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IN THE SUPREME COURT OF THE UNITED STATES

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LARRY DEAN DUSENBERY, :
Petitioner :
v. : No. 00-6567
UNITED STATES. :
- - - - -X

Courtroom 20
333 Constitution Avenue, N.W.
Washington, D.C.
Monday, October 29, 2001

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

APPEARANCES:

ALLISON M. ZIEVE, ESQ., Washington, D.C.; on behalf of the
Petitioner.
JEFFREY P. MINEAR, ESQ., Assistant Solicitor General,
Department of Justice, Washington, D.C.; on behalf
of the Respondent.

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

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 00-6567, Larry Dean Dusenbery v. the United
5 States.

6 Mr. Zieve -- Ms. Zieve. Pardon me.

7 ORAL ARGUMENT OF ALLISON M. ZIEVE

8 ON BEHALF OF THE PETITIONER

9 MS. ZIEVE: Mr. Chief Justice, and may it please
10 the Court:

11 The issue in this case is whether the procedures
12 used to serve notice of forfeiture of petitioner's
13 property satisfied due process.

14 The Federal Government forfeited Mr. Dusenbery's
15 \$22,000 in 1988 after mailing a notice to him at the
16 Federal prison where he was incarcerated. It is not
17 disputed that he did not get the notice.

18 The -- the Government argues that its 1988
19 procedures satisfied due process whether or not the notice
20 was received. However, in light of the circumstances
21 presented here, including the Government's control over
22 the prisoner's location and knowledge of the prisoner's
23 location at all times and its control over prison
24 procedures, due process requires the Government to use
25 procedures that offer assurances of delivery to the inmate

1 addressee and not just to prison personnel. Such
2 procedures --

3 QUESTION: Well, you take the position that it's
4 not sufficient that there be staff at the prison who
5 deliver mail to the inmates?

6 MS. ZIEVE: That, in and of itself, is not
7 sufficient. The -- the procedures need --

8 QUESTION: A procedure whereby a prison employee
9 delivers certified mail to prisoners is inadequate in
10 your --

11 MS. ZIEVE: That -- that, in and of itself, is
12 inadequate as -- although --

13 QUESTION: Is in adequate?

14 MS. ZIEVE: Is inadequate, although those
15 procedures --

16 QUESTION: How can that be under any of our case
17 law, that that would be in adequate per se?

18 MS. ZIEVE: Well, the -- under this Court's case
19 law, what's required when the notice is served is
20 determined by a consideration of a balance of factors in
21 light of the circumstances. And that --

22 QUESTION: Well, we've never required actual
23 notice in any case, have we?

24 MS. ZIEVE: No, although there is some
25 suggestion of that in -- in a couple cases, for instance,

1 Phillips Petroleum. But in -- in the cases discussed in
2 the briefs, there is not a requirement of actual notice,
3 but at the same time, the Court assumes that the mailed
4 notice or the form of notice will be received, and the
5 Court hasn't considered a case where it was uncontested
6 that individual -- an individual was entitled to notice
7 and yet the notice wasn't received.

8 QUESTION: Well, but that's going to happen
9 sometimes with any sort of notice except the requirement
10 of actual receipt by the individual, and we've never felt
11 that destroyed the validity of the notice.

12 MS. ZIEVE: That's true, Your Honor, but in the
13 circumstances presented here, consideration of the balance
14 of factors leads to a requirement the procedures that
15 would satisfy those factors would also lead to actual
16 notice. For instance, today the Government uses
17 procedures under which, after the mail is received by the
18 prison, there's not just some vague distribution process
19 at the prison, but the mail is signed for. In the mail
20 room, there's a log book kept, and when it leaves the mail
21 room a log book is kept that is ultimately signed for by
22 the inmate. And this chain of receipts helps to ensure
23 that there's extra care and attention paid with the
24 delivery of the notice.

25 QUESTION: Would you be satisfied with that if

1 that had been the case here?

2 MS. ZIEVE: Yes. If those procedures had been
3 followed.

4 QUESTION: Even -- even though there was -- I
5 was going to say even though there was no receipt
6 signature, but I guess under the procedures now, the --
7 the prisoner would have signed a log. Is that right?

8 MS. ZIEVE: Yes, he would have signed a log.
9 And if he had a challenge and he has a signature, he's
10 going to lose, and if there is no signature -- excuse me.

11 QUESTION: The procedure that was in place for
12 certain kinds of mail that was labeled special mail -- if
13 that had been -- if that had applied to notices in this
14 category -- special mail, as I understand it, could be
15 opened only in the presence of the prisoner?

16 MS. ZIEVE: That's correct.

17 QUESTION: And if that had applied, that old
18 rule had applied to this category of mail, you would not
19 object to that, would you?

20 MS. ZIEVE: Well, the special mail opened only
21 in front of the prisoner happens after it's delivered to
22 the prisoner. I think it's helpful that the FBI and the
23 DEA, in recent years -- the Government writes in its
24 brief, in recent years, have considered forfeiture notices
25 and labeled those as special mail, but the procedure still

1 needs to be adequate to get to that point where you're
2 standing in front of the prisoner opening the mail.

3 QUESTION: Ms. Zieve, I'm -- I'm not sure what
4 -- what is the general principle of which you assert the
5 rule that you urge upon us in this case is -- is just an
6 exemplar. Is the general principle that when the
7 Government is in charge of the delivery system, there must
8 be actual notice evidenced by a signature of whoever it's
9 delivered to?

10 MS. ZIEVE: Your Honor, that's one important
11 factor, but the case here is even easier because there are
12 -- there are numerous --

13 QUESTION: You're not urging that when the --
14 that the distinctive factor is that the Government is in
15 charge of the delivery system because that would have been
16 the case in the old post office when -- when the post
17 office was actually part of the Federal Government. So,
18 that's not the principle. Right?

19 MS. ZIEVE: That's not the only factor. Here we
20 have not --

21 QUESTION: What -- what is the principle? When
22 the Government is in charge of the residence? Right? So,
23 we would need a similar rule for all members of the armed
24 forces.

25 MS. ZIEVE: There are several key factors here,

1 and I don't think you can separate out one circumstance
2 from the rest. The inmate --

3 QUESTION: Well, you said the first one isn't
4 it. Right? I don't understand. If neither one alone is
5 enough, I don't know why all in combination turn out to be
6 enough.

7 MS. ZIEVE: Because that's the circumstances.
8 There's a body of circumstances presented here. The
9 inmate's location is not just easily ascertainable by the
10 Government, but determined by the Government. The
11 procedures used for --

12 QUESTION: Well, that would apply -- that would
13 apply to all members of the armed forces.

14 MS. ZIEVE: The procedures used for delivery are
15 also determined by the Government, and --

16 QUESTION: That would also apply to the armed
17 forces.

18 MS. ZIEVE: And the Government is in an adverse
19 position, which I think requires additional cross checks
20 in the system to ensure that care is taken because the
21 Government doesn't have incentive to identify and rectify
22 inefficiencies on its own.

23 QUESTION: You really think that that's
24 realistic here? You would not urge us to apply this rule
25 in a civil action where your client was being served a

1 paper by -- by someone who is not the Government.

2 MS. ZIEVE: Well, if the -- if the serving party
3 were not the Government, then the person doing the service
4 would not be the person who was also in control of the
5 delivery procedures.

6 QUESTION: I understand that.

7 MS. ZIEVE: So --

8 QUESTION: So, you have not urged the rule in
9 that case, only when the Government is -- is the opposing
10 party.

11 MS. ZIEVE: Well, I'm not trying to be evasive,
12 but it's hard to answer without knowing all the
13 circumstances there. For instance, what would be the --

14 QUESTION: All the other circumstances are just
15 like this one except that the complaint was not on behalf
16 of the Government. It was behalf on a private individual.

17 MS. ZIEVE: Well, then the private individual
18 wouldn't have control over the procedures. It might be
19 that mailing wasn't -- wasn't adequate in that
20 circumstance. It might have to do with the value of the
21 property.

22 QUESTION: You can answer this yes or no. Do
23 you assert that your rule would apply in that situation or
24 not? All of the circumstances are the same. The only
25 difference is the complaint was not filed by the

1 Government, but by a private party.

2 QUESTION: Say it was for an ordinary debt, that
3 the prisoner owed money and the creditor brought suit.

4 MS. ZIEVE: It might not apply in that
5 circumstance, but whether or not it does, this is an
6 easier case.

7 QUESTION: Let -- let me ask you. I -- I take
8 it you begin from the premise that mailed notice is
9 adequate for a civil suit, or do you? I'm going to ask
10 the Government the same thing. I -- are we supposed to
11 write an opinion that -- that says that mailed notice is
12 adequate in any civil suit?

13 MS. ZIEVE: No. The -- in fact, under rule 4(d)
14 mailed notice is not adequate under civil suit -- for any
15 civil suit. But I don't think --

16 QUESTION: From a constitutional -- I know what
17 4(e) says, but from a constitutional standpoint, is mailed
18 notice adequate in any civil suit?

19 MS. ZIEVE: Well, I think it's probably not
20 adequate in any civil suit.

21 QUESTION: All right. What is -- what is it
22 about this that makes mailed notice adequate whereas
23 apparently there's another class of cases in which
24 personal service is required?

25 MS. ZIEVE: Well, this case --

1 QUESTION: You -- you begin I -- I think with
2 the assumption that mailed notice would be adequate, and
3 the question is, are these mailing procedures adequate in
4 this case?

5 MS. ZIEVE: Well, no, Your Honor --

6 QUESTION: But I'm -- I don't want to have you
7 take a position you don't take. But it -- it does seem to
8 me that that is the baseline assumption from where you
9 begin the argument. Am I correct about that?

10 MS. ZIEVE: Not exactly, Your Honor. This case
11 is not really a mailed notice case because the procedures
12 that are inadequate are the procedures that happened after
13 the mailing. The mailing is the first step in the
14 delivery chain, and the question here is the adequacy of
15 the procedures after that.

16 QUESTION: But I'm asking why is mail adequate
17 at all? You seem to assume that, and that's fine. We can
18 decide the case on that basis. But you make the
19 assumption that if the mail were received, the mailed
20 notice would be adequate.

21 MS. ZIEVE: If the mail is received by the
22 inmate?

23 QUESTION: Yes. And I want to know why that is.
24 I'm going to ask the Government. If we have to write this
25 case, it would seem to me that at least an argument could

1 be made that personal service is required --

2 MS. ZIEVE: Well --

3 QUESTION: -- in any civil case. And then we
4 ask if this is a forfeiture or there's some old hangover
5 from the in rem idea that is still somehow affecting us
6 even though we don't talk about in rem anymore and so
7 forth.

8 But I want to know what your -- your beginning
9 principle is for the due process, elementary, minimum
10 standards of service.

11 MS. ZIEVE: The mailed notice is any form of
12 delivery -- any form of notice is adequate as to that
13 individual if it's received. The mailed notice is
14 adequate when it's received, and in this case, the
15 Government's procedures used certified mail so that you
16 know that the mail was received. If the Government had
17 mailed the certified mail to the proper prison and it had
18 not been received, the certified mail slip never came
19 back, then I don't think the mailed service would have
20 been adequate.

21 QUESTION: Have any of our cases ever required
22 certified mail?

23 MS. ZIEVE: Well, the first case where the Court
24 considers whether mailed notices is constitutional in Hess
25 v. Pawloski, the mail at issue was certified mail.

1 Subsequent to that, the Court hasn't made a distinction
2 between the form of mail.

3 The Court also hasn't considered the case where
4 mail was sent but not received. And the Court's cases in
5 Mennonite Board and Tulsa Professional Collection
6 Services, in the cases discussed in the briefs, the
7 question was whether an individual was entitled to notice
8 in addition to publication or posting, not whether -- the
9 Court had no occasion to consider what would happen if the
10 notice was mailed but never got there.

11 QUESTION: It seems to me one of the
12 difficulties I find with your position, Ms. Zieve, is that
13 this inquiry can come up, you know, months and maybe years
14 after the actual notice took place or didn't take place.
15 And it's one thing to say we have a -- you followed a
16 system and that system affords due process, but to have
17 every case turn on perhaps an argument between the person
18 who's seeking to set aside the service -- I never received
19 it -- and someone else saying, yes, you did receive it, I
20 think is rather unsatisfactory.

21 MS. ZIEVE: Well, that's why the procedures
22 should require proof of verification which the
23 Government's procedures do today. If Mr. Dusenbery was
24 served with a forfeiture notice today, he would be
25 required to sign for it and there would be no question

1 later about whether or not he received it.

2 QUESTION: Was he not --

3 QUESTION: Your --

4 QUESTION: The question I'd have is we all seem
5 to agree now that the question -- the Government has to
6 provide reasonable procedures. Reasonable means
7 reasonably calculated to give actual notice.

8 MS. ZIEVE: Under the circumstances.

9 QUESTION: Well, don't say -- there's no such
10 thing. There's no such thing. Under the circumstances
11 doesn't add anything I don't think. You say is it
12 reasonably calculated to give actual notice. I haven't
13 figured out your qualification, how that would work.

14 But why wasn't this precisely? Precisely what's
15 wrong with these procedures in your opinion?

16 MS. ZIEVE: The --

17 QUESTION: Why are they not calculated to give
18 actual notice reasonably?

19 MS. ZIEVE: The 1988 procedures did not provide
20 assurances of delivery because what happened after the
21 mail reached the mail room is -- was vague and
22 undocumented. And as the Government acknowledged --

23 QUESTION: I always thought the procedure -- I
24 thought the -- what -- what -- tell me precisely. I think
25 the procedure is, A, mailed to a prison. B, it comes to a

1 prison, and a person who works for the prison signs for
2 it. Then the procedure required what? C. What was it
3 required? And then what should it have required?

4 MS. ZIEVE: The procedure was that the mail room
5 employee picked up the mail and signed the certified mail
6 receipt at the post office, brought it back to the prison,
7 where he entered it in a log book. A prison employee
8 testified that in 1988 the procedure then would have been
9 that a -- a housing unit staff would have signed when he
10 took the mail -- the certified mail out of the mail room.

11 QUESTION: Yes.

12 MS. ZIEVE: He also testified that he didn't
13 know what the procedure was after that.

14 QUESTION: All right. I guess after that -- a
15 reasonable person would think the procedure after that is
16 you give it to the person it's addressed to. Now, is -- I
17 mean that would be normal in life. Is there any testimony
18 that that wasn't the procedure? No.

19 MS. ZIEVE: No. There was no testimony about
20 that.

21 QUESTION: Okay. Now, we've described the
22 procedure, and now you tell me what, in your opinion, is
23 wrong with that procedure.

24 MS. ZIEVE: The procedure doesn't require
25 verification of delivery and that --

1 QUESTION: Okay. So, in your opinion, it is
2 unreasonable not to have an additional step that the
3 prisoner signs for it.

4 MS. ZIEVE: Yes, and the reason is this.
5 Because the documentation -- the improved documentation
6 improves delivery. The -- the Department of Justice Board
7 of Prisons memorandum that the Solicitor General lodged
8 with the Court both in 1999 and 2001 -- it ties improved
9 documentation to improved delivery.

10 QUESTION: Then -- then whenever there's a
11 requirement or -- a requirement -- procedure for service
12 by mail, it should be certified mail so the person signs
13 for it in every case.

14 MS. ZIEVE: In --

15 QUESTION: Ms. Zieve, you couldn't say every
16 case because in Mullane regular mail was adequate in that
17 under the circumstances, which was heavily emphasized by
18 Justice Jackson, those words, under the circumstances.

19 MS. ZIEVE: In Mullane and in some cases where
20 there's a class of interested parties where everyone has
21 this same interest, it might not be necessary for all
22 interested parties to receive the notice. As the Court
23 recognized in Mullane, because there were many
24 beneficiaries of a 113 different trusts and they all had a
25 identical interests --

1 QUESTION: All right. Then I'll -- then I'll
2 amend my question. In a case where there is only a single
3 defendant and service is permitted by mail, it must be by
4 certified mail.

5 MS. ZIEVE: Well, that would likely be
6 reasonable since the burden of doing so is so small and
7 the increased -- the decreased risk of it not reaching the
8 addressee would be --

9 QUESTION: You don't mean that it might
10 reasonable. You mean it isn't reasonable not to do it.
11 That's your argument.

12 MS. ZIEVE: Right.

13 QUESTION: It isn't reasonable not to do it.
14 And I guess a person who thought it was reasonable not to
15 do it would say, well, we can't think of everything, and
16 you know, it's in the prison, and prisons normally do
17 work. I mean, they're not great, but they have a -- a
18 fairly disciplined order. And so, it's good enough. And
19 your response to that is what?

20 MS. ZIEVE: It wasn't good enough in -- in these
21 circumstances. The Government has shown us --

22 QUESTION: Well, they might -- they might say
23 more than that. They might say we have no reason to
24 believe that the prison delivery system is any worse than
25 the post office's delivery system.

1 And I -- I guess it's your -- I guess it's your
2 contention that even if the reason your client never
3 received the notice was -- had nothing to do with the
4 fault of the -- of the prison. It was the Postal Service
5 that lost the -- the notice on the way. That would still
6 -- that would still invalidate the service. Right?

7 MS. ZIEVE: It would still mean the forfeiture
8 was done without adequate notice.

9 QUESTION: So that -- so -- which would not be
10 the case, I suppose, unless you're going to adopt the
11 certified mail rule, which would not be the case for an
12 ordinary citizen who is not incarcerated. If notice is
13 sent to an ordinary citizen and the post office loses it,
14 unless you adopt the certified mail rule, that would be
15 adequate notice. But in the case of an incarcerated
16 person, if the post office loses it, it is not adequate
17 notice. Right?

18 MS. ZIEVE: Well, I don't know that it would be
19 adequate notice to serve someone by mail out of prison if
20 it's not received.

21 QUESTION: Well, what is -- what is the
22 statutory requirement in your view for forfeiture as -- as
23 far as notice is concerned?

24 MS. ZIEVE: The statutory requirement?

25 QUESTION: Yes.

1 MS. ZIEVE: Is publication and notice to the
2 interested party.

3 QUESTION: By mail? What is the general
4 statutory requirement on these forfeiture notices?

5 MS. ZIEVE: I believe the statute says by mail,
6 although the Government always does it by certified mail.
7 And it does that --

8 QUESTION: Is it in the materials we have in the
9 briefs? Is there some copy of that provision somewhere
10 that you're aware of in the briefs? Don't take a lot of
11 time if you don't know. I just thought perhaps you knew.
12 Is in your brief at all?

13 MS. ZIEVE: It's on page 3 of the Government's
14 brief.

15 QUESTION: Page 3.

16 MS. ZIEVE: It just says, shall be sent to each
17 party who appears to have an interest.

18 QUESTION: See, that's why I don't know how to
19 do it because, I mean, suppose there's a ship, for
20 example. Take the other extreme case. People forfeit
21 ships. People have tort actions against ships, and you
22 could have ships that are owned by thousands of people,
23 for example. And where you bring the action against the
24 thing, it's fairly normal that you don't actually have to
25 get the signature of every person who has some interest in

1 that ship, for example. Now, I think, am I not right, or
2 do you have to get the signature?

3 If -- if, for example, you're bringing an action
4 against a thing and the thing is owned by millions,
5 thousands, or hundreds, does the -- do you have to
6 normally, under the rules -- forget the Constitution for
7 the moment -- you have to get the signature on a -- on
8 that notice, a return receipt requested of each person who
9 has an interest in that thing?

10 MS. ZIEVE: Under the statute?

11 QUESTION: Yes.

12 MS. ZIEVE: Now, you've asked a sort of
13 complicated question because the statute for an in rem
14 judicial forfeiture requires publication, but the
15 Government, based on this Court's case law, gives notice
16 by certified mail.

17 QUESTION: But I take it your argument would be
18 that even if all the signatures are not required in the in
19 rem case, there is -- there is a fairness in the procedure
20 that would not require actual notice and signatures to
21 every ship owner because the owner of the ship at least
22 has some right to control the ship. So, you say, look, if
23 -- if they don't pay attention to what's happening to
24 their ship, we -- we can tag them with that.

25 But the difference between that case and this,

1 as I understand it, is there is a period between delivery
2 of the letter and what should be the point of receipt by
3 the prisoner when the prisoner is not in control of the
4 process. The post office has finished its part. So, if
5 we assume regularity on the post office is normally
6 enough, that isn't enough here because there's a hiatus
7 between where the post office stops and the point at which
8 we hope the prisoner gets the delivery.

9 And I take it you would be satisfied in this
10 case, even without a rule requiring actual signature, if
11 the Government were required to show, with a greater
12 detail than you say it has here, that there was a regular
13 procedure, at the time involved here, that makes it just
14 as probable that the letter would have gotten from the
15 front door of the prison to the prisoner, as it is
16 probable that the letter mailed in the box gets to the
17 front door of the prison. You'd be satisfied with that
18 kind of a rule, wouldn't you?

19 MS. ZIEVE: Yes. I'm not -- it's not -- it's
20 not important to petitioner how the procedures --

21 QUESTION: How he wins the case as long as he
22 wins. I realize that.

23 (Laughter.)

24 MS. ZIEVE: No.

25 QUESTION: I mean, you would -- you would be

1 satisfied if -- if we had the -- I take it, the same kind
2 of demand for proof of regularity for the period between
3 the front door of the prison and the prisoner's cell that
4 we do from the mailbox to the front door of the prison.
5 That would be a reasonable system. And -- and you'd be
6 satisfied with it, I would take it, as a general rule.

7 MS. ZIEVE: Probably.

8 QUESTION: It would be nice to have a signature
9 requirement, but basically we -- we would have the same
10 kind of rule then that we have with -- with respect to
11 mail delivery in general.

12 MS. ZIEVE: Yes, but the reason that I emphasize
13 the signature is because, as the Bureau of Prisons has
14 since recognized, the -- the signature does help to
15 improve delivery. It helps to make sure that this letter
16 is treated with some extra attention and care. It ensures
17 that it's not going to get misdelivered to Larry Smith two
18 cells over.

19 QUESTION: What do we do with prisoners who
20 won't sign?

21 MS. ZIEVE: Well, actually the Board of Prisons
22 procedures deal with that, and I think effectively, which
23 is on the log book, if the prisoner refuses to sign, then
24 the person delivering the mail signs for it stating that
25 the prisoner won't sign, which I think is comparable to a

1 process server giving a contemporaneous statement that
2 service has been completed.

3 QUESTION: You know, it seems to me we need to
4 focus on some kind of a test, and I thought I understood
5 you to argue for a test that says in these prison cases,
6 there has to be actual receipt by the prisoner. And I --
7 I know the Third Circuit and probably the Fourth have a
8 different sort of test, which is that the Government just
9 has to show that internal prison delivery procedures are
10 adequate. Is that an acceptable general statement of the
11 test?

12 MS. ZIEVE: They have to be adequate. My view
13 is that under this Court's -- the analysis that this Court
14 has used in its cases, in its due process cases, that
15 applying that general statement leads to the same result
16 that I'm arguing for here, although if the Court --

17 QUESTION: You say it isn't adequate unless
18 there's actual receipt.

19 MS. ZIEVE: Yes, because those procedures are --
20 it's entirely practicable to do that. There's -- it is
21 not difficult to --

22 QUESTION: Well, in the event we don't agree
23 with you, what's your fall-back position?

24 MS. ZIEVE: Well, even under the Third Circuit's
25 formulation, the Court, looking at the 1988 procedures in

1 the record, such as they are -- those procedures were
2 inadequate. It's uncontested that he didn't get the
3 notice, and the procedures as described, are inadequate,
4 although for the same reasons as I think lead to actual
5 notice, even if you don't want to go that far.

6 QUESTION: Why is it that a procedure is
7 inadequate if the procedure is that if we get certified
8 mail, we -- we deliver it to the prisoner? What's
9 inadequate about that as a procedural standard?

10 MS. ZIEVE: Again, it doesn't provide the
11 assurances of delivery that both are feasible because, if
12 you're going to deliver it, it doesn't take that much to
13 just get the signature, and because I think it's important
14 to have cross checks to make sure that the Government --

15 QUESTION: Do we look back at Mullane or at
16 Mathews v. Eldridge for our guidance here in establishing
17 a standard?

18 MS. ZIEVE: I think either one, Your Honor.
19 Mullane states -- sort of states the test in one sentence,
20 but I think summarizes the three-part framework that
21 Mathews articulates later. Either way you can reach the
22 same result. The value of the property at stake, the risk
23 of erroneous deprivation, the valuable -- the value of
24 additional procedures, and the burden on the Government,
25 the factors to consider, all lead to same -- to the result

1 here that the prison should have done more and could have
2 and should have ensured actual notice to inmates in its
3 charge.

4 QUESTION: -- apply this rule to any -- anything
5 other than prisons or are you talking about the
6 circumstances of someone incarcerated by the Government?
7 Is there any other setting in which you would require not
8 merely that certified mail be sent and signed for by
9 someone, but in-hand delivery?

10 MS. ZIEVE: There may be other cases, though
11 there also may not be. This is the easy case. If there's
12 any circumstances where actual notice is required, it's
13 got to be these where the Government is both the sender
14 and sort of the recipient for later delivery to the person
15 who it knows where it is --

16 QUESTION: Why is it the easy case? It is the
17 case, I take it from your argument, because you haven't
18 suggested that there might be another setting other than
19 where the Government has someone in confinement.

20 MS. ZIEVE: No, I haven't.

21 QUESTION: Is it any part of your argument that
22 we should be suspicious of prison officials because they
23 may use a refusal to follow their procedures for
24 vindictive reasons or anything like that?

25 MS. ZIEVE: That may occur, Your Honor, but our

1 argument does not rely on any malfeasance on the
2 Government's part.

3 QUESTION: That's not your argument.

4 QUESTION: Well, if that's not part of your
5 argument, I don't see why your situation is any different
6 from the military situation where, unless -- unless the
7 serviceman or woman is AWOL, the Government knows right
8 where that person is and the Government is responsible for
9 -- for where that person is. I don't know why you
10 wouldn't have the same rule.

11 MS. ZIEVE: Well, to be honest, I hadn't
12 considered the military situation, and maybe there's more
13 parallels. However, there's still the -- the inmate is
14 still special in that he has no control over his property.
15 There are no proxies looking out for him, for his
16 interests. And the mail, even when it's sent to the
17 military, my assumption is that if you get certified mail,
18 the soldier is going to sign for it. The officer will
19 sign for it and not someone for later delivery to him
20 without any proof or documentation about what happened in
21 the interim.

22 If the Court has no further questions, I'd like
23 to reserve the balance of my time.

24 QUESTION: Very well, Ms. Zieve.

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

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ORAL ARGUMENT OF JEFFREY P. MINEAR
ON BEHALF OF THE RESPONDENT

MR. MINEAR: Mr. Chief Justice, and may it please the Court:

This Court has repeatedly held that the notice requirements of the Due Process Clause are satisfied by a method of notice that's reasonably calculated to provide interested parties with notice of the proceedings.

The Government's method of providing notice in this case, this forfeiture case, satisfies that test. The method was by the use of certified mail. And petitioner does not dispute that mails generally are satisfactory for purposes of notice. Rather they draw the distinction that only in the case of prisoners is that method unwarranted or unconstitutional.

Petitioner is asserting a constitutional violation. It therefore has the burden of proof of establishing the procedures the Government used are unconstitutional.

And I'd like to clarify a point with regard to whether notice was received here or not. The Government has not submitted that notice was not received. We simply are unable to prove that it was not received.

QUESTION: So, why not just put the burden on the person who was supposed to get it to prove he didn't

1 get it?

2 MR. MINEAR: Well, that is in fact what the
3 court did. It didn't -- there wasn't a test it required,
4 but the inquiry was made, and the court concluded that
5 whatever the protestations of the defendant might be, or
6 the prisoner in this case, nevertheless the method that
7 was used here was reasonably calculated to reach him. And
8 that is all that Mullane requires.

9 QUESTION: No, no. Look, what I take it that
10 she's arguing for is there's a step missing here and it
11 should apply not just to prisoners, apply to anybody who's
12 going to have their property forfeited, and that is, you
13 give them notice by certified mail so they have to sign
14 it. That's the point. So, it would apply to everybody,
15 armed forces, everybody. And what's wrong with that? It
16 isn't that hard to do. It protects pretty thoroughly
17 against losing your property without even knowing about
18 it. So, do it.

19 MR. MINEAR: The problem --

20 QUESTION: That's -- that's basically, as I
21 understand it, the argument.

22 MR. MINEAR: The problem with that position is
23 it's contrary to 50 years of this Court's precedence,
24 which has consistently recognized that mailing alone --
25 not certified mail -- but ordinary mail, is sufficient to

1 provide parties with notice.

2 QUESTION: Where did the Court hold that?

3 QUESTION: Have we ever said that with reference
4 to a simple contract or tort action?

5 MR. MINEAR: No. All of the cases in which this
6 issue has arisen in this Court's jurisprudence have
7 involved special procedures. Nevertheless --

8 QUESTION: Well, that's why I'm asking because
9 in Mullane and subsequent cases, we have tended to say
10 that the in rem/in personam distinction is -- is not too
11 clear a line.

12 Are you arguing for the proposition that, again,
13 in a standard contract or tort case, notice by mail would
14 be sufficient?

15 MR. MINEAR: We are certainly willing to defend
16 the proposition that the Federal Rules of Procedure, which
17 provide --

18 QUESTION: No. I'm talking about -- I'm talking
19 about due process requirements now.

20 MR. MINEAR: Yes. And -- and with regard to the
21 Federal Rules, they do recognize that service can be
22 effected through mail -- through the notice of waiver
23 provisions that are set forth there, and we would defend
24 the constitutionality of those provisions which allow the
25 party to, in fact, accept service by notice.

1 QUESTION: If this Court writes a due process
2 opinion, can we say that mail, routine mail, is always
3 sufficient, or are there some cases in which you must have
4 personal service?

5 MR. MINEAR: Well, the Court can certainly do
6 that. We might caution that it's not necessary to do that
7 in this case.

8 QUESTION: Well, I want to know what the
9 principle is that you're -- that controls our case, the
10 beginning principle here.

11 MR. MINEAR: The Court has drawn these
12 principles largely from common experience and knowledge
13 about the instrumentalities that are used for purposes of
14 service. And if we looked at the Mullane case, the Court
15 cited that the mails had, through common experience, been
16 determined to be a reasonable means for providing service
17 in that type of proceeding.

18 Now, whether the Court would want to take the
19 step of saying that the mails are always adequate in any
20 proceeding is a step that's not necessary for the Court to
21 take. And so, I'm hesitant to suggest to the Court that
22 it ought to do so. It certainly does not need to do so in
23 this case because this case involves procedures that are
24 very similar to Tulsa, to Mennonite, to Schroeder, to --

25 QUESTION: All right. So, then you are relying

1 on the fact that this is a forfeiture case and we're --
2 there's this voice of the past of in rem versus in
3 personam hanging over this -- this argument of yours.

4 MR. MINEAR: Well, actually no, Your Honor.
5 It's not the in rem nature of the proceedings, but rather
6 it's a -- it's an intersection of two factors.

7 One, this type of proceeding is similar to the
8 proceedings this Court has dealt with previously that are
9 not necessarily in rem. For instance, probate claims are
10 not necessarily -- would not necessarily be treated as in
11 rem I think under -- under traditional law. But it's --
12 it's the intersection of the fact that these proceedings
13 are similar to proceedings elsewhere that the Court has
14 already ruled on and the fact that this Court can draw on
15 its long experience the mails are, in fact, as a practical
16 matter, a reasonable means for providing service or
17 providing notice.

18 QUESTION: I'm just very puzzled by your
19 reliance on Mullane when Justice Jackson took such care to
20 say this procedure, common trust fund, so many
21 beneficiaries, some unknown, some addresses lost -- if we
22 use regular mail, the chances are it will get to many, if
23 not most, people in the group, and that's good enough for
24 that kind of case. Here we're talking about some \$12,000
25 that once belonged to an individual, not 113 trusts

1 combined together in a common fund with hundreds, even
2 thousands of beneficiaries.

3 QUESTION: Your Honor, Mullane has been extended
4 beyond the facts of its individual case. And this case
5 is, in fact, quite similar to the Court's most recent
6 decisions, such as Tulsa Professional Services. In that
7 case, I believe there was some \$12,000 in medical fees
8 that were in dispute. The -- the creditor in that case
9 couldn't count on other claimants, as in Mullane, to
10 perhaps make the arguments that that creditor might --

11 QUESTION: Well, but that was with the probate
12 proceeding. And as Justice Ginsburg's questions point out
13 and what I've been trying to -- to explore with you, this
14 is a case where a person has an ownership interest. It's
15 not that much different from an ordinary contract or tort
16 action.

17 MR. MINEAR: Yes, Your Honor. And we think that
18 this case is similar to Tulsa and ought to be treated as
19 such. I'm simply reluctant to urge this Court to go
20 beyond the facts of this case and to deal with the
21 question of a civil complaint and whether ordinary --

22 QUESTION: I suppose -- I suppose in probate a
23 claimant, a debtor claimant, is in much the same standing
24 as a person who sues in contract on that claim before the
25 person dies.

1 MR. MINEAR: Well, yes. But probate is very
2 similar to the situation here, that the notice that is
3 being provided is simply to ascertain whether there are
4 any claims outstanding to the property at issue. And if a
5 person does make a claim, then that initiates a judicial
6 procedure in which further process would be necessary.

7 But this case is --

8 QUESTION: Here there's no doubt about the
9 person who has the interest. It was not like sending out
10 a notice: any interested people come forward. The
11 Government knows who the person in the world is who has a
12 claim to this \$12,000.

13 MR. MINEAR: But, Your Honor, the same could be
14 said, for instance, in Mennonite with regard to the
15 mortgagee, that the person who is -- that -- that was a
16 situation in which there was an interest in -- in
17 foreclosing on a property and selling it at a tax sale.
18 Now, the Government in that situation certainly could have
19 identified the mortgagor and simply provided notice by
20 publication. This Court said that notice by mail was
21 sufficient. It was the minimum that was necessary and it
22 applied in that --

23 QUESTION: -- better than publication generally.

24 MR. MINEAR: Yes.

25 QUESTION: -- publication is the least

1 effective, and the Mullane case that you rely on so
2 heavily makes that point.

3 MR. MINEAR: Yes, and that's the reason why the
4 Government in these situations provides notice by
5 publication, also by notice to the person's last address,
6 and also notice to his current address if it can be
7 ascertained. In this case, the Government, through
8 reasonable diligence, was able to locate the individual
9 and send notice to his place of incarceration.

10 The only thing that distinguishes this case, in
11 fact, is that the mails are being directed to a prison,
12 and the only real question here is whether the prison
13 system is reliable. And what we established at trial was,
14 in fact, it was. There were procedures in place to ensure
15 that the mails were delivered to prisoners.

16 QUESTION: Fine. Then you would win even under
17 their rule because then the prisoner would be unable to
18 prove that he didn't get the notice.

19 So, assume that that's the rule. The prisoner
20 has to prove he didn't get the notice. Anyone who doesn't
21 -- who actually gets notice loses. Assume that. What I'd
22 like to know is, assuming that, what is the argument
23 against saying where it's a forfeiture case and where the
24 forfeiting -- the person who's going to get the property
25 knows the address of the individual who would forfeit the

1 property, that person has to use certified mail? What she
2 said was the Government does that anyway in forfeiture
3 cases.

4 MR. MINEAR: The argument against that, Your
5 Honor, is that the Due Process Clause simply specifies the
6 constitutional minimum. The Government can make a
7 decision to provide more process than is necessary.

8 QUESTION: Fine. And my question is, what is --
9 if you're in the Government, aside from -- well, it's a
10 little easier. Is there any policy reason for not doing
11 it?

12 MR. MINEAR: The reason -- there -- there are
13 several reasons for not recognizing this as a -- a general
14 constitutional standard. One is the fact that it would
15 have to be applied to other analogous situations at least
16 by a parity of reason--

17 QUESTION: All right. And the reason that
18 that's wrong is because? I mean, the harm that it will do
19 it other analogous situations. Give me an example of some
20 serious problem that would be caused by such a rule.

21 MR. MINEAR: The rule would, first of all,
22 require, for instance, as the Chief Justice has pointed
23 out, similar service on the armed services. It also would
24 apply to other situations that might not be documented in
25 the record. For instance, it's my understanding that the

1 Postal Service delivers mail to dormitories and
2 residential halls in bulk for distribution to the people
3 that live in those halls. So --

4 QUESTION: So, I want an example, since you're
5 writing the address anyway -- I want an example of the
6 problem that would be caused by saying you not only have
7 to write the address, you also have to send it certified,
8 whether it's to dormitories, armed forces, prisoners, or
9 anyone else in the world. What's the actual practical
10 problem that would cause the Government?

11 MR. MINEAR: Well, I cannot say that the
12 Government cannot overcome that difficulty, because it
13 does in fact use certified mail.

14 But the problem is should the Court erect that
15 as a constitutional standard, and the difficulties with
16 erecting that as a constitutional standard, as I pointed
17 out before, is it will be very difficult to cabin that to
18 a wide variety of other situations --

19 QUESTION: With certified mail, you have to get
20 a signature from the recipient, whereas with ordinary
21 mail, you can put it in the slot in your mailbox. In
22 other words, it's often difficult to obtain the certified
23 mail signature in a way that it wouldn't be to get the
24 ordinary mail slot.

25 MR. MINEAR: That's correct. And, for

1 example --

2 QUESTION: But shouldn't it be difficult if
3 you're going to take \$20,000 away from them?

4 MR. MINEAR: Your Honor, but again, this case is
5 on -- on par with other cases that involved similar
6 amounts of money.

7 And with regard to the signature -- obtaining
8 the signature, my suggestion is it might be that the
9 litigation will shift from the assertions that we think in
10 many cases are -- are untrue, that the person did not
11 receive the notice, that, well, a guard signed for me and
12 never actually -- I did not refuse to receive it and a
13 guard simply signed and said that I refused.

14 What we're trying to do from a policy
15 perspective, from the Bureau of Prisons' perspective, is
16 to eliminate the sort of wasteful litigation that takes
17 place over assertions.

18 QUESTION: Mr. Minear, the Third Circuit has
19 apparently adopted a test that requires the Government to
20 show a little more than that it dropped a notice in the
21 mail, and that, in fact, the Government must show that
22 procedures at the receiving facility, the prison, were
23 reasonably calculated to deliver notice to the intended
24 recipient.

25 MR. MINEAR: Yes.

1 QUESTION: Is that a -- a standard that the
2 Government would find satisfactory?

3 MR. MINEAR: We disagree with that, Your Honor,
4 for the reasons set forth in Judge Alito's dissenting
5 opinion on -- on that ground; namely, that it imposes
6 burdens that are not necessary. The burden is on the
7 person who's raising the constitutional challenge to show
8 the deficiency in the procedures, and no deficiency in the
9 procedures has been shown.

10 QUESTION: But your -- your argument, it seems
11 to me, is premised on the fact that forfeiture is like an
12 in rem proceeding and it's just different. Assume with me
13 -- I'm not sure that this is -- assume that there's a
14 constitutional due process requirement for personal
15 service unless there's some showing of unavailability in
16 the routine case for contract and tort. Why should this
17 be any different?

18 MR. MINEAR: The reason -- the reason why --

19 QUESTION: That may be an heroic assumption.
20 I'm not sure that's true. I think -- let me go back.

21 Do you know of any State which in an ordinary
22 civil action allows service by mail as a routine matter?

23 MR. MINEAR: I don't know of --

24 QUESTION: Absent unavailability or the fact
25 that the person is avoiding the process server or

1 something like that?

2 MR. MINEAR: I don't know of any State that
3 allows ordinary mail. I believe that a number of States
4 have adopted certified mail with return receipt requested.
5 I believe that California follows that pattern. And in
6 fact, the Federal rules that provide this optional method
7 were based on that -- on that approach.

8 QUESTION: Okay.

9 But then -- then going back to the other
10 question, it seems to me your case is premised on the
11 assumption that this is a forfeiture in rem type,
12 different action than -- than a routine contract or tort
13 action.

14 MR. MINEAR: Well, we certainly do think it
15 falls on the side of the -- of the line that this other --
16 the other cases of this Court demarcs, namely probate
17 proceedings, tax sales, condemnation proceedings, notice
18 of forcible entry and detainer proceedings, which are
19 basically ejectment proceedings. All of those types of
20 proceedings have involved situations where this Court
21 indicated that notice by ordinary mail would be
22 sufficient.

23 Now, we go beyond that. We do provide certified
24 mail as -- as a matter of policy. And it serves an
25 important policy --

1 QUESTION: May I ask you? This is prompted by
2 Justice Scalia's question. Does the Government have any
3 special procedures for people in the military?

4 MR. MINEAR: I'm not aware of any special
5 procedures that -- that we provide in those situations.
6 For instance, if there was forfeiture --

7 QUESTION: And I should think there's a lot of
8 mail that might -- addressed to a serviceman that might be
9 signed for by the mail orderly or something. He may never
10 get the mail. I'm just wondering if the -- there's
11 nothing in the record about that, is there?

12 MR. MINEAR: No. There's nothing in the record
13 and it's not clear to me at all that if there was a
14 forfeiture that was directed to a serviceman, it would be
15 treated any differently.

16 QUESTION: What about the -- the immunity while
17 the person -- there's an immunity that governs people in
18 the military during the time. Is it -- what is that
19 statute?

20 QUESTION: The Soldier's and Sailor's Civil
21 Relief Act.

22 MR. MINEAR: Yes, and I'm not sure how that
23 would apply in this situation. It might very well toll
24 the type of requirement --

25 QUESTION: It would toll the statute of

1 limitations because the person could assert immunity for
2 the period that they're in service.

3 MR. MINEAR: Yes. I'm simply not certain how
4 that would apply. But I do know that for general civil
5 procedures -- for civil forfeitures, the regulations of
6 the FBI do provide mechanisms such as mitigation and
7 remission that can ameliorate some of the hardships, where
8 a party can actually show that there was nonreceipt.

9 QUESTION: But can I ask you a question that
10 puzzles me about this? The -- even before the current
11 regulations, there was this special mail category and
12 several things fell into it, including letters that the
13 prisoner would get from the attorney. Those have to be
14 opened in the presence of the prisoner?

15 MR. MINEAR: That's correct.

16 QUESTION: And then there was this category
17 called law enforcement. And why wasn't a notice of this
18 character categorized as law enforcement and therefore put
19 within the special mail category?

20 MR. MINEAR: I think for a short while the DEA
21 and the FBI did follow the practice of denominating
22 certain mails as special mail. I'm not sure if the
23 special mail category existed in 1988. I don't think the
24 record is clear on that.

25 I would point out, however, that under the

1 Bureau of Prisons operations memorandum, there is more
2 protection to providing it by certified mail rather than
3 by special mail, primarily because of the long period of
4 retention of the log books for certified mail. And so,
5 the practice for -- the current practice of BOP --

6 QUESTION: That applies to the Federal system,
7 but the rule we're working with today would apply to State
8 forfeitures as well, the State prisons and the like. So,
9 your rules don't necessarily tell us what would happen in
10 a -- to a State prisoner.

11 MR. MINEAR: No, they do not, although I think
12 that the -- the Court can -- can safely assume that State
13 prisons do, in fact, provide for mail delivery to their
14 prisoners.

15 QUESTION: Would you just comment on the
16 suggestion that your opponent has made, in effect, that
17 there really ought to be a special rule for people who are
18 in the custody of the Federal Government? And I assume
19 with Justice Scalia that would include military personnel
20 too. Is there -- would it make sense to say that when
21 they know darned well where a person is, there's no reason
22 to have three publications in the local newspaper? You
23 just make sure you get it to -- to where the man is.

24 MR. MINEAR: Well, there's no reason to depart
25 -- that's certainly -- the fact that we know where the

1 person is, certainly does dictate that we contact the
2 person by mail, and that's inconsistent with Mullane and
3 its progeny, that where the address is reasonably
4 ascertainable, the person should be contacted by mail.

5 The fact that we have the person under our
6 control I don't think adds anything to that. The basic
7 question is, is this notice reasonably certain to reach
8 the inmate? And if it does, it doesn't really matter if
9 he's at a location of our choosing or some other location.
10 It's simply what's important here is, is this method, is
11 the procedure reasonably certain to provide actual notice?

12 QUESTION: Is there any court action -- if you
13 accepted your -- your points and said, look, they send it
14 to the prison. It's signed for in the prison. So, up to
15 there, it's certified. And then a person regularly picks
16 it up, and this person did, and then delivers it to the
17 cell. Suppose the picker-upper either maliciously,
18 negligently, or deliberately didn't give it to the
19 prisoner. Would the prisoner have any kind of claim under
20 the Tort Claims Act?

21 MR. MINEAR: I think not under the Tort Claims
22 Act because it does exclude intentional torts. There
23 might be the -- the opportunity for either seeking redress
24 through the prison administrative remedies or through a
25 Bivens type action. But certainly the problem there --

1 QUESTION: -- Bivens type action. It must be
2 that there's a constitutional right or -- I mean, that's
3 -- but -- but is under the Torts Claims Act negligence?

4 MR. MINEAR: Under negligence? There is
5 conceivably an opportunity to seek damages based on
6 negligence, although you'd have to show an absence of --
7 of due care. In the case of the Government, the
8 regulations here do certainly provide the sort of
9 reasonableness that we think compliance with would --
10 would satisfy the standard.

11 QUESTION: Let me make sure I understand your
12 position on one point. Is it your view that that even if
13 you had not use certified mail in this case, but just used
14 regular mail and an affidavit by the Secretary that it was
15 mailed and so forth, that that would be constitutionally
16 sufficient?

17 MR. MINEAR: Yes. It's our view that that would
18 be constitutionally sufficient. The procedures that we
19 use, with regard to certified mail, are something that we
20 do beyond constitutional requirements in order to --
21 primarily to ensure that we can disprove false claims of
22 nonreceipt.

23 QUESTION: Mr. Minear, am I correct that the --
24 that the current method of simply providing written notice
25 is -- you -- you maintain that that is method that

1 Congress has specified in 19 U.S.C. 1607(a)?

2 MR. MINEAR: The method of -- the requirement of
3 providing written notice I believe is in 1881, on page 3
4 of our briefs. And all that Congress has specified is
5 that -- oh, excuse me. It is 1607(a). I'm mistaken.
6 Written notice of seizure, together with information --

7 QUESTION: This is on page 3, Mr. Minear?

8 MR. MINEAR: On page 3, and the -- at the end of
9 the first indented paragraph.

10 It provides that written notice of seizure is to
11 be provided. It does not specify mail --

12 QUESTION: Shall be sent.

13 MR. MINEAR: Shall be sent.

14 QUESTION: Shall be sent.

15 MR. MINEAR: To each party --

16 QUESTION: What do you think that means? How
17 does one normally send things?

18 MR. MINEAR: Well, normally by mail, and we
19 think that it's --

20 QUESTION: It doesn't say shall be sent by
21 certified mail. I think it's -- a fair reading of what
22 Congress thought was adequate was -- was by mail.

23 MR. MINEAR: Yes. I think that by ordinary
24 mail. And I think -- as I say, the certified mail
25 procedure is something that the Bureau of Prisons and the

1 agencies have adopted in order to disprove false claims of
2 nonreceipt. That's its principal purpose.

3 But it's our position that ordinary mail is
4 sufficient here as it would be in the wide variety of
5 other cases, comparable other cases, this Court has
6 addressed.

7 QUESTION: How do you think the Sixth Circuit
8 standard differs from the Third Circuit's and the
9 Fourth's?

10 MR. MINEAR: I think as a practical matter, Your
11 Honor, there's primarily a question of the burden of
12 proof. Under the Sixth Circuit's standard, we are simply
13 -- if we are challenged, if there's a challenge to whether
14 mail was -- was received or not, it's the obligation of
15 that party who's raising the challenge to prove the lack
16 of reasonableness.

17 QUESTION: Well, but here the Government is
18 seeking to forfeit property from someone. Maybe it's not
19 unreasonable to think that the Government has the burden
20 of proving that notice was given or reasonably calculated
21 to be given.

22 MR. MINEAR: Well, the Government met that
23 burden in this case, but again, we don't think that that
24 should be the test. Rather, we think that it's the
25 obligation of the party to show that -- what defects are

1 necessary. And in this case, the only defect -- the only
2 proof of inadequacy that petitioner showed was his claim
3 that he did not receive the notice, and we in return
4 indicated there were procedures in place that would have
5 ascertained the mail.

6 Now, because the issue is joined, it's likely
7 the Government would be required or would find it
8 necessary or useful to put forward information about
9 procedures.

10 But the problem with the Third Circuit standard
11 is it requires that we, ex ante, at the very beginning of
12 the process, go through and determine what procedures are
13 in various prisons. And that doesn't seem particularly --
14 that seems particularly inappropriate with regard to State
15 prisons where we think it's reasonable for us to send --
16 to mail the receipts to the prisons with the expectation
17 that those State prisons will forward the mail
18 appropriately.

19 QUESTION: Mr. Minear, we have a smattering of
20 courts of appeals cases addressing the issue that we've
21 got today, but beyond that, I don't know how much
22 litigation there is about this. Do we have any indication
23 of how much time in forfeiture cases is spent litigating
24 the question of notice?

25 MR. MINEAR: I don't know the answer to that,

1 Your Honor. As we point out in the brief, in the year
2 2000, the Government, the DEA and the FBI, sent out
3 roughly 9,000 notices of forfeiture to their incarcerated
4 prisoners. Now, how many of those are contested, I don't
5 know the answer to that, but certainly there is the
6 possibility of a substantial clog on the courts,
7 particularly over claims of nonreceipt which are so easily
8 made.

9 QUESTION: Well, except that I -- I don't know
10 that the -- that that argument really favors you. There
11 would be certainly some questions of -- of adequacy of
12 signature and so on. But if there were a -- a certified
13 mail kind of signature requirement, I'm guessing that
14 institutionally it might be of some help to the courts
15 because I'm -- I am assuming that in most cases there
16 wouldn't be any contest. If the Government had the
17 signature, it would go forward. If it didn't have the
18 signature, it would wait until it got one. So, I am -- I
19 am assuming that, knowing nothing, if I don't know any
20 facts beyond what I know now, that there might be an
21 institutional advantage in a rule that required the -- the
22 kind of proof that -- that your friend on the other side
23 wants.

24 MR. MINEAR: Your Honor, I think that -- you
25 know, that the Department of Justice, and the Bureau of

1 Prisons in particular, has tried to be helpful in that
2 regard with -- with regard to providing this type of
3 process. But we simply do not believe that it's required
4 by the Due Process Clause and was not required to be in
5 place in 1988 when this case arose.

6 QUESTION: But would you -- would you agree that
7 there can be an institutional consideration in a closed
8 case in deciding what due process does require?

9 MR. MINEAR: That certainly is a factor that the
10 Court could weigh, but again --

11 QUESTION: Well, you'd have no problem if we --
12 if we held the way you've asked us to hold. I mean, that
13 -- that institutional problem would disappear if you put
14 it in the mail and there are prison procedures in place,
15 as there are in every prison, everything is okay. Right?

16 QUESTION: There wouldn't be any litigation
17 about that.

18 QUESTION: There wouldn't be any litigation.

19 MR. MINEAR: Well -- well, no. No, there isn't,
20 but there are also State prisons that do need to determine
21 what procedures they would follow. And my guess is there
22 are a large number of State prisons that follow the
23 practice that was in place in 1988, namely that certified
24 mail may be signed by the -- by the prison officials, but
25 they may not have recorded signatures with regard to the

1 actual receipt by the inmate.

2 QUESTION: And you think it's not reasonable for
3 the Government go assume that the State prison procedures
4 are adequate to get mail to State prisoners. You don't
5 think that that's reasonably calculated to get mail to
6 State prisoners.

7 MR. MINEAR: We think it is reasonably
8 calculated. Exactly, yes.

9 QUESTION: So, if we held that this is a
10 reasonable -- sending it by mail is a reasonable way to do
11 it, you wouldn't have any more of an institutional
12 problem.

13 MR. MINEAR: Well, no, we wouldn't. At the
14 same --

15 QUESTION: But if we -- if we said that because
16 there is a gap between mail delivery to a prison and
17 delivery to a prisoner and, for that reason, there must be
18 some indication of the procedure for getting the mail to
19 the prisoner, then you might have a -- a problem and there
20 might be an institutional advantage in a signature rule.
21 Wouldn't there?

22 MR. MINEAR: Well -- well, that's correct. But
23 again, I think that the baseline, the constitutional
24 baseline, here should be that ordinary mail suffices, and
25 it's left to the --

1 QUESTION: I don't understand why it's -- it's
2 intuitively obvious that ordinary mail suffices when we
3 have a situation here which is different from the
4 situation covered by the -- the ordinary mail. In the
5 ordinary mail situation, the mail is delivered to
6 someone's post office box or -- or a mailbox, and that box
7 is under the control of the addressee. We don't have that
8 here. We have a -- we have a gap between that point and
9 the point at which the mail gets to a prisoner. And
10 that's why it doesn't seem obvious to me that merely
11 adopting an ordinary mail rule is appropriate to these
12 circumstances at all. What am I missing?

13 MR. MINEAR: Your Honor, I think what -- what
14 you see here is the proceedings below validated the fact
15 that ordinary mail would suffice, the fact that there are
16 mail --

17 QUESTION: The proceedings below didn't -- as I
18 understand it, did not stop with proof that the letter was
19 mailed. The proceedings below involved an -- an
20 indication of what the prison did with the mail when it
21 got it in order to get that mail to the prisoner. Isn't
22 that correct?

23 MR. MINEAR: Well, perhaps the answer to your
24 question, Your Honor, is that this Court can certainly
25 affirm the decision below and say that the procedures

1 below were adequate. It would be our view, though, that
2 the Court ought not to foreclose the possibility that
3 ordinary mail would suffice.

4 QUESTION: Mr. Minear, are there -- do you know
5 whether there are more prisoners incarcerated in prisons
6 than there are college students living in dormitories to
7 whom the mail is not delivered personally or -- or
8 individuals living in high rise apartment buildings where
9 the mail is -- is sorted downstairs and not delivered by
10 the -- by the postman to their -- to their own room?

11 MR. MINEAR: I do not know the answer to that,
12 Your Honor.

13 QUESTION: That's a problem for all those
14 people, just as it is for prisoners. They have to rely on
15 whatever institution they're in getting the mail to them.

16 MR. MINEAR: Yes. Although I would draw a
17 distinction between the apartment building where
18 oftentimes the mail is provided -- is sorted by the mail
19 -- by the U.S. Postal Service, put into individual boxes,
20 and the dormitory residential hall. I think the Postal
21 Service does draw a distinction between apartment
22 buildings and dormitories in that regard.

23 QUESTION: Mr. Minear --

24 QUESTION: What about a hospital?

25 QUESTION: -- there was a period when mail was

1 not always routinely delivered to prisoners. Sometimes it
2 was censored and all the rest. Would you say that
3 ordinary mail would have been sufficient in that period of
4 time?

5 MR. MINEAR: Yes. Well, we think -- again,
6 there are --

7 QUESTION: The warden could just put it on the
8 shelf and not even give it to the prisoner and there would
9 be no remedy at all.

10 MR. MINEAR: Obviously, if there is -- if there
11 is reason to believe by the party that's sending notice
12 the mail will not -- that ordinary mail will not suffice,
13 then due process may require that additional steps be
14 taken.

15 QUESTION: Mr. Minear, in the -- in the hospital
16 setting, the Government has a claim against someone, knows
17 that person is hospitalized, sends ordinary mail to the
18 hospital for the contract claim, the tort claim, whatever.
19 Is the Government saying that for an individual it is
20 enough that mail is sent to that person care of an
21 institution, no return receipt requested, that will do to
22 satisfy due process notice requirements?

23 MR. MINEAR: Your Honor, I think that it would
24 for this reason, that if a return address is provided and
25 the mail is not delivered by the hospital, we can expect

1 the hospital to send the mail return it to sender. Upon
2 learning that, the Government may be on an -- under an
3 obligation at that point --

4 QUESTION: But suppose the hospital doesn't?
5 Suppose all we know is that this mail -- well, I think
6 your time is up.

7 MR. MINEAR: Okay. Thank you, Your Honor.

8 QUESTION: Thank you, Mr. Minear.

9 Ms. Zieve, you have 2 minutes remaining.

10 REBUTTAL ARGUMENT OF ALLISON M. ZIEVE

11 ON BEHALF OF THE PETITIONER

12 MS. ZIEVE: First of all, I'd like to address
13 the -- the suggestion that these cases are about false
14 claims. Mr. Dusenbery actually made claims -- tried to
15 get return of property of eight categories of forfeited
16 property in this case and in the one cited at 201 F.3d
17 763. As to seven of the eight categories, it was proven
18 that he didn't get the notice either because it wasn't
19 sent at all or it was sent to the wrong place. So,
20 there's no reason to think that he's lying about the
21 eighth.

22 In addition, this is not a mail notice case.
23 We're not talking about the adequacy of mail notice to a
24 mortgage company or a creditor of an estate. This case is
25 more comparable to a situation in which you have a process

1 server go out and you prove that you gave the notice to
2 the process server, but you don't ask him or her to ever
3 give you any verification that it was served.

4 Certified mail -- counsel suggests it could be
5 above the constitutional minimum, but applying this
6 Court's framework, this Court's test for assessing the
7 adequacy of notice, we know it's not above the
8 constitutional minimum because it will reduce the risk of
9 erroneous deprivation at minimal burden, and we know it
10 reduces the risk because it can only be -- the notice can
11 only be delivered, if their signature is required, to the
12 addressee. It will not be sent as in a private residence.
13 It won't be misdelivered to your neighbor's house if you
14 have to sign for it. In a prison, it's not going to be
15 misdelivered to the next cell or bundled with something
16 else. The inmate is going to have to sign for it.

17 And finally, the Third Circuit, which did not
18 require actual notice, did so only because of concern
19 about the evidentiary burden it would place on the
20 Government to have that standard, but the Government's
21 current --

22 QUESTION: Thank you, Ms. Zieve.

23 MS. ZIEVE: Thank you.

24 CHIEF JUSTICE REHNQUIST: The case is submitted.

25 (Whereupon, at 11:03 a.m., the case in the

1 above-entitled matter was submitted.)54

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