATT: I like that moonstone, but -- I see  
15      what you're saying, Your Honor.

16              I think the problem is, is how we evaluate an  
17      instrumentality. An instrumentality is a means by which.

18              We have property divided in three areas,  
19      contraband, proceeds of contraband, and an  
20      instrumentality, and contraband and proceeds of contraband  
21      have always been a strong remedial interest, and have been  
22      forfeited.

23              Instrumentality, there has to be a connection.  
24      In this particular case, and I would agree from a common,  
25      practical point of view, we're splitting hairs. When

1 we're talking about an instrumentality, should it really  
2 relate to a substantial connection?

3 I believe there should be some type of cutoff  
4 point in reference to instrumentality, but the historical  
5 legal fiction doesn't really fit any more. In other  
6 words, it's -- we now look under modern times that the --  
7 in reference to the property, as to the use of the  
8 property, and not truly in relation to its respect as to  
9 how it was used during piracy times.

10 I think the key issue in this matter is whether  
11 the district court used the appropriate standard of  
12 grossly disproportionate when it forfeited approximately  
13 \$15,000.

14 QUESTION: Mr. Blatt --

15 QUESTION: Well --

16 QUESTION: -- then I mistook your position. I  
17 thought your position was, if the money is clean, then any  
18 forfeiture was excessive and you don't get into the  
19 proportionality. I thought that's what your first  
20 position was.

21 MR. BLATT: No, I --

22 QUESTION: That if nothing is involved other  
23 than failure to report --

24 MR. BLATT: No. My -- excuse me, Justice  
25 Ginsburg. The first -- in reference to the

1 instrumentality argument, I was arguing that it really  
2 wasn't an instrumentality. It is a crime of omission. It  
3 was not contraband. It doesn't fit under the traditional  
4 historical standard of what an instrumentality is.

5 QUESTION: Well, it's a crime of omission when  
6 one fails to declare the imported goods and pay the duty.

7 MR. BLATT: Yes.

8 QUESTION: And there is a -- I don't think the  
9 labels matter, but there is a sense in which the word  
10 contraband is used to describe the undutied goods. Why  
11 isn't that analogy just as good when the person taking  
12 currency out fails to declare it?

13 MR. BLATT: Justice Souter, the reason it's not  
14 as good is that -- is because in One Lot Emerald you had  
15 to pay a duty. Once you did not pay that duty, by statute  
16 it became contraband.

17 QUESTION: Why should that be the point of  
18 distinction? The concern -- there is a general concern  
19 with undutied goods, and that is, they come into the  
20 country at a competitive advantage. The -- quite apart  
21 from the Government's loss of revenue, they tend to  
22 compete with products within the country, and therefore  
23 one of the objects of a duty is to try to even those odds.

24 In this case, the Government's concern with  
25 exporting unreported funds is, if one is allowed to do

1 that it tends to facilitate tax evasion, skimming of  
2 illegal profits, and so on. In each case, there is a  
3 social ill which is one of the objects of declaring, or  
4 declaring and taxing these goods.

5 Why isn't the social object that underlies the  
6 money-reporting requirement sufficient to support the  
7 analogy between that and the undutied goods? Why should  
8 the fact of the tax be crucial?

9 MR. BLATT: I think the Court is correct, that  
10 if -- that in reference to splitting hairs in this matter,  
11 if we're going to evaluate it, there is a strong remedial  
12 interest, and we've never denied this in our brief, that  
13 the Government should have the opportunity to determine  
14 what funds are leaving this country, and that's equally as  
15 strong remedial interest in reference to smuggled goods.

16 The problem here is one of semantics. In  
17 reference to an instrumentality, it's not a means by which  
18 a crime or contraband was conveyed.

19 QUESTION: Well, this is a means or not a means  
20 in the same sense that the undutied goods are means or not  
21 means.

22 MR. BLATT: That is correct, Your Honor. That  
23 is correct.

24 QUESTION: Whatever you call it, it's in the  
25 same relation to the person who owns the goods.



1 MR. BLATT: Whatever you call it there's a  
2 substantial connection, but where we disagree with the  
3 Government is that when they see the substantial  
4 connection, but-for, and/or an instrumentality, that's  
5 where their position ends. If it's an instrumentality, it  
6 all must be forfeited, and there's no really  
7 proportionality analysis. If it's an instrumentality, we  
8 take it all, irregardless of culpability, irregardless of  
9 whether the money --

10 QUESTION: So is it your argument simply that  
11 the Government may not assume and this Court may not  
12 assume that the undutied goods are, per se, forfeitable?

13 MR. BLATT: That is correct.

14 QUESTION: They're all in the same boat, and  
15 we've got to go through the same proportionality analysis  
16 on the undutied goods that we would, on your theory, on  
17 the unreported money.

18 MR. BLATT: That is correct, Your Honor. In  
19 other words, we have the first issue as to the connection,  
20 and once -- because this is a forfeiture, because the  
21 Eighth Amendment does apply in reference to punishment,  
22 there has to be a second analysis as to whether it is  
23 grossly disproportionate or not.

24 QUESTION: All right. Now, what about the  
25 Government's argument, one argument in response to that

1 that if it is, in fact, a threat of certain social ills to  
2 allow the export of unreported currency, the more you  
3 allow to be exported, the greater the social ill.

4 MR. BLATT: That is --

5 QUESTION: So that there is, as Mr. Gornstein  
6 said, in this kind of case as opposed to the Taj Mahal  
7 case for example, there really is a kind of inherent  
8 proportionality involved in seizure of the entire amount,  
9 whatever that amount may be.

10 MR. BLATT: Your Honor, with all due respect, I  
11 don't see an inherent proportionality. This was money  
12 that had been earned --

13 QUESTION: If I'm likely to be skimming profits,  
14 the more money I take out, the more profit I'm likely to  
15 be skimming.

16 MR. BLATT: That is correct, Your Honor, and  
17 that goes to culpability. This money wasn't received for  
18 money laundering or anything illegal, and it was not for  
19 an illegal purpose. The examples --

20 QUESTION: Don't you think it's worse to sneak  
21 out \$350,000 than it is to sneak out \$10,000? Do you  
22 think that they are crimes of equivalent proportion?

23 MR. BLATT: It depends on the reasoning. If  
24 we're talking about punishment, Your Honor, we're talking  
25 about --

1 QUESTION: All other factors being equal, is it  
2 not worse to take out \$350,000 than it is to -- like --

3 MR. BLATT: Yes, it is, Your Honor.

4 QUESTION: Approximately 35 times worse.

5 MR. BLATT: Yes, it is.

6 QUESTION: No, it isn't. I mean, --

7 MR. BLATT: It is a factor to consider.

8 QUESTION: That is a principle in punishment law  
9 I've never seen anywhere, that it is proportionately  
10 worse.

11 MR. BLATT: Well --

12 QUESTION: I mean, every bit of punishment law  
13 I've ever seen suggests that it does increase in  
14 culpability, but not proportionately.

15 MR. BLATT: Well --

16 QUESTION: That's -- at least, maybe your  
17 experience is different on that.

18 MR. BLATT: Well, Justice Breyer, what I'm  
19 indicating is that it has an effect on the culpability.  
20 Obviously, if someone is taking out millions of dollars  
21 for an unlawful purpose --

22 QUESTION: Yes, it's worse. There's no  
23 question.

24 MR. BLATT: It's much worse.

25 QUESTION: It's worse, but I have not seen

1 proportionality in respect to punishment proportional to  
2 the amount of dollars.

3 MR. BLATT: What I meant, Your --

4 QUESTION: And there's a lot to the contrary.

5 MR. BLATT: What I meant, Your Honor, was in  
6 reference to culpability. If the Eighth Amendment is  
7 going to apply, which this Court has indicated that it  
8 should concerning excessive fines, then --

9 QUESTION: Now, if that's so, suppose I accept  
10 your argument that say in an environmental case they're  
11 not going to forfeit the factory because some, you know,  
12 stuff spilled out the pipe intentionally, because I got  
13 that far, assume.

14 Now, suppose we're also, because of this  
15 Alexander that you cited -- it's Alexander, right?

16 MR. BLATT: Yes, Your Honor.

17 QUESTION: You're quite right, it said shall  
18 forfeit.

19 Now, suppose because of that we have to look at  
20 the application case-by-case. Still I'm back to where  
21 Justice O'Connor started. It's very hard to believe that  
22 all we're going to do is in every single case start  
23 looking as to whether there's an abuse of discretion.

24 Is there not some standard that you've come  
25 across that could catch the extreme cases that wouldn't

1 involve an analysis case by case, instant by instance, of  
2 whether the judge somehow went a little wrong, or, in your  
3 view, do you have to conduct that under the Constitution?  
4 How do you, in other words, give what we call a margin of  
5 appreciation to the judge to make some kind of mistake  
6 before the Constitution comes into play?

7 MR. BLATT: I don't know the answer to that,  
8 Your Honor. I don't know the answer.

9 QUESTION: Well, what are the standards that you  
10 would say? So here's this 47, whatever it is. You have  
11 already disabused me of one notion, that because they're  
12 not ill-gotten gains the Government can't take any of it,  
13 so you say the Government can take some of it, so how much  
14 is too much? How do we know?

15 MR. BLATT: Well, we used a standard, Your  
16 Honor, of grossly disproportionate. We look at the value,  
17 we look at the culpability, we look at the harm that could  
18 be caused in reference to this to the Government. Once  
19 the information was found there was no harm to the  
20 Government. They now have the information.

21 QUESTION: Well, where does one -- you said we  
22 look at this, that, and the other thing. Where does one  
23 go to find those guides?

24 MR. BLATT: We look at the Alexander remand. We  
25 look at Busher. In those -- and in that particular case



1 they evaluated the harshness of the penalty in light of  
2 the gravity of the offense. They evaluated the  
3 defendant's culpability. They looked at the dollar volume  
4 of any loss, the existence of any benefit to the  
5 defendant, which there was none in this particular case,  
6 and the --

7 QUESTION: Are you telling me essentially that  
8 you think that Judge Wallace, then was it Chief Judge  
9 Wallace, got it basically right?

10 MR. BLATT: Yes, I do, Your Honor.

11 QUESTION: So he used the right factors, and --

12 MR. BLATT: I think that Judge Davies, the  
13 district court used the exact factors that were necessary  
14 in this matter. He looked at this matter as to whether it  
15 was grossly disproportionate. He looked at the  
16 lawfulness --

17 QUESTION: Oh, so you -- the district judge.  
18 Then Judge Wallace --

19 MR. BLATT: The district court, and the --

20 QUESTION: There's a difference, because  
21 Judge -- I think his position was most favorable to yours,  
22 but you reject that.

23 MR. BLATT: Judge Wallace has gave a concurring  
24 opinion where he disagreed with the Ninth Circuit  
25 expansion of this particular area, and --

1 QUESTION: And didn't he say that the 15,000 he  
2 was letting stand because you hadn't challenged it?

3 MR. BLATT: That was the district court, Your  
4 Honor. The -- Judge Wallace indicated in his concurring  
5 opinion that he was allowing the 15,000 because he did not  
6 feel it was abuse of discretion, and he agreed with the  
7 proportionality analysis.

8 What I am saying, Your Honor, is that the  
9 district court applied the correct standard of grossly  
10 disproportionate. It looked at all the factors that I've  
11 indicated just now and came up with a decision that the  
12 \$5,000 fine -- it was a \$5,000 fine under the guidelines,  
13 not \$250,000, and probation, that based upon that he was  
14 going to add an additional \$15,000 for what he considered  
15 what a small fine would be under the guidelines, and the  
16 Government expense in this matter.

17 QUESTION: May I ask you a question on your  
18 proportionality approach? It seems to me that one of the  
19 problems in this area is that it's sort of a prophylactic  
20 statute.

21 We're not sure what's going to happen to all  
22 this money, and supposing the person violating the statute  
23 takes the Fifth Amendment, says I'm not going to tell you  
24 what I'd do. I have a constitutional right to secrecy. I  
25 didn't want -- if I'd filed the report, somebody would

1 have found out about it. There are no protections on  
2 secrecy. He just isn't going to tell, and the Government  
3 has no way of finding out.

4 What's your proportionality analysis there? Do  
5 you assume he's guilty of something really bad because he  
6 won't talk about it, or he's perfectly innocent?

7 MR. BLATT: I don't really assume either, but he  
8 has not met his burden, Your Honor. The defendant, by his  
9 failure to report, should have the burden, as it was in  
10 this particular case. We had the burden to show that this  
11 money was lawful and for a lawful purpose, and that it  
12 would be not grossly disproportionate. The defendant  
13 should have the burden in these matters when he commits a  
14 crime and then tries to obtain the moneys in reference to  
15 the forfeiture.

16 QUESTION: I'm trying to understand your  
17 application of gross disproportionality here. In the  
18 garden variety case of gross disproportionality I think  
19 one of the things, one of the principal things that we do  
20 is to compare sentences and individuals. It's hard to do  
21 that here, I guess, because we don't have a long string of  
22 forfeitures to compare it to.

23 Are you really saying, when you use the gross  
24 disproportionality criterion, and you then point out the  
25 factors that a judge should consider in applying it, are

1 you really saying that any judge who makes a gross  
2 disproportionality analysis and refers to all of the  
3 relevant factors as you have listed them, should be upheld  
4 unless we can say that his determination as such was  
5 simply unreasonable or irrational? Is that what gross  
6 disproportionality here means?

7 In other words, it's a standard that goes to the  
8 care of the judge or relevant considerations, as opposed  
9 to a standard that goes to real comparisons between this  
10 instance, that instance, and the other instance.

11 MR. BLATT: Yes, that's what I'm saying, Your  
12 Honor, because if we're going to look at real  
13 comparisons, when you evaluate a forfeiture, it's a matter  
14 of comparing the value in reference to what is going to be  
15 forfeited to the serious nature or extensive nature of the  
16 crime.

17 QUESTION: Well, then we could have -- you know,  
18 we have 700 district judges in the country, and we could  
19 have 700 different results, all of them correct under that  
20 standard, I suppose.

21 MR. BLATT: That's a possibility, Your Honor,  
22 but in the -- Mr. Chief Justice.

23 QUESTION: You think that's desirable?

24 MR. BLATT: I think it is under this fashion.  
25 When we're examining, Your Honor, under a forfeiture

1 statute, it shouldn't be the district court's position to  
2 compare what happened in another district involving  
3 another factual situation that could be entirely  
4 different. Each factual situation, because it's  
5 punishment and culpability are involved and different  
6 values are involved, have to be decided by that district  
7 judge.

8 QUESTION: Well, of course, you've got not only  
9 a prohibition against excessive fines, but a prohibition  
10 against cruel and unusual punishment. Could this be  
11 imported into the sentencing phase of criminal cases and  
12 say, you know, whatever Congress says each district judge  
13 has just got to figure out what the right punishment is to  
14 make sure it isn't cruel and unusual?

15 MR. BLATT: Well, excessive fines have been  
16 distinguished significantly from cruel and unusual  
17 punishment, Your Honor, and the -- frankly, I feel that  
18 the district court can make that decision. Yes, there's  
19 going to be differences, but that district court has all  
20 of those particular facts in that particular case, and  
21 they would be best able to make that determination as to  
22 whether a fine is excessive.

23 QUESTION: So you do reject the -- I'm sorry I  
24 got the judges mixed up. The Ninth Circuit majority said,  
25 no forfeiture at all here because these were lawfully



1     possessed funds, so you're not defending that position,  
2     then.

3             MR. BLATT:  No, I'm not, Your Honor, and our  
4     position at the district court level was, we conceded that  
5     the funds were subject to forfeiture, but requested a  
6     proportionality examination.  The law was changed  
7     significantly in the interim, where 69,000 and El Dorado  
8     came out by the Ninth Circuit, where they held the  
9     instrumentality test, and that test was used in reference  
10    to our briefs.

11            I think a instrumentality, substantial  
12    connection, or some form of cutoff or threshold is  
13    necessary, but once that threshold is met, a standard of  
14    proportionality in criminal in personam matters needs to  
15    be developed as to what is grossly disproportionate.

16            QUESTION:  And your best guide to the  
17    development is what the district court did here?

18            MR. BLATT:  I think the district court did a  
19    good job, Your Honor, I really do, because they evaluated  
20    all the factors, whether the money was lawfully  
21    obtained --

22            QUESTION:  So what guide should an appellate  
23    court -- this is one district judge out of, what --

24            MR. BLATT:  The guide --

25            QUESTION:  -- did the Chief Justice say, 700?

1 MR. BLATT: Yes. Justice Ginsburg, the guide  
2 that I would give, and based upon the Alexander remand and  
3 Busher, and I do not mean to be presumptuous, is looking  
4 at a totality of the circumstances, the gravity of the  
5 offense, whether the property was lawfully obtained and  
6 for a lawful purpose, the dollar volume of the loss, the  
7 existence of a benefit that was to be gained by the  
8 defendant -- in this case there was none -- and whether  
9 this was part of a criminal enterprise.

10 I'm sure there are many more factors that this  
11 Court could consider. I'm just naming a few.

12 QUESTION: We've been enforcing customs laws in  
13 this country for over 200 years. Do you know of a single  
14 case in which the forfeiture of undutied goods has been  
15 declared to be an excessive fine, by any court?

16 MR. BLATT: There has not been one single case,  
17 Your Honor, in reference to that.

18 QUESTION: That's what you're saying the  
19 Constitution has been requiring all these 200 years.

20 MR. BLATT: That is correct, Your Honor, but  
21 after Austin and Alexander, where the Court indicated that  
22 fines -- that forfeitures can be considered fines, and  
23 therefore punishment does apply, and the Eighth Amendment  
24 does apply. That has changed things. That has -- in  
25 other words, there is now a review in reference to

1       excessiveness concerning the Eighth Amendment, and  
2       excessiveness implies an evaluation.

3               QUESTION:  What about, in terms of a  
4       constitutional limit, a word like shocking?

5               MR. BLATT:  Shocking?

6               QUESTION:  Mm-hmm.

7               MR. BLATT:  Well, grossly disproportionate, Your  
8       Honor, to me is as close to strict liability as one could  
9       get.  I think it's a difficult burden for a defendant to  
10      meet under the district court's standards, in a district  
11      court, and it's a word, it's a concept that I think  
12      district courts are familiar with.

13              Shockingly, I'm not too familiar with that.  I  
14      would like --

15              QUESTION:  Shocks the conscience.

16              MR. BLATT:  Will shock the conscience?  I like  
17      that, and I think, Your Honor, that taking -- no one is  
18      denying that this -- the Government has a strong remedial  
19      interest, but perhaps there is something that shocks the  
20      conscience when lawful money for a lawful purpose is taken  
21      entirely, without any concept of culpability, and I would  
22      respectfully indicate that --

23              QUESTION:  Well, except the district said, and  
24      the Government I think concedes they must show that the  
25      defendant knew about the reporting requirement and knew

1 that it was illegal to take out more than X amount of  
2 dollars.

3 MR. BLATT: No, Your Honor. It's a strict  
4 liability type of situation. You don't have to know. If  
5 you don't -- if you go there and you have the money --

6 QUESTION: I thought the Government -- maybe I'm  
7 wrong about this. I thought the Government conceded that  
8 it must prove the defendant knew it was unlawful not to  
9 report that he was carrying in excess of \$10,000.

10 MR. BLATT: No, I don't believe that's the case,  
11 Your Honor. If you go out of the money -- if you go out  
12 of the country without the money -- I mean, without  
13 declaring it, for whatever reasons, ignorance of the law,  
14 not knowing --

15 QUESTION: But there was no such thing here,  
16 because the agent told him.

17 MR. BLATT: Oh, he knew.

18 QUESTION: You know --

19 MR. BLATT: No question about it, he knew, and  
20 he lied, but I would ask the Court to seriously consider  
21 at this time developing a proportionality analysis.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Blatt.

23 MR. BLATT: Thank you, Your Honor.

24 CHIEF JUSTICE REHNQUIST: The case is submitted.

25 (Whereupon, at 2:00 p.m., the case in the 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:

UNITED STATES, Petitioner v. HOSEP KRIKOR BAJAKAJIAN  
CASE NO: 96-1487

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BY Don Nani Federico

(REPORTER)